
Free Speech Without Democracy

Ashutosh Bhagwat*

In the United States, First Amendment protections for free speech are deeply associated with democracy. The dominant view in the Supreme Court and among commentators is that the primary (albeit not necessarily the only) reason we protect free speech is because of its essential role in advancing democratic self-governance. What are the implications of the democratic self-governance theory for free-speech protections outside the United States, in particular in nondemocratic countries? If we assume that the role of free speech is to advance democratic politics, then presumably non-democratic countries would have no reason to protect or tolerate speech. After all, if one rejects western-style liberal democracy, presumably one also rejects the subsidiary rules that undergird that system of government. The truth, however, is more complex. First of all, the vast majority of constitutions in the world grant at least some level of written protection for free speech, even though many of these constitutions are in countries which do not even purport to be free, multiparty democracies. Of course, many of these constitutional protections are shams; but it remains true that some autocratic regimes do permit free speech. The purpose of this paper is to explore how and why that might be so, and to consider whether the answers to these questions might have implications for U.S. domestic law.

I begin by surveying the scope of global protections for free speech in written constitutions, and then examine in some detail three case studies of autocratic countries that have provided a degree of room for free speech: modern Communist China, the Soviet Union during the Glasnost era under Mikhail Gorbachev, and modern Qatar. In each case, I demonstrate that the regime provides meaningful protections for free speech, albeit with clear limits. I also argue that in each of these cases, the leadership has absolutely no interest in advancing democracy or surrendering their

* Copyright © 2015 Ashutosh Bhagwat. Professor of Law, UC Davis School of Law. B.A. 1986 Yale University. J.D. 1990 The University of Chicago. Thanks to Chris Elmendorf, Keith Hand, Greg Magarian, Mark Tushnet, and participants at the UC Davis School of Law faculty “schmooze” for extremely helpful comments. Thanks also to Andrew Ho and Briana Fitzpatrick for excellent research assistance.

monopoly on power. Yet, even without democracy, they perceive that permitting some degree of free speech advances their interests and the interests of their citizens and nations.

Based on my case studies, I identify three distinct reasons why autocratic leaders might have an interest in permitting some freedom of speech by citizens. The first, and most significant, is enforcing central authority. In any large, bureaucratic system, central leadership often faces great difficulty in getting local officials to advance central policies and follow central leadership. Citizens can play an important role in identifying, and publicizing, corruption and lawlessness, as well as violations of central policy, at the local level. Second, free speech can act as a safety valve. Permitting some degree of free speech can alleviate pressures for political change. Third, free speech as a form of citizen participation in government can lend legitimacy to a government, even without the legitimacy conferred by popular consent through elections. I also explore the countervailing factors — notably the desire for rulers to maintain their power — which result in clear limits on what sorts of speech will be tolerated in autocracies.

I close by considering whether these alternative justifications for protecting free speech have any implications for speech within the United States. I argue that they do, for this reason: even though our system of government is at its base democratic, citizens often do not experience actual interactions with the government in this way. This means that in addition to protecting democratic government, free speech also plays some of the same roles in the U.S. as in autocracies: permitting oversight over the bureaucracy, providing a safety valve, and granting legitimacy to high officials. I close by considering some doctrinal implications of this insight.

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INTRODUCTION

Why do we protect freedom of speech? While many alternative theories of free speech have been advanced over the years,¹ in the United States, the leading answer has been that we value free speech because it is an essential element of democratic self-governance. The self-governance rationale, which has its roots in Justice Brandeis’s seminal separate opinion in *Whitney v. California*² as well as in the writings of the philosopher Alexander Meiklejohn,³ has over the years gained broad acceptance as the primary, if not necessarily the only, reason why the First Amendment protects free speech as well as the related rights of freedom of the press, association, peaceable assembly,

¹ See, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (advancing the “marketplace of ideas”/search for truth rationale for free speech); C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 47-69 (Oxford 1992) (speech is protected because it advances “the speaker’s self-fulfillment”); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 879 (1963) (free speech is protected because it contributes to “the achievement of self-realization”).

² *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

³ See, e.g., Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 *SUP. CT. REV.* 245, 255 (1961). Interestingly, in his writings Meiklejohn explicitly acknowledges that his theory of free speech has no relevance to nondemocratic societies or institutions. See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 84 (Harper & Bros. 1965) (“The principle of the unqualified freedom of public speech is, then, valid only in and for a society which is self-governing.”).

and petitioning the government.⁴ The Supreme Court has in recent years repeatedly reaffirmed the close relationship between self-governance and First Amendment liberties, including free speech.⁵ Among commentators, leading figures as diverse as Robert Bork and Cass Sunstein have endorsed the self-governance theory,⁶ and more recently Robert Post and Jim Weinstein have ably and convincingly argued that “participatory democracy” is the primary reason we protect free speech.⁷ Insofar as consensus is ever possible in constitutional theory, this seems to be an area where broad, albeit not universal,⁸ consensus exists.

The implications of the self-governance theory for free-speech law in the United States are complex but manageable. When one moves outside the United States, however, things get more complicated. Presumably, in other liberal democracies, the basic questions one might ask about how free speech advances democracy, and how those values should be balanced against other social interests, are not terribly different, albeit the answers may be shaped by differing political cultures. But, of course, large parts of the world are *not* plausibly described as liberal democracies, including China and most of the Middle East. These nations do not engage in what Ozan Varol calls “stealth authoritarianism,”⁹ but rather have explicitly autocratic forms of government. Self-governance theory would suggest that in these countries, which self-consciously reject liberal democracy, protections for free speech would be non-existent. More broadly, self-governance theory, on its face, suggests that autocracy and free speech

⁴ See U.S. CONST. amend. I.

⁵ See, e.g., *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1448 (2014); *Knox v. Serv. Emps. Int’l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012); *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011); *id.* at 2505 (Scalia, J., dissenting); *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011); *Citizens United v. FEC*, 558 U.S. 310, 339-40 (2010).

⁶ See CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 121-65 (The Free Press 1993); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 20-21 (1971).

⁷ Robert Post, *Participatory Democracy and Free Speech*, 97 *VA. L. REV.* 477, 482 (2011); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 *VA. L. REV.* 491, 502-03 (2011); see also Ashutosh Bhagwat, *Details: Specific Facts and the First Amendment*, 86 *S. CAL. L. REV.* 1, 32-35 (2012).

⁸ See, e.g., Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 *CONST. COMMENT.* 283, 283-84 (2011) (advocating “a thinker-based foundation for freedom of speech”).

⁹ See generally Ozan O. Varol, *Stealth Authoritarianism*, 100 *IOWA L. REV.* 1673 (2015) (describing how contemporary regimes use the “mask of law” to conceal authoritarian practices).

are fundamentally inconsistent. Given the prevalence of autocratic constitutions in the world,¹⁰ one would think that protections for free speech would be rare.

The truth is otherwise. The vast majority of the world's constitutions protect free speech, as least in writing, and such protections can be found in autocratic countries as regularly as in democratic ones.¹¹ Of course, in many instances these protections are “shams,” meaning that rights are protected on paper but not in practice, a fact of which the population is fully aware.¹² It is the thesis of this paper, however, that not all free-speech protections in authoritarian regimes are shams. To the contrary, many autocratic regimes display real, albeit limited, tolerance for free speech. Moreover, this tolerance is not simply the result of a loss of control, or an inability to enforce repressive norms. Rather, autocratic leaders are self-consciously choosing to permit, and in some cases encourage, free expression by its citizens in some circumstances. Presumably autocratic leaders who tolerate or encourage free speech have a reason for doing so. Assuming that there exists a group of autocratic leaders who are unwilling to yield their monopoly on power, but whose actions are otherwise generally designed to advance the welfare of their citizens and nations, autocratic leaders in these regimes clearly see free speech as advancing national interests, even in the absence of democracy. They may also believe that free speech, within limits, might bolster their own power.

The fundamental question this paper seeks to answer is why that might be so. Is it possible to come up with a theoretical framework explaining the role of free speech in an autocratic regime? Furthermore, if such a theory can be developed, can it be reconciled with self-governance theories? More broadly, what are the implications of autocratic free speech for free speech in democracies? The answers that emerge are interesting both in their own right, and because of the insights they yield about the role of free speech and the nature of an active citizenry in *all* regimes, not just democratic ones.

Part I provides examples of free speech-tolerant autocratic regimes, including three case studies: modern China, the Soviet Union under

¹⁰ See *infra* Part I.A.

¹¹ See *id.*

¹² See David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CALIF. L. REV. 863, 865-67 (2013) (listing examples such as North Korea and Eritrea where written constitutions grant broad rights, but the regimes are highly repressive). Interestingly, Law and Versteeg find that a broad listing of constitutional rights is *negatively* correlated with actual protections. *Id.* at 892.

Mikhail Gorbachev, and modern Qatar. Part II explores the reasons why such regimes tolerate or, in some cases, encourage free speech. From these reasons, it develops three non-democratic rationales for free speech that are nonetheless political, and instrumental. It also explores the limits tolerant autocratic regimes impose on free speech and seeks to reconcile those limits with the justifications identified earlier. Finally, Part III explores the implications of my analysis for free speech in the United States.

I. FREE SPEECH IN AUTOCRACIES

This part of the paper demonstrates that free speech protections in autocratic countries exist, and have been given real effect in at least some important non-democratic nations. It begins by providing some numerical support for the proposition that written free speech protections are common, and then examines in some detail specific, autocratic regimes that have provided tangible protection to free speech, albeit subject to limits.

A. *The Ubiquity of Free Speech Protections*

Guarantees of free speech are ubiquitous in the modern world. There are currently somewhere around 194 constitutions in effect in the world.¹³ About 95% of these constitutions provide some form of protection for freedom of expression.¹⁴ Given the preponderance of authoritarian constitutions over democratic ones, a necessarily high percentage of those constitutions are in autocratic regimes.¹⁵ Empirical research also supports the proposition that authoritarian constitutions are no less likely to protect (on paper at least) common rights, such as freedom of expression, than democratic constitutions (though they do protect fewer rare rights).¹⁶ Not all free speech guarantees are written in as absolute terms of the U.S. First Amendment,¹⁷ but many are, and

¹³ The database “Constitute” collates current world constitutions in a searchable form, and lists 194 constitutions. See CONSTITUTE, <https://www.constituteproject.org/search?lang=en> (last visited Aug 3, 2015).

¹⁴ Use of Constitute’s search filter “Freedom of expression” suggests that 184 out of 194 constitutions listed provide such protections, in various forms. See *id.*

¹⁵ Zachary Elkins, Tom Ginsburg & James Melton, *The Content of Authoritarian Constitutions*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES 141, 145-46 (Tom Ginsburg & Alberto Simpser eds., Cambridge 2014) (reporting that since 1789, 695 of 846 constitutions identified were authoritarian, and that even in 2008 56% of the world’s constitutions in force were authoritarian).

¹⁶ *Id.* at 157-58.

¹⁷ See U.S. CONST. amend. I (“Congress shall make *no* law . . . abridging the

there seems to be no pattern of autocratic countries granting more circumscribed protections than democratic ones.

Examples of strong, written free speech protections in non-democratic nations abound. Article 35 of China's Constitution of 1982 states flatly that "Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration."¹⁸ Article 67 of the current North Korean Constitution similarly states that "Citizens are guaranteed freedom of speech, of the press, of assembly, demonstration and association," and further promises that "The State shall guarantee conditions for the free activity of democratic political parties and social organizations."¹⁹ Article 50 of the 1977 Constitution of the Soviet Union went even further, providing that:

In accordance with the interests of the people and in order to strengthen and develop the socialist system, citizens of the USSR are guaranteed freedom of speech, of the press, and of assembly, meetings, street processions and demonstrations.

Exercise of these political freedoms is ensured by putting public buildings, streets and squares at the disposal of the working people and their organisations, by broad dissemination of information, and by the opportunity to use the press, television, and radio.²⁰

A random sample of other autocratic nations that provide unqualified free speech protections includes Belarus,²¹ Eritrea,²² Kazakhstan,²³ and

freedom of speech . . ." (emphasis added)).

¹⁸ XIANFA art. 35 (1982) (China), available at http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content_1372964.htm. As discussed later, see *infra* Part I.B, the strength of this assurance is somewhat undermined by other constitutional provisions which qualify all of the rights granted in the Chinese Constitution. In isolation, however, the free speech right reads in absolute terms.

¹⁹ CONSTITUTION OF THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA [CDPRK] art. 67 (N. Kor.), available at https://www.constituteproject.org/constitution/Peoples_Republic_of_Korea_1998.

²⁰ KONSTITUTSIIA SSSR (1977) [KONST. SSSR] [USSR CONSTITUTION] art. 50, available at <http://www.constitution.org/cons/ussr77.txt>.

²¹ CONSTITUTION OF THE REPUBLIC OF BELARUS [CRB] art. 33, available at https://www.constituteproject.org/constitution/Belarus_2004 ("Article 33: Everyone is guaranteed freedom of thoughts and beliefs and their free expression.").

²² THE CONSTITUTION OF ERITREA [CE] art. 19(2), available at https://www.constituteproject.org/constitution/Eritrea_1997 ("Article 19(2): Every person shall have the freedom of speech and expression, including freedom of the press and other media.").

²³ CONSTITUTION OF THE REPUBLIC OF KAZAKHSTAN [CRK] art. 20(1), available at

Syria.²⁴ Obviously, none of these countries actually grant absolute protection to free speech, any more than does the United States or any other democracy. The point is that many countries, both autocratic and democratic, feel the need to include strong free speech provisions in their constitutions, whether or not that commitment has any practical import.

Another relatively common pattern found in modern constitutions, including authoritarian ones, is to assure free speech, but to qualify it by clarifying that the right must be exercised “in accordance with the provisions of the law” or some similar limit. That is the language of Vietnam’s Constitution,²⁵ and similar language can be found in the constitutions of Jordan²⁶ and (importantly) Qatar.²⁷

Finally, there is a group of countries which, even though they purport to grant some protection for free speech, hedge that assurance so thoroughly as to make it largely meaningless, even on paper. Consider, for example, Article 53 of the Cuban Constitution:

Citizens have freedom of speech and of the press in keeping with the objectives of socialist society. Material conditions for the exercise of that right are provided by the fact that the press, radio, television, movies and other organs of the mass media are State or social property and can never be private property. This assures their use at the exclusive service of the working people and in the interest of society.

https://www.constituteproject.org/constitution/Kazakhstan_1998 (“Article 20(1): The freedom of speech and creative activities shall be guaranteed. Censorship shall be prohibited.”).

²⁴ CONSTITUTION OF SYRIAN ARAB REPUBLIC [CSAR] art. 42(2) (Syria), *available at* https://www.constituteproject.org/constitution/Syria_2012 (“Article 42(2): Every citizen shall have the right to freely and openly express his views whether in writing or orally or by all other means of expression.”).

²⁵ CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM [CSRV] art. 69, *available at* https://www.constituteproject.org/constitution/Socialist_Republic_of_Vietnam_2001 (“Article 69: The-citizen shall enjoy freedom of opinion and speech, freedom of the press, the right to be informed, and the right to assemble, form associations and hold demonstrations in accordance with the provisions of the law.”).

²⁶ THE CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN [CHKJ] art. 15(1), *available at* https://www.constituteproject.org/constitution/Jordan_2011 (Article 15(1) provides that “[t]he State shall guarantee freedom of opinion; and every Jordanian shall freely express his opinion by speech, writing, photography and the other means of expression, provided that he does not go beyond the limits of the law.”).

²⁷ CONSTITUTION OF QATAR [CQ] art. 47, *available at* https://www.constituteproject.org/constitution/Qatar_2003 (“Article 47: Freedom of opinion and scientific research are guaranteed, according to conditions and circumstances laid down by the law.”).

The law regulates the exercise of these freedoms.²⁸

The first sentence of this provision might seem to protect freedom of speech generously, — though even here, the caveat “in keeping with the objectives of socialist society” might well give one pause. Reading on, however, it becomes clear that what the provision really establishes is a state monopoly over the media, combined with authority for the state to regulate speech in the name of “the objectives of socialist society.”²⁹ In other words, even on its face, the freedom of speech protected in Cuba is entirely chimerical.

Another example of such a highly restricted free speech provision can be found in the Constitution of Rwanda. Article 33 protects “freedom of thought, opinion [and] conscience,” but then clarifies that this freedom does not extend to “[p]ropagation of ethnic, regional, racial or discrimination or any other form of division”³⁰ Article 34 deals with press freedoms. It begins, hopefully enough, by stating that “Freedom of press and freedom of information are recognized and guaranteed by the State.”³¹ The next three paragraphs, however, then read as follows:

Freedom of speech and freedom of information shall not prejudice public order and good morals, the right of every citizen to honour, good reputation and the privacy of personal and family life. It is also guaranteed so long as it does not prejudice the protection of the youth and minors.

The conditions for exercising such freedoms shall be determined by Law.

There is hereby established an independent institution known as the “Media High Council.” A Law shall determine its responsibilities, organization and functioning.³²

As with Cuba, what the Rwandan Constitution giveth, it immediately taketh away. The hedge that free speech must not “prejudice public

²⁸ CONSTITUTION OF CUBA [CC] art. 53, available at https://www.constituteproject.org/constitution/Cuba_2002.

²⁹ Admittedly, this language could be read in a nobler sense, as assuring Cuban citizens of a right to access to the media. If that is what was meant, it obviously is not how the Cuban leadership has enforced it. Thanks to Greg Magarian for pointing this nuance out.

³⁰ CONSTITUTION OF RWANDA [CR] art. 33, available at https://www.constituteproject.org/constitution/Rwanda_2010.

³¹ *Id.* at art. 34.

³² *Id.*

order and good morals,” as well as the establishment of a media regulator, leave no doubt that even by its terms the Rwandan Constitution does not purport to seriously limit the State’s power to restrict speech.

Finally, there is Saudi Arabia. The only provision of the Saudi Basic Law that touches on free speech is Article 39, which states:

Mass media, publication facilities and other means of expression shall function in a manner that is courteous and fair and shall abide by State laws. They shall play their part in educating the masses and boosting national unity. All that may give rise to mischief and discord, or may compromise the security of the State and its public image, or may offend against man’s dignity and rights shall be banned. Relevant regulations shall explain how this is to be done.³³

Obviously, this provision provides no actual protections, nor does the Basic Law elsewhere protect speech, religion, or association and assembly.³⁴ The absence of any positive protection for free speech, as well as the frankness with which the Saudi Basic Law restricts and justifies restrictions on speech, is extraordinarily unusual in modern times, as the statistics recounted earlier suggest.³⁵ What special circumstances have led Saudi Arabia, and to a lesser extent Cuba and Rwanda, to adopt such restrictive free-speech provisions is a question which Part II.C addresses.³⁶

One last point is in order, before we turn to more specific case studies. The terms of the free speech provisions set forth above suggests very different levels of protection for speech in different countries. It should be noted, however, that there is little correlation between the written terms of a constitution and the actual degree of protection provided. Certainly free speech in Qatar is restricted, but as the home of Al Jazeera, it is not restricted as thoroughly as in North Korea, Eritrea, or Syria. Indeed, despite the absence of any free-speech guarantees in Saudi Arabia, it is undoubtedly a less repressive society than North Korea (admittedly, not a high bar). Furthermore, this observation is consistent with David Law and Mila Versteeg’s conclusion that written constitutional guarantees are in fact *negatively*

³³ BASIC LAW OF SAUDI ARABIA [BLSA] [CONSTITUTION], art. 39, available at https://www.constituteproject.org/constitution/Saudi_Arabia_2005.

³⁴ Abdulaziz H. Al-Fahad, *Ornamental Constitutionalism: The Saudi Basic Law of Governance*, 30 YALE J. INT’L L. 375, 387 (2005).

³⁵ See *supra* notes 13–16.

³⁶ See *infra* Part II.C.

correlated with actual liberty.³⁷ It follows then that when autocratic regimes permit some degree of free speech, it is not because their constitutions place any enforceable obligation on them to do so but because the rulers have made the choice for their own reasons.

B. *Free Speech in China*

To understand the state of free speech in China,³⁸ some background is needed about the Chinese system of government. On paper, the system is democratic. Article 3 of the Constitution explicitly states that the National People's Congress (the highest legislative body) as well as local people's congresses "are constituted through democratic elections."³⁹ Critically, however, the same provision announces the principle of "democratic centralism."⁴⁰ Among other things, this means that only the people's congresses at the lowest, local level are actually elected by citizen voters; all of the higher-level congresses, including the National People's Congress, are elected by the next lower level of congresses.⁴¹ Add to this the facts that even the local elections are tightly controlled by local chapters of the Communist Party and that provincial congresses inevitably elect delegates selected by the national Party, and in practice, the Communist Party is in complete control of the government. Indeed, the Preamble to the Constitution explicitly recognizes "the leadership of the Communist Party of China,"⁴² thereby acknowledging this fact. China is then (as is widely known) a one-party state, with essentially no effective, democratic institutions. The question then becomes, what role can, and does, free speech play in such a system.

³⁷ See *supra* note 12 and accompanying text.

³⁸ When I use the words "free speech" to describe the central authorities' tolerance of some speech in China, or any other autocracy, I do not mean to suggest that citizens of those countries enjoy free speech rights in the sense that citizens of liberal democracies do (though of course, even those rights face some limits). A better phrasing might be to describe the Chinese situation as one of "permitted speech" or "zones of tolerated discourse." However, for the sake of simplicity and familiarity, I will continue to use the phrase "free speech."

³⁹ XIANFA art. 3, (1982) (China), available at http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content_1372963.htm.

⁴⁰ *Id.*

⁴¹ *Id.* at arts. 59, 97.

⁴² *Id.* at pmb1.

1. Legal Rights

As discussed earlier, Article 35 of the Chinese Constitution grants Chinese citizens a seemingly unqualified right to “freedom of speech.”⁴³ It should be noted, however, that despite the clear language of Article 35, other parts of the Constitution suggest that there may be limits on this right. In particular, Article 51 states that “Citizens of the People’s Republic of China, in exercising their freedoms and rights, may not infringe upon the interests of the state, of society or of the collective, or upon the lawful freedoms and rights of other citizens.”⁴⁴ Clearly, this language, notably the restriction on infringing “upon the interests of the state, of society, or of the collective,” could easily be invoked to justify, on constitutional grounds, limits on free speech. And in fact, commentators have argued that this is precisely the effect that this and other provisions of the Constitution have had.⁴⁵

In any event, even if the written Chinese Constitution did provide unambiguous free speech protections, its efficacy would be undermined by one simple fact: the Chinese judiciary does not exercise the power of judicial review. After a brief flirtation with the adjudication of constitutional rights at the beginning of this century, China has firmly rejected this approach, denying legal effect to the Constitution.⁴⁶ Even if a system of judicial review existed, given the weakness of Chinese courts and their lack of independence from the Communist Party, it is quite clear that they are not institutionally capable of meaningfully constraining the actions of the State and Party.⁴⁷ In practice, then, in the area of free speech, as in most other areas, the actual system of government in China has little relationship to the written Constitution, except insofar as senior officials choose to

⁴³ See *supra* note 18 and accompanying text.

⁴⁴ XIANFA art. 51. (1982) (China), available at <http://www.hkhrm.org.hk/english/law/const03.html>.

⁴⁵ See, e.g., Owen M. Fiss, *Two Constitutions*, 11 YALE J. INT’L L. 492, 493-94 (1986); Mindy Kristin Longanecker, *No Room for Dissent: China’s Laws Against Disturbing Social Order Undermine Its Commitments to Free Speech and Hamper the Rule of Law*, 18 PAC. RIM L. & POL’Y J. 373, 379-80 (2009); see also Guo Quan Verdict, DUI HUA (Suqian Interim. People’s Ct. of Jiangsu Province Oct. 16, 2009) (China), available at http://www.duihua.org/work/verdicts/verdict_Guo%20Quan_en.htm (invoking Article 51 to reject a “freedom of speech and association” defense in a subversion prosecution).

⁴⁶ See Albert H.Y. Chen, *The Discourse of Political Constitutionalism in Contemporary China*, 14 CHINA REVIEW 183, 191 (2014); Keith Hand, *Resolving Constitutional Disputes in Contemporary China*, 7 E. ASIA L. REV. 51, 54, 65-69 (2012).

⁴⁷ See Shauna Emmons, *Freedom of Speech in China: A Possibility or a Prohibition?*, 23 LOY. L.A. INT’L & COMP. L. REV. 249, 277-78 (2001); Hand, *supra* note 46, at 82-87.

follow constitutional rules.⁴⁸ The Constitution, by its own terms, has no constraining effect, except perhaps a moral one.

2. Free Speech in Action

Given the lack of legally enforceable constitutional rights in China, and the Party's rejection of democracy, one might think that free speech is entirely absent in China. The truth is more complex. It is undoubtedly true that during the Maoist era, before the reforms that began in the late 1970s, China was a police state with no official tolerance for dissenting speech.⁴⁹ Even today, a pervasive system of censorship of the mass media remains in place, permitting the State, if it wishes, to suppress particular ideas.⁵⁰ And China has famously imposed massive censorship on the Internet within China through its "Great Firewall" and occasional prosecution of dissenting websites.⁵¹ These restrictions, however, tend to deflect attention from the flourishing of cultural and political speech during the reform period. No doubt these developments, to some extent, are due to the greater difficulty in enforcing censorship in the electronic age. However, it seems clear that the Chinese leadership has also consciously loosened restrictions on speech. Indeed, its very decision to permit the growth of the Internet in China (albeit subject to oversight and censorship) clearly reflects such a policy choice.

⁴⁸ See Donald C. Clarke, *Puzzling Observations in Chinese Law: When Is a Riddle Just a Mistake?*, in UNDERSTANDING CHINA'S LEGAL SYSTEM: ESSAYS IN HONOR OF JEROME A. COHEN 93, 103 (C. Stephen Hsu ed., NYU Press 2003); Xin He, *The Party's Leadership as a Living Constitution in China*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES 245, 245-46 (Tom Ginsburg & Alberto Simpser eds., Cambridge 2014).

⁴⁹ See He, *supra* note 48, at 257; RANDALL PEERENBOOM, CHINA MODERNIZES: THREAT TO THE WEST OR MODEL FOR THE REST? 104 (Oxford 2007); Randall Peerenboom, *Law and Development of Constitutional Democracy in China: Problem or Paradigm?*, 19 COLUM. J. ASIAN L. 185, 212 (2005).

⁵⁰ See Emmons, *supra* note 47, at 260, 267-69.

⁵¹ For a detailed description of how Chinese Internet censorship operates, see Gary King, Jennifer Pan & Margaret E. Roberts, *How Censorship in China Allows Government Criticism but Silences Collective Expression*, 107 AM. POL. SCI. REV. 326, 328-30 (2013), available at <http://gking.harvard.edu/publications/how-censorship-china-allows-government-criticism-silences-collective-expression>; see also Longanecker, *supra* note 45, at 391-92; Min Jiang, *The Co-Evolution of the Internet, (Un)civil Society & Authoritarianism in China*, in THE INTERNET, SOCIAL MEDIA, AND A CHANGING CHINA (Jacques deLisle, Avery Goldstein & Guobin Yang eds., Univ. of Pa. Press forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2379092; *The Great Firewall: The Art of Concealment*, ECONOMIST (Apr. 6, 2013), <http://www.economist.com/news/special-report/21574631-chinese-screening-online-material-abroad-becoming-ever-more-sophisticated>.

One of the most important steps in the movement towards a more open society in China was undoubtedly the growth of an autonomous media. This development began in the 1980s and 1990s in the wake of reform,⁵² and has of course gained speed as China has become the largest Internet user in the world.⁵³ The media primarily provide cultural expression and entertainment,⁵⁴ but obviously can be a vehicle for political expression as well.

Equally as important as the growth of the Chinese mass media is the enormous loosening of restrictions on personal speech in the reform era. Commentators generally agree that since the reform era began, China has come to tolerate wide amounts of political speech in private and academic spheres. Thus Randall Peerenboom notes that in modern China,

political discussion is commonplace whenever friends and colleagues meet socially, while visitors are often surprised at how ready even first-time acquaintances are to criticize the government, disparage top leaders, or call for faster political reforms. Academics regularly publish works criticizing the government and call for greater democratization and political reforms. Legal scholars and government officials continue to press for constitutional reforms including greater judicial independence. The media, forced to respond to consumer interest as a result of market reforms, are ever more critical and free-wheeling.⁵⁵

He also notes that the press regularly reports on official corruption, albeit not corruption of high-level officials.⁵⁶ Xin He similarly acknowledges both the commonality of “dinner-table freedom of speech,” and the number of publications.⁵⁷ As we shall see, this new freedom is not unlimited in either topic or medium; but it is undoubtedly a substantial change from pre-reform practice, reflecting changing policies and priorities among the leadership.

⁵² See Emmons, *supra* note 47, at 254-55.

⁵³ Euan McKirdy, *China's Online Users More Than Double Entire U.S. Population*, CNN.COM (Feb. 4, 2015), <http://www.cnn.com/2015/02/03/world/china-internet-growth-2014/>.

⁵⁴ See *Let Me (Not) Entertain You*, ECONOMIST (Jan. 7, 2012), <http://www.economist.com/node/21542469>.

⁵⁵ PEERENBOOM, *supra* note 49, at 104.

⁵⁶ *Id.* at 113-14.

⁵⁷ He, *supra* note 48, at 257.

Recent press reports provide confirmation of at least some tolerance, or even support, for free speech among Party leaders. Thus, in January of 2013 *The Economist* reported that a (foolish) change in traffic rules elicited such a strong barrage of online complaints that officials rescinded the rule, and even thanked the “broad masses” for complaining.⁵⁸ In April of 2013, in describing the response of the Chinese political leadership to a new bird flu, *The Economist* noted that Chinese officials have in recent years ended a ban on media coverage of public emergencies such as disease outbreaks, a change in policy triggered by China’s struggles in 2003 in dealing with the outbreak of SARS at least in part because information about the disease was originally suppressed.⁵⁹ In July, the magazine reported on a local protest against a planned nuclear power plant, which led to local officials cancelling the project.⁶⁰ And in April of 2014, *The Economist* reported on an explosion of non-governmental organizations (“NGOs”) in China in recent years, often encouraged by the State and the Party.⁶¹

Finally, in addition to tolerating private speech, the Chinese leadership has also begun to take steps that would permit private citizens to obtain information about the operations of the state, a crucial step to enabling speech about the state. In 2008, China adopted regulations permitting private citizens to file “open government information” requests — the equivalent of freedom-of-information requests — with local and central government entities.⁶² Evidence also indicates that in recent years, the number of such requests has exploded, and courts have been increasingly willing to

⁵⁸ *Slamming on the Brakes: Drivers Push Back Against a Government Directive*, *ECONOMIST*, Jan. 12, 2013, at 40, available at <http://www.economist.com/news/china/21569453-drivers-push-back-against-government-directive-slamming-brakes>.

⁵⁹ *Bird Flu: New Scare*, *ECONOMIST*, Apr. 13, 2013, at 47-48, available at <http://www.economist.com/news/china/21576133-deadly-outbreak-bird-flu-testing-chinas-political-leaders-well-its-response>.

⁶⁰ *Nuclear Activism: Limiting the Fallout*, *ECONOMIST*, July 20, 2013, at 41-42, available at <http://www.economist.com/news/china/21582016-rare-protest-prompts-government-scrap-plans-build-uranium-processing-plant>.

⁶¹ *Chinese Civil Society: Beneath the Glacier*, *ECONOMIST*, Apr. 12, 2014, at 34-36, available at <http://www.economist.com/news/china/21600747-spite-political-clampdown-flourishing-civil-society-taking-hold-beneath-glacier>.

⁶² *Freedom of Information: Right to Know*, *ECONOMIST*, May 3, 2014, at 40, available at <http://www.economist.com/news/china/21601564-leaders-discover-some-transparency-can-help-make-society-more-stable-right-know>; see also Jamie P. Horsley, *The Development of Public Participation in the People’s Republic of China*, in *THE SEARCH FOR DELIBERATIVE DEMOCRACY IN CHINA* 289, 292-93 (Ethan J. Leib & Baogang He eds., Palgrave Macmillan 2010).

force recalcitrant agencies to comply with them.⁶³ The result is clearly greater openness, and a greater capacity for citizens to monitor and publicize government (mis)conduct than in the past, though certainly official obstructionism and secrecy remain issues.

I close this section with a note of caution. The developments described above regarding greater tolerance of speech in modern China are undoubtedly real. They are not, however, either linear or irreversible. In particular, it seems clear that in the last several years, especially since the ascension of Xi Jinping to the presidency in March of 2013, there has been a movement towards greater restraints on the media.⁶⁴ The Party also appears to be making greater efforts to influence and control ideological discussion, especially among academics, as illustrated by the striking “Document 9” issued (secretly) by the Party’s Central Committee that identifies seven areas of ideological concern.⁶⁵ And most recently, the authorities have launched a sophisticated campaign to disrupt virtual private networks, and thereby prevent Internet users from circumventing the Great Firewall and obtaining access to foreign websites.⁶⁶ Nonetheless, it is clearly true that whatever the inclinations of the current leadership, speech and public discussion in China remain common, and exponentially freer than it was during the Mao era. It is noteworthy in this regard that the press reports describing China’s new Internet controls quote many Chinese citizens vehemently attacking the new policy, without insisting on anonymity.⁶⁷

⁶³ *Freedom of Information: Right to Know*, *supra* note 62, at 40.

⁶⁴ See, e.g., Josh Chin, *China Restricts News Gathering, Proposes Punishing Lawyers’ Online Use*, WALL ST. J. (June 18, 2014, 12:54 PM ET), <http://online.wsj.com/articles/china-restricts-news-gathering-proposes-punishing-lawyers-online-use-1403110468>; Josh Rudolf, *China Bans Unauthorized Critical Media Coverage*, CHINA DIGITAL TIMES (June 18, 2014, 4:32 PM), <http://chinadigitaltimes.net/2014/06/china-bans-unauthorized-critical-coverage-journalists/>; see also *Ideology: Class struggle*, ECONOMIST, Feb. 28, 2015, at 37, available at <http://www.economist.com/news/china/21645222-officials-are-trying-stifle-independent-voices-universities-class-struggle> (describing recent efforts to impose ideological purity in university classrooms).

⁶⁵ *Document 9: A ChinaFile Translation*, CHINAFILE (Nov. 8, 2013), <http://www.chinafile.com/document-9-chinafile-translation#start>.

⁶⁶ See Andrew Jacobs, *China Further Tightens Grip on the Internet*, N.Y. TIMES (Jan. 29, 2015), <http://www.nytimes.com/2015/01/30/world/asia/china-clamps-down-still-harder-on-internet-access.html>.

⁶⁷ *Id.*

3. Red Lines

In short, China has undoubtedly created greater space in the post-reform era for free expression, including political expression, than would have been imaginable during the Mao era. There are, however, important and consistent limits to this new freedom — well-known red lines — that also are an important part of the story of free speech in China.

The clearest red line in the Chinese leadership's approach to free speech is any speech threatening the primacy of the Communist Party. Numerous commentators, some critical and some more supportive of China's approach to free speech, agree that speech directly challenging the current political system, or posing a serious threat to it, will not be tolerated.⁶⁸ Indeed, commentators recount regular and harsh prosecutions of dissenters seen to directly challenge the hegemony of the Party.⁶⁹

Another well-established red line prohibits accusations against top Party leaders, including revelations of embarrassing facts about such leaders. Thus, while the State tolerates and even encourages revelations about corruption among local officials, similar revelations about senior officials are out of bounds.⁷⁰ The strength and breadth of this policy is revealed by two incidents involving major, foreign press entities. In October of 2012, *The New York Times* (*The Times*) ran an extensive story detailing the wealth acquired by family members of Wen Jiabao, at the time the Prime Minister of China, during Wen's time in office.⁷¹ In response, Chinese authorities blocked *The Times's* website, forced two experienced reporters working for the newspaper to leave by refusing to process their visa applications, and prevented *The Times* from assigning new correspondents to its Beijing bureau.⁷² *Bloomberg News* had a similar experience. In 2012, it, too, published stories revealing the wealth of the Chinese leadership and their families, including a story about the family of Xi Jinping, then the Vice

⁶⁸ See He, *supra* note 48, at 257-58; PEERENBOOM, *supra* note 49, at 111; Chen, *supra* note 46, at 29 & 29 n.121; Emmons, *supra* note 47, at 259.

⁶⁹ See He, *supra* note 48, at 257-58; PEERENBOOM, *supra* note 49, at 111.

⁷⁰ PEERENBOOM, *supra* note 49, at 113-14.

⁷¹ David Barboza, *Billions in Hidden Riches for Family of Chinese Leader*, N.Y. TIMES (Oct. 25, 2012), <http://www.nytimes.com/2012/10/26/business/global/family-of-wen-jiabao-holds-a-hidden-fortune-in-china.html?pagewanted=all>.

⁷² Andrew Jacobs, *China Appears Set to Force Times Reporter to Leave*, N.Y. TIMES (Jan. 27, 2014), <http://www.nytimes.com/2014/01/28/world/asia/times-reporter-faces-expulsion-from-china.html?ref=wenjiabao>.

President and now the President of China,⁷³ and a separate story about the wealth of members of the National People's Congress.⁷⁴ *Bloomberg* faced a similar response as *The Times*, including expulsion of reporters and blocking of its website.⁷⁵ Note that in both of these instances, the disfavored news reports did not necessarily reveal corruption or misbehavior, but were undoubtedly embarrassing to the leadership. That was sufficient to elicit a draconian response.

A third area where Chinese authorities have tended to suppress speech — though less consistently than with the first two discussed above — is regarding disclosures of major social problems or policy failures within China. Thus, China has punished speakers who reveal such things as the incidence of AIDS deaths within China,⁷⁶ or the existence of hunger within China.⁷⁷ Most famously, during the outbreak of the SARS epidemic in 2002-2003, Chinese officials, especially local ones, systematically suppressed information about the prevalence and spread of the disease, thereby hampering efforts to combat it both within China and abroad.⁷⁸ Another famous example is the July 2011 high-speed train crash in Wenzhou, news of which the central authorities are also accused of seeking (unsuccessfully) to suppress.⁷⁹ Similarly, the government's initial (and again unsuccessful)

⁷³ Michael Forsythe et al., *Xi Jinping Millionaire Relations Reveal Fortunes of Elite*, BLOOMBERG (June 29, 2012, 12:32 AM), <http://www.bloomberg.com/news/2012-06-29/xi-jinping-millionaire-relations-reveal-fortunes-of-elite.html>.

⁷⁴ Michael Forsythe, *China's Billionaire Congress Makes Its U.S. Peer Look Poor*, BLOOMBERG (Feb. 26, 2012, 11:21 PM), <http://www.bloomberg.com/news/2012-02-26/china-s-billionaire-lawmakers-make-u-s-peers-look-like-paupers.html>.

⁷⁵ David Folkenflik & Robert Siegel, *China Threatens to Expel Reporters After Reports on Leaders' Wealth*, NPR (Dec. 5, 2013, 4:37 PM), <http://www.npr.org/templates/story/story.php?storyId=249074808>. In response to this treatment, *Bloomberg* has been accused (by *The New York Times*, ironically) of spiking later articles likely to elicit a similar response. Edward Wong, *Bloomberg News Is Said to Curb Articles that Might Anger China*, N.Y. TIMES (Nov. 8, 2013), <http://www.nytimes.com/2013/11/09/world/asia/bloomberg-news-is-said-to-curb-articles-that-might-anger-china.html>.

⁷⁶ PEERENBOOM, *supra* note 49, at 114.

⁷⁷ *See id.* at 116.

⁷⁸ *See* Yanzhong Huang, *The SARS Epidemic and Its Aftermath in China: A Political Perspective*, in *LEARNING FROM SARS: PREPARING FOR THE NEXT DISEASE OUTBREAK* 116, 118-19 (Stacey Knobler et al. eds., 2004), available at <http://www.ncbi.nlm.nih.gov/books/NBK92479/>; *China Accused of SARS 'Cover-Up'*, BBC (Apr. 9, 2013, 11:11 AM), <http://news.bbc.co.uk/2/hi/health/2932319.stm>.

⁷⁹ Tania Branigan, *Chinese Anger over Alleged Cover-Up of High-Speed Rail Crash*, GUARDIAN (July 25, 2011, 12:24 PM), <http://www.theguardian.com/world/2011/jul/25/chinese-rail-crash-cover-up-claims>; Steven Jiang, *Chinese Netizens Outraged over Response to Fatal Bullet Train Crash*, CNN (July 26, 2011, 5:16 AM), <http://www.cnn.com/2011/WORLD/asiapcf/07/25/china.train.accident.outrage/>.

response to the very recent (June 2015) ferry disaster on the Yangtze River was to try and control all information about the tragedy.⁸⁰ The motivation for this policy of suppression seems to be the leadership's belief that widespread knowledge of major problems or policy failures will undermine the public's faith in the competence of the Party, and so raise doubts about the wisdom of continued one-party rule. Intuitively, there seems to be some validity to these sorts of concerns. But as we shall see, there are substantial costs to this approach as well.⁸¹

Again, a final caveat is in order. The above description of "red lines" suggests clear boundaries between what speech is permitted, and what is not. The truth, of course, is more nuanced. Some lines are clear, such as reporting on corruption at the very top levels of government. On the other hand, the exact line between "top" or "central" leadership and "subordinate" or "local" leadership is far from clear, creating a gray area. Similarly, the exact limits on what censors will consider a "major" policy failure that it is out of bounds to publicize can also be unclear, creating further uncertainty. The result of this sort of ambiguity is, of course, self-censorship — the famous "chilling effect" of First Amendment theory.⁸² One clear implication of this phenomenon is that insofar as the Chinese leadership — or any other autocratic leadership — wishes to encourage some forms of citizen speech while steering speech clear of danger zones, they would be well-advised to provide clarity as to the nature of the red lines they wish to maintain.

C. *Glasnost*

For our second example of free speech within an autocracy, we turn from the current era to the 1980s, and from modernizing China to the epitome of Communist autocracy, the Soviet Union. In particular, we examine the policy of *Glasnost* associated with the last leader of the Soviet Union, Mikhail Gorbachev. What we find are surprising parallels to the policies towards free speech adopted by the modern Chinese leadership, albeit with very different trajectories and ultimate outcomes.

⁸⁰ Editorial, *China Tries to Censor a Disaster*, WASH. POST (June 3, 2015), http://www.washingtonpost.com/opinions/china-tries-to-handle-a-cruise-ship-disaster-by-increasing-censorship/2015/06/03/3378dd4c-0a11-11e5-a7ad-b430fc1d3f5c_story.html.

⁸¹ See *infra* Part II.D.

⁸² See, e.g., *Broadrick v. Oklahoma*, 413 U.S. 601, 629 (1973) (Brennan, J., dissenting) (stating of First Amendment rights, "[t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions" and describing this phenomenon as a "chilling effect").

Prior to Mikhail Gorbachev's ascent to the position of General Secretary of the Communist Party of the Soviet Union in 1985, press censorship in the Soviet Union was pervasive, and the Communist Party largely treated the press as an instrument to pursue its own policies.⁸³ Admittedly, the level of repression and violence decreased dramatically after the death of Stalin in 1953, but tolerance for dissent was still extremely limited. All of this changed when, soon after taking power, Gorbachev began to press for greater "glasnost," or openness, in Soviet society.⁸⁴ After a slow and cautious start, by the end of 1986 Glasnost produced a substantial opening in the media, and in Soviet public life more generally,⁸⁵ developments spurred on by Gorbachev's insistence that Glasnost was essential for "democratism, the political creativity of the masses and their participation in management."⁸⁶ Within two more years, Glasnost produced an explosion of writing on formerly taboo subjects including Soviet history, the Soviet economy, and other hot-button policy issues.⁸⁷

Why did Mikhail Gorbachev turn his back on six decades of history, and decide to encourage open debate in the Soviet Union? What were his goals, and what limits did he envision for Glasnost? The answers to these questions are intricate, but as noted above, turn out to have striking similarities to modern Chinese policy.

1. Glasnost in Action: Freedoms and Reasons

Mikhail Gorbachev first mentioned the need for "glasnost" or openness at a Party meeting in December of 1984, just before he came to power.⁸⁸ Once he was appointed to the top leadership role, the official Soviet press began publishing articles calling for citizens — and eventually the press — to expose waste and corruption by local officials and managers of state-owned enterprises.⁸⁹ During these early

⁸³ JOSEPH GIBBS, *GORBACHEV'S GLASNOST: THE SOVIET MEDIA IN THE FIRST PHASE OF PERESTROIKA* 4-8 (Texas A&M 1999).

⁸⁴ See Serge Schmemmann, *Greater 'Glasnost' Turns Some Soviet Heads*, N.Y. TIMES (Nov. 9, 1986), <http://www.nytimes.com/1986/11/09/weekinreview/greater-glasnost-turns-some-soviet-heads.html>.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ For a sampling of publications during the critical 1987–1988 period, see generally *GORBACHEV AND GLASNOST: VIEWPOINTS FROM THE SOVIET PRESS* (Isaac J. Tarasulo ed., Scholarly Resources 1989).

⁸⁸ GIBBS, *supra* note 83, at 13.

⁸⁹ *Id.*; Steve Goldstein, *Soviets Still Adjusting to 'Glasnost,'* PHILA. INQUIRER (June 24, 1987) [hereinafter *Soviets Still Adjusting*], [http://articles.philly.com/1987-06-](http://articles.philly.com/1987-06-24)

stages, Glasnost was simply an expansion of the concept of *kritika i samokritika*, or criticism and self-criticism, introduced by Lenin as a way of ensuring the Communist Party's strength.⁹⁰ Indeed, from the beginning of Glasnost, Gorbachev was quite explicit that Glasnost was intended to serve the interests of the Party as a whole, by taking on entrenched Party bureaucrats who were resisting Gorbachev's general restructuring of Soviet society and the Soviet economy.⁹¹ In other words, Glasnost was never seen as free speech for its own sake, but rather as a tool for advancing Gorbachev's substantive policies through the Communist Party.

When one understands Glasnost in these instrumental terms, a clear pattern emerges. Glasnost marked the first period under the Soviet Union when a media independent of the Party emerged.⁹² The reason why Glasnost required some independence in the media is clear: many of the early articles published pursuant to Glasnost exposed incompetence and corruption among local officials.⁹³ Indeed, Gorbachev was quite clear that the openness represented by Glasnost was needed most in the provinces and republics, rather than in Moscow.⁹⁴ Obviously, however, an official media subject to the control of local officials could not be counted upon to expose such abuses.⁹⁵ In short, the function of Glasnost was to permit Gorbachev to "outflank the entrenched party and government *apparatchiki*" who were, for reasons of self-interest, likely to resist Gorbachev's reforms.⁹⁶ At least one commentator, as of 1989, concluded that Glasnost had been fairly successful at exposing such corruption, albeit less successful at combatting it.⁹⁷

Aside from revealing incompetence and corruption among local officials, another area where Glasnost played an important, early role was in exposing environmental problems. Even prior to Glasnost,

24/news/26182045_1_shortcomings-of-soviet-society-openness-soviet-press.

⁹⁰ See GIBBS, *supra* note 83, at 12-13.

⁹¹ *Id.* at 3, 13.

⁹² *Id.* at 3.

⁹³ *Id.* at 32-33.

⁹⁴ *Id.* at 34-35; GORBACHEV AND GLASNOST, *supra* note 87, at xxi.

⁹⁵ See Celestine Bohlen, *Soviet Media Struggling for Glasnost*, WASH. POST, Dec. 20, 1987, at A1, A34, available at <http://www.washingtonpost.com/archive/politics/1987/12/20/soviet-media-struggling-for-glasnost/03ab1eaf-46d6-45f7-ae5c-6bbc627ef61a/> (reporting resistance by local authorities to disclosures of official wrongdoing).

⁹⁶ GIBBS, *supra* note 83, at 11-12 (quoting Robert L. Stevenson et al., *Soviet Media in the Age of Glasnost*, in CURRENT ISSUES IN INTERNATIONAL COMMUNICATION 195 (L. John Martin & Ray Eldon Hiebert, eds., 1990)).

⁹⁷ See GORBACHEV AND GLASNOST, *supra* note 87, at 75-76.

environmental groups and activism had taken root in the Soviet Union, and been tolerated by the Party, because of the importance of such issues and their perceived apolitical nature.⁹⁸ Under Glasnost, these groups became increasingly vocal, and brought to the attention of the public the gross environmental damage done by the Party's policy of industrialization at all costs.⁹⁹ Thus, in an article published in early 1988, attention was given to a protest movement within an important industrial city suffering from extreme pollution, which resulted in discussions to modify polluting equipment.¹⁰⁰ Given the vast overlap between local party leadership and local leadership of polluting, state-owned enterprises, it is again not hard to see why independent speech, and an independent media, were essential if the central government was to become aware of these kinds of problems.

In short, free speech during Glasnost was real, and was not only tolerated but positively encouraged by Gorbachev and his supporters. Free speech, however, was not an end in itself, or a step towards democratization. It was a tool to achieve Gorbachev's substantive, policy goals of economic restructuring. This in turn implies limits to Glasnost. We now turn to the nature of those limits and their fate.

2. Limits

Once it is recognized that Glasnost, in its original incarnation, was never intended to threaten the Communist Party's hold on power, the most obvious limitation of Glasnost becomes clear: Glasnost explicitly excluded criticisms of the central leadership, or of the political system of the Soviet Union under which the Communist Party monopolized power. As early as 1987, the Irish politician and commentator Conor Cruise O'Brien noted this limitation on Glasnost, and tied it to the Party's desire to maintain its authoritarian nature.¹⁰¹ Other commentators agree that, at least in its early stages, Glasnost was never intended to extend to criticism of the Party and central leadership.¹⁰² It is telling in this regard that while Glasnost entailed an easing of political censorship of the press, Gorbachev did *not* originally

⁹⁸ *Id.* at 128.

⁹⁹ *See id.*

¹⁰⁰ *See* V. Sanatin, *Smog over the City*, KOMSOMOLSKAYA PRAVDA, Apr. 6, 1988, reprinted in GORBACHEV AND GLASNOST, *supra* note 87, at 135-142.

¹⁰¹ Conor Cruise O'Brien, *Freedom to Serve Their Master*, TIMES (London), May 18, 1988.

¹⁰² *See* GIBBS, *supra* note 83, at 13-14, 29-31.

dismantle the apparatus of censorship.¹⁰³ Indeed, as late as 1988, Gorbachev was still condemning press reports exposing corruption at the senior levels of the Party,¹⁰⁴ and the official resolution endorsing Glasnost at the 19th Party Conference that same year explicitly restricted Glasnost to exclude attacks on the Party or the Soviet state.¹⁰⁵

Not only did Glasnost exclude attacks on the Soviet political system, it also excluded attacks on Gorbachev himself and (ironically) Glasnost and its sister policy, Perestroika. In one episode in 1987, Gorbachev sought to have a reporter fired because he published a story reporting polling figures that indicated opposition to Perestroika in Siberia.¹⁰⁶ A more famous incident occurred in 1988, when a chemistry teacher named Nina Andreyeva published a letter sharply criticizing Glasnost and defending Stalin from a nationalist and Marxist perspective.¹⁰⁷ Gorbachev's response was to orchestrate a campaign, including high-profile publications, attacking the letter and its author.¹⁰⁸ The journal that published the letter was also pressured into reprinting a *Pravda* article and letters criticizing the Andreyeva piece, as well as publishing a partial apology on behalf of the editorial board.¹⁰⁹ Ultimately, Yegor Ligachev, the Politburo member considered to be behind the publication of the letter — and to be the leader of high-level opposition to Glasnost and Perestroika — was forced out of his position of authority.¹¹⁰

Another interesting episode illustrating the limits of Glasnost involved Boris Yeltsin, then the leader of the Moscow Communist Party (and later, of course, the first president of an independent Russia). On October 21, 1987 during a meeting of the Party's Central Committee, Yeltsin rose and gave a speech sharply criticizing the slow pace of reform under Glasnost and Perestroika. He also appears to have attacked Gorbachev personally, claiming a cult of personality was forming around him. He concluded by resigning his positions in the Party.¹¹¹ Not only was Yeltsin's resignation accepted, the Party

¹⁰³ See *id.* at 39.

¹⁰⁴ *Id.* at 80-81.

¹⁰⁵ *Id.* at 82-83.

¹⁰⁶ *Id.* at 15.

¹⁰⁷ Nina Andreyeva, *Polemics: I Cannot Waive Principle*, SOVETSKAYA ROSSIYA, Mar. 13, 1988, reprinted in GORBACHEV AND GLASNOST, *supra* note 87, at 277-90.

¹⁰⁸ GIBBS, *supra* note 83, at 68-69.

¹⁰⁹ Marshall I. Goldman, *Wide Bitterness at Gorbachev's Glasnost Shouts Through*, L.A. TIMES, Apr. 28, 1988, at C7; GIBBS, *supra* note 83, at 70.

¹¹⁰ GIBBS, *supra* note 83, at 71-73.

¹¹¹ *Id.* at 55.

leadership, including Gorbachev, also systematically tried to suppress the contents of Yeltsin's speech, and to disseminate the story that Yeltsin was ousted because of disruptive behavior on his part.¹¹² Again, we see a pattern where speech serving Gorbachev's goals is encouraged, but speech attacking him or his policies is suppressed.

Finally, Glasnost also apparently did not extend in its early years to major policy disasters that might reflect poorly on the central leadership. The prime example of this is the Soviet press's reaction to the nuclear disaster at Chernobyl on April 26, 1986. The reaction was almost complete silence for weeks, both on the part of the press and of the government itself.¹¹³ Instead, the official press launched a propaganda campaign designed to understate the extent of the environmental and human damage caused by the disaster, as well as the massive failures of the official response to it.¹¹⁴ Even in 1987, when reporting of domestic events was becoming more open under Glasnost, the state continued to enforce limits on reporting events, such as ethnic unrest or alleged misbehavior of central officials, which were perceived to threaten the Soviet state.¹¹⁵ Indeed, during the very end of the Glasnost era, when the Soviet state was at risk of collapsing (as it in fact did in 1991), Gorbachev to some extent reversed himself on Glasnost, especially with respect to reporting unrest and resistance to central authority in the Baltic republics.¹¹⁶ As with the other limitations on Glasnost, this one was clearly seen as essential to maintaining the structure of the Soviet state, and to maintaining Gorbachev's power.

3. Collapse

In the end, Gorbachev's efforts to retain the Soviet system failed. The Soviet Union collapsed, and even before that event, restrictions on press and speech freedoms had largely disappeared. Was this an inevitable byproduct of Glasnost? If that is so, then modern authoritarian leaders will obviously be deterred from walking a similar

¹¹² *Id.* at 55-56; William J. Eaton, *Soviet Propaganda Chief Meets Press but Glasnost Is Out of Sight*, L.A. TIMES (Nov. 4, 1987), http://articles.latimes.com/1987-11-04/news/mn-12399_1_soviet-propaganda; Steve Goldstein, *Pravda Essay Narrows 'Glasnost' Definition*, PHILA. INQUIRER (Dec. 15, 1987) [hereinafter *Pravda Essay*], http://articles.philly.com/1987-12-15/news/26204433_1_viktor-g-afanasyev-pravda-article-moscow-party-boss.

¹¹³ GIBBS, *supra* note 83, at 40-42.

¹¹⁴ *Id.* at 41-42.

¹¹⁵ *Id.* at 51-53.

¹¹⁶ *Id.* at 18-20.

path. I would argue, however, that the collapse was not the inevitable result of Gorbachev's policies. Glasnost was a central part of Gorbachev's broader reform schemes. Unfortunately for Gorbachev (and the Soviet system), while Glasnost itself was embraced by the Soviet population, the broader reforms it was meant to accelerate were not implemented properly. In other words, it was not Glasnost but the weakness and divisions within the Soviet state that led to the ultimate failure of the system.

1988 appears to have been the pivotal year in the evolution of Glasnost. Prior to that year, Gorbachev's limits on Glasnost were largely obeyed, and so criticism of the Party or of Gorbachev was quite limited. In 1988, however, journals started publishing articles critical of Gorbachev and his policies, including, most famously, the Andreyeva letter.¹¹⁷ The press during this period also began to report on divisions within the Party, and conservative internal opposition to Gorbachev, in stark contrast to the suppression of the Yeltsin conflict in 1987.¹¹⁸ Indeed, the divisions within the Party, and Soviet society, were sufficiently deep by 1988 that the press itself began to split into rival camps.¹¹⁹ The leadership's loss of control over the press is illustrated by one incident in 1988 when a paper that published an article critical of a senior leader was threatened with punishment, but then not actually punished. As news of such events spread, the press, by 1989, became increasingly willing to take on the leadership itself, and to throw off the last limits on Glasnost.¹²⁰

Ultimately, of course, the Soviet Union collapsed. In 1989, it lost control of its satellite states in the Warsaw Pact, and by the end of 1991, the Soviet Union itself ceased to exist, breaking up into its constituent states. As central authority in the Soviet Union began to fail, Gorbachev and other party leaders made some efforts to reign in Glasnost, expanding laws that restricted speech attacking the State.¹²¹ By this time, however, the divisions within the Party leadership, along with Boris Yeltsin's emergence as the non-Communist leader of Russia, and the continued weakness of the Soviet economy, made restoration of control impossible.¹²² The only way to restore the Party's authority at that late date was violence, as attempted by the August 1991 coup

¹¹⁷ See *id.* at 8-9.

¹¹⁸ *Id.* at 18, 55-56.

¹¹⁹ *Id.* at 18, 60-61.

¹²⁰ *Id.* at 62-63.

¹²¹ See Zach Georgopoulos, Note, *Soviet and Chinese Criminal Dissent Laws: Glasnost v. Tienanmen*, 14 HASTINGS INT'L & COMP. L. REV. 475, 484-85 (1991).

¹²² GIBBS, *supra* note 83, at 8-9, 90.

plotters; but Gorbachev and the bulk of the armed forces were not willing to take that extreme step.

What this narrative demonstrates is that Glasnost's expansion was not inevitable. During the first three years of Gorbachev's rule, limits did remain in place, and the authority of the Party remained largely unchallenged. The collapse that occurred in 1989-1991 was not the product of Glasnost. Rather, it was the result of severe economic weakness, and sharp divisions within the leadership of the Party and the Soviet Union over Glasnost.¹²³ Those divisions, and continuing resistance to liberalization among conservative party leaders, are what led Gorbachev to separate the Party from the State, and so effectively give up one-party rule.¹²⁴ There is no reason to believe, however, that a united leadership, in an economically prosperous autocratic state, would be forced into similar steps simply because they permit limited freedom of speech.

D. Qatar

Qatar is an emirate located on the Arabian Peninsula. With a population of approximately two million, Qatar has the highest per capita GDP in the world, thanks to massive energy reserves.¹²⁵ Qatar has been ruled since the middle of the Nineteenth Century by the al-Thani family.¹²⁶ The current emir, Sheikh Tamim bin Hamad al-Thani, ascended the throne in June of 2013, after his father voluntarily abdicated.¹²⁷

Qatar is an absolute monarchy. It is true that Article I of its Constitution, adopted in 2004, states that Qatar's "political system is democratic,"¹²⁸ and Article 77 provides for the election by general ballot of 30 of the 45 members of the Al-Shoura Council, the

¹²³ For descriptions of those divisions, see, e.g., Bohlen, *supra* note 95 (describing resistance to Glasnost among some top Party leaders); Gary Lee, *Soviet Delegates Attack Glasnost*, WASH. POST (June 30, 1988), <http://www.washingtonpost.com/archive/politics/1988/06/30/soviet-delegates-attack-glasnost/87023f57-f9e8-426a-af0f-d4e0e3e9b5d9/> (describing criticism of Glasnost at 19th Party Conference).

¹²⁴ GIBBS, *supra* note 83, at 60.

¹²⁵ See *The World Factbook: Qatar*, CENTRAL INTELLIGENCE AGENCY (July 8, 2015), <https://www.cia.gov/library/publications/the-world-factbook/geos/qa.html>.

¹²⁶ *Id.*

¹²⁷ See Regan Doherty, *Qatar Emir Hands Power to Son, No Word on Prime Minister*, REUTERS (June 25, 2013), <http://www.reuters.com/article/2013/06/25/us-qatar-emir-idUSBRE95N19M20130625>.

¹²⁸ See CQ art. I.

legislative body of the emirate.¹²⁹ However, though elections to the Council had originally been scheduled for 2013, they were indefinitely postponed when the current Emir ascended the throne in 2013 and have not been rescheduled.¹³⁰ All indications are, therefore, that the al-Thani family has little interest in surrendering its longstanding and absolute hold on power.

Qatar's relationship with free speech and the press is unique among the Gulf monarchies. Its Constitution protects "[f]reedom of expression of opinion" and "[f]reedom of press, printing and publication," but in both cases the assurances are modified so that the protection is only in accordance with law.¹³¹ Despite the constrained level of written protections, however, Qatar is widely recognized as a regional center of media freedom.¹³² This is primarily because of the Qatari government's sponsorship of the Al Jazeera satellite television network.¹³³ Al Jazeera played an incalculably important role in bringing news of the Arab Spring to Arab populations and is generally considered a leader in independent reporting about events in the Arab world.¹³⁴ Indeed, Al Jazeera's coverage of issues such as political unrest in the Arab world, as well as its sympathetic coverage of the Muslim Brotherhood, have resulted in substantial conflicts between the Qatari government and fellow Arab states.¹³⁵ Qatar's idiosyncratic and continuing support for Al Jazeera therefore strongly suggests that its leaders believe that they, and their nation, benefit from protecting Al Jazeera's press freedoms.

As in China and Gorbachev's U.S.S.R., however, the scope of Qatari tolerance for free speech is limited. Al Jazeera itself, while it reports extensively on events around the Arab world, very rarely broadcasts

¹²⁹ *Id.* at arts. 76, 77.

¹³⁰ See Doherty, *supra* note 127; *The World Factbook*, *supra* note 125.

¹³¹ CQ arts. 47, 48.

¹³² *World Report 2013: Qatar*, HUMAN RIGHTS WATCH (2013) <http://www.hrw.org/world-report/2013/country-chapters/qatar?page=1>.

¹³³ See *id.*

¹³⁴ *Id.*; see Mehdi Hasan, Editorial, *Voice of the Arab Spring*, NEW STATESMAN (Dec. 7, 2011), <http://www.newstatesman.com/broadcast/2011/12/arab-channel-jazeera-qatar>; Nehad Ismail, *Al Jazeera's Role in Toppling the Dictators One by One*, HUFFINGTON POST (Sept. 5, 2011, 7:54 AM), http://www.huffingtonpost.com/nehad-ismail/al-jazeeras-role-in-toppl_b_948247.html.

¹³⁵ See David D. Kirkpatrick, 3 *Gulf Countries Pull Ambassadors from Qatar over Its Support of Islamists*, N.Y. TIMES (Mar. 5, 2014), <http://www.nytimes.com/2014/03/06/world/middleeast/3-persian-gulf-states-pull-ambassadors-from-qatar.html>; David D. Kirkpatrick, *Egypt Pulls Ambassador from Qatar*, N.Y. TIMES (Mar. 6, 2014), <http://www.nytimes.com/2014/03/07/world/middleeast/egypt-withdraws-ambassador-from-qatar.html>.

stories critical of Qatar or of the Qatari leadership.¹³⁶ Nor is criticism, or even perceived criticism, of the Qatari government tolerated from other quarters. The extent of repression on this issue is illustrated by the Qatari government's prosecution of the poet Mohammed al-Ajami. In 2011, a video was posted onto the Internet showing Ajami reading his poem *Tunisian Jasmine*, which lauded the Tunisian Jasmine Revolution, and generally criticized Arab rulers as repressive. Ajami was then charged with insulting the Emir and inciting his overthrow. He was convicted and originally sentenced to life in prison.¹³⁷ His sentence was later reduced to 15 years, but otherwise his sentence and conviction were affirmed by Qatar's highest court.¹³⁸ Ajami remains in prison as of this writing.

In a small, wealthy, and highly regulated society such as Qatar's, occasions to prosecute dissenters or government critics are understandably rare. What the Ajami episode demonstrates, however, is that the Qatari government remains fully committed to repressing any such critical speech. Qatar's tolerance for speech on non-sensitive issues is thus generally broad, but clearly does not extend to speech seen to threaten the Emir or the political system.

II. STRENGTHENING THE NONDEMOCRATIC STATE

In each of the three examples discussed in the previous section — modern Communist China, the Soviet Union during the Gorbachev/Glasnost era, and modern Qatar — autocratic governments are shown to tolerate and even encourage substantial amounts of free speech. Yet it is equally clear that in none of these instances did the leadership have any interest in yielding absolute power, or introducing substantial democracy. What then did the leadership hope to gain from tolerating speech? And more broadly, what instrumental goals might free speech advance, other than the traditionally preeminent goal (at least in the United States) of advancing democratic self-governance? In this section, I advance and discuss three distinct instrumental goals that speech might serve, which are entirely independent of democracy.

¹³⁶ See *World Report 2013: Qatar*, *supra* note 132.

¹³⁷ *Qatari Poet Jailed for Life After Writing Verse Inspired by Arab Spring*, *GUARDIAN* (Nov. 29, 2012), <http://www.theguardian.com/world/2012/nov/29/qatari-poet-jailed-arab-spring>.

¹³⁸ *Qatar Court Upholds Poet's Jail Sentence*, *AL JAZEERA* (Oct. 21, 2013), <http://www.aljazeera.com/news/middleeast/2013/10/qatar-court-upholds-sentence-against-poet-20131021123723850815.html>.

A. Enforcing Central Authority

One of the recurring themes that emerges from the examples of free-speech tolerant autocracies discussed in the previous section is the extent to which free speech is seen as a tool by central officials to control their own subordinates. This makes sense. In any large bureaucratic system, one of the fundamental and recurring problems the highest leadership faces is how to ensure that one's policy preferences are executed at the ground level. Local and subordinate officials have their own agendas and priorities that unsurprisingly will often be in tension with those of central authorities. Given that local and subordinate officials necessarily exercise substantial control over the flow of information to central leadership, the latter needs help. Free speech enables them to deputize citizens as well as the press to assist them. The underlying problem here is relatively clear. In federal democracies, the electoral accountability of local officials acts as at least some form of check on misconduct. In a hierarchical autocracy, the only real check on local officials is central supervision. But without information, such supervision is impossible.

That concern over the behavior of subordinate and local official motivates central leaders to tolerate and encourage speech is beyond doubt. In China, for example, the recent move away from censorship of news about health emergencies is clearly a response to the fact that in 2003 local officials suppressed news about the extent of the SARS outbreak. This, it is widely agreed, massively complicated efforts by the central leadership to respond to the crisis.¹³⁹ A recent report from *The Economist* confirms that this is the lesson learned by China's leadership: in response to a recent outbreak of bird flu, the leadership consciously chose to encourage press coverage, precisely to prevent local officials from suppressing information and so repeating the mistakes made during the SARS epidemic.¹⁴⁰ On a more mundane level, *The Economist's* report about complaints about a change in local traffic laws is another indication that authorities are beginning to accept that citizen activism is a useful and necessary deterrent to unpopular and incompetent policy choices by subordinate officials.¹⁴¹ China's recent adoption of regulations permitting citizens to file the equivalent of freedom-of-information requests with local governments

¹³⁹ See Huang, *supra* note 78 and accompanying text; see also Longanecker, *supra* note 45, at 401 (making this argument).

¹⁴⁰ *Bird Flu: New Scare*, *supra* note 59, at 47-48.

¹⁴¹ See *supra* note 58 and accompanying text.

undoubtedly also is designed in significant part to permit citizens to monitor, and report on, local government activities.¹⁴²

Gorbachev's Glasnost provides an even more powerful example of the use of free speech by central leadership to exert control over hostile subordinates. From the very beginning of Glasnost, Gorbachev and the central leadership of the Soviet Union explicitly stated that the main purpose of Glasnost was to enlist ordinary citizens in the task of exposing waste and corruption among local and subordinate officials.¹⁴³ One telling indication of how clearly Gorbachev's original vision of Glasnost was focused on combatting entrenched interests occurred in late 1987. During this period, Soviet writing was focusing more and more on Soviet history and the excesses of Stalinism. In response, the official Party newspaper *Pravda* published an article arguing that Glasnost should be more constructive and positive, presumably meaning that it should serve Gorbachev's goals of reforming the Soviet economy by shaking up state-owned businesses and the bureaucracy.¹⁴⁴ In an economic system (unlike modern China) where all productive enterprises were state-owned and Party bureaucrats had essentially unchecked authority over those enterprises, the problems Gorbachev faced are unsurprising. After all, those same officials were profiting handsomely from the existing system and allocating themselves the perks of power in the Soviet Union, from nicer quarters to dachas in the country. The fact that their incompetence was leading their nation to ruin could not be expected to incite them to change their ways. Gorbachev and the central leadership, on the other hand, surely understood that the path the Soviet Union was on was unsustainable. Hence the need for Glasnost.

The nature of the dynamic between the Soviet leadership, especially Gorbachev and his inner circle, and the broader *apparatchiki* of the Party, may also partially explain the unintended expansion of Glasnost in the last years of the Soviet Union. The fact is that Gorbachev's reforms, for all that they opened up Soviet society, did not work on an economic level.¹⁴⁵ An important reason for this was that Gorbachev faced substantial opposition to his policies within the Party itself, including at both the level of central leadership and among lower level

¹⁴² See *supra* notes 62–63 and accompanying text.

¹⁴³ See GIBBS, *supra* note 83, at 3-4, 11-12, 32-33; Goldstein, *Soviets Still Adjusting*, *supra* note 89.

¹⁴⁴ Goldstein, *Pravda Essay*, *supra* note 112.

¹⁴⁵ See generally John Blaney & Mike Gfoeller, *Lessons from the Failure of Perestroika*, 108 POL. SCI. Q. 481, 482 (1993).

officials.¹⁴⁶ It was indeed this dynamic that led Gorbachev, in the later stages of Glasnost, to begin separating the levers of government from the Communist Party — essentially so as to create a new vehicle for implementation of his preferred reforms.¹⁴⁷ One predictable byproduct of this separation, however, was the gradual collapse of censorship, and with it any limits on Glasnost. After all, the entire Soviet system had been built on Party control over government and society. The new, democratic government that at the end of the Soviet Union came to replace the Party apparatus had neither the tools, nor the will, to retain the same sort of hegemonic control — as reflected by the fact that the coup plotters of 1991 understood the need to undermine the new government if control was to be restored. All of this obviously had broad historical implications, but for our purposes the point is a narrow one: the ultimate failure of Glasnost to remain within the original limits set by Gorbachev was not an inevitable dynamic, but rather a product of a failing economy, and deep divisions within the Communist Party at every level.¹⁴⁸

One interesting parallel between China and the Soviet Union in this regard relates to speech on environmental issues. As noted earlier, speech about environmental damage figured prominently in early Glasnost writings, and indeed was tolerated to a substantial extent even in the pre-Glasnost era.¹⁴⁹ Similarly, Chinese authorities have been notably tolerant, even encouraging, of speech about environmental problems,¹⁵⁰ to the point of permitting NGOs to operate in this area unlike most other policy areas.¹⁵¹ China has also, in response to public pressure, started to release more official pollution data in recent years.¹⁵² And most intriguingly, in early 2014,

¹⁴⁶ GIBBS, *supra* note 83, at 60-61.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 90.

¹⁴⁹ See *supra* notes 98–100 and accompanying text.

¹⁵⁰ See *Particulate Matter*, *ECONOMIST*, Mar. 7, 2015, at 44 (reporting official praise for, and dissemination of, a documentary describing the extent of environmental damage in China, and the role of state-owned enterprises in creating the damage).

¹⁵¹ See *Wu Dengming*, *ECONOMIST*, Aug. 10, 2013, at 78, available at <http://www.economist.com/news/obituary/21583228-wu-dengming-environmental-activist-died-july-19th-aged-73-wu-dengming>.

¹⁵² *Something in the Air?*, *ECONOMIST*, Jan. 19, 2013, at 47, available at <http://www.economist.com/news/china/21569743-measures-air-pollution-go-scale-public-impatience-rises-something-air>; Simon Denyer, *In China's War on Bad Air, Government Decision to Release Data Gives Fresh Hope*, *WASH. POST* (Feb. 2, 2014), http://www.washingtonpost.com/world/in-chinas-war-on-bad-air-government-decision-to-release-data-gives-fresh-hope/2014/02/02/5e50c872-8745-11e3-a5bd-844629433ba3_story.html.

China adopted new rules requiring extensive, real-time public disclosure by industry of pollution emissions, with the explicit purpose of enabling environmental groups and citizens to pressure local officials.¹⁵³

The focus on speech about pollution is unsurprising. This is an area where the goals of central and local officials are in fundamental tension. Local officials, often associated with state-owned enterprises, have strong motivations to achieve maximum economic growth, at any price. Such growth creates tax revenues, and also creates opportunities for self-enrichment. Pollution, however, is extremely unpopular among citizens because of the severe health problems it causes; and over time, pollution can also create massive economic burdens.¹⁵⁴ Local officials may well wish to ignore these systematic and long-term consequences of economic growth and industrial activity because of their short-term horizons and incentives, but central authorities cannot afford to do so if they are to maintain popularity and legitimacy. Deputizing citizens and citizens' groups to police local officials in this area is one solution to the dilemma faced by central officials.

One last comment is in order regarding the instrumental value of free speech in permitting authoritarian central leaders to learn about the misbehavior of subordinates. In a recent paper, Mark Tushnet expresses skepticism about such instrumental accounts of constitutionalism in authoritarian regimes, on the grounds that because autocrats remain free to change the rules mid-game — to shift the “red lines” and punish speech previously tolerated — they cannot credibly commit to protecting speech at all. As a result, citizens will not speak out honestly, because they can have no confidence that their behavior will not be punished.¹⁵⁵ There is undoubtedly something to this, and certainly one result of this dynamic is that free speech is *less* effective in autocracies than in countries with strong constitutional traditions. However, I do not believe that this concern is decisive. The fact of the matter is that people do speak out in China about local injustices, and Soviet citizens did speak out during Glasnost, albeit

¹⁵³ *Transparency in the Haze*, ECONOMIST, Feb. 8, 2014, at 44, available at <http://www.economist.com/news/china/21595927-government-takes-steps-towards-more-openness-transparency-haze>.

¹⁵⁴ See *id.* (quoting studies finding that pollution caused 1.2 million premature deaths in China in 2010 and caused economic losses amounting to 2.5% of GDP).

¹⁵⁵ Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391, 425-26, (2015); see also Mark Tushnet, *Authoritarian Constitutionalism: Some Conceptual Issues*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES 40-42 (Tom Ginsburg & Alberto Simpser eds., Cambridge 2014).

after enough time had passed for them to have confidence that Glasnost was real. The desire to communicate grievances, and the longing for justice, are clearly sufficiently powerful forces to sometimes overcome even rational fears of punishment, a phenomenon that autocrats can utilize.

Enforcing central control over subordinate officials is thus clearly an important explanation for why some autocracies — presumably those whose leaders care about national prosperity and the successful implementation of policy — tolerate and encourage free speech. It should be noted, however, that this explanation is only a partial one. While it clearly is an important, probably the most important, explanation for Chinese and Soviet Glasnost policies, it does not seem to have much relevance to Qatar. But this makes sense. Qatar is a very small country with tightly controlled civil servants, not a continent spanning behemoth like China or the Soviet Union. Not only is Qatar's population only a little over two million, but only about 12% of that population constitutes native-born Qataris.¹⁵⁶ As a result, Qatar simply lacks the sprawling bureaucracy that creates barriers to central control. In that situation, other explanations for tolerance must be found, to which we now turn.

B. Safety Valves

The basic thought behind free speech as a safety valve is that permitting citizens to speak their minds allows them to feel engaged with the system as well as to “blow off steam,” and so tends to deflect discontented individuals and groups from violence or revolution.¹⁵⁷ That free speech can play this role has long been recognized. It is an important theme in Justice Brandeis's foundational free speech opinion in *Whitney v. California*.¹⁵⁸ It was also prominent among the arguments made by opponents of the persecution of leftists during First Red Scare in 1919-1920.¹⁵⁹ Indeed, the young Robert H. Jackson, then 27 years old, published a letter in a newspaper in 1919 making exactly this point in objecting to censorship of socialists, even using

¹⁵⁶ Jure Snoj, *Population of Qatar by Nationality*, BQDOHA.COM (July 12, 2014), <http://www.bqdoha.com/2013/12/population-qatar>.

¹⁵⁷ See Emerson, *supra* note 1, at 884-86; Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 10-11 (2008).

¹⁵⁸ See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

¹⁵⁹ Bradley C. Bobertz, *The Brandeis Gamble: The Making of America's "First Freedom," 1909-1931*, 40 WM. & MARY L. REV. 557, 609-14 (1999).

the phrase “safety valve.”¹⁶⁰ The safety-valve rationale for protecting free speech, it should be noted, is consistent with the democracy-enabling rationale, and is generally considered linked to it, as illustrated by its appearance in the Brandeis *Whitney* opinion, probably the most famous exposition of the democracy-enabling rationale.¹⁶¹

What is noteworthy about the concept of free speech as a safety valve, however, is that unlike the democracy-enabling theory, it is *not* in any way restricted to democracies. To the contrary, it seems entirely likely that safety valves are *more* needed in autocracies, where citizens do not participate directly in government, than in liberal democracies. If the leadership of an autocratic system of government wishes to minimize the need for violent repression — which many do, if for no other reason than the cost and economic disruption involved — it is in their interest to channel discontent into sources other than revolt. The safety-valve theory is that free speech can play a role in that strategy.¹⁶²

There is good evidence that at least in China, free expression is viewed by the central authorities as a safety valve. One such indication is the liberality with which, in the reform era, censors have permitted the spread of entertainment that would in a previous era have certainly been considered anti-socialist, such as the recent movie “Tiny Times” celebrating consumer culture.¹⁶³ Oddly enough, however, China’s tolerance does not extend to pornography, which is subject to regular crackdowns¹⁶⁴ (though it remains generally available¹⁶⁵). And even

¹⁶⁰ See John Q. Barrett, *Free Speech as Safety Valve (1919)*, THE JACKSON LIST 1-2, 4, Mar. 17, 2011, available at <http://thejacksonlist.com/2011/03/>.

¹⁶¹ See Ashutosh A. Bhagwat, *The Story of Whitney v. California: The Power of Ideas*, in CONSTITUTIONAL LAW STORIES 383, 400-407 (Michael C. Dorf ed., 2d ed. 2009). This is not to say that there is no tension between the safety-valve and democratic justifications for speech freedoms. As Greg Magarian points out, the emphasis on stability underlying the safety-valve theory is somewhat inconsistent with democratic theory’s focus on popular political dynamism. See Gregory P. Magarian, *Religious Argument, Free Speech Theory, and Democratic Dynamism*, 86 NOTRE DAME L. REV. 119, 159-60 (2011).

¹⁶² Another common safety-valve strategy for autocrats is, of course, to encourage xenophobia. See, e.g., Miriam Elder, *Vladimir Putin Warns Foreigners Not to Intervene in Russian Politics*, GUARDIAN (Dec. 12, 2012), <http://www.theguardian.com/world/2012/dec/12/vladimir-putin-foreigners-russian-politics>; William Wan, *Beijing Both Encourages and Reins in Anti-Japan Protests, Analysts Say*, WASH. POST (Sept. 17, 2012), http://www.washingtonpost.com/world/chinese-government-both-encourages-and-reins-in-anti-japan-protests-analysts-say/2012/09/17/53144ff0-00d8-11e2-b260-32f4a8db9b7e_story.html.

¹⁶³ See *My Generation*, ECONOMIST, July 20, 2013, at 42.

¹⁶⁴ See Clifford Coonan, *China Hires Porn Watchdogs as Crackdown Intensifies*, IRISH TIMES (May 6, 2014), <http://www.irishtimes.com/news/ireland/irish-news/china-hires-porn-watchdogs-as-crackdown-intensifies-1.1784580>; see also King et al., *supra* note

popular entertainment is subject to occasional, unpredictable restrictions, such as the leadership's decision to shut down the popular "American Idol" clone "Super Girl."¹⁶⁶ Such decisions undoubtedly reflect divisions in the leadership between pragmatists and more traditional Communists. On the whole, however, given the enormous proliferation of an independent media and popular entertainment during post-reform era, it seems clear that the leadership views such speech as defusing, rather than creating, political and social tension.¹⁶⁷

Nor is China's tolerance for speech as a safety valve limited to non-political entertainment. As noted earlier, in the modern era Chinese authorities have become broadly tolerant of casual political conversation, including conversation critical of the leadership.¹⁶⁸ More intriguingly, a recent, thorough, empirical study of Chinese Internet censorship by Professor Gary King and two graduate students at Harvard (the King Study) finds that even with respect to Internet postings, individual criticism of the government, government policy, and the Communist Party does *not* increase the probability of censorship at all.¹⁶⁹ The view, commonly held in the West, that the Chinese government does not tolerate criticism of itself, especially on the Internet, is simply false. What the Chinese state does not tolerate — what it censors with great regularity — are Internet postings that create the risk of collective action or organizing.¹⁷⁰ This pattern strongly suggests that while the leadership has no intention of risking its hold on power — something collective action might threaten — it otherwise sees tolerance of criticism as in its interest. Why exactly that is so cannot, of course, be directly determined (the Chinese Communist leadership being famously opaque). But a very likely hypothesis is that the leadership sees individual criticism as an opportunity to diffuse tension by permitting discontented citizens to feel that they have a voice. In other words, such criticism blows off steam that might otherwise lead to action.¹⁷¹

51, at 334 (finding that two of the top five triggers for Internet censorship in China involve pornography).

¹⁶⁵ See PEERENBOOM, *supra* note 49, at 118.

¹⁶⁶ See Andrew Jacobs, *Popularity May Have Doomed Chinese TV Talent Show*, N.Y. TIMES (Sept. 19, 2011), <http://www.nytimes.com/2011/09/20/world/asia/popularity-may-have-doomed-chinese-tv-talent-show.html>.

¹⁶⁷ See Emmons, *supra* note 47, at 254-55; PEERENBOOM, *supra* note 49, at 114.

¹⁶⁸ See *supra* notes 55-57 and accompanying text (citing PEERENBOOM, *supra* note 49, at 104; He, *supra* note 48, at 257).

¹⁶⁹ King et al., *supra* note 51, at 326, 328.

¹⁷⁰ *Id.*

¹⁷¹ See Roy L. Sturgeon, *China's Homegrown Free-Speech Tradition: Imperial Past and*

The safety-valve hypothesis also provides a plausible explanation for the Qatari government's tolerance and support of Al Jazeera. Again, a definitive answer is impossible in light of the secretiveness of the Al-Thani dynasty, but the facts are suggestive. As noted earlier, Qatar stands out as extremely unusual among Gulf monarchies in encouraging the development of a vibrant and largely independent media entity in the form of Al Jazeera.¹⁷² Al Jazeera's reporting, in combination with other Qatari policies such as support for the Muslim Brotherhood, have also created substantial tension between Qatar and its fellow Gulf states; notably, with Saudi Arabia.¹⁷³ There is no indication that Al Jazeera is used by the monarchy as a means to control subordinate officials. The function it seems to serve, rather, is to provide a channel for the intellectual and politically active part of Qatari society to express itself on topics relevant to the Arab world generally, and therefore to divert their attention away from the Qatari state itself. In other words, it acts as a safety valve, albeit a diversionary one. Such diversionary encouragement of speech is not unique to Qatar. As Roy Sturgeon notes, China used essentially similar tactics in 2005 in encouraging protests against Japan.¹⁷⁴ But in a small, tight-knit society such as Qatar's, it is probably especially effective because direct dissent is so threatening to the social fabric.

If China and (perhaps) Qatar offer examples of free speech as a safety valve, Glasnost would appear to be the counterexample. After all, Glasnost did not succeed in diffusing opposition to the regime. To the contrary, at the end, it appeared to play a role in galvanizing dissent, ultimately contributing to the collapse of the Soviet Union. Even in the Soviet Union, however, the story is slightly more complex than that. In the early years of Glasnost, Gorbachev's new openness did appear to divert discontent onto Gorbachev's entrenched opponents, contributing to his extraordinary popularity during this period (especially for a Soviet leader).¹⁷⁵ It was only after Glasnost expanded, and the failings of the Soviet economic system became obvious in the 1989-1991 period, that it became a vehicle for dissent against Gorbachev and the system itself. What the Soviet experience suggests is not that free speech cannot diffuse dissent, but rather that

Modern Present. And Post-Modern Future?, 26 FLA. J. INT'L L. 291, 318-19 (2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2410656 (arguing that China should permit greater free speech in order to reduce tension).

¹⁷² See *supra* notes 131-35 and accompanying text.

¹⁷³ See *supra* note 135 and accompanying text.

¹⁷⁴ See Sturgeon, *supra* note 171, at 320.

¹⁷⁵ GIBBS, *supra* note 83, at 16.

safety valves cannot save an otherwise bankrupt political and economic system.

C. Legitimization

A final function of free speech in nondemocratic nations is to provide legitimacy to the incumbent regime. In liberal democracies, the primary source of legitimacy for government is, of course, free and fair elections. A government formed out of such a process should command legitimacy even among its opponents because they were permitted to freely and equally participate in the process of selecting the government, and will be permitted to do so in the future with the possibility that their preferences will carry the day. Autocracies, of course, lack this form of legitimization. Nonetheless, it is clearly in the interest of autocrats for their citizens to believe that their authority is legitimate, if for no other reason than to be spared the cost and disruption of constant physical repression. Autocratic legitimacy, as we shall see,¹⁷⁶ comes in many forms, from the Divine Right of Kings to Marxist theory. But when such sources do not exist or start to weaken, permitting speech can contribute to preserving legitimacy.

The most obvious way in which speech contributes to legitimacy is simply by making citizens believe they have a voice heard by their rulers (the latter point being the distinction between the pure safety-valve function of speech, and the legitimization function). The notion of a responsive ruler, even a despot, has held attractions throughout history, as illustrated by stories of kings who walk incognito among their people, listening to their complaints. This notion of responsiveness also helps explain why the right of petition is one of the oldest Anglo-American rights, far predating freedoms of speech, the press, or religion.¹⁷⁷ Permitting citizens to speak, and having governing authorities acknowledge widely expressed views, creates the image of a benevolent and responsive ruler, and so confers legitimacy. In contrast, suppressing speech creates an image of uncaring aloofness, thereby undermining legitimacy. There is an obvious relationship between this legitimizing function of speech and the safety-valve rationale: both are designed to alleviate discontent.

¹⁷⁶ See *infra* notes 192–203 and accompanying text.

¹⁷⁷ See generally RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE 84–87 (2012) (describing the medieval English origins of the right of petition, and its codification in the English Bill of Rights of 1689); Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 720 (2002) (also recognizing that a right of petition was widely accepted in England well before a right of free speech) [hereinafter *Freedom's Associations*].

But the legitimizing rationale is broader and more positive in that it does not simply seek to divert unhappiness, it seeks to prevent it in the first place.

The flipside of the idea that permitting speech lends legitimacy is that suppressing it can undermine other sources of legitimacy. A good example of this is the anticorruption campaign launched by the Chinese leadership since the ascension of Xi Jinping to the Chinese presidency in 2013. In January of 2013, after he had been elevated to leadership of the Communist Party but before he had formally taken office as President of China, Xi announced a major assault on corruption, promising to take on both “tigers” and “flies,” meaning both high level and low level corrupt officials.¹⁷⁸ Commentators explicitly linked this drive with President Xi’s efforts to establish his legitimacy as a leader.¹⁷⁹ Xi has also been clear, however, that the anticorruption campaign would be led by the Party alone, and that independent speech revealing corruption and accumulated wealth, especially about the top leadership, was not welcome.¹⁸⁰ The result has been to substantially reduce the legitimacy-enhancing impact of the drive, by raising doubts about its seriousness, especially with respect to Xi’s allies.¹⁸¹

Permitting freer speech by citizens can enhance autocratic legitimacy not only directly, by making citizens feel empowered, but also indirectly, by making central government policy more effective. This strategy has substantial overlap with the first justification for permitting free speech discussed above: enforcing central authority and controlling subordinates.¹⁸² In a post-ideological era, when few autocratic governments can claim legitimacy based on political

¹⁷⁸ Tania Branigan, *Xi Jinping Vows to Fight ‘Tigers’ and ‘Flies’ in Anti-Corruption Drive*, GUARDIAN (Jan. 22, 2013), <http://www.theguardian.com/world/2013/jan/22/xi-jinping-tigers-flies-corruption>.

¹⁷⁹ *Id.* (discussing comments of Professor Deng Xiaogang); see also Shai Oster, *President Xi’s Anti-Corruption Campaign Biggest Since Mao*, BLOOMBERG (Mar. 4, 2014), <http://www.bloomberg.com/news/2014-03-03/china-s-xi-broadens-graft-crackdown-to-boost-influence.html>.

¹⁸⁰ *Less Party Time*, ECONOMIST (Jan. 25, 2014), <http://www.economist.com/news/china/21595029-communist-partys-anti-graft-campaign-has-had-surprising-impact-new-report-shows-how>.

¹⁸¹ See *id.*; see also Matt Schiavenza, *Why Xi Jinping’s ‘Anti-Corruption Campaign’ Is Hollow, Unserious, and Ultimately Doomed*, ATLANTIC (July 18, 2013), <http://www.theatlantic.com/china/archive/2013/07/why-xi-jinpings-anti-corruption-campaign-is-hollow-unserious-and-ultimately-doomed/277908/>.

¹⁸² See *supra* Part II.A. The overlap is not complete, however, because presumably central leadership has an interest in maintaining control over subordinates over and above any contribution to legitimacy that such control makes.

philosophies such as Marxism or Nationalism, success can become the best self-justification for retaining power, and thus the strongest source of legitimacy. Certainly, it is widely acknowledged, this has been the post-reform strategy of the Chinese Communist Party,¹⁸³ and it also appears to have been Mikhail Gorbachev's (ultimately unsuccessful) goal in introducing Glasnost and Perestroika to the Soviet Union. To achieve success, however, whether it be economic success, implementation of environmental policies, or a convincing anticorruption campaign, central leadership must be able to have visibility, and so control, over the actions of subordinates. Those subordinates, however, will often have different and perverse incentives, including notably hiding the truth from their superiors, as illustrated by the example discussed above of implementing pollution-control policies in the Soviet Union and China.¹⁸⁴ Again, citizens' speech can play an important role in providing leaders with much-needed knowledge about subordinates' actual behavior.

One particular form of legitimacy-enhancing policy "success" that needs special attention is economic success: the creation of a thriving economy.¹⁸⁵ There is no question that in modern China and Qatar, this is the primary form of success by which the leadership seeks to justify itself, though no doubt others such as pollution-control and fighting corruption are also significant. Even in the Soviet Union, rescuing the Soviet economy was the primary goal of Glasnost, precisely because the crumbling of that economy was undermining faith in the Communist Party. And, it was the ultimate inability to produce economic success that spelled doom for Glasnost, the Communist Party in the Soviet Union, and the Soviet Union itself.

The relationship between free speech and economic growth, however is complicated, though undoubtedly real. One way in which

¹⁸³ See, e.g., Clarke, *supra* note 48, at 104-06; HARLEY BALZER, *State and Society in Transitions from Communism: China on Comparative Perspective*, in STATE AND SOCIETY IN 21ST CENTURY CHINA: CRISIS, CONTENTION AND LEGITIMATION 235 (Peter Hays Gries & Stanley Rosen eds., Routledge 2004) (offering a comparative perspective on evolving state-society relations in China today); *The Paradox of Prosperity*, ECONOMIST (Jan. 28, 2012), <http://www.economist.com/node/21543537>.

¹⁸⁴ See *supra* Part II.A.

¹⁸⁵ Indeed, it could be argued that advancing economic growth is an entirely independent, instrumental purpose of free speech. I have chosen not to treat it as such, however, for two reasons. First, I suspect that the primary reason autocrats value growth is to confer legitimacy. Second, such an approach to free speech threatens to fall into the abyss of Lochnerism. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 783-85 (1976) (Rehnquist, J., dissenting).

speech contributes to economic success is, as noted above,¹⁸⁶ by restraining the corruption and incompetence of subordinate officials; but that is not the only way it does so. Most obviously, unless businesses have the ability to gather and share information about consumer preferences, and to advertise to those consumers, economic activity is stymied.¹⁸⁷ Thus, an economic-success-as-legitimizing rationale for free speech suggests minimum state interference with commercial speech and other speech necessary for business activities, something that is certainly observable in China.

In addition, speech is itself of course a consumer product. In an age when manufactured goods make up an ever smaller share of economies and the digital economy is the most dynamic sector, products related to speech such as movies, television and other mass media, web searches, e-commerce, social media, and video games, inevitably play an ever-increasing economic role. This sort of economic activity, however, is most unlikely to thrive in an atmosphere of censorship and uncertainty. Indeed, Anupam Chander has argued that the liberality of American free speech law is one of the prime reasons for the success of Silicon Valley.¹⁸⁸ Autocracies who wish to develop digital economies, then, must tolerate open and creative speech to a substantial degree. Of course, protecting these forms of speech, especially social media, poses risks to authoritarian regimes, explaining why in China Twitter and Facebook are excluded in favor of local — and more easily censorable — entities such as Sina Weibo.¹⁸⁹ But to completely exclude such forms of speech as in North Korea is entirely inconsistent with China's quest for growth.

Qatar's tolerance for Al Jazeera demonstrates another avenue by which free speech can promote legitimacy. As noted earlier, one of the roles of Al Jazeera may be to provide a safety valve for Qatari intellectuals.¹⁹⁰ In addition, however, tolerance of Al Jazeera, as well as other substantive Qatari policies such as support for the Muslim

¹⁸⁶ See *supra* Part II.A.

¹⁸⁷ I am grateful to Chris Elmendorf for this thought.

¹⁸⁸ See generally Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639 (2014) (arguing that free speech was critical to Silicon Valley's development); Anupam Chander & Uyen Le, *Free Speech*, 100 IOWA L. REV. 501, 504-05 (2015) (arguing that free speech was critical to the Internet's development).

¹⁸⁹ See Charles Custer, *The Demise of Sina Weibo: Censorship or Evolution?*, FORBES (Feb. 4, 2014), <http://www.forbes.com/sites/ccuster/2014/02/04/the-demise-of-sina-weibo-censorship-or-evolution/> (describing the spectacular rise of Chinese microblogging site Sina Weibo and its relative decline in recent years, due in part to government regulation).

¹⁹⁰ See *supra* Part II.B.

Brotherhood and the various aspects of the Arab Spring,¹⁹¹ permit the Qatari leadership to distinguish itself from other Gulf monarchies. We, the Qataris can say, are not like these other hidebound regimes, and so claim a mantle of self-confidence and shared values with the common people. The extent to which this is convincing is, to say the least, uncertain, given Qatar's lack of tolerance for criticism of its own leadership and government; but such a strategy is at least plausible.

The theory that free speech tolerance can be a means to secure legitimacy thus has some force and explanatory power. One of its additional strengths is that it also helps explain why certain autocratic regimes do *not* provide much in the way of protection for speech. If, the theory suggests, an autocratic regime can point to a form of legitimization that does not require citizen consent or support, then the need to permit free speech declines substantially. Sometimes, the source of that legitimacy can be ideological. Thus, in Maoist China, the early Soviet Union, and Cuba through the latter part of the twentieth century, Marxist-Leninism was advanced as sufficient justification for the one-party Communist State. In that world, the legitimacy of the Dictatorship of the People flows fully and automatically from Marxist theory itself, requiring no other source. And therefore, in such states one would expect reduced incentives for the leadership to tolerate critical speech, which is precisely what we saw. Indeed, as discussed earlier, to this day, the Cuban Constitution provides extremely limited written protections for speech.¹⁹²

Saudi Arabia presents another excellent example of alternative forms of legitimacy. As noted earlier, Saudi Arabia is extraordinarily unusual in the modern world in failing to provide any formal, constitutional protection for free speech.¹⁹³ The reason is clear: the Saudi royal family does not view popular consent as a significant part of its claim to legitimacy as rulers. Instead, the Saudi Basic Law explicitly identifies the Constitution of Saudi Arabia with "The Holy Qur'an and the

¹⁹¹ See, e.g., Ian Black, *Arab States Withdraw Ambassadors from Qatar in Protest at 'Interference,'* GUARDIAN (Mar. 5, 2014), <http://www.theguardian.com/world/2014/mar/05/arab-states-qatar-withdraw-ambassadors-protest> (describing diplomatic rift between Qatar and other Gulf monarchies because of Qatar's support for the Muslim Brotherhood, which is viewed by neighboring states as a threat to their stability); Elizabeth Dickinson, *Tiny Qatar Played Outsized Role as Arab League President. Will It Last?*, CHRISTIAN SCI. MONITOR (Mar. 28, 2012), <http://www.csmonitor.com/World/Middle-East/2012/0328/Tiny-Qatar-played-outsized-role-as-Arab-League-president.-Will-it-last> (describing the unusual leadership role taken on by Qatar in response to the Arab Spring uprisings).

¹⁹² See *supra* note 28 and accompanying text.

¹⁹³ See *supra* note 34 and accompanying text.

Prophet's Sunnah (traditions),”¹⁹⁴ and states that “The regime derives its power from the Holy Qur'an and the Prophet's Sunnah”¹⁹⁵ In other words, the roots of the Saudi state's authority and legitimacy is not popular consent; it is the law of God, with a particular emphasis on the regime's role as the protector of the Holy Mosques of Mecca and Medina.¹⁹⁶ Noah Feldman notes that Saudi Arabia, uniquely among modern states, has preserved the structure of relationships between the traditional Sunni Islam Caliph and religious scholars, thereby self-consciously invoking the traditional religious roots of Sunni Islamic leaders' authority (albeit without claiming the title of Caliph).¹⁹⁷ Given this claim, and the fact that the Saudi government is an absolute monarchy,¹⁹⁸ the need for legitimacy simply plays no role in the Saudi calculations regarding free speech. Further buttressing this lack of regard is the fact that the Saudi state has no need to tax its population to raise revenue because of its oil wealth. To the contrary, much of the citizen population is entirely dependent on the state financially.¹⁹⁹ This fact makes even the safety valve function of speech less pressing.²⁰⁰ These twin, unusual factors may well explain why almost uniquely in the world, the Saudi leadership does not feel a need to provide even paper protections for free speech or other political and religious rights. This is not to say that the Saudi state should or does suppress all speech. It may well be that for instrumental reasons, such as fostering economic growth, some speech will be tolerated. But the reasons are clearly less pressing than in other countries.

A final example of a nation where legitimacy derives from factors other than popular consent, and so free speech plays little role in the regime's policies, is Rwanda. In the case of Rwanda, the self-claimed legitimacy of the current leadership under Paul Kagame derives not from ideology or religion, but from the leadership's role in ending the 1994 Rwandan genocide against the Tutsi. The Preamble to the current Rwandan Constitution, adopted in 2003, begins by acknowledging the genocide and emphasizing the need for

¹⁹⁴ BLSA art. 1.

¹⁹⁵ *Id.* at art. 7.

¹⁹⁶ *See id.* at art. 24.

¹⁹⁷ *See* NOAH FELDMAN, *THE FALL AND RISE OF THE ISLAMIC STATE* 92-101 (Princeton University Press 2008).

¹⁹⁸ BLSA at art. 5.

¹⁹⁹ *See The World Factbook: Saudi Arabia*, CENTRAL INTELLIGENCE AGENCY (July 20, 2015) <https://www.cia.gov/library/publications/the-world-factbook/geos/sa.html> (indicating that 80% of Saudi Arabian government revenues are derived from the petroleum sector).

²⁰⁰ *See* FELDMAN, *supra* note 197, at 100-01.

reconciliation, national unity, and assurances against a return to violence.²⁰¹ In light of the history of the genocide (where the media was used to instigate killings), and the regime's claims to authority based on its prevention of genocide, it is not surprising that what guarantees of free speech the Constitution grants are heavily restricted. In particular, the freedom of "thought, opinion, [and] conscience" that is protected excludes speech propagating discrimination,²⁰² and the Constitution explicitly states that "[f]reedom of speech and freedom of information shall not prejudice public order and good morals."²⁰³ Popular consent plays a very limited role here, especially given that President Kagame and his fellow leaders are drawn largely from the minority Tutsi group, not the majority Hutu whose then-leaders perpetrated the genocide.

In short, the relationship between speech, autocracy, and legitimacy is a complicated one. For many regimes, however, especially those who lack or have lost alternative sources of popular legitimization, granting some scope for citizens' freedom of speech can contribute in important ways to regime stability and acceptance.

D. Countervailing Factors

Up to now, in this Part of the paper we have explored various ways in which autocracies can be strengthened by granting free speech rights to their citizens. It is worthwhile to close by considering the opposite question: in what ways does free speech undermine autocracy? This question is central to our analysis because of the presumption that leaders of autocracies, even if they otherwise mean well for their nation and citizens, have no interest in relinquishing power. This may be for selfish reasons, or it may be because the rulers genuinely believe their continuation in power is beneficial to the nation. Regardless, autocratic retention of power remains the ground rule. We have seen that not all free speech is inconsistent with autocratic regimes. But, clearly, some is. What restrictions on free speech does continued autocracy require?

One might think, especially based on the behavior of the most repressive regimes such as North Korea or Eritrea, that all criticisms of government officials or policy are inconsistent with autocracy, because they threaten to foment dissent. That, however, is an exaggeration. China's experience, as well as our theoretical discussion, demonstrates

²⁰¹ See CR pmbi.

²⁰² *Id.* at art. 33.

²⁰³ *Id.* at art. 34.

that some such criticism need not undermine a regime, so long as it is performing well economically and otherwise (obviously a weak point of both the Eritrean and North Korean regimes). To the contrary, in successful autocracies some such criticism probably should be tolerated, as a safety valve.

Such tolerance cannot, however, be absolute. That is surely one of the lessons from the fall of the Soviet Union, albeit only part of the story. Two important principles come to mind as limiting factors. First, as our case studies indicate, autocrats inevitably restrict direct criticism of top leadership in the mass media, and probably correctly so from their perspective. Repeated, widely disseminated criticism of top leaders, as happened in the latter stages of Glasnost, undermines citizens' faith in the system of government itself. Criticism is especially dangerous if it exposes corruption in top leadership, because that raises doubts about the leadership's commitment to serving the nation as a whole, as opposed to their own private interests. It is noteworthy, moreover, that while indigenous mass media can be censored to prevent the airing of such criticisms or revelations, foreign media cannot. No doubt this is why the Chinese authorities are so adamant about preventing its citizens from accessing foreign websites, and have increased their efforts in recent years as revelations of high-level corruption in China have proliferated in the foreign media.²⁰⁴ Once such doubts take solid root, legitimacy is likely to crumble. At that point, a resort to violence becomes the only long-term strategy for maintaining authority.

Even otherwise benevolent autocrats are sometimes willing to resort to violence as a last resort, as perhaps illustrated by the Tiananmen Square massacre (the "perhaps" refers to my assumption of benevolence); but it is an unattractive option. The need to resort to violence itself undermines legitimacy that must then be rebuilt. Large-scale violence and repression also undermines the economic growth on which the long-term stability of most nonviolent autocracies is based. Therefore, from the point of view of an enlightened despot, it is surely better to take steps to avoid the need for violence, if possible. Our study suggests that most such autocrats have concluded, probably rationally, that permitting extended criticism or exposure of embarrassing facts about top-level leaders poses unacceptable threats to their regimes, and so must be suppressed, even if certain benefits are thereby lost.²⁰⁵

²⁰⁴ See *supra* notes 66, 70–75.

²⁰⁵ In particular, such repression undoubtedly undermines the safety-valve and

Aside from attacks on the leadership, the form of criticism that most clearly threatens autocratic authority is *organized* dissent, which has important implications for free speech. To understand why, we begin with the obvious point that while individual dissent against an autocratic regime rarely poses a serious threat to it, any organized opposition might. In any complex society, there are serious limits to what any single individual can accomplish. Groups, on the other hand, are powerful, and, as they grow from a nucleus, they can become quite powerful. This is the insight underlying the law of conspiracy, and the reason why U.S. criminal law proscribes terrorist groups, even though individual advocacy of terrorism is protected.²⁰⁶ In large countries such as China or the former Soviet Union, what are especially powerful, and so especially dangerous to the regime, are large, geographically dispersed groups.²⁰⁷ Such groups can create an organizational apparatus parallel to the state, and so a potential rival to the state. Given that in any modern autocracy there will always be some discontent with lack of political freedoms, such groups can easily become the focal point for organized dissent, and ultimately resistance. The final piece of the puzzle is that speech is essential to group formation, growth, and identity. Without being able to freely communicate among members, no group of any significant size — the kind of group that might pose a threat to an autocratic regime — can possibly organize or recruit new members. Speech is the lifeblood of an association, without which it cannot thrive.²⁰⁸

The implications of this fact for autocratic regimes are clear — they may well be willing to tolerate dissenting speech, but they will not tolerate speech used to organize groups in opposition to the regime. This dichotomy is nicely illustrated by the experience of Xu Zhiyong, a prominent Chinese human rights advocate. Early in his career, Xu became famous for publicizing the killing of a migrant worker in

legitimization functions of free speech.

²⁰⁶ For a discussion of modern terrorism prosecutions in the United States, and their relationship to the First Amendment, see Ashutosh Bhagwat, *Terrorism and Associations*, 63 EMORY L.J. 581, 583 (2014) [hereinafter *Terrorism*].

²⁰⁷ An example of such a group is the peaceful religious organization Falun Gong, which has been ruthlessly suppressed by the Chinese authorities. See Leeshai Lemish, *Why is Falun Gong Banned?*, NEW STATESMAN BLOG (Aug. 19, 2008), <http://www.newstatesman.com/blogs/the-faith-column/2008/08/falun-gong-party-chinese>.

²⁰⁸ For a discussion of the relationship between speech and associations, and the First Amendment implications of that relationship, see Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 995-1002 (2011) [hereinafter *Associational Speech*].

police custody, and using the case to call for reform.²⁰⁹ These activities were tolerated by the Chinese government, and made Xu famous. More recently, however, Xu has been convicted and imprisoned for organizing a national movement, the “New Citizens Movement,” to protest official policies.²¹⁰

This was also precisely the finding of the King Study, a major study of censorship in China discussed above:²¹¹ while China tolerates substantial amounts of individual criticism of the government, its “censorship program is aimed at curtailing collective action by silencing comments that represent, reinforce, or spur social mobilization, regardless of content.”²¹² Intriguingly, the study finds that Chinese censors act against *any* speech with the potential to trigger collective action, “regardless of whether or not they cast the Chinese leadership and their policies in a favorable light.”²¹³ In other words, Chinese censors do not concern themselves much with criticism; what they target is any associational activity with political overtones, *even if it is supportive of the state*. Free speech is not considered inconsistent with autocracy, but civil society apparently is.

Autocratic regimes’ distrust of speech that might produce political organization leaves them in a difficult relationship with the Internet. On the one hand, the Internet is the central mechanism for commerce and communication in the modern era, and so cannot be entirely suppressed consistent with economic growth. On the other hand, the Internet can become an important tool for organization across wide geographic areas, making it uniquely dangerous to an autocracy. The solution to this conundrum, adopted by both China and Qatar (the Soviet Union fell before it faced the problem) has been two-fold: to permit, indeed encourage the growth of the Internet, but to sustain tight controls over it as well, especially with regard to access to uncontrolled, foreign websites. The aim, clearly, is to obtain the economic and other benefits of the Internet, while minimizing its use as a form of social organization. Indeed, the findings of the King Study

²⁰⁹ See Keith Hand, *Using Law for a Righteous Purpose: The Sun Zhigang Incident and the Evolving Forms of Citizen Action in the People’s Republic of China*, 45 COLUM. J. TRANSNAT’L L. 114, 124-26 (2006).

²¹⁰ Jonathan Kalman, *China Upholds Four-Year Sentence of Activist Xu Zhiyong*, GUARDIAN (Apr. 11, 2014), <http://www.theguardian.com/world/2014/apr/11/china-upholds-sentence-activist-xu-zhiyong>.

²¹¹ See *supra* note 169 and accompanying text.

²¹² King et al., *supra* note 51, at 1.

²¹³ *Id.* at 14 (giving examples of two posts *praising* the government or supporting it that were censored because they might lead to mass action).

make clear that China is even willing to use the Internet as a safety valve by permitting critical postings on social media, so long as there is no danger of collective action ensuing.²¹⁴ Qatar seems to be less tolerant of even individual criticism of the leadership on the Internet, as illustrated by the prosecution of the poet Mohammed al-Ajami,²¹⁵ but that may well be because in a small, homogeneous society, individual criticism can much more easily lead to group coalescence.

To say that autocracies may not suppress all political use of the Internet is not to say, however, that the fact that speech is disseminated via the Internet is irrelevant to censorship. Given the vastly expanded audience that the Internet makes available to critics of the state, and given the ease of organization on the Internet, it seems likely that speech tolerated in private venues will sometimes not be tolerated on the Internet because of the greater possibility of collective action. This is indeed exactly what Randall Peerenboom finds regarding China: speech tolerated in private is often not tolerated on the Internet.²¹⁶ The very existence of the vast machinery of Internet censorship described by the King Study²¹⁷ demonstrates that the Chinese leadership is very much aware of the risk that the Internet will produce organized opposition, and is willing to dedicate enormous resources to prevent that from happening. It is not that no critical speech is permitted on the Internet, but the red line shifts towards more repression in that context.

The decision of autocratic regimes to suppress speech that threatens to produce organized associations is understandable given the leaderships' commitment to maintaining unchallenged power. Indeed, this may be an inescapable element of autocratic regimes. But, it comes at a cost. Many of the goals that free speech does advance in autocratic regimes would be accomplished more effectively through associations than through individual speech. There seems to be little doubt that associations of whistleblowers and active citizens would be more effective than individual citizens acting alone at monitoring corruption and misbehavior by local officials. Associations can also offer powerful safety valves, as the proliferation of extremist groups on the Internet in liberal democracies demonstrates. Indeed, associations can even contribute to legitimization, by assisting central authorities in achieving their policy goals such as assisting the poor, protecting

²¹⁴ *Id.* at 13.

²¹⁵ See *supra* notes 136–38 and accompanying text.

²¹⁶ PEERENBOOM, *supra* note 49, at 117.

²¹⁷ King et al., *supra* note 51, at 1, 3 & 7.

the environment, or combating infectious disease, and more broadly by providing citizens with a sense of joint engagement in their societies. Awareness of these potential benefits seems to have been the motivation behind recent rule changes in China designed to make it easier for NGOs to organize and register with the government.²¹⁸ There are even hints that central authorities are encouraging NGOs to confront local officials who are interfering with central policies, notably in the environmental arena.²¹⁹ These changes should not be overstated, however — it is clear that many Chinese officials remain highly suspicious and skeptical of NGOs, viewing them a threat to the Party's authority.²²⁰ The truth is that from an autocrat's perspective, the benefits that NGOs provide may well be outweighed by the risks. But something is clearly lost through suppression.

Another difficult problem for autocrats is how to deal with speech regarding policy failures. As discussed earlier, historically, the Chinese state was highly likely to suppress news of natural disasters or other social crises, including the SARS epidemic and the Wenzhou train accident.²²¹ Similarly, at the height of Glasnost, Gorbachev heavily suppressed news of the Chernobyl nuclear disaster.²²² Chinese and Soviet leaders also consistently have sought to suppress news about internal unrest in places such as the Baltics (for the Soviet Union)²²³ or Tibet and Xinjiang (for China).²²⁴ The reasons for this suppression seem obvious: reporting failures threatens to undermine faith in the leadership's competence, and so its legitimacy. This is particularly so if knowledge of widespread discontent were to become commonly known; hence, the particularly vigorous suppression of news about internal unrest. There is, however, a very significant cost born by the

²¹⁸ See *Chinese Civil Society: Beneath the Glacier*, *ECONOMIST*, Apr. 12, 2014, at 34-36, available at <http://www.economist.com/news/china/21600747-spite-political-clampdown-flourishing-civil-society-taking-hold-beneath-glacier>.

²¹⁹ *Id.* at 36.

²²⁰ *Id.*; Sui-Lee Wee, *Chinese Police Raid Office of Prominent NGO Co-Founder*, *REUTERS CAN.*, Mar. 26, 2015, available at <http://ca.reuters.com/article/topNews/idCAKBN0MM0CD20150326>.

²²¹ See *supra* notes 76–80 and accompanying text.

²²² See *supra* notes 113–14 and accompanying text.

²²³ See *supra* note 116 and accompanying text.

²²⁴ See Peter Ford, *In China, Reporting on Tibetan and Uighur Unrest Is Nearly Impossible*, *CHRISTIAN SCI. MONITOR* (Mar. 2, 2012), available at <http://www.csmonitor.com/World/Global-News/2012/0302/In-China-reporting-on-Tibetan-and-Uighur-unrest-is-nearly-impossible>; Michael Wines, *Chinese Crackdown Seals off Ethnic Unrest*, *N.Y. TIMES* (Jan. 28, 2012), http://www.nytimes.com/2012/01/29/world/asia/chinese-crack-down-to-curb-spread-of-tibetan-unrest.html?_r=0.

leadership for such suppression. Local and subordinate authorities often have substantial incentives to downplay problems, and to hide their extent from the central leadership, in order to avoid responsibility. This was very much a factor during the SARS epidemic,²²⁵ and appears to some extent to have driven suppression of news about both Chernobyl and the Wenzhou accident. But, lack of knowledge can hamstring the central leadership's ability to respond effectively to a problem, as was very much the case in all of these incidents. Speech by private citizens can help close this gap in knowledge. There is thus a delicate balance to be drawn here. My own suspicion is that given the closed and distrustful nature of autocracies, their tendency will be to underestimate the benefits of openness, and so to over-suppress news about problems. Certainly, the recent Chinese leadership's changed attitude towards reporting about bird flu suggests that they believe that may have been the case in the past.²²⁶ It may therefore behoove the well-intentioned autocrat, in times of crisis, to curb the censorial instincts of subordinate officials and professional censors, for the good of the regime as a whole.

III. DOMESTIC IMPLICATIONS

The question addressed in this Part — whether the study of free speech in autocracies yields any lessons for domestic free-speech law — may seem absurd. After all, we know what the primary instrumental value of speech is in our society: to advance democratic self-governance. We in the United States select our own leaders through free and fair elections, and as this article began by noting, the critical role of free speech in that process is widely acknowledged.²²⁷ The truth, however, is more nuanced. There are obviously huge differences between the political systems of an autocracy like Communist China and a liberal democracy like the United States. But there are also parallels, and those parallels are worthy of attention.

A. *Autocratic and Democratic Citizenship*

The self-governance theory of the First Amendment is based on the premise that the key rights protected by the First Amendment (other than the Religion Clauses²²⁸) — speech, the press, association,

²²⁵ See *supra* note 78 and accompanying text.

²²⁶ See *supra* note 59 and accompanying text.

²²⁷ See *supra* notes 2–7 and accompanying text.

²²⁸ For a historical explanation of why the Religion Clauses have different roots

assembly, and petition — are rights of citizenship. But what is citizenship? The immediate answer that comes to mind is voting. The relationship between citizenship and speech, then, is that speech prepares citizens to vote intelligently. This was the view put forward by Alexander Meiklejohn, the intellectual father of the self-governance theory of free speech.²²⁹ It has been highly influential since.²³⁰

The Meiklejohn perspective, however, is radically incomplete. There is an extensive scholarship pointing out that throughout our history, citizenship and political activism have encompassed a wide range of activities including petitioning leaders, assembly and protest, and other forms of civic engagement through private associations.²³¹ The rights of petition and assembly are, after all, independent rights protected by the First Amendment, no less so than speech and the press, and are no less central to citizenship. Furthermore, speech itself contributes to participatory citizenship in many ways other than preparing citizens to vote, notably by permitting citizens to form associations, organize assemblies, and gather support for petitions.²³² Modern democratic theory, then, envisions a multifaceted role for the First Amendment, enabling citizens to engage in myriad forms of collective action and to exert influence over the state in myriad ways. First Amendment doctrine must, if it is to be true to the underlying purposes of the Amendment, reflect this more expansive vision of citizenship.

This broader view of First Amendment freedoms and citizenship, however, still does not point towards parallels between democratic and autocratic citizenship. After all, autocracies that restrict free speech also (and even more so) restrict assembly, petition, and

and purposes than the latter part of the First Amendment, see Ashutosh Bhagwat, *Religious Associations: Hosanna-Tabor and the Instrumental Value of Religious Groups*, 92 WASH. U. L. REV. 73, 91-95 (2014).

²²⁹ MEIKLEJOHN, *supra* note 3, at 24-26.

²³⁰ See Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 439-40 & n.50 (2009); Jason Mazzone, *Speech and Reciprocity: A Theory of the First Amendment*, 34 CONN. L. REV. 405, 413-16 (2002).

²³¹ For examples of such scholarship, see, e.g., KROTOSZYNSKI, JR., *supra* note 177 (petitioning); Tabatha Abu El-Haj, *Friends, Associates, and Associations: Theoretically and Empirically Grounding the Freedom of Association*, 56 ARIZ. L. REV. 53 (2014) (association); Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 555-61 (2009) (assembly and street demonstrations); Bhagwat, *Associational Speech*, *supra* note 208, at 990-93 (assembly and association); John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 575-88 (2010) (assembly); Mazzone, *Freedom's Associations*, *supra* note 177, at 642-44, 700-01, 730-34 (association).

²³² See Bhagwat, *Associational Speech*, *supra* note 208, at 995-99.

association.²³³ Nonetheless, citizens of autocracies are in fact citizens. Moreover, the lesson of Part II of the paper is that well-meaning or strategically sophisticated autocrats often desire their citizens to participate in their societies, including through speech (albeit with sharp limits, the “red lines” we identified). The key insight here is that the forms of citizen participation available to citizens of autocracies are also relevant and significant in democracies. Each of the three functions of free speech in autocracies identified above — enforcing central authority over subordinates, acting as a safety valve, and legitimizing current rulers²³⁴ — are also functions of free speech in democracies, over and above free speech’s role in enabling democracy.

The parallels I propose between democratic and autocratic citizenship may seem counterintuitive, but they should not be. The truth is that the traditional view of liberal democracies as systems in which citizens exercise control over rulers through voting is grossly exaggerated and based on an archaic, overly simplistic view of modern government. In the world of the administrative state and massive bureaucracies, including both state and federal in the United States, most interactions between citizens and the state are not those of voter and elected official: they are of supplicant and subordinate official. Citizens are entitled to be treated as citizens in the latter situation no less than the former. But elections are not in practice effective tools to ensure that treatment. Put concretely, while a U.S. citizen interacting with the IRS or the Social Security Administration may have more avenues of recourse than a Chinese citizen interacting with that nation’s bureaucracy, she is surely unlikely to feel meaningfully empowered, especially if she is not a member of the economic elite, regardless of her right to vote for members of Congress and the President.

Even with respect to elected officials, moreover, the actual accountability of such officials to average citizens is more fiction than fact. The average size of a congressional district following the 2010 census is 710,767 individuals.²³⁵ Add to this the reality that modern elections are dominated by money — in part due to First Amendment decisions by the Supreme Court²³⁶ — and it seems highly unlikely that

²³³ See *supra* notes 205–10 and accompanying text.

²³⁴ See *supra* Part II.A–II.C.

²³⁵ See KRISTIN D. BURNETT, CONGRESSIONAL APPORTIONMENT 1 (U.S. Census Bureau 2011), available at www.census.gov/prod/cen2010/briefs/c2010br-08.pdf.

²³⁶ See, e.g., *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434 (2014) (holding the two-year aggregate campaign contribution limit in the Bipartisan Campaign Reform Act (“BCRA”) unconstitutional); *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010) (striking down restrictions on corporate expenditures

most citizens of this country believe that their elected officials are meaningfully accountable to them as individuals, or even perhaps as a group. Moreover, a prominent recent study by faculty at Princeton and Northwestern suggests that this cynicism is justified: federal policymakers *are* far more responsive to the preferences of economic elites than they are to those of the median citizen.²³⁷

Even in the United States, then, citizenship and democracy are not synonymous. It is not that democratic participation is not a part of citizenship. To the contrary, in a liberal democracy it is a central element. But it is an incomplete vision of how citizens interact with the state. That in turn suggests that envisioning First Amendment freedoms as *only* advancing democratic participation undervalues the complex roles that speech can play in mediating the relationship between citizens and the state. In the next subpart, we will consider what that might mean for modern free-speech doctrine.

B. Doctrinal Lessons

Acceptance of the proposition that the instrumental roles of free speech in our society encompass not only enhancing democratic participation but also enforcing central authority over subordinates, acting as a safety valve, and legitimizing current rulers, has important implications for modern free-speech doctrine. I cannot hope, in the space remaining, to tease out all of those implications, but some important points stand out.

1. Hate Speech and Pornography

The First Amendment has generally been understood to grant complete protection to speech denigrating minorities and women, including hate speech and pornography that falls short of obscenity.²³⁸ This approach has been subjected to strong criticism on the grounds that hate speech and pornography silence the voices of disempowered

funding independent “electioneering communications”).

²³⁷ See generally Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPECTIVES ON POLITICS 564 (2014).

²³⁸ See, e.g., *United States v. Playboy Entm’t Grp.*, 529 U.S. 803 (2000) (striking down restrictions on pornographic cable television channels); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (reversing conviction for cross-burning); *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (striking down statute prohibiting sexually explicit subordination of women). *But see Virginia v. Black*, 538 U.S. 343 (2003) (upholding ban on cross-burning as a regulation of “true threats”).

groups such as women and racial minorities, thereby interfering with their ability to participate fully in society and the political process.²³⁹ Seen purely from the democracy-enhancement perspective, there is indeed a completely plausible argument that hate speech and pornography, far from advancing democratic self-governance, actually detract from it because such speech silences important voices, and the ideas expressed by hate speech and pornography (such as they are) have no legitimate role in a liberal democracy.

There are, of course, counterarguments to the attack on hate speech based on traditional free speech theory.²⁴⁰ The analysis presented here, however, suggests yet another reason why the First Amendment should protect hate speech: the role of hate speech as a safety valve. Explicitly racist and misogynistic ideas are very much at the margins of modern American political culture. As a result, individuals who hold such views are very likely to feel silenced and disempowered. That such people *are* disempowered is obviously a good thing; but suppressing their ability to express their ideas is likely to increase resentment and potentially violence. There is a non-trivial argument to be made that just as autocratic regimes should tolerate some dissenting speech in order to siphon off emotion, so too liberal democracies should tolerate hate speech — which after all, *is* dissenting speech in our societies — for the same reason.

It should be noted that the argument for protecting hate speech as a safety valve is limited to the modern context. In an earlier time, when hate speech was common rather than in a marginalized position and society itself was officially discriminatory, hate speech did not primarily function as a safety valve. It was instead the expression of the dominant political position, whose impact was to suppress rather than enhance democratic politics. Interestingly, therefore, the

²³⁹ See, e.g., CATHERINE A. MACKINNON, *ONLY WORDS* (Harvard 1993) (discussing the impact of pornography and hate speech on women and minorities); *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH AND THE FIRST AMENDMENT* (Mari J. Matsuda et al. eds., Westview 1993) (racial minorities); Richard Delgado, *First Amendment Formalism Is Giving Way to First Amendment Legal Realism*, 29 HARV. C.R.-C.L. L. REV. 169 (1994) (racial minorities); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1986) (racial minorities).

²⁴⁰ See, e.g., Steve Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193 (1996) (arguing that recent “postmodern” attempts to censor pornography and hate speech repeat the same mistakes that underlay prior attempts to censor political speech); Mark A. Graber, *Old Wine in New Bottles: The Constitutional Status of Unconstitutional Speech*, 48 VAND. L. REV. 349 (1995) (also arguing that arguments against protecting hate speech parallel prior arguments to censor dissident speech).

argument for protecting hate speech is reliant on the political collapse of the ideas hate speech embodies. In a different situation, the argument for protection would be much weaker,²⁴¹ but, perversely, so would the likelihood of regulation.

2. Speech of Government Employees and Freedom of Information

The law regarding the First Amendment rights of public employees is currently complex, and in a state of flux. The Supreme Court has unequivocally held that employees do possess some rights *i.e.*, the state does not enjoy *carte blanche* to fire its employees because of their speech.²⁴² On the other hand, the Court simultaneously held that public employees' free-speech rights are more circumscribed than those of the general public, and are therefore subject to a balancing test.²⁴³

Furthermore, in subsequent years, the Court has recognized two important, categorical restrictions on those rights. First, public employee speech is protected only when it is on "matters of public concern."²⁴⁴ Public employers enjoy wide latitude to punish employees for speech on "matters only of personal interest" such as "internal office affairs."²⁴⁵ The reason for this limitation is that the free speech rights of public employees are intended to protect "the rights of public employees to participate in public affairs."²⁴⁶ They are not concerned with purely internal governmental matters.

A second limitation on public employees' rights is that the Court has flatly denied protection for speech made pursuant to an employee's official duties.²⁴⁷ This remains true even if the speech concerns official misconduct, a subject normally considered of public concern and relevant to democratic government.²⁴⁸ And again, the reason the Court has given for this restriction is that the First Amendment is concerned only with public employees' right to "speak as citizens on matters of public concern."²⁴⁹ In short, current doctrine does recognize a First

²⁴¹ This perhaps explains why when the Supreme Court first confronted hate speech, during the Jim Crow era, it held it unprotected by the First Amendment. See *Beauharnais v. Illinois*, 343 U.S. 250, 267 (1952).

²⁴² *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

²⁴³ *Id.*

²⁴⁴ *Connick v. Meyers*, 461 U.S. 138, 147 (1983).

²⁴⁵ *Id.* at 147-49.

²⁴⁶ *Id.* at 144-45.

²⁴⁷ *Lane v. Franks*, 134 S. Ct. 2369, 2378 (2014); *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

²⁴⁸ See *Garcetti*, 547 U.S. at 421.

²⁴⁹ *Id.* at 420.

Amendment right of public employees, but it is a sharply limited one, based on a narrow vision of the purposes of the First Amendment.

The analysis presented here strongly suggests that the modern Supreme Court's view of public employee rights is unjustifiably restrictive because its vision of the First Amendment's purposes is too limited. If in fact an important role of free speech in our society is to permit central leaders (and citizens) to monitor the misconduct of local and subordinate officials, current doctrine undermines that goal. The types of speech that the Court has held to be unprotected — an office worker's poll of fellow workers concerning office morale and possible misconduct,²⁵⁰ and an internal memo by a deputy district attorney alleging inaccuracies in an affidavit used to obtain a search warrant²⁵¹ — is precisely the sort of speech that permits the discovery and publicizing of official misconduct. It is true that such speech does not meaningfully implicate the whistleblowing employee's role as a citizen of a democracy; but that is not the only function of free speech.

More broadly, if free speech doctrine is to protect and enhance the ability of citizens to report on misconduct by lower-level officials, there must be some mechanism through which citizens can learn of such misconduct. One such mechanism, as noted above, is to protect public employees who speak about such misconduct: they are, after all, the people most likely to know of misconduct. But whistleblowers will not always exist. The monitoring rationale therefore strongly supports the view that citizens should enjoy some sort of positive right to obtain information about internal government affairs, especially about the activities of local and subordinate officials. Indeed, as noted earlier, the need for monitoring subordinate officials is an important explanation for China's recent move towards more open government.²⁵²

It should be acknowledged that current doctrine provides essentially no support for such a right of access. To the contrary, the Court has consistently rejected access rights for either the press or the general public.²⁵³ Moreover, given the language and history of the First

²⁵⁰ *Connick*, 461 U.S. at 141.

²⁵¹ *Garcetti*, 547 U.S. at 413-14.

²⁵² See *supra* note 140 and accompanying text.

²⁵³ See, e.g., *Houchins v. KQED*, 438 U.S. 1 (1978) (denying a radio station a right of access to a state jail); *Pell v. Procunier*, 417 U.S. 817 (1974) (denying journalists a right of access to state correctional facilities); *Saxbe v. Wash. Post*, 417 U.S. 843 (1974) (denying a newspaper a right of access to federal prisons). The one narrow exception to this general rule is that the Court has granted the press and the public rights of access to judicial proceedings. See, e.g., *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (granting the general public a right of access to *voir dire*

Amendment, this reading — that the First Amendment generally protects only negative liberties — is probably correct.²⁵⁴ Such a rule, however, clearly does undermine one of the important goals of the First Amendment. Our societal solution to this dilemma has been statutory, the Freedom of Information Act (“FOIA”), which does grant citizens a circumscribed right to obtain information about the internal workings of the government.²⁵⁵ The lesson to be drawn then is that FOIA, even if not compelled by the First Amendment, is very much consistent with First Amendment values, and should be interpreted in that light.

3. Commercial Speech and Data

Since the 1970s, the Supreme Court has granted commercial speech — meaning, basically, advertising — some constitutional protection, but it has insisted that commercial speech is granted a lower level of protection than political speech.²⁵⁶ In recent years, however, the protection the Court grants to commercial speech has been ratcheting up to a level close to political speech.²⁵⁷ The Court’s protection for commercial speech has long been subjected to sharp criticism because of the lack of any apparent connection between commercial speech and democracy,²⁵⁸ and recent developments have elicited similar

examination); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (invalidating a state statute excluding the general public from trials for certain sex offenses if the victim was under 18); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (confirming that the press and public have a constitutional right to attend criminal trials).

²⁵⁴ There are, of course, prominent critics of this view. See, e.g., Lillian R. BeVier, *An Informed Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482 (1980) (arguing for a right of access of the press to information about the government); Jerome A. Barron, *Access to the Press — A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967) (arguing for a positive right of access to the press on the part of the public).

²⁵⁵ See 5 U.S.C. § 552 (2009).

²⁵⁶ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562-64 (1980); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770-73 (1976).

²⁵⁷ See, e.g., *Sorrell v. IMS Health*, 131 S. Ct. 2653, 2664-68 (2011) (applying “heightened judicial scrutiny” to regulation of commercial speech, and suggesting that this scrutiny is equivalent to strict scrutiny); *Thompson v. Western States Medical Center*, 535 U.S. 357, 367-68 (2002) (suggesting that the intermediate scrutiny test for commercial speech regulations, “as applied in our more recent commercial speech cases,” has become more searching).

²⁵⁸ See, e.g., Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 14-18 (1979).

critiques.²⁵⁹ If, however, one adopts a broader view of the First Amendment's functions, a justification for protecting commercial speech does emerge. As noted earlier,²⁶⁰ an important source of legitimacy for autocratic rulers is economic success. The same, naturally, is true of democratic rulers, as evidenced by the slogan "It's the Economy, Stupid" adopted by Bill Clinton's 1992 presidential campaign.²⁶¹ Commercial speech, however, is an essential ingredient of economic dynamism, especially in modern economies where consumer spending plays such an important role. Protecting such speech, therefore, advances economic prosperity, at least when the speech is truthful and non-misleading (as modern commercial speech doctrine requires). Thus, the speech-as-legitimization theory provides more support for the commercial speech doctrine than a simple self-governance approach.

A related issue is the treatment of information and data under free-speech law. In its recent *Sorrell v. IMS Health* decision, the Supreme Court strongly hinted that it would extend full First Amendment protection to commercial disclosures of data.²⁶² In so doing, the Court stepped into, and accentuated, an ongoing debate about how to balance privacy concerns with First Amendment protections for data disclosure.²⁶³ As with commercial speech, protection for data disclosure is difficult to reconcile with a democracy-enhancing view of free speech since most data disclosures contribute little or nothing to the political process, and on the flip side data disclosure threatens substantial social harm in the form of lost privacy. Data disclosure, however, is obviously big business. Indeed, free use and sharing of data lies at the heart of the digital economy. Protecting data therefore

²⁵⁹ See, e.g., Tamara R. Piety, "A Necessary Cost of Freedom?" *The Incoherence of Sorrell v. IMS*, 64 ALA. L. REV. 1, 47-53 (2012) (criticizing *Sorrell* as overextending free speech protections for commercial speech); Jedediah Purdy, *The Roberts Court v. America*, DEMOCRACY: A J. OF IDEAS, Winter 2012, available at <http://www.democracyjournal.org/23/the-roberts-court-v-america.php?page=all> (criticizing the protection of commercial speech by analogy to *Lochner*); Amanda Shanor & Robert Post, *Adam Smith's First Amendment*, 128 HARV. L. REV. 165 (2015) (noting that the protection of commercial speech has allowed plaintiffs to overturn economic regulations).

²⁶⁰ See *supra* notes 185-87 and accompanying text.

²⁶¹ Caleb Galoozis, *It's the Economy, Stupid*, HARV. POLITICAL REV., available at <http://www.iop.harvard.edu/it%E2%80%99s-economy-stupid-2>.

²⁶² *Sorrell v. IMS Health*, 131 S. Ct. 2653, 2666-67 (2011).

²⁶³ See Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 62-63 (2014); Ashutosh Bhagwat, *Sorrell v. IMS Health: Details, Detailing and the Death of Privacy*, 36 VT. L. REV. 855, 874-80 (2012); Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1151-52 (2005).

clearly enhances economic dynamism, and hence the legitimacy of rulers of whatever ilk.

A potential objection here is that if commercial speech and data disclosure enhance economic success, then rulers will not seek to suppress them. As such, constitutional protection is unnecessary. There is some truth to this, but it misses an important dynamic. Restrictions on both commercial speech and Big Data often originate with administrative officials and lower levels of government, whose reputations are much less closely tied to general economic success than those of national leaders. As a result, there can be conflicting incentives, where national leaders may be opposed to regulation but cannot prevent administrative officials, or state and local officials, from adopting policies contrary to their preferences. The First Amendment can then become a tool to protect against those kinds of policies.

4. Campaign Finance Regulation

Campaign finance reform is yet another area of First Amendment law that is complex, but whose trend is clear. In recent years, the courts have with increasing vigor protected the rights of individuals and corporations to spend unlimited amounts to fund campaign speech,²⁶⁴ and to contribute unlimited amounts to campaigns (albeit not to any individual candidate).²⁶⁵ Whether or not this approach advances the First Amendment's purpose of enhancing democratic self-governance is, of course, highly debatable.²⁶⁶

It is possible, however, that even if self-governance is advanced by the Court's campaign-finance jurisprudence, other goals — notably, that of achieving legitimacy with the public — are sacrificed. The influx of huge amounts of money into politics as a result of recent decisions is well-documented.²⁶⁷ The impact of this spending on

²⁶⁴ See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 371 (2010); *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 744-45 (2008).

²⁶⁵ See *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1461-62 (2014); *Speechnow.org v. Fed. Election Comm'n*, 599 F.3d 686, 698 (D.C. Cir. 2010).

²⁶⁶ *Contrast Citizens United*, 558 U.S. at 339-40 (permitting unlimited corporate spending will enhance political speech) *with id.* at 447-78 (Stevens, J., dissenting) (arguing that unlimited spending can undermine democratic values in many ways).

²⁶⁷ See, e.g., Jennifer Liberto, *2012 Election Priciest to Date: \$4.2 Billion Tab and Rising*, CNN (Nov. 5, 2012), <http://money.cnn.com/2012/11/05/news/economy/campaign-finance/> (tracing a jump in spending during the 2012 presidential election to the 2010 *Citizens United* decision); *Why American Elections Cost So Much*, *ECONOMIST* (Feb. 9, 2014), <http://www.economist.com/blogs/economist-explains/2014/02/economist-explains-4> (noting that *Citizens United* has caused federal and state elections spending to increase).

public confidence in government is less clear. I am not aware of strong empirical evidence that the two are directly linked. However, it seems at least plausible that over time, extraordinarily high levels of political spending and contributions by a handful of wealthy individuals may well convey the impression to voters that these individuals exercise undue influence over elected officials. Such a perception can only act to undermine legitimacy. This in turn suggests that if it is unclear whether the Court's campaign finance decisions will enhance self-governance, the need for legitimacy provides an additional argument against them.

5. Parody

To what extent should the First Amendment protect parodies of or attacks on public and private figures, even when the parodies inflict emotional injury or otherwise cause harm? The doctrinal answer is that protection is almost absolute.²⁶⁸ Such speech is seen as an essential part of political discourse, and so must be tolerated.²⁶⁹ That conclusion is almost certainly correct, and probably trumps any contrary concerns. Moreover, in addition to advancing democracy by permitting criticism of leaders, parodies also are important safety valves. Political parodies can diffuse political tension by permitting anger over particular policies or leadership to be sublimated into laughter. Thus, the strong constitutional protection accorded to parodies is supported not only by the traditional self-governance theory of the First Amendment, but also by the view that the First Amendment protects safety valves.

There is, however, one counterargument: legitimacy. Political parodies are, needless to say, not widely tolerated in autocracies, because they tend to threaten the legitimacy of the leadership. Autocrats sense, probably correctly, that it is far easier to maintain authority in the face of criticism than it is in the face of ridicule. Criticism is merely a reflection of the fact that disagreement is inevitable within any society, and so need not be construed as an attack on one's right or ability to rule. Ridicule, on the other hand, suggests lack of fitness, and so if effective can be a far more dangerous threat to a nondemocratic regime.

Parody thus forces us to choose between competing First Amendment values: democracy and safety valves against legitimacy.

²⁶⁸ See *Snyder v. Phelps*, 131 S. Ct. 1207, 1218-20 (2011); *Hustler Magazine v. Falwell*, 485 U.S. 46, 53-55 (1988).

²⁶⁹ *Snyder*, 131 S. Ct. at 1220; *Hustler Magazine*, 485 U.S. at 53-55.

Here, the differences between an autocracy and democracy become clear. Autocracies will often choose to suppress parodies, even where they might permit sober criticism, because their desire for regime stability trumps all other concerns, and, of course, because advancing democratic values is not part of their agenda. In a liberal democracy, on the other hand, self-governance must always trump, as it is the core political value undergirding the system of government. Other free-speech interests are real enough, and can supplement the advancement of self-governance in important settings; but it is inconceivable that the First Amendment would be interpreted to permit the suppression of political speech simply to protect other, secondary values such as legitimacy.

6. Association

Another area where autocracies and democracies demonstrate differences as well as parallels is in the regulation of associations. As noted earlier, rulers of nondemocratic nations tend to be highly suspicious of private associations because they are seen as potentially rival loci of power and loyalty.²⁷⁰ Autocrats are also, concomitantly, suspicious of associational speech; which is to say, speech involved in the formation and growth of associations.²⁷¹ This lack of tolerance for groups comes at a cost, notably in lost efficacy of speech, but it seems a cost most autocrats are willing to bear, whether wisely or not.²⁷²

It is the very things that make associations dangerous to autocrats that make them so valuable in democracies. In the Supreme Court's words, "[t]he very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances."²⁷³ Associations also, as noted earlier, can provide important safety valves and contribute to legitimization.²⁷⁴ Given the centrality of associations to self-governance, as well as their other values, it is unsurprising that the First Amendment has been interpreted to grant strong protections

²⁷⁰ See *supra* notes 205–08 and accompanying text.

²⁷¹ See Bhagwat, *Associational Speech*, *supra* note 208 at 995–99; *supra* notes 205–06 and accompanying text.

²⁷² See *supra* notes 211–13 and accompanying text.

²⁷³ *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1875)).

²⁷⁴ See *supra* note 217–19 and accompanying text.

to the activities as well as the internal organization and integrity of associations.²⁷⁵ The contrast with autocracies is clear.

There is also, however, a potentially troubling parallel between autocracies and democracies in their treatment of associations. The parallel has its roots in the fact, recognized by both autocrats and democrats, that groups are dangerous. Individuals are more effective at accomplishing things when they act jointly, though groups. This effectiveness is generally valuable, but it becomes threatening when a group's goals are violent, illegal or subversive. This is the insight underlying the law of conspiracy, and it is also why the First Amendment grants greater protection to violent speech than violent associations.²⁷⁶

The difficulty arises, of course, in line drawing. Autocracies tend to broadly over-classify political groups as "subversive" or threatening, and so suppress them. The First Amendment has, at least since the 1960s, been a bulwark against such overreaching in the United States. A recent Supreme Court decision permitting prosecution for even peaceful association with foreign terrorist organizations suggests, however, that the War on Terror may be weakening that bulwark.²⁷⁷ The question then become whether we will see some convergence in the treatment of associations between democracies and autocracies, as we saw during the First Red Scare²⁷⁸ and the McCarthy era.²⁷⁹ There is no question, of course, that associational freedoms will remain far stronger, for the foreseeable future, in the United States than in China. At the margins, however, there are similarities between the line-drawing problems faced by autocratic and democratic authorities.

²⁷⁵ See, e.g., *Boy Scouts v. Dale*, 530 U.S. 640 (2000) (holding that First Amendment protects Boy Scouts' right to revoke membership of gay assistant scoutmaster); *NAACP v. Button*, 371 U.S. 415 (1963) (holding that Virginia may not prohibit the NAACP from providing attorneys in public interest litigation to which it was not a party); *NAACP v. Alabama*, 357 U.S. 449 (1958) (holding that an Alabama statute that would force the NAACP to provide membership lists infringed their right to associate).

²⁷⁶ See Bhagwat, *Terrorism*, *supra* note 206, at 624-25.

²⁷⁷ The Supreme Court decision is *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). For a discussion of modern terrorism prosecutions and their relationship to the right of association, see generally Bhagwat, *Terrorism*, *supra* note 206.

²⁷⁸ See *Whitney v. California*, 274 U.S. 357, 366-72 (1927).

²⁷⁹ See *Dennis v. United States*, 341 U.S. 494, 508-11 (1951); *Am. Comm'ns Ass'n v. Douds*, 339 U.S. 382, 415 (1950).

CONCLUSION

In the 2010 movie version of *Alice in Wonderland* the Mad Hatter (played by Johnny Depp) says to Alice, “You would have to be half mad to dream me up.”²⁸⁰ Some might say the same of this article. In our culture, democracy and free speech are inextricably linked, each strengthening the other. Why then even think about free speech without democracy? Isn’t that like sound in a vacuum? Not exactly. Sound cannot exist in a vacuum, because sound consists of vibrations of matter. Free speech can exist in nondemocratic states and can have important functions in the operations of such states. There is, however, always a tension between the structure of such a regime and the tendency of free speech to create an active citizenry. And, there is no doubt that the undoubtedly key role of free speech in liberal democracies — to facilitate self-governance — is entirely irrelevant to autocracies.

Nonetheless, there is value in considering how free speech might operate, and what functions it may serve, in a nondemocratic state. Such an investigation sheds important light on the nature of citizenry, both in autocratic and in democratic societies. Speech, I have argued, is a function of citizenship. In democratic societies, the core of being a citizen is participating in the democratic process. In autocratic countries, that option is not available. But citizenship nonetheless can exist. Citizenship is to a great extent defined by interactions between individuals and the state. Speech mediates those interactions, and more broadly shapes the relative roles and authority of individuals and the state. These issues arise in all states, including those without democratic accountability. Moreover, even in democratic states, the range of citizen/state interactions is far broader than elections. Indeed, the very phrase “democratic state” as a description of the modern United States is an oversimplification of a complex system of power and authority, aspects of which are highly democratic and aspects of which are, from the typical citizen’s perspective, not.

The purpose of this paper is not to suggest that democracies and autocracies are the same from the average citizen’s perspective. This is obviously untrue. Nor is it to deny that in a democracy, the most important role of free speech is to facilitate self-governance. But by examining the role of speech in states lacking democratic institutions, we can learn about other ways in which free speech mediates the relationships between citizens and the state. In a democracy, those other

²⁸⁰ ALICE IN WONDERLAND (Walt Disney Pictures 2010).

functions are necessarily subsidiary to self-governance. But they are nonetheless real, and they have implications for constitutional doctrine.

Finally, the topic of this article has important implications for broader First Amendment theory. The questions explored here can be seen as part of a larger inquiry into the nature of citizenship. Traditionally, we have envisioned citizenship in a democracy as consisting entirely, or primarily, of participating in elections or otherwise engaging in collective decision making, and this perspective has shaped First Amendment doctrine in significant ways. This, however, is clearly too narrow a view. There is much work to be done in developing a broader vision of citizenship, and exploring the implications of that vision for the citizenship rights enumerated in the First Amendment.