



THE “CONSTITUTIONAL” RISE OF CHINESE SPEECH IMPERIALISM

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This article conceptualizes China’s new constitutional doctrine of “party supremacy” and explains the implications it carries for speech regulation in both domestic and international public spheres. In particular, the article captures the Chinese Communist Party’s scheme of legitimizing its comprehensive speech regulation through party supremacy. This new constitutional doctrine, in contrast to China’s earlier dualistic constitutional framework, attempts to overcome the textual and contextual barriers for speech regulation and reshape the constitutive mechanism of the CCP’s domestic and international speech rules. Thus, there is a multi-layer “constitutional” spillover effect of intra-party speech regulation. First, the party-state may well redefine the distinction between the regulation of political speech and that of non-political speech: the former is geared exclusively to the CCP’s intra-party rules under the tutelage of constitutional

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law. Consequently, the new constitutional doctrine could alter the structure of China’s speech regulatory framework in two aspects: it both verticalizes the entire body of speech norms by prioritizing party rules and fully empowers party organs in the institutional governance of political speech.

Moreover, the party-state strives to extend the new constitutional framework to speech regulation in a transnational context. Here it seeks to reinforce the textual and contextual substance of its regulatory framework for overseas political speech by legitimizing party supremacy through authoritarian constitutional theories, customizing the CCP’s speech regulation in cross-border trade arrangements, and building a global identity with constitutional legitimacy for party supremacy that goes against constitutionalism itself. Thus, the article unveils this scheme as the underlying driving force of Chinese speech imperialism—a nuanced and tangible legal regime with a tacit, but uncompromising, constitutional blueprint of a power-monopolizing party to undermine the protection of free speech in liberal democracies.

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INTRODUCTION: WHAT IS THE UNDERLYING DRIVING FORCE OF “CHINESE SPEECH IMPERIALISM”?

Although the last four decades witnessed the rise of the People’s Republic of China (PRC/China) as a global economic power and its thriving diplomatic relationship with Western powers, China remains an authoritarian state with the quintessential characteristic of illiberal politics.¹ A fundamental feature of any system led by Communist parties is the suppression of freedom of expression through extensive regulations.² Traditionally, China’s regulation of speech, especially political speech, has been considered a regime rooted in the predominant political ideology of the Chinese Communist Party (CCP/party).³ This runs in sharp contrast to the protection of free speech in the United States (US).⁴

To be sure, the constitutional protection of political speech is tied to democratic self-governance by fostering a “dialogue between members of the electorate and between governors and governed” and “the operation of a constitutional democracy.”⁵ By contrast, the scenario in an authoritarian state like China is characterized by a highly repressive speech regulatory regime in which political speech is subject to government regulation without the corresponding checks by judicial review.⁶ In fact, it was only between the late 1970s and the 2010s—the major period of China’s

¹ Kellee S. Tsai, *China: Economic Liberalization, Adaptive Informal Institutions, and Party-State Resilience*, in THE OXFORD HANDBOOK OF TRANSFORMATIONS OF THE STATE 654, 663–66 (Stephan Leibfried et al. eds., 2015).

² See, e.g., *2020 World Press Freedom Index: China*, REPORTERS WITHOUT BORDERS, <https://perma.cc/67NB-LH4N>. For a detailed account of such a system in a comparative lens, see Fu Hualing & Jason Buhi, *Diverging Trends in the Socialist Constitutionalism of the People’s Republic of China and the Socialist Republic of Vietnam*, in SOCIALIST LAW IN SOCIALIST EAST ASIA 135, 140–47 (Hualing Fu et al. eds., 2018).

³ Ellen R. Eliasoph, *Free Speech in China*, 7 YALE J. WORLD PUB. ORD. 287, 290–303 (1981) (pointing out that the regulatory regime is shrouded by the Marxist-Leninist constitutional theories).

⁴ Owen M. Fiss, *Two Constitutions*, 11 YALE J. INT’L L. 492, 497–500 (1986).

⁵ ERIC BARENDT, FREEDOM OF SPEECH 156 (2d ed. 2005).

⁶ Ashutosh Bhagwat, *Free Speech Without Democracy*, 49 U.C. DAVIS L. REV. 59, 70, 75–77 (2015).

economic reforms—that ordinary Chinese learned gradually about free speech as a constitutional right and Western societies started to perceive its implementation in China as an issue of internationally recognized human rights.⁷ Admittedly, despite other aspects of China’s legal development that might showcase some progress of its economic reforms, the party-state has made little progress in the protection of free speech that warrants rigorous study.⁸ Therefore, one could view the status of speech regulation in China as largely insulated from, if not entirely irrelevant to, the free speech in liberal democracies.

However, there is now a serious concern that liberal and democratic values are in danger of decay.⁹ In particular, the status of free speech as a global “foundational” human right appears to be ever more precarious,¹⁰ as the past decade has witnessed a worldwide decline of speech protection.¹¹ Not only has the crackdown on free speech in authoritarian countries itself exacerbated the problem, but the “long arm of authoritarianism” seems to exert increasing influence on the paradigmatic protection of political speech in democracies,¹² posing a threat to this fundamental right.¹³ Much of this recent development is linked and attributed to China’s entrenched, yet incrementally extraterritorial, regime of speech regulation,¹⁴ which

⁷ Hermann Aubié, *Freedom of Opinion and Expression*, in HANDBOOK ON HUMAN RIGHTS IN CHINA 301, 302–03 (Sarah Biddulph & Joshua Rosenzweig eds., 2019).

⁸ Xin He, *The Party’s Leadership as a Living Constitution in China*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES 245, 257–58 (Tom Ginsburg & Alberto Simpser eds., 2013).

⁹ According to a recent study, democracy declined in 2021 to 1989 levels, while a process of “autocratization” rose to cover 70% of the world’s population and freedom of expression deteriorated in a record 35 countries. See VANESSA A. BOESE ET AL., VARIETIES OF DEMOCRACY INST., DEMOCRACY REPORT 2022: AUTOCRATIZATION CHANGING NATURE? 6 (Vanessa A. Boese & Staffan I. Lindberg eds., 2022), <https://perma.cc/9XF4-9QSE>.

¹⁰ ERIC HEINZE, THE MOST HUMAN RIGHT: WHY FREE SPEECH IS EVERYTHING 10 (2022).

¹¹ Jacob Mchangama, *The War on Free Speech: Censorship’s Global Rise*, FOREIGN AFFS., Mar.–Apr. 2022, at 117, <https://perma.cc/S7ZT-5J6J>.

¹² Yana Gorokhovskaia & Isabel Linzer, *The Long Arm of Authoritarianism: How Dictators Reach Across Borders to Shut Down Dissent*, FOREIGN AFFS. (June 2, 2022), <https://perma.cc/W9PK-KTEA>.

¹³ Editorial, *Free Speech Is Under Threat*, N.Y. TIMES (Mar. 20, 2022), at SR4.

¹⁴ A prominent example is the recent national security legislation in Hong Kong. Benedict Rogers, *Beijing Launches a Global Assault on Free Speech*, FOREIGN POL’Y (July 9, 2020, 1:56 PM), <https://perma.cc/ETE5-VNZV>.

many fear could change the liberal international order in favor of China's autocratic system.¹⁵

In addition to actions to suppress political dissent globally,¹⁶ China's heavy-handed censorship during the recent outbreak of the Covid-19 pandemic in Wuhan has generated lasting consequences.¹⁷ Most importantly, it raises doubts about whether the immeasurable losses around the world caused by the pandemic—especially in human lives and economic growth—could be ascribed to the authoritarian state that has no mechanism to contain and counter the unfettered practice of suppressing free speech.¹⁸

Nevertheless, China's censorship represents merely a defensive, albeit basic, strategy of its authoritarian speech regulation. A subsidiary but more offensive approach to regulating political speech is the propaganda, disinformation, and misinformation campaigns launched by the authoritarian state in an attempt to reshape global public opinions in terms of its ideological narratives.¹⁹ For one, China has

¹⁵ DAVID L. SLOSS, TYRANTS ON TWITTER: PROTECTING DEMOCRACIES FROM INFORMATION WARFARE 76–81 (2022) (using the example of several states' endorsement of China's national security legislation in Hong Kong and other states' reticence to pinpoint China's success in shaping the global narrative, but qualifying China's global ambition as a self-preservative strategy).

¹⁶ Suzanne Nossel, *Chinese Censorship Is Going Global*, FOREIGN POL'Y (Oct. 26, 2021, 5:37 AM), <https://perma.cc/3Y7U-JSSG>.

¹⁷ One of the oft-cited evidences is that local authorities silenced and punished Dr. Li Wenliang, the “whistle blower” who articulated his misgivings about the re-emergence of SARS in social media at the onset, before the Chinese government confirmed the existence of coronavirus officially. Chris Buckley, *Whistle-Blower on China Virus Succumbs to It*, N.Y. TIMES (Feb. 7, 2020), at A1. Well-respected voices at home criticized the government's mishandling and posited that the doctor's warning should have been taken seriously from the outset to eschew an epidemic. However, the Chinese government cracked down on those critics without any exception. LYDIA KHALIL, DIGITAL AUTHORITARIANISM, CHINA AND COVID 14–16 (2020), <https://perma.cc/4M7P-ZDNN>.

¹⁸ James D. Schultz & Sean Carter, Opinion, *China Needs to Be Held Accountable for Covid-19's Destruction*, CNN (June 20, 2020, 6:31 PM), <https://perma.cc/C9M2-RZ3A>. For the most recent litigation, see, e.g., *Missouri ex rel. Schmitt v. China*, 610 F. Supp. 3d 1174 (E.D. Mo. 2022).

¹⁹ Social manipulation and disinformation, sometimes referred to as “flooding,” may serve the purpose of censorship by “drowning out legitimate sources of information” and manipulating existing content. See STEVEN FELDSTEIN, THE RISE OF DIGITAL REPRESSION: HOW TECHNOLOGY IS RESHAPING POWER, POLITICS, AND RESISTANCE 32–34 (2021). For an analysis of how China manages

reportedly joined Russia in mobilizing its propaganda force to make up and spread specific falsehoods about the efficacy of vaccines on international social media in order to promote the advantages of authoritarian systems over liberal democracies.²⁰ On the one hand, such government-led campaigns echo China’s “vaccine diplomacy” during the pandemic as a “carrot policy” to deepen its regional ties across the world with the purpose of competing with the US in a sharpened arena of political economy.²¹ On the other hand, these tactics are consistent with China’s post-Covid “wolf warrior diplomacy”—a “stick policy” characterized by China’s hardline stance to fuel the narrative of its systemic superiority over liberal democracies.²² Such offensive speech campaigns are becoming increasingly frequent on a more confrontational level, given China’s recent role as Russia’s key partner in creating disinformation about the Russia-Ukraine war.²³ These recent developments have caused wide concerns about whether liberal democracies led by the US could deal with the “information warfare” between the authoritarian camp and the democratic camp without shaking the foundations of free speech.²⁴

the toolbox of censorship, propaganda, and disinformation, see SARAH COOK, FREEDOM HOUSE, BEIJING’S GLOBAL MEGAPHONE: THE EXPANSION OF CHINESE COMMUNIST PARTY MEDIA INFLUENCE SINCE 2017 (Tyler Roylance ed., 2020), <https://perma.cc/63AD-338D>. See also SLOSS, *supra* note 15, at 3–23 (illustrating how Russia and China use disinformation and misinformation campaigns to influence democratic countries). For a most recent empirical study of China’s successful use of US-based social media as a platform of applying propaganda, disinformation and coercive strategies, see Albert Zhang & Tilla Hoja, *Assessing the Impact of CCP Information Operations Related to Xinjiang*, 62 AUSTRALIAN STRATEGIC POL’Y INST. 10–17 (2022), <https://perma.cc/8QGQ-REP4>.

²⁰ BEN DUBOW ET AL., CTR. FOR EUR. POL’Y ANALYSIS, JABBED IN THE BACK: MAPPING RUSSIAN AND CHINESE INFORMATION OPERATIONS DURING COVID-19, at 9–12 (2021), <https://perma.cc/UZ6K-JXNL>.

²¹ Detlef Nolte, *Relativizing the Success of China’s “Vaccine Diplomacy”*, DGAP ONLINE COMMENTARY (Feb. 1, 2022), <https://perma.cc/HBL2-B4MP>.

²² Aidan Powers-Riggs & Eduardo Jaramillo, *Is China Putting “Wolf Warriors” on a Leash?*, THE DIPLOMAT (Jan. 22, 2022), <https://perma.cc/3FTA-DMEL>.

²³ Paul Mozur et al., *China Intensifies Its Echoes of Russia’s Disinformation*, N.Y. TIMES (Apr. 12, 2022), at B1.

²⁴ SLOSS, *supra* note 15, at 231–42 (suggesting various strategies to counter Chinese and Russian influence and discussing their constitutionality).

Today, backed by both defensive and offensive tactics, China's speech regulatory regime, which transcends its territorial border via the Internet in a more assertive manner,²⁵ stands alongside those of the European Union (EU) and the US as an "empire" with global reach.²⁶ Until very recently, however, this issue has only attracted a few political science studies on its implications and potential countermeasures.²⁷ This is probably because the post-Cold-War optimism dominated the field of ideological confrontation to such an extent that it was taken for granted that wide use of digital technology would eventually make China's censorship impossible.²⁸ In reality, however, a significant part of the global protection of political speech seems to be overshadowed by the growing influence of China's speech regulatory regime.²⁹

A major concern is that the chilling effect of China's online speech regime may have trickled down to the other side of the Pacific,³⁰ which could compromise the traditional values of speech protected by the First Amendment. The US embassy in

²⁵ See Owen Churchill, *Top US Human Rights Official Decries 'Transnational Repression' Campaign by China*, S. CHINA MORNING POST (June 16, 2022, 3:51 AM), <https://perma.cc/6955-GJ33>.

²⁶ Jack Balkin, *How to Regulate (and Not Regulate) Social Media*, 1 J. FREE SPEECH L. 71, 89 (2021); see also Editorial, *As Internet Splinters, the World Suffers*, N.Y. TIMES (Oct. 15, 2018), at A22.

²⁷ For one, speech regulation is regarded as a key element of China's "sharp power." See Christopher Walker, *What Is "Sharp Power"?*, 29 J. DEMOCRACY 9 (2018). For the role of China's speech regulation in digital context during the pandemic, see KHALIL, *supra* note 17, at 14–20; see also HARRIET MOYNIHAN & CHAMPA PATEL, *RESTRICTIONS ON ONLINE FREEDOM OF EXPRESSION IN CHINA: THE DOMESTIC, REGIONAL AND INTERNATIONAL IMPLICATIONS OF CHINA'S POLICIES AND PRACTICES* (2021), <https://perma.cc/47ER-ZTTB>. A more recent study discusses China's strategic ambition through its digital governance. NAT'L BUREAU OF ASIAN RSCH., *CHINA'S DIGITAL AMBITIONS: A GLOBAL STRATEGY TO SUPPLANT THE LIBERAL ORDER* (Emily De La Bruyère et al. eds., 2022), <https://perma.cc/NUG9-5BXB>.

²⁸ The most famous example of such optimism was the former US President Bill Clinton's description of China's Internet crackdown as "trying to nail Jell-O to the wall." Editorial, *Clinton's Words on China: Trade Is the Smart Thing*, N.Y. TIMES (Mar. 9, 2000), at A10.

²⁹ In all events, Clinton's famous "nailing-Jell-O" forecast seems to go in the reverse direction. See Xuan Loc Doan, *"Nailing Jello to the Wall" Is Possible in Xi's China*, ASIA TIMES (Nov. 14, 2018), <https://perma.cc/86JG-J3L3>.

³⁰ For a recent record of China's transnational speech control in the US, see CONG.-EXEC. COMM'N ON CHINA (CECC), 117TH CONG., ANNUAL REP. 1 (2022).

China was banned from publishing political messages Beijing dislikes.³¹ US business institutions and commercial entities conducted self-censorship to avoid criticizing China and gain access to the Chinese market.³² Self-censorship occurred also at times in the US academic, educational, and cultural sectors that some argue were more vulnerable than other sectors to China’s speech regulatory regime.³³ However, perhaps the most controversial effects of China’s speech regulation on the world’s largest democracy are envisaged by the CCP’s control over its global social media such as Tiktok, which some fear might even undermine US elections in sophisticated ways.³⁴ The ideological combat is equally visible in Europe, where China retaliated against elected representatives who spoke critically of the Chinese government.³⁵ In the most prominent case, China’s expanding speech regime

³¹ Siladitya Ray, *Chinese Social Media Platforms Censor US Embassy Posts*, FORBES (July 6, 2022, 9:44 AM), <https://perma.cc/5P5J-Q7SW>.

³² This is highlighted by a series of recent reports. German Lopez, *American Self-Censorship*, N.Y. TIMES (Feb. 20), 2022. The National Basketball Association had to avoid offending China by deleting pro-democratic tweets. Evan Crystal, *Censorship and Self-Censorship: China and the NBA*, NE. UNIV. POL. REV. (Nov. 4, 2019), <https://perma.cc/VJC9-8JM4>. For similar reasons, Microsoft had to close its localized version of LinkedIn in China. Zhaoyin Feng, *Microsoft Shutting Down LinkedIn in China*, BBC NEWS (Oct. 14, 2021), <https://perma.cc/TR44-Z6V9>.

³³ Even in the US, it is not uncommon that both Chinese and non-Chinese scholars find it difficult to utter critical voices openly regarding any issues deemed politically sensitive by the Chinese government. Isaac Stone Fish, *The Censorship Circus*, WIRE CHINA (Feb. 27, 2022), <https://perma.cc/QX6T-KW5V>.

³⁴ Casey Newton, *It Turns Out There Really Is an American Social Network Censoring Political Speech*, VERGE (Sept. 26, 2019, 5:00 AM), <https://perma.cc/V7ME-2BPA>.

³⁵ Stuart Lau, *China Denies Visas to German Lawmakers over Their Human Rights Criticism*, S. CHINA MORNING POST (Aug. 21, 2019, 10:00 AM), <https://perma.cc/6T5U-JL9F>.

wielding sticks and carrots at the UK,³⁶ France,³⁷ and Germany,³⁸ could be a challenge to academic and educational freedoms for these cultural powerhouses. In short, China's global speech regulatory regime is no longer limited to the conventional sphere of ideological conflicts, but may well reflect the authoritarian state's ambition to challenge and influence the liberal model of protecting free speech.³⁹

This evolving global speech regulatory regime combining both defensive and offensive strategies unseen in the past, I argue, amounts to *speech imperialism*. To differentiate it from traditional imperialism, Chinese speech imperialism is not a policy with explicit territorial ambitions. Instead, it represents a nuanced and tangible legal regime with tacit, but uncompromising, geopolitical goals of extending its global regulation of political speech by a power-monopolizing party.⁴⁰ Moreover, the authoritarian regime seeks to undermine the protection of free speech and the democratic system elsewhere through its propaganda about the systemic advantages of authoritarianism.⁴¹ In fact, Chinese speech imperialism goes beyond a

³⁶ The UK first observed the danger of the erosion of independent research. Maev Kennedy & Tom Phillips, *Cambridge University Press Backs down over China Censorship*, GUARDIAN (Aug. 21, 2017, 11:36 AM), <https://perma.cc/MZ64-QLZ7>. There are also voices questioning the independent status of higher education. Freddie Hayward, *How the Chinese Government Is Buying Its Way into UK Universities*, NEW STATESMAN (July 13, 2021), <https://perma.cc/A7S9-A9SN>.

³⁷ Two French universities were obliged to end their cooperation with the local Confucius Institute due to pressure from Beijing to revise educational programs in the light of China's ideological guidelines. *The Debate over Confucius Institutes Part II*, CHINAFILE (July 1, 2014), <https://perma.cc/7M6X-TP34>.

³⁸ China managed to stop independent plans in Germany for holding book talks relating to Xi Jinping. Andreas Fulda & David Missal, *German Academic Freedom Is Now Decided in Beijing*, FOREIGN POL'Y (Oct. 8, 2021, 11:45 AM), <https://perma.cc/W244-UV8J>.

³⁹ The Biden administration, for instance, defines China as the "only competitor potentially capable of combining its economic, diplomatic, military, and technological power to mount a sustained challenge to a stable and open international system." THE WHITE HOUSE, RENEWING AMERICA'S ADVANTAGES: INTERIM NATIONAL SECURITY STRATEGIC GUIDANCE 8 (2021), <https://perma.cc/ZRF8-LLEJ>.

⁴⁰ SLOSS, *supra* note 15, at 82–99 (documenting China's employment of traditional and digital means to shape global narratives about China-related political developments).

⁴¹ China has succeeded partly in touting Chinese-style censorship in democratic countries via concealed business models. *See, e.g.*, Andrew Asmakov, *Elon Musk Wants Twitter to Be WeChat-Style 'Super App' with Payments*, DECRYPT (May 18, 2022), <https://perma.cc/Y2BF-JB49>. Typically,

sheer response to the so-called “American speech imperialism” whose mission is often perceived as promoting free speech and democracy in authoritarian countries.⁴² Unlike its US counterpart, Chinese speech imperialism is founded on distinctive underpinnings of constitutional law as well as legal architectures to maintain and expand the legitimacy of illiberal rule.

Conventionally, China’s regulation of political speech is embedded in a unique, dualistic governance structure which, by juxtaposing both the Constitution of the PRC (Constitution) and the Constitution of the CCP,⁴³ allows for the coexistence of content reviews by the state organ as a “normative state” and by the party organ as a politically “prerogative state.”⁴⁴ Presumably, under such a constitutional framework, state organs review political speech by non-CCP members in accordance with national speech laws, whereas the CCP organs scrutinize political speech by its members pursuant to intra-party regulations. However, constitutional dualism alone can no longer accurately explain the increasing expansion of China’s speech regulatory regime, which is becoming more nuanced but widely felt.⁴⁵ Above all, intra-party speech rules are turning into national speech laws: China’s

these successes are attributable to China’s propaganda and censorship. SLOSS, *supra* note 15, at 100–106 (illustrating how China used overseas Chinese social media and China-funded overseas media to influence elections in Taiwan and other western countries).

⁴² Andrew Keane Woods, *China and the Hypocrisy of American Speech Imperialism*, LAWFARE (Oct. 18, 2019, 2:19 PM), <https://perma.cc/ECK7-2B3K>.

⁴³ Shucheng Wang, *Emergence of a Dual Constitution in Transitional China*, 45 HONG KONG L.J. 819, 827 (2015).

⁴⁴ Hualing Fu & Michael Dowdle, *The Concept of Authoritarian Legality: The Chinese Case*, in AUTHORITY IN ASIA 63, 67–69, 89 (Weitseng Chen & Hualing Fu eds., 2020).

⁴⁵ These features are documented in growing amount of literature. See, e.g., Jonas Gamsö, *Is China Exporting Media Censorship? China’s Rise, Media Freedoms, and Democracy*, 27 EUR. J. INT’L RELS. 858, 858–61 (2021); Muyi Xiao & Paul Mozur, *With Digital Dragnet, Chinese Police Hunt Critics Near and Far*, N.Y. TIMES (Dec. 31, 2021), at A1; Christopher A. Ford & Thomas D. Grant, *Exporting Censorship: The Chinese Communist Party Tries to Control Global Speech About China*, NAT’L. SEC. INST. GEO. MASON (2022), <https://perma.cc/C47U-ANZ8>.

offensive speech campaign now finds its normative basis in national speech regulations such as those enacted by the Cyberspace Administration of China (CAC), a state organ directly established by the CCP.⁴⁶

Moreover, the CCP has increasingly institutionalized its direct political governance through national laws.⁴⁷ These legal measures both “coerce” and “co-opt” private owners far more strongly than what Professor Balkin defines as the private speech governance in the transition of contemporary speech governance “from the dyadic to the pluralist model.”⁴⁸ Although still embryonic, such institutionalization could strengthen information control, which, as Professor Ginsburg argues, is essential for autocracies to use international law in authoritarian ways that foster the development of cross-border norms to suppress free speech.⁴⁹ With China’s strongly asserted self-portrait of its rise as a great power,⁵⁰ the CCP’s intra-party speech rules are being transplanted systematically into the Chinese state’s long-arm regulation of political speech, which, contrary to China’s constitutional provision for protecting free speech,⁵¹ affects the world incrementally as a routine practice of Chinese speech imperialism.

⁴⁶ For the first time, national law prescribes a mandatory rule of intra-party regulation that encourages the production and distribution of contents in offensive operations “contributing to enhancing the international influence of Chinese culture and presenting a true, three-dimensional, and comprehensive China to the world.” Other types of content pertaining to the CCP guidelines include, for instance, “publicizing the Party’s theoretical line, principles, and policies” and “responding effectively to social concerns, dispelling doubts and confusion, clarifying facts and helping the general public to reach consensus.” CAC, Provisions on Ecological Governance of Network Information Content, 2019, Art. 5(1)-(7).

⁴⁷ For instance, the “development of administrative regulations on political laws” must be “reported to the CCP Central Committee in a timely manner.” Art. 4, Decision of the State Council on Amending the Regulation on the Procedures for the Development of Administrative Regulations (2017).

⁴⁸ Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149, 1186–93 (2018).

⁴⁹ Tom Ginsburg, *Authoritarian International Law*, 114 AM. J. INT’L L. 221, 230–31 (2020).

⁵⁰ CONGYAN CAI, THE RISE OF CHINA AND INTERNATIONAL LAW: TAKING CHINESE EXCEPTIONALISM SERIOUSLY 321–26 (2019).

⁵¹ XIANFA [CONSTITUTION] arts. 35, 41 (2018).

Clearly, these speech issues are of constitutional importance and should be explored in their constitutional dimension.⁵² In that sense, one is tempted to cry out for an Ackerman-style “constitutional moment” to respond to the challenges of China’s multi-dimensional speech regulation across the world. Yet, despite those aforementioned empirical studies, there is scarcely any legal discourse that elucidates the constitutional framework and legal structure of Chinese speech imperialism. If this appears to be an appealing global constitutional moment, it remains a mystery how Chinese speech imperialism has evolved and developed constitutional resilience to achieve its geo-political priorities. A salient question is: if, post-Covid, the Chinese government’s global regulation of political speech has become so real, what is the underlying constitutive force that drives and prompts Chinese speech imperialism so effectively that it becomes suddenly so prominent and imminent?

Recently, the party-state has reformed its dualistic constitutional framework and restructured its speech regulation through China’s 2018 constitutional amendments that establish the CCP’s supreme status as the country’s “defining feature” and turn intra-party disciplinary bodies into constitutional organs.⁵³ This constitutional doctrine, which was crystallized officially as “party supremacy” in the 2022 amendments of the Constitution of the CCP,⁵⁴ imparts new framings to speech regulation in both domestic and international public spheres.

This study captures the CCP’s scheme of legitimizing and retooling its comprehensive speech regulation through that new constitutional doctrine and unveils the scheme as the underlying driving force of Chinese speech imperialism. The article examines how “party supremacy” develops along with China’s constitutional law, transforms the CCP’s intra-party speech rules into national speech laws, and guides the development of China’s constitutional theories as well as the state practice of speech control in a transnational context. In particular, this article analyzes how the

⁵² Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 614–18 (1985) (criticizing the instrumental approach to the First Amendment for ignoring its constitutive dimension).

⁵³ XIANFA arts. 1, 123–27 (2018).

⁵⁴ The amendments of the Constitution of the CCP were passed at the twentieth National Congress of the CCP on 22nd October 2022 and a new mandate that the “Party is the supreme force for political leadership” [党是最高政治领导力量] was added to the preamble of the Constitution of the CCP. *Factbox: China’s Communist Party Amends Its Charter, Strengthens Xi’s Power*, REUTERS (Oct. 22, 2022, 6:19 AM), <https://perma.cc/ZP49-SNR5>.

new constitutional doctrine reshapes the constitutive mechanism of the CCP's domestic and international speech rules through the "constitutional" spillover effect of intra-party speech regulation. As such, this article reinterprets China's speech regulation under the new constitutional doctrine of "party supremacy" by breaking down the implications into three dimensions.

First, based on this new constitutional doctrine of party supremacy, the party-state may well redefine the distinction between the regulation of political speech and that of non-political speech: whereas the latter may still be subject directly to China's national legal system, the former is geared *exclusively* to the CCP's intra-party rules under the tutelage of constitutional law. While China's constitutional "transformation" was driven primarily by the legislature in the "reform era,"⁵⁵ the CCP has exploited the narrative of the "intra-party rule of law" and created a system of intra-party regulations.⁵⁶ Today, party rules proliferate rapidly in China's state legislation, though they are neither an official legal source nor substantiated by the judicial practice so far.⁵⁷ Despite its "illiberal narratives,"⁵⁸ this practice flows from the CCP's blueprint to consolidate its status as the "supreme force for political leadership" through rule-based governance,⁵⁹ which illustrates the incorporation of party rules governing political speech into national speech laws.

Secondly, it must be recognized that the CCP's speech regulation, though often dormant and vague, had long engendered a spillover effect in Chinese law prior to China's 2018 constitutional amendments. However, despite some preambular

⁵⁵ Yan Lin, *Constitutional Evolution Through Legislation: The Quiet Transformation of China's Constitution*, 13 INT'L J. CONST. L. 61 (2015). The "reform era" is now a term used to mean that China's economic reform characterized by measures that Deng initiated has come to an end. See generally CARL MINZNER, *END OF AN ERA: HOW CHINA'S AUTHORITARIAN REVIVAL IS UNDERMINING ITS RISE* (2018).

⁵⁶ Xiaodan Zhang, *Rule of Law Within the Chinese Party-State and Its Recent Tendencies*, 9 HAGUE J. RULE L. 373, 391–94 (2017).

⁵⁷ While Chinese courts do occasionally cite the CCP's ideological concepts, empirical studies show that they tend to do so without relying on them as formal legal principles. Björn Ahl, *Why Do Judges Cite the Party? References to Party Ideology in Chinese Court Decisions*, 18 CHINA: INT'L J., May 2020, at 175, 180–81.

⁵⁸ Samuli Seppänen, *Interrogating Illiberalism Through Chinese Communist Party Regulations*, 52 CORNELL INT'L L.J. 267, 271–72 (2019).

⁵⁹ The CCP's constitution stresses the importance of law by using the phrase "in accordance with the law" several times. Constitution of the CCP, 2022, pmb1.

statements of party leadership in China’s Constitution,⁶⁰ the CCP’s comprehensive speech regulation lacked constitutional legitimacy under China’s former constitutional framework in the eyes of leading constitutional lawyers in China.⁶¹ This was because, to the disadvantage of the CCP, normative incoherence always existed between any intra-party speech rules and the constitutional clauses on free speech owing to the dichotomy between the constitutional preamble and the constitutional text.⁶² Similarly, there was an institutional loophole due to the absence of an indisputable principle of party leadership in the constitutional text, which reveals the illegitimate governance of political speech by party organs—the real decisive hand that purges a “marketplace of ideas.”⁶³

It is true that China’s constitutional provisions on free speech may often be seen as irrelevant given the Chinese government’s top-down practice of speech control. Yet, one should not overlook the legitimacy and dynamics of the Constitution in the bottom-up struggles that range from exercising constitutional rights

⁶⁰ There are extensive statements about the historical and contemporary roles of the CCP’s leadership in the Preamble of the Constitution, which attribute the revolutionary fruits to the CCP and prescribe the future political routes adopted by the CCP. XIANFA pmbl. §§ 5–7, 10 (1982). These statements are, however, only limited to either historical facts or specific political mandates such as the “fundamental tasks of the state,” the “guiding thoughts of the state,” “patriotic united front,” and the system of political parties. See Qianghong Qin [秦前红] & Yida Liu [刘怡达], *Normative System of “the Leadership of the CPC” in the Current Chinese Constitution [中国现行宪法中的“党的领导”规范]*, 49(6) CHINESE J. L. [法学研究] 18, 23–25 (2019).

⁶¹ Prof. Qianfan Zhang, one of China’s leading constitutional lawyers, sums up the different legal theories leading to the “controversy” and debates on the binding force of the Preamble of China’s Constitution. Qianfan Zhang [张千帆], *The Preamble of the Constitution and the Controversy about Its Legal Force [宪法序言及其效力争议]* 6 YANHUANG CHUNQIU [炎黄春秋] 1, 5–7 (2013) (citing Prof. Youyu Zhang [张友渔] who expresses and explains his view that “the Preamble does not assume legal force in general”).

⁶² *Id.* at 6–7 (summarizing Chinese scholars’ debates on the legal force of the constitutional preamble as opposed to that of the constitutional text).

⁶³ The discourse on the need for ideas to compete against each other stems from John Milton and John Stuart Mill. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 33 DUKE L. J. 1, 3 (1984).

through “civil litigation” to influencing the public policy by “constitutional entrepreneurship.”⁶⁴ These struggles all relied on the rights provisions in the constitutional text, but the weakness in the constitutional legitimacy of party leadership probably encouraged those civil rights activists and constitutional entrepreneurs to rely on the constitutional text for their success far more actively than to revere the party leadership enshrined in the constitutional preamble.

For that reason, both the CCP and the civil society attach great importance to the constitutional text, perhaps to an extent more than many assume. Obviously, the recent enshrinement of the constitutional doctrine of party supremacy in the constitutional text is a response to those concerns and aims to tackle that legitimacy issue. In the minds of the constitutional reformers, therefore, rebuilding China’s speech regulatory framework in terms of this new constitutional doctrine would not be superfluous, but most essential, because the new constitutional framework is supposed to be more compatible with China’s political reality, which lends both normative and institutional pedigrees to the CCP’s overall regulation of political speech.

In that regard, this article reveals how the new constitutional doctrine could alter the structure of Chinese speech law in two aspects: it both changes the structure of the entire body of speech norms by prioritizing party rules and empowers party organs to act directly in the institutional governance of political speech. In contrast to the earlier dualistic framework of speech regulation, both the normative and the institutional architectures now work under a unifying, substantial, and authoritarian constitutional doctrine of party supremacy. Thus, when it comes to speech regulation in China today, party norms trump state norms, and party organs go ahead of state organs, so that both party norms and party organs supposedly assume more “constitutional legitimacy” than before, even though the outcome of such speech regulation might not necessarily differ so much from that before the 2018 constitutional reforms.

⁶⁴ The former paradigm represents the rudimentary stage of claiming constitutional rights such as in the case of Qi Yuling. See Thomas E. Kellogg, *Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China*, 7 INT’L J. CONST. L. 215, 231–34 (2009). The latter appears to be a more advanced paradigm that developed in a subsequent stage of China’s economic reform era, as exemplified by the Sun Zhigang case. Mark Jia, *China’s Constitutional Entrepreneurs*, 64 AM. J. COMP. L. 619, 633–48 (2016).

Finally, based on party supremacy, the party-state is far more assertive than before in extending the spillover effect of the intra-party speech rules to international law. In fact, what may strike the rest of the world as speech imperialism represents the CCP’s response to the issue of constitutional legitimacy of speech control in a transnational context. Here the party-state aims to reinforce the textual and contextual substance of its regulatory framework for overseas political speech through the constitutional legitimation of intra-party speech rules that are incorporated into China’s transnational legal arrangements, especially into its trade law. After all, global trade is a core field geared to the narrative of “global constitutionalism” today.⁶⁵

Thus, the interaction between China and the rest of the world in this conflict-ridden domain follows China’s new statist course of creating a “constitutional” principle for speech regulation in a transnational context: the CCP’s exclusive and overall regulation of political speech replaces China’s earlier policy of walking the line between acrimonious interstate dialogues of human rights and the crucial need of maintaining trade relationship. By linking its own constitutional theories and mandates of party supremacy with trade arrangements, the party-state weaponizes both the constitutional legitimacy of speech regulation and international trade to achieve its new identity through “authoritarian constitutionalism.”⁶⁶ In that connection, this article assesses Chinese speech imperialism as an authoritarian response to global constitutionalism, and reflects critically on China’s approach of creating a constitutional doctrine of party supremacy for the transnational regulation of political speech.

Against such a backdrop of profound changes of China’s constitutional theories and practice, this article conceptualizes China’s new constitutional doctrine of party supremacy as the origin of and precondition for the spillover effect of the CCP’s speech regulation in both domestic and international settings. It also offers

⁶⁵ Ari Afilalo & Dennis Patterson, *Global Economic Constitutionalism and the Future of Global Trade*, 40 U. PA. J. INT’L L. 323, 330–34 (2019) (conceptualizing the “global economic constitutionalism”).

⁶⁶ For a general view of “authoritarian constitutionalism” at this point, see Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391 (2015). See also Günter Frankenberg, *Authoritarian Constitutionalism: Coming to Terms with Modernity’s Nightmares*, in *AUTHORITARIAN CONSTITUTIONALISM: COMPARATIVE ANALYSIS AND CRITIQUE 1* (Helena Alviar García & Günter Frankenberg eds., 2019).

a critique of extending party supremacy to speech regulation in a transnational context amid the clash between global constitutionalism and global authoritarianism. Thus, the article reveals a highly sophisticated scheme of authoritarian speech regulation that is based on the development of China's constitutional theories, international legal practice, and an authoritarian response to the global constitutionalist discourse. Part I traces the development of intra-party speech regulation along with that of China's constitutional law, which leads to an explicit constitutional doctrine of party supremacy. Part II analyzes how the new constitutional doctrine reshapes the normative principles in speech regulatory sources. Part III interprets the institutional reconstruction of speech governance under that doctrine. Part IV explains how the party-state relies on its leading constitutional lawyers to create constitutional theories to legitimize the doctrine of party supremacy. Part V explores the emerging global legal framework that party-state is developing to customize the CCP's speech regulation guided by party supremacy. Part VI assesses how the party-state seeks to build a global identity with constitutional legitimacy for party supremacy that goes against constitutionalism itself.

I. THE GENESIS OF A NEW CONSTITUTIONAL DOCTRINE FOR THE CCP'S EXCLUSIVE REGULATION OF POLITICAL SPEECH

In China, the regulation of political speech has rarely been explored as an independent issue of law itself. This could be attributed to the convergence of legal and political system with a "low degree of differentiation" between them.⁶⁷ While the enforcement of China's constitutional law hinges heavily on the interplay between politics and law,⁶⁸ the political system prevents laws from "exercising their normal functions independently" to certain extent.⁶⁹ Indeed, China's constitutional law

⁶⁷ Sida Liu [刘思达], *The Shape of Chinese Law [中国法律的形状]*, 26(4) PEKING UNIV. L. J. [中外法学] 1024, 1041 (2014).

⁶⁸ Guoqiang Zhai [翟国强], *The Dual Track of Enforcing Chinese Constitutional Law [中国宪法实施的双轨制]*, 61(3) CHINESE J. L. [法学研究] 82, 88, 92 (2014).

⁶⁹ Dezhi Wu [伍德志], *The Attitude Between Refusing and Receiving: The Social System Theory Analysis of Relationship Between Politics and Law [欲拒还迎：政治与法律关系的社会系统论分析]*, 30(2) SCI. L. [法律科学] 3, 4, 6 (2012).

cannot neutralize the “direct erosion” of laws by its political system.⁷⁰ Consequently, the regulation of freedom of expression is regarded as a fundamental political principle of the party-state.⁷¹ In fact, the CCP’s exclusive regulation of political speech can be perceived as an implicit constitutional doctrine that has always accompanied the development of the three-stage lineage of China’s constitutional law.

A. 1949–1978: The CCP’s Speech Regulation Beyond Itself as a Constitutional Mandate

As a matter of publicity, the CCP claimed to embrace free speech before it came to power. In the 1940s, Xinhua Daily, the only media under the CCP’s full and direct control, frequently published lead articles that advocated the emulation of British and American liberal democracy and their protection of freedom of expression.⁷² Yet, the propaganda tactics in its revolutionary stage were at odds with what was ingrained in the CCP’s political genes. As early as 1937, Mao, the CCP’s paramount leader, articulated his express opposition to free speech as a Western philosophical trend that spawned “irresponsible criticism behind our backs.”⁷³ Between 1942 and 1944, Mao launched the Yan’an Rectification Movement, in which the CCP adopted a party constitution sanctifying Marxism-Leninism and Mao Thought as the Party’s sole guiding ideologies and started the canonical Soviet-style

⁷⁰ See Zhongxia Li [李忠夏], *Reflections on Constitutional Law Dogmatics: A Perspective of Social Systemic Theory* [宪法教义学反思：一个社会系统理论的视角], 62(6) CHINESE J. L. [法学研究] 3, 5 (2015) (highlighting that economic standards produce a radiative effect, but should be limited by law).

⁷¹ Traditionally, Chinese scholars separate political speech from academic and artistic speech. Many argue that the constitutional right to free speech under Art. 35 only includes individual speech freedom and press freedom, but not academic or artistic freedom, which should be regarded as a different constitutional right under Art. 47. In an authoritarian state without constitutional review, the point of these scholars’ arguments is that at least the latter should not be directly regulated through the political system but through national laws. See Kai Tu [屠凯], *On the Demarcation Between Cultural Rights and Freedom of Expression* [论文化权利与表达自由的界分], 37(5) STUD. L. & BUS. [法商研究] 89, 91 (2020).

⁷² Xupei Sun [孙旭培], *What the Party Said and Did About the Freedom of Press before the Founding of the PRC* [建国前党对新闻自由的说法与做法], 8 YANHUANG CHUNQIU [炎黄春秋] 10, 10–12 (2012).

⁷³ Mao Zedong [毛泽东], *Against Liberalism* [反对自由主义], in *SELECTED WORKS OF MAO TSE-TUNG* [毛泽东选集] 359 (1952).

campaign of brainwashing with the purpose of reforming and controlling the thoughts of party cadres and intellectuals.⁷⁴ Nevertheless, the regulation of political speech was confined only to the CCP and its followers in those days.

This movement of thought reform went gradually beyond the CCP itself after the founding of the PRC. As the country's first formal constitution, the 1954 Constitution established the framework of speech control as a distinctive feature of the party-state. Despite its enshrinement of free speech,⁷⁵ the 1954 Constitution set the CCP's political leadership and the "people's democratic dictatorship" as a default principle in the Preamble, which was further consolidated by a definition of the leadership role of the CCP's grassroots components in the constitutional text.⁷⁶ Although the preambular statements may often be seen as merely hortatory,⁷⁷ the CCP's power to control political speech nationwide was not bound by that Constitution in effect. In 1956, bolstered by Mao, the CCP initiated the "Hundred Flowers Campaign," encouraging Chinese citizens to express their opinions of the governing regime openly without being punished.⁷⁸ Shortly thereafter, Mao reneged on this promise, launched the Anti-Rightist Movement, and cracked down severely on dissidents who dared to express their critical views of the regime and its ideology.⁷⁹ The unwarranted prosecution of citizens based on their speeches and publications reached its peak during the Cultural Revolution: Chinese society was divided hierarchically into nine categories, of which intellectuals—traditionally seen as a group shouldering the responsibility for criticizing the government and initiating social change⁸⁰—were branded as the "stinking ninth category" in terms of the widespread dictum "the more knowledgeable one is, the more counterrevolutionary one

⁷⁴ KLAUS MÜHLHAHN, *MAKING CHINA MODERN: FROM THE GREAT QING TO XI JINPING* 321–24 (2019).

⁷⁵ XIANFA art. 87 (1954).

⁷⁶ *Id.* art. 1 (defining the PRC as "a state of the people's democracy led by the working class and based on the alliance of workers and peasants").

⁷⁷ Recently, constitutional scholars have engaged with this view. JUSTIN O. FROSINI, *CONSTITUTIONAL PREAMBLES AT A CROSSROADS BETWEEN POLITICS AND LAW* 153 (2012).

⁷⁸ Merlie Goldman, *The Party and the Intellectuals*, in 14 *THE CAMBRIDGE HISTORY OF CHINA* 218, 242–50 (Roderick MacFarquhar & John K. Fairbank eds., 1987).

⁷⁹ *Id.* at 250–53.

⁸⁰ SHAKHAR RAHAV, *THE RISE OF POLITICAL INTELLECTUALS IN MODERN CHINA* 3–4 (2005).

is.”⁸¹ Thus, free speech became the synonym for the “corrupt and decadent culture of *petit-bourgeoisie*.”⁸²

Throughout the 1960s and 1970s, constitutional development was completely subject to the “overall dictatorship of the proletariat,” as the 1975 Constitution manifested.⁸³ At the time, the leadership role of the party and the CCP’s political ideology hallowed in the Constitution of the CCP were transcribed into constitutional norms.⁸⁴ Consequently, the official powers of the state were largely paralyzed or nullified: the 1975 Constitution removed the chairman of the state and empowered the chairman of the CCP to lead the national armed forces,⁸⁵ and the constitutional provisions about the executive and the judicial branches were reduced to only the minimal level.⁸⁶ Under such a constitutional framework, speech rights were retained, but incorporated with all the other constitutional rights into one clause.⁸⁷ In fact, free speech was often misconstrued and misused as tantamount to the “Four Big Freedoms,”⁸⁸ another constitutional mandate later seen as a distorted form of free speech not to criticize the ruling class, but for the CCP to stir up the masses to attack dissidents.⁸⁹

⁸¹ Chun-Chan Yeh, *The Role of the Intellectual in China*, 11 *THIRD WORLD Q.*, Apr. 1989, at 143, 149–50.

⁸² Ximeng An [安希孟], *Can One Practice Overall Dictatorship on the Thoughts and Lives of the Bourgeoisie? The Privacy of One’s World View, Life View and Social Lives* [可以在思想上生活上对资产阶级实行全面专政吗——世界观人生观社会生活领域的私密性], *NEWCENTURYNET* [新世纪] (Apr. 28, 2014), <https://perma.cc/V9DL-SQNJ>.

⁸³ XIANFA art. 12 (1975).

⁸⁴ At the time, the CCP’s constitutional status was formulated as “the core of leadership for the entire Chinese people.” *Id.* art. 2.

⁸⁵ *Id.* art. 15.

⁸⁶ Only three provisions remained. *Id.* arts. 19, 20, 25.

⁸⁷ *Id.* art. 28.

⁸⁸ *Id.* art. 45 (“speak out freely, air views fully, hold big debates, and write big-character posters”). See also Eliasoph, *supra* note 3, 287–88.

⁸⁹ Wei Jingsheng, *The Cultural Revolution and Beyond*, *FOOTNOTES*, June 2007, at 1, <https://perma.cc/TR3X-HUSF>.

B. 1978–2012: The Reformist Constitutional Doctrine of Party Leadership in Speech Regulation

Thus, anti-liberalism remained the ideological guideline that Mao’s successors all clung to in regulating political speech, though the first decade of Deng’s reforms was sometimes referred to as a period of somewhat relaxed party leadership.⁹⁰ Although Deng proclaimed a reform program that claimed to “disentangle the government from the party,”⁹¹ it turned out to be merely a symbolic gesture. In fact, new constitutional reforms were in place to activate party leadership in speech regulation. As the “Four Big Freedoms” were removed from the 1982 Constitution, the independent status of the free speech clause was restored.⁹² However, the “Four Cardinal Principles,” which upheld the CCP’s absolute leadership and socialist ideologies, came up as a new narrative of party leadership in the constitutional framework, albeit in the form of preambular statements.⁹³ Moreover, the “democratic dictatorship” and the “socialist system,” which forbid political speech the CCP deems subversive, became an express cornerstone of the substantive constitutional norms.⁹⁴ Nevertheless, the 1982 Constitution created term limits for the chairman of the state,⁹⁵ though the Constitution of the CCP set none for head of the CCP. At this time, it was the Chinese government, instead of the CCP itself, that instituted a set of laws and regulations to control personal speech and the media. In the 1980s, the CCP appeared much less straightforward in regulating public speech

⁹⁰ See MÜHLHAHN, *supra* note 74, at 514–18 (describing the intellectual, educational, and cultural changes characterized by diversity, pluralism, enlightenment, and liberalism).

⁹¹ The Third Plenary of the Eleventh Central Committee of the CCP, The Communiqué [中国共产党第十一届中央委员会第三次全体会议公报], Dec. 22, 1978.

⁹² XIANFA art. 35, 41 (1982).

⁹³ In 1979, Deng proposed the four political principles for China’s economic reforms: under all circumstances, China must uphold “the socialist path, the people’s democratic dictatorship, the leadership of the CCP, and Mao Zedong Thought and Marxism-Leninism.” *Id.* pmb1.

⁹⁴ *Id.* art. 1.

⁹⁵ *Id.* art. 79.

directly.⁹⁶ However, adherence to the political ideology of the CCP was still hailed as the cornerstone of the party’s disciplinary rules.⁹⁷

Although Deng himself benefited from free speech in retrieving political power after the Cultural Revolution by allowing citizens to articulate their support for him, he did not tolerate any dissidents when he sensed threats to his rule.⁹⁸ After the Tiananmen protests, Deng realized how dangerous untamed political speech could be to maintaining the party’s monopoly on power.⁹⁹ Thus, the party resolved to resurrect its predominant role in the leadership of the country’s political ideology, while exploring a tentative path of “intra-party democracy” that entailed “intra-party free speech.”¹⁰⁰ Yet this was an experiment in a “lame-duck reform” limited to a small group of elites of the CCP.¹⁰¹

In fact, during the following two decades, Deng’s two successors, Jiang and Hu, adopted a surreptitious nationwide campaign of speech regulation using the doctrine of party supremacy. On the one hand, the party-state resorted to the strategy of “governing the country in accordance with the law.”¹⁰² Although this resulted in the proliferation of laws and regulations on speech control,¹⁰³ this was seen at home

⁹⁶ MÜHLHAHN, *supra* note 74, at 519–20.

⁹⁷ The Fifth Plenary of the Eleventh Congress of the CCP [中国共产党第十一届中央委员会第五次全体会议], Several Codes of Conduct of Intra-Party Political Life, Part One [关于党内政治生活的若干准则], Mar. 4, 1980.

⁹⁸ Wei, *supra* note 89, at 2.

⁹⁹ SULMAAN WASIF KHAN, HAUNTED BY CHAOS 165–66 (2018) (analyzing Deng’s antagonism towards the call of the young generation for Western-style democracy without centralized control).

¹⁰⁰ Yaotong Xu & Linbin Zhao [许耀桐 赵麟斌], *Study of Issues in Preventing Risks While Developing Intra-Party Democracy* [关于发展党内民主防范风险问题研究], 4 NEW PERSPECTIVES [新视野] 51 (2009).

¹⁰¹ In the 1990s, the CCP continued to institutionalize government reforms without giving up intense control of speech by laws, regulations, and departmental rules. MÜHLHAHN, *supra* note 74, at 530–31.

¹⁰² XIANFA amend. Art. 5 (1999).

¹⁰³ Ming Wan, *Human Rights Lawmaking in China: Domestic Politics, International Law, and International Politics*, 29 HUM. RTS. Q. 727, 746 (2007).

at least as a step, however lethargic, towards rule-based governance.¹⁰⁴ On the other hand, the party-state often handled political speech in an overwhelmingly political manner by criminalizing subversive political speech through prosecutions for crimes such as corruption rather than through prosecutions for endangering national security, incitement, or sedition.¹⁰⁵ At the time, the party-state aimed to prevent critical political speech from spreading by “publishing a medley of lies and half-truth to mystify the political issues at stake and bewilder the mass,” “distracting the attention of the public by commercializing and vulgarizing the Chinese society,” and “investing heavily in technological infrastructure” such as the Great Firewall to control the free flow of information on the Internet.¹⁰⁶

C. *Since 2012: Towards an Explicit Constitutional Doctrine of Party Supremacy in Speech Regulation*

Xi’s ascension to the apex of the CCP in 2012 and his manifestly Leninist course marked a drastic change to the CCP’s low-profile style of regulating political speech. In 2015, as the CCP’s top leader, Xi spoke openly about his aversion to some cadres’ “reckless comments on underlying policies and guidelines” set forth by the Central Committee of the CCP.¹⁰⁷ This remark reshaped the CCP’s policy related to governing political speech through disciplining members of the CCP. A new intra-party speech rule was created and enshrined as the core “political discipline” in the CCP Disciplinary Regulations, which bans members of the CCP from “making a mockery of the Party Central Committee’s major directives and undermining the Party’s centralism and unity.”¹⁰⁸ According to a senior party official who was involved in amending these rules, the regulations were made in accordance with the

¹⁰⁴ Bin Li, *China’s Socialist Rule of Law and Global Constitutionalism*, in GLOBAL CONSTITUTIONALISM FROM EUROPEAN AND EAST ASIAN PERSPECTIVES 58, 58–59 (Takao Suami et al. eds., 2018).

¹⁰⁵ HE QINGLIAN, THE FOG OF CENSORSHIP: MEDIA CONTROL IN CHINA 13 (2008).

¹⁰⁶ *Id.* at 13–15.

¹⁰⁷ Xi Jinping [习近平], *Ruling the Party Strictly and Enforcing the Party Disciplines Strictly* [从严治党, 严明党的纪律], in SELECTED SPEECHES BY XI JINPING ON IMPROVING THE PARTY’S WORK STYLE, BUILDING AN HONEST AND CLEAN GOVERNMENT, AND COMBATING CORRUPTION 50 [习近平关于党风廉政建设和反腐败斗争论述摘编] (CCP Central Commission for Discipline Inspection & Party Literature Research Center of the CCP Central Committee eds., 2015).

¹⁰⁸ Disciplinary Regulations of the CCP, 2018, Art. 46(2).

Constitution of the CCP and targeted at “open discussion of party policies by officials.”¹⁰⁹

Notably, these intra-party speech regulations are guided by the doctrine of Overall Party Leadership (OPL),¹¹⁰ the CCP’s most recent version of party supremacy which evolved from Mao’s dictum that “the party leads all.”¹¹¹ As he embarked on China’s reforms, Deng criticized this route as “indiscriminate integration of party and government” and vowed to replace it with a policy of “separation of the functions of the party from those of the government.”¹¹² Although Deng’s promise was empty, his two successors, Jiang and Hu, both picked up this political cliché while keeping a low key in tightening party leadership. By contrast, Xi no longer concealed the party-state’s real intention, but turned the OPL into the CCP’s top political principle in 2016.¹¹³ In 2017, the Constitution of the CCP was amended to declare that “the party leads all” and that “the CCP leadership is the defining feature of socialism with Chinese characteristics.”¹¹⁴ In 2022, the Constitution of the CCP was amended again to include the explicit mandate of “adhering to and

¹⁰⁹ Huiping Zhuang, *Professor Punished for ‘Radical Views’ amid Fears China Is Tightening Noose on Freedom of Speech*, S. CHINA MORNING POST (Nov. 13, 2015, 12:30 AM), <https://perma.cc/QPY2-LUG4>.

¹¹⁰ “Upholding the party’s overall leadership” [坚持党的全面领导] is conceptualized in the CCP’s most recent historical resolution. The CCP Central Committee, *Resolution on the Major Achievements and Historical Experience of the Party Over the Past Century* [中共中央关于党的百年奋斗重大成就和历史经验的决议], XINHUA AGENCY [新华社] (Nov. 16, 2021) (CCP Resolution 2021), <https://perma.cc/6ZVG-YAWB>.

¹¹¹ The original sentence was: “Party, government, army, society, learning—east, west, south, north, and center—the party leads all” [党政军民学, 东西南北中, 党是领导一切的]. See Gangyin Zhao [赵钢印], *Where Did “the Party Leads All” Come from* [“党领导一切”是怎么来的], 24(1) LITERARY CIRCLES OF CPC HISTORY [党史文苑] 60 (2018). For an explanation of the development of this doctrine into the recent OPL, see Bruce J. Dickson, “The Party Leads All”: *The Leninist Revival in China*, in *THE PARTY LEADS ALL: THE EVOLVING ROLE OF THE CHINESE COMMUNIST PARTY* 43 (Jacques deLisle & Guobin Yang eds., 2022).

¹¹² The Communiqué, *supra* note 91.

¹¹³ Xi Jinping Hosts the Session of the Standing Committee of the Politburo of the Central Committee of the CCP [习近平主持中共中央政治局常委会会议] XINHUA AGENCY [新华社] (Jan. 7, 2016), <https://perma.cc/P4RC-ADJF>.

¹¹⁴ The Constitution of the CCP, 2017, pmb1.

strengthening the OPL” and establishing the party as “the supreme force for political leadership.”¹¹⁵ Whereas “party supremacy” as Mao’s political legacy had never perished during China’s reform era,¹¹⁶ it had never been termed officially in the law or played such an impressive role in China’s evolving legal system. In fact, there are wide concerns that the development of intra-party regulations under Xi towards codifying the route of the OPL could not contribute to China’s prospect of the rule of law.¹¹⁷

Correspondingly, Art. 1 of China’s 2018 constitutional amendments reproduces a mandate in the 2017 amendments to the CCP Constitution by highlighting the unparalleled role of party leadership as the “defining feature of socialism with Chinese characteristics.”¹¹⁸ As such, a new constitutional framework informed by the OPL replaces the previous reformist framework of party leadership that had been implemented under the aegis of “de-linking the party from the state.”¹¹⁹ This new framework is grounded on three pillars. First, the 2018 constitutional amendment revokes the term limit of chairman of the state and opens up the prospect of a permanent office.¹²⁰ Secondly, while the CCP used to consolidate party supremacy via personnel arrangements in the constitutional organs, viz. via “soft” constitutional arrangements, it is now armed with constitutional teeth—the national system of supervisory commissions represents an overall takeover of the supervision

¹¹⁵ The Constitution of the CCP, 2022, pmb1.

¹¹⁶ MÜHLHAHN, *supra* note 74, at 518–19 (2019) (using the example of shutting down the Democracy Wall to show the continuity of Maoism).

¹¹⁷ See, e.g., ELIZABETH C. ECONOMY, *THE THIRD REVOLUTION: XI JINPING AND THE NEW CHINESE STATE* 44–48 (2018) (discrediting Xi’s interpretation of the rule of law as a means of institutionalizing the CCP leadership).

¹¹⁸ XIANFA art. 1 (2018).

¹¹⁹ The pre-Xi party leadership is now branded explicitly as having been “played down, weakened, emptied, and peripherized” (*danhua, ruohua, xuhua, bianyuanhua*), which was a “course” that must be “rectified.” *An Irreversible Historic Process: The Chinese Nation’s Great Revival Seen from the Perspective of the Revolutionary Practice in the New Era Led by the Party’s Central Committee with Comrade Xi Jinping as the Core* [不可逆转的历史进程——从以习近平同志为核心的党中央引领新时代变革性实践看实现中华民族伟大复兴], XINHUA AGENCY [新华社] (Nov. 8, 2021), http://www.gov.cn/xinwen/2021-11/08/content_5649791.htm.

¹²⁰ XIANFA art. 79 (2018). According to China’s constitutional practice in the past three decades, whoever was head of the CCP would also take over the post of chairman of the state with two consecutive terms of up to ten years.

of the public authorities by the CCP’s discipline inspection regime, previously only an intra-party supervisory mechanism.¹²¹ Finally, the preceding two elements ensure that the “Xi Jinping Thought on Socialism with Chinese Characteristics in a New Era,” formerly enshrined in the Constitution of the CCP, is anointed as the new guiding political ideology of the country.¹²²

Thus, Art. 1 turns the OPL into a substantive constitutional doctrine, which makes the CCP’s regulation of political speech beyond its members ever more prominent. During the reform era, the regulation of political speech by the CCP and by the state authorities were often described as co-existent.¹²³ In 2021, however, the CCP issued the third “resolution” on its own history, which cemented the underlying significance of promoting the CCP’s ideological control throughout the country.¹²⁴ Additionally, this resolution presents the CCP’s authoritarian path with a global ambition of confronting the liberal international order,¹²⁵ which marks the CCP’s recognition of the regulation of political speech in China’s ongoing constitutional transformation as an instrument committed explicitly to confronting liberal democracies and constitutionalism.¹²⁶ In that sense, the new constitutional framework reflects a lineage culminating in an explicit doctrine of party supremacy that relies heavily on the CCP’s exclusive regulation of political speech as a tool for countering any ideological challenges.

D. The Task of “Party Supremacy”: Overcoming the Textual and Contextual Barriers in the CCP’s Exclusive Regulation of Political Speech

Under the OPL, the leading doctrine for speech regulation is that all political speech must be subject to the CCP’s exclusive regulation. Contrary to what many

¹²¹ XIANFA arts. 123–27 (2018). For an analysis of the transformation, see Keith J. Hand, *An Assessment of Socialist Constitutional Supervision Models and Prospects for a Constitutional Supervision Committee in China: The Constitution as Commander?*, in CHINA’S SOCIALIST RULE OF LAW REFORMS UNDER XI JINPING 30, 35 (John Garrick & Yan Chang Bennett eds., 2016).

¹²² XIANFA pmb. (2018).

¹²³ Cf. Larry Catá Backer, *Chinese Constitutionalism in the “New Era”: The Constitution in Emerging Idea and Practice*, 33 CONN. J. INT’L L. 162, 179 (2018) (discussing the state constitution as an administrative system and the party constitution as the overarching political order).

¹²⁴ CCP Resolution 2021, *supra* note 110.

¹²⁵ Rana Mitter, *New Characteristics for Chinese Socialism? How a CCP Resolution Connects Xi to China’s Marxist Past*, FOREIGN AFFS. (Dec. 20, 2021), <https://perma.cc/KCH9-BXTL>.

¹²⁶ CCP Resolution 2021, *supra* note 110.

might have presumed, this was not a self-evident constitutional doctrine. Instead, the “dualistic” constitutional framework mentioned above once posed both textual and contextual barriers to the CCP’s exclusive regulation of political speech. Admittedly, classic debates on the protection of political speech are premised mainly on the theory of public participation in democracy,¹²⁷ along with that of the equal respect for citizens’ rights.¹²⁸ However, political speech is a term rarely defined as such in national constitutional texts or international human rights conventions, though constitutional practice across the world does lend gravity to its “preferred position” by distinguishing political speech from non-political speech.¹²⁹ For instance, in a leading First Amendment case, the US Supreme Court affirmed the constitutional protection for political speech that attacks the government and officials, despite its conflict with private interests.¹³⁰ Likewise, in its leading free speech case, the German Federal Constitutional Court prioritized political speech on matters of public concern over private economic or personal interests.¹³¹ In this sense, it is widely acknowledged that there is an important distinction between “public speech” and “private speech.”¹³²

Though not explicit, a similar dichotomy between political speech and non-political speech exists under Art. 35 of China’s Constitution which grants citizens the right to “enjoy freedom of speech, of the press, of assembly, of association, of procession, and of demonstration.”¹³³ This constitutional right, which stems from Art. 87 of the 1954 Constitution, is regarded as protecting solely political speech. The *travaux préparatoires* of the first draft of the 1954 Constitution reveal the original purport of the designers in differentiating the “political right” of speech freedom from “religious freedom” rooted in another clause.¹³⁴ Yet China’s Constitution also recognizes some protection for non-political speech by prescribing the

¹²⁷ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATIONSHIP TO SELF-GOVERNMENT* 26 (1948).

¹²⁸ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 15–26 (1977).

¹²⁹ BARENDT, *supra* note 5, at 155–62.

¹³⁰ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

¹³¹ *Lüth*, 7 BVERFG 198, §§ 39, 54 (1958).

¹³² MEIKLEJOHN, *supra* note 127, at 62–63.

¹³³ XIANFA art. 25 (2018).

¹³⁴ DAYUAN HAN [韩大元], *THE MAKING OF THE 1954 CONSTITUTION [1954 年宪法制定过程]* 250–52 (2014).

“freedom to engage in scientific research, literary and artistic creation and other cultural pursuits.”¹³⁵ Thus, just as Meiklejohn found an “unholy union” between public speech and private speech under the US Constitution,¹³⁶ China’s Constitution does not preclude a similar bond.

Certainly, despite the severance of “private speech” from political speech, any speech is vulnerable to the CCP’s regulation because governmental interests in China almost always override any vaguely defined speech protections.¹³⁷ However, that doctrinal dichotomy highlighted the presence of the protection for political speech, which has created uncertainties for the CCP’s speech regulation in the past. An important source for such trouble is Art. 41 of the Constitution:

Citizens have the right to criticize and make suggestions regarding any state organ or functionary. Citizens have the right to make to relevant state organs complaints or charges against, or exposures of, any state organ or functionary for violation of the law or dereliction of duty, but fabrication or distortion of facts for purposes of libel or false incrimination is prohibited.

The state organ concerned must deal with complaints, charges or exposures made by citizens in a responsible manner after ascertaining the facts. No one may suppress such complaints, charges and exposures or retaliate against the citizens making them.

Citizens who have suffered losses as a result of infringement of their civil rights by any state organ or functionary have the right to compensation in accordance with the law.

In essence, Art. 41 is a potpourri of the legislative proposals of various versions of six constitutional rights in the past decades which encouraged citizens to criticize

¹³⁵ XIANFA art. 47 (2018).

¹³⁶ Meiklejohn’s view was that, while the former enjoys absolute protection by the First Amendment, the latter finds shelter under the Fifth Amendment. MEIKLEJOHN, *supra* note 127, at 62–63. This is a controversial issue that created debates, though. See Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245; Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993); Martin H. Redish & Abby Marie Mollen, *Understanding Post’s and Meiklejohn’s Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303 (2009).

¹³⁷ Minghui Chen [陈明辉], *Does the Free Speech Clause Only Protect Freedom of Political Speech?* [言论自由条款仅保障政治言论自由吗], 35(7) POLITICAL SCIENCE AND LAW [政治与法律] 74, 80 (2016).

government agencies and officials.¹³⁸ Presumably, the first half of the clause highlights citizens' "supervision of state organs and public officials" as a specific subset of the general category of political speech under Art. 35,¹³⁹ to the extent that Art. 41 prevails over Art. 35 under those circumstances.¹⁴⁰ It means, thus, that citizens exercising their speech rights under Art. 41 should enjoy more certain and clearly defined constitutional protection than under Art. 35.¹⁴¹

However, China's leading constitutional lawyers have made distinctions between those rights on the ground that the legislative history of Art. 41 shows it covers both public speech and private speech that seeks to realize private economic and social interests.¹⁴² Certainly, this is merely an artificial approach to keeping the political system of the party-state safe from criticism on the one hand and creating constitutional protection for political speech on the other hand: it could not really, under such circumstances, iron out the potential conflict between free speech and "private" interests in the reputation of the government and its officials.¹⁴³ Nevertheless, this dichotomy still leaves broad leeway for activists to challenge the party-state legitimately based on concerns that seem less related to the political system by that dichotomy.¹⁴⁴ For the party-state, therefore, the legitimacy cost of suppressing

¹³⁸ WEIYUN XIAO [尚蔚云], ON THE NEW DEVELOPMENT OF THE NEW CONSTITUTION [论新宪法的新发展] 131 (1983).

¹³⁹ WEIYUN XIAO [尚蔚云], ON THE CONSTITUTION [论宪法] 368 (2004).

¹⁴⁰ Qiangqiang Du [杜强强], *The Normative Scope and Degree of Protection of Basic Rights: A Normative Comparison of Art. 35 and Art. 41 in the Constitution* [基本权利的规范领域和保护程度—对我国宪法第 35 条和第 41 条的规范比较], 33(1) CHINESE J. L. [法学研究] 3, 5 (2011).

¹⁴¹ *Id.* at 10.

¹⁴² According to authoritative constitutional scholars, the rights to criticize, suggest, and report on (expose) state organs and government employees under Art. 41 do reflect citizens' political participation, but the rights to complain (appeal), charge (sue), and claim for compensation are the relief rights of individuals, and are clearly oriented towards the protection of individual interests. Although the exercise of these rights might serve to strengthen democratic supervision, they are not targeted at the political system of the PRC but are largely equivalent to the right of petition. LAIFAN LIN [林来梵], LECTURES OF THE CONSTITUTION [宪法学讲义] 373 (2d ed. 2015).

¹⁴³ Chen, *supra* note 137, at 83.

¹⁴⁴ Such rights activists are invariably subject to the practice of prosecuting seditious libel in China. For a detailed English summary of a number of seditious libel verdicts in China since 2014,

Art. 41 rights could be even greater than for Art. 35 rights. Obviously, if the constitutional text does not expressly place the party-state above the right to political speech, it would hardly make sense for the CCP to blur the distinction between political speech and non-political speech by intra-party speech rules.

Apart from the textual limitations of political speech, China’s Constitution accommodates contextual limitations of political speech that are the hallmarks of an illiberal state. Indeed, what makes a real difference between Chinese speech laws and Western speech laws is the ideological substance of the speech that is protected, given the ideological confrontation between communism and liberalism. The US Supreme Court created the “clear and present danger” test as a way to authorize restriction of political speech that might “bring about [sufficiently serious] substantive evils,”¹⁴⁵ and ultimately applied it to conspiracy to spread Communist propaganda, which was seen as jeopardizing the existence of liberal democracy.¹⁴⁶ The German Federal Constitutional Court even interpreted the limits of free speech by stating that any political parties, including the German Communist Party,¹⁴⁷ should be banned if they seek to “topple supreme fundamental values of the free democratic order”¹⁴⁸ and to “replace the existing constitutional system with an authoritarian national state that adheres to the idea of an ethnically defined people’s community.”¹⁴⁹ Apparently, courts in liberal democracies could apply contextual limitations on subversive speech based on democratic values without any legitimacy issue.

see WILLIAM A. FARRIS, STATE PROSECUTIONS OF SPEECH IN THE PEOPLE’S REPUBLIC OF CHINA: CASES ILLUSTRATING THE APPLICATION OF NATIONAL SECURITY AND PUBLIC ORDER LAWS TO POLITICAL AND RELIGIOUS EXPRESSION 416–479 (2022) (summarizing the verdicts such as the 2014 case of Cheng Haishan defaming the Politburo, the 2015 case of Guo Jianhe defaming state leaders, the 2017 case of Yu Doe defaming Xi Jinping, the 2018 case of Feng Zhouguan berating Xi Jinping, the 2019 case of Jiang Kun vilifying the party, the 2019 case of Ma Huaying critiquing party leaders, the 2020 case of Zhang Zhixiang vilifying the CCP, and the 2020 case of Yang Tianqiao criticizing Mao Zedong).

¹⁴⁵ *Schenck v. United States*, 249 U.S. 47, 52 (1919).

¹⁴⁶ *Dennis v. United States*, 341 U.S. 494, 508 (1951) (plurality opin.). Nevertheless, the US Supreme Court stressed the need to provide evidence of the advocacy of action and not merely that of doctrine for conviction. *Yates v. United States*, 354 U.S. 298, 318 (1957).

¹⁴⁷ *KPD-Verbot*, 5 BVERFG 85 (1956).

¹⁴⁸ *SRP-Verbot*, 2 BVERFG 1, § 34 (1952).

¹⁴⁹ *NPD-Verbotsverfahren*, 144 BVERFG 20, § 803 (2017).

In contrast, the contextual limitations on free speech in China are defined in terms of the CCP's ideological guidelines and enshrined in both the Constitution of the PRC and the Constitution of the CCP, which can be characterized by the two-fold risks related to the CCP.¹⁵⁰ One is regime-focused risk of speech that poses direct threat to the CCP's "party supremacy." The other is territory-focused risk of speech that undermines territorial integrity as well as ethnic tension and independence, which the CCP treats as an indirect threat to its rule. The former may be a purely political concern of the ruling party, while the latter is often believed to be a nationalist concern shared by most Chinese citizens.¹⁵¹ Although the Constitution of the CCP prescribes both party supremacy and territorial integrity as inviolable,¹⁵² they are not of equal importance to the CCP *per se*. In order to legitimately assuage, minimize, and eliminate the regime-focused concerns, the CCP would often have to play up the importance of addressing those territory-focused risks in regulating political speech.¹⁵³ This is because regulating these two different risks has different costs of legitimacy for the party-state, although the general restrictions on speech in China's constitutional text bear some superficial resemblance to those in international human rights law.¹⁵⁴

¹⁵⁰ Hualing Fu, *China's Imperatives for National Security Legislation, in CHINA'S NATIONAL SECURITY: ENDANGERING HONG KONG'S RULE OF LAW?* 41, 42–46 (Cora Chan & Fiona de Londras eds., 2020).

¹⁵¹ *Id.* at 43–44.

¹⁵² The Constitution of the CCP, 2022, pmb1.

¹⁵³ For instance, to support this political agenda, the CCP has framed the narrative that only the CCP can protect China's territorial integrity. See, e.g., Chaoqun Zhai [翟超群], *The Theories and Practice of the CCP in Promoting the Reunification of the Country and the Maintenance of Territorial Integrity* [中国共产党推进国家统一、维护领土完整的理论与实践], 32(6) REUNIFICATION FORUM [统一论坛] 42, 44–45 (2021).

¹⁵⁴ Above all, the Constitution imposes restrictions on all constitutional rights by forbidding citizens to "infringe upon the interests of the state, of society or of the collective, or upon the lawful freedoms and rights of other citizens." XIANFA art. 51 (2018). Even if this may be seen as on par with the permissible restrictions related to "national security," "public safety," or "rights of others" under the International Covenant on Civil and Political Rights (ICCPR), the other significant ICCPR tests such as "prescribed by law," "necessity," and "proportionality" are entirely missing in China's constitutional text. See Comm. on the International Covenant on Civil and Political Rights, General Comment No. 34, ¶¶ 22, 24, 28–29, 33–35, U.N. Doc. CCRP/C/GC/34 (Sept. 12, 2011).

Traditionally, party organs had no explicit constitutional legitimacy in codifying or applying intra-party speech rules against the regime-focused risks and territory-focused risks. In that sense, the earlier “dualistic” constitutional framework that separated the CCP organs from the state organs did pose significant barriers to the ruling party which relies on the direct regulation of regime-focused risks, because it lacked both normative coherence and institutional legitimacy for the CCP to redefine the distinction between the regulation of political speech and that of non-political speech. In contrast, Art. 1 of the 2018 Constitution, which literally enshrines the doctrine of party supremacy, is supposed to provide a legitimate source of authority for the CCP to regulate political speech, and particularly the regime-focused risks, by redefining those textual and contextual limitations. In that regard, this constitutional doctrine aims to “rectify” the earlier framework so that the regulation of political speech must be geared exclusively to the CCP’s intra-party rules under the tutelage of the Constitution, though non-political speech may, theoretically, still be subject to other national laws. This is bound to be the only viable approach in the PRC: political speech is the distinct target of the CCP’s speech regulation. To overcome those inherent barriers, Art. 1 creates a new constitutional doctrine with ramifications for China’s speech laws that should be reinterpreted in both normative and institutional dimensions.

II. REDEFINING THE NORMATIVE BASES FOR SPEECH REGULATION: VERTICALIZING THE CONSTITUTIONAL CONSTRAINTS OF POLITICAL SPEECH BY PRIORITIZING PARTY RULES

Before the 2018 constitutional amendments, China’s constitutional text authorized restrictions on free speech aimed at protecting national security, public order, and others’ rights in a parallel way.¹⁵⁵ In other words, these vaguely defined restrictive conditions used to be interpreted as equally applicable with no single restriction taking precedence over others. However, Art. 1 of the 2018 Constitution changes the structure of these constitutional constraints of political speech. In contrast to the hortatory statement of party leadership in the constitutional preamble, Art. 1 enshrining the OPL is a peremptory constitutional norm.¹⁵⁶ As such, Art. 1

¹⁵⁵ XIANFA arts. 51, 53 & 54 (1982).

¹⁵⁶ Qinghua Jiang [蒋清华], *Expounding the Legal Dogmatics of Party Leadership in the Constitution* [现行宪法中党的领导之法教义学阐释], 25(6) CENT. S. UNIV. J.: SOC. SCI. [中南大学学报 (社会科学版)] 86, 89 (2019).

must be regarded as a substantive principle for regulating political speech, which generates a spillover effect of intra-party regulations broader than that merely contemplated within the CCP itself: it can extend to any “socio-political clout subversive of the party leadership.”¹⁵⁷ Based on this new constitutional mandate, the CCP defines intra-party regulations as “thematic rules and systems” developed by internal organs of the party “whose implementation is ensured by party disciplines.”¹⁵⁸ They are “regulatory documents” of the CCP that are “created by party organizations during the performance of duties,” “generally binding” and “applicable for a certain period of time.”¹⁵⁹ Accordingly, intra-party regulations may assume constitutional “binding force,” since the Constitution prescribes “factual norms” that realize the “unity of the wills of the party and the people,” producing a “constitutional order in which intra-party regulations form a component of the socialist legal system.”¹⁶⁰

This new normative framework manifests the transition of a passive paradigm of party supremacy into an active one that *verticalizes* the regulation of political speech by prioritizing party rules. While intra-party regulations used to bind only party members in a largely unwritten manner, they can now turn directly into national laws restricting political speech. Amid a plethora of such intra-party regulations, there is now a distinct cohort of “political disciplines” for CCP members, which proscribe a variety of speeches ranging from explicit opposition to the CCP leadership to implicit opinions or comments that divert from the CCP’s political routes.¹⁶¹ Thus, the constitutional constraints on political speech now informed by the OPL must be read *vertically* by identifying hierarchical norms of party supremacy and nonhierarchical norms that are guided by the former. This interpretive framework for the constitutional regulation of political speech is incorporated into corresponding national speech laws.

¹⁵⁷ *Id.* at 92.

¹⁵⁸ Regulation of the CCP on Development of Intra-Party Regulations (RDIR) 2019, Art. 3.

¹⁵⁹ Provisions of the CCP on Filing and Review of Intra-Party Regulations and Regulatory Documents 2019, Art. 2.

¹⁶⁰ Xianjun Zheng [郑贤君], *The Constitution as Review Standards for Intra-Party Regulations* [论宪法作为党内法规的审查标准], 13(1) J. CHINA EXEC. LEADERSHIP ACAD. YAN’AN [中国延安干部学院学报] 28, 29–31 (2020).

¹⁶¹ Regulations of the CCP on Disciplinary Action, 2018, Arts. 44–69.

A. National Security: A Hierarchical Speech Norm

Although China’s Constitution does not define national security explicitly as the leading restrictive condition for political speech, it prescribes “the duty of citizens” not to “infringe upon the interests of the state” but to “safeguard the security, honor, and interests of the motherland.”¹⁶² Importantly, Art. 1 of the Constitution, which establishes a normative doctrine of the OPL for limiting political speech, is geared to a new legal framework of national security based on party rules. Initially, the party leadership decided to “establish a legal system of national security” at the 2014 plenum of the CCP, before China’s legislature started the legislation.¹⁶³ The 2015 National Security Act (NSA), as the core element of this legal framework, defines national security as “a status in which the regime, sovereignty, unity, territorial integrity, welfare of the people, sustainable economic and social development, and other major interests of the state are relatively not faced with any danger and not threatened internally or externally and the capability to maintain a sustained security status.”¹⁶⁴

Notably, this law addresses both regime-focused and territory-focused risks, which marks the legalization of the transformation of China’s “conventional view” of national security into a “comprehensive view” based on the CCP leadership’s new definition.¹⁶⁵ Under such a broad definition, this law prioritizes the doctrine of the OPL in Art. 1 of the Constitution, viz. “adherence to the CCP leadership” and “maintenance of the socialist system,” by empowering the state to “prevent, frustrate, and legally punish any conduct that betrays the country, splits the country, incites rebellion, subverts or incites the subversion of the people’s democratic dictatorship.”¹⁶⁶ Thus, the NSA establishes a hierarchical normative principle of *anti-*

¹⁶² XIANFA arts. 51, 54 (2018).

¹⁶³ The Fourth Plenary of the Eighteenth Central Committee of the CCP [中国共产党第十八届中央委员会第四次全体会议], The Decision of the Central Committee of the CCP on Several Significant Issues Concerning the Overall Promotion of Governing the Country in Accordance with the Law [中共中央关于全面推进依法治国若干重大问题的决定], Oct. 28, 2014.

¹⁶⁴ The NSA of the PRC, 2015, Art. 2.

¹⁶⁵ Zongke Yang [杨宗科], *On the Attribute of the National Security Law as a Basic Law* [论《国家安全法》的基本法律属性], 4 J. COM. L. [比较法研究] 1, 5–6 (2019).

¹⁶⁶ The NSA of the PRC, 2015, Art. 15.

subversion that conflates party discipline with Art. 1 of the Constitution, and is codified into a series of legislation on national security.¹⁶⁷

Certainly, the role of national security as a limit on free speech is not unique in Chinese law. In common law countries, it is not rare to find legal traditions that attempt to restrict publications of speech or writing that tend to express aversion and hostility to governments and advocate any form of changing them.¹⁶⁸ In modern days, however, the demarcation between tolerance and punishment of such offensive speech is best illustrated by the landmark *Brandenburg v. Ohio* decision, in which the US Supreme Court set the standard for punishment of inciting speech at the point of advocacy of immediate violence or force that may result in illegal conduct.¹⁶⁹ By contrast, the German Federal Constitutional Court did not resort to the same standards as the *Brandenburg* test, but applied an early warning test in determining whether to ban extremist political parties preaching political theories that could undermine the democratic system.¹⁷⁰

In a similar vein, technical standards comparable to both “immediate violence” and “early warning” are available in Chinese law, except with regard to threats to the underlying ideologies endorsed by the government. Indeed, two regulatory approaches, which may be referred to as “prior restraints” and “subsequent penalties” respectively,¹⁷¹ must be regarded as an organic whole guided by the anti-subversion doctrine embedded in the NSA. The former approach seeks to censor any political speech “harmful” to the party leadership or the socialist system. It consists of nu-

¹⁶⁷ See, e.g., The Counter-Espionage Act of the PRC, 2014, Art. 1; The Cybersecurity Act of the PRC, 2016, Art. 1; The Anti-Terrorism Act of the PRC, 2018, Art. 1; The Act on Safeguarding National Security in the Hong Kong Special Administrative Region (ASNSHK) of the PRC, 2020, Art. 1. Whereas the NSA embodies primarily the underlying constitutional doctrines that affect the regulation of political speech, other related laws expand those doctrines on larger platforms with graduated binding forces. For example, the Cybersecurity Act covers regulation of political speech in domestic Internet, while the ASNSHK spreads the repressive tentacles in an extraterritorial way.

¹⁶⁸ BARENDT, *supra* note 5, at 163–64.

¹⁶⁹ 395 U.S. 444, 447 (1969).

¹⁷⁰ Durchsetzung von Parteiverboten, 25 BVERFG 44, § 62 (1969).

¹⁷¹ BARENDT, *supra* note 5, at 118–19.

merous government regulations that restrict and ban the production and dissemination of political speech that is inconsistent with an anti-subversion doctrine.¹⁷² The latter approach provides that speech that is deemed conducive to subversion or overthrow of government may well constitute a criminal offence.¹⁷³ While both China’s censorship regulations and criminal law long feature an anti-subversion doctrine without defining it precisely, the NSA now offers a seemingly coherent interpretative framework of this doctrine.

In essence, the normative principles in the NSA follow the CCP’s regulation of political speech which, in the form of intra-party disciplinary rules, lays out specific types of speech that “do not conform with the party on major principles,”¹⁷⁴ or any public speeches “upholding bourgeois liberalization, opposing the four cardinal principles or the party’s policy of Reform and Opening,”¹⁷⁵ or “making a mockery of the Party Central Committee’s major directives, undermining the party’s centralism and unity” via “networks, radio, television, periodicals, pamphlets or books, as well as lectures, forums, report meetings or symposiums.”¹⁷⁶ Based on Art. 1 of the Constitution, state authorities may argue that these specific CCP speech rules have acquired substantive constitutional legitimation and could serve as normative guidance or principles for interpreting national security in laws and regulations. Thus, the law of national security, which internalizes party rules that weigh heavily against sedition, incitement, and subversion of the CCP leadership, as well as other speech relating to the CCP’s regime-focused concerns, becomes the highest normative doctrine that could be applied as a constitutional standard for restricting political speech.

For example, Chinese courts punish “subversive speech” so far with little noteworthy discussion of the tension between free speech and national security; this lack of discussion seem to make all speech crimes self-evident. In the 2003 case of *Wang Xiaoning*, for example, the court didn’t discuss the defendant’s speech right

¹⁷² See, e.g., Regulations of the PRC on the Administration of Publication (RAP), 2020, Art. 25(1)-(3).

¹⁷³ See, e.g., The Criminal Code of the PRC, 2020, Art. 105.

¹⁷⁴ Disciplinary Regulations of the CCP, 2018, Art. 44.

¹⁷⁵ *Id.* Art. 45.

¹⁷⁶ *Id.* Art. 46.

at all, but simply convicted him of inciting “subversion of state power” and “endangering state security” by relying on, among other things, evidence that the defendant published articles expressly countering the “Four Cardinal Principles.”¹⁷⁷ In the 2009 case of *Liu Xiaobo*, the court convicted Liu of “instigating the subversion of state power” merely on the ground that Liu carried out “actions of inciting subversion of our country’s State regime and the overthrow of the socialist system,” which “clearly exceeded the boundaries of freedom of speech.”¹⁷⁸ Although Liu relied on the speech rights under Art. 35 of the Constitution for defense, the court did not address why Liu was not entitled to the constitutional protection of free speech under those circumstances. In the 2014 case of *Cheng Huaishan*, prosecutors even recognized the defendant’s constitutional right to free speech by citing Arts. 35 and 41 but invoked Art. 51 of the Constitution to argue that his exercise of the right was illegitimate.¹⁷⁹ The court merely adopted the prosecutor’s view, without any further explanation. In short, the absence of sufficient legal underpinnings in these cases undermines the legitimacy of court decisions in an easily perceptible manner.

However, courts now could, and probably should, use party norms incorporated into the broadly defined mandate of “national security” under the NSA to enrich their reasoning and justify court decisions.¹⁸⁰ A recent speech case relating

¹⁷⁷ Wang Xiaoning—Inciting Subversion, First Intermediate People’s Court of Beijing, Criminal Judgment, (2003) 1st Intermediate Criminal First Instance No. 2226 (Sept. 12, 2003); FARRIS, *supra* note 144, at 331, 340.

¹⁷⁸ Liu Xiaobo—Inciting Subversion, First Intermediate People’s Court of Beijing, Criminal Judgment, (2009) 1st Intermediate Criminal First Instance No. 3901 (Dec. 25, 2009); FARRIS, *supra* note 144, at 386, 393.

¹⁷⁹ Cheng Huaishan—Defaming the Politburo, People’s Court of Kunshan, Jiangsu, Administrative Judgment, (2014) Kun Administrative First Instance No. 0015 (May 12, 2014); FARRIS, *supra* note 144, at 416, 418.

¹⁸⁰ *Cf.* Ahl, *supra* note 57, at 182–83 (illustrating how Chinese courts use party ideology including the socialist core value system in “explaining the law, appeasing the losing parties and educating them with reference to ideology” in their decisions). More recently, the Supreme People’s Court (SPC) has stated explicitly that courts should apply “socialist core values” in cases relating to national security. The SPC Printed a Notice of “Guiding Opinions on Deepening the Promotion of the Integration of Socialist Core Values into the Judicial Interpretation and Reasoning of Adjudicative Instruments” [最高人民法院印发《关于深入推进社会主义核心价值观融入裁判文书释法说理的指导意见》的通知], Art. 4(1), Jan. 19, 2021.

to a “state symbol” illustrates such potential.¹⁸¹ In 2016, the SPC upheld the lower courts’ decisions in a defamation case involving articles that allegedly derogated a spiritual symbol of China’s national security. The court found that some “heroic figures” in a CCP mythology under attack—five men who fought the Imperial Japanese Army during the Second Sino-Japanese War and committed suicide—formed “the socialist core value system” that had “become part of the public interest” from the perspective of the “current law.”¹⁸² Interestingly, the court then went on to consider the tension between the defendant’s free speech and the public interest in “socialist core values,” holding that the defendant should have exercised his speech freedom without undermining those core values.¹⁸³ While not explicit, the “current law” in the court ruling may well be understood as referring to the mandate of “cultivating and practicing the socialist core values” in the NSA, which is China’s first statutory law that codifies this party norm.¹⁸⁴ In that sense, Chinese courts offered a direct and detailed explanation of the tension between free speech and a regime-focused concern of the CCP in terms of this *de facto* party speech norm. Arguably, the courts seemed to suggest that Chinese citizens should only exercise the constitutional right to free speech in a way that is the least harmful to the “public interest” covered by the NSA.

Nevertheless, it remains a fact so far that courts are often guided by party speech norms under this doctrine of national security without applying them directly to

¹⁸¹ Such cases are comparable but not equivalent to “symbolic speech,” which often refers to conducts such as desecration of national flags. Under Chinese law, courts often deal with speech attacking national symbols in cases relating to “public order” or “libel.” Here it makes sense to analyze such cases from a comparative perspective. Cf. ALPHEUS THOMAS MASON & DONALD GRIER STEPHENSON, JR., *AMERICAN CONSTITUTIONAL LAW: INTRODUCTORY ESSAYS AND SELECTED CASES* 511 (18th ed. 2021). For a leading US case on symbolic speech, see *Texas v. Johnson*, 491 U.S. 397 (1989). For a leading German case, see *Bundesflagge*, 81 BVERFGE 278 (1990).

¹⁸² The Supreme People’s Court Position Paper on the “Five Heroes of Wolf Tooth Mountain” Cases—2016; FARRIS, *supra* note 144, at 667, 670.

¹⁸³ *Id.* at 671.

¹⁸⁴ The NSA of the PRC, 2015, Art. 23. The “socialist core value system” was first conceptualized in a party document in 2013. *The General Office of the CCP Central Committee Printed Opinions on Cultivating and Practicing the Socialist Core Value System* [中共中央办公厅印发《关于培育和践行社会主义核心价值观的意见》] XINHUA AGENCY [新华社] (Dec. 23, 2013), http://www.gov.cn/zhengce/2013-12/23/content_5407875.htm.

“subversive speech.” In a recent case, Ren Zhiqiang, a well-known retired outspoken real estate tycoon in China, criticized Xi for excessive control of speech which led to the Covid-19 outbreak.¹⁸⁵ In earlier investigations, local government authorities accused Ren of having “failed to stay in line with the party’s central authorities on major matters of principle” and of having “published articles openly against the four cardinal principles,”¹⁸⁶ a verbatim citation of the intra-party disciplinary rules against subversive speech. However, it turned out that the court only convicted Ren of “corruption, bribery, and embezzlement of public funds,”¹⁸⁷ one of those offences in China that may well be characterized as a “catch-all crime” to silence dissent, without naming the criminalization of political speech.¹⁸⁸ Obviously, the hierarchical norm of national security is often aided by subsidiary norms for enforcement so as to avoid controversy or even attention in an authoritarian state.

B. Public Order and Rights of Others: Two Nonhierarchical Speech Norms

Apart from subsidiary norms in other statutory laws such as mentioned in the *Ren* case, two nonhierarchical norms stand out in the Constitution as such subsidiary principles. These principles often seem to address risks other than regime-focused, but defer to the hierarchical principle of national security where any speech might jeopardize the CCP’s party supremacy indirectly. Under Art. 1, these constitutional bases for limiting speech could be reinterpreted in terms of intra-party rules that tend to politicize the regulation of non-political speech, thus extending the spillover effect of the hierarchical speech norm of national security.

¹⁸⁵ Javier C. Hernández, *Chinese Tycoon May Face Prosecution After Expulsion from Communist Party*, N.Y. TIMES (JULY 25, 2020), at A13.

¹⁸⁶ *Ren Zhiqiang, Former Vice Party Secretary and Director of Huayuan Group of the City of Beijing Seriously Was Expelled from Party for Seriously Violating Party Disciplines and the Law* [北京市华远集团原党委副书记、董事长任志强严重违法违纪违法被开除党籍] XINHUA AGENCY [新华社] (July 24, 2020), http://www.xinhuanet.com/legal/2020-07/24/c_1126280188.htm.

¹⁸⁷ Chris Buckley, ‘Big Cannon’ Blasted Xi. Now He’s Been Sentenced to 18 Years, N.Y. TIMES (Sept. 23, 2020), at A8.

¹⁸⁸ See He, *supra* note 105, at 13. See also Guo Rui, ‘Picking Quarrels and Provoking Trouble’: How China’s Catch-all Crime Muzzles Dissent, S. CHINA MORNING POST (Aug. 25, 2021, 9:00 AM), <https://perma.cc/F363-7L7S> (stating that “social activists, lawyers and ordinary people arrested” during Xi’s anti-corruption campaign were “convicted for what many see as simply exercising free speech”).

1. Public order

One of the heterarchical principles of restricting political speech is the “public order” enshrined in the Constitution.¹⁸⁹ When it comes to political speech, this vaguely defined constitutional doctrine may also include banning the publication and distribution of racially or religiously harmful materials, often referred to as “hate speech.”¹⁹⁰ However, the most prominent application of this doctrine lies in the seemingly non-political crime of “picking quarrels and provoking trouble” (*xunxin zishi*) in the public.¹⁹¹ This catch-all speech offence used to be defined broadly as undermining public order by creating a disturbance among the public, but Chinese courts have applied it recently in regulating various types of online speech, especially where someone “fabricates and spreads information.”¹⁹² Abstract and vague as the formula may be, Chinese authorities often use it to prosecute a wide range of speech that the government finds politically offensive and harmful.¹⁹³

Two salient formal sources of “subsequent punishment” play an instrumental role here. One is the criminal offence of “disturbance of public order” applicable to whoever “make(s) up any false information on the situation of any risk, epidemic

¹⁸⁹ XIANFA, 2018, Art. 53.

¹⁹⁰ Both censorship regulations and criminal law contain such rules. See, e.g., RAP, 2020, Art. 25(4–5); The Criminal Code of the PRC, Arts. 249–50 (2020). Besides, the CCP’s Disciplinary Regulations single out both activities that are apt to “provoke harm to ethnic relations” and religious activities that “are organized or exploited to oppose the party line, directives, policies, and resolutions, undermining ethnic unity.” Disciplinary Regulations of the CCP, 2018, Arts. 60–61.

¹⁹¹ The Criminal Code of the PRC, 2020, Art. 293. See Guo, *supra* note 188.

¹⁹² The SPC & the Supreme People’s Procuratorate (SPP), Interpretation on Several Issues concerning the Specific Application of Law in the Handling of Defamation through Information Networks and Other Criminal Cases, Art. 5, Interpretation No. 21 [2013], Sept. 6, 2013 (Interpretation 2013).

¹⁹³ For example, this offence may cover speech that “insults police in WeChat,” “disseminates unverified contents to the detriment of the government’s credibility,” “lodges complaints in illegal visits to the central government,” “rejoices in the mishaps of others,” “harms national sentiments,” “smears leaders’ image,” or “vents anger drastically.” *2020 New Standards for the Offence of Picking Quarrels and Provoking Trouble* [2020, 寻衅滋事罪最新标准！每个人都要知道，别进去了都不知道怎么回事！], THE PAPER (Aug. 31, 2020), https://www.thepaper.cn/newsDetail_forward_8965487.

disease, disaster or emergency and spreads such information.”¹⁹⁴ The other is the administrative regulation penalizing those “intentionally disturbing public order by spreading any rumor, giving false information about the situation of any risk, epidemic disease or emergency, or by any other means.”¹⁹⁵ This latter government rule was applied to Dr. Li, who issued the first warning to his fellow colleagues about the coronavirus outbreak through WeChat but was summoned by the police on suspicion of the “illegality” of distributing “untruthful remarks” that “severely disrupted social order.”¹⁹⁶ Party-state authorities also codify similar “prior restraints” and apply them when censoring online speech that is often politicized more than it is political. For instance, some specific prosecuting principles were created as party speech rules, where the CCP’s disciplinary regulations forbid party members to “create, distribute or transmit political rumors undermining party unity.”¹⁹⁷ While these rules banning “political rumors” are targeted at party members, they are now carried forward into a nationwide ministerial regulation that bans online content “spreading rumors to disturb economic and social order” and “making improper comments on natural disasters, major accidents or other disasters.”¹⁹⁸

Moreover, the offence of “picking quarrels and provoking trouble” may be applied to mask what is essentially a subversion offence.¹⁹⁹ In such cases, “public order” is nonhierarchical but merely a subsidiary norm: it operates seemingly as an independent legal principle, but the hierarchical norm of national security looms larger where, for example, the CCP leadership takes speech about an epidemic as a

¹⁹⁴ The Criminal Code of the PRC, 2015, Art. 291(1).

¹⁹⁵ The Act of the PRC on Public Security Administration Punishments, 2005, Art. 25(1).

¹⁹⁶ Dr. Li Wenliang—Telling People About Covid in Wuhan, Public Security Bureau of Wuhan, Wuchang Division, Zhongnan Precinct, Letter of Reprimand, Wu Public (Central) No. 20200103; FARRIS, *supra* note 144, at 622.

¹⁹⁷ Disciplinary Regulations of the CCP, 2018, Art. 52.

¹⁹⁸ CAC, Provisions on the Ecological Governance of Network Information Content, 2019, Arts. 6(8) & 7(3).

¹⁹⁹ Gao Feng, *Chinese Activist Who Supported Hong Kong Protests Faces ‘Subversion’ Charge*, RADIO FREE ASIA (Jan. 15, 2021), <https://perma.cc/GD2T-3S97>.

“challenge to national security and social stability.”²⁰⁰ Conversely, if state authorities find that “spreading false information” does not challenge but instead contributes to safeguarding national security, that speech would no longer be prosecuted. In the 2020 case of *Wang Doe*, the court revoked the police decision to detain the plaintiff for spreading untruthful message online about riots in Xinjiang on the ground that the plaintiff’s stated purpose was to post “patriotic and government-loving statements.”²⁰¹ It is, therefore, a widely observable practice that government regulation of critical speech is informed by the hierarchical norm of “national security” but can be shrouded by the subsidiary, nonhierarchical norm of “public order.”²⁰²

2. Rights of others

Another constitutional basis for limiting political speech is the “rights of others.”²⁰³ Presumably, Chinese law recognizes the protection of reputation in the form of libel litigation, despite the potential conflict of such litigation with free speech.²⁰⁴ Although reputation rights and libel law can be seen as relatively independent constraints on speech, they may also serve as a nonhierarchical and subsidiary party norm supporting the constraints on political speech by deferring to the hierarchical norm of national security.

When interpreted in line with party rules, the constitutional protection of reputation sets a restrictive condition particularly on speech that attacks government

²⁰⁰ Xi Jinping [习近平], *Providing Strong Technological Support to Win the War of Preventing and Controlling the Epidemic* [为打赢疫情防控阻击战提供强大科技支撑], 6 QIUSHI [求是] (2020).

²⁰¹ Wang Doe—Disrupting Public Order by Posting About Xinjiang, Intermediate People’s Court of Yinchuan, Ningxia Hui Autonomous Region, Administrative Judgment, (2020) Ning 01 Administrative Final Instance No. 282, (Oct. 14, 2020). *Id.* at 63, 66.

²⁰² For the hierarchy in applying such rules, see Xiao & Mozur, *supra* note 45 (documenting a new ranking system of three types of speech that online security staff must investigate in terms of the “severity of the violation” such as “plans to politically organize or protest,” “promotion of liberal ideology,” and libel or pornography).

²⁰³ XIANFA, 2018, Art. 51.

²⁰⁴ The Criminal Code of the PRC, 2020, Art. 246(1). The SPC replied to several questions concerning the infringement of reputation by news reports, critical articles, and literary works. Answers of the SPC to Some Issues Concerning the Trial of Cases Involving the Right of Reputation [最高人民法院关于审理名誉权案件若干问题的解答], Aug. 7, 1993.

reputation. For instance, the CCP's intra-party regulation makes it taboo to "vilify the Party or State's image, or disparage and slander Party or State leaders and heroes and martyrs, or distort the history of the Party, the PRC, or the people's armed forces."²⁰⁵ In that regard, Chinese libel law follows the constitutional mandate that requires citizens to safeguard the "honor of the motherland."²⁰⁶ For instance, this principle is incorporated into the 2018 Act on the Protection of Heroes and Martyrs, which forbids anyone to "distort, defame, desecrate or deny the deeds and spirit of heroes and martyrs" including their "name, portrait, reputation, and honor."²⁰⁷

In practice, this rule goes far beyond existing defamation and libel laws to cover seditious libel, so that public authorities could prosecute a variety of critical speech threatening the CCP's ruling status. For example, in the 2018 case of *Xu Chang*, the court decided against the defendant who published an online post "defaming" a dead fireman whom the government dubbed a "martyr."²⁰⁸ The court held that the "spiritual values" of martyrs were a "source from which socialist core values spring."²⁰⁹ Indeed, Chinese courts would not even tolerate the slightest challenge to the party-state's definition of "heroes and martyrs."²¹⁰

Furthermore, Chinese courts have specified the offence of "fabricating and spreading facts" and "falsifying the original information" to "defame another person."²¹¹ Such a rule creates a chilling effect, especially because of the risk of higher punishment when "the same defamatory information is actually clicked or browsed

²⁰⁵ Disciplinary Regulations of the CCP, 2018, Art. 46(3).

²⁰⁶ XIANFA, 2018, Art. 54.

²⁰⁷ The Act of the PRC on the Protection of Heroes and Martyrs, 2018, Art. 22.

²⁰⁸ *Xu Chang—Defaming a Martyred Firefighter*, Intermediate People's Court of Yantai, Shandong, Civil Judgment, (2018) Lu 06 Civil First Instance No. 211, (June 26, 2018); FARRIS, *supra* note 144, at 547.

²⁰⁹ FARRIS, *supra* note 144, at 551.

²¹⁰ A military blogger who cast doubt on the official number of dead soldiers in the Sino-India border clash was jailed for "slandering" them. *Update: Blogger in SW China's Sichuan Arrested After Confessing Insults Toward PLA Martyrs*, GLOB. TIMES (Feb. 21, 2021, 1:09 PM), <https://perma.cc/L9R3-HTNZ>.

²¹¹ The SPC and the SPP, Interpretation 2013, *supra* note 192, Art. 1.

for more than 5,000 times or is forwarded for more than 500 times.”²¹² This nonhierarchical party norm, which uses personal rights as a pretext to fend off any criticism of the party-state and its leaders, can be well understood in the light of China’s judicial practice concerning vaguely defined reputation rights.²¹³ Recently, the CAC has banned Internet content providers from producing and disseminating any contents “harming the nation’s honor and interests,” “distorting, vilifying, defiling, or denying the deeds and spirit of heroes and martyrs,” “harming the names, images, reputations, and honor of heroes and martyrs through insult, defamation, or other such means,” or “sensationalizing gossip, scandals, misdeeds, etc.”²¹⁴ In fact, the CCP’s long-arm regulation of cyber speech could extend to overseas “vilification of the party’s and the state’s image.”²¹⁵

To sum up, under Art. 1 of the Constitution, the CCP’s intra-party rules may well serve as the source for interpreting originally ill-defined constitutional principles and ambiguous legal rules in a way that justifies regulating political speech. In the current constitutional framework, the vertical structure of such a regime consists of a hierarchical norm of national security and two nonhierarchical norms of public order and others’ rights. In interpreting the restriction of political speech, therefore, national security always takes precedence over public order and others’ rights. Where, for instance, political speech is found to pose regime-focused risks, national security laws would trump public order laws and libel laws.

III. REMAKING THE INSTITUTIONAL ARRANGEMENTS FOR SPEECH REGULATION: EMPOWERING PARTY ORGANS IN THE CONSTITUTIONAL GOVERNANCE OF POLITICAL SPEECH

Under the 1982 Constitution, the National People’s Congress (NPC) is the “supreme organ of state power.”²¹⁶ However, the principle of party supremacy en-

²¹² *Id.* Art. 2(1).

²¹³ For a list of selected cases, see FARRIS, *supra* note 144.

²¹⁴ CAC, Provisions on Ecological Governance of Network Information Content, 2019, Arts. 6(3), 6(4) and 7(2).

²¹⁵ The offence of subversion was applied to an ethnic Korean who wore a T-shirt calling Xi “Xitler” and posted his selfie online in China. Chris Buckley, *He Combined ‘Xi’ With ‘Hitler’ on Twitter. Now He Faces Prison Time.*, N.Y. TIMES (Feb. 17, 2017).

²¹⁶ XIANFA, 2018, Art. 57.

shrined in the 2017 and 2022 amendments of the Constitution of the CCP has virtually trumped that principle.²¹⁷ Party organs as the “supreme force of political leadership,” therefore, must find a way to fulfill their newly defined roles. Thus, to enforce the CCP’s speech regulation that highlights national security, Art. 1 of the Constitution requires reconstructing the institutional governance of political speech in China. This is because, in order to fulfill security mandates, states always look to institution building with duly defined missions of accomplishing the “underlying normative commitments.”²¹⁸ As to the regulation of political speech, China’s new process of institution building is a transition from textual to contextual remaking of the constitutional framework for the purpose of “constraining” regime-threatening speech, “enabling” overall implementation of security-oriented speech regulations, and “constituting” an ideological context that envelopes citizens with the CCP’s regime-focused concerns.²¹⁹ As the fundamental principle of the new constitutional arrangements, Art. 1 consolidates the systemic institutionalization of the OPL and, thus, the principle of party supremacy, in the constitutional governance of political speech.

In 2017, the CCP issued its “Work Organ Regulations” that manifested the future plan of “merging party and government bodies and work together into a joint office as long as their duties are akin to each other.”²²⁰ To put this plan into practice, the CCP launched a reform of party and government institutions alongside the

²¹⁷ This is best illustrated by the CCP’s recent practice of the construction of the “top-level design” (*dingceng sheji*) in China’s government system. It is an engineering term introduced into China’s political context and now refers specifically to the various CCP small leading groups chaired by Xi himself in order to reinforce the OPL in national security, law, finance, foreign relations, and cyberspace. See, e.g., *An Irreversible Historic Process*, *supra* note 119.

²¹⁸ Cora Chan & Fiona de Londras, *Building Rule of Law Resilience through Institutions: A Proposed Institutional Infrastructure for National Security Legislation*, in *CHINA’S NATIONAL SECURITY: ENDANGERING HONG KONG’S RULE OF LAW?* 275, 277 (Cora Chan & Fiona de Londras eds., 2020).

²¹⁹ *Cf. id.* at 277, 279.

²²⁰ Regulations on the CCP’s Work Organs, 2017, Art. 5.

2018 constitutional amendments to ensure the “overall coverage of the CCP leadership.”²²¹ This reform echoes the aforementioned contextual functionalities of “constraining,” “enabling,” and “constituting” which implement and expand the CCP’s governance of political speech. The project encompasses three basic institutional elements: (1) translating the party’s political will and decision into the law and policy of the state; (2) integrating the personnel of the party with those of the executive branch; (3) ensuring the enforcement of the law and policy made by *de facto* party organs.²²² Though not an explicit constitutional mandate, the project could be perceived as the penumbra of Art. 1 that empowers the CCP’s party organs to take over the constitutional governance of political speech by segmentizing the party’s institution building into decision-making, administration, and enforcement of the regulatory framework of political speech.²²³ These interrelated elements forge the institutional spillover effect of the CCP’s intra-party speech regulation and, thus, implement the OPL in the entire legal system.

A. *Extending Decision-Making Capacities to Party Organs*

The first step towards institutionalizing the spillover effect of the OPL in the new constitutional governance of political speech is to extend decision-making capacities to relevant organs of the CCP. These party organs then turn their speech regulatory principles into national law by bringing the daily practice of constraining regime-threatening speech into legislative proposals. To reach this goal, the CCP leadership stresses “the role of the functional departments of the party” and the importance of reallocating governance duties among “decision-making institutions” that shall “be responsible for the top design, general layout, overall coordination and advancement of significant work.”²²⁴ Specifically, this comprehensive reform program involves four major decision-making institutions of the Central

²²¹ The Third Plenary of the Nineteenth Central Committee of the CCP [中国共产党第十九届中央委员会第三次全体会议], Decision of the CCP Central Committee on Deepening the Reform of the Party and State Institutions [Decision DRPSI/中共中央关于深化党和国家机构改革的决定], Feb. 28, 2018.

²²² Jiang, *supra* note 156, at 91.

²²³ See The Third Plenary of the Nineteenth Central Committee of the CCP [中国共产党第十九届中央委员会第三次全体会议], Program of the CCP Central Committee on Deepening the Reform of the Party and State Institutions [Program DRPSI/中共中央关于深化党和国家机构改革的方案], Mar. 21, 2018.

²²⁴ Decision DRPSI, *supra* note 221, III.1 & .3.

Committee of the CCP in charge of speech regulation, including the Central Cyberspace Affairs Commission (CCAC), the CCP Propaganda Department (CPD), the Central Political and Legal Affairs Commission (CPLAC), and the United Front Department (UFD).²²⁵ Their decision-making facilities are concentrated respectively on the regulation of Internet speech, press and media, protest, and hate speech and overseas political speech.

First, the CCAC, also known as the CAC, is a relatively young party organ that oversees individual online speech and formulates policies on Internet censorship and Internet security. Since Xi became the chairman of the CCAC, however, the CCAC has virtually taken the place of the CPD as the highest institution with decision-making facilities in information control.²²⁶ It centralizes the general regulation of Internet speech by establishing the CAC, an executive office in the State Council.²²⁷ The reach of the CAC as the leading authority in Internet control is much broader than might have been expected. For instance, as early as 1996, China's State Council issued administrative rules on Internet access which aimed at banning the use of VPNs but were never enforced.²²⁸ However, the CAC decided and managed to enforce those rules by inviting the Ministry of Industry and Information Technology (MIIT) to issue a set of new regulations.²²⁹ More recently, the CAC has been the leading cyberspace regulator that proposed China's overarching legal frame-

²²⁵ Program DRPSI, *supra* note 223, §§ 4, 11–16, 19–20.

²²⁶ See A.J. Caughey & Shen Lu, *How the CAC Became Chinese Tech's Biggest Nightmare*, PROTOCOL (Mar. 11, 2022), <https://perma.cc/EVW7-9JR5>. See also Jamie P. Horsley, *Behind the Façade of China's Cyber Super-Regulator*, Stanford Cyber Policy Center, DIGICHINA (Aug. 8, 2022), <https://perma.cc/SQ6E-5CUU>.

²²⁷ *Id.*

²²⁸ The State Council, Provisional Management Regulations for the International Connection of Computer Information Networks of the PRC, 1996, Art. 6.

²²⁹ Yuxi Wei, *China's New Cybersecurity Regulations: Analyzing the Ban on VPN Services*, UNIV. WASH. E. ASIA CTR. (Apr. 17, 2017), <https://perma.cc/Y6PK-SFH5>.

work for data control, including the Data Security Act and the Personal Information Protection Act,²³⁰ and, by its own mandate, enacted bills with detailed legal requirements for China’s cross-border data transfer.²³¹

Secondly, the CPD remains a key party organ that oversees ideological control and regulation of the press and media. While the CPD used to do so without a constitutionally supported mandate,²³² the party-state’s 2018 program of institutional reform empowers the CPD to acquire the official functions of administering news, press, and films from the State Administration for Press, Publication, Radio, Film, and Television (SAPPRFT),²³³ a former ministerial department of China’s State Council. The SAPPRFT was a department of the central government between 2013 and 2018, but has since dissolved into the National Press and Publication Administration (NPPA), China Film Administration (CFA), and National Radio and Television Administration.²³⁴ Both the NPPA and the CFA, previously two constituent departments of China’s State Council, have merged with the CPD, which is responsible for carrying out the CCP’s propaganda guidelines and working out the official guiding policy on the regulation of news, press, copyright, production and content review of publications and films, and imported or exported films and publications.²³⁵

Thirdly, the CPLAC is the CCP’s internal organ responsible for political and legal affairs, but oversees, in practice, state law enforcement bodies including the judiciary, public prosecutors, and the police. As for speech regulation, the CPLAC centralizes resources in dealing with mass protests and specific religious activities for the purpose of “maintaining social stability,” a power that used to be shared by

²³⁰ The Data Security Act of the PRC, June 10, 2021; The Personal Information Protection Act of the PRC, Aug. 20, 2021.

²³¹ CAC [国家互联网信息办公室], Cybersecurity Review Measures [网络安全审查办法], Dec. 28, 2021; CAC [国家互联网信息办公室], Data Export Security Assessment Measures [数据出境安全评估办法], July 7, 2022.

²³² This was done by issuing formal and informal party directives. See Benjamin L. Liebman, *Watchdog or Demagogue: The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1, 43–46 (2005).

²³³ Program DRPSI, *supra* note 223, § 11.

²³⁴ *Id.* §§ 11, 12 & 35.

²³⁵ *Id.* §§ 11, 12.

three “small leading groups” of the Central Committee of the CCP.²³⁶ Under the 2018 reform program, the CPLAC is committed to working out policies on collecting the data concerning “social stability” and “evil religions” as well as coordinating the “settlement of social emergencies” in both of them.²³⁷ Besides, the CPLAC needs its police force to assist in implementing its decisions because any mass protests stemming from sociopolitical or religious crises could trigger “collective actions” conducive to anti-government sentiments, plans, and actions—threats that lie at the very heart of the CCP’s regulation of political speech.²³⁸

These three decision-making institutions of the CCP are all responsible for the regulation of regime-focused political speech, such as sedition and incitement potentially leading to subversion of government. The regulation of political speech, however, often goes beyond that category and covers hate speech against particular races or religions.²³⁹ In this connection, the UFD is another decision-making party organ with the function of forming a social and geographical “united front” against “common enemies” including “enemy speeches,” working out the CCP’s policies on racial and religious issues, and extending the regulation of political speech to overseas Chinese.²⁴⁰ To achieve the institutional reconstruction for such regulations, the 2018 reform program confers on the UFD direct leadership of the National Ethnic Affairs Commission, and allows the UFD to merge with the State Administration for Religious Affairs and the Overseas Chinese Affairs Office,²⁴¹ all of which are constituent departments of the State Council. In 2020, the CCP amended its Regulation on the United Front Work to expand its influence on foreigners and overseas Chinese by “strengthening ideological and political guidance,” “fuelling the passion,” and “improving understanding of and association with the CCP and

²³⁶ *Id.* §§ 18, 19, 20.

²³⁷ *Id.* §§ 19, 20.

²³⁸ Gary King et al., *How Censorship in China Allows Government Criticism but Silences Collective Expression*, 107 AM. POL. SCI. REV. 326, 334–37 (2013).

²³⁹ For a discussion of racial and religious hate speech as political speech, see BARENDT, *supra* note 5, at 189.

²⁴⁰ Program DRPSI, *supra* note 223, §§ 13–15. For a detailed analysis of the role of the UFD in this respect, see, e.g., LIN LI & JAMES LEIBOLD, INT’L CYBER POL’Y CTR., CULTIVATING FRIENDLY FORCES: THE CHINESE COMMUNIST PARTY’S INFLUENCE OPERATIONS IN THE XINJIANG DIASPORA 8–11 (2022), <https://perma.cc/RM7C-NL47>.

²⁴¹ Program DRPSI, *supra* note 223, §§ 13–15.

socialism.”²⁴² Notably, this happened against the backdrop of the US’ identification of the CCP’s UFD as an integral component of its “soft war against America.”²⁴³

Speech control by CCP decision-making institutions: a new outlook since the 2018 constitutional amendment



B. Merging Working Organs of the Party with Administrative Bodies

The CCP also empowers its working organs to implement decisions constraining political speech directly through the executive branch of the government. This creates a constitutional anomaly of juxtaposing party organs and administrative bodies in the same regulatory arena. On the one hand, the Constitution recognizes the principle of popular sovereignty and takes the administrative bodies as state organs deriving from the people’s congresses.²⁴⁴ On the other hand, the Constitution treats political parties merely as a *de jure* component of “the people” that differ from administrative organs,²⁴⁵ even though Art. 1 of the Constitution now accords the CCP an outstanding status of political leadership. Yet, the CCP’s 2018 institutional reform program is set to reallocate political power between party organs and administrative bodies responsible for regulating political speech by merging them

²⁴² Regulation on the United Front Work of the CCP, 2020, Art. 37.

²⁴³ Lee Edwards, *China’s “Soft” War against America*, THE HERITAGE FOUND. (Feb. 22, 2021), <https://perma.cc/9QZ2-ZVX8>.

²⁴⁴ XIANFA, 2018, Arts. 2 & 3.

²⁴⁵ *Id.* Art. 5.

into joint offices while keeping their separate identities.²⁴⁶ Thus, this political scheme creates a spillover effect of intra-party regulation of political speech by enabling the CCP's speech regulatory institutions to merge with state authorities, so that the former assimilate both the organs and the personnel of the latter.²⁴⁷ Two salient examples illustrate this.

The first example comes from the control of Internet speech. Above all, the CCP not only works through its direct leadership of the CAC, a state organ of the central government, but also takes over control of the National Computer Network Emergency Response Technical Team/Coordination Center (CNERT/CC) from the MIIT.²⁴⁸ The CNERT/CC is a non-governmental cybersecurity technical center and the key coordination unit for cybersecurity emergencies across China. However, it has quasi-administrative missions such as safeguarding the "security of critical information infrastructure," leading efforts to "prevent, detect, alert, coordinate, and handle cybersecurity threats and incidents," and "establishing the mechanism of prompt response to and coordinative handling of cross-border cybersecurity incidents."²⁴⁹ Thus, the CCAC not only exercises the core function of determining the policy on regulating Internet speech, but also gives administrative orders directly to the CNERT/CC. In turn, the CNERT/CC can carry out its missions of speech control over a wide range of entities, such as key network operators, domain name registrars, cybersecurity vendors, academia, civil society, and research institutes.²⁵⁰

²⁴⁶ Notably, a major mechanism of party-state organizational reconstruction in the PRC is "one institution with two titles." This means that a government institution may work under two different names in two related domains to cater to various political needs without changing its nature as one legal person or its staff as members of the same team. There are two forms of adopting this approach in government reforms. One is "adding a title," while the other is "retaining the title externally." In the former case, an additional title is accorded to a party or state organ to authorize it to carry out administrative duties in a new area, whereas in the latter an agency is allowed to retain its title when it is incorporated into another organ. As shown above, the most palpable organizational reconstruction in the regulation of political speech takes place in the sector overseen by the CPD. Program DRPSI, *supra* note 223, §§ 8, 10, 14–15.

²⁴⁷ Decision DRPSI, *supra* note 221, III.4.

²⁴⁸ Program DRPSI, *supra* note 223, § 16.

²⁴⁹ CNERT/CC, ORGANIZATION PROFILE, <https://perma.cc/YS8Y-H6A8> (last visited July 29, 2022).

²⁵⁰ *Id.*

The second example lies in the regulation of press freedom. Before the 2018 institutional reform, the CPD maintained control of government agencies only through administrative supervision and staff nomination (*guikou guanli*).²⁵¹ Such an indirect approach of the CPD to regulating political speech dates back to the founding of the PRC, when the central government established internal organs in charge of news and publication.²⁵² Since the party-state’s 2018 institutional reform, however, both the functions and the staff of the NPPA and the CFA have been integral components of the CPD.²⁵³ In other words, the titles of both administrative bodies are transferred to the CPD, so that they are no longer constituent departments of the central government but those of the CPD.²⁵⁴ Thus, the CPD has acquired their official administrative authorities to plan, manage, and guide the development and contents of news, press, media, and imported and exported publications, as well as to oversee the production and distribution of films and organize the content review of films.²⁵⁵

What is even more an oddity is the trinity of the CPD, the NPPA, and the National Copyright Bureau (NCB).²⁵⁶ Originally, the NPPA and the NCB were launched in the 1980s as a joint office and a constituent department of the State Council. Whereas the name of the NPPA changed several times before it became part of the CPD, it remains the single leading administration in charge of censorship of political speech.²⁵⁷ By contrast, the NCB focuses on the administration of copyright which pertains primarily to the commercial interests in non-political

²⁵¹ Tu, *supra* note 71, at 99–100.

²⁵² *Id.*

²⁵³ Program DRPSI, *supra* note 223, §§ 11, 12.

²⁵⁴ Likewise, the State Council Information Office became the Central Office of Foreign Propaganda, a subordinate organ of the CPD of the CCP whose main duty is to oversee Internet news information including “reports and comments on political, economic, military, diplomatic and other social and public affairs, and the reports and comments on relevant social emergencies.” CAC, Provisions for the Administration of Internet News Information Services, 2017, Art. 2.

²⁵⁵ Program DRPSI, *supra* note 223, §§ 11, 12.

²⁵⁶ *Id.*

²⁵⁷ RAP, 2020, Art. 10.

speech.²⁵⁸ However, the 2018 constitutional reform pierces the veil of this artificial dichotomy of administration between political and non-political speech: the CPD, a party organ, becomes the *de facto* administrator of both political news and copyright. Copyright becomes part of the party-state's speech regulatory system because, in contrast to other intellectual property rights, copyright law, which is based on both the private creative interests in making profits and the public interest in accessing intellectual works, is part of the CCP's regulatory instruments to control free speech and the free flow of information.²⁵⁹

This shows how the institutional reconstruction serves the CCP's political interests by empowering party organs to regulate speech that might cause regime-focused risks. In fact, China's copyright law allows the CPD and the NCB to administer the publication and dissemination of works, viz. to carry out content review in the name of the Constitution and public interests, as a precondition for copyright protection.²⁶⁰ Through this arrangement, the CPD may reduce copyright owners' incentive to exercise their right to freedom of speech by thwarting their economic interests in remuneration for producing politically sensitive works.²⁶¹ Besides, the CPD has also acquired and retooled the National Work Group for Combating Pornography and Illegal Publications, previously an organ of the NPPA. Through this National Work Group, the NPPA, in tandem with the NCB, leads regular crackdown campaigns which are, in fact, targeted at restricting the dissemination of sensitive political speech.²⁶² Under China's copyright law, the NCB is authorized to take legal measures to punish those who distribute "illegal works" in the event that "public interests" are damaged,²⁶³ and, thus, to control the free flow of information in terms of party ideology.

²⁵⁸ The dichotomy between political speech and non-political speech is palpable in the legal definition of two different types of speech in the form of individual publications. The former is to "express in publication his opinions and willingness towards national affairs, economic and cultural careers, and social affairs" and the latter is to "publish its achievements in respect of scientific research, literary, and artistic creation and other cultural pursuits." *Id.* Art. 23.

²⁵⁹ GE CHEN, COPYRIGHT AND INTERNATIONAL NEGOTIATIONS: AN ENGINE OF FREE EXPRESSION IN CHINA? 21–32 (2017).

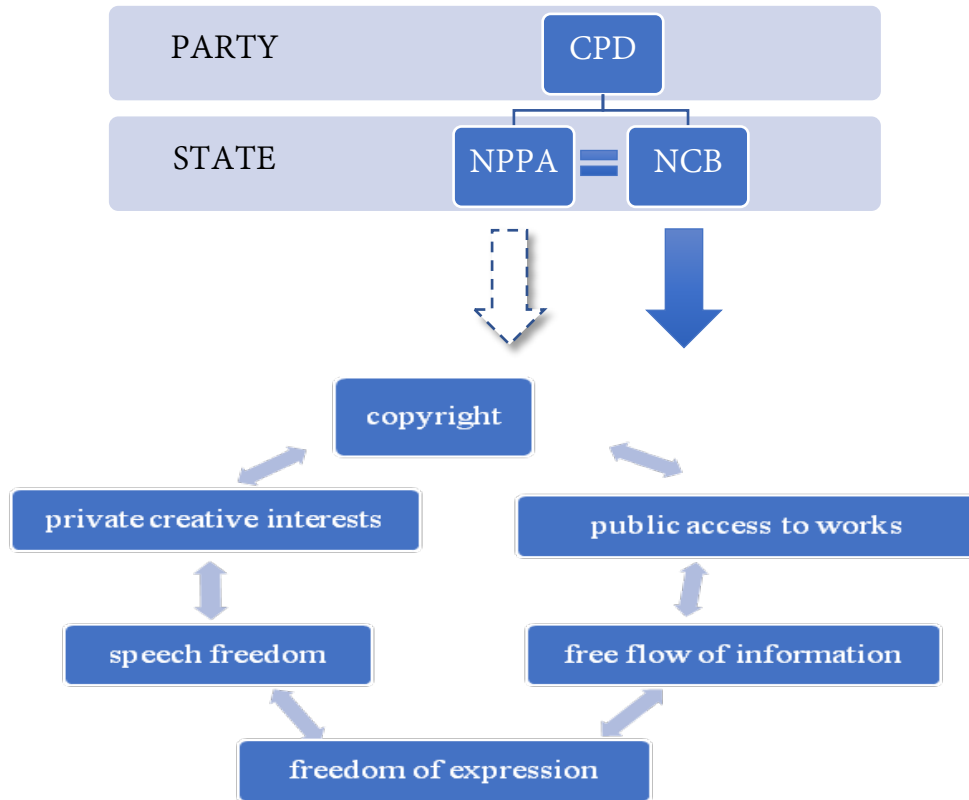
²⁶⁰ The Copyright Act of the PRC, 1990 & 2020, Art. 4.

²⁶¹ CHEN, *supra* note 259, at 71–81.

²⁶² *Id.* at 164–67.

²⁶³ The Copyright Act of the PRC 2020, Art. 52.

The CPD incorporates China’s state media regulator and copyright administration to turn copyright law into a party-driven speech regulatory tool



C. *Monitoring Public Servants Through the Party-State Enforcement System*

A third institutional arrangement that goes beyond “constraining” political speech and “enabling” party organs to further consolidate the spillover effect of intra-party speech regulation is the new constitutional power of supervisory committees at various levels,²⁶⁴ with the National Supervisory Commission (NSC) as the top leader.²⁶⁵ Under the 2018 Constitution, the NSC joins all other existing state organs that are subordinate to the NPC.²⁶⁶ Yet the establishment of the NSC as a constitutional power in addition to the legislative, executive, and judicial powers simply duplicates the governance model of “discipline inspection” within the CCP and legalizes a highly politicized policing tool for ideological control within the

²⁶⁴ XIANFA, 2018, Art. 123.

²⁶⁵ *Id.* Art. 125.

²⁶⁶ *Id.* Arts. 57 & 125.

CCP.²⁶⁷ Pursuant to the CCP's 2018 reform program, the NSC shall take over the anti-corruption investigative power from the executive branch and the SPP, merging and sharing its power with the Central Commission for Discipline Inspection (CCDI) of the CCP.²⁶⁸ Accordingly, this "unitary institution with two titles" combines party organs and state organs and has the power of both carrying out discipline inspection of party members and monitoring any public servants of the state.

As far as the regulation of political speech is concerned, the NSC and its subordinate supervisory commissions are able to enforce the intra-party disciplinary rules almost without being questioned,²⁶⁹ including rules which set forth the boundaries for political speech by all party members and public servants.²⁷⁰ Officially, the supervisory system is a non-judicial entity that institutionalizes the CCP's internal instrument of preventing party cadres from misuse of power for private economic gains.²⁷¹ Whereas the CCDI was committed to investigating party cadres' corruption cases, it never routinely investigated or punished party cadres only for political speech that violated guiding party ideologies. However, the creation of this constitutional supervisory power enables the CCDI's investigative power to transcend its previous purview of corruption cases and restrict the political speech of both party members and non-party members by applying party guidelines. Two recent cases of supervisory investigations involving public figures' speech illustrate how the constitutional mandate that turned the institutional power of the party's disciplinary organs into that of state organs deepens the spill-over effect of the CCP's entrenched system of speech control.

In the abovementioned case of *Ren Zhiqiang*, it was the local party-state organ, which is both the Discipline Inspection of the CCP and the Supervisory Committee

²⁶⁷ Seppänen, *supra* note 58, at 290–95 (providing a historical account of the CCP's disciplinary governance).

²⁶⁸ Program DRPSI, *supra* note 223, § 1.

²⁶⁹ Li Li & Peng Wang, *From Institutional Interaction to Institutional Integration: The National Supervisory Commission and China's New Anti-Corruption Model*, 240 THE CHINA Q. 967, 968–69, 975–76 (2019).

²⁷⁰ The National Supervision Act of the PRC, 2018, Art. 15.

²⁷¹ Li & Wang, *supra* note 269, at 981–82.

in Beijing Xicheng District, that held Ren in secret detention to investigate his alleged “serious violations of discipline and law.”²⁷² Months later, the CCP’s disciplinary organ in Beijing stripped Ren of his membership in the CCP based on the investigative results released by the supervisory organ, which applied intra-party speech rules and accused Ren of “smearing the party and country’s image, distorting the party and the military’s history, being disloyal and dishonest with the party,” and “refusing to admit his wrongdoing.”²⁷³ However, Ren was no longer a public servant at the time, though he used to be head of a state-owned enterprise and remained a member of the CCP before the official investigation was launched against him.²⁷⁴ This means that, in practice, supervisory organs may apply the CCP’s speech regulations directly to non-government officials.

In a more recent case, Professor Cai Xia, a retired staff of the Central Party School (CPS) of the CCP, was punished for her critical speech on the national security law in Hong Kong and for signing a petition in support of free speech following Dr. Li’s death at the outbreak of coronavirus.²⁷⁵ Even though she had left China, a disciplinary commission jointly run by the CCDI/NSC and the discipline inspection unit of the CPS found all her previous public speech, statements, and writings to be “politically problematic and damaging to the reputation of the country,” and concluded that she had violated the political disciplines of the CCP.²⁷⁶ The commission claimed that Cai “did not regret her erroneous statements at all” and “refused to acknowledge her mistakes” during the investigation, and that she “refused to return to China for organizational examination” or “provide information regarding relevant personnel with whom she discussed her erroneous statements.”²⁷⁷ Upon this finding, the commission decided to expel Cai from the CCP and even deprive her of all her retirement benefits.²⁷⁸ Thus, the NSC claimed extraterritorial jurisdiction over the political speech of a former public servant living in the US.

²⁷² Hernández, *supra* note 185.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ Cai Xia, *The Party that Failed: An Insider Breaks with Beijing*, 100 FOREIGN AFFS., Jan.-Feb. 2021, at 78, 94–96.

²⁷⁶ Anne Henochowicz, *Cai Xia Tweets Three Strikes That Pushed Her Out of the Party*, CHINA DIGITAL TIMES (Aug. 20, 2020), <https://perma.cc/9WU6-RXXP>.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

IV. BUILDING THE THEORETICAL ROOT: LEGITIMIZING THE CONSTITUTIONAL DOCTRINE OF PARTY SUPREMACY

For all those new constitutional arrangements, defenders of the party regulation of political speech needed to redefine the relationship between the CCP intra-party regulations and the national law, which is premised on two conflicting formulae in the mainstream constitutional theories.²⁷⁹ On the one hand, the fundamentality of the Constitution seems to be established in the 1982 Constitution: “All state organs, the armed forces, all political parties and public organizations, and all enterprises and institutions must abide by the Constitution and the law.”²⁸⁰ Even in the 2013 “constitutional debate,”²⁸¹ the Central Committee of the CCP restated it as a constitutional principle that the development of intra-party regulations must be “subject to the Constitution and the law.”²⁸²

On the other hand, the coin flipped over quickly at a landmark plenum in 2014, when the CCP leadership decided to integrate the intra-party regulations into the “socialist rule-of-law system with Chinese characteristics” and highlighted the “connections and coordination between these regulations and the law of the state.”²⁸³ Thus, the status of intra-party rules blurs, if not trumps, that of the Constitution. In fact, this definition fits with the principle of party supremacy to echo

²⁷⁹ In a sense, the 2018 constitutional amendment was only a political corollary that put an end to the intransigent debates between these two schools over decades. Such a contrast is termed a dichotomy between a “formalist” and an “anti-formalist” approach of justifying the CCP’s governance model. Samuli Seppänen, *Formalism and Anti-formalism in the Chinese Communist Party’s Governance Project*, 10 GLOB. CONST. 290 (2021).

²⁸⁰ XIANFA, 1982, Art. 5.

²⁸¹ The debate was triggered by Xi’s 2012 remark that “the life of the Constitution lies in its implementation.” Rogier Creemers, *China’s Constitutionalism Debate: Content, Context, and Implications*, 74 CHINA J. 91, 95–102 (2015) (describing the contents of the debate following Xi’s speech).

²⁸² RDIR, *supra* note 158, Art. 7(5).

²⁸³ The Fourth Plenum of the Eighteenth Central Committee of the CCP, *supra* note 163. For a general overview of the emphatic discussion of the CCP and the socialist rule of law, see Chongyi Feng, *China’s Socialist Rule of Law: A Critical Appraisal of the Relationship Between the Communist Party and Comprehensive Law Reform*, in CHINA’S SOCIALIST RULE OF LAW REFORMS UNDER XI JINPING 45, 46–50 (John Garrick & Yan Chang Bennett eds., 2016).

the paramount leader’s drive of intra-party anti-corruption campaigns “by law.”²⁸⁴ Since 2019, this formulation of the relationship between party rules and the national law has been hailed unequivocally as the standard version of its kind.²⁸⁵

Such a mainstream narrative of the CCP’s legal status holds pragmatic implications about the intra-party regulation of political speech and, thus, the CCP’s regulation of political speech at large. Recently, the CCP has revised its Regulations on Safeguarding Party Members’ Rights—an intra-party “bill of rights” that underlines the rights of political speech granted only to members of the CCP including the right to be informed, the right to receive education and training, the right to discuss, the right to advise, advocate, and supervise, the right to dismiss and replace (cadres), the right to vote, the right to elect and be elected, the right to petition, the right to raise different opinions, the right to petition, and the right to complain.²⁸⁶ However, the enshrinement of these rights is subject to the new doctrine of “adherence to the party leadership,”²⁸⁷ which stays attuned to the new constitutional doctrine of the OPL by replacing the earlier principle of “ensuring the normal exercise of party members’ rights.”²⁸⁸ How that doctrine reins in the right to political speech of party members can be understood in terms of a more recent speech regulatory document of the CCP, which bans party members from making reckless comments about the Central Committee, disparaging the CCP leadership, leaking national secrets, or registering accounts on social media.²⁸⁹

Notably, the CCP seeks to legitimize and widen its exclusive regulation of political speech in a far more prominent manner than in the past decades, not only by constitutionalizing the party’s supreme status but also by creating theories that en-

²⁸⁴ Cf. also Seppänen, *supra* note 279, at 295 (citing Xu’s tripartite statement justifying the CCP’s status “above the law, in the middle of the law and under the law”).

²⁸⁵ RDIR, *supra* note 158, Art. 7(5).

²⁸⁶ Regulations of the CCP on Safeguarding Party Members’ Rights, 2020, Arts. 6–19.

²⁸⁷ *Id.* Art. 1.

²⁸⁸ Regulations of the CCP on Safeguarding Party Members’ Rights, 2004, Art. 1.

²⁸⁹ CCP Propaganda Department, CCP Organization Department, and CCP Cyberspace Administration, CCP Opinions Concerning the Regulation of Internet Activities of Party Members and Cadres, 2017, Arts. 2–4.

dorse the constitutional doctrine of party supremacy from a comparative perspective.²⁹⁰ Indeed, “migration of constitutional theories” may well entail “repurposing” and “de-purposing” of the borrowed ideas.²⁹¹ Thus, some of China’s leading constitutional lawyers have transplanted influential foreign legal theories into their own constitutional theories to espouse the CCP’s practice of universalizing intra-party rules.²⁹² While these theoretical discussions about how to justify the CCP’s supreme status in the constitutional framework took place mostly prior to the 2018 constitutional amendment, Art. 1 does not simply render them obsolete. Instead, part of them form theoretical harbingers of the 2018 constitutional amendments and, therefore, provide an interpretative framework that serves to weaponize the constitutional doctrine of party supremacy in a transnational context.

A. *Unwritten Constitution*

Shigong Jiang, a Chinese legal and political theorist and professor at Peking University Law School, developed the first discourse by relying on the British and American theories of an “unwritten constitution” to legitimize the role of intra-party regulations as the law of the state.²⁹³ Jiang stresses the political nature of written constitutions and advocates the adoption of an approach that compels the spirit of a “genuine” or “living constitution.”²⁹⁴ Accordingly, Jiang’s framework dwells

²⁹⁰ This was necessitated by the developments of both Chinese constitutional law and comparative constitutionalism. See Bui Ngoc Son, *China’s Comparative Constitution*, 54 VAND. J. TRANSNAT’L L. 1, 24–27 (2021) (illustrating the dynamics of Chinese constitutional law in its unique socio-political contingency and party-state structure along with the dynamics of pluralizing comparative constitutional law).

²⁹¹ Claudia Geiringer, *When Constitutional Theories Migrate: A Case Study*, 67 AM. J. COMPAR. L. 281, 309–11 (2019).

²⁹² They were part of the focus of the lasting “constitutional debate” in China, with the theories of Jiang, Chen, and Schmitt as the most representative. See Lucas Brang, *The Dilemmas of Self-Assertion: Chinese Political Constitutionalism in a Globalized World*, 48 MOD. CHINA 498, 501–10 (2022).

²⁹³ Shigong Jiang, *Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China*, 36 MOD. CHINA 12, 18–19 (2010) (highlighting the historical lineage of Britain’s constitutional theories ranging from unwritten constitution to non-legal rules and effective constitution).

²⁹⁴ *Id.* at 15.

in an “effective constitution” that surpasses the written constitution.²⁹⁵ Such an approach serves to turn party norms into unwritten constitutional rules that could be codified subsequently.²⁹⁶ Instead of taking intra-party regulations as only binding to the CCP, Jiang prioritizes the real binding force of the Constitution of the CCP as a constitutional document over that of the Constitution of the PRC.²⁹⁷

Based on such theoretical underpinnings, Jiang interprets the CCP’s 2014 plenary resolution as a summary of China’s legal practice that establishes the constitutional doctrine of the OPL in China’s “legal pluralism” characterized by the co-existence of four legal sources: political principles and policies, intra-party regulations, the national legal system, and local customary law.²⁹⁸ However, such a comparative constitutional law approach, which aims to qualify the Constitution of the CCP as a fundamental component of China’s constitutional order, attempts to apply intra-party regulations as the law of the state from a purely utilitarian perspective without discussing its legitimacy.

B. Soft Law

Alternatively, Chinese scholars have resorted to the international legal theory of soft law so as to justify the formal legal status of the CCP’s intra-party regulations in the administrative regulation of societal interests. Haocai Luo, former judge of the SPC and Professor of Administrative Law at Peking University Law School, calls for “the rule of soft law” in public governance.²⁹⁹ Nevertheless, Jiang suggests creating a branch of “social law” as opposed to the “state law,” which is often understood as equivalent to the constitutional law.³⁰⁰ Such “social law” has a bipartite

²⁹⁵ *Id.* at 15–16.

²⁹⁶ *Id.* at 25 (explaining how legitimizing the will of the party converts the general will of the people into national will under the written constitution).

²⁹⁷ *Id.* at 27 (postulating that the Constitution of the CCP “is actually more significant than the written Constitution”).

²⁹⁸ Shigong Jiang [强世功], *The Constitution of the CCP and the Constitution of the PRC: Constructing a Republic of Legal Pluralism* [党章与宪法：多元一体法治共和国的建构], 7(4) BEIJING CUL. REV. [文化纵横] 18, 20 (2015).

²⁹⁹ Haocai Luo [罗豪才], *The Soft Law in the Governance of Public Sphere* [公域之治中的软法], AISIXIANG [爱思想] (Dec. 12, 2005), <https://perma.cc/ANG7-QFQS>.

³⁰⁰ Mingan Jiang [姜明安], *The Nature and Function of the Intra-party Regulations of the Chinese Communist Party* [论中国共产党党内法规的性质和作用], 49(3) J. PEKING U. [北京大学学报] 109, 113 (2012).

function of regulating not only the internal organization of social public authorities such as political parties, but also their interaction and relationship with other organizations, entities, and individuals.³⁰¹ It is called “soft law” because it is made by a non-legislative community, reflects the will and interests of the majority of that community, and ensures its enforcement by their own incentivizing or punishing mechanisms.³⁰² As such, Jiang positions the CCP’s intra-party regulations as a kind of “social law” and “soft law.”

In practice, however, intra-party regulations go beyond what such soft law covers: the former requires strict control of member behavior, whereas the latter allows for more flexibility.³⁰³ Thus, Qianhong Qin, Professor of Constitutional Law at the School of Law of Wuhan University, endorses the nature of the CCP regulations as “hardened soft law” on the ground that these regulations have a far more profound impact on the national legal system than the self-governing rules of other political or social organizations.³⁰⁴ As the spillover effect of the CCP regulations, these regulations could play a complementary role in interpreting formal legal rules where the legal rules refer explicitly to such regulations, or where courts choose to give the regulations such force.³⁰⁵ Alternatively, the CCP regulations can be precursors of formal legal rules and can ultimately turn into national law.³⁰⁶ The “soft law” approach makes it easier to establish a special status for intra-party regulations in daily administration under the constitutional doctrine of the OPL. However, this

³⁰¹ *Id.* at 112.

³⁰² *Id.* For a similar definition of soft law in public domain, cf. GREG WEEKS, *SOFT LAW AND PUBLIC AUTHORITIES: REMEDIES AND REFORM* 13–16 (2016).

³⁰³ Xiaochuan Wu [武小川], *On the Restriction of Power of Intra-party Regulations: Reflecting on the Limitation of the Application of Soft Law* [“党内法规”的权力规限论—兼论“党内法规”软法论的应用局限], 20(6) JOURNAL OF THE PARTY SCHOOL OF THE CENTRAL COMMITTEE OF THE CCP [中共中央党校学报] 14, 18–20 (2016).

³⁰⁴ Qianhong Qin [秦前红], *On the Coordination and Connection between the Intra-party Regulations and National Laws* [论党内法规与国家法律的协调衔接], 5(10) FRONTIERS [人民论坛·学术前沿] 50, 60 (2016). For an analysis of the “hardening” of soft law as a result of precedential application of soft law in judicial practice, see WEEKS, *supra* note 302, at 47–53.

³⁰⁵ WEEKS, *supra* note 302, at 53–57 (citing the case of Hua-Aus to illustrate the regulatory effects of soft law in judicial practice).

³⁰⁶ *Id.* at 57–59 (documenting how the Commonwealth Freedom of Information Act adopts soft law guidelines in limiting administrative arbitrariness).

theory of “social law” still faces the dilemma of justifying the spillover effect of the intra-party regulations without any mechanism for subjecting those regulations to a constitutional review.

C. *The Schmittian Theory of Politics and Law*

Another most influential and popular discourse is Carl Schmitt’s theory of politics, constitution, and law, which gives rise to China’s various schools of political constitutionalism and their debates on the issue of political legitimacy.³⁰⁷ A leading authority on the CCP’s legitimacy in terms of the Schmittian narrative on absolute constitution is Duanhong Chen, Professor of Public Law at Peking University Law School who maintains the CCP leadership as the “first fundamental law” of China’s constitution.³⁰⁸ In so doing, however, Chen attempts to proffer merely a normative approach to justifying party supremacy by the constitutional text without ever questioning it *per se*.³⁰⁹ According to Chen, party supremacy can only be accepted as a political reality and constitutional order, without being subject to constitutional review.³¹⁰ Chen further envisions this order as China’s “political constitutionalism,” allegedly a transitional stage that evolves from revolutionary politics and would, eventually, lead to democracy and the rule of law.³¹¹ Thus, one may even characterize any conflicts between this political order and the Constitution as “benevolent violation of the constitution.”³¹²

Likewise, Jiang dwells on Schmittian political realism to sharpen his theory of the unwritten constitution by characterizing the Constitution as a consequence of Western imposition of transnational constitutionalism on China, which deviates

³⁰⁷ Xie Libin & Haig Patapan, *Schmitt Fever: The Use and Abuse of Carl Schmitt in Contemporary China*, 18 INT’L J. CONST. L. 130 (2020).

³⁰⁸ Duanhong Chen [陈端洪], *On the Constitution as the Fundamental Law and the Highest Law of the State [论宪法作为国家的根本法与高级法]*, 20(4) PEKING U. L. J. [中外法学] 485 (2008).

³⁰⁹ Xie & Patapan, *supra* note 307, at 135.

³¹⁰ Chen, *supra* note 308, at 488.

³¹¹ *Id.* at 487.

³¹² Tiechuan Hao [郝铁川], *On Benevolent Constitutional Violations [论良性违宪]*, 4 CHINESE J. L. [法学研究] 89 (1996). Arguably, this can be seen as the resurrection of the manifold “antinomies” in Schmitt’s work. Lucas Brang, *Carl Schmitt and the Evolution of Chinese Constitutional Theory: Conceptual Transfer and the Unexpected Paths of Legal Globalisation*, 9 GLOB. CONST. 117, 139 (2020).

from China's constitutional reality.³¹³ Thus, the written constitution only serves to formalize the unwritten constitutional order of party supremacy.³¹⁴ On top of this, Jiang redefines Chen's theory by endorsing party norms in lieu of the Constitution as the highest law in terms of the Kelsenian concept of "*Grundnorm*."³¹⁵ Considering the historical revolutionary mission of party norms and the function of the Constitution in maintaining legal stability, Jiang views judicialization of constitutional rights as unnecessary.³¹⁶

On the other hand, Quanxi Gao, a prominent scholar of Chinese constitutionalism and professor at Kaiyuan School of Law of Shanghai Jiaotong University, disproves Chen's and Jiang's reading of the Constitution and, thus, party supremacy. Relying also on the Schmittian theory of "exceptional politics," Gao endorses a transition from revolutionary practice to normal politics ending with liberal constitutionalism.³¹⁷ According to Gao, however, China is yet to achieve the progression from what he calls the "Leviathanian moment" (i.e., the moment of founding a new constitution) to a counter-revolutionary, liberal constitution that may well preserve the fruits of the revolution.³¹⁸ Interestingly, his comparison between the German *Sonderweg* and its modern counterpart of Chinese exceptionalism is rooted in a critique of the Schmittian theory of "exceptional politics."³¹⁹ This means that allowing constitutional law to operate is equivalent to the state's consensus on the restriction of its sovereignty.³²⁰ Thus, whereas Chen's and Jiang's adoption of the Schmittian approach amounts to unconditional justification of the political order and prohibits any liberal elements in the Constitution, Gao reckons the need to develop constitutionalism even under the current political conditions.³²¹

³¹³ Jiang, *supra* note 293, at 14.

³¹⁴ *Id.* at 19. See Brang, *supra* note 312, at 142.

³¹⁵ Brang, *supra* note 312, at 143.

³¹⁶ *Id.* at 144.

³¹⁷ Quanxi Gao [高全喜], *Political Constitutionalism and Judicial Constitutionalism [政治宪政主义与司法宪政主义]*, in FROM EXCEPTIONAL POLITICS TO REGULAR POLITICS [从非常政治到日常政治] 3, 27 (China Legal Publishing House, ed., 2009).

³¹⁸ *Id.* at 43.

³¹⁹ Quanxi Gao [高全喜], *The Schmittian Question in Chinese Context [中国语境下的施密特问题]*, 95 TWENTY-FIRST CENTURY [二十一世纪] 119, 126 (2006).

³²⁰ Gao, *supra* note 317, at 26.

³²¹ Brang, *supra* note 312, at 149–51.

D. Böckenförde’s Constitutional Theory of Legitimacy

As illustrated above, the CCP’s regulation of political speech involves new constitutional designs in both normative and institutional dimensions. The abovementioned analyses all focus on the legitimacy of the principle of party supremacy with regard to party norms. In order to assess the legitimacy of party supremacy with respect to the CCP’s institutional reforms, constitutional lawyers in China have recently resurrected German legal philosopher Böckenförde’s constitutional theory.³²² To be clear, Böckenförde’s theory aims to rectify the Schmittian narrative on the political and constitutional order by “salvag[ing]” it “for liberal democracy” and “shift[ing]” it “towards the rule of law.”³²³ Thus, applying this constitutional theory in China would carry a transformative purpose and a vision of democratic reform.

Böckenförde’s theory concerning institution-building entails an “uninterrupted chain of democratic legitimation” of all administrative activities through the “functional and institutional” level, “personnel and organizational” level, and “fact and content” level.³²⁴ Pursuant to this theory of constitutional legitimacy, the functionality of any constitutionally created institution assumes legitimacy only if the institutional activities take place within the purview set forth by the constitution.³²⁵ Besides, the employment and dismissal of all administrative staff must be overseen by a representative institution which delegates specific authorities and sets restrictive mandates to administrative organs.³²⁶ Finally, the specific administrative decisions and activities must be supervised by representative organs through legislation, budget, and other supervisory means.³²⁷

³²² Zheng Chen [陈征], *The Level of Legitimation of Merging Party and Government Organs into Joint Office and Their Administrative Activities* [党政机关合并合署与行政活动的合法化水平], 37(3) L REV. [法学评论] 27, 29–30 (2019).

³²³ Mathias Hong, *Böckenförde, the State of Emergency and Carl Schmitt: What Böckenförde Learned from Schmitt—and What Schmittians Should Learn from Böckenförde*, VERFASSUNGSBLOG (May 9th, 2019), <https://perma.cc/AM66-CLA7>.

³²⁴ ERNST-WOLFGANG BÖCKENFÖRDE, STAAT, VERFASSUNG, DEMOKRATIE: STUDIEN ZUR VERFASSUNGSTHEORIE UND ZUM VERFASSUNGSRECHT 301–303 (1991).

³²⁵ *Id.* at 301.

³²⁶ *Id.* at 302–03.

³²⁷ *Id.* at 329.

However, it is difficult to reconcile such a liberal constitutional theory with China's illiberal institutional design of incorporating the CCP's regulation of political speech into the constitutional practice. The purpose of applying this theory is to argue for the need to gauge the constitutional legitimacy of merging party organs and government bodies against some measurable standards of "constitutional" institutionalization.³²⁸ Thus, all activities of those party organs that transcend their constitutional mandates, even under the "constitutionally granted" titles or with the connivance of legislative representatives, would be illegitimate.³²⁹ Apparently, this approach represents some constitutional lawyers' efforts of reforming the relationship between the party and the state on the condition that the existing political reality must be accepted.

Admittedly, the above-mentioned constitutional theories concerning party supremacy focus on the legitimacy of the CCP's overall application of its intra-party regulations. As a significant step towards comprehensive speech regulation, the CCP needs to legitimize party supremacy and, thus, the unquestionable application of intra-party speech regulation by weaponizing its own theories of constitutional legitimacy. In fact, the constitutional spillover effect of intra-party regulations in various fields including the regulation of political speech does flow from these theoretical roots, which are created in connection with constitutional theories that are internationally recognized.³³⁰ Given the importance of this legitimacy issue in both domestic and transnational contexts, the CCP leadership now sees the Constitution as the "fundamental norm for activities" in its Plan on Building the Rule of Law in China (2020–2025).³³¹ Indeed, the party-state is aware that promoting the development of theories of the constitutionality of the intra-party regulations could help upgrade domestic speech regulation and consolidate the authoritarian system.³³²

³²⁸ Chen, *supra* note 322, at 31.

³²⁹ *Id.* at 34–36.

³³⁰ Swayamsiddha Samal, *China Is Working to Change the Laws of Global Governance, the Xi Jinping Way*, NEWS 18 (Mar. 20, 2022, 10:33 PM), <https://perma.cc/JL4K-AW7S>.

³³¹ *The CCP Publishes the Plan on Building the Rule of Law in China (2020–2025)* [中共中央印发《法治中国建设规划(2020–2025年)》] XINHUA AGENCY [新华社] (Jan. 10, 2021), <https://perma.cc/2BFR-WZSS>.

³³² Most recently, the CCP has set forth an explicit mandate for reinforcing the research on intra-party regulations in the legal education and the research on legal theories in China. It requires

However, it is doubtful that the party leadership, in making and amending the Constitution by itself, can really make sure that the party’s activities are compatible with the Constitution. As one can see from the various theoretic debates above, the demarcation between the conservative school (e.g., Chen, Jiang) and the reform school (e.g., Gao) in China’s exploration of constitutional theories lies, above all, in the restriction of the principle of party supremacy within the constitutional framework. To be sure, Art. 1 of the Constitution, along with the amended CCP Constitution, counters any efforts to set limits on party supremacy.

V. THE TEXTUAL ROUTE TOWARDS SPEECH IMPERIALISM: CUSTOMIZING CROSS-BORDER SPEECH REGULATORY ARRANGEMENTS

The foregoing interpretation of the constitutional doctrine of party supremacy is largely limited to the CCP’s domestic regulation of political speech. However, the party-state does not halt at the creation of a *domestic* constitutional doctrine of party supremacy from which the normative principles and the institutional framework for the CCP’s exclusive speech regulation originate.

As a strategic move, China follows its new statist course in which the CCP’s proactive *transnational* regulation of political speech replaces the earlier vague policy of walking the line between acrimonious international dialogues of human rights and the crucial need to maintain international trade relations. The current interaction between the CCP’s cross-border regulation of political speech and the protection of free speech in the rest of the world reveals a conflict-ridden domain characterized by China’s extension and furtherance of that constitutional doctrine to international law.

In fact, the spillover effect of the CCP’s regulation of political speech under the OPL continues to expand in a transnational context through China’s practice of

all law schools and lawyers in China to “adamantly oppose to and resist western constitutionalism, separation of powers, and judicial independence.” One of the approaches to realizing this is to “innovate and develop a system of research on legal theory,” “construct China’s independent system of legal knowledge,” and “inherit the genes of the red rule of law.” In particular, the mandate highlights the need to “grasp the interdisciplinary characteristics of research on intra-party regulations and its role in coordinating basic research and applied research.” *The General Office of the CCP Central Committee and the General Office of the State Council Printed Opinions on Reinforcing the Legal Education and the Research on Legal Theories in the New Era* [中共中央办公厅国务院办公厅印发《关于加强新时代法学教育和法学理论研究的意见》], XINHUA AGENCY [新华社] (Feb. 26, 2023).

international law which, informed by an instrumentalist framework of state sovereignty,³³³ aims at creating a “new model of major power relations.”³³⁴ In an increasingly proactive manner, China not only safeguards against but also attempts to alter the textual components of international law that place the rule of law above political power and highlight the status of individuals and multinational corporations in post-modern global governance.³³⁵ Consequently, China’s cross-border speech regulatory arrangements proliferate rapidly so as to strengthen the constitutional doctrine of party supremacy that leads to speech imperialism.

A. China’s Dualistic Strategies in Transnational Speech Regulation

Traditionally, China’s international law practice has been geared to a Westphalian approach that focuses on state interests defined only by the party-state.³³⁶ This is particularly relevant in areas China deems “politically sensitive,” where the state has always maintained strong opposition to the “new interventionist tide” that “human rights outweighs state sovereignty.”³³⁷ As such, China signed the ICCPR, which imposes obligations of respecting free speech on member states, but left it open without a schedule of ratification, despite constant criticism and requests from Western countries.³³⁸ In the area of international trade, however, China upholds a more cooperative approach—a paradigm which constitutes what is coined as “selective adaptation” by retaining its authoritarian speech rules while transforming only economic rules that don’t even appear to threaten the authoritarian

³³³ Jiangyu Wang & Huaer Cheng, *China’s Approach to International Law: From Traditional Westphalianism to Aggressive Instrumentalism in the Xi Jinping Era*, 10 CHINESE J. COMPAR. L. 140, 144–45 (2022).

³³⁴ The wording came from the Report of the Eighteenth Congress of the CCP. *The Origin of the Sino-US New Model of Major Power Relations* [中美新型大国关系的由来], XINHUA AGENCY [新华社] (June 6, 2013), <https://perma.cc/2G6Q-4TSX>. For a detailed overview, see generally Congyan Cai, *New Great Powers and International Law in the 21 Century*, 24 EUR. J. INT’L L. 755 (2013).

³³⁵ Wang & Cheng, *supra* note 333, at 145–52.

³³⁶ *Id.* at 140–43.

³³⁷ See, e.g., *The Editorial: The Western “New Interventionism” Is Knocking at the Door Everywhere in the World* [社评：西方“新干涉主义”在世界四处敲门], GLOBAL TIMES [环球时报] (Mar. 6, 2014), <https://perma.cc/MQE4-6DUN>.

³³⁸ See, e.g., Margaret K. Lewis, *Why China Should Unsign the International Covenant on Civil and Political Rights*, 53 VAND. J. TRANSNAT’L L. 131 (2020).

regime.³³⁹ This means that trade law may well cloak China’s constitutional conflicts with the liberal democracies, when it comes to speech regulation. In fact, there are broad concerns about China’s “shift toward selective reshaping” of both the institutional and the normative framework of international trade.³⁴⁰ In contrast to the earlier process of “selective adaptation” that hinges on “downloading external rules,” China embraces a new trade strategy of “uploading of China-preferred rules” and “reshaping of institutions.”³⁴¹

Above all, the party-state employs such a dualistic and adaptive strategy of “divide and rule” to link China’s foreign trade and foreign companies to its transnational speech regulation on the one hand, and place critics and dissidents, on the other hand, in a state where China chooses not to subject itself to international law and where free speech and the free flow of information remain vulnerable to party supremacy. Thus, China may well adopt a cooperative approach to the technical request for adjustment of domestic legal policies when an unfavorable trade ruling touches peripherally on speech regulation.³⁴² For example, after the World Trade Organization (WTO) ruled against China due to the inherent censorship requirement in its Copyright Act and saw it as a trade barrier,³⁴³ China revised the law promptly without prejudice to the censorship regime. Such a dualistic approach allows China to reinforce its censorship in international law without affecting the CCP’s economic resources.³⁴⁴ In practice, this corresponds to what Professor Ginsburg warns against as “a growing authoritarian role in the international arena” that “may affect the normative content of international law.”³⁴⁵

³³⁹ Heng Wang, *Selective Reshaping: China’s Paradigm Shift in International Economic Governance*, 23 J. INT’L ECON. L. 583, 587–88 (2020).

³⁴⁰ *Id.* at 588–94.

³⁴¹ *Id.* at 602.

³⁴² Ge Chen, *Piercing the Veil of State Sovereignty: How China’s Censorship Regime into Fragmented International Law Can Lead to a Butterfly Effect*, 3 GLOB. CONST. 31, 50–54 (2014) (analyzing the indirect approach of addressing China’s censorship through two WTO rulings).

³⁴³ Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WTO Doc. WT/DS362/R (adopted Jan. 26, 2009) (*China-IPR*).

³⁴⁴ Chen, *supra* note 342, at 54–58.

³⁴⁵ Ginsburg, *supra* note 49, at 251.

B. Materializing the Schmittian Constitutional Theory: Speech Regulation Through Transnational Repression

Chinese speech imperialism is, above all, buttressed by the rapid development of speech regulation as part of China's transnational repression. In such cases, transnational speech regulation often involves coercive instruments such as digital and in-person harassment and surveillance, targeting and intimidating family members, and attempts to repatriate critics.³⁴⁶ Thus, transnational repression provides a vivid example of how the party-state maintains a wholesale pattern of customizing the CCP's domestic practice of exclusive regulation of political speech with explicit extraterritorial force in both legal and non-legal arrangements, which produces the effect of "the anaconda in the chandelier" by vague intimidation and unpredictable rewards.³⁴⁷ While China's transnational repression started a long time ago, the party-state has recently endeavored to enhance the legitimacy, necessity, and efficiency of transnational repression based on its national security laws and state surveillance laws,³⁴⁸ which can be linked to the constitutional doctrine of party supremacy.

First, China's transnational repression aims to exert pressure and control on a wide range of targeted groups including "ethnic and religious minorities, political dissidents, human rights activists, journalists, and former insiders accused of corruption."³⁴⁹ As demonstrated above, the constitutional legitimacy of party supremacy derives largely from applying the Schmittian theory of political order and constitutional law. A widely contested aspect of Schmittian political constitutionalism is its distinction between "enemy and friend" to the extent that the state is supposed

³⁴⁶ See CECC ANNUAL REP. 2022, *supra* note 30, at 348–50.

³⁴⁷ "[T]he Chinese government's censorial authority . . . has resembled not so much a man-eating tiger or fire-snorting dragon as a giant anaconda coiled in an overhead chandelier. Normally the great snake doesn't move. It doesn't have to. It feels no need to be clear about its prohibitions. Its constant silent message is 'You yourself decide.'" Perry Link, *China: The Anaconda in the Chandelier*, CHINAFILE (Apr. 11, 2002), <https://perma.cc/2R4P-NXLJ>.

³⁴⁸ National security laws enacted recently are mentioned above in Part II. Leading examples of recent state surveillance laws include the National Intelligence Act of the PRC, June 27, 2017, the Data Security Act of the PRC, June 10, 2021, and the Counter-Espionage Act of the PRC (amendment), Apr. 26, 2023.

³⁴⁹ Nate Schenkkan & Isabel Linzer, *Out of Sight, Not Out of Reach: The Global Scale and Scope of Transnational Repression*, FREEDOM HOUSE (2021), <https://perma.cc/D7HS-5WZZ>.

to identify and conquer its enemy.³⁵⁰ One of the party-state’s leading legal theorists characterizes the friend-enemy distinction as the foundation of any Schmittian political order.³⁵¹ Thus, everyone who criticizes the CCP in any part of the world could be identified as the enemy of the party-state, regardless of whether the person is a Chinese citizen, a Chinese diaspora member, or non-Chinese citizen.³⁵² This distinction, however, would easily result in the persecution of anyone that the state identifies as the “enemy of the people.”³⁵³ The party-state has exerted control over targets in countries near (Thailand) and far (Egypt) and deployed repressive measures against overseas users of Chinese language messaging devices such as the WeChat platform.³⁵⁴ Therefore, former government officials, ethnic groups including Uighurs, Tibetans, Inner Mongolians, and Hong Kongers, religious groups such as Falun Gong practitioners, dissidents who worked as journalists, lawyers, professors, as well as all their family members who live in China or abroad can almost always be identified as the enemy of the party-state and fall prey to the party-state’s transnational repression.³⁵⁵

Secondly, China’s transnational repression operates under an exceptional normative and institutional framework for prosecuting overseas political speech, which could be linked to a second contested concept of the Schmittian political constitutionalism—the “exceptional politics” that envisions unlimited sovereign power to bring order to an anarchical society.³⁵⁶ Accordingly, the party-state holds a profound belief in the unrestrained and absolute nature of sovereignty as a “premise of constitutionalism” that “always remains its latent guarantee,”³⁵⁷ which justifies the “permanent condition of party leadership” as a permanent “state of exception.”³⁵⁸ It is only in this sense that “Chinese exceptionalism” can be considered

³⁵⁰ Weidong Ji, “To Take the Law as the Public”: *The Diversification of Society and Legal Discourse in Contemporary China*, in BUILDING CONSTITUTIONALISM IN CHINA 125, 133 (Stephanie Balme & Michael W. Dowdle eds., 2009).

³⁵¹ Chen, *supra* note 308, at 486.

³⁵² Schenkkan & Linzer, *supra* note 349, at 16.

³⁵³ Xie & Patapan, *supra* note 307, at 142.

³⁵⁴ Schenkkan & Linzer, *supra* note 349, at 16.

³⁵⁵ *Id.*

³⁵⁶ Xie & Patapan, *supra* note 307, at 143.

³⁵⁷ Chen, *supra* note 308, at 487.

³⁵⁸ Brang, *supra* note 312, at 144.

equivalent to the extraterritoriality of the party-state's numerous speech regulatory measures such as coerced return,³⁵⁹ detainment in foreign countries and deportation or extradition to China,³⁶⁰ surveillance, harassment and intimidation of overseas critics³⁶¹ and their family members,³⁶² and border exit bans.³⁶³ This practice is not only characteristic of the party-state's recent use of the "rule by fear,"³⁶⁴ but is also frequently abetted by foreign countries that are willing to accommodate China's global speech regulation.

Most of these measures of transnational repression are carried out by the party-state institutions such as the Ministry of National Security (MNS), the Ministry of Public Security (MPS), and the Ministry of Foreign Affairs (MFA). A recent example of the role of the MNS is that it has reportedly set up a large number of covert overseas police stations to intimidate and silence Chinese dissidents and force them

³⁵⁹ In 2018 the party-state issued "irregular measures" including "kidnapping" and "entrapment" that could be used to get overseas political critics back to China. For a record of such cases, see CECC ANNUAL REP. 2022, *supra* note 30, at 349–50.

³⁶⁰ Detainment and deportation of CCP critics are carried out either directly by Chinese embassies and secret service or indirectly by local authorities in a dozen foreign countries that China is confident that it can influence. China also signed extradition agreements with some countries to extradite critics on the list. For a record of such cases, see Nate Schenkkan & Isabel Linzer, *supra* note 349, at 17.

³⁶¹ In many instances, critics received messages of warning and threats from Chinese authorities. Chinese authorities also used their influence to make it difficult for critics living abroad to get local residence permit. *Id.*

³⁶² To pressure overseas critics, Chinese authorities forced their family members living in China to call these critics by WeChat to warn, coerce, and threaten them. *Id.*

³⁶³ Earlier in 2023, a former Chinese bookseller's wife was held under "border exit ban" after she returned from the US to China to visit family. The reason was that her husband who emigrated to the US published articles criticizing China. She was not allowed to leave China unless her husband returned to China to be investigated. John Feng, *China Holds Florida Woman Hostage to Target Husband*, NEWSWEEK (Jan. 31, 2023, 8:19 AM), <https://perma.cc/6Q64-L99P>.

³⁶⁴ Eva Pils, *Rule-of-Law Reform and the Rise of Rule by Fear in China*, in AUTHORITARIAN LEGALITY IN ASIA FORMATION, DEVELOPMENT AND TRANSITION 90, 105–12 (Weiseng Chen & Hualing Fu eds., 2020) (analyzing the essence of China's use of a repressive system of criminal justice for the crackdown on dissidents during the Xi era).

to return to China.³⁶⁵ According to many critics, such stations are invariably connected with the CCP’s UFD, although the Chinese government claimed to do so only to “persuade” its nationals to face criminal proceedings at home.³⁶⁶ The MPS has a likewise covert role of spying, detaining, and arresting overseas critics through its police. Recently, a naturalized German citizen travelling to China was detained and pressured by the police to submit a list of critics in Germany who, along with this visitor, took part in the local protest against the party-state in 2022.³⁶⁷ By contrast, the MFA not only plays an overtly eminent role in China’s “wolf warrior diplomacy,”³⁶⁸ but also in guiding Chinese embassies around the world, the Chinese student associations backed by them, as well as other pro-CCP associations, all of which could help the party-state carry out transnational repression.³⁶⁹ Through such a practice, relevant statutory provisions of the NSA may well assume extraterritoriality.³⁷⁰ Such a comprehensive institutional framework of cross-border speech regulation could generate powerful spillover effect of party rules in the long run.

Finally, through its transnational repression, the party-state pursues a goal of redefining and reshaping global human rights standards in “a systematic attempt to subvert the ability of the UN human rights system to confront abuses in China

³⁶⁵ Nina dos Santos, *Exclusive: China Operating over 100 Police Stations across the World with the Help of Some Host Nations, Report Claims*, CNN (Dec. 04, 2022, 12:03 AM), <https://perma.cc/22V3-CHYW>. See also John Feng, *Full List of China’s Unofficial Police Stations Around the World*, NEWSWEEK (Dec. 05, 2022, 10:10 AM), <https://perma.cc/9WW8-U3UX>.

³⁶⁶ Michael Martina & Ted Hesson, *China Pushes Back on FBI Claims of Chinese ‘Police Stations’ in U.S.*, REUTERS (Nov. 18, 2022, 1:15 PM), <https://perma.cc/5US7-Z4UJ>.

³⁶⁷ Till Eckert & Sophia Stahl, *At Some Point I’ll Break Down: Urged by the Chinese Police to Inform [„Irgendwann breche ich zusammen“: Von der chinesischen Polizei zum Spitzeln gedrängt]*, CORRECTIV: RECHERCHEN FÜR DIE GESELLSCHAFT (July 07, 2023), <https://perma.cc/V9WS-4BSR>.

³⁶⁸ For recent practice, see, e.g., Josh Halliday & Emma Graham-Harrison, *Chinese Diplomat Involved in Violence at Manchester Consulate, MP Says*, GUARDIAN (Oct. 22, 2022, 4:01 PM), <https://perma.cc/X467-RE5T>. See also Simone McCarthy, *Chinese Ambassador Sparks European Outrage over Suggestion Former Soviet States Don’t Exist*, CNN (Apr. 25, 2023, 2:53 AM), <https://perma.cc/ML2P-ZBDM>.

³⁶⁹ Schenkkan & Linzer, *supra* note 349, at 17.

³⁷⁰ For example, security organs may “lawfully collect intelligence information related to national security and perform their duties in accordance with law to investigate, detain, do pretrial work and conduct arrests as well as other duties provided by law.” Moreover, Chinese citizens must perform their “obligations to preserve national security” by providing those organs “with necessary support and assistance.” The NSA of the PRC, 2015, Arts. 15 & 77(5).

and beyond.”³⁷¹ This reflects a third contested aspect of the Schmittian political constitutionalism that attacks the parliamentary system for its “undemocratic” nature and justifies the dictatorship by its “not necessarily anti-democratic” result.³⁷² Since supporters of this theory call for wider democracy at the cost of liberty,³⁷³ the party-state is confident in its global attempt to overthrow the current human rights standards that it believes were set by the US and replace them with what Xi defines as the “community of common human destiny.”³⁷⁴ For example, China proposed removing some key provisions about human rights obligations in transnational business from a draft released by the UN Human Rights Council.³⁷⁵ Such attempts to make textual changes to the current international human rights standards could undermine any efforts to protect free speech and shield the party-state from criticism of its transnational repression.

***C. From Schmittian Constitutional Theory to Schmittian Economic Guidelines:
Speech Regulation through Economic Coercion***

When it comes to its transnational trade arrangements, the party-state remains likewise obsessed with the constitutional legitimacy of its expansionary, speech-repressive trade policies at both the domestic and the international level.³⁷⁶ As such, the constitutional spillover effect of the intra-party speech regulation is most likely to expand with China’s trade activities coupled with economic coercion against foreign companies and governments to extract concessions in the protection of political speech.³⁷⁷ Such a stance has given rise to rising cautions against the “risk of a Schmittian moment” consisting of a “major shift toward an ideal of unfettered national sovereignty as the chief paradigm to re-orient the international (economic)

³⁷¹ HUMAN RIGHTS WATCH, THE COSTS OF INTERNATIONAL ADVOCACY: CHINA’S INTERFERENCE IN UNITED NATIONS HUMAN RIGHTS MECHANISMS 3 (Sept. 2017), <https://perma.cc/RU5P-UQGN>.

³⁷² Xie & Patapan, *supra* note 307, at 139–40.

³⁷³ *Id.*

³⁷⁴ Nadège Rolland, *China’s Vision for a New World Order*, Nat’l Bureau of Asian Rsch., NBR Special Report, no. 83, 36, 39–40 (Jan. 2020), <https://perma.cc/3LNW-RT2X>.

³⁷⁵ See CECC ANNUAL REP. 2022, *supra* note 30, at 355–56.

³⁷⁶ Wang, *supra* note 339, at 600–05.

³⁷⁷ For a list of countries and companies that were involved in China’s economic coercion, see CECC ANNUAL REP. 2022, *supra* note 30, at 349–52.

order.”³⁷⁸ An underlying concern here is that the retreat from a globalized world to that dominated by a few powerful nation states would result in a dim prospect for promoting liberal democratic values.³⁷⁹ This is especially pertinent to the protection of the right to political speech. For example, China routinely requires multinational social media corporations, publishing firms, film makers, and video game producers to adapt their corporate policies and cultures to its national speech regulations that carry the normative principles of the CCP’s intra-party speech regulation,³⁸⁰ which could change speech rules elsewhere in the long run.³⁸¹

In fact, implementing the Schmittian constitutional discourse within China’s international economic guidelines is another key step towards Chinese speech imperialism. Arguably, China’s normative pursuit of speech regulation in a transnational context is to assuage, minimize, and eliminate the CCP’s regime-focused risks through speech-repressive arrangements in trade deals.³⁸² As to speech regulation, China has invested legal resources in traditionally non-regime-focused and trade-related areas such as international data governance to promote its regime-focused and state-centric narrative of cyber sovereignty.³⁸³ In a world of data-

³⁷⁸ Alessandra Arcuri, *International Economic Law and Disintegration: Beware the Schmittian Moment*, 23 J. INT’L ECON. L. 323 (2020).

³⁷⁹ *Id.* at 331.

³⁸⁰ For a record of US commercial companies involved in the Chinese government’s censorship, see CECC ANNUAL REP. 2022, *supra* note 30, at 63, 262–63.

³⁸¹ As US law professor Danielle Citron observes, “[a]s companies alter speech rules and speech operations in a wholesale way (rather than retail via country), then the strictest regime prevails,” which “is a considerable threat to free expression.” David L. Hudson Jr., *Free Speech or Censorship? Social Media Litigation Is a Hot Legal Battleground*, ABA J. (Apr. 1, 2019), <https://perma.cc/653N-RMDA>.

³⁸² A recent example here is the data privacy law. Traditionally, data governance and control of privacy are not components of China’s direct regime-related concerns or conventional regulation of political speech, so that China refrains from incorporating information-related industries into its trade deals. However, its recent practice shows that China is adopting a different policy of engagement in order to accommodate the Chinese government’s need to control data. See Matthew S. Erie & Thomas Streinz, *The Beijing Effect: China’s “Digital Silk Road” as Transnational Data Governance*, 54 N.Y.U. J. INT’L L. & POL. 1, 35–42 (2021).

³⁸³ *Id.* at 24–35 (identifying how “data localization” in China’s recent legislation tends to produce transnational regulatory effects).

driven economics, this global strategy entails, in the first place, building up institutional initiatives to accommodate the party-state's proposals for restricting cross-border data flow at multilateral and bilateral levels.³⁸⁴ On the multilateral level, China has put forward at the UN its Global Initiative on Data Security, an expansionary digital agenda including its sovereignty-centered digital speech rules.³⁸⁵ On the bilateral level, China aims to push its restrictive data policies to monitor speech on private platforms.³⁸⁶ As China's digital agendas keep evolving, these recent speech-related initiatives often find support in transnational data governance: Several developing countries that have implemented China's data localization policies are willing to embrace China's initiative of cyber sovereignty and, thus, adopt China's authoritarian model of content moderation.³⁸⁷

D. The Emerging Structure of China's Evolving Global Digital Speech Regulation

The analyses above are a sketch of the party-state's traditional route of gearing its cross-border speech regulation towards speech imperialism. Nowadays, this route is backed by the party-state's digital route of speech regulation. In a nutshell, the emerging structure of China's evolving global digital speech regulatory regime can be summarized in the following three-prong analytical framework.

First, the normative impacts of the CCP's intra-party speech regulation arise from the seminal concept of "cyber sovereignty" that China develops under the principle of party supremacy and promotes proactively throughout the world.³⁸⁸ This evolving regime has two basic normative features. One is its defensive strategy

³⁸⁴ *Id.* at 35–42. See also Nigel Cory, *Writing the Rules: Redefining Norms of Global Digital Governance*, in CHINA'S DIGITAL AMBITIONS: A GLOBAL STRATEGY TO SUPPLANT THE LIBERAL ORDER 73 (Emily de La Bruyère et al. eds., 2022), *supra* note 27, at 76–78 (explaining how China's advocacy of international data governance is related to its restrictive sovereignty-oriented approach).

³⁸⁵ *China Focus: China Proposes "Global Initiative on Data Security,"* XINHUA AGENCY (Sept. 8, 2020, 11:50 PM), <https://perma.cc/R4X2-N5BD>. See also Cory, *supra* note 384, at 78–80.

³⁸⁶ Karen M. Sutter, *Capturing the Virtual Domain: The Expansion of Chinese Digital Platforms*, in CHINA'S DIGITAL AMBITIONS: A GLOBAL STRATEGY TO SUPPLANT THE LIBERAL ORDER 23 (Emily de La Bruyère et al. eds., 2022), *supra* note 27, at 40–47 (demonstrating how several state-controlled Chinese digital companies carried out the Chinese government's policy of influencing the digital agendas of partners across the world).

³⁸⁷ Cory, *supra* note 384, at 82 (citing recent studies of African countries as objects of China's pilot project of engagement and input of restrictive legal standards and digital infrastructure).

³⁸⁸ The NSA of the PRC, 2015, Art. 25. The Cybersecurity Act of the PRC, 2016, Art. 1.

of creating hard-law instruments including prior restraints and subsequent punishments. In particular, imposing legal punishments such as those under the Hong Kong national security law produces a global chilling effect on free speech by extending its extraterritorial force of criminalizing online speech conducive to “subversion,” “secession,” “collusion with foreign political clouts,” and “terrorism.”³⁸⁹ The other normative feature is the offensive operation including overseas disinformation and misinformation campaigns as a soft-law mechanism governed by party-state organs.³⁹⁰ Eventually, such campaigns could induce self-censorship of seemingly harmless and non-political content,³⁹¹ such as removing academic publications the CCP would potentially find offensive.³⁹²

This regulatory framework has long crossed the Westphalian border and produced repercussions for free speech and the free flow of information worldwide.³⁹³

³⁸⁹ Hadas Gold, *Hong Kong’s Security Law Could Have a Chilling Effect on Press Freedom*, CNN BUS. (July 3, 2020, 9:53 AM), <https://perma.cc/EK3Q-88W8>. For the most recent application of the law, see Brian Wong, *Hong Kong National Security Law: Children’s Books Aimed at Inciting Separation and Hatred towards Mainland China, Prosecutors Say*, S. CHINA MORNING POST (July 5, 2022, 7:50 PM), <https://perma.cc/D3W3-M5KC>. For direct extension of the chilling effects abroad, see Jonathan Ames, “*Hong Kong Police*” Threaten UK Barristers of Jailed Tycoon Jimmy Lai, TIMES (London) (July 7, 2022, 12:01 AM), <https://perma.cc/3NYA-CSGM>.

³⁹⁰ See Irene Khan (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Disinformation and Freedom of Opinion and Expression*, U.N. Doc. A/HRC/47/25 (Apr. 13, 2021).

³⁹¹ For example, Buick advertisement was censored whose promotional video said: “After one day, you’ll be invited to sit in this chair you’ll never want to leave.” This was accused of implying that China’s leader Xi Jinping did not want to leave office. John Feng, *Why This Buick Ad Has Been Censored in China*, NEWSWEEK (Nov. 9, 2022, 11:12 AM EST), <https://perma.cc/9P8Z-QZHC>.

³⁹² A leading example was that Cambridge University Press received and complied with an order from Chinese authorities to block access to more than 300 articles on its website. While the censored items included “sensitive” topics such as the Tiananmen Square massacre, the Cultural Revolution and Xi Jinping, there were also many book reviews and articles that were not widely cited. For a detailed analysis of the censored articles, see Mathew Y. H. Wong & Ying-Ho Kwong, *Academic Censorship in China: The Case of The China Quarterly*, 52 PS: POL. SCI. & POL. 287, 288–89 (2019).

³⁹³ David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. on the Regulation of User-Generated Online Content*, U.N. Doc A/HRC/38/35 (Apr. 6, 2018).

Indeed, not only does Russia's 2021 Sovereign Internet Act echo this speech regulatory regime,³⁹⁴ but China's Internet-restrictive measures are also emulated in some Asian countries, with a particular view to China's earlier success in the control of the pandemic.³⁹⁵ Moreover, China is exporting part of its restrictive Internet laws to African countries,³⁹⁶ spawning seeds of digital surveillance in a continent yet to overcome the digital gap.³⁹⁷ Last but not least, the influence of this regime can be absorbed into the digital speech laws of leading liberal democracies: Parts of China's speech-restrictive Internet laws, such as the obligations imposed on Internet service providers to regulate political content,³⁹⁸ long precede the notice and takedown regime in Germany's 2017 Network Enforcement Act, which has become the model law for combating online hate speech in Europe and around the world.³⁹⁹

³⁹⁴ *Russia: Growing Internet Isolation, Control, Censorship*, HUMAN RIGHTS WATCH (June 18, 2020, 3:10 PM), <https://perma.cc/VG8K-6EWT>.

³⁹⁵ The countries that have passed similar laws recently include Bangladesh, India, Indonesia, Malaysia, Myanmar, Nepal, Pakistan, the Philippines, Sri Lanka, Thailand, and Vietnam. See MOYNIHAN & PATEL, *supra* note 27, at 9.

³⁹⁶ Nick Bailey, *East African States Adopt China's Playbook on Internet Censorship*, FREEDOM HOUSE (Oct. 24, 2017), <https://perma.cc/7DRM-EF3B>; Abdi Latif Dahir, *China Is Exporting Its Digital Surveillance Methods to African Governments*, QUARTZ AFRICA (Nov. 1, 2018), <https://perma.cc/73JY-AT2Y>.

³⁹⁷ Iginio Gagliardone, *Chinese Digital Tech in Africa: Moral Panics and the Messy Reality of Surveillance*, LONDON SCH. ECON. & POL. SCI.: CHINA DIALOGUES (May 20, 2021), <https://perma.cc/5ALP-ZUTH>.

³⁹⁸ As early as 2000, the Chinese government issued regulations that require ISPs to carry out political censorship and take measures to remove contents. See Regulations of the PRC on Internet Information Service, 2000, Arts. 15–16. In 2006, the Chinese government introduced the “notice and takedown regime” into its copyright administrative regulations. See Regulations of the PRC on the Protection of the Right of Communication to the Public on Information Networks, 2006, Arts. 13–15. However, as analyzed above, the NCB, China's copyright administration, which is also the NPPA, the department for censorship in news and publications, oversees the enforcement of the regulations.

³⁹⁹ The Act on the Improvement of the Enforcement of Law in Social Media (Gesetz zur Verbesserung der Rechtsdurchsetzung in Sozialen Netzwerken/NetzDG), 2017, Section 3. The NetzDG has provoked broad concerns about the chilling effects on Internet speech. See, e.g., Hum. Rts. Comm., Concluding Observations on the Seventh Periodic Report of Germany, ¶¶ 46–7, U.N. DOC. CCPR/C/DEU/CO/7, (2021).

However, the institutional impacts of the CCP’s exclusive speech regulation guided by party supremacy loom even larger. In addition to its recent monopolization of all state media by party disciplines,⁴⁰⁰ the party-state “contracted private companies, recruited foreign social media influencers, and supported academic research” to manipulate “public opinion abroad in support of PRC narratives.”⁴⁰¹ Meanwhile, party-state media are operating a handful of overseas Chinese media facilities through shareholding to consolidate the influence of CCP’s ideologies.⁴⁰² Thus, China has sought to harness extant institutional platforms and create new ones to advance its global normative pursuit informed by the OPL at the United Nations, the Shanghai Cooperation Organization (SCO), the BRICS grouping, and the Belt and Road Initiative.⁴⁰³

Most importantly, the underlying political ambitions of the CCP’s intra-party speech regulation are attached to the constitutional blueprint of party supremacy. By advocating the normative change of the protective model of free speech with the institutional underpinnings described above, the party-state aims to reshape the global political context that defines its systemic competition with liberal democracies led by the US.⁴⁰⁴ Thus, the SCO presaged the advent of the “information war” in its constitutional documents signed by the leading authoritarian states.⁴⁰⁵ Recently, the party-state has reportedly continued to pay influential US social media companies generously to “create counternarratives to reporting critical of” the Chinese government and contents reflecting the party-state positions on human rights

⁴⁰⁰ CECC ANNUAL REP. 2022, *supra* note 30, at 55.

⁴⁰¹ Mary Hui, *China Wants an Even More Dominant State Monopoly on the Media*, QUARTZ (Oct. 11, 2021), <https://perma.cc/3SAG-KHHS>.

⁴⁰² *In the West, China Holds Growing Sway over Chinese-language Media*, ECONOMIST (Sept. 23, 2021), <https://perma.cc/D85C-9GJS>.

⁴⁰³ MOYNIHAN & PATEL, *supra* note 27, at 15.

⁴⁰⁴ See Elizabeth Economy, *Xi Jinping’s New World Order: Can China Remake the International System*, FOREIGN AFFS., Jan.–Feb. 2022, at 52, 53–54 (articulating China’s global ambition under Xi); see also Alexander Cooley & Daniel H. Nexon, *The Real Crisis of Global Order: Illiberalism on the Rise*, FOREIGN AFFS., Jan.–Feb. 2022, at 103, 107–09 (analyzing the advantage of authoritarians in exploiting “an open and connected global system”).

⁴⁰⁵ Agreement among the Governments of the Shanghai Cooperation Organisation Member States on Cooperation in the Field of Ensuring International Information Security, Annex 1, June 16, 2009.

often “appeared among top results on Google, Bing, and YouTube.”⁴⁰⁶ YouTube, for instance, has become notoriously vulnerable to the party-state’s regulation of political speech, where contents critical of China’s human rights record could be removed and those content creators could be sanctioned, harassed, or requested to produce pro-CCP contents through monetary lures or political threats.⁴⁰⁷

In fact, the past few years have witnessed numerous records of anti-US disinformation and misinformation campaigns that the Chinese state waged during the pandemic,⁴⁰⁸ the ongoing Russia-Ukraine war,⁴⁰⁹ and the US presidential election.⁴¹⁰ In Europe, Viktor Orbán, China’s authoritarian ally in Hungary, intends to play the Chinese speech rulebook by allowing a Chinese prestigious university to set up its overseas campus there—a widely suspected candidate for China’s “Trojan” in Europe.⁴¹¹ In Africa, China’s threat to democracy via a large “digital prison” that uses digital technology to spy on every life detail of citizens is now well documented as “digital neocolonialism.”⁴¹² Consequently, the party-state has shaped information manipulation in many countries and created risks for the political foundation of several vulnerable democracies.⁴¹³ All these developments that stem from

⁴⁰⁶ CECC ANNUAL REP. 2022, *supra* note 30, at 60.

⁴⁰⁷ *Id.* at 331.

⁴⁰⁸ Doowan Lee, *The United States Isn’t Doomed to Lose the Information Wars*, FOREIGN POLICY (Oct. 16, 2020, 6:56 AM), <https://perma.cc/HG6Z-CEN2>.

⁴⁰⁹ Elizabeth Dvoskin, *China Is Russia’s Most Powerful Weapon for Information Warfare*, WASH. POST (Apr. 8, 2022, 6:00 AM), <https://perma.cc/N6LB-BKCB>.

⁴¹⁰ Olivia Solon & Ken Dilanian, *China’s Influence Operations Offer a Glimpse into the Future of Information Warfare*, NBC NEWS (Oct. 21, 2020, 4:00 AM), <https://perma.cc/S3G9-YP3E>.

⁴¹¹ Szabolcs Panyi, *Hungary Could Turn into China’s Trojan Horse in Europe*, BALKAN INSIGHT (Apr. 9, 2021, 1:00 PM), <https://perma.cc/BP6A-MA3C>.

⁴¹² Willem H. Gravett, *Digital Neocolonialism: The Chinese Surveillance State in Africa*, 30 AFR. J. INT’L & COMPAR. L. 39, 44–50 (2022).

⁴¹³ For instance, there is ample and detailed evidence for this development in two recent studies released by the International Republican Institute on the CCP’s largely successful media influence in Australia, Cambodia, Ecuador, Georgia, Greece, Hungary, Malaysia, Mongolia, Montenegro, Myanmar, Pakistan, Sri Lanka, Serbia, the Gambia, the Maldives, Nepal, and Zambia. JOHN FEI ET AL., CHINESE MALIGN INFLUENCE AND THE CORROSION OF DEMOCRACY: AN ASSESSMENT OF CHINESE INTERFERENCE IN THIRTEEN KEY COUNTRIES (David Shullman ed., 2019), <https://perma.cc/W63N->

China’s expansionary speech regulatory regime informed by party supremacy manifest the party-state’s global “digital ambition” to compete with and even change the liberal international order,⁴¹⁴ a mission stated almost explicitly in the abovementioned 2021 historical resolution of the CCP.

VI. THE CONTEXTUAL RUSE BEHIND SPEECH IMPERIALISM: CREATING A GLOBAL “CONSTITUTIONAL IDENTITY” FOR PARTY SUPREMACY

In fact, China’s new constitutional doctrine of party supremacy may precipitate the advent of a “neo-totalitarian” state that combines illiberal politics and state capitalism under the CCP’s ideological guidelines to constrain political speech.⁴¹⁵ Importantly, speech regulation is a touchstone of the demarcation between constitutionalism and authoritarianism. Indeed, liberal democracies learned to coexist peacefully with an authoritarian regime characterized by heavy internal speech regulation during China’s earlier economic boom, but the speech regulatory practice was overwhelmingly confined to its domestic population.⁴¹⁶ At the peak of economic globalization, democratic countries took to the policy of facilitating China’s gradual change through vibrant trade and continuous dialogue, although the CCP’s speech regulation began to cause concerns among China’s business partners.⁴¹⁷ Over the past decade, however, Western powers whose foreign relations with China

9AHW; TINATIN KHIDASHELI ET AL., A WORLD SAFE FOR THE PARTY, CHINA’S AUTHORITARIAN INFLUENCE AND THE DEMOCRATIC RESPONSE: COUNTRY CASE STUDIES FROM NEPAL, KENYA, MONTENEGRO, PANAMA, GEORGIA AND GREECE (David Shullman ed., 2021), <https://perma.cc/P9UB-WECY>.

⁴¹⁴ See generally NAT’L BUREAU OF ASIAN RSCH., *supra* note 27.

⁴¹⁵ Xiaoguang Kang, *Moving Toward Neo-Totalitarianism: A Political-Sociological Analysis of the Evolution of Administrative Absorption of Society in China*, 9 NONPROFIT POLICY FORUM, no. 1, 2018, at 1, 5.

⁴¹⁶ The legitimacy of China’s authoritarianism is partly defensible by Western political philosophies that emphasize economic performance, political stability, and cultural and historical contingencies, JINGHAN ZENG, THE CHINESE COMMUNIST PARTY’S CAPACITY TO RULE: IDEOLOGY, LEGITIMACY, AND PARTY COHESION 69–90 (2016).

⁴¹⁷ The literature on China’s Internet regulations at the time is rich. See, e.g., Anne S. Y. Cheung, *Public Opinion Supervision: A Case Study of Media Freedom in China*, 20 COLUM. J. ASIAN L. 357 (2007); Trina K. Kissel, *License to Blog: Internet Regulation in the People’s Republic of China*, 17 IND. INT’L & COMPAR. L. REV. 229 (2007); Christopher Stevenson, Note, *Breaching the Great Firewall: China’s Internet Censorship and the Quest for Freedom of Expression in a Connected World*, 30 B.C. INT’L & COMPAR. L. REV. 531 (2007).

were primarily driven by economic incentives have been challenged by the question whether their past foreign policies would be sustainable vis-à-vis the party-state's global regulation of political speech.

Anyway, the constant interaction between China and liberal democracies in trade and speech regulation was conducive to the proliferation of various narratives of "Chinese constitutionalism."⁴¹⁸ However, that should be seen merely as China's initial response to the request of Western countries for its gradual development towards a constitutionalist country. If the party-state's approach of intertwining the CCP's comprehensive speech regulation with trade arrangements used to be indirect and subtle, its underlying authoritarian project of searching for its own "constitutional identity" has been made far more explicit and straightforward.⁴¹⁹ Arguably, this represents China's contextual ruse of building a global "constitutional identity" for its constitutional doctrine of party supremacy and, thus, the CCP's exclusive speech regulation. In practice, such an identity envisions a project of building global authoritarianism that runs multidimensionally through China's calculated response to global constitutionalism in political, economic, and technological perspectives.

A. A Political Scheme: Constitutional Authoritarianism

First, such a "constitutional identity" is the party-state's legal scheme in global politics. The classical scholarship about "Chinese constitutionalism" singles out liberal constitutionalism, Confucian constitutionalism, and Marxist constitutionalism.⁴²⁰ While only liberal constitutionalism accommodates free speech truly as a core civil right, the latter two schools represent China's inherent reactions that are founded on fundamentally different political philosophies.⁴²¹ Certainly, these different discourses do seem to enrich what Tushnet characterizes as "authoritarian constitutionalism" by "pluralizing the idea of constitutionalism."⁴²² Yet, even by

⁴¹⁸ See generally CHENGYI PENG, CHINESE CONSTITUTIONALISM IN A GLOBAL CONTEXT (2018).

⁴¹⁹ Son, *supra* note 290, at 12 (reflecting on the discourse of "constitutional identity of contemporary China").

⁴²⁰ PENG, *supra* note 418, at 20–85.

⁴²¹ Shucheng Wang, *Authoritarian Legality and Legal Instrumentalism in China*, 10 CHINESE J. COMPAR. L. 154, 160–61 (2022).

⁴²² Tushnet, *supra* note 66, at 413.

those standards,⁴²³ China’s tolerance of political speech does not live up to the lowest standards of constitutionalism.

Therefore, it may be highly risky and confusing to apply “authoritarian constitutionalism” to the constitutional doctrine of party supremacy behind Chinese speech imperialism. This is because, in effect, constitutionalism is a normative concept that “serves the ideas and ideals of a liberal democracy, the rule of law and the protection of human rights.”⁴²⁴ By contrast, what an authoritarian constitutional doctrine such as party supremacy endorses is “constitutional authoritarianism” which “uses constitutional law (not the normative concept of constitutionalism)” to “pursue authoritarian ideas” to the extent that they “stabilize governments politically” and “misuse(s) and distort(s) certain constitutional institutions (without giving them full powers).”⁴²⁵ If used interchangeably, these terms would enable an entirely speech-restrictive regime to claim that its authoritarian approach is nearly identical with or ultimately geared towards constitutionalism. In this sense, Chinese speech imperialism would become totally legitimate.

In fact, what is at stake is that authoritarianism here is dressed up as “constitutional”—an authoritarian legality that focuses on the “instrumental” use of law rather than the real idea of law.⁴²⁶ It presupposes the coexistence of “normal politics,” in which law applies to politics, and “exceptional politics,” in which law is subject to political expediency.⁴²⁷ Certainly, the power to determine the regime of exceptionalism in speech regulation falls again into the category of sovereignty in the Schmittian sense.⁴²⁸ As Professors Fu and Dowdle point out, authoritarian legality is a collateral characteristic of a dualistic system in a party-state where censorship matters so much that party norms become superior to legal rules because the party

⁴²³ *Id.* at 449–50.

⁴²⁴ Konrad Lachmayer, *Counter-Developments to Global Constitutionalism*, in *GLOBAL CONSTITUTIONALISM AND ITS CHALLENGES TO WESTPHALIAN CONSTITUTIONAL LAW* 81, 87 (Martin Belov ed., 2018).

⁴²⁵ *Id.* (emphasis added).

⁴²⁶ Wang, *supra* note 421, at 157.

⁴²⁷ *Id.* at 155–56.

⁴²⁸ Mark Tushnet, *The Constitutional Politics of Emergency Powers: Some Conceptual Issues*, in *EMERGENCIES AND THE LIMITS OF LEGALITY* 145, 151 (Victor V. Ramraj ed., 2008).

must create “the zone of exception” to counteract any force of the law in “pushing back authoritarian overreach.”⁴²⁹

This contention is an echo of Professors Zhang and Ginsburg’s perception that China’s 2018 constitutional amendments mark a “turn to law” in an instrumentalist mindset based on the CCP’s cost-benefit calculation.⁴³⁰ Indeed, it is not a real turn to liberalism or democracy, but the CCP’s investment in legality “to formalize the operation of state institutions, facilitate the joint penetration of both party and state into society in a controlled and regularized fashion.”⁴³¹ While that discourse does not apply solely to China’s speech regulation, the new constitutional doctrine endorsing the CCP’s party supremacy may serve to legalize the existing patchwork of intra-party regulations of political speech. By establishing this authoritarian principle in its constitution, therefore, the CCP feels more assertive in turning its core internal governance functions into transnational speech law as an essential component of Chinese speech imperialism.

B. An Economic Scheme: Adaptive Authoritarianism

The second feature of this global “constitutional identity” pertains to its economic orientation. In contrast to “transformative constitutionalism” as a transitional approach to many a changing polity,⁴³² scholars resort to “adaptive authoritarianism” as a transitional school of political and constitutional thoughts that aims to capture the polity characterized by the CCP’s leadership during China’s reform era.⁴³³ Embedded in awareness of existential crisis, the CCP seeks to retain its “authoritarian resilience” through economic reforms,⁴³⁴ while exercising the party’s

⁴²⁹ Fu & Dowdle, *supra* note 44, at 67–68, 76.

⁴³⁰ Taisu Zhang & Tom Ginsburg, *China’s Turn Toward Law*, 59 VA. J. INT’L L. 306, 347 (2019) (“the document has become more instrumentally important . . . emphasizing its authority now brings greater political benefits than in the not-so-distant past, whereas disregarding it now carries much greater political cost”).

⁴³¹ *Id.* at 373–74.

⁴³² See, e.g., Michaela Hailbronner, *Transformative Constitutionalism: Not Only in the Global South*, 65 AM. J. COMPAR. L. 527 (2017).

⁴³³ Anna L. Ahlers & Gunter Schubert, “Adaptive Authoritarianism” in *Contemporary China: Identifying Zones of Legitimacy Building*, in REVIVING LEGITIMACY: LESSONS FOR AND FROM CHINA 59 (Deng Zhenglai & Su Jianguo eds., 2011).

⁴³⁴ Andrew J. Nathan, *China’s Changing of the Guard: Authoritarian Resilience*, 14 J. DEMOCRACY, no. 1, 2003, at 6.

capacity for ideological control, so as to “adapt to an ever-changing environment and to generate system stability and regime legitimacy.”⁴³⁵

Thus, the CCP’s capacity to accommodate “policy reforms” and “institutional innovations” lies in conforming to the “authoritative allocation of values” in the society, as long as the majority are not dissatisfied enough with the policy performance of the system to withdraw their support.⁴³⁶ In contrast to the entire “authoritarian aconstitutionality” during the Mao era, some positive constitutional developments may have survived “attack from the Chinese party-state” by their routinization as “infrastructural power” in the bureaucratic system.⁴³⁷ Therefore, despite continued suppression of regime-challenging negative freedom such as free speech, adaptive authoritarianism enjoys widespread consensus or acquiescent support due to the predictability of certain effective delivery of other public goods and services, as well as the prospect of allowing more people to enjoy freedom one day.⁴³⁸

In a sense, this discourse of political economy corresponds to what is referred to above as “selective adaptation” of China’s global trade policy, which well explains the survival of party supremacy and the CCP’s speech regulation through a period of steady economic growth that could have produced politically transformative effects. Despite the shock from the 1989 Tiananmen protests, however, China’s suppression of free speech has continued to upgrade, while its intermittent engagement with the international human rights system and dialogues aims merely at sprinkling its trade packages with some rule-based legitimacy.⁴³⁹

This is evident in earlier disputes that the US launched against China at the WTO and has coalesced around the question whether China’s censorship regime

⁴³⁵ Ahlers & Schubert, *supra* note 433, at 61.

⁴³⁶ *Id.* at 62–63 (emphasis added).

⁴³⁷ These developments are featured by functional differentiation and professionalization such as in legislative hearings and judicial professionalism. See Michael W. Dowdle, *Infrastructural Power and Its Possibilities for the Constitutional Evolution of Authoritarian Political Systems: Lessons from China*, in *AUTHORITARIAN CONSTITUTIONALISM* 76, 79–82 (Helena Alviar García & Günter Frankenberg eds., 2019).

⁴³⁸ *Id.* at 86–94.

⁴³⁹ Aubié, *supra* note 7, at 303–04.

constituted a systematic trade barrier.⁴⁴⁰ Due to the systemic difficulties of international law, however, the WTO was unable to provide a fundamental remedy to rectify a non-trade-oriented censorship regime.⁴⁴¹ The hardly reconcilable conflicts between censorship and trade have become so conspicuous that multinational corporations and business entities often have to recalibrate the benefit of exercising their right to free speech against the prospect of forfeiting astronomical income for offending China.⁴⁴² The corollary of a pacifying trade policy at the expense of free speech, however, is that the CCP's global regulation of political speech has managed to overshadow the protection of free expression in many parts of the world,⁴⁴³ thus envisioning Chinese speech imperialism despite and because of robust economic growth.

C. A Technological Scheme: Digital Authoritarianism

Thirdly, this global “constitutional identity” relies heavily on technological development. Compared with the former two facets of authoritarianism, digital authoritarianism is a thriving, but often hidden, menace to democracy, which operates by instrumentalizing digital technology to suppress and manipulate speech with the help of abusive data collection and surveillance.⁴⁴⁴ As an engine of digital authoritarianism, China, along with Russia, is the largest exporter of modern versions of Schmittian political and legal constitutionalism and the most frequent host of programs training technical know-how of media and Internet censorship for other authoritarian countries.⁴⁴⁵ Two stages of digital authoritarianism mark China's strategic turn to speech imperialism.

⁴⁴⁰ WTO Panel Report, *China-IPR*, *supra* note 343; *see also* Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/R (Aug. 12, 2009).

⁴⁴¹ Chen, *supra* note 342, at 50–54.

⁴⁴² *See, e.g.*, Patrick Hruby, *How the NBA's Rift with China Laid Bare the Cost of Free Speech*, *GUARDIAN* (Oct. 12, 2019, 4:00 AM), <https://perma.cc/9FMX-PKSD>.

⁴⁴³ *See, e.g.*, Raymond Zhong, *TikTok Blocks Girl for Posts About China*, *N.Y. TIMES* (Nov. 26, 2019), at B4.

⁴⁴⁴ *See* Adrian Shahbaz, *Freedom on the Net 2018: The Rise of Digital Authoritarianism*, *FREEDOM HOUSE* (2018), <https://perma.cc/B8YM-NVM3>.

⁴⁴⁵ *See* ALINA POLYAKOVA & CHRIS MESEROLE, *EXPORTING DIGITAL AUTHORITARIANISM: THE RUSSIAN AND CHINESE MODELS* (2019), <https://perma.cc/65M8-MFU3>.

In the defensive phase, authoritarian governments around the world look to the Chinese model for emulation and adept practice of digital authoritarianism.⁴⁴⁶ First, authoritarian states view it as essential to enact more repressive media laws that coopt and coerce media companies to censor Internet speech and shut down websites on the grounds that they allegedly contain hate speech, fake news, and disinformation.⁴⁴⁷ Secondly, authoritarian states rely heavily on the monopolistic collection and control of personal data and digital surveillance by state agencies for effective content moderation.⁴⁴⁸ Finally, authoritarian regimes endorse China’s proposal of celebrating and distributing the principles of digital authoritarianism at international arenas.⁴⁴⁹

However, the global pandemic provides the catalyst for China’s second phase of offensive digital authoritarianism by turning the aforesaid “normal politics” into “exceptional politics.” Thus, the party-state finds the best pretext for not only imposing overall surveillance on its population, but also for deploying the most comprehensive censorship, propaganda, and disinformation campaigns outside of China. For instance, Twitter suspended over 200,000 fake accounts that the Chinese government controlled alone during the Anti-Extradition Law Amendment Bill Movement in Hong Kong.⁴⁵⁰ This maneuver of digital authoritarianism poses the greatest threat to free speech, because liberal democracies may respond to this threat by using similar tools to moderate challenging and extremist content, which

⁴⁴⁶ See MOYNIHAN & PATEL, *supra* note 27, at 9–11 (outlining countries other than China that enacted similar laws of restricting freedom of expression).

⁴⁴⁷ For case studies of importers of this model such as Venezuela, Central Asia, Ecuador, and Zimbabwe, see MICHAEL SCHIFFER & DANIEL RICCHETTI, *THE NEW BIG BROTHER: CHINA AND DIGITAL AUTHORITARIANISM* 31–35 (2020) (“A Democratic Staff Report Prepared for the Use of the Committee on Foreign Relations United States Senate”), <https://perma.cc/7DF3-8G5Z>.

⁴⁴⁸ For a study of how China uses digital means including artificial intelligence to monitor its citizens, see KIP WAINSCOTT, STAN. CYBER POL’Y CTR., *COUNTERING THE RISE OF DIGITAL AUTHORITARIANISM: CHINA, AI AND HUMAN RIGHTS* (2020), <https://perma.cc/E6HS-DEYJ>.

⁴⁴⁹ SCHIFFER & RICCHETTI, *supra* note 447, at 37–44 (describing China’s initiatives at the UN, the WTO, World Internet Conference, and international standards-setting bodies).

⁴⁵⁰ Xiao Qiang, *Chinese Digital Authoritarianism and Its Global Impact*, in 43 POMEPS STUD., *DIGITAL ACTIVISM AND AUTHORITARIAN ADAPTATION IN THE MIDDLE EAST* 35, 35–38 (Larry Diamond & Eileen Donahoe eds., 2021), <https://perma.cc/7EY5-RQVM>.

gives authoritarian propaganda the best excuse to attack democracies on their “failure” to protect free speech.⁴⁵¹ It is also in this sense that the CCP’s intra-party speech regulation informed by party supremacy could go global, thus facilitating Chinese speech imperialism in digital governance.

D. Speech Imperialism Geared to Party Supremacy

In sum, Chinese speech imperialism is chained to all three facets of the global constitutional identity of party supremacy as China’s authoritarian response to global constitutionalism. First, while global constitutionalism is a political philosophy based on the instrumentalization of international law, it relies entirely on the pluralistic interpretation of national constitutional rules, without an enforcement mechanism. Thus, a constitutional norm such as free speech could cease to be global once it fails to be taken seriously in terms of the liberal political ideology. By contrast, constitutional authoritarianism merely utilizes, but does not rely on, the transnational force of such legality.⁴⁵² Thus, a constitutional authoritarian approach to political speech such as Chinese speech imperialism could turn into a “global” norm, as long as only a few countries subscribe to it and liberal democracies can be undermined stepwise by its influence.

Secondly, authoritarianism is often more adaptive than constitutionalism is transformative, especially when it comes to the regulation of political speech. Generally, global constitutionalism aims to exert a transformative function in an economically progressive society. However, the Chinese party-state rejects a global order of constitutionalism, because the CCP, on its own interest calculation, is convinced that constitutionalism would overthrow rather than facilitate China’s domestic order of party supremacy.⁴⁵³ Nevertheless, resistance to constitutionalism could often take the form of “glocalization” which allows the coexistence of two

⁴⁵¹ For example, Chinese ambassador to France criticized European audience for not respecting free speech after he sparked wide outrage over his suggestion that former Soviet states didn’t exist. *Freedom of Speech in Public Debate Should Be Guaranteed, Says Chinese Ambassador to France Lu Shaye*, GLOBAL TIMES (Jun 03, 2023 10:52 PM), <https://perma.cc/ETY7-3M3D>.

⁴⁵² Lachmayer, *supra* note 424, at 90–92 (illustrating the four ramifications of engagement with global constitutionalism that end up with opposition to its transnational nature).

⁴⁵³ See, e.g., Hu Xijin, *Free Speech Cannot Be Allowed to Jeopardize China’s Governance*, GLOB. TIMES (Feb. 9, 2021, 10:08 PM), <https://perma.cc/BB45-877R>.

seemingly opposing governance models.⁴⁵⁴ As such, the CCP’s exclusive speech regulation embedded in its intra-party regulations and national speech laws could well adapt to a variety of authoritarian constitutional theories through misinterpreted standards of the rule of law.

Finally, Chinese speech imperialism stands at the forefront of digital authoritarianism by taking advantage of the prevalence of information technology. An authoritarian constitutional doctrine such as the CCP’s “party supremacy” could be consolidated more easily with the help of overall and comprehensive digital surveillance and data monitoring. In that sense, while party supremacy guides speech regulation, it also relies heavily on speech regulation in a society permeated by digital technologies. Moreover, digital authoritarianism represents an authoritarian regime’s response to “digital constitutionalism” that thrives in Europe and, likewise, aims to expand its influence in the global context.⁴⁵⁵ For the party-state, authoritarianism is as Chinese as constitutionalism is European. Therefore, digitalization is an ancillary arena that extends the classic clash between constitutionalism and authoritarianism far beyond national borders: Speech imperialism is only possible because digital authoritarianism makes it “global.”

CONCLUSION

China’s recent political rise has caused concerns about its authoritarian ambition to influence liberal democracies by extending its speech regulation and catalyzing the erosion of free speech elsewhere. Yet, regardless of its actual impacts on other liberal democracies, the rise of China’s global speech regulatory regime appears, above all, “constitutional.” This is because the constitutional legitimacy of the CCP’s speech regulation is the issue at stake, which the party-state and its constitutional lawyers are trying to defend and develop through the new constitutional doctrine of “party supremacy.” This constitutional doctrine derives from a recent party-driven constitutional amendment, but is based on distorted reframing of constitutional theories and practice. In fact, the “constitutional” mandates that emanate from party supremacy include prioritizing intra-party speech norms and po-

⁴⁵⁴ Maartje De Visser & Ngoc Son Bui, *Glocalised Constitution-making in the Twenty-first Century: Evidence from Asia*, 8 GLOB. CONST. 297 (2019).

⁴⁵⁵ Giovanni De Gregorio, *The Rise of Digital Constitutionalism in the European Union*, 19 INT’L J. CONST. L. 41 (2021).

liticizing party-driven speech regulatory institutions. By weaponizing its constitutional theories and international trade, the party-state even aims to extend this new constitutional doctrine to speech regulation beyond the Chinese border. In that regard, any “constitutional” reconstruction of speech regulation under “party supremacy” could produce global effects.

Thus, Chinese speech imperialism becomes one of the features of the CCP’s global authoritarian rise and represents a nuanced and tangible speech regulatory regime with a tacit but uncompromising constitutional blueprint of a power-monopolizing party to undermine the protection of free speech in liberal democracies. Today, Chinese speech imperialism overshadows a significant part of the world’s landscape of political speech. No doubt this thriving practice relies on the party-state’s self-created constitutional discourses.

For the Chinese party-state, a constitution is merely the body, rather than the soul, of its political life. In fact, the “constitutional” rise of Chinese speech imperialism is the necessary and direct outcome of reinvigorating and activating the fundamental ideological principle of party supremacy in a comprehensive manner. In that sense, however, the CCP’s ideological and existential lifelines may be at odds: On the one hand, the CCP’s overall and exclusive regulation precludes any free exercise of speech rights conducive to universal political participation. On the other hand, the party-state needs stable trade relations as the blood vessel to prolong its authoritarian life. Thus, creating a Potemkin village channeling its authoritarian speech regulation into the global constitutionalist discourse becomes essential for the party-state, albeit with many inherent conflicts.