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IN EVROPSKE ŠTUDIJE

Politics and Ideology Beyond the Law of Free Speech

Cao Xinglong

Editor's note : We were unable to fully verify the identity of the author of this article, and it should thus be regarded as written by 'anonymous'. However, given the nature of the claims made in the article about the possible repercussions for those expressing views contrary to the Chinese state, we have decided to publish the article anyway.

Laws alone cannot carry themselves into practice.

— *MENCIUS, "LI LOU" (THE FIRST HALF)*

Introduction

Like in the USA, Chinese law claims to protect its people's freedom of expression. But the Chinese Government has always been condemned to crush the citizens' rights of free speech, which is opposite to the Government's manifesto that it only intends to curb the evil effects of illegal voices rather than to censor the content. China believes that, the same as with Western countries, it has an 'independent judicature' to carry out the 'rule of law'² that regulates illegal speech, rather than the Government ad arbitrium dealing with political criticism by dissidents.³ Liu Xia-

¹ School of law, City College of Zhejiang University, xinglongcao@yahoo.com.

² For example, Qin Gang, a speaker of the Ministry of Foreign Affairs of the PRC, expostulated that no one should intervene in China's "rule of law" and "independent judicature" when he was asked about the espionage and bribery case against Rio Tinto PLC underway in China, 2009 Nian 7 Yue 16 Ri Waijiaobu Fayaren Qin Gang Juxing Lixing Jizhehui [Routine Press Conference of the Ministry of Foreign Affairs [RPC] by Speaker Qin Gang, on July 16, 2009], FMPRC.GOV.CN (July 16, 2009), <http://www.fmprc.gov.cn/chn/pds/wjdt/fyrbt/t573518.htm>.

³ For example, the State Council Information Office of the PRC [SCIO] issued a Chinese Internet Report on June 8, 2010 which stated that the Government had implemented statutes such as the National People's Congress [NPC] Standing Committee's [SC] Decision on Safeguarding Internet, Regulations on Telecommunications of the PRC and Regulations on the Internet Information Service to crack

obo, the Nobel Peace Prize Laureate of 2010, was sentenced to 11 years' imprisonment and deprived of his political rights for two years on December 25, 2009 for his libelling and abetting to subvert the Communist Party of China [CPC] and the Government under its leadership by publishing defamatory articles on the Internet.⁴ Confronting internal and outside pressure to acquit Liu,⁵ the Chinese Government officially proclaimed that according to international standards Liu is a common criminal rather than a political prisoner,⁶ which is conventionally read as political rhetoric by commentators. But when some legal scholars provide expert testimonies to the conviction of Liu, a canonical academic law-dogma emerges as to whether Westerners are criticising the Chinese Government by wielding a "Double-Standard" stick on the issue of freedom of expression. Gao Mingxuan, the most authoritative criminal law professor in China,⁷ expressed his supporting view

down on information that impinge on public or private interests, Guowuyuan Xinwen Bangongshi [SCIO], ZHONGGUO HULIANWANG ZHUANGKUANG [CHINESE INTERNET REPORT] (June 8, 2010), available at http://www.gov.cn/zwgk/2010-06/08/content_1622866.htm; Guayu Weihu Hulianwang Anquan de Jueding [Decision on Safeguarding the Internet] (promulgated by NPCSC Dec. 28, 2000, effective Dec. 28, 2000) 2001 NPCSC GAZ. 18; Dianxin Tiaoli [Regulations on Telecomm.] (promulgated by the St. Council, Sep. 25, 2000, effective Sep. 25, 2000) 2000 [33] ST. COUNCIL GAZ., 11, translated in LAWINFOCHINA; Hulianwang Xinxi Fuwu Guanli Banfa [Regulations on Internet Info. Serv.] (promulgated by the St. Council, Sep. 25, 2000, effective Sep. 25, 2000) 2000 [34] ST. COUNCIL GAZ., 7, translated in LAWINFOCHINA.

⁴ Liu Xiaobo Shandong Dianfu Guojia Zhengquan An [In re Liu Xiaobo Sedition to Subvert the Government] (Beijing 1st Interim. People's Ct. Dec. 25, 2009), WIKISOURCE.ORG (Aug. 26, 2011), <http://zh.wikisource.org/zh-hans/%E5%88%98%E6%99%93%E6%B3%A2%E4%B8%80%E5%AE%A1%E5%88%A4%E5%86%B3%E4%B9%A6>. And Liu's appeal was dismissed on Feb. 11, 2010, Liu Xiaobo Shandong Dianfu Guojia Zhengquan An [In re Liu Xiaobo Sedition to Subvert the Government] (Beijing High People's Ct. Feb. 11, 2010), BULLOGGER.COM (Feb. 16, 2010 3:33 AM) <http://www.bullogger.com/blogs/stainlessrat/archives/352866.aspx>.

⁵ Political dissidents and free speech advocates in China celebrated Liu as the winner of the Nobel Peace Prize, Wu Yu, Huojiang Zhihou: Liu Xiaobo Jia Bei Fengsuo, Zifa Qingzhuzhe Beizhua [After Winning the Nobel Peace Prize, Liu Xiaobo's Home Was Tightly Picketed by the Police and Voluntary Celebration Activists Were Arrested around There], DW-WORLD.DE (Oct. 8, 2010), <http://www.dw-world.de/dw/article/0,,6095659,00.html>; RTE, A Chinese College Student Is So Brave to Unfurl a Banner to Celebrate Liu Xiaobo's Nobel Peace Prize, NAOL.CA (Dec. 10, 2010), <http://www.naol.ca/news/world/1012/1210-8.htm>. Exiled dissidents and foreign politicians have campaigned for Liu's freedom, Lu Yang, Guoji Shehui Jixu Shengyuan Liu Xiaobo [International Society Continues Support for Liu Xiaobo], VOA-NEWS (Dec. 8, 2010, 1:09 AM GMT), <http://www.voanews.com/chinese/news/20101208-China-Jail-Liu-Xiaobo-111516989.html>.

⁶ For example, Jiang Yu, a speaker of the Ministry of Foreign Affairs of the PRC, announced such an assertion, 2010 Nian 12 Yue 9 Ri Waijiaobu Fayansen Jiang Yu Juxing Lixing Jizhehui [R.P.C. by Speaker Jiang Yu, on Dec. 9, 2010], FMPRC.GOV.CN (Dec. 9, 2010), <http://www.fmprc.gov.cn/chn/gxh/tyb/fyrbt/jzhsl/t775713.htm>.

⁷ In China, people often rank legal scholars for their achievements in light of the academic titles they earn from the Government. According to his resume on the website of the Renmin University of China, School of Law, Professor Gao Mingxuan has been conferred with the following titles: 1. Vice Chairman of the National Law Society; 2. Honorary Chairman of the Criminal Law Society (an institution affiliated with the National Law Society); 3. Honorary Chairman of the Beijing Law Society; 4. Commissioner of the Advisory Committee for the Supreme People's Procuratorate of the PRC; 5. Special Consultant for the Supreme People's Court of the PRC; 6. Convener of Meetings of the Legal

of Liu's conviction in an interview (*Experts Talk About Liu's Case of Sedition*) on the official Zhongpingshe on Feb. 11, 2010,⁸ and in another one (*It Is Misunderstanding to Read Liu's Case as Criminating a Person for His Latitude*) on Xinhua-Net on Oct. 25, 2010.⁹ Professor Gao found that Liu's conviction was in line with the International Covenant on Civil and Political Rights, and was even enlightened by and in accord with the principles of US law.¹⁰

Part I of this article will examine the law of free speech in both the USA and China and the fact that, like in the USA, the Constitution and other statutes of China proclaim strong protection for latitude. Part II analyses the "idea market" as the mechanism of free speech being immanently genial to democratic politics. The Chinese Government, although claiming its rules a better democracy than the USA, is in actuality autocratic, cannot abide criticism broadly resonated in the "idea market" for fear of such democratic speech's outgrowth of political democratisation and the death of the dictatorship, and so political debate is strictly censored. Part III show that dysfunctions of the "idea market" always delay the process of finding the truth and are a detriment to the important values people cherish, provoking governmental regulation, parti-

Education Supervisory Board of the Academic Degrees Committee of the State Council; 7. The first Ph.D. Supervisor in Law Approved by the Academic Degrees Committee of the State Council; 8. Honorary First Grade Professor approved by the Renmin University of China; 9. Honorary Chairman of the Research Centre of Criminal Jurisprudence of the Renmin University of China, Gao Mingxuan [Resume of Gao Mingxuan], LAW.RUC.EDU.CN, <http://law.ruc.edu.cn/introduction/shizi3.asp?No=73> (last visited Sep. 14, 2011). Regarding Titles 1, 2 and 3, because law societies in China are essentially government academic organisations other than self-claimed civil ones and ranked high up in the political hierarchy (for example, the current Chairman of the National Law Society is Han Zhubin, the former Deputy Secretary of the CPC Disciplinary Committee and Procurator-General of the Supreme People's Procuratorate; the current Chairman of the Beijing Law Society is Wang Anshun, the No. 1 Deputy Secretary of the CPC Beijing Municipal Committee and Chairman of the Beijing Municipal Committee of the Chinese People's Political Consultative Conference), Gao's positions are quite influential in the Chinese legal community. See Zhongguo Faxuehui Zhangcheng [Chinese Law Societies Constitution], CHINALAW.ORG.CN (Jan. 14, 2010, 4:25 PM), http://www.chinalaw.org.cn/Column/Column_Template4.aspx?ColumnID=107; Zhongguo Faxuehui Jianjie [Introduction to the Chinese Law Society], CHINALAW.ORG.CN (Jan. 14, 2010, 2:45 PM), http://www.chinalaw.org.cn/Column/Column_Template4.aspx?ColumnID=106; Introduction to Leaders of the Beijing Law Society, BJFXH.ORG.CN, <http://www.bjfxh.org.cn/fxwww/xhjs/XhjsWebsiteAction.do?action=xhldview&lo=xhjs5> (last visited Sep. 14, 2011). Titles 4 and 5 are tied to powerful government branches. Title 6 is regarded as the highest rank in the administration of legal education and academics. Titles 7, 8 and 9 are great honours for a legal scholar.

⁸ Zhongpingshe, Zhuanjia Tan Liu Xiaobo Shandong Dianfu Guojia Zhengquan An [Experts Talk About Liu's Case of Sedition], ZHGPL.COM (Feb. 11, 2010, 5:42 PM) <http://www.zhgpl.com/doc/1012/2/8/1/101228132.html?coluid=7&kindi>.

⁹ Xinhua-wang [Xinhua-Net], Suowei "Yinyanhuozui" Shi Dui Liu Xiaobo An Panjue de Wudu [It Is a Misunderstanding to Read Liu's Case as Criminating a Person for His Latitude], XINHUANET.COM (Oct. 25, 2010, 2:26 PM) http://news.xinhuanet.com/world/2010-10/25/c_12698346.htm.

¹⁰ Zhongpingshe, *supra* note 7, para. 3, sentence 4; Xinhua-Net, *supra* note 8, para. 5, sentence 10, and para. 8.

cularly for foreign unwelcome ideas. The variance of the scopes of the freedom of speech in US history supports such a conclusion. While in China, governmental propaganda intentionally exaggerates this fault of the speech mechanism and incites nationalism against any exotic democratic ideology, the distorted “markets” of politics, the economy, education and speech etc. under the totalitarian regime compel people to deeply experience the unfairness of “Chinese-style” marketisation to establish an anti-democracy ideology. So people can, with rare odds, self-consciously nurse a candid “idea market” for political debate, or even for non-political argument, independent of governmental tampering and to peaceably transform the Government. Part IV concludes that the Chinese Government by garbling doctrines of speech regulation in the USA and by sophism, such as the “Chinese type of dictatorship is a new form of democracy”, tries to justify its dictatorial restriction on the freedom of expression.

I. Law of Free Speech

The First Amendment of the US Constitution guarantees the people’s freedom of expression:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

While common law circumscribes some speech to contain its evil secondary effect, it concerns the damage incurred by the method of speech rather than the idea itself. In *Los Angeles v. Alameda Books, Inc.*, Justice Kennedy made a clear discrimination between a speech’s content and its secondary effect:

Speech can produce tangible consequences: It can change minds. It can prompt actions. These primary effects signify the power and the necessity of free speech. Speech can also cause secondary effects, however, unrelated to the impact of the speech on its audience. A newspaper factory may cause pollution, and a billboard may obstruct a view.¹¹

¹¹ *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 444 (2002) (Kennedy, concurring).

If the information communicated in a speech could attract a conviction for its inciting effect to incense someone or excite him to undertake some contravention, then the freedom of expression would be rendered void because little speech can appease every listener or teach people to do the right things without detriment to anyone. On the contrary, if any act, such as “a gigantic fireworks display or a parade of nude models in a public park” to “draw even more attention to a controversial message”, and “the communicative value of a well-placed bomb in the Capitol”,¹² should be protected for its expressive connotation even though it causes damage to people, then no human behaviour can be punished because, as body language, it can unleash some of the actor’s meanings at the same time. But discerning the so-called ‘secondary effects’ from the ‘content’ is always difficult.

In *United States v. O’Brien*, the Supreme Court legalised a statute that criminalised O’Brien for publicly burning his draft card to demonstrate his opposition to the war;¹³ the reason was that it prohibited any acts (public or private) that intentionally impinged on the governmental interest of assuring the availability of the draft card rather than to bridle the latitude of anti-war.¹⁴ On the contrary, the Court in *Flag Cases* nullified Flag Protection Laws that punished persons who defied the image of the flag because the symbol of the flag as an incarnation of the national spirit was only denigrated by those profane acts for their protective communicative impacts on an audience.¹⁵

However, some speech was restricted for its so-called secondary ill-effect that was suspected of being a communicative fallout. In *Renton v. Playtime Theatres, Inc.* and *Los Angeles v. Alameda Books, Inc.*, the Supreme Court validated a “zoning ordinance” to disperse adult entertainment for the limitation of secondary effects such as increased crimes and a devalued adjacent property.¹⁶ The Court spared its effort to make it clear that if the secondary evils that “concentrations of adult businesses are associated with higher rates of prostitution, robbery, assaults, and thefts in surro-

¹² *United States v. Eichman*, 496 U.S. 310, 322 (1990) (Stevens, J., dissenting).

¹³ *United States v. O’Brien*, 391 U.S. 367 (1968).

¹⁴ *Id.* at 381-82.

¹⁵ *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

¹⁶ *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

unding communities”,¹⁷ were in actuality entailed by the information of a pandering business.

In addition, a handful of cases have intimated that courts do not prohibit regulations that target a speech’s communicative unwelcome impact in some particular settings, only if they did not over-inclusively squash the utterance everywhere. In *Chaplinsky v. New Hampshire*, the Supreme Court acknowledged a “public peace” statute of New Hampshire that convicted a man for using “fighting words” face to face that allegedly offended the complainant.¹⁸ And in *Morse v. Frederick*, the Supreme Court legalised a public school discipline to punish a demagogic contravention that gave rise to a “risk of substantial disruption”.¹⁹

Here, distinguishing trouble-making speech from all sorts of order-sustaining pretence and the latitude haven requires a balancing between acceptable and unacceptable words, i.e., to gauge the obligation and capacity of the audience’s tolerance for them case by case. For example, *Chaplinsky* listed “the lewd and obscene, the profane, the libellous, and the insulting or ‘fighting’ words” as “no essential part of any exposition of ideas”, and “of such slight social value as a step to truth”;²⁰ some agree that “false fact” rather than a “false idea” should be imputable under defamatory laws because the latter should be bearable even if you do not agree with the speaker;²¹ some believe that “even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on”.²² But, by and large, these test standards themselves are murky and obfuscating when they are applied case to case.

To save speech from too much regulation, it is said that defamed “public officials and public figures” are prohibited from “recovering damages” unless they prove that “the statement was made with ‘actual malice’ – that is, with knowledge that it was false or with reckless disregard of whether it was false or not”, whereas “where such a statement involves a private figure on a matter of

¹⁷ Alameda, 535 U.S. at 430.

¹⁸ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

¹⁹ *Morse v. Frederick*, 551 U.S. 393 (2007).

²⁰ *Chaplinsky*, 315 U.S. at 571.

²¹ *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

²² *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring), quoted in *Morse*, 551 U.S. at 438 (Stevens, J., dissenting).

public concern, a plaintiff must show that the false connotations were made with some level of fault as required by *Gertz*.²³

It is also argued that “political speech”, “at the core of what the First Amendment is designed to protect”,²⁴ is prioritised in the hierarchy of speech categories. In *Morse*, the Court became confident to find against the student petitioner only when they found that “not even Frederick (the student petitioner) argues that the banner conveys any sort of political or religious message. ... this is plainly not a case about political debate over the criminalization of drug use or possession”.²⁵ And the preceding test of “advocacy of violation”²⁶ can be traced to the “clear and present danger” doctrine, such as when the Schenck Court faced a challenge to convict “political speech” as “a conspiracy to obstruct the draft”.^{27, 28}

The Constitution of PRC includes a free speech clause similar to the US First Amendment:

“Citizens of P.R.C. enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration”.²⁹

Although there is argument that Chapter II, Article 51, (“Citizens of P.R.C., in exercising their freedoms and rights, may not infringe upon the interests of the State, of society or of the collective, or upon the lawful freedoms and rights of other citizens”) limits the freedom in Article 35 to a narrower purview than in the US First

²³ *Milkovich*, 497 U.S. at 14-16, 20-21 (reviewing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986)).

²⁴ *Virginia v. Black*, 538 U.S. 343, 365 (2003).

²⁵ *Morse*, 551 U.S. at 402-03 (alteration in original). And the Court looked back to the “political ‘message’” and “sexual content” argument in *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), *id.* at 404.

²⁶ *Supra* note 21 and accompanying text.

²⁷ *Schenck v. United States*, 249 U.S. 47 (1919).

²⁸ See Edward J. Bloustein, *Criminal Attempts and the “Clear and Present Danger” Theory of the First Amendment*, 74 CORNELL L. REV. 1118, 1120 (1989).

²⁹ XIANFA [Constitution] ch. II, art. 35 (1982), translated in LAWINFOCHINA. The present Constitution of the PRC was enacted in 1982, and was later amended in 1988, 1993, 1999 and 2004; this Free Speech Clause was established in the 1982 version and has been kept intact since then. Before this Constitution, three Constitutions had appeared in the PRC, including the Constitution of 1954, the Constitution of 1975 and the Constitution of 1978 (amended in 1979 and 1980), all of which guaranteed the freedom of speech, XIANFA ch. , art. 87 (1954) (“Citizens of speech PRC enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration. The State should provide material support for citizens to enjoy such liberties.”); XIANFA ch. , art. 28 (1975) (“Citizens of the PRC enjoy freedom of speech, of communication, of the press, of assembly, of association, of procession, of demonstration and of strike,”); XIANFA ch. , art. 45 (1978) (“Citizens of the PRC enjoy freedom of speech, of communication, of the press, of assembly, of association, of procession, of demonstration and of strike, and have the right to air one’s views freely, write big-character posters and hold great debates”. (The amendment of 1980 struck out the latter half of “and have the right to air one’s views freely, write big-character posters and hold great debates”).

Amendment, in fact the freedom of expression in the latter is also so circumscribed in common law dogmas, even though the US Constitution lacks a limitation statute like China's. Moreover, such a limitation in the Constitution of PRC is conventionally understood as providing no pretext to curtail the freedom of expression.³⁰

China also targets speech for its communicative ill effects, including defamation,³¹ and libel laws discriminate subjective ideas of a speaker (protectable) against false facts and insulting words that incur defamation (punishable), to accommodate the free speech clause in the Constitution:

For critical writings, if the facts related to are basically veritable and there are no insulting contents therein, charges of defamation against the authors cannot be established; if the facts related to are basically veritable but there are insulting contents therein that damage the accusers' reputation, charges of defamation against the authors should be established; if the facts related to that damage the accusers' reputation are basically untrue, although there are no insulting contents therein, charges of defamation against the authors should be established.³²

³⁰ For example, International Covenant on Civil and Political Rights, Article 19 guarantees the freedom of expression as "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." International Covenant on Civil and Political Rights, art. 19, para. 2, adopted and opened for signature, ratification and accession Dec. 16, 1966, <http://www2.ohchr.org/english/law/ccpr.htm> (entered into force Mar. 23, 1976) (alteration in original). And limitations on it are similar to those of the Constitution of the PRC, such as:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (order public), or of public health or morals.

³¹ para. 3. When the USA ratified the Covenant, it declared such limitations should not be read as a pretext for curtailing the freedom of expression, stating:

For the United States, article 5, paragraph 2, which provides that fundamental human rights existing in any State Party may not be diminished on the pretext that the Covenant recognises them to a lesser extent, has particular relevance to article 19, paragraph 3, which would permit certain restrictions on the freedom of expression.

³² A, Declarations: (2), June 8, 1992, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidsg_no=IV-4&chapter=4&lang=en#EndDec.

³¹ See Minfa Tongze [General Principles of the Civil Law] (promulgated by the NPC, Apr. 12, 1986, effective Jan. 1, 1987) ch. 5, art. 101, [1986] 4 NPCSC GAZ. item 1 - 2, http://www.npc.gov.cn/wxzl/gongbao/2000-12/04/content_5001770.htm, http://www.npc.gov.cn/wxzl/gongbao/2000-12/06/content_5004470.htm, translated in LAWINFOCHINA ("Citizens and legal persons shall enjoy the right of reputation. The personality of citizens shall be protected by law, and the use of insults, libel or other means to damage the reputation of citizens or legal persons shall be prohibited.").

³² Guayu Shenli Mingyuquan Anjian Ruogan Wenti de Jieda [Reply on the Trial of Cases Concerning the Right of Reputation] (promulgated by the Sup. People's Ct., June 15, 1993, effective Aug. 7, 1993), Issue 8, 1993 Sup. People's Ct. Gaz. 103. In China, the Supreme People's Court can enact rules on

Such a balance between free speech and defamation is akin to what happens in US common law.³³

And in China, only serious defamation within these two categories of acts can be criminated.³⁴ Further, in practice, even if speech falls into the punishable two categories it can still be exempted from punishment if it is “acceptable internally spreading in an organization” as defined in the Interpretation of the Supreme People’s Court on the Trial of the Case Concerning the Right of Reputation.³⁵

Some Chinese courts have even found that doctrines in the USA such as “public figures” can be equally applied. For example, in *Fan Zhiyi v. Wenhui Xinmin United Newspapering Grp.* the Court stated that although the defendant, in error and unintentionally, referred the plaintiff, who was a famous football star, as a suspect in a “football gambling scandal” report and then remitted the plaintiff from such disrepute in its following press, the plaintiff, as a public figure, should abide such a slight injury according to the “treating claimed but unverified misdemeanour of the defendant as innocence” argument.³⁶

issues unregulated by current statutes, to interpret current statutes and to privately give case opinions to a lower court if necessary, Guayu Sifa Jieshi Gongzuo de Guiding [Provisions on the Judicial Interpretation Work] (promulgated by the Sup. People’s Ct., Mar. 9, 2007, effective Apr. 1, 2007), arts. 5-6, 2007 [5] Sup. People’s Ct. Gaz. 25, CHINALAWINFO chl_89508, translated in LAWINFOCHINA; Guayu Sifa Jieshi Gongzuo de Ruogan Guiding [Several Provisions of the Supreme People’s Court on the Judicial Interpretation Work] (promulgated by the Sup. People’s Ct., June 23, 1997, effective July. 1, 1997) arts. 4, 9, 1997 Sup. People’s Ct. Gaz. 96 (repealed 2007). Such legislative power is claimed to be authorised by the Organic Law of the People’s Courts of the PRC, which provides that “The Supreme People’s Court gives interpretation on questions concerning specific application of laws and decrees in judicial proceedings”. Renmin Fayuan Zuzhi Fa [Organic Law of the People’s Courts] (promulgated by the NPC, July 5, 1979, effective Jan. 1, 1980, amended by the NPCSC, Sep. 2, 1983; Dec. 2, 1986; Oct. 31, 2006) art. 32, CHINALAWINFO chl_81825, translated in LAWINFOCHINA. But many rules enacted by the Supreme Court are suspected of overreaching what they are empowered to do.

³³ Compare with supra notes 19-21 and the accompanying text.

³⁴ Xing Fa [Criminal Law] (promulgated by the NPC, Mar. 14, 1997, effective Oct. 1, 1997) pt. , ch. 4, art. 246, sec. 1, 1997 NPCSC GAZ. 184, translated in LAWINFOCHINA (“Those openly insulting others using force or other methods or those fabricating stories to slander others, if the case is serious, are to be sentenced to three years or less in prison, put under criminal detention or surveillance, or deprived of their political rights.”).

³⁵ Guayu Shenli Mingyuquan Anjian Ruogan Wenti de Jieshi [Interpretation on Several Issues about the Trial of Cases Concerning the Right of Reputation] (promulgated by the Sup. People’s Ct., July 14, 1998, effective Sep. 15, 1998) Issue 2, 4, 1998 Sup. People’s Ct. Gaz. 137, translated in LAWINFOCHINA, available at http://www.procedurallaw.cn/english/law/200905/t20090508_217007.html (Issue 2: “The people’s court shall not accept the action instituted by the interested parties on the ground that, the contents of the publications, materials etc. which are compiled by relevant agencies and organisations and only for internal reference in the leadership departments infringe upon their right of reputation.”; Issue 4:

The people’s court shall not accept an action instituted by the interested parties on the ground that the conclusions made by the functional agencies such as state authorities, social organisations, enterprises, government-sponsored institutions etc. according to their authorities against the interested parties who are personnel under their administration infringe upon their right of reputation.).

³⁶ Fan Zhiyi Su Wenhui Xinmin Lianhe Baoye Jituan [Fan Zhiyi v. Wenhui Xinmin United Newspapering Grp.] (Shanghai Jingan Dist. People’s Ct. Dec. 18, 2002), DOCIN.COM (Oct. 18, 2010), <http://www.docin.com/p-89332439.html>.

Little evidence shows that “political speech” is enshrined as a fundamental latitude in China, but the Constitution does mention that political criticism should be encouraged, by providing that:

Citizens of PRC have the right to criticise and make suggestions regarding any State organ or functionary. Citizens have the right to make to relevant State organs complaints or charges against, or exposures of, any State organ or functionary for violation of law or dereliction of duty; but fabrication or distortion of facts for purposes of libel or false incrimination is prohibited.

The state organ concerned must deal with complaints, charges or exposures made by citizens in a responsible manner after ascertaining the facts. No one may suppress such complaints, charges and exposures or retaliate against the citizens making them.³⁷

Further, “[a]ll State organs and functionaries must ... hear their (people’s) opinions and suggestions, accept their supervision ...”^{38, 39}

By and large, the freedom of expression provided by the US Constitution and the PRC Constitution is essentially the same, and PRC exceeds the US regarding the protection of “political speech” by express constitutional statutes; fundamental dogmas for speech liberty in US common law are literally “copied” in PRC law or recognised by some Chinese courts as feasible in the legal framework.

II. Politics of Free Speech

However, the law found in books patently transforms its aspects in practice from case to case in China, where judges always decide cases less on justice than on other considerations such as litigants’ status. It is difficult to measure how well the mentioned PRC

³⁷ XIANFA ch. II, art. 41, § 1-2 (1982).

³⁸ XIANFA ch. , art. 27, § 2 (1982) (alteration in original).

³⁹ The citizens’ right to political criticism was not ignored in the preceding three Constitutions; statutes akin to the provisions of the present Constitution can be found there, XIANFA ch. , art. 14, § 2; art. 15, § 1; ch. , art. 55 (1978); XIANFA ch. , art. 13; ch. , art. 27, § 3 (1975); XIANFA ch. , art. 17; ch. , art. 97 (1954).

freedom of expression is guaranteed according to comprehensive statistics data,⁴⁰ but some eye-catching speech cases show that dogma in free speech is rendered *ad libitum* from case to case.⁴¹ Some available data show that political speech antagonistic to the Government is unwelcome in the discretion of judges, which can also be substantiated by the opinions of the Supreme People's Court:

First, commentators' viewpoints about a government official performing his duties should not contravene a governmental evaluation of such a person if such an evaluation does exist. In *Huang Shiguan and Huang Dexin v. Guangxi Legal Press and Fan Baozhong*, the press reported that the plaintiffs, as judges, had been arrested by the Procuratorate for their "practising injustice and committing anti-discipline"; then, a charge against two Huangs was dismissed by the Court, but the press declined to publish the news of the dismissal, insisting that the previous arrest was correct. The Supreme People's Court supported the two Huangs' claims of libel and incurred liabilities because the dismissal of the criminal case made it clear that the previous arrest was wrong, and that its propagation was unfair.⁴² In another case, the defendant

⁴⁰ Most judgements of PRC courts are not open to the public.

⁴¹ For example, Xiao Chuanguo, a urologist and professor who competed for the China highest academic title, an academician at the Chinese Academy of Science, accused Fang Shimin (aka Fang Zhouzi) who criticised him for contravening professional ethics, boasting his academic publications and achievements by hyperbole in the competition materials. In several Internet conversations, Fang made such comments based on data collected from websites of organisations such as Xiao's employers, academic publications and achievements recorders. Two courts confirmed the libel charge and judges reasoned that a commentator should not establish criticism mainly based on website information, Xiao Chuanguo Su Zhongguo Xiehe Yike Daxue Chubanshe Fang Shimin [Xiao Chuanguo v. PUMC Press, Fang Shimin] (Hubei Wuhan Jiangnan Dist. People's Ct. July 25, 2006), NEW THREADS (July 31, 2006), <http://www.xys.org/xys/ebooks/others/science/dajia7/xiaochuanguo141.txt>; Xiao Chuanguo Su Zhongguo Xiehe Yike Daxue Chubanshe Fang Shimin Shangsu An [Xiao Chuanguo v. PUMC Press, Fang Shimin] (Hubei Wuhan Interm. People's Ct. Feb. 27, 2007), NEW THREADS (Mar. 22, 2007),

⁴¹<http://www.xys.org/xys/ebooks/others/science/dajia8/xiaochuanguo399.txt>. In the other similar case, two other courts dismissed the charge because Fang had tried his best to pick out information on authoritative websites to build up his comments on a public figure, Xiao Chuanguo Su Beijing Leiting Wanjun Wangluo Keji Youxian Zeren Gongsi Fang Shimin [Xiao Chuanguo v. Beijing Leiting Wanjun Network Technology Co. Ltd, Fang Shimin] (Beijing 1st Interm. People's Ct. May 25, 2007), NEW THREADS (May 28, 2007), <http://www.xys.org/xys/ebooks/others/science/dajia8/xiaochuanguo434.txt>; Xiao Chuanguo Su Beijing Leiting Wanjun Wangluo Keji Youxian Zeren Gongsi Fang Shimin Shangsu An [Xiao Chuanguo v. Beijing Leiting Wanjun Network Technology Co. Ltd, Fang Shimin] (Beijing High People's Ct. Nov. 29, 2007), NEW THREADS (Nov. 30, 2007), <http://www.xys.org/xys/ebooks/others/science/dajia8/xiaochuanguo473.txt>. Fang Zhouzi is a freelancer in science who also runs an influential website called "New Threads" (www.xys.org) to expose the pervasive academic misconduct in China.

⁴² Guanyu Guangxi Gaoyuan Qingshi Huang Shiguan Huang Dexin Yu Guangxi Fazhi Baoshe Fan Baozhong Mingyu Qinquan Yi'an Qingshi de Fuhuan [Reply to Guangxi High Ct., Huang Shiguan, Huang Dexin v. Guangxi Legal Press, Fan Baozhong] CHINALAWINFO chl_50046 (Sup. People's Ct. July 31, 2000) (No. 2000 - 8).

was barred from making public comments contrary to the conclusion of a governmental organisation: Zheng Daichou, a member of a professional qualification examination committee, held out to the committee that Wang Shuiquan, a public university teacher and a candidate for the title of Associate Professor had in the support material for one of his articles plagiarised from others' scholarship; when the committee dismissed this argument, the unpersuaded Zheng made his comments public; the Supreme People's Court supported Wang's defamation complaint against Zheng for his wrong opinions at odds with the Government bodies.^{43, 44} Thus, the Government's political viewpoints as exclusively true speech prohibit their dissidence from circulating, which is not in accord with the preceding defamation doctrines in routine libel cases in China and in the USA.

Second, in the USA, the Government is conventionally treated as unqualified for the right to repute, as the Court in *New York Times Co. v. Sullivan* found in the case of *City of Chicago v. Tribune Co.*⁴⁵ Contrarily, Chinese courts always allow governmental bodies to act as plaintiffs in defamation cases. In 2006, the Hunan Yongzhou Qiyang Public Security Bureau won a libel case against Dai Tingyuan;⁴⁶ and earlier in 1995 the Guangdong Shenzhen Futian People's Court successfully sued the Magazine of Democracy and Legal System for critical comments in the Shenzhen Intermediate People's Court.⁴⁷

In China such libel cases, according to the Supreme People's Court government officials and bodies have a privilege over common persons: Even if criticisms of them are "objective and accu-

⁴³ In China, a professional qualification evaluation is a governmental authority of an administrative license, Guayu Shixing Zhuanye Jishu Zhiwu Pinren Zhidu de Guiding [the State Council on Regulation of Professional Titles] (promulgated by the St. Council, Feb. 18, 1986, effective Feb. 18, 1986) CHINALAWINFO chl_2704; Gaodeng Xuexiao Jiaoshi Zhiwu Shixing Tiaoli [Interim Regulation of Higher Education Institutions Teachers' Professional Titles] (promulgated by the Central Government Professional Titles Reform Work Leading Group, Mar. 3, 1986, effective Mar. 3, 1986) CHINALAWINFO chl_10084.

⁴⁴ Guanyu Wang Shuiquan Su Zheng Daichou Mingyuquan An de Fuhuan [Reply to Jiangxi High Ct., Wang Shuiquan v. Zheng Daichou] CHINALAWINFO chl_4658 (Sup. People's Ct. Apr. 6, 1990) (No. 1989 - 39).

⁴⁵ *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964); *City of Chicago v. Tribune Co.*, 307 Ill. 595, 607 (1923).

⁴⁶ Qiyangxian Gong'anju Liu Heping Zou Wei Wang Guoxuan Su Dai Tingyuan Zhixing An [Civil Enforcement Judgement, Qiyangxian Public Security Bureau, Liu Heping, Zou Wei, Wang Guoxuan v. Dai Tingyuan] (Hunan Yongzhou Lengshuitan Dist. People's Ct. Feb. 27, 2007) (Docket: 2006 - 238).

⁴⁷ Liu Haitao, Zheng Jinrong & Shen Rong, Baodao Re Guansi, Baoshe Danze [A Magazine Lost a Case for Its Report], RENMIN FAYUAN BAO [PEOPLE'S COURT NEWSPAPER], Jul. 4, 2006, available at http://www.jcrb.com/zhuanli/fzzt/xwqqkb/al/200809/t20080903_69220.html.

rate”, the press should still be liable for “infringement” if “the public official documents and functional acts of state authorities” “have been corrected in public but the news agency refuses to correct the report”.⁴⁸ Moreover, when a case of defamation crime is established, generally only the calumniated person can act as a plaintiff other than the Procurator; but when a case is related to a government official or body, it may be regarded as “seriously undermining social order or the state’s interests” and call on the Police and Procurator which,⁴⁹ under Chinese law and practice, have much more power than others to collect enough evidence to win the case.⁵⁰

Although penal punishment for maligning the Government is available in China, usually the Government will prosecute a critic for his speech’s seditious impact apart from in an action for libel, as in Liu’s case, because a libel case will focus too much on the speech content when it comes to discerning true facts from false claims, which is always “sensitive” in terms of embarrassing the Government,⁵¹ while a sedition case mainly seeks to judge the effect of the speech⁵² and can easily lead to a heavier punishment.⁵³ Liu was convicted under the Criminal Law of P R C, Article 105, Section 2, which states:

Whoever instigates the subversion of the political power of the state and overthrow the socialist system through spreading rumours, slandering or other ways is to be sentenced to not more than five years of fixed-term imprisonment, criminal detention, control or deprivation of political rights; the ringleaders and those whose crimes are grave are to be sentenced to not less than five years of fixed-term imprisonment.

⁴⁸ Interpretation on Several Issues about the Trial of Cases Concerning the Right of Reputation (promulgated by the Sup. People’s Ct., July 14, 1998, effective Sep. 15, 1998), Issue 6, 1998 Sup. People’s Ct. Gaz. 137 – 138.

⁴⁹ Criminal Law (promulgated by the NPC, Mar. 14, 1997, effective Oct. 1, 1997) pt. , ch. 4, art. 246, sec. 2, 1997 NPCSC GAZ. 184.

⁵⁰ For example, torture is illegal and widely used.

⁵¹ ‘Sensitive’ words have comprehensively been avoided from use in China in any place. For example, Internet speech is stringently censored to sift them out, Tania Branigan, Google to End Censorship in China over Cyber Attacks, THE GUARDIAN, Jan. 13, 2010, available at <http://www.guardian.co.uk/technology/2010/jan/12/google-china-ends-censorship>.

⁵² The lawyer for the defendant is always admonished by the Government for arguing about the impact rather than the content of the speech.

⁵³ The longest imprisonment for libel is three years, while for sedition it is fifteen years, Criminal Law, pt. , ch. 4, art. 246, sec. 1; pt. , ch. 1, art. 105, sec. 2; pt. , ch. 3, subch. 4, art. 45, 1997 NPCSC Gaz. at 184, 155, 146 (China).

Liu was charged over such seven seditious words in all of his writings: (1) “the dictators of CPC have cared most for their own powers and least for citizens’ lives since the Party came into power in China;” (2) “the dictatorship of CPC propagates ‘official patriotism’ that essentially and fallaciously replaces the notion of ‘country’ with ‘the Party’ to misguide the people to love the dictatorship of authority, Party and dictators, which oppresses people under the cover of patriotism;” (3) “all the instruments wielded by CPC are only expedient to sustain its moribund governance but cannot support the edifice of dictatorship with collapsing cracks everywhere for the long term;” (4) “citizens should transform the society to incur a change of Government”; (5) “a free China badly counts on new civil forces rather than new governance grown up from inside the Government; (6) China should abolish the One-Party political system;” (7) “the United States of China should be built in the framework of a democratic constitution”.⁵⁴

According to Professor Gao, Liu’s words even constituted criminal sedition in the light of US laws⁵⁵: (1) 18 U.S.C. § 2383⁵⁶ and 18 U.S.C. § 2385;⁵⁷ (2) *Schenck v. United States*, *Abrams v. United States*, and *Mack v. State*.⁵⁸

Further searching may support Professor Gao regarding the existence of more legislation on sedition in the USA than just Section 2383 and Section 2385, as one reviewer combed through some historical material:

“[O]n May 16, 1918, Congress amended and expanded the Espionage Act with passage of the Sedition Act. It became illegal to utter or print any profane language that interfered with the operation or success of the U.S. military or criticized the government or Constitution”.⁵⁹

“It (the Voorhis Act of 1940) requires that organizations register with the Attorney General if they engage in political or ci-

⁵⁴In re Liu Xiaobo Sedition to Subvert the Government (Beijing 1st Interm. People’s Ct. Dec. 25, 2009); In re Liu Xiaobo Sedition to Subvert the Government (Beijing High People’s Ct. Feb. 11, 2010).

⁵⁵Supra note 9.

⁵⁶Stating: “Whoever incites, . . . any rebellion or insurrection against the authority of the United States or the laws thereof, . . . shall be fined . . . and shall be incapable of . . .”

⁵⁷Stating: “Whoever knowingly or willfully advocates, abets, advises, or teaches . . . prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter . . . overthrowing or destroying any government in the United States by force or violence, . . .”

⁵⁸Zhongpingshe, supra note 7, para. 3, sentence 8; Xinhua-net, supra note 8, Para. 5, sentence 3, para. 6, sentence 2. For the three cases, see the cases cited supra note 26; infra notes 68, 72.

⁵⁹Joshua Azriel, Five Years After the 9/11 Terrorist Attacks: Are New Sedition Laws Needed to Capture Suspected Terrorists in the United States?, 6 Conn. Pub. Int. L.J. 1, 7 (2006) (alteration in the original). The Sedition Act was repealed in 1921, Id..

vilian military activities with the goal of overthrowing the U.S. government”.⁶⁰

“The McCarran Internal Security Act of 1950 ... required most Communist associations and organizations to register with the Attorney General and to submit a detailed report listing all the machinery they owned that was used for printing books and pamphlets”.⁶¹

“Section 411 of the Patriot Act, authorizes the government to exclude aliens from the country based on their speech”.⁶²

Further, case laws accompanying these sedition statutes involve limited criminalisation of seditious speech only for its unacceptable inciting effecting, because “[c]riminal law ‘only deals with conduct,’ not the moral character of the actor”.⁶³ So, abstract ideals embracing dictatorship, anarchy or overthrowing democratic authority other than advocating subversion of the US government will not be punished under the laws on sedition.⁶⁴ But what constitutes so-called ‘illegally advocating’ has always been problematic in the application of the sedition doctrine ever since. It is argued that in the course of history US case laws have developed three sedition yardsticks, in sequence, namely “bad tendency”, “clear and present danger”, and “imminent and likely lawless action”.⁶⁵

“Bad tendency” is argued to be a misunderstood reading of Blackstonism that legitimatised punishment for “pernicious tendency” speech to service “peace and good order”.⁶⁶ “Clear and present danger” is the opinion of the *Schenck* Court that “[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that

⁶⁰ Id. at 14. And the Act is still carried out today as in 18 U.S.C. § 2386 (2006) (alteration in the original).

⁶¹ Id. at 14-15 (footnote omitted). The McCarran Act was repealed in 1990, Id. at 19.

⁶² Id. at 19. This law is now active in 8 U.S.C. § 1182(a)(3)(B)(C) (2006).

⁶³ Bloustein, *supra* note 27, at 1121 (alteration in original) (construing Justice Holmes’ doctrine of criminal attempts).

⁶⁴ Communist Party of Indiana v. Whitcomb, 414 U.S. 441, 447-48 (1974); United States v. Robel, 389 U.S. 258, 262-263 (1967); Noto v. United States, 367 U.S. 290, 297-99 (1961); Yates v. United States, 354 U.S. 298, 326-27 (1957); Dennis v. United States, 341 U.S. 494, 502-07 (1951); Gitlow v. New York, 268 U.S. 652, 664-65 (1925).

⁶⁵ See Terry Heinrichs, Gitlow Redux: “Bad Tendencies” in the Great White North, 48 WAYNE L. REV. 1101, 1118-19 (2002) (“Prior to Schenck, ‘bad tendency’ had long been the preferred judicial remedy ...”); Jason Paul Saccuzzo, Bankrupting the First Amendment: Using Tort Litigation to Silence Hate Groups, 37 CAL. W. L. REV. 395, 405-09 (2001).

⁶⁶ Geoffrey R. Stone, The Origins of the “Bad Tendency” Test: Free Speech in Wartime, 2002 SUP. CT. REV. 411, 432 (2002).

Congress has a right to prevent”.⁶⁷ “Imminent and likely lawless action” comes from the wording in *Brandenburg v. Ohio* that “constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”.⁶⁸

It seems that courts have historically tended to apply a stricter standard on the proximity between “seditious” speech and lawless action, as the vicissitude of “advocacy” connotations shows. But each criterion is so plastic that it can contain even sharply opposite opinions for its application to the same case.⁶⁹ Moreover, even the variance among these criteria is subtle and perplexing for discerning: commentators have found that *Schenck* created a “clear and present danger” but did not apply the doctrine itself⁷⁰ and the Supreme Court has often invoked the earlier “bad tendency” long after *Schenck*;⁷¹ it seems that “clear and present danger” even budded during the earlier period of “bad tendency”;⁷² “imminent and likely lawless action” should not be simply regarded as a new and outstanding creature of *Brandenburg*⁷³ and the earliest “bad tendency” could even be resuscitated by courts today.⁷⁴

Gauging Liu’s case by the US sedition doctrines, it is easy to conclude that no imputation should be handed out against him. His criminated seven sentences merely include two ingredients: criticising the dictatorship of the CPC, for Sentences 1–3; and hoping for political strength other than the CPC and its Government to emerge, for Sentences 4–7. What Liu said was not directly relevant to a change of the current authority, whether you describe such “speech” as “preaching”, “abetting”, or “inciting”. But, how

⁶⁷ *Schenck v. United States*, 249 U.S. 47, 52 (1919) (alteration in original).

⁶⁸ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

⁶⁹ I.e., opposite parties can both find some support in the same doctrine. See *Brandenburg*, 395 U.S. at 449 (overruling *Whitney v. California*, 274 U.S. 357 (1927)); *Robel*, 389 U.S. at 282–89 (White, J., dissenting); *Dennis*, 341 U.S. at 515 (“We agree that the standard as defined is not a neat, mathematical formulary.”); *Gitlow*, 268 U.S. at 672–73 (Holmes, J., dissenting); *Abrams v. United States*, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

⁷⁰ Heinrichs, *supra* note 63, at 1106.

⁷¹ *Id.* at 1123–24.

⁷² Bloustein, *supra* note 27, at 1120.

⁷³ *Brandenburg*, 395 U.S. at 447 (“These later decisions have fashioned the principle that . . .”); also see *Mack v. State*, 463 So. 2d 344, 345 (1985) (the defendant arguing that his action fell short of “a clear and present danger”).

⁷⁴ Isaac Molnar, *Resurrecting the Bad Tendency Test to Combat Instructional Speech: Militias Beware: Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997), 59 OHIO ST. L.J. 1333 (1998).

has his support for the newly emerging political powers, in the Chinese legal context, been characterised as sedition of overthrowing the present Government?

Currently, a good number of scholarly works in China delve deeply into libel laws; yet few materials that seriously examine the laws on sedition are available, perhaps because scholars always cringe when it comes to this ‘sensitive’ academic area. This makes it impossible to probe Chinese scholars’ sincere academic viewpoints on sedition issues. But the fact that the Chinese Government dares to publicly criminate a well-known and high-profile political dissident like Liu⁷⁵ under such a disputable law can show, to some degree, that it is confident that the reason for the conviction is cogent jurisprudence.⁷⁶ Then, what is the Chinese logic behind Liu’s case?

Numerous research materials find that speech is able to powerfully affect human behaviour because the expressed information is “fundamental to human existence” and prompts people to “adapt” their acts.⁷⁷ In this way, speech essentially influences the formation and development of social culture and actions; for example, “at the heart of strong democracy [perhaps we could say democracy more generally] is talk”; “every human interaction that involves language or linguistic symbols”.⁷⁸ And researchers can, according to quantity, establish relations between information and actions; for example, models of information as a “central, practical feature” of “political and economic governance”.⁷⁹ In this sense, “every idea is an incitement”.⁸⁰

Accordingly, whether some speech should be prohibited for being illegally seditious depends on which acts it could “incite”.

⁷⁵ Liu Xiaobo, WIKIPEDIA, http://en.wikipedia.org/wiki/Liu_xiaobo (last visited Sep. 18, 2011).

⁷⁶ Alternatively, the Chinese Government can cap other criminal statutes on such political dissidents. For example, the Criminal Law of the PRC, Part , Chapter 3 (Crimes of Undermining the Order of Socialist Market Economy) is a priority among the available tools because crimes under such caps are commonly regarded as economically selfish, which will defame the political activists claiming to pursue welfare for the public. Some dissidents were so treated, AP, Chinese Legal Scholar Held for Tax Evasion: His Group Worked on Behalf of Victims of Tainted-Milk Scandal, CHINA ON MSNBC.COM (Aug. 4, 2009, 2:25 PM ET), http://www.msnbc.msn.com/id/32286049/ns/world_news-asia_pacific/t/chinese-legal-scholar-held-tax-evasion/; AP, China Says Artist Ai Weiwei Detained for Economic Crimes, CBCNEWS (Apr. 7, 2011, 7:38 AM ET), <http://www.cbc.ca/news/arts/story/2011/04/07/ai-wei-wei-china-detention.html>.

⁷⁷ Amanda Spink and Charles Cole, A Human Information Behavior Approach to a Philosophy of Information, 52 LIBRARY TRENDS, no. 3, Winter 2004 at 618.

⁷⁸ BENJAMIN BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 173 (Berkeley: University of California Press 1984), quoted in Paul Fairfield, A Modest Phenomenology of Democratic Speech, 10 THE EUROPEAN LEGACY, no. 4, 2005 at 360.

⁷⁹ John W. Patty, The Politics of Biased Information, 71 THE JOURNAL OF POLITICS, no. 2, April 2009 at 385-397.

⁸⁰ *Gitlow v. New York*, 268 U.S. 652, 673 (1925).

There are two approaches to overthrowing a government: democracy or dictatorship. For a democratic government, there are legal ways to change it through democratic processes such as election and deposing⁸¹ where all kinds of speech trying to “incite” the change can “rebut” or “answer” each other.⁸² Such free debate is most likely to result in a majority rule that fits into the present legal frame, unless some theoretical and unlikely glitch happens.⁸³ Yet things are different when we talk about dictatorially subverting a democratic government, which is beyond the permission of present law. But ideas for such a rebellion may not be criminated for lacking the proximity of the idea-act. To implement the goal of dictatorship, such speech should have circumvented democratic debate to incite the minority; but when it dives into the free pool of debate as part of an effort to win the majority’s support, it is seeking to overthrow the current government in a democratic way within the democratic legal structure; there surely exists the possibility that some supporters of a dictatorship may be invigorated by such ideas in the debate and surreptitiously replace the government by force, yet this falls out of the speech’s target if it does not intend such use.

Therefore, whether to criminate seditious speech within the framework of a political democracy can largely depend on whether it is for “candid discussion”⁸⁴ in the “idea market”;⁸⁵ if it is, it is exculpatory even under the “bad tendency” doctrine; or perhaps the “clear and present danger” or “imminent and likely lawless action” criteria should be invoked when further perusing the strength of its incitement. Abstract ideals are susceptible to fairly debatable subject matter in such a market, while calling on a revolt against a specific government is liable to be concrete demagoguery due to its purpose to directly instruct some action other than argument. Some speech, ranging from “abstract” and “advocacy”, has its “advocacy” fallout measured against the governmental capability to

⁸¹ See U.S. CONST. art. I, §§ 2-3; art. II, § 1; art. III, § 1.

⁸² *Dennis v. United States*, 341 U.S. 494, 503 (1951).

⁸³ For example, in the presidential election of 2000 Al Gore won more popular votes but lost to George W. Bush due to the shortage of electors; if the majority of citizens insist that Al Gore should be the President as the democratic outcome, such political action might be seen as an illegal toppling of the Bush Government. Again, if too many citizens are excluded from the voter list, which actually influences the election outcome, the opinion to nullify such an election might be seen as subversive if it goads the majority for such a fight.

⁸⁴ *Abrams v. United States*, 250 U.S. 616, 622 (1919).

⁸⁵ Justice Holmes mentioned such a notion early, Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U.L. REV. 1275, 1302-03 (1998).

contain its seditious effects; the Government will judge such balance, based on various factors, to decide if the governmental power is confident enough to let such speech go, or to punish it for its unacceptable danger.⁸⁶

Similarly, for an autocratic government, to privately propagate toppling it by a coup d'état probably falls under the heading of "seditious advocacy". But, contrary to a democratic society, making speech in the "idea market", whether claiming to support a new dictatorship or a democratic government, also falls outside of what the present government approves: The "idea market" will absorb such "changing the present government" ideas and seek to form a majority rule that will surely oppose the present totalist one. Dictatorship builds its legitimacy on a natural origin other than the conferring of a political democratic process. And dictatorship can never accept its authority as being inferior to the mass' democratic politics, even if the latter might support its power, because it fears that the people may, one day, change their minds and rescind such political authorisation.⁸⁷ For a democratic government, dictatorship-prone ideas probably languish in the amplitude of the "idea market" and hardly endanger the democracy; while, for a despot, calls for democracy are resonant during fair debate in the "market" and rise up against the autocracy. Thus, the more chances there are for debate, the more tolerant the elected government can be in holding out to anti-democratic ideas, while the autarch can face greater peril from a pro-democracy speech. A dictatorship, involving a minority in society, is never powerful enough to bear any voices, whether supporting democracy or other rulers, which negate its legitimacy.

As for Liu's speech, Sentences 1–3 criticised the CPC for being an incorrigible dictatorship that is essentially the enemy of a modern democracy and never compatible with the sovereign of the nationals, while Sentences 4–7 called for a democratic China that necessitates the abolition of the autocratic regime of the CPC and

⁸⁶ For example, »at war« is a typical reason for stricter regulation, *Schenck*, 249 U.S., at 52 ("We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done"). And Joshua Azriel found that "[s]everal times in the nation's history, during national crisis or war, Congress passed laws that limited the right to free speech, and the U.S. Supreme Court upheld many of them". Azriel, *supra* note 58, at 1 (alteration in original) (footnote omitted).

⁸⁷ For example, in Chinese Taiwan, Kuomintang was the dictatorial party before 1986 when the One-Party politics were abolished; it still won many elections after then, but it is never able to retain the dictatorship as before.

its Government; by and large, his controversial six articles and the “2008 Charter” all talked about these two topics.⁸⁸ Different from abetting speech that tries to trigger rebellion by circumventing the filtration of the “idea market”, Liu’s speech activated the democratic turn of the “idea market” that will produce some actions; unlike privately propagated words that call for a coup d’état, what Liu did to ignite the debate on the legitimacy of the present government in the “idea market” was sufficient to incite an overthrow a government if it be dictatorial because the democratic market is itself anti-dictatorship. The Courts relied much for the crimination on the fact that Liu extensively spread his speech over the “idea market”, particularly on the Internet.⁸⁹ Another premise for the crime of sedition is that it abets to violently revolt,⁹⁰ but a governmental transition can hardly be peaceable if the old one, such as a dictatorship, regards the new establishment, such as a republic, as illegal.

The question of Liu’s case can thereby be reduced to: Does the Chinese Constitution confer dictatorial power on the CPC and its Government?

The Constitution of PRC constructs a complex and delicate system of authority for state governance: (1) Preamble, Paragraph 7 stipulates that the CPC is the leader of the “People” and the Authority: “under the leadership of the CPC ... the Chinese people of all nationalities will ...”; (2) Chapter I, Article 2 makes it clear that “[a]ll power in the PRC belongs to the people” and the “NPC (National People’s Congress) and the local people’s congresses at various levels are the organs

⁸⁸ See *In re Liu Xiaobo Sedition to Subvert the Government* (Beijing 1st Interm. People’s Ct. Dec. 25, 2009); *In re Liu Xiaobo Sedition to Subvert the Government* (Beijing High People’s Ct. Feb. 11, 2010). Liu’s six articles and “2008 Charter.” Zhonggong de Ducai Aiguo Zhuyi [The Dictatorial Patriotism Propagated by the CPC], PEACEHALL.COM (Oct. 4, 2005), <http://www.peacehall.com/news/gb/china/2005/10/200510041308.shtml>; Nando Zhongguoren Zhipei Jieshou “Dangzhu Minzhu”? [Do Chinese Have to Live with the ‘Democracy’ Doled Out by the CPC?], DERKEILER.COM (Jan. 5, 2006, 10:39 PM), <http://newsgroups.derkeiler.com/Archive/Talk/talk.politics.china/2006-01/msg00025.html>; Tongguo Gaibian Shehui Lai Gaibian Zhengquan [To Change the Society and Then to Change the Authority] [hereinafter Liu, Change], BOXUN.COM (Feb. 28, 2006), <http://news.boxun.com/news/gb/pubvp/2006/02/200602280149.shtml>; Duomian de Zhonggong Ducai [Facets of CPC. Dictatorship], PEACEHALL.COM (Mar. 14, 2006), <http://www.peacehall.com/news/gb/pubvp/2006/03/200603140311.shtml>; Ducai Jueqi Shi Dui Shijie Minzhuhua de Fumian Xiaoying [Boom of Dictatorship Counteracts the Trend of Global Democracy], BOXUN.COM (May 7, 2006), <http://news.boxun.com/news/gb/pubvp/2006/05/200605071934.shtml>; Dui Heiyao Tongnu An de Jixu Zhuiwen [Further Inquiry into the Labor Cases: Teenage Slaves in Savage Mining Factories], PEACEHALL.COM (Aug. 2, 2007), <http://www.peacehall.com/news/gb/pubvp/2007/08/200708020440.shtml>; China’s Charter 08, NYBOOKS.COM (Dec. 18, 2008), <http://www.nybooks.com/articles/archives/2009/jan/15/chinas-charter-08/> (Perry Link trans.).

⁸⁹ *In re Liu Xiaobo* (Beijing 1st Interm. People’s Ct.); *In re Liu Xiaobo* (Beijing High People’s Ct.).

⁹⁰ 18 U.S.C. § § 2383, 2385 (2006).

through which the people exercise state power”;⁹¹ and (3) Chapter III, Subchapter 1, Article 62 and Article 64 confer on the NPC the power to amend the Constitution by a majority of two-thirds.^{92, 93}

Thus, although the Constitution puts the power in the hands of the “People” and the “People” manage the state in a democratic way, they can only operate the authority in line with instructions of the CPC; for example, many political activities are judged as illegal and void for being at variance with CPC instructions in the process.⁹⁴ Moreover, obviating the “CPC Leadership” clause in the Constitution, as a political activity, is only legitimate when it is carried out under the leadership of the CPC (with its consent). Further, the Constitution never mentions when the CPC should terminate its period of office. That is to say the CPC is forever a dictator unless it is willing to abdicate its leadership at some stage.

Certainly, there can be some disagreement over such a dictatorship clause. For example, one can ask whether the “People” at the time sincerely signed up to such Constitution a to render themselves servile to the CPC and, if they did, can the “People” of today change such a contract? In fact, the context of the Preamble to the Constitution explains that the “People” historically accept the CPC as their leader because only the CPC can hold power for them,⁹⁵ and so does the CPC Constitution;⁹⁶ this may imply that the

⁹¹ XIANFA ch. I, art. 2, § 1 - 2 (1982).

⁹² Id. ch. III, subch. 1, art. 62 (‘The NPC exercises the following functions and powers: (1) to amend the Constitution; . . .’); art. 64, § 1 (‘Amendments to the Constitution are to be proposed by the NPCSC or by more than one-fifth of the deputies to the NPC and adopted by a vote of more than two-thirds of all the deputies to the NPC’).

⁹³ Such political system was similarly established in the preceding Constitutions, XIANFA pmbl, para. 4; ch. I, arts. 2-3; and ch. III, subch. 1, art. 22 (1978); XIANFA pmbl, para. 4; ch. I, arts. 2-3; and ch. III, subch. 1, arts. 16-17 (1975); XIANFA pmbl, para. 4; ch. I, art. 2; and ch. , subch. 1, arts. 27, 29 (1954).

⁹⁴ For example, in Jan. 2011 Zhang Bingsheng, the Mayor and Deputy Secretary of Shanxi Province, Taiyuan City, by mobile phone messages, canvassed several deputies of Shanxi People’s Congress to elect him as Deputy Provincial Governor as a non-candidate because the CPC had nominated his competitor as a candidate; he was then removed from both of his positions and punished by CPC disciplinary reprimand, Zhou Yingfeng & Cui Jing, Taiyuanshi Yuanshizhang Weifan Huanjie Jilü Shoudao Dangnei Yanzhong Jinggao Chufen [The Mayor of Taiyuan City Was Punished by CPC Disciplinary Severe Reprimand for His Defiance of CPC Disciplines], XINHUANET.COM (Apr. 12, 2011, 10:14 AM), http://www.sx.xinhuanet.com/jdwt/2011-04/12/content_22502434_1.htm. And Liu Ping, who was treated as defiant and unwelcome to the CPC, had all her effort as an independent candidate for Deputy to the People’s Congress nullified by the authority, see Oiwan Lam, China: Another Failed Grassroots Election, GLOBALVOICESONLINE.ORG (May 17, 2011, 2:10 PM GMT), <http://globalvoiceonline.org/2011/05/17/china-another-failed-grassroots-election/>.

⁹⁵ XIANFA pmbl, para. 1-5 (1982); XIANFA pmbl, para. 1 (1978); XIANFA pmbl, para. 1 (1975); XIANFA pmbl, para. 1 (1954).

⁹⁶ Zhongguo Gongchandang Zhangcheng [CPC Constitution] General Programme, para. 3, translated in XINHUANET.COM (Oct. 25, 2007, PM 7:56), http://news.xinhuanet.com/english/2007-10/25/content_6944738.htm (“[T]he Chinese Communists . . . follow the road . . . chosen by the Chinese people . . .” (alteration in original)).

“People” have always tried to partner with various political parties in history, and that the “People” are free to choose their leaders, who are to serve rather than enslave them. If it is understood that the “People” can disemploy the CPC from the “leadership”, then Liu’s speech, calling for a democratic way to implement such action, was surely within his right.

Moreover, even if the CPC has a right to lead the “People”, the right should coexist with, rather than overpower the rule of the “People”. The CPC itself professes that it “has no special interests of its own apart from the interests of the working class and the broadest masses of the people”⁹⁷. Thus, if the CPC breaches the contract to impinge upon the right of the “People”, the “People” may respond with a precautionary act by suspending its leadership, punishing or deposing it. Accordingly, Liu’s speech is necessary for the “People” to communicate with each other as part of the consideration of possible action against the CPC’s suspected betrayal of the constitutional compromise.

Whatever the critique of the dictatorship clause may be, the CPC insists on the “Principle” of “leadership by the CPC”.⁹⁸ On the premise of a legitimate CPC dictatorship, cracking down on words like Liu’s may accord with some of the US “sedition” doctrines for the necessary sustaining of the present legal system; and the narrower space for latitude in China than in the USA may be legally forgivable because a democratic government is inherently more magnanimous in tolerating anti-government speech than a dictatorial one.

In light of the conclusion that free debate on deposing the present government could lead to subverting it in the Chinese legal framework, many other instances of democratic speech involving a critique of governmental policies can also be seen as obstructing the government in discharging its duties, punishable under all sorts of statutes.⁹⁹ It seems that the mass of patience

⁹⁷ Id. para. 25.

⁹⁸ Id. para. 12.

⁹⁹ For example, Criminal Law of the PRC, Part I, Chapter 2, Subchapter 3, Article 29 states »one who instigates others to commit a crime« as a »Joint Criminal«, and Part II, Chapter 1 (Crimes of Endangering National Security), Chapter 6, Subchapter 1 (Crimes of Disrupting Public Order), and Chapter 7 (Crimes of Endangering the Interests of National Defence) can be applied to »seditious« words goading public opposition to governmental bodies when they are carrying out their duties; Law of the PRC on Public Security Administration Punishments, Chapter III, Subchapter 1 (Acts Disrupting Public Order and the Punishments Thereto), and Subchapter 4 (Acts Impairing the Social Administration and the Punishments Thereto) can have the »provocative« speech to obstruct the Government under executive punishment; and so does the Decision of the State Council on Imprisonment for

and tolerance of the Chinese Government regarding the political latitude for the people is not readily measurable on the basis of historical data, although there some signs exist to implicate greater odds of successfully bypassing the “sedition” mine field: For example, private anti-government discussion might be pardoned for its lack of invoking the strength of the “idea market”;¹⁰⁰ not only criticising the Government but also providing some advice for its improvement might be regarded as good-will and acceptable;¹⁰¹ anti-government utterance by someone with a higher political status might be more accommodated for being “advice” rather than “sedition” because higher ranks are less motivated to topple the regime.¹⁰²

Although the CPC insists on its unchallengeable “leadership”, it does not dare to expressly profess that “leadership” is essentially

Re-education Through Labour, see Guanyu Laodong Jiaoyang Wenti de Jueding [Decision of the State Council on Imprisonment for Re-education Through Labour] (promulgated by the St. Council, Aug. 3, 1957, effective Aug. 3, 1957) 1957 ST. COUNCIL GAZ. 731. Besides, the Decision on Safeguarding the Internet enumerates some typical speech content crimes and executively punishable transgression on the Internet, and so do Punishment of Illegal Publications (Guayu Chuli Weifa de Tushu Zazhi de Jueding [Punishment of Illegal Publications] (promulgated by the NPCSC, Nov. 8, 1955, effective Nov. 8, 1955) 1980 [3] NPCSC GAZ., CHINALAWINFO chl_8047), Law of the PRC on Assemblies, Processions and Demonstrations (Jihui Youxing Shiwei Fa [Law on Assemblies, Processions and Demonstrations] (promulgated by the NPC, Oct. 31, 1989, effective Oct. 31, 1989) ch. 2, art. 12, 1989 [5] NPCSC GAZ. items 1-2, translated in LAWINFOCHINA), Regulations on Telecommunications of the PRC (ch. 5, art. 57), and Regulations on Internet Information Service (art. 15). Again, some “content-based” laws and governmental policies disqualify anti-CPCists from some professional or educational opportunities, e.g. Gongwuyuan Fa [Civil Servant Law] (promulgated by NPCSC, Apr. 27, 2005, effective Jan. 1, 2006) ch. II, art. 11, 2005 NPCSC GAZ. 309, 310, translated in LAWINFOCHINA; Xianyi Junguan Fa [Law of the People's Republic of China on Officers in Active Service] (promulgated by NPCSC, Sep. 5, 1988, effective Jan. 1, 1989, amended May 12, 1994; Dec. 28, 2000) ch. II, art. 8, 2001 NPCSC GAZ. 28, 28, translated in LAWINFOCHINA; Lüshi Fa [Law on Lawyers] (promulgated by the NPCSC, Oct. 28, 2007, effective June 1, 2008) ch. II, art. 5, 2007 NPCSC GAZ. items 15-16, translated in LAWINFOCHINA; 2000 Nian Putong Gaodeng Xuexiao Zhaosheng Gongzuo Guiding [Rules for Enrolment in Undergraduate Programmes at Higher Education Institutions in 2000] (promulgated by the Ministry of Ed., Apr. 3, 2000, effective Apr. 3, 2000) art. 1, para. 1, 2000 ST. COUNCIL GAZ. item 6; Zhaoshou Gongdu Shuoshi Xuewei Yanjiusheng Guanli Guiding [Regulations on Enrolment in Master Degree Programmes] (promulgated by the St. Educ. Comm'n, Nov. 5, 1996, effective Nov. 5, 1996) art. 2, CHINALAWINFO chl_19662; 2004 Nian Quanguo Putong Gaodeng Xuexiao He Keyan Danwei Zhaoshou Gongdu Boshi Xuewei Yanjiusheng Zhaosheng Jianzhang [Charter for Enrolment in Doctor Degree Programmes at Higher Education Institutions in 2004] (promulgated by the Ministry of Educ., Sep. 14, 2003, effective Sep. 14, 2003) art. 2, para. 1, 2003 MINISTRY OF ED. GAZ. 470, 470.

¹⁰⁰ See XIANFA ch. , subch. 1, art. 75 (1982) (“Deputies to the NPC may not be held legally liable for their speeches or votes at its meetings”).

¹⁰¹ For example, according to Professor Gao, Liu's speech could be indicted for its intention to subvert rather than to improve the Government, Xinhua-Net, *supra* note 8, para. 3, sentence 2.

¹⁰² See *supra* note 99. And Chairman Mao, as the high figure of the CPC, has legally lectured some words, such as »it is the people's right to rebel against the Government“, which are much more subversive than Liu's, Song Meiyu, Lixing de Mishi - “Weige” Zhong Hongweibing “Zaofan Youli” de Xinli Fenxi [Loss of Reason— the Psychoanalysis of Red Guards' “Reasonable Rebelling” During “the Cultural Revolution”], [2009] 9 SHANXI GAODENG XUEXIAO SHEHUI KEXUE XUEBAO [SOCIAL SCIENCES JOURNAL OF COLLEGES OF SHANXI] 110 - 12.

equal to despotism, perhaps because it cannot deny the right of the Chinese people to revolt against a despot,¹⁰³ like the “right” and “duty” “to throw off such Government” for the American people.¹⁰⁴ On the contrary, the CPC and its Government assesses its leadership as being more “democratic” than “imperialism, feudalism and bureaucrat-capitalism” that subsume the model of the US political system.¹⁰⁵ For this, the CPC “strictly distinguishes between the two different types of contradictions, those between ourselves and the enemy, and those among the people;”¹⁰⁶ the first type is handled by democratic politics, while the second by a governmental dictatorship.¹⁰⁷ The obligation of the “People”, in the opinion of CPC leaders such as Chairman Mao Zedong, has always been ambiguous and varied in history, but the benchmark feature has been that the “People” should be patriots who support a CPC-led China.¹⁰⁸ Thus, the Chinese regime believes that the CPC and its Government can also be peaceably changed as in the USA,¹⁰⁹ but such change can only be implemented by the “People” who are faithful to the CPC leadership; those who want to depose the CPC are the “Enemy” without political rights in the country and, as a result, there are no political dissidents among the “People”.¹¹⁰ Because the CPC is so confident due to the self-evident fact that the CPC devotees who make up the “People” represent the majority of nationals,¹¹¹ it boasts such a broad democratic base breeding

¹⁰³ See supra notes 94-95 and the accompanying text. And Chairman Mao confirmed such a right, Song, supra note 101.

¹⁰⁴ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

¹⁰⁵ See XIANFA pmbl, para. 5 (1982); XIANFA pmbl, para. 1 (1978); XIANFA pmbl, para. 1 (1975); XIANFA pmbl, para. 1 (1954); CPC Constitution, general programme, para. 4.

¹⁰⁶ CPC Constitution, general programme, Para. 17.

¹⁰⁷ See XIANFA ch. , art. 1 (1982) (“The PRC is a socialist state under the people’s democratic dictatorship ...”); XIANFA ch. , art. 1 (1978); XIANFA ch. , art. 1 (1975); XIANFA pmbl, para. 1 (1954).

¹⁰⁸ Li Xuebang & Hu Dong, Renmin Gainian Zhengzhixing de Xianzheng Jiedu [The Constitutional Interpretation of the Political Connotation of the “People”], [2006] 3 BEIFANG LUNCONG [THE NORTHERN FORUM] 154; Lu Jianjie, Manyi Dangqian Zhengzhi Huayu Zhong de Sange Gainian: “Ren” “Min” “Renmin” [Three Concepts in Present Political Issues: “Human”, “Subject” and “People”], [2004] 2 WEISHI [ONLY THE TRUTH] 4; Xu Zhaojun, Renmin Neibu Maodun Gainian de Lishi Jiedu Ji Zai Xinshiqi de Lilun Jiazhi [A Historical Interpretation of Contradictions Among the People and Its New Theoretical Value], [2001] 1 XUESHU JIAOLI [ACADEMIC EXCHANGE] 1; Yue Rongsheng, “Renmin Qunzhong” Gainian de Zaitan [Reconsideration About the Concept of People], [2007] 1 HUBEI JIAOYU XUEYUAN XUEBAO [JOURNAL OF HUBEI INSTITUTE OF EDUCATION] 58; Zhang Shaoyi, Dui Renmin Gainian de Xinjie [New Interpretation of the “People”], [2009] 15 XUE LILUN [THEORY STUDY] 50.

¹⁰⁹ See CPC Constitution, general programme, para. 27 (“The Party must adapt itself to the march of events and changing circumstances, improving its system”).

¹¹⁰ BBC, Appeal by China Dissident Liu Xiaobo Rejected, BBC NEWS (Feb. 11, 2010, 3:34 PM GMT), <http://news.bbc.co.uk/2/hi/asia-pacific/8509777.stm> (“Foreign Ministry spokesman Ma Zhaoxu said there were ‘no dissidents in China’”).

¹¹¹ CPC Constitution, general programme, para. 1 (“(C.P.C) represents . . . the fundamental interests of the overwhelming majority of the Chinese people” (alteration in original)).

more democratic politics than in US and other Western capitalism states. Following such “socialist democracy” “with Chinese characteristics” logic,¹¹² the freedom of political speech for Chinese “People” is limited to words that propitiate and help the CPC rectify some shortcomings regarding its self-renovation, and Liu’s critique seemed shy of such characteristics. And for some Chinese scholars who believe China has a democratic system now, they may despair with the Western “Double-Standard” doctrine: While the USA can criminate speech that advocates the overthrowing of a democratic Government using mechanisms lying outside of its legal framework, why cannot China do this?

For political speech, the idea of “candid discussion” in the “idea market” transforms into an element of the integrated “market” idea which then directly affects the audience; so the “market” idea rather than the individual one should account for any ill effect. Such rationale may also find a foothold in non-political speech cases: As in Part I, the specific valueless content of speech can only be prohibited in some places other than in a fair debate “market”; words such as “obscene”, “insulting”, “fighting” and “false” are susceptible to non-for-“candid discussion”, insolubility in the “idea market”, and evil effect, but criticising a “public figure” has more chance of escaping a the libel charge for the existence of a keen “idea market” for its discussion. In China, the “idea market”, with exception of political subjects, does exist and some of the opinions in US defamation cases can be copied here, unless in some cases where the disputed speech has a certain political colour or is related to a powerful mogul, then the court may resort to principles “with Chinese characteristics” to settle them.

III. Ideology of Free Speech

Different ideologies lead to varying viewpoints on “what speech should be protected” by the same law on free speech.¹¹³ So, to successfully upset a rationale for free speech might ‘cogently’ render void some laws supported by such a rationale. And such efforts always see hopeful results: It seems that doctrines for freedom of expression are “extensive” and there is hardly any com-

¹¹² Id. general programme, para. 15.

¹¹³ See Molnar, *supra* note 73, at 1337.

mon “foundational value” underpinning them; “[e]ach of the theories” “leads to highly dubious applications”.¹¹⁴

Free speech, together with the separation of governmental powers and other establishments, are believed to improve the “Union”, “Justice”, and so on;¹¹⁵ among the rationales for the freedom of speech, the obtrusive scholarly one may be the merit of the mechanism of the “idea market” as Professor Zechariah Chafee, Jr. “argued that the most important purpose served by free speech was the social interest in ‘the discovery and spread of truth on subjects of general concern’”.¹¹⁶ Although some analyses find that these rationales are “a web of mutually reinforcing values”,¹¹⁷ there is still a chance that sometimes people regard the function of the “idea market” as being opposite to other more important values.

The Sedition Act of 1798, which punished “false, scandalous and malicious” writings “against the government”, “with the intention” for “contempt”, “disrepute”, “hatred”, “sedition” or being “unlawful”,¹¹⁸ has been “virtually unanimously” contended as violating “certain fundamental principles of representative democracy” by “all political scientists, historians and legal scholars” “since the middle of the nineteenth century when the Act was explicitly disowned by Congress”.¹¹⁹ According to James P. Martin, although the Act obviously contravenes the freedom of expression, Federalists then supported it in the light of their favoured theory for speech democracy “via the representative mechanisms” that were purported to be “more democratic than modern ones, especially if one takes into account the undeveloped conditions that still prevailed in the 1790s”.¹²⁰

In *Patterson v. Colorado*, the Supreme Court argued that criticism of the State Court, even if for public debate in the “idea market” and “to prove the truth”, could still be contemptuous because “[a] publication likely to reach the eyes of a jury, declaring a witness in a pending cause a perjurer, would be none the less a con-

¹¹⁴ Daniel A. Farber & Philip P. Frickey, Practical Reason and the First Amendment, 34 UCLA L. REV. 1615, 1618, 1640-41 (1987) (alteration in original).

¹¹⁵ U.S. CONST. pmbl.

¹¹⁶ ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH 34 (1920); Zechariah Chafee, Jr., Freedom of Speech in War Time, 32 HARV. L. REV. 932, 956 (1919), quoted in Heyman, supra note 84, at 1302.

¹¹⁷ Farber & Frickey, supra note 113, at 1640.

¹¹⁸ Act of July 14, 1798, ch. 74, § 2, 1 Stat. 596, 596-97 (expired in 1801).

¹¹⁹ James P. Martin, When Repression Is Democratic and Constitutional: The Federalist Theory of Representation and the Sedition Act of 1798, 66 U. CHI. L. REV. 117, 123 (1999).

¹²⁰ Id. at 118.

tempt that it was true”¹²¹ The *Patterson* reasoning is commonly regarded as “crabbed”¹²² and that there was no “clear and present danger” in the defendant’s speech manner.¹²³ Later on, in a similar dispute in *Bridges v. California* the Supreme Court dismissed the contempt conviction because the petitioners’ acts – “publication in the newspapers aside, in sending the message to the Secretary”, the message even assumed “to call a strike”, were with their rights, and if the judge felt some intimidation by “the possibility of a strike as a consequence of his decision”, it should be ascribed to such “facts themselves” rather than the petitioners’ speech.¹²⁴

If the Sedition Act of 1798 and *Patterson* can be read as the incumbent government feeling unconfident having its authority freely scrutinised in the “idea market”, election campaign laws show people’s worry about the free speech “market” unfairly forming a new government, with a long history of regulating finance for speech like “contribution” and “expenditure”, based on a variance in talking methods and speakers’ statuses.¹²⁵ There are many reasons to curb this freedom of expression, for example, eliminating corruption for the intimate relations between patrons and clients,¹²⁶ levelling off unequal campaign funds among candidates,¹²⁷ and redressing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas”.¹²⁸ Disputes on how to regulate campaign speech in a fair debate “market” seem never settled today.¹²⁹

Speech that potentiates a foreign force against the USA is always unwelcome and containable. The Sedition Act of 1918 was to some degree de facto the reincarnation of its predecessor of 1798, except that it added a premise of “when the United States is

¹²¹ *Patterson v. Colorado*, 205 U.S. 454, 459, 462 (1907) (alteration in original).

¹²² Michael Kent Curtis, Teaching Free Speech from an Incomplete Fossil Record, 34 AKRON L. REV. 231, 237 - 38 (2000).

¹²³ Susan W. Brenner, Complicit Publication: When Should the Dissemination of Ideas and Data Be Criminalized?, 13 ALB. L.J. SCI. & TECH. 273, 322 n.250 (2003).

¹²⁴ *Bridges v. California*, 314 U.S. 252, 277-78 (1941).

¹²⁵ The Federal Election Campaign Act was enacted in 1971. The Act, the ensuing amendments and collateral laws are mostly compiled in 2 U.S.C., Chapter 14 and 26 U.S.C., Chapters 95 and 96.

¹²⁶ *Buckley v. Valeo*, 424 U.S. 1, 21, 27-28 (1976).

¹²⁷ *Davis v. FEC*, 128 S. Ct. 2759, 2773 (2008).

¹²⁸ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990).

¹²⁹ See generally *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *Davis*, 128 S. Ct.; *Austin*, 494 U.S.; *McConnell v. FEC*, 540 U.S. 93 (2003); *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985); *Buckley*, 424 U.S.

at war”,¹³⁰ which manifested its intention to dampen ideas toward to enemies. While the “Subversive Activities Control Act applies only to foreign-dominated organizations which work primarily to advance the objectives of a world movement controlled by the government of a foreign country”, the Court did not equalise it with “requirements upon any group which pursues unpopular political objectives or which expresses an unpopular political ideology”.¹³¹ Section 411 of the Patriot Act is another instance of disinterest in unwelcome exotic speech.¹³² And regarding election campaigns, “a foreign principal”, and “an individual who is not a citizen of the United States or a national of the United States” “and who is not lawfully admitted for permanent residence” may not participate in a federal election campaign speech by “a contribution or donation”, “or an expenditure, independent expenditure, or disbursement for an electioneering communication”,¹³³ for their suspicious motives to misguide the US public under the cover of eloquence. Scholars have found that in “times of war”, “it is perhaps only natural that our tolerance for the usual disorder of dissent will decline”.¹³⁴

Few commentators argue that the fact that the “truth” filtered out by the “idea market” sometimes harms other values can justify its restriction, because “true” information rather than “false” information one helps people figure out practical solutions to puzzles. On the contrary, it is a dysfunction of the “idea market” that is not able to find the “truth” or delays the process of such work that prompts people to modulate the speech debate mechanism. Just as a “market failure” happens in an economy where the “allocation of goods and services by a free market is not efficient” in the light of “Monopolies”, “Public Goods”, “Natural Monopoly”, “Externalities”, “Bounded Rationality”, “Information Asymmetry” and other theories,¹³⁵ the “idea market” should never be presumed as perfect to extricate the expected “truth” accurately and timely for many reasons, such as: (1) Unlike the trade market, a lack of interest in-

¹³⁰ Compare the Sedition Act of 1918, ch. 75, 40 Stat. 553 (1918) (repealed Mar. 3, 1921) with the Act of July 14, 1798, ch. 74, § 2, 1 Stat. 596.

¹³¹ *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1, 104 (1961).

¹³² See *supra* note 61 and the accompanying text.

¹³³ 2 U.S.C. § 441e (2006).

¹³⁴ Lee C. Bollinger, *The First Amendment's Original Sin*, 72 U. CHI. L. REV. 417, 417 (2005).

¹³⁵ “Market Failure”, WIKIPEDIA, http://en.wikipedia.org/wiki/Market_failure (last visited Sep. 14, 2011).

centives in some “idea market” may attract few speakers, listeners and speeches to it, which will make the discussions too scarce to produce the desirable truth; (2) speakers are inept or unwilling to make truth speeches for the “market”; and (3) listeners are incapable of searching for and discerning the truth in the “market”. Critics from foreign countries or antagonists who have motives to topple the majority rule are liable to be regarded as an unwelcome destroyer of the “idea market” because people do not want to have freedom of expression, in any sense, simply rendered as a game that any information (true or false) races in the “market field” to earn a final title that can be evil for people.

The distrust of the non-national idea is persistently nurtured by the Chinese Government beneath the flag of patriotism. To frame such nationalist philosophy, laws establish that there is inborn civilisation congruity among Chinese nationalities/ethnics¹³⁶ which has been the foundation of their communal benefit and welfare,¹³⁷ and all the Chinese nationalities are essentially integrated into one nationality called Chinese Nation/Ethnic¹³⁸ in China’s long history; oppositely, “imperialism” has been the foreign “rule” of “the Chinese people of all nationalities” and should be labelled as the Enemy.^{139, 140} There are enemies of sorts within the group of the Chinese Nation;¹⁴¹ the political doctrine is that those whose ideologies “collaborate with imperialism” should be regarded as more dangerous for their “treason against the fatherland” and “cause

¹³⁶ Han Nationality is the majority, and fifty-five other nationalities have been recognised by the Government as minorities, *Di Shiyijie Quanguo Renmin Daibiao Daihui Shaoshu Minzu Daibiao Ming’e Fenpei Fang’an* [Act of the Quota of Deputies from Minorities for the 11th NPC] (promulgated by the NPCSC, Apr. 27, 2007, effective Apr. 27, 2007) art. 1, 2007 NPCSC GAZ. 371, 371-374.

¹³⁷ XIANFA pmbl, para. 1, 5 (1982); XIANFA pmbl, para. 6 (1978); XIANFA pmbl, para. 2, 5 (1975); XIANFA pmbl, para. 5 (1954).

¹³⁸ The appellation of the «Chinese Nation» is invoked in «The March of the Volunteers», the official national anthem according to the Constitution of the PRC, Chapter , Article 136. And such appellation can also be found in the CPC Constitution, General Programme, Paragraph 1.

¹³⁹ XIANFA pmbl, para. 5 (1982); XIANFA pmbl, para. 1, 5, 8 (1978); XIANFA pmbl, para. 1, 3, 6 (1975); XIANFA pmbl, para. 1 (1954).

¹⁴⁰ Such a «China/Foreign» dichotomy might contradict the Chinese Government’s “upholding” of “Marxism-Leninism”, XIANFA pmbl, para. 7 (1982), that is also exotic. But one argument might be that real “Marxism-Leninism” is “Communism” for the whole of humankind and should not be treated as foreign for any nation including China. For example, during the Chinese-Soviet friendly relationship period, the Constitution of 1954 claimed to maintain an alliance with the Soviet Union, although it was foreign, XIANFA pmbl, para. 6 (1954); while gaps cropped up between them over the understanding of the “Communism” doctrine, the Constitution of 1975 denounced Sovietism as inimical exotic “Social Imperialism”, XIANFA pmbl, para. 3 (1975), and “Superpower Hegemonism”, id. pmbl, para. 6, and Constitution of 1978 added a new nickname of “Revisionism” for it, XIANFA pmbl, para. 5 (1978).

¹⁴¹ XIANFA pmbl, para. 8 (1982); XIANFA pmbl, para. 6 (1978); XIANFA pmbl, para. 3 (1975); XIANFA pmbl, para. 2 (1954).

of people's democracy", and "severely" punished; by comparison, "[f]eudal landlords, bureaucratic capitalists and reactionary elements in general" have opportunities to be "reformed into new men".¹⁴²

Probably, all Chinese nationalities have their own civilisational features that differ from an alien nation, and every civilisation may be self-conscious to resist the intrusion of others into its own identity.¹⁴³ But it is difficult to accurately pinpoint which elements a civilisation immanently takes on and cannot allow to be compromised by the outside; and the political and economic establishment is seen as no essential part for the identity of a civilisation.¹⁴⁴ However, it seems that the Chinese Government, to some degree, successfully labels China's present politics as "Chinese-characteristics Socialism",¹⁴⁵ and denominates it as most appropriately fitting with Chinese civilisation called "China's specific conditions",¹⁴⁶ and "represents the development trend of China's advanced productive forces, the orientation of China's advanced culture and the fundamental interests of the overwhelming majority of the Chinese people".¹⁴⁷ Besides the assertion that the Chinese Government is identical to the Nation civilisation, all of the disliked ideologies that are democratic such as "capitalism"¹⁴⁸ and "bourgeois liberalisation"¹⁴⁹ are packed into an aggressive and colonial extraneous civilisation like "imperialism"¹⁵⁰ and in particular "a system of multiple parties holding office in rotation", "diversification of guiding thought", "separate executive, legislative and judicial powers", "a bicameral or federal system",

¹⁴² ZHONGGUO RENMIN ZHENGZHI XIESHANG HUIYI GONGTONG GANGLING [THE COMMON PROGRAMME OF THE CHINESE PEOPLE'S POLITICAL CONSULTATIVE CONFERENCE] ch. , art. 7 (1949) (alteration in original). The Common Programme is conventionally rendered as the virtual first constitutional law of the PRC before the Constitution of 1954.

¹⁴³ Samuel P. Huntington, *The Clash of Civilizations?* FOREIGN AFFAIRS, Summer 1993, at 22

¹⁴⁴ It is my hypothesis that the fundamental source of conflict in this new world will not be primarily ideological or primarily economic. The great divisions among humankind and the dominating source of conflict will be cultural. Nation states will remain the most powerful actors in world affairs, but the principal conflicts of global politics will occur between nations and groups of different civilizations. The clash of civilizations will dominate global politics. The fault lines between civilizations will be the battle lines of the future).

¹⁴⁴ Id.

¹⁴⁵ XIANFA pmbi, para. 7 (1982).

¹⁴⁶ CPC Constitution, general programme, para. 9.

¹⁴⁷ Id. general programme, para. 1.

¹⁴⁸ XIANFA ch. 1, art. 24 (1982); XIANFA pmbi, para. 5 (1978); XIANFA pmbi, para. 3 (1975).

¹⁴⁹ CPC Constitution, general programme, para. 12.

¹⁵⁰ »Imperialism« is routinely known as the necessity of »capitalism« by communists, typically in Lenin's classical work, "Imperialism Is the Highest Stage of Capitalism".

“privatization”,¹⁵¹ and some “systems of laws of certain Western countries”¹⁵² are treated as enemies of Chinese civilisation. Patriotism education is broadly required by all kinds of laws, where it is seamlessly bundled with CPCism and anti-capitalism.¹⁵³

The sensitivity of the issue makes it impossible to establish a comprehensive poll score for the acceptance of such politics/nationalism among the public. But common political logic hints at the considerable probability of its clout on some members of the population: If China has to learn from the Western powers, then it will always lag behind them; and in the worst case, the ‘teachers’ might misguide the ‘student’ by intentionally preaching wrong ideologies. Many Chinese scholars have captured the popular phenomena of nationalism among youth¹⁵⁴ and students¹⁵⁵ in the places of Internet freelance¹⁵⁶ and official media,¹⁵⁷ and in the fields of culture¹⁵⁸ and others.¹⁵⁹ Some influential dissidents have

¹⁵¹ Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Gongzuo Baogao [Report on the Work of the NPCSC], 4th Session of the 11th NPC, Mar. 10, 2011, 2011 [3] NPCSC GAZ. item 14, translated in GOV. CN, http://www.gov.cn/english/official/2011-03/18/content_1827230.htm (last visited Sep. 17, 2011).

¹⁵² Id.

¹⁵³ See XIANFA ch. 1, art. 24 (1982); CPC Constitution, general programme, para. 12, 16; Jiaoyu Fa [Education Law] (promulgated by the NPC, Mar. 18, 1995, effective Sep. 1, 1995) ch. 1, 1995 NPCSC GAZ. 207, 207-209, translated in LAWINFOCHINA. Such patriotism is also a ticket providing access to some professional or educational opportunities, relevant sources cited supra note 98.

¹⁵⁴ Zhu Yunsheng, Dangxia Qingnian Bingtai Minzu Zhuyi Qingxiang de Weihai Jiqi Pipan [Critique of the Evil of Current Morbid Nationalism of Youth], [2010] 5 ZHONGGUO QINGNIAN YANJIU [CHINESE YOUTH STUDY] 31.

¹⁵⁵ Wan Jinqiang & Chen Chao, Hexie Xiaoyuan Shiye Xia Daxuesheng de Minzu Zhuyi Gai Hequhecong [Where Should College Students’ Nationalism Go in the Eye of the Harmonious Campus?], [2010] 5-1 KEJIAO DAOKAN [JOURNAL OF INTRODUCTION OF SCIENCE & EDUCATION] 32; Xia Xiaoqian & Liu Zuyun, Zhongguo Daxuesheng de Minzu Zhuyi: Biaoxian Ji Zhengce Yindao [The Nationalism of Chinese College Students: Performance and Guidance Measures], [2010] 4 HUAIYIN GONGXUEYUAN XUEBAO [JOURNAL OF HUAIYIN INSTITUTE OF TECHNOLOGY] 85.

¹⁵⁶ Cui Haifeng & Bo Jianhua, Lun Zhongguo Wangluo Minzu Zhuyi de Neihan Ji Zuoyong [On the Connotation and Functions of Chinese Network Nationalism], [2010] 4 SHANXI QINGNIAN GUANLI GANBU XUEYUAN XUEBAO [JOURNAL OF SHANXI COLLEGE FOR YOUTH ADMINISTRATORS] 46; Dong Chengwen, Qianxi Wangluo Minzu Zhuyi Xingqi de Yuanyin [Brief Analysis of the Reasons for the Rise of Nationalism in Network], [2010] 5 JIAMUSI JIAOYU XUEYUAN XUEBAO [JOURNAL OF JIAMUSI INSTITUTE OF EDUCATION] 108; Huang Rihan & Cong Peiying, Qianxi Wangluo Minzu Zhuyi Yu Zhongguo Guojia Anquan [About Network Nationalism and China’s National Security], [2010] 2 JIANGNAN SHEHUI XUEYUAN XUEBAO [JOURNAL OF JIANGNAN SOCIAL UNIVERSITY] 44; Luo Kunjin, Wangluo Minzu Zhuyi de Minzuxue Jiedu [Comprehension of Network Nationalism in Ethnology], [2010] 4 GUANGXI MINZU YANJIU [GUANGXI NATIONALITIES RESEARCH] 60.

¹⁵⁷ Wang Yuwei & Dong Tiance, Minzu Zhuyi: Dangdai Zhongguo Chuanmei de Yizhong Huayu Shijian [Nationalism: A Practice in Chinese Present Media], [2010] 1 XIANDAI CHUANBO [MODERN COMMUNICATION] 28.

¹⁵⁸ Chen Shenggang, Shilun Wenhua Minzu Zhuyi Yu Minzu Ningjuli [On Cultural Nationalism and National Concentration], [2010] 5 HEILONGJIANG MINZU CONGKAN [JOURNAL OF HEILONGJIANG NATIONALITY FORUM] 27; Li Yiyu, Zhongguo Wenhua Minzu Zhuyi Lunlüe [On Chinese Cultural Nationalism], [2009] 5 ZHONGGONG TIANJIN SHIWEI DANGXIAO XUEBAO [JOURNAL OF CPC TIANJIN COMMITTEE UNIVERSITY] 60.

¹⁵⁹ E.g., Piao Qiche, Zhongguo Xin Minzu Zhuyi de Fazhan He Tezheng Yanjiu [The Study of Development and Character of Chinese Neo-nationalism], [2010] 4 ZAOZHUANG XUEYUAN XUEBAO

commented on several Chinese events of extreme nationalism such as acclaim for the Japan 3.11 earthquake,¹⁶⁰ the anti-protest of the 2008 Olympic torch relay,¹⁶¹ the anti-compassion of Tibetan independence from the West during 2008,¹⁶² the denunciation of Zhao Wei (a Chinese actress) wearing Japanese ensign clothes,¹⁶³ and gloating over the US 9.11 terrorist attack,¹⁶⁴ encouraged by the Chinese Government.

While it seems that the civilisation's nationalism does not so much instate the CPC maxim that Western democracy is not suitable for China on the heads of people,¹⁶⁵ maybe because for domestic politics the public is more persuaded by what the Government conducts than its preaching, many foreign ideas far away from Chinese people's daily lives may unluckily encounter an offish face of nationalism, and speech advocating a foreign state's benefit may be more susceptible to native animosity. For example, maybe for the purpose of justifying Liu's crimination, the Chinese Government has denounced Liu as a traitor who derogated by stating that the Chinese nationality needs the West as colonisers to help its democratisation for at least 300 years, to earn a high salary from the Democratic China Corporation¹⁶⁶ that is patronised by the National Endowment for Democracy (NED), an agent of the American CIA, and prizes and awards from its Western masters; to strengthen such a voice, the Government used little sophism against Liu's democratic opinion except for simply disqualifying

[JOURNAL OF ZAOZHUANG UNIVERSITY] 48; Xue Huiwen & Qin Yi, Dangdai Zhongguo Minzu Zhuyi Shiye Xia de Sixiang Zhengzhi Jiaoyu Yanjiu [Research on Ideological and Political Education in the Perspective of Modern Chinese Nationalism], [2010] 6 CHUANQI ZHUANJI WENXUE XUANKAN(LILUN YANJIU) [SELECTIONS FROM LEGENDS & BIOGRAPHIES (THEORIES RESEARCH)] 81.

¹⁶⁰ Wuerkaixi, Xia' ai Minzu Zhuyi Xingcheng de Yuanyin [Cause of Ultrationalism], WUERKAIXI.COM (Mar. 21, 2011), <http://wuerkaixi.com/2011/03/21/420.htm>.

¹⁶¹ Wang Dan, Zai Minzu Zhuyi Mianqian Qufen Zhongguo Yu Zhonggong [Dissecting Chinese Nationalism and CPC Nationalism], BOXUN.COM, http://blog.boxun.com/hero/200804/wangdan/2_1.shtml (last visited Sep. 18, 2011).

¹⁶² Wang Dan, Guiyi de Minzu Zhuyi [Uncanny Nationalism], BOXUN.COM, http://blog.boxun.com/hero/200804/wangdan/4_1.shtml (last visited Sep. 18, 2011).

¹⁶³ Wei Jingsheng, Zhongguo de Jiduan Minzu Zhuyi Yu Nacui Zhuyi [Chinese's Ultrationalism and Nazism], EPOCHTIMES.COM (Mar. 28, 2002, 1:24 PM), <http://www.epochtimes.com/gb/2/3/28/n179746.htm>.

¹⁶⁴ Wang Lixiong, Weapons Cannot Destroy Hatred, MIDDLE-WAY.NET (Oct. 20, 2001, 5:50 PM), http://woeser.middle-way.net/2011/05/blog-post_04.html (Ogyen trans.).

¹⁶⁵ A mini-sample survey found that »55.3% of university faculty were unsure whether the U.S.-style system of Western multiple parties was suitable for China», Yue Peng, Wei Chenggong & Dai Gangshu, Minzu Zhuyi Sichao Dui Dangdai Gaoxiao Jiaoshi Sixiang Yingxiang de Diaota Yu Sikao [Survey and Analysis on Nationalism Tide's Impact on Present University Faculty], [2010] 4 SIXIANG ZHENGZHI JIAOYU YANJIU [IDEOLOGICAL AND POLITICAL EDUCATION RESEARCH] 49, 52.

¹⁶⁶ The Corporation's website is <http://minzhuzhongguo.org/Default.aspx>.

his status as a dissident for treason.¹⁶⁷ Moreover, under the guise of the national interest, the Government strictly narrows the influx conduit for foreign speech by prohibiting independent foreign investment in all press and media entities,¹⁶⁸ only allowing it to partly embrace some entertainment and education programmes under the control of domestic entities,¹⁶⁹ censoring and sifting kinds of information from the outside;¹⁷⁰ stipulations do not intimate that the main target for such exclusion is the liberal idea, bypassing the public discontent about the domestic dictatorship.

Nationalism and exclusionism not only cut down the chances for Chinese people to learn about the bountiful and pluralistic speech in the world, and experience the value of the “idea market” for truth finding, but also dampen their aspirations to learn from the outside, driving up suspicion as to whether free speech is capable of benefitting people in scenarios like the invasion of foreign ideas. Such distrust of the “idea market” covers a wide range of subjects, not limited to political ideology the Government

¹⁶⁷ Zhongguowang, Liu Xiaobo Qiren Qishi [Liu Xiaobo and His Conducts], CHINA.COM.CN (Oct. 26, 2010), http://news.china.com.cn/txt/2010-10/26/content_21202476.htm, available at <http://world.people.com.cn/GB/13053039.html>; <http://no.chineseembassy.org/chn/zyxw/t764250.htm>; also see Xinhuaawang [Xinhua-Net], Nuobei'er Hepingjiang Shi Xifang Gei Liu Xiaobo de Zhengzhi “Kao-shang” [Liu Xiaobo's Nobel Peace Prize Is a Dole from the West], XINHUANET.COM (Oct. 15, 2010, 5:11 PM), http://news.xinhuanet.com/world/2010-10/15/c_12664760.htm.

¹⁶⁸ See Waishang Touzi Chanye Zhidao Mulu [Catalogue for the Guidance of Foreign Investment Industries], (promulgated by the St. Development and Reform Comm'n & Ministry of Commerce, Oct. 31, 2007, effective Dec. 1, 2007) pt. THREE (Catalogue of Prohibited Foreign Investment Industries), ch. X (Art, Sports & Entertainment Industries), 2008 ST. COUNCIL GAZ. item 17, translated in LAWINFOCHINA; Guayu Wenhua Lingyu Yinjin Waizi de Ruogan Yijian [Several Opinions on Canvassing Foreign Investment into the Cultural Sector] (promulgated by the Ministry of Culture, St. Admin. of Radio, Film and Television, General Admin. of Press and Publ'n, St. Development and Reform Comm'n & Ministry of Commerce, July 6, 2005, effective July 6, 2005) CHINALAWINFO chl_75592, translated in LAWINFOCHINA.

¹⁶⁹ See Catalogue for the Guidance of Foreign Investment Industries, pt. TWO (Catalogue of Restricted Foreign Investment Industries), ch. XII (Education), ch. XIV (Art, Sports & Entertainment Industries); pt. ONE (Catalogue of Encouraged Foreign Investment Industries), ch. X (Education), ch. XII (Culture, Sports & Entertainment); Several Opinions on Canvassing Foreign Investment into the Cultural Sector; Waishang Touzi Dianxin Qiye Guanli Guiding [Provisions on the Admin. of Foreign-funded Telecomm. Enter.] (promulgated by the St. Council, Dec. 11, 2001, effective Jan. 1, 2002, amended Sep. 10, 2008) 2008 ST. COUNCIL GAZ., item 27, translated in LAWINFOCHINA.

¹⁷⁰ See Chuban Guanli Tiaoli [Regulations on the Admin. of Publ'n] (promulgated by the St. Council, Dec. 25, 2001, effective Feb. 1, 2002, amended Mar. 19, 2011) 2011 ST. COUNCIL GAZ. item 9, translated in LAWINFOCHINA), Yinshuaye Guanli Tiaoli [Regulations on the Admin. of Printing Indus.] (promulgated by the St. Council, Aug. 2, 2001, effective Aug. 2, 2001) [2001] 27 ST. COUNCIL GAZ. 12, translated in LAWINFOCHINA), Jisuanji Xinxi Wangluo Guoji Hulanwang Anquan Baohu Guanli Banfa [Measures for Sec. Prot. Admin. of the Int'l Networking of Computer Info. Networks] (promulgated by the Ministry of Pub. Sec., approved by the St. Council, Dec. 16, 1997, effective Dec. 30, 1997) [1998] 1 ST. COUNCIL GAZ. 14, translated in LAWINFOCHINA). Regulations on Internet Information Service in actuality authorise relevant speech supervision agencies to censor any information during its whole public issuance process, and these authorities can and do stipulate many decrees to exclude unwelcome or even susceptible foreign speech.

cares about, and may inundate or dilute people's dissatisfaction with the Government's policies of speech restriction.

Whoever brags that Chinese-style socialism democracy is supreme will not easily buy or even condole the people who asphyxiate under the dictatorship.¹⁷¹ However, to indoctrinate that Western-style democracy does little good to China may somewhat persuade the public that the current politics are not perfect but optimum for this country. Classic Marxism holistically repudiates capitalism/Western democracy as fake and hypocritical, essentially the rich men's ruling/dictatorship over the poor. Such dogma is not cogent enough to discourage people from pursuing the dream of democracy: If Western democracy, not so good, is better than China's dictatorship, it can be borrowed. So what the Chinese Government is doing now is to develop new Marxism that can score Western lower, at least no higher, than China: For example, in response to the *US 2010 Human Rights Report* that analysed the extensive existence of the infraction of human rights on the Chinese Mainland,¹⁷² the State Council Information Office of the PRC published the *Human Rights Record of the United States in 2010*, which criticised the USA for astoundingly trampling human rights in the fields of "Life, Property and Personal Security", "Civil and Political Rights", "Economic, Social and Cultural Rights", "Racial Discrimination", "the rights of women and children", and "US Violations of Human Rights against Other Nations",¹⁷³ to show that evils under US democracy are no fewer than in China in their width and depth. And some prominent scholars in China have published articles claiming that typical democratic models are so bad that even the West has basically abandoned them.¹⁷⁴

¹⁷¹ A poll found that »49.8% of university faculty were unsure whether China should adopt a Democratic Socialism model to emend the present one", Yue Peng, Wei Chenggong & Dai Gangshu, *supra* note 164, at 52.

¹⁷² BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, 2010 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, PT. 2010 HUMAN RIGHTS REPORT: CHINA (INCLUDES TIBET, HONG KONG, AND MACAU) (Apr. 8, 2011), available at <http://www.state.gov/g/drl/rls/hrrpt/2010/eap/154382.htm>.

¹⁷³ S.C.I.O., 2010 NIAN MEIGUO DE RENQUAN JILU [THE HUMAN RIGHTS RECORD OF U.S. IN 2010 (Apr. 10, 2011)], available at <http://www.scio.gov.cn/zxbd/wz/201104/t888099.htm>

¹⁷⁴ E.g., Hu Lianhe & Hu Angang, Xifang Guojia You Duoshao Gao Sanquan Fenli de? [How Many Western Countries Establish the System of 'Separate Executive, Legislative and Judicial Powers?'], ZHONGGUO SHEHUI KEXUEYUAN BAO [THE NEWSPAPER OF THE CHINESE ACADEMY OF SOCIAL SCIENCES], Feb. 24, 2009, available at http://news.xinhuanet.com/theory/2009-02/24/content_10881799.htm (the last para. "To sum up, rare Western countries virtually adopt the system of 'separate executive, legislative and judicial powers,' and political parties play the most important role in politics; so China should always uphold the leadership of CPC ..." (alteration in original)). Hu Angang is a renowned professor at Tsinghua University, having earned many governmental titles and awards, see Hu Angang [Resume of Hu Angang], TSINGHUA.EDU.CN, <http://www.tsinghua.edu.cn/>

Democratic practice, for its malfunctions, can nurture more animosity than theoretical derogation. In 1993, China amended the Constitution to establish a “socialist market economy”¹⁷⁵ system, and the amendments of 1993, 1999 and 2004 patently improved the strength of the private economy while retreating state ownership;¹⁷⁶ all of those acts have been broadly evaluated as capitalism democratisation in the economy. But such democratisation is tilted to political powers that can easily enrich themselves by cheaply “buying” state-owned property in the privatisation process,¹⁷⁷ or by means of charter-like or monopolisation-style business,¹⁷⁸ to defame itself for its evil dysfunction.¹⁷⁹ Parallel to the economic marketisation, some political democracy transformation has also been tried in low-level organisations. For example, since 1998, rural villagers have had some right to “directly elect members of a villagers committee”, and “[n]o organization or individual may designate, appoint or replace any member”,¹⁸⁰ or even “nominate candidates”;¹⁸¹ but lax laws indulge some powerful ones to illegally win an election by means such as bribery, violence or nepotism.¹⁸² In addition, with democratic trials in education, for example, the policy of higher education marketisation encounters similar damper as in other fields of economic transformation: to partly allow the market to determine the fee for education and to push graduates into the job market for employment, the Government sees that

publish/sppm/4620/2010/20101217201750450206566/20101217201750450206566_.html (last visited Sep. 18, 2011). Hu Lianhe is a researcher at Tsinghua University.

¹⁷⁵ XIANFA, amend. of 1993, § 7.

¹⁷⁶ Id. § 5, 6, 8, 9; Amend. of 1999, § 14, 15, 16; Amend. of 2004, § 21, 22.

¹⁷⁷ E.g., LANG, LARRY H. P., ZHONGGUOSHI MBO: BUMAN XIANHUA DE XIANJING [CHINA'S MBO: TRAPS COVERED BY FLOWERS] (Dongfang Chubanshe [Oriental Press Pub.] 2006).

¹⁷⁸ E.g., DU ZHIGEN & SHEN JUAN, GUANSHANG QIEGUO LU [POWER AND MONEY: HOW THEY STEAL] (Mirrorbooks 2008).

¹⁷⁹ For example, it is said that

¹⁸⁰ If the 3,220 Chinese citizens with a personal wealth of 100 million yuan (\$13 million) or more, 2,932 are children of high-level cadres. Of the key positions in the five industrial sectors finance, foreign trade, land development, large-scale engineering and securities 85% to 90% are held by children of high-level cadres.

¹⁸¹ Arsten A. Holz, Have Chinese Scholars All Been Bought? FAR EASTERN ECONOMIC REVIEW, April 13, 2007 (alteration in original). But China denied such a claim, People-Net, Yizu Xujia Shujü Shi Ruhe Zai Wangshang Wangxia Yi'echuan'e de? [How Has the Fake Data Propagated by Rumours?], PEOPLE.COM.CN (Aug. 15, 2009), <http://politics.people.com.cn/GB/1026/9794858.html>.

¹⁸² Cunmin Weiyuanhui Zuzhi Fa [Organic Law of the Villagers Committees] (promulgated by the NPCSC, Nov. 4, 1998, effective Nov. 4, 1998, amended Oct. 28, 2008) ch. 3, art. 11, [2010] 7 NPCSC GAZ. 649, translated in LAWINFOCHINA (alteration in original).

¹⁸³ Id. at art. 15.

¹⁸⁴ Yu Jianrong, Zhongguo Nongcun Zhengzhi de Xianzhuang He Fazhan Qushi [China Rural Area: Political Situation and Its Trend], pt. , paras. 7-8, CHINAREFORM.ORG.CN (Sep. 30, 2004), http://people.chinareform.org.cn/y/yujianrong/Article/200409/t20040930_44033.htm. Yu Jianrong is a famous scholar researching rural-area politics, including some sensitive issues there.

the public is dejected by the rise of expensive tuition, low education quality and high unemployment;¹⁸³ both the education and job markets are unfairly distorted to benefit powerful students¹⁸⁴ and teachers, and academic corruption is rife in China.¹⁸⁵

By and large, Chinese people have few opportunities to learn or experience what a real and fair democratic system can bring; contrarily, the distorted domestic democracy may push them into deep suspicion of what democracy produces. The Chinese Government classifies political ideologies as three types: “Left”, who are Marxism Purists, intolerant of any Western capitalism democracy; “Right”, who are keen to learn from liberal capitalism; and “Neutral”, who brag about being a balance between “Left” and “Right”,¹⁸⁶ to always find a “great”, “glorious” and “correct” way for the CPC.¹⁸⁷ The “Left” are steadfast anti-Westernists contemptuous of capitalism democracy;¹⁸⁸ compared with the “Left” who may be idealists,¹⁸⁹ the “Neutral” are bona fide pragmatists who pur-

¹⁸³ Cai Wenbo & Ma Jie, *Woguo Gaoxiao Biyesheng Jiuye Zhidu Gaige 30 Nian de Huigu Yu Fansi* [Retrospect and Analysis of the Thirty Year History of Chinese Graduates Employment Policies Transformation], [2009] 8 XIANDAI JIAOYU GUANLI [MODERN EDUCATION MANAGEMENT] 111; Ruan Minghua, *Dui Woguo Jiaoyu Chanyehua de Huigu Yu Fansi* [Retrospect and Analysis of China's Education Industrialisation], [2010] 19 SHANGQING [BUSINESS INFORMATION] 105; Zhao Shikui & Wen Maodong, *Sanshinian Lai Gaoxiao Biyesheng Jiuye Zhidu Biange de Huigu Yu Xianxing Zhidu de Fenxi* [Retrospect of the Thirty Year History of Graduates Employment Policies Transformation and Analysis of the Current Situation], [2008] 5 ZHONGGUO GAOJIAO YANJIU [CHINA EDUCATION RESEARCH] 2.

¹⁸⁴ Guan Erdai Fu Erdai Zhanju Shehui Ziyuan, Qiu Erdai Qiu Shangliu Bukede [The Offspring of the Officials and Rich Control Social Resources, While Those of the Poor Can Hardly Move to the High Level], QILU WANBAO [QILU EVENING], Oct. 2, 2010, available at <http://news.qq.com/a/20101002/001064.htm>.

¹⁸⁵ See, e.g., Hao Xin, *Research Ethics: Questions from China Snag U.S. Trial of Nerve-Rerouting Procedure*, 330 SCIENCE no. 6005, Nov. 5, 2010 at 741, DOI: 10.1126/science.330.6005.741, available at <http://www.sciencemag.org/content/330/6005/741.summary>; Hao Xin, *Scientific Misconduct: Retractions Put Spotlight on China's Part-Time Professor System*, 323 SCIENCE, no. 5919, Mar. 6, 2009 at 1280-81, DOI: 10.1126/science.323.5919.1280, available at <http://www.sciencemag.org/content/323/5919/1280.short>; Hao Xin, *Urologist Arrested for Attacks on Chinese Whistleblowers*, SCIENCE INSIDER, Sep. 23, 2010, <http://news.sciencemag.org/scienceinsider/2010/09/urologist-arrested-for-attacks.html>; Yigong Shi & Yi Rao, *China's Research Culture*, 329 SCIENCE, no. 5996, Sep. 3, 2010 at 1128, DOI: 10.1126/science.1196916, available at <http://www.sciencemag.org/content/329/5996/1128.summary>; Will Clem, *Leading Professor Hit with Claims of Embezzlement; Geologist at Chinese Academy of Sciences Arrested over Claims Funds Misused to Pay, in Part, for Lovers*, SOUTH CHINA MORNING POST, July 23, 2011, NEWS, at 05, <http://www6.lexisnexis.com/publisher/EndUser?Action=UserDisplayFullDocument&orgId=574&topicId=100016870&docId=l:1463335502&isRss=true>. Besides, “New threads” is a pivotal website seeking to expose numerous Chinese academic scandals.

¹⁸⁶ See CPC Constitution, general programme, para. 23.

¹⁸⁷ Hu Sheng, *Cong Dang de Lishi Kan Zhongguo Gongchandang Shi Weida Guangrong Zhengque de Dang* [The History of the CPC Shows that the CPC Is a Great, Glorious and Correct Party], [1996] 5 ZHONGGONG DANGSHI YANJIU [CPC HISTORY RESEARCH], available at <http://cpc.people.com.cn/GB/218984/219000/14793619.html>.

¹⁸⁸ For example, Wu You Zhi Xiang [Utopia Association] is conventionally regarded as a Leftist club whose website, <http://www.wyzsx.com/>, fervidly propagates Ultra-Maoism.

¹⁸⁹ For example, some opinions on the Utopia website even encourage overthrowing the present Chinese Government for its corruption.

pose to sustain the present Government and then benefit from it, including many intellectuals.¹⁹⁰ It appears that little compassion of democratic ideology can be gained from “Left” and “Neutral”, yet relying too much on the “Right” to ingenuously carry out democracy also seems over-optimistic: Many Rightists perhaps love democracy mainly for its nature of being an enemy to the Chinese Government¹⁹¹ rather than the fact that they genuinely enjoy the merit of a democratic mechanism.¹⁹²

Distrust of democracy necessarily implies a disinterest in free speech that is only one among different kinds of democratic establishments; worse, China’s unfair political and legal environment twists the “idea market”, which may directly and bluntly dampen the public confidence in its speech-cleansing mechanism. For example, for political speech, currently an active army of Internet commentators is hired by the Government to justify whatever its employer does and controvert assorted criticism in cyberspaces with sophism skills learned in official training; people call them the “Five-Mao Party” because government pay for their predecessors was counted as five Mao (equal to half a Yuan) per post in BBS.¹⁹³ Under the protective policies of the Government, “Five-Mao” opinions are always prevalent on sensitive issues, dwarfing the function of the “idea market” in finding the truth. For non-political speech, organising an “Internet Water-Army” to falsely and unfairly propagate one’s opinion to create an online atmosphere for one’s benefit is common now;¹⁹⁴ the costs of exploiting such

¹⁹⁰ See Wang Dan, Zhonggong Yuyong Xuezhe Zai Taiwan de Zuilian [The Show of CPC-Fostered Scholars in Taiwan], BOXUN.COM, http://blog.boxun.com/hero/200911/wangdan/2_1.shtml (last visited Sep. 18, 2011); Xiao Han, Wumao Leixing Xue [Types of “Five-Mao”], ABOLUOWANG.COM (Feb. 24, 2010), <http://space.aboluowang.com/html/09/9509-5342.html>. Xiao Han is an eminent independent scholar in China.

¹⁹¹ See generally Li Yuanhan & Li Yue, China’s Officials and Wealthy Hatred, NTDTV.COM (Jul. 27, 2011), <http://www.ntdtv.com/xtr/gb/2011/07/28/atext565276.html-%E3%80%90%E7%A6%81%E9%97%BB%E3%80%91%E5%AD%A6%E8%80%85%EF%BC%9A%E4%BB%87%E5%AE%98%E4%BB%87%E5%AF%8C%E4%B8%AD%E5%9B%BD%E5%9F%BA%E6%9C%AC%E7%A4%BE%E4%BC%9A%E5%BF%83%E6%80%81.html#video>.

¹⁹² For example, before its rule over China since 1949 the CPC heavily advocated democracy and freedom of expression to supplant Kuomintang’s dictatorship, with proposals much like Western ideologies, Zhongguo Gongchandang Jiefangqian Yanlun Jingxuan [Selected Speech of the CPC Before Founding the PRC], MOLIHUA.ORG (Apr. 2, 2011), http://molihuaxingdong.blogspot.com/2011/04/blog-post_02.html.

¹⁹³ Xiao Han, *supra* note 189.

¹⁹⁴ Zhang Lei & Liu Yang, Wangluo Heishehui Xianxiang de Weihai Chengyin Ji Kongzhi Yanjiu [“Internet Gangsterdom”: Evils, Origin and Rectification], [2010] 6 XINWEN ZHISHI [NEWS KNOWLEDGE] 51; Zhang Zuoguo, Cong “Renrou Sousuo” Kan Wangluo Yanlun Ziyou de Heli Xianzhi [Thinking of Reasonable Limitation on the Freedom of Speech on the Internet from “Human Flesh Search”], [2009] 6 XIBU FAXUE PINGLUN [WESTERN LAW REVIEW] 7.

media or prosecution against the mis-exploiting are both so great that such a speech market is necessarily suitable to the powerful. Unfortunately, the public dissatisfaction with China's current "idea market" may play into the hands of the Government, emboldening it to implement its intention of more supervision of media, covered by some academic-like ideas such as establishing an "Internet Real-Name System" for every online speech.¹⁹⁵

In reality, more space for free speech exists in daily lives than in politics, which might be able to hatch a peaceful "idea market" to show the merit of truth finding, and this may be part of Liu's purpose in his article, "*Change*."¹⁹⁶ However, the bad thing could be that without legal compulsion, few like to accept debate democracy: The "idea market" always dampens your convinced claims, for it is in rare cases that an innovative opinion can return a little acerbic criticism; the process for the truth is so disappointing because things temporarily accepted by the majority can be false, and even a well-run "idea market" is only capable of redressing its faults and wrongs in the long term, turning out the truth as approximate to its veritable aspects. The right to free speech took hold in the West probably not because people had pre-enjoyed its availability before its establishment, but due to the fact that "democracy is the kind of government we happen to have".¹⁹⁷ To service the order of free speech, everyone should become tolerant of his critique and learn to live with his opponents; he also needs to modestly express what he really knows, avoiding his brashness from triggering irritating unreasonable disputes to push the "idea market" toward a risky cliff, broken by anger: These qualities are not easy to obtain by self-consciousness in China where the law on free speech is not faithfully carried out. Critics find that many famed independent intellectuals even release animosity to the free debate mechanism when they or their friends encounter great criticism that seems quite difficult to overcome;¹⁹⁸ more than such a lack of complai-

¹⁹⁵ Such proposal is attributed to famous Professor Li Xiguang at Tsinghua University, Liu Xueyi & Wang Yili, Wangluo Yanlun Shixing Shimingzhi Ying Shenzhong [Never Discretionally Implement an "Internet Real-Name System"], [2010] 1 - 1 XINWEN AIHAOZHE [NEWS LOVERS] 10.

¹⁹⁶ See Liu, *Change*, supra note 87.

¹⁹⁷ Farber & Frickey, supra note 113, at 1642.

¹⁹⁸ Fang Zhouzi finds that many elite liberalism scholars also commit academic corruption as others, and his words ignite great protest from »Rightists« who claim that Fang is a traitor, a spy for the Chinese Government and that his private denunciation of academic malpractice is illegal and should be subdued and some of the extremists even hope he will be killed, Fang Zhouzi, Weibo [Microblog] June 19, 21:50 and Jun 23, 14:29, 2011, NEW THREADS (June 23, 2011), <http://www.xys.org/xys/netters/Fang-Zhouzi/blog/weibo38.txt>; Microblog May 14, 16:47, 2011, NEW THREADS (May 27, 2011),

sance, they are sometimes so confident of their scholarship that they comment on fields they know little about, just as “pseudo-scientists” spread scientific rumours.¹⁹⁹ Under the present politics and official ideology, many pre-eminent dissidents are pessimistic of democratisation budding among intellectuals,²⁰⁰ or from their cooperation with the Government, disagreeing with Liu’s peaceable political viewpoints.²⁰¹

Conclusion

The political imprint on the law of free speech is clear: “The greatest element in the formation of libel law ... was political;”²⁰² “the indispensability of speech to the political process and the marketplace of ideas.”²⁰³ The Chinese Government insists that the experience of the USA teaches the doctrine of “law bred by politics”,²⁰⁴

<http://www.xys.org/xys/netters/Fang-Zhouzi/blog/weibo36.txt>; Microblog Apr. 27, 15:21, 2011, NEW THREADS (May 12, 2011), <http://www.xys.org/xys/netters/Fang-Zhouzi/blog/weibo35.txt>; Microblog Apr. 1, 16:22 and Apr. 5, 16:48, 2011, NEW THREADS (Apr. 12, 2011), <http://www.xys.org/xys/netters/Fang-Zhouzi/blog/weibo33.txt>; Microblog Mar. 22, 15:02, and Mar. 25, 15:32, 2011, NEW THREADS (Mar. 26, 2011), <http://www.xys.org/xys/netters/Fang-Zhouzi/blog/weibo32.txt>; Microblog Feb. 26, 16:53, 2011, NEW THREADS (Feb. 26, 2011), <http://www.xys.org/xys/netters/Fang-Zhouzi/blog/weibo30.txt>; Microblog Jan. 20, 23:47, 2011, NEW THREADS (Jan. 30, 2011), <http://www.xys.org/xys/netters/Fang-Zhouzi/blog/weibo28.txt>; Microblog Dec. 29, 18:31, 2010, NEW THREADS (Jan. 6, 2011), <http://www.xys.org/xys/netters/Fang-Zhouzi/blog/weibo26.txt>; Nanfang Zhoumo Xianzai Zhenshi Duoluo Le” [“The Southern Weekly Is Depraved Now”], NEW THREADS (Nov. 10, 2005), <http://www.xys.org/xys/ebooks/others/science/dajia6/yujianrong35.txt>.

¹⁹⁹ Christina Larson, The People’s Republic of Rumors, FOREIGN POLICY, Jul. 8, 2011, available at http://www.foreignpolicy.com/articles/2011/07/08/the_peoples_republic_of_rumors?page=0,1 (“(Weibo) used by pseudo-scientists to allege that dam construction impacts the weather” (alteration in original)). Fang Zhouzi has criticised many Chinese independent intellectuals as “pseudo-scientists” who try to denounce the Government’s every policy about science even if it is right, *supra* note 197.

²⁰⁰ See, e.g., Yuan Hongbing, Guanban Zhishi Fenzi Shi Renmin Kunan de Yuanzui [Intellectuals Bred by Government Are the Origin of People’s Adversity], BOXUN.COM (Sep. 4, 2005), <http://news.boxun.com/news/gb/pubvp/2005/09/200509040001.shtml>.

²⁰¹ Many democratic activists claimed that the Nobel Peace Prize should not be awarded to Liu, A Letter to the Nobel Peace Prize Committee and Mr. Havel from Overseas Chinese Concerned with Chinese Democracy, 64TIANWANG.COM (Mar. 1, 2010, 4:05 AM), <http://64tianwang.com/bencandy.php?fid=13-id=5663-page=1.htm>; Second Letter to the Nobel Peace Prize Committee from Overseas Chinese Concerned with Chinese Democracy, 64TIANWANG.COM (Oct. 4, 2010, 2:55 AM), <http://www.64tianwang.com/bencandy.php?fid=13&aid=6545>; cf. Liu Xiaobo, I Have No Enemies: My Final Statement, CHINADIGITALTIMES.NET (Feb. 8, 2010, 7:26 PM), <http://chinadigitaltimes.net/2010/02/liu-xiaobo-i-have-no-enemies-my-final-statement/> (David Kelly trans.).

²⁰² THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 489 (5th ed. 1956), quoted in Brenner, *supra* note 122, at 287.

²⁰³ DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 297, 1789-1801 (Chicago 1997), quoted in Bollinger, *supra* note 133, at 422 n.13.

²⁰⁴ Jiang Bixin, Meiyou Duli Yu Zhengzhi de Sifa [No Judicature Independent from Politics], LEGAL-DAILY.COM.CN (May 18, 2011, 9:13 AM), http://www.legaldaily.com.cn/commentary/content/2011-05/18/content_2664209.htm?node=22528 (“Judicature should be tied with political strength ... according to Owen M. Fiss ... and according to Richard Allen Posner who affirmed that the Supreme Court of the USA was a political court ...”). Jiang Bixin is an Associate Chief Justice of the Supreme People’s Court of the PRC. Also see Zhang Jun, Shenpan Gongzuo Jiyao Jiang Fazhi Yeyao Jiang Zhengzhi,

and it convinces people that the Constitution enshrines the CPC dictatorship as a “Chinese Characteristics” democracy better than in the West. Then for the “Long Life” of the CPC, the “idea market”, as a common area for latitude in the West, should have little space in China for its nature of anti-dictatorship; particularly, when it calls on the market’s strength to magnify some ‘sensitive’ issues that may encourage acts to topple the Government, such “clear and present danger” should legalise governmental quenching. Hence, political speech liberty in China basically occurs through the private conduit of appealing to the Government,²⁰⁵ while non-political ideas are allowed rather than encouraged to be debated in the “idea market”.²⁰⁶

People may wish for Chinese people to nurse a fair “idea market” in the cramped space left by governmental censorship, but the Government is vigilant to avert its formation.²⁰⁷ Official mainstay ideologies such as totalitarianism and nationalism ‘bear’ the atmosphere of the “idea market”; the distorted and limited democracy manipulated by the Government dims the merit of truth-finding, making sceptical investors stampede from the “market”, including some elite open-minded intellectuals. Even optimists like Liu believe China’s peaceable democratisation will be a long process.²⁰⁸

The history of free speech in the USA also bears witness to the latitude twisted by partisan politics and varied liberal ideologies even if the constitutional clause for it is without change, but there has always been a mainstream to converge all these offshoots: that is democracy whose nature caters to free speech.²⁰⁹ And through such a long democratic history, the “idea market” does bear fruit

Faguan Jiyao Zuo Falüjia Yeyao Zuo Zhengzhijia [Law and Politics Both Matter for Judicature, and a Judge Should Be a Jurist as Well as a Politician], RENMIN FAYUAN BAO [PEOPLE’S COURT NEWS], Sep. 16, 2008, available at <http://www.chinacourt.org/public/detail.php?id=321579> (“The CPC leads everything ... as in the West, the judicature is to serve politics ... and parties ...”). Zhang Jun is also an Associate Chief Justice of the Supreme People’s Court of the PRC.

²⁰⁵ Cf. Martin, *supra* note 118, at 160-66 (“Petitions: The Federalist alternative to political speech”).

²⁰⁶ For implementing its anti-sensitive speech laws *supra* note 98 and 169, pre-censorship is the most efficient method used by the Chinese Government, which kills many non-sensitive words together with sensitive ones.

²⁰⁷ See Zhou Benshun, Zou Zhongguo Tese Shehui Guanli Chuangxin Zhi Lu [The Way of “Chinese Characteristics” Management Innovation], [2011] 10 QIUSHI [ONLY TRUTH] 37, available at http://www.qstheory.cn/zxdk/2011/2011010/201105/t20110513_80501.htm (“Be careful not to stumble into the trap of so-called ‘civil society’ which is vended by some Western countries to us ...”). Zhou Benshun is Director of Secretariat of the Committee of Politics and Law under the CPC Central Committee, and Deputy Director of the Central Committee for Comprehensive Management of Public Security.

²⁰⁸ Liu, Change, *supra* note 87.

²⁰⁹ By contrast, changes of Chinese leaders and governmental policies do not rock their foundation of autocracy.

for the people such as the evolution of the free speech law itself: many old-time, anti-latitude stipulations are being thrown out of the “market”.

While China’s law on paper metes out no less freedom of expression than in the USA, its efficacy in action is greatly cut down by politics and ideology. Is such law Janus-faced? The Chinese Government does not think so as it always claims that liberties in law are developing in history, in China as well as in the West. That is right, and China can easily check the earlier history of the USA to find some similar restrictions on speech for justifying its current policy, as Professor Gao has done. Yet that is not enough: Wrongs forsaken by others should not be re-used by you as reasons for your wrongdoing; moreover, even the premature speech freedom of earlier America guarantees a fair debate on a democratic change of the Government, like Liu’s.²¹⁰ The earlier American speech curbing law was still based on democracy, far away from the situation in present China, and then a good sophism for China’s ‘quiet’ policies should perhaps be built on rhetoric like “Chinese-characteristics dictatorship is a new form of democracy”. But to garble the centuries-old conception of “democracy” by patching on “dictatorship”, which the Chinese Government is doing, seems just like a case of black humour.

²¹⁰ For example, the Sedition Act of 1798, Section 3 allowed a speech’s “truth of the matter” as a defence of “lawful” latitude, Act of July 14, 1798, ch. 74, § 3, 1 Stat. 597.