

Two Constitutions

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Chinese history has taken a new turn. Private sectors of the economy are expanding, and to accommodate these economic developments, and perhaps even more, to respond to the excesses of the Cultural Revolution, a new emphasis has been placed on the rule of law. In December 1982, a new constitution was promulgated. Chinese legal scholars take great pride in their new constitution—the impression of this visitor and the results of a more systematic survey indicate that the 1982 Constitution is generally viewed as the best since the 1949 revolution.¹ Chinese scholars are also quick to point to the guarantee of free speech in their new constitution and draw obvious parallels to the American Constitution and the first amendment, but a question arose in my mind about this comparative exercise: Are the free speech guarantees of the two constitutions, taken as formal legal structures, in fact similar?

China is now eager to strengthen its ties with America, and Chinese legal scholars have a growing interest in the American Constitution. They marvel at its endurance. As Professor He Huahui, one of our hosts, noted on a number of occasions, America is a young country, but it has a very old constitution. Since 1949 and the original revolutionary charter, China has had four constitutions (1954, 1975, 1978, and now 1982). The Chinese Constitution is not the product of an extralegal constitutional convention, like ours, nor does the amendment process entail the elaborate procedures contemplated by the American Constitution. The Constitution of 1982 was promulgated by the National People's Congress, the supreme legislative body, and can be amended by a two-thirds vote of that body.²

Some Chinese also look upon the guarantee of liberty in our Constitution admiringly, and in that regard assign a prominent place to the first

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1. China Daily, Mar. 8, 1986, at 4, col. 1.

2. XIANFA (Constitution) art. 64 (China). On the method of revision of the Chinese Constitution, particularly the removal of the "Four Big Rights" from the 1978 Constitution after the crackdown on "Democracy Wall" in 1979, see the pioneering article by Ellen R. Eliasoph, *Free Speech in China*, 7 YALE J. WORLD PUB. ORD. 287, 293-98 (1981).

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amendment. The guarantee of free speech is seen as one of the most distinctive aspects of our constitutional system—it is a source of our national identity—and is accepted by Chinese scholars as one institution of which we have every right to be proud. It is in that spirit that they point to a provision in their constitution, article 35, which guarantees freedom of speech in terms that appear every bit as generous as that of the first amendment. It provides: “Citizens of the People’s Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.”

In any legal system there is a gap between stated ideal and actual social practice, and the Chinese would be the first to acknowledge that they are no exception to this rule. The earlier constitutions included guarantees of free speech, in many respects similar to article 35, and these provisions did not prevent widespread and sometimes brutal censorship. I believe it would be a mistake, however, to dismiss article 35 as a mere formality and to treat their effort to draw comparisons to the first amendment as a desperate attempt to build bridges. For one thing, China is now placing great emphasis on the rule of law, and the institutional developments accompanying this shift in policy—reopening the law schools and increasing the number of lawyers and other legal institutions in the country—suggest that the past will not necessarily be repeated. The law as written always matters, and in the present climate in China it matters a great deal: it codifies aspirations and may change the terms of political discourse, though of course no law can guarantee its own efficacy. Second, to dismiss the Chinese guarantee of free speech as a mere formality is to assume that the concept of free speech in the Chinese Constitution means essentially what it does in the American Constitution. Such an assumption is supported by the effort of the Chinese to draw parallels between the two constitutions, but, as we will see, this assumption is problematic. Social practices different from our own may indicate not that the Chinese free speech guarantee is ignored, and therefore meaningless, but rather that it means something quite different from ours.

This inquiry into the free speech guarantees of the two constitutions — simply as a stated ideal—must begin with a recognition of the fact that article 35 tells only part of the story. Following a pattern that occurs in almost all socialist countries,³ but that may well be rooted in China’s feudal past, the guarantee of liberty is coupled with a statement of duties that limits liberty. Article 35 is the first provision of a chapter of the constitution entitled “Fundamental Rights and Duties of Citizens.” Sub-

3. See, e.g., KONSTITUTSII (Constitution) arts. 39, 50, 59 (U.S.S.R.).

sequent provisions, particularly article 51, spell out the duties: "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." A number of other provisions point in the same direction, and some seem especially addressed to speech. Article 38, for example, constitutionalizes libel action in the name of protecting human dignity: "Insult, libel, false charge or frame-up directed against citizens by any means is prohibited." Article 53 also provides: "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." Finally, near the end of the chapter, perhaps to make certain that nothing was missed by way of specifying the limitations of liberty, article 54 declares: "It is the duty of citizens of the People's Republic of China to safeguard the security, honor and interests of the motherland; they must not commit acts detrimental to the security, honor and interests of the motherland."

These provisions in the Chinese Constitution, qualifying or limiting article 35 and its protection of free speech, have no counterpart in the American Constitution. As Professor Joseph Goldstein put it in the course of discussion, we speak of a "Bill of Rights," not a "Bill of Rights and Duties." This fact standing alone, however, does not fully capture the distinction between the two systems of free expression, for there has always been a recognition of limits on free speech in America. Justices Black and Douglas have made a reputation for themselves by espousing an absolutism, but their view has never controlled.⁴ As in China, free speech in America has also always been a composite of freedom and restraint.

True, the limits on freedom of speech in America are not mentioned in our Constitution in the Yin/Yang, or to use the Marxist idiom, dialectic, fashion of the Chinese Constitution, but they have been fully and amply acknowledged by the courts in applying the first amendment. In fact, in response to Justice Black's and Justice Douglas' self-righteous claim that only their absolutism was faithful to the text ("no law" means "no law"), some have clung to the words "the" and "of": What the First Amendment protects is not free speech or freedom to speak, but rather *the*

4. Indeed, it is unclear whether Justice Black and Justice Douglas were true to their proclaimed absolutism, for even they accorded a recognition of the limits of liberty in their definition of "speech." For example, shouting "Fire!" in a crowded theater, Justice Holmes' famous test for the absolutist, is not viewed by Justice Douglas as "speech" but rather "speech brigaded with action." *Brandenburg v. Ohio*, 395 U.S. 444, 456 (1969) (Douglas, J.) (separate opinion.)

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freedom of speech," a phrase that suggests that the Framers were thinking of freedom as a legal construct that includes elements of restraint or limitations.⁵ It is not the very idea of limits on freedom, therefore, that distinguishes the American and Chinese Constitutions, nor perhaps even the source of these limits, but rather both the quantity and quality of those limits.

The limits of free speech in America are not codified in the way that they are in China, nor is it possible to summarize all of the cases that tried to identify those limits. There is, however, one case, *Brandenburg v. Ohio*,⁶ that is most revealing on this subject, not because it is representative, but rather because it involved a type of speech that presented the hardest test for freedom. *Brandenburg* was an instance when the Court was confronted with subversive speech—the advocacy of violence to alter basic tenets of the system—and was thus especially mindful of Justice Jackson's truism, the Constitution is not "a suicide pact."⁷ *Brandenburg* was a most appealing case for imposing limits on freedom, and the Court's response is offered as a way of gaining insight into the nature of our composite known as freedom of speech.

The case arose from a prosecution by the state of Ohio of a leader of the Ku Klux Klan for violating a statute that made it unlawful to advocate violence as a means of accomplishing political reform. The defendant extolled the racist program of the Klan, and also appeared (at least to the Court) to have advocated using violence and other unlawful means to bring that program into being. The speech for which he was prosecuted, however, took place in a context in which there was little risk of its being immediately efficacious. He spoke at a farm in Ohio before local television cameras. Aside from the reporters, only the defendant and eleven other Klansmen were present.

The Supreme Court held that the first amendment (as made applicable to the states by the fourteenth) barred the application of the statute to the defendant. The Court also held the statute itself invalid because it was not in any way confined to the prohibition of "incitement to imminent lawless action."⁸ The statute simply made it unlawful to advocate violence to achieve political or social reform. Such a statute, the Court reasoned, could not stand because "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advo-

5. Meikeljohn, *The First Amendment is Absolute*, 1961 SUP. CT. REV. 245.

6. 395 U.S. 444 (1971).

7. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.")

8. *Brandenburg*, 395 U.S. at 449.

cacy 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."⁹

Brandenburg bears ample witness to our willingness to protect the advocacy of ideas—no matter how distasteful the ideas might be, and no matter how much they are at odds with basic norms of the political system. Here the Klan speech was in conflict with the constitutional promise of racial equality and the assumption of the entire Constitution that change will come about through the ballot box and the amendment process. There are limits to the protection of advocacy—according to *Brandenburg*, the advocacy will not be protected if it becomes incitement—but the balance between freedom and regulation, in the purely quantitative sense, seems to be skewed in favor of freedom. There is more freedom than limitation.

It is hard to locate in China's constitutional system a parallel to the *Brandenburg* pronouncement. There is a Supreme Court, but the country operates as a civil law system, lessening the binding force of judicial decisions. In any event, the final authority to interpret the constitution rests not with the judiciary, but with the National People's Congress and its Standing Committee. Neither the Congress nor its Standing Committee has spoken to this issue nor are they likely to speak in the same manner as our Court (e.g., with the same degree of specificity or with reasoned opinions). I heard informal statements about expectations, but they, like social practices, were fragmentary and inclusive about the meaning of free speech in the constitution. There have been campaigns of suppression since the promulgation of the 1982 Constitution. One was the aborted crackdown on "spiritual pollution" ("Marxist humanism," existentialism, stylish hairdos, bright clothing, rock music, pornography, etc.) in 1983 and 1984.¹⁰ The other and more relevant one was the interference, albeit gentle interference, by the public security force with student demonstrations in September 1985 against the flood of Japanese goods coming into the country (the "second occupation").¹¹ It was difficult, however, to determine whether these so-called crackdowns were viewed as in accord with the formal guarantee of free speech, or in viola-

9. *Id.* at 447. It was clear, from the case and from general principles of American constitutional law, that the same rule would apply to the federal government, and that no significance was attached to the fact that at issue was a *state* statute.

10. See N.Y. Times, Dec. 20, 1983, at A2, col. 3; L.A. Times, Nov. 4, 1983, § 1-A, at 6, col. 1; Bernstein, *Domestic Politics*, in CHINA BRIEFING 1984, at 1 (S. Goldstein ed. 1984); Goldman, *Culture*, in CHINA BRIEFING 1984, at 21 (S. Goldstein ed. 1984).

11. See N.Y. Times, Sept. 19, 1985, at A4, col. 3; Wash. Post, Dec. 9, 1985, at A19, col. 2; N.Y. Times, Dec. 11, 1985, at A2, col. 3.

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tion thereof. No prosecutions ever took place, and these actions were not in any way tested in court, though both crackdowns provoked widespread criticism in China.

On the other hand, the reaction to my recitation of *Brandenburg*—the look of a startled audience—leaves no doubt in my mind that the kind of advocacy protected in *Brandenburg*—not just criticism of the current administration's policy (modernization), but advocacy of an idea that is at odds with a fundamental tenet of the system (socialism) coupled with the advocacy of unlawful conduct (violence) to achieve that end—falls beyond the free speech guarantee of the Chinese Constitution, not simply as applied, but on its face. Freedom of speech in China does not just consist of article 35, but is a product of articles 35 and 51 and the other proclamations of the duties of citizenship. The combination produces a different balance between freedom and restraint from that which we have in America. There is a quantitative difference in the amount of freedom allowed.

Of even greater significance is what might be referred to as the qualitative dimension of the two systems of free speech. In America, the free speech guarantee is seen as a limitation upon the exercise of power otherwise conferred and duly exercised by a government agency. As in *Brandenburg*, a legislature may use duly authorized procedures to pass a statute making it a crime to advocate using violence to achieve political reform, but that statute might be struck down if it is found to violate the free speech guarantee of the Constitution. Procedural regularity does not assure constitutional validity. Free speech in America imposes a limit on statutes or executive or judicial action; it cuts into the law. In China, even under the new constitution, free speech appears as a residue; it remains after we have reached the outer boundary of the statute (or other form of law). Article 35 tells citizens what they might do, but is not a restriction on the power of the state. They are allowed to engage in speech that is lawful. In America, individuals are not told what they might do—it is understood that they could do everything not denied—but limitations are placed on the state. Hence, what at first appears in our Constitution as a niggardly way of creating rights—prohibit the State (“Congress shall make no law . . .”) and then infer rights belonging to the citizens—turns out to be more generous, in a qualitative sense, than the positive conferral of rights by the Chinese Constitution (“Citizens enjoy freedom of speech . . .”).

The qualitative difference between the two constitutions might be illustrated by referring to the one provision of the Chinese Criminal Code that deals with a problem comparable to that in *Brandenburg*, though

there it is referred to as a "counterrevolutionary" speech. Article 102, section 2, proscribes "through counterrevolutionary slogans, leaflets or other means, propagandizing for and inciting the overthrow of the political power of the dictatorship of the proletariat and the socialist system." Although the statute refers to "inciting," it also uses the phrase "propagandizing for," and that phrase sweeps far more broadly than the "incitement to imminent lawless action" of *Brandenburg*. Indeed, article 102 (2) can be seen as almost the equivalent of the criminal syndicalism statute held unconstitutional in *Brandenburg*. Whatever misgivings Chinese legal scholars had about the suppression of the student demonstrations against "the second occupation," or for that matter about the crackdown on "spiritual pollution," both of which were in the nature of executive action rather than exercises of the formal lawmaking power, no doubts were raised by anyone about the validity of article 102(2). Even more to the point, it is not clear what effect such doubts would have within the Chinese system. It is not that Chinese citizens would have no place to turn (we were "assured" that they could file a complaint with the Standing Committee for violations of the constitution); nor is it that the Congress is not subject to the constitution. Rather, the problem stems from the fact that the free speech guarantee, as a composite of article 35 and those articles setting forth the duties of citizens, is not seen as imposing substantive limits on the legislature or other lawmaking agencies. In fact, article 53 requires Chinese citizens to "abide by the Constitution and the law." In such a context, *Brandenburg* is unthinkable.

I do not mean to make too much of *Brandenburg*. No one case could capture all of a constitutional tradition, especially one as rich and as varied as that of free speech. Indeed, *Brandenburg*, and for that matter the whole era of which it was part, was something of a high water mark for free speech in America. *Brandenburg* was in many respects the final statement of the Warren Court on free speech, summing up the uniquely generous spirit of that Court on civil liberty issues. Times may change. To underscore this point, our hosts confronted us with *Whitney v. California*¹² and, even more emphatically, with *Dennis v. United States*.¹³ Neither required a showing of "incitement of imminent lawless action": In *Whitney* only some rational basis for the legislative belief of a danger of overthrow was required (a substantive due process test),¹⁴ and on that theory, a criminal syndicalism statute identical to the one at issue in *Brandenburg* was upheld. In *Dennis*, the Supreme Court used the so-

12. 274 U.S. 357 (1927).

13. 341 U.S. 494 (1951).

14. 274 U.S. at 369-70.

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called discounted clear and present danger test, which allowed the probability of a danger occurring to be augmented by the gravity of the danger,¹⁵ and upheld the conviction of the leaders of the American Communist Party for advocating the overthrow of the government. *Brandenburg* explicitly overruled *Whitney*, and also, in my judgment, overruled *Dennis*, but—so the point was emphatically made by our hosts—there is nothing to stop the pendulum from swinging back in the other direction. Everything depends, so they argued, on the specific historical conditions.

The possibility of change for the worse cannot be denied—indeed, in the late seventies, the Chief Justice wrote an opinion for the Court that seemed to revive the *Dennis* test¹⁶—but my own hunch is that the difference, even the quantitative one, that I noted in the two systems of free speech, will still persist. In the future, something less than “incitement of imminent lawless action” might suffice in America, but I think it will still be necessary to present some special danger to the social order over and above what might be contained in the communication of a subversive idea. The same cannot be said about the Chinese Constitution. As I read it, especially against the background of article 102(2), “mere advocacy” is not protected and thus can be stopped and punished when the speech entails a criticism of some fundamental tenet of the social system.

Even more importantly, it is hard to imagine the qualitative dimension of *Brandenburg* disappearing, no matter how dark the times, for this aspect of freedom of speech implicates what constitutionalism has come to mean to us. In America, the Constitution not only establishes the structure of government, but also creates boundaries—marked by such substantive ideals as free speech—beyond which no agency of government can pass. In the People’s Republic, all agencies of government are subject to the constitution—indeed, that is the principal thrust of what is meant by the new emphasis on the rule of law. The combination of article 35 with provisions such as articles 51 and 53, however, limits freedom of speech with a force and scope equal to that with which it grants it. In such a situation, it is hard to think of freedom of speech as imposing a substantive boundary on legislative action such as article 102(2).

In part, the differences in the free speech guarantees might stem from the way in which the ultimate interpretive power is allocated. As I already noted, in the People’s Republic the final authority to interpret the constitution rests with the National People’s Congress, or more specifically, with the Standing Committee of the Congress. In the United

15. 341 U.S. at 510.

16. *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976).

States, at least since *Marbury v. Madison*,¹⁷ the interpretive power rests with the judiciary. It may be that one is more likely to view a constitution as a limit on the ordinary lawmaking process—as demarcating substantive boundaries on that process—when the ultimate interpretive power is entrusted to the courts. On this account, that remarkable American institution of judicial review might explain what I referred to as the qualitative dimension of free speech, our tendency to see a constitutional provision of liberty as a substantive limitation on the regular lawmaking power. But what might explain the quantitative dimension? Can it also be tied to judicial review?

Some might think protection for free speech is likely to be more generous in the quantitative sense when it comes from an institution that is relatively insulated from popular pressure, like the judiciary, on the theory that freedom of speech protects minorities against the majority. In fact, however, freedom of speech often protects the majority, giving it an opportunity, apart from elections, to express its views on public issues. In any event, allocation of the interpretive power could at best explain the difference in the pattern of interpretations that emerge over time. It could hardly account for the different balance between freedom and restraint that appears on the very face of the two constitutions. To explain that quantitative difference, some might resort to China's feudal past and the cultural differences with the United States, but I am inclined, perhaps because I found so little truth to the old and familiar stereotypes, to stress political rather than cultural factors, or more specifically, the conception of democracy that informs each system. Political ideals are not autonomous, but neither are they reducible to cultural factors, or even economic ones.

One theory of democracy works from the top-down. It vests power in elites, who in turn are to exercise power to further the ("true") interests of the people. It is government *for* the people. The elite are to lead the people toward the realization of their true interests; in this scheme, free speech plays only a minor role, at most allowing the people to make suggestions and recommendations to the governing elite. There is, however, another conception of democracy, which works from the bottom-up. It is government *by* the people, and extolls the capacity of the people at the bottom of the pyramid—the masses—to govern themselves. The citizenry guides the state, and to do that, the citizens must be free to create their own agenda and they must have the information needed to make intelligent choices. There must, in short, be free debate over public

17. 5 U.S. (1 Cranch) 137 (1803).

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issues, for it is the essential precondition of true collective self-determination.

In the early 1960's, when America was swept by egalitarianism, the Supreme Court spoke of a national commitment that "debate on public issues should be uninhibited, robust and wide-open."¹⁸ This commitment to free debate drew upon the second conception of democracy and inspired the Warren Court's generous protection of free speech, of which *Brandenburg v. Ohio* was part. In effect, the Court was saying that even the advocacy of violence or unlawful conduct must be protected, for fear of excluding from public debate those ideas that call for reform so radical as to have little chance of success in the ordinary political process. Every idea should be before the citizenry, even if that means risking democracy itself.

It remains, of course, an open question whether we in America have been sufficiently attentive to the ways private corporate elites distort and impoverish public debate. What can be said, however, is that the free speech tradition richly and amply protects the integrity of public debate against government intrusion and that many of us are working to extend this protection to guard against abuses by private elites.¹⁹ The commitment to a rich public debate espoused in *New York Times v. Sullivan* and the conception of democracy upon which that commitment rests is both the foundation and inspiration for that effort.

On one reading, China might seem to have simply mirrored our strengths and weaknesses. In China, free speech is endangered by one elite—high government or party officials, but not by another—the leaders of a private corporate sector. The truth is, however, a little deeper and a little darker. It is not that China sees one elite as more of a threat to free speech than another, but rather that it is informed by a different set of commitments altogether. Private elites are curbed as a by-product of socialism, rather than from a commitment to free and open debate. True, China sees itself as a democracy, but it appears to have a top-down, as opposed to a bottom-up conception. The emphasis is upon leading the masses, not enriching debate. The true path has been found.

The preamble of the 1982 Constitution extolls democracy but also makes clear what kind of democracy is contemplated:

Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Zedong Thought, the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship and follow the socialist road, steadily improve socialist institutions, develop

18. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

19. See Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. (1986) (forthcoming).

socialist democracy, improve the socialist legal system and work hard and self-reliantly to modernize industry, agriculture, national defence and science and technology step by step to turn China into a socialist country with a high level of culture and democracy.²⁰

Article 3 of the constitution provides for democratic elections to the National People's Congress and to the local peoples' congresses and insists that these officials "are responsible to the people and subject to their supervision." At the same time, that article reaffirms "the principle of democratic centralism," an attempt to mediate the conflict between leadership and participation that leaves little doubt as to where the emphasis lies. As one China hand explained the idea of democratic centralism, "Leaders take the ideas expressed by the masses, extract from them what is valuable, and return with them to the masses who study them, grasp them, and translate them into concrete practice."²¹ There is no commitment, as there is in America, to a public debate that is, to use our talismanic phrase, "uninhibited, robust and wide-open." To many in China, such a commitment seems bizarre, or, as one student at my lectures put it, an invitation to "social chaos."

Constitutions can be amended or even be totally supplanted. This is especially true where the revisionary powers are vested in an ongoing state agency as they are in China. Also, constitutions have a way of evolving. The protection of a free and open debate may have been the central purpose of the first amendment as originally conceived, but that purpose was not understood or articulated for nearly 200 years. In fact, the history of free speech in America began not with *New York Times v. Sullivan* but with the Alien and Sedition Acts of 1789, which threatened to suppress debate on the most pressing issues then facing the nation. These statutes provoked strong opposition and were soon repealed, but they were not "officially" declared unconstitutional until the *Sullivan* decision in 1964.²²

Likewise, over time there may be a change in the governing theory of the Chinese Constitution. At the moment, the constitution is informed by a top-down conception of democracy, signified by such oxymora as "democratic centralism" and "democratic dictatorship," but there are a number of forces in Chinese society—which go under the rubric of modernization—that might lead to a change. One is increased exchanges between our countries, which might increase the attraction for "bourgeois

20. Apparently, there is some dispute among constitutional scholars as to the legal status or binding force of the preamble.

21. Eliasoph, *supra* note 2, at 301.

22. *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).

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liberalism" (or at least convince the Chinese that open debate does not necessarily mean social chaos). Even more significantly, the further proliferation of "free markets" (private entrepreneurship in consumer goods and services) might involve greater dispersion of economic power to the people at the bottom of the pyramid, and thus provide a more secure economic foundation for an assertion of political power. If these developments continue, and if the leaders become sufficiently confident in the durability and strength of their governmental institutions (which, after all, are only some thirty-five years old), we may see a shift in the underlying political theory of the constitution. Democracy might come to be understood to mean rule *by*, as well as, *for* the people.

In that case, the proud declaration of article 2 ("All power in the People's Republic of China belongs to the people.") might be given a new institutional expression, and the limitations imposed on article 35 by article 51 and similar sections might be amended or narrowly construed. These changes—if they ever come into being—will not alter what I have referred to as the qualitative dimensions of free speech, for that implicates the very idea of constitutionalism as well as the theory of democracy. Yet they might result in a new balance between freedom and restraint and thus narrow some of the gap that now exists between our two constitutions.