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## Carl Schmitt and the Evolution of Chinese Constitutional Theory: Conceptual Transfer and the Unexpected Paths of Legal Globalization

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### Abstract

The intense reception of Carl Schmitt's writings among Chinese constitutional theorists is one of the more striking phenomena within the globalization of constitutional thought in recent decades. This paper approaches it from two angles. Firstly, the reception of Schmitt and the subsequent debates about his oeuvre and persona are interpreted as performative practices in which Schmitt soon emerged as both the *bête noire* of a liberal-leaning constitutional scholarship and an object of romantic projection for avant-garde theoretical endeavors. Engagement with Schmitt thus crucially contributed to the emergence of both a neo-conservative and a critical-liberal sensibility among Chinese legal scholars. Secondly, with the rise of what is known in China as Political Constitutionalism in the mid-2000s, Schmitt also began to exert a more substantive terminological and conceptual influence on Chinese constitutional theory more generally, leaving his imprint on some of its fundamental theoretical binaries. Looking at the Chinese debate on Schmitt, therefore, not only grants us a unique glimpse into how constitutional debates are structured and evolving in contemporary China, it also demonstrates the often-unexpected trajectories of conceptual migration in the global age.

### Keywords

Carl Schmitt, Chinese party-state, Constitutional theory, Conceptual transfer

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## I. Introduction: Carl Schmitt's unexpected rise to fame in China

There was a time after World War Two when things appeared to be deadly silent around Carl Schmitt – that is a time when he was personally discredited and academically marginalized. Once one of the rising stars of the Weimar Germany intellectual scene – urban bohemian and catholic fatalist, erudite and polyglot, a talented polemicist and a political opportunist – his infamous endorsement of the Nazi take-over and subsequent efforts to cater to the regime's elite had ended in a disgraceful way. Not only did he, despite his best efforts at vindicating the regime, fall from grace within the Nazi establishment – his academic career in post-War Europe was shattered due to his despicable political affiliations and his unwillingness to distance himself from his previous deeds. Henceforth, he spent his life in his small house in rural West Germany and found intellectual refuge in Franco's Spain. Academically, he remained an outlaw, producing grand historical tales of the expansion of European legal civilization and nostalgic contemplations on its subsequent demise.<sup>1</sup> Notable exceptions include his tacit yet sustained influence on German post-war constitutional thought and parts of the European New Left.<sup>2</sup>

As is well known, things have changed dramatically since then and the reappearance of Schmitt's specter on the international academic stage is among the most striking phenomena of intellectual globalization in recent decades. Schmitt's influence on contemporary political theory has been widely covered by recent research.<sup>3</sup> However, when a volume on the international reception of Schmitt appeared in 2007, China was conspicuously absent.<sup>4</sup> This is striking, since it was precisely in the People's Republic (PRC) where Schmitt's work had received considerable interest since the late 1990s and early 2000s. This gap has now partly been filled by the publication of another volume on the intellectual reception of Carl Schmitt and Leo Strauss in Greater China.<sup>5</sup> The Chinese interest in Schmitt can now no longer be

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<sup>1</sup> C Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (4th edn, Duncker und Humblot, Berlin, 1997).

<sup>2</sup> EW Böckenförde, 'Der Begriff des Politischen als Schlüssel zum staatsrechtlichen Werk Carl Schmitts' in idem, *Recht, Staat, Freiheit* (Suhrkamp, Frankfurt a.M., 1991) 344.

<sup>3</sup> J Derrida, 'Force of Law: The "Mystical Foundation of Authority"' (1990) 11 *Cardozo Law Review* 920; G Agamben, *State of Exception* (University of Chicago Press, Chicago, 2005); generally see M Hirsch, 'Politische Theologie des Konflikts. Carl Schmitt im politischen Denken der Gegenwart' in R Voigt (ed), *Der Staat des Dezisionismus: Carl Schmitt in der internationalen Debatte* (Nomos, Baden-Baden, 2007) 82.

<sup>4</sup> R Voigt, 'Carl Schmitt in der Gegenwartsdiskussion' in idem (ed), *Der Staat des Dezisionismus: Carl Schmitt in der internationalen Debatte* (Nomos, Baden-Baden, 2007) 13.

<sup>5</sup> K Marchal and C Shaw, 'Introduction' in idem (ed), *Carl Schmitt and Leo Strauss in the Chinese-Speaking World. Reorienting the Political* (Lexington, London, 2017) 1; C Shaw, 'Toward a Radical Critique of Liberalism: Carl Schmitt and Leo Strauss in Contemporary Chinese Discourses' in K Marchal and C Shaw (ed), *Carl Schmitt and Leo Strauss in the Chinese-Speaking World. Reorienting the Political* (Lexington, London, 2017) 37; also see S Veg, 'The Rise of China's Statist Intellectuals: Law, Sovereignty, and "Repoliticization"' (2019) 82 *The China Journal* 23, for a recent account.

neglected. Back in 1998, Liu Xiaofeng – soon to become the initiator of the Chinese ‘Schmitt fever’ – could still rhetorically ask his Chinese peers: ‘Who is Schmitt? The knowledge of this figure among Chinese intellectuals is extremely limited.’<sup>6</sup> Two decades on, and there are now countless scholarly articles in mainland China dealing with Schmitt’s thought. Most works of him have been translated into Chinese, including seemingly peripheral writings, such as his letters of correspondence with Ernst Jünger. The Chinese publishers *Zhongguo Shehui Kexue Chubanshe* and *Shanghai Remin Chubanshe* even initiated a series on Schmitt’s work.<sup>7</sup> As a consequence, Guo Jian would conclude merely eight years after the publication of Liu’s foundational essay that, whenever the Chinese ‘are discussing Western thought today, particularly political philosophy and jurisprudence, we can hardly ever escape the entanglements with Schmitt’s specter.’<sup>8</sup>

It is by no means easy to answer, however, what drove the interest, and at times outright obsession of Chinese intellectuals with Schmitt’s writings. Likewise, there is no straightforward answer as to why Schmitt’s thought became an object of desire for a number of well-known constitutional scholars. Besides the undoubtedly justified focus on anti-liberal tendencies in Chinese academia and the alleged or real appeal held by Schmitt to such illiberal sentiments, the constitutional and legal-theoretical dimensions of Schmitt’s work and their influence on China’s constitutional discourse have remained under-explored. It is precisely in this field, however, where Schmitt’s impact can be felt most glaringly.<sup>9</sup> In the following, I will interpret the Chinese reception of Schmitt as a phenomenon of legal globalization and the migration of constitutional ideas and concepts. In this regard, at least three related questions call for an answer. Firstly, *who* is reading – and perhaps utilizing – Schmitt; secondly, *how* is he being understood and adopted to Chinese conditions; and, thirdly, *why*? Of these, the third question seems to trouble outside observers most. Why did prominent constitutional scholars in China,

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<sup>6</sup> X Liu, ‘施米特与自由主义宪政理论的困境’ [‘Schmitt and the Dilemmas of Liberal Constitutional Theory’] (1998) 47 *Twenty-First Century* [二十一世纪] 111.

<sup>7</sup> A list of the titles in this series (卡尔·施米特研究文丛) can be found at <<https://book.douban.com/series/26516>>.

<sup>8</sup> J Guo, ‘为了打击共同的敌人–施米特及其左派盟友’ [‘In Order to Defeat the Common Enemy – Schmitt and his Left-Wing Allies’] (2006) 94 *Twenty-First Century* [二十一世纪] 19.

<sup>9</sup> See, for instance, C Kroll, ‘Reading the Temperature Curve: Sinophone Schmitt-fever in Context and Perspective’ in K Marchal and C Shaw (ed), *Carl Schmitt and Leo Strauss in the Chinese-Speaking World. Reorienting the Political* (Lexington, London, 2017) 103; Q Zheng, ‘Chinese Political Constitutionalism and Carl Schmitt’ (2017) 1 *Carl Schmitt Studien* 43; X Zhang, ‘Carl Schmitt in China: Why Is He Needed and How Is He Understood? – An Analysis of Chinese Political Constitutional Theory’ (2018) 25(2) *Zeitschrift für chinesisches Recht* 83. While my account is indebted to earlier explorations of this topic by the quoted authors, it seeks to present a unique perspective on the issue in three regards: firstly, by including the work of Jiang Shigong in the discussion; secondly, by showing how the Chinese debate moved from the initial liberal-illiberal-divide concerning Schmitt’s political philosophy to a more substantive conceptual controversy with the rise of Political Constitutionalism in the mid-2000s; and, lastly, by reflecting upon the implications of this phenomenon for the study of legal and constitutional globalization more generally.

given the vast tradition of modern constitutional thought, choose to seek inspiration precisely in Schmitt's work for their elaboration of an admittedly creative account – and apology – of the Chinese party-state? I will attempt to answer these three questions based on three corresponding aspects of Schmitt's work: the concept of the political, the notions of sovereignty and state order – including his rejection of judicial review – as well as his distinction between constitution and constitutional law. I will then proceed to distinguish three loosely corresponding scholarly 'strategies of reception' which are being interpreted as performative practices of reading Schmitt: the *anti-liberal* or leftist strategy, the *statist* or neo-conservative strategy, and the *conceptual* or 'critical-liberal' strategy. Lastly, I will trace Schmitt's impact on the work of three well-known constitutional theorists: Chen Duanhong, Jiang Shigong, and Gao Quanxi. Schmitt's theoretical oeuvre indeed played a crucial role in the formation of their scholarly agenda. However, disagreement over how to adequately assess his legacy also epitomizes the wide normative gap between these scholars. This resulted in an intellectual rift that cuts across the long-established liberal-illiberal fault line of Chinese constitutional scholarship. As a consequence, Schmitt's work now informs both the neo-conservative agenda of statist intellectuals as well as the realist sensibility of some of their liberal critics.

## II. Three aspects of Schmitt's work...

Carl Schmitt's constitutional thought evolved within the specific context of Weimar Germany's constitutional debate which was in turn inseparable from the constitutional crisis of the young republic.<sup>10</sup> In many ways, Weimar served as an intellectual laboratory of 20<sup>th</sup> century political modernity. It is not too surprising, then, that current processes of constitutional and intellectual globalization are still caught within – or might at least be described along the lines of – Weimar-era conceptual binaries. When looking at the Chinese reception of Schmitt, we therefore ought to take into account both this original context as well as its sometimes only loosely corresponding context of reception.<sup>11</sup> I will attempt to condense three aspects of Schmitt's work that to me seem most relevant for the constitutional-theoretical reception of his thought in China, beginning with the concept of the political.

The relevance of Schmitt's most well-known work *Der Begriff des Politischen*, dating from 1927, has always been contested. While some legal scholars, notably Ernst-Wolfgang

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<sup>10</sup> Generally see M Gangl, 'Einleitung. Die Weimarer Staatsrechtsdebatte' in M Gangl (ed), *Die Weimarer Staatsrechtsdebatte. Diskurs- und Rezeptionsstrategien* (Nomos, Baden-Baden, 2011) 9.

<sup>11</sup> It is in this vein that Kroll speaks of 'three discursive layers' of the sinophone discussion on Schmitt. See Kroll (n 9) 103.

Böckenförde, place it at the center of Schmittian thought,<sup>12</sup> others claim that the context of its drafting suggests that he developed the essay ‘occasionally for analytical purposes’.<sup>13</sup> From a systematic perspective, Schmitt’s *opus magnum* is without any doubt the *Verfassungslehre* of the following year, which incorporates all relevant aspects of his writings of the 1920s. From a conceptual point of view, however, one can legitimately argue that both his constitutional theory and the concept of sovereignty *presuppose* the concept of the political. Schmitt famously asserts that the foundation of the political is the distinction between friend and enemy. Most misunderstandings are based on a vulgarized reading of this, admittedly striking, claim. For Schmitt, said distinction is a polemical and descriptive, *not* a normative, criteria – building on a differential mode of thinking characterized by Mark Lilla as ‘distinguo ergo sum’.<sup>14</sup> Notably, Schmitt does at no point suggest a quasi-ontological need for enmity, but instead conceives of the friend-enemy-distinction as a ‘phenomenological’ account of the political process of ‘building exclusive groups’.<sup>15</sup> His concept of the political, therefore, is not that of an ‘autonomous field (*Sachgebiet*), but of a degree of intensity of association and dissociation of people’.<sup>16</sup> The process of forming a ‘state’, particularly a modern nation-state – which is nothing but ‘the political unity of a people’ – involves not only the inclusion of all nationals *within*, but also the exclusion of all non-nationals *from* this unity. Despite his fervent and polemical agitation against liberalism in many of his works,<sup>17</sup> it is this rather mundane claim which serves as the conceptual foundation of the concepts of state, sovereignty, and constitution. As with the concept of the political, Schmitt’s peculiar talent of condensing complex notions into concise definitions is also apparent in his infamous definition of sovereignty brought forward in the 1922 essay *Politische Theologie*: ‘Sovereign is he who decides on the state of exception.’<sup>18</sup> It was often noted by liberal critics that Schmitt appeared to profess an inborn inclination to favor the exceptional over the ordinary and normal. I will not dwell on the historical context of such right-wing obsessions with the exceptional in modern German

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<sup>12</sup> EW Böckenförde, ‘Die Entstehung des Staates als Vorgang der Säkularisation’ in idem, *Recht, Staat, Freiheit* (Suhrkamp, Frankfurt a.M., 1991) 92.

<sup>13</sup> R Mehring, ‘Carl Schmitt, Der Begriff des Politischen’ in M Brocker (ed), *Geschichte des politischen Denkens* (Suhrkamp, Frankfurt a.M., 2006) 510.

<sup>14</sup> M Lilla, *The Reckless Mind. Intellectuals in Politics* (New York Review Books, NYC, 2011) 57; also see C Schmitt, *Der Begriff des Politischen* (9th edn, Duncker und Humblot, Berlin, 2015) 28.

<sup>15</sup> L Strauss, ‘Anmerkungen zu Carl Schmitt, Der Begriff des Politischen’ in Heinrich Meier (ed), *Carl Schmitt, Leo Strauss und Der Begriff des Politischen. Zu einem Dialog unter Abwesenden* (Metzler, Stuttgart, 1988) 97, 132.

<sup>16</sup> Schmitt (n 14) 38.

<sup>17</sup> Mehring (n 13) 515.

<sup>18</sup> C Schmitt, *Politische Theologie* (10th edn, Duncker und Humblot, Berlin, 2015) 13.

intellectual history.<sup>19</sup> This peculiar background might, however, explain why he developed his notion of sovereignty out of what he calls the ‘state of exception’, i.e. a moment of constitutional crisis which allegedly demands decisive action on part of the sovereign:

There are no norms that are applicable to chaos. Order must be established, so that the legal order (Rechtsordnung) can have any sense. A normal situation must be brought about, and sovereign is he who definitely decides upon whether this is actually the case.<sup>20</sup>

As with the concept of the political, Schmitt does not provide any substantive definition of what sovereignty is or ought to be. Instead, he resorts to a formal definition *ex negativo*, relying on the phenomenological distinction between order and suspension, norm and decision. Simply look, Schmitt seems to say, at what occurs during the state of exception. *This* is sovereignty.<sup>21</sup>

Closely linked to this definition of sovereignty is the idea of state order. Schmitt maintains that, during the state of exception, the state order remains intact whereas the law is being suspended:

In such a situation, it is clear that the State remains, whereas the law recedes. Since the state of exception is still something different from anarchy and chaos, *in the juridical sense there is still an order, albeit not a legal order*. The existence of the State retains an undoubtful superiority over the validity of the legal norm.<sup>22</sup>

His notion of sovereign state power can be summed up in the quasi-ontological assertion that ‘no norm [...] protects or guards itself; no normative validity can assert itself’.<sup>23</sup> This rejection of the autonomous self-regulating capacity of modern law also presupposes Schmitt’s rejection of judicial review. Against Kelsen, who played a leading role in the introduction of constitutional review in post-World War I Austria, Schmitt famously rejected the idea of a constitutional court for Weimar Germany and instead advocated a powerful president as the *political* guardian of the constitution.<sup>24</sup> This opposition to what might be called judicial or normative constitutionalism also plays a key role in his reception in China.<sup>25</sup> The two aspects dealt with so far are, however, conceptually inter-dependent and cannot be separated from the larger framework of the *Verfassungslehre* of 1928 without distorting their meaning.

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<sup>19</sup> See H Bredekamp, ‘From Walter Benjamin to Carl Schmitt, via Thomas Hobbes’ (1999) 25(2) *Critical Inquiry* 247.

<sup>20</sup> Schmitt (n 18) 19.

<sup>21</sup> Consequently, some have argued that Schmitt’s theory of sovereignty is but a factual description of a successful *coup d’état*. See V Neumann, ‘Theologie als staatsrechtswissenschaftliches Argument: Hans Kelsen und Carl Schmitt’ (2008) 47(2) *Der Staat* 163.

<sup>22</sup> Schmitt (n 18) 18.

<sup>23</sup> C Schmitt, *Legalität und Legitimität* (8th edn, Duncker und Humblot, Berlin, 2012) 57.

<sup>24</sup> H Kelsen, ‘Wer soll der Hüter der Verfassung sein?’ in R Van Ooyen (ed), *Wer soll der Hüter der Verfassung sein?* (Mohr Siebeck, Tübingen, 2008) 25; C Schmitt, *Der Hüter der Verfassung* (5th edn, Duncker und Humblot, Berlin, 2016).

<sup>25</sup> Cf. H Liu, ‘Carl Schmitt Redux: Law and the Political in Contemporary Global Constitutionalism’ in K Marchal and C Shaw (ed), *Carl Schmitt and Leo Strauss in the Chinese-Speaking World. Reorienting the Political* (Lexington, London, 2017) 103.

In his Constitutional Theory, Schmitt distinguishes between constitutions in the sense of a political order and written constitutional texts. He refers to the former as positive concepts of constitutions (*positiver Verfassungsbegriff*), and to the latter as relative concepts or *relativer Verfassungsbegriff*.<sup>26</sup> In his view, then, the very notion of a constitution, even more so if we are to appreciate the semantic origins of the term, must denote more than the written document usually referred to as such.<sup>27</sup> A positive constitution in the Schmittian sense is thus the order that is created through a sovereign decision. This decision – unlike the ‘formal characteristics’ of the constitutional law which are seen as merely ‘peripheral’ – determines the very nature of the state in question:

A state does not *have* a constitution “according to which” its will is formed and functions, but rather a state *is* a constitution, i.e. an existential condition, a status of unity and order.<sup>28</sup>

This short quotation from the *Verfassungslehre* – also cited by Chen Duanhong in his well-known 2008 essay which launched the project of Chinese Political Constitutionalism – incorporates all elements set out above. The constitutional law or ‘relative constitution’ is but a legal concretization and specification of the underlying state order, which is founded on purely political grounds, i.e. through a process of exclusion (the infamous friend-enemy-distinction).<sup>29</sup> Therein lies the implication of the concept of the political in constitutional terms. Accordingly, Schmitt further distinguishes between the foundational ‘political’ and the superimposed ‘rule-of-law’ (*rechtsstaatlich*) elements of modern-day constitutions. The latter, including individual rights, surely are a genuine feature of any ‘bourgeois’ state, but by no means a conceptually necessary element of constitutions *as such*.<sup>30</sup> On the other hand, all legal documents, including the written document of the constitutional law itself, can only function under the premise of this political *conditio sine qua non*: ‘The concept of the state presupposes the concept of the political’.<sup>31</sup> For any text to acquire legal validity and meaning, it must be based upon ‘a preceding political *decision*’.<sup>32</sup> Hence, written constitutions are not only amendable (through revision) but also ‘suspendable’ (through an act of sovereign decision):

The constitution is inviolable. The constitutional law, on the other hand, can be suspended during the state of exception.<sup>33</sup>

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<sup>26</sup> C Schmitt, *Verfassungslehre* (11th edn, Duncker und Humblot, Berlin, 2017) 11.

<sup>27</sup> Some have pointed out that Schmitt's theory in this regard merely mirrored the 'two-sided conception of statehood' that German scholars of public law since Georg Jellinek had come to endorse: the state as a socio-historical entity and as a set of legal norms. See Mehring (n 13) 513; M Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (CUP, Cambridge, 2001) 242.

<sup>28</sup> Schmitt (n 26) 4.

<sup>29</sup> *Ibid* 76.

<sup>30</sup> *Ibid* 125.

<sup>31</sup> Schmitt (n 14) 7

<sup>32</sup> *Ibid* 22.

<sup>33</sup> Schmitt (n 26) 26.

Thus, we have seen that all three aspects outlined above are intrinsically linked and form a distinct conceptual line: from the foundational concept of the political which presupposes the existence of a state in the form of a ‘friend-enemy distinction’; via the theory of sovereignty giving expression to the order thus formed through sovereign decisions; to the distinction between constitution and constitutional law, the latter of which is but the final formalization of the underlying political decision. Hence, the political decision to form a nation-state is without any doubt the most basic element in Schmitt’s constitutional thought. However, if we were to isolate and decontextualize this single element, we would arrive at a vulgarized notion of what Schmitt meant by the political – something which is particularly evident in the Chinese Schmitt-reception of the early years.<sup>34</sup> A modern state founded on the sovereign decision of a people – this follows from Schmitt’s realist imperative – is inherently legitimate and needs no external justification. Schmitt famously asserts that ‘whatever exists as a *political* entity is worth existing from the juridical point of view’.<sup>35</sup> Likewise, regarding the state of exception, Schmitt’s theory plainly evades all normative predicaments entailed by this realist imperative. The successful resolution of a constitutional crisis is thus determined retrospectively in a purely factual manner – *ex facto ius oritur*:

If asked what the *raison d’état* is when it demands a violation or removal of the existing law; all these questions cannot be answered normatively, but only acquire their concrete meaning with the concrete decision of the sovereign.<sup>36</sup>

### III. ... and three corresponding ‘strategies of reception’

Foreign depictions of the Chinese legal discourse used to be centered around substantive notions, most notably the debate over ‘thick’ or ‘thin’ conceptions of the rule of law.<sup>37</sup> Whereas these debates served as a legitimate starting point for conceptual analysis, they were not very telling once a deeper understanding of the ‘internal dynamics of the Chinese rule of law discourse’ was required.<sup>38</sup> This is so because substantive conceptual dichotomies as the above-mentioned tend to obfuscate the internal diversity and degree of disagreement within the Chinese debate for the sake of presenting a seemingly uniform ‘Chinese’ approach to the rule of law. The departure from this illiberal-liberal or thin-thick-dichotomy has gone furthest in

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<sup>34</sup> Also see Q Zheng, *Carl Schmitt, Mao Zedong and the Politics of Transition* (Palgrave, Basingtoke, 2015) 13 et seqq.

<sup>35</sup> Schmitt (n 26) 22. Also see H Kelsen, *Reine Rechtslehre* (Franz Deuticke, Leipzig, 1934) 71.

<sup>36</sup> Schmitt (n 26) 49.

<sup>37</sup> See for instance R Peerenboom, ‘Fly High the Banner of Socialist Rule of Law with Chinese Characteristics! What does the 4<sup>th</sup> Plenum Decision Mean for Legal Reforms in China?’ (2015) 7 *Hague Journal of the Rule of Law* 49.

<sup>38</sup> S Seppänen, *Ideological Conflict and the Rule of Law in Contemporary China: Useful Paradoxes* (CUP, Cambridge, 2016) 1.

Samuli Seppänen's account of ideological conflict in the Chinese rule of law discourse. Instead of taking every statement made by Chinese legal scholars at face-value, he argues that:

Ideological statements matter regardless of whether they are sincerely believed – and sometimes they matter because they are not sincerely believed.<sup>39</sup>

This 'performative turn' shifts the focus from the truth-value of speech acts to their instrumental, ideological, and at times plainly contradictory or even paradoxical dimensions. Legal statements are thus seen as inherently ideological and rarely ever detached from their social and discursive context which demarcates the confines of the 'speaking'.<sup>40</sup> Adopting such a perspective, while also acknowledging its limits, thus allows us to describe the conflicting ways in which Schmitt is read, adopted, and redefined in Chinese discourse as forms of performative practices which are mirrored in the argumentative strategies analyzed below. We may thereby show how different 'personae' of Schmitt are conceived of and put to use as instruments of ideological positioning.<sup>41</sup> How one positions oneself toward Schmitt, and what meaning one ascribes to his work within the Chinese context, also implies a take on questions of particular ideological pertinence. Although I acknowledge that these ascriptions are inherently ambiguous and elusive, applying them seems justified to the extent that they are deeply entrenched in the Chinese debate as well. One's stance on Schmitt, for instance, implies a decision upon questions such as:<sup>42</sup>

- i) What is the position of the CCP in the legal system and vis-à-vis the judiciary?
- ii) Can the CCP suspend legal norms when she deems that politically desirable?
- iii) Is the legal sphere in general autonomous from the political?

When encountering Schmitt's theoretical work, one can either adopt an affirmative or hostile position, but hardly ever be neutral or indifferent. Therefore, we can duly call Schmitt a marker of ideological division lines in China's current legal discourse. Consequently, Schmitt's contested persona assumes different roles depending on whether he is cited by, say, neo-conservative adherents or liberal adversaries. However, due to his influence on the contemporary Chinese debate, one almost cannot evade associating with or dissociating from what one early Chinese essay on Schmitt dubbed the 'Schmittian challenge'.<sup>43</sup>

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<sup>39</sup> Ibid 18.

<sup>40</sup> For a classical study with regard to Chinese politics see M Schoenhals, *Doing Things with Words in Chinese Politics: Five Studies* (University of California China Research Monographs, Berkeley, 1992).

<sup>41</sup> Cf. Kroll (n 9) 106-108.

<sup>42</sup> Seppänen (n 38) 15.

<sup>43</sup> X Zhang, '施米特的挑战: 读“议会民主的危机”' [The Schmittian Challenge: Reading "The Crisis of Parliamentary Democracy"] (2005) 2 *Open Times* [开放时代] 126.

*Of common enemies and faux amis: Leftist appropriations of Schmitt and their liberal critics*

The glaringly anti-liberal dimensions of Schmitt's thought and its reception in China were addressed rather exhaustively elsewhere.<sup>44</sup> This anti-liberal line of reception can be linked to several political theorists and scholars conventionally – though not unproblematically – referred to as the Chinese New Left. In the heyday of the Chinese discussion, their 'strategy' of reading Schmitt anti-liberally was particularly pronounced. Notable scholars include Liu Xiaofeng, who instigated the Chinese 'Schmitt-fever' with a number of articles and publications beginning in 1998, as well as Zhang Xudong, whose 2005 article on the 'Schmittian challenge' for mainstream liberal thought was a major point of reference for liberal critics.<sup>45</sup> The leftist interpretation of Schmitt is largely based on an anti-liberal reading of Schmitt's concept of the political. Professor Zhang Xudong's 2005 essay, for instance, for the most part seems to selectively rely on a variety of anti-liberal statements from various works of Schmitt, without presenting them in their larger theoretical context. Schmitt, then, merely serves as a yet another source of anti-liberal criticism of 'Western' politics which is depicted as utterly hypocritical, constantly trying to conceal its power-orientation under the veil of liberal values.<sup>46</sup> Albeit amounting to what Mehring referred to as a 'metaphysically decapitated Schmittianism', then, references to Schmitt's work nonetheless serve the rather mundane purpose of 'de-legitimizing the current system'.<sup>47</sup> Conversely, scholars of the Chinese New Left seem to show little desire to analyze the intricacies of Schmitt's constitutional theory. This is also why some liberal critics ironically refer to the Schmittianism of their fellow intellectuals as a kind of 'take-over-ism' (拿来主义).<sup>48</sup> Many liberals have suggested that Schmitt's highbrow language prevented a sober assessment of his theoretical insights, which are superficial at best.<sup>49</sup> Some even argue that a Schmitt-infused nationalism historically filled the gap left behind ideologically by the

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<sup>44</sup> Marchal and Shaw (n 5); Shaw (n 5).

<sup>45</sup> Liu (n 6); Zhang (n 43); also see X Liu, '施米特与政治哲学的现代性' ['Schmitt and the Modernity of Political Philosophy'] (2001) 3 *Zhejiang Academic Journal* [浙江学刊] 19.

<sup>46</sup> Zhang (n 43) 137-138. Generously, one might call this as a 'critical' reading of the friend-enemy-distinction. Less generously, one might content that it is the vulgarization of its theoretical underpinnings.

<sup>47</sup> R Mehring, 'Otto Kirchheimer und der Links-Schmittismus' in R Voigt (ed), *Der Staat des Dezisionismus: Carl Schmitt in der internationalen Debatte* (Nomos, Baden-Baden, 2007) 60, 62.

<sup>48</sup> Guo (n 8) 19.

<sup>49</sup> Ibid 7. Also see the similar criticism in B He, '保卫程序: 一个自由主义者对卡尔施米特例外理论的批评' ['Defending the Procedure: A Liberal's Critique of Carl Schmitt's Theory of the Exception'] (2002) 2 *Zhejiang Academic Journal* [浙江学刊] 73, 79; W Chen, 'Utterly Unreliable "Legitimacy": A Preliminary Discussion of the Limits of Carl Schmitt's Theory of Legitimacy' ['并不可靠的"合法性": 试论卡尔施米特的合法性理论的限度'] (2015) 2 *Tianfu Xinlun* [天府新论] 53, 58.

demise of Marxism in the 1990s.<sup>50</sup> Further, one recurring theme of Schmitt's liberal critics is to point to his affiliation with the Nazi regime, by which one may suggest that those adopting his ideas must entertain similar political inclinations – or at the least profess a sense of political ignorance and irresponsibility.<sup>51</sup> In response to this charge – which Zheng Qi calls the 'strong critique of Schmitt'<sup>52</sup> – some of his adherents, such as Chen Duanhong, have adopted a position of avowed political indifference, arguing that:

Carl Schmitt is the most successful theorist who has introduced political theory into constitutional studies. We admire his constitutional theory. In terms of his personal political choice, that is his own business.<sup>53</sup>

Perhaps the most intriguing and at the same time paradigmatic criticism of Schmitt's work was articulated by Professor Ji Weidong, a well-known legal scholar. His criticism largely mirrors that of Hans Kelsen almost a century before him.<sup>54</sup> Ji rightly points to the ambiguous nature of Schmitt's definition of sovereignty. How can one ascertain the ever-elusive sovereign will, if, as Schmitt always maintained, the *volonté général* of the populace cannot be quantified in elections? This indicates where Ji's criticism of Schmitt is heading: to a liberal notion of procedural justice.<sup>55</sup> Without procedural rules, he insists, no democracy is feasible in practice. A self-proclaimed sovereign might arrive at any moment to usurp constitutional power, justifying his actions with appeals to a fictional sovereign authority:

[...] Schmitt never tells us explicitly who these people are that represent the political will. Who determines their authority?<sup>56</sup>

Liberal critics of Schmitt are thus fundamentally concerned with his apparent disgust for all-inclusive and inviolable procedural rules. Just as for China's 'authoritarian political strongmen', Ji suggests, separation of power and procedural rules were but a heap of 'useless rubbish' for Schmitt.<sup>57</sup> For Ji, as for other critics of Schmitt, what is needed in China are procedural checks

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<sup>50</sup> B Xu, '中国不需要这样的政治和主权者决断—施米特和国家主义' ['China does not need such Politics and Sovereign Decisions – Schmitt and Nationalism'] (2006) 94 *Twenty-First Century* [二十一世纪] 26, 34.

<sup>51</sup> Guo (n 8) 22. Also see Ji Weidong, who likens the nationalism of the New Left to Schmitt's rejection of the post-Versailles treaty system: W Ji, '施米特宪法学说的睿智与偏见' ['Wisdom and Prejudice in Schmitt's Constitutional Theory'] (2006) 84 *Twenty-First Century* [二十一世纪] 4, 4.

<sup>52</sup> Zheng (n 34) 13-9. However, my taxonomy of the Chinese Schmitt-reception differs from Zheng's, since her account of Schmitt's 'strong' critics also includes scholars such as Gao Quanxi who I would describe as a 'critical' liberal, since he is – despite his principled criticism of Schmitt – concerned with the lesson Schmitt's work supposedly holds for Chinese constitutional scholarship and political liberalism.

<sup>53</sup> Quoted in Zheng (n 9) 49.

<sup>54</sup> He (n 49); Neumann (n 21).

<sup>55</sup> W Ji, "'To Take the Law as the Public": The Diversification of Society and Legal Discourse in Contemporary China' in S Balme and M Dowdle (ed), *Building Constitutionalism in China* (Palgrave, New York, 2009) 125, 136; generally see Kelsen (n 24) and Seppänen (n 38) 125.

<sup>56</sup> Ji (n 51) 9

<sup>57</sup> *Ibid* 8.

*within* the constitutional system, *not* the extrapolation of sovereign decision power onto a super-legal sovereign. He concludes that:

Precisely when we cannot reach a consensus on substantive issues, the respective decision can only be regarded as legitimate when it complies with given procedural rules.<sup>58</sup>

However, while most liberal-leaning scholars tend to evade the question of whether the CCP might be described as a sovereign in Schmitt's sense, the *possibility* of such a reading might have, Kroll suggests, contributed to a critical self-understanding among many Chinese liberals:

In these early years of the Sinophone debate on Schmitt, the rejection of either Schmitt's critique of liberalism or its relevance for China was a way of emphasizing and demarcating one's own understanding of what liberalism should mean for China.<sup>59</sup>

Likewise, one might contend that this debate crucially contributed to the formation of a critical sensibility among Chinese liberal legal scholars, for some of which – like Gao Quanxi – the encounter with Schmitt was later described as a decisive moment of 'political maturing'. Ji, too, grants a certain degree of academic value to Schmitt's early work, especially his constitutional theory, albeit merely as a 'cautionary example'. A 'cool-headed observation', he suggests, might reveal 'blind spots and shortcomings' of liberal constitutionalism – a recurring trope in the liberal discussion of Schmitt.<sup>60</sup>

### *Chinese neo-conservatism and Schmitt: Embracing the exceptional*

Another rule of law paradox involves the relationship between routine order and states of exception, and between formal justice and substantive justice. In China, this paradox is especially evident in the dilemma between law-abiding and law-changing. Carl Schmitt's theory about the relationship between politics, judicial order, and the national will strikes a sympathetic chord in many Chinese people.<sup>61</sup>

While the early discussion of Schmitt remained largely entangled in the opposition between Chinese liberals and the left, things became more complex with the emergence of what I dub the 'neo-conservative' or statist strand of reception. Sebastian Veg has recently suggested that, following the discursive changes in China's political debate, 'in the 2000s the main controversy shifted from "liberty vs. equality" to "law vs. politics"'.<sup>62</sup> Consequently, sovereignty versus constitutionalism seems to have superseded the illiberal-liberal-divide of the early 2000s as a new meta-debate of Chinese intellectuals, which also entailed new alliances and oppositions. These shifts were closely linked – though not identical – to the rise of Political

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<sup>58</sup> Ibid 11.

<sup>59</sup> Kroll (n 9) 108.

<sup>60</sup> Ji (n 51) 8. Also see Q Liu, '施米特的幽灵' ['Schmitt's Specter'] (2006) 94 *Twenty-First Century* [二十一世纪] 13.

<sup>61</sup> Ji (n 55) 132.

<sup>62</sup> Veg (n 5) 25.

Constitutionalism as a scholarly agenda, which is indeed a primary example of how liberal and illiberal positions overlap and intersect with statist views. However, while Veg stresses the affinities and connections between leftist and statist thought in contemporary China,<sup>63</sup> there are also differences, particularly concerning the debate about Schmitt. The neo-conservative strand of Political Constitutionalism – chiefly represented by Chen Duanhong and Jiang Shigong – is primarily concerned with defending the party-state order, and thus focuses on Schmitt’s *constitutional* theory and the notion of sovereignty. This to some extent sets them apart from the Schmitt-reading of the New Left which is preoccupied with his political philosophy.

Vis-à-vis ‘orthodox’ socialist legal scholarship, on the other hand, the neo-conservative position differs not so much in its normative implications for the party-state or the overall political agenda they espouse, but rather in that they resort to methodological approaches and theoretical sources which transcend or reinterpret orthodox socialist ideology.<sup>64</sup> Oftentimes, these scholars rely on an eclectic mélange of postmodern theorems in their normative assertions of the ‘particular’ and ‘Chinese’. In reaction to what some perceived as the uncritical transplantation of non-Chinese liberal models endorsed by the text-centered jurisprudential mainstream, Neo-Conservatives were beginning to search for counter-narratives to the gradually expanding autonomy of the legal sphere vis-à-vis the political. As Seppänen suggests, ‘the difference between conservative and mainstream scholars can be seen in their attitudes toward the normality of the suspension of the rule of law for extralegal considerations’.<sup>65</sup> This sheds some additional light upon why Schmitt became so popular among Neo-Conservatives. The discrediting of statist socialist theory following the collapse of the Soviet Union is what facilitated and to some extent necessitated his reception in the first place. Now, undermining liberal theory *from within* constituted a ‘more subtle argument’ and attractive strategy than facing it on the open field of ideological struggle.<sup>66</sup> Under such conditions, the German constitutional scholar and ‘miner of the Weimar Constitution’ (Mehring) seemed to provide a welcome ‘toolbox’ for the raid against legal autonomy and normative methodology.

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<sup>63</sup> Ibid 31. These mutual affinities are evident, for instance, in the work of Jiang Shigong (see below, IV).

<sup>64</sup> Seppänen (n 38) 134. This is apparent, for instance, in D Chen, ‘论宪法作为国家的根本法与高级法’ [‘On the Constitution as the Fundamental Law and the Highest Law of the State’] (2008) 20(4) *Peking University Law Journal* [中外法学] 485, 496, and S Jiang, ‘哲学与历史: 从党的十九大报告解读“习近平时代”’ [‘Philosophy and History: An Interpretation of the “Xi Jinping Era” from the Viewpoint of the 19th CPC National Congress Report’] (2018) 1 *Open Times* [开放时代] 11, 17.

<sup>65</sup> Seppänen (n 38) 37.

<sup>66</sup> Veg (n 5) 41.

### *‘Conceptual Schmittianism’, or: Reading Schmitt against the grain*

Following the heated ideological debates described above, the work of Schmitt slowly began to leave its indelible mark on the conceptual underpinnings of constitutional discourse in China. It was only in the late 2000s that the performative positioning of the previous years slowly gave way to a more sustained conceptual diffusion and entrenchment of Schmittian ideas.<sup>67</sup> This shift points to the complex processes of conceptual history and the migration of constitutional thought in the global age. As Kroll notes, this is also where we might identify the more long-lasting impact of Schmitt on the Chinese debate, rather than in the ideological controversies characterizing the early years of his reception.<sup>68</sup> In the present paper, the term ‘conceptual Schmittianism’ is used to denote two separate yet related phenomena. On the one hand, it refers to a process of unconscious diffusion by which concepts may gradually creep into a national discourse until their foreign origin is becoming ever-more elusive and blurred. This, I argue, happened to many of the dichotomies frequently employed by Schmitt, as well as much of his iconoclastic and biologicistic language which now abounds in the literature of Political Constitutionalism.<sup>69</sup> As a consequence, some of the more enduring conceptual binaries and discussions among Chinese constitutional lawyers can be traced back to Schmitt’s work. *Prima facie*, one might get the impression that these dichotomies merely mirror the controversy between normative and political methodological approaches. However, some ‘critical-liberal’ scholars – including respected legal theorists such as Gao Quanxi and He Xin – have also taken sides with a political and contextual understanding of the Chinese constitution, thus further complicating these distinctions.<sup>70</sup> Their motivational drivers, however, seem to be markedly different from that of statists or neo-conservative scholars. The ‘critical-liberal’ perspective advocated by Gao Quanxi, for instance, holds that the normative mainstream position is both *politically naïve* and *theoretically incapable* of accounting for the constitutional reality Chinese scholars find themselves in. Gao arrives at this conclusion, however, through a critical and inverted adoption of Schmitt’s theoretical binaries. This conscious rejection of Schmitt’s normative implications *through* an inverted employment of his conceptual instruments, then, is the second dimension of what I call ‘conceptual Schmittianism’. As this phenomenon evidently

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<sup>67</sup> In my account, this shift corresponded to a transition from the first to the second and third strategy of reception. In that sense, these might also be seen as historical, rather than merely theoretical categories.

<sup>68</sup> Kroll (n 9) 113.

<sup>69</sup> See Chen (n 64) 501; Q Gao, ‘政治宪政主义与司法宪政主义’ [‘Political and Judicial Doctrines of Constitutionalism’] in idem, *从非常政治到日常政治* [From Exceptional to Regular Politics] (China Legal Publishing House, Beijing, 2009) 3, 6-7.

<sup>70</sup> Cf. X He, ‘The Party’s Leadership as a Living Constitution in China’ (2012) 72 *Hong Kong Law Journal* 73.

transcends the liberal-illiberal divide, it also prompts us to theorize the impact of conceptual diffusion on the universalizing dynamics of constitutional globalization more generally.

#### IV. Reasserting the body politic: Schmitt and the emergence of Political Constitutionalism in China

The emergence of Political Constitutionalism on the Chinese academic scene is a relatively recent phenomenon. Its origins are too complex to fully account for here. It bears noting, however, that its rise as an academic movement corresponded to institutional changes at the state and party level which were directed against the judicialization drive associated with the major opposing scholarly methodology – Normative Constitutionalism. These changes amounted to what Professor Carl Minzner famously called a ‘turn against law’.<sup>71</sup> On an ideological level, these trends were accompanied by a new state narrative critical of law as being unresponsive to popular needs; the circulation of an infamous ‘Document No. 9’ outlawing the use of certain terminology supposedly associated with Western liberalism (including ‘constitutionalism’);<sup>72</sup> a sustained crackdown on human rights lawyers; and, lastly, a populist turn in judicial politics. Crucially, these political trends under the late Hu and current Xi administration also fostered a sustained state-sponsored criticism of ‘legal formalism’.<sup>73</sup> Somewhat simplified, then, one might say that the emergence of Political Constitutionalism in the pivotal year 2008 was no coincidence and part of a broader political and research agenda against trends toward liberalization.

The scholars associated with Political Constitutionalism tend to imply that, from a programmatic point of view, the text-centered approach championed by Normative Constitutionalism amounts to a hidden liberal reform agenda,<sup>74</sup> particularly a narrowly rights-

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<sup>71</sup> For a critical view of this claim see A Chen, ‘China’s Long March towards Rule of Law or China’s Turn against Law?’ (2016) 4 *Chinese Journal of Comparative Law* 1. For a discussion of the judicialization drive preceding it see T Kellogg, ‘Constitutionalism with Chinese characteristics – Constitutional Development and Civil Litigation in China’ (2009) 7(2) *International Journal of Constitutional Law* 215; T Kellogg, ‘The Death of Constitutional Litigation in China?’ (2009) 9(7) *China Brief*, available at <<https://jamestown.org/program/the-death-of-constitutional-litigation-in-china/>>; R Morrison, ‘China’s Marbury: Qi Yuling v. Chen Xiaoqi – The Once and Future Trial of Both Education & Constitutionalization’ (2010) 2 *Tsinghua China Law Review*, available at <[http://www.tsinghuachinalawreview.org/articles/0202\\_Morris.htm](http://www.tsinghuachinalawreview.org/articles/0202_Morris.htm)>. For discussions of the continuity under the Xi leadership see T Ginsburg and T Zhang, ‘Legality in Contemporary Chinese Politics’ *Virginia Journal of International Law* (forthcoming), available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3250948](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3250948)>; C Minzner, ‘Legal Reform in the Xi Jinping Era’ (2015) 20 *Asia Policy* 4; Peerenboom (n 37).

<sup>72</sup> See <<http://www.chinafile.com/document-9-chinafile-translation>>.

<sup>73</sup> S Seppänen, ‘Anti-Formalism and the Pre-Ordained Birth of Chinese Jurisprudence’ (2018) 4 *China Perspective* 31, 31-3.

<sup>74</sup> See, for instance, D Chen, ‘论中国宪法的根本原则及其格式化修辞’ [‘On the Fundamental Principles and the Rhetorical Format of the Chinese Constitution’] in idem, *宪政与主权* [*Constitutionalism and Sovereignty*] (Law Press, Beijing, 2007) 147, 152.

based understanding of constitutional law. Its openly professed sympathy for the expansion of legal autonomy and judicial review is by some portrayed as an imposition of foreign models undesirable or unfeasible within the Chinese political context.<sup>75</sup> More liberal-leaning scholars of Political Constitutionalism, on the other hand – while not denying the importance of such liberal institutions as such – contend that a normative methodology is prone to be either petty-minded or utopian under current Chinese conditions.<sup>76</sup> All scholars of Political Constitutionalism agree, however, that, rather than being concerned with the technocratic particularities of constitutional interpretation, a shift of perspective toward the political conditions of constitutionalism was much needed in order to ‘remind the people that they are the master of the state and the bearer of constituent power’.<sup>77</sup> The ‘avant-garde’ criticism of mainstream methodology, at the most basic level, thus implied a shift of perspective from the constitutional text to the political conditions under which the constitution evolves and asserts its normativity. In the words of Chen Duanhong, Political Constitutionalism aims at using ‘the political nature of the constitution to expound its normative character’ and to ‘deduce the legal character of the constitution from the political decision under the constituent power of the people’.<sup>78</sup> The resemblance to Schmitt’s dictum that ‘the constitution’s validity is subject to the existing political will through which it is founded’<sup>79</sup> is not a coincidence, as we shall see shortly.

The most elaborate self-description of the movement can be found in an essay by Gao Quanxi.<sup>80</sup> His juxtaposition of the normative and political methodology reveals immediately how deeply the Chinese discussion is entangled in Schmittian terminology. According to Professor Gao, Political Constitutionalism challenges the normative mainstream in the following respects:

<u>Political Constitutionalism</u>	versus	<u>Normative Constitutionalism</u>
i) <i>Realism</i> (现实主义)		<i>Utopianism</i> (理想主义)
ii) <i>Sovereignty / Constituent Power</i> (制宪权)		<i>Judicial Review</i> (违宪审查)
iii) <i>State of Exception</i> (非常时刻)		<i>State of ‘Normalcy’</i> (平常时刻)
iv) <i>Historicity</i> (历史观) of the Constitution		<i>A-Historicity</i> in Interpretation

<sup>75</sup> Chen (n 64) 501 et seq.; S Jiang, ‘Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China’ (2010) 36(1) *Modern China* 12, 41; generally see Seppänen (n 38) 36-42 and 104-33.

<sup>76</sup> Gao (n 69) 47; Q Gao, ‘政治宪法学的兴起于善变’ [‘Emergence and Evolution of Political Constitutionalism’] in idem, *政治宪法学纲要* [*Outline of Political Constitutionalism*] (Central Compilation and Translation Press, Beijing, 2014) 1, 6.

<sup>77</sup> Gao (n 76) 7.

<sup>78</sup> D Chen, ‘宪法的法律性阐释及证立’ [‘Explanation and Demonstration of the Legal Character of the Constitution’] (2016) 10(2) *Tsinghua University Law Journal* [清华法学] 5, 6.

<sup>79</sup> Schmitt (n 26) 22.

<sup>80</sup> Gao (n 76).

v) <i>Contextualism</i> (unwritten political conditions)	<i>Textualism</i> (written constitution)
vi) <i>Organic</i> (有机) Understanding of Law	<i>Mechanical</i> Understanding of Law
vii) Emphasis on the <i>Preamble</i> (序言)	Emphasis on <i>Fundamental Rights</i>

The similarities to Schmitt are striking. Not only was he notorious for his ‘realist’ take on politics and rejection of idealist thinking (i)<sup>81</sup> or his emphasis on sovereign power (ii) and the exceptional (iii); he also built his constitutional theory on an explicitly historical (iv) approach to political concepts<sup>82</sup> and emphasized the political context (v) of adjudicative decisions and legal interpretation in general.<sup>83</sup> It is also striking to note the terminological parallel regarding a supposedly ‘mechanical understanding of law’ and the opposing ‘organic’ approach Gao proposes as a remedy. In *Political Theology*, Schmitt famously writes that:

In the exception, the power of real life breaks through the crust of a mechanism that has become torpid by repetition.<sup>84</sup>

Just as Schmitt depicted Hans Kelsen’s normative theory of law as mechanical and ossified (vi), and his own thought in turn as realistic and true-to-life, Gao and others now apply this charge to Chinese adherents of normative constitutionalism. Lastly, in his constitutional theory, Schmitt explicitly emphasizes the political importance of modern constitutional preambles (vii).<sup>85</sup> This was naturally read with great interest in China, where the legal effect of the preamble of the currently operative Constitution of 1982 was long contested.<sup>86</sup> While in the past the preamble was the only place within the constitutional text where the CCP was explicitly mentioned, last year’s constitutional amendment has brought the ‘leadership of the party’ back into Article 1 of the operative text and thus largely rendered this controversy outdated. Although some have suggested that ‘theoretical production can serve as a kind of proxy for changes in the political line’, it seems exceedingly difficult to determine whether the amendment might reasonably be interpreted as a political victory and institutionalization of the political constitutionalist agenda.<sup>87</sup> It is safe to say, however, that the reception of Schmitt’s constitutional theory has provided a fertile ground for the discursive shifts that have taken place under the auspices of Xi Jinping, including the practical outlawry of many key liberal

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<sup>81</sup> Also see Chen (n 64) 511.

<sup>82</sup> Cf. C Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (6th ed, Duncker und Humblot, Berlin, 1996).

<sup>83</sup> Schmitt (n 18).

<sup>84</sup> *Ibid* 21.

<sup>85</sup> Schmitt (n 26) 25.

<sup>86</sup> See Chen (n 64) 494.

<sup>87</sup> Veg (n 5) 24. Veg suggests with regard to the neo-conservative strand of Political Constitutionalism that ‘[s]everal of their concepts have been translated into new institutional arrangements through the constitutional reform adopted in March 2018.’ *Ibid* 42.

constitutional notions and the corresponding re-merging and integration of party and state organs on an institutional level.<sup>88</sup>

### *Chen Duanhong and the fundamental law of party leadership*

If we had to determine a singular ‘founding act’ of the Political Constitutionalist project, it would most likely be the publication of Professor Chen Duanhong’s 2008 essay ‘On the Constitution as the Fundamental Law and Highest Law of the State’. The influence of Schmitt on Chen is well-known in Chinese academia.<sup>89</sup> Chen’s work is too complex to account for it in its entirety here. In the following, I thus want to focus primarily on Schmitt’s terminological and conceptual impact on Chen and show how Chen is making use of Schmitt to bolster his own theoretical and normative position. Chen was one of the first constitutional scholars to positively relate to Schmitt. Already before his well-known 2008 essay, Chen quoted Schmitt’s distinction between constitution and constitutional law affirmatively in one of his publications, stating that: ‘Every State does have a constitution, no matter whether a document referred to as a ‘constitution’ exists’.<sup>90</sup> Quoting from Schmitt’s constitutional theory, he writes that:

On a purely descriptive level, a constitution can be equated with political unity and the integrated status of institutions in a concrete society.<sup>91</sup>

Against the normative mainstream in Chinese jurisprudence, Chen sought to demonstrate that the adherents of this methodology committed a theoretical fallacy by equating what he calls the ‘highest law’ (高级法) – i.e. the status of the Chinese constitution as being on top of the normative hierarchy of the Chinese legal system – with what he refers to as the five ‘fundamental laws’/principles (根本法) of the Chinese constitutional order, which include (in top-down hierarchical order): the Chinese people under the leadership of the party, socialism, democratic centralism, modernization through (legal-economical) construction, and fundamental rights. Although his discussion of the five fundamental laws is quite complex and goes beyond a mere reception of Schmittian notions, Schmitt’s terminology surfaces at various crucial points – after all, he is being cited explicitly three times in an article containing just 20 footnotes. Chen, *inter alia*, utilizes Schmitt’s distinction between constitution and constitutional law; his idea that a constitution is based upon the legal formalization of a political order which is founded on a friend-enemy-distinction; the characterization of the *pouvoir constituant* as

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<sup>88</sup> Ibid 28.

<sup>89</sup> Cf. Z Li, ‘中国宪法学方法论反思’ [‘Reflections on the Methodological Debate in Chinese Constitutional Scholarship’] (2011) 2 *Chinese Journal of Law* [法学研究] 160, 164; Zheng (n 9).

<sup>90</sup> Chen (n 74) 151.

<sup>91</sup> Ibid.

being an essentially unrestrainable force which manifests itself in ‘sacral moments’ (神圣时刻),<sup>92</sup> albeit always hovering in the background as a latent power (which, by implication, might provide a justification of a possible state of exception); and, lastly, his rejection of judicial review – again, with explicit emphasis to Schmitt’s essay on the *Guardian of the Constitution*.

As it seems to be Chen’s main objective to refute the idea that China’s constitution can be judicialized in any meaningful way, he introduces the distinction between fundamental and highest law in order to show that, while the latter might be judicialized (including the stipulations on fundamental rights), the former *cannot*, since it is the expression of a *factual* political order. In this sense, the ‘derivative’ status of the Chinese constitution as the ‘highest law’ is but an *a priori* conceptualization imposed upon the factual order as expressed in the five ‘fundamental laws’.<sup>93</sup> It is clear that this is but a reproduction of Schmitt’s distinction between constitution and constitutional law in different wording.<sup>94</sup> In a more recent publication, Chen further argues that any purely normative theory of constitutional validity in the line of Kelsen’s *Grundnorm* encounters insurmountable dilemmas:

Just as Schmitt has pointed out, ‘the reason for the validity of a constitution is that it derives from a *pouvoir constituant* (a power or authority), based upon the will of which it is enacted.’ The endpoint for Kelsen is the starting point for Schmitt.<sup>95</sup>

Consequently, Chen urges his readers to consider ‘using the political nature of the constitution to demonstrate its normativity.’ This implies conceiving of constitutions as ‘fundamental decisions’ of a people ‘on their future form of life’.<sup>96</sup> The five fundamental laws, in Chen’s parlance, are the expression of an ‘existential law’ (生存的法), and as such of an underlying ‘political will’ – which is also why they are not eligible for judicialization:

Political existence is an existence of order (结构的存在), constitutional scholarship is a science concerning the order of political existence. Only after the order of political existence is transformed into that of a constitutional existence, can the political life of a people become regular (常态) and permanent. The transformation of the CCP from a revolutionary party to a party in power is in essence this transformation from political to constitutional order. The correct path leads from revolutionary politics (friend-enemy-politics) to political constitutionalism (政治宪政主义), to democracy and the rule of law.<sup>97</sup>

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<sup>92</sup> Chen (n 64) 486.

<sup>93</sup> Ibid 488.

<sup>94</sup> Cf. Li (n 89) 164-5.

<sup>95</sup> Chen (n 78) 20.

<sup>96</sup> Ibid 6.

<sup>97</sup> Chen (n 64) 487.

While it is not clear whether Chen's reference to friend-enemy-politics (敌我政治) is an allusion to Mao or Schmitt – *or both* – his characterization of constitutional scholarship as the study of existential orders demonstrates that he is at least reinterpreting Maoist terminology through a Schmittian lens. Chen makes it blatantly clear that the most important of the five fundamental laws is the leadership of the party – which he also refers to, again quoting Schmitt's *Verfassungslehre*, as China's 'absolute constitution' (绝对宪法):

The so-called absolute constitution refers to the existential political status of an independent and self-determined people, 'the concrete, collective condition of political unity and social order of a particular state'.<sup>98</sup>

The nature of party-leadership as China's absolute constitution also implies that a judicial review of party policies would manifestly violate said absolute constitution.<sup>99</sup> Tellingly, Chen quotes Schmitt as the *spiritus rector* and major counter-voice in his discussion of the judicialization drive in Chinese jurisprudence: 'The specificity of the Chinese question', he reasons, 'equals the description Schmitt once gave of Germany', in that the conflict he described in his essay on *Legality and Legitimacy* – between a rigid normative system of rules which comes into open conflict with the legitimacy of the political will of the sovereign – also characterizes current Chinese jurisprudence.<sup>100</sup> The reason why normativism is incapable of appreciating this absolute constitution of party-leadership, Chen maintains, is that it fails to recognize that any interpretation of China's constitution has to follow 'an existentialist philosophical conception'.<sup>101</sup> Chen also creatively reinterprets the Schmittian distinction between absolute and relative constitution in another way. If, he contends, the distinction between the two remains too strictly fixed, the relative constitution (read: constitutional law) might end up being deprived of its binding force altogether – as it indeed has during the Cultural Revolution. This points to the self-proclaimed mission of Political Constitutionalsists of providing a coherent theoretical framework for party-state-relations. Since the constitutional text itself does not provide a solution to this problem, Chen argues, it is among the tasks of a constructive constitutional theory to elaborate upon it.<sup>102</sup>

However, this refutation of *both* the liberal-leaning normative mainstream – which tends to avoid the question of party-leadership altogether – *and* the radical leftist vision arguing for a reappraisal of the Maoist past – including the Cultural Revolution – is obviously fraught with

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<sup>98</sup> Ibid 494.

<sup>99</sup> Ibid 504.

<sup>100</sup> Ibid 502.

<sup>101</sup> Ibid 500.

<sup>102</sup> Ibid 495.

tension. As noted above, Chen implicitly makes use of Schmitt's notion of sovereignty as a prerogative to decide upon the state of exception, when he writes that:

The absolute character of sovereignty is a premise of constitutionalism, and always remains its latent guarantee.<sup>103</sup>

It is not at all clear – this extends to Jiang Shigong's work as well – how the idea of a principally unrestrained party as the arbiter and wielder of sovereign power can be reconciled with the insistence on the unquestioned legitimacy of the existing order. Chen's vision of Chinese constitutional scholarship as a holistic science which is giving normative validity to a factual political order, one could argue, is at odds with his insistence on absolute party-leadership. This is so because the party may very well become the driving force behind efforts to *undermine* the existing constitutional order, as it has been during Mao's Cultural Revolution – and as it has again become, one might argue, with the de facto abolishment of the reform era principle of collective leadership in the 2018 Constitutional Amendment. I would suggest, however, that the antinomy resulting from these conflicting theoretical premises is not peculiar to Chen, but in fact merely *reproduces* the antinomies present in Schmitt's work. Chen seems to be preemptively addressing this predicament of his theory in his discussion of what is known in the Chinese discussion as a 'benevolent violation of the constitution' (良性违宪). This theorem emerged out of the realization by Chinese jurists that the market reforms of the early reform period in the 1980s were, *strictu sensu*, in violation of the economic constitution at that time. In an effort to reconcile political desirability with legal predictability, the notion of a benevolent violation was thus brought forward.<sup>104</sup> Chen attempts to rationalize the resulting antinomy – traditionally expressed in the Latin dictum *ex iniuria ius non oritur* – by arguing that the economic reforms were in fact a mere *realization* of the fourth fundamental law (i.e. economic-legal modernization) and thus no violation at all.<sup>105</sup>

### *Jiang Shigong and China's party-state constitutionalism*

If Chen was the first prominent constitutional scholar to provide a comprehensive theoretical vindication of party-leadership, Jiang Shigong might be the most eloquent one to have emerged thus far. A professor at Peking University, Jiang has been variously described as an

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<sup>103</sup> Ibid 487.

<sup>104</sup> A classical account is T Hao, '论良性违宪' ['On Benevolent Constitutional Violations'] (1996) 4 *Chinese Journal of Law* [法学研究] 89.

<sup>105</sup> For a criticism of Chen's position see Li (n 89) 165.

‘internationally prominent theorist and scholar’<sup>106</sup> and ‘the leading intellectual warrior for Xi’ism’.<sup>107</sup> While there can be no doubt that Jiang has actively sought the role of a major voice in Chinese legal science supporting the current party-state regime; and while he has sought to explicitly provide theoretical justifications of legal reforms under the Xi leadership, his theoretical merits are contested both within and outside of China – including within the ranks of Chinese Political Constitutionalism itself. Schmitt’s influence on Jiang is articulated most clearly in an excerpt quoted by Ji Weidong. Here, Jiang writes that:

We will never regard the constitution as only a legal document. Why? Because the constitution cannot guarantee itself. The constitution must be ensured by a political power beyond the law. In fact, this problem is precisely the focal point in the debates between Schmitt and Kelsen [...]. As Schmitt said, the major issue of politics is to distinguish between ourselves and the enemy. The problem is not one of ‘freedom’ but one of conquering that enemy. This is the essence of politics, the essence that liberals always dare not face [...]. Only in the critical moments of seizing state power or of life-or-death struggle can we really understand why Schmitt detests the endless dialogue of political romanticists.<sup>108</sup>

All three aspects of Schmitt’s work discussed above are utilized here by Jiang: an anti-liberal reading of the concept of the political, the notion of sovereignty as a political power unbound by law, and a concept of constitutions as being fundamentally a political decision. Just as for Chen, who speaks of the constitution as an ‘existential law’, for Jiang, too, it is infinitely more than a written document. As he puts it, a constitution is a ‘form of life’ (生活方式) and an existential ‘believe’ above which hovers a ‘principle of theological legitimacy’.<sup>109</sup> Jiang and Chen, then, not only make use of many of Schmitt’s core theoretical tenets, they also appropriate his existentialist and iconoclastic language. Whereas this propensity of the Chinese legal ‘avant-garde’ to indulge in existentialist language and what Seppänen calls an ‘ethos of anti-formalism’<sup>110</sup> is certainly worthy of further research, I want to focus here instead on the conceptually more trenchant underpinnings of Jiang’s theory.

Professor Jiang’s core objective in the last decade has been to develop a theory of the complex integration of party and state organs through constitutional principles and conventions. He has done so, firstly, by systematizing a number of uncodified constitutional principles into what he

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<sup>106</sup> LC Backer, ‘Reflections on Jiang Shigong on “Philosophy and History: Interpreting the “Xi Jinping Era” through Xi’s Report to the Nineteenth National Congress of the CCP”’ (2018) 6 *Working Papers Coalition for Peace & Ethics* 1.

<sup>107</sup> D Clark, ‘Jiang Shigong on Xi Jinping and socialism with Chinese characteristics: an empty vessel’, 28<sup>th</sup> May 2018, available at <<https://thechinacollection.org/tag/jiang-shigong/>>.

<sup>108</sup> Ji (n 55) 133.

<sup>109</sup> S Jiang, ‘民主, 如何是好’ [‘How Can Democracy Work?’] (2009) *Dushu* [读书] 20, 24; S Jiang, ‘革命与法治: 中国道路的理解’ [‘Revolution and Rule of Law: Understanding the Chinese Path’] (2011) *Beijing Cultural Review* [文化纵横] 36, 40.

<sup>110</sup> Seppänen (n 73) 31.

calls China's unwritten constitution; secondly, he has provided an account of how this uncodified or unwritten constitution, with the party statute at its core, relates to and interacts with the written constitution of the state. This scheme of interaction includes the relation between the CCP's Central Committee and the National People's Congress (NPC) as the state's highest legislative body, as well as between the party policies/statute and state laws/constitution. Jiang is perhaps most well-known outside China for his article on China's unwritten constitution which was translated into English and published in 2010.<sup>111</sup> While Jiang has made many explicit and implicit references to Schmitt in the past, in this essays he does not explicitly reference Schmitt. Instead, he resorts to his interpretation of the 'uncodified' British constitution to bolster his claim that, indeed, China too has an unwritten constitution which should be regarded as no less important than the written constitutional text itself. His references to sociological jurisprudence and legal pluralism have perhaps kept observers from reading his theory more explicitly along the lines of Schmitt. Jiang argues that, in China's case, the unwritten elements of the constitution are more telling and legally significant in terms of describing China's constitutional reality than the actual written text of the Constitution of 1982. He then goes on to identify four sources for said unwritten constitution: The Party Constitution (党章), Constitutional Conventions (宪法惯例), Constitutional Doctrine (宪法教义) and Constitutional Statutes (宪法性法律). As in the discussion of Chen above, I will not dwell on the intricacies of Jiang's account but rather point out the methodological borrowings from Schmitt.

Firstly, Jiang adopts Schmitt's realist imperative. He states that 'it is well known that Chinese politics does not function completely according to this written constitution – there is a wide gap between constitutional representation and constitutional practice'.<sup>112</sup> Instead of attempting to bridge this gap by implementing what is in fact written in the constitution while neglecting whatever is not – the 'mainstream agenda' – Jiang argues that the problem in fact resides in the *false representation* of China's political reality within its written constitution.<sup>113</sup> A constitution, that is, which was 'imposed' on China by political pressure of an evolving transnational constitutionalism originating in the West.<sup>114</sup> His assertion that 'it can be said that modern history is a narrative of Western nations imposing their way of life on other nations',<sup>115</sup> whether

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<sup>111</sup> Jiang (n 75).

<sup>112</sup> Ibid 13.

<sup>113</sup> Needless to say, this assertion has encountered criticism by many authors. See, for instance, Li (n 89) 164.

<sup>114</sup> Jiang (n 75) 14; also see Liu (n 25).

<sup>115</sup> S Jiang, 'How to Explore the Chinese Path to Constitutionalism? A Response to Larry Catá Backer' (2014) 40(2) *Modern China* 196, 203-4.

persuasive or not, reiterates an anti-liberal and postmodern reading of Schmitt which parts of the Chinese New Left have helped to foster in the early 2000s. The merits of Schmitt's anti-formalism for Jiang's approach are obvious: rather than lamenting the gap between text and implementation, it allows him to instead criticize the 'deviation' of the written constitution from a factual constitutional reality. In this reading, it is not the party-state which is responsible for the failure to live up to the constitution, but rather it was the corrupting influence of a hegemonic Western model which forced the constitutional text to deviate from the organically-grown and healthy party-state structure in the first place. By implication, just as Chen, Jiang inverts the notion of constitutional normativity: it is not reality that diverts from normativity, but the other way around.

Jiang relies on legal pluralism to justify this realist turn. As he asserts, 'in the sea of "non-legal rules", a written and codified constitution is only an isolated island'.<sup>116</sup> However, he does not merely suggest that we might enrich our understanding of China's constitutional reality by taking into account constitutional conventions and customs *as well* – rather, he implicitly asserts a hierarchical ranking in which the written constitutional text can merely 'grant' formal legality to the unwritten constitutional order:

Thus, the fundamental law of China is the leadership of the CCP with multiparty cooperation, and it is that fundamental law which is the foundation of all of China's constitutional institutions. The political function of the written constitution is to affirm and reinforce that fundamental law [...].<sup>117</sup>

Thus, Jiang follows Chen's notion of party leadership as the fundamental law of the Chinese constitutional order, but rather than attempting to distill this principle from the *written* text of the constitution – as Chen does – Jiang extrapolates it from a set of *unwritten* rules which are nonetheless intricately related to the written document. In his framework, the sole function of the written constitution and the state organs established thereunder is to provide a *legal* form for the *political* decisions taken by party organs; its aim is to 'embed the system [...] of the leadership of the party [...] in a legal form'.<sup>118</sup> In a similar vein, Professor Larry Backer has attempted to distinguish between political and administrative powers in the Chinese constitutional structure, vesting the former in party organs and the latter in state organs.<sup>119</sup> The connecting piece between these two legal orders is the preamble of the written constitution which serves as the interpretive framework from which the political meaning of the entire

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<sup>116</sup> Jiang (n 75) 19.

<sup>117</sup> Ibid 23.

<sup>118</sup> Ibid 24.

<sup>119</sup> LC Backer, 'Toward a Robust Theory of the Chinese Constitutional State: Between Formalism and Legitimacy in Jiang Shigong's Constitutionalism' (2014) 40(2) *Modern China* 168, 169.

constitutional order is deduced.<sup>120</sup> In a way, this politics-law-duality merely constitutes a consequent application of Schmitt's distinction between positive and formal constitution onto the Chinese party-state.

In his more recent writings, Jiang has further elaborated on his theory of party-state constitutionalism. Like Chen, he builds on Schmitt's distinction between legislative, jurisdictional and administrative state, and seeks to present China as a category *sui generis*: a rule-of-law-based party-state or party-led-*Rechtsstaat* (政党依法治国).<sup>121</sup> For Jiang, said party-state is best understood in constitutional terms by taking into account different normative documents of legal and non-legal nature, the latter including party policies (政策), guiding principles (方针), and political guidelines (路线). These different norms do not merely coexist in their plurality, but are part of a hierarchical integrity. Just as Chen resolves the tension between party-leadership and statutory stability in favor of the former, Jiang resolves the tension between normative pluralism and state integrity in favor of the latter. As he puts it:

Pluralism is a pluralism within integrity, integrity is an integrity on top of pluralism; pluralism is condensed into integrity, integrity commands pluralism.<sup>122</sup>

Integrity, in this sense, refers to the absolute primacy of party decisions for those state organs applying the law. Following from this, important party policies supersede statutory norms enacted by the state, and decisions by the Central Committee take precedence over those of the NPC.<sup>123</sup> It is interesting in this regard that Jiang speaks of *party* norms as a system of 'higher law'. He thus re-defines Chen's term of the constitution as the highest law – explicitly understood in the sense of Kelsen's *Grundnorm* – and applies it to the party statute instead.<sup>124</sup>

Apart from this structural argument, which Jiang largely shares with Chen, his theory also faces the same charge of normative incoherence and political indifference, since he has to reconcile his realist-structural imperative with an iconoclastic vision of the exceptional, loosely understood as a driving force of historical change. Just like Chen, Jiang seeks to dissolve this tension into an elusive dialectic of revolution and stability. The major problem of Chinese constitutional law, in his view, is not the separation of party and state, but their appropriate interaction and counter-balancing facilitated through the medium of law and party norms.<sup>125</sup>

Both normative orders rely on each other, as they exert different societal functions. While the

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<sup>120</sup> Jiang (n 75) 25.

<sup>121</sup> Ibid 18, 21; Chen (n 64) 503.

<sup>122</sup> S Jiang, '党章与宪法: 多元一体法治共和国的建构' ['Party Statue and Constitution: Building a Pluralistic yet Integrated Rule of Law Republic'] (2015) 4 *Beijing Cultural Review* [文化纵横] 18, 20.

<sup>123</sup> Ibid 21.

<sup>124</sup> Ibid 22, 28.

<sup>125</sup> Ibid 26.

party statute is the codified expression of the ‘historical mission’ of the CCP and its main basis of legitimacy, the state constitution is the expression of a general need for legal stability. This seems to reproduce Schmitt’s distinction between foundational ‘political’ and derivative ‘rule of law’ elements in his *Verfassungslehre* of 1928. At the same time, these two orders express the quasi-metaphysical duality of historical mission and legal consolidation, future and presence.<sup>126</sup> More widely understood, then, the exceptional might be described here as a permanent condition of party leadership, which drives a perpetual dynamic of suspension and reinforcement and propels constitutional change forward. Both dimensions are seen as inherently legitimate by Jiang and thus have to be brought into a harmonic unity. Although the function of the NPC is to ‘tame the prince’, i.e. to ‘confine the power of the CCP’ and ‘to gradually transform the party from a “revolutionary party” to a “ruling party” and then to a “constitutional party”’,<sup>127</sup> it seems to go without saying for Jiang and Chen that during a state of exception in the sense of Schmitt the political power of party organs would prevail over the state organs established under the written constitution. Accordingly, the written constitution is not only amendable but also – albeit only by implication – suspendable, since it is distinct from the underlying constitutional order:

The constitution has undergone several thorough revisions, but the essential nature of the PRC has not changed, because the fundamental law that constitutes China has not changed.<sup>128</sup>

In this respect, Jiang faces the same theoretical predicament as Chen, since he rejects a formalist notion of constitutional violations but does not provide any compensatory criteria for how to distinguish a ‘benevolent’ from a ‘malicious’ violation.<sup>129</sup> Jiang’s alleged ‘value-free stance in historical and empirical research’<sup>130</sup> notwithstanding – these seemingly methodological quarrels are more than mere tinkering with the right analytical method: they entail normative questions of profound importance for the legitimacy of the entire party-state order. Jiang eagerly joins the chorus of those arguing that the real problem of Chinese constitutional development is not the judicialization of fundamental rights but the delimitation of powers between party and state, between the unwritten and the written constitution. He is unable or unwilling, however, to give any viable and explicit criteria for such a delimitation of powers. How can we tell, for instance, unconstitutional party interference from newly arising constitutional conventions? This pertains to the well-known dialectics of newly emerging customary law – *ex iniuria ius*

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<sup>126</sup> Ibid 29.

<sup>127</sup> Jiang (n 75) 25.

<sup>128</sup> Ibid 23.

<sup>129</sup> Cf. Li (n 89) 164.

<sup>130</sup> Jiang (n 75) 15.

*non oritur*: can new norms arise from illegality? If we follow Seppänen's reading, part of the message could be that *there are no such criteria, and deliberately so*; that the very meaning of sovereignty is paradoxically to retain a vague and ambiguous space for maneuvering.<sup>131</sup> Although the party is above the state and the law, Jiang argues, its legitimacy is to a large extent based upon the law and the constitution, which is why it cannot simply disregard them.<sup>132</sup> The binding force of the Chinese Constitution, however, would then be reduced to a mere psychological self-restraint on part of the Chinese leadership. Despite his sophisticated theoretical framework, then, Jiang ultimately has to derive his entire theoretical system from the *factum brutum* of principally unrestrained party power: *ex facto ius oritur*.

### *Gao Quanxi and the critical inversion of the Schmittian paradigm*

If Chen and Jiang are the most vocal defenders of the particularity of China's party-state constitutionalism, then Gao Quanxi is the most vocal critic of it among scholars of Political Constitutionalism. Gao is referred to by Professor Albert Chen as the 'leading theorist of political constitutionalism in China today'.<sup>133</sup> A professor at Shanghai's Jiaotong University and expert on European history of ideas, Gao has had a complex intellectual trajectory.<sup>134</sup> Political Constitutionalism, as he understands it, is both a descriptive and a normative theory of modern constitutional history.<sup>135</sup> In his view, constitutional law in the modern sense begins with the establishment of a new type of political order in the form of nation-states. These founding moments of constitutional law – what Gao also refers to as 'Leviathanian moments' (利维坦时刻) – are understood as manifestations of the revolutionary *pouvoir constituant*. Like Chen and Jiang, Gao agrees that the founding of a new state order is a *creatio ex nihilo*.<sup>136</sup> He also agrees with Chen's statement that constitutional politics depends on the subsequent transition from this revolutionary founding period to what he refers to as 'ordinary' or 'regular' politics. The process of transition to this state of consolidation is described by him somewhat paradoxically as a 'counter-revolution which conserves the fruits of the revolution', or a 'rebirth from restauration'.<sup>137</sup>

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<sup>131</sup> Seppänen (n 38), 87.

<sup>132</sup> Jiang (n 122) 26.

<sup>133</sup> A Chen, 'The Discourse of Political Constitutionalism in Contemporary China: Gao Quanxi's Studies on China's Political Constitution' (2014) 14 *China Review* 183, 183.

<sup>134</sup> Generally see L Wang, '从"现象学"到"法哲学": 一个自由主义者的"政治成熟"' ['From "Phenomenology" to "Legal Philosophy": A Liberal's "Political Maturing"'] in Q Gao, *从非常政治到日常政治* [*From Exceptional to Regular Politics*] (China Legal Publishing House, Beijing, 2009) 319.

<sup>135</sup> Chen (n 133) 195.

<sup>136</sup> Gao (n 69) 18.

<sup>137</sup> *Ibid* 34, 27.

Of course, before turning conservative, a creation is needed, and this creation can be said to be a revolution, a radical revolution; once the *pouvoir constituant* is realized, however, constitutionalism is the restriction of the revolutionary *pouvoir constituant* through the text of the constitution and the practice of constitutional institutions; this is why it is conservative.<sup>138</sup>

Notably, and in contrast to Chen and Jiang, Gao denies that China has succeeded in making this last transition to a stable polity and remains caught in a prolonged period of transition from revolution and ‘exceptional politics’ to constitutionalism and regular politics.

It is evident, at this point, that Gao adheres to an implicit historical teleology.<sup>139</sup> The relation between exceptional and regular politics, for him, is not one of political preference, but the expression of a historical logic of progression.<sup>140</sup> His macro-scope application of the Schmittian dichotomy of norm and exception leads him to the debatable assertion that every modern revolution by necessity leads to a constitutional counter-revolution which restrains the initial radicalism inherent in the founding of a new state.<sup>141</sup> It follows from this that every modern Chinese revolution thus far, including that of 1949, failed to make the subsequent progression toward a stable form of constitutionalism. By this claim, however, he not only seems to adhere to a contestable teleology, he also disregards that the current Chinese constitutional arrangement need not be described as a prolonged transition from revolutionary radicalism to liberal constitutionalism. Indeed, one could content that Chinese party-state constitutionalism in the lines of Chen and Jiang constitutes a relatively stable arrangement and already has made the transition to ‘everyday politics’ – albeit an illiberal one. Also, it seems at least debatable that the PRC today is facing the exact same challenges as European constitutionalism did in the 19<sup>th</sup> century.<sup>142</sup> In Gao’s grand-historical narrative, however, China since the Opium Wars is caught in the Leviathan-like politics of constitution-building and has failed at bringing about a viable and lasting counter-revolution to conserve the fruits of this process.<sup>143</sup> Therefore, the efforts of constitutional scholars must aim at breaking out of this trajectory. Gao’s rejection of the normative mainstream, in contrast to Jiang, follows from his belief that normativism as a methodology is only applicable under fully-developed constitutionalism in the sense of ‘ordinary’ politics. Therefore, he deems the liberal quest for constitutional review of fundamental rights unfeasible under China’s current conditions.<sup>144</sup> Much like Wittgenstein’s

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<sup>138</sup> Ibid 23.

<sup>139</sup> Ibid 9.

<sup>140</sup> Ibid 35.

<sup>141</sup> Cf. Chen (n 133) 204.

<sup>142</sup> Gao (n 69) 41.

<sup>143</sup> Ibid 43.

<sup>144</sup> Ibid 17.

famous metaphor in the *Tractatus* of a ladder one throws away after having climbed up on it, Political Constitutionalism as a methodological premise is ultimately aimed at bringing about its own dispensability in the future.

Gao was one of the first Chinese scholars to take an active part in the Chinese discussion on Schmitt. *Prima facie*, Schmitt merely constitutes a cautionary example for Gao. In that sense, he follows the criticism of Schmitt by scholars such as Ji Weidong. Since China's continued adherence to exceptional politics is part of the very problem Gao purports to resolve, Schmitt, in his view, inhibits rather than enables the transition that is needed in Chinese constitutionalism:

Let us make clear that we do not lack a politics of friend-enemy-distinction. 'Who is our enemy? Who is our friend? That is the primary question of any revolution'. We have known this sentence [of Mao] since we were children; we do not lack decisive revolutionary leaders either. The political power of exceptional politics has already penetrated every aspect of social life in modern China. [...] What we need is precisely liberal equality before the law.<sup>145</sup>

This take on Schmitt, first expressed in 2006, has however shifted subtly in the years that followed. The problem of Schmitt, Gao initially argued, was to solely think from the viewpoint of the exceptional and thus to neglect the merits of procedural elements in liberal constitutionalism.<sup>146</sup> Gao's aim, in other words, is to ultimately transcend Schmitt's friend-enemy-distinction through a transition to full-fledged liberal constitutionalism.<sup>147</sup> Like Chen, he also draws a parallel between the constitutional debates of Weimar Germany and the current Chinese discourse. The early 20<sup>th</sup> century debates surrounding the German *Sonderweg* (德国问题) are mirrored, Gao suggests, in the idea of 'Chinese exceptionalism' today.<sup>148</sup> The significance of Weimar for modern constitutional theory, then, resides in the fact that it was the classical era of contention between judicial and political constitutionalism. In Gao's view, however, the failure of the former was not due to the inherent contradiction of the Republic's constitutional system – as Chen asserts following Schmitt – but due to the political immaturity of the German bourgeoisie, who was unable to hold the various centrifugal forces of the Republic together and provide a viable alternative to the radicalism of both the left and the right.<sup>149</sup> If we read this as a conscious attempt of Gao at avoiding a similar disaster of constitutionally unrestrained politics in China, his rejection of a narrowly textual reading of the Chinese constitution as politically naïve gains currency. Despite having contributed important

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<sup>145</sup> Q Gao, '中国语境下的施米特问题' ['The Schmitt Problem in Chinese Context'] (2006) 94 *Twenty-First Century* [二十一世纪] 119, 128.

<sup>146</sup> *Ibid* 124.

<sup>147</sup> Gao (n 69) 28.

<sup>148</sup> Gao (n 145) 126.

<sup>149</sup> Gao (n 69) 25.

conceptual innovations, Gao reasons, Schmitt ‘has overlooked that, in particular times or decisive political moments of establishing a constitutional order, the [operation of] the constitutional law in everyday politics and its mundane contents can be transformed into a crucial force to restrict sovereign creations.’<sup>150</sup>

It is not surprising, then, that Gao criticizes Jiang and Chen for their uncritical appropriation of Schmitt. According to Gao, the authors Chen is primarily referring to – Hobbes, Rousseau, and Schmitt – are merely theorists of the *political*, but not of *constitutionalism*. The inherent danger of constitutional politics is that this transition fails and the ‘latent force’ of the *pouvoir constituant* is being perpetuated, as it is implicitly the case in the theories of Chen and Jiang. This transition instead requires an ‘evolutionary path from “existential law” to the “law of liberty”’, as Gao puts it with reference to Chen.<sup>151</sup> Despite admitting that he is largely in agreement with Chen and Jiang from a methodological perspective, therefore, Gao distances himself from their political views:

In my words, the difference between us is one of “left-wing” and “right-wing” political constitutionalism; our differences, at a certain level, are much more pronounced than the differences between me and the normative and interpretation-based [school of] constitutionalism.<sup>152</sup>

This not only illustrates that Political Constitutionalism should best be understood as a weak methodological consensus which is capable of entertaining vastly different worldviews, but also that the ideological rift that Schmitt has left in current Chinese constitutional debates transcends the methodological controversy between the normative and political approach:

Of course, as I have pointed out repeatedly, political constitutionalism is but a problem awareness (问题意识) and a methodology of constitutional research. Being an academic movement does not imply that our understanding of the current Chinese constitutional system is identical [...]. The problem is more complex. For instance, Chen Duanhong’s [account of] the five fundamental laws [...] and their inherent hierarchy does exhibit a certain normative compatibility with the ideology of mainstream constitutional scholarship; the view of Jiang Shigong concerning China’s unwritten constitution does defend the party-state theory of orthodox constitutional scholarship from a new perspective; my view, on the other hand, has stressed the normativity of political constitutionalism from the beginning on [...].<sup>153</sup>

It is revealing to look more closely at Gao’s criticism of Chen’s and Jiang’s theoretical endeavors. Chen’s writings, Gao suggests, exhibit a curious duality of radicalism and conservatism. On the one hand, he follows Rousseau’s radically democratic vision of the

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<sup>150</sup> Ibid 26.

<sup>151</sup> Gao (n 76) 5.

<sup>152</sup> Ibid 4-5.

<sup>153</sup> Ibid 3. Also see Gao (n 69) 50.

popular *volonté general* as the sole basis of legitimate constitutional politics; on the other hand, his vision of the five fundamental laws ‘obfuscate the development of the liberal spirit inherent in China’s constitution. This [inclination to] defend the existing system via constitutional theory is even more pronounced in Jiang Shigong’s sociological constitutionalism.’<sup>154</sup> It goes without saying that the Janus-face of radical popular sovereignty and an unconditional justification of the existing state order also characterizes Schmitt’s work. Gao maintains that Chen is unable to resolve the latent tension between the notions of fundamental and highest law within his theoretical framework.<sup>155</sup> Further, by absolutizing the difference between socialist and capitalist constitutions through the use of Schmittian terminology, Chen unconsciously reproduces the friend-enemy-distinction that he purported to overcome.<sup>156</sup> Moreover, Jiang, too, is mistaking when he instead turns to the distinction between written and unwritten constitution, since the important question is how to restrain the political and not whether this restraint is attained through a written document or unwritten customs.<sup>157</sup> His final and most devastating judgement on Chen’s and Jiang’s work, however, is that they have completely abandoned the normative potential of constitutional scholarship in favor of a politics of might:

In my view, the understanding and explication of Chen and others concerning the political nature of the constitution is [following] a realist vision of the political (现实主义的政治学), it is [a form of] political authoritarianism, not political normativism. Thus, they heavily distort the scholarly pursuit of political legitimacy and define constitutions with resort to power politics or a politics of might, while completely depriving the political of its normative character.<sup>158</sup>

I have indicated above that Gao’s reception of Schmitt might be called a conceptual one, since he adopts some of his core notions while also critically re-interpreting them. To be sure, the term conceptual Schmittianism could indeed be applied to Chen and Jiang as well, in the sense that they, too, only selectively employ Schmittian concepts in their theory of Chinese party-state constitutionalism. Like Gao, Chen Duanhong concludes that the normative methodology is not inappropriate as such, but merely inapt during times of fundamental social transition.<sup>159</sup> The key difference, however, is a performative one, in that they employ Schmitt in an openly *apologetic* fashion, whereas Gao instead relies on an *inverted reading of Schmitt* for his normative *critique* of Chinese party-state constitutionalism. In my view, it seems fair to say, then, that Jiang and Chen go beyond a mere conceptual reception of Schmitt by endorsing some

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<sup>154</sup> Gao (n 76) 7.

<sup>155</sup> Gao (n 69) 52.

<sup>156</sup> Ibid 49.

<sup>157</sup> Ibid 50.

<sup>158</sup> Ibid 16.

<sup>159</sup> Chen (n 64) 500.

of his core *normative* tenets, such as his quasi-metaphysical apology and sacralization of the *factual*. In Gao's words:

His [i.e. Chen's] politics is the politics of Machiavelli, Hobbes, and Schmitt, it is a modern version of [the view that] 'the existing is rational' (存在即合理).<sup>160</sup>

Chen and Jiang do not deny the importance of a normative perspective altogether. Their normativism, however, is fully derivative – it follows directly from and is subject to their realist imperative, which, in Gao's view, deprives it of any critical capacity.<sup>161</sup>

Nonetheless, Gao's own theoretical outlook remains deeply entangled in Schmittian concepts. This is evident if we just consider Gao's basic claims. In his historical narrative of modern Chinese constitutional politics, as Zheng Qi rightly noted, 'Gao obviously absorbs Schmitt's dualism between the constitution and constitutional law and that of state of exception and normalcy'.<sup>162</sup> In a foundational essay on political and judicial constitutionalism, Gao implicitly acknowledges that he partly owes his conceptual framing to Schmitt when he states that 'Carl Schmitt, although not a liberal theorist of constitutionalism, still demonstrates a deep understanding of modern constitutional institutions.'<sup>163</sup> When discussing alternatives to the judicialization of constitutional law, Gao, like Chen, cites Schmitt's *The Guardian of the Constitution* as the main counter-voice against constitutional review among Western constitutional theorists.<sup>164</sup> Gao thus dissociates himself both from the programmatic aims of neo-conservative statist and from the methodological assumptions of most Chinese liberals. His view is essentially liberal-traditionalist or liberal-conservative, as he points out.<sup>165</sup> On the one hand, he criticizes present-day liberalism, including in its Chinese form, for being blind to the political.<sup>166</sup> On the other hand, as Wang Lingyun puts it, Gao drew a decisive political lesson from reading Schmitt that led 'his own liberal standpoint toward "political maturity"'.<sup>167</sup> Perhaps, then, the most fundamental lesson of his critical-liberal reading of Schmitt is that one must remain aware of the political conditions under which constitutional law operates.<sup>168</sup>

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<sup>160</sup> Gao (n 69) 17.

<sup>161</sup> Also see Li (n 89) 165.

<sup>162</sup> Zheng (n 9) 47.

<sup>163</sup> Gao (n 69) 5.

<sup>164</sup> Ibid 6 (in footnote 1).

<sup>165</sup> Gao (n 76) 30.

<sup>166</sup> Gao (n 69) 36.

<sup>167</sup> Wang (n 134) 347.

<sup>168</sup> Zheng Qi in particular interprets Schmitt as a thinker of political and democratic transition. Unlike Gao, however, who adopts Schmitt's ideas as a mere cautionary example, Zheng argues for looking at him more positively as a theorist who provides helpful insights into exceptional politics during political transition periods. See Zheng (n 34) 111 et seq. and passim. Also see Böckenförde (n 2) for a post-War German take on this.

## V. Conclusion: Chinese Schmittianism and the many faces of constitutional globalization

*The very possibility* of such a critical-liberal reading, I would suggest, once more reveals the Janus-faced role of Schmitt in current Chinese constitutional discourse. The various personae of Schmitt in contemporary China range from his status as the *bête noire* of liberal scholarship, via the romantic projections of avant-garde scholars who see in him a potentially subversive force and an eloquent critic of the Western liberal order, to the ‘Schmitt-informed’ realist imperative of the critical-liberal agenda. Notably, the clear ideological division lines which were so salient in the early Chinese discussion on Schmitt seem to have slowly given way in in the late 2000s to a more diverse treatment of him as an intellectual figure worthy of scholarly interest. Along with an ever-growing body of literature, this resulted in something more closely resembling ‘Schmitt-scholarship’ than ‘Schmitt-fever’. On the other hand, this shift from ideological controversy to conceptual diffusion coincided, as shown above, with a more thorough penetration of Schmittian terminology into the deeper layers of Chinese legal discourse. This in turn significantly contributed to the formation of Political Constitutionalism as a scholarly agenda. Another consequence is that the clear-cut ideological divisions of the early reception period are now becoming ever-more blurred. This led to the paradox condition that, while Schmitt was more and more treated as a historical figure instead of an ideological mask, his conceptual impact on scholarly discussions became not only more profound but also increasingly elusive and harder to track.

I would further argue that this dynamic presents a paradigmatic example of how constitutional ideas and concepts not only ‘migrate’ across borders,<sup>169</sup> but also how they are subsequently re-interpreted and re-defined in ways unintended by their creators. One scholar has referred to this phenomenon as the ‘pliability’ and ‘plasticity’ of constitutional ideas in the process of their global spread.<sup>170</sup> If anything, the Chinese reception of Schmitt confirms this pliability characterizing the conceptual migration of legal ideas. On the other hand, this phenomenon is but a consequence of the increasingly eclectic and globalized character of Chinese Political Constitutionalism itself, which merges different intellectual traditions into what Seppänen calls an ‘anti-formalist sensibility’. This theoretical *mélange* not only implies a turn to historical analysis, a postmodern affinity for methodological pluralism, and a critical sensitivity to ideological questions – but also a self-conscious absorption of the iconoclastic language of the

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<sup>169</sup> S Choudhry, ‘Migration as a new metaphor in comparative constitutional law’ in idem (ed), *The Migration of Constitutional Ideas* (CUP, Cambridge, 2006) 1.

<sup>170</sup> A Shinar, ‘The ideologies of global constitutionalism’ (2019) 8 *Global Constitutionalism* 12, 19.

20<sup>th</sup> century intellectual avant-garde. The reception of Schmitt by constitutional theorists like Chen Duanhong, Jiang Shigong, or Gao Quanxi represents, I would suggest, a particular scholarly strategy of coming to terms with the challenges posed by legal globalization in contemporary China. All three read Schmitt as a voice for the *reassertion* of China's constitutional particularity in the face of a Western-led legal globalization. However, through their reading they arrive at radically different conclusions about China's constitutional future. The resulting controversy over the right way of approaching Schmitt provides a lens through which we can perceive the formation, evolution, and subsequent fragmentation of Political Constitutionalism, and Chinese legal theory more generally, in recent decades. In this sense, the Chinese reception of Schmitt and the genealogy of Political Constitutionalism overlap and coalesce. However one chooses to assess this condition – it surely is indicative of the degree of the globalization of legal theory today that the contested work of a 20<sup>th</sup> century German jurist – who is rarely discussed in his native country anymore – now provides a conceptual frame through which we can interpret discursive changes in 21<sup>st</sup> century Chinese jurisprudence.

Moreover, the Chinese Schmitt debate also sheds light on the problematic assumption of uniformity that still guides many discussions about Chinese legal reforms. This can also be witnessed regarding China's recent constitutional amendment which, despite the leaden silence with which it was largely greeted in the Chinese scholarly community, has also sparked implicit and more open forms of contestation that call into doubt the picture of a monolithic Chinese discourse marching toward an officially-sanctioned notion of the rule of law. To be sure, very few scholars dare to openly criticize recent policy shifts under Xi's leadership. While Chen Duanhong seems to have taken an affirmative position,<sup>171</sup> Gao Quanxi was the only major scholar of Political Constitutionalism to question the integration of party and state organs and stress the importance of further increasing the power of the NPC and moving toward the institutionalization of judicial review.<sup>172</sup> As he puts it, 'today's task' cannot consist in 'overturning the operative constitution, or adopting a new one, but in fully implementing the content and spirit of the current constitution'.<sup>173</sup> On the other hand, there are certainly few scholars who endorse the recent amendment as openly as Jiang Shigong, who has also begun to elaborate a more explicitly normative theory of the Chinese model as a contender to an US-led legal globalization. This also implied distancing himself from Gao and others who advocate a

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<sup>171</sup> D Chen, '解读修宪' ['Reading the Constitutional Amendment'], 31st January 2018, available at <[https://www.guancha.cn/ChenDuanHong/2018\\_01\\_31\\_445247.shtml](https://www.guancha.cn/ChenDuanHong/2018_01_31_445247.shtml)>.

<sup>172</sup> Q Gao, '宪法的生命在于实施' ['The Life of the Constitution Resides in its Implementation'] (2018) 170 *Democracy and Science* [民主与科学] 6, 8.

<sup>173</sup> *Ibid* 7.

form of Chinese nationalism checked by an American-type liberalism.<sup>174</sup> Whatever one thinks of the soundness of Jiang's theoretical frame, his normative ambitions are grand:

[...] the 'Chinese solution' to modernisation engineered in the Xi Jinping era clearly seeks to [...] create a developmental path to modernity different from that of Western civilisation. This means not only the end to the global political landscape of Western civilisation's domination since the age of great discoveries, but also means breaking the global dominance of Western civilisation in the past 500 years in the cultural sense, and hence ushering in a new era in human civilisation.<sup>175</sup>

For Jiang, there can be no doubt that such a new era in human civilization also requires an 'uncompromising struggle' on a civilizational scale.<sup>176</sup> In his recent theoretical turn from a mostly defensive vindication of the Chinese party-state against outside influences to a more assertive propagation of its merits on a global scale, Jiang has also begun referring to Schmitt's works on international law, including his elaboration of the notions of *Nomos* and *Großraum*.<sup>177</sup> This follows Jiang's long-standing effort at elaborating a grand historical narrative of Western-led legal expansion which is about to come to an end, before likely being replaced by a Chinese form of legal modernity. This vision not only strikingly contrasts with Gao Quanxi's view that there simply is no indigenous Chinese legal modernity to draw on or propagate;<sup>178</sup> it also indicates that Chinese Political Constitutionalism, and by implication the Chinese reception of Carl Schmitt, has entered a new stage of confidence and assertiveness.

## Acknowledgements

Research for this article was funded by the Fritz Thyssen Foundation (grant no. 10.16.2.008RE).

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<sup>174</sup> Jiang (n 64) 18. I cite here from the English translation of Jiang's text by David Ownby which is available at <<https://www.thechinastory.org/cot/jiang-shigong-on-philosophy-and-history-interpreting-the-xi-jinping-era-through-xis-report-to-the-nineteenth-national-congress-of-the-ccp/>>. References are to the page numbers of the original Chinese version. This criticism was reciprocated by Gao (n 172) 6.

<sup>175</sup> Jiang (n 64) 23.

<sup>176</sup> Ibid 25.

<sup>177</sup> S Jiang, '陆地与海洋: "空间革命"与世界历史的"麦金德时代"' ['Land and Sea: "Spatial Revolutions" and the "Mackinder Age" of World History'] (2018) 6 *Open Times* [开放时代] 103, 115.

<sup>178</sup> Q Gao, '三十年法制变革之何种"中国经验"' ['What is the "Chinese experience" after 30 Years of Legal Reform?'] in idem, *从非常政治到日常政治* [From Exceptional to Regular Politics] (China Legal Publishing House, Beijing, 2009) 55, 68.