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ARTICLES

Application of the Economic Provisions in the Constitutional Law —Beginning from the Debate of the German Economic Constitution Law*

*Huang Hui***

ABSTRACT

The Economic Constitution Law Study can be seen as a sub-discipline of the Constitution Law Study. It explores how to carry the constitutional economic norms into effect. In other words, it explores how to ensure the governmental and social economic powers operate within the constitutional framework. The Paragraph 1 of article 15 of the Chinese Constitution Law, which provides that "the state practices socialistic market economy," is the key norm of the Chinese Economic Constitution. In view of that the interpretation and application of the constitutional law is still in the blank, we might draw inspiration from the Debate on the Economic Constitution in Germany during the 1950s. The German experience tells that the uncertainty at the economic constitutional norms could be clarified by the joint efforts of the scholars and judicial practitioners. Therefore, the present starting point and the constructive work way of the Chinese constitution law scholars is to get the intent and the application method of the constitutional law norms gradually from the case-based constitutional study and the relevant comparison law.

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Key Words*: economic constitutional law; application of constitutional law; comparison of constitutional case.*

I. INTRODUCTION

Article 15(1) of the *Constitution of the People's Republic of China* (the *PRC Constitution*) provides that "[t]he state practices socialist market economy." Does such a consequential but abstract constitutional provision possess any legal-normative effect under the notion that the Constitution is law as well? What is its meaning? How should it be understood in conjunction with other constitutional provisions related to the economy, also known as the Economic Constitution? These are unavoidable questions facing every constitutional law scholar in China, since the study of the Economic Constitution is as integral as the studies of the *PRC Constitution* in its political, social, marital and familial aspects. Inspired by the Debate on the Economic Constitution in Germany during the 1950s, the author raises the above questions in an attempt to use them as a starting point for analyzing whether the provisions related to the economic system in the *PRC Constitution* are applicable and the scope of their application.

This Article consists of five parts. Part I delineates the concept of the "Economic Constitution," which falls within the study of constitutional law and is gaining familiarity and acceptance from Chinese legal scholars. Part II outlines the history of the Debate on Economic Constitution in Germany during the 1950s. In particular, it illustrates how the Federal Constitutional Court (*Bundesverfassungsgericht*) deliberately denied the existence of any particular economic system in the text of the German Constitution. This also leads to this Article's main conclusion: the Federal Constitutional Court's denial of a particular economic system in the German Constitution was driven by the objective to avoid losing its discretion in constitutional review, which is likely to happen if constitutional review is over-reliant on economic theories. Part IV, by way of questions, discusses whether the German experience is illuminating for us to understand article 15(1) of the *PRC Constitution* and its scope of application. Part V points out that the methods of comparative law and case-based analysis will be the most useful for research in this area.

II. DELINEATION OF CONCEPT

To discuss constitutional provisions related to economic system, we must begin with a superordinate concept, which is the concept of "Economic Constitution." Economic Constitution, *Wirtschaftsverfassungsrecht* or *Wirtschaftsverfassung* in German, is a concept of great importance in German public law. Specifically, it refers to all the constitutional norms related to the economic life and order as can be found in the German constitution, i.e. the *Basic Law for the Federal Republic of Germany* (the *Basic Law*). The Economic Constitution is as an integral part of the German Constitution as its political, social, marital and familial aspects. Accordingly, it is an important subject of research in the area of constitutional law. To some extent, the Economic Constitution Law Study can be viewed as a subordinate discipline of the constitutional law Study. Its research centers on how to implement the economic norms in the Constitution. In other words, its study focuses on how to ensure that the economic powers of the state as well as that of the society operate within the constitutional framework.[1]

Since the above understanding on Economic Constitution is based on the existing constitutional text, it is considered as an understanding in a formalistic as well as a narrow sense. Under German law, the Economic Constitution is otherwise defined in a broad and substantial sense, and would accordingly cover all legal norms relating to economic systems and developments. That is to say, in addition to all the economic norms found in the *Basic Law*, the Economic Constitution should also include regulations and rules such as the *1957 Act Against Restraints of Competition* (*Gesetz gegen Wettbewerbsbeschränkungen*, or GWB), the *1965 Stock Corporation Act* (*Aktiengesetz*, or AktG), the *1967 Law to Promote Economic Stability and Growth* (*Gesetz zur Förderung*

[1] For the concept of the German Economic Constitution, *see* Peter Badura, *Wirtschaftsverwaltungsrecht* [*Economic Administrative Law*], *in* BESONDERES VERWALTUNGSRECHT [SPECIAL ADMINISTRATIVE LAW] 245, 262 (Eberhard Schmidt-Assmann ed., 12th ed. 2003) (hereinafter *Wirtschaftsverwaltungsrecht*); Peter Badura, *Grundprobleme des Wirtschaftsverfassungsrechts* [*Basic Problems of Economic Constitutional Law*], 16 JURISTISCHE SCHULUNG [LEGAL TRAINING] 205, 205, 207 (1976) (hereinafter *Grundprobleme*); 乌茨·施利斯基 (UTZ SCHILESKY), 经济公法 [PUBLIC ECONOMIC LAW] at 4, 7 (喻文光 (Yu Wenguang) trans., 2006).

der Stabilität und des Wachstums der Wirtschaft, or StabG), and *the 1976 Codetermination Act* (*Mitbestimmungsgesetz*, or MitbestG), all of which have massive impact on the formation as well as the development of the actual economic order.[2]

Why would legal norms unrelated to the Constitution Law be referred to as the "Economic Constitution"? To answer this question, it is helpful to give some explanation of the German term "*Verfassung*." In English, the corresponding term for "*Verfassung*" is "Constitution." Its ordinary meaning is the basic and fundamental state of human beings, things and matters. For example, one can ask questions about the other's "*Verfassung*" as a way to inquire the latter's health conditions. The term "*Verfassung*," in legal parlance, is understood to mean the law concerning the basic state, especially when the suffix "*Recht*" (law) is added to form the term "*Verfassungsrecht*." Generally, *Verfassung* means written constitution. It should be noted, though, that the ordinary meaning of "*Verfassung*" is also frequently used in legal contexts.[3] However, it should not be difficult to distinguish between the two meanings as long as the context is taken into account.

"Economic Constitution," in its broad sense, is derived from the ordinary meaning of "Constitution." Hence, it should be understood as the "law" concerning "the basic state of the economy." According to the prevailing opinion in the German public law academia, Economic Constitution is an independent area of law with its own subject of research. Thus, its meaning should be limited to a narrow sense, which includes only the economic norms contained in the *Basic Law*. The renowned constitutional jurist Badura is of the opinion that Economic Constitution Study in the broad sense is prone to certain systemic influence and dogmatism, and thus such a structural presumption is beyond the com-

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[2] For categorization of the Economic Constitution, *see* Badura, *Wirtschaftsverwaltungsrecht*, *supra* note 1, at 262; 施利斯基 (SCHILESKY), *supra* note 1, at 20.

[3] For example, the German *Company Organization Act* (*Betriebsverfassungsgesetz*) uses "*Verfassung*" in its original German title. However, "*Company Organization Act*" is a more appropriate translation than "*Company Constitution Act*" considering its contents. Another example is the *German Stock Corporation Act* (*Aktiengesetz*): Part Four of which is entitled "*Verfassung der Aktiengesellschaft*." This title should be translated as "the Organization of the Company," rather than "the Constitution of the Company."

petence of law as a discipline.[4]

In addition to the broad and narrow understandings discussed above, German "Economic Constitution" has a third definition that is further narrowed, in that it includes only norms relating to economic system in the constitutional text. "Economic Constitution," therefore, refers to some kind of economic system or regime that is substantially certain and institutionalized, such as planned economy, free market economy, or social market economy.[5] Such a definition embraces the ordinary meaning of "*Verfassung*," i.e. "basic state." In the author's view, the most appropriate translation for this "*Versfassung*" should be "economic system" or "economic regime." This is vital for this Article. "Debate on Economic Constitution," as is seen in the subtitle of this Article, is intended to refer to the debate during the 1950s among German legal scholars on whether the *Basic Law* establishes some kind of "social market economy." This makes it necessary to adopt different translations [to the same German term]. Otherwise, confusing statements such as "whether the German Economic Constitution includes some kind of Economic Constitution" may come about. In the same vein, article 15(1) of the *PRC Constitution*, which provides that "[t]he state practices socialist market economy," should be understood as an Economic Constitution provision in the narrowest sense. To distinguish, the author calls such an article an "economic system provision" or an "economic system norm."

Chinese literature contains other explanations of "Economic Constitution." The most widespread one sees Economic Constitution as synonymous with anti-monopoly law. This viewpoint has gone beyond the legal profession after the media's reporting on the legislative events associated with the Chinese *Anti-Monopoly Law* around the year 2007. The literature also shows a fifth explanation of "Economic Constitution," which studies the relationship be-

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[4] *See* Badura, *Grundprobleme*, *supra* note 1, at 207. Moreover, some scholars expressly argue that the broad sense of "Economic Constitution" should be abandoned. They contend that this sense confuses constitutional law with ordinary statutes. Consequently, it might, on the one hand, cause the danger of elevating economic policies that at best have ordinary legal authority onto a constitutional level; and on the other hand, it leaves a mistaken impression that any real-life "economic" phenomenon has a constitutional basis, *see* 施利斯基 (SCHILESKY), *supra* note 1, at 7, 20.

[5] *Compare* 施利斯基 (SCHILESKY), *supra* note 1, at 7, 19, 20.

tween economy and constitution from a law and economics perspective. Since these two explanations are unrelated to the thesis of this Article, they will not be discussed.[6]

III. DEBATE ON ECONOMIC CONSTITUTION IN THE 1950S GERMANY

A. Background

In the year of 1949, the Federal Republic of Germany promulgated a written constitution entitled the "*Basic Law*." Unlike the Weimar Constitution, the *Basic Law* does not have a separate chapter for provisions governing the economic life and order.[7] Instead, these economic norms are spread out all over the whole text. These norms include, *inter alia*, first, economic basic right provisions that bear close relation to the economic life, such as freedom of action (*Handlungsfreiheit*) in article 2, occupational liberty (*Berufsfreiheit*) in article 12, property protection (*Eigentumschutz*) in article 14; second, provisions establishing Germany as a social federal state (*sozialer Bundesstaat*) in article 20; third, provisions governing the division of legislative powers as regards the economy between the Federation and the States in article 70 and below; fourth, constitutional principles and doctrines that constitute the foundation of rule of law in modern nations (*Rechtsstaat*), such as the principles of legal reservation, proportionality, and judicial review of discretionary powers.

In spite of the dispersion of these economic provisions, German law scholars swiftly offered an outline of the German economic order presumably intended by the drafters of the *Basic*

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[6] Chinese translators tend to translate "*Verfassung*" and "constitution" into "宪法" in Chinese, but "宪法" generally refers only to the formal text of the Constitution. Therefore, it is necessary to distinguish between the meanings of "宪法" and "constitution." Prof. Chen Duanhong has done a thorough analysis of the two meanings of the English word "constitution" (*i.e.* "*Verfassung*" in German). *See generally* 陈端洪 (CHEN DUANHONG), 宪治与主权 [CONSTITUTIONALISM AND SOVEREIGNTY], 3–5. (2007).

[7] The Weimar Constitution, officially titled Verfassung des Deutschen Reichs (Constitution of the German Reich), was promulgated on Aug. 11, 1919. Its Chapter 5 (arts. 151–165) is titled *Economic Life* (*Das Wirtschaftsleben*). The content of this chapter, though inheriting the liberal element of liberal economy, includes socialist-characterized provisions about labor and about social security.

Law. First, considering the inclusion of broad provisions governing freedom of action, occupational liberty and property protection, it is confirmed that the *Basic Law* has abandoned the extreme planned economy as practiced by the Third Reich, the (former) Soviet Union, and (former) socialist Eastern bloc countries. Second, the *Basic Law* disagrees with the laissez-faire pioneered by Adam Smith and championed in the United States prior to President Roosevelt's "New Deal," because article 20(1) of the *Basic Law* provides that the Federal Republic of Germany is a democratic and social federal state. Here the word "social" (*sozial*) implies the state's power and duty to intervene in the economy for the purpose of remedying defects in the market economy as well as achieving social fairness and justice.[8] In other words, economic provisions in the *Basic Law* consist of two factors on both ends of the spectrum: the first one is a market economy with freedom and basic civil rights as its essential features, and the second one is a social factor allowing government intervention. The *Basic Law* demands that these two factors exist simultaneously. Such an objective is easily understandable, as the German constitutional law scholars and the judiciary would both agree.

Nonetheless, "economic freedom" and the "social principle" are still antitheses of each other. The former asks the government to sit back while the latter requires intervention by the government. In such a case, apart from not holding on to any extreme, what is actually the scope of government intervention potentially permissible under the *Basic Law*? For those who have to study and apply the *Basic Law*, this is a principal and eternal question, especially during the 1950s. Article 1(3) of the *Basic Law* expressly states that "[t]he following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law." This means that the *Basic Law* is the supreme law that binds all government branches.[9] Thus, the vague conclusion that "the *Basic Law* not only protects civil liberties and basic rights, but also allows reasonable intervention in respect of such liberties and rights" is simply insufficient. Practitioners need a constitutional theoretical

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[8] *See eg,* WERNER FROTSCHER, WIRTSCHAFTSVERFASSUNGS und WIRTSCHAFT -VERWALTUNGSRECHT [ECONOMIC CONSTITUTION AND ECONOMIC ADMINISTRATIVE LAW], at 19 (4th ed. 2004).

[9] HARMUT MAURER, STAATSRECHT I [STATE LAW, VOLUMNE ONE], at 23 (4th ed. 2005).

framework that is more detailed and rigorous than the slogan of "searching for a unity of opposites." For this purpose, in the 1950s, German constitutional law scholars engaged in a debate over whether the *Basic Law* establishes or favors a particular economic system. The debate essentially discussed the lawful scope of the state's intervention in the economy. This is what is meant by the subtitle of this Article, i.e. the "Debate on Economic Constitution."

B. Hans Carl Nipperdey and the Freiburg School

German constitutional law scholars disagreed widely in relation to issues concerning Economic Constitution. Among all those disagreements, the one attracting most attention is certainly the intense Debate on Economic Constitution between the Federal Constitutional Court and Hans Carl Nipperdey, an eminent jurist as well as the inaugural president of the Federal Labor Court.[10] Nipperdey first made known his opinion in March 1954, during a presentation before the Legal Research Association (*Juristische Studiengesellschaft*) in Karlsruhe. His opinion can be summarized as follows: after an "overview" of the *Basic Law*,[11] it can be said

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[10] There are another two major opinions: the first is the "Hybrid Economic System" conclusion proposed by E.R. Huber after analyzing collectively all the provisions of the *Basic Law*, balancing economic freedom and the Principle of Social State; the second is an opposite view proposed by Abendroth, arguing that the *Basic Law* failed to make any decision on economic system, hence both liberal economy and socialist economy are permitted. For various opinions on the topic of the Economic Constitution, *see generally* Peter J. Tettinger, *Neuer Streit um die "Wirtschaftsverfassung"* [*New Dispute over the "Economic Constitution*"], 32 BETRIEBS-BERATER [THE OPERATION CONSULTANTS] 1617, 1617–21 (1977).

[11] "Overview" is a technique used in the application of law. In the context of applying the constitution to solve a constitutional problem, it means reaching a conclusion not through one or more particular constitutional provisions, but through the Theories of State and an overall view (*Gesamtschau*) of the constitution. According to Frotscher's introduction, this technique was used in the "*Cologne Opinion*" (*Koelner Gutachten*), or "*Common Opinion*" (*Gesamschaftsgutachten*). "*Korlner Opinion*" was drafted by three famous professors (Badura, Rittner and Ruethers) and submitted by enterprises to challenge the *Codetermination Act*. It did not point to any specific provisions, but instead reached the conclusion of unconstitutionality based on the "institutional connection of the economic constitution" (*institutionellen Zusammenhang der Wirtschaftsverfassung*) and "the overall order and protection mechanism formed by various basic rights" that had great significance in German economic and labor order, *see* Frotscher, *supra* note 8, at 7 n.6,. Frotscher also opined that, the "overview" technique has its earlier root in the judgment of the

that the relevant articles and their meanings imply that the social market economy (*soziale Marktwirtschaft*) has been designated by the *Basic Law* to be Germany's fundamental economic system.[12] Nipperdey did not invent such a "social market economy" theory out of nowhere. Instead, he aligned himself with the then highly influential economic theory of Ordoliberalism (*Ordoliberalismus*), which was led by Walter Eucken and Franz Böhms, who were both professors in the Freiburg University at that time. This economic theory is also referred to as the neo-liberal theory (*Neoliberale Theorie*), the "Freiburg School" (*Freiburger Schule*), or the Freiburg School of National Economy (*Freiburger Schule der Nationaloekonomie*). Supporters of the Freiburg School are cognizant of the severe social problems that will arise if the national economy is entirely left to the "invisible hand." They support government intervention in preventing over-concentration of economic power, i.e. economic monopoly, on the ground that the market's private power, similar to the state's public power, can also disturb free competition in the market. The Freiburg School is still part of the school of liberalism, with small adjustments to the traditional theory of classical liberalism, because it also recognizes full market competition as the foundation of the economy, while defending the government's role in maintaining market order, rather than in regulating the economy by way of self-engagement or intervention in specific economic activities. The key words of the Freiburg School are "privatization" and "deregulation" (*Deregulierung*).[13] Thus, their theory suits Nipperdey's argument

1954 *Investment Aid* Case (*Investitionshilfe-Entscheidung)*. This case will be briefly introduced later in this Article.

[12] Hans Carl Nipperdey, *Die soziale Marktwirtschaft in der Verfassung der Bundesrepublick* [*The Social Market Economy in the Constitution of the Federal Republic of Germany*], *in* 10 SCHRIFTENREIHE DER JURISTISCHEN STUDIENGESELLSCHAFT KARLSRUHE [SERIES OF KARLSRUHE LEGAL STUDIES SOCIETY] 5 (1954). In 1960, Nipperdey published his article *Economic Constitution and Federal Constitutional Court* (*Wirtschaftsverfassung und Bundesverfassungsgericht*), in which he further explained his position; afterwards, in an effort to correct people's misunderstandings about him, he published a second version of this article in 1961, titled "Social Market Economy and Basic Law" (*Soziale Marktwirtschaft und Grundgesetz*), and in 1965, he published a third version.

[13] *See generally*, WALTER EUCKEN, GRUNDSAETZE DER WIRTSCHAFTSPOLITIK [PRINCIPLES OF ECONOMIC POLICY] (1953); 德国秩序政策理论与实践 [THE THEORY AND PRACTICE OF THE GERMAN REGULATORY POLICY], (何梦笔 (Carsten Herrmann-Phillath) ed., 庞健 & 冯兴元 (Pang Jian & Feng Xingyuan) trans.,

perfectly.

C. Opinions of The Federal Constitutional Court

The Federal Constitutional Court of Germany clearly disagreed with Nipperdey. Several months after Nipperdey delivered the speech, the Federal Constitutional Court was finally able to issue its opposing opinion in the famous *Investment Aid* case (*Investitionshilfe-Entscheidung*), where the Court found that the principle of neutrality shall govern the issue of economic system in the *Basic Law*.[14]

The *Investment Aid* Case involved *the Law on Investment Aid for Industrial Economy* (*Gesetz über die Investitionshilfe der gewerblichen Wirtschaft*) (hereinafter the "*Investment Aid Law*"), a law issued by the federal government on January 7, 1952. According to the *Investment Aid Law*, the industrial and commercial sector was obliged to raise 100 million Deutschmarks at once and loan these funds to the coal, steel, energy production enterprises that had been running into difficulties for their severe lack of investment. Specifically, relevant institutions devised a plan: each enterprise was required to calculate its amounts of payable funds based on the its profit and revenue during the preceding two years, and then report the calculation result and pay the funds to the financial department with appropriate jurisdiction. This is a legal obligation, so should any enterprise refuse to perform or improperly perform that obligation, the financial department was authorized to determine the amount of payable funds for them. The benefited enterprises, after receiving the funds, were required to issue stock or bond of the same value, and the contributing enterprises could claim the stock based on the payment receipt. Before a contributing enterprise claims the stock, the annual interest of the contributed payment was 4%, and 5% beginning from the 18th month from payment of fund.

Needless to say, the fund-raising required by *Investment Aid*

2000)；冯克利 [Feng Keli], *Translator's Comments* to GEOFFREY BRENNAN & JAMES BUCHANAN, 宪政经济学 [CONSTITUTIONAL POLITICAL ECONOMY], at 6–7. (冯克利等 (Feng Keli) et al. trans., 2004).

[14] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court of Germany] July 20, 1954, 4 BUDESVERFASSUNGSGERICHTSENTSCHEIDUNG [BVERFGE] 7 (Ger.).

Law was coercive, and was therefore subject to strong protest of the entire industrial and commercial sector. Administrative litigations continuously initiated in various states, and the disputes ultimately merged into one before the Federal Constitutional Court. Hundreds of business owners challenged the constitutionality of the *Investment Aid Law* on various grounds,[15] including: that it violated article 1 of the *Basic Law* that protects human dignity because it forced some enterprises to finance others; that it violated the right to freedom of action in article 2(1) because it had deprived enterprises' autonomy; that it violated the protection of property in article 14 because the insufficient consideration and compensation for the fund raised constituted "deprivation of property"; that it violated the negative freedom of assembly in articles 2 and 9 because it forced enterprises to purchase other enterprises' stock or bonds; that it violated the principle of equality because it financed some enterprises at the cost some others; that it violated the legislative mandate in articles 74(1) and 115; that it violated the basic right of civilian and enterprise because a mere adherence to the principle of legislative reservation was not adequate to pass such a law, a specific constitutional authorization should be required, but it lacked such an authorization; that it violated the basic principle of Rule of Law (*Rechtsstaat*) because of the retroactive nature of its means of calculation. Among these various reasons, there was one submission relevant to our analysis. This submission directed towards the principle of market. That is to say, it argued that the *Investment Aid Law* was unconstitutional because it used non-market method and violated the economic order set forth by the *Basic Law* (i.e. the Economic Constitution).

The Constitutional Court denied all these submissions (its arguments are omitted here because they are irrelevant to this Article). Regarding the allegation of "violation of economic system" and "non-market means," the court made its famous declaration of "neutrality in economic policy" (argument D/5 of

[15] *See generally* 克劳斯·施莱希、斯特凡·科里奥特 (KLAUS SCHLAICH & STEFAN KORIOTH), 德国联邦宪法法院：地位、程序与裁判 [THE FEDERAL CONSTITUTIONAL COURT: POSITION, PROCESS, DECISIONS], at 198–283. (刘飞 (Liu Fei) trans., 2007).

the opinion)[16]:

> "The Basic Law warrants neither the neutrality in economic policy nor some 'social market economy' that uses market method only." The "neutrality in economic policy" denotes only that the framers of the Constitution did not endorse any specific economic system. This means that the legislators could adopt any economic policy they deemed necessary, so long as it is consistent with the specific provisions in the Basic Law. The present economic and social order is permitted by the Basic Law, but it is by no means the only permissible order. The order is based on the decision of the legislators on economic and social policy, which can be replaced or interrupted by another decision. Therefore, the discussions of whether the Investment Aid Law is consistent with the economic and social order, and whether the regulatory means fits the market economy is meaningless in the sphere of Constitution.[17]

In 1958, the Federal Constitutional Court re-stressed the Constitution's neutral stance on economic order in the *Pharmacy* case (*Apotheken-Entscheidung*). [18] The petitioner in this case, Mr. A, is a pharmacist with a practice qualification. After being an employee for 10 years, Mr. A planned to open a pharmacy in the Traunreut county of Bavaria state. In 1956, Mr. A applied to relevant authorities for an enterprise license (*Betriebserlaubnis*), but was rejected. Mr. A satisfied all the subjective conditions

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[16] According to the judgment's wording and scholars' relatively consensual understanding, the "neutrality in economic policy" used in the judgment does not mean that the Constitution does not care about this question. At least the Constitution has outlawed the extreme planned economy and the extreme laissez faire. Accurately speaking, the legislature is entitled to adopt any economic policy it deems appropriate only when it does not violate the distribution of legislative power between the federation and state, the rule of law principle, and the *Basic Law* provisions on protecting the basic rights of citizens. *See* Badura, *Wirtschaftsverwaltungsrecht*, *supra* note 1, at 262–65; 施利斯基 (SCHILESKY), *supra* note 1, at 20–24; FROTSCHER, *supra* note 8.

[17] BVERFGE, *supra* note 14.

[18] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court of Germany] June 11, 1954, 7 BUDESVERFASSUNGSGERICHTSENTSCHEIDUNG [BVERFGE] 377 (Ger.).

required by the *Bavarian Apothecary Act* (*Bayerisches Apothekengesetz*), namely that a pharmacy operator must (1) hold a pharmacist qualification certificate, (2) have an experience practicing as a pharmacist for a certain period, (3) be a German citizen, and (4) have a dependable character and be suitable for operating a pharmacy. However, article 3(1) of that law also provided two objective requirements: (1) the newly established pharmacy must meet the public interest, and (2) the petitioner must have an economic basis as an assurance, and the newly established pharmacy must not influence the existing pharmacy owners' economic basis. Mr. A's petition was rejected on these two objective requirements, as the newly established pharmacy would not meet the public interest because there were already sufficient pharmacies in this region, and Mr. A had no economic basis as an assurance, and allowing his new business would impact the economic assurances of the neighboring pharmacy owners.

Following the failures in an administrative review and an administrative litigation, Mr. A petitioned to the Federal Constitutional Court on the ground that article 3(1) of the *Bavarian Apothecary Act* and the rulings of the administrative agencies and of the administrative court violated the occupational freedom provided in article 12 of the *Basic Law*, and the petition finally succeeded. Interestingly, although Mr. A did not assert a violation of market economic order as a basis of argument, the Federal Constitutional Court, in analyzing whether the legislators of the *Bavarian Apothecary Act* had exceeded their legislative discretionary power, incidentally mentioned that:

> We can be entirely certain that, the only reason to restrict legislative discretion is the protection of basic rights. On the issue of economic policy, the *Basic Law* remains neutral (BVerfGE 4, 7). Specifically, the legislature may adopt any policy it deems proper for a realistic need, so long as it respects the *Basic Law*, especially the basic-right provisions (BVerfGE 4, 7, 17–18). Therefore, a legislation promulgated based on article 12, section 1, sentence 2 of the *Basic Law*, would not be constitutionally problematic simply because that legislation is in conflict with other economic policies, or certain national economic theory

> which bases on such economic policies. That the judge disfavors the economic policy in a certain legislation is an even less persuasive reason to find unconstitutionality.[19]

As can be seen from these two judgments, in examining the constitutionality of certain economic legislations, administrative rulings, or judicial decisions, the Federal Constitutional Court adhered only to the bottom line of basic rights, and firmly set aside restrictions of any economic theory. The legal academia was touched by this position of the Federal Constitutional Court, and adopted it as the prevailing opinion. Its direct consequence being: if anyone challenges the constitutionality of a certain legislation, authorized legislation, autonomous protocol or relevant judicial decision based on infringement on economic freedom, an assertion of a "violation of market economic institution" will not be supported. His or her silver lining must be searched in the provisions of specific basic rights.[20]

IV. THE SIGNIFICANCE OF THE DEBATE ON ECONOMIC CONSTITUTION

From some German textbooks related to State Law (*Staatsrecht*),[21] constitutional law, economic law, economic administrative law, the author learned about the history of this "Debate on Economic Constitution" in the 1950s, the various opinions of scholars, and the sharp disagreement between the Federal Constitutional Court and Nipperdey. All the materials, however, were conclusive opinions, and their reasoning was mainly the technique of constitutional application. An overall impression summarized from those materials, therefore, is that different schools, starting from the same historical background and the same constitution, through their respective verbal tricks,

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[19] *Id.*

[20] 施利斯基 (SCHILESKY), *supra* note 1, at 21. The explanation of R. Schmidt is quite apt: The Economic Constitution that the Federal Constitutional Court failed to specifically define is actually the aggregated scope of all the basic freedom and rights of citizens. The legislature cannot violate these basic rights in regulating the economy.

[21] The part of German constitutional law that deals with the rules that establish the government and regulate the relationship between different institutions of government.

reach their respective opinions. For example, relying on article 2, section 1, the catch-all provision of constitutional basic rights,[22] and the freedom of occupation in article 12, section 1, Nipperdey managed to deduce a "market economy institution," arguing that the "Principle of Social State" grammatically modifies and limits "market economy," while the "market economy" is the essence. Facing the same materials, other scholars failed to deduce such a meaning, or only deduced a "mixed" system.[23] On the other hand, while the Federal Constitutional Court strongly opposed Nipperdey's opinion, it only stated its own opinion without specific illustration as reflected in the above-quoted judgment.

Apparently, this debate is connected to the basis used in constitutional review: if the court accepted Nipperdey's opinion, then "social market economy" would become a legal norm, and would be used as an important standard in examining the constitutionality of an economic legislation. Otherwise, the grounds for unconstitutionality can only be found in the specific provisions of the *Basic Law*. The good thing about the latter approach is that the Constitutional Court, as well as all the other courts, was exempted from having to closely examine the "social market economy."

However, is this serious debate merely about a technical question of constitutional application? Or, maybe the debate has a more profound significance. With such questions and guesses, the author recently read Nipperdey's pamphlet *Social Market Economy and the Basic Law* re-published in 1965,[24] and finally came

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[22] Art. 2(1) of the *Basic Law* provides that "[e]very person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law." This provision grants individuals a broad freedom of action (*Handlungsfreiheit*). Gradually, through judicial practice and academic interpretation, this provision was developed into a "catch-all" provision of basic rights. That is, where an individual considers that one of his or her critical interest was violated, but such interest is not expressly listed as a basic right in the *Basic Law*, she can allege a violation of basic right based on art. 2(1) of the *Basic Law*. Article 12(1) of the *Basic Law* provides that "[A]ll Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training. The practice of an occupation (*Berufsausuebung*) or profession may be regulated by or pursuant to a law."

[23] Tettinger, *supra* note 10.

[24] Nipperdey, *supra* note 12.

to understand that Nipperdey was unconfident as to whether the basic-right mechanism of the constitution could prevent Germany's economic order from leaning again towards a farfetched "state interventionism." He, therefore, took every effort to tie the economic order in the *Basic Law* to the "Ordoliberalist economic institution" that he advocated. If his opinion were accepted by the legal profession, then no matter how a court applying the constitution expands the connotation of "sociality," the intervention [of state] would still be limited. Apparently, Nipperdey had seen that "the Principle of Social State" could tolerate very broad economic intervention. His concern is understandable, as we have seen that under the Weimar Constitution, the final result was a disastrous nationalist planned economy, and that is not what Nipperdey and a considerable number of scholars would like to see. Therefore, Nipperdey wished to use "market economy" to restrain the connotation of "social."

Nevertheless, how come the judges in the Federal Constitutional Court could not tolerate a few abstract words? This interpretation was merely an academic one from a jurist, so if the court did not want to adopt it, would it be more appropriate to simply ignore it?

Here, it is necessary to give some background information regarding the relationship between Germany's judicial practice and legal study. The primary mission of jurisprudence includes, *inter alia*, the study of the application of legal norms, the meaning of individual norms and the distinction between related norms (overlapping norms), as well as the jurisprudential rationale behind every norm. The purpose of such study is to better serve the legal practice, thereby living up to the notion that "[t]he legal study is a practical science." In this respect, there is no essential distinction between civil law and common law systems despite the fact that legal norms mainly derive from case law in common law countries and from statutes in European continental countries. Legal study whose focus is on the application of laws, cannot run from the task to examine decisions resulting from judicial practice, especially court judgments, in order to know whether laws are applied properly, so that affirmation or criticism can be given. And the outcome of such examination is supposed to influence legislation when the timing is right, by supporting proposals to enact new laws or amend existing laws. This can correct the normative

defects that judges cannot overcome within the limits of their adjudicative discretion, namely through methods such as statutory interpretation, gap filling and reconstruction. Although judges' interpretation of the law has "final effect," they cannot ignore jurists' opinions for several reasons. First, litigants often cite the views of jurists to defend themselves, forcing the judge to respond. This is a basic requirement of judicial adjudication in nations ruled by law. Secondly, judges themselves welcome jurists' to join the discussion on questions regarding application of laws. On one hand, jurists can help better analyze the meaning of individual legal norm as well as the relationship among various norms.[25] On the other hand, jurists' opinions can help examine defects of judicial decisions from an "outsider" perspective. Although they cannot correct decided cases, but they may prevent the same defects from occurring in future cases. If we admit that the judicial works in every country are subject to dual pressures caused by large caseload and limited resources, then there is no reason to disapprove of a "judicial inspection" team that spreads over the whole country and consists of numerous jurists, whom are funded by the state? This understanding leads to amicable interactions between the German legal academia and the judiciary.[26] As a matter of fact, Chinese judges often seek opinions from jurists on how to handle individual cases, even though such practice is neither formally recognized in official documents nor reasonably reflected in adjudicative documents.

Back to this Article, in the *Investment Aid* case the petitioner did raise the argument that the *Investment Aid Law* constituted a breach of the "social market economy" system, thus the court cannot stay away from Nipperdey's opinion that the "*Basic Law* did establish social market economy of Ordoliberalism." However, the judicial response to the parties' arguments is not necessarily one or the other. The most ingenious way to avoid such tough

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[25] *See* 卡尔·拉伦茨 (KARL LARENZ), 法学方法论 (METHODOLOGY OF LAW), (陈爱娥(Chen Ai'e) trans., 2005) (Section 3 of Chapter 4 "The overlaps of most provisions and norms," at 146–49, Section 3 of Chapter 7 "internal system," at 348–55.).

[26] *See generally* Ye Bifeng, *Foreword* to PIHLIP KUNING, ADMINISTRATIVE LAW AND ADMINISTRATIVE LITIGATION LAW PAGE (2007). English translation *available at* http://huang20000hui.fyfz.cn/blog/huang20000hui/index.aspx?blogid=422505 (last visited May 4, 2009).

questions, proficiently used among senior judges in many countries, is to issue an opinion that says "The question raised is immaterial to the present case, therefore the Court will not analyze it in detail." Faced with Nipperdey's social market economy theory, judges in both the *Investment Aid* case and the *Pharmacy* case did not want to give vague response and hide their opinions as usual. Even in the *Pharmacy* case, which has nothing to do with this question, judges actively chose to repeat the conclusions in the *Investment Aid* Case. Why?

If historical assumption is permitted, assuming that Nipperdey did not enjoy such a high prestige in the legal academia, or that he left room for discussion in the report, meaning instead of firmly asserted that "if the economic legislation and policies deviate from market economy of Ordoliberalism, amendment to the constitution is the priority," he mildly state something like "when balancing 'social' and 'market economy,' the latter should be given more preference." In that case, the Federal Constitutional Court may not have to directly tackle Nipperdey's opinions. Even if the Federal Constitutional Court disagreed with the boundaries of government intervention given by Nipperdey, there is no need to set a "neutral principle" which seems suitable for any economic system but is practically impossible. Does the *Basic Law* permit planned economy? Nontheless, it is possible to consider a "social market economic order" with rather open contents. In fact, the Federal Constitutional Court was also unclear about the boundary for government intervention under the "Principle of Social State." It also needed to wade the river by groping for stones. However, history cannot be rewritten.

Assuming the role of judges in the Federal Constitutional Court, how should we deal with the argument that "the *Investment Aid Law* violates the principle of social market economy" as supported by Nipperdey's views? Apparently, the Court rejected such argument in its judgment, but conclusion alone is not sufficient, it must be justified by legal analysis. Moreover, once the court expressed opposition to the Ordoliberalism, it needs to answer another unavoidable question: Which economic system is favored by the Court?

To judge which economic system is better, judges are required to tell apart the great thoughts and defects of economists. Apparently, judges and jurists are not competent to do that. The

Federal Constitutional Court had been pushed to face with Nipperdey's challenge. They responded by holding that when judging the constitutionality of a legislation, "it will not be considered constitutionally flawed on the ground that it is inconsistent with other economic policies, or a particular national economic theory that is based on such policies." (see above the *Pharmacy* case) As a result, the debate on Economic Constitution Law was blocked outside the constitutional legal analysis.

Perhaps, this is the most sensible choice. Once the economic norms in the *Basic Law* are linked with a fixed economic model and its theory, the specific contents can be decided only by economists. As mentioned above, judges and jurists will not be able to revise economic theories as efficiently as economists. As a result, judges would end up following economists' work. Even worse, if judges oppose the theories of authoritative economists, they have to explain why the non-authoritative theory should prevail over the authoritative theory. However, judges can do nothing but obtain an appraisal report from other economists. Consequently, a constitutional court's possible function in providing relief in the economic field will be greatly weakened.

Judges at the Federal Constitutional Court are forward looking. They not only saw the danger, but also the division of work and responsibilities between judges and economists. [27] Economists can fully explore the economic order on the purely abstract and theoretical basis, without the risk of bearing any legal consequence for their miscalculation or unwise advice. For the politicians who followed their orders, the worst result is to step down from power. The role of judges is rather different. Their focus is to maintain the legal order, whose fundamental value is institutional stability and security. If theories of economics or other

[27] Interestingly, reading the dissenting opinion written by Justice Holmes in the famous *Lochner v. New York*, the author finds a sentence that coincides with the German Federal Constitutional Court's refusal to recognize that its constitution endorses any economic system: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," *see Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., Dissenting). Moreover, Justice Black, in his majority opinion in *Ferguson v. Skrupa*, made the same declaration in 1963: "We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,' ... Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours." *See Ferguson v. Skrupa*, 372 U.S. 726, 731–32 (1963).

social sciences can freely enter the legal context without any paradigm shifts, the stability of law will be destroyed.[28]

Based on above considerations, the Federal Constitutional Court insists on keeping distance with economists, asserting their freedom to adopt the economists' theories rather than obligations to take orders from them. In this way, the Federal Constitutional Court maintains its discretion in the adjudicative process: the primary basis for determining whether the economic power exercised by the state or the society exceeds constitutional limits should be the economic rights provisions in the *Basic Law*, whose interpretations fall within the expertise of constitutional scholars.

V. INSPIRATIONS FROM THE GERMAN DEBATE ON ECONOMIC CONSTITUTION

What use is the German Debate on Economic Constitution in the 1950s in helping us understand and apply our own Economic Constitution, especially the constitutional provisions relating to economic system? The direct connections are too obvious. The initial question would certainly be: In light of the German experience, should China abandon the economic system provisions? When answering this question from an what-ought-to-be point of view, jurists who believe that legal principles should not be excessively restricted by economic principles are mostly willing to learn from the German experience. They also agree that the constitutional rights provisions should be the primary basis for reviewing the constitutionality of economic power in the coming future. This is also the view of the author.

However, we are not living in an era without constitutional arrangement on the economic system. As a result of the seventh amendment in 1993, article 15(1) clearly states that, "[t]he state

[28] The constitutional practice proves that the constitutional judges made a wise decision. In 1967, a provision that requires the federation and states to maintain an overall economic balance in their economic plans was added into art. 109, § 2 of the *Basic Law*. This economic theory was developed based on Keynesian theory and convinced Schiller, then minister of the Ministry of Economy, who used his personal influence to successfully convinced the legislature and added this provision into the constitution. This provision, though fairly intelligible to economists, troubled constitutionalists significantly, because they were unable to ascertain whether this duty had been fulfilled, or even whether those in power took this duty seriously. Frotscher, *supra* note 8.

practices socialist market economy." This legislation arrangement is very different from that of the German *Basic Law*. The *Basic Law* contains no similar provision. Scholars like Nipperdey saw a system of "socialist market economy" from the "comprehensive observance" of the Principle of Social State in article 20 and a number of economic rights provisions in the *Basic Law*, and were more guided by their own political and economic convictions than the *Basic Law* (see "Section 1 Part II" above). The Federal Constitutional Court, in terms of legal interpretation, clearly refused or even despise this "comprehensive observing" technique which is similar to the mathematical equation of "A + B = C." In the judgments of the *Investment Aid* case and the *Pharmacy* case, the Federal Constitutional Court directly pointed out that "the *Basic Law* itself does not establish any economic system." without further explanation, which in my opinion, suggests that the Court considered it unnecessary to defend its conclusion. In sum, the Federal Constitutional Court rejected the existence of any economic system provision at the level of constitutional application and interpretation without any difficulty. The only possible pressure came from Nipperdey's elevated status within the legal world. Nevertheless, under normal circumstances, if jurists' opinions are not supported by legal dogmatism or internalized by judges, then they cannot defeat the judicial authority.[29]

The text of the *Basic Law* does not include economic system provisions, indicating that in addition to the warning that judicial practitioner should maintain an appropriate distance with economic theories, there is no direct technical support for us to refuse to apply article 15(1). We must find the most appropriate method

[29] Scholars, however, do not have to subject themselves to judicial authority in their studies. They may well insist on their view and make it the "minority opinion" (*Mindermeinun*) on this matter; should it attract numerous followers; it may even become the "prevailing opinion" (*herrschende Meinung*). As time passes by, their view might be finally accepted by the judicial system, reaching the consensus between the academia and the judiciary. Matters like this occasionally happen, but Nipperdey's view in the Debate on Economic Constitution has been remaining a minority opinion among German scholars, because his rigid "A+B=C" interpretation had become a negative example on constitution interpretation. *See* Franz Jürgen Säcker, *Die soziale Marktwirtschaft—ein wirtschaftsverfassungsrechtliches Leitbild im Wandel der Zeiten: Von Hans Carl Nipperdey zu Klaus Adomeit*, *in* FS FUER ADOMEIT 661–72 (Luchterhand Verlag 2008).

within the framework of existing constitutional theories and constitutional application techniques. For a constitutional text that has legal effect as a whole, it is not easy to screen out which provisions have the legal effect, which are merely declaratory, especially in the main body of the text rather than the preamble. The purpose of such screening is to allow us to understand which provisions should be excluded from application. This is a process that requires legal reasoning and analysis. Unfortunately, I have to admit that at present we do not have sufficient theoretical and technical basis to exclude the legal effect of article 15(1) of the *PRC Constitution*.

The dilemma is that neither denying nor admitting the legal effect of article 15(1) is easy. Even if the provision is given minimum legal effect to constrain legislators, we also need to inquire, how to understand the scope of such effect? In other words, since the core issue of Economic Constitution is to explore the boundaries of state's economic intervention, how could we find the possible boundaries from the abstract text such as "socialist market economy"? To determine the boundaries—it seems we are back to the starting point, should we take orders from some authoritative socialist market economists or learn from the German experience, in which the Federal Constitutional Court firmly rejected the use of economic theories without any paradigm transformation, and simply treated those theories as references available to the court. What is the difference between China's "Socialist market economy" and Germany's "market economy"? What are the differences between China's "Socialist State" and Germany's "Social State"?

A question more realistic and more challenging is, what is the relationship between article 15(1) (the "Socialist Market Economy Provision") and article 6 (the "Ownership Provision") of the *PRC Constitution*? The latter provision uses the term "economic system" twice, so at least literally, this provision is also an economic system provision:

> Article 6 The basis of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people. The system of socialist public ownership supersedes the system of exploitation of man by man; it applies the principle of from each ac-

> cording to his ability, to each according to his work.
>
> In the primary stage of socialism, the State upholds the basic economic system in which the public ownership is dominant and diverse forms of ownership develop side by side and keeps to the distribution system in which distribution according to work is dominant and diverse modes of distribution coexist.[30]

These two "economic system provisions" conflict with each other in both their wording and their substance, thus these provisions will be considered overlapping norms in their application. Therefore, we must find out the hierarchy between the two, and determine which one, judged from its legislative technique, is a more general provision in nature and consequently can be considered an economic provision with a nature of general principle.

This determination work is realistic and challenging because the great constitutional debate caused by the *Property Law (Draft)* in 2005–2006 clearly placed this work in front of every scholar that cares about the implementation of the *PRC Constitution*. In the great debate about whether the *Draft* was unconstitutional due to its equal protection on state-owned property and private property, Prof. TONG Zhiwei, an important scholar of constitutional law, arguing for differentiated protection, tended to deem article 6 of the *PRC Constitution* as the economic system provision,[31] whereas Prof. LIANG Huixing, a civil law authority arguing for equal protection, insisted that article 15(1) of the *PRC Constitution* is the most basic economic system provision.[32] Both sides of the debate focused on expressing their own views, but ignored the fact that reasonable arguments of the other side had already jeopard-

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[30] 中华人民共和国宪法(2004 年修正) [CONST. OF THE PEOPLE'S REPUBLIC OF CHINA (amended 2004)] art. 6, CLI.1.51974(EN) CHINALAWINFO.

[31] 童之伟 (Tong Zhiwei), 物权法(草案)该如何通过宪法之门[*How Could the Property Law (Draft) Pass the Gate of Constitution*], 法学 [LEGAL SCI.], issue 3, at 4 (2006); 童之伟 (Tong Zhiwei), 再论物权法草案中的宪法问题及其解决路径[*On the Constitutional Question in the Property Law (Draft) and Its Solutions*], 法学 [LEGAL SCI.], issue 7, at 3 (2006).

[32] 梁慧星 (Liang Huixing), 谁在曲解宪法、违反宪法？——正确理解宪法第十一条、揭穿个别法理学教授的谎言[*Who is distorting and violating the Constitution?—Correctly Understand Art. 11 of the Constitution and Exposing A Certain Law Professor's Lies*], *in* "巩献田旋风" 实录——关于<物权法（草案）>的大讨论 [MEMOIR OF THE "GONG XIANTIAN TORNADO"—THE DEBATE ON THE PROPERTY LAW (DRAFT)] 334–46 (Liu Yiqing eds., 2007).

ized the persuasiveness of their own arguments. Finally, this constitutional crisis was resolved through a political, i.e. legislative manner, and the debate, though unsettled, eventually ceased to attract any attention. The author here also has an opinion on this topic, but would rather discuss it in detail in another article to limit the length of this Article.[33]

In fact, as far as the author is concerned, there remain numerous questions to be asked: the starting point of the supporters of equal protection on properties is that the principle of equality is a requisite content of market economy; in other words, an economy without equality cannot be called "market economy." Thus, is there any other "requisite" content of market economy out there, and, what normally "requisite content" of market economy would cease to be requisite because of the "socialist" requirement? For those arguing for unequal protection, it must be questioned that why the ownership provision should not give way to the market economy provision. In addition, no matter which provision is finally granted the title of "economic system provision," there is a question that cannot be avoided: what is the relationship between this provision and other economic provisions, e.g. the provision concerning the state's exclusive ownership of special resources (articles 9–10), the property protection provision (articles 12–13), the enterprise system provisions (articles 16–18), and the labor system provision (article 42)? In other words, how to reconcile various single economic provisions under one constitutional economic system provision? Further, how should the various Economic Constitutional provisions be organized? What is the relationship between the Economic Constitution and other constitutional provisions?

The questions can be expanded even further. These questions, however, cannot be answered abstractly, nor can this Article solve them. This inability is not only due to the limitation on length, but more importantly, is due to the fact that we lack complementing

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[33] *See generally* 黄卉 (HUANG HUI), *supra* note 27, at 74–75. The author tends to take article 15(1) as generally principled economic system provision, and suggests deeming article 6 and subsequent economic provisions, e.g. ownership provisions in articles 6–8, provisions concerning the state's exclusive ownership and its protections in articles 9–13, and enterprise institutions in articles 16–18, all as (partial) specifications of article 15.

institutions to implement the *PRC Constitution*, and it is the extent of constitution implementation that determines the level of relevant theoretical research.

VI. METHODOLOGY AS CONCLUSION: COMPARISON OF LAWS AND CASE STUDY

What, then, is the approach and possible breakthrough for a deeper research? This question involves methodology. In the author's opinion, the most effective approaches nowadays to break through in the field of Economic Constitution, and to push forward the whole normative constitutional research, are comparative legal study, and case study.

In an exploration for a Chinese answer to a Chinese question, we are not bound, of course, by systems, theories, and studies of Germany or any other country; however, foreign experience can be borrowed, and for some reasons, comparative law has become a basic method of legal studies. Borrowing foreign experience, whether positive ones or negative ones, will inspire our work and reduce costs. For example, the German Debate on Economic Constitution in the 1950s has helped the author to realize that, a constitution interpreter who is restricted by certain economic theories in interpreting the Economic Constitution would cause legal remedies to be excessively passive. Such a passivity in turn causes the author to wonder, is it possible to avoid relevant theories of economic system when the *PRC Constitution* has clearly provided that "[t]he state practices socialist market economy"? Moreover, in converting between the economic paradigm and the legal paradigm, is it possible to limit the constitutional judgment's reliance on economic theories within an acceptable scope? It is crucial for comparers of laws to remember the main reason, if not the only reason, of comparison: to facilitate the legal construction of our own country. Otherwise, we would be easily lost in exotic sentiments of foreign laws.

For the legal study, an applied study, case study is largely both a method and a purpose. By starting from specific cases to reflect and analyze the legal norms that are potentially applicable, we would be able to better understand their requirements and contents, and better discover their uncertainty; thus, a norm can only be understood in its application. Here, a Chinese perspective

should also be emphasized, and understanding the Chinese constitution necessitates Chinese constitutional cases. The incident of the *Property Law* is a good example: before that incident, discussions on the market economy provision and the public ownership provision could freely cite academic resources of any time and any country, and make arguments either generally or specifically; after all the discussions would not harm anyway. After the incident, however, questions and answers were no longer ample or vague, because a real-world question has been placed in front of every discusser: one side was citing article 6, the public ownership provision of the Constitution to oppose the equal protection adopted by the *Property Law*, while the other side was citing article 15, the market economy provision to support it. How should such a contradiction be solved? In this great debate with a clear purpose, the academia of constitutional law, together with that of civil law, held a forum of constitution application and constitutional review; and in practically understanding constitutional theories and applying the theories to reality, scholars had sufficiently displayed their capability and incapability; the incident also enabled other attentive persons in the legal profession to realistically recognize and understand relevant provisions in the *PRC Constitution*, hence the abstract constitutional provisions were gradually vivified. The function of case study here is more than significant.

Now, we can continue to question, under the topic of methodology, the manner and scope of the case-study method: after such a heated constitutional case that tapped significant amount of legal resources, in what manner should we normalize the constitutional knowledge and experience gained, in order to provide theoretical and technical support for resolving later constitutional crises, and in order to release later constitution interpreters from having to start over?

We have our own subtle understandings and manners to handle constitutional questions. The final say on the case of *Property Law* was from the National People's Congress, which declared that an equal protection on both public and private properties is constitutional by officially passing the *Property Law*, merely failing to directly express this meaning due to political and legislative strategy. The constitutional crisis was indeed solved effectively. However, we must also admit that we are

losing those precious insights and opinions about important substances like the constitutional economic system provision and those consensuses of constitutional norms. This phenomenon is unavoidable, because legislation, in the nature of its work, does not comprehensively analyze the nature and content of constitutional provisions; nor is it the most appropriate tool for constitutional interpretation. For example, legislation cannot possibly respond to questions like the hierarchy among Economic Constitutional provisions, though it must have formed its understanding about relevant provisions as required by "legislating in compliance with the Constitution."

The German Debate on Economic Constitution and the German constitutional court's cases like the *Investment Aid* case and the *Pharmacy* case have taught us that, the difficult legal thoughts and progress in perception about how to apply Economic Constitutional provisions, as well as other legal norms, can be materialized in the form of adjudicative documents. Judicial decisions, in adjudicating specific cases, grant the law-application and arguments some kind of authority because of the decisions' authoritative nature. The decisions thus direct legal studies into an organized process: conscientious scholars would begin another round of analysis and research, probably inspired by a later similar case, based on the conclusions and arguments of the judicial decisions; rather than evading issues, disguising their avoidance of making legal judgments with the excuse of "pursuing the truth," or ignoring their major opponents' opinions because of pride. The relationship between constitution researchers and reviewers thus become an interaction of combining theories with reality; this interaction accumulates judicial practical experience and academic research in the form of case law, and at some point, will also enter into legislation when the time is ripe. In this interactive structure of legislature, judiciary, and academic studies, the function of case study would apparently be maximized, which is a quite desirable prospect that is worth borrowing and exploring.

Nonetheless, we have our unique history (perhaps millstone) and understanding concerning legal culture, legal theories and constructions, and the whole modern concept of rule of law. More crucially, whether we should and could successfully borrow foreign experience would depend on our constitutional reality. The reality is, first, despite the fact that the PRC Constitution's

text has vested the power to supervise its implementation in the National People's Congress and its Standing Committee (articles 62(2) and 67(1)),[34] and a power of constitutional review can be theoretically inferred, in reality this power has never been exercised at the level of constitutional review, the academia even diverge on whether such a power really exists; second, adjudicative documents have always been adopting a "minimalist" style that rarely reflects the true process and true reasons of the judgment, and even if a few judgments contain excellent reasoning and conclusions, since we have not yet established a system of *stare decisis*, alleged guiding-case system[35] necessary for civil law countries, they are not sure to influence later judgments, let alone binding them; third, though the academia has been changing its habit of ignoring legal practice into occasionally participating in discussing difficult cases or spotlight cases, scholars have not widely realized that the major subject-matter of legal studies is the existing law and its application, and the consciousness of a positive interaction between scholars and judicial personnel has just started. To summarize, we are on a different stage in the construction of rule of law from other countries, we have huge practical and theoretical work to do to find out whether and how to borrow their experience.

Back to methodology, comparative law and case study from the perspective of Chinese law should both be emphasized; otherwise, in trying to analyze the scope of our economic provisions under the stimulation of the German Debate on Economic Constitution, a highly similar foreign case, any legal thinking would, due to the fear of giving overly arbitrary judgments, stop after raising questions, as described in this Article. Of course, the

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34 中华人民共和国宪法(2004 修正) [CONS. OF THE PEOPLE'S REPUBLIC OF CHINA (2004 amended)] art. 62, § 2, art. 67, § 1, CLI.1.51974 CHNALAWINFO.

Article 62 provides that "the National People's Congress exercises the following functions and powers: . . . (2) to supervise the enforcement of the Constitution; . . . ." Article 67 provides that "the Standing Committee of the National People's Congress exercises the following functions and powers: (1) to interpret the Constitution and supervise its enforcement; . . . ."

35 *See generally* 黄卉 (Huang Hui), 关于判例形成的观察和法律分析——以我国失实新闻侵害公众人物名誉权案为切入点 [*Observations and Legal Analyses of the Formation of Precedents: Starting from Cases on Defamation of Public Figures Caused by Misreported News in China*], 华东政法大学学报 [J.E. CHINA U. POL. SCI. & LAW], issue 1, at 114 (2009).

construction of necessary legal conditions cannot be completed suddenly, so every legal professional who is part of this progress needs to be, apart from hardworking, patient.

Damages for Adultery and Interference with Marriage Relation —From the Perspective of Anglo-American Law

*Sun Weifei**

I. PRESENTATION OF QUESTIONS

Can one person get remedies if his/her spouse commits adultery with a third person? This legal question involves two aspects. The first aspect is the legal relation between spouses. Article 46 of the Marriage Law of the People Republic of China (2001 Amendment) (hereinafter the "Marriage Law") provides that one person may claim damages in a divorce suit from his/her spouse who has extramarital cohabitation, but does not address issues involving adultery without extramarital cohabitation; The second aspect is the legal relation between the third person and the aggrieved spouse. The Marriage Law does not touch upon this aspect, and neither does the Tort law of the People's Republic of China (hereinafter the "Tort Law") that entered into force in 2010. Journal articles show that there were considerable objections to the aggrieved spouse's right to claim damages under tort law from the paramour before the amendment of the Marriage Law.[1] After the amendment, some scholars object to tort liability for pure adultery that does not involve extramarital cohabitation,[2] but there are also supporters.[3] In addition, there

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[1] Before the amendment of the "Marriage Law" in 2001, opinions opposing the victim spouse claim tort damages against a third person: *e.g.*, 周孝正 (Zhou Xiaozheng), "专家稿"与"配偶权"质疑 [*Questions about the "Draft of Experts" and "Spouse Rights"*], 中国青年研究 [THE CHINESE YOUTH STUDY], issue 6 (1998); 杨光 (Yang Guang), 以法律惩罚"第三者"的立法价值评价 [*Legislative Value Assessment on Punishing "A Third Person" by Law*], 当代法学 [CONTEMP. L. REV.], issue 5 (2000); 周安平 (Zhou Anping), 性爱与婚姻的困惑——"第三者"民事责任的理论与现实之探讨 [*Confusion about Sex and Marriage—Discussion on Theory and Reality of Civil Responsibility of A Third Person*], 现代法学 [MOD. L. REV.], issue 2 (2001).

[2] *See, e.g.*, 刘余香 (Liu Yuxiang), 论对"第三者"的法律规制 [*On the Legal*

are also some scholars supporting this opinion on the basis of article 22 of the Tort Law.[4] In judicial practice, early before the amendment of the Marriage Law, there were already cases granting requests for emotional injury compensations from the other spouse and the paramour. For example, in *Zhou v. Wang* where the extramarital relation with sexual intercourse between the spouse and the third party had been for more than half a year, the court held that the "disreputable conduct greatly violated the Plaintiff's spousal rights and caused significant mental harm to the Plaintiff, so the two Defendants shall compensate to the Plaintiff for his emotional injury."[5] After the Marriage Law was amended in 2001, there still have been similar cases in practice.[6] However, there are also cases denying one spouse's request for damages for emotional injury from the other spouse and the paramour. One main reason is that according to article 46 of the Marriage Law, only the spouse who has extramarital cohabitation relation or commits bigamy is liable for damages. If the spouse commits adultery without cohabitating with the paramour, he or she is not liable for damages under article 46.[7] Another reason is the lack of other legal basis to allow the request for damages for emotional injury from the paramour.[8]

Regulations against "a Third Person"], 法学杂志 [LAW MAG.], issue 8 (2011).

[3] *See, e.g.*, 卢志刚 (Lu Zhigang), 干扰婚姻关系之精神损害赔偿 [*Mental Damages for Interference with Marriage*], 河南财经政法大学学报 [HENAN U. ECON. & L. J.], issue 2 (2012) (but this article is a bit vague about whether it is from the perspective of interpretivism).

[4] *See, e.g.*, 于晓 (Yu Xiao), 论干扰婚姻关系的侵害客体 [*On the Injured Party in Interference with Marriage*], 山东社会科学 [SHANDONG SOC. SCI.], issue 1 (2011).

[5] 周某诉王某等确认生身父母纠纷案 [Zhou v. Wang on the Affirmation of Parental Relationship] (2000) 六民初字第 731 号, (Jiangsu Nanjing Liuhe Dist. People's Ct. Sept. 28, 2000), CLI.C.228710 CHINALAWINFO.

[6] *See, e.g.*, 田某诉王某某一般人格权纠纷案 [Tian v. Wang on Rights of Personality] (2010)沙法民初字第 7148 号, (Chongqing Shapingba Dist. People's Ct. May 27, 2011), CLI.C.384847 CHINALAWINFO.

[7] *See, e.g.*, 周浩诉韦玉琼离婚纠纷案 [Zhou Hao v. Wei Yuqiong on Divorce] (2005)大民初字第 41 号, (Guangxi Dahua Cnty. People's Ct. May 22, 2005) CLI.C.93664 CHINALAWINFO.

[8] *See, e.g.*, 受害配偶对第三人主张侵权赔偿欠缺法律依据 [*Victim Spouse Claiming Tort Damages against the Third Person Lacks Legal Basis*], 人民司法•案例 [PEOPLE'S JUDICATURE—SELECTED CASES], issue 22 (2009) (analyzing Wang v. Zhang, (2008) 赣中民三终字第 314 号, (Jiangxi Ganzhou Interm. People's Ct. 2008).

In addition, in *Zhou v. Wang*, Defendant Wang had a son with her paramour Wang (co-Defendant) as a result of their adultery during Wang's marriage with Plaintiff Zhou. After knowing the truth, Plaintiff divorced with Defendant by agreement and brought a lawsuit. Plaintiff's request for damages for emotional injury was granted as mentioned before. Besides, the court also granted his request for damages resulting from paying for the costs of the birth of the child and medical fees out of their community property during the marriage, based on the provision of general tort[9]—article 106 (2) of the General Principles of the Civil Law of the People's Republic of China (2009 Amendment) (hereinafter the "General Principles of the Civil Law").

This Article studies the issue of damages for emotional injury related to adultery, as well as the issue of damages for raising non-biological children. This Article observes the history and current practice of interference with marriage relations in the Anglo-American tort law and conducts a comparative analysis with Chinese cases, with the purpose of providing some perhaps valuable insights for the future development of practice and theory on this issue in China.

II. ADULTERY CLAIM FOR DAMAGE UNDER ENGLISH LAW

In the early history of common law, a husband enjoys the right to the consortium of his wife. If a third person seduces, harms or commits adultery with his wife, then he is violating this right.[10] However, because the personality of a wife temporarily ceases to exist and is absorbed by her husband in the marital community,[11] the wife does not enjoy the same right as her husband.[12] Due to the lack of independent personality of the wife, her consent to extramarital intercourse in adultery does not have a material influence on her husband's right. For the husband, the

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[9] In China, torts can be categorized into general tort and special tort. General tort provides the general and universal elements of tort, while the elements of special tort are specifically prescribed by law and may vary from those of general tort. The concept of "special tort" is similar to the common law concept of "statutory tort." [Editor's note]

[10] Evans Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1, 2 (1923).

[11] 1 WILLIAM BLACKSTONE, COMMENTARIES 442.

[12] Evans Holbrook, *supra* note 10, at 2–3.

adultery between his wife and her paramour is no different from a third person's assault on or robbery of the wife, all of which are regarded trespass *vi et armis* by violence.[13] Although the economic loss as a result of the loss of service of the wife will increase the husband's compensation, it is not the necessary condition to husband's getting damages, because the harms of adultery on a husband are "dishonor of his bed," "alienation of his wife's affection," "destruction of domestic comfort" and "suspicion cast upon legitimacy of her offspring."[14] The Matrimonial Causes Act 1857[15] in England established the jurisdiction of the secular courts on the matters relating to matrimony and divorce in article 2.[16] Despite the repeal of the action for criminal conversation in article 59, the Act kept the husband's right to request for damages from the paramour who committed adultery with his wife (generally known as an action for damages for adultery) in a divorce suit or a suit for separation. What's more, article 33 provided that unless prescribed to the contrary, the common-law principles and rules that previously applied to the action for adultery still continued to be applicable to the action. Article 34 even gave the court discretionary power to require the spouse who committed adultery to pay for all or partial costs of the litigation. In *Butterworth v. Butterworth and Englefield*, Justice McCardie reviews the existing cases in detail, and discusses in depth many aspects of the action for damages for adultery. This case has therefore become the most famous one in cases of action for damages for adultery. According to Justice McCardie, precedents showed two factors in examining the harms of the husband in the action for damages for adultery. The first factor was the actual value of the wife to the husband. It can be further analyzed from the pecuniary aspect and the consortium aspect. Considerations related to the

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[13] Early English common law distinguished trespass and trespass on the case. *See* 梅特兰 (F. W. MAITLAND), 普通法的诉讼形式 [THE FORMS OF ACTION AT COMMON LAW], at 119–20 (王云霞等 (Wang Yunxia et al.) trans., 2009).

[14] FREDERICK POLLOCK, THE LAW OF TORTS: A TREATISE ON THE PRINCIPLES OF OBLIGATIONS ARISING FROM CIVIL WRONGS IN THE COMMON LAW 273 (2d ed. 1890).

[15] The Matrimonial Causes Act, 1857, 20 & 21 Vict., c. 85. The long title is "An Act to Amend the Law relating to Divorce and Matrimonial Causes in England."

[16] *See* William Searle Holdsworth, *The Ecclesiastical Courts and Their Jurisdiction, in* 2 SELECT ESSAYS IN ANGLO-AM. LEGAL HIST. 297–301 (Comm. of the Ass'n of Am. Law Sch. eds., 1908).

pecuniary aspect were the help of the wife with the husband's career, the wife's ability to manage the household, etc.; Considerations related to the consortium aspect were the purity and morality of the wife, love, etc. When assessing the husband's damages from the pecuniary aspect, a judge mainly relied on his good sense and experience, while regarding the specific factors about the paramour as almost irrelevant; nonetheless, when assessing the husband's damages from the consortium aspect, the behavior of the paramour was relevant. If the paramour has to use his wealth to seduce the wife of one person, it would demonstrate that the wife is not a woman who could be easily seduced and that she has a higher value to her husband in relative to wives who commit adultery just because of one time seductive implication. The second factor was the harms on the emotions or self-esteem of the husband. Considerations under this factor were more important that those under the factor of the actual value of the wife to the husband, and are uniformly recognized in textbooks and authoritative precedents. The behavior of the third person was very significant in assessing the harms on the emotions or self-esteem of the husband. The wealth or social status of the paramour *per se* was irrelevant, but the employment of the wealth or social status to facilitate adultery would aggravate the harms on the emotions or self-esteem of the husband. Thus, the wealth or social status of the paramour should be considered in evaluating damages. In addition, the character and conduct and affection of the husband were relevant in both aforementioned factors. The negligent, rude or cruel behavior of the husband might also have destroyed the love of wife, thus undermining his right to request for damages from the paramour. Lastly, Justice McCardie specifically pointed out that unlike the action for adultery in the early times, the paramour should not pay for the damages if he did not know about the marriage relation of the woman in the beginning and during the continuance of adultery.[17]

The Law Reform (Miscellaneous Provisions) Act 1970 of the United Kingdom clearly provides that, since this Act comes into force, no person shall be liable in tort under the law of England and Wales to any other person on the ground only of his having induced the wife or husband of that other person to leave

[17] Butterworth v. Butterworth & Englefield, [1920] P. 126, 142–54 (Eng.).

or remain apart from the other spouse. As to the abolition for enticement, seduction and harboring of spouse, the reader might as well refer to the reasons raised by the English Law Commission's working paper, *Matrimonial and Related Proceedings: Financial Relief*, in 1967. For example, the paper observes that the damages for adultery treats the wife as the husband's chattel; the parties are able to place one another in a humiliating position and when proceedings are brought they tend to create great bitterness between the parties; Besides, when there is collusion between husband and wife, it lends itself to blackmail against the adulterer. To the reporters, the action purporting to compensate the husband for the fact that the defendant has had sexual intercourse with the wife is based on a rather barbarous theoretical basis. It is illogical that person committing adultery which results to breakdown of marriage is liable for pecuniary damages while in other situations resulting breakdown of marriage he is not. This amounts to unreasonable discrimination. Also, the reporters do not believe that the risk of liability to damages deters would-be adulterers.[18]

Adultery often goes along with the problem of paternity fraud. A v B [2007] EWHC 1246 (QB) (03 April 2007) was related to paternity fraud rather than adultery. An observation of this case might be helpful to understanding the unique characteristics of paternity fraud after the abolition of damages for adultery. In this case, A and B both worked for the same firm; both were unmarried. They started a sexual relationship which went on for some years. B became pregnant and her son, Y, was born in 1997. A thought the child was his own and paid for expenses associated with the child. In 2002, the relationship was in a poor way and A learned that Y was not a child of his own. After the relationship between A and B had broken down, A commenced proceedings against B claiming damages for deceit. An alleged that B concealed the truth that Y was not his biological son when she had

[18] Law Commission, Matrimonial and Related Proceedings—Financial Relief, paras 128–32, (English and Wales Law Comm'n, Working Paper No.9, 1967), *available at* http://www.bailii.org/ew/other/EWLC/1967/c9.pdf. In addition, late Lord Denning described in his book that the fact that somebody was determined to sue another for adultery to get money may be called "blackmail." *See* [英] 丹宁勋爵 (LORD DENNING), 法律的界碑 [LANDMARKS IN THE LAW], at 125–28 (刘庸安(Liu Yongan) & 张弘 (Zhang Hong) trans., 1992).

chances to tell the truth. This assertion was accepted by Judge John Blofeld, observing that the facts amounted to deceit and thus A was entitled to damages for emotional injury (£7,500 in the judgment). However, A's claim for damages for payment of cost of support was not accepted. One of the reasons, besides public policy, is that A gained a considerable amount of happiness from the relationship between him and Y before he learned the truth.[19]

III. ADULTERY CLAIM FOR DIRECT DISTURBANCE OF MARRIAGE UNDER U.S. LAW

In the common law of some US states, interference with marriage relation amounts to a tort. It consists of indirect interference with marriage relation and direct interference with marriage relation. When the interferer harms the body of one of the spouse, this amounts to a tort against him or her. Such tort is not interference with marriage relation. Meanwhile, such act results in loss of family service and other losses for the other spouse and thus amounts to a tort of indirect interference with marriage relation. When the interferer commits adultery with one spouse, it is not a tort against him or her because of consent. But it might result in pecuniary damage and mental damage to the other spouse. There is only a tort against the other spouse, i.e. interference with marriage relation. There is no other tort such as a tort against the spouse's body.[20] Therefore, it is a direct interference with marriage relation.

Under US common law, the characteristics of "action for adultery" can be first observed from the differences between it and "action for alienation of affection"—an action never existed in British law. An action for alienation of affection is also an action for direct interference with marriage relation. Its core is that the tortfeasor entices one spouse to part from the other spouse and results to the loss of family service and the alienation of affection for the other spouse. The core for an action for adultery, on the contrary, is not the loss of family service or alienation of affection; it is rather the infringement of the exclusive rights to

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[19] A v B, [2007] EWHC (QB) 1246 (Eng.).

[20] Peter B. Kutner, *Law Reform in Tort: Abolition of Liability for "Intentional" Interference with Family Relationships*, 17 W. AUS. L. REV. 34 (1987).

marital intercourse.[21] Such a right, same as that in the UK, was at first entitled only to the husband. But now both the husband and the wife are entitled to this right in those states that have not abolished the action for adultery.[22] According to Restatement (Second) of Torts, one who has sexual intercourse with one spouse is subject to liability to the other spouse whether or not he/she has knowledge of the marriage relation. "One who has sexual relations with a married person takes the risk that he or she is married to another." In the determination of the amount recoverable for the emotional distress, many factors should be considered. If, during the marriage with the plaintiff the other spouse has repeatedly had sexual relations with the defendant, the plaintiff's damages will be enhanced; if the plaintiff neglect or is indifference toward the other spouse, the plaintiff's damages will be reduced; if the other spouse has previously had sexual relations with other persons, the damages will be reduced.[23]

In the US, actions for adultery are dying out. Only a few states still allow actions for adultery.[24] Such lawsuit criticizes and punishes indiscretions in sex. Reasons for abolishing such lawsuit include: it facilitates blackmailing and extortion; it is likely that such litigations are motivated merely by greed or revenge; decent people will not pursue such lawsuits which bring disgrace to the family; the emotional injuries are difficult to be compensated by pecuniary means; adulteries are seldom calculatedly planned and, thus, damages do no help to curbing such activities. Moreover, the following idea has been receiving more and more acceptance: each spouse is an independent person, not a property the other spouse exclusively owns.[25]

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[21] William E. Geer, *Criminal Conversation: Civil Action for Adultery*, 25 BAYLOR L. REV. 495, 496 (1973).

[22] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 916 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 685, cmt. d (1965).

[23] RESTATEMENT (SECOND) OF TORTS § 685, cmts. e, f, and g (1965).

[24] Up until 2012, only four states (Hawaii, Illinois, New Mexico and North Carolina) still allow alienation of affection lawsuits. *See* Laura Belleau, *Farewell to Heart Balm Doctrines and the Tender Years Presumption, Hello to the Genderless Family*, 24 J. AM. ACAD. MATRIM. LAW. 365, 372, n.38 (2012). In the early 20th century, Indiana introduced the first bill to abolish actions for direct interference with marriage relation, including actions for adultery. *See* Nathan P. Feinsinger, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979 (1935).

[25] PROSSER & KEETON, *supra* note 22, at 930. In 1935, New Jersey adopted a

In *Koestler v. Pollard*, for example, decided by the Supreme Court of Wisconsin, Pollard and Koestler's wife had engaged in sexual intercourse during the marriage, which resulted in the birth of a child.[26] Koestler alleged that Pollard intentionally concealed from him his paternity of the child and revealed said fact after Koestler developed a bond with the child, which amounts to intentional infliction of emotional distress. Therefore, Pollard should be liable for damages for emotional injuries. Intentional infliction of emotional distress is a tort which is different from interference with marriage relation. According to Restatement (Second) of Torts, "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another" is subject to liability for such emotional distress.[27] Koestler claimed intentional infliction of emotional distress in order to circumvent criminal conversation which was abolished by the state legislation. This, however, was rejected by the Supreme Court of Wisconsin for the reason that it was essentially a criminal conversation claim. It ought to be rejected in order to achieve the public policy underlining the state legislation abolishing such claim. Louis J. made a thorough analysis on this. He first listed the required elements for actions for adultery: (1) an actual marriage between the spouses, and (2) sexual intercourse between the defendant and the guilty spouse during marriage; Then he listed the alleged facts in Koestler's complaint: (1) an actual marriage between Koestler and Vickie Lynn Koestler; (2) sexual intercourse between Pollard and Vickie Lynn Koestler during the Koestlers' marriage; (3) the birth of a child, C.K., during the marriage as a result of the aforementioned sexual intercourse; and (4) the initial concealment and eventual disclosure of the fact that Pollard is the biological father of C.K. Finally, he compared the two sets and observed that: the first two facts contained in Koestler's complaint are identical. The third and

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bill abolishing actions for adultery. One court opinion might worth considering: "It is impossible to save the remedy for the honest, well-meaning, truly injured spouse without leaving the door wide open for the 'racketeer.' Therefore, the spouse having a bona fide complaint must, as a member of society, conform to a law designed for the protection of society." Bunten v. Bunten, 192 A. 727, 729 (N.J. 1937). *See also* Clark W. Toole, *Domestic Relations—Constitutionality of "Heart Balm" Legislation [Illinois]*, 4 WASH. & LEE L. REV. 185, 186 n.6 (1947).

[26] Koestler v. Pollard, 471 N.W.2d 7 (Wis. 1991).

[27] RESTATEMENT (SECOND) OF TORTS § 46 (1965).

fourth facts contained in Koestler's complaint are direct consequences of the second and third facts. Specifically speaking, the third fact contained in Koestler's complaint is a natural and probable consequence of the second fact contained in Koestler's complaint because the birth of a child is a natural consequence of sexual intercourse; the fourth fact contained in Koestler's complaint a consequence of the third fact because concealment and eventual disclosure of the paternity of the child born as a result of the adulterous intercourse is undoubtedly a common occurrence in cases of criminal conversation. Justice Abrahamson, in his dissenting opinion, disagreed with Justice Louis' opinion that the plaintiff was essentially stating a claim for criminal conversation. He argued that although a particular set of facts may give rise to different causes of action, these causes of action were "separate and different."[28] Action for criminal conversation focused on the plaintiff's marital relationship, it did not require the defendant's conduct to be extreme and outrageous; and action for intentional infliction of emotional distress focused on the plaintiff's well-being, it did not require the plaintiff to be in a marital relationship when the tort is committed.[29]Another Supreme Court of Oklahoma case *Miller v. Miller* can perhaps supplement Justice Abrahamson's opinion.[30] In this case, the wife and her parents lied to the defendant that she was pregnant with his child, therefore the plaintiff got married to his former wife, and he only knew the truth after 15 years living together with his former wife. The plaintiff sued for damages on the theory of intentional infliction of emotional distress and was supported by the court. The plaintiff also claimed restitution of payments for the cost of support, but the court responded that: on one hand, the statute of limitation for him to disestablish paternity had passed and thus he could not recover it based on the theory of unjust enrichment which was condition upon the disestablishment; on the other hand, when the child support is paid pursuant to a valid and unreversed judgment, he cannot state a claim to recover it as unjust enrichment either.[31]

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[28] *Koestler*, 471 N.W.2d at 9.

[29] *Id*. at 12 (Abrahamson, J., dissenting).

[30] Miller v. Miller, 956 P.2d 887 (Okla. 1998).

[31] Even if it was procured by fraud, payment pursuant to a valid judgment cannot be recovered as unjust enrichment, unless it was vacated. For more about this principle of unjust enrichment in Anglo-American law. *See* 皮特•博克

It is also worth noted that in some US states, the laws expressly prohibit the recovery of payment of child support from his mother or country, even in a situation where paternity is disestablished.[32]

IV. COMPARISON WITH CHINESE CASES AND OUR LESSONS

From previous parts, we can see that action for adultery is completely abolished in Britain, and is recognized only in a few numbers of states in the US. Certain reasons for this abolishment can hardly stand in a Chinese context. For example, the reason that we should abolish the action for adultery in order to prevent one of the spouses from profiting from this action or conspiring with the other spouse to extort the paramour because Chinese values reputation and adultery is highly detrimental to reputation. But some other common characteristics of the action for adultery shared by Britain and the US are worth reflecting. This Article contends that the core of the action for adultery in both Britain and the US is to treat the interest to enjoy sexual intercourse with someone as an exclusive right of his spouse, and to protect it with tort law. This explains why in the US law, the damages for the action of adultery would be reduced if the plaintiff is also committing adultery with others. This also explains why in the English law, the harder the wife can be seduced by money the larger the amount of damages would result from adultery. In these two situations, courts are actually examining the chastity of the spouse. Chastity alone can influence the amount of damages. In my view, it suggests that chastity of one spouse itself has value for the other spouse, and this value should be protected by tort law. The harm to it itself will result in damages, without considering the loss of family service or emotional distress.[33] This is probably why in *Butterworth v Butterworth and Englefield*, Jus-

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斯 (PETER BIRKS), 不当得利 [UNJUST ENRICHMENT], at 266 (刘桥 (Liu Qiao) trans., 2005).

[32] WYO. STAT. ANN. § 14-2-823 (West 2015). *See also* Paula Roberts, *Truth and Consequences: Part III Who Pays When Paternity Is Disestablished?*, 37 FAM. L.Q. 69, 69 (2003).

[33] In cases where one's property is damaged by tort, different from cases where one's use of property is interfered, we should consider the objective market value of the property. The damage of property reflects the existence of the tort, and the consequent damage of the tort. Therefore, the higher the objective market value, the higher the compensation, and we do not have to consider whether the owner's use of the property is interfered.

tice McCardie considered "the actual value of the wife to the husband" and "harms on emotions and self-esteem of the husband" separately in determining the amount of damages. Since of the core of the action for adultery in both Britain and the US is to treat the interest to enjoy sexual intercourse with someone as an exclusive right of his spouse and to protect it with tort law, then abolishing this action means to stop treating it as an interest that recognized and protected by tort law.

Assuming that we decide to adopt their abolishment of the action for adultery (it is just an assumption at this point, and we will deal with the question of whether we should adopt it later in this Article), it means that, using civil law's terminology, in determining the illegality of a tortious act, conduct harming "the interest to exclusively enjoy sexual intercourse with one's spouse" should be deemed as not possessing illegality, therefore, damages purely as a result of conduct harming "the interest to exclusively enjoy sexual intercourse with one's spouse" will not be compensated. Nonetheless, we should still ask: if the wife conceal from her husband that the child is actually the child of the paramour that she commits adultery with, and inflict damages on the husband, are they still damages purely as a result of conduct harming "the interest to exclusively enjoy sexual intercourse with one's spouse"? Logically speaking, it is possible to give a negative answer, because the damages in this question are the emotional distress or economic loss as a result of paternity fraud. So, harming "the interest to exclusively enjoy sexual intercourse with one's spouse" may, though not necessarily, result in this kind of damages because a man cohabitating with a woman (without a marital relationship) can also suffer from it, just like the *A v B* case mentioned before. *Miller v. Miller* is also the same because the birth of the non-biological child was the result of sexual intercourse prior to the marriage. The marriage did not exist when the sexual intercourse happened, so there was no harm to "the interest to exclusively enjoy sexual intercourse with one's spouse." In addition, in cases where both parties are married to each other, the opinion of Justice Louis in *Koestler v. Pollard* that the damages of paternity fraud are essentially the same as the damages for the action of adultery is not completely sound. Assuming the abolishment of the action of adultery, on one hand, it is reasonable to reject compensating damages resulting from natural consequences of adultery in the name of "intentional infliction of

emotion distress" or other causes of action in tort law because otherwise it is detrimental to the goal of abolishing the action of adultery; but on the other hand, paternity fraud may not be a natural consequence of adultery. In my view, the decision of whether to compensate this damage involves value judgment. For any country, legitimizing or not punishing adultery does not necessarily equate legitimizing or not punishing paternity fraud. The reason why this Article focuses on the issue of paternity fraud is that the action for adultery in mainland China normally involves such issue. The following parts will turn to introduce and observe some of these cases.

By searching keywords "adultery," "sexual intercourse," or "sexual relationship" in combination with "damages" or "restitution" in PKULaw and Lawyee databases, we can find relevant cases.[34] From these cases, we can see that: (1) in all cases except one,[35] the spouses were compensated with damages for emotion injury if the adulteries resulted in defendants' giving birth of children,[36] and no damage were awarded otherwise;[37] (2) in

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[34] 北大法宝 [PKU.LAW], http://www.pkulaw.cn and 北大法意 [LAWYEE], http://www.lawyee.net (last visited March 15, 2013). Key word "divorce" is added when searching in Lawyee database.

[35] 张某某与王某某离婚纠纷上诉案 [Zhang v. Wang] (2009)沪二中民一(民)终字第 608 号, (Shanghai Second Interm. People's Ct. Apr. 8, 2009) CLI.C.276948 CHINALAWINFO.

[36] 周某诉王某等确认生身父母纠纷案 [Zhou v. Wang](2000)六民初字第 731 号, (Jiangsu Nanjing Liuhe Cnty. People's Ct. Sept. 28, 2000) CLI.C.228710 CHINALAWINFO; *See also* 邹某某诉李某等返还受欺骗抚养非亲生子费用和侵犯配偶权索赔案 [Zou v. Li] 案件字号不详, (Jiangsu Nanjing Liuhe Cnty. People's Ct. Sept. 25, 2000) CLI.C.21407 CHINALAWINFO; 陈某与那某抚养费纠纷上诉案 [Chen v. Na]案件字号不详, CLI.C.240603 CHINALAWINFO; 陈某与肖某等抚养权纠纷上诉案 [Chen v. Xiao] (2012)长中民未终字第 0490 号, (Hunan Changsha Interm. People's Ct. Mar. 14, 2012) CLI.C.887910 CHINALAWINFO; 彭某诉邓某抚养纠纷案 [Peng v. Deng] (2011)涟民一初第 1301 号, (Hunan Lianyuan Cnty. People's Ct. May 4, 2012) CLI.C.1241128 CHINALAWINFO; 田某诉王某某一般人格权纠纷案 [Tian v. Wang] (2010)沙法民初字第 7148 号, (Chongqing Shapingba Dist. People's Ct. May 27, 2011) CLI.C.384847 CHINALAWINFO; 应小明诉陈淑红配偶权侵权案 [Ying Xiaoming v. Chen Shuhong] (2008)嵊民一初字第 900 号, (Zhejiang Shengzhou People's Ct. Aug. 18, 2008) CLI.C.352964 CHINALAWINFO; 曹 A 与黄 A [Cao A v. Huang A](2010)闵民一（民）初字第 8703 号, (Shanghai Minhang Dist. People's Ct. Feb. 26, 2011); 林承桂诉郭晓丹离婚后损害赔偿纠纷案 [Lin Chenggui v. Guo Xiaodan] (2009)梅民初字第 1445 号, (Fujian Minqing Cnty. People's Ct. Dec. 14, 2009); 王林瑞诉丁红英案 [Wang Linrui v. Ding Hongying] (2009)德民一初字第 184 号, (Jiangxi De'an Cnty. People's Ct. Aug. 10, 2009).

[37] 周浩诉韦玉琼离婚纠纷案 [Zhou Hao v. Wei Yuqiong] (2005)大民初字第

every case where the adultery resulted in defendant's giving birth of child, plaintiff's request to recover the cost of support were supported by the court, without referring to article 92 (restitution of unjust enrichment) of the General Principles of the Civil Law;[38] (3) in the only case where the defendant was pregnant because of pre-marital sex and subsequently conceal from her husband that child was not his biological child, the plaintiff's claim for damage for emotional injury based on violation of his personality interest was denied by the court, because the court finds that the defendant did not violate her obligation of conjugal fidelity.[39]

The Law Commission states the following in their working paper on the adultery damages:

> Accordingly, we are inclined to the view that damages for adultery (and the action for enticement) should be abolished altogether and not replaced by any financial liability (other than for costs). However, we feel that this is not a question on which we at this stage ought to give a firm opinion. It is a matter of the moral judgment of society generally, which may feel that in outrageous cases a rich seducer should be made to pay. We shall welcome the comments from the readers of this paper, both lay and legal.[40]

Similarly, the answer to damages for adultery in China also depends on the moral judgment of society, and it should be that of China, but not of the UK or the US. Therefore, the perceptions and attitudes in China towards this issue are what really matters;

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41 号, (Guangxi Dahua Cnty. People's Ct. May 22, 2005) CLI.C.93664 CHINALAWINFO; 张建芬诉朱德扬离婚案 [Zhang Jianfen v. Zhu Deyang] (2001) 黄浦民初字 738 号, (Shanghai Huangpu Dist. People's Ct.) CLI.C.225519 CHINALAWINFO (the adultery results in pregnancy but the child is aborted); 罗梅清与伍建雄离婚纠纷上诉案 [Luo Meiqing v. Wu Jianxiong] (2003)佛中法民一终字第 1872 号, (Guangdong Foshan Interm. People's Ct. Oct. 8, 2003) CLI.C.64788 CHINALAWINFO.

38 In the comment on *Zou Moumou v. Li Mou*, the commentator opines that the court should refer to the rules of unjust enrichment in supporting plaintiff's claim to recover the cost of support.

39 张某诉李某一般人格权纠纷案 [Zhang Mou v. Li Mou] (2009)浙甬民一终字第 760 号, (Zhejiang Ningbo Interm. People's Ct. Aug. 26, 2009) CLI.C.822570 CHINALAWINFO.

40 Law Commission, *supra* note 18, at para. 142.

it is doubtful the moral judgment reflected in the history of damages for adultery in Britain and the US could have meaningful reference to China's adultery damages practices. Even from the perspective of universal values, foreign moralities are irrelevant to China's adultery damage issue. However, in contrast to the Law Commission's legislative perspective—the only question is whether to abolish the action for adultery, we need to pay close attention to the moral judgment reflected in Mainland China's interpretation of domestic positive laws. Judicial decisions definitely adopt an interpretive approach as judges are constrained by positive laws, yet it is still difficult to conclude whether these decisions embody the moral judgment of our society. This Article will assume that the limited judicial decisions herein reflected the moral judgment of our society under the constraint of the positive laws (or moral judgment that do not contradict positive laws). Premised on this, the rest of this part seeks to provide a systematic legal dogmatic interpretation to those decisions under China's positive laws and learn from Britain and US common law practices regarding an action for adultery rather than the moral judgments of their societies.

First, mere committing adultery seems insufficient to claim damages for emotional injury under positive laws in Mainland China. The Marriage Law of the People's Republic of China with the 2001 amendment expressly states in article 4, "Husband and wife shall be faithful to and respect each other." However, enumerated circumstances for claiming damages for divorce in article 46 does not include adultery, although adultery is a clear violation of the obligation of conjugal fidelity. Article 3 of the 2001 Supreme Court's judicial interpretation of marriage law (Interpretation No. I of the Supreme People's Court on Several Issues in the Application of Marriage Law of the People's Republic of China, 2001 Judicial Interpretation No. 30 [2001]) states: "If any party initiates a lawsuit based on article 4 of the marriage law, the people's court shall not accept the case. If the people's court has accepted such case, it shall make a ruling to dismiss the lawsuit."[41] Accordingly, it is improper to interpret the adultery

[41] 关于适用<中华人民共和国婚姻法>若干问题的解释（一）[Interpretation (I) of the Supreme People's Court of Several Issues on the Application of Marriage Law] (promulgated by the Sup. People's Ct., Dec. 24, 2011, effective Dec. 27,

that does not violate article 46, section 2 (cohabitation between a person who has a spouse but co-habitats with a third person) as constituting a violation of spouse right and purport to claim damages for it. In addition, this Article is also against holding the unfaithful spouse and the paramour liable under article 22 of the Tort Law.[42] The reason is that the judicial branch should respect the Marriage law's intention, which is to refrain from intervening pure adultery, and to avoid conflict it by applying article 22 of the Tort Law, and ultimately preserves consistency in the legal regime.[43]

Second, combining the common law distinction between damages for pure adultery and damages for paternity fraud (despite there is disagreement) and the foregoing articulation, the author proposes that while the claim for damages for pure adultery should be denied, the claim for paternity fraud may be supported. The distinction is justified because the two claims serve to protect different interests. The adultery claim seeks to vindicate the interest of exclusive enjoyment of sex life with spouse; by contrast, the paternity fraud claim involves the protection of a different personal interest, which is unnamed and is defined as general personal interest for this Article's purpose. The emotional injury incurred due to infringement of this general interest includes not only the damage to one's dignity and reputation but also the damage of one's bond with his non-biological children and of maybe missing the optimal chance to give birth to his own biological children. This perspective affords a consistent explanation to the Mainland Chinese judicial practices, where damages are more likely to be awarded in paternity fraud case than in adultery case. If the claim for damages for pure adultery is denied and the focus is turned to compensation for emotional injury resulting from paternity fraud, the emphasis will be on factors including, how long the husband is deceived, whether the husband lives together with the children and the emotional connection between them but not on how long the adultery had last.

2011) CLI.3.38081 CHINALAWINFO.

42 *See* Yu Xiao, *supra* note 4, at 142 (2011).

43 The view is against the holding that paramour liability under Tort Law of the People's Republic of China. *See also* 冉克平 (Ran Keping), 论配偶权之侵权法保护 [*On the Protection of Spouse Right Under Tort Law*], 法学论坛 [LEGAL F.], issue 4, at 106 (2010).

Therefore, as it is illustrated in the aforementioned British case, *A v. B*, the spouse could be still held liable for paternity fraud, even if she did not commit adultery. In a Chinese case with a similar fact pattern, the court reached a different conclusion because it still analyzed the paternity fraud under the framework of violation of the obligation of conjugal fidelity, and neglected the distinction between emotional injuries caused by paternity fraud and that caused by adultery.[44]

Last, claim for damages for paternity fraud can be based on article 22 of the Tort law, because there is no confinement of damages for emotional injury to *jus personarum* infringement in this Article.[45] In contrast, the Tort law of the People's Republic of China (Draft) published by the Standing Committee of the National People's Congress (NPCSC) proposed such confinement in article 22.[46] An interpretation consistent with this legislative history should be: general personal interests beyond *jus personarum* are not excluded from the scope of article 22. Accordingly, paternity fraud claim under article 22 is legally well grounded, although this Article defines paternity fraud as infringing the husband's general personality interest rather than certain specific personality right. In addition, courts in Mainland China are supportive to those claims in judicial decisions and treat them as tort claims, without referring to article 92 (restitution of unjust enrichment) of General Principles of the Civil Law.[47] The negligence element must be established before holding the biological father liable under tort law. The biological father is far from negligent and cannot be responsible for the damages if he does not even realize the existence of his biological child. However,

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44 *See* comment on *Zou v. Li* and the relevant discussion in this Article.

45 侵权责任法 [Tort Law] (promulgated by Standing Comm. of the Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010) art. 22, CLI.1.125300 CHINALAWINFO ("Where any harm caused by a tort to a personal right or interest of another person inflicts a serious mental distress on the victim of the tort, the victim of the tort may require compensation for the infliction of mental distress").

46 侵权责任法(草案) [Tort Law (Draft)] (published by Standing Comm. of the Nat'l People's Cong., Nov. 6, 2009), *available at* http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2009-11/06/content_1525914.htm (last visited Mar. 9, 2016).

47 民法通则(2009 修正) [General Principles of the Civil Law (2009 Amendment)] (promulgated by Standing Comm. of the Nat'l People's Cong., August 27, 2009, effective Jan. 1, 1987) art. 92, CLI.1.167199 CHINALAWINFO.

different from the issue of damages for emotion injury, it is worth considering whether this constitutes an unjust enrichment claim when the deceived husband pays for the cost of support which should be borne by the biological father. Considering the public policy of child protection, and that the deceived husband's enjoyment and happiness during his living together with the non-biological child will not retroactively disappear after he discovers the truth,[48] it is inconclusive, and worthy of further study, as to the possibility of recovering those costs of support either as damages under tort law or unjust enrichment.

V. CONCLUSION

Damages for adultery are relevant to different cultures and values. This Article presents a general introduction of the abolishment of action for adultery in both Britain and the US and draw mainly from the distinction of separating pure adultery claim from paternity fraud claim in their practices, rather than the moral judgments reflected. Based on the selected cases and analysis of positive laws, this Article reaches the following interpretive conclusions. First, a claim for damages for emotional injury caused by mere adultery should be denied. Second, a claim for damages for paternity fraud should be granted as compensation for infringing general personality interests according to article 22 of the Tort Law. Finally, the answer to the possibility of recovering the cost of support remains uncertain and needs further studies.

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[48] 最高人民法院关于夫妻关系存续期间男方受欺骗抚养非亲生子女离婚后可否向女方追索抚育费的复函 [Letter of Reply of the Supreme People's Court on the Issue Whether the Deceived Husband Could Recover Raising Non-Biological Children Against the Wife During the Period of Marital Relationship] (promulgated by Sup. People's Ct., 1991) CLI.3.11100 CHINALAWINFO ("After research, the Supreme Court thinks if the husband is deceived to raise the non-biological children birth during the period of marriage, the husband can recover a reasonable amount of rearing expenses paid after divorce. The recovery of rearing expense incurred during marital relationship involves more complicated issues and needs further research"). Such restraint attitude does not seem to exist in the judicial cases cited in this Article; yet, how to interpret this reply is worth considering and further studies.

The Reform and Development of the U.S. Legal and Financial System —A Reflection on the 2008 World Financial Crisis

*ZHU Daming**

I. PREFACE

In 2008, with the bankruptcy of Lehman Brothers Holdings Inc. ("Lehman Brothers"), American International Group ("AIG"), *etc.*, the financial crisis caused by the US subprime mortgage spread around the world instantaneously, giving rise to the global financial and even the economic crisis worldwide. No more than one year after the crisis, the total market value of the world's major bourses fell by $35 trillion. It was the first time since the World War II that the world's total GDP shrank.[1] The total loss of financial institutions (if broadly defined) was up to $1.1 trillion; another $9 trillion were supplied by the U.S. and European authorities in an emergent effort to provide necessary liquidity.[2] It is safe to say that a financial crisis of such scope and scale would only happen once a hundred years. Apart from the United States, many countries, including China, are reflecting on this crisis.

The most intuitive cause for this global financial crisis is generally considered to be the burst of the bubble economy under a distorted global economic system. The market-oriented financial system enjoyed rapid development under this circumstance. At the same time, with the acute changes of the financial system, the systematic risks amounted to an extent that eventually led to the financial crisis. However, existing regulations and relevant theories to prevent systematic risks cannot cope with the newborn systematic risks stemmed from the market-oriented financial system. Moreover, they could even contribute to the so-called

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[1] Arthur E. Wilmarth, Jr., *The Dark Side of Universal Banking: Financial Conglomerates and the Origins of the Subprime Financial Crisis*, 41 CONN. L. REV. 963, 967 (2009).

[2] *Id.* at 968.

pro-cyclical problem to the effect that the crisis would be exacerbated. Thus, a new significant issue rises as how to guard against systematic risks arising from the market-oriented financial system. This paper aims to study and organize the relevant theories to such issue among the United States and other countries, so as to provide references for the development and improvement of China's financial system reform.

II. BACKGROUND OF THE 2008 WORLD FINANCIAL CRISIS

It is generally believed that the 2008 financial crisis was resulted from the great changes occurred in the world economy and finance sector. If so, the crisis just evidenced how incapable the current theories about finance and financial regulations are to cope with the economic operation. By contrast, the part of human nature that produces economic bubbles and causes financial crisis almost remains unchanged. Therefore, it is necessary to re-examine the direction of financial development and financial regulation in light of the changed and the unchanged.

As for the cause of the financial crisis in 2008, it is generally believed that the excessive liquidity resulted from the bursting bubble economy ultimately led to the global financial crisis of such a magnitude. The further inquiry into the liquidity excess, however, witnesses diverged opinions. These views can be summarized as two main categories: the first attributes to the long-term loosened financial regulation carried out by the U.S. Federal Reserve Board system;[3] the other blames other countries who either manipulate forex to a low level for domestic employment, or have a substantial surplus from natural resources trade. In both of the situations, these countries would have a slew of capital reserves. What ensued the huge amount of dollars in 2008 was the recession in the U.S. and the financial crisis around the globe.[4]

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[3] Anna J. Schwartz, *Origins of the Financial Market Crisis of 2008*, 29 CATO J. 19, 19 (2009).

[4] Ben S. Bernanke, *The Global Saving Glut and the U.S. Current Account Deficit*, FED. RES. (Mar. 10, 2005), http://www.federalreserve.gov/boarddocs/speeches/2005/200503102/. *See also* Henry M. Paulson, *Remarks at the Ronald Reagan Presidential Library*, U.S. DEP'T OF THE TREASURY, (Nov. 20, 2008), https://www.treasury.gov/press-center/press-releases/Pages/hp1285.aspx. *See also* Herbert Grubel, *Who is to Blame for the Great Depression?* SOC. SCI. RES. NETWORK (June 15, 2010), http://ssrn.com/abstract=1569848.

In addition, there are some thoughts about the fundamental issues underlying those problems of loosened financial regulations and imbalances of the international payment. Specifically, among developed countries, like the U.S., their international competitiveness in manufacturing sectors has been declining because of the rise of China and other emerging countries, thus huge deficits in trade balance appear in those developed countries. Since 1995, the annual growth rates of GDP in those countries were only 2 to 3 percent. Moreover, financial assets (debts) has gone upward at more than 10 percent per annum. For example, from the period of 1995 to 2006, housing loans (debts) increased from $3.727 trillion to $10.921 trillion in the United States, and consumer credit increased from $1.123 trillion to $2.387 trillion. As a result, the proportion of liabilities in disposable income surged from 89.8 percent of annual income to 135 percent.[5] Another set of data that illustrate the problem is the proportion of income and consumption in GDP. For a long term, both the ratios stayed at around 64 percent in the United States, the EU and Japan. Between the two ratios, usually the income ratio would be slightly higher than that of consumption. However, around 1982, consumption in those countries began to increase. By 2008, the proportion of income in GDP dropped to 61 percent; in contrast, consumption rose to 72 percent (the change is more significant in the U.S).[6]

What fills the increasing discrepancy is the returns from the rising value of various assets. Among all these returns, the profits in real estate have been twice as much as the returns from financial markets.[7] Basically this is why real estate bubbles occurred in the U.S., the UK and other EU countries in the context of excessive liquidity assets. In the U.S., subprime mortgage granted to persons with low credit records grew rapidly [in light of the rocketing prices in real estate]. Despite the low credit ratings, the greater risks can still be hedged through a variety of mechanisms including securitization and derivatives. Many players in these transactions were hedge funds as well as international investors

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[5] DONALD RAPP, BUBBLES, BOOMS, AND BUSTS: THE RISE AND FALL OF FINANCE ASSETS 78–80 (2009).

[6] Didier Sornette & Ryan Woodard, *Financial Bubbles, Real Estate Bubble, Derivative Bubbles, and the Financial and Economic Crisis*, SOC. SCI. RES. NETWORK (May 2, 2009), http://ssrn.com/abstract=1596024.

[7] *Id*. at 14–17.

whose funds would be tied with subprime mortgages. Consequentially the scale of housing finance witnessed a steep increase,[8] propelling a further climbing in real estate prices.[9] Facing the huge trade deficits, the United States tried to balance the deficits through capitals gains that extracted from China and oil-rich countries in the Middle East by offering high-yielding financial instruments. The previous strategies supported the United States to maintain the value of dollars as well as its domestic prosperity. Among foreign investors, a substantial portion of them were central banks. As such, the financial sector and relevant industries have become the prime industry to drive the American economy.[10] As the financial sector has the ability to de facto re-distribute the capital around the globe, we can say that financial development has become the pillar of American economy in lieu of the traditional manufacturing sector. In addition, instead of banks, institutional investors such as pension funds were becoming the major players who invest in financial assets in developed economies because they were driven to these presumably high-yield financial instruments by the demanding beneficiaries and/or clients.

III. SECURITIZATION, SHADOW BANKING SYSTEM, ETC., AND FINANCIAL CRISIS

A more direct cause to the global financial crisis is generally considered as the shift of the financial system from a bank-centered one to a market-oriented one, where instruments like securitization, derivatives, and *etc.* are traded. On the one hand, the financial regulators were not able to supervise the new-born financial model effectively; on the other hand, a functioning market mechanism that had been anticipated turned out to

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[8] Patrick Artus, *La finance peut-elleseuleconduireàunecirse grave?*, 416 FLASH ÈCONOMIE 2 (2008). *See* Kawamura Tetsuji, *A Study of the Transfiguration of Economic Globalization Under the Impacts of the Current Global Financial Crisis: With a Special Focus on the U.S. and Emerging Economy Relationship*, 46 ECON. THEORY 4 (2013); OKINA YURI, THE FINANCIAL CRISIS AND THE PRUDENTIAL POLICY 6 (2010).

[9] Maureen F. Maitland & David M. Blitzer, *S&P/Case-Schiller Home Price Indices: 2009, A Year in Review*, Chart 1, CME GRP. (Jan. 2010), https://www.cmegroup.com/trading/real-estate/files/SP-CSI-2009-Year-in-Review.pdf; Artus, *supra* note 8, at 4.

[10] Sornette & Woodard, *supra* note 6, at 18 (in addition, 40% of those main American companies' earnings are the return of financial investment).

be a failure where the market prices failed to faithfully reflect the intrinsic risks of ABS instruments. Thus, the ill-functioned market where risks abounded eventually led to excessive liquidity and bubble economy.[11]

In the tide of securitization, commercial banks were overshadowed by investment banks, structured investment vehicles and other suppliers of short-term (or long-term) liquidity assets, all of which have been referred to as the shadow banking system.[12] Yet the existing financial regulatory regime had been put in place chiefly in order to prevent systematic risks in settlements in a world of commercial banks while regulations on investment banks was in a laisser faire manner. The unleased shadow banking system, however, became paralyzed to the lethal detriment of its purported function to provide liquidity when Lehman Brothers went bankrupted at the beginning of the 2008 crisis. And it was this new type of systematic risks that became the thin end of the 2008 financial wedge. From the crisis the necessity to regulate the shadow banking becomes evident. Moreover, the bankruptcy of AIG, who subscribed credit derivatives, and the consequent government aids could partly indicate that such systematic risks in the securitized financial markets and the ineffectiveness of laws in the field of these new-born systematic risks.

Why had this kind of new financial regulation been imperfect or vacant for a long time? There may exist two reasons.[13] One is due to the novelty of this financial model and the other is due to the excessive trust to the market. Specifically, when America was faced with the depression of the manufacturing industry, it adopted the above new financial model to develop the financial industry, the IT industry, risk industry and *etc.* so as to revive a prosperous economy recovery based on a loosely regulated market. Further, the development of the financial industry

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[11] Patricia A. McCoy, Andrey D. Pavlov & Susan M. Wachter, *Systemic Risk Through Securitization: The Result of Deregulation and Regulatory Failure*, 41 CONN. L. REV. 493, 537 (2009); Okina Yuri, *Macro-prudential Perspective in Financial Supervision and Regulation Policy-Exploration on New Regulation System After the Financial Crisis*. 12 BUS. & ECON. REV. 157, 161 (2009).

[12] Gary Gordon, *Slapped in the Face by the Invisible Hand: Banking and the Panic of 2007*, SOC. SCI. RES. NETWORK (May 9, 2009), http://ssrn.com/abstract=1401882.

[13] John Ryan, *The Greenspan Federal Reserve Role in the Financial Crisis* (Dep't of Econ. Ca' Foscari Univ. of Venice, Working Paper, No. 04/WP/2009, 2009), http://ssrn.com/abstract=1345802.

and the IT industry promotes investment opportunities, the risk industry, and the demand and development of real estate industry, which raises people's expectation of developing the real economy (known as the "New Economy" theory). At the same time, the self-discipline ability of the financial market was overestimated. People believe that market liberalization is the basis of development and the progress of the financial technology has overcome market failure and other problems in the financial market. Behind this trend of thought, it is important to note that from the 1980s, with the rise of the New Liberalism Economics and other related economic (or political) thoughts, the market omnipotence theory has been widely accepted.

The expectations of this new financial model is an important cause of the real estate bubble. These bubbles are resulted from the over optimistic expectation towards future earnings. The IT bubble from 1996 to 2000 was resulted from over expectation of the improvement of the economic efficiency and the development of the real economy such as the increase in demand. Real estate bubbles can also be considered resulting from the expectation of the new financial model's effect in increasing the value of assets. The United States is maintaining its economic vitality and the circular flow of the global capitals through a cycle from the collapse of expectation, which ultimately leads to the collapse of bubbles, to the creation of an expectation, which satirically leads to a new round of bubbles.[14]

IV. THE REFORM AND DEVELOPMENT OF FINANCIAL REGULATION

A. Extending the Scope of Regulation

The financial crisis of 2008 witnessed the imperfection of the financial supervision system and related regulations on the new financial model. Therefore, many countries, centered by the United States and other countries that deeply trapped into the financial crisis, started to reexamine their financial law and fi-

[14] Sornette & Woodard, *supra* note 6, at 17–20; Andrew W. Lo, *Regulatory Reform in the Wake of the Financial Crisis of 2007–2008*, SOC. SCI. RES. NETWORK (Mar. 10, 2009), http://ssrn.com/abstract=1398207 (pointing out that the bubble and burst cannot be entirely avoided if the enterprises combine homization with liberty).

nancial regulatory regime.[15] Since many details of the reform are not yet crystalized, this Article only introduces the possible direction of the reform on related regulations.

First, the extension of the scope of regulation should be discussed. Focusing on the systematic risks of paralytic clearing function, the traditional regulation regime regards deposit-soliciting banks as its primary objects. However, this worldwide financial crisis is originated from the bankruptcy of investment banks such as Lehman Brothers Holdings Inc. and American International Group (AIG) who sell derivatives such as CDS. They act as part of the shadow banking system under the market-oriented financial mechanism. The result of the discussion is that, in addition to banks, those who are subject to new systemic risks, such as investment banks and monoline insurance companies, should also be regulated.

Specifically, some scholars advocate dividing the financial institutions into four categories on the basis of measured value-at-risk. The first includes those individually systematic financial institutions which are too big to fail. They enjoy numerous affiliations and are even capable of representing the nation. It is hard for this kind of establishments to go bankrupt because of political considerations. To these companies, regulations need to be made from two aspects. One is to require the macro-prudential regulation. The other is to require the micro-prudential regulation that guarantees financial soundness in financial institution.[16] The second category refers to the financial institutions which are systematic as part of a herd. Like hedge funds who are characterized by short-term debt burdens, high asset-liability ratio, and holding assets with low liquidity, if each of them functions as a single institution, their systematic existence does not need to be considered because they are unimportant. But once they function as a part of a big group (the collective operation of hedge funds), they will possibly be operating systematically. For that reason, it is necessary to introduce some kind of macro-prudential regula-

[15] *See* Kanda Hideki, *The Improvement of Law After Financial Crisis*, 1399 JURISUTO 2 (Apr. 15, 2010) (the Dodd Frank Wall Street reform and Consumer Protection Act enacted by United States abolishes relief from public funds, strengthen the regulation on the capital, asset-liability ratio, liquidity and risk management of financial institutions. So it does attach much importance to regulation).

[16] OKINA, *supra* note 8, at 86.

tion, e.g., regulating the asset-liability ratio, cyclic disorder, and the expansion of credit supply. Whereas the micro-prudential regulation can be strictly confined to a minimum range. The third category includes non-systematic large financial institutions with low asset-liability ratios, represented by insurance companies and pension funds. It is not necessary to require a macro-prudential regulation. But a complete micro-prudential regulation is needed. The fourth category concerns the tiny financial institutions. Only a minimum amount of business regulations is necessary to be imposed on them.[17]

B. Macro-Prudential Analysis

A lesson is learned from this financial crisis that despite the dominant capital market efficiency hypothesis as the financial theory,[18] the bubble economy still occurred.[19] The occurrence of bubble economy was the reason for several financial crises.[20] Although a macroscopic policy is the key to preventing the bubble economy, it is considerably difficult to design an effective macroscopic policy.[21]

Another lesson learned is that the basic system of the modern financial regulations, such as BIS (Bank for International Settlements), market-value accounting, and risk management of enterprise, increase the probability that the burst of bubble induces the systemic market risk in the market-oriented financial system. This is a pro-cyclical problem. Therefore, many scholars observe that it is necessary to adjust this financial regulation system to a counter-cyclical one, taking the macrosopic prudence into account; introduce the macroscopic policy which includes liquidity risk; correlate the tier 1 ratio of the Basel Accord II with the asset-liability ratio, cyclic disorder, assets growth rate, *etc*. All these measures were designed to harmonize the macrosopic prudence with the micro-prudential regulation such as BIS rules.[22]

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[17] *Id.* at 95.

[18] *See* IKEO KAZUHITO & IKEDA NOBUO, WHY WOULD THE WORLD INTO DEPRESSION 132 (2009).

[19] MARKUS BRUNNERMEIER ET AL., THE FUNDAMENTAL PRINCIPLES OF FINANCIAL REGULATION, 30 (2009); *See* FRANKLIN ALLEN & DOUGLAS GALE, UNDERSTANDING FINANCIAL CRISIS 35–259 (2007).

[20] BRUNNERMEIER ET AL., *supra* note 19.

[21] MASAAKI SHIRAKAWA, MODERN FINANCIAL POLICY 399 (2008).

[22] OKINA, *supra* note 8, at 125.

Specifically, aside from adjusting the abovementioned BIS data through the coefficient among macroscopically evaluated value-at-risk, it is still necessary to improve the following systems through which financial institutions could easily finance itself facing operational difficulty. These systems mainly include limitations on the asset-liability ratio, introducing linked settlement into the fund-raising period system, limitations on the speed of asset expansion, compulsive requirements on enterprises to increase their capital reserve during well-managed periods, improving asset insurance and contingent capital, introducing Spanish dynamic allowance for doubtful accounts, *etc.* These suggestions are thought to be practically difficult in terms of institutionalization, thus lack practicability. Even so, it is still necessary to discuss the feasibility of a systematic reform.

V. CONCLUSION

The global financial crisis of 2008 revealed the limitation of the market finance model. If we fully recognize this limitation, we will conclude that we should gradually reform the financial system and the financial regulation regime along the process of reforming the social and economic system. Besides, the role of finance (the financial industry) should be to support the fully functioning of the real economy rather than to drive economy growth, as overly expected by the United States.

Freedom of Contract and National Regulation over Real Estate Transactions in Villages —Taking Dispute over Sales of Houses in the Artist Village as an Example*

*Zhu Qingyu***

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I. INTRODUCTION

Freedom of contract as a fundamental principle of civil law has been well known to those who study the law. However, in Chinese legal society, the principle has only been taught in textbooks and developed at a theoretical level. A closer look at the construction and operation of the Chinese legal system in real practice reveals that freedom of contract is not even aspired by the public authorities, including the legislature, the judiciary, and the executive.

This paper takes the dispute over sales of houses in the Artist Village as an example, and demonstrates and analyzes the intense relations between personal freedom and state regulations. It also sheds light on the current role freedom of contract plays in real estate transactions in rural China.

II. FACTS AND HOLDING OF THE *MA HAITAO V. LI YULAN* CASE[1]

Songzhuang Town in Tongzhou District in Beijing, a gathering place for artists, is known as the "Artist Village." At peak times, it once accommodated over 2000 people, more than 300 of whom bought houses from villagers there. In recent years, some sellers regretted closing the original deals. This has led to disputes over sales of houses. Among all is the *Ma Haitao v. Li Yulan* case. As one of the leading cases, it was selected as one of the Top Ten Artistic Events of 2017.[2]

The plaintiff Ma Haitao ("Ma") was originally a villager from Xindian Village, Songzhuang Town in Tongzhou District. The defendant Li Yulan ("Li") was originally an urban resident from Handan City, Hebei Province. In July 1st, 2002, the plaintiff and the defendant entered into a "Sales of House Agreement," un-

[1] The facts and decisions comes from 马海涛与李玉兰房屋买卖合同纠纷案 [Ma Haitao v. Li Yulan on Real Estate Purchase Contract] (2007)通民初字第 1031 号, (Beijing Tong Zhou District People's Ct.) and 马海涛与李玉兰房屋买卖合同纠纷上诉案 [In re Ma Haitao v. Li Yulan on Real Estate Purchase Contract] (2007) 二中民终字第 13692 号, (Beijing Second Interm. People's Ct.) CLI.C.1761585 CHINALAWINFO.

[2] 英楠 (Ying Nan), 2007 艺术中国·最具影响力评选结果 [*The Results of Selection of 2007 The Most Influential Participants of Chinese Art*], 雅昌艺术网 [YA CHANG ARTS. COM], Mar. 1, 2008, http://news.artron.net/show_news.php?newid =42007 (last visited Feb. 10, 2016).

der which the plaintiff sold the disputed house, including the courtyard, to the defendant at 45,000 RMB. After signing the Agreement, the defendant duly made the payment and the plaintiff delivered the house and the "Collective Land Use Rights Permit" to the defendant pursuant to the contract. The defendant renovated the property and constructed three new rooms at the west wing of the house upon obtaining approval from the Xindian Villagers' Committee in October, 2003.

In December, 2006, Ma sued Li at the court of first instance claiming the following: In 2002, Ma sold five rooms at the north wing and three rooms at the west wing to Li. However, since Li is not a peasant from Xindian Village, Li is not entitled to "Collective Land Use Rights" in Xindian Village. Therefore, Ma prayed for the court to declare the Sales of House Agreement void *ab initio*, requested Li to return the house, meanwhile agreed to reimburse Li for the difference between the original price and the current market price. The defendant requested to declare the Agreement lawful and valid, and to dismiss the plaintiff's claims.

The court of first instance ruled that any contract in violation of mandatory provisions in laws and regulations is void. According to the law, urban residents shall not purchase or sell any house that is supposed to be owned by members of the rural collective economic organizations. Li was an urban resident, hence was not allowed by law to purchase the said house. According to article 52(5) of the Contract Law of the PRC, the Agreement was void.[3]

The defendant appealed. The court of appeals affirmed the lower court, and added an additional reasoning in its own judgment:

> Homestead land use rights are rights exclusively enjoyed by members of the rural collective economic organizations. The rights are associated with the identity of the rights-holders. They cannot be owned or *de factor* owned by people beyond the organizations. What

[3] Another Technical problem in *In re Ma Haitao v. Li Yulan on Real Estate Purchase Contract* is that the applied law could not be art. 52(1)(5) of the Contract Law because there is no so called Subsection 1 here. *See Ma Haitao v. Li Yulan on Real Estate Purchase Contract* (2007)通民初字第 1031 号, and *In re Ma Haitao v. Li Yulan on Real Estate Purchase Contract* (2007)二中民终字第 13692 号, and 合同法 [Contract Law] (promulgated by the Nat'l People's Cong., Mar. 15,1999, effective Oct. 1, 1999) art. 52, CLI.1.21651 CHINALAWINFO.

> were being sold in the Sales of House Agreement between Ma Haitao and Li Yulan were not only the house itself, but also the corresponding homestead land use rights. Li Yulan was never a villager of Xindian Village, Songzhuang Town, Tongzhou District. Therefore, the lower court's ruling of the validity of the Agreement was in line with the current land control laws, regulations, and principles.

III. FREEDOM OF CONTRACT IN COURTS' RULINGS

The best way to understand how freedom of contract is applied in China is to engage in a case-by-case study. This paper adopts such an approach. The primary question is: How would the court decide on the validity of the disputed Agreement?

The court of first instance applied article 52(5) of the Contract Law. It ruled that all contracts in violation of mandatory provisions in laws and regulations are unlawful and void. Therefore, whether all agreements that violate "mandatory provisions" are void with no exception is the primary question.

Laws and regulations are categorized into mandatory rules (*zwingendes Recht*, *ius cogens*) and default rules (*nachgiebiges Recht*, *ius dispositivum*). All parties must comply with mandatory rules. However, failure to comply leads to different legal outcomes. Under German laws, "violating mandatory provisions (*Mußvorschrift*) would render the conduct invalid and void *per se*, whereas violating recommendatory provisions (*Sollvorschrift*) would not have the same effect."[4] Chinese law makes the same distinction. Article 149 of the Contract Law is a recommendatory provision (*Sollvorschrift*). The Supreme People's Court issued the "Interpretation II of the Supreme People's Court of Several Issues concerning the Application of the Contract Law of the People's Republic of China" ("the Interpretation") on April 24th, 2009. Although the Interpretation predates this case and has no legal effect, it has a reference value. Article 14 of the Interpretation notes that "'[m]andatory provisions' as referred to in article 52(5) of the Contract Law only refers to 'mandatory provisions' on effectiveness." Mandatory provisions on effectiveness is equivalent to

[4] Brox & Walker, Allgemeiner Teil des BGB, ¶ 60 (Verlag Franz Vahlen, 34th ed., 2010).

Mußvorschrift in German law. Therefore, article 52(5) should be applied restrictively based on the purpose of the law. In the present case, the judges apparently believed that the mandatory provision was a *Mußvorschrift*, and could be the basis for invalidating a contract. However, even if this being the case, the judges' reasoning was inadequate. Article 52(5) is merely a rule of reference and it cannot be the basis for invalidating a contract. We still need to pinpoint the "mandatory provision in law or regulation" violated by the Agreement.

Both Courts never referred to any specific provision. The court of appeals merely used principle of integration between house ownership and land-use right as a means to substitute the question of whether the transfer of homestead land use rights was legal for the question of whether the Sales of House Agreement was legal. Accordingly, the court ruled that because the transfer of the said homestead was forbidden, the Agreement was void.

However, even applying the principle of integration, the courts still failed to cite any law or regulation that explicitly prohibits the transfer of homestead. Such a regulation is most likely to be article 62 paragraph 4 of The Land Administration Law of the PRC. According to article 62 paragraph 4, "Reapplication for a house site by a villager in a rural area who sold or rented out his/her house shall not be approved of." But this provision does not explicitly a mandatory provision on effectiveness. According to article 62 paragraph 4, if a villager in a rural area sells his house, his "reapplication for a house site . . . shall not be approved of." The legal effects take place between the seller and the Registrar. The law regulates the seller, namely, the villager. Moreover, logically speaking, only by acknowledging the validity of the sales of house agreement do we need to answer the question of whether to approve of the seller's "reapplication for a house site." Otherwise, the seller could simply ask for return of the house, not to reapply for a new one with the authorities.

The real problem being: why would the court be so determined to take the troubles and invalidate such an agreement?

As is known to all, China has the "strictest" land administration system.[5] All control over land is centralized in the hands of

[5] 全国人大法律委员会 (Commission of Legislative Affairs of the National People's Congress), 全国人大法律委员会关于《中华人民共和国物权法（草案）》

the public authorities. The Chinese government reckons that only village residents are entitled to the homestead land use rights of that village. Under article 62 paragraph 1 of The Land Administration Law, each household could only obtain one homestead. To maintain the dual land use rights system between city and the village, the Chinese government has repeatedly emphasized that urban residents are forbidden to purchase homestead in rural China. "Opinions on the Ministry of Land & Resources on Strengthening Administration of Homestead in Rural Areas (No. 234 [2004] of the Ministry of Land and Resources)" enunciated that "urban citizens are forbidden to purchase homestead in villages. Issuing land use certificates to urban citizens who purchase or build homestead in villages is strictly prohibited." Such a system not only regulates rural residents but also urban residents who have obtained houses or lands from villagers. Both courts obviously invalidated the Agreement out of respect for this policy consideration.

As has become obvious, the Chinese judiciary is not a neutral adjudicator. It rather executes and vindicates Chinese national policies. The court already decided to invalidate the Agreement even before it heard the case. What all judges did was to find basis to reach this conclusion. The conclusion cannot be altered even if it means the reasoning would be farfetched. The court determined to conform to documents issued by the State Department and the Ministry of Land and Resources, even if they have no legal effect.[6] The court was indifferent to whether the parties were innocent, and would never test the reasonableness of documents issued by public powers.[7] The court backs up public powers. It plays the role of

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修改情况的汇报（2005 年 6 月 24 日十届全国人大常委会第十六次会议） [*The Report of the Commission of Legislative Affairs of the National People's Congress on the Amendment to Property Law of the People's Republic of China (Draft)* (*The 16th Meeting of the Standing Committee of the Tenth National People's Congress on June 24, 2005*)], *in* 物权法立法背景与观点全集 [THE PROPERTY LAW LEGISLATION BACKGROUND AND VIEWS COLLECTED], at 73 (Law Press·China, 2007).

[6] 最高人民法院 (Supreme Pepole's Court), 《中华人民共和国物权法》条文理解与适用 [THE INTERPRETATION AND APPLICATION OF THE PROPERTY LAW OF THE PEOPLE'S REPUBLIC OF CHINA], at 458–62 (黄松有 Huang Songyou et al. ed., People's Court Press, 2007).

[7] The Supreme Court issued the *Provisions of the Supreme People's Court on Citation of Such Normative Legal Documents as Laws and Regulations in the Judgments* less than two years after the final decision. Article 4 States that, civil case decision shall quote law, legal interpretation and judicial interpretation. And those relevant governmental regulations, local regulations or separate regulations can be quoted directly. Other official documents apart from this shall be

public executors. It justifies executor's decisions that limit or deprive individuals of their private rights. It therefore loses its supposedly neutral status as a balancing power between public powers and private freedom.

What merits attention is that the appellate court judges did empathize with the purchasers. In the last part of the ruling, the judges noted as if speaking to themselves that "the seller is mainly responsible for all costs incurred from invalidation of the Agreement," but because the purchaser "did not raise any counterclaim in the original court proceedings," this tribunal could only recommend "the purchaser to bring further claims on contract damages." The purchaser immediately understood the judges' implication and brought another claim in Tongzhou district court, requesting the court to award damages. The Tongzhou district court grasped the gist of the previous ruling and issued No. 02041 [2008], Civil Division, Tongzhou District, Beijing, under which the plaintiff's claim was supported. The latter judgment compensated the purchaser for the monetary damages results-wise, and somehow balanced the interests of both parties.[8] However, the court reached this seemingly balanced result by being a litigator, not a neutral adjudicator. As soon as the court suggested "the purchaser to bring further claims concerning contract damages," it has lost its neutrality. Two wrongs don't make a right. The two rulings made by the courts only demonstrate how the judiciary is not a neutral decision-making body, and how personal privacy is compromised *vis a vis* the integrity of the judiciary.

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part of the reasoning after review on its necessity and legality. Unfortunately, the decision fails to list the documents published by State Council or Ministry of Land and Resources, and only claimed as certain that the original court was correct in determine the validity of the contract pursuant to laws and regulations on administration of land. *See* 关于裁判文书引用法律、法规等规范性法律文件的规定 [Provisions of the Supreme People's Court on Citation of Such Normative Legal Documents as Laws and Regulations in the Judgments] (Promulgated by Sup. People's Ct., Oct. 26, 2009, effective Nov. 4, 2009) art.4 & 6, CLI.3.122772 CHINALAWINFO.

[8] The attorney of the purchasing party, Chen Xu, thought the court decision, "provided that the law and the state policy on land purchase have not been changed yet, not only maintained the seriousness of the law, but protected interests of parties involved in this case." *See* 王小乔 (Wang Xiaoqiao) & 张涛 (Zhang Tao), 宋庄案还在开庭 [*Song Zhuang Case is on Trial*], 南方周末网 [INFZM.COM], July 2, 2011, http://www.infzm.com/content/7494 (last visited July 2, 2011).

IV. Freedom of Contract Under the Institutional Framework

To better gauge the extent of private freedom in real estate transactions in rural China, we might as well review the designed system of real estate transactions in rural China from a macro-perspective in addition to reviewing individual cases. Freedom of contract includes three basic requirements: freedom to contract, no restriction on the content of contract, and no form of contract requirement, of which the first two elements have substantial meaning. The followings are observations of the three elements.

A. Freedom to Contract

Freedom to contract means parties' freedom to decide whether to enter into a contract and with whom they sign a contract.

Freedom to determine whether to enter into contract would be analyzed first. Article 155 of The Property Law of the PRC states that, the Registry should timely record any transfer of the registered homestead land use rights. This regulation seems to affirm the possibility of transferring homestead land use rights. Meanwhile, article 153 stipulates that "such laws as The Land Administration Law and the relevant state regulations shall be applicable to the obtaining, exercising and transferring of homestead land use rights." According to paragraphs 1 and 3 of article 62 of The Land Administration Law, rural residents could obtain homestead land use rights by way of administrative examination and approval. In addition, "a household can only own one piece of homestead, namely, land for building house, with the area not exceeding the standards provided by provinces, autonomous regions and municipalities." Although this regulation is for homestead, it has an effect on houses built on homestead because of the principle of integration. Therefore, there is only a slim chance for rural residents to purchase homestead and houses built on it. According to paragraph 4 of article 62, rural residents are not allowed to sell their homestead and houses. As a result, rural residents have no freedom in determining whether to enter into contract selling their own houses if The Land Administration Law is not amended.

Without a freedom to determine whether to enter into a contract, individuals have absolutely no freedom in choosing the con-

tracting parties. During the enactment of The Property Law, attempts to loosen control ended up in drafts in the opposite direction.

The first drafts of The Property Law paid due respect to homestead land users' freedom of contract. Article 169 of the first draft in December, 2002 and article 163 of the second draft in October, 2004 similarly provided that "it's forbidden to transfer homestead land use rights alone unless the house built on this homestead would be transferred together." This means as long as the principle of integration was not trampled, individuals generally enjoyed freedom in contracting. Nevertheless, to appeal to the spirits that the State Council reinforces management of rural land and forbids urban residents to purchase homestead, parties' freedom of choice has been sharply limited since the third draft in June, 2005.[9] Paragraph 1 of article 162 stipulates that:

> With the consent of the community, people having homestead land use rights can transfer their houses to farmers who are in the same community and are up to the requirements for the allocation of homestead land use right; houses are transferred along with all the homestead land use rights. Urban residents are forbidden to purchase homestead in the rural area.

According to paragraph 2 of article 162, "farmers transferring homestead land use rights according to the preceding regulation shall not apply for homestead again." Not only urban residents are excluded from purchasing, but also rural residents who have the right to purchase must be in the same community and meet the requirements for the allocation of homestead land use rights. Article 162 of the fourth draft in October, 2005, article 156 of the fifth draft in August, 2006, and article 154 of the sixth draft in October, 2006 are in accordance with the above regulations. The subsequent amendments further tightened land control. All the above regulations were deleted in the seventh draft in December, 2006. Inserted was article 153 which stipulates that "the transferring of homestead land use rights applies to The Land Administration Law and other laws and relevant provisions" to uphold "current national laws and policies on rural land."[10] Since then, land control policies, which

[9] 全国人大法律委员会（Commission of Legislative Affairs of the National People's Congress), *supra* note 5, at 26.

[10] 全国人民代表大会常务委员会 (The Standing Commitee of the National People's Congres), 关于《中华人民共和国物权法（草案）》的说明 (2007 年 3 月

originally had the possibility of being loosened up, were tightened up, gap closed, and hurled back to the "most stringent" regulation era.

B. No Restriction on the Content of Contract

This element suggests that parties could freely decide the content of their contracts. It is generally based on the premise of freedom to contract, whereas the freedom to contract itself is meaningless without the freedom to decide the content. To some extent, the reason that rural house owners nearly have no freedom to contract is closely related to the fact that they have no freedom to decide the content of contracts.

The Court invalidated the Sales of Houses Agreement in the *Ma Haitao v. Li Yulan* case based on two premises: principle of integration and rural collective land ownership. This means sales of rural houses contracts would certainly affect homestead, therefore be regulated under regulations and policies on homestead.

Individuals can own land under a system of private ownership; all lands are owned by the state under a system of public ownership. Under China's legislation, land can never be privately owned, but the buildings on land can be privately owned as separate properties. As a result, law of land has no need to be the same as law of buildings, which is reflected in article 25 sentence 2 and article 24 sentence 2 of The Interim Regulations on Transfer of Urban State-owned Land Use Rights. Nevertheless, the above two regulations are merely exceptions to the rule, which is set forth in article 23: "when the land use right is transferred, the ownership of the above-ground buildings and other attached objects are accordingly transferred." Article 24 sentence 2 also states "when land users transfer the ownership of the above-ground buildings and other attached objects, the land use right within the scope of use is transferred together . . . ."

The subsequent legislation has observed the principle of integration. Even the two provisions in exceptions in The Interim

8 日十届全国人大第五次会议) [*Interpretation on Property Law of the People's Republic of China (Draft) (The 5th Meeting of the Standing Committee of the Tenth National People's Congress on Mar. 8, 2007)*], *in* 物权法立法背景与观点全集 [THE PROPERTY LAW LEGISLATION BACKGROUND AND VIEWS COLLECTED], at 73 (Law Press·China, 2007).

Regulations on Transfer of Urban State-owned Land Use Right somehow disappeared. Article 32 of The Urban Real Estate Administration Law of the PRC states that "when a real estate is transferred or mortgaged, the ownership of the building and the right to use the land occupied by the building are transferred or mortgaged at the same time." Article 146 of The Property Law stipulates that "when the right to use construction land is transferred, exchanged, or donated, buildings, structures, and their ancillary facilities attached to the land are handled together." Article 147 provides that "when buildings, structures, and attached facilities are transferred, exchanged, or donated, the buildings, structures and attached facilities together with the right to use construction land within the area are handled together."

Obviously, what the principle of integration means is that the ownership of the building and the right of land use are interdependent, as opposed to two ownership rights. Under the framework of public land ownership, usufructuary rights on land play a role equivalent to private ownership, thus providing for a legislative solution to the inconveniences created by ideological conflicts. But this solution in preservation of public land ownership was created at the expense of freedom of contract. Its adverse effects are especially outstanding in rural land. Although the above mentioned legislative principle of integration is set for state-owned land, it is universally accepted that rural collective land ownership is also subject to this principle. Indeed, it is much more restricted compared with that of state-owned land. An obvious phenomenon is that if one is to obtain collective land usufructuary rights, such as rural homestead land use rights, that party must have acquired the corresponding collective membership, namely he ought to be approved by authorities. Even in the same community, secret dealings are not allowed, let alone outside the community. Both courts' judgments follow the same logic in dispute over sales of houses in the Artist Village. Under this premise, rural residents have access to house ownership in "law," but they cannot dispose of it for principle of integration. Ergo, "ownership" is simply a meaningless and comforting concept.

V. Conclusion and Reflections

Although the dispute over sales of houses in the Artist Village is merely an individual case, it reflects the tension between

personal freedom and national regulation in a general sense. In order to defend public land ownership, China implemented the strictest and the most well knit regulatory regime from the legislative, the executive, to the judiciary. Thus, individuals are almost being deprived of freedom of contract within this area.

Regulations not only sabotage the ideal of freedom of contract, but also impose much more far-reaching influences that may not be directly reflected in legal outcomes. Any regulation leads to costs, not merely costs for implementing these regulations. The case at hand at least demonstrated two additional external effects.

First of all, stringent regulations not only invalidate contract but also slow down the overall accumulation of wealth. After disputes over sales of houses in the Artist Village, according to Cao Wei, director of the Association for the Advancement of Songzhuang Art, "[T]he annual per capital income of Songzhuang has increased from 300 yuan to 12,000 yuan in the past decade. The greatest contribution to the economy is owed to the influx of painters to the village." Survey data show that annual per capital income of Songzhuang was just 300 yuan to 400 yuan more than a decade ago, but nowadays, with the most artists gathering here, rental income of this small village alone reached 7.5 million yuan in 2006, accounting for nearly half of all villagers' incomes. Moreover, investment into the cultural industry in Songzhuang Town hit 320 million yuan that year, and annual profit tax reached up to 350 million yuan.[11] The arrival of the painters brought positive results to Songzhuang Town, local villagers, painters themselves, and the state. It is conceivable that if the painters were forced to move out because of the invalid house sales, these positive effects would abate and even vanish. For this reason, after the occurrence of this incident, on the one hand, the Songzhuang Town government negotiated with courts to ensure of "no house returning";[12] on the other hand, Songzhuang was prepared to take measures to retain the painters before the case was concluded, such as renovating certain old plants to ensure that even if the judgment went against their favor, painters could use these old plants as their studios. What's

[11] 王小乔 (Wang Xiaoqiao) & 张涛 (Zhang Tao), *supra* note 8.

[12] 成功 (Cheng Gong) & 徐国允 (Xu Guoyun), 画家村农民诉讼索房 [*Dispute over Sales of Houses in the Artist Village*], 南方周末网 [INFZM.COM], Apr. 4, 2008, http://www.infzm.com/content/5715 (last visited Feb. 15, 2008).

more,[13] after Li Yulan returned the house, Xiao Bao Villagers' Committee provided free studio for him for one year as compensation.[14] It is clear that invalidating a contract may lead to seriously negative effects dispelled by other stakeholders outside the parties; but the irreducible thing is the invalid judgment. Except that the seller benefits from his misconduct, the buyer, the village collective, and the country all suffer a lot. Rural land regulations are designed to safeguard the interests of farmers,[15] but the implementation of them reaches contrary results. Even farmers often have to seek interests outside the law because of this policy.[16] Then, a hard question is whose interests statutory rules or judicial adjudications are going after.

Second, stringent regulations provide for a legitimate excuse for moral hazard on the grounds of "abiding by the law." Because "many villagers want their houses back through litigation to make more profits,"[17] they are motivated by maximizing interests to follow suit. The villagers "with lopsided psychology" who "wanted to make profits for a second time"[18] forgo their fundamental integrity and honesty. The court would actually announce such actions lawful. The logic behind such case is confusing. Ironically, the party suing to invalidate a contract would then again blame the other party for seeking monetary damages. They accuse the buyers of being morally despicable, "putting their own self-interest above national law and policy," and "entering into a contract to secure high compensation after rescinding the contract, which speaks to a despicable personality."[19] The basic principle that no one can benefit from their own misconduct was already accepted in the Roman law era. It has also been the basic requirement of integrity in legal conducts since the ancient time. If statutes and judicial decisions

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[13] 王小乔 (Wang Xiaoqiao) & 张涛 (Zhang Tao), *supra* note 8.

[14] Material source: http://www.hjcun.com/html/200908/15/005430836.htm.

[15] 全国人民代表大会常务委员会 (The Standing Commitee of the National People's Congress), *supra* note 10.

[16] The fact that Li Yulan loses this lawsuit makes Hu Jie who is secretary of the party committee of Songzhuang Town confused: why do rural residents have no rights to sell their houses but urban residents do? If they have no rights to sell their houses, how can they handle the old precarious houses? He sold his house to his neighbor several years ago. *See* 成功 (Cheng Gong) & 徐国允 (Xu Guoyun), *supra* note 12.

[17] *Id.*

[18] *Supra* note 8.

[19] *Id.*

are to support morally hazardous behaviors, how to justify their legitimacy? How to maintain the so-called legal authority? When the law is no longer worth believing in, people tend to believe that there is no better way than to take as many opportunistic measures as possible to maintain their own interests. Moral decline is sometimes a reflection not on morality but on an existing system as a whole.

The Study on the Transplantation of Controlling Shareholders' Fiduciary Duty from U.S. to China

*Sun Hui**

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I. INTRODUCTION

Started with the "Berle-Means" thesis,[1] the attention of both the theoretical and practical field is paid on the construction of the board of directors' system. Nonetheless, LLSV proved through their convincing empirical study that only a handful of countries in which the shareholder's right is well protected have the dispersed equity structure, while the equity structure is concentrated around the world.[2] Under such concentrated holdings structure, corporate governance is not only the problem of agency relationship between shareholder and internal manager, but also about the balance of power between the majority and the minority shareholder. According to the traditional theory of corporate law, shareholders do not assume any other liabilities except the duty of capital contribution. However, as a legal entity, a company cannot directly declare its will just like the natural person and the realization of its decision can only be implemented through its members' declaration of will. The modern corporate law applies democratic decision-making mechanisms to corporate governance and the capital majority rule is the way through which a company unifies its will. That is to say, the system regards the will of the majority shareholders as the implied will of the company binding on all shareholders.[3] Inevitably, the will of the majority shareholders does not necessarily reflect the interests of the company and other shareholders.[4] So when there is in lack of effective mechanisms to balance the rights and power between the controlling shareholders and other stakeholders, many cases emerge in which the controlling shareholders abuse their controlling power to make excess personal profits and then shift the adverse consequences to the minority shareholders. Judicial practices in almost all countries notice the fact that the

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[1] *See generally* Adolf A. Berle & Gardiner C. Means, The Modern Corporation and Private Property (1932).

[2] Rafael La Porta, Florencio López-De-Silanes & Andrei Shleifer, *Corporate Ownership Around the World*, 54 J. FIN. 471, 512 (1999).

[3] *See* Foss v. Harbottle, (1843) 67 Eng. Rep. 189 (Ch.) (establishing the "majority rule principle," which ruled that if a decision or an action is confirmed or ratified by the simple majority shareholders, the court would not interfere with corporate behaviors).

[4] 朱慈蕴 (Zhu Ciyun), 资本多数决原则与控制股东的诚信义务 [*The Capital Majority Rule and Controlling Shareholders' Fiduciary Duty*], 法学研究 [CHINESE J.L.], issue 4, at 110 (2004).

exercise of the controlling power will inevitably lead to conflicts of interests between shareholders.[5] Therefore, establishing a restrictive mechanism which protects the rights of the controlling shareholders has become an important research topic in the field of company law.

Due to the unique historical background, in most stock companies in China, especially public companies, there is the phenomenon of "one shareholder dominance."[6] Originally, excessive concentration of shares is apt to cause the abuse of power. What makes the situation worse in China is the imperfection of the mechanism protecting minority shareholders in the securities market. As a result, the cases happen all the time in which the controlling shareholders "tunneling" company property,[7] unfair self-dealing,[8] interfering in the company management[9] and other behaviors violating the benefits of the company and minority shareholders. Chinese scholars think that the lack of controlling shareholder's fiduciary duty in Chinese Company Law is an important reason leading to controlling shareholder's abuse of their controlling power in stock companies.[10] Therefore, many researches in company law suggest that we should bring in the controlling shareholder's fiduciary duty[11] in Chinese Company

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[5] 徐晓松 (Xu Xiaosong) & 徐东 (Xu Dong), 我国《公司法》中信义义务的制度缺陷 [*Institutional Defects of Fiduciary Duty in Company Law of the People's Republic of China*], 天津师范大学学报 [J. TIANJIN NORMAL U.], issue 1, at 52 (2015).

[6] 王保树 (Wang Baoshu) & 杨继 (Yang Ji), 论股份公司控制股东的义务与责任 [*Studies on Controlling Shareholders' Fiduciary Duty in Listed Companies*], 法学 [L. SCI.], issue 2, at 60 (2002).

[7] 干胜道 (Gan Shengdao), 自由现金流量专题研究 [Monographic Study on Free Cash Flow], at 120 (2009). The book discussed the top 10 controlling shareholder tunneling cases of China in 2005.

[8] 周慧君诉嘉兴市大都市置业有限公司、嘉兴大都市实业集团有限公司盈余分配权纠纷案 [Zhou Huijun v. Dadushi Properties Development Co., Ltd. in Jiaxing City and Dadushi Industry Group Co., Ltd. in Jiaxing] (2005) 浙民二终字第 288 号, (Zhejiang High People's Ct. 2006) CLI.C.179684 Chinalawinfo.

[9] 罗珉 (Luo Min), 猴王集团破产案的启示 [*The Lesson from the bankruptcy case of Monkey King Group*], 人民日报 [PEOPLE'S DAILY], Apr. 13, 2001, at 5.

[10] 徐晓松 (Xu Xiaosong) & 徐东 (Xu Dong), *supra* note 5, at 54.

[11] United States firstly put forward to the notion of fiduciary duty and has exerted a worldwide influence. However, the statute laws and case laws of all states strictly distinguish their governing mechanisms according to different business entities. In the area of close company, state corporation law and case law provides three main relief approaches: controlling shareholder's fiduciary duty, shareholder's oppression system and contractual system between shareholders. In the field of public company, minority shareholders usually passively participate in the corporate governance and the protec-

Law. Controlling shareholder's fiduciary duty is an important concept in American company law. The rule was established by the court with a strong character of openness, which makes it quite difficult to bring in the concept. Whether it is feasible or not should be based on a fully understanding of not only the rule itself but also the reality of China. Although there are plenty of research results relating to the topic in China, it still lacks a systemic introduction on the controlling shareholder's fiduciary duty of the United States. Therefore, a systematic introduction on the American fiduciary duty rule is of great significance in defining our own regulation system toward the controlling shareholders.

By investigating the American fiduciary duty system of controlling shareholder and analyzing the possibility of bringing in the system to China, this paper argues that: the controlling shareholder's fiduciary duty rule, which was established by American courts, is a strongly opening concept. It is still unclear in its content and is narrow in its application. Actually, in the United States, the specific rules relating to the principle diverge seriously among the various states[12] and its rationality is still a controversial topic in its academic field.[13] In addition, the legal system for the regulation of controlling shareholder's abusing their controlling power is complicated and systematic. The effective implementation of the controlling shareholder's fiduciary duty system needs cooperation with and supplement of other related regulations.[14] In the absence of such supporting regulations in China, just introducing the principle in the corresponding regulations is difficult to achieve the same aim as it has in the United States. Without sufficient demonstration and practice,

tion of the public markets. In practice, except in the case of related party transactions, the public company's shareholder bears no obligation to other shareholders.

Although the Chinese scholars did not explicitly point out the specific rules of the controlling shareholders' fiduciary duty in American, the scholars rarely discuss this issue in the context of American public company regulations. Instead, many Chinese scholars mentioned the rule of Donahue case in their current Chinese law researches, which is one of the leading rules in the controlling shareholders' fiduciary duty in close company. This article is a reflection and criticism to these researches, therefore, the author would discuss the preferred rule, controlling shareholders' fiduciary duty in close company, and try to provide an appropriate path and thought for developing the regulation of the controlling shareholders of public companies in China.

[12] This opinion would be discussed in details in Part IV.

[13] This opinion would be discussed in Part V.B

[14] This opinion would be discussed in Part III.

Chinese scholars suggest modifying the company law to make the controlling shareholder's fiduciary duty become a basic principle of corporate governance in our country. It is a suggestion that will certainly shock the existing shareholder system. In fact, legislators and scholars in China cannot reach a consensus on specific rules of the transplantation of controlling shareholder's fiduciary duty.[15] Therefore, this paper argues that it is not suitable for China to bring in the American controlling shareholder's fiduciary duty to Chinese Company Law. However, we can learn from the idea and spirit behind it to enhance the protection of minority shareholders and find solutions from the current company law system.

Part II introduces the basic principles for regulating the controlling shareholder's abuse of their power in Chinese Company Law and the current situation and problems of the research on the controlling shareholder's fiduciary duty among Chinese law scholars. Part III introduces the facts that controlling shareholder's fiduciary duty functions with other rules. Instead, the controlling shareholder's fiduciary duty system, the shareholder oppression system and the shareholder contract system constitute together the legal frame to regulate controlling shareholder's abuse of their controlling power in United States' close company; Part IV introduces the specific application of the American controlling shareholder's fiduciary duty in close companies, and Part V analyzes the feasibility of bringing in the rule to China. Part VI is the conclusion of this paper.

II. CURRENT SITUATION OF REGULATIONS OF CONTROLLING SHAREHOLDERS IN CHINA

A. The Principle of Controlling Shareholder's Duty in Chinese Company Law

In Chinese modern history, the social and economic system has changed frequently. It changed from the feudalism of Qing Dynasty to capitalism of Republic of China, from socialism planned economy of the early stages of the People's Republic of China ("PRC") to the socialist market economic system after the

[15] This opinion would be discussed in Part II.

Chinese economic reform. Although congresses and governments in different periods had issued laws and regulations to regulate controlling shareholders' power, these laws and regulations could not play their role effectively due to the unitability of society. In 1993, PRC established its first Company Law. Thus, China restored the joint-stock company system, laying the foundation for the reform of state-owned enterprises. It greatly promoted the transformation and development of state-owned enterprises. At the same time, the recovery of company system also laid the basis for the rapid development of private enterprises. In the process of rapid economic development in China, especially in the late 1990s, the infringement of controlling shareholders on the interests of the company became increasingly serious, and shocking corporate scandals emerged frequently. In addition, in recent years, in the process of the reform of state-owned enterprises, the shares of state-owned enterprises mainly are state-holding non-tradable shares. It makes controlling shareholders remain unchanged and difficult to be contained by the market. Moreover, private enterprises generally use public subsidiary in financing. Therefore, in many stock companies in China, especially public companies, there is the phenomenon of "one shareholder dominance."[16] Generally, the excessive concentration of shares is easy to cause the abuse of power. What makes the situation worse in China is the imperfection of minority shareholders protection mechanism in the securities market. As a result, cases happen all the time in which the controlling shareholders "tunneling" company property, unfairly self-dealing, interfering with the company management and violating the benefits of the company and minority shareholders in other ways.

Under such situation, China made large-scale revisions on the Company Law in 2005. In order to regulate the controlling shareholders' misbehavior, the new version specially added the rule of "pierce the corporate veil" (article 20.3), forbad misusage of power principle (article 20.1), added the responsibility to compensate damages for shareholders' abuse of right (article 20.2), added directors' duty of loyalty and diligence (article 147), and allowed shareholder derivation action (article 153).

[16] 王保树 (Wang Baoshu) & 杨继 (Yang Ji), *supra* note 6.

Article 20(1) of Chinese Company Law is the general rule of shareholder's duty, which provides:

> The shareholders of a company shall abide by the laws, administrative regulations and bylaw and shall exercise the shareholder's rights under the law. None of them may injure any of the interests of the company or of other shareholders by abusing the shareholder's rights, or injure the interests of any creditor of the company by abusing the independent status of legal person or the shareholder's limited liabilities.[17]

Some scholars argue that this Article is the general rule of controlling shareholder's duty in Chinese law.[18] However, through a quick look at the content of this Article, it is easily discovered that this rule targets at all the shareholders of a company, not only the controlling shareholders. It does not stipulate any special rules for controlling shareholders based on their special status or enumerate any concrete standards for deciding whether the obligation is breached.[19] Neither can shareholder's fiduciary duty to other shareholders be explained nor be deduced from this rule. In addition, the prohibition on abuse of rights is a general obligation deriving from the doctrine of good faith and only requires people not to infringe on others' rights without justification when exercising their own rights. Unlike US law that requires fiduciaries to act for the benefit of beneficiaries, requirements of prohibition on abuse of rights in Chinese law are much looser. Actually, Chinese Company Law has not set forth any clear rules regulating controlling shareholder's duties and responsibilities.

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[17] 公司法 [Company Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Dec. 28, 2013, effective Jan. 1, 2006) art. 20.1, CLI.1.218774 Chinalawinfo.

[18] 范世乾 (Fan Shiqian), 控制股东滥用控制权行为的法律规制：中国公司法相关制度的构建 [Legal Regimes Regarding Controlling Shareholders' Liability: Construction of Chinese Corporation Law], at 23 (2010).

[19] 苏今 (Su Jin), 公司法第二十条第一款不能作为独立判案依据 [*Paragraph 1 of article 20 of Company Law Could Not Be Treated as An Independent Legal Ground of Judgment*], 人民法院报 [PEOPLE'S CT. DAILY], July 23, 2014, at 7.

B. Academic Achievements on Controlling Shareholder's Fiduciary Duty

Currently in China, there are plenty of research achievements focusing on controlling shareholder's fiduciary duty system. Considering the opinions of national scholars, in Chinese academia, main consensus on controlling shareholder's fiduciary duty system can be summarized as four points: (1) controlling shareholder's fiduciary duty should be introduced to China;[20] (2) shareholders in all types of companies should be bound by fiduciary duty, especially controlling shareholders in public companies;[21] (3) controlling shareholder's fiduciary duty includes duty of loyalty and duty of care;[22] (4) regulations on corporation groups such as parent companies and their subsidiaries should

[20] *See generally* 殷召良 (Yin Shaoliang), 公司控制权法律问题研究 [A Study on the Controlling Power in Corporations] (2001); 习龙生 (Xi Longsheng), 控制股东的义务和责任研究 [A Study on the Duties and Responsibilities of Controlling Shareholders] (2010); 汤欣 (Tang Xin), 控股股东法律规制比较研究 [A Comparative Study of Regulations on Controlling Shareholders] (2006); 王保树 (Wang Baoshu), 转型中的公司法的现代化 [Modernization of Chinese Company in the Period of Transformation] (2006); 张圣怀 (Zhang Shenghuai), 中国上市公司控制权法律问题研究：缺陷与改良 [A Study on the Controlling Power of Chinese Public Corporations: Defects and Modifications] (2007); 白慧林 (Bai Huilin), 控股公司控制权法律问题研究 [A Study on the Controlling Power of Parent Corporations] (2010); 王继远 (Wang Jiyuan), 控制股东对公司和股东的信义义务 [Research of Controlling Shareholders' Fiduciary Duties to Corporations and other Shareholders] (2010); 张民安 (Zhang Min'an), 公司少数股东的法律救济 [*Studies on The Legal Remedies to Minority Shareholders*], 法制与社会发展 [L. & SOC. DEV.], issue 3 (1995); 郭富青 (Guo Fuqing), 公司收购中目标公司控股股东的诚信义务探析 [*A Study of Target Company's Controlling Shareholders' Fiduciary Duty in Merger and Acquisition Cases*], 法律科学 [L. SCI.], issue 3 (2002); 朱慈蕴 (Zhu Ciyun), *supra* note 4; Xu Chenggang & Katharina Pistor, *Fiduciary Duty in Transitional Civil Law Jurisdictions: Lessons from the Incomplete Law Theory*, *in* GLOBAL MARKETS, DOMESTIC INSTITUTIONS: CORPORATE LAW AND GOVERNANCE IN A NEW ERA OF CROSS-BORDER DEALS 77 (Milhaupt & Curtis J. eds., 2003).

[21] For Public Corporations: 王保树 (Wang Baoshu) & 杨继 (Yang Ji), *supra* note 6; 汤欣 (Tang Xin), 控股股东的受信义务——从美国法上移植 [*Controlling Shareholders' Fiduciary Duty—Educed from the United States*], 清华法律学堂 [TSINGHUA L. NET], Sept. 8, 2012, *available at* http://academic.law.tsinghua.edu.cn/homepage/index.php?r=show/index&id=2435&cate_id=190%2C.

For Limited Liability Corporations: 甘培忠 (Gan Peizhong), 有限责任公司小股东利益保护的法学思考——从诉讼视角考察 [*Minority Shareholders' Protection in Limited Liability Company—From the Perspective of Litigation*], 法商研究 [STUD. L. & BUS.], issue 6 (2002).

[22] 王保树 (Wang Baoshu) & 杨继 (Yang Ji), *supra* note 6, at 63; 王继远 (Wang Jiyuan), *supra* note 20.

learn from the German Konzern system.[23]

Additionally, many scholars have conducted research on introducing the framework of controlling shareholder's fiduciary duty. However, they are still in dispute about which concrete rules should be introduced to China.

1. Jurisprudential Basis of Controlling Shareholder's Fiduciary Duty

Scholars in China have not reached an agreement about why controlling shareholders should bear more obligations than other shareholders. Among opinions, Professor Wang Baoshu holds that controlling shareholders of many stock companies play a dual role, both as the decision maker and as the executive officer, who enjoy far more rights than ordinary shareholders.[24] Based on the principle that obligations correspond rights, special obligations should therefore be imposed on controlling shareholders to regulate certain behaviors. Professor Zhu Ciyun considers that due to aberrance of majority rule (decided by capital), controlling shareholders get super power and may abuse this power for their own interest, which will destroy the equality of shareholders.[25] This provides the basis for controlling shareholder's fiduciary duty owed to minority shareholders. Professor He Meihuan believes that control brings obligation and holding more voting rights does not necessarily entail risk unless holders actually control the company.[26] Doctor Xi Longsheng reckons that explicit or implied agency relationship between subject of controlling power and related interested parties are the premise and foundation of former's fiduciary duty.[27]

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[23] 王保树 (Wang Baoshu) & 杨继 (Yang Ji), *supra* note 6, at 63; 汤欣 (Tang Xin), *supra* note 20, at 249.

[24] 王保树 (Wang Baoshu) & 杨继 (Yang Ji), *supra* note 6, at 61.

[25] 朱慈蕴 (Zhu Ciyun), *supra* note 4, at 109–11.

[26] 何美欢 (He Meihuan), 公众公司及其股权证券 [Public Corporations And Their Securities], at 823 (1999).

[27] 习龙生 (Xi Longsheng), *supra* note 20, at 94.

2. Who Owe Whom Fiduciary Duty

Scholars in China have disagreed on the subjects of fiduciary duty.

With respect of the scope of controlling shareholders, expression used in Chinese Company Law is share-controlled shareholders.[28] This is to emphasize that by means of holding shares; shareholders can influence decisions of shareholder meetings and then get the controlling power. In fact, besides shares, controlling shareholders can also achieve to control companies through other methods, for example controlling power agreements. Compared with current law, almost all the scholars in China unanimously agree to expand the existing scope of controlling shareholders and focus on shareholder's controlling power to companies. They consider people to be controlling shareholders as long as they are able to get and exercise actual controlling power to business affairs.[29] Additionally, other scholars argue that on the grounds of current legislation and judicial practice needs, fiduciary duty aims at controlling power and its abuse problem, and its obligator should point at subject of controlling power. Therefore, subject of fiduciary duty could include controlling shareholders, controlling operators and actual controllers.[30]

Scholars are also in disagreement about whether minority

[28] "A controlling shareholder refers to a shareholder whose capital contribution occupies 50% or more in the total capital of a limited liability company or a shareholder whose stocks occupies more than 50% of the total equity stocks of a joint stock limited company or a shareholder whose capital contribution or proportion of stock is less than 50% but who enjoys a voting right according to its capital contribution or the stocks it holds is large enough to impose an big impact upon the resolution of the shareholders' meeting or the shareholders' assembly." 公司法 [Company Law] (promulgated by the Nat'l People's Cong., Dec. 28, 2013, effective Mar. 1, 2014) art. 216.2, CLI.1.218774 Chinalawinfo.

[29] 赵晓华 (Zhao Xiaohua) & 赵宝奇 (Zhao Baoqi), 控制股东:公司法框架下的责任重构 [*Controlling Shareholder: Obligation under Corporation Law*], 河北法学 [HEBEI L. SCI.], issue 5, at 101–02 (2004); 王保树 (Wang Baoshu) & 杨继 (Yang Ji), *supra* note 6, at 60; 范世乾 (Fan Shiqian), *supra* note 18, at 28.

[30] 傅穹 (Fu Qiong) & 王志鹏 (Wang Zhipeng), 公司控制权滥用规制的法理基础与司法判断 [*The Legal Basis and Judicial Judgment of Controlling Shareholder's Abuse of Power*], 社会科学战线 [SOC. SCI. FRONT], issue 5, at 190 (2011); "Actual controller refers to anyone who is not a shareholder but is able to hold actual control of the acts of the company by means of investment relations, agreements or any other arrangements." 公司法 [Company Law] (promulgated by the Nat'l People's Cong., Dec. 28, 2013, effective Mar. 1, 2014) art. 216.3, CLI.1.218774 Chinalawinfo.

shareholders should owe fiduciary duty to corporation and other shareholders. To those holding only controlling shareholders have fiduciary duty, their argument is that fiduciary duty derives from the controlling position so only subject of controlling power should bear fiduciary duty.[31] By contrary, other scholars believe that even minority shareholders should bear fiduciary duty. Because good faith doctrine applies to all civil and business activities, all the shareholders should not act to harm other shareholders—this requirement is for not only controlling shareholders, but ordinary minority shareholders as well.[32]

As for object of shareholder's fiduciary duty, scholars in China generally consider that controlling shareholders should bear fiduciary duty as to companies and other shareholders. Because controlling shareholders are actual executive officers and operators, they should be bound by certain obligations when enjoying the managing power.[33] As for minority shareholders, they are the main source of companies' capital.[34] But when they trust controlling shareholders and invest their capital, their interest is always at risk during the company operation. However, some scholars claim to expand the application of fiduciary duty and believe that all the interested parties could be regarded as object of fiduciary duty in theory as long as they may have reasonable reliance on subject of controlling power, such as other shareholders, creditors and employees.[35]

3. Contents of Controlling Shareholder's Fiduciary Duty

Scholars in China thought the shareholder's fiduciary duty including both duty of loyalty and duty of care.[36] The more influential shareholders/directors are to companies, the more obligations should they undertake. However, some scholars believe that it will impose too strict obligations on controlling

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[31] 傅穹 (Fu Qiong) & 王志鹏 (Wang Zhipeng), *supra note 30*, at 191.
[32] 王保树 (Wang Baoshu) & 杨继 (Yang Ji), *supra* note 6, at 62.
[33] *Id.* at 61.
[34] 傅穹 (Fu Qiong) & 王志鹏 (Wang Zhipeng), *supra* note 30, at 191.
[35] 傅穹 (Fu Qiong) & 王志鹏 (Wang Zhipeng), *supra* note 30, at 192.
[36] 朱慈蕴 (Zhu Ciyun) & 郑博恩 (Zheng Boen), 论控制股东的义务 [*Studies of The Controlling Shareholder's Obligation*], 政治与法律 [POL. SCI. & L.], issue 2, at 15–16 (2002); 王保树 (Wang Baoshu) & 杨继 (Yang Ji), *supra* note 6, at 62; 傅穹 (Fu Qiong) & 王志鹏 (Wang Zhipeng), *supra* note 30, at 192.

shareholders if they are required to bear the same duty of loyalty and duty of care as directors for the benefit of the companies. To these scholars, controlling shareholder's fiduciary duty should be limited to abuse of controlling power and injury minority's rights.[37]

4. Judicial Judgment

In order to impose legal liability correspondingly on the controlling shareholders, rules about abuse of controlling power must be set up to decide whether the fiduciary duty of controlling shareholders is breached. Nowadays, rules adopted by different countries are divided mainly in two groups: one is subjective, including fraud, business judgment rule; the other one is objective, including due process rule and objective damage rule.[38]

In China, scholars have different views on this issue. Some insist that the business judgment rule, which is the rule for judging the breach of directors' fiduciary duty in US Law, should be taken as reference, when we consider how to judge the breach of fiduciary duty.[39] The business judgment rule means that controlling shareholders will not be imposed with legal liabilities, if they perform their duties for the interests of the whole company, or act in a manner, with their knowledge and experiences at that time, the directors reasonably believe to be in the best interests of the company, even though that manner causes damages to the company.[40] Some others recommend objective damage rule, because this rule mainly focuses on actual damages and liabilities, which is more objective and easier to practice.[41]

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[37] 邓小明 (Deng Xiaoming), 控制股东义务法律制度研究 [The Legal System of Controlling Shareholder's Obligation] 11 (April 2005) 清华大学博士论文 [(unpublished Ph.D. dissertation, Tsinghua University)].

[38] 冯果 (Feng Guo) & 艾传涛 (Ai Chuantao), 控制股东的诚信义务及民事责任制度研究 [*Studies on Controlling Shareholder's Fiduciary Duty and Liability*], 商事法论集 [COM. L. REV.], issue 6, at 83–86 (2002).

[39] 王保树 (Wang Baoshu) & 杨继 (Yang Ji), *supra* note 6, at 63.

[40] Krasner v. Moffett, 826 A.2d 277, 284–85 (Del. 2003); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984); Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34, 42 (Del. 1993); Lyman Johnson, *Rethinking Judicial Review of Director Care*, 24 DEL. J. CORP. L. 787, 791–92 (1999).

[41] 冯果 (Feng Guo) & 艾传涛 (Ai Chuantao), *supra* note 38, at 85.

C. Problems

Fiduciary duty of controlling shareholders is a rule rooted in US Law. When this rule is highly recommended, actively introduced into China, and detailed discussed, most scholars nonetheless ignore to basically learn this rule. In China today, there are still few study focusing on fiduciary duty of controlling shareholders in US Law. The introduction in many articles about this rule in US Law are rough, partial or even misleading.

First, the legal system of regulating controlling shareholder's abuse of controlling power in US is complicated and comprehensive. The effective execution of fiduciary duty needs other related rules as cooperation or supplement. In US Law, the system of rules regulating controlling shareholder's abuse of controlling power itself is quite complex and full of conflicts. Actually, the reasonableness of this system is still a question being disputed by many scholars in America. Scholars in China have mainly focused on the rule of fiduciary duty itself, while ignoring the study of other important related rules.

Moreover, Chinese scholars discuss the fiduciary duty of controlling shareholders in US Law as a whole. However, legal issues about corporation in America are regulated under state statutes. That is to say, every state has its own rule to regulate controlling shareholder's abuse of controlling powers, and there is no such a uniform rule. The current research on this field has not reached the details in state law level. Most scholars have only supposed the introducing of shareholder's fiduciary duty from US Law. They have not elaborated the detailed rules for transplanting. Some studies even mistakenly took the rule derived from a specific case in someone state law as the rule applied in all the states in US

Additionally, the rules of fiduciary duty of controlling shareholders in US Law are applied quite narrowly. Usually, only shareholders of close company are imposed with fiduciary duty. For shareholders of public company, the fiduciary duty will only be imposed under some specific circumstances. However, most scholars in China have ignored the different application of the rule between different types of companies. They even suggest that

the rule of fiduciary duty should be expressly written into Chinese Company Law as a general rule.[42] Even though some scholars realize that fiduciary duty of controlling shareholders is mainly applied to close companies, they still insist that fiduciary duty should also be applied to controlling shareholders in public companies.[43]

Finally, in terms of the regulation for controlling shareholders, especially for those in the public company, most of the Chinese scholars hold the attitude of "borrowlism" and mainly focus on the regulation on American and German, but ignore the rules in some Asian countries. Moreover, although the current Chinese company law is imperfect, it creates a system which involves many provisions of substantive law and procedural law. Most of the Chinese scholars have ignored to review the existing law in China.

III. THE STATUTORY FRAMEWORK FOR CONTROLLING SHAREHOLDER IN US

A. Introduction

Generally, state statues and common law in US treat shareholders in regular public corporation differently from those in close corporations.[44] In public companies, minority shareholders usually passively and powerlessly participate in the corporate governance[45] "without expectation of participation in corporate management or employment."[46] In addition, they can protect themselves from controlling shareholder's oppressive conducts and recover their investments by selling their shares in the active

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[42] 汤欣 (Tang Xin), *supra* note 21.

[43] 范世乾 (Fan Shiqian), *supra* note 18, at 5.

[44] Mary Siegel, *Fiduciary Duty Myths in Close Corporate Law*, 29 DEL. J. CORP. L. 377, 384 (2004); Robert C. Art, *Shareholder Rights and Remedies in Close Corporations: Oppression, Fiduciary Duties, and Reasonable Expectations*, 28 J. CORP. L. 371, 382 (2003).

[45] Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1267 (2008); Douglas K. Moll, *Shareholder Oppression in Texas Close Corporations: Majority Rule (Still) Isn't What It Used to Be*, 43-SPG TEX. J. BUS. L. 21, 24 (2009).

[46] Exadaktilos v. Cinnaminson Realty Co., 400 A.2d 554, 560 (N.J. Super. Ct. Law Div. 1979).

capital market.[47] By contrary, shareholders in closely held corporations typically intend to participate in the corporate operation and recover their investment by salaries or dividends.[48] Because of the lack of market protection, minority shareholders in close firms are more vulnerable than their counterparts in public corporations.[49] If the majority shareholder in a close corporation refuses to pay dividends and terminates minority shareholder's employment, the minority shareholder is "frozen-out" from the financial return on their investments and "locked-in" in the corporation.[50]

In order to provide minority shareholders with rights to relief from controlling shareholder's oppressed conduct, there are two core avenues in state statutes and common law.[51] First, some states include "oppression" in their dissolution statutes.[52] Second, for those states without "oppression-triggered dissolution statute,"[53] courts allow oppressed shareholders to challenge the improper majority control as a breach of fiduciary duty. However, courts also encourage shareholders to negotiate their rights and positions advanced by shareholder agreements.

B. Shareholder Oppression Statutes

In order to protect minority shareholders in close corporations from the abuse of control power by majority shareholders,[54] legislators in some states issue the shareholder oppression statutes, which treats shareholder oppression as one of the legal reasons for dissolution of the company. However, neither state statutes

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[47] Moll, *supra* note 45, at 24.

[48] *Id.* at 23.

[49] Robert A. Ragazzo, *Toward a Delaware Common Law of Closely Held Corporations*, 77 WASH. U. L. Q. 1099, 1100 (1999).

[50] Charles W. Murdock, *The Evolution of Effective Remedies for Minority Shareholders and Its Impact Upon Valuation of Minority Shares*, 65 NOTRE DAME L. REV. 425, 431 (1990).

[51] Moll, *supra* note 45, at 24; Siegel, *supra* note 44, at 379–87; Art, *supra* note 44, at 25–26.

[52] Robert B. Thompson, *The Shareholder's Cause of Action for Oppression*, 48 BUS. LAW. 699, 709 (1993); Douglas Moll, *Shareholder Oppression and Reasonable Expectations: Of Change, Gifts, Inheritances in Close Corporation Disputes*, 86 MINN. L. REV. 717, 729 (2002).

[53] Moll, *supra* note 52, at 728.

[54] Art, *supra* note 44, at 372.

nor Model Business Corporation Act clearly defines what behavior constitutes oppressive conducts. Generally, oppression means a "harsh, dishonest, or wrongful conduct, a visible departure from the standards of fair dealing."[55] Whether there are oppression conducts is decided by a case-by-case analysis.[56]

There are three judicial interpretations of the meaning of shareholder oppression, which sometimes are used in parallel or combined.[57] First, some states explain the shareholder oppression in general and vague ways. To be more specific, courts usually rephrase the term of "oppression" as wrongful conducts, rather than provide a clear definition.[58] Second, instead of providing a definition of oppression, courts link the judicially invented shareholder fiduciary duty to shareholder oppression. Oppressive conduct is found by courts when the majority shareholders breach their fiduciary duty owed to the minorities.[59] Third, some states interpret oppression as a violation of those minority shareholder's reasonable expectation. It is an interpretation that to some extent differentiates from the view which pays attention to those controlling shareholder's wrongdoing.[60]

Traditionally, courts would offer company dissolution as the remedy for shareholder oppression claim. Due to the dissolution is drastic to corporations, courts are more likely to provide harmless remedies, like receivers, buyouts and dividend orders.[61]

C. Shareholder's Fiduciary Duty

Additionally, some states, without shareholder oppression statutes, leave the issues to the fiduciary duty analysis in common law.[62]

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[55] *Id*. at 377.

[56] Thompson, *supra* note 52, at 711.

[57] Art, *supra* note 44, at 376.

[58] *Id*. at 377.

[59] *See* Cooke v. Fresh Express Foods Corp., 7 P.3d 717, 721 (Or. Ct. App. 2000); *see also* Baker v. Commercial Body Builders, Inc., 507 P.2d 387, 394 (Or. 1973).

[60] Art, *supra* note 44, at 376.

[61] George Parker Young, Vincent P. Circelli & Kelli L. Walter, *Fiduciary Duties and Minority Shareholder Oppression from the Defense Perspective: Differing Approaches in Texas, Delaware, and Nevada*, 45-Fall TEX. J. BUS. L. 257, 320 (2013).

[62] Siegel, *supra* note 44, at 386.

For those states without oppression statute, courts allow oppressed shareholders to challenge the improper majority control as a breach of fiduciary duty. Initially, shareholders of a company owe no duty to other shareholders. Traditionally, American corporate statutes generally recognize that directors owe fiduciary duty to the entity, including duty of care and duty of loyalty, while shareholders are typically not liable to others. However, "shareholder democracy" is one of the most significant trends of corporate governance.[63] As shareholders have enjoyed greater power than before, the controlling shareholders have been given new power to influence corporate transaction, decide share dividends, intervene the employee employment. Controlling shareholders play a director-like role in corporations, as well as, have the same risks as directors to act on behalf of other shareholders and damage corporations and other members by obtaining personal benefit. Moreover, courts found a striking resemblance between close corporations and partnerships. Like partnership, members in close corporations trust and depend on each other and contribute their "capital, skills, experience and labor" to the corporations, as well as, trust and loyalty between members are prerequisite of the close corporation to survive and develop.[64] Therefore, state legislatures and courts couple the more powerful controlling shareholders with greater shareholder responsibility, the fiduciary duty.

In 1919, the United States Supreme Court established and defined the fiduciary obligations between or among shareholders in the leading case, *Southern Pac. Co. v. Bogert*.[65] In this case, the plaintiff, Bogert and others, brought a breach of fiduciary duty action on behalf of minority shareholders of the Houston & Texas Central Railway Company because the defendant, as the controlling shareholder of Houston Company, participated in a reorganization agreement, prevented the minority shareholders from any participation the reorganized company and obtained the whole fruits of sale for itself.[66] In holding for minority share-

[63] Anabtawi & Stout, *supra* note 45, at 1255.

[64] *See* Kruger v. Gerth, 210 N.E.2d 355, 356 (N.Y. Ct. App. 1965); Ricci Consultants, Inc. v. Bournival, 87 Mass. App. Ct. 1132, 1133 (2015).

[65] Southern Pac. Co. v. Bogert, 250 U.S. 483 (1919).

[66] *Id*. at 486.

holders, the Supreme Court of United States reasoned that controlling shareholder's right of control is subject to the fiduciary duty.[67] This opinion is widely accepted by many following cases.

However, in order to avoid the expansion of the fiduciary obligation, only limited types of shareholders are bound by fiduciary duties in limited types of circumstances.[68] In practice, courts, especially Delaware courts, are more likely to find that only controlling shareholders are generally bound by fiduciary duty. Moreover, beyond the two-limited contexts of corporate "freeze-outs" and closely held companies, many scholars insist that shareholders owe no fiduciary duties.[69]

D. Shareholder Agreement

It is true that the oppression principles do respond to the problems that the fiduciary duty principles intend to resolve, and also provide another feasible method to protect the benefits of the minority shareholders. But the courts' decisions on fiduciary duty, together with oppression principles, mix the judicial approach with the legislative approach on this particular problem.[70] The freedom of contract makes it practicable to exclude the fiduciary duties from their relationship, but not just to impose restrictions on them. The courts of Delaware should apply the principle of the freedom of contract under Delaware entity statutes.[71]

Even courts usually use fiduciary duties to describe the relationship between or among shareholders; shareholder agreement provides another judicial protection of minority shareholders. Based on the assumption that reasonable investors would bargain all provisions at one arm's length before the investment,[72] many state statutes leave a "significant degree of contractual or

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[67] *Id*. at 487–88.

[68] Anabtawi & Stout, *supra* note 45, at 1266.

[69] David A. Hoffman, *The "Duty" to Be a Rational Shareholder*, 90 MINN. L. REV. 537, 537 (2006); Roberta S. Karmel, *Should a Duty to the Corporation Be Imposed on Institutional Investors?*, 60 BUS. LAW. 1, 2 (2004).

[70] Siegel, *supra* note 44, at 389–90.

[71] Symposium, *The Convergence of Fiduciary Duties in Unincorporated and Incorporated Entities: The Issue, Its Implications, Its Limitations*, 28 DEL. J. CORP. L. 999, 1012–13 (2003).

[72] Benjamin Means, *A Contractual Approach to Shareholder Oppression Law*, 79 FORDHAM L. REV. 1161, 1163 (2010).

organizational freedom"[73] to shareholders and allow them to sign a contract to modify the relationship between minority and majority shareholders, even the content of the agreement deviate from the standard model of governance.[74] In Delaware, for example, the statutes enable the shareholders in closed corporation to reshape their relationship by shareholder agreement.[75] In addition, Delaware courts have a clear tendency to enable the minority shareholders to bargain for protection and acquire a better position.

If a shareholder agreement is against public policy,[76] violate the statute of frauds or damage the interests of creditors, the contract is binding between the shareholders. However, the content of the agreement cannot infringe director's rights and direction of business judgment, even though it is a regular public company.[77]

E. Summary

These three methods offer minority shareholders different reliefs, which are not exclusive to each other, but mutually coexistent. In some jurisdictions, one approach even becomes the course of action of another approach. There are few examples to illustrate this point. In Texas, statutory and fiduciary duty analyses are dualistic coexisting. The courts allow minority shareholders to file a breach of fiduciary duty action against the controlling shareholder for oppressive conducts.[78] In some cases, the courts even allow the plaintiff claims for both breach of fiduciary duty and shareholder oppression.[79]

Furthermore, some commentators assert that shareholder agreements provide minority shareholders with a more justified judicial protection and would be the future development of

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[73] Thomas M. Madden, *Do Fiduciary Duties of Managers and Members of Limited Liability Companies Exist as with Majority Shareholders of Closely Held Corporations?*, 12 DUQ. BUS. L.J. 211, 219 (2010).

[74] Siegel, *supra* note 44, at 385; Art, *supra* note 44, at 410.

[75] Del. Code. Ann. tit. 8, §§ 354–355 (2000).

[76] *See generally* Ramos v. Estrada, 8 Cal. App. 4th 1070 (1992); Schimel v. Berkun, 264 A.D.2d 725 (N.Y. App. Div. 1999).

[77] Matter of Glekel (Gluck), 30 N.Y.2d 93, 97 (Ct. App. 1972).

[78] Moll, *supra* note 45, at 30.

[79] *Supra* note 61, at 287.

shareholder protection.[80] First, in terms of fiduciary duty doctrine, like Delaware, courts have a clear tendency to enable the minority shareholders to bargain for protection and acquire a better position,[81] which makes fiduciary duties easier to distinguish in practice. Some cases even find the contract dispositive in shareholder relationships.[82] Second, shareholder agreement doctrine offers a coherent explanation and increases the operability of shareholder oppression[83] because it is much easier for courts to find a written reasonable expectation of shareholders.[84]

Overall, in addition to controlling shareholder fiduciary duty, state statutes and common law offer shareholders other confluent protection pathways, which constantly develops and perfects the minority shareholder protection system in United States. It is impossible to distinguish which approach is better. Also, their predominant position is dynamic and varies from different states. Therefore, when we introduce fiduciary duty doctrine into China, we should see the whole forest rather than just a tree. Thus, we cannot ignore other related factors in the system.

IV. THE FIDUCIARY DUTY IN CLOSE CORPORATE LAW

The controlling shareholder's fiduciary duty was originated and mainly developed in the field of close corporation. By investigating the judicial practice of different states in United States, state courts widely acknowledge that controlling shareholder in close corporations owe fiduciary duty to minority shareholder.[85] However, there is not a clear and uniform interpretation for controlling shareholder's fiduciary duty in United States. Usually, commentators focus on the practices of two representative states: Delaware and Massachusetts.

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[80] *Supra* note 72, at 1161.

[81] Nixon v. Blackwell, 626 A.2d 1366, 1380 (Del. 1993).

[82] *See generally* Fox Fire Dev. Co. v. Hans, 618 A.2d 90 (Del. 1992); Riblet Products Corp. v. Nagy, 683 A.2d 37 (Del. 1996).

[83] Means, *supra* note 72, at 1199.

[84] *Id.* at 1199–203.

[85] *See generally* Morrison v. Gugle, 142 Ohio App. 3d 244 (10th Dist. 2001); McLaughlin v. Beeghly, 84 Ohio App. 3d 50 (10th Dist. 1992); Norman v. Elkin, 726 F. Supp. 2d 464 (D. Del. 2010); McMorrow v. Specht, 344 Wis. 2d 696 (App. Ct. 2012).

A. The Basic Rule: Partnership-Heightened Duties v. Corporate Monitors

In the field of company law, especially in public company areas, the Delaware law is crucial, leading the development of the company law of US. But in terms of the controlling shareholder fiduciary duty rules of close corporation, Delaware rule is not the majority. The majority rule, represented by Massachusetts, believes that shareholders in capacity of management are fiduciaries to each other. They are subjected to a heightened fiduciary duty, similar to the partnership-heightened duties. Some states follow the footstep of the Massachusetts.

In 1975, the Massachusetts Supreme Judicial Court established the landmark rule of shareholder's fiduciary duty in *Donahue v. Rodd Electrotype Co. of New England, Inc.*,[86] which stepped out of the traditional barriers and created the partnership-heightened duties of controlling shareholders. The Donahue rule is used even in today. The Massachusetts Supreme Judicial Court put forward the core opinion of the case, held that the shareholders in close corporations owe other shareholders partnership fiduciary duties for two reasons. First, the court found a striking resemblance between close corporations and partnerships for two reasons. A close corporation is usually a small firm, even smaller than an "incorporated or chartered partnership."[87] In reality, some close corporations are really partnerships that members are dependent on each other and contribute their "capital, skills, experience and labor."[88] Hence, the trust, confidence

[86] *See* Donahue v. Rodd Electrotype Co. of New England, Inc., 367 Mass. 578 (1975). In this case, Harry Rood was the majority shareholder of the corporation, who own of eighty percent of corporation's stock. The minority shareholder of the company, Joseph Donahue had the remaining twenty percent. Over time, Rood gave some his shares to his children. In 1970, the board of director of the corporation, mainly made up of Rodd and his children, decided and purchased his remaining shares. Euphemia Donahue, the widow of minority shareholder, demanded the corporation to purchase her shares on same conditions, but the corporation refused her demands. Therefore, Mrs. Donahue brought an action against the defendants for breach of the fiduciary duty. The Massachusetts Supreme Judicial Court reversed the opinions of the two lower courts and held that the majority shareholder and directors breached their fiduciary duties to minority shareholder by not offer an equal opportunity for the minority shareholder to resell her shares to corporation at the same conditions.

[87] *Id.* at 586.

[88] *Id.*

and loyalty are extremely important and essential to such enterprises.[89] Second, the minority shareholders in close corporations are inherently in a dangerous and disadvantage position.[90] The corporate form not only supplies limited liability and other advantages for shareholders, but also provides opportunities for controlling shareholder to employ a variety of "freeze-outs" conducts to other shareholders who are in disadvantage positions.[91] However, even minority shareholders' interest in a corporation would be their livelihoods, it is difficult for them to recoup their investments and change the controlling shareholder's misbehaviors. Because it is hard to prove and win litigation, there is no open market for their stocks and; they do not have enough authority to force a dissolution.[92] Therefore, the court ruled the shareholder is subject to a heightened fiduciary duty and should operate the corporation in a strict good faith standard—"utmost good faith and loyalty."[93] It is important to note that the court expand strict good faith standard to all the stockholders, including the minority shareholders.[94] Moreover, the court pointed out that fiduciary duty requires the company provide equal opportunities for all stockholders. Applying the rule, when the corporation had repurchased the controlling shareholder's shares or distributed the corporation assets, the minority shareholder should be provided the equal opportunity on the same term to access these benefits, unless all other shareholder advanced consent or ratify the purchase arrangement.[95]

However, the "utmost good faith and loyalty" standard has no intent to excessively interfere corporate behavior. The court tried to find a balance between shareholders' right of selfish ownership and their fiduciary duty. In 1976, the Massachusetts Supreme Judicial Court abandoned equal opportunity rule in *Wilkes v. Springside Nursing Home, Inc*.[96]

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[89] *Id*.
[90] *Id*. at 592–93.
[91] *Id*. at 588–89.
[92] *Id*. at 591–92.
[93] *Id*. at 593.
[94] *Id*. at 597.
[95] *Id*. at 598.
[96] *See* Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 663 (Mass. 1976). In this case, Wilkes was one of the four equal shareholders who participated in the

The Massachusetts Supreme Judicial Court followed the Donahue rule, but made another explanation of the standard of "utmost good faith and loyalty," because of considering the efficiency of the corporate decision-making.[97] It is necessary leave large rooms of discretion for majorities to establishing corporate policy. Additionally, the majority shareholders had the rights of "selfish ownership" which should balance against their fiduciary duties.[98] Therefore, the court ruled that a shareholder's conducts with a legitimate business purpose would not violate the fiduciary duty, unless the minorities prove the majority could use a less harmful approach to achieve the same goal.[99] Having the "rebuttable legitimate business purpose test" to be applied, the court then mentioned the issues of shareholder's expectation. The court rejected majorities' declaration of having dislike of Wilkes as a legitimate business purpose. By contrary, the court found Wilkes' expectation of employment, because he was one of the four founders of the nursing home business; he participated in corporate management and operation for fifteen years and looked forward to continue to involved in corporate decision-making; and he had no way to reclaim his investment expect the salary.[100] Based on this idea, majority's legitimate business purposes are irrelevant whenever minority shareholder are deprived something which has been bargained in advance.[101] The "rebuttable legitimate business purpose test" makes the Massachusetts approach much closer to the traditional corporate monitors, which require the fiduciaries consider the best interests of the company. However, I should note that this modification did not change the core nature of the partnership-like fiduciary duty.

However, not all sates have accepted the Massachusetts ap-

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corporate management as directors and gained corporate payment in Springside Nursing Home. After a dispute, other shareholders forced Wilkes out the corporate management and refused to pay any further salary, which was the principle return he got from his investment. The court reiterated its rule in Donahue case, that is, shareholders owe fiduciary duty to other members and, they should act at "utmost good faith and loyalty." Then, Wilkes filed a breach of fiduciary duty action to against the other three shareholders.

[97] *Id*. at 663.

[98] *Id*.

[99] *Id*.

[100] *Id*. at 664.

[101] Ragazzo, *supra* note 49, at 1106.

proach, which demands the shareholders owe partnership-like fiduciary duty to each other.[102] In fact, Delaware court tried to adopt the rule of Massachusetts' in the *Ueltzhoffer v. Fox*.[103] However, in *Nixon v. Blackwell*,[104] the Delaware Supreme court moved in the opposite direction. As in Donahue case, the Nixon judges faced similar facts that the company planned to selectively repurchase the shares owned be the employee shareholders by an Employee Stock Ownership Plan, except other non-employee shareholder. Unlike the Massachusetts Supreme Judicial Court analyzing Donahue case under partnership law and providing special rule in close company, the Delaware Supreme Court asserted that Delaware corporation law should not provide minority shareholders in close corporation a special protection.[105] Special judicially-created protection for the minorities is an inappropriate judicial legislation.[106]

Since the case involving corporation governance issue, the court decided to use corporate monitors to analyze the case. Instead of using Business Judgment Rule, the court believed the "entire fairness test" was the proper and correct judicial approach.[107]

B. Specific Differences

1. Who Owe the Fiduciary Duty

The two approaches, Massachusetts approach and Delaware approach, both recognized that the controlling shareholder in close company should assume the fiduciary duty. However, as for the minority shareholder, two regulations are very different on whether the minority shareholder should assume the fiduciary duty or not.

Massachusetts courts believe that not only controlling

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[102] Mark J. Loewenstein, *Wilkes v. Springside Nursing Home, Inc.: A Historical Perspective*, 33 W. NEW ENG. L. REV. 339, 363 (2011).

[103] Ueltzhoffer v. Fox Fire Dev. Co., Civ. A. Nos. 9871, 9900, 1991 WL 271584, at *6 (Del. Ch. Dec. 19, 1991).

[104] *See* Nixon v. Blackwell, 626 A.2d 1366 (1993).

[105] *Id.* at 1379–81.

[106] *Id.*

[107] *Id.* at 1375–76.

shareholders bear the fiduciary duty, but also the minority shareholders may assume the partnership-like fiduciary duty.[108] In *Smith v. Atlantic Properties Inc.*,[109] when 80% voting rights are necessary, those minority shareholders possessing 25% shares have the veto power or negative controlling power. Therefore, the minority shareholders cannot arbitrarily or unreasonably or absolutely concern only their own interests and veto down the transaction of the company, regardless of the company's interest, or else they will also violate the fiduciary duty among shareholders.[110] In addition, the suit for the violation of shareholder's fiduciary duty can be filed only against the shareholder, but not the company.[111]

However, Delaware insists only controlling shareholders should assume the fiduciary duty. The court holds that the shareholder owning less than 50% shares of the company, if there is no other special conditions, should not bear the fiduciary duty.[112] However, the assumption is not absolute. If the plaintiff can prove the existence of factual control of the company by minority shareholders, they can also be the obligors of the duty.

2. Freeze-out Cases: Reasonable Expectation Principle v. Substantial Fairness Principle

The key of the fiduciary duty is the specific rules on how to judge if there is any conduct in violation of the fiduciary duty. Because of the cognitive difference on the basic nature of the controlling shareholder's fiduciary duty, states also various in specific judgment standards.

Freeze-out means the conduct through which the controlling shareholders abuse their controlling power to force the minority shareholders to sacrifice the minority's interests.[113] In the

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[108] Zimmerman v. Bogoff, 402 Mass. 650, 657 (1988).

[109] Smith v. Atlantic Properties, Inc., 422 N.E.2d 798 (Mass. 1981).

[110] *Id.* at 801.

[111] *Zimmerman*, 402 Mass. at 660–61; Merola v. Exergen Corp. 423 Mass. 461, 464 (1996).

[112] Cafcas v. DeHann & Richter, P.C., 699 F. Supp. 679, 683–84 (N.D. Ill. 1988); Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53, 70 (Del. 1989).

[113] James M. Van Viet, Jr. & Mark D. Snider, *The Evolving Fiduciary Duty Solution for Shareholders Caught in a Closely Held Corporation Trap*, 18 N. ILL. U. L. REV. 239, 258 (1998).

field of close corporation, freeze-out is the most important way the controlling shareholders use to abuse their controlling power and to illegally harm the minority shareholder's legal interests.[114] It is also the main reason for the minority shareholders to bring the fiduciary duty suit. This paper introduces the different specific rules under different natures of fiduciary duty from the perspective of cases involving the conduct of freeze-out, which is the most important and most common behavior in fiduciary duty cases.

In the freeze-out cases, Massachusetts always applies the "reasonable expectation" rule.[115] To be more specific, illegal termination of the employment and re-purchase of the shares of the minority are the main approaches for the majority shareholders to freeze-out the minority. In the cases of illegal termination of employment, the Massachusetts courts apply the "reasonable expectation" principle, holding that the controlling shareholders cannot violate the reasonable expectation of continuing employment of the minority shareholders. The court of course set strict conditions for the reasonability of the expectation. It is satisfied only when (1) the corporation has its long-term policy on ownership and employment and (2) the corporation has never declared its dividend, the minority shareholders can make no interests from the company other than their salary, or the corporation requires its employees to buy stocks as the condition of employment.[116] Therefore, in the case of Wilkes, the plaintiff was one of the originators of the company and had contributed capital and labor for fifteen years to the company.[117] More importantly, the company had never declared its dividend and Wilkes could no longer receive any salary, which led to the fact that he couldn't get any interests from the corporation any more.[118] Therefore, he had the reasonable expectation that he would continue participat-

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[114] *See generally*, David E. Belfort & Michael L. Mason, *The Employee-Shareholder: At the Frontier of Business and Employment Law*, 9 MASS. BAR ASS'N SEC. REV. 27 (2007).

[115] *See* Bodio v. Ellis, 401 Mass. 1, 9 (1987); Wilkes v. Springside Nursing Home, Inc., 370 Mass. 842, 852–53 (1976).

[116] Siegel, *supra* note 44, at 394.

[117] *Wilkes*, 353 N.E.2d at 664.

[118] *Id.*

ing in the company's management.[119] However, in *Merola v. Exergen Corp*, the court holds that even if the minority shareholders had the reasonable expectation of continuing employment, if the corporation had no policy on stock ownership and employment, the other shareholders also have no expectation of employment.[120]

Additionally, the majority shareholders can also freeze-out the minority shareholders by repurchase their stocks in practice. In these freeze-out cases, minority shareholders have no other options but to receive cash or bound as the consideration of repurchasing their stocks, even though the price of repurchase may be lower than their due price.[121] If the controlling shareholders violate the expectation of the minority shareholders and their expectations is objectively reasonable, or the expectation is the important decisive factor of the minority shareholder's joining in the corporation, the controlling shareholders may violate their fiduciary duty to the minority shareholders.[122] The facts that whether the shareholder has the reasonable expectation or not are under courts' discretion case by case. Among these cases, courts apply the "reasonable expectation" principle not only to decide whether the shareholder violates the fiduciary duty or not, but also to determine the remedy for it, namely the compensation of minority shareholder's profits of their reasonable expectation, but the compensation should be in proportion.[123]

Different from Massachusetts courts which apply special "reasonable expectation" principle to protect the minority shareholders from being freezing-out, Delaware courts provides no special protection for minority shareholders in close corporation. However, its "entire fairness" principle plays a similar protective role.[124] This principle requires not only procedural fairness but also substantial fairness.[125] Procedurally, the time and procedures of the transaction, framework, information disclosure and deci-

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[119] *Id.*

[120] *Merola*, 423 Mass. at 465.

[121] Victor Brudney & Marvin A. Chirelstein, *A Restatement of Corporate Freezeouts*, 87 Yale L.J. 1354, 1357 (1978); *supra* note 49, at 1104.

[122] In re Kemp & Beatley, Inc., 473 N.E.2d 1173, 1179 (N.Y. 1984).

[123] Brodie v. Jordan, 447 Mass. 866, 873 (2006).

[124] Ragazzo, s*upra* note 49, at 1150–51.

[125] Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983).

sion-making process should all be fair and in good faith.[126] Substantially, a fair price requires consideration of factors such as assets of the corporation, market price, future prospects and any other economic factors to determine the real price of the company stock.[127] The party involving in related transaction should prove the substantial fairness of the transaction,[128] which is a hard standard to meet.

V. ANALYSIS OF THE FEASIBILITY OF TRANSPLANTING THE CONTROLLING SHAREHOLDER'S FIDUCIARY DUTY IN CHINA

A. Model Selection Problem

Chinese scholars only proposed the idea of introducing the controlling shareholder's fiduciary duty from US, but failed to demonstrate which rules to transplant. In American legal system, the regulations of controlling shareholder's fiduciary duty are quite complicated. In fact, it is very difficult to choose the specific rules fitting the situation of China.

1. No Representative Model

As mentioned above, states have the power to regulate corporation affairs. In fact, the rules of regulating controlling shareholder are different and not uniform in US. The approaches of Massachusetts and Delaware are representative in practice. American academia used to treat the former model as the majority rule and the latter as the minority rule.[129] However, with the development of the judicial practice, scholars demonstrated that the division of the majority and minority rules is a misunderstanding.[130] Actually, the states that follow Massachusetts are not in absolute majority, whereas the states that follow Delaware are

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[126] *Id.*

[127] *Id.*

[128] *Id.* at 703.

[129] *See generally* George W. Dent, Jr., *Gap Fillers and Fiduciary Duties in Strategic Alliances*, 57 BUS. LAW. 55, 86 (2001); Shannon Wells Stevenson, *The Venture Capital Solution to the Problem of Close Corporations Shareholder Duties*, 51 DUKE L.J. 1139, 1148 (2001); Mark Meinhardt, *Investor Beware: Protection of Minority Shareholder Interests in Closely Held Limited Liability Organizations: Delaware Law and its Adherents*, 40 WASHBURN L.J. 288, 289–90 (2001).

[130] Siegel, *supra* note 44, at 435–39.

not minority.[131] Consequently, neither of the models can be in the majority and the representative of the American controlling shareholder's fiduciary duty as a whole. With the development of state statutes and common law, scholars have different comments of the effect of the two approaches and cannot clearly deduce the future trend of the two models. For instance, the Delaware supporters claim the Delaware model would be the mainstream model of American controlling shareholder's fiduciary duty.[132] While the opponents consider the Delaware model, not providing sufficient protection for minor shareholders, would be approaching the Massachusetts special protection model.[133]

2. The Analyses in State Level

Since there is no representative approach of American controlling shareholder's fiduciary duty, the Chinese scholars must find out the most suitable model for China's current situation by studying the specific rules in separate states.

(a) The Feasibility of the Massachusetts' Rule

As discussed above, Massachusetts' approach has following characteristics: 1. partnership-like fiduciary obligations between close corporation shareholders, namely utmost good faith and loyalty; 2. all the shareholders owe fiduciary duty to each other, like partners; 3. "reasonable expectation standard" is applied in freeze-out cases.

Chinese scholars claim that the American controlling shareholder's fiduciary duty rule should be educed into article 20 of the Chinese Company Law, as the result, this rule would be a general corporate governance of all types of corporations in China. One important reason of introducing the shareholder's fiduciary duty rule is that the interest of corporations and minority shareholders have been greatly harmed by controlling shareholders in public companies. The phenomenon is very serious.[134]

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[131] *Id.*

[132] *Id.* at 467–70.

[133] Ragazzo, *supra* note 49, at 1150–51.

[134] *See* 王保树 (Wang Baoshu) & 杨继 (Yang Ji), *supra* note 6, at 60; 汤欣 (Tang Xin), *supra* note 21.

Therefore, our scholars have paid much attention to the inducement of controlling shareholder's fiduciary duty for managing public companies. Some scholars even proposed the Donahue case fiduciary duty for public companies.[135]

It has been discussed that the American controlling shareholder's fiduciary duty is a very strict duty and has a narrow range of application, which originated and developed from the field of close corporations. There are two reasons for judges to limit the fiduciary duty in close corporations. One is that the shareholders in close corporations lacks protection of free market and salary is the main process of recouping their investment. Another reason is that most shareholders participate in the management of corporation for the limit of faculties in close corporations.[136] Trust and loyalty are the basis of development for this type of business organization.[137]

The application of controlling shareholder's fiduciary duty has been extended to Limited Liability Corporations and Limited Liability Partnership.[138] However, the common characteristics of these commercial organizations are closure and collaboration of human resource. Because of these features, reasonable expectation standard and the regulation of all shareholders as fiduciaries is applicable. On the contrary, public companies have much more shareholders without corporation participation expectation. More importantly, they can easily protect themselves by selling stocks in the capital market. Because the minorities could vote by feet, in order to save or attract capital from the market, controlling shareholders will be friendly and generous to the minor shareholders.[139] Interference into major shareholder's private interests by fiduciary duty do not accord with the interest of corporation and shareholders.

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[135] 汤欣 (Tang Xin), *supra* note 21.

[136] *Donahue*, 367 Mass. at 587.

[137] *Id.*

[138] *See generally* Myron T. Steele, *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 32 DEL. J. CORP. L. 1 (2007); Madden, *supra* note 73, at 211.

[139] Sang Yop Kang, *Re-Envisioning the Controlling Shareholder Regime: Why Controlling Shareholders and Minority Shareholders Often Embrace*, 16 U. PA. J. BUS. L. 843, 881–82 (2013–2014); Mancur Olson, Power and Prosperity: Outgrowing Communist and Capitalist Dictatorship 7 (2000).

In terms of Chinese public corporations, the shareholding is concentrative and the stock market and shareholder protection mechanism are not quite sound.[140] But it is still not convincing for Chinese legislators to educe controlling shareholder's fiduciary duty rules from American close corporations into Chinese public corporations' corporate governance, because Chinese public corporations do not have the two fundamental reasons for the generation of controlling shareholder's fiduciary duty in close corporation. In fact, it is unrealistic to satisfy every shareholder's expectation in public corporations, which is consisted of large numbers of shareholders. It is also impossible to ask those benefit orientation shareholders to obey the utmost good faith and loyalty standard to others.

Therefore, the Massachusetts model is unsuitable for China to satisfy the urgent demand for regulating controlling shareholder's controlling power abuse in public corporations.

(b) The Feasibility of the Delaware Rule

The Delaware model has the following characteristics: 1. without statutes, it is improper for courts to set special protection rules for minority shareholders, instead, court should use the corporate monitors; 2. only the controlling shareholders have more obligation; 3. the "entire fairness test" (or intrinsic fairness standard) is usually used as a criteria for whether the shareholder violates fiduciary duty or not. Particularly, in shareholder self-dealing cases in Delaware, the entire fairness test is also applicable to public corporations.[141]

The policy in Delaware seems to satisfy the urgent demand for regulating controlling shareholder's control power abuse in Chinese public corporations. However, the Chinese scholars still have to face two problems:

First, controlling shareholders in Delaware carry out their duties in the capacity of directors or administrators and fiduciary duty does not extend to the capacity of shareholders.[142] It is

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[140] 汤欣 (Tang Xin), s*upra* note 21.

[141] James D. Cox & Thomas Lee Hazen, Corporations 253 (2d ed. 2002); Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971).

[142] Mary Siegel, *The Erosion of the Law of Controlling Shareholders*, 24 DEL. J.

reasonable for Delaware court not to distinguish the fiduciary duty between directors, administrators and shareholders. Since Delaware state corporation law adopts the "board of director center doctrine,"[143] most of the operating decisions are made by directors and authorized administrators. The role of shareholders has been limited to voting on director election and corporation structure changes.[144] There are essential differences for shareholders from different identifications. When they are in the capacity of shareholders, they can vote for their own interest rather than being other shareholder's fiduciary.[145] However, when they are voting in the capacity of directors, they are becoming shareholder's trustees. On this occasion, they represent all the shareholders and cannot seek personal gains. Therefore, they can take fiduciary duties. Actually, the authority of shareholder is limited. Only when controlling shareholders control the corporation indirectly in the capacity of directors or by electing dependent directors, he has the power to harm the interest of corporations and minor shareholders.[146] Compared with Massachusetts approach, Delaware lessens the regulating range of controlling shareholder's fiduciary duty.[147]

According to the regulations of general meeting of stockholders and power of board of directors in Chinese Company Law, the "Shareholder Center Doctrine" is established.[148] Stockholders can make decisions without being in the capacity of director or controlling the board of directors. Therefore, if the Delaware model were educed, this rule could fail to provide full protection for minority shareholders because it had only regulated some misbehavior of controlling shareholder.

Second, there are no supporting system and cultural soil for educing controlling shareholder's fiduciary duty in China.

When involving the fiduciary duty in corporation law, the

CORP. L. 27, 33–34 (1999).

[143] 陈蕾 (Chen Lei), 高伟 (Gao Wei) & 王振东 (Wang Zhendong), 公司治理理论与实践 [The Theory and Practice of Corporate Governance], at 10 (2006).

[144] *Id.*

[145] Jedwad v. MGM Grand Hotels, Inc., 509 A.2d 584, 598 (Del. Ch. 1986).

[146] McDaniel v. Painter, 418 F.2d 545, 547 (10th Cir. 1969).

[147] Viet & Snider, *supra* note 113, at 242.

[148]陈蕾 (Chen Lei), 高伟 (Gao Wei) & 王振东 (Wang Zhendong), *supra* note 143, at 9.

Delaware courts would first decide whether the appeal is applicable to "business judgment rule" or "inherent fairness test" into consideration.[149] Although "inherent fairness test" is usually suitable in cases of controlling shareholder's fiduciary duty, it doesn't mean the Business Judgment Rule and Entire Fairness Test can be separated, educing the entire fairness by itself. As discussed above, the identifications of shareholder and director are overlapped and non-separated in many cases. Even though the controlling shareholder is judged abusing control power, the protection of business judgment rule for his general managing operation cannot be deprived when he is in the capacity of a director.[150] Besides, other mechanisms of shareholder protection maintain the effective implementation of controlling shareholder's fiduciary duty, such as derivative action, class action, appraisal rights and litigation system of stockholder general meeting (board of directors) decision flaw. While in Chinese Company Law, there is no Business Judgment Rule, no market mechanism and other mechanisms of shareholder protection, and no external supervision from habit strength. Without these supporting systems for controlling shareholder's fiduciary duty, it is difficult to achieve the results like in America when China transplants the rule.

Moreover, the duty of care and loyalty, especially the latter, can be observed primarily due to deeper cultural reasons. The idea of other-regarding behavior has imperceptibly merged into American social culture basis. Therefore, the transplantation of controlling shareholder's fiduciary duty is not likely to be successful unless the local society and parties can observe the principles consciously, namely have local inclinations toward other-regarding behavior.

(c) Problems of the Hybrid Rule

Considering neither the approach of Massachusetts nor the approach of Delaware fits our China's situation, some people may suggest that we can combine the most suitable and reasonable

[149] Cox & Hazen, *supra* note 141, at 253.

[150] Arthur R. Pinto, *Corporate Governance: Monitoring the Board of Directors in American Corporations*, 46 AM. J. COMP. L. SUPP. 317, 331–32 (1998).

elements of different approaches to make a hybrid rule that is useful to China. However, the suggestion may not be feasible in practice.

First, it is hard to know the validity of the piece-together of the rules in different approaches. If not be tested by practice, educing those rules without careful consideration is lack of reasonableness.

Second, those specific elements or rules developing from controlling shareholder's fiduciary duty of different natures are not independent with each other. They cooperate with each other to achieve the total and inner balance of rights and obligations in the whole system. For example, in Massachusetts' approach, the utmost fiduciary duty between shareholders reaches an internal balance in the system with the rule that all shareholders are trustees. The requirements of utmost good faith and loyalty are so strict and they provide good protection to shareholders. If all shareholders are fiduciaries of the duty and get equal protection, but meanwhile they also assume the deterrence of the same strict obligations, then internal balance between different rules can be realized. By contrast, if only one of the rules is changed, for example, just one or few shareholders assume the fiduciary duty and only one or few shareholders get protection, this will definitely violate the principle of "shareholders equality." To amend a rule, we must continually amend other rules for keeping consistency and balance between rules.

In conclusion, the rules concerning majority shareholder's fiduciary duty are complex in American legal system. Because of the complexity and non-uniformity, it is hard for us to identify the rules that may be suitable to China.

B. Doubt on the Validity

Even if we can find an available specific system from the available approaches mentioned above, Chinese scholars should further consider the validity of the transplanted fiduciary duty. At present, the reasonableness of the controlling shareholder's fiduciary duty is still debatable.

Many scholars have doubts on the validity of controlling shareholder's fiduciary duty itself.[151] In early stages, the company law of US was deeply affected by U.K. company law. U.K. company law has established shareholder oppression legal system to avoid controlling shareholder's abusing their power.[152] Some states of US adopted the system but some not. The suits of controlling shareholder's fiduciary duty developed from the states without shareholder oppression legal system and it is a special rule to meet unique needs of the governance of close company.[153] In a sort of sense, the controlling fiduciary duty rule is policy-driven creation. In some cases, even the existence of the relationship of fiduciary duty cannot be proved; the fiduciary duty can be applied to provide an all-purpose claim to litigation without any cause of action.[154] According to the principle of the "Reunification of Powers and Responsibilities," different legal subjects will have different rights and obligations because of different legal relationships. Fiduciary duty imposes strict liability to obligor, and it does not correspond to all conducts of abusing. For example, members in partnership organization should certainly assume the fiduciary duty, but if the partnership organization is changed to the form of company, the shareholders can on the one hand get protections by limited liability; on the other hand, they are free from fiduciary duty to each other. The expanding of fiduciary duty will cause the violation of the fundamental right of selfish ownership.[155] In fact, there are still debates about whether shareholders have fiduciary duty between each other. To conclude the opinions of many scholars, no fiduciary duty does not mean no restraint is imposed on the shareholders' controlling power. The restraints can be imposed by particular rules of company law, rather than the principle fiduciary duty.

Noticing the deviation from the principle of fiduciary duty

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[151] Jens Dammann, *The Controlling Shareholder's General Duty of Care: A Dogma That Should Be Abandoned*, 2015 U. ILL. L. REV. 479, 506 (2015).

[152] 汤欣 (Tang Xin), s*upra* note 21.

[153] Thompson, *supra* note 52, at 726.

[154] Malcolm D. Talbott, *Restitution Remedies in Contract Cases: Finding a Fiduciary or Confidential Relationship to Gain Remedies*, 20 OHIO ST. L.J. 320, 323–24 (1959).

[155] Sandra K. Miller, *How Should U.K. and U.S. Minority Shareholder Remedies for Unfairly Prejudicial or Oppressive Conduct Be Reformed*, 36 AM. BUS. L.J. 579, 627 (1997).

during the application, some American scholars hold the opinions that fiduciary duty should be abandoned.[156] As a substitution, scholars think the shareholders contract is a good choice to protect minority shareholders.[157] Company Contract theorists hold that the main rights of shareholders should be decided by themselves, rather than interfered by courts.[158] Moreover, they can identify their protections and remedies through negotiation. In order to avoid the uncertainty of future risks and litigation, reasonable amending system of contract and the implied principle of contract law (such as good faith and fair dealing) can also help the parties form a stable contract to protect their current and future interest. The written contract is also good for deducing shareholder's reasonable expectation and avoids the possibility that judge may take sides with minority shareholders and violates majority shareholder's expectation, reaching a balance between the interests of majority and minority shareholders.[159] In practice, courts tend to attach more importance on the shareholders' contract. The courts of Massachusetts and Delaware also show their tendency of settling the disputes by contract in recent cases. Shareholders should solve problems of employment and liquidity by back and forth negotiations and contractual protections.[160] Under this principle, even though the shareholders have fiduciary duty between each other, if they abide the contract in good faith, the fiduciary duty will not be violated.[161]

C. The Conflicts with the Current Legal System in China

Regardless of the validity of the controlling shareholders' fiduciary duty, the rule is difficult to melt into the current China's legal system, because, controlling shareholder's fiduciary duty is an US common law obligation. Even German only transplanted

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[156] Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporation*, 138 U. PA. L. REV. 1675 (1990).

[157] Means, *supra* note 72, at 1161.

[158] Paula J. Dalley, *The Misguided Doctrine of Stockholder Fiduciary Duties*, 33 HOFSTRA L. REV. 175, 221 (2004); Edward B. Rock & Michael L. Wachter, *Waiting for the Omelet to Set: Match-Specific Assets and Minority Oppression in Close Corporations*, 24 J. CORP. L. 913, 915 (1999).

[159] Means, *supra* note 72, at 1203.

[160] Arthur R. Pinto & Douglas M. Branson, Understanding Corporate Law 326 (3d ed. 2009).

[161] Selmark Assoc. Inc. v. Ehrlich, 467 Mass. 525, 537 (2014).

the rule in case law due to the difficulties in codifying the rule. Judges have to apply the rule based on case by case inquiries. However, China is a civil law country, all the rules are written in laws and statutes. Since precedents are not binding in China and it is difficult to codify the case law of controlling shareholders' fiduciary duty, there would be more problems in transplanting the rule to China.

Some Chinese scholars suggest that the legislator need to adapt article 20 of the Chinese Company Law by transplanting the controlling shareholder's fiduciary duty rule. However, article 20 of the Company law belongs to the General Rules, which means it would be applied for both limited liability companies and stock companies (including close companies and public companies). As discussed above, the controlling shareholder's fiduciary duty was originated and developed in the field of close companies. Whether this rule should apply in public company, limited liability company is still in dispute. Besides common shareholders, the specific positions of state-owned controlling shareholders are also assignable in China. A general transplantation, without distinguishing the different needs of diverse corporations, will be difficult to fit with the current development in China.

VI. CONCLUSION

Rules concerning controlling shareholders' fiduciary duty are within the states' jurisdiction in the United States. Rules not only vary from one state to another but also are narrowly applied within the scope of closely hold corporations. Also, , the regulatory regime is complicated. For these reasons, China needs more time to reflect upon whether it makes sense to transplant on a wholesale basis US law on controlling shareholder fiduciary duty. The intermediate solution, which the author advocates for, is to learn from the idea and spirit of the US law, but recognize that the reforms need to be rooted in the Chinese company law.

To be more specific, no fiduciary duty does not mean there is no restraint imposed on the shareholders' controlling power. Restraints can be imposed by particular rules of company law, rather than the principle fiduciary duty. Facing so many cases in which the controlling shareholder harms the interests of the mi-

nority shareholder, Chinese scholars need to focus on the reference of the concept and experience of controlling shareholder's fiduciary duty, rather than bringing in the specific rules. The legislators of China could learn to attach great importance on the protection of minority shareholder and categorize the conducts of controlling shareholder's abuse of their controlling power and then provide the court with different choices of remedies according to different categories of conducts. To solve the urgent and existing problem, Chinese scholars should not limit our solution to just refer to the rules of other countries, but try to solve the problem by interpreting existing. Considering the current situation in China, this paper suggests that, according to the different needs of different types of companies, the legislator should define in the specific laws or relevant laws or regulations the categories of the conducts by which controlling shareholder's abuse of their controlling power, then develop and refine the rules and liabilities corresponding to those categories of conducts. In terms of some extreme cases, we can apply article 20 of Chinese Company Law to regulate controlling shareholder's abuse of their controlling power and protect the interests of minority shareholder.

Adios Scalia: For or Against Foreign Law?

*Editors**

It is unimaginable how the death of a judicial figure would come as a shock to the world. United States Supreme Court Justice Antonin Scalia was such a figure. When this renowned defender of judicial conservatism died unexpectedly during a hunting trip on February 13, 2016, the world stopped and mourned this judicial giant. For a law student, digesting Scalia's witty dissents and consistent reasoning has always been pleasurable for late-night readings. For a transnational law review, Scalia's opinions spurred debates and provided valuable insights into whether and when foreign law could be used to construe U.S. domestic laws.

In memorial of Scalia, we have devoted 4 pages to his quotes on the application of foreign law in the interpretation of domestic laws.

Scalia has consistently rejected the use of foreign law to interpret the U.S. Constitution, as enshrined in the following famous quotes from Supreme Court decisions:

> We must never forget that it is a Constitution for the United States of America that we are expounding . . . [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.[1]

> Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because foreign nations decriminalize conduct.[2]

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* This Article is completed by Li Mengshi, Li Changhong, Li Shujun and Yuan Ziyan. They are all students of STL and are all editors of *Peking University Transnational Law Review*.

[1] Thompson v. Oklahoma, 487 U.S. 815, 868 (1988) (Scalia, J., dissenting).

[2] Lawrence v. Texas, 539 U.S. 558 (2003) (Scalia, J., dissenting).

> The notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to control a sovereign's treatment of *its own citizens* within *its own territory* is a 20th-century invention of internationalist law professors and human rights advocates . . . American law—the law made by the people's democratically elected representatives—does not recognize a category of activity that is so universally disapproved by other nations that it is automatically unlawful here, and automatically gives rise to a private action for money damages in federal court.[3]

> The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry . . . [t]he basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.[4]

The crux of Scalia's reasoning is that foreign laws should not be used to interpret the Constitution because they could only invite manipulation. Judges' role is not to make moral judgments, not to find the correct answer, but to faithfully interpret what the Constitution provided, even if it is *wrong*. Intelligent men and women abroad can make very intelligent arguments, but that's not the issue, because it should not be up to judges to make those moral determinations.[5]

Proponents of using foreign law to interpret the Constitution, led by Justice Stephen Breyer, attack Scalia's contentions for three main reasons. First, foreign or international law influences the decisions of domestic legal issues. For instance, if Congress's legislative purposes included harmonization of Amer-

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[3] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (Scalia, J., concurring).

[4] Roper v. Simmons, 125 S. Ct. 1183, 1226 (2005) (Scalia, J., dissenting).

[5] Paltz, *Full Written Transcript of Scalia-Breyer Debate on Foreign Law*, FREE REPUBLIC (Feb.28, 2005), http://www.freerepublic.com/focus/f-news/1352357/posts.

ican and foreign laws, courts must look at that foreign law to evaluate that American objective. Second, decisions of foreign courts render helpful comparisons in resolving U.S. constitutional issues. Third, it is valuable to learn from how other democracies responded to constitutional questions in similar circumstances. Fourth, treaties on public international law might also be relevant to particular domestic legal disputes, such as the legality of death penalty, and should be taken into consideration.[6] In a nutshell, "a global legal enterprise . . . is now upon us."[7]

Albeit the debate on using foreign laws in the Constitutional analysis is unresolved, Scalia does agree that under certain circumstances, foreign laws offer valuable references. He allows for and even encourages the use of foreign law in treaty and statute interpretations. In his ironic comments, courts mistakenly use foreign laws to justify their constitutional arguments, whereas they do not give enough attention to foreign laws when analyzing treaties. The quotes below offer a glimpse of his witty observations and suggestions for what the court should do:

> Today's decision stands out for its failure to give any serious consideration to how the courts of our treaty partners have resolved the legal issues before us . . . This sudden insularity is striking, since the Court in recent years has canvassed the prevailing law in other nations (at least Western European nations) to determine the meaning of an American Constitution that those nations had no part in framing and that those nations' courts have no role in enforcing . . . We can, and should, look to decisions of other signatories when we interpret treaty provisions. Foreign constructions are evidence of the original shared understanding of the contracting parties. Moreover, it is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently.[8]

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[6] *Id.*

[7] Stephen Breyer, Remarks at the 97th Annual Meeting of the American Society of International Law on the Supreme Court and the New International Law (Apr. 4, 2003) (transcript available at http://www.supremecourtus.gov/publicinfo/speeches/sp_04-04-03.html).

[8] Olympic Airways v. Husain, 540 U.S. 644 (2004) (Scalia, J., dissenting).

> More recent lower court precedent has also tempered the extraterritorial application of the Sherman Act with considerations of "international comity." . . . [T]he practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence.[9]

> [F]or every argument why juries are more accurate factfinders, there is another why they are less accurate . . . Finally, the mixed reception that the right to jury trial has been given in other countries, . . . though irrelevant to the meaning and continued existence of that right under our Constitution, surely makes it implausible that judicial fact-finding so "seriously diminishe[s]" accuracy as to produce an "impermissibly large risk" of injustice. When so many presumably reasonable minds continue to disagree over whether juries are better factfinders at all, we cannot confidently say that judicial fact-finding seriously diminishes accuracy. [10]

Returning to the constitutional discussion, Scalia, as an originalist, would never look at foreign laws but only the text of the Constitution to interpret this instrument. This would be, as noted in his famous quote, giving the courts the chance to "look over the heads of the crowd and pick out its friends."[11]

On a final note, would this discussion be relevant to the Chinese legal environment? Would it offer any valuable reference for the current judicial reform? What is the value of foreign law to Chinese statutory interpretation? If the judiciary would one day retain the power to apply the Chinese Constitution, might it abuse its power as such? We have all these intriguing debates unresolved; yet sadly, we have lost a judicial giant to fiercely defend the other side.

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[9] Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) (Scalia, J., dissenting).

[10] Schriro v. Summerlin, 542 U.S. 348 (2004).

[11] Conroy v. Aniskoff, 507 U.S. 511 (1993) (Scalia, J., concurring).

Vitriolic in Rhetoric, Independent in Spirit: Justice Antonin Scalia*

*Thomas Y. Man***

A few weeks ago (February 13, 2016), the United States Supreme Court lost Justice Antonin Scalia, the first Italian-American Justice and its longest-serving member. At age 79, Justice Scalia was the most senior Associate Justice and ranked only after Chief Justice John G. Roberts, Jr. in seniority on the nine-member high court. But he wasn't the oldest (Justice Ruth Bader Ginsburg is 82) and had displayed little sign of diminishing energy and intellectual prowess. At the beginning of the year, he visited Hong Kong and other Asia places. His sudden death caught everyone in surprise and added a new element of uncertainty to the already colorful election year politics. All of a sudden, nominating by President Obama a successor to Justice Scalia became a fresh spark of political contention between the Republican Party, which controls the Senate wielding the power to confirm any nominee for the Supreme Court, and the Democratic Party which rallies behind President Obama in asserting the president's Constitutional power (and "duty," as claimed by Obama) to nominate a new justice during the remaining months of the Obama presidency.[1] This brief note focuses not on this unfolding political debate subsequent to the death of Justice

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[1] As of this writing, President Obama has nominated Merrick Garland, Chief Judge of the U.S. Circuit Court of Appeals for the District of Columbia to fill the vacancy left by Justice Scalia, but the Senate Republicans, using their power to control the agenda, have refused to consider his nomination. *See* Manu Raju & Ted Barrett, *Grassley: If I can meet with a 'dictator,' I can meet with Garland*, CNN (Mar. 18, 2016), http://edition.cnn.com/2016/03/17/politics/garland-grassley-supreme-court-dictator/index.html.

Scalia; instead it discusses some of the most important aspects of Justice Scalia's political and judicial philosophy and his personal character with a view to shedding some comparative light on the ongoing process of judicial reform in China with respect to the importance of an independent judiciary.

As a leading proponent of the conservative judicial jurisprudence in the contemporary U.S. political arena, Justice Scalia's name is intimately associated with the judicial philosophy known as "Originalism."[2] Although he was not the first jurist to employ the concept "Originalism,"[3] he was nevertheless the most vocal "Originalist" and most influential judicial practitioner of Originalism by virtue of his long tenure on the Supreme Court. According to Scalia's version of the Originalist view he labeled invariably as "textualism" or "original meaning," when interpreting the U.S. Constitution and other statutes, the court ought to follow the text of the Constitutional or statutory provision and strictly construe the meaning of the provision in accordance with its meaning at the time of making. The court shall not expand or otherwise extend the meaning of such provision in the light of the evolving definitions of the relevant concepts or terminology.[4] An Originalist like Scalia scorns the theory of "Living Constitution," which believes that the court should treat the Constitution and other statutes as living documents whose meaning evolves with the changes of the American society and therefore should interpret these documents in accordance with the contemporary understanding reflecting the reality of today's society.[5] From his

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[2] For a standard explication of "Originalism," *see* Robert H. Bork, *The Original Understanding*, *in* CONTEMPORARY PERSPECTIVES ON CONSTITUTIONAL INTERPRETATIONS 47–68 (Susan J. Brison & Walter Sinnott-Armstrong eds., 1993).

[3] According to one account, Originalism emerged as a named judicial doctrine with the work of Robert Bork, then a Yale law professor, who wrote in the 1970s: "There is no other sense in which the Constitution can be what Article VII claims it to be: 'Law.' This means, of course, that a judge, no matter on what court he sits, may never create new constitutional rights or destroy old ones." *See* Robert Bork, *Neural Principles and Some First Amendment Issues*, 47 IND.L.J. 1, citing page (1971). Another account indicates that the term "Originalism" was coined by Paul Brest in his article, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 238 (1980).

[4] Bork, *supra* note 2. For a critique of the "Original Intent" jurisprudence, a variation of Originalism, see LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 322–87 (1988).

[5] "[T]he genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great

appointment to the high court by President Reagan in 1986 until his death, Justice Scalia had openly expounded the tenets of Originalism in and outside the Supreme Court. Applying Originalism to judicial practice, his many opinions in a long series of significant Supreme Court decisions over a span of three decades consistently defended traditional morality and systems, making him a darling of the conservative right. The classic exposition of Originalism comes from Scalia's plain and straightforward language:

> The theory of originalism treats a constitution like a statute, giving the constitution the meaning that its words were understood to bear at the time they were promulgated.
>
> You will sometimes hear it described as the theory of original intent. You will never hear me refer to original intent, because I am first of all a textualist, and secondly an originalist. If you are a textualist, you don't care about the intent, and I don't care if the Framers of the U.S. Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words.[6]

In terms of personality, Justice Scalia was expressive, vitri-

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principles to cope with current problems and current needs," wrote Supreme Court Justice William Brennan (1956–1990 in office), a leading exponent of the "Living Constitution" philosophy. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 88 (Kermit L. Hall ed., 1992). In sharp contrast, Scalia once wrote, "[t]he worst thing about the Living Constitution is that it will destroy the Constitution." Antonin Scalia, Remarks at the Woodrow Wilson International Center for Scholars: Constitutional Interpretation the Old Fashioned Way (Mar. 14, 2005) (transcript available at http://www.bc.edu/content/dam/files/centers/boisi/pdf/Symposia/Symposia%202010-2011/Constitutional_Interpretation_Scalia.pdf). "The whole purpose of the Constitution is to prevent a future society from doing what is wants to do." Antonin Scalia, Speech at Catholic University of America: Judicial Adherence to the Text of Our Basic Law: A Theory of Constitutional Interpretation (Oct. 18, 1996) (transcript available at http://www.proconservative.net/PCVol5Is225ScaliaTheoryConstlInterpretation.shtml).

[6] Antonin Scalia, Speech at Catholic University of America: Judicial Adherence to the Text of Our Basic Law: A Theory of Constitutional Interpretation (Oct. 18, 1996) (transcript available at http://www.proconservative.net/PCVol5Is225ScaliaTheoryConstlInterpretation.shtml).

olic and stubborn. It seemed that his personal vocabulary contained no such concepts as moderation, temperance, flexibility or compromise, casting him not only in sharp contrast with most Supreme Court justices, past or present, but also making his character seemingly inconsistent with the traditionalistic temperament and conservative principles he had so unabashedly embraced. Scalia was a second generation Italian American. His father, a devout Catholic from Sicily, passed on to him the Catholic faith and traditional moralism.[7] Adhering to the Catholic creed against contraception, he and his wife (also a Catholic) had nine children and, at the time of his death, 28 grandchildren. He once told a journalist, half jokingly, that he and his wife had practiced "Vatican roulette."[8] The Catholic teaching of obeying authority conforms seamlessly with the Originalist tenet of adhering to the existing rules, including the words in their original meaning that the Founding Fathers had written into the Constitution more than 200 years ago. However, in expounding this traditionalistic jurisprudence, Scalia had never thought of conforming his advocacy to the traditionalistic temperament. He was a straight shooter, almost never making any effort to hide or sugarcoat his absolutist position or losing any opportunity to retort an opposite or different position. He displayed his unique style of straight talk not only in executing his official duties on the Supreme Court (such as oral arguments open to the public, closed-door conferences among justices or published court opinions) but also in extrajudicial public speeches and academic publications. For instance, he usually fired more questions than any other justices to legal counsels in open court arguments, employing his characteristic "in-your-face" style of questioning by frequently interrupting the legal counsel and asking pointed and challenging questions. He used the same style in extrajudicial public lectures and exchanges with journalists and audiences. Because of his extreme conservative standing on controversial issues, he was often confronted with tough questions from the audience, but his response was never diplomatic.[9]

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[7] JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 17–24 (2009).

[8] Margaret Talbot, *Postscript: Antonin Scalia, 1936–2016*, THE NEW YORKER (Feb. 14, 2016), http://www.newyorker.com/news/news-desk/postscript-antonin-scalia-1936-2016.

[9] *See generally* Biskupic, *supra* note 7, especially Chapter 12, "Quack,

Like his verbal language, Scalia's writing was equally harsh and vitriolic. His many Supreme Court opinions, either concurring or dissenting, are always violently polemical, sparing no opportunity to attack or criticize any opposing or differing views held by other justices, including his fellow conservative colleagues. In June 2015, the Supreme Court, by a 5 to 4 majority, upheld the right to marry by same-sex couples in *Obergefell v. Hodges*, which attracted a barrage of fierce attack from Scalia. His dissent accused the majority (who were described as "a select, patrician, highly unrepresentative panel of nine") of violating "a principle even more fundamental than no taxation without representation: no social transformation without representation."[10] In writing his opinions, Scalia was not satisfied with simply laying out his position, but often lambasted others (including his fellow justices) holding a view different from his own with invective and disparaging remarks, earning the well-deserved label of "poison pen and tongue" and writing "like a devil."[11] Another commentator wrote, "Scalia's opinions read like they're about to catch fire for pure outrage."[12] To his ideological foes of liberal justices, he never yielded an inch of ground on any issue, in and outside of the court, and used acerbic language to the extent possible in a judicial setting. Justice Ginsburg, a liberal, is reported to have said, half jokingly: "I love him. But sometimes I'd like to strangle him."[13] To his fellow conservatives, Scalia was hardly more lenient in his criticism if he found them to have fallen short of thoroughly conservative. In deciding *Obergefell v. Hodges*, Justice Anthony Kennedy, a fellow conservative with growing moderate views on social issues, joined the liberals' rank to write the majority opinion recognizing same-sex marriage. Scalia criticized Kennedy in a tone more vitriolic than that against the liberals, taunting the majority opinion as "couched in a style that is as pretentious as its content is egotistic."[14] Back in 2012, Chief

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Quack," 252–75, and Chapter 13, "The Central Chair," 276–98, Chapter 14, "Showman of the Bench," 299–320.

[10] Obergefell v. Hodges, 135 S.Ct. 2584, 2630 (2015).

[11] Richard Wolf, *Questions swirl around longevity of Scalia legacy*, USA TODAY, Feb. 19, 2016, at 6A.

[12] Conor Clarke, *How Scalia Lost His Mojo*, SLATE (July 5, 2006), http://www.slate.com/articles/news_and_politics/jurisprudence/2006/07/how_scalia_lost_his_mojo.html.

[13] Biskupic, *supra* note 7, at 277.

[14] Obergefell v. Hodges, 135 S.Ct. 2584 (2015).

Justice Roberts, another fellow conservative, chose to lend support to President Obama's healthcare legislation and wrote the majority opinion. Scalia attacked the majority opinion sharply: "The court regards its strained statutory interpretation as judicial modesty. It is not. It amounts instead to a vast judicial overreaching."[15] On another occasion, Scalia accused Roberts of "faux judicial minimalism" and "judicial obfuscation" even when he concurred with Roberts's majority opinion.[16]

Scalia not only possessed a sharp tongue, but also utterly rejected compromise in judicial decision-making. He almost never modified his position in order to gain support from other justices, nor did he use any tacit maneuvering to achieve compromise or trade-offs. Because of the layered differences in political and social viewpoints and judicial philosophy among Supreme Court justices, it is extremely difficult, if not entirely impossible, to reach full consensus on almost any case that has landed on the court's docket, even if all justices have proceeded from the same, broadly defined constitutional framework to form his or her own opinion. In order to prevent individualized perspective from paralyzing the decision-making process, most justices are open, at various degrees, to consider the views of other justices and arguments from both sides and modify his or her own original position through oral arguments and closed-door conferences. Many justices, especially those who have had extensive executive or legislative experiences before judicial appointment and thus are adept at political deal making, are willing to engage in private exchange with fellow justices to minimize differences and build up consensus. Some justices are even willing to make limited, principled concessions on certain issues or cases in exchange for support from other justices on other issues or cases.[17] But Scalia had none of these. He held stubbornly on his view on every issue, every case, yielding to neither his ideological opponents nor his fellow conservatives as long as their

[15] National Federation of Independent Business v. Sebelius, 132 S.Ct. 2566 (2012).

[16] Federal Election Commission v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007). *See* MARCIA COYLE, THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION 108 (2013).

[17] As noted by one Supreme Court scholar, in the Court's decision-making process, "bargaining is simple fact of life." WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 57 (1964). The late Justice Brennan would accept less than he wanted in order to gain a partial victory. *See* BISKUPIC, *supra* note 7, at 132.

views are different, significantly or slightly, from his own.

Since the 1980s the Supreme Court has maintained a precarious balance between liberals and conservatives, making the vote of one or two justices holding the middle ground of the particular issue in contest the decisive force for the court's decision. Such "swing votes" by these moderate justices invariably become the focus of attention by both camps. Each camp has tried hard not to offend these moderates in order to gain their pivotal support. But Scalia had consistently scolded such strategy. His aggressive and uncompromising personality had on numerous occasions alienated potential allies, to the extent of strangling personal relationships. Early in his justiceship in the late 1980s, Scalia developed a relationship "like oil and water" with Justice Lewis Powell, even though they were reasonably similar in political view and judicial philosophy.[18] In particular, it is widely believed that Scalia's failure in cultivating a cordial working relationship with Justice Sandra Day O'Connor, a moderate conservative who held the swing vote on a number of important social issues including abortion, had helped frustrate the conservatives' repeated attempts during the 1990s and 2000s to overturn *Roe v. Wade*, the landmark Supreme Court case that legitimized women's rights to abortion. On more than one occasions, Scalia openly ridiculed O'Connor's minimalist, pragmatic approach to abortion, which not only pushed O'Connor to the opposing camp in deciding specific cases but also caused serious strains in their personal relations. For example, he attacked one of O'Connor's' majority opinions on abortion as so flawed that her rationale "cannot be taken seriously." It is hard to believe that such words would not have been taken personally by O'Connor, who commented to others that "sticks and stones will break my bones, but words will never hurt me," but then quickly added, "That probably isn't true."[19] People close to the court (such as law clerks to the two justices) observed that if Scalia had showed more willingness to listen to the concerns voiced by O'Connor

[18] The "oil and water" phrase was coined by John C. Jefferies, Jr., Powell's biographer, quoted from Margaret Talbot, *Supreme Confidence: The Jurisprudence of Justice Antonin Scalia,* THE NEW YORKER, March 28, 2005, also available at http://www.newyorker.com/magazine/2005/03/28/supreme-confidence.

[19] JOAN BISKUPIC, SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 277 (2005).

and used less acerbic language in his criticism, he would have been able to gain her support. But he was capable of doing neither. As a result, the personal relationship between them was measurably cold to the point that either had been seen to have paid individual visits to the other's office across the corridors to confer on issues before the court, a practice common among the justices who share the same office building.[20]

Scalia's stubbornness had gained him adulation from Republicans and other conservative operatives but also visible dismay from the same groups. On the one hand, they loved him for his unswerving Originalism and steadfast conservative political stance. On the other hand, they were disappointed in his failure to employ tactics to win judicial battles due to his rigidity and deplorable interpersonal skills. When Chief Justice William H. Rehnquist died in 2005, Scalia, as the ranking conservative justice, had all the right qualifications, politically as well as in terms of intellectual brilliance and judicial experiences, to be picked by President George W. Bush to succeed Rehnquist. Scalia also appeared to be prepared to take up this challenge,[21] but was passed by President Bush. Although not explicitly articulated, concerns by Bush's advisors on the perceived lack of leadership skills by Scalia due to his overly aggressive personality have widely been speculated to be one of the reasons that doomed his hope for the Chief Justice post.

Under the US system of separation of powers ordained by the Constitution, the judiciary, as the only non-political branch of the government, exercises judicial power independently. Judges, especially federal judges appointed pursuant to Article III of the Constitution, are expected not to participate in partisan or other political activities that may erode public confidence in judges' independence, integrity and impartiality. Historically, most Supreme Court justices have strictly followed this practice by refraining from making public statements on political issues or otherwise appearing in public events in order not to create the

[20] A law clerk for Justice O'Connor once told a reporter, "There are cases she might have been persuadable had he been more sensitive to the need to cultivate her—even just to the extent of not actively attacking her . . . . I think his tone with her has pushed her against him. I never saw them calling or coming to one another's chambers, as Justices will occasionally do, if they have differing but similar opinions." Talbot, *supra* note 18.

[21] Talbot, *supra* note 18.

appearance of entanglement with individuals or organizations of particular political persuasion. Scalia acted differently, at least as compared with most other justices. Consistent with his outspokenness on the bench, he took part in much more public activities than his colleagues by giving speeches and publishing articles and was much less selective than his colleagues in being intimately associated with public figures and individuals whose political or economic interests were arguably implicated by cases coming before the Supreme Court. This had brought him repeated controversies. For instance, he never attempted to conceal his close personal relationship with Dick Cheney, Vice President during the Bush administration (2000–2008). In 2004 it was reported by the news media that Scalia took a duck-hunting trip with Cheney in Louisiana hosted by a businessman. At that time, the Supreme Court was reviewing a case in which a governmental energy task force headed by Cheney was a party. That a justice went out on a private vacation trip with a political figure who was arguably involved in a case that was under the court's review posed serious questions, at least on the appearance, on the justice's impartiality in adjudicating the case, even if no applicable code of conduct had been violated. This incident ignited a wave of media reports and negative commentaries requesting Scalia recuse himself from hearing the case, which made other justices feel exceedingly uncomfortable.[22] But Scalia brushed aside all criticisms and refused to recuse himself. He responded to a question on the hunting trip from the audience at a college speech by imitating duck voice "Quack, Quack,"[23] an act not imaginable for other justices. On another occasion, during a pubic speech in January 2003, Scalia openly criticized a decision by the U.S. Court of Appeals for the Ninth Circuit holding that public school teachers' leading the recitation of the Pledge of Allegiance to the American flag, with its "under God" language, violated the freedom of religion of atheist children and parents.[24] This was a rare act, contrary to the usual practice of Supreme Court justices to refrain from making public comments on lower court decisions. For this

[22] Biskupic, *supra* note 7, at 259–60.

[23] The case is *Cheney v. United States District Court for the District of Columbia,* 541 U.S. 913 (2005). *See* Biskupic, *supra* note 7, at 256–57.

[24] The case is *Elk Grove Unified School District v. Newdow,* 542 U.S. 1 (2004). *See* Biskupic, *supra* note 7, at 267.

act, Scalia was forced to recuse himself next year when the case was accepted for review by the Supreme Court.[25]

One of the reasons for Scalia to insert himself into the public debate on politically sensitive issues by openly declaring his judicial philosophy and political and social preferences, even at the risk of recuse from hearing particular cases, was his strong desire to disseminate conservative ideas through public expression. For him, it was part of his unique strategy of public relations, as he firmly believed that the effectiveness of his effort to spread the Originalist tenets was partly conditioned by his personality. "One of the ways to get people to pay attention to ideas," he said, "is to get people to pay attention to you."[26] Such reasoning and conduct were decisively inconsistent with the prevailing ethos of moderation and self-restraint characteristic of the judiciary.

In retrospect, over the 30 years of Scalia's tenure on the Supreme Court, he had more setbacks than victories. This trend had intensified with the passage of time, resulting in him issuing more and more dissenting opinions. It reflected the gradual change of tide in the American sentiment toward increasing tolerance and inclusiveness on social issues and the reluctant retreat of traditionalist culture and ideology represented by Scalia.[27] From the American liberals' perspective, Scalia represented the lost world of the past generations of anti-progressive, backward-looking, "reactionary" ethos based on outdated, moralistic traditionalism, who "devoted his professional life to making the United States a less fair, less tolerant, and less admirable democracy." He "wanted the world to be in uniform and at a sort of moral attention forever."[28] Most illustrative of Scalia's moralistic traditionalism was his vocal, persistent and adamant opposition to legalization of same-sex marriage. In 2003, the Supreme Court

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[25] Biskupic, *supra* note 7, at 268.

[26] Robert Wolf, *Questions swirl around longevity of Scalia legacy*, USA TODAY, February 19, 2016, at 6A, also available at http://www.usatoday.com/story/news/politics/2016/02/18/supreme-court-justice-antonin-scalia-legacy/80465762.

[27] "The Court must be living in another world," declared Scalia in 1996. "Day by day, case by case, it is busy designing a Constitution for a country I do not recognize." JEFFREY ROSEN, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 181 (2006).

[28] Jeffery Tobin, *Looking Back*, THE NEW YORKER, (Feb. 29, 2016), http: http://www.newyorker.com/magazine/2016/02/29/antonin-scalia-looking-backward.

ruled in *Lawrence v. Texas* that for the first time in history struck down a Texas law that criminalized homosexual sex. In his dissent, Scalia wrote bitterly,

> Today's opinion is the product of a Court which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. . . . Many Americans do not want persons who openly engage in homosexual conduct as partners in their business . . . as teachers in their children's schools, or boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.[29]

Scalia was aware of the diminishing influence of his conservative traditionalism.[30] He once remarked, self-deprecatingly, that one could "fire a cannon loaded with grapeshot in the faculty of any major law school" but "not hit an originalist."[31] The demise of his judicial philosophy was mostly the result of the shifting political and social beliefs held by the American public, but his loss of so many judicial battles in deciding close cases was also determined, at the personal level, by his stubbornness, loathing to compromise and in-discriminatory aggressiveness. In addition to being vitriolic, Scalia's self-grandiosity precluded him from thinking and acting in less idiosyncratic manners. It was reported that he once asked one of his law clerks rhetorically, "What is a smart guy like me doing in a place like this?"[32]

Needless to say, Scalia was a justice surrounded by controversies. From his colorful judicial career, we can clearly observe the tidal changes of the American political, social and cultural life over the last several decades. Furthermore, for a Chinese observer outside the context of the American judicial politics, the characteristic "Scalian" judicial phenomenon also provided a unique

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[29] Lawrence v. Texas, 539 U.S. 558, 602 (2003).

[30] In 2009, after nearly 25 years on the Supreme Court, Scalia characterized his court victories as "damn few." BISKUPIC, *supra* note 7, at 363.

[31] Talbot, *supra* note 18.

[32] ROSEN, *supra* note 27, at 203.

window to perceive the role and position of American judges as individuals in the U.S. constitutional framework as a comparison to the Chinese judges in the Chinese context.

Scalia served on the federal bench for 35 years, including five years on the U.S. Circuit Court of Appeals for the District of Columbia and 30 years on the Supreme Court, and had made countless enemies, mostly political and ideological but also some personal, in and outside the courthouses. He fought his enemies through political debates and judicial arguments, often fiercely and with ferocious intensity, within the broad and flexible constitutional framework. He, like almost all other U.S. judges, had never feared for his personal safety because his political and personal foes, including the litigants whose interests had been adversely impacted by his court decisions, had ever thought of any means to defeat or destroy him other than meeting him head-on in political debates and judicial arguments.[33] Jim Obergefell, the named party to the landmark same-sex marriage case whose claim to constitutional equal protection for himself and his partner and other same-sex couples had been relentlessly rejected by Scalia in dissent displayed no trace of personal hatred toward the demised justice. Upon learning Scalia's death Obergefell tweeted: "Thank you for your service to our country, Justice Scalia. Condolences to your family and friends."[34]

Under the U.S. Constitution, a federal judge like Justice Scalia, once confirmed by the Senate upon the President's nomination, enjoys life-long tenure and income security[35] and is not subject to any administratively-type supervision and direction within and without the judicial institutions. On the Supreme

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33 This presents a sharp contrast with Chinese judges who, despite the lack of open disagreements within themselves in judicial decisions and reasoning, are often faced with harassments and other concerns for personal and family security. The recent tragic killing of a trial court judge in Beijing allegedly by an individual whose case was heard by the slain judge is just one extreme example that manifested this lack of personal security and tranquility by Chinese judges. For a thoughtful analysis, *see* 季卫东 (Ji Weidong), 中国法律秩序的正当性危机——从女法官被枪杀反思大陆司法制度 [*The Legitimacy Crisis of the Chinese Legal Order: Reflection on the Killing of the Chinese Woman Judge*], 凤凰周刊 [PHOENIX WEEKLY], issue 8, (2016).

34 Talbot, *Postscript: Antonin Scalia, 1936–2016*, THE NEW YORKER (Feb. 14, 2016), http://www.newyorker.com/news/news-desk/postscript-antonin-scalia-1936-2016.

35 U.S. CONST. art, III, § 1.

Court, all justices are equal in status and weight of opinion. The Chief Justice serves only as the chair of procedures without any administrative power over other justices.[36] Individual independence based on equal standing and freedom from administrative supervision enables each justice to freely express his or her views, including those critical of fellow justices or the Chief Justice, without fear of retaliation or punishment. Within the federal judicial system, a court of the superior level has the legal authority to review, amend, vacate or overturn a judgment by an inferior court, but possesses no power to censor, or otherwise punish, a judge of the inferior court for any criticism by such judge expressed as individual views of a decision or holding of a superior court, including the Supreme Court. For instance, Michael McConnell, a well-known conservative jurist, when sitting on the U.S. Court of Appeals for the Tenth Circuit (2002–2009), frequently voiced his disagreements with, and criticism of, Chief Justice Roberts and Justice Scalia for the decisions on certain social issues, which McConnell deemed to have deviated from the Originalist position they vowed to hold dearly.[37] Similarly, Richard Posner, Judge of the U.S. Court of Appeals for the Seventh Circuit, has openly criticized Scalia's inclination to take religion over the Constitution in his judicial jurisprudence.[38]

Independence in person, position and opinion provides the institutional foundation for federal judges to act in accordance with their own political and judicial convictions and personal understanding of the related legal principles and reasoning and to express their views freely without yielding to any extrajudicial pressure, whether it is from other judges, the superior courts, the executive and legislative branches, the press, or the general public. Despite his staunch adherence to traditional conservative values and vitriolic rhetoric had pitted him in losing battles against liberal and moderate justices (and sometimes, other fellow conservatives), Scalia was able to hold his ground, uttering his views

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[36] *See* PHILIP COOPER & HOWARD BALL, THE UNITED STATES SUPREME COURT: FROM THE INSIDE OUT 132–58 (1996).

[37] ROSEN, *supra* note 27, at 217.

[38] Richard Posner & Eric Segall, *Justice Scalia's Majoritarian Theocracy*, THE NEW YORK TIMES (Dec. 2, 2015), http://www.nytimes.com/2015/12/03/opinion/justice-scalias-majoritarian-theocracy.html?smtyp=cur; Richard Posner, *In Defense of Looseness*, THE NEW REPUBLIC (August 27, 2008), https://newrepublic.com/article/62124/defen se-looseness.

in an unreserved manner. Ironically, because of this candor and transparency, ideological foes are still able to get along well as personal friends as long as political debates do not escalate to personal attack between individual justices. Ideologically, Justice Ginsburg, a celebrated liberal, is Scalia's political mimesis on the high court. On most issues coming before the Supreme Court they held different or opposite views and were often engaged in fierce debates in oral arguments and private conferences. But such clashes in political views and judicial approach did not prevent them and their families from developing close personal relations. Their families spent almost every New Year's Eve together, and Ginsburg and Scalia often performed on stage together sharing their common passion for opera. On one occasion when Ginsburg's husband was hospitalized, Scalia was the only person outside Ginsburg's family who had visited him in the hospital.[39] Scalia had said openly that if he had been stuck on a desert island, Ginsburg was the liberal he'd most like to be stuck with.[40] Justice Ginsburg noted fondly of their seemingly odd friendship in her personal tribute to Justice Scalia upon his death:

> Towards the end of the opera Scalia/Ginsburg, tenor Scalia and soprano Ginsburg sing a duet: "We are different, we are one," different in our interpretation of written texts, one in our reverence for the Constitution and the institution we serve. From our years together at the D.C. Circuit, we were best buddies. We disagreed now and then, but when I wrote for the Court and received a Scalia dissent, the opinion ultimately released was notably better than my initial circulation. Justice Scalia nailed all weak spots—the "applesauce" and "argle bargle"—and gave me just what I needed to strengthen the majority opinion.[41]

Evidently, political debates and criticism, including seemingly unfair or unpleasant criticism made in a harsh and irritating tone, may work to benefit both individuals on the giving and receiving ends if conducted within a reasonable context. To

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[39] Talbot, *supra* note 8.

[40] Talbot, *supra* note 18.

[41] Statement from the Supreme Court Regarding the Death of Justice Antonin Scalia (Updated), Supreme Court of the United States (Feb. 15, 2016), http://www.supremecourt.gov/publicinfo/press/pressreleases/pr_02-14-16.

achieve this mutual benefit necessarily requires both parties enjoy true independence as individuals. Such personal independence encompasses at least independence in spirit and expression and independence in physical means and social standing. If this personal independence has its roots in the human nature of yearning for freedom and self-governance, its survival relies heavily on effective protection by political and social institutions. With regards to judicial functions, judicial independence in terms of both judicial institutions and independent individuals as judges is the prerequisite for the judiciary to resolve disputes fairly and impartially. Whereas judicial independence does not necessarily guarantee justice, it is certain that judicial fairness and justice will not be secured without genuine independence of the judicial branch, the courts, and the judges.