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## China's Homegrown Free-speech Tradition: Imperial Past and Modern Present. And Post-Modern Future?

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**CHINA'S HOMEGROWN FREE-SPEECH TRADITION:  
IMPERIAL PAST AND MODERN PRESENT.  
AND POST-MODERN FUTURE?**

Roy L. Sturgeon 罗义\*

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## I. PRELUDE

### A. Speaking of Speech

All human beings cherish the freedom to speak honestly, and no person feels fully human when this freedom is denied. This rule holds for all nations, all ethnic groups, and all times and places. No one can truthfully say that Chinese people are any different—that they somehow do not want to tell the truth, or want only to tell a part of it. Right now, I dare say, my fellow Chinese are at work telling the truth—in Yuyuan Park in Beijing, at the foot of Mount Yu in my hometown of Changshu, and in countless other nooks in China where ordinary people have determined that they can speak their minds without incurring disaster.<sup>1</sup>

Freedom of speech is the most important right persons have in nations claiming to be democratic, respect human rights, and follow the rule of law. Other rights matter little without it. For example, if a government imposes an agricultural policy that causes a colossal famine and ordinary citizens lack freedom of speech to expose and stop it, then whatever economic or subsistence rights those citizens have are negated by this lack.<sup>2</sup> Such a tragedy befell the People’s Republic of China (PRC) from

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1. Quote by China-based human rights activist Jiang Qisheng. It is from a statement he wrote accepting the 2003 Spirit of Freedom Award of the Independent Federation of Chinese Students and Scholars after spending four years in prison for commemorating victims of the 1989 Beijing massacre. A friend read it aloud in front of the Chinese embassy in Washington, D.C. Jiang Qisheng, *On Leaving a Chinese Prison* (Perry Link trans.), N.Y. REV. BOOKS, July 17, 2003, at 49, available at <http://www.nybooks.com/articles/archives/2003/jul/17/on-leaving-a-chinese-prison/>. Jiang later became one of the original 303 signers [along with Liu Junning, *infra* notes 14, 101; jailed 2010 Nobel Peace laureate Liu Xiaobo, *infra* notes 14, 69, 75, 98, 99, 101; Dai Qing, *infra* notes 15, 50; Yu Jie, *infra* note 18; He Weifang, *infra* notes 34, 67, 101; Tsering Woesser, *infra* notes 79, 103; Pu Zhiqiang, *infra* note 88] of “Charter 08” and released his own report on the 1989 Beijing massacre. Human Rights in China, *Charter 08*, Dec. 9, 2008, <http://www.hrichina.org/en/content/238>; Human Rights in China, *Independent Report on June Fourth Victims: A Directory of 195 Killed and More Than 800 Imprisoned*, June 3, 2010, <http://www.hrichina.org/en/content/406>.

2. Hu Ping, *Freedom of Speech is the Foremost Human Right* (1998), in THE CHINESE HUMAN RIGHTS READER: DOCUMENTS AND COMMENTARY 1900–2000, at 423, 429–30

1958 to 1962 when an estimated 30–45 million people starved to death during the Great Leap Forward.<sup>3</sup>

So what exactly is freedom of speech? *Black's Law Dictionary* defines it as “[t]he right to express one’s thoughts and opinions without governmental restriction . . .”<sup>4</sup> And Article 19 of the United Nations’ 1948 Universal Declaration of Human Rights, a document that China helped write, states that “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>5</sup> Free speech, however, is

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(Stephen C. Angle & Marina Svensson eds., 2001). See also QIANFAN ZHANG, *THE CONSTITUTION OF CHINA: A CONTEXTUAL ANALYSIS* 226 (2012) (explaining how free-speech suppression exacerbated both a famine followed by a baby boom in late 1950s-early 1970s China); AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 180–82 (2000) (discussing incentives, information, and the prevention of famines). But see Info. Office of the State Council of the People’s Republic of China, *White Paper on Human Rights in China*, Nov. 1991, pt. I, <http://www.china.org.cn/white/7/index.htm> (arguing that the right to subsistence is the most important human right); Info. Office of the State Council of the People’s Republic of China, *National Human Rights Action Plan of China (2012–2015)*, June 11, 2012, pt. I, [http://www.china.org.cn/government/whitepaper/node\\_7156850.htm](http://www.china.org.cn/government/whitepaper/node_7156850.htm) (stating that priority will keep being given to protecting people’s subsistence and development rights).

3. See generally YANG JISHENG, *TOMBSTONE: THE GREAT CHINESE FAMINE, 1958–1962* (Edward Friedman et al. eds., Stacy Mosher & Guo Jian trans., 2012); *THE GREAT FAMINE IN CHINA, 1958–1962: A DOCUMENTARY HISTORY* (Zhou Xun ed., 2012); FRANK DIKÖTTER, *MAO’S GREAT FAMINE: THE HISTORY OF CHINA’S MOST DEVASTATING CATASTROPHE, 1958–1962* (2010); JASPER BECKER, *HUNGRY GHOSTS: MAO’S SECRET FAMINE* (1998). No matter whether 30 or 45 million people starved to death, this famine was last century’s deadliest human-made famine and, writes sinologist W.J.F. Jenner, perhaps the biggest ever. *THE TYRANNY OF HISTORY: THE ROOTS OF CHINA’S CRISIS* 70 (1994). See also SEN, *supra* note 2, at 43. But see Chris Buckley, *Milder Accounts of Hardships Under Mao Arise as His Birthday Nears*, N.Y. TIMES, Oct. 17, 2013, at A8 (describing recent efforts by government backers to deny such high famine death tolls); WILLIAM HINTON, *THROUGH A GLASS DARKLY: U.S. VIEWS OF THE CHINESE REVOLUTION* 241–57 (2006) (disputing “Great Famine” characterizations); EDGAR SNOW, *RED CHINA TODAY* 585 (rev. & updated ed. 1971) (claiming that he saw food shortages and considerable malnutrition, but not mass starvation).

4. BLACK’S LAW DICTIONARY 779 (10th ed. 2014).

5. United Nations, *The Universal Declaration of Human Rights* (1948), available at <http://www.un.org/en/documents/udhr/index.shtml>. Dr. Peng-chun Chang (1892–1957), representative of China and Vice-Chairman of the Commission on Human Rights, helped draft the Declaration. P.C. Chang (Zhang Pengjun), *Chinese Statements During Deliberations on the UDHR (1948)*, in *THE CHINESE HUMAN RIGHTS READER: DOCUMENTS AND COMMENTARY 1900–2000*, at 206, 206–13 (Stephen C. Angle & Marina Svensson eds., 2001). China voted with forty-seven other nations to ratify the Declaration during the General Assembly on Dec. 10, 1948. No nation voted against ratification, but eight abstained (all Soviet-bloc nations, Saudi Arabia, and [apartheid] South Africa). BROWNLIE’S DOCUMENTS ON HUMAN RIGHTS 39 (Ian Brownlie & Guy S. Goodwin-Gill eds., 6th ed. 2010). Although a signed writing between nations, the Declaration is customary international law and not a treaty. See generally Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287 (1995/1996), available at <http://digitalcommons.law.uga.edu/gjic/vol25/>

not absolute. Even nations with long and robust traditions of tolerating it limit it like the United States,<sup>6</sup> where commercial speech is less protected than political speech and speech advocating violence is less protected than commercial speech.<sup>7</sup> Political speech is considered the most fundamental and, therefore, given the greatest protection.<sup>8</sup> This means that persons can publicly criticize government officials and policies without being criminally prosecuted *or otherwise deprived of personal liberty*.<sup>9</sup>

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iss1/13/. In 1998 China signed—but has yet to ratify—the International Covenant on Civil and Political Rights (ICCPR), which is a treaty. Article 19 mandates freedom of speech. ICCPR, Dec. 19, 1966, 999 U.N.T.S. 171, 178, available at <https://treaties.un.org/doc/publication/UNTS/Volume999/v999.pdf>. For more on the ICCPR's status in China, see generally Shiyan Sun, *The Understanding and Interpretation of the ICCPR in the Context of China's Possible Ratification*, 6 CHINESE J. INT'L L. 17 (2007). See also David Bandurski, *Journalist Explains Human Rights Appeal*, CHINA MEDIA PROJECT, Apr. 8, 2013, <http://cmp.hku.hk/2013/04/08/32250/>; Sophie Beach, *Open Letter Calls for Ratification of Human Rights Covenant (Updated)*, CHINA DIGITAL TIMES (Feb. 26, 2013, 9:27 AM), <http://chinadigitaltimes.net/2013/02/open-letter-calls-for-ratification-of-human-rights-covenant/>; ELISA NESOSI, CHINA'S PRE-TRIAL JUSTICE: CRIMINAL JUSTICE, HUMAN RIGHTS AND LEGAL REFORMS IN CONTEMPORARY CHINA 34–35 (2012) (discussing China's continual postponement of ratification).

6. Lee C. Bollinger [William G. Ross rev.], *First Amendment*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 344, 344–46 (Kermit L. Hall et al. eds., 2d ed. 2005); *Amendment I: Free Speech and Free Press Clauses*, in THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 83, 83–128 (Neil H. Cogan ed., 1997).

7. DANIEL A. FARBER, THE FIRST AMENDMENT 13–14 (3d ed. 2010).

8. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 955 (4th ed. 2011); CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 98 (2003). See also ERIC BARENDT, FREEDOM OF SPEECH 154–97 (2d ed. 2005) for a longer discussion about why political speech enjoys a “preferred position” in many Western nations.

9. Despite Chinese government claims since 2004 that it “respects and preserves human rights,” law-abiding citizens are still subject to extralegal or illegal (in addition to legal) deprivations of personal liberty for publicly criticizing government officials and policies. See Stanley Lubman, *Arrested, Detained: A Guide to Navigating China's Police Powers*, CHINA REAL TIME REP. (Aug. 12, 2014, 3:50 PM), <http://blogs.wsj.com/chinarealtime/2014/08/12/arrested-detained-a-guide-to-navigating-chinas-police-powers/>; *Activists Break Security Cordon Around Liu Xia* [Liu Xiaobo's wife, held under house arrest in Beijing since 2010 for merely being married to a public critic of the government], S. CHINA MORNING POST (online ed.), Dec. 31, 2012, <http://www.scmp.com/news/china/article/1116714/activists-break-security-cordon-around-liu-xia>; Press Release, Human Rights Watch, China: 12 Win Prestigious Free Speech Prize (Dec. 20, 2012), <http://www.hrw.org/news/2012/12/20/china-12-win-prestigious-free-speech-prize>; Frank Langfitt, *For Complainers, a Stint in China's 'Black Jails,'* NPR, Nov. 1, 2012, <http://www.npr.org/2012/11/01/163949720/for-complainers-a-stint-in-chinas-black-jails>; Edward Wong, *First a Black Hood, Then 81 Captive Days for an Artist in China*, N.Y. TIMES, May 27, 2012, at A10; *Recent Developments and History of the Chen Guangcheng Case: Hearing Before the Cong.-Exec. Comm'n on China*, 112th Cong., 2d Sess. (May 3, 2012), available at <http://www.cecc.gov/events/hearings/recent-developments-and-history-of-the-chen-guangcheng-case>; *The Case and Treatment of Prominent Human Rights Lawyer Gao Zhisheng: Hearing Before the Cong.-Exec. Comm'n on China*, 112th Cong., 2d Sess. (Feb. 14, 2012), available at

## B. Speaking of Speech in China

On paper, the current PRC Constitution adopted in 1982—like all

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<http://www.cecc.gov/events/hearings/the-case-and-treatment-of-prominent-human-rights-lawyer-gao-zhisheng>. See generally Otto Malmgren, *Article 37: The Right to Liberty of Person Under the Chinese Constitution*, 2 CHINA-EU L.J. 35 (2013), available at <http://link.springer.com/article/10.1007/s12689-011-0002-9>. Why are such deprivations continuing? See generally Carl F. Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 935 (2011). But see ZHANG, *supra* note 2, at 225 (stating that “ordinary Chinese enjoy infinitely more free speech today than they did during the ‘dark ages’ of the 1950s and 1960s, when one could be executed for blasphemy against the ‘supreme leader’ . . . , even if the sin was committed in one’s private home”). See *infra* note 95 for details about a legal way—besides criminal prosecution—the Chinese government has deprived personal liberty to citizen-critics since the 1950s. See also Andrew Jacobs, *No Exit: China Uses Passports as Political Cudgel*, N.Y. TIMES, Feb. 23, 2013, at A1; Chinese Human Rights Defenders, “*The Darkest Corners*”: *Abuses of Involuntary Psychiatric Commitment in China* [report], Aug. 2012, at 10–11, 39–51, available at <http://chrndnet.com/2012/08/the-darkest-corners-abuses-of-involuntary-psychiatric-commitment-in-china/>. Furthermore, it seems that the Chinese government is even trying to silence public criticism abroad and finding appeasers in, of all places, Western liberal democracies. See Carol J. Williams, *Nobel Laureates Cancel Cape Town Summit After Dalai Lama Denied Visa*, L.A. TIMES (online ed.), Oct. 2, 2014, <http://www.latimes.com/world/africa/la-fg-south-africa-nobel-laureates-dalai-lama-20141002-story.html>; Ian Johnson, *German Broadcaster Fires Chinese Blogger*, N.Y. TIMES, Aug. 22, 2014, at A9; Paul Monk, *China's Propaganda Infiltrating Our Shores*, AGE (online ed.), July 9, 2014, <http://www.theage.com.au/comment/chinas-propaganda-infiltrating-our-shores-20140709-zt122.html>; Howard W. French, *Bloomberg's Folly*, COLUM. JOURNALISM REV., May/June 2014, at 43–47, available at [http://www.cjr.org/feature/bloombergs\\_folly.php](http://www.cjr.org/feature/bloombergs_folly.php); Isaac Stone Fish, *Blame Norway*, FOREIGN POL’Y (online ed.), May 6, 2014, [http://www.foreignpolicy.com/articles/2014/05/06/why\\_wont\\_norwegian\\_prime\\_minister\\_meet\\_with\\_dalai\\_lama\\_china](http://www.foreignpolicy.com/articles/2014/05/06/why_wont_norwegian_prime_minister_meet_with_dalai_lama_china); Jonathan Mirsky, *London: The Triumph of the Chinese Censors*, N.Y. REV. BOOKS, May 24, 2012, at 49; Sophie Beach, *China's Export of Censorship*, CHINA DIGITAL TIMES (Oct. 12, 2009, 6:21 PM), <http://chinadigitaltimes.net/2009/10/chinas-export-of-censorship/>. See also Philip Pulella, *Vatican Denies Dalai Lama Papal Audience Over China Concern*, REUTERS, Dec. 12, 2014, <http://www.reuters.com/article/2014/12/12/us-vatican-dalailama-idUSKBN0J1DC20141212>.

Pockets of resistance in North America and Western Europe, however, are sprouting. See Andrew Jacobs & Jess Macy Yu, *Another U.S. University Severs Ties to Confucius Institute*, SINOSPHERE (Oct. 2, 2014, 9:41 PM), <http://nyti.ms/1rRhYUB>; Gregory B. Lee, *Perfidious Marianne? The France-China Relationship and the Question of Human Rights*, MEDIAPART (Sept. 24, 2014), <http://blogs.mediapart.fr/blog/gblee/240-914/perfidious-marianne-france-china-relationship-and-question-human-rights>; Karen Howlett, *TDSB Votes to Delay Partnership with Beijing-Backed Confucius Institute*, GLOBE & MAIL (online ed.), June 18, 2014, <http://www.theglobeandmail.com/news/national/education/chinese-officials-press-tdsb-not-to-abandon-confucius-institute/article19217497/>. And Congress is starting to act. *Is Academic Freedom Threatened by China's Influence on U.S. Universities? Hearing Before the H. Subcomm. on Afr., Global Health, Global Human Rights, and Int'l Orgs. of the H. Comm. on Foreign Affairs*, 113th Cong., 2d Sess. (Dec. 4, 2014), available at <http://foreignaffairs.house.gov/hearing/subcommittee-hearing-academic-freedom-threatened-chinas-influence-us-universities>. But see Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on December 5, 2014*, [http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/2511\\_665403/t1216978.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1216978.shtml) (answering that China “has never hindered academic freedom” in the United States).

previous ones and every regular or provisional constitution in China from 1908 to 1946—grants citizens the right of free speech.<sup>10</sup> But citizens exercising this right in the political sphere have met grave problems.<sup>11</sup>

10. Since its founding in 1949, the PRC has had four constitutions. The first one was adopted in 1954. Article 87 states that “[c]itizens . . . enjoy freedom of speech . . .” SELECTED LEGAL DOCUMENTS OF THE PEOPLE’S REPUBLIC OF CHINA 51 (Joseph En-pao Wang ed., 1976). The second one was adopted in 1975. Article 28 grants free speech. *Id.* at 87. The third one was adopted in 1978. Article 45 grants free speech. It also says that citizens have the right to “speak out freely, air their views fully, hold great debates and write big-character posters.” 2 SELECTED LEGAL DOCUMENTS OF THE PEOPLE’S REPUBLIC OF CHINA 164 (Joseph En-pao Wang ed., 1979). The “four big freedoms” in Article 45 of the 1978 Constitution were repealed by the government two years later after citizens began citing them as legal bases for actions. MERLE GOLDMAN, FROM COMRADE TO CITIZEN: THE STRUGGLE FOR POLITICAL RIGHTS IN CHINA 49 (2005). *But see The “Dazibao”: Its Rise and Fall*, BEIJING REV., Oct. 6, 1980, at 27–28, available at <http://massline.org/PekingReview/PR1980/PR1980-40.pdf> (defending the government’s decision to repeal these freedoms). The fourth—and current—Constitution was adopted in 1982. Article 35 states that “[c]itizens . . . enjoy freedom of speech.” THE LAWS OF THE PEOPLE’S REPUBLIC OF CHINA 1979–1982, at 12 (Legis. Affairs Comm’n of the Standing Comm. of the Nat’l People’s Cong. of the People’s Republic of China comp., 1987). In addition, Article 41 specifically grants citizens the right to criticize the government and not be suppressed or retaliated against. *Id.* at 13. *See generally* Benjamin L. Liebman, *Article 41 and the Right to Appeal* (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 14-407, Aug. 2014), available at <http://ssrn.com/abstract=2492802>. Every pre-1954 constitution in China also granted a right to free speech. XIANFA pt. 2, no. 2 (1908) (China); XIANFA art. 6, no. 4 (1912) (China); XIANFA art. 5, no. 4 (1914) (China); XIANFA art. 11 (1923) (China); XIANFA art. 15 (1931) (China); XIANFA art. 11 (1946) (China) [fully implemented on the self-governed Chinese island of Taiwan decades later, but not effective at all on the mainland since 1949]. WILLIAM L. TUNG, THE POLITICAL INSTITUTIONS OF MODERN CHINA 319, 322, 326, 333, 345, 351 (1964); ANDREW J. NATHAN, CHINESE DEMOCRACY 108–10 (1986); *Constitution of the Republic of China (Taiwan)*, OFFICE OF THE PRESIDENT, <http://english.president.gov.tw/Default.aspx?tabid=434>. Fifteen years before seizing power in 1949, the Chinese Communist Party (CCP) adopted the Basic Constitutional Program of the Chinese Soviet Republic. It, too, granted a right to free speech (No. 10). THE LEGAL SYSTEM OF THE CHINESE SOVIET REPUBLIC, 1931–1934, at 124 (W.E. Butler ed., 1983). At the start of the CCP’s first half-decade in power, it adopted the Common Program. This document served as a quasi-constitution until the adoption of the 1954 Constitution and granted a right to free speech (Art. 5). FUNDAMENTAL LEGAL DOCUMENTS OF COMMUNIST CHINA 36 (Albert P. Blaustein ed., 1962). So freedom of speech has been legally enshrined—if not always tolerated—in China for over a century.

11. This is because the PRC’s rulers have “always seen these freedoms as conditional on not disturbing political ‘stability and unity’ and, more importantly, on involving no challenge to the leadership of the CCP.” Keith Forster, *Dissidents*, in DICTIONARY OF THE POLITICS OF THE PEOPLE’S REPUBLIC OF CHINA 84, 84 (Colin Mackerras et al. eds., 1998). Article 51 of the 1982 Constitution says that the exercise of freedoms and rights may not infringe on the interests of the state, society, collective, or other citizens. The incorporation of vague legal duties like this one in a constitution is quite unusual. Most other nations lack such a provision in their constitutions. LIN FENG, CONSTITUTIONAL LAW IN CHINA 278 (2000). *But see* Liu Hainian, *Freedom of Speech and Social Development*, CHINA SOCIETY FOR HUMAN RIGHTS STUDIES, 1998, pt. II, <http://www.humanrights-china.org/zt/situation/2004020041015102127.htm> (arguing that constitutional limits on free speech are not so unusual in other nations). One critic claims that clauses like Article 51 are nonsense and argues “that the question is not that freedom of speech cannot violate the law,

Three large-scale events involving free speech have occurred since China's reopening<sup>12</sup> to the world in 1978. All three (1978–79, 1986, and 1989) ended when the ruling Communist Party tired of the speakers' criticisms.<sup>13</sup> The first two events ended with mass arrests, show trials, and

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but that the law cannot violate the freedom of speech." Hu, *supra* note 2, at 432. China's constitutional right of free speech appears to be only assertive instead of prohibitory against legislative power: "it merely makes a claim that may or may not actually be true." WILLIAM W. VAN ALSTYNE, *THE AMERICAN FIRST AMENDMENT IN THE TWENTY-FIRST CENTURY: CASES AND MATERIALS* 5 (4th ed. 2011). Many nations, such as the United States, view free speech as necessary to protect the individual and society from official corruption. For example, "When someone blows the whistle on government fraud or deceit, the real winners are members of the public, not the whistleblower. Legal protection of whistleblowing is an effort to ensure the free flow of information." SUNSTEIN, *supra* note 8. The writers of China's numerous constitutions, however, saw things differently: "their purpose was not to protect the individual against the state, but to enable the individual to function more effectively to strengthen the state. This idea of rights as means to a healthy political order was new in China, but it drew on traditional [i.e., classical Confucian] concepts to make sense." NATHAN, *supra* note 10, at 125. Another major difference is that speech in the PRC is regulated by content and limits imposed by either the legislature or executive (or extra-legally by the CCP) are not subject to judicial review. Peter Lin, *Between Theory and Practice: The Possibility of a Right to Free Speech in the People's Republic of China*, 4 J. CHINESE L. 257, 273–74 (1990). The latter is not so on the self-governed Chinese island of Taiwan, where judicial review is used to restrain government. TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* 157 (2003). Attempts to start judicial review in mainland China were made last decade, but failed. See generally Tian Lei, *In Search of China's Marbury: Why the Judicialization Campaign Failed and How to Revive Constitutionalism in China*, 4 PEKING U. J. LEGAL. STUD. 139 (2013); Robert J. Morris, *China's Marbury: Qi Yuling v. Chen Xiaoqi – The Once and Future Trial of Both Education and Constitutionalization*, 2 TSINGHUA CHINA L. REV. 273 (2010), available at [http://tsinghuachinalawreview.org/articles/0202\\_Morris.htm](http://tsinghuachinalawreview.org/articles/0202_Morris.htm); Symposium, *Constitutional Review in China*, 43 SUFFOLK U. L. REV. 589 (2010), available at <http://suffolklawreview.org/tag/china/>; BUILDING CONSTITUTIONALISM IN CHINA (Stéphanie Balme & Michael W. Dowdle eds., 2009); Cai Dingjian, *The Development of Constitutionalism in the Transition of Chinese Society*, 19 COLUM. J. ASIAN L. 1 (2005). See also LI BUYUN, *CONSTITUTIONALISM AND CHINA* 240 (Huang Jue et al. trans., 2006). But see Eric C. Ip, *Judicial Review in China: A Positive Political Economy Analysis*, 8 REV. L. & ECON. 331, 360 (2012) (claiming that "the Supreme People's Court [China's top court] has managed to construct and exercise a *de facto* right of nullification (albeit a considerably circumscribed one) over national legislation and local agency acts . . ."). For a profile of a newly republished and still banned (in mainland China) Chinese-language book that documents support for constitutionalism by top CCP leaders seventy years ago, see David Bandurski, *The Party and Its Promises*, CHINA MEDIA PROJECT, Aug. 15, 2013, <http://cmp.hku.hk/2013/08/15/33848/>.

12. Despite widely held views to the contrary, globalization is not new to China. See generally FRANK DIKÖTTER, *THE AGE OF OPENNESS: CHINA BEFORE MAO* (2008); VALERIE HANSEN, *THE OPEN EMPIRE: A HISTORY OF CHINA TO 1600* (2000); JOANNA WALEY-COHEN, *THE SEXTANTS OF BEIJING: GLOBAL CURRENTS IN CHINESE HISTORY* (1999).

13. For primary writings by free speakers in 1978–79, see *THE FIFTH MODERNIZATION: CHINA'S HUMAN RIGHTS MOVEMENT, 1978–1979* (James D. Seymour ed., 1980); in 1986, see *SEEDS OF FIRE: CHINESE VOICES OF CONSCIENCE* (Geremie Barmé & John Minford eds., 1988); in 1989, see *CRIES FOR DEMOCRACY: WRITINGS AND SPEECHES FROM THE 1989 CHINESE DEMOCRACY MOVEMENT* (Han Minzhu ed., 1990). The government's side of the story about



harsh sentences. The third with mass killings by the military of unarmed, peaceful civilians televised globally.

Tension and conflict over political speech in China, however, are not only recent phenomena. They have existed for millennia. A primitive form of free speech preceded state censorship in ancient China over 4000 years ago. According to China-based scholar Jiang Jinsong, “People could freely air their complaints and criticisms of the king in the streets. Kings listened to them with care. . . . Public opinion effectively guided kings in matters of public life.”<sup>14</sup> For perhaps as long, history-minded Chinese have practiced a homegrown tradition of using the past to criticize the present and improve the future.<sup>15</sup> This venerable and

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1989 is allegedly told in *THE TIANANMEN PAPERS* (Andrew J. Nathan & Perry Link eds., Zhang Liang comp., 2001). For a still-controversial three-hour documentary film about 1989, see *THE GATE OF HEAVENLY PEACE* (Long Bow Group, Inc. 1995). Excerpts can be viewed on its archival website: <http://www.tsquare.tv/>. See also *Frontline: The Tank Man* (public television broadcast Apr. 11, 2006), available at <http://www.pbs.org/wgbh/pages/frontline/tankman/>.

14. JIANG JINSONG, *THE NATIONAL PEOPLE’S CONGRESS OF CHINA* 3–4 (2003). Also, a primitive form of democracy preceded absolute monarchy and tyranny in ancient China over 4000 years ago. Elders and kings shared communal decision-making power. Kings were elected and they could not legally pass their kingship to family members. *Id.* Furthermore, another China-based scholar writes that “what we now call Western-style liberalism has featured in China’s own culture for millennia.” Liu Junning, *The Ancient Roots of Chinese Liberalism*, WALL ST. J., July 6, 2011, at A13. See generally Lynn Struve, *Modern China’s Liberal Muse: The Late Ming*, MING STUD., Apr. 2011, at 38. Similar to the modern West, China has an ancient maxim capturing free speech’s essence: “Say all you know, in every detail; a speaker is blameless, because listeners can think; if the words are true, make your corrections; if they are not, just take note.” LIU XIAOBO, *NO ENEMIES, NO HATRED: SELECTED ESSAYS AND POEMS* 317 (Perry Link et al. eds., 2012). See also *THE ANNALS OF LÜ BUWEI [LÜ SHI CHUN QIU]: A COMPLETE TRANSLATION AND STUDY*, at 585–603 (John Knoblock & Jeffrey Riegel trans., 2000) (3d-century BCE); Du Gangjian & Song Gang, *Relating Human Rights to Chinese Culture: The Four Paths of the Confucian Analects and the Four Principles of a New Theory of Benevolence*, in *HUMAN RIGHTS AND CHINESE VALUES: LEGAL, PHILOSOPHICAL, AND POLITICAL PERSPECTIVES* 35, 39–44 (Michael C. Davis ed., 1995).

15. Jonathan Unger, *Introduction to USING THE PAST TO SERVE THE PRESENT: HISTORIOGRAPHY AND POLITICS IN CONTEMPORARY CHINA*, at 1, 1 (Jonathan Unger ed., 1993); Merle Goldman, *Foreword to JAMES R. PUSEY, WU HAN: ATTACKING THE PRESENT THROUGH THE PAST*, at v, v (1969). See also Jonathan K. Ocko, *Using the Past to Make a Case for the Rule of Law*, in *THE LIMITS OF THE RULE OF LAW IN CHINA* 65, 65–87 (Karen G. Turner et al. eds., 2000) (discussing how Chinese scholars since the late 1970s have begun looking to China’s millennia of legal history as an indigenous source of positive examples for present-day change); Hung Shih-ti, *The Struggle Between “Emphasizing the Present While Slighting the Past” and “Using the Past to Criticize the Present,”* in *THE FIRST EMPEROR OF CHINA: THE POLITICS OF HISTORIOGRAPHY* 116, 116–31 (Li Yu-ning ed., 1975) (discussing the struggle between Legalist and Confucian scholars over 2200 years ago as part of an even older struggle between a rising landlord class and declining aristocracy). For contemporary practitioners, see generally Patrick Boehler, *Opponents Turn to Chinese Classics to Protest Anti-Rumour Crackdown*, S. CHINA MORNING POST (online ed.), Sept. 2, 2013, <http://www.scmp.com/news/china-insider/article/1301740/party-scholar-song-huichang-blasts-china-leadership-clampdown>; Geremie Barmé, *Using the Past to Save the Present: Dai Qing’s Historiographical Dissent*, E. ASIAN HIST., June

indigenous tradition is one of China's best because it can help create a more just, stable, and fully modern nation, benefiting all humankind.<sup>16</sup> Now is a good time to revive it, but not to embarrass the just-retired top leaders: the so-called "Fourth Generation" led by President Hu Jintao and Premier Wen Jiabao that ruled from 2003 to 2013.<sup>17</sup>

A recounting of six important free-speech cases throughout Chinese history (3rd-century BCE to the 1990s, withholding direct criticism of the Hu-Wen administration<sup>18</sup> and allowing it to save face) shows why the Party should give ordinary citizens a greater say in public affairs to help fix the nation's chronic legal and political problems and sustain breathtaking economic reforms begun in 1978. Albeit hard, this is the best way for the Party to save itself and avert full-blown social unrest in the short term as well as transform the PRC into more than the world's

1991, at 141, available at [http://www.eastasianhistory.org/sites/default/files/article-content/01/EAH01\\_07.pdf](http://www.eastasianhistory.org/sites/default/files/article-content/01/EAH01_07.pdf).

16. China's autocratic tradition of free-speech suppression has failed on these counts. *Charter 08*, *supra* note 1, pt. IV. See also Parts II–V of my Article for facts and supporting arguments.

17. See generally ANDREW J. NATHAN & BRUCE GILLEY, *CHINA'S NEW RULERS: THE SECRET FILES* (2d rev. ed. 2003). Since 1976, China's top leaders have turned over gradually the reins of power to their handpicked successors. This process can last months or longer, depending on various factors. Hu and Wen began leaving office in November 2012 and turned full power over in March 2013 to their successors: Xi Jinping and Li Keqiang, the "Fifth Generation" of CCP leadership. Xi and Li are expected to serve two, five-year terms before retiring in 2023. Scott Greene, *Li Keqiang Named Premier*, CHINA DIGITAL TIMES (Mar. 15, 2013, 2:07 AM), <http://chinadigitaltimes.net/2013/03/li-keqiang-named-premier/>; Sophie Beach, *Xi Jinping Named China's President*, CHINA DIGITAL TIMES (Mar. 13, 2013, 10:22 PM), <http://chinadigitaltimes.net/2013/03/xi-jinping-becomes-chinas-president/>. For a book about the Fifth Generation, see KERRY BROWN, *THE NEW EMPERORS: POWER AND THE PRINCELINGS IN CHINA* (2014).

18. For such criticism, see generally CONG.-EXEC. COMM'N ON CHINA, 113TH CONG., 2D SESS., ANN. REP. (2014), available at <http://www.cecc.gov/publications/annual-reports> [also has all previous reports, spanning 2002–13]; AI WEIWEI: NEVER SORRY (DVD: MPI Media Group 2012); LIU XIAOBO, *supra* note 14; Human Rights Watch, *Promises Unfulfilled: An Assessment of China's National Human Rights Action Plan* [report], Jan. 11, 2011, available at <http://www.hrw.org/reports/2011/01/11/promises-unfulfilled-0>; Cara Anna, *Chinese Author [Yu Jie] May Risk Jail for Book Critical of Premier*, HUFFINGTON POST (Aug. 4, 2010, 9:59 AM), [http://www.huffingtonpost.com/2010/08/04/chinese-author-may-risk-j\\_n\\_670153.html](http://www.huffingtonpost.com/2010/08/04/chinese-author-may-risk-j_n_670153.html); *Freedom of Expression on Trial in China* [issue focus], CHINA RTS. F., no. 1, 2010, available at <http://www.hrichina.org/en/crf/issue/2010.01>; Mindy Kristin Longanecker, *No Room for Dissent: China's Laws Against Disturbing Social Order Undermine Its Commitment to Free Speech and Hamper the Rule of Law*, 18 PAC. RIM L. & POL'Y J. 373 (2009), available at <http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/532/18PacRimLPolyJ373.pdf>; PHILIP P. PAN, *OUT OF MAO'S SHADOW: THE STRUGGLE FOR THE SOUL OF A NEW CHINA* (2008); *CHALLENGING CHINA: STRUGGLE AND HOPE IN AN ERA OF CHANGE* (Sharon Hom & Stacy Mosher eds., 2008). But see Info. Office of the State Council of the People's Republic of China, *Assessment Report on the National Human Rights Action Plan of China (2009-2010)*, July 14, 2011, pt. I, [http://www.china.org.cn/china/2011-07/14/content\\_22989895.htm](http://www.china.org.cn/china/2011-07/14/content_22989895.htm) (asserting that comprehensive implementation led to "remarkable achievements in promoting human rights").

sweatshop by century's end.

With free speech and China's current free-speech dilemma now defined, Part II of this Article retells three notable free-speech cases from imperial Chinese history. Part III retells three notable free-speech cases from modern Chinese history. Part IV argues for the toleration of free speech in today's China. And Part V dreams of a future China that tolerates free speech as a truly great nation reinvigorating a wise native practice.

## II. A TRIO OF IMPERIAL FREE-SPEECH CASES

### A. *Case 1: Qin and Li v. Books and Scholars (3rd-century BCE)*

The first emperor of a unified China, Qin Shihuang, is infamous for many things, not least of which his harsh punishments<sup>19</sup> and aversion to free speech. He and his prime minister, Li Si, presided over the banning, burning, and almost complete destruction of China's ancient literary heritage during the short-lived Qin dynasty from 221 to 206 BCE. Li believed that free speech begat confusion and chaos thereby weakening the emperor's power.<sup>20</sup> As a result, it had to be destroyed. In ordering the burning of all pre-Qin dynasty historical records, Li said

[a]nyone who ventures to discuss the *Odes* or *Documents* [two of the five Confucian Classics] shall be executed in the marketplace. Anyone who uses antiquity to criticize the present shall be executed along with his family. Any official who observes or knows of violations and fails to report them shall be equally guilty.<sup>21</sup>

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19. If a group of less than five men stole something worth below a certain amount, then they were banished. If they stole something worth more than a certain amount, then they were tattooed, made convict laborers, and had their noses cut off. If a group of at least five men stole something worth more than a certain amount, then they were tattooed, made convict laborers, and had their feet cut off. A.F.P. HULSEWÉ, REMNANTS OF CH'IN LAW: AN ANNOTATED TRANSLATION OF THE CH'IN LEGAL AND ADMINISTRATIVE RULES OF THE 3RD CENTURY B.C. DISCOVERED IN YÜN-MENG PREFECTURE, HU-PEI PROVINCE, IN 1975, at 120 (1985). For a brief survey of the Qin penal system, see *id.* at 14–18.

20. SIMA QIAN, RECORDS OF THE GRAND HISTORIAN: QIN DYNASTY 54–55, 185 (Burton Watson trans., 1993) (1st-century BCE).

21. *Id.* at 55. This event, which occurred in 213 BCE, “has come to stand both for the repression of principled dissent and for impiety toward the past . . .” JOHN E. WILLS, JR., MOUNTAIN OF FAME: PORTRAITS IN CHINESE HISTORY 48 (2012). *But see* MICHAEL NYLAN, THE FIVE “CONFUCIAN” CLASSICS 29–30 (2001) (doubting that the Qin dynasty targeted the *Odes* or *Documents* for destruction). For an article arguing that the book burning was directed against ways of thought better described as “didactic” and “historical” than “philosophical,” see Jens

One lifetime of absolute power was not enough for the first emperor. He sought immortality and hired two scholars to find a way for him to conquer death. But the scholars went into hiding because they felt his greed for authority was unbecoming of someone seeking immortality. After hearing of their disappearance, he ordered an investigation of all scholars and on at least one occasion had 460 of them executed (perhaps buried alive)<sup>22</sup> as a warning to others who might oppose his will.<sup>23</sup>

The Qin rulers rejected the humaneness of Confucianism in favor of Legalism, a rival philosophy mostly interested in centralizing power, subjugating the individual to the state, standardizing thought, and using brute force.<sup>24</sup> The Qin dynasty's brutality and violence led to its quick demise as well as the official demise of Legalism. All later dynasties adopted one version or another of Confucianism as the official state ideology. But they all shared the Qin's aversion to free speech and adopted similar measures to suppress it. As one of my Chinese classmates in Beijing said to me, "They were Confucian on the outside and Legalist on the inside."<sup>25</sup>

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Østergård Petersen, *Which Books Did the First Emperor of Ch'in Burn? On the Meaning of Pai Chia in Early Chinese Sources*, 43 *MONUMENTA SERICA: J. ORIENTAL STUD.* 1 (1995).

22. Watson writes that, "*Keng*, the word translated here as 'executed,' can also mean to bury alive. Commentators anxious to emphasize the satanic nature of the First Emperor usually take it in the latter meaning." SIMA, *supra* note 20, at 58 n.28. Of the four English translations I consulted, two use "executed" and two use "buried alive." For the former, see SIMA, *supra* note 20, at 58; Ssu-ma Ch'ien, 1 *THE GRAND SCRIBE'S RECORDS: THE BASIC ANNALS OF PRE-HAN CHINA* 150 (William H. Nienhauser, Jr. ed., Tsai-fa Cheng et al. trans., 1994) (1st-century BCE) (giving a similar explanation at n.259 to Watson and citing Ulrich Neininger, *Burying the Scholars Alive: On the Origin of a Confucian Martyr's Legend*, in 2 *EAST ASIAN CIVILIZATIONS: NEW ATTEMPTS AT UNDERSTANDING TRADITIONS* 121, 121–36 (Wolfram Eberhard et al. eds., 1983)). For the latter, see SZUMA CHIEN, *SELECTIONS FROM RECORDS OF THE HISTORIAN*, at 181 (Yang Hsien-yi & Gladys Yang trans., 1979) (1st-century BCE); SIMA QIAN, *THE FIRST EMPEROR: SELECTIONS FROM THE HISTORICAL RECORDS*, at 78 (Raymond Dawson trans., 2007) (1st-century BCE). Neither Yang nor Dawson explains why.

23. SIMA, *supra* note 20, at 58. This event, which occurred in 212 BCE, has been described as a "suppression of counterrevolutionary elements." Mass Criticism Group of Peking University & Tsinghua University, *A Brief Discussion on Ch'in Shih-huang's Violence*, in *THE FIRST EMPEROR OF CHINA: THE POLITICS OF HISTORIOGRAPHY* 132, 135 (Li Yu-ning ed., 1975).

24. *A SOURCE BOOK IN CHINESE PHILOSOPHY* 251 (Wing-tsit Chan trans. & comp., 1963).

25. Spoken by Zhang Xiaobo (John) in fall 2005. See also ZHENGYUAN FU, *AUTOCRATIC TRADITION AND CHINESE POLITICS* 23, 46 (1993). But see JUNG CHANG, *EMPRESS DOWAGER CIXI: THE CONCUBINE WHO LAUNCHED MODERN CHINA* 328–29 (2013) (discussing how Cixi's tolerance of free speech during the first decade of last century was "unmatched by any of her predecessors – or, arguably, her successors").



Yue Fei Temple Entrance



Yue Fei's Tomb

### B. Case 2: Qin Gui v. Yue Fei et al. (12th-century CE)

Qin Gui, a prime minister during the late Song dynasty (1127–1279), opposed free speech and ruthlessly silenced dissent.<sup>26</sup> In 1138 a fellow southern minister accused Qin of treason for not resisting China's northern rulers, the Jurchens. This minister demanded that the emperor execute Qin. Instead, the emperor disregarded the demand and gave Qin more power. Qin wasted little time before banning southern military expeditions against the Jurchens. Moreover, he destroyed all government records unfavorable to his view and rewarded officials who divulged the critical opinions of others.



Qin Gui (Right) & Wife Kneeling in Repentance

Qin was not finished. He then had a southern general named Yue Fei,<sup>27</sup> who had fought successfully against the Jurchens, jailed falsely and executed. Qin may have also arranged for the destruction of most of

26. See generally Gong Wei An, *The Usurpation of Power by Ch'in Kuei Through the Censorial Organ (1138–1155 A.D.)*, CHINESE CULTURE, Sept. 1974, at 25.

27. For more about Yue, one of China's most famous heroes and legendary fighters, see WILLS, *supra* note 21, at 168; F.W. MOTE, *IMPERIAL CHINA, 900–1800*, at 299–305 (1999); Stanley E. Henning, *Chinese General Yue Fei: Martial Arts Facts, Tales, and Mysteries*, 15 J. ASIAN MARTIAL ARTS, no. 4, 2006 at 30, 30–35.

Yue's writings.<sup>28</sup> Yue is one of China's most beloved heroes. A temple honoring him can be found in Hangzhou (approximately 120 miles southwest of Shanghai). Qin, however, is one of China's most hated villains. Life-size iron statues of he and his wife kneeling in repentance face Yue's tomb at the Hangzhou temple and are sometimes spat on by visitors.<sup>29</sup> Like the first Qin emperor, he imposed a series of book-banning ordinances that resulted in spotty enforcement but wide self-censorship. In addition, it became normal practice during his tenure to punish publishers and preface writers of banned books.<sup>30</sup>

Qin's usurpation of power by appropriating and then twisting the imperial Censorate<sup>31</sup> is partly to blame for the first emperor of the next

28. Tradition claims that Yue was a talented poet and calligrapher. But in reality he may not have been. Like all heroes, Yue's story contains exaggerations and fabrications. MOTE, *supra* note 27, at 305. Regardless, many official records of Yue's military career were destroyed. WILLS, *supra* note 21, at 179.

29. Henning, *supra* note 27, at 34. I visited Yue's temple in 2007. I wanted to spit on the kneeling statues, but posted signs forbade it and I complied. Visitors in earlier times could urinate with impunity on these statues to dishonor them, but, alas, not nowadays. WOLFRAM EBERHARD, *A DICTIONARY OF CHINESE SYMBOLS: HIDDEN SYMBOLS IN CHINESE LIFE AND THOUGHT* 305 (G.L. Campbell trans., 1986). Luckily, I did not visit in the early 1970s. The temple was off-limits to foreigners back then. Andrew J. Nathan, *Nan De Hu Tu (1973)*, in *MY FIRST TRIP TO CHINA: SCHOLARS, DIPLOMATS AND JOURNALISTS REFLECT ON THEIR FIRST ENCOUNTERS WITH CHINA*, at 197, 206 (Kin-ming Liu ed., 2012), available at <http://www.chinafile.com/nandehutu>.

30. Susan Whitfield, *Qin Gui*, in *3 CENSORSHIP: A WORLD ENCYCLOPEDIA*, L-R 1990, 1990 (Derek Jones ed., 2001).

31. The history of imperial Chinese censors goes back over 2000 years. They began as relatively unimportant secretaries to emperors and could impeach principal officers of the state. Granted greater importance during the Tang dynasty (618–907 CE), censors spoke out fearlessly and served “as the trusted ears and eyes of the emperor and act[ed] against misconduct and maladministration on the part of officials, high and low, central and local.” CH’IEN TUAN-SHENG, *THE GOVERNMENT AND POLITICS OF CHINA, 1912–1949*, at 39 (1970). They “were in theory given some privileges that other officials did not enjoy. For example, they had freedom of speech . . . and were free from punishment for their performance of official duties.” PEI HUANG, *AUTOCRACY AT WORK: A STUDY OF THE YUNG-CHENG PERIOD, 1723–1735*, at 115 (1974). See also John W. Haeger, *Li Kang and the Loss of K'ai-feng: The Concept and Practice of Political Dissent in Mid-Sung*, 12 *J. ASIAN HIST.* 30, 33 (1978) (“The Chinese government had invented the Censorate, in some ways an institutional concession to the expression of dissenting opinion, but far more importantly an agency charged with surveillance over the bureaucracy . . .”). In the late imperial era, the impeachment power of censors overtook their ability to dissent, or remonstrate, from emperors and high dignitaries. CH’IEN TUAN-SHENG, *supra*, at 39–40. For an article about mass dissent by officials, including censors, in Beijing during the mid-Ming, see John W. Dardess, *Protesting to the Death: The Fuque in Ming Political History*, *MING STUD.*, Jan. 2003, at 86 (2003). See also CHARLES O. HUCKER, *THE CENSORIAL SYSTEM OF MING CHINA* (1966) for more about the Ming (as well as pre-Ming) censorial heritage. The institution of the Censorate, which originated in ancient China and was later borrowed by neighboring countries, is an invention from Asia's past that contemporary Asian nations could adapt to their modern political systems and might more likely succeed than those transplanted from the West. For example, keeping each official—and not just the organization as a whole—independent and empowering young officials to become internal agents of change within bureaucracies are two

(and last) ethnic Han Chinese dynasty, the Ming, abolishing by decree the office of prime minister in 1380 because it had been a source of power struggles and political instability since the Qin dynasty.<sup>32</sup> But prime ministers would make a comeback later in Chinese history. One has been characterized as “a loyal prime minister to a doomed dynasty” and another “the most corrupt prime minister in Chinese history.”<sup>33</sup> Regarding the imperial Censorate, it has yet to be adapted to the modern era. Educated elites as well as ordinary Chinese lack a similar institutional channel through which they can join peacefully in final political decisions.<sup>34</sup>

### C. Case 3: Wei Zhongxian v. Donglin Academy (17th-century CE)

The Donglin Academy was founded during the Song dynasty and later revived in the Ming (1368–1644) and Qing (1644–1911) dynasties. Its influence peaked in the early 1600s before members suffered political persecution at the hands of a powerful eunuch.<sup>35</sup> Donglin was atypical for academies because it operated more as a think tank than a traditional school. Despite numerous imperial edicts prompted by the emperor’s prime minister outlawing such activities and private academies in the late 1500s, Donglin reopened in Wuxi (roughly halfway between Nanjing and Shanghai) soon after his death to discuss the political reasons behind the dynasty’s decline. Its members practiced orthodox Confucianism via discipline, righteous living, and study.<sup>36</sup> Also, it published annual

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ways to apply certain ideas behind the design of the Censorate to improve the performance of existing institutions. Jongryn Mo, *The Challenge of Accountability: Implications of the Censorate, in* CONFUCIANISM FOR THE MODERN WORLD 54, 67 (Daniel A. Bell & Hahm Chaibong eds., 2003). See generally JIANG QING, *A CONFUCIAN CONSTITUTIONAL ORDER: HOW CHINA’S ANCIENT PAST CAN SHAPE ITS POLITICAL FUTURE* (Daniel A. Bell & Ruiping Fan eds., Edmund Ryden trans., 2013); Pierre-Étienne Will, *Epilogue: Virtual Constitutionalism in the Late Ming Dynasty, in* BUILDING CONSTITUTIONALISM IN CHINA 261 (Stéphanie Balme & Michael W. Dowdle eds., 2009); *On Point with Tom Ashbrook: China and Confucian Democracy?* (public radio broadcast Aug. 15, 2006), available at <http://onpoint.wbur.org/2006/08/15/china-and-confucian-democracy>.

32. JIANG, *supra* note 14, at 13–14.

33. TALES OF PRIME MINISTERS IN ANCIENT CHINA 235, 252 (Cheng Yu trans. & comp., 2001).

34. John K. Fairbank, *Why China’s Rulers Fear Democracy*, N.Y. REV. BOOKS, Sept. 28, 1989, at 32. See also HE WEIFANG, *IN THE NAME OF JUSTICE: STRIVING FOR THE RULE OF LAW IN CHINA 187–88* (2012).

35. *A Censor Accuses a Eunuch* (Patricia Buckley Ebrey trans.), in CHINESE CIVILIZATION: A SOURCEBOOK 263, 263–66 (Patricia Buckley Ebrey ed., 2d rev. & expanded ed. 1993). See JOHN W. DARDESS, *BLOOD AND HISTORY IN CHINA: THE DONGLIN FACTION AND ITS REPRESSION, 1620–1627* (2002) for a book on this event.

36. Most previous scholarship on Donglin has focused on its moral and philosophical aspects. One scholar, however, argues that its political aspect must be considered as well. “It is time to view the Donglin more in the familiar light of political compromise and less in the



proceedings regularly criticizing the government's moral character.

Another way Donglin spoke freely<sup>37</sup> was by voicing its approval or disapproval of court appointees, such as eunuchs.<sup>38</sup> In 1624 a Donglin member named Yang Lien scathingly criticized a eunuch named Wei Zhongxian. Yang's letter to the emperor stated,

How would anyone have expected that, with a wise ruler like Your Majesty on the throne, there would be a chief eunuch like Wei Zhongxian, a man totally uninhibited, who destroys court precedents, ignores the ruler to pursue his selfish ends, corrupts good people, ruins the emperor's reputation as a Yao or Shun [two prehistoric sage-kings], and brews unimaginable disasters? The entire court has been intimidated. No one dares denounce him by name . . . If today out of fear I also do not speak out, I will be abandoning my determination to be loyal and my responsibility to serve the state.<sup>39</sup>

Yang begged the emperor to investigate Wei or else risk losing the dynasty. Although the emperor did not act on Yang's letter, Wei did by purging Yang and others at Donglin. Seven hundred members of the "Donglin faction" were dismissed, many were jailed and tortured, twenty-two of them died (including Yang), and private academies were abolished yet again. These academies were later restored and put under

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otherworldly light of philosophical determinism." Harry Miller, *Newly Discovered Source Sheds Light on Late Ming Faction: Reading Li Sancai's Fu Huai Xiao Cao*, MING STUD., Jan. 2003, at 126, 137. For some of this previous scholarship, see HUCKER, *supra* note 31, at 152. Two eminent Donglin members were Ku Hsien-ch'eng (1550–1612) and Kao P'an-lung (1562–1626). Ku re-founded Donglin and Kao was the principal leader of both the intellectual and political movements associated with Donglin. Heinrich Busch, *Ku Hsien-ch'eng*, in 1 *DICTIONARY OF MING BIOGRAPHY*, 1368–1644, A-L 736, 740 (L. Carrington Goodrich & Chaoying Fang eds., 1976); Charles O. Hucker, *Kao P'an-lung*, in 1 *DICTIONARY OF MING BIOGRAPHY* at 701, 701.

37. For an article examining how Ming rulers paradoxically encouraged and discouraged the kind of speech Donglin and others engaged in, see generally Zhang Xiangming, *A Preliminary Study of the Punishment of Political Speech in the Ming Period*, MING STUD., Nov. 2010, at 56.

38. Chinese eunuchs date back 5000 years. They were voluntarily castrated males who served in various capacities at the royal household. Their castration ensured that the king or emperor did not have to worry about them impregnating his many women, thereby muddying the line of succession. Because they lived with the ruling family, eunuchs enjoyed rare access to power and often improperly influenced royal decision making or usurped power altogether. The institution of the palace eunuch ended with the fall of the last royal dynasty in 1911. PIOTR O. SCHOLZ, *EUNUCHS AND CASTRATI: A CULTURAL HISTORY* 128–31 (John A. Broadwin & Shelley L. Frisch trans., 2001). For more about eunuchs, see generally JIA YINGHUA, *THE LAST EUNUCH OF CHINA: THE LIFE OF SUN YAOTING* (Sun Haichen trans., 2008); SHIH-SHAN HENRY TSAI, *THE EUNUCHS IN THE MING DYNASTY* (1996). See also OUYANG XIU, *HISTORICAL RECORDS OF THE FIVE DYNASTIES* 316–22 (Richard L. Davis trans., 2004) (11th-century CE).

39. Ebrey, *supra* note 35, at 264.

strict state control.<sup>40</sup> By the way, Yang was right. The Ming dynasty ended two decades after Wei's free-speech crackdown.<sup>41</sup>

### III. A TRIO OF MODERN FREE-SPEECH CASES

#### A. Case 4: Chairman Mao v. Writers and Artists (1940s)

In 1942 Mao Zedong, leader of the then-insurgent Chinese Communist Party, held two talks in Yanan (approximately 200 miles north of Xian in central China) on the role of writers and artists in society. The main, pragmatic, and audience-centered question he addressed was how could literature and art serve the masses?<sup>42</sup> Published the following year, the *Talks at the Yanan Forum on Literature and Art*<sup>43</sup> served as a basis for the Party's widespread censorship of writers and artists for the next half century. Intellectuals at the talks suggested that writers and artists should be free to explore ideas without political interference.<sup>44</sup>

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40. Susan Whitfield, *Donglin Academy*, in 1 CENSORSHIP: A WORLD ENCYCLOPEDIA, A-D 686, 686 (Derek Jones ed., 2001).

41. HUANG TSUNG-HSI, WAITING FOR THE DAWN: A PLAN FOR THE PRINCE: HUANG TSUNG-HSI'S *MING-I TAI-FANG LU* 167 (Wm. Theodore de Bary trans., 1993) (17th-century CE) (blaming eunuchs and their chilling of political speech). Huang's father, Huang Tsun-su, was a censor and loyal Donglin member who denounced Wei in 1625. The following year, he was unjustly put to death in jail. Not long after, his good name was posthumously restored. Tu Lien-chê, *Huang Tsung-hsi*, in 1 EMINENT CHINESE OF THE CH'ING PERIOD (1644–1912), A-O 351, 351–52 (Arthur W. Hummel ed., 1943).

42. Leo Ou-fan Lee, *Literary Trends: The Road to Revolution, 1927–1949*, in 13 THE CAMBRIDGE HISTORY OF CHINA: REPUBLICAN CHINA 1912–1949, PT. 2, at 421, 479 (John K. Fairbank & Albert Feuerwerker eds., 1986).

43. See generally BONNIE S. MCDUGALL, MAO ZEDONG'S "TALKS AT THE YAN'AN CONFERENCE ON LITERATURE AND ART": A TRANSLATION OF THE 1943 TEXT WITH COMMENTARY (1980). See also MAO TSE-TUNG, 3 SELECTED WORKS OF MAO TSE-TUNG 69–98 (1967).

44. A group of them [including the famous female novelist Ding Ling and poet Ai Qing, father of world-renowned contemporary China-based artist Ai Weiwei, *supra* note 18] had published essays a month or two before in the Party's official literary organ [*Liberation Daily*] that criticized the apathy, hypocrisy, and bureaucratism of top Party leaders.

Through their criticisms, these writers sought to halt what they considered to be the distortion of Communist ideals in practice and the subordination of the humanitarian values of communism to short-term tactical goals. Their essays revealed a feeling of betrayal by a movement to which they had given themselves in misunderstanding.

MERLE GOLDMAN, LITERARY DISSENT IN COMMUNIST CHINA 20–21 (1967). Consistent with China's best indigenous traditions, "they reminded intellectuals of their duty to be the critical conscience of society." SIMON LEYS [pen name of Pierre Ryckmans], CHINESE SHADOWS 124 (1977). See also Donghai Idao, *The Role of Public Intellectuals*, CHINA RTS. F., no. 1, 2005 at

Mao could not have disagreed more. He insisted that the Party should control the creative process. Writers and artists were not to address people's flaws or dwell on dark societal themes. Rather, they should appeal to the masses, inspiring them to unite and help shape their own environment.<sup>45</sup>

After the Party seized power in 1949, literary bureaucrats swiftly attacked writings that deviated from the Party line and forced authors to make humiliating self-criticisms. The *Talks* were used to suppress free speech in numerous crackdowns during the rest of Mao's rule. These included the campaign against prominent literary theorist and critic Hu Feng in 1955,<sup>46</sup> the Anti-Rightist Movement of 1957,<sup>47</sup> and culminated in the Great Proletarian Cultural Revolution (hereinafter "Cultural Revolution") from 1966 to 1976.<sup>48</sup> Also,

By prescribing the role of writers and artists in socialist society, defining the themes that could (or could not) be treated, and even giving directions on style, Mao was establishing norms that were to stifle literary creation beyond his lifetime. Even in the early 1980s, when a number of his other policies were being called into question, the ideas of the "Yan'an Talks" remained sacrosanct.<sup>49</sup>

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65, 65 (lamenting that "[c]ontemporary Chinese intellectuals are not only beneath comparison with Western intellectuals, but are likewise spiritually far inferior to the intellectuals (scholars) of imperial China" who criticized reality and society).

45. Mao's views were later codified in Article 45 of the Common Program (the PRC's quasi-constitution from 1949 to 1954), which states that "[l]iterature and art shall be promoted to serve the people, to awaken their political consciousness, and to enhance their enthusiasm for labour. Outstanding works of literature and art shall be encouraged and rewarded. The people's drama and cinema shall be developed." Blaustein, *supra* note 10, at 50. Although using different language, three (1954 [Art. 95]; 1978 [Art. 52]; 1982 [Art. 47]) of the PRC's four constitutions have reiterated that the state "encourages and assists" creative work in literature and art. Wang (1976), *supra* note 10, at 54; Wang (1979), *supra* note 10, at 167; Legis. Affairs Comm'n, *supra* note 10, at 14. The 1982 Constitution qualifies this with the words "conducive to the interests of the people." Legis. Affairs Comm'n, *id.* Article 12 of the 1975 Constitution, written near the end of the Great Proletarian Cultural Revolution (1966–76) by the soon-to-be deposed Gang of Four (led by Mao's fourth and last wife, Jiang Qing), more closely resembles language in the Common Program. It states that "literature and art . . . must all serve proletarian politics, serve the workers, peasants and soldiers, and be combined with productive labour." Wang (1976), *supra* note 10, at 76.

46. Goldman, *supra* note 44, at 129–57.

47. *Id.* at 203–42.

48. See generally RODERICK MACFARQUHAR & MICHAEL SCHOENHALS, *MAO'S LAST REVOLUTION* (2006).

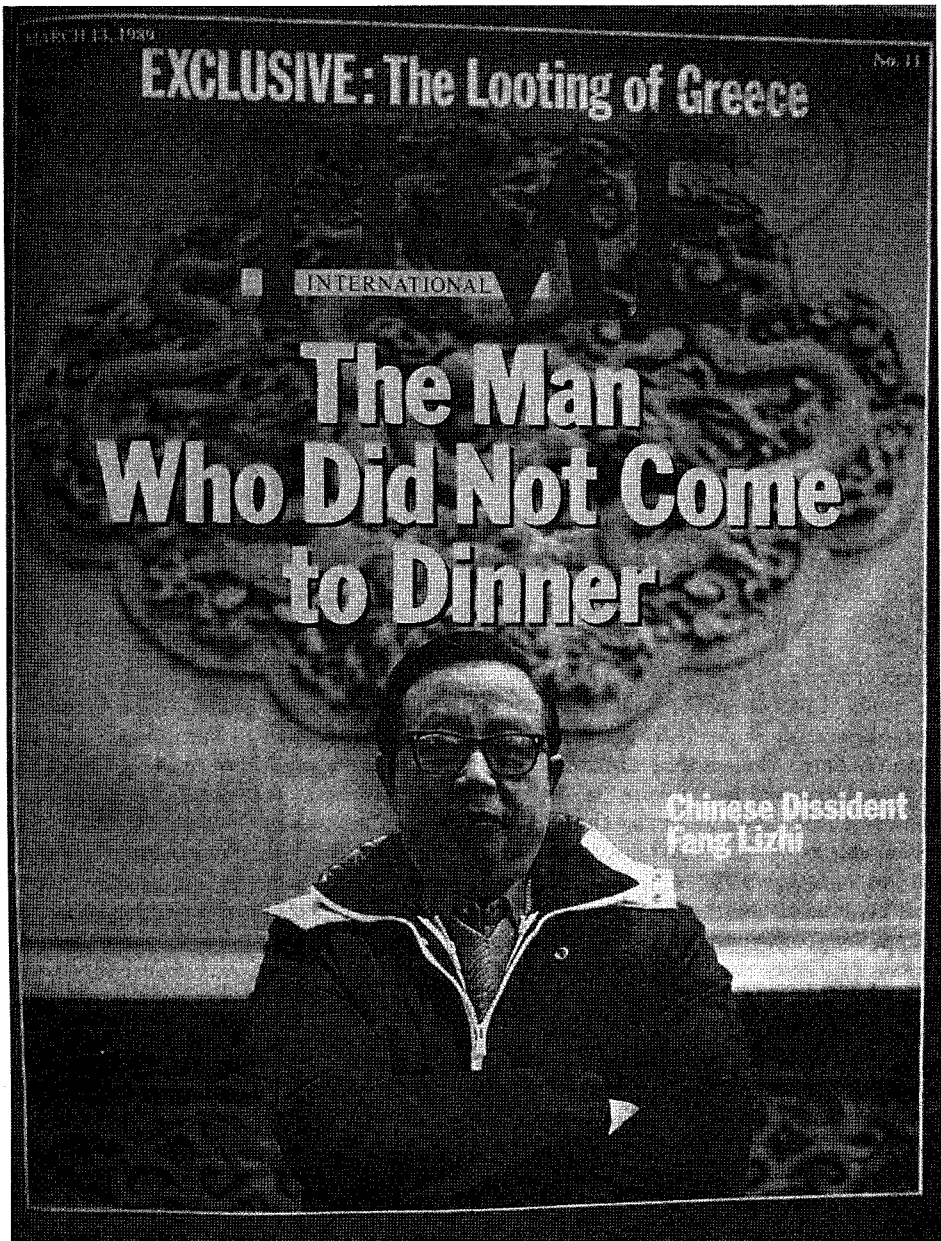
49. Desmond A. Skeel, *Mao Zedong – Talks at the Yan'an Forum on Literature and Art*, in 3 CENSORSHIP: A WORLD ENCYCLOPEDIA, L-R 1534, 1534 (Derek Jones ed., 2001).

Outspoken intellectuals at Yanan were just the first persons to learn that the Party would not tolerate free speech.<sup>50</sup> Since 1949, PRC citizens have lived under this troubling fact.<sup>51</sup>

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50. One even paid the ultimate price for speaking freely. Wang Shih-wei, a Communist sympathizer whose pre-*Talks* essays criticized the opulent lifestyles of Party leaders at a time when ordinary Chinese were suffering the hardships of the Second Sino-Japanese War (1937–45), was executed by the Party in 1947 after being labeled a “Trotskyite” and secret agent. GRAHAM HUTCHINGS, *MODERN CHINA: A GUIDE TO A CENTURY OF CHANGE* 68 (2001); LEYS, *supra* note 44, at 123–27; GOLDMAN, *supra* note 44, at 25–27, 37–42. *See generally* DAI QING, WANG SHIWEI AND “WILD LILIES”: RECTIFICATION AND PURGES IN THE CHINESE COMMUNIST PARTY, 1942–1944 (David E. Apter & Timothy Cheek eds., Nancy Liu & Lawrence R. Sullivan trans., Song Jinshou comp., 1994). Interestingly, Wang started the use of big-character posters to criticize the Party. Hua Sheng [pseudonym], *Big Character Posters in China: A Historical Survey*, 4 J. CHINESE L. 233, 236 (1990). *But see Dazibao*, *supra* note 10, at 23 (claiming that such posters started in the late 1950s).

51. HUTCHINGS, *supra* note 50, at 113; LEYS, *supra* note 44, at 126–27. But some seemed to have forgotten. During the seventieth anniversary of the *Talks* in 2012, a Chinese publisher released a commemorative edition hand-copied by some of China’s most popular and respected writers, including Mo Yan (winner of the Nobel Literature Prize later that year). Chinese netizens noted the irony: “decades after the official repudiation of Soviet-style cultural management, a hundred writers were asked to meticulously transcribe what once amounted to an artistic death sentence pronounced on their forebears – and the vast majority assented.” Several assenting writers later apologized. Eric Abrahamsen, *Chairman Mao, in Their Own Hand*, LATITUDE (June 6, 2012, 10:56 AM), <http://latitude.blogs.nytimes.com/2012/06/06/chairman-mao-in-their-own-hand/>. Mo said he participated because the publishing house editor was his friend and he wanted to show off with his calligraphy. *Nobel Laureate Mo Yan: ‘I Am Guilty,’* SPIEGEL ONLINE, Feb. 26, 2013, <http://www.spiegel.de/international/zeitgeist/nobel-literature-prize-laureate-mo-yan-answers-his-critics-a-885630.html>. In a later incident, the award-winning Chinese writer and noted censorship critic Murong Xuecun [*infra* note 105] criticized Mo for seemingly fawning over current Party leaders. Tom Phillips, *Mo Yan Stirs Controversy with Support for Chinese President*, TELEGRAPH (online ed.), Jan. 11, 2015, <http://www.telegraph.co.uk/news/worldnews/asia/china/11338916/Mo-Yan-stirs-controversy-with-support-for-Chinese-president.html>.



Fang Lizhi on *Time Magazine* (International Edition) Cover

B. Case 5: Chinese Communist Party v. Fang Lizhi  
(1950s, 60s, and 80s)<sup>52</sup>

Fang Lizhi studied theoretical and nuclear physics at Peking University (China's Harvard, nicknamed *Beida*) in the 1950s. While there he became a committed Marxist and joined the Party. And like the outspoken intellectuals at Yanan, he believed that politics should not interfere with intellectual pursuits, especially science. He openly criticized the government in 1955 by urging students to break free from the rigid dogma of the education system and claiming that schools should nurture independent thinking. Needless to say, he was soon denounced and expelled from the Party.<sup>53</sup> Mao's violent, teenaged police (aka Red Guards) detained him for three years in the late 1960s.

After the Cultural Revolution, the Party restored Fang's membership and he became director of physics at the prestigious University of Science and Technology in Hefei (approximately 100 miles west of Nanjing). At the suggestion of the Ministry of Education, he created radical plans for reorganizing the administration of his school in 1985. He advocated free speech and an open academic environment. In 1986 he became something like a national hero due to stories about him published in the Party's official newspaper, *People's Daily*.<sup>54</sup> But trouble ensued. The Party blamed him for student pro-democracy and anti-official corruption demonstrations later that year.<sup>55</sup> It expelled him again from the Party, removed him from his post, and reassigned him to another, less important one.

The West hailed Fang as China's Sakharov and he appeared on a March 1989 *Time* magazine cover.<sup>56</sup> After the June 1989 military

52. I wrote a slightly different version of this Subpart for BIOGRAPHICAL DICTIONARY OF THE PEOPLE'S REPUBLIC OF CHINA 77, 77–78 (Yuwu Song ed., 2013).

53. IAN BURUMA, BAD ELEMENTS: CHINESE REBELS FROM LOS ANGELES TO BEIJING 61 (2001).

54. Orville Schell, *China's Hidden Democratic Legacy*, FOREIGN AFF., July/Aug. 2004, at 116, 124.

55. Thousands of students at Fang's university marched in the streets in December to demand democracy. Similar protests spread to twenty other cities. BURUMA, *supra* note 53, at 64–65. Unlike other large protests in 1976, 1978–79, and 1989, these protests ended relatively quickly and without mass arrests, military intervention, or killing. Fang told his students to end their protest and return to class. To his surprise, they did! *The New Generation, in CHINA: A CENTURY OF REVOLUTION – PART THREE: BORN UNDER THE RED FLAG 1976–1997* (DVD: Zeitgeist Films & Ambrica Prods. 2007). See generally Julia Kwong, *The 1986 Student Demonstrations in China: A Democratic Movement?*, 28 ASIAN SURV. 970 (1988); David A. Kelly, *The Chinese Student Movement of December 1986 and Its Intellectual Antecedents*, 17 AUSTL. J. CHINESE AFF. 127 (1987).

56. Orville Schell, *China's Andrei Sakharov*, ATLANTIC MONTHLY, May 1988, at 35, available at <http://www.theatlantic.com/past/docs/unbound/flashbks/china/fang.htm>; Daniel Benjamin, *Intimidating Fang*, TIME (int'l ed.), Mar. 13, 1989, at 8.

crackdown on pro-democracy demonstrators in Beijing, he and his wife, neither of whom were directly involved in the protests despite government claims to the contrary, took refuge for over a year there in the U.S. embassy. They fled China for the West in 1990.<sup>57</sup> One of the PRC's best homegrown scientists and critical thinkers, the exiled Fang was until his death in 2012 a physics professor at the University of Arizona.<sup>58</sup>

### C. Case 6: Comrade Deng v. Citizen Wei (1970s and 90s)<sup>59</sup>

Wei Jingsheng was born in Beijing in 1950 to a well-connected Party family. No one could have predicted that this former Red Guard, People's Liberation Army soldier, and Beijing Zoo electrician would become post-Mao China's most famous free speaker. The Democracy Wall Movement—a short-lived public outpouring of complaints, demands, and dissent for more democracy and freedom by ordinary Chinese from late 1978 to early 1979—attracted him almost immediately.<sup>60</sup> He wrote his legendary big-character poster *The Fifth Modernization: Democracy* in only a few hours and posted it on the Wall in downtown Beijing at the intersection of Xidan and Chang'an avenues (a few blocks west of Tiananmen Square and the Forbidden City) on December 5. It dared question the Party's legitimacy in the aftermath of the Cultural Revolution and argued that without the addition of democracy the four modernizations in agriculture, defense, industry, and science just announced by the new reform-minded Party leaders would ultimately fail.<sup>61</sup>

Wei and others founded a grassroots journal called *Exploration* that highlighted social problems. Among other things, it covered peasant petitions and prison conditions. China's then-new supreme leader, Deng Xiaoping, started cracking down on Democracy Wall participants in early

57. Desmond A. Skeel, *Fang Lizhi*, in 2 CENSORSHIP: A WORLD ENCYCLOPEDIA, E-K 773, 774 (Derek Jones ed., 2001).

58. Perry Link, *On Fang Lizhi (1936–2012)*, N.Y. REV. BOOKS, May 10, 2012, at 65, also at NYRBLOG (Apr. 13, 2012, 11:45 AM), <http://www.nybooks.com/blogs/nyrblog/2012/apr/13/on-fang-lizhi/>. For more about Fang by Fang, see FANG LIZHI, BRINGING DOWN THE GREAT WALL: WRITINGS ON SCIENCE, CULTURE, AND DEMOCRACY IN CHINA (James H. Williams ed. & trans., 1992). For more about Fang once he settled in the United States, see BURUMA, *supra* note 53, at 59–79.

59. I wrote a slightly different version of this Subpart for BIOGRAPHICAL DICTIONARY OF THE PEOPLE'S REPUBLIC OF CHINA 317, 317–18 (Yuwu Song ed., 2013).

60. Desmond A. Skeel, *Wei Jingsheng*, in 4 CENSORSHIP: A WORLD ENCYCLOPEDIA, S-Z, at 2617, 2617 (Derek Jones ed., 2001). See generally Kjeld Erik Brodsgaard, *The Democracy Movement in China, 1978–1979: Opposition Movements, Wall Poster Campaigns, and Underground Journals*, 21 ASIAN SURV. 747 (1981).

61. WEI JINGSHENG, THE COURAGE TO STAND ALONE: LETTERS FROM PRISON AND OTHER WRITINGS 201 (Kristina M. Torgeson ed. & trans., 1998).

1979. Wei responded,

If he implements policies that benefit the people and if he leads them to peace and prosperity, we will trust him . . . If he implements policies that are detrimental to the people, and if he follows a dictatorial road and acts contrary to the interests of the people, the people should oppose him.<sup>62</sup>

The government promptly arrested and charged him with “counterrevolutionary activities” and divulging military secrets to foreigners. Wei testified at a one-day show trial on October 16 and refused to recant his bold views. Exemplifying a nascent rights-consciousness among citizens at that time, he invoked the PRC Constitution’s free-speech provision.<sup>63</sup> Not persuaded, the court sentenced him to fifteen years in prison. He remained there, enduring beatings and long periods of solitary confinement and was nominated for the Nobel Peace Prize, until being released in 1993 in a bid by the government to host the 2000 Summer Olympics in Beijing.<sup>64</sup>

That bid lost.<sup>65</sup> The government re-arrested Wei in 1994 and re-sentenced him to fourteen years in prison in 1995.<sup>66</sup> Mounting international pressure led to his release and exile (read: *banishment*, a punishment meted out to various “bad elements” by Chinese rulers dating back to at least the Qin dynasty)<sup>67</sup> to the United States for health reasons

62. Skeel, *supra* note 60. Unlike almost all other Democracy Wall activists, “Wei warned that without radical political change, Deng would turn out to be a tyrant just like the countless Chinese despots who had preceded him. Without the freedom to criticize and vote, there could be no check on absolute personal power. Wei turned out to be right.” BURUMA, *supra* note 53, at 86.

63. The fourth charge of Wei’s indictment claimed that he incited the overthrow of the government by speaking freely for democracy and human rights. He rebutted this charge by arguing that free speech is a constitutional right to be enjoyed by all citizens. In addition, he denied advocating the violent overthrow of the government and explained how quotes of his had been taken out of context by the public prosecutor. WEI, *supra* note 61, at 222–25. See generally William C. Jones, *Due Process in China: The Trial of Wei Jingsheng*, 9 REV. SOCIALIST L. 55 (1983).

64. HUTCHINGS, *supra* note 50, at 461–62. To commemorate the forthcoming anniversaries of the French Revolution (1789), China’s May 4th Movement (1919), and the founding of the PRC (1949), Fang Lizhi wrote a letter to Deng in January 1989 asking him to pardon Wei and other political prisoners. FANG, *supra* note 58, at 242–43. Fang told fellow intellectuals what he had done and his example inspired the like-minded among them to do the same. They wrote petitions calling for freedom of speech, rule of law, and Wei’s pardon. Needless to say, Deng did not grant any of these requests. MERLE GOLDMAN, *SOWING THE SEEDS OF DEMOCRACY IN CHINA: POLITICAL REFORM IN THE DENG XIAOPING ERA* 287–88 (1994).

65. Beijing tried again later and won. Jeré Longman, *Beijing Wins Bid for 2008 Olympic Games*, N.Y. TIMES, July 14, 2001, at A1.

66. For documents on and analysis of his 1995 trial, see Human Rights in China, *A Travesty of Justice: The Show Trial of Wei Jingsheng* [report], Mar. 4, 1996.

67. HULSEWÉ, *supra* note 19, at 17. Also, Hulsewé notes that “banishment in [imperial]



soon after Deng's death in 1997. True to form, Wei chastised U.S. politicians and businesspeople for going soft on human rights in China. But the U.S. government did not punish him. Criticism, even mockery, of political and business leaders is tolerated there and does not plunge society into chaos. One of the PRC's bravest homegrown heroes and democrats, the exiled Wei continues speaking out for a politically freer China.<sup>68</sup>

#### IV. WHY THE PARTY SHOULD TOLERATE FREE SPEECH

##### A. *Cautionary Tales*

The sextet of free-speech cases retold above should serve as cautionary tales to the PRC's current leaders that such repressions of criticism and dissent are signs of intellectually backward and frightened governments.<sup>69</sup> Professor Daniel Farber writes that “[r]epression drives dissidents underground, provides them with martyrs, and gives their ideas the attractive aura of the forbidden. Also, dissidents, however bad their ideas, are early warning signs of popular discontent and mounting social problems, alerting the government to the need for reform before events reach a crisis.”<sup>70</sup>

It is no coincidence that the most technologically advanced, culturally dynamic, and politically stable country in the world today, the United States, is also the one that most tolerates freedom of speech, especially political speech. This kind of speech can be hard to define. “Virtually everything from comic strips to commercial advertisements to even pornography can have a political dimension,” writes dean and professor Erwin Chemerinsky. “[The United States’] refusal to narrowly limit the

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China left the exile still within the country and subject to Chinese authority.” *Id.* at 17 n.12. In modern China, Fang and Wei were de facto banished outside the country in 1990 and 1997. Fang was never allowed back in. Wei has yet to be. More recently, a de facto banishment within the country happened to outspoken law professor He Weifang of Beijing University. Peter Foster, *Leading Dissident ‘Exiled’ to Chinese Northwest*, TELEGRAPH (online ed.), Mar. 11, 2009, <http://www.telegraph.co.uk/news/worldnews/asia/china/4974333/Leading-dissident-exiled-to-Chinese-northwest.html>. He was “reassigned” to teach for two years at an obscure school in China’s remote Xinjiang region. But this was not necessarily a bad thing. While there, he seriously read ancient Chinese classics for the first time. HE, *supra* note 34, at 42. Regardless, Xinjiang’s use as a banishment site goes back centuries. See generally JOANNA WALEY-COHEN, *EXILE IN MID-QING CHINA: BANISHMENT TO XINJIANG, 1758–1820* (1991).

68. For more about Wei and his post-1997 activities, see BURUMA, *supra* note 53, at 80–107; Wei Jingsheng Foundation’s website, <http://www.weijsingsheng.org/>.

69. LIU XIAOBO, *supra* note 14, at 318–19 (writing in his 2009 criminal trial self-defense statement that past Chinese repressions of free speech “have come to be viewed as black marks on the records of the regimes that imposed them and as embarrassments to the Chinese nation”).

70. FARBER, *supra* note 7, at 6.

First Amendment [i.e., speech] . . . in this way reflects the importance of freedom of speech about other topics ranging from scientific debates to accurate commercial information in the marketplace.”<sup>71</sup>

Genuinely democratic, human rights-respecting, and rule of law-following governments tolerate free speech because it furthers self-governance and social stability, helps the discovery of truth via the marketplace of ideas, promotes autonomy and self-realization, and fosters tolerance.<sup>72</sup> It is doubtful whether anyone could argue persuasively that these ends are undesirable, unreasonable, and not marks of modernity.

### B. A *Disharmonious Society*

The PRC’s current leaders need not fear public criticism of themselves and their policies by citizens. By letting citizens publicly criticize the Party, the Party could gain honest, independent feedback on what it is doing right, wrong, and ought to do. With 86 million members, the Party is the world’s largest political organization. Membership is highly selective and hard to get, which explains why members make up only 6% of China’s 1.37 billion citizens.<sup>73</sup> Tolerating political speech can help the Party truly remain in “the vanguard both of the Chinese working class and of the Chinese people and the Chinese nation” as the Party’s constitution claims.<sup>74</sup> Silencing such speech erodes the Party’s credibility

71. CHEMERINSKY, *supra* note 8, at 955.

72. *Id.* at 954–58; FARBER, *supra* note 7, at 3–6; BARENDT, *supra* note 8, at 6–23 (discussing, in addition, a fourth theory for free-speech protection: suspicion of government). See also JOHN STUART MILL, ON LIBERTY WITH THE SUBJECTION OF WOMEN AND CHAPTERS ON SOCIALISM 19–55 [ch. 2 of ON LIBERTY] (Stefan Collini ed., 1989) (1859) for the classic arguments in support of free speech. Mill’s *On Liberty* was first translated into Chinese and published in China over a century ago. See generally MAX KO-WU HUANG, THE MEANING OF FREEDOM: YAN FU AND THE ORIGINS OF CHINESE LIBERALISM (2008); DOUGLAS HOWLAND, PERSONAL LIBERTY AND PUBLIC GOOD: THE INTRODUCTION OF JOHN STUART MILL TO JAPAN AND CHINA (2005).

73. *CPC Membership (2013)*, CHINA.ORG.CN, July 4, 2014, [http://www.china.org.cn/china/2014-07/04/content\\_32857792.htm](http://www.china.org.cn/china/2014-07/04/content_32857792.htm); Min Jie, *Trimming the Fat*, NEWS CHINA, May 2013, at 26–27, available at <http://www.newschinamag.com/magazine/trimming-the-fat>; THE PEOPLE’S REPUBLIC OF CHINA YEARBOOK 246 (32d ed. 2012). See also Edward Wong, *In China, Widening Discontent Among the Communist Party Faithful*, N.Y. TIMES, Jan. 20, 2013, at A6. For three books about the Party—one of the world’s most opaque organizations, rivaled mainly by the Vatican—during the last two decades, see ROWAN CALLICK, THE PARTY FOREVER: INSIDE CHINA’S MODERN COMMUNIST ELITE (2013); RICHARD MCGREGOR, THE PARTY: THE SECRET WORLD OF CHINA’S COMMUNIST RULERS (2010); DAVID SHAMBAUGH, CHINA’S COMMUNIST PARTY: ATROPHY AND ADAPTATION (2008).

74. *Full Text of Constitution of Communist Party of China* [general program], PEOPLE’S DAILY ONLINE, Nov. 19, 2012, <http://english.people.com.cn/90785/8024545.html>. The Party’s constitution should not be mistaken for the national constitution, although both were written by the Party. The former deals mainly with ideology and membership, while the latter deals mainly

and legitimacy among Chinese as well as the larger international community. Eventually citizens will get fed up and resort to other ways to let the government know what they think.

For example, although rarely reported in the state-run Chinese media, mass incidents or public protests have been on the rise. China's Ministry of Public Security reported that more than 58,000 mass incidents occurred in 2003 (an average of 159 per day), more than 74,000 in 2004 (an average of 202 per day), and more than 87,000 in 2005 (an average of 238 per day),<sup>75</sup> including a notable one that year in Guangdong Province near Hong Kong. At least 3, and maybe as many as 20, protesters were shot dead by the police. It was the first known use of lethal force by authorities on protesters since June 1989 in Beijing.<sup>76</sup>

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with the framework of government.

75. I was unable to verify (personally or via Chinese contacts in Beijing) whether these numbers came from the Ministry of Public Security, which is frequently cited as the source by mostly unofficial—but reliable—sources. *China Looks for Solution to a Few Protests in Rural Areas*, PEOPLE'S DAILY ONLINE, Mar. 1, 2006, [http://english.people.com.cn/200603/01/eng20060301\\_247056.html](http://english.people.com.cn/200603/01/eng20060301_247056.html); Liu Xiaobo, *Atop a Volcano*, CHINA RTS. F., no. 1, 2005 at 39, 39–44, available at <http://www.hrichina.org/sites/default/files/PDFs/CRF.1.2005/1.2005AtopAVolcano.pdf>; Minxin Pei, *Rights and Resistance: The Changing Contexts of the Dissident Movement*, in CHINESE SOCIETY: CHANGE, CONFLICT AND RESISTANCE 31, 37 (Elizabeth J. Perry & Mark Selden eds., 3d ed. 2010). Also, none of the unofficial sources I relied on that cite these numbers define whether or how “mass incidents” or “public protests” are officially defined (i.e., how many persons must be involved and what activities they must engage in to constitute an incident or protest). [To compound confusion, a senior Party member quoted in the *People's Daily Online* article above seemingly distinguishes (without defining) protests and incidents from public order disturbances, saying that the protests only account for a very small portion of public order disturbances and the cause of the incidents (protests? public order disturbances?) are “very complicated.”] This ambiguity may be to the government's liking. Justine Zheng Ren, *What is “Mass Incident”? The Categorization and Deconstruction of a Dangerous Concept*, 4 CHINA ELECTIONS & GOVERNANCE REV. 12, 16–17 (2009), available at <http://www.cartercenter.org/resources/pdfs/peace/china/CEG-review-issue4.pdf>. Regardless, I think these numbers are probably official and, consequently, undercounts. Why would the government release such numbers, which, even if undercounts, are still quite damning? I spoke privately with a Chinese law professor in 2006 at an elite Beijing school who opined that the Ministry releases this information without realizing how bad it makes China look to the outside world. He appears to have been right—and the Ministry soon got wise. It has not released figures since then, when 90,000 mass incidents were reported. Yu Jianrong, *Anger in the Streets*, CAIJING ANN. ED. 25 (2009). Sociology professor (and doctoral supervisor of newly appointed President Xi Jinping) Sun Liping at Beijing's elite Tsinghua University estimates that 180,000 mass incidents occurred in 2010. Peter Coy et al., *The Great Fall of China*, BLOOMBERG BUS. WK., May 7–13, 2012, at 7. And some prominent China-based academics say that number has probably doubled (to 360,000 mass incidents yearly) since 2010. Hannah Beech, *Big Brotherhood*, TIME, Oct. 22, 2012, at 39.

76. *The Leonard Lopate Show: Underreported – Violent Crackdown in China* (public radio broadcast Dec. 15, 2005), available at <http://www.wnyc.org/story/51683-reporting-violence/>; Howard W. French, *Beijing Casts Net of Silence Over Protest*, N.Y. TIMES, Dec. 14, 2005, at A1; Joseph Kahn, *Military Officer Tied to Killings is Held by China*, N.Y. TIMES, Dec. 12, 2005, at A1; Howard W. French, *Protesters Say Police in China Killed Up to 20*, N.Y. TIMES, Dec. 10, 2005, at A1; *China Reveals Report on Violence in South*, CHINA DAILY (online ed.), Dec. 11,

Also, protests grew in number (almost nine-fold) and violence (including attacks on government property) from the mid-1990s to mid-2000s. Last decade estimated economic losses resulting from mass incidents totaled billions of dollars.<sup>77</sup> Former *New York Times* Beijing bureau chief Joseph Kahn writes that “[t]he scale of unrest is extraordinary for any country in peacetime.”<sup>78</sup>

Unlike in many other countries or regions, the main causes of mass incidents in China have little to do with ethnic or religious differences.<sup>79</sup> Around 92% of Chinese are ethnic Hans<sup>80</sup> and religions both native and foreign have coexisted relatively peacefully for centuries. Rampant official corruption, wage disputes, social welfare problems, the restructuring of state-owned enterprises, environmental concerns, and land-use evictions are to blame for most of China’s alarming rise in public

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2005, [http://www.chinadaily.com.cn/english/doc/2005-12/11/content\\_502385.htm](http://www.chinadaily.com.cn/english/doc/2005-12/11/content_502385.htm).

77. C. FRED BERGSTEN ET AL., CHINA: THE BALANCE SHEET: WHAT THE WORLD NEEDS TO KNOW NOW ABOUT THE EMERGING SUPERPOWER 41 (2007) (claiming that estimated economic losses totaled US \$4–5 billion, or CN ¥32–40 billion, during just the first half of 2005). Partly in response, the government recently began for the first time spending more money—at least officially—on domestic “stability protection” than national defense. Some China-based scholars worry that such spending is diverting money from initiatives that could ease the causes, instead of the symptoms, of social unrest. Chris Buckley, *China’s Internal Security Spending Tops Army Budget*, CHINA POST (online ed.), Mar. 6, 2011, <http://www.chinapost.com.tw/china/national-news/2011/03/06/293553/Chinas-internal.htm>. Also partly in response, all major industrial projects must now pass a “social risk assessment” before starting. This is meant to reduce “the large and increasingly violent environmental protests of the last year, which forced the suspension or cancellation of chemical plants, coal-fired power plants and a giant copper smelter.” Keith Bradsher, ‘Social Risk’ Test Ordered by China for Big Projects, N.Y. TIMES, Nov. 13, 2012, at A8.

78. Joseph Kahn, *Pace and Scope of Protest in China Accelerated in '05*, N.Y. TIMES, Jan. 20, 2006, at A10.

79. But two truly “mass incidents” involving ethnic differences happened late last decade in China’s far west, pitting Han Chinese against Tibetans in 2008 and Uyghurs in 2009. At least scores of people (Han and Tibetan) were killed in Tibet and hundreds (Han and Uyghur) in Xinjiang. For the government’s version of events, see *March 14: The Lhasa Riots*, CCTV NEWS, <http://www.cctv.com/english/special/tibetriots/01/index.shtml>; *July 5th: The Xinjiang Urumqi Riots*, CCTV NEWS, <http://www.cctv.com/english/special/0705riots/homepage/index.shtml>. For independent and dissenting views outside of China, see WARREN W. SMITH, JR., TIBET’S LAST STAND? THE TIBETAN UPRISING OF 2008 AND CHINA’S RESPONSE (2010); Human Rights Watch, “*We Are Afraid to Even Look for Them*”: Enforced Disappearances in the Wake of Xinjiang’s Protests [report], Oct. 21, 2009, available at <http://www.hrw.org/en/reports/2009/10/22/we-are-afraid-even-look-them-0>. For an exchange between a Chinese scholar in China and a Tibetan scholar in Canada about the longstanding “Tibet issue,” see WANG LIXIONG & TSERING SHAKYA, THE STRUGGLE FOR TIBET (2009). And for a two-part talk with Wang and his wife Tsering Woesser, a Tibetan writer and activist in Beijing, about Tibet and Xinjiang, see Ian Johnson, *Wang Lixiong and Woesser: A Way Out of China’s Ethnic Unrest?*, NYRBLOG (Aug. 8, 2014, 1:15 PM), <http://www.nybooks.com/blogs/nyrblog/2014/aug/08/wang-lixiong-woesser-chinas-ethnic-unrest/>.

80. THE PEOPLE’S REPUBLIC OF CHINA YEARBOOK, *supra* note 73, at 248. The remaining 8% of Chinese belong to 1 of 55 government-recognized ethnic minority groups.

protests.<sup>81</sup>

### C. $FS = C^2 > EP$ Does Not Add Up

Qin dynasty prime minister Li Si's ancient political equation of free speech equals chaos and confusion greater than the emperor's power (expressed mathematically as  $FS = C^2 > EP$ ) does not add up. To fix it, put a minus sign in front of  $FS$  because this is proved by Chinese history. In the polyglot United States the applicable equation has been  $FS = C^2 < PP$  ( $PP$  stands for president's power because the United States has never had an emperor). Many Americans publicly criticized and denounced then-President George W. Bush's decision to invade Iraq in 2003. One of the first and most memorable, Academy Award-winning filmmaker Michael Moore, even scolded Bush on live television during the 2003 Oscars,<sup>82</sup> less than a week after the invasion began and more than a year

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81. Amnesty Int'l, *Standing Their Ground: Thousands Face Violent Eviction in China* [report], Oct. 11, 2012, at 37, available at <http://www.amnesty.org/en/library/info/ASA17/001/2012/en>; *Recent High-Profile Mass Protests in China*, BBC NEWS, July 3, 2012, <http://www.bbc.co.uk/news/world-asia-china-18684903>; Sun Zhe, *Fishermen's Fury*, NEWS CHINA, Mar. 2012, at 34, available at <http://www.newschinamag.com/magazine/fishermens-fury>; Jim Yardley, *Premier Says China Beset by Corruption and Rural Land Issues*, N.Y. TIMES, Mar. 14, 2006, at A5; Joseph Kahn, *Chinese Premier Says Seizing Peasants' Land Provokes Unrest*, N.Y. TIMES, Jan. 21, 2006, at A3; Howard W. French, *Land of 74,000 Protests (but Little is Ever Fixed)*, N.Y. TIMES, Aug. 24, 2005, at A4; *A Chronology of Unrest*, CHINA RTS. F., no. 1, 2005 at 20, 20–22, available at <http://www.hrichina.org/sites/default/files/PDFs/CRF.1.2005/1.2005AChronologyofUnrest.pdf>. See generally Eva Pils, *Taking Yuan (冤) Seriously: Why the Chinese State Should Stop Suppressing Citizen Protests Against Injustice*, 25 TEMP. INT'L & COMP. L.J. 285 (2011); Jun Jing, *Environmental Protests in Rural China*, in CHINESE SOCIETY: CHANGE, CONFLICT AND RESISTANCE 197 (Elizabeth J. Perry & Mark Selden eds., 3d ed. 2010); CHING KWAN LEE, *AGAINST THE LAW: LABOR PROTESTS IN CHINA'S RUSTBELT AND SUNBELT* (2007); KEVIN J. O'BRIEN & LIANJIANG LI, *RIGHTFUL RESISTANCE IN RURAL CHINA* (2006); Eva Pils, *Land Disputes, Rights Assertion, and Social Unrest in China: A Case from Sichuan*, 19 COLUM. J. ASIAN L. 235 (2005); Human Rights Watch, *Demolished: Forced Evictions and the Tenants' Rights Movement in China* [report], Mar. 24, 2004, available at <http://www.hrw.org/en/reports/2004/03/24/demolished-0>. Disagreement exists over the broad meaning and ultimate impact of this rise. See generally Shi Fayong, *Improving Local Governance Without Challenging the State: The Middle-Class Protest in Urban China*, 12 CHINA: INT'L J. 153 (2014); XI CHEN, *SOCIAL PROTEST AND CONTENTIOUS AUTHORITARIANISM IN CHINA* (2012); Ho-fung Hung, *South China's Protests Are Not as Subversive as Many Think*, COLUM. U. PRESS BLOG (Jan. 24, 2012, 12:42 PM), <http://www.cupblog.org/?p=5224>; Bruce J. Dickson, *No "Jasmine" for China*, CURRENT HIST.: J. CONTEMP. WORLD AFF., Sept. 2011, at 211; MARTIN KING WHYTE, *MYTH OF THE SOCIAL VOLCANO: PERCEPTIONS OF INEQUALITY AND DISTRIBUTIVE INJUSTICE IN CONTEMPORARY CHINA* (2010); Xiao Qiang, *Sun Liping (孙立平): The Biggest Threat to China is Not Social Turmoil but Social Decay (Part I)*, CHINA DIGITAL TIMES (Mar. 10, 2009, 10:26 PM), <http://chinadigitaltimes.net/2009/03/sun-liping-孙立平-the-biggest-threat-to-china-is-not-social-turmoil-but-social-decay/>; IS CHINA UNSTABLE?: ASSESSING THE FACTORS (David Shambaugh ed., 2000).

82. Moore's Oscar acceptance speech can be read, seen, and heard in its entirety at

before Bush's main justifications (Iraqi weapons of mass destruction and ties to al-Qaida terrorists) for waging a pre-emptive war were officially discredited,<sup>83</sup> as a "fictitious" president and said that the United States had been sent to war for "fictitious" reasons.

The following year, just four months before a small majority of Americans re-elected Bush,<sup>84</sup> Moore released *Fahrenheit 9/11*, an award-winning and record-setting documentary film that harshly criticizes Bush's first term as president and mocks his pre-White House life.<sup>85</sup> Americans took to the streets that summer to see the movie and that fall to vote for president. But they did not kill each other, kill Bush, or bomb the White House. They spoke freely and behaved civilly for the most part. And Bush won a second term. Chinese Communist Party, take note: no matter what domestic critics say and citizens hear publicly about a top political leader or that leader's policies, that leader and his party can still win a majority of votes and legitimately stay in power.

#### D. Rewards of Free Speech

Tolerating free speech in the political sphere yields two valuable rewards. First, it is highly therapeutic. Citizens can say whatever is on their minds and not have to keep their thoughts pent up. This gives them a sense of being heard, participating in political processes, and shaping their own destinies. Moreover, it can reduce the likelihood of clashes growing yearly between citizens with pent-up political speech and the

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<http://www.americanrhetoric.com/speeches/michaelmooreoscaracceptance.htm>.

83. See generally COMPREHENSIVE REPORT OF THE SPECIAL ADVISOR TO THE DCI ON IRAQ'S WMD (Sept. 30, 2004), available at [https://www.cia.gov/library/reports/general-reports-1/iraq\\_wmd\\_2004/index.html](https://www.cia.gov/library/reports/general-reports-1/iraq_wmd_2004/index.html); THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (July 22, 2004), available at <http://www.gpo.gov/fdsys/pkg/GPO-911REPORT/content-detail.html>.

84. Bush beat his main challenger, then-Senator John Kerry, by 3,012,166 popular votes (out of 122,295,395 total votes cast nationally) and 35 electoral votes. FEDERAL ELECTIONS 2004: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 5–6 (2005), available at <http://www.fec.gov/pubrec/fe2004/federaelections2004.pdf>. In the closest and most controversial presidential election in U.S. history, Bush lost the national popular vote by 543,895 votes (out of 105,405,100 total votes cast nationally) to then-Vice President Al Gore in 2000. But he eked out a five electoral-vote win, which, along with the intervention of a deeply divided U.S. Supreme Court, helped him become president. FEDERAL ELECTIONS 2000: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES [Table: 2000 Presidential Electoral and Popular Vote] (2001), <http://www.fec.gov/pubrec/fe2000/elecpop.htm>. See generally RECOUNT: THE STORY OF THE 2000 PRESIDENTIAL ELECTION (DVD: HBO Studios 2008); BUSH V. GORE: THE COURT CASES AND THE COMMENTARY (E.J. Dionne, Jr. & William Kristol eds., 2001).

85. FAHRENHEIT 9/11 (DVD: Sony Pictures Home Entm't 2004); Geoffrey O'Brien, *Is It All Just a Dream?*, N.Y. REV. BOOKS, Aug. 12, 2004, at 17, available at <http://www.nybooks.com/articles/archives/2004/aug/12/is-it-all-just-a-dream/>; Richard Corliss, *The World According to Michael*, TIME, July 12, 2004, at 62.

state.<sup>86</sup> The Fourth Generation recognized the value of group therapy, which is why it tolerated, perhaps encouraged, mass protests in Beijing, Shanghai, and approximately thirty-eight other Chinese cities in 2005 against Japan.<sup>87</sup> These protests lasted for several weeks. Some Japanese passers-by were harassed and even beaten up. After determining that protesters had let off enough steam (and in a way that could have been directed at the Chinese government instead), the government called for the protests to end. In other words, the group therapy session was over.<sup>88</sup>

Second, it maximizes intellectual capital. The PRC seeks to turn many of its best universities like Beijing's elite Tsinghua (China's MIT) into world-class centers of learning within a decade. This involves recruiting top foreign-trained Chinese and Chinese-American specialists, setting them up in well-equipped labs, surrounding them with the smartest students, and giving them great leeway. But the political speech climate is far less open in China than in the West. Some China-based academics fear that great foreign professors publicly critical of the Party's policies will come to China for only a year or two and leave frustrated. Compounding matters, Chinese students "are not encouraged to challenge authority or received wisdom," writes former *New York Times* Shanghai bureau chief Howard French. "For some, that helps explain why China has never won a Nobel Prize [in the sciences]. What is needed most now, some of China's best scholars say, are bold, original thinkers."<sup>89</sup> If

86. MINXIN PEI, CHINA'S TRAPPED TRANSITION: THE LIMITS OF DEVELOPMENTAL AUTOCRACY 203 (2006); SOR-HOON TAN, CONFUCIAN DEMOCRACY: A DEWEYAN RECONSTRUCTION 182 (2003) (discussing ancient Chinese arguments for a "safety-valve" defense of free speech); FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 78–80 (1982). And according to another China scholar, "They [China's rulers] are coming up against a number of uncomfortable facts. There is a great deal of repressed demand out there for political expression . . . there is a fear [by the rulers] that if you give an inch, they [the ruled] will take a mile." Jim Yardley, *Report Calls Communist Party Rule Essential to Democracy in China*, N.Y. TIMES, Oct. 20, 2005, at A5.

87. Protesters, mostly nationalistic youth, were upset with the Japanese government for several reasons: its attempt to become a permanent member of the U.N. Security Council, its approval of high school textbooks that Chinese felt whitewashed Japan's war crimes in China during World War II, and a visit by the then-prime minister of Japan to a Tokyo shrine that memorializes World War II military heroes—including some war criminals. SUSAN L. SHIRK, CHINA: FRAGILE SUPERPOWER 140 (2007). Similar protests broke out again in 2012, this time over a long-contested, uninhabited [and uninhabitable] tiny set of East China Sea islands known as Diaoyu in China and Senkaku in Japan. JESSICA CHEN WEISS, POWERFUL PATRIOTS: NATIONALIST PROTEST IN CHINA'S FOREIGN RELATIONS 189–218 (2014); Sophie Beach, *Anti-Japan Protests Escalate, Turn Violent*, CHINA DIGITAL TIMES (Sept. 16, 2012, 1:11 AM), <http://china.digitaltimes.net/2012/09/anti-japan-protests-escalate-turn-violent/>.

88. Pu Zhiqiang, *China's Selective Memory* [Perry Link trans.], N.Y. TIMES, Apr. 28, 2005, at A25. For a scholarly assessment, see WEISS, *supra* note 87, at 127–59.

89. Howard W. French, *China Luring Scholars to Make Universities Great*, N.Y. TIMES, Oct. 28, 2005, at A1. See generally ROBERT A. RHOADS ET AL., CHINA'S RISING RESEARCH UNIVERSITIES: A NEW ERA OF GLOBAL AMBITION (2014). See also Melinda Liu, *How High?*,

the Party tolerated free speech, then it, the PRC, and the world could reap enormous benefits in the sciences as well as other fields of human endeavor.

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NEWSWEEK [special ed.]: ISSUES 2006/THE KNOWLEDGE REVOLUTION, Dec. 2005–Feb. 2006, at 31 (discussing the “stuffed-duck system” of Chinese education that has resulted in a lack of curiosity and creativity among many Chinese students); Chris Davis, *Biologist Laments Science Brain Drain*, S. CHINA MORNING POST, Dec. 9, 2004, at BN20; Jean Nicol, *Why Are There So Few Chinese Nobel Laureates? And Does it Matter?*, S. CHINA MORNING POST, Jan. 31, 2003, at IE13. Educational—and related political and legal—mediocrity may ultimately sink the PRC’s experiment in free-market authoritarianism. Xu Tian is one of the world’s top geneticists. Xu was born in China and educated there (at Shanghai’s prestigious Fudan University) soon after the Cultural Revolution and in the United States (at Yale), and is rumored to be a potential Nobel laureate. He became an American citizen in the 1990s, but visits China to teach. While acknowledging the improved economic lot of many Chinese since the mid-1990s, he thinks that materialism has fueled an overpowering urge to “get rich quickly” among students. As a result, few of them have the patience for pure inquiry. Howard W. French, *A Lifetime in Recovery From the Cultural Revolution*, N.Y. TIMES, Oct. 22, 2005, at A4. Another concerned Chinese scientist who moved to the United States after 1989 thinks there is a lack of political idealism among university students in China. “Students on China’s main campuses today are very different than in 1989. Today, they actually like the Communist Party . . . They want to make money, not democracy. For them, the Communist Party is a good thing because it offers the stability they need to get rich.” Fang Lizhi, *China’s Students: More Pro-Money Than Pro-Democracy*, NEW PERSP. Q., Spring 2005, at 35. Similarly, a Chinese professor of anthropology based in the United States writes,

Without young people’s idealism or counterculture, where are the internal catalysts for a society to improve itself? A whole generation of pragmatic youth can be a factor for social and political stability in the short run, but in the long run they could also prove a huge liability for innovation and replenishment because there will be few to raise the bar of justice and equality or push the envelope of social progress.

Yunxiang Yan, *Little Emperors or Frail Pragmatists? China’s ‘80ers Generation*, CURRENT HIST.: J. CONTEMP. WORLD AFF., Sept. 2006, at 262. *See also* Andrew Jacobs, *Support for [Hong Kong] Protesters is Hard to Find [Among Young Chinese] on the Streets of Beijing*, N.Y. TIMES, Oct. 10, 2014, at A11. *But see* Alec Ash, *China’s Youth: Do They Dare to Care About Politics?*, DISSENT, Spring 2013, at 44, *available at* <http://www.dissentmagazine.org/article/chinas-youth-do-they-dare-to-care-about-politics> (arguing that Chinese born in the 1980s and 90s “have a greater sense of entitlement to their rights and fewer qualms about speaking out when those rights are grossly breached” than those born in the 1950s and 60s). During a 2002 speaking tour of several top Chinese universities, American law professor Ronald Dworkin spoke with a group of students about whether their generation of leaders would and could end human rights abuses and insist on the rule of law once they came to power. They were uncertain. One remarked that it is natural not to risk losing power when one has it. Although Maoist totalitarianism is no longer the dominant ideology in China, Dworkin warns that “citizens should now fear an older and perhaps more durable form of repression: rule by people with fewer ideological commitments but with enormous power that they will do anything to keep.” Ronald Dworkin, *Taking Rights Seriously in Beijing*, N.Y. REV. BOOKS, Sept. 26, 2002, at 67.



## V. GRAND FINALE

### A. *So Long, Communist-Ruled China: 1949–201?*

It is extremely hard, if not impossible, to imagine the PRC in the future as a fully developed postindustrial nation capable of cultivating and attracting bold, original minds yet incapable of tolerating free speech in the political sphere. No precedent exists. Perhaps China will be the first. But the odds are unfavorable.<sup>90</sup> The best bet would be for the Party to begin immediately tolerating such speech. This suggestion probably strikes most readers as absurd. Why should the Party, which has held total power for sixty-five years, willingly do something that could reduce its power? Because “the world today has no septuagenarian one-party governments—and for good reason,” writes professor Minxin Pei.<sup>91</sup>

In democratic societies external incentives (voters, free press, and independent non-governmental organizations) compel political parties to transform themselves regularly. But one-party governments have neither external nor internal incentives. As the nineteenth-century British historian Lord Acton famously remarked, “Power tends to corrupt and absolute power corrupts absolutely.”<sup>92</sup> Serious problems go unsolved and metastasize, causing larger crises.<sup>93</sup> And larger crises result in either the

90. See generally PEI, *supra* note 86. See also Stephen L. Sass, *Can China Innovate Without Dissent?*, N.Y. TIMES (online ed.), Jan. 21, 2014, <http://nyti.ms/1aGokgv> (“[A]s a scientist who has taught in China, I don’t believe that China will lead in innovation anytime soon – or at least not until it moves its institutional culture away from suppression of dissent and toward freedom of expression and encouragement of critical thought.”); AI WEIWEI, AI WEIWEI’S BLOG: WRITINGS, INTERVIEWS, AND DIGITAL RANTS, 2006–2009, at 140 (Lee Ambrozy ed. & trans., 2011) (“Modernity cannot exist without freedom of speech.”).

91. Minxin Pei, *Here Today, Gone Tomorrow: The Chinese Communist Party*, FOREIGN POL’Y, Sept.-Oct. 2005, at 47, available at [http://www.foreignpolicy.com/articles/2005/08/30/the\\_chinese\\_communist\\_party](http://www.foreignpolicy.com/articles/2005/08/30/the_chinese_communist_party). Perhaps mindful of this fact, China’s new president voiced his concerns recently for the Party’s continued rule. See Malcolm Moore, *Communist Party’s Future on the Line, Warns Xi Jinping*, TELEGRAPH (online ed.), Mar. 3, 2013, <http://www.telegraph.co.uk/news/worldnews/asia/china/9905760/Communist-partys-future-on-the-line-warns-Xi-Jinpin-g.html>.

92. JOHN EMERICH EDWARD DALBERG ACTON, *ESSAYS ON FREEDOM AND POWER* 335 (1948).

93. Pei, *supra* note 91. See also BRUCE GILLEY, *CHINA’S DEMOCRATIC FUTURE: HOW IT WILL HAPPEN AND WHERE IT WILL LEAD* 251 (2004) (“Dictatorships like the CCP have proven unsustainable precisely because of their inability to respond to crises like SARS [in 2003] that arise on the back of accumulated misgovernance . . . Authoritarian regimes live from crisis to crisis and there will be many more to come in China.”). Perhaps the worst crisis since then occurred at 2:28 PM China Standard Time on May 12, 2008, when a 7.9 magnitude earthquake struck Sichuan province. Around 87,000 people died or were presumed dead (including over 5000 children in collapsed school buildings) and over 5 million people were left homeless. For the first few weeks after, the Chinese government surprisingly let the domestic and foreign media report freely on the disaster. But this freedom ended with the asking of tough questions about poorly

downfall of authoritarian governments or their temporary preservation by declaring martial law and using the military against citizens.<sup>94</sup>

### B. *Speak and Let Speak*

The Party has a terrible record when it comes to free speech. As a result, it lacks free-speech credibility. No reasonable Chinese would believe the Party if tomorrow its top leaders announced that citizens could publicly criticize the government (and not fear prosecution or detention).<sup>95</sup> Similar announcements in the mid-1950s and late 1970s

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built “tofu” schools and local government corruption. Andrew Jacobs & Edward Wong, *China Reports Student Toll for Quake*, N.Y. TIMES, May 8, 2009, at A10; James Reynolds, *Shutting Us Out?*, JAMES REYNOLDS’ CHINA (June 13, 2008, 5:42 AM), [http://www.bbc.co.uk/blogs/the-reporters/jamesreynolds/2008/06/shutting\\_us\\_out.html](http://www.bbc.co.uk/blogs/the-reporters/jamesreynolds/2008/06/shutting_us_out.html); Stephen Kaufman, *China’s Government Praised for Easing Media Restrictions*, IIP DIGITAL, May 20, 2008, <http://iipdigital.us.embassy.gov/st/english/article/2008/05/20080520153034esnamfuak0.7039911.html>.

94. For a still-controversial Chinese example of the latter from 1989, see CRIES FOR DEMOCRACY; THE TIANANMEN PAPERS; THE GATE OF HEAVENLY PEACE; *Frontline*, *supra* note 13.

95. Two top Party leaders urged and encouraged citizens to criticize the government recently, but failed to mention whether citizen-critics should not fear prosecution or detention. *Xi Jinping Urges CPC to Accept Criticism*, XINHUANET, Feb. 7, 2013, [http://news.xinhuanet.com/english/china/2013-02/07/c\\_132158173.htm](http://news.xinhuanet.com/english/china/2013-02/07/c_132158173.htm); David Barboza, *China Leader [Wen Jiabao] Encourages Criticism of Government*, N.Y. TIMES, Jan. 27, 2011, at A9. In the mid-1950s China began practicing “re-education through labor,” or RTL, which is a Soviet-transplanted administrative sanction that applies to citizens who commit minor offenses but not real crimes. Detention can last between one to four years in prison-like conditions. It has been used widely against political dissidents. Mike P.H. Chu, *Criminal Procedure Reform in the People’s Republic of China: The Dilemma of Crime Control and Regime Legitimacy*, 18 UCLA PAC. BASIN L.J. 158, 177 (2000). See also LIANG HENG & JUDITH SHAPIRO, *INTELLECTUAL FREEDOM IN CHINA AFTER MAO: WITH A FOCUS ON 1983*, at 56–60 (1984) (discussing the four levels of sanctions—criminal, sub-criminal, disciplinary, and informal—for citizens overstepping the bounds of free speech); Manfred Nowak, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, on His Mission to China (20 November to 2 December 2005)*, U.N. Doc. E/CN.4/2006/6/Add.6 (Mar. 10, 2006), available at <http://www.ohchr.org/EN/countries/AsiaRegion/Pages/CNIndex.aspx>. Section 4 of the *Report* focuses on the deprivation of liberty for political crimes and RTL as a form of inhuman or degrading treatment. The Chinese government committed itself publicly in 2005 for the first time to building political democracy. Info. Office of the State Council of the People’s Republic of China, *Building of Political Democracy in China*, Oct. 2005, <http://www.china.org.cn/english/features/book/145877.htm>. But the Special Rapporteur noted that China’s use of RTL against citizens exercising their right to free speech, which is a human right at the very core of a democratic society, seems to be incompatible with building political democracy. Nowak, *id.* para. 65. For two books about the distinct but related Chinese RTL and prison systems, see LAOGAI: THE MACHINERY OF REPRESSION IN CHINA (Nicole Kempton & Nan Richardson eds., 2009) (laojiao [aka “RTL”] camps house persons denied trials, while laogai [aka “reform through labor”] camps house persons sentenced at trials); JAMES D. SEYMOUR & RICHARD ANDERSON, *NEW GHOSTS, OLD GHOSTS: PRISON AND LABOR REFORM CAMPS IN CHINA* (1999). See also Laogai Research Foundation (<http://laogai.org/>), founded by laogai survivor and human rights crusader Harry Wu.

ended in disaster for those who spoke out most critically.

Although the Party cannot play an active role by encouraging citizens, it can play a passive one by simply letting free speech happen.<sup>96</sup> Besides, Chinese do not need encouragement to speak out. Speaking truth to power is rooted deeply in their history.<sup>97</sup> It is one of the most Chinese things a

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In January 2013 the Chinese government announced that it would seek to reform RTL by year's end, but failed to say whether reform meant curtailment or abolition. On December 28, it said the latter. While a positive development, time will tell if RTL lives on under a new name to silence citizen-critics. Samuel Wade, *Criminal Detention Replacing Re-Education Through Labor*, CHINA DIGITAL TIMES (Apr. 21, 2014, 9:53 PM), <http://chinadigitaltimes.net/2014/04/criminal-detention-replacing-re-education-labor/>; Frank Langfitt, *China Ends One Notorious Form of Detention, but Keeps Others*, PARALLELS (Feb. 5, 2014, 3:29 AM), <http://www.npr.org/blogs/parallels/2014/02/05/271412045/china-ends-one-notorious-form-of-detention-but-keeps-others/>; *China Abolishes Reeducation Through Labor*, NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA, Dec. 30, 2013, [http://www.npc.gov.cn/englishnpc/news/Legislation/2013-12/30/content\\_1821953.htm](http://www.npc.gov.cn/englishnpc/news/Legislation/2013-12/30/content_1821953.htm); Sophie Beach, *Family Planning and Labor Camp Reforms Approved*, CHINA DIGITAL TIMES (Dec. 28, 2013, 10:36 PM), <http://chinadigitaltimes.net/2013/12/family-planning-labor-camp-reforms-formally-approved/>; *The End of Reeducation Through Labor? Recent Developments and Prospects for Reform: Roundtable Before the Cong.-Exec. Comm'n on China*, 113th Cong., 1st Sess. (May 9, 2013), available at <http://www.cecc.gov/events/roundtables/the-end-of-reeducation-through-labor-recent-developments-and-prospects-for-reform/>; Nicholas Bequelin, *Re-education Revisited*, N.Y. TIMES (online ed.), Jan. 29, 2013, <http://www.nytimes.com/2013/01/30/opinion/global/re-education-revisited.html?smid=pl-share>.

96. Hu, *supra* note 2, at 428. "When we demand freedom of speech, we are not asking the government to do anything just asking it to refrain from doing something. This is not something that requires spending money and effort, but, rather, saves money and effort." *Id.* See also Margaret Ng, *Are Rights Culture-bound?*, in HUMAN RIGHTS AND CHINESE VALUES: LEGAL, PHILOSOPHICAL, AND POLITICAL PERSPECTIVES 59, 61–62 (Michael C. Davis ed., 1995) (distinguishing positive rights from negative rights and ranking the latter higher). I had a private discussion last decade with a Chinese law professor at an elite Beijing school about whether the government should simply let free speech happen. The professor opined that before citizens can be allowed to speak freely, the government must strengthen the rule of law. This sounds like a variation of the trendy gradualist argument advocating economic reforms ahead (or instead?) of political reforms. The gradualist approach is more myth than reality, more self-serving than altruistic. It presumes that ordinary citizens are incapable of being governed and, therefore, must be ruled by an elite that postpones them the exercise of their freedoms and rights until that elite deems those citizens are ready to exercise them at some always unspecified future date when everyone is rich and well-educated. There is no historical precedent of this ever happening, of benevolent autocrats voluntarily allowing subjects real freedoms and rights. Subjects must demand them! FANG, *supra* note 58, at 257; MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 91 (Signet Classics 2000) (1963). A great Chinese scholar last century, Hu Shih (1891–1962), wrote that "[t]he only way to have democracy is to have democracy." Schell, *supra* note 54, at 123. Similarly, I think that the only way to have free speech is to have free speech. It is not a product or distant descendant of the rule of law, but a producer and constant companion. Without it, how else can a legitimate rule of law take root and grow?

97. Paul S. Ropp, *Vehicles of Dissent in Late Imperial Chinese Culture*, in LA SOCIÉTÉ CIVILE FACE À L'ÉTAT: DANS LES TRADITIONS CHINOISE, JAPONAISE, CORÉENNE ET VIETNAMIENNE 117, 118 (Léon Vandermeersch ed., 1994); NEW GHOSTS, OLD DREAMS: CHINESE REBEL VOICES xxiii–xxiv, 23 (Geremie Barmé & Linda Jaivin eds., 1992); WORLDLY

person can do. Once citizens realize that they will not be punished for speaking their minds on political matters, free speech will be realized.<sup>98</sup> The Party's credibility and legitimacy will both suffer and improve because honesty dispels myth and fosters trust. Admittedly, this means that at some point in the near future the Party will probably have to share legislative power with or peacefully transfer executive power to an opposition party. (The latter happened on the self-governed Chinese island of Taiwan in 2000 for the first time in Chinese history, and again in 2008.) But it is better to do so than to risk losing all power permanently and violently as well as jeopardizing the nation's unity and progress.

In 2006 a dozen former Party officials and senior scholars—including a onetime secretary to Mao, a Party propaganda chief, and the retired bosses of some of the PRC's most powerful newspapers—issued a public letter urging more free speech. “At the turning point in our history from a totalitarian to a constitutional system,” they wrote, “depriving the public of freedom of speech will bring disaster for our social and political transition and give rise to group confrontation and social unrest. Experience has proved that allowing a free flow of ideas can improve

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WISDOM: CONFUCIAN TEACHINGS OF THE MING DYNASTY xviii (J.C. Cleary trans. & ed., 1991); TSO CH'IU-MING, *THE TSO CHUAN: SELECTIONS FROM CHINA'S OLDEST NARRATIVE HISTORY* xv-xix (Burton Watson trans., 1989) (4th-century BCE); WM. THEODORE DE BARY, *THE LIBERAL TRADITION IN CHINA* 97 (1983). See generally QIANG FANG, *CHINESE COMPLAINT SYSTEMS: NATURAL RESISTANCE* (2013); David McMullen, *Memorials and Essays: Political Protest in Late Medieval China*, 3 INT'L J. CHINA STUD. 239 (2012), available at <http://ics.um.edu.my/images/ics/IICSV3N3/mcmullen.pdf>; Wen-hsin Yeh, *Discourses of Dissent in Post-Imperial China*, in REALMS OF FREEDOM IN MODERN CHINA 165 (William C. Kirby ed., 2004); ALFREDA MURCK, *POETRY AND PAINTING IN SONG CHINA: THE SUBTLE ART OF DISSENT* (2000); JEFFREY N. WASSERSTROM, *STUDENT PROTESTS IN TWENTIETH-CENTURY CHINA: THE VIEW FROM SHANGHAI* (1991); GÖRAN LEIJONHUFVUD, *GOING AGAINST THE TIDE: ON DISSENT AND BIG-CHARACTER POSTERS IN CHINA* (1990); LAURENCE A. SCHNEIDER, *A MADMAN OF CH'U: THE CHINESE MYTH OF LOYALTY AND DISSENT* (1980). Two current, real-life events also attest to China's ancient tradition of free speech. First, a traditional and newly official Chinese holiday commemorates one of China's most famous free speakers: 3rd-century BCE poet-statesman and self-martyr Qu Yuan (the “madman” of Schneider's above-cited book). The popular *Duanwu* or “Double Fifth” Festival is held annually on the fifth day of the fifth lunar month and involves, among other things, racing dragon boats. *The Dragon Boat Race* (Patricia Buckley Ebreys trans.), in *CHINESE CIVILIZATION*, *supra* note 35, at 208–10. Second, Dr. Paul Ropp, a distinguished professor (retired from full-time teaching since 2011) of Chinese history at Clark University in Massachusetts, periodically teaches a seminar titled *Political Dissent in Chinese History*. It explores this topic from the 4th-century BCE to the present and counterbalances Western awareness of China's similarly ancient tradition of autocratic rule. *Paul Ropp, Ph.D.*, CLARK UNIVERSITY HISTORY DEPARTMENT FACULTY BIOGRAPHY, <http://www.clarku.edu/departments/history/facultybio.cfm?id=192>.

98. LIU XIAOBO, *supra* note 14, at 319 (“Only when the practice of treating speech as crime is fundamentally uprooted from our system can citizens across our great land finally be assured that the freedom of speech guaranteed by our constitution will be a living reality for them.”).

stability and alleviate social problems.”<sup>99</sup> They know intimately China’s past and present, and are all too correct.

The Party’s survival hinges on free speech. It must soon make a fateful decision whether to keep suppressing free speech like the doomed Qin, Song, and Ming rulers or tolerate it and help catapult China into the top tier of advanced nations by century’s end.<sup>100</sup> Albeit hard, the latter choice is best because it exacts a lesser cost from the Party for being allowed a place in a healthy, stable, and dynamic nation.<sup>101</sup> What is the worst that

99. Joseph Kahn, *Beijing Censors Taken to Task in Party Circles*, N.Y. TIMES, Feb. 15, 2006, at A1. Similarly, many Chinese intellectuals in the PRC and around the world signed another letter in 2006 stating that “[p]eople cannot live without freedom of speech, and suppressing this freedom violates the United Nations’ Universal Declaration of Human Rights as well as China’s Constitution.” Liu Xiaobo, *One Hundred Intellectuals’ Letter of Appeal on the Shutdown of Century China*, N.Y. REV. BOOKS (online ed.), Nov. 2, 2006, <http://www.nybooks.com/articles/archives/2006/nov/02/one-hundred-intellectuals-letter-of-appeal-on-the-/>. Since then, at least two more such letters were submitted to the Chinese government. Press Release, International Committee for Liu Xiaobo, 134 Nobel Laureates Urge Incoming Chinese President Xi Jinping to Release Nobel Peace Prize Laureate Liu Xiaobo and Wife Liu Xia (Dec. 4, 2012), [http://www.fidh.org/IMG/pdf/campagne\\_librezliuxiaobo.pdf](http://www.fidh.org/IMG/pdf/campagne_librezliuxiaobo.pdf); David Bandurski, *Open Letter from Party Elders Calls for Free Speech*, CHINA MEDIA PROJECT, Oct. 13, 2010, <http://cmp.hku.hk/2010/10/13/8035/>.

100. In 2005 then-U.S. President George W. Bush met with then-PRC President Hu Jintao in Beijing. According to Bush administration officials told about the meeting, Hu told Bush “that fighting political corruption, rural unrest, a widening wealth gap and severe pollution consumes nearly all his time. He said domestic problems left China with neither the will nor means to challenge America’s dominance in world affairs.” Joseph Kahn, *In Private Candor from China, An Overture to Promote a Thaw*, N.Y. TIMES, Apr. 17, 2006, at A1. For more about economic, environmental, political, and social forces that could prove profoundly destabilizing, see generally SHIRK, *supra* note 87; Jonathan R. Laing, *What Could Go Wrong with China?*, BARRON’S, July 31, 2006, at 21. Party leaders, however, may be up to the task of fixing China’s numerous problems. “After more than a century of misrule, China is now run by the best governing class in generations. Gone are the aging commissars clinging to party rule; they have been replaced by leaders committed to moving the country forward, including many young mayors who have been trained at U.S. universities.” Kishore Mahbubani, *Understanding China*, FOREIGN AFF., Sept./Oct. 2005, at 49, 52. China’s current leaders may be better schooled than their predecessors, but they are not necessarily more upright. This helps explain why official corruption is rife. John L. Thornton, *China’s Leadership Gap*, FOREIGN AFF., Nov./Dec. 2006, at 133, 136–37. And “[i]t remains to be seen whether they will be able to do what they claim they can: surmount the country’s challenges and solve the Party’s problems without fundamentally restructuring the political system.” NATHAN & GILLEY, *supra* note 17, at 229. According to some PRC officials and scholars, China’s current problems are more political and legal than economic. They think that allowing ordinary citizens a greater say in public affairs could help solve these problems. Joseph Kahn, *At a Secret Meeting, Chinese Analysts Clashed Over Reforms*, N.Y. TIMES, Apr. 7, 2006, at A14.

101. See generally Liu Xiaobo, *supra* note 75. See also Gary F. Locke, *Ambassador Locke’s Remarks at Renmin University Law School*, EMBASSY OF THE UNITED STATES (BEIJING, CHINA), Jan. 17, 2014, <http://beijing.usembassy-china.org.cn/2014ir/ambassador-lockes-remarks-at-renmin-university-law-school2.html> (“China has a great future ahead of it, but reaching its full potential will depend on . . . respect for the constitutionally guaranteed freedom of speech for all”); Liu

can happen: growing social unrest and ongoing brain drain?<sup>102</sup> These are the most impactful ways ordinary citizens can now publicly show direct criticism of the government.<sup>103</sup> Unless this changes, disharmony and

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Junning, *supra* note 14 (“Real success for China in the 21st century will depend not on the Communist Party itself, but on the establishment of the rule of law, limited government, and further economic liberalization that opens China’s market to the world.”); Jim Yardley, *Fired Editors of Chinese Journal Call for Free Speech in Public Letter*, N.Y. TIMES, Feb. 18, 2006, at A5 (quoting reply of scholars to then-President Hu’s call for a harmonious society: “a truly harmonious society is actually a society that appears to be rife with various conflicts”); BO YANG [pen name of Guo Yidong], *THE UGLY CHINAMAN AND THE CRISIS OF CHINESE CULTURE* ix–x (Don J. Cohn & Jing Qing eds. & trans., 1992) (“It will take the re-establishment of a market economy, the institution of a democratic system of government, and a long period of political and economic stability before the Chinese people can begin to live normal, healthy lives.”). For an English translation of the full letter discussed above by Yardley, see HE, *supra* note 34, at 181–88.

102. On brain drain, see generally Qian Wei & Xie Ying, *Tempting Talent*, NEWS CHINA, Feb. 2014, at 32, available at <http://www.newschinamag.com/magazine/tempting-talent>; Ian Johnson, *Wary of Future, Professionals Leave China in Record Numbers*, N.Y. TIMES, Nov. 1, 2012, at A1; Mark McDonald, *Heading for the Exits in China*, RENDEZVOUS (Aug. 15, 2012, 1:19 AM), <http://rendezvous.blogs.nytimes.com/2012/08/15/heading-for-the-exits-in-china/>; Cong Cao, *China’s Brain Drain at the High End: Why Government Policies Have Failed to Attract First-Rate Academics to Return*, 4 ASIAN POPULATION STUD. 331 (2008). See also Li Fangchao, *China Hit by Brain Drain, Report Says*, CHINA DAILY, June 1, 2007, at 3, available at [http://www.chinadaily.com.cn/china/2007-06/01/content\\_884824.htm](http://www.chinadaily.com.cn/china/2007-06/01/content_884824.htm); Freda Wan, *Social Sciences Hit Hard by Brain Drain; Only 4% of Elite Academy’s Students Who Go Overseas Return After Graduating*, S. CHINA MORNING POST, Mar. 5, 2004, at 7. But see Pete Engardio, *China’s Reverse Brain Drain*, BUS. WK. (online ed.), Nov. 19, 2009, [http://www.businessweek.com/magazine/content/09\\_48/b4157058821350.htm](http://www.businessweek.com/magazine/content/09_48/b4157058821350.htm); Mary Hennock, *China’s Reverse Brain Drain*, NEWSWEEK (online ed.), Aug. 8, 2008, <http://www.newsweek.com/chinas-reverse-brain-drain-87877>; *China Sees “Brain Drain” Reversed*, XINHUANET, Dec. 18, 2003, [http://news.xinhuanet.com/english/2003-12/18/content\\_1238132.htm](http://news.xinhuanet.com/english/2003-12/18/content_1238132.htm). If brain drain really is reversing, then it is probably due just as much to tighter job markets and cumbersome immigration laws abroad, especially in the United States, as to whatever the Chinese government is doing to lure citizens back. P’ship for a New Am. Econ. & P’ship for New York City, *Not Coming to America: Why the U.S. is Falling Behind in the Global Race for Talent* [report], May 2012, at 28–30, available at <http://www.renewoureconomy.org/sites/all/themes/pnae/not-coming-to-america.pdf>. Also, the Party’s efforts to restrict free speech online—known outside China as the “Great Firewall” and inside China as the “Golden Shield”—might help reverse the “reverse brain drain” and lead to unintended consequences that threaten China’s current economic growth. For example, a Chinese doctoral student in physics at New York University who has job offers from top technology companies in the United States and China may just choose the former because the “Great Firewall” could hinder the student’s ability to conduct research and innovate. *The Brian Lehrer Show: Keep on Rocking in the Friedman World* (public radio broadcast Apr. 19, 2006), available at <http://www.wnyc.org/story/23478-keep-on-rocking-in-the-friedman-world/>. See also Jeffrey R. Young, *For Chinese Academics, ‘Great Fire Wall’ Hinders Networking with Colleagues*, COLLEGE 2.0 (Sept. 8, 2010), <http://chronicle.com/blogs/college20/for-chinese-academics-great-fire-wall-hinders-networking-with-colleagues/26785>.

103. And increasingly since 2009, another kind of mass incident: setting one’s self on fire in public. Tsering Woenser, *Tibet’s Enduring Defiance* [Violet S. Law trans.], N.Y. TIMES (online ed.), Mar. 2, 2014, <http://nyti.ms/1eSi4QB>; Samuel Wade, *Flames of Protest: The History of Self-*

mediocrity will only worsen in the world's most populous nation. And when a breaking point is reached, myriad global repercussions will follow due to the mutually dependent economic links between China and the rest of the world.<sup>104</sup>

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*Immolation*, CHINA DIGITAL TIMES (Feb. 21, 2013, 12:24 AM), <http://chinadigitaltimes.net/2013/02/flames-of-protest-the-history-of-self-immolation/>; Amnesty Int'l, *supra* note 81, at 40–43, 56–65; Carole McGranahan & Ralph Litzinger, *Self-Immolation as Protest in Tibet*, CULTURAL ANTHROPOLOGY ONLINE, Apr. 9, 2012, <http://www.culanth.org/fieldsights/93-self-immolation-as-protest-in-tibet>. A 2006 controversy over a blockbuster film illustrates a humorous but indirect way Chinese can criticize the Party. A young man named Hu Ge paid hard-earned money to watch the much-hyped, big-budget kung-fu fantasy film *The Promise* by acclaimed director Chen Kaige at a movie theater. The film disappointed him. Feeling cheated, Hu obtained a copy of the film and made a short video parody of it on his computer. He emailed his parody, variably titled in English translation as *The Bloodbath that Began with a Steamed Bun*, to some friends. It quickly became the most downloaded and talked-about item on the Chinese Internet. Besides mocking *The Promise*, Hu's parody also takes aim at the state-run media and exploitation of migrant workers. Fans of the parody view Chen as belonging to the Party establishment. Mocking his film is like mocking the Party minus the dangers resulting from direct confrontation. Chen threatened to sue Hu for copyright violations. Hu apologized, but did not admit to breaking the law. Ching-Ching Ni, *China's Clash of Cultures in Cyberspace*, L.A. TIMES, Mar. 28, 2006, at A14. For more about China's unusual relationship with the Internet, see generally Paul Mozur & Jane Perlez, *China's Tough-Minded Web Keeper*, N.Y. TIMES, Dec. 2, 2014, at B1; David Bandurski, *Envisioning the Splinternet*, CHINA MEDIA PROJECT, Nov. 20, 2014, <http://cmp.hku.hk/2014/11/20/37261/>; CHINA DIGITAL TIMES, DECODING THE CHINESE INTERNET: A GLOSSARY OF POLITICAL SLANG (Sept. 2014) [e-book], <http://chinadigitaltimes.net/2014/09/cdt-ebook-decoding-chinese-internet/>; Josh Rudolph, *Netizen Voices: Information Disclosure Request Denied*, CHINA DIGITAL TIMES (Aug. 26, 2014, 4:50 PM), <http://chinadigitaltimes.net/2014/08/netizen-voices-information-disclosure-request-denied/>; Michael R. Gordon, *Chinese Ask Kerry to Help Tear Down a Firewall*, N.Y. TIMES, Feb. 16, 2014, at A8; Yu Hua, *The Censorship Pendulum* [Allan H. Barr trans.], N.Y. TIMES, Feb. 5, 2014, at A23; JASON Q. NG, BLOCKED ON WEIBO: WHAT GETS SUPPRESSED ON CHINA'S VERSION OF TWITTER (AND WHY) (2013); *Special Report: China and the Internet*, ECONOMIST, Apr. 6, 2013, available at [http://www.economist.com/printedition/specialreports?page=2&year\[value\]=\[year\]=2013](http://www.economist.com/printedition/specialreports?page=2&year[value]=[year]=2013); Gary King et al., *How Censorship in China Allows Government Criticism but Silences Collective Expression*, 107 AM. POL. SCI. REV. 326 (2013); GUOBIN YANG, THE POWER OF THE INTERNET IN CHINA: CITIZEN ACTIVISM ONLINE (2011); "China's Internet": *Staking Digital Ground* [issue focus], CHINA RTS. F., no. 2, 2010, available at <http://www.hrichina.org/en/content/4058>. For an editorial cartoon, see Sophie Beach, *Hexie Farm (蟹农场): The Strength of Free Speech*, CHINA DIGITAL TIMES (Aug. 12, 2013, 2:08 PM), <http://chinadigitaltimes.net/2013/08/hexie-farm-蟹农场-the-strength-of-free-speech/>.

104. For two debates about China's prospects of becoming a failed state, see generally Eric X. Li, *The Life of the Party: The Post-Democratic Future Begins in China*, FOREIGN AFF., Jan./Feb. 2013, at 34; Yasheng Huang, *Democratize or Die: Why China's Communists Face Reform or Revolution*, FOREIGN AFF., Jan./Feb. 2013, at 47; Ross Terrill, *The Case for Selective Failure*, WILSON Q., Autumn 2010, at 52; David M. Lampton, *We'd Better Hope It Doesn't!*, WILSON Q., Autumn 2010, at 61. For dueling op-eds, see generally Eric X. Li, *Why China's Political Model is Superior*, N.Y. TIMES (online ed.), Feb. 16, 2012, <http://www.nytimes.com/2012/02/16/opinion/why-chinas-political-model-is-superior.html>; Roy L. Sturgeon, *China's Inferior Political Model*, FLETCHER F. WORLD AFF. (online ed.), June 28, 2013, <http://www.fletcherforum.org/2013/06/28/sturgeon/>. Warnings about China's precarious status

This Article ends as it began with more words by a Chinese citizen upon completing a four-year prison sentence last decade for publicly commemorating victims of the 1989 Beijing massacre, which remains twenty-five years later the most unspeakable topic in the PRC. He sums up the state of free speech at the start of the Hu-Wen administration in 2003, and asks a question still needing an affirmative and final answer today more than ever by the newly appointed Xi Jinping-Li Keqiang administration at the start of its rule:

If my own case has any special significance it is only that it forces people to face a highly embarrassing fact—the fact that even now, in the dawn of the twenty-first century, a Chinese citizen can be imprisoned for what he says. A person who merely exercises the normal human proclivity to say what he thinks comes to be viewed as a prize-winning hero. This is odd, my friends. Will it not be wonderful when, some day, every Chinese person will be able to say what is on his or her mind—without either prison or prizes, heroism or villainy, even coming into it?<sup>105</sup>

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are not limited to outside observers, but include a rising chorus of well-placed Chinese insiders. *China Must Prevent a “Hard Landing” of Public Frustration*, NEWS CHINA, Oct. 2013, at 1, available at <http://www.newschinamag.com/magazine/china-must-prevent-a-hard-landing-of-public-frustration>; Ben Blanchard, *China Academics Warn of “Violent Revolution” If No Political Reform*, REUTERS, Dec. 30, 2012, <http://www.reuters.com/article/2012/12/31/us-china-politics-idUSBRE8BU01W20121231>; Chris Buckley, *China Must Reform or Risk Crisis, Experts Warn New Leader*, REUTERS, Oct. 7, 2012, <http://www.reuters.com/article/2012/10/07/us-china-politics-reform-idUSBRE8960K320121007>.

105. Jiang, *supra* note 1, at 50. See also *Charter 08*, *supra* note 1, pt. 3, no. 11 (calling for an “end to punishing speech as a crime”); Sophie Beach, *Hexie Farm (蟹农场): Speech is Not a Crime*, CHINA DIGITAL TIMES (Dec. 17, 2012, 10:34 AM), <http://chinadigitaltimes.net/2012/12/hexie-farm-蟹农场-speech-is-not-a-crime/>. In 2012, outspoken China-based government researcher Yu Jianrong published online a “Ten-Year Outline of China’s Social and Political Development.” Notably specific, it calls for, among other things, the abolition of speech crimes (phase 1, sec. 3, subsec. 3). *100 Top Global Thinkers of 2012: Yu Jianrong* [no. 54], FOREIGN POL’Y, Dec. 2012, at 86–87, available at [http://www.foreignpolicy.com/articles/2012/11/26/the\\_fp\\_100\\_global\\_thinkers](http://www.foreignpolicy.com/articles/2012/11/26/the_fp_100_global_thinkers); David Bandurski, *Scholar Posts 10-Year Plan for Social and Political Reform*, CHINA MEDIA PROJECT, Mar. 26, 2012, <http://cmp.hku.hk/2012/03/26/20910/>. Post-2012 developments, however, portend proliferation. See Chris Buckley & Andrew Jacobs, *Maoists in China, Given New Life, Attack Dissent*, N.Y. TIMES, Jan. 5, 2015, at A1; *China’s Xi Calls for Tighter Ideological Controls in Universities*, REUTERS, Dec. 29, 2014, <http://www.reuters.com/article/2014/12/29/us-china-universities-idUSKBN0K70TI20141229>; Bob Dietz, *In China, Mainstream Media as Well as Dissidents Under Increasing Pressure*, COMMITTEE TO PROTECT JOURNALISTS (Dec. 17, 2014, 12:01 AM), <http://cpj.org/x/5e4e>; Amy Qin, *China’s Artists to Be Taught ‘Correct View’ in New Plan*, SINOSPHERE (Dec. 2, 2014, 1:03 AM), <http://nyti.ms/1FKgyQB>; Murong Xuecun [pen name of Hao Qun], *The Art of Xi Jinping* [Harvey Thomlinson trans.], N.Y. TIMES (online ed.), Nov. 21, 2014, <http://nyti.ms/1qFUcMP>; David Bandurski, *China’s “Positive” Prescription for Dissent*, CHINA MEDIA PROJECT, Nov. 17, 2014, <http://cmp.hku.hk/2014/11/17/37177/>; Chris Buckley, *Leader [Xi Jinping] Taps Into Chinese*



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*Classics in Seeking to Cement Power*, N.Y. TIMES, Oct. 12, 2014, at A15; Samuel Wade, *Uyghur Scholar Ilham Tohti Receives Life Sentence for Separatism [Updated]*, CHINA DIGITAL TIMES (Sept. 23, 2014, 1:31 AM), <http://chinadigitaltimes.net/2014/09/uyghur-scholar-ilham-tohti-receives-life-sentence-separatism/>; Lulu Yilun Chen & Ting Shi, *Xi Remakes Internet in China's Year of Blogging Dangerously*, BLOOMBERG (Aug. 15, 2014, 12:57 AM), <http://www.bloom.bg/1sHspLn>; Josh Rudolph, *The Cult of Xi?*, CHINA DIGITAL TIMES (July 25, 2014, 2:43 PM), <http://chinadigitaltimes.net/2014/07/cult-xi/>; Stanley Lubman, *"Picking Quarrels" Casts Shadow Over Chinese Law*, CHINA REAL TIME REP. (June 30, 2014, 9:10 AM), <http://blogs.wsj.com/chinarealtime/2014/06/30/picking-quarrels-casts-shadow-over-chinese-law/>; *Understanding China's Crackdown on Rights Advocates: Personal Accounts and Perspectives. Hearing Before the Cong.-Exec. Comm'n on China*, 113th Cong., 2d Sess. (Apr. 8, 2014), available at <http://www.cecc.gov/events/hearings/understanding-china%E2%80%99s-crackdown-on-rights-advocates-personal-accounts-and>; Chinese Human Rights Defenders, *A Nightmarish Year Under Xi Jinping's "Chinese Dream": 2013 Annual Report on the Situation of Human Rights Defenders in China*, Mar. 2014, at 11–35, 52–64, available at [http://chrnet.com/wp-content/uploads/2014/03/CHRD\\_XJP\\_online.pdf](http://chrnet.com/wp-content/uploads/2014/03/CHRD_XJP_online.pdf); Sophie Beach, *ChinaFile Translation of the CCP's "Document 9,"* CHINA DIGITAL TIMES (Nov. 10, 2013, 10:58 PM), <http://chinadigitaltimes.net/2013/11/chinafile-translation-ccps-document-9/>. *But see* Info. Office of the State Council of the People's Republic of China, *Progress in China's Human Rights in 2013*, May 2014, pt. IV, [http://www.china.org.cn/china/2014-05/26/content\\_32490034.htm](http://www.china.org.cn/china/2014-05/26/content_32490034.htm) (claiming that “the space of freedom of speech has been increasingly expanded, and the people's rights to freedom of speech have steadily developed”).