

CIVIL RIGHTS AND CIVIL LIBERTIES: WHOSE “RULE OF LAW”?

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*For Forms of Government let fools contest;
Whate'er is best administer'd is best.*

Alexander Pope¹

Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.

Learned Hand²

The task of this Court to maintain a balance between liberty and authority is never done. . . . The Court's day-to-day task is to reject as false, claims in the name of civil liberty which, if granted, would paralyze or impair authority to defend existence of our society, and to reject as false, claims in the name of security which would undermine our freedoms and open the way to oppression.

Robert Jackson³

I. REMEMBERING OUR OWN HISTORY

There is something sobering in the juxtaposition of quotations from Alexander Pope, the formidable figure of English literature of the early eighteenth century, and from Judge Learned Hand, one of the most respected American judges of the twentieth century. Pope's career spanned a crucial time in English history from the “Glorious Revolution” of 1688 (the date of Pope's birth) to the date of his death in 1744. It was a period rife with Catholic persecution; Pope himself was a Catholic.⁴

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¹ ALEXANDER POPE, THE THIRD EPISTLE OF THE ESSAY ON MAN, ll.303–04, *reprinted in 3 POEMS OF ALEXANDER POPE* pt.1, at 123–24 (Maynard Mack ed., Yale Univ. Press 1951) (1733).

² LEARNED HAND, THE SPIRIT OF LIBERTY, Address at the “I am an American Day” ceremony in New York City (May 21, 1944), *in THE SPIRIT OF LIBERTY* 189, 190 (Irving Dillard ed., 3d ed. 1974).

³ *Am. Communications Ass'n v. Douds*, 339 U.S. 382, 445 (1950) (Jackson, J., concurring and dissenting).

⁴ That there might be persecution of Catholics, with no sense of inconsistency with a

It also marked the end of press licensing laws, the repeal of which, however, was quickly followed by various taxes, selective subsidies, and criminal prosecutions for seditious libel as the preferred techniques of controlling speech, assembly, and press in England.⁵ As reflected in his famous refrain, Pope did not put much stock in structures, forms, written constitutions, or bills of rights. He mocked them all. One might conclude that, in his dour but well-taken view, all notions relying on mere parchment provisions — constitutions, bills of rights, and, most of all, naive aphorisms like those extolling the “rule of law,” — are empty notions, arid side shows promising much but too often honored mostly in the breach.

For Pope, it may have seemed obvious that a parliamentary system, with nominal separations of power between the legislative, executive, and judicial departments, even with an enacted bill of rights, may not in fact be more conducive to liberty or human flourishing than some random alternative. Indeed, he believed that rule by a single person (a monarch) might be far superior in both respects — depending on whom he or she might be and just how that person embraced a generous, rather than a narrow, view of “liberty,” and, indeed, of life itself. The pith of it all is simply this: “For Forms of Government let fools contest; Whate’er is best administer’d is best.”⁶

Judge Learned Hand’s career, like Alexander Pope’s, also spanned times of tumult and change. Most notably, aside from the convulsions of the Great

cherished freedom of speech and of the press, had been urged even by John Milton, almost a half-century earlier, in his famous *Areopagitica*, the essay in the style of a petition addressed to Parliament, in 1644. JOHN MILTON, *AREOPAGITICA* (Sir Richard Jebb ed., Cambridge Univ. Press 1918) (1644). Though Milton eloquently called for an end to licensing of the press, and seemed to call for a much more generous liberty of free speech, e.g., *id.* at 58 ll.7–10 (“[T]hough all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength.”), he emphatically made certain exceptions — beginning with Catholicism itself. E.g., *id.* at 60 ll.22–24 (“I mean not tolerated popery, and open superstition, which as it extirpates all religions and civil supremacies, so itself should be extirpate.”).

⁵ See FREDRICK S. SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND, 1476–1776*, at 305–06 (1952). Following the expiration of the last licensing act in 1694,

[t]he eighteenth-century statesmen saw no reason to revive such obviously unsavory methods of control as state licensing and printing-trade regulation. There were other methods, more subtle, more indirect, and therefore less dangerous. Taxation, subsidization, and prosecution under due process of law — these were the methods employed by the state to control and regulate the press during the period between the death of Anne and the Declaration of American Independence.

Id.; see also 4 WILLIAM BLACKSTONE, *COMMENTARIES* *151–52 (extolling the end of press licensing in 1694, but also endorsing the severe punishment of “any dangerous or offensive writings . . . of a pernicious tendency,” or the “making public, of bad sentiments, destructive of the ends of society,” under the common law and various acts of Parliament).

⁶ POPE, *supra* note 1, ll.303–04, at 123–24.

Depression, it endured the two major periods of domestic political trials of the twentieth century, each involving fears of Communist subversion in the United States. The first of these was the period of the original "Red Scare," brought on the wave of the 1917 Bolshevik Revolution, and lasting through most of the 1920s.⁷ The second was a reprise of that first period, played out in the aftermath of World War II and the specter of the Soviet Union during the fretful years of an often chilling Cold War.⁸

Early in that first period, sitting as a judge on the federal district court in New York, Learned Hand authored a bold, seminal opinion enjoining the Postmaster of the City of New York from refusing postal carriage of *The Masses*, a radical monthly journal attacking capitalism, and *Mother Earth*, a magazine that suggestively praised two radical left-wing figures recently convicted of conspiracy to resist the draft.⁹ In granting the injunction requested by the plaintiffs, thus ordering the U.S. Postal Service to carry the rejected printed materials despite government objections, Judge Hand construed the then-recent Espionage Act of 1917¹⁰ invoked by the Postmaster as not reaching the materials in question.¹¹ He held that the Postmaster had erred and could not reject the offending publications.¹²

Moreover, in explaining his decision, Learned Hand expressed his view that the Postmaster's interpretation of the Act was simply not compatible with reasonable breathing room for dissent in a free country.¹³ Hand would not presume that Congress meant to foreclose publications of the kind at issue, nor would he raise a serious question about the constitutionality of the Act of Congress itself.¹⁴ It was overall an excellent opinion, which reflected a generous view of the civil liberty of political speech and dissent, even as today, we urge other countries to respect as well.

But our recounting of this case is not complete. For, on appeal, and evidently unmoved by Judge Hand's eloquent disquisition on the importance of freedom of dissent and its importance to an open, democratic society, the judges on that court

⁷ See Paul Carrington, *Fearing Fear Itself*, 5 GREEN BAG 2d 375 (2002) (recounting the repressive events of the 1920s).

⁸ See Frank Wilkinson, *Revisiting the "McCarthy Era": Looking at Wilkinson v. United States in Light of Wilkinson v. Federal Bureau of Investigation*, 33 LOY. L.A. L. REV. 681 (2000) (recounting the era of the House Committee on Un-American Activities).

⁹ See *Masses Publ'g Co. v. Patten*, 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F.2d (2d Cir. 1917); see also Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975).

¹⁰ Espionage Act, ch. 30, 40 Stat. 217 (1917).

¹¹ *Masses Publ'g Co.*, 244 F. at 539-41.

¹² *Id.* at 543.

¹³ *Id.* at 540.

¹⁴ *Id.*

of appeals unanimously reversed.¹⁵ They held the Postmaster's broader interpretation, requiring him to sweep these publications from the mail, was consistent with the broad wording of the Act; they deferred to that interpretation and effortlessly sustained the postal ban.¹⁶ It was as if, though not intentionally, the judges of the court of appeals meant to provide a bracing example of what Alexander Pope had said. Neither the written nature of the First Amendment, its strong language,¹⁷ or its prominent placement in the Bill of Rights played any meaningful role in the concrete outcome of this case. Nor did the constitutional commitment of the power to set aside acts of Congress when judges find them inconsistent with the Constitution,¹⁸ or any part thereof, finally help. Indeed, not even the additional fact that the Constitution grants all federal judges in the United States an extraordinary degree of tenure and independence¹⁹ (with less to fear than judges in many other countries with no similar security of office) made a sufficient difference in the case.

Slightly more than thirty years later, Judge Hand wrote the opinion in *Dennis*

¹⁵ *Masses Publ'g Co. v. Patten*, 246 F. 24 (2d Cir. 1917).

¹⁶ *Id.* The court of appeals rejected the notion that there was any significant First Amendment question, noting that the Act did not prohibit publication and, thus, did not violate "the freedom of the press." *Id.* at 29. The Act merely banned the publication from the mails, which the court declared Congress had a right to do with materials it might reasonably regard as "injurious" to the public welfare and, accordingly, Congress could decline to furnish postal privileges as a means of circulation. *Id.* at 28–29.

¹⁷ "Congress shall make *no* law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I (emphasis added).

¹⁸ The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . The judicial Power shall extend to *all Cases . . . arising under this Constitution*, the laws of the United States, and Treaties made, or which shall be made, under their Authority

U.S. CONST. art. III, §§ 1–2 (emphasis added); *see also* U.S. CONST. art. VI, cls. 2–3: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation to support this Constitution

¹⁹ *See* U.S. Const., art. III, § 1 (providing for indefinite tenure, rather than a limited term of office, for all Article III federal judges, and further providing that, during their tenure, "Compensation . . . shall not be diminished." Once appointed by the President and confirmed by the Senate, Article III judges may serve for life, without fear of retaliatory cuts of pay, and are subject to removal solely by an arduous process of impeachment by the House of Representatives, and trial by the Senate. U.S. CONST. art. I, §§ 2–3. These procedures literally have *never* been successfully employed against *any* justice on the Supreme Court in more than two hundred years. For the relevant constitutional provision regarding impeachment, *see* U.S. CONST. art. II, § 4.

v. United States,²⁰ for the very court of appeals that had reversed him in 1917—the court to which he had since been elevated during the intervening years. And, now writing for that court in the most famous “Communist conspiracy” case of the 1950s and the second “Red Scare,” he upheld the conviction of several officers and members of the Communist Party of the United States, on conspiracy charges under various sections of the Smith Act,²¹ which Congress shaped efficiently to achieve that end.²² The Act made it a crime to advocate the duty or desirability of overthrowing the government by force or violence, or to circulate any materials that contained such advocacy, when a jury would be satisfied that it was done with the requisite intent to bring about the overthrow of the government as speedily as circumstances would allow.²³ Under the Act, such advocacy was a crime, even if that time was not imminent and ample time might exist to “answer” all such advocacy with countervailing speech.²⁴ In the view of more committed civil libertarians of the time, it was not Learned Hand’s finest hour.²⁵

On appeal, over the dissents of Justices Black and Douglas, the Court adopted

²⁰ 183 F.2d 201 (1950), *aff’d*, 341 U.S. 494 (1951).

²¹ Alien Registration Act of 1940, ch. 439, 54 Stat. 670 (1940).

²² *Dennis*, 183 F.2d at 234.

²³ *Id.* at 214.

²⁴ *Id.* at 234.

²⁵ When the case came to the Supreme Court on appeal, Justice William O. Douglas described the basic offense for which the defendants had been prosecuted:

So far as the present record is concerned, what petitioners did was to organize people to teach and themselves teach the Marxist-Leninist doctrine contained chiefly in four books Those books are to Soviet Communism what *Mein Kampf* was to Nazism [The defendants] are fervent Communists to whom these volumes are gospel. They preached the creed with the hope that some day it would be acted upon.

Dennis v. United States, 341 U.S. 494, 582 (1951) (Douglas, J., dissenting). As Justice Douglas noted: “The record, however, contains no evidence whatsoever showing that the acts charged, *viz.*, the teaching of the Soviet theory of revolution with the hope that it will be realized, have created any clear and present danger to the Nation.” *Id.* at 587. For example, a clear and present danger of such imminence and violence, forthcoming from any of the activities of the defendants that nothing less than their arrest and prosecution might prevent its occurrence. Accordingly, in Justice Douglas’s own view, absent evidence of any such imminent danger, consistent with the First Amendment there could be no criminal sanctions imposed upon the defendants, even assuming they did, indeed, teach their doctrines with a desire to have them acted upon. *Id.* at 579–80. Justice Douglas closed his vigorous dissenting opinion with the following observation, meant perhaps as much for his colleagues, as for Congress, and for the nation at large: “Vishinsky wrote in 1938 in *The Law of the Soviet State*, ‘In our state, naturally, there is and can be no place for freedom of speech, press, and so on for the foes of socialism.’ Our concern should be that we accept no such standard for the United States.” *Id.* at 591 (emphasis added). It was a suggestion only partly heeded, as serious students of that era well know.

Judge Hand's opinion and rejected all of the defendants' First Amendment claims.²⁶ The Court found no inconsistency between the Act as applied and the First Amendment guarantees of free speech and free press, or of rights of peaceable assembly, and petition.²⁷ To be sure, eighteen years later, the Supreme Court reconsidered the doctrine of the case and substituted a much more stringent First Amendment test, effectively overruling the *Dennis* case, albeit not expressly.²⁸ By then, however, also, the fear of a Communist takeover or other violent domestic uprising — or even an abortive attempt — was long gone. Moreover, the ease with which the Supreme Court affirmed the criminal convictions of Eugene Dennis and others, in the 1950s, was not an aberration merely of that time. Rather, it continued a pattern that had marked the Court's own decisions from the 1920s,²⁹ and also, in other respects, from the distresses felt by the country both during and immediately after World War II.³⁰

²⁶ See *Dennis v. United States*, 341 U.S. 494, 510 (1951), *aff'g* 183 F.2d 201 (1950).

²⁷ See *id.*

²⁸ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969):

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy [even] of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

The test reformulated by the Court in *Brandenburg* is very stringent. It requires that the speaker *meant* to incite violence or some other serious breach of a valid law to be convicted: Thus, that such violence or breach of law might foreseeably have resulted from the speech, and even that it *did* so result is insufficient to hold the speaker criminally accountable for the speech he gave. Even supposing it *was* the express design of the speaker to incite violence or some other serious breach of a valid law, if the danger of that action was not "imminent," the speaker could not be subject to criminal sanction despite his express intent (i.e., in speaking as he did, to bring just such action about). The "*Brandenburg* test" represented the high water mark of the Supreme Court's First Amendment jurisprudence in the protection of seditious or subversive political speech. Essentially, *Brandenburg* enacted the views Justice Douglas had advanced nearly two decades earlier in his dissent in *Dennis*. See *Dennis*, 341 U.S. at 579 (Douglas, J., dissenting).

²⁹ See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Abrams v. United States*, 250 U.S. 616 (1919). Nor did the pattern vary, in respect to criminal (sedition-type) prosecutions brought pursuant to various state (rather than federal) laws. See, e.g., *Gitlow v. New York*, 268 U.S. 652 (1925) (holding that New York's criminal anarchy statute did not violate the due process clause); *Whitney v. California*, 274 U.S. 357 (1927) (upholding the state criminal Syndicalism Act).

³⁰ See, e.g., *Ex parte Quirin*, 317 U.S. 1 (1942) (holding that there is no right to a civil tribunal before a jury); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (affirming that a curfew order is an appropriate exercise of war powers); *Korematsu v. United States*, 333 U.S. 214 (1944) (upholding a curfew order as an appropriate exercise of war power); *In re Yamashita*, 327 U.S. 1 (1946) (affirming the legitimacy of a military commission). These are not "First Amendment" cases. Rather, they are notable cases rejecting constitutional

In fact, though it may come as a surprise to some Americans — indeed, it is likely that most American lawyers as well as nearly all American citizens are quite unaware of it, and may be expected to doubt it — *no* act of Congress — *not one* — was successfully challenged in the Supreme Court on the basis of either the “freedom of speech” or “freedom of press” clauses of the First Amendment prior to 1965.³¹ One hundred eighty-four years passed in American history before the Supreme Court found constitutional fault with *anything* Congress presumed to enact and the executive department readily chose to enforce, in so far as the First Amendment “guarantees” of freedom of speech and press were concerned.

As much as one might like to think he could explain this astonishing hiatus between the express constitutional protection added to the Constitution in 1791 — that “Congress shall make no law . . . abridging the freedom of speech, or of the press”³² — and the Supreme Court’s first case holding against Congress in 1965,³³ it was not due merely to some suitable sense of government self-restraint prior to the Espionage Act and similar legislation put in place during and following the nation’s engagement in World War I. To the contrary, serious legislative measures appeared nearly from the beginning. As early as 1798, a mere seven years following ratification of the Bill of Rights, a variety of seditious speech was made a national crime by act of Congress.³⁴ No prosecution under that original Sedition Act failed or was reversed on grounds that the Act exceeded the powers granted to Congress or flouted the safeguards provided by anything in the Bill of Rights.³⁵

Now, perhaps all of this merely illustrates, still again, the cynic’s — or the

claims regarding the harsh domestic treatment of Japanese-American citizens and rejecting various due process of law claims by those whom the United States tried and executed in highly irregular trials, during and following World War II. For an especially timely review of *Ex parte Quirin*, see G. Edward White, *Felix Frankfurter’s “Soliloquy” in Ex parte Quirin*, 5 GREEN BAG 2d 423 (2002) (reviewing *Ex parte Quirin*).

³¹ *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965). It is a fair wager, moreover, that not only are most Americans quite unaware of this distinction of the *Lamont* case, but that even most American lawyers would be unable to identify the case by name, much less be able to recall just what it dealt with, or of what genuine significance it is even today. Nor will we say anything about it here, except to encourage the reader to satisfy his or her own curiosity by looking it up.

³² U.S. CONST. amend. I.

³³ *Lamont*, 381 U.S. at 301.

³⁴ Alien and Sedition Acts, ch. 74, 1 Stat. 596 (1798).

³⁵ The Sedition Acts were adopted by Congress during a period of domestic tension respecting the national policy of neutrality between the French and English, who were then at war. The Sedition Acts were promptly and harshly applied against polemical critics of the Adams Administration. Prosecutions were brought, convictions secured, and constitutional objections rejected in every federal court in which they were raised. Moreover, although no case was reviewed in the Supreme Court, several of the Justices of that Court participated in the lower courts in which the trials were held. None presumed to find any constitutional fault.

realist's — perspective that we waste our time in wrangling over “forms of government,” even as Alexander Pope jarringly suggested would be so.³⁶ Alternatively, perhaps these recalled facts merely underscore (even in ways he did not intend) Learned Hand's different, yet nearly as deflating, view in placing any great hopes on institutional arrangements, such as they may be, to safeguard essential freedoms — whether speech, petition, press, assembly, or something else.³⁷ “Deflating,” that is, because Judge Hand also seemed clearly to warn that those who may fret over constitutional structures, entrenched bills of rights, the role of courts, et cetera, may similarly deceive themselves in their hopes.³⁸ Insofar as they take these institutions even as a necessary, much less as a sufficient, set of conditions for maintaining civil liberties at large, he declared, they may be quite mistaken.³⁹ Prominent among the things mentioned within his rueful reflections, he suggested pointedly that one should be wary of putting too much faith in a constitution, no matter how seemingly well written, or, in courts, even those structured as are our Article III courts, with their exceptional security of tenure and of undiminishable pay.⁴⁰

Perhaps then, in concluding this Introduction and approaching an assessment of the state of civil liberties and the rule of law in China or elsewhere, we may admit that our own history may serve as a cautionary tale. Significant parts of that history seem at least to confirm, rather than deny, the ascetic views of Alexander Pope and Learned Hand. Specifically, for much of that history, it is difficult to show how either the Constitution or the First Amendment, or even our courts of law, served terribly well to check our own government when it may have mattered most. And, though this may no longer be as true as once it was — nor has it been true for some time⁴¹ given merely some unexpected strain of events in our national

³⁶ POPE, *supra* note 1, at 123.

³⁷ See HAND, *supra* note 1, at 190; see also *Dennis v. United States*, 183 F.2d 201 (1950).

³⁸ HAND, *supra* note 1, at 190.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ It assuredly is not true at this time, judged merely by the large number of instances in which various acts of Congress as well as state laws have been successfully challenged in the Supreme Court even within the last decade or so. For example, in the most recent term of the Supreme Court, the Court reviewed eight cases raising First Amendment challenges to various state (or local) and federal laws. Two different recent acts of Congress were held to be void under the Freedom of Speech Clause of the First Amendment, and two state (or local) enactments were similarly struck down under the Fourteenth Amendment. See *Republican Party v. White*, 536 U.S. 765 (2002); *Watchtower Soc'y v. Vill. of Stratton*, 536 U.S. 150 (2002); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). Moreover, since 1995, *twenty-six* different federal enactments have been set aside on constitutional grounds by the Supreme Court. While not all of these were “civil liberty” cases, quite a substantial number assuredly were. For a complete listing, see Seth Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1074 n.8

life,⁴² the state of our own civil liberties easily could once again look none too secure, even as Learned Hand cautioned, in a more general way, more than a half-century ago.

What does all or any of this have to do with this symposium, or with this particular panel? Perhaps not a great deal, but perhaps at least this much. Those of us who may severely fault the state of civil liberties and civil rights in China, as I assuredly mean to do in what follows next in this Essay, should at least be sensitive to the mixed history of our own nation.⁴³ We should understand that it has taken more than two centuries to bring the “rule of law,” in some strong, well-developed constitutional sense, and in some substantial (if incomplete) *real* measure, reasonably well and consistently, in our own courts, in the protection of civil rights and civil liberties in the United States.⁴⁴ That it may not take nearly as

(2001).

But even these figures (and some other figures one could provide from earlier times when, in fact, the government also lost in court and yielded without resistance) substantially understate the success of private citizens challenging government practices in the state and federal courts. In the federal courts, acts of Congress have frequently been interpreted as not authorizing the type or breadth of restriction the government attempted to impose, thus achieving a result favoring the citizen’s claim, quite without need to consider any broader (i.e., constitutional) challenge. Moreover, in a number of states, the state supreme court has not infrequently interpreted provisions in the bill of rights furnished within the constitution of that state as favorable to the citizen’s claim. The result is *greater* protection under the *state* constitution against an infringing state law than the United States Supreme Court has found under the national Constitution itself. One of the less noticed aspects of constitutional federalism in the United States, is this feature of “dual constitutionalism,” establishing two sets of constitutional ceilings *within* each state. Thus, if a party loses on the “federal question” (i.e., the question raised by the citizen litigant under some provision in an act of Congress or the national Constitution) when seeking relief against a state statute or local law, it is not necessarily fatal to that party’s civil rights or civil liberties claim. The party may succeed anyway, on the strength of a provision drawn directly from the state constitution.

In conclusion, there are various legal bases on which a party may seek relief against alleged infringements of civil rights and civil liberties in the United States. The courts’ willingness and standards of providing that relief, in conjunction with the government’s willingness to yield when it loses (rather than resist, seek retaliation against the litigant or the judges, or otherwise seek evasion of the judgment), must be fairly counted today as both meaningful and substantial in most parts of the United States if not in all.

⁴² For example, the events of September 11, 2001, have produced both legislative and executive measures raising virtual “wartime” civil liberty concerns. Alison Mitchell, *The Perilous Search for Security at Home*, N.Y. TIMES, July 28, 2002, § 4, at 1 (reviewing current and proposed measures).

⁴³ William Tyndal put it well four centuries ago, in translating anew, into English: “And why beholdest thou the mote that is in thy brother’s eye, but considerest not the beam that is in thine own eye?” *Matthew 7:3* (Tyndal).

⁴⁴ For example, as illustrated in the aftermath of the 1992 police beating of Rodney King in Los Angeles, captured on videotape (as were the events of Tiananmen Square in 1989).

long in China, starting from its own revolution in 1949, we may to encourage — and hope may come true.

II. WHOSE AND WHAT “RULE OF LAW” IN THE PEOPLE’S REPUBLIC?

Torture, forced labor and detention without trial underpin worsening political repression in China, Amnesty International said in a report Friday. . . . The report’s release coincides with the anniversary of the June 4, 1989, crackdown on the pro-democracy movement at Tiananmen Square, in which hundreds of people were slaughtered by Chinese troops. . . . Foreign Ministry spokesman, Chen Jian, said Thursday that dwelling on the 1989 “incident” was of no use. . . . “Chinese citizens have the right to exercise their democratic rights in accordance with the constitution,” Chen Jian said. “The Chinese judicial departments and authorities are also entitled to take actions against those things in violation of Chinese laws.”⁴⁵

Of course, the law did not prevent the beatings, but it did provide significant measures of punishment and redress. In rough summary, here is how it worked. Initially, the identified officers were acquitted following trial by jury in the California courts for aggravated criminal assault, a state felony offense. Then, however, they were separately indicted, prosecuted and convicted in federal court, for violating Mr. King’s constitutional right to be secure from “unreasonable searches and seizures” by the police. The federal prosecutions were brought pursuant to an act of Congress, 18 U.S.C. § 242, adopted in the aftermath of the Civil War, to lend means of enforcing the Fourteenth Amendment prohibition against state police using excessive force or making violent arrests or unwarranted searches and seizures. The state acquittals are reviewed by Seth Mydans in *Los Angeles Policemen Acquitted in Taped Beating*, N.Y. TIMES, Apr. 30, 1992, at A1. For a review of the federal court conviction, see Joyce Price & Ron Taylor, *Better Prosecution, Use of King Credited*, WASH. TIMES, Apr. 18, 1993, at A6.

Nor were these criminal proceedings against the offending officers the end of the matter. Rather, a separate, additional action was brought against the officers and the City of Los Angeles in federal district court, as a private civil rights action under a separate act of Congress, 42 U.S.C. § 1983 (2000), providing this *additional* recourse for persons injured by those who, acting “under color of” state authority, deprive them of their civil right to be free of just the very sort of denial of due process as the police misconduct reflected in this case. Pursuant to those proceedings, the jury awarded Mr. King \$3.8 million in compensatory damages. Seth Mydans, *Rodney King Awarded \$3.8 Million*, N.Y. TIMES, Apr. 20, 1994, at A14.

⁴⁵ Charles Hutzler, *Amnesty Report: Detention, Forced Labor on Rise in China*, ASSOCIATED PRESS, June 1, 1995, 1995 WL 439076; see also Elisabeth Rosenthal, *In Rural China, Mental Hospitals Await Some Who Rock the Boat*, N.Y. TIMES, Feb. 16, 2002, at A1:

No one would dispute that Huang Shurong is stubborn and outspoken. She is also smart, confident and articulate, attributes that would seem to leave her poised for success. But not in rural China. Instead, for her tenacity in protesting a land dispute . . . in rural Suileng County . . . officials have had her forcibly

Repulsed or not, one should at least pause and take note of the response provided by the foreign ministry's spokesman in this report of Amnesty International, six years after the original events in Tiananmen Square: "Chinese citizens have the right to exercise their democratic rights in accordance with the constitution," Chen said. "The Chinese judicial departments and authorities are also entitled to take actions against those things in violation of Chinese laws."⁴⁶ These statements by the spokesman, Chen Jian, are not discernibly different in any obvious way from an equivalent statement as might be offered by a spokesman for our own State Department when called upon in a foreign press conference to explain the circumstances associated with some internationally newsworthy, disruptive event in the United States. If there are differences, they are not easily disposed of simply by exclaiming that here, at least, there is a respect by the authorities for "the rule of law," including the Constitution, but in China there is no equivalent respect. Nothing on the face of this report offers support for that view. To the contrary, the statements deny that this is so.

Rather, far from denouncing the rule of law as some mere artifact of bourgeois pretension, the foreign ministry spokesman's point was precisely to stress, even as we might do, an exacting regard for "the rule of law." He straightforwardly affirmed the right of citizens "to exercise their democratic rights in accordance with the constitution," even as we would do.⁴⁷ And he also then adverted equally to the entitlement of the "judicial departments and authorities . . . to take action against

committed to a series of psychiatric hospitals, five times in the last three years. . . . "The police wouldn't take me in, since I'd done nothing illegal, so they sent me to a psychiatric ward where they had some connections to shut me up and humiliate," she said.

Erik Eckholm, *Furor Over Death Sentences of 5 in China Church Group*, N.Y. TIMES, Feb. 12, 2002, at A12:

The five are leaders of the South China Church . . . convicted in secret trials on what appeared to be dubious charges of rape, assault, and sabotaging national security . . . [S]ecret Chinese government documents, provided by discontented security officials . . . outline campaigns to crush 14 Christian or Buddhist groups that have been labeled cults since 1995 China formally allows freedom of worship, but only in regulated churches that join the Communist Party-sponsored "patriotic" associations. . . . "This is a new tactic of suppression, under the name of the 'rule of law,'" said Mr. [Xiqiu] Fu [Executive Director of the Committee for Investigation of Persecution of Religion in China, a rights monitoring group in the United States]. . . . Illustrating the slippery nature of "heresy" and "cult" charges as wielded by the Chinese police, another convicted evangelical leader was accused of having betrayed Christian doctrine by claiming "Christ is I, and I am Christ." But the leader was probably quoting well-known words of Paul in the Bible: "It is no longer I who live but Christ who lives in me" (Gal. 2:20). [It] is "a text which can be heard in any American church."

⁴⁶ Hutzler, *supra* note 23.

⁴⁷ *Id.*

those things in violation of Chinese laws.”⁴⁸ On their face, *nothing* in these statements express disrespect for the constitutional rights of citizens of China or for “the rule of law.” Furthermore, the statements assuredly distance the foreign ministry from embracing a view approving rule by mere authoritarian caprice, much less rule by mere arbitrary assertions of raw force.

Similarly, note also from the *New York Times* report of the fate of Huang Shurong, in a rural province of China, how it was that she explained that, although treated very badly, she had not been arrested by the police.⁴⁹ But why not? “The police wouldn’t take me in,” she said, “since I’d done nothing illegal.”⁵⁰ In other words, her protest activities even in her own view, would not — and had not — resulted in her arrest and detention by the police; and this because the police themselves evidently felt constrained and bound by “the rule of law” and would not proceed against her absent adequate legal grounds.⁵¹

Government reliance on, rather than disparagement of, the “Rule of Law” in China, was itself acknowledged — even if dismissively — by Xiqui Fu, the Executive Director of the Committee for Investigation of Persecution of Religion in China, quoted in the report from the *New York Times*.⁵² In his complaint of recent repressive measures against various religious groups, Fu observed, “This is a new tactic of suppression, under the name of ‘the rule of law.’”⁵³ What might that mean? And were these actions merely “*under the name of*” the rule of law? Or was it the case that the various groups that drew the ire of public authority may not, in fact, have complied with certain laws? And that, in failing to so comply, did they make themselves vulnerable to some of the harsh measures taken against them?⁵⁴ But if that is the case, then it is evidently not “the rule of law” that Amnesty International, or that we, can say the People’s Republic fails to respect. To the contrary, it is now the “rule of law” exactly as we find it, increasingly *entrenched* in the People’s Republic, that has left us feeling very unsettled and highly disturbed.

There was in fact ample law to justify the spokesman for the foreign ministry position, responding to questions of the aftermath of Tiananmen Square. A number

⁴⁸ *Id.*

⁴⁹ Rosenthal *supra* note 23, at A1.

⁵⁰ *Id.*

⁵¹ That she was nonetheless carted away may be true and deplorable. It may nonetheless illustrate a different kind of problem in parts of China today, namely that in rural areas of China, local political leaders frequently seek to evade reform measures the government has tried to undertake. Rather than merely carrying out central government or central Communist Party commands, they resist a new rule of law and effectively seek to subvert it insofar as it would, if fairly and conscientiously implemented, reduce their own power and wealth. See Eckholm, *supra* note 23; Rosenthal, *supra* note 23.

⁵² See Eckholm, *supra* note 23, at A12.

⁵³ *Id.* at A12.

⁵⁴ See *id.* at A12; Rosenthal, *supra* note 23, at A1.

of provisions in the formally-adopted, well-published Criminal Law Articles of the People's Republic, and also in the regulations provided for the implementation of its Law of Assembly, Procession and Demonstration,⁵⁵ provided a firm basis for the foreign ministry spokesman's suggestion — that those who assembled and remained in Tiananmen Square defied the rule of law. It is probably beyond likely that those who assembled there met virtually *none* of the requirements providing for lawful assembly, procession, or demonstration. And insofar as that was so, they likewise defied the rule of law in failing to disperse.

So, too, whether one thinks it unfortunate or otherwise, in *not* "registering" as plainly required under the relevant, published regulations governing "venues for religious activities" in the People's Republic, whether it be Falun Gong, or varieties of Buddhist, Christian, or other religious groups, forcibly suppressed as they have been — it is nonetheless true these groups, too, were defying the "rule of law" applicable to them.

And so, one must also admit violations, even with respect to those persons in China who have presumed to speak to foreign journalists on various matters in the most recent decade, only then to face arrest, trial, and conviction.⁵⁶ Though on its face Article 111 of the Criminal Code⁵⁷ might not appear to forbid most such interviews, given the scope of how the phrase "state secret" is widely understood in Article 111 (essentially to cover any information that may reflect negatively on the government), citizens who presume to provide such information to foreign journalists can fairly be said to have had due notice that this sort of undermining the good standing of the government abroad is not tolerated under the rule of law in China. Accordingly, those who defy the law cannot expect simply to be ignored. In brief, the "rule of law" has been provided in keeping with the proper mechanisms established under the national constitution. Indeed, in respect to each of the various

⁵⁵ A profile of these acts and regulations, and also of those governing religious entities, is reprinted *infra* at Appendices B–D.

⁵⁶ See, e.g., Patrick Baert, *Arrests of Chinese Americans Violate China's Own Laws, Say Experts*, AGENCE FR.-PRESSE, July 8, 2001, 2001 WL 2443074; Eric Eckholm, *China Has Held N.J. Man for 18 Months*, CHI. TRIB., Sept. 8, 2001, at 4; *Four More Jailed for Contact with Foreign Press*, JAPAN ECON. NEWSWIRE, July 31, 1993, LEXIS, News Library, Jen File; Jay Taylor, *How Scholars Get Pulled into Spy Scares*, L.A. TIMES, July 30, 2001, pt. 2, at 11; *U.S. Warns Its Citizens They Risk Arrest in China*, EFE NEWS SERV., Apr. 20, 2001, LEXIS, News Library, Gnw File.

⁵⁷ Article 111 provides in part: "Anyone who . . . secretly gathers, purchases . . . , or illegally provides [state] secrets . . . for any foreign . . . organizations . . . shall be sentenced to fixed-term imprisonment of not less than five years nor more than ten years." XING FA [Criminal Code] art. 111 (P.R.C.), translated in THE 1997 CRIMINAL CODE OF THE PEOPLE'S REPUBLIC OF CHINA 33 (Wei Luo trans., Chinese Law Series, vol. 1, 1998). See also *id.*, art. 102 (colluding with foreign states "to jeopardize the sovereignty of the Motherland"); *Id.* art. 105 ("act[ing] to subvert the political power of the State or to overthrow the socialist system . . . [through] rumor, slander or other means").

matters just reviewed, it may be said that in the People's Republic, it is the "rule of law" that *reigns*.⁵⁸

But then, what of the other source of the "rule of law" pursuant to which citizens in China may seek protection — the protection to which the foreign ministry spokesman also expressly referred? "Chinese citizens have the right to exercise their democratic rights in accordance with the constitution," he evenly declared.⁵⁹ So, what of *those* rights? There is a difficulty here as well. Today, in China, the Constitution of the People's Republic cannot be invoked by the citizens of China or by others as the basis for seeking the dismissal of charges brought against them in the tribunals and courts of the country.⁶⁰ Nor can it be invoked as the basis for applying for any kind of affirmative relief or redress in the courts against agencies or agents of the government. An example may help us to see how this affects matters in an additional and substantial way.

Article 136 of the constitution designates a "national flag" for the People's Republic of China.⁶¹ In turn, Article 299 of the Code of Criminal Law, as adopted by the National People's Congress, protects that flag: "Anyone who deliberately insults the national flag or national emblem⁶² of the [PRC] in a public place with methods such as burning, destroying, scraping, trampling, etc., shall be sentenced to a fixed-term imprisonment of not more than three years, [or] criminal detention, [or] deprivation of political rights."⁶³

It is self-evident that the national legislature of China evidently believed that

⁵⁸ Or, with just a touch of gallows humor, perhaps one might say it "rains" . . . and pours.

⁵⁹ Hutzler, *supra* note 23.

⁶⁰ In brief, there is no *Marbury v. Madison*, 5 U.S. (1 Crauch) 137 (1803), to be found in China; there is no case confirming the power and obligation of judges to withhold judicial sanction from any act of the national legislature that in their own, independent determination, is not authorized by the constitution or exceeds its granted powers or offends any provision expressly placing limits on those powers. To the contrary, constitutional questions are reserved from the courts, including the Supreme Court. Article 57 of the Constitution of the People's Republic of China makes the National People's Congress "the highest organ of state power," and at once provides that "[i]ts Permanent body is the Standing Committee." XIANFA [Constitution] art. 57 (P.R.C. 1999). In turn, Article 67 commits to the Standing Committee the powers "to interpret the Constitution and supervise its enforcement," *id.* art. 67, cl. 1, as well as the power "to appoint *and remove* the Vice-Presidents and judges of the Supreme People's Court." *Id.* art. 67, cl. 11 (emphasis added). Additionally, "the Supreme People's Court is *responsible to* the National People's Congress and its Standing Committee." *Id.* art. 128 (emphasis added).

⁶¹ XIANFA art. 136 ("The national flag of the People's Republic of China is a red flag with five stars."). Both this and a number of other provisions of the Constitution of the People's Republic, relevant to this Essay, are reproduced *infra* at Appendix A.

⁶² The "national emblem" is not the same as the "national flag." See *id.* art. 137 ("The national emblem of the People's Republic of China is Tian'anmen in the centre illuminated by five stars and encircled by ears of grain and a cogwheel.").

⁶³ XING FA art. 299.

this clear, plainly stated “rule of (criminal) law” was appropriate, to protect the “integrity” of the national flag of the People’s Republic as a symbol of national unity. Moreover, that the legislature concluded also that such a provision could not reasonably be faulted as inconsistent with any provision in the Constitution of the People’s Republic, including those specific provisions enumerating the fundamental rights of citizens,⁶⁴ would seem to be obvious as well. After all, the legislation was presumably adopted with full awareness by those who voted it into law of those constitutional freedoms. And, that much being granted, there would seem to be no more reason to impute to the People’s Congress in China an intention to enact a criminal law inconsistent with those designated freedoms of the people of China as they are set forth in its constitution than there would be reason to impute to our *own* national Congress an intention to enact a criminal law inconsistent with those same freedoms, even as they are similarly set forth in our Constitution. Consider, for example, an Act of our Congress reading in just the following, remarkably similar way: “Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than \$1,000 or imprisoned for not more than one year, or both.”⁶⁵

Were *our own* Congress to have enacted this kind of law, presumably *it* would not have done so without persuading itself that it is utterly reconcilable with the First Amendment — that the freedoms of speech, peaceable assembly, or petition of which Congress is forbidden to abridge does not extend to public acts of physical abuse of the flag of the United States.⁶⁶ Congress would have to assert that whether the flag be privately owned or not, and whether it be some part of some political demonstration or otherwise, such physical acts of “defilement” are simply not “speech” (or at least not “protected” speech — if speech at all) and that they need

⁶⁴ *E.g.*, XIANFA art. 35 (“Citizens of the People’s Republic of China enjoy freedom of speech, of the press, assembly, of association, of procession and of demonstration.”). *But see id.* art. 54 (“It is the duty of citizens of the People’s Republic of China to safeguard the security, honour and interests of the motherland; they must not commit acts detrimental to the security, honour and interests of the motherland.”); *id.* art. 51 (“The exercise by citizens . . . of their freedoms and rights may not infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens.”). Note also, that the phrasing of Article 35 is merely assertive — on its face it simply *asserts* that all citizens “enjoy” the enumerated freedoms. Thus, it frames no restriction on any government entity in determining the appropriate extent to which citizens shall (or shall not) “enjoy” those enumerated freedoms — it contains no “prohibitory” language at all. For a compact discussion of this and other problems of the Constitution of the People’s Republic, see Shingo Morikawa, *Citizen’s Rights and Democracy Under the Constitution of the PRC*, Legal Forum, at http://www.enstar.co.uk/china/law/articles/legal_e.htm (last visited Oct. 10, 2002).

⁶⁵ Act of July 5, 1968, Pub. L. No. 90-381, sec. 1, § 700(a), 82 Stat. 291 (codified as amended at 18 U.S.C. § 700(a)(1) (2000)).

⁶⁶ *See* U.S. CONST. amend. I.

not be tolerated . . . *will* not be tolerated in this country! And if the *American* Congress can so persuade itself (and is correct in being able to persuade itself), and carry *its* view into our own national criminal laws, what fault or reproach may be laid at the feet of the government of China for emulating its example? Indeed. Were any Americans to presume to lecture the Chinese, might it not be a deserved rebuke to their arrogant ignorance even to suggest that the origin of the criminal code provision in China was the very “excellent model” provided by the *Congress of the United States*?

In each country, accordingly, there is a “nice” symmetry in how each regards the freedom of speech and demonstration — what it does and does not include. In China, subject to few limitations, citizens may be free *to burn the flag of the United States* — to demonstrate their public outrage for some policy or practice by the American government — as part of their freedom of expression in China. Accordingly, fully respecting that right, there may be no law in the People’s Republic forbidding such acts.⁶⁷ Likewise our own Congress has resolved matters in mirror-image fashion. Thus, Americans are free *to burn the flag of China* to demonstrate their outrage for some policy or practice by the Chinese government, and Congress would not presume to forbid them to express themselves in such a manner.⁶⁸ Three rowdy cheers for freedom of speech! That *neither*, however, tolerates such similar acts of soiling its *own* flag, *whether or not as part of some political demonstration* — to protest its *own* government’s practices or policies is beyond reproach. Why? Evidently, just because that is simply the way that freedom of speech, assembly, demonstration, and protest, are constitutionally “reasoned” by the respective congresses in *both* countries. It is simply, just the way things are. For in both countries, each is — and says it is — “under the Constitution,”⁶⁹ but the Constitution (including its provisions for preserving certain stipulated civil liberties) is, under this interpretation, evidently “what the people’s *representatives* say it is,” neither more nor less.

Yet, we know it is not quite the case.⁷⁰ For here, there is a further check, a

⁶⁷ Though there may be a serious degree of overstatement in so asserting. It is more likely in fact that the government authorities would not permit such demonstrations insofar as they felt them to be undesirable.

⁶⁸ Compare THE 1997 CRIMINAL CODE OF THE PEOPLE’S REPUBLIC OF CHINA, *supra* note 29, with Act of July 5, 1968, Pub. L. No. 90-381, 82 Stat. 291.

⁶⁹ The Constitution of The People’s Republic expressly declares itself to be the “supreme law” quite as much as is similarly provided in our own Constitution. Compare U.S. CONST. art. VI, cl. 2 (“This Constitution . . . shall be the supreme Law of the Land . . .”), with XIANFA pmb1. (“This Constitution . . . is the fundamental law of the state and has supreme legal authority.”), and *id.* (“No laws or administrative or local rules and regulations may contravene the Constitution.”).

⁷⁰ See *Texas v. Johnson*, 691 U.S. 397 (1989) (striking down a flag desecration state statute as applied in the setting of a political demonstration, in a closely divided Supreme Court); *United States v. Eichman*, 496 U.S. 310 (1990) (finding a similar result, in similar

slight additional feature of the “form” of government, a set of provisions establishing in the judiciary a “countermajoritarian” balance wheel, giving an additional prop or “brace” to the shelter of civil liberties and civil rights sketched out in the Constitution and the Bill of Rights.⁷¹ So, while nothing is meant to be enacted into national law unless the prevailing majority in each House of Congress agree that it is (a) in the national interest to enact it, and *also* (b) constitutionally

circumstances, respecting 18 U.S.C. § 700(a)(1), as amended by the Flag Protection Act of 1989, Pub. L. No. 101-131, § 2(a), 103 Stat. 777, in response to *Texas v. Johnson*). Congress persuaded itself that by merely making a few largely cosmetic changes in the 1968 Act, the Act as amended might then survive a constitutional challenge in court, despite the decision just then delivered by the Court in the *Johnson* case. As noted, however, it did not. The Act did not change a single vote on the Court and, as in the *Johnson* case, the outcome in *Eichman* turned on a single vote. The amended version of the Act, struck down in the Supreme Court, read as follows: “Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.” 18 U.S.C. § 700(a)(1) (Supp. 1989). This was not quite the end. Subsequent to the Court’s decision in *Eichman*, repeated efforts were mounted in Congress and elsewhere to secure an amendment to the Constitution that would permit Congress and the states to again make it a crime to do any of the acts contemplated in *Johnson* or in *Eichman*. But the Founders intentionally made amending the Constitution of the United States difficult under the provisions of Article V (unlike the equivalent processes in China and elsewhere as well). So, thus far, those efforts have failed.

⁷¹ I but borrow, here, from phrasing used by Thomas Jefferson, writing from Paris, on March 15, 1789, to James Madison, in encouragement of his proposal in the First Congress, that amendments be added to the Constitution, expressly reserving an enumeration of rights and of liberties from the power of Congress to deny or abridge. So, Jefferson wrote to Madison:

The declaration of rights is, like all other human blessings, alloyed with some inconveniences, and not accomplishing fully its object But though it is not absolutely efficacious under all circumstances, it is of great potency always, and rarely inefficacious. A brace the more will often keep up the building which would have fallen, with that brace the less.

Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 427–28 (Adrienne Koch & William Peden eds., 1998). Significantly, in this letter to Madison, commending the resolve to move ahead with this project, Jefferson added something else. It was this: that, when placed within the Constitution itself, such “a declaration of rights” will “put into the hands of *the judiciary*,” a “*legal check*.” *Id.* at 426 (emphasis added). Thus, Jefferson understood that Congress would *not* be the sole judge of the constitutionality of its own enactments, whether with or without the President’s consent. By making a specification of reserved liberties as part of the Constitution, Congress and the ratifying states would also be making it a part of the obligation of the courts not to accept Congress’s view of, or its claims of, the constitutionality of its own actions, rather, to assess the consistency of those acts with the Constitution separately, even as the Court did just a decade ago, in “flag burning” cases and in *Eichman* itself.

within its prerogative to enact it,⁷² their declared view on the *second* part of that proposition is final merely for themselves. It is not, however, final for the courts.⁷³

That the courts, too, may fail, is surely true. One may well concede failure can be charged against parts of the mired history that is our heritage. As it was very much the point of the first part of this Essay to concede, and for which reason, moreover, the sobering reflections of Learned Hand remain as relevant for our time as they were for his, both for China and for us. Perhaps, too, none of the particular features, present in the American constitutional system and currently lacking in the People's Republic, are per se indispensable.⁷⁴ In the abstract, it is impossible to determine, either way. Still, whatever the aggregate of the explanations, the "rule of law" as now understood and applied in the People's Republic, with respect to a wide sweep of civil rights and liberties, is more a cage of iron than a source of solace. May we live to a time when that may no longer be true.

⁷² Recall that members of Congress are themselves, *just as much as the judges*, bound by oath or affirmation to "support" the Constitution. See U.S. CONST. art. VI, cl. 3. Therefore, *like the judges*, and *like the President*, meant to give no sanction to any proposal which in their own view would be inconsistent with that obligation taken under oath.

⁷³ In the very course of introducing into the House of Representatives the list of proposed amendments of which, when ratified by three-fourths of the state legislatures, became the Bill of Rights, Madison disclaimed any illusion that such additions were a be-all or end-all of security. In that respect, he would agree with some of the views of Learned Hand, or even in some measure with Alexander Pope. See 1 THE WRITINGS OF JAMES MADISON 269, 271 (Gaillard Hunt ed., 1904). Still, he pointed out what he regarded as an additional usefulness in putting that list into the Constitution, observing: "If they are incorporated into the Constitution, *independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights.*" Speech by James Madison to the United States House of Representatives (June 8, 1789), *reprinted in id.* at 370, 385 (emphasis added).

⁷⁴ The English to this day think little of the U.S. model, and except for recent legislation authorizing courts to examine Acts of Parliament in litigation, against the protective provisions of the European Convention on Human Rights, they find nothing strange or lacking in proceeding by a rule of parliamentary supremacy in marking out the boundaries of "the rule of law." Within some measured limits, perhaps it but proves Alexander Pope's point.

APPENDIX A**CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA
(1999)⁷⁵****PREAMBLE**

.....

After waging hard, protracted and tortuous struggles, armed and otherwise, the Chinese people of all nationalities led by the Communist Party of China with Chairman Mao Zedong as its leader ultimately, in 1949, overthrew the rule of imperialism, feudalism and bureaucrat capitalism, won the great victory of the new-democratic revolution and founded the People's Republic of China. Thereupon the Chinese people took state power into their own hands and became masters of the country.

... The people's democratic dictatorship led by the working class and based on the alliance of workers and peasants, which is in essence the dictatorship of the proletariat, has been consolidated and developed. ...

The victory in China's New Democratic Revolution and the successes in its socialist cause have been achieved by the Chinese people of all ethnic groups, under the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Zedong Thought, by upholding truth, correcting errors and surmounting numerous difficulties and hardships. ...

The exploiting classes as such have been eliminated in our country. However, class struggle will continue to exist within certain limits for a long time to come. The Chinese people must fight against those forces and elements, both at home and abroad, that are hostile to China's socialist system and try to undermine it.

.....

China's achievements in revolution and construction are inseparable from support by the people of the world. The future of China is closely linked with that of the whole world. China adheres to an independent foreign policy as well as to the five principles of mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence in developing diplomatic relations and economic and cultural exchanges with other countries.

⁷⁵ XIANFA (1999) (official translation), available at http://www.novexcn.com/prc_constitution_1999.html. This is merely a selection of some of the articles and provisions in the lengthy Constitution of the People's Republic of China. The full document runs to 138 articles. The constitution was originally adopted by the Fifth National People's Congress on December 4, 1982, and was subsequently amended by the Ninth People's Congress on March 15, 1999.

This Constitution affirms the achievements of the struggles of the Chinese people of all nationalities and defines the basic system and basic tasks of the state in legal form; it is the fundamental law of the state and has supreme legal authority. The people of all nationalities, all state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings in the country must take the Constitution as the basic norm of conduct, and they have the duty to uphold the dignity of the Constitution and ensure its implementation.

CHAPTER I. GENERAL PRINCIPLES

....
Article 5. The People's Republic of China exercises the rule of law, building a socialist country governed according to law.⁷⁶ The state upholds the uniformity and dignity of the socialist legal system. No law or administrative or local rules and regulations shall contravene the constitution. All state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be investigated. No organization or individual may enjoy the privilege of being above the Constitution and the law.

....
Article 22. The state promotes the development of literature and art, the press, broadcasting and television undertakings, publishing and distribution services, libraries, museums, cultural centres and other cultural undertakings, that serve the people and socialism, and sponsors mass cultural activities.

....
Article 28. The state maintains public order and suppresses treasonable and other criminal activities jeopardizing state security; it penalizes criminal activities that endanger public security and disrupt the socialist economy, as well as other criminal activities; and it punishes and reforms criminals.⁷⁷

CHAPTER II. THE FUNDAMENTAL RIGHTS AND DUTIES OF CITIZENS

....
Article 35. Citizens of the People's Republic of China enjoy freedom of

⁷⁶ This first sentence was added by the 1999 amendment to the constitution. Cf. XIANFA art. 5 (1982).

⁷⁷ Cf. XIANFA art. 28 ("The state maintains public order and suppresses treasonable and other counter-revolutionary activities; it penalizes actions that endanger public security and disrupt the socialist economy and other criminal activities, and punishes and reforms criminals.").

speech, of the press, of assembly, of association, of procession and of demonstration.

....

Article 40. The freedom and privacy of correspondence of citizens of the People's Republic of China are protected by law. No organization or individual may, on any ground, infringe upon the freedom and privacy of citizens' correspondence except in cases where, to meet the needs of state security or of investigation into criminal offences, public security or procuratorial organs are permitted to censor correspondence in accordance with procedures prescribed by law.

....

Article 47. Citizens of the People's Republic of China have the freedom to engage in scientific research, literary and artistic creation and other cultural pursuits. The state encourages and assists creative endeavours conducive to the interests of the people made by citizens engaged in education, science, technology, literature, art and other cultural work.

....

Article 51. The exercise by citizens of the People's Republic of China of their freedoms and rights may not infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens.

....

Article 53. Citizens of the People's Republic of China must abide by the constitution and the law, keep state secrets, protect public property and observe labour discipline and public order and respect social ethics.

Article 54. It is the duty of citizens of the People's Republic of China to safeguard the security, honour and interests of the motherland; they must not commit acts detrimental to the security, honour and interests of the motherland.

....

CHAPTER III. THE STRUCTURE OF THE STATE

Section 1. The National People's Congress

Article 57. The National People's Congress of the People's Republic of China is the highest organ of state power. Its permanent body is the Standing Committee of the National People's Congress.

....

Article 62. The National People's Congress exercises the following functions and powers:

- (1) to amend the Constitution;
- (2) to supervise the enforcement of the Constitution;

(3) to enact and amend basic statutes concerning criminal offences, civil affairs, the state organs and other matters;

(4) to elect the President and the Vice-President of the People's Republic of China;

....

(7) to elect the President of the Supreme People's Court;

....

(14) to decide on questions of war and peace; and

(15) to exercise such other functions and powers as the highest organ of state power should exercise.

....

Article 64. Amendments to the Constitution are to be proposed by the Standing Committee of the National People's Congress or by more than one-fifth of the deputies to the National People's Congress and adopted by a majority vote of more than two-thirds of all the deputies to the Congress.

....

Article 67. The Standing Committee of the National People's Congress exercises the following functions and powers:

(1) to interpret the Constitution and supervise its enforcement;

(2) to enact and amend statutes with the exception of those which should be enacted by the National People's Congress;

....

(4) to interpret statutes;

....

(6) to supervise the work of the State Council, the Central Military Commission, the Supreme People's Court and the Supreme People's Procuratorate; [and]

....

(11) to appoint and remove the Vice-Presidents and judges of the Supreme People's Court, members of its Judicial Committee and the President of the Military Court at the suggestion of the President of the Supreme People's Court

....

Section 7. The People's Court and the People's Procuratorates

Article 123. The people's courts in the People's Republic of China are the judicial organs of the state.

....

Article 126. The people's courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals.

Article 127. The Supreme People's Court is the highest judicial organ. The Supreme People's Court supervises the administration of justice by the local people's courts at different levels and by the special people's courts

Article 128. The Supreme People's Court is responsible to the National

People's Congress and its Standing Committee. . . .

.....

CHAPTER IV. THE NATIONAL FLAG, THE NATIONAL EMBLEM AND THE CAPITAL

Article 136. The national flag of the People's Republic of China is a red flag with five stars.

Article 137. The national emblem of the People's Republic of China is Tian'anmen in the centre illuminated by five stars and encircled by ears of grain and a cogwheel.

Article 138. The capital of the People's Republic of China is Beijing.

APPENDIX B

CRIMINAL LAW OF THE PEOPLE'S REPUBLIC OF CHINA⁷⁸

....
Article 2. The tasks of the PRC Criminal Law are to use punishment struggle against all criminal acts to defend national security, the political power of the people's democratic dictatorship, and the socialist system; to protect state-owned property and property collectively owned by the laboring masses; to protect citizens' privately owned property; to protect citizens' right of the person, democratic rights, and other rights; to maintain social and economic order; and to safeguard the smooth progress of the cause of socialist construction.

....
Article 13. All acts that endanger the sovereignty, territorial integrity, and security of the state; split the state; subvert the political power of the people's democratic dictatorship and overthrow the socialist system; undermine social and economic order; violate property owned by the state or property collectively owned by the laboring masses; violate citizens' privately owned property; infringe upon citizens' rights of the person, democratic rights, and other rights; and other acts that endanger society, are crimes if according to law they should be criminally punished. However, if the circumstances are clearly minor and the harm is not great, they are not to be deemed crimes.

....
Article 102. Whoever colludes with foreign states in plotting to harm the motherland's sovereignty, territorial integrity and security is to be sentenced to life imprisonment or not less than ten years of fixed-term imprisonment. . . .

Article 103. Whoever organizes, plots, or acts to split the country or undermine national unification, the ringleader, or the one whose crime is grave, is to be sentenced to life imprisonment or not less than ten years of fixed-term imprisonment; other active participants are to be sentenced to not less than three but not more than 10 years of fixed-term imprisonment; and other participants are to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, control, or deprivation of political rights.

....
Article 105. Whoever organizes, plots, or acts to subvert the political power of the state and overthrow the socialist system, the ringleaders or those whose crimes are grave are to be sentenced to life imprisonment, or not less than 10 years of fixed-term imprisonment; active participants are to be sentenced from not less than three years to not more than 10 years of fixed-term imprisonment; other participants are to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, control, or deprivation of political rights.

Whoever instigates the subversion of the political power of the state and

⁷⁸ XING FA (1997), translated in Charles D. Paglee, *PRC Criminal Law*, CHINALAW WEB, at <http://www.qis.net/chinalaw/prclaw60.htm> (last updated Apr. 7, 1998).

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

Article 106. Whoever colludes with institutions, organizations, or individuals outside the country and commits crimes stipulated in Articles 103, 104, and 105 of this chapter are to be heavily punished according to the stipulations in the articles.

.....
Article 111. Whoever steals, secretly gathers, purchases, or illegally provides state secrets or intelligence for an organization, institution, or personnel outside the country is to be sentenced from not less than five years to not more than 10 years of fixed-term imprisonment; when circumstances are particularly serious, he is to be sentenced to not less than 10 years of fixed-term imprisonment, or life sentence; and when circumstances are relatively minor, he is to be sentenced to not more than five years of fixed-term imprisonment, criminal detention, control, or deprivation of political rights.

.....
Article 128. Whoever violates the regulations governing gun management by owning or unlawfully possessing, guns and ammunition is to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, or control; when the circumstances are serious, to not less than three years and not more than seven years of fixed-term imprisonment. . . .

.....
Article 152. Smuggling obscene movies, video tapes, audio tapes, pictures, books and journals, and other obscene articles for profit or dissemination shall be punished with imprisonment of more than three years but less than ten years with fine; for offenses of a serious nature to over ten years of imprisonment or life imprisonment, with fine or forfeiture of property; for offenses of a less serious nature to imprisonment or criminal detention or restraint of less than three years, and with fine.

.....
Article 222. Where, in violation of the state regulations, an advertisement owner, advertising agency, or advertisement carrier gives false publicity by taking the advantage of advertising a commodity or service, and when the circumstances are serious, he shall be sentenced to not more than two years of fixed-term imprisonment, criminal detention, and may in addition or exclusively be sentenced to a fine.

.....
Article 246. Those openly insulting others using force or other methods or those fabricating stories to slander others, if the case is serious, are to be sentenced to three years or fewer in prison, put under criminal detention or surveillance, or deprived of their political rights.

Those committing crimes mentioned above are to be investigated only if they are sued, with the exception of cases that seriously undermine social order or the

state's interests.

....
Article 249. Those provoking ethnic hatred or discrimination, if the case is serious, are to be sentenced to three years or fewer in prison, put under criminal detention or surveillance, or deprived of their political rights. If the case is especially serious, they are to be sentenced to three to 10 years in prison.

....
Article 277. Whoever uses violence or threat to obstruct state personnel from discharging their duties is to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, or control; or a sentence of a fine.

Whoever uses violence or threats to obstruct National People's Congress deputies, or local people's congress deputies, from discharging their lawful deputy duties is to be punished according to the preceding paragraph.

....
Article 287. Whoever uses a computer for financial fraud, theft, corruption, misappropriation of public funds, stealing state secrets, or other crimes is to be convicted and punished according to relevant regulations of this law.

....
Article 290. In cases where crowds are assembled to disturb public order with serious consequences; where the process of work, production, business, teaching, and scientific research are disrupted; and where serious losses have been caused, the ringleaders are to be sentenced to not less than three years but not more than seven years of fixed-term imprisonment; other active participants are to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, control, or deprivation of political rights.

....
Article 291. In cases where a crowd is assembled to disturb order at stations, wharves, civil aviation stations, market places, public parks, theaters, exhibitions, sports grounds or other public places, or a crowd is assembled to block traffic or undermine traffic order, or resist or obstruct state security administration personnel who are carrying out their functions according to law, when the circumstances are serious, ringleaders are to be sentenced to not more than five years of fixed-term imprisonment, criminal detention, or control.

....
Article 293. Whoever undermines public order with anyone of the following provocative and disturbing behaviors is to be sentenced to not more than five years of fixed-term imprisonment, criminal detention, or control:

....
(4) creating a disturbance in a public place, causing serious disorder.

....
Article 296. Whoever holds an assembly, parade, demonstration without application in accordance with the law or without authorization after application, or does not carry it out in accordance with the beginning time and ending time, place, and road as permitted by authorities concerned, and refuses to obey an order to dismiss, thereby seriously sabotaging social order, those personnel who are in

charge and those who are directly responsible are to be sentenced to not more than five years of fixed-term imprisonment, criminal detention, control or deprived of political rights.

....

Article 299. Whoever purposely insults the national flag, national emblem of the PRC in a public place with such methods as burning, destroying, scribbling, soiling, and trampling is to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, control or deprived of political rights.

Article 300. Whoever organizes and utilizes superstitious sects, secret societies, and evil religious organizations or sabotages the implementation of the state's laws and executive regulations by utilizing superstition is to be sentenced to not less than three years and not more than seven years of fixed-term imprisonment; when circumstances are particularly serious, to not less than seven years of fixed-term imprisonment.

....

Article 311. Whoever refuses to provide information, when the state's public security organs look into relevant situations and collect relevant evidence from him, about other people who he clearly knows have conducted criminal espionage activities is to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, or control if the circumstances are severe.

....

Article 378. Those who create rumors and undermine the morale of the armed forces are to be sentenced to not more three years of fixed-term imprisonment, criminal detention or control. In serious cases, those law offenders are to be sentenced to more than three years but less than 10 years of fixed-term imprisonment.

....

Article 432. Those who leak military secrets by design or by accident in violation of laws and regulations on protecting state secrets shall be sentenced to not more than five years in prison or criminal detention if the circumstances are serious. If the circumstances are especially serious, they shall be sentenced to not less than five years and not more than 10 years in prison.

APPENDIX C

**REGULATIONS FOR THE IMPLEMENTATION OF THE LAW
OF ASSEMBLY, PROCESSION AND DEMONSTRATION OF THE
PEOPLE'S REPUBLIC OF CHINA⁷⁹**

....

Article 7. Assembly, procession or demonstration falls under the jurisdiction of local city or county public security bureaus or urban public security sub-bureaus.

....

Article 9. The individual responsible for staging an assembly, procession or demonstration shall submit in person a written application to the competent public security organs, as stipulated in Article 7 of these regulations.

....

Article 10. Upon receiving an application for staging an assembly, procession or demonstration, the competent public security organs shall promptly conduct investigations and then deliver a written decision, within a certain legal time limit, stating whether or not permission has been granted. The written decision shall contain a clear description of what has been approved and provide reasons for denying permission.

....

Article 14. If the organizers of a rally, procession or demonstration want to petition against a competent public security organ's decision of disapproval, they may apply within three days after they receive the letter of disapproval to a people's government at the same level for a reexamination of the case. Within three days after the application for re-examination is received, the people's government should decide whether to maintain or overrule the competent public security organ's decision and forward a "letter of decision on the reexamination of an application for the holding rally, procession or demonstration" to the organizers of the scheduled rally, procession or demonstration, with a copy of the letter sent to the competent public security organ. The re-examination decision made by the people's government must be carried out by the competent public security organ and the organizers of the scheduled rally, procession or demonstration.

....

Article 22. People in charge of an assembly, procession or demonstration must maintain order and shall stop other people from joining the assembly, procession or demonstration. If the latter ignore the caveat, they shall immediately inform the people's police personnel maintaining order on the scene. The people's police shall stop those people after they are advised of the situation.

....

⁷⁹ Regulations for the Implementation of the Law of Assembly, Procession and Demonstration (June 1992), translated in Charles D. Paglee, *Regulations for the Implementation of the Law of Assembly, Procession and Demonstration*, CHINALAW WEB, at <http://www.qis.net/chinalaw/prclaw113.htm> (last updated May 1, 1998).

Article 23. People's police have the right to put an immediate stop to any illegal assembly, procession, demonstration or incident that endangers public security or seriously disrupts social order, during an assembly, procession or demonstration as stipulated in Article 27 of the "Law of Assembly, Procession and Demonstration."

They shall order the crowd to disperse if their warning is ignored. Through the use of a loudspeaker or by shouting, they shall advise people on the scene to leave the area through designated passages within a specified time. If the people do not leave the area within the specified time, personnel in charge of people's police on the scene have the right to forcibly disperse the crowd by issuing warnings or by resorting to other police means in accordance with relevant state regulations. They may lead away or immediately detain those people who remain on the scene.

.....

Article 32. The right to interpret specific questions in the application of this law resides with the Ministry of Public Security.

APPENDIX D**REGULATION GOVERNING VENUES FOR RELIGIOUS
ACTIVITIES⁸⁰**

Article 1. In order to protect normal religious activities, safeguard the legal rights of venues for religious activities and facilitate the management of venues for religious activities, the following regulations have been formulated in conformity with the Constitution.

Article 2. For the purposes of this regulation, "venues for religious activities" refers to monasteries, temples, mosques, churches and other fixed venues.

Registration is required for the establishment of a venue for religious activities. The registration procedure will be decided by the Religious Affairs Bureau of the State Council.

.....

Article 4. Venues for religious activities should set up a management system. Religious activities undertaken in these venues should comply with the laws and regulations. No person shall be permitted to make use of any such venue to undertake activities which harm national unity, ethnic unity, or the social order, harm citizens' health or obstruct the national educational system.

Venues for religious activities shall not be controlled by persons or organizations outside China.

.....

Article 11. Relevant units or persons who, within the premises of a venue administered by a religious venue, build or renovate buildings, set up commercial or social service enterprises or hold a display or exhibition or make films or television programs, etc., are required to secure the permission of the management team of the religious venue in question and that of the Religious Affairs Bureau of the People's Government at or above county level before applying to the departments concerned.

.....

Article 14. If a religious venue violates the stipulations of this regulation, the Religious Affairs Bureau of the People's Government at or above county level may apply penalties according to the seriousness of the case, issue a warning, halt activities, or rescind registration. If the case is especially serious, it may be submitted to the corresponding level of the People's Government, which may ban the venue.

.....

Article 18. The People's Government at the provincial, autonomous region and municipality level may, in compliance with this regulation, formulate practical measures on the basis of local realities.

⁸⁰ Regulation Governing Venues for Religious Activities, *translated in* Charles D. Paglee, *Regulation Governing Venues for Religious Activities*, CHINALAW WEB, at <http://www.qis.net/chinalaw/prclaw110.htm> (last updated May 1, 1998).

Article 19. Interpretation of this regulation lies with the Religious Affairs Bureau of the State Council.

