

Penn State Journal of Law & International Affairs

Volume 8 | Issue 1

May 2020

Chinese Receptions of Carl Schmitt Since 1929

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ISSN: 2168-7951

Recommended Citation

Ryan Martinez Mitchell, *Chinese Receptions of Carl Schmitt Since 1929*, 8 PENN. ST. J.L. & INT'L AFF. 181 (2020).

Available at: <https://elibrary.law.psu.edu/jlia/vol8/iss1/8>

The Penn State Journal of Law & International Affairs is a joint publication of Penn State's School of Law and School of International Affairs.

Penn State
Journal of Law & International Affairs

2020

VOLUME 8 NO. 1

**CHINESE RECEPTIONS OF CARL
SCHMITT SINCE 1929**

*Ryan Martínez Mitchell**

ABSTRACT

In recent years, an increasing number of Chinese scholars of law and politics have found inspiration in the works of the influential conservative German legal and political theorist Carl Schmitt (1888-1985). Embodying a larger shift away from orthodox debates framed on the opposition of state Marxism and Anglo-American liberalism, Schmitt's views have broadened the scope of discourse on issues such as the Communist Party's role in governance, judicial constitutionalism, economic systems, and China's place in international order. This article assesses Schmitt's role in current debates as part of a longer history of engagements that began during the Nanjing Decade (1927-1937), but was interrupted due to Schmitt's persona non grata status during the Cold War. For the first time putting recent discourse in the context of earlier (now obscure) receptions by Chinese intellectuals, the article shows that Schmitt's thought has long provided a conceptual vocabulary useful for reframing matters of public law and political economy.

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I. INTRODUCTION

The German legal and political theorist Carl Schmitt (1888-1985) is widely regarded as one of the most incisive modern critics of liberalism. Considered by some as the “Hobbes of the 20th century,”¹ his thoughts continue to generate new applications and responses worldwide, particularly when fundamental tenets of mainstream liberal thought, such as representative government, universal human rights, judicial review, or the rule of law, are called into question. As a historical personality, Schmitt’s reputation has long been tarnished by his opportunistic embrace of, and legal contributions to, the Nazi regime that took power in Germany after 1933 (and in which his internal enemies successfully marginalized his political influence by 1936).² However, his theoretical work remains highly influential across a wide variety of scholarly disciplines, despite the opposition which it often generates due to these associations. Now, just as during his life, even those who fundamentally disagree with Schmitt’s concepts and premises often find themselves compelled to engage with them.

Moreover, while Schmitt’s views were for the most part developed as an internal critique of Western modernity steeped in his own political, legal, and social context, he has also had a strikingly large and growing impact in intellectual discourse beyond Western Europe and North America.³ In relation to topics such as the nature of politics, sovereignty and international law, the function of executive power, et

¹ See, e.g., HELMUT SCHELSKY, THOMAS HOBBS: EINE POLITISCHE LEHRE [THOMAS HOBBS: A POLITICAL DOCTRINE] 5 (1981); CARL SCHMITT, THE LEVIATHAN IN THE STATE THEORY OF THOMAS HOBBS: MEANING AND FAILURE OF A POLITICAL SYMBOL, back cover (G. Schwab trans., 2006) (1938).

² See REINHARD MEHRING, CARL SCHMITT: A BIOGRAPHY, 346–48 (2009).

³ See, e.g. Shiyake Masanori, *Zur Lage der Carl Schmitt-Forschung in Japan* [On the State of Carl Schmitt Research in Japan] in COMPLEXIO OPPOSITORUM: ÜBER CARL SCHMITT 491–502 (Helmut Quaritsch ed., 1988); Bongkun Kal, *Carl Schmitts Einfluß auf das koreanische Verfassungsleben* [Carl Schmitt’s Influence on the Life of the Korean Constitution] in *id.* at 503–07; Vamireh Chacon, *Die Rezeption Carl Schmitts in Brasilien* [Carl Schmitt’s Reception in Brazil] in SCHMITTIANA V: BEITRÄGE ZU LEBEN UND WERK CARL SCHMITTS 305-313 (Piet Tommissen ed., 1996); Maria Engström, *Contemporary Russian Messianism and New Russian Foreign Policy*, 35 CONTEMP. SECURITY POL’Y 356, 356–79 (2014); Stefan Auer, *Carl Schmitt in the Kremlin: The Ukraine Crisis and the Return of Geopolitics*, 91 INT’L AFF. 5, 953, 953–68 (2015).

al., Schmitt's critiques of liberal universalism have ironically sparked an ever more universal interest.

The phenomenon of "Schmitt in China" has recently drawn increased attention among Western scholars.⁴ Meanwhile Chinese intellectuals themselves have been discussing, with varying opinions, a "Schmitt Fever" among their colleagues since at latest 2006.⁵ Since the turn of the 21st century, it has become widely recognized that Schmitt has a special appeal for Chinese intellectual audiences. cursory searches of major Chinese academic databases turn up hundreds of new articles per year that mention Schmitt by name, as well as others that clearly display his influences, for example, via discussion of concepts such as "political theology" (*Politische Theologie*; *zhengzhi de shenxue* 政治的神学)⁶ or the "state of exception" (*Ausnahmezustand*;

⁴ For helpful background regarding some legal and political factors associated with the most recent wave of attention to Schmitt in China, see Flora Sapio, *Carl Schmitt in China*, THE CHINA STORY (Oct. 7, 2015), <https://www.thechinastory.org/2015/10/carl-schmitt-in-china/>; Charlotte Kroll, *Reading the Temperature Curve: Sinophone Schmitt-fever in Context and Perspective in CARL SCHMITT AND LEO STRAUSS IN THE CHINESE-SPEAKING WORLD: REORIENTING THE POLITICAL*, 103–19 (Kai Marchal and Carl K.Y. Shaw eds., 2017); Sebastian Veg, *The Rise of China's Statist Intellectuals: Law, Sovereignty, and 'Repoliticization'*, 82 CHINA J. 24, 2345– (2019).

⁵ See especially the April 2006 issue of the Hong Kong-based journal *Twenty-First Century* (Ershiyi Shiji 二十一世紀), which opens with a section comprised of four articles "Discussing 'Schmitt Fever in China'" (*Lun "Shimite Re" zai Zhongguo* 论「施米特热」在中国). The phrase "Schmitt Fever" (*Shimite Re* 施米特) is a variant of a standard expression used to describe academic trends, e.g. "Weber Fever" (*Weibo Re* 韦伯热). In fact, "Schmitt Fever" had already been discussed by Chinese scholars as early as 2000, but this was primarily in reference to the upsurge in interest in Schmitt studies in the West. 孙伟 [Sun Wei], "施密特" 敌友政治观" 的三种诠释 [*Three Interpretations of Schmitt's Friend-Enemy Definition of the Political*], 5 青海师范大学学报 (哲学社会科学版) [J. QINGHAI NORMAL U. (PHIL. AND SOC. SCI. ED.)], [page numbers] (2000) ("[A]lthough Carl Schmitt is known to very few people in China, the 'Schmitt Fever' in the West is flourishing"); 曹卫东 [Cao Weidong], 领袖与思想家 [*Leaders and Thinkers*], 3 读书 [DUSHU] 114–24 (2001); 刘小枫 [Liu Xiaofeng], 施密特与政治哲学的现代性 [*Schmitt and the Modernity of Political Philosophy*], 浙江学刊 [ZHEJIANG ACADEMIC J.] [page numbers] (2001) (noting that "[Jürgen] Habermas has reacted to the 'Schmitt fever' of the English-speaking world with profound alarm[.]").

⁶ CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab trans., 2010) (1922).

lìwài zhuàngtài 例外状态).⁷ As in the West, these references span a number of fields from law and politics to philosophy, comparative literature, history, and other subjects in the humanities.

Much in-depth engagement with Schmitt in the areas of political and legal theory has often tended to reflect views emphasizing the paramount importance of state and Party authority (albeit diverging in how that authority is more concretely defined).⁸ At the same time, however, many discussions of Schmitt's ideas are less directly polemical, instead simply conducting legal analysis or comparative political studies via the prism of his ideas, for example, his conception of sovereignty as the power to decide upon the state of exception.⁹ Even some scholars calling for democratic reforms or a reduction in Party interventionism have made use of his ideas in seeking to develop their proposals while avoiding stereotyping as imitators of Western norms.¹⁰

Moreover, Schmitt's later international thought, as opposed to his earlier constitutional law writings, is not easily confined to ideological classifications oriented around dichotomies between liberalism and statism or authoritarianism. His writings on the origins of "Europe" as a political-spatial entity have stimulated critical scholarship on colonial and imperial legal history. These writings are now also finding keen readers among intellectuals who see in China's rise a possible new "spatial revolution" of the world.¹¹ Given these emerging readings, it is possible that Schmitt's greatest impact in China could ultimately lie less in domestic affairs than those concerning the

⁷ *Id.* at 1.

⁸ See section IV.A. *infra*.

⁹ *Id.*

¹⁰ See QI ZHENG, CARL SCHMITT, MAO ZEDONG AND THE POLITICS OF TRANSITION (2015) (arguing that Schmitt's thought is best interpreted as problematizing how an "exceptional" polity can transition into a state of order and normality, implicitly defined as a significant reduction in the Party's direct political control over the legal organs of the state).

¹¹ Cf. Carl Schmitt, *Die Raumrevolution: Durch den totalen Krieg zu einem totalen Frieden* [*Spatial Revolution: Through Total War to Total Peace*] in STAAT, GROBRAUM, NOMOS: ARBEITEN AUS DEN JAHREN 1916-1969 (Günter Maschke ed., 1995) (1940).

organization of Asia's "great space" (*Großraum*; *Da Kongjian* 大空间) or the global spatial order (*Raumordnung*; *Kongjian Zhixu* 空间秩序).¹²

Of course, it will only become clear in retrospect which of the diverse Chinese readings of Schmitt leaves the most significant legacy. However, a more nuanced understanding of his impact in China today might be gained by paying attention to the broad variety of engagements with Schmitt's thought, as well as by examining the historical context of his Chinese receptions. As this article will show, Schmitt has had notable Chinese readers and a role (if until around 2000 usually only a very minor one) in Chinese arguments on law and politics since 1929 at the latest. Even as he was developing his ideas during the Weimar and Nazi periods, some leading intellectuals were engaging with these ideas and translating them into the Chinese context—with their own elaboration and questioning. While it would be a mistake to attribute much influence to Schmitt during most of the twentieth century (especially given that his work was primarily known only within narrow academic circles) his previous receptions may nonetheless help to illuminate debates that have emerged since the beginning of "Schmitt Fever" in the early 2000s.

The first section below will examine the occasional engagements with Schmitt's theory of leading intellectuals during the Republic of China's so-called "Nanjing Decade" (1927-1937). The second section will examine how more marginal—but still influential—intellectual currents, including members of China's 1930s fascist movement and pro-Japanese wartime collaborators, at times found support for their views in Schmitt's work. The third section will address the subsidence of interest in Schmitt in the postwar period in both the People's Republic of China ("PRC") and under the Republic of China ("ROC") regime on Taiwan, until his resurgence on both sides of the Strait in discussions of the 1980s-1990s. Finally, the last

¹² See 方旭 [Fang Xu], 以大空间秩序告别普世帝国 [Saying Farewell to Universal Empire with a *Großraum* Order], 开放时代 [OPEN TIMES] 4 (2018); 刘小枫 [Liu Xiaofeng], 欧洲文明的"自由空间"与现代中国——读施米特《大地的法》劄记 [European Civilization's "Free Space" and Modern China: A Reading of Carl Schmitt's *Der Nomos der Erde*], 1 中国政治学 [CHINESE POLITOLOGY] 2 (2018). These and other related readings of Schmitt's international thought are the subject of section IV.C. *infra*.

section will review key features of Schmitt's role in PRC discourse over the past two decades, first in domestic debates on law and political economy, and, most recently, in relation to international law and geopolitics.

II. EARLY ENGAGEMENT AND CRITIQUE

A. Germany, China, and the Life of States

In a diary entry dated July 19, 1931, Carl Schmitt refers to a visit by “a Chinese [student] that [Rudolf] Smend graduated . . . Dauling Hsü; a handsome, clever, and likable man.”¹³ This student, now often referred to via the standard Pinyin romanization of his Chinese name, Xu Daolin 徐道邻 (1907-1973),¹⁴ was both one of the earliest Chinese public intellectuals to engage with Schmitt's thought and one of those who did so most intensively. Xu's own unique path as a member of one of China's most elite families, as an influential scholar, and then as a politician (and back again) would give him cause to reflect on Schmitt's ideas at various points. For several years after 1932 he was a high-level state official, diplomat, and close associate of Chiang Kai-shek 蒋介石 (1887-1975). After 1949, Xu would head to Taiwan with his family, before moving to the United States for the last chapter of his life.¹⁵

¹³ CARL SCHMITT, *TAGEBÜCHER 1930-1934*, 125 (Wolfgang Schuller ed., 2010) (“um 1 kam der Chinese Dauling Hsü . . . ein schöner, kluger, sympathischer Mann.”).

¹⁴ Xu is also referred to at times by the German-style romanization of his name that he favored, Hsü Dau-lin, or by the English-style romanization Hsu Tao-lin, among other variations.

¹⁵ See, e.g., entry on Xu Daolin in 何勤华 [HE QINHUA], 中国法学史 [HISTORY OF CHINESE LEGAL STUDIES] VOL. 3 706 (2006); 陈新宇 [Chen Xinyu], 先哲已逝, 典范永存——缅怀徐道邻先生兼评《中国法制史论集》 [The Great Sage Has Passed, The Model Is Preserved Forever: Recalling Xu Daolin and Commenting on his Essays on Chinese Legal History], 4 政法论坛 [TRIB. POL. SC. & L.] 178 (2007). See also BIOGRAPHICAL DICTIONARY OF REPUBLICAN CHINA VOL. 2 143-46 (Howard L. Boorman and Richard C. Howard eds., 1968). See also 徐州走出的民国宪法学先驱 [A Pioneering Legal Scholar of the Republic of China from Xuzhou], 徐州日报 XUZHOU DAILY (Nov. 15, 2014).

Xu was born as the third son of the warlord Xu Shuzheng 徐树铮 (1880-1925),¹⁶ who was influential in the “Anhui Clique,” a leader of its political wing, and as a general led the occupation of recently independent Mongolia in an ultimately failed attempt at reconquest between 1919-1921. The elder Xu provided his son with an extensive modern education (including in the German language) by private tutors, while acting as the right-hand man of the leader of the Northern Chinese regime, Duan Qirui 段祺瑞 (1865-1936). Duan and the Anhui Clique suffered several reversals of fortune against their rivals during the early 1920s, however, and the elder Xu was dispatched on extended visits to Europe in part due to these factional struggles. Xu Daolin accompanied his father during several of these trips, and arrived in Germany with his father in 1924 to pursue higher level studies there. Upon the latter’s return to China the following year, he was assassinated upon the orders of the rival warlord Feng Yuxiang 冯玉祥 (1882-1948).¹⁷

Xu thus interrupted his studies to return to China for his father’s funeral, coming again to Germany in 1926 and studying over the following years in Heidelberg, Frankfurt, and Geneva.¹⁸ In 1928, he then entered the Friedrich-Wilhelms-Universität in Berlin as a doctoral candidate in law, working with the legal theorist Rudolf Smend (1882-1975), who was one of Schmitt’s longtime friends and benefactors.¹⁹ The topic of his doctoral thesis was “[The] Rigid and Flexible Constitution and Constitutional Change” (*Starre und biegsame Verfassung und Verfassungswandlung*).²⁰ Eventually, following his

¹⁶ Xu Daolin would later write a collection of his father’s writings with additional biographical material, in which he also recounts some details of his early life. 徐树铮 [XU SHUZHENG], 徐树铮先生文集年谱合刊 [COLLECTED WRITINGS, LIFE, AND PUBLICATIONS OF XU SHUZHENG] (徐道麟 [Xu Daolin] and 徐樱 [Xu Ying] eds., 1962).

¹⁷ *Id.*

¹⁸ *Id.* at 27.

¹⁹ Schmitt owed in part one of his own major career advancements, his appointment to the University of Bonn in 1921, to Smend’s appreciation of his books *Political Romanticism* (1919) and *Dictatorship* (1921). See Mehring, *supra* note 2, at 105–16.

²⁰ Hartmut Walravens, *Hsü Dau-lin 徐道鄰 (1906–1973) im Briefwechsel mit Hellmut Wilhelm [Hsü Dau-lin’s Correspondence with Hellmut Wilhelm]*, NOAG

successful defense of the thesis on August 8, 1931 and receipt of the Dr. Jur. degree, this project would be published with De Gruyter as the well-received *Die Verfassungswandlung* (1932), which to this day is regularly cited in (particularly German and Latin American) constitutional scholarship.²¹

Xu arrived in Berlin at a time when Smend and Schmitt were particularly engaged with each other's work.²² The two shared a commitment to what could be termed existential or subjective forms of constitutionalism, as opposed to the positivism or legal formalism associated with figures such as the Austrian legal scholar Hans Kelsen (1881-1973).²³ However, they differed as to some of the key characteristics of constitutions and their role in the life of the state. In Schmitt's depiction, the constitution of a state was based on the concrete form of existence of that state's people, taking into account both the basic desired structure of its social and cultural way of life and its inherent distinctiveness from outsiders and alien groups. Because non-members could in the extreme case always turn into existential threats, they had to be regarded as potential enemies and as different in character from the in-group. This binary classification, the "Friend-

(NACHRICHTEN DER GESELLSCHAFT FÜR NATUR- UND VÖLKERKUNDE OSTASIENS) 177–78 (2005).

²¹ See, e.g. Andreas Voßkuhle, *Gibt es und wozu nutzt eine Lehre vom Verfassungswandel? [Is There a Theory of Constitutional Change and How Is It Useful?]*, 43 DER STAAT 450–59 (2004); Ana Victoria Sánchez Urrutia, *Mutación constitucional y fuerza normativa de la Constitución: una aproximación al origen del concepto [Constitutional Transformation and the Normative Force of the Constitution: An Approach to the Origins of the Concept]*, 20 REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 105–35 (2000). Xu is cited in the above articles as Georg Jellinek's successor in studying constitutional change.

²² This is reflected in, for example, the correspondence between the two. See AUF DER GEFAHRENVOLLEN STRASSE DES ÖFFENTLICHEN RECHTS: BRIEFWECHSEL CARL SCHMITT–RUDOLF SMEND 1921-1961: MIT ERGÄNZENDEN MATERIALEN [“ON THE DANGER-FILLED ROAD OF PUBLIC LAW”: CORRESPONDENCE BETWEEN CARL SCHMITT AND RUDOLF SMEND 1921-1961: WITH SUPPLEMENTARY MATERIAL] (Reinhard Mehring ed., 2012).

²³ For an overview of different major positions on the Weimar Constitution taken by these and other interlocutors, see, e.g. ARTHUR JACOBSON AND BERNHARD SCHLINK, *WEIMAR: A JURISPRUDENCE OF CRISIS* (2002).

Enemy” relationship (*Freund-Feind Verhältnis*), was Schmitt’s famous definition of the “concept of the political.”²⁴

Though the “concept of the political” is best known today from Schmitt’s 1932 book,²⁵ it was first presented in a 1927 journal article.²⁶ This was in turn followed by Schmitt’s 1928 book on *Constitutional Theory (Verfassungslehre)*²⁷ and his related 1929 and 1931 works denying that courts could serve as “the Guardian of the Constitution” (*Der Hüter der Verfassung*).²⁸ During the same years, Schmitt was also continuing to produce essays critical of the League of Nations and its interventions into German territory and policy, as in the management of the “demilitarized” Saar Basin or the French-Belgian occupation of the Ruhr to secure reparations payments.²⁹

In this period, Smend was also advocating his own constitutional doctrine, the *Integrationslehre* (theory of integration), which focused its analysis on how the constitution of a state acts as a force structuring the relationship of the individual with the political group of which he or she is a part. Unlike Kelsen or other positivists, Smend would not reduce the meaning of the state and its organization to a set of formal legal norms. The state was instead an “ethical totality” in the Hegelian sense: more than the sum of its members and a source of meaning for their individual existences. Yet, unlike Schmitt, he did not consider this ethical totality to be defined by potential conditions of enmity with its non-constituents. Rather, it was best understood as a kind of dynamic “living” organism continually deepening the affective allegiance and fraternity of those already under

²⁴ CARL SCHMITT, *THE CONCEPT OF THE POLITICAL: EXPANDED EDITION* (George Schwab trans., 2008) (1932).

²⁵ CARL SCHMITT, *DER BEGRIFF DES POLITISCHEN* (1932).

²⁶ Carl Schmitt, *Der Begriff des Politischen*, 58 *ARCHIV FÜR SOZIALWISSENSCHAFT UND SOZIALPOLITIK* 1, 1–33 (1927).

²⁷ CARL SCHMITT, *CONSTITUTIONAL THEORY* (Jeffrey Seitzer trans., 2008) (1928).

²⁸ CARL SCHMITT, *DAS REICHSGERICHT ALS HÜTER DER VERFASSUNG* (1929); CARL SCHMITT, *DER HÜTER DER VERFASSUNG* (1931).

²⁹ See, e.g. Carl Schmitt, *Völkerrechtliche Probleme im Rheingebiet [International Legal Problems in the Rhein Basin]* (1928) in *POSITIONEN UND BEGRIFFE: IM KAMPF MIT WEIMAR-GENÈVE-VERSAILLES 1923-1939 [POSITIONS AND CONCEPTS: IN STRUGGLE WITH WEIMAR-GENEVA-VERSAILLES 1929-1939]* (1988) (1940).

its care,³⁰ “integrating” them into a homogenized social whole: for “[t]he realization of all ideal content . . . presupposes community.”³¹ In a 1930 commentary, Hans Kelsen would harshly criticize this theory with the charge that “it is a true fetish cult, what he is promoting with the word ‘Life’ . . . the ‘Life’ of the State, as Smend means it—without having the courage to clearly and directly say it—is the Life of a superhuman being (*übermenschlichen Wesens*).”³²

Meanwhile, Smend was also being criticized on the realist flank by Schmitt, who considered his vision of integration and reconciliation of differences as a “great placebo.”³³ If the most intense forms of human relationship comprised the sorting of groups into friends and enemies, in an exceptional situation (*Ausnahmezustand*) that raised the possibility of conflict, the sovereign “Decision” on the nature of the political community would matter more than legal norms or the affective bonding of its constituents.³⁴

Schmitt’s state would be premised on the idea that Executive authority (not judges or political parties) could best represent the people’s true will and the society’s “concrete order.”³⁵ This did not necessarily mean constant intervention by the Executive, however. Rather, it would embody sovereign power in the “state of exception” when existing norms were inapplicable or unclear. Moreover, it would do so primarily in order to preserve the existing situation, acting as a conservative force in a manner that Schmitt sometimes encapsulated with the medieval motto *protego ergo obligo*: “I protect, thus I oblige [obedience].”³⁶ If Smend’s thought was geared towards theorizing the organic change over time of constitutional systems, Schmitt was

³⁰ RUDOLF SMEND, *VERFASSUNG UND VERFASSUNGSRECHT* [CONSTITUTION AND CONSTITUTIONAL LAW] (1928).

³¹ *Id.*

³² HANS KELSEN, *DER STAAT ALS INTEGRATION* [THE STATE AS INTEGRATION], 23–31 (1930).

³³ Mehring, *supra* note 22, at 152 (citing Schmitt’s reference to “Integration, das große Placebo”).

³⁴ Schmitt, *supra* note 6, at 31.

³⁵ Schmitt, *supra* note 27, at 85.

³⁶ Schmitt, *supra* note 24, at 52 (“[t]he *protego ergo obligo* is the *cogito ergo sum* of the state.”).

preoccupied with discovering principles by which they might stay unchanged in a chaotic world.

Xu's close work with Smend began in the summer of 1929, just as these constitutional debates were in full swing. As a result he became deeply conversant with Schmitt's ideas. At this point, he took part in helping Smend to arrange a summer seminar on the topic of pluralism and the state. Among the many sources and theories discussed, sometimes identified in Smend's notes with specific referral to Xu's participation, were numerous references to Schmitt's ideas as well as to Harold Laski's theories on pluralism.³⁷ Although describing the experience as being "as stimulating as it is exhausting" (*ebenso anregend wie anstrengend*), Xu acquitted himself well enough that by November of the same year Smend had taken him on as a doctoral student.³⁸ In a Christmas Eve letter to his advisor that year, Xu mentions the difficulties facing those seeking to conduct "polemic[s] against Carl Schmitt."³⁹

Towards the end of Xu's studies in 1931, he was as mentioned above introduced to Schmitt personally via Smend's referral, and the two struck up a fast friendship, although one that would prove brief. "Delighted over Hsü," Schmitt wrote in his diary after one such engagement.⁴⁰ Continuing to see each other socially on several occasions through the end of 1931, Xu and Schmitt discussed "China" and "disarmament," among other topics.⁴¹ The following year, however, Xu returned to China, just as he was beginning to make a mark on German legal scholarship.

The published version of Xu's thesis, 1932's *Die Verfassungswandlung*,⁴² had considerable implications for contemporary debates on the nature of constitutionalism, and at various points he

³⁷ Cod_Ms_R_Smend_N_23 in NIEDERSÄCHSISCHE STAATS- UND UNIVERSITÄTSBIBLIOTHEK GÖTTINGEN: NACHLASS RUDOLF SMEND.

³⁸ Walravens, *supra* note 20, at 159.

³⁹ Cod_Ms_R_Smend_A_388 (Hsü, Dau-Lin) at 5.

⁴⁰ Schmitt, *supra* note 13.

⁴¹ *Id.*

⁴² HSÜ DAU-LIN, DIE VERFASSUNGSWANDLUNG [CONSTITUTIONAL TRANSFORMATION] (1932).

notes where his views converge or diverge from those of Schmitt. Ultimately, however, Xu sought to provide his own novel theory of the nature and forms of constitutional change. He did this by dividing up the phenomena of constitutional change into different varieties based on the degree to which the changes were deliberate or involuntary, and took place through formal violation of existing rules or instead via more gradual shifts in interpretation.⁴³ Although on the whole presenting an argument that leaned towards support of Smend's theory of organic integration as opposed to Schmitt's Decisionism, Xu also acknowledged that his views were, for example, "in agreement with Schmitt on the increased importance of precedent for constitutional and international law,"⁴⁴ as opposed to textualist fidelity to the letter of the law.

Xu's book, as well as the companion essay on "formalist and anti-formalist concepts of the constitution" published the same year,⁴⁵ built in various ways upon both Schmitt's and Smend's conceptions of constitutional law. For Xu, as for both influential mentors, "the incompleteness of constitutional norms in relation to the life lessons of the State on the one hand, and the elasticity of their normativity on the other hand" meant that the constitution would always be a means, not an end, to realizing the full "political life" of the State.⁴⁶ Anglo-American style juristocracy and Kelsenian style positivism both fell into the trap of substituting dead words on paper for living social processes. On his book's first page, citing the major statist public intellectual Liang Qichao 梁启超 (1873-1929) (who in turn was discussing the ancient Chinese Legalist philosopher Han Feizi 韩非子 (c. 279-233 BCE)), Xu noted that modern German thought and traditional Chinese legal philosophy coincided in the awareness that

⁴³ *Id.*

⁴⁴ *Id.* at 119. On this point, *see also* the discussion in 陈新民 [Chen Xinmin], 惊鸿一瞥的宪法学彗星 - 谈徐道邻的宪法学理论 [*Fleeting Glimpse of a Comet of Constitutional Scholarship—On Xu Daolin's Constitutional Law Theory*], 38 军法专刊 [MIL. L. J.] 8, 16-25 (1992).

⁴⁵ Hsü Dau-lin, *Formalistischer und anti-formalistischer Verfassungsbegriff* [*Formalist and Anti-Formalist Conceptions of the Constitution*], 61 ARCHIV DES ÖFFENTLICHEN RECHTS 1, 27-53 (1932).

⁴⁶ *Id.* at 160

“men, not laws, are what govern.”⁴⁷ States are not identical with legal norms, and thus their constitutions cannot consist only of unchanging texts.

Xu emphasized, however, that it was also a mistake to go as far as Schmitt in considering the constitution simply as a “mass of unrelated constitutional statutes” with no inherent “logical unity.”⁴⁸ Xu argued for a normative unity of the constitution in which any gaps in the law could be filled by reference to shared community values or to concrete relationships and shared living conditions.⁴⁹ Xu’s constitution is thus one that has “right answers” to its hard questions of interpretation, and immanent norms capable of filling its apparent gaps or overruling its formal rules. But these norms are not to be the product of judges’ ideas about fundamental values—rather, they should reflect the lived experience of the nation and its people. Xu argued that Schmitt’s enthusiastic enthronement of the Executive as the embodiment of the sovereign “decision”:

strips the concept of the constitution of any connection with values and results in the “constitution” signifying nothing but a decision . . . The whole doctrine can then be reduced to the simple formula: the constitution is whatever is framed as a constitution (because all that lies within it is a decision), it is valid because it is valid (whoever actually decides), and as long as it is valid (because the reason for its validity is not to be sought in the correctness of a norm, but rather in its mere objective presence [*in ihrem bloßen Vorhandensein zu suchen*]).⁵⁰

In other words, Xu argued that Schmitt’s emphasis on the Executive’s “Decision” embodying the sovereign will would result in

⁴⁷ Hsü, *supra* note 42, at 1.

⁴⁸ Hsü, *supra* note 45, at 40 (arguing that such views result in “eliminating all value-content from the Constitution” and citing Schmitt, *supra* note 27, at 10).

⁴⁹ Cf. RONALD DWORKIN, *LAW’S EMPIRE* 77–80 (1986) (Xu’s views are much less judiciary-focused than Dworkin’s, however, and much more amenable to an Executive-centered state order, if less so than Schmitt).

⁵⁰ Hsü, *supra* note 45, at 53.

an empty tautology: valid norms are those that arise from the Decision; while the Decision is whatever produces valid norms. There was little opportunity for public reason or democratic politics, given that sovereign power would be reduced to a kind of “objective presence” (*Vorhandensein*),⁵¹ In other words, Schmitt *seemed* to privilege life over formal law, but in considering the Decision as something essentially external and alien—something *encountered* by the legal interpreter, rather than emerging as part of his or her subjective process of co-creation with fellow citizens—it could not (for Xu) capture the political phenomenon of “self-rule” comprising modern democratic states. Despite his criticisms, though, Xu still held that Schmitt’s anti-formalism could help to refute the widespread fallacy among idealistic Chinese intellectuals that a properly drafted Constitution would by itself “solve” the concrete problems of State disorganization, normative disagreement, and social disunity.⁵² Indeed, Xu would soon find himself moving closer to Schmitt’s views in the course of his new political career in China.

B. The Appeal of Authoritarian Constitutionalism

When Xu returned home, it was to a welcome reception in the most elite circles of the Guomindang regime. Chiang Kai-shek himself had been on very positive terms with Xu’s father before the latter’s death.⁵³ Moreover, Xu’s credentials as a legal theorist who was making waves in the most prestigious corners of European legal scholarship were extremely rare and impressive for the time. He was thus taken on by Chiang as a high-level advisor as well as personal tutor to his son,

⁵¹ In fact, Xu is referring here to a specific statement in which Schmitt does make use of the term *Vorhandensein* to describe the condition of constituent power in the state after its founding. (In *Verfassungslehre*, Schmitt refers to the “constantly existing presence (permanence) of the constituent power (ständiges Vorhandensein (Permanenz) der verfassunggebenden Gewalt).”) However, Xu here clearly criticizes “mere” (*bloße*) *Vorhandensein* as suffering from a lack of subjective engagement and agency. The term had also recently been used in this negative sense by Martin Heidegger in MARTIN HEIDEGGER, *SEIN UND ZEIT* [BEING AND TIME], 42, 203 (1967).

⁵² Hsü, *supra* note 42, at 27–8.

⁵³ See, e.g. Xu *supra* note 16.

Chiang Ching-kuo 蒋经国 (1910-1988) (who would eventually preside over the liberalization of Taiwan in the 1980s).⁵⁴

Soon after his return to China in 1932, Xu was appointed to the ROC government's National Defense Strategy Committee (*Guofang Sheji Weiyuanhui* 國防設計委員會).⁵⁵ He also published essays promoting his views on legal and political issues, educational policy, and diplomacy, as well as poetic compositions. However, in comparison with his work in Germany, these were brief writings, at times clearly geared primarily towards providing justifications for the Guomindang's dominance over political institutions. Somewhat ironically, Xu's interventions in ROC politics thus at times took on a quite Schmittian tone, though he does not seem to have explicitly cited his Berlin conversation partner.

For example, in a 1934 critique of the draft constitution that had been produced by a relatively liberal-leaning committee headed by John C.H. Wu 吴经熊 (1899-1986), who like Xu had also studied at the University of Berlin (in Wu's case under the neo-Kantian jurist Rudolf Stammler), Xu seemingly took a page from the Decisionist playbook. The draft constitution was flawed, he argued, because "a 'good' constitution that does not 'take effect' is no more than a scrap of wastepaper . . . at a time when our country faces severe internal and external disasters, we will only be able to pass through these if the political authority is unified, while the political authority will only be unified if its position is made secure."⁵⁶ Provisions such as promises of local autonomy would only impede the decisive authority of the State, as well as that of the Guomindang and Chiang Kai-shek himself, guiding its path forward through the exercise of sovereign authority.

⁵⁴ Xu would later serve as a high-ranking diplomat in Italy as well as in successive posts as the secretary of various Chinese provinces, before returning to academia in the last two decades of his life, spent primarily at the University of Washington. See Chen, *supra* note 15; see also 马振犊 [MA ZHENDU] and 戚如高 [QI RUGAO], 蒋介石与希特勒：民国时期中德关系研究 [CHIANG KAI-SHEK AND HITLER: STUDIES ON SINO-GERMAN RELATIONS DURING THE REPUBLIC OF CHINA] 65 (2012).

⁵⁵ *Id.*

⁵⁶ 徐道鄰 [Xu Daolin], 憲法草案初稿商兌 [*Considerations on the Draft Constitution*], 94 獨立評論 [INDEPENDENT COMMENTARY] 9–11 (1934).

Although Xu did not explicitly cite Schmitt in support of these views, the latter was already being discussed by others in Chinese publications. Schmitt's writings on dictatorship, for example, were prominently cited in Chinese translations of essays on "ancient and modern concepts of dictatorship" by the influential Japanese political theorist Imanaka Tsugimaru 今中次磨 (1893-1980).⁵⁷ Imanaka, too, viewed Schmitt's description of the relationship between modern state sovereignty and commissarial dictatorship as a major contribution to understanding how the Executive power of the State could function independently and authoritatively without sacrificing the premise of popular representation—ideas that drew significant attention in Japan.⁵⁸

Another key figure who engaged with Schmitt in the early 1930s was Zhang Junmai 张君勱 (also known as both Carsun / Carson Chang and Chang Chia-sen) (1887-1969), one of the most significant independent political theorists and activists of the era. A close associate of Liang Qichao, Zhang had later undertaken doctoral studies in philosophy (switching from law) at the University of Berlin. He developed a close relationship with the neo-Kantian philosopher Rudolf Eucken before the latter's death in 1926, co-authoring with him a book on the respective outlooks on life of Europe and China.⁵⁹ Having witnessed the end of the German Empire, Zhang initially viewed the new Weimar Constitution as an excellent model for China to follow,⁶⁰ and in general sought to promote democratization via activities such as founding an "Institute for Politics" in Shanghai that sought to educate a new political elite that would not be tied to either the Guomindang or the Communist Party, both of which he criticized. He was also involved in popular writing and in party politics, and in all

⁵⁷ 今中次磨 [Imanaka Tsugimaru], 独裁政治概念之今昔 [*Ancient and Modern Concepts of Dictatorship*], 7 国闻周报 [NATIONAL NEWS WEEKLY] 1-6 (1930) (a multi-part essay continued in the following issue).

⁵⁸ *Id.* Cf. Shiyake, *supra* note 3.

⁵⁹ See overview of Zhang's life and studies in ROGER B. JEANS, *DEMOCRACY AND SOCIALISM IN REPUBLICAN CHINA: THE POLITICS OF ZHANG JUNMAI (CARSON CHANG), 1906-1941* (1997).

⁶⁰ 陈新民 [Chen Xinmin], 德国基本法对台湾公法学的影响 [*The Effect of German Public Law on the Study of Public Law in Taiwan*], 中德法学论坛 [JAHRBUCH DES DEUTSCH-CHINESISCHEN INSTITUTS FÜR RECHTSWISSENSCHAFT DER UNIVERSITÄTEN GÖTTINGEN UND NANJING] 23 (2009).

of these arenas was critical of the ascendant Guomindang's exclusion of alternative voices. Though he at times courted sponsors within the Guomindang or among regional warlords, he was also frequently punished or intimidated for "excessive" criticism.

It was fleeing suppression by the Guomindang directly after its re-unification of China in 1928 that brought Zhang back to Germany the following year, to begin a period as a lecturer at the University of Jena. While there, he continued to keep abreast of the latest discussions on *Staatsrechtslehre*, in particular debates regarding the Weimar Constitution and the relative merits of Russian and Italian "dictatorship" as opposed to parliamentary democracy. Before returning to China in 1931, Zhang published an essay on the "State Crisis of the Chinese Republic" in the *Jahrbuch des Öffentlichen Rechts*.⁶¹ In it, he describes a global contest between the opposing political outlooks of "*Rechtsstaat und Diktatur*." China since 1928, he argued, had been directing itself too much towards the latter, following in the footsteps of Russia and Italy.⁶²

Like Xu, Zhang both engaged with Schmitt and consciously positioned his own views as being less fatalistically critical regarding liberal political institutions. He nonetheless thought that Schmitt's theorization of the Weimar Constitution could be useful for the purposes of articulating the limits of existing legal structures and the scope of possible alternatives. Thus, he cites Schmitt's *Verfassungslehre* for the notion that "in a country where there is no press freedom or right of association, and where no opposition party can be tolerated, an election can be no more than an acclamation."⁶³ However, it is in extending his critique to the political ideas and policies of the Guomindang founder, Sun Yat-sen, that Zhang's views tend to align most closely with Schmitt's. He accuses Sun of excessive imitation of foreign models as opposed to the development of ideas based on China's own traditions, and also of subordinating China's national

⁶¹ Carsun Chang, *Die staatsrechtliche Krisis der chinesischen Republik*, 19 JAHRBUCH DES ÖFFENTLICHEN RECHTS 336–55 (1931).

⁶² *Id.* at 316–17.

⁶³ *Id.* at 344, citing Schmitt, *supra* note 27, at 277.

struggle to Soviet claims of internationalism that could in practice signify infringements of China's sovereignty.⁶⁴

At the end of his essay, Zhang again cites Schmitt, this time his *Die Geistesgeschichtlichen Lage des Heutigen Parlamentarismus*, for the notion that the one party states of Italian fascism and Soviet communism are each animated by a desire to pursue “*élan vital*” at the expense of their formal legal systems.⁶⁵ Like Schmitt, he was well aware of the appeal of such ideas during an era of massive and sudden social and political change, while warning against wholesale subscription to them as opposed to concrete social structures. However, the binary opposition of formal law versus a “living” political movement was for him too simplistic. A party-led movement might actually be stultifying and deadening for a society's political development, while rule of law (but not necessarily a full judicial constitutionalist or parliamentary system after Anglo-American models) might instead prove the best way to stimulate the State as an organic social unity. As he concludes, citing Schmitt's (at the time) “liberal nationalist” rival Otto Koellreutter, “[a] ‘national *Rechtsstaat* [legal state]’ that legally secures the basic rights of the people while also giving the government a sufficient zone of action is a state in which the People can enjoy the greatest justice and at the same time is most useful for the existential struggle between Peoples.”⁶⁶

These comments help to concretize the lessons that some prominent Chinese intellectuals drew from Schmitt's Weimar-era thought during the Nanjing Decade. Zhang and Xu, as two among their country's leading authorities on German legal and political theory, both shared some criticisms of Schmitt's Executive-focused state. Yet at the same time they appreciated his formulation of basic questions regarding the concrete preconditions for a stable political and legal structure. They agreed with the basic premise that “[t]here exists no norm that is applicable to chaos. For a legal order to make sense, a

⁶⁴ *Id.* at 333–34.

⁶⁵ Chang, *supra* note 61, at 355.

⁶⁶ *Id.*

normal situation must exist, and he is sovereign who . . . produces and guarantees the situation in its totality.”⁶⁷

This problem of bringing about a “normal situation” upon which the rule of law could be grounded was a preoccupation shared by intellectuals in China both inside and outside of Guomindang circles. Indeed, it was even a formal aspect of the Guomindang’s official state theory, which was premised on a three-stage transition from military rule (*junzheng* 军政) to “tutelary rule” (*xunzheng* 训政), and only then to “constitutional rule” (*xianzheng* 宪政).⁶⁸ During the period of “tutelary rule” (aka “political tutelage”), the Guomindang was to “lay the foundation for a total people’s government . . . [for o]nly then will the constitution to be promulgated not become a mere piece of paper[.]”⁶⁹ This basic premise remained consistent from the time that Sun Yat-sen developed his three-stage theory through the end of Guomindang rule in China in 1949. Even those who sought to push the Guomindang regime in a more democratic direction, Xu and Zhang included, made allowances as to the need for a strong Executive to ensure the “normal situation.”

On the basic grounds of state legitimacy, there was thus a substantial compatibility between elements of Schmitt’s thought and those of leading mainstream intellectuals. Meanwhile, another aspect of receptivity to Schmitt’s thought lay in the realm of political economy. Schmitt’s thought of the 1920s and early 1930s was often directed towards seeking to define the state and its central figure, the Executive, in such a manner as to ensure it supreme authority within a constrained sphere. In particular, this implied the rejection of Marxist views as to the domination of economic affairs by the state. Rather, Schmitt advocated “a state that takes on the task of liberating the economy, depoliticizing the socio-economic relations, [and] enabling free economy in the social structure and mentality of society[.]”⁷⁰ Such a “qualitative” state would be able to “intervene freely to distinguish

⁶⁷ Schmitt, *supra* note 6 at 13.

⁶⁸ See, e.g. CHIANG KAI-SHEK, CHINA’S DESTINY AND CHINESE ECONOMIC THEORY 124-127, 160-161 (1947).

⁶⁹ *Id.* at 170.

⁷⁰ Werner Bonefeld, *Authoritarian Liberalism: From Schmitt via Ordoliberalism to the Euro*, 43 CRITICAL SOCIOLOGY 4-5, 747-761 at 749 (2017).

between the ‘friends’ of liberty and its ‘enemies,’”⁷¹ without being dragged into a “quantitative” role due to mass democracy or the need to administer a comprehensive welfare state.

These were views that Schmitt shared with the early ordoliberal writers on political economy that also emerged out of the crisis of the Weimar Republic. Figures like the economists Wilhelm Röpke and Walter Eucken, among others, argued in terms similar to Schmitt’s that “democracy can really function properly only when there is a certain minimum of agreement about the essential problems of national life,”⁷² and that, as Friedrich Hayek would later advocate, “a dictatorship . . . if self-limited [] may be more liberal in its policies than a democratic assembly” given the latter’s potential to squelch economic freedom in the name of a redistributive agenda.⁷³ Koellreutter’s concept of a state strong within its own “sufficient zone of action” that nonetheless secured the (individual) rights of the people also, in fact, owed much to Schmitt. Koellreutter acknowledged as much later, writing for example that Schmitt had been the first to develop the idea of a constitutional system based on “institutional guarantees,” i.e. “not individual rights . . . but the constitutional guarantee of certain statutory arrangements (*Rechtsinstituten*),” of which “the most important [include] the guarantee of private property[.]”⁷⁴

These premises of Schmitt’s thought encapsulated a general attitude among some conservative Weimar intellectuals of opposition to mass politics (but above all Marxism) and a willingness to embrace “dictatorial” Executive authority in suppressing them. This set of positions was one that the democratic socialist jurist Hermann Heller described as “authoritarian liberalism,” meaning by this a combined commitment to “liberalization (*Entstaatlichung*) of the economy and dictatorial control by the state of politico-intellectual functions.”⁷⁵

⁷¹ *Id.*

⁷² *Id.* (citing WILHELM RÖPKE, INTERNATIONAL ECONOMIC DISINTEGRATION 253 (1942)).

⁷³ THE ROAD FROM MONT PÈLERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE, WITH A NEW PREFACE 446 (Philip Mirowski & Dieter Plehwe eds., 2015).

⁷⁴ OTTO KOELLREUTTER, DEUTSCHES STAATSRICHT 62 (1952).

⁷⁵ Hermann Heller, *Authoritarian Liberalism*, 21 EUR. LJ 295 (2015) (1933).

Heller viewed Schmitt as embodying this position, for example in a 1932 lecture to business leaders on the topic of “A Sound Economy in a Strong State” (*Gesunde Wirtschaft im starken Staat*).⁷⁶

Schmitt’s works did indeed tend to reiterate a consistent set of views regarding the role of an exceptional Executive authority to maintain order and make possible basic legal guarantees, including those of the capitalist economy. In this respect, too, they fit well with the rising “rightist” tendency within the Guomindang, which was shifting from Sun Yat-sen’s earlier emphasis upon “people’s livelihood” to a more capital-friendly economic platform under Chiang.⁷⁷ Intellectuals associated with the regime thus found themselves, like Xu, in effect arguing for an arrangement resembling the authoritarian liberalism that Heller saw in Schmitt’s thought. In general, however, political unity and empowering the Executive via “authoritarian constitutionalism” took precedence over economics.

The Nazi era, of course, would change the way Schmitt was read in China. Before the National Socialists rose to power in 1933, Schmitt had not been sympathetic, seeing in them mass politics that threatened state order. However, he quickly became a collaborator with the new regime, producing justifications for Nazi policies that awkwardly mixed his previous emphasis on concrete order with a new appreciation for (non-Marxist) radical movements. Schmitt scholars argue about the extent to which there was a “break” between his pre- and post-1933 thought.⁷⁸ However, for foreign readers, there was certainly a great deal of difference between studying Schmitt the conservative critic of Weimar (before 1933) and studying the post-1933 Schmitt who was one of the most respected academic collaborators with the new regime. This “new” Schmitt did, however, greatly interest some in China’s nascent mid-1930s fascist movement.

⁷⁶ Carl Schmitt, *Starker Staat und Gesunde Wirtschaft: Ein Vortrag vor Wirtschaftsführern* (Lecture of 23 Nov. 1932) in Maschke *supra* note 11.

⁷⁷ AUDREY WELLS, THE POLITICAL THOUGHT OF SUN YAT-SEN: DEVELOPMENT AND IMPACT 163 (2001).

⁷⁸ See, e.g. Ingeborg Maus, *The 1933 “Break” in Carl Schmitt’s Theory*, 10 CANADIAN JOURNAL OF LAW & JURISPRUDENCE 1, 125-140 (1997).

III. SCHMITT AS GUIDE?: SEARCHING FOR A “SPECIAL PATH”

A. A “Stance of Critiquing Modernity”

Discussions of German state theory in China in the early-to-mid-1930s should in general be seen in the context of an emerging “debate over dictatorship,” in part directly inspired by the rise of German Nazism, that was initiated by Chiang Kai-shek and some of his close allies within the Guomindang.⁷⁹ Indeed, some writers even cited Xu’s advisor Smend, the theorist of “integration,” as support for their arguments against premature democratization.⁸⁰ When Schmitt embraced Nazism, this made him useful for some public intellectuals to justify the notion that China should establish its own form of Guomindang-led fascism along German or Italian lines.

The most notable invocation of Schmitt to support such views was an essay that appeared in the July 1934 issue of the magazine *The Future* (*Qiantu* 前途), which was produced under the auspices of the “Vigorous Practice Society” (*Lixingshe* 力行社).⁸¹ This was an authoritarian group that overlapped with the fascist-leaning, so-called “Blue Shirt Society” clique within the Guomindang.⁸² As part of a general drive to promote (primarily Italian-style) fascism as a path forward for China, *The Future* published large quantities of commentary on the need for one party rule, obedience to Chiang as a dictatorial

⁷⁹ WILLIAM KIRBY, *GERMANY AND REPUBLICAN CHINA 155–70* (1984); LLOYD EASTMAN, *THE ABORTIVE REVOLUTION: CHINA UNDER NATIONALIST RULE, 1927-1937* 175–76 (1974). Although Chiang’s official push for dictatorial status ended in failure by late 1934, the “debate over dictatorship,” including strong views in favor, continued long after.

⁸⁰ “霜露” [“Frost and Dew”], 德國國社黨運動的根本思想 [*The Basic Thought of the German National Socialist Movement*], 1 警醒 [VIGILANCE] 9, 13–25 (1934).

⁸¹ On the background of the “Vigorous Practice Society” and its connection with *The Future*, see 徐有威 [Xu Youwei]. 从《前途》杂志看德国法西斯主义在战前中国之影响 [*The Influence of German Fascism in Pre-War China as Seen in Qiantu Magazine*] 9 近代中国 [CONTEMPORARY CHINA] (1999).

⁸² See, e.g., *id.* at 118–19. See also Lloyd E. Eastman, *Fascism in Kuomintang China: The Blue Shirts*, 49 CHINA Q. 1, 1–31 (1972); MAGGIE CLINTON, *REVOLUTIONARY NATIVISM: FASCISM AND CULTURE IN CHINA, 1925-1937* 5 (2017) (discussing the background of *The Future* and its embodiment of fascist views in Republican China).

figure, the total elimination of communism, and defense of China's unique civilization against foreign invasions both military/political and cultural.⁸³ *The Future*, and its factional backers, operated with Chiang's tacit support but also competed with other factions within the Guomindang. Chiang had, however, signaled meaningful backing to the "Vigorous Practice Society" via various meetings and by having his own remarks published in *The Future*. The magazine also served as a major organ in announcing and advancing Chiang's "New Life Movement," which was launched in 1934 as an attempt to "militarize thoroughly the lives of the citizens of the entire nation so that they can cultivate courage and swiftness, the endurance of suffering and a tolerance for hard work, and especially the habit and ability of unified action, so that they will at any time sacrifice for the nation."⁸⁴

In the July 1934 issue of *The Future*, there appeared an essay titled "Examining the Thought of the Fascist Political Theorist Carl Schmitt,"⁸⁵ which took the Nazi Party's consolidation of power in Germany as the starting point for an exploration of how "fascist thought" could transform a society's way of understanding politics. Schmitt, taken as the intellectual architect of the new regime,⁸⁶ could provide new ideas for China to learn from. To this end, the essay lays out brief summaries of Schmitt's major works, and then summarizes some of their key concepts. The initial focus is on four ideas that are portrayed as fundamental: Decisionism, Confessionalism, Existentialism, and the Friend-Enemy Relationship. The last of these is then taken as the main theme for the next several pages, which explain how Schmitt's *Concept of the Political* is based on the fundamental opposition of "friends" and "enemies," as a binary opposition different from that of morality (which opposes "good" and "evil") or

⁸³ Xu Youwei and Philip Billingsley, *Behind the Scenes of the Xi'an Incident: The Case of the Lixingshe*, 154 CHINA Q. 283, 283-307 (1998).

⁸⁴ CAMBRIDGE HISTORY OF CHINA 66 (John King Fairbank et al. eds, 1978) (citing Chiang Kai-shek, *Chiang tsung-f'ung ssu-hsiang yen-lun chi*, 12.111 and Arif Dirlik, *The Ideological Foundations of the New Life Movement: A Study in Counterrevolution*, 34 J ASIAN STUD. 945, 945-80 (1975)).

⁸⁵ 姚宝贤 [Yao Baoxian], 法西斯政论家喀尔·修米特思想之检讨 [Examining the Thought of the Fascist Political Theorist Carl Schmitt], 2 前途 [THE FUTURE] 7 (1934).

⁸⁶ But see Mehring, *supra* note 2 (on the limits of Schmitt's actual influence, and its rapid decline).

economics (which opposes “profit” and “loss”). The political opposition is an autonomous way of ordering the world, not dependent on other factors, and it is the possibility of an enemy’s existence that determines the nature of a political union.

After this discussion, the essay turns to the important role of the concept of sovereignty in Schmitt’s work. Because law cannot account for all potential situations, there will be certain exceptional cases that must be decided by a practical political authority. This implicates the famous first sentence of *Political Theology*: “Sovereign is the one who decides upon the state of exception” (“Souverän ist, wer über den Ausnahmezustand entscheidet.”).⁸⁷ Over half a page, this statement is translated in three slightly different ways, demonstrating the difficulty of communicating Schmitt’s somewhat abstract and technical point regarding the indeterminacy of legal norms to a general audience unfamiliar with German jurisprudence.⁸⁸ Moreover, it then follows that this “exceptional” authority also necessarily implies an ability to decide upon the true content of the legal norms to which exceptions are being drawn. The leader is supposed to “guide” rather than “command,” but should nonetheless be uniquely powerful and generally obeyed.⁸⁹

The essay in general portrays Schmitt as “opposing liberalism, rationalism, and constitutionalism in favor of mobilization and a heroic theory of struggle,”⁹⁰ which ensures state unity and power by means of his “theory of sovereignty based on the great manifestation of ‘Decisionism.’”⁹¹ In the very last section, it turns somewhat awkwardly to the racial and ethnocentric context of Nazism and its connection with demands for a “pure” and homogeneous racial subject of the nation. Yao agrees in somewhat convoluted terms that “the concept of leadership requires above all the element of a duty of loyalty

⁸⁷ Schmitt, *supra* note 6, at 1.

⁸⁸ Yao, *supra* note 85, at 6 (translating Schmitt’s phrase variously as “将这些非常特别的事项，给以有效的最终的决定的就是 国家的主权者”；“主权，是非常特别事项的决定作用 (Decision [/] Entscheidung)” (German included in original); “主权者，是非尋特别状态的决定者.”).

⁸⁹ *Id.*

⁹⁰ *Id.* at 1.

⁹¹ *Id.* at 6.

(*Treuepflicht*) . . . and duties of loyalty are the same as legal duties. [Meanwhile,] the German people require an equality based on race (*renzong de pingdeng* 人种的平等) to serve as the basis for realizing this relationship of mutual loyalty and reliance[.]” In the same way, for China too, mutual faith would develop “upon the basis of good customs, not as in liberalism where laws only restrain conduct that is within the scope of the law. The People of the State should have a collective way of life consisting in ‘mutual reliance,’ and the People of the State equate to the race[.]”⁹²

This essay introducing Schmitt’s ideas to a general audience was remarkable in several ways. While *The Future* regularly featured praise for fascism⁹³ (and, early on, many issues concluded with excerpts from Mussolini’s memoirs), this was actually one of the only pieces in the publication’s entire run that was devoted to exploring the views of a single political theorist. For that reason, it would have particularly caught readers’ attention. The author, Yao Baoxian 姚宝贤, was an interesting figure who in many ways encapsulated the intellectual ferment of the period and the diversity of approaches to seeking China’s “way out” from modernity and its crises.

Yao was a prolific political and cultural essayist, and lay Buddhist practitioner, who was born in Luhe (now part of Nanjing) in 1905.⁹⁴ After graduating from the prestigious National Central University in Nanjing, Yao studied philosophy in Tokyo between 1929-1931 at Taishō University (大正大学), a major center of Buddhist studies affiliated with the Japanese Tendai tradition.⁹⁵ Beginning in his teenage years, he published essays lamenting the decadence and materialism that he saw as endemic among Chinese of his generation, beginning with a short article in 1919 called “A Sincere

⁹² *Id.* at 6.

⁹³ This was sometimes expressed in generic terms, i.e. 陈鲁仲 [Chen Luzhong], 法西斯蒂运动与民族精神之发扬 [*The Fascist Movement and the Uplifting of the People’s Spirit*], 2 前途 [THE FUTURE] 7 (1934). Other articles, meanwhile, went into more detail regarding aspects of, especially, Italian policies and practices. But it was highly rare to have the sustained focus on a single figure that Schmitt was accorded in the July 1934 issue.

⁹⁴ The basic elements of Yao’s personal history are covered in a Guomindang personnel file stored at Academia Sinica: 129000016516A.

⁹⁵ *Id.*

Warning for Pessimistic Youth,”⁹⁶ and continuing with pieces in which he excoriated lack of national consciousness of his fellow students in Nanjing.⁹⁷ From the start, he viewed apathy as being as much a psychological or spiritual deficiency as a political failing. In a 1924 essay on “Youth and Labor,” for example, he extolled the power of physical exertion to spark moral progress and invigorated thinking. Citing Proudhon’s dictum that “property is theft,” he claimed that the children of the wealthy had a particular need to commit themselves to strenuous self-improvement activities and political activism.⁹⁸ Evidently his views coincided sufficiently with those of certain elements in the Guomindang for him to be inducted into the Party the same year via the introduction of the prominent pro-German intellectual, and soon-to-be high level government official Zhu Jiahua.⁹⁹ At the same time, however, Yao was also developing idiosyncratic, revivalist Buddhist ideas regarding his generation’s path to spiritual and political awakening, writing detailed essays on the Indian roots of Buddhism, the concepts of karma and rebirth, the history of East Asian civilizations and other such topics.

While in Tokyo, Yao continued diligently publishing, beginning in 1929 with an article on “Neo-Kantian Socialism” that engaged with the work of European Marxists such as Max Adler, as well as the translation of an essay on “Fundamental Buddhism” by the Japanese Buddhist scholar Ui Hakuju.¹⁰⁰ At the same time, Yao’s ideas regarding the need to awaken Chinese national consciousness via voluntarist activism on behalf of the nation-state took ever firmer root. After his return to China in 1931, the more abstract visions of liberation offered by socialism and Buddhism were diminished in his writing by a strident nationalism that he promoted as a lecturer at the

⁹⁶ 姚宝贤 [Yao Baoxian], 對於抱悲观青年之忠告 [*A Sincere Warning for Pessimistic Youth*], 广益杂志 [GUANGYI ZAZHI] 35, 56–7 (1919).

⁹⁷ 姚寶賢 [Yao Baoxian], 雜感：南京的學生 [*Random Impressions: Nanjing Students*], 5 民国日报·觉悟 [MINGUO RIBAO: JUEWU] 23 (1925).

⁹⁸ 姚寶賢 [Yao Baoxian] 青年與勞動 [*Youth and Labor*], 2 教育与人生 [EDUC. & LIFE] 9 (1924).

⁹⁹ Yao Baoxian Personnel File: 129000016516A.

¹⁰⁰ 姚寶賢 [Yao Baoxian], 新康德派社会主义引端 [*Introduction to Neo-Kantian Socialism*] 10 民铎杂志 [THE PEOPLE’S TOCSIN] 2 (1929); 宇井伯壽 [Ui Hakuju], 根本佛教 [*Fundamental Buddhism*], 10 民铎杂志 [THE PEOPLE’S TOCSIN] 1, 1–13 (1929) (姚寶賢 [Yao Baoxian] trans.).

Shanghai-based Chizhi University (*Chizhi Daxue* 持志大学),¹⁰¹ as a member of various cultural and political organizations, and in numerous writings. Echoing Guomindang appeals for ideological “unity” among the populace, Yao focused in particular on the need to educate the youth of China as consciously self-sacrificing ethical agents working on behalf of the Chinese *ethnos* (*minzu* 民族) as the emissary of a unique Asian civilization.¹⁰²

Modern German thought and political practice could serve as a key example in these regards. These themes are present, for instance, in an essay on “Hegel’s Perspective on Religion” that Yao wrote for the 1933 “Special Issue on Hegel” of the journal *Philosophical Commentary* (*Zhexue Pinglun* 哲学评论).¹⁰³ The following year, he then argued again in favor of such ideas in another essay, this time on “The National Theorist Hegel’s Philosophy of the State,” for the magazine *Youth and War* (*Qingnian yu Zhanzheng* 青年与战争):

[Hegel] opposed Montesquieu’s theory of three separate powers, and promoted instead the theory of State unity . . . Hegel’s theory of the State is not a position of utilitarian individualism . . . It treats the State as the basis for the common spirit. What is the common spirit? It is the concentration of a *minzu*’s collective consciousness. When Napoleon occupied Germany, this desperate situation shook awake the national spirit. What a great event! [. . .] Now, the great hero Hitler is howling mightily, and this too in reality is the revival of Hegel’s theory of the State.

At present . . . especially those “distant climbers” in China who believe in supranational theories need to do

¹⁰¹ See 中华学艺社总办事处 [CHINA ART STUD. SOC’Y OFF.], 中华学艺社社员录 [China Art Study Society Membership Roster] 88 (1935). Chizhi University is the ancestor of today’s Shanghai International Studies University.

¹⁰² 姚宝贤 [Yao Baoxian], 青年新生活运动具体之方案 [*A Detailed Plan for Youth in the New Life Movement*], 4 青年与战争 [YOUTH & WAR] 8, 15–19 (1934).

¹⁰³ 姚宝贤 [Yao Baoxian], 黑格尔之宗教观 [*Hegel’s Perspective on Religion*], 5 哲学评论 [PHIL. COMMENT.] 67–73 (1933). This issue also features an essay on Hegel’s philosophy by Zhang Junmai.

a detailed study of Hegel's State philosophy. At the same time, in order to progress in striving to make Hegel's ideal planned State into a reality, and to save ourselves from the same despair that afflicted Germany in his time, we have an urgent need to faithfully defend our great leader!¹⁰⁴

1934 was an especially productive year for Yao, with the publication of the Schmitt article, the above piece on Hegel, and various other essays for *Youth and War* on “unifying the thought of Chinese youth,” Confucianism as an intellectual system,¹⁰⁵ and ongoing developments in Japanese society. In one of these essays, he boldly sought to provide a “detailed plan” for youth education in Chiang's New Life Movement, and pointed out in terms drawn from philosopher Henri Bergson that “we must recognize that *all* transformation and change in the universe is a form of the original force of *élan vital* (生的冲动); human life develops with purpose and value in accord with this great flow of Life[.]”¹⁰⁶ Despite his praise of Hitler and somewhat strained, favorable comments on Nazi views of racial homogeneity in 1934, Yao in general did not promote race-based politics, but rather those based on “Asian civilization.” Indeed, he rejected limiting that civilization to China, arguing that Buddhism, in particular, could not be confined to any one national tradition.¹⁰⁷

On the same date that Yao's essay for *The Future* was published another pro-fascist publication, the Hankou-based *Vigilance* (*Jingxing* 警醒), published its own slightly longer version of the essay under the title “Nazi Political Thought: An Introduction to Carl [I] Schmitt-Dorotic.” Published under the pseudonym “Frost and Dew” (*Shuang Lu* 霜露: a metaphor for enduring hardship), the version in *Vigilance* is in most passages identical with the one appearing in *The Future*, but has several pages of additional material discussing, for example, the

¹⁰⁴ 姚宝贤 [Yao Baoxian], 民族思想家黑格尔之国家观 [*The National Theorist Hegel's Philosophy of the State*], 4 青年与战争 [YOUTH & WAR] 12–13 (1934).

¹⁰⁵ 姚宝贤 [Yao Baoxian], 中国儒教思想之体系 [*The System of Chinese Confucian Thought*], 4 青年与战争 [YOUTH & WAR] 5–7 (1934).

¹⁰⁶ Yao, *supra* note 102.

¹⁰⁷ 姚宝贤 [Yao Baoxian], 文化里面找不出 ‘本位’ [No ‘Native Place’ Can Be Found in Culture], 6 现代 [THE MODERN] 4 (1935).

similarity between Schmitt's views and those of Hobbes, as well as a brief conclusion that states:

I have introduced here one of the most exceptional theorists operating under the Nazi administration. Although one feels there is room to criticize some immaturity and arbitrariness in [Schmitt's] constructive theories, nonetheless much can be illuminated by his stance of critiquing modernity. It can be said that this point is something we should learn from him.¹⁰⁸

“Frost and Dew” published a number of other pro-fascist essays, along with pieces on other topics, during the brief run of *Vigilance*. The thoughts he or she expresses generally resemble Yao's, although the Schmitt essay in *The Future* has a brief author's note (praising Leo Strauss) that does not appear in *Vigilance*, along with other minor additions and subtractions.¹⁰⁹ The exact circumstances surrounding the origins of this article are quite murky, but at minimum demonstrate clear interest in Schmitt among some in the Guomindang's fascist-leaning circles. As noted, this coincided with the unsuccessful 1934 push within the Guomindang for an explicit turn to dictatorial politics.

After 1934, however, other works did continue to appear that explained Nazi views on law and politics in favorable terms, and mentioning Schmitt in this capacity.¹¹⁰ A 1935 essay in the journal *Construction*, for example, spends a few pages on Schmitt's criticisms of formalistic legal thought, based primarily on his *Three Types of Juridical Thinking*. Following and based on this discussion, the essay asserts that

¹⁰⁸ 霜露 [“Frost and Dew”], 那齊斯的政治思想: *Care [sic] Schmitt-Dorotic* 的介紹 [*Nazi Political Thought: Introducing Care [sic] Schmitt-Dorotic*], 1 警醒 [VIGILANCE] 9–28 (1934).

¹⁰⁹ Another difference is that the version of the Schmitt essay in *The Future* contains very few misspellings of foreign words, while the version in *Vigilance* is rife with them (including Schmitt's first name in the title). Such misspellings could easily arise from printer's errors, however, rather than from the author's own manuscripts, and so likely are of no use in attributing authorship.

¹¹⁰ Multiple works of his are cited, for example, in 国社党的法律 [THE LAW OF THE NATIONAL SOCIALIST PARTY] (杉村章三郎 [Shōzaburō Sugimura] and 叶翔之 [Ye Chizhi] trans., 1935).

there is a need for a “fundamental transformation of legal theory” to meet modern political conditions.¹¹¹ The Russian/Italian (and now also German) emphasis upon a Party-led *Diktatur*, which Zhang Junmai had warned against, was by the mid-1930s appealing to a significant constituency among Chinese intellectuals. Those reading the above publications would see Schmitt as an important expositor of such approaches.¹¹²

More ambivalent 1930s writings on Nazi German politics or law also occasionally mentioned Schmitt, though often only briefly. The prominent legal theorist Qian Duansheng 钱端升, for example, wrote a 1934 book on *The Government of Germany* that briefly includes Schmitt’s criticism of parliamentarism in its citations and also discusses the “state of exception” in terms that seem drawn from Schmitt’s writings.¹¹³ Also notable are the writings of two legal scholars, Zhou Ziya 周子亚 and Zhu Jianmin 朱建民, who conducted master’s degree (*Diplom*) level studies in law at the University of Berlin between 1936–1938. Upon returning to China, they taught at the National Chengchi University and became co-editors of a journal called *New Politics* (*Xin Zhengzhi* 新政治). Zhou briefly mentioned Schmitt in

¹¹¹ 徐炎 [Xu Yan], 德国国社党的国家和法律观 [*The German National Socialist Party’s View on Law and the State*], 6 行健月刊 [CONSTRUCTION] 98 (1935) (this essay is labeled as a reprint of one that appeared the same year in the journal *Transformation* [Gaiqao 改造]).

¹¹² There do not appear to have been translations of any complete works of Schmitt’s into Chinese during this period. However, some of his works in German were available in Chinese libraries. For example, the Oriental Library in Shanghai (which was destroyed by Japanese bombing in 1932 and subsequently restored) received a large collection of donated books from Germany in 1934 that included Schmitt’s *Political Romanticism* and *The Concept of the Political*. 方图书馆复兴委员会编 [COMMITTEE FOR THE REVIVAL OF THE ORIENTAL LIBRARY], 德国捐赠东方图书馆书籍展览纪要 [Summary of Books Donated from Germany to the Oriental Library] (方图书馆复兴委员会编 [COMMITTEE FOR THE REVIVAL OF THE ORIENTAL LIBRARY], 1935).

¹¹³ 钱端升 [QIAN DUANSHENG], 德国的政府 [THE GOVERNMENT OF GERMANY] 12 (1934). Qian’s book cites many of the other leading legal theorists of Weimar and early Nazi-era Germany, but of Schmitt’s work only *The Crisis of Parliamentary Democracy* is explicitly included. On the other hand, some references to the state of exception do also seem to draw on Schmitt’s thought.

pieces introducing Nazi law and politics,¹¹⁴ while Zhu, in a 1940 book on aggression in international law, cites Schmitt's essays on *Die Kernfrage des Völkerbundes* [The Core Question of the League of Nations] (1926) and *Der Völkerbund und das politische Problem der Friedenssicherung* [The League of Nations and the Political Problem of Securing Peace] (1931).¹¹⁵ Unlike either the critiques or pro-fascist writings noted above, these citations are essentially neutral discussions of legal principles.

Some other intellectuals during the Nanjing Decade made more critical references to Schmitt's work. The activist, human rights advocate, and China Democratic League co-founder Chow Ching-Wen 周鲸文 (1908–1985), for example, explained in a 1939 collection of essays from his Hong Kong-based journal *Modern Critique* (*Shidai Piping* 时代批评) that “Professor Schmitt states that if there was nothing in the structure of the universe such as war that implicates the survival or extermination of human beings . . . then it would also lose all political characteristics.”¹¹⁶ Such bellicosity was for Chow endemic of “nationalism that has taken a wrong path,” in contrast to which he argued for a nationalism based on Confucian virtues of “benevolence and virtue” as well as liberal ideals of “freedom and equality.”¹¹⁷ Marrying a form of cosmopolitanism with a sense of China's unique

¹¹⁴ See, e.g. 周子亚 [Zhou Ziya], 國社主義政治學說與其實施 [National Socialist Political Theories and Their Implementation] 1 新政治 [NEW POLITICS] 94–7 (1939) (discussing, for example, Schmitt's arguments in his *Verfassungslehre* that political legitimacy can be derived only via theological claims, on the one hand, or democratic will on the other, then linking these to the Nazi political arrangement in which the “Movement” represents the People). Later, Zhou briefly mentions Schmitt again the following year in an essay on “National Socialist Views on International Law.” 周子亚 [Zhou Ziya], 國社主義的国际法学说 [National Socialist Theory of International Law] 3 新政治 [NEW POLITICS] 72–7 (1940). This latter essay, however, appears to be translated without attribution from a 1938 article that appeared in *The American Journal of International Law*: Virginia L. Gott, *National Socialist Theory of International Law*, 32 AM. J. INT'L L. 704 (1938).

¹¹⁵ 朱建民 [ZHU JIANMIN], 侵略问题之国际法的研究 [RESEARCH ON THE ISSUE OF AGGRESSION IN INTERNATIONAL LAW] (1940).

¹¹⁶ 周鲸文 [CHOW CHING-WEN], 中华民族在一切民族革命斗争中的领导地位 [THE LEADING POSITION OF THE CHINESE PEOPLE IN THE REVOLUTIONARY STRUGGLE OF ALL PEOPLES] (1939).

¹¹⁷ *Id.*

and grandiose fate, his volume ultimately calls for China to act as “leader in the liberation of the world’s nations.”¹¹⁸

Even for liberals like Chow, it was appealing to think that China had an exceptional role in world history beyond mere integration into an Anglo-American-dominated world order. For Yao, China’s ability to redefine itself as a modern state would be in part based on an awareness of its status as one of the hubs of East Asian and Buddhist civilization, and this identity would help it to define its political friends and enemies. Meanwhile, the related but competing idea that China’s special destiny was intimately tied with Japan’s prompted a very different set of engagements with Schmitt’s work, providing a rationale for some collaborators with Japanese imperialism.

B. Hegemony in an Asian *Großraum*

The pro-fascist KMT clique that had created *The Future* magazine, and that would have had editorial control over the article on Schmitt, had, by the late 1936 “Xi’an Incident” and its aftermath, lost a great deal of its influence, reducing the space for such views.¹¹⁹ The war with Japan from 1937 dominated political discourse, which made calls for immediate political transformation seem to many like unwelcome distractions. Meanwhile, the renewed United Front between the KMT and the Communist Party in order to resist Japan meant that the most extreme advocacy of one-party rule was out of step with official policies. Though debates on constitutionalism continued even during the height of the war, these discussions often tended to be more limited in scope than in the mid-1930s.¹²⁰

As the Republic of China’s crises continued, Yao Baoxian would continue in his writings to veer between spiritual topics, calls

¹¹⁸ *Id.*

¹¹⁹ See Xu and Billingsley, *supra* note 83.

¹²⁰ An exception is a 1940 special issue on constitutionalism of Zhou Ziya and Zhu Jianmin’s *New Politics* journal. In the essays within, authors laid out various different positions either calling for immediate implementation of a justiciable constitution or arguing that this would be detrimental during the period of war with Japan. Yao contributed one essay, characteristically arguing in favor of one party rule until China’s exceptional crises were overcome.

for political dictatorship and consolidation of the Guomindang's one party rule, discussions of East Asian societies and their mutual relations, occasional forays back into German state and political theory, and a variety of other subjects. Explicit references to Nazism came to be very few, given Germany's increasingly close ties with an invading Japan, and similarly the focus on Schmitt's thought also did not reappear after the prominent 1934 essay. In 1937, Yao became the editor of a new journal based first in Nanjing, then in Hankou, named *Founding* (*Chuangdao* 创导). Though this venture ended in 1938, Yao continued to promote his brand of Asianist Hegelianism in the service of China's struggle, viewing Japanese invasion as an existential threat to China's political identity despite their cultural ties.

While Yao's interest in fascism and pan-Asianism did not lead him to accept Japanese claims to leadership in Asia, that was not true of some others with similar inclinations. Indeed, there were Chinese academics collaborating with the Japanese occupation regime who cited Schmitt's thought to justify the idea of a Japan-led "Greater East-Asia Co-Prosperty Sphere." Especially of note is Hu Yingzhou 胡瀛洲, a prominent professor at the Peking University law faculty, whose 1942 book "The Study of Politics" (政治學) featured many citations to Schmitt's thought and also promoted his theory of "an international legal order of 'great spaces'" (*Völkerrechtliche Großraumordnung* / 国际法上之大地域秩序).¹²¹

Schmitt developed his conception of the *Großraum*, or "great space," after internal pressure within Nazi circles led to his increasing marginalization and loss of influence. Turning away from domestic legal topics, he adopted this term that had previously been applied in primarily economic contexts, but that also had obvious political implications, as his new primary focus. A *Großraum* was a large regional order of social, economic, and political linkages forming a self-sufficient system centered on one hegemonic state. In Schmitt's own context, these ideas would suggest developing a continental European order based on German leadership to counter "spatially alien" Anglo-American and Soviet incursions.¹²² In its basic parameters, this notion

¹²¹ 胡瀛洲 [HU YINGZHOU], 政治學 [THE STUDY OF POLITICS] (1942).

¹²² See, e.g. Carl Schmitt, *Raum und Großraum im Völkerrecht* [Space and *Großraum* in International Law] (1940) in Maschke, *supra* note 11, at 249; Carl Schmitt,

was highly compatible with other writings on hegemony by conservative authors during the Nazi period.¹²³ Its most innovative feature, however, was the premise that the “great spaces” of empires in various regions of the world could form the basis for a stable new international order, along the lines of the United States’ Monroe Doctrine in the Western Hemisphere. Indeed, Schmitt specifically cited Japan’s role in China as embodying an “Asia Monroe-shugi” that showed the general validity of his theory.¹²⁴

These views were both amenable and useful to some Japanese scholars seeking to theorize Japan’s claim to regional hegemony, and to some Chinese intellectuals that collaborated in such efforts. In a 1944 article, for example, Hu explained that:

the concept of an order of great spaces originated with Japan [and] its New Order for East Asia. However, not many people have yet contributed new political analysis [to this idea]. In German scholarship, the first to use the idea of an ‘order of great spaces’ was Carl Schmitt, in his ‘Völkerrechtliche Großraumordnung’ . . . Schmitt explains that the order of great spaces contains not only the idea of cooperation, but also of . . . a great sphere of politics . . . in which a leading people acts as the center to unite the whole into a political force.¹²⁵

This article appeared in the journal *Songs of Chu*, an organ of the Wang Jingwei regime, for which Hu was by this point serving as the Hubei provincial propaganda chief. On the page containing the above excerpt, just below the mention of Schmitt’s 1937 article, there was posted a photograph of a “political [study] conference” (*zhengzhi*

Völkerrechtliche Formen des Modernen Imperialismus [Forms of Modern Imperialism in International Law] (1932) in POSITIONEN UND BEGRIFFE IM KAMPF MIT WEIMAR – GENÈVE – VERSAILLES 1923-1939 (1988) (1940).

¹²³ See, e.g. HEINRICH TRIEPEL DIE HEGEMONIE: EIN BUCH VON FÜHRENDEN STAATEN (1938).

¹²⁴ Carl Schmitt, *Großraum gegen Universalismus*, (1939) in POSITIONEN UND BEGRIFFE IM KAMPF MIT WEIMAR – GENÈVE – VERSAILLES 1923-1939 (1988) (1940).

¹²⁵ 胡瀛洲 [Hu Yingzhou], 世界新秩序论 [*The Theory of New World Order*], 1 楚声 [SONGS OF CHU] 5 (1944).

zuotanhui 政治座谈会), strongly suggesting that Schmitt's thought, along with that of other foreign scholars amenable to the new academic environment within Japan's imperial possessions, was a topic of officially-sponsored study. Indeed, the war period and its aftermath saw various direct and indirect references to Schmitt's thought in works available in Japanese-occupied areas.¹²⁶

In Japan itself, conservative authors were also citing Schmitt during the war years, both in reference to the *Großraum* and regarding his earlier writings against parliamentarism and in favor of commissarial dictatorship.¹²⁷ Schmitt's Japanese readers spanned the political spectrum however. For example, the sociologist and philosopher Shimizu Ikutarō 清水幾太郎 (1907-1988), who was influenced by both Marxism and John Dewey's pragmatism, published a volume in 1939 on "The True Nature of Politics" (政治の本質) (1939). This book, which comprised Japanese translations of Max Weber's *Politics as a Vocation* and Schmitt's *Concept of the Political*, was available in some libraries in occupied areas of China.¹²⁸ Schmitt's ideas were also critically engaged with in some texts on historical and cultural topics by openly leftist Japanese authors.¹²⁹

¹²⁶ See, e.g. 张榆芳 [ZHANG YUFANG], 何谓新秩序? [WHAT IS 'NEW ORDER?'] (1943) (Describing a philosophy of "great space-ism" [大地域主义] that is clearly derived from Schmitt's conception of a *Großraum* order).

¹²⁷ 大串兎代夫 [Toyō Ōgushi], 指導者原理論 [*The Führerprinzip*] in 大日本赤誠會思想局 [GREAT JAPAN SINCERITY ASSOCIATION THEORY DEPARTMENT], 戰時國民講座 [WARTIME LECTURES TO THE NATION] 219–22 (1942) (discussing Schmitt's theory of commissarial dictatorship "to save the people" during emergencies, his critique of parliamentarism's inability to produce political decisions, and arguing that Hitler's extraordinary powers were "just as Schmitt described, entrusted to him by the entire German people.").

¹²⁸ 哈尔滨图书馆增加图书目錄 [HARBIN LIBRARY EXPANDED BOOK CATALOGUE], 21 (竹内正一 [Takeuchi Shōichi] ed., 1939).

¹²⁹ 永田广志 [NAGATA HIROSHI], 科学的历史观 [A SCIENTIFIC PERSPECTIVE ON HISTORY], (阮均石 [Ruan Junshi] trans., 1938) (calling Schmitt an important Catholic thinker seeking to promote *Urmonotheismus* as a "bourgeois reaction against pantheism"); 堀伸二 [HORI SHINJI], 大众政治学 [MASS POLITICAL SCIENCE], (谢叔良 [Xie Shuliang] trans., 1948) (citing Schmitt's views as representing important strains of fascist political thought, for example, the critique of Parliamentarism as incapable of producing political decisions and the view that *Führertum* is not simply "command").

Immediately after the war, there were of course few Chinese intellectuals engaging with theories, or authors, who had helped to supply rhetorical ammunition for the defeated invader. One of the only major mentions of Schmitt in official discourse in the following years came via comments by a leading Soviet intellectual in a 1949 volume of essays “On Internationalism and Nationalism” that was produced by the Chinese Communist Party’s New China Press (*Xinzhongguo Shuju* 新中国书局) as part of its “Cadre Study Collection” (*Ganbu Xuexi Congshu* 干部学习丛书).¹³⁰ The second-ranking Communist Party leader Liu Shaoqi 刘少奇 (1898-1969) was listed as the main author of the volume, which opens with an essay he had written for the *People’s Daily* the previous November, and which was also separately published as a pamphlet.¹³¹ After Liu, the book also includes essays by Lenin, Stalin, the Finnish-Soviet philosopher and Central Committee member Mikhail Davidovich Kammari (1898-1965), and the Soviet Jewish jurist Aron Trainin (1883-1957), with two pieces by Mao Zedong towards the end of the volume.

Trainin’s translated essay on “National Independence and Internationalism”¹³² is the only one to mention Schmitt, but it does so in a prominent manner in its opening pages that reflects interestingly on the rest of the volume’s contents. First, Trainin notes that the world’s two “camps,” the imperialists of the West and the democratic camp of socialist states, had different views on the importance of national sovereignty. Even as the socialist states were calling for an order in which sovereignty would be respected, the West was seeking (with ulterior motives, in Trainin’s view) to reestablish dialogues that would diminish this principle’s importance:

German fascists openly promoted the view that national sovereignty had to be eliminated. They

¹³⁰ 刘少奇 [LIU SHAOQI] et. al 国际主义与民族主义 [INTERNATIONALISM AND NATIONALISM] (1949).

¹³¹ 刘少奇 [Liu Shaoqi], 国际主义与民族主义 [*Internationalism and Nationalism*], 人民日报 [PEOPLE’S DAILY] (Nov. 7, 1948).

¹³² 特莱宁 [Aron Trainin], 民族独立与国际主义 [*National Independence and Internationalism*], in Liu, *supra* note 130, at 61. The essay is attributed only to “Telaining,” however given its context and content, it is almost certainly by Trainin. “Telaining” had also been used as the transliteration of Trainin in other publications.

claimed that the rule of the higher race had to be guaranteed through a *Lebensraum* [*Shengcun Kongjian* 生存空间] that would sacrifice many other states. The people of the sacrificed states would be relegated to the status of “inferior races.” Carl Schmitt is one of the pillars of fascist “legal theory.” He sought with all his might to establish the view that under the conditions of modern production, the old nation-state independence and autonomy have lost all meaning. Thus the “theory” that he set forth was one filled with imperialist thinking: the “*Großraum* theory” [*Guangda kongjian de lilun* 广大空间的理论]. Based on this theory, other states, and especially those of Slavs and other ethnicities, should lose their economic and political autonomy.

Currently the discussions over issues of postwar organization that are occurring within the imperialist camp reflect the fascist *Großraum* theory. The imperialist elements are seeking by means of a vacuous rhetoric of “democracy” to restore and to camouflage this fascist *Großraum* theory. Some evidence for this is in the highly successful outline by the reactionaries in the United States for establishing a “world government,” and Churchill and his conservatives’ plan for a “United States of Europe,” which in reality would be making Europe serve the interests of the American and British imperialists. In the Marshall Plan and the militarily dangerous “Western Alliance” (NATO), etc., there is the full and clear demonstration of the attempt to economically and politically subjugate various nations, and to unite in alliance with reactionary governments, in order to oppose the Soviet Union and other people’s democracies.¹³³

This Party-approved reader is indicative of the lack of a receptive audience among Chinese Communist circles for Schmitt or

¹³³ *Id.*

his ideas during the period of renewed civil war and at the time of the PRC's founding in 1949. It does, however, indicate that at least some within the Party's intelligentsia were likely familiar to some degree with Schmitt's ideas, at least via Trainin's criticism and through the pro-fascist writings of the period noted above. Schmitt thus makes his first appearance in a Party ideology document as an apologist for imperialism, to be condemned for rejecting the principle of national sovereignty. The ideology of the "Greater East Asia Co-Prosperty Sphere" was tied to the *Großraum*, as were the new American-led attempts to create a "space" for transnational managerialism under the NATO security umbrella, for example. With his wartime justifications of regional hegemony by powerful central states, Schmitt had articulated a hierarchical idea of international relations that the Soviet bloc as well as the Chinese Communists rejected in principle. However, the problem of how to structure a world divided into two or more competing "great spaces" was indeed a key dynamic of the Cold War period that was to follow.

The apparent sole direct mention of Schmitt in an early Chinese Communist Party document thus labeled him as *persona non grata*. However, as he himself would come to believe, China's subsequent path under Mao would in many respects make manifest his major themes of autochthonous politics, civilizational autonomy, and the task of defining a *Großraum* resistant to foreign universalist incursions.¹³⁴ In his 1963 *Theory of the Partisan*, Schmitt notes the insight of one of Mao Zedong's poems, "Kunlun" (1935), in which the latter imagines taking a sword to split the world into three pieces: "one inherited by Europe, one presented to America, and one left to China."¹³⁵ Ironically, in Mao's 1963 revision of the poem, published the very same year as Schmitt's book, he changes "China" (*Zhongguo* 中国) into "Eastern Countries" (*Dongguo* 东国), adding a footnote that says "the main thought of this poem is anti-imperialist, and nothing else[,] I have changed the line 'one left to China' into 'one returned to the Eastern Countries.' Forgetting the Japanese isn't right. Now

¹³⁴ Regarding Schmitt's general late interest in China, cf. Mehring, *supra* note 2, at 492–94.

¹³⁵ CARL SCHMITT, *THEORY OF THE PARTISAN: INTERMEDIATE COMMENTARY ON THE CONCEPT OF THE POLITICAL* 41 (G.L. Ulmen trans., 2007) (translation modified to reflect the verbs used in Mao's original).

England, America, and Japan are all mentioned. Any other interpretations aren't realistic."¹³⁶

In general, the advent of the Cold War saw Schmitt's earlier interlocutors turn to other influences and pursuits. Xu Daolin, for example, spent much of the war as a diplomat posted to Rome. In January 1953, as Xu was beginning to turn his focus back to academia, he wrote to his old advisor Smend asking him for guidance on recent developments in legal and political theory, culminating with the question "What is Carl Schmitt writing?"¹³⁷

Despite this expression of continued interest in Schmitt, however, Xu does not seem to have turned to him in any subsequent work, which as mentioned centered largely on the study of pre-Qing Chinese legal history. Similarly, Zhang Junmai did not explicitly engage with Schmitt's thought in his post 1930s public career. He had continued to exercise influence as a gadfly to both the Guomindang and Communist Parties, as the founder of the attempted "third force" Democratic Socialist Party (which he originally named the "National Socialist Party"), and an advocate for a more pluralistic multi-party system. Despite (or rather because) of his non-aligned status, he was later a significant leader in the drafting the Republic of China's 1946 Constitution (which occurred with US consultation as part of an attempt to create a national unity government).¹³⁸ The 1946 Constitution was, however, infamously suspended by the Guomindang's "Temporary Provisions Effective During the Period of National Mobilization for Suppression of the Communist Rebellion" (*Dongyuan Kanluan Shiqi Linshi Tiaokuan* 動員戡亂時期臨時條款). These Provisions placed the Republic into a state of exception, granted Chiang Kai-shek decisive authority, and would forestall development of a multi-party democratic system until they were finally lifted in 1992.¹³⁹

¹³⁶ 毛泽东 [MAO ZEDONG], 毛主席诗词 [POEMS OF CHAIRMAN MAO] (1963).

¹³⁷ Cod_Ms_R_Smend_A_388: 19.

¹³⁸ Jeans, *supra* note 59; *see also* Chen, *supra* note 60.

¹³⁹ The legal scholar Chen Xinmin offers insightful commentary tying this roundabout journey to constitutionalism to Xu Daolin's vision of constitutional

IV. SCHMITT REDISCOVERED

A. Against Romanticized Politics

Throughout most of the Cold War period, explicit citation of Schmitt's ideas became unpalatable (if to different degrees) in both Mainland China and Taiwan. There does not seem to have been any notice by PRC officials of his 1963 book praising Mao, though there may potentially be evidence in diplomatic archives or elsewhere that would indicate otherwise. In addition, neither the doctrinaire Marxism of PRC academia through the end of the Cultural Revolution nor the freer, but still constrained discourse of Taiwan during Chiang's lifetime were conducive to engagement with heterodox legal or political theory.

In the 1980s and 1990s, with Reform and Opening-Up in China and a more comprehensive liberalization of Taiwan's government and society, Schmitt again began to influence discourse. A handful of articles mentioning Schmitt can already be found in Mainland China in the early 1980s.¹⁴⁰ However, his first major "interventions" into important debates would occur in Taiwan, where the influential legal scholar and later justice of the Judicial Yuan, Wu Geng 吳庚 (1940-2017), was one of his major advocates and interpreters. Wu was born into a Catholic family in Guangdong, and moved with his mother to Taiwan after the Communist victory in 1949, rising from poverty to obtain an elite legal education.¹⁴¹ Between 1974 and 1977, he earned a Ph.D. in public law at the University of

transformation, when he notes that the general course of Taiwan's democratization has occurred "not via extreme bloodletting, violence, revolution, or legislation by the ruling authorities, but rather via judicial interpretations by the Judicial Yuan, in one case after another . . . in what could be called a silent constitutional transformation (*stillschweigende Verfassungswandlung*)" in Chen, *supra* note 15, at 25 (citing Hsü, *supra* note 42 for the concept of "silent constitutional transformation.").

¹⁴⁰ These early 1980s mentions include negative references to Schmitt's *Großraum* theory as a justification for Nazi expansionism. See 李家善 [Li Jiashan], "反霸" 是国际法的一个基本原则 [*'Anti-Hegemony' Is a Fundamental Principle of International Law*]; 法学 [L. SCI.] 1, (1983); 李家善 [Li Jiashan], 格老秀斯——近代国际法的奠基人 [*Grotius: Founder of Modern International Law*], 法学研究 [CHINESE J. L.] 5 (1983). There are also scattered references in some translated texts.

¹⁴¹ See 翁岳生 [Weng Yuesheng] et al., 緬懷大法官吳孟庚先生 [*Remembering Justice Wu Geng*], 中研院法學期刊 [ACADEMIA SINICA L. J.] 22 (2018).

Vienna. In 1978, he published with Springer his thesis on “The State Theory of Han Fei: A Contribution to the Chinese Idea of State Reason,”¹⁴² analyzing the thought of the pre-Qin Legalist authoritarian philosopher Han Fei and comparing it to that of Western thinkers such as Machiavelli and Hobbes.¹⁴³ Although Schmitt’s views would have been highly relevant as a point of analysis, he was not cited in this book, suggesting that Wu was not yet familiar with his ideas.

Upon returning to Taiwan and taking up a position as a professor at the prestigious National Taiwan University, Wu continued to develop his interest in illiberal legal thought and his reading of relevant German sources. It is at this point that he turns to Schmitt in his work, as demonstrated in his 1981 study of Carl Schmitt’s thought titled *The New Political Romanticism: A Study of Carl Schmitt’s Political Theory*.¹⁴⁴ The title, a reference to Schmitt’s 1919 book *Politische Romantik*, supplied Chinese legal and political scholars wary of overly rapid liberalization with a striking new epithet against calls for radical transformation. In Wu’s subsequent work, including his 1993 book on Max Weber’s thought, he continued to find inspiration in Schmitt’s realist approach to legal analysis—specifically, the premise that law is the emanation of a “concrete order” of society, and that its content should be understood on that basis.¹⁴⁵

This idea would go on to animate Wu’s own jurisprudence as a highly influential justice of the Judicial Yuan and as one of Taiwan’s foremost authorities on administrative law. Wu led a reception of Schmitt’s ideas in Taiwan that later took on (arguably) “liberal” characteristics over time, with a focus on, for example, analysis of the constitution by reference to basic rights presumed to be outside the possible scope of amendment (as they are part of the basic political

¹⁴² WU GENG, DIE STAATSLHRE DES HAN FEI — EIN BEITRAG ZUR CHINESISCHEN IDEE DER STAATSRATION [THE STATE THEORY OF HAN FEI: A CONTRIBUTION TO THE CHINESE IDEA OF *RAISON D’ÉTAT*] (1978).

¹⁴³ *Id.*

¹⁴⁴ 吳庚 [WU GENG], 政治的新浪漫主義：卡爾·史密特政治哲學之研究 [THE NEW POLITICAL ROMANTICISM: A STUDY OF CARL SCHMITT’S POLITICAL THEORY] (1981).

¹⁴⁵ 吳庚 [WU GENG], 韋伯的政治理論及其哲學基礎 [MAX WEBER’S POLITICAL THEORY AND ITS PHILOSOPHICAL FOUNDATIONS] (1993).

consensus that is a prerequisite for the constitution's existence in the first place).¹⁴⁶ Meanwhile, however, this same doctrine also suggests sharp limits to the potential for rapid political transformation or reform. It suggested that a society like Taiwan's, or Mainland China's, could not suddenly transform its political system due to shifts in the popular will. Wu's application of Schmitt's constitutional doctrine, to a certain extent, helped create a state in which liberalization could be pursued without necessarily implying a recourse to mass democracy.¹⁴⁷

Only slightly later, some scholars in the PRC also turned new attention to Schmitt. Brief mentions in the early 1980s by the East China Normal University ("ECNU") historian of international law Li Jiashan 李家善 show Schmitt's continued disrepute due to the *Großraum* theory—an example of “‘hegemony’-promoting ‘claims’ and ‘theories’ that made noise for a time but never had any place in the mainstream of international law . . . and have been condemned and criticized by legal scholars the world over.”¹⁴⁸ Nonetheless, a few legal scholars in the PRC did begin to cite Schmitt favorably during the 1980s, likely influenced by the growing discourse in Taiwanese legal circles as well as awareness of Schmitt's role in Japanese legal scholarship (where he had never gone fully out of fashion), and of course in German work on law and politics.¹⁴⁹

The Chinese University of Politics and Law professor Dong Fanyu 董璠輿, for example, cited Schmitt in 1987 as the “most clear-eyed pioneer in opening up the study of . . . constitutional preambles.”¹⁵⁰ Relying on Schmitt's *Verfassungslehre* (via the mediation of Japanese legal scholarship) as his main theoretical support, Dong

¹⁴⁶ See discussion in Shu-Perng Hwang, *Carl Schmitt in Taiwanese Constitutional Law: An Incomplete Reception of Schmitt's Constitutional Theory* in Marchal and Shaw, *supra* note 4.

¹⁴⁷ See Chen, *supra* note 15 at 25 (citing Hsü, *supra* note 42).

¹⁴⁸ See Li, *supra* note 140.

¹⁴⁹ See, e.g. Ernst-Wolfgang Böckenförde, *Politische Theorie und Politische Theologie: Bemerkungen zu ihrem gegenseitigen Verhältnis* [Political Theory and Political Theology: Comments on Their Mutual Relationship], 19 REVUE EUROPÉENNE DES SCIENCES SOCIALES 233–43 (1981).

¹⁵⁰ 董璠輿 [Dong Fanyu], 关于宪法序言及其法律效力 [On the Constitutional Preamble and its Fundamental Principles], 政法论坛 [TRIB. POL. SCI. & L.] 22 (1987).

argues that the preamble to the PRC Constitution (which explains the basis of the legal system as an outgrowth of the Party's liberation and leadership of the Chinese people) should be used as a source of norms to clear up ambiguities in constitutional interpretation in favor of Party authority.¹⁵¹ This notable application of Schmitt's constitutional ideas (thematically similar to that of Wu Geng in Taiwan, but with different practical implications based on the PRC's political context) would reappear later on in the works of constitutional scholars Jiang Shigong and Chen Duanhong.

Those who were not exposed to Japanese, Taiwanese, or German legal scholarship might instead encounter Schmitt due to the growing interest in Western Marxism and critical theory. Various texts translated between the early 1980s and 1990s, for example those of Jürgen Habermas, made references to Schmitt's incisive critiques of liberalism in a manner that many Chinese intellectuals during the early Reform period would have been likely to find intriguing.¹⁵²

Meanwhile, the conservative critique of excessive liberal reformism as "political romanticism" was also one that emerged on both sides of the Strait during the 1980s. By the end of the decade, extensive debate about the desirable scope of political and social transformation in China had generated not only official Party warnings against "bourgeois liberalization," but also intellectuals who sought to provide State authority with a firmer set of theoretical justifications vis-a-vis the emerging force of civil society. Two such scholars active during the 1980s and 1990s bear special mention. The first, Wang Huning 王沪宁 (b. 1955), completed graduate study at Shanghai's Fudan University between 1977-1981, writing a thesis on the topic of

¹⁵¹ *Id.*

¹⁵² See, e.g. 于尔根·哈贝马斯 [Jürgen Habermas], 现代性:一项尚未完成的事业 (下) [*Modernity: An Unfinished Project (Part II)*], 6 文艺研究 [LITERATURE & ART STUD.] 153-56 (1994) (行远 [Xing Yuan] trans.). Translations from Lukacs, Fredric Jameson, and others also contained brief references to Schmitt. Fredric Jameson also mentioned Schmitt alongside Hobbes, Locke, and Rousseau as a great figure of political theory during a guest lecture at the Chinese Academy of Social Sciences Institute of Foreign Literature in 1997. See, e.g. transcribed lecture in 弗雷德里克·詹姆逊 [Fredric Jameson], 后现代主义中的旧话重提 [*Repetition in Postmodernism*], 华中师范大学学报(哲学社会科学版) (J. CENTRAL CHINA NORMAL U. (HUMAN. & SOC. SCI.) 6 (1997).

sovereignty in Western thought “from Bodin to Maritain,” subsequently published as the 1987 book *State Sovereignty*.¹⁵³ Choosing the French Catholic philosopher Jacques Maritain (1882-1973) as the endpoint of his study was intended to reflect the way that modern Western discourse had started to find ways to relativize and diminish state sovereignty precisely as soon as this concept became the basis for claims to equality by non-Western states. Wang argued that the “natural law” thinking on which arguments for limited sovereignty were based in Maritain’s thought represented a new kind of “divine right” for the bourgeois class.¹⁵⁴

After becoming a professor at his alma mater in 1981 (where he would rise to become the Director of the Department of International Politics and later Dean of the Law Faculty), Wang continued in numerous writings throughout the 1980s and 1990s to advocate a critical skepticism of Western claims regarding liberal democracy and universal values. These were tools, Wang argued, for the West to deprive developing states of their autonomy.¹⁵⁵ In his work, Wang cited extensively to twentieth century theorists of international law and politics, such as Kenneth Waltz, E. H. Carr, as well as Schmitt-adjacent figures like Hans Kelsen, Hans Morgenthau, and others. However, he does not seem to have cited to Schmitt specifically. Nonetheless, his arguments for sovereignty as a defense for civilizational pluralism, and against liberal universalism, closely overlap with Schmitt’s ideas. This is especially significant because of Wang’s post-academic trajectory. By the mid-1990s, he was a key figure in the Communist Party’s Policy Research Office, where he rose quickly and is credited with being the driving force behind the major ideological initiatives of Jiang Zemin, Hu Jintao, and Xi Jinping.¹⁵⁶ In 2017, he attained the highest rank in China’s political system by entering the Politburo Standing Committee, technically ranked fifth in

¹⁵³ 王沪宁 [WANG HUNING], 国家主权 [STATE SOVEREIGNTY] (1985).

¹⁵⁴ *Id.*

¹⁵⁵ 王沪宁 [Wang Huning], 论现当代主权理论的新发展 [On the Development of Modern Theories of Sovereignty], 1 政治学研究 [CASS J. POL. SCI.] 39–45 (1985).

¹⁵⁶ See, e.g. Haig Patapan and Yi Wang, *The Hidden Ruler: Wang Huning and the Making of Contemporary China*, 27 J. CONTEMP. CHINA 47–60 (2018).

the Party's ruling hierarchy. Today, he is the single official with the most extensive direct authority over China's political ideology.

While Wang and other supporters of Party rule on partially non-Marxist grounds did not explicitly tie their arguments to Schmittian thought, some parallels have grown more apparent over time. This is perhaps most apparent in the work of Xiao Gongqin 萧功秦 (b. 1946). Xiao began teaching political theory at Shanghai Normal University in 1982, and over the course of the 1980s was another one of the leaders in developing a perspective that would come to be referred to as “neo-authoritarianism” (*xinquanweizhuyi* 新权威主义) or “neo-conservatism” (*xinbaoshouzhuyi* 新保守主义).¹⁵⁷ In essence, Xiao's position was that the concrete economic and cultural conditions of Chinese society made sudden radical transformations towards political modernity dangerous and certain to fail. By the late-1980s, he, like Wu Geng in Taiwan, had firmly associated this “realist” conservative position with an opposition to political “romanticism.”¹⁵⁸ For a realist, state-led development would have to come first to achieve national strength and prosperity, political reforms only well after.

In a 2001 book titled *Farewell to Political Romanticism*,¹⁵⁹ he recounts the occasion at an academic conference in Beidaihe, Hebei Province, in August 1988 when he first articulated in a comprehensive way his opposition to romantic political reform projects:

[at the Beidaihe meeting] I suggested that because China did not have a sufficiently powerful middle class,

¹⁵⁷ 萧功秦 [Xiao Gongqin], 新保守主义能否成为左右之争外第三种选择 [Can Neo-Conservatism Become the Third Way Beyond Left and Right?], 爱思想 [AISIXIANG] (October 13, 2011) (noting that neo-conservatism seeks to, *inter alia*, “guide the development of the market economy via the means of political stability [通过政治稳定, 来引导市场经济的发展]”). See also 大陆「新保守主义」的崛起——采访萧功秦 [The Rise of the Mainland's Neo-Conservatism: An Interview with Xiao Gongqin], 中国时报周刊 [CHINA TIMES WEEKLY] 4–5, (1992).

¹⁵⁸ 萧功秦 [Xiao Gongqin], 论当前中国浪漫主义改革观——对制度决定论的批评 [On Contemporary Romantic Reformism in China: A Critique of the Theory of System-Determinacy] in 现代社会与知识份子 [MODERN SOCIETY AND INTELLECTUALS] (梁从诚 [Liang Congcheng] ed., 1989).

¹⁵⁹ 萧功秦 [XIAO GONGQIN], 与政治浪漫主义告别 [FAREWELL TO POLITICAL ROMANTICISM] (2001).

it did not have its own internal motive force of modernization, and so in these historical conditions, after the Xinhai Revolution (the overthrow of the Qing Dynasty) the parliamentary regime that was established was a “rootless” politics. It was not based on China’s own internal needs, but rather on the effect of norms emanating from the West. Because the Western-style political system was not able to effectively cohere the primitive social formation, it brought about ever more severe political crises and anomie, eventually leading to the strongman Yuan Shikai’s usurpation of power.¹⁶⁰

As Xiao would write in 1989, “in an environment that lacks full development of autonomous personality and contract-based interpersonal relationships, ‘pulling up sprouts to make them grow’ into a pluralistic democratic system is simply another sort of attempt at ‘transition amidst poverty’ (*qiong guodu* 穷过渡).”¹⁶¹ Just as the mass democracy movement was beginning to swell and then collapse under the force of the Party’s backlash, Xiao was developing his “neo-authoritarian” view that it was necessary for the state to “use its ‘visible hand’ to create the ‘invisible hand’” in creating the social conditions for economic growth.¹⁶²

The emerging ethos of state-led but market-oriented developmentalism built upon the reception of Western economic ideas that had increasingly permeated the intelligentsia and officialdom during the 1980s. Milton Friedman, Friedrich Hayek, and other such economic thinkers were being discussed with great interest, if not (until much later, and even then only for a specific intellectual faction) as generally embraced gurus of objective economic expertise.¹⁶³

¹⁶⁰ *Id.* at 5–7.

¹⁶¹ Xiao, *supra* note 158. The phrase “transition amidst poverty” refers to the by then rejected notion, associated with the high-Maoism of the Cultural Revolution, that it was not necessary to focus on economic development before seeking to realize a Communist society.

¹⁶² Xiao, *supra* note 159 at 7.

¹⁶³ See discussion in JULIAN GEWIRTZ, UNLIKELY PARTNERS: CHINESE REFORMERS, WESTERN ECONOMISTS, AND THE MAKING OF GLOBAL CHINA, Conclusion, FN35 (2017).

Importantly, the freeing of the economy—and even, within specified bounds, of the individual as a member of society—need not signify bestowing forms of “freedom” that would challenge the Party. Although such views were developing in official and intellectual circles throughout the 1980s, the emergence of “neo-authoritarianism” as an intervention in broader public discourse occurred via the January 16, 1989 World Economic Herald editorial of Wu Jiexiang 吳稼祥 (b. 1955), an economist who had worked at the Central Committee’s General Office among other Party positions. In this editorial, Wu opens by noting that “as some more sensitive individuals might have already noticed, there is a strange fairy beating its wings through the forest of the intelligentsia, and it is called neo-authoritarianism.”¹⁶⁴ According to Wu, this specter is “new” because:

It does not seek to strip individuals of their freedom as the basis for establishing an autocratic authority, rather it uses authority to dissolve the obstacles to the development of individual freedom and in order to guarantee individual freedom. To deprive or to guarantee individual freedom is the dividing line between the old and the new forms of authoritarianism . . . on the one hand, it allows individual freedom to develop, on the other hand, it uses the necessary centralization of power to maintain the social stability needed for freedom to develop.¹⁶⁵

In the editorial, Wu notes Wang Huning along with a few other scholars as leading pioneers of neo-authoritarianism. In a later retrospective, he would also note Xiao Gongqin’s important role.¹⁶⁶ As

¹⁶⁴ 吳稼祥 [Wu Jiexiang], 新權威主義述評 [*Explanation and Commentary on Neo-Authoritarianism*], 世界經濟導報 [WORLD ECON. HERALD] (Jan. 16, 1989).

¹⁶⁵ *Id.*

¹⁶⁶ 吳稼祥 [Wu Jiexiang], 1989年:《新权威主义述评》引发激烈争论 [1989: *Explanation and Commentary on Neo-Authoritarianism* Sparks an Intense Debate], 爱思想 [AI SIXIANG] (2008). Wu also notes the interesting detail that shortly after the editorial was released, sparking widespread and often acrimonious debate, Wang Huning gave him a call from abroad to ask him what was transpiring. Also important to the early development of neo-authoritarianism was Rong Jian 荣剑 (1957-) (who had become a critic of the idea by January 1989), and the influence of Samuel Huntington’s writings on state-led development in Asia. *Id.*

Xiao wrote subsequently in 1989, politics and economics would “have to be separated,”¹⁶⁷ and indeed Wu later summarized the basic point of his editorial as being that “economic freedom must take priority over democratic politics.”¹⁶⁸ Xiao, Wang, Wu, and others in the PRC continued developing their new forms of statist developmentalism at the same time as sometimes overlapping conversations on development and modernization were being held in Taiwan,¹⁶⁹ and Xiao, for instance, became personally involved in cross-Strait activities. They and other neo-authoritarians were essentially committed to the idea of developmentalist autocracy—a state that can justifiably limit civil and political rights, as well as social and economic guarantees, for the purposes of modernization and overall development. This, of course, matches very well with the PRC’s actual policies since the beginning of the Deng Era in 1978. As Xiao would write in 2001:

Neo-authoritarianism viewed objectively has the effect of using the ‘visible hand’ of authoritarian politics to create the ‘invisible hand’ and market economy, and ultimately to spur the fundamental transformation of the social structure, creating the social and economic foundations needed in order to establish a genuine, rooted democratic politics. [. . .] My conclusion was that, although this neo-authoritarianism had a certain degree of risk of degenerating back into traditional authoritarianism, nonetheless it could not be disregarded as a realistic alternative option in

¹⁶⁷ Xiao, *supra* note 158.

¹⁶⁸ Wu, *supra* note 166.

¹⁶⁹ See, e.g. 葛克昌 [Ge Kechang], 國家與社會二元論及其憲法意義 [*State and Society Dualism and its Constitutional Meaning*], 臺大法學論叢 [NAT’L TAIWAN U. L. J.] (1994); 蕭高彥 [Xiao Gaoshen], 馬基維利論政治秩序：一個形上學的考察 [*Machiavelli on Political Order: A Metaphysical Investigation*], 9 政治科學論叢 [TAIWANESE J. POL. SCI.] 145–72 (1998) (citing Schmitt’s *Political Theology* and Wu Geng’s interpretation of Schmitt for the view that anthropological assumptions, for example, about mankind’s inherent good or evil, underlie political projects).

comparison with the unrealistic political romanticism of ‘virtual democracy’ [*xuni minzhu zhengzhi*].¹⁷⁰

Not coincidentally, Wang Huning’s first great contribution to Communist Party ideology, the “Three Represents” theory proclaimed by Jiang Zemin in 2002, would assert that the Party’s legitimacy was premised on its representation of “advanced social productive forces,” “advanced culture,” and “the fundamental interests of the majority.”¹⁷¹ That is, the Party’s status as the agent of modernization and development of state, economy, and society (rather than socio-economic egalitarian redistribution) was given a firm political basis. Party policy has since continued to evince a path closely resembling (but not explicitly endorsing) the “neo-authoritarian” vision of progressively greater freeing of markets while maintaining tight control of all political discourse.

Although these most influential neo-authoritarian voices did not explicitly embrace Schmitt, they helped create a climate in which others began to cite him favorably for related ideas. Particularly notable is a 1995 article on “The Political Function of the Modern State” that appeared in the journal *Comparative Economic & Social Systems*.¹⁷² The author, Wang Lie 王列, was affiliated with the Party’s Compilation and Translation Bureau (*Zhongyang Bianyizhu* 中央编译局) (“CCTB”). Before its eventual merger into another Party body in 2018, the CCTB was responsible for the study and translation of important theoretical texts, including the reception of Western Marxism. It also functioned as a think tank generating policy proposals.

Wang Lie’s article concerns different ways of conceiving of state authority and, in particular, the state’s function as a coercive regulator of society. Over the course of a few pages, Wang introduces relevant views on state power from a number of Western theorists, including Althusser, Max Weber, Schmitt, Julien Freund, Michel

¹⁷⁰ Xiao, *supra* note 158. In the same section of the book, Xiao also criticizes the attempt to establish “virtual parliamentary democracy” in Third World states unprepared for the importation of parliamentary institutions.

¹⁷¹ See Patapan and Wang, *supra* note 156.

¹⁷² 王列 [Wang Lie], 现代国家的政治职能 [*The Political Function of the Modern State*], 经济社会体制比较 [COMP. ECON. & SOC. SYS.] 2 (1995).

Foucault, and others. Schmitt's ideas are presented as a continuation of Weber's theorization of the state as the holder of a "monopoly of legitimate violence." By reference to Schmitt's *Concept of the Political* and Friend-Enemy distinction, Wang argues that this conception of politics helps to clarify the distinction of state's distinctive political existence from its qualities as an economic or social actor. Nonetheless, he ultimately argues that it is Foucault's thought which holds the most useful insights for contemporary China. By reference to Foucault's *Discipline and Punish* and *History of Sexuality*, he argues that it is important for Chinese to realize that the state is no longer primarily an agent of violent coercion. Rather, in the modern age the state can more effectively make use of "thought control and techniques of surveillance" to achieve its political ends.¹⁷³ In post-1989 China, this suggestion actually carried overtones of moderate reformism.

The same year, Schmitt also appears in a brief list of "important legal theorists" of the twentieth century in an article by China University of Politics and Law professor Shu Guoying.¹⁷⁴ Overall, however, explicit engagement with Schmitt's ideas in PRC scholarship remained extremely marginal throughout most of the 1980s-1990s. As a demonstration, in 1988 Schmitt was cursorily included (as "Karl Schmidt") in the China Practical Legal Studies Dictionary.¹⁷⁵ The paragraph-long entry runs as follows:

施米特 [Schmitt] 1888–? Karl Schmidt

German fascist political and legal theorist, educator, and lawyer. Received his education in Berlin, Munich, Strasbourg, and other universities. After graduating was an instructor at universities in Greifswald, Bonn, Cologne, and Berlin. Between 1933-1945 he was a member of the Prussian State Council, and the editor in chief of the *Deutsche Juristen-Zeitung*. He was arrested

¹⁷³ *Id.*

¹⁷⁴ 舒国滢 [Shu Guoying], 赫伯特·L·A·哈特:一代法哲学大师的陨落 [Herbert L.A. Hart: *The Passing of a Great Legal Philosopher*] (vol. no.) 研究生法学 [GRAD. L. REV.] (1995).

¹⁷⁵ 中华实用法学大辞典 [CHINA PRACTICAL LEGAL STUDIES DICTIONARY] (栗劲 [Li Jin] and 李放 [Li Fang] et al. eds., 1988).

after the end of the Second World War, and released in 1947. He advocated state monopoly and actively supported the fascist ascent to power. He was a loyal believer in Hitler's National Socialism. Already before the fascists rose to power, he had used criticism of the Weimar Republic's governing system to advertise totalitarianism and oppose bourgeois democracy. In order to serve the fascist regime, he published a series of essays, in particular on the so-called *Führerprinzip*. His major works include *Dictatorship* (1921), *The Crisis of Parliamentary Democracy* (1926), *The Concept of the Political* (1927), *Constitutional Theory* (1928), *State, Movement, People* (1933), and *On the Three Types of Juristic Thought*, etc.

Almost the exact same entry on Schmitt (down to the incorrect spelling and failure to notice his death in 1985) was reprinted nine years later in an entry in the *China Law Dictionary*, produced by the official press of the Chinese People's Procuratorate (*Zhongguo Jiancha Chubanshe* 中国检察出版社).¹⁷⁶ Despite the overlaps between the new "neo-authoritarian" ideas and Schmitt's thought, at this point officially-sanctioned government texts still dismissed him in a manner similar to his treatment in Liu Shaoqi's 1949 volume on internationalism and in Li Jiashan's early 1980s mentions. Even as the 1997 reference work was being published, however, a new movement towards intensive engagement with Schmitt was beginning to take hold.

B. Strong State and Sound Economy

A significant watershed for open reception of Schmitt's thought in the PRC came with advocacy of his ideas by Liu Xiaofeng (刘小枫) (b. 1956), a professor of cultural and political theory at Renmin University in Beijing. After completing undergraduate studies in German language and literature in his home province Sichuan, Liu began Ph.D. studies in theology with the Swiss theologian Heinrich Ott at the University of Basel in 1989, graduating four years later with

¹⁷⁶ 孙国华 [SUN GUOHUA], 中华法学大辞典法理学卷 [CHINA LAW DICTIONARY: JURISPRUDENCE] (1997).

a thesis on the phenomenology of Max Scheler.¹⁷⁷ Between 1993-2002, he was affiliated as a researcher with the Chinese University of Hong Kong's Institute of Chinese Studies.¹⁷⁸ It was during this period in Hong Kong that Liu's interests in politics and theology, and his skepticism of cultural universalism, led him to engage with Schmitt's ideas as well as those of Leo Strauss.¹⁷⁹ In 1998, Liu published the article "Carl Schmitt and the Predicament of Liberal Constitutionalism," in a Hong Kong-based journal.¹⁸⁰ This piece, a response to John P. McCormick's book *Carl Schmitt's Critique of Liberalism: Against Politics as Technology*, marked the beginning of a phase during which Liu would emphatically advocate Schmitt's ideas.¹⁸¹ Already in 1999, he led a seminar series at Peking University in which he sought to convince his elite academic audience of Schmitt's status as the most recent giant of the Western political theory canon.

Over the next several years, Liu wrote a number of pieces on Schmitt's thought and its relationship to modern China. In 2002, he edited a volume of essays on *Carl Schmitt and Political Law*,¹⁸² and also wrote articles on Schmitt and modernity,¹⁸³ Schmitt's theory of the partisan and valorization of Maoism,¹⁸⁴ and other topics. Liu's idiosyncratic personal views as both a self-described "cultural Christian" and a zealous advocate for the importance of Mao Zedong and his thought (opposing the official characterization of the Cultural

¹⁷⁷ See introduction and overview of Liu's early academic career in LIU XIAOFENG, *SINO-THEOLOGY AND THE PHILOSOPHY OF HISTORY: A COLLECTION OF ESSAYS BY LIU XIAOFENG*, 1–24 (Leopold Leeb ed., 2015). See also discussion in Kroll, *supra* note 4.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* A critical appraisal of Liu's uses of Strauss is presented in Marchal and Shaw, *supra* note 4.

¹⁸⁰ 刘小枫 [Liu Xiaofeng], 施米特与自由主义宪政理论的困境 [*Carl Schmitt and the Predicament of Liberal Constitutionalism*], 6 二十一世紀 [TWENTY-FIRST CENTURY] (1998).

¹⁸¹ Liu notes, for example, that McCormick fails to take "deeply engage with the Hegelian background to Schmitt's *Political Romanticism*." *Id.*

¹⁸² 施米特與政治法學 [CARL SCHMITT AND POLITICAL LAW] (刘小枫 [Liu Xiaofeng] ed., 2002).

¹⁸³ 刘小枫 [Liu Xiaofeng], 施密特与政治哲学的现代性 [*Schmitt and the Modernity of Political Philosophy*], 浙江学刊 [ZHEJIANG ACADEMIC JOURNAL] (2001).

¹⁸⁴ 刘小枫 [Liu Xiaofeng], 施米特与游击队理论 [*Schmitt's Theory of the Partisan*], 爱思想 [AI SIXIANG], (2005).

Revolution as an unmitigated error), both would seem to put him at the fringes of PRC intelligentsia. Yet his scholarly arguments were framed in terms highly compatible with the rising state developmentalist ethos being promoted in official discourse and by “neo-authoritarians.”

Echoing Xiao Gongqin’s reflections on China’s constitutional history, Liu in 2005 wrote that China’s reformist intellectuals during the Republic of China period had been unrealistic and incapable of perceiving the reality of the society they were trying to create laws for. He found it particularly remarkable that Zhang Junmai could have spent so much time in Weimar Germany without encountering Schmitt’s anti-liberal views.¹⁸⁵ Liu does not, however, seem to have read the rather forgotten 1932 article on the “State Crisis of the Chinese Republic,” cited *supra*, in which Zhang does in fact (if briefly) cite and engage with Schmitt’s thought.¹⁸⁶

Like Yao in the 1930s, Liu also has a longstanding interest in Hegelian philosophy of history and the idea that China’s modern politics reflect something like the “movement of spirit” through historical events that create self-aware national subjects. This is reflected in writings both before and after his turn to Schmitt.¹⁸⁷ In works on the history of both Chinese and Western political thought, Liu has advanced his views regarding the untranslatability of Anglo-American rule of law-based liberalism to other cultural contexts. His interest in Schmitt is paired with complementary appreciation for the critical positions to be read in the works of Leo Strauss, Thomas Hobbes, and Han Feizi (whose thought similarly struck both Xu

¹⁸⁵ 刘小枫 [LIU XIAOFENG], 现代人及其敌人—公法学家施米特引论 [MODERN MAN AND HIS ENEMY: INTRODUCTION TO PUBLIC LAW SCHOLAR CARL SCHMITT] 240-70 (2005).

¹⁸⁶ See *supra* note 61.

¹⁸⁷ E.g., in 刘小枫 [LIU XIAOFENG], 圣灵降临的叙事 [THE STORY OF THE COMING OF THE HOLY SPIRIT] (2003). In this book, Liu provides his interpretation of the “spirit” (*Geist* / *jingshen* 精神) that is so important to Hegel’s philosophy of history, and argues *inter alia* that Chinese history presents analogous developments of “spirit”—specifically in the sense of a dialectical progression of group subjectivity through a series of advancing political forms—to that which Hegel sees in the West.

Daolin and Wu Geng as a valuable resource for the critique of reductive liberal prescriptivism).

Liu's late 1990s and early 2000s writings on Schmitt were joined by those of various others developing an interest in non-Marxist critiques of liberalism (as well as liberals who noticed with alarm the sudden upsurge of interest in an arch-conservative figure).¹⁸⁸ Not all of the political theorists and (particularly) legal scholars who began to discuss Schmitt's ideas at this point were inspired by Liu's Schmittian evangelism. The evolution of the Party's ideology (with Wang Huning at the forefront) and its overall policies combining continued repression of alternative political voices with ever more committed statist developmentalism (reflected in particular in the extensive state-led efforts to ensure successful World Trade Organization ("WTO") entry in 2000), ensured that conditions were ripe for anyone seeking to theorize the legitimacy of a "strong state and sound economy."¹⁸⁹

Some uses of Schmitt during this period were, however, articulated as more searching critiques of China's policy direction since Opening Up. The "New Left" historian and political theorist Wang Hui 汪晖 (b. 1958) of Tsinghua University was a prominent early representative of such discourse. He has particularly criticized China's "depoliticization" in the Reform Era, as important social issues and state policies have been removed from the scope of possible discourse and contestation. In 2006, for example, he argues that "for reasons of development and social stability, the space for political debate has largely been eliminated[, t]he party is no longer an organization with specific political values, but is a structured organization of power. Even

¹⁸⁸ 张小劲 [ZHANG XIAOJIN] and 景跃进 [JING YUEJIN], 比较政治学导论 [INTRODUCTION TO COMPARATIVE POLITICS], 121, 250 (2001) (citing Schmitt's *The Concept of the Political* for the "most extreme variant" of a realist view considering politics as "the struggle for survival of the state."); see also, e.g. 何包钢 [He Baogang], 保卫程序: 一个自由主义者对卡尔·施密特例外理论的批评 [Defending Procedure: A Liberal's Critique of Carl Schmitt's Theory of the Exception], 2 浙江学 [ZHEJIANG ACADEMY] (2002).

¹⁸⁹ Cf. Carl Schmitt, "Starker Staat und Gesunde Wirtschaft: Ein Vortrag vor Wirtschaftsführern" (Lecture of 23 Nov. 1932) in Maschke *supra* note 11.

within the party it is not easy to carry out real political debate.”¹⁹⁰ This is a state of affairs that characterizes the West as well. Indeed, he argues, it should be seen as endemic to liberalism qua ethos of an international order premised on free market political economy. Specifically referring to Schmitt’s 1929 essay “The Age of Neutralizations and Depoliticizations” as an inspiration, Wang notes that:

Schmitt, for whom the central practical political problem in the 1920s was the containment of the rising power of the working class, sought a new form of relationship between the political and the economic, neither laissez-faire nor social-democratic. The unsystematic interpenetration of the political and the economic during the 1920s was, from this perspective, a mistake and a danger. Schmitt’s concept of “neutralization,” although specific to Western intellectual and political history, could have utility in other contexts.¹⁹¹

Wang’s work is characterized by these sorts of occasional deployments of Schmitt’s concepts as a source for insights related to modern Chinese political history. This approach is on display, for instance, in his 2010 review of the Chinese translation of Lydia Liu’s *Clash of Empires*.¹⁹² Wang notes that Schmitt’s concept of sovereignty sets up key assumptions underlying Liu’s analysis: namely, how liberalism’s ostensibly neutral doctrine of the state as “equate[d] with pure legal processes,” ignores the political essence of the sovereign state in its actual concrete relationship to society.¹⁹³ In the same essay, Wang notes how Japan’s experience with international law was particularly instructive regarding these themes. On this point, he recites

¹⁹⁰ Wang Hui, *Depoliticized Politics, Multiple Components of Hegemony, and the Eclipse of the Sixties*, 7 INTER- ASIA CULTURAL STUD. 683, 686 (2006) (Christopher Connery trans.).

¹⁹¹ *Id.* (citing Carl Schmitt, *The Age of Neutralizations and Depoliticizations* (1929) in 96 TELOS 130–142 (Summer 1993) (G. L. Ulmen trans.)).

¹⁹² Wang Hui, 帝国的冲突，或帝国时代的冲突? [*Clash of Empires or Clashes of the Imperialist Age?*], 读书 [DU SHU] 1 (2010).

¹⁹³ *Id.*

the anecdote that members of the Japanese Iwakura mission to Europe (1871-1873) had initially believed that international law was treated as a genuinely binding code similar to domestic laws—until Otto von Bismarck explained to them that sovereign states were not, in the end, constrained by legal norms they did not choose to obey.¹⁹⁴

Understanding the systematic nature of the sovereign state's self-definition as a kind of free agent able to exploit and conquer less-developed peoples is, for Wang, a crucial aspect of understanding the crisis China has endured since being suddenly confronted with a world full of such actors over the course of the nineteenth century. It is in this context as well, that China faced (and still faces) its own task of “defining its boundaries” as a traditional empire or civilization not reducible to a Westphalian state.¹⁹⁵ Schmitt's thought is, for Wang, a useful launching point for reflections that tend to arrive not at any particular set of prescriptions, but rather at open-ended questions about China's identity in the face of an alienating modernity and exploitative global markets.¹⁹⁶

Liu Xiaofeng and Wang Hui's different approaches to Schmitt can be viewed as continuing a theme that has been apparent since his earliest reception by Chinese intellectuals. His critiques can be taken as either justifications for the total power of the state and the elimination of challenges from civil society (as both Yao Baoxian and Liu Xiaofeng seem to suggest) or, alternatively, as articulating dissatisfaction with *both* the possibilities afforded by Western liberalism and with China's own failures to independently develop a system capable of achieving specific political goods. Wang employs Schmittian ideas to support his questioning as to why key policies, such as economic distribution, should be taken out of the space of political contestation. Part of the explanation for the degree of Chinese attention to Schmitt's thought is undoubtedly this “double-edged sword” quality—it can be used either to legitimate existing power systems as reflecting a given society's

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Wang's four-volume series on “The Rise of Modern Chinese Thought” (*Xiandai Zhongguo Sixiang de Xingqi* 现代中国思想的兴起) similarly delves into these questions of China's civilizational identity and capacity to define its own politics as well as cultural *Weltanschauung*.

concrete order, or, alternatively, as the basis for calls to transform them to better match that order.

In 2002, alongside Liu Xiaofeng's first edited book on Schmitt, a separate translation of several of Schmitt's writings (including *The Concept of the Political*) was included in a collection entitled *Schmitt: The Surplus Value of the Political*.¹⁹⁷ The following year, Liu edited a collection titled *The Concept of the Political*, that included translations of the eponymous work as well as *Legality and Legitimacy*, *Political Theology*, *Roman Catholicism and Political Form*, and *Political Theology II*.¹⁹⁸ From this point, translation of Schmitt's work in the PRC picked up rapidly, and his thought could be said to have "gone mainstream" in Chinese legal and political scholarship. A partial list includes: A 2004 translation of *Political Romanticism* paired with *The Crisis of Parliamentary Democracy*,¹⁹⁹ which was shortly followed by *Constitutional Theory* (2005),²⁰⁰ *Land and Sea* (2006),²⁰¹ *Positions and Concepts: In Combat with Weimar, Geneva, Versailles (1923-1939)* (2006),²⁰² *The Guardian of the Constitution* (2008),²⁰³ *The Leviathan in the State Theory of Thomas Hobbes* (2008),²⁰⁴ *On the Three Types of Juristic Thought* (2012),²⁰⁵ revised editions of *Legality and*

¹⁹⁷ 施米特: 政治的剩余价值 [SCHMITT: THE SURPLUS VALUE OF THE POLITICAL] (舒炜 [Shu Wei] ed., 2002).

¹⁹⁸ 政治的概念 [THE CONCEPT OF THE POLITICAL] (刘小枫 [Liu Xiaofeng] ed., 2003).

¹⁹⁹ CARL SCHMITT, 政治的浪漫派 [POLITICAL ROMANTICISM], (冯克利 [Feng Keli] ed. and 刘锋 [Liu Feng] trans., 2004).

²⁰⁰ CARL SCHMITT, 宪法学说 [CONSTITUTIONAL THEORY] (刘锋 [Liu Feng] trans., 2005).

²⁰¹ CARL SCHMITT, 陆地与海洋: 古今之"法"变 [LAND AND SEA: ANCIENT AND MODERN TRANSFORMATIONS OF "LAW"] (林国基 [Lin Guojij] and 周敏 [Zhou Min] trans., 2006).

²⁰² CARL SCHMITT, 论断与概念: 在与魏玛, 日内瓦, 凡尔赛的斗争中 [POSITIONS AND CONCEPTS: IN COMBAT WITH WEIMAR, GENEVA, VERSAILLES] (朱雁冰 [Zhu Yanbing] trans., 2006).

²⁰³ CARL SCHMITT, 宪法的守护者 [THE GUARDIAN OF THE CONSTITUTION], (李君韬 [Li Juntao] and 苏慧婕 [Su Huijie] eds., 2008).

²⁰⁴ CARL SCHMITT, 霍布斯国家学说中的利维坦: 一个政治符号的意义及其失败 [THE LEVIATHAN IN THE STATE THEORY OF THOMAS HOBBS: MEANING AND FAILURE OF A POLITICAL SYMBOL] (应星 [Ying Xing] and 朱雁冰 [Zhu Yanbing] trans., 2008).

²⁰⁵ CARL SCHMITT, 论法学思维的三种模式 [ON THE THREE TYPES OF JURISTIC THOUGHT], (苏慧婕 [Su Huijie] ed., 2012).

Legitimacy (2015),²⁰⁶ *Political Theology* (2015),²⁰⁷ *The Concept of the Political* (paired with *The Theory of the Partisan*) (2015),²⁰⁸ *Constitutional Theory*,²⁰⁹ and *Political Romanticism* (2016).²¹⁰ Most recently, *The Nomos of the Earth* (2017), was translated for the first time.²¹¹

V. ONGOING DEBATES

A. Authoritarian “Seduction”?

As noted, some PRC scholars in the Reform Era were aware of Schmitt’s work, even citing him favorably before Liu Xiaofeng’s essays and seminars started to generate increasing attention of Schmitt. Some came to such awareness via familiarity with contemporary Taiwanese, Japanese, or German legal scholarship (or with the growing number of works on Schmitt in the English language during the 1980-1990s). As the Shandong University law professor Li Daogang wrote in a 2003 review of Liu’s edited collection on *Carl Schmitt and Political Law*, by the time Li visited Germany for his studies in the late 1980s Schmitt’s name already “filled the ears like thunder.”²¹² The late 1990s also featured accelerated translation and commentary on works of Western critical theory which appeared in officially-endorsed Party publications like the journal *Marxism and Reality* of the Central Compilation & Translation Bureau’s Institute for Contemporary

²⁰⁶ CARL SCHMITT, 合法性与正当性 [LEGALITY AND LEGITIMACY] (冯克利 [Feng Keli], 李秋零 [Li Qiuling] and 朱雁冰 [Zhu Yanbing] trans., 2015).

²⁰⁷ CARL SCHMITT, 政治的神学 [POLITICAL THEOLOGY] (刘宗坤 [Liu Zongkun], 吴增定 [Wu Zengding] et al. trans., 2015).

²⁰⁸ CARL SCHMITT, 政治的概念 [THE CONCEPT OF THE POLITICAL] (刘宗坤 [Liu Zongkun], 朱雁冰等 [Zhu Yanbing] et al. trans., 2015).

²⁰⁹ CARL SCHMITT, 宪法学说:修订译本 [CONSTITUTIONAL THEORY: REVISED TRANSLATION] (刘锋 [Liu Feng] trans., 2015).

²¹⁰ CARL SCHMITT, 政治的浪漫派 [POLITICAL ROMANTICISM] (冯克利 [Feng Keli] and 刘锋 [Liu Feng] trans., 2016).

²¹¹ CARL SCHMITT, 大地的法 [THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF JUS PUBLICUM EUROPAEUM] (刘毅 [Liu Yi] and 张陈果 [Zhang Chenguo] trans., 2017).

²¹² 李道刚 [Li Daogang], 浪漫国家主义批判:《施米特与政治法学》漫谈 [A Critique of Romantic Statism: Discussing Carl Schmitt and Political Law], 山东大学法律评论 [SHANDONG U. L. REV.], 360–63 (2003).

Marxism (*Zhongyang Bianyijiu Dangdai Makesizhuyi Yanjiusuo* 中央编译局当代马克思主义研究所), and Schmitt's name and some of his ideas could also be encountered in such works.²¹³ Thus, while Liu has certainly influenced Schmitt's overall reception and clearly done much to draw attention to his ideas, it would be an exaggeration to say that Chinese readers of Schmitt are necessarily following Liu's interpretations.²¹⁴ This is especially important to keep in mind when evaluating the practical dimensions of Schmitt reception in China over the last two decades, i.e., the active debates in which his authority is cited as the basis for specific positions.

Broadly speaking, Schmitt's thought, since roughly 2000, has been deployed primarily (as was the case ever since its earliest receptions in China) as a prophylactic against wholesale liberalism and "Westernization," as well as its legal manifestation of "judicialization" (*sifabua* 司法化) of essentially political issues.²¹⁵ It has only secondarily been the basis for positive political prescriptions or even for more comprehensive projects of critique. This is apparent when taking into account two aspects of the Schmitt reception. The first is its status as in significant part a *reaction* against the (until recently) much more dominant reception in Chinese academia of Anglo-American liberal

²¹³ Brief discussions of Schmitt's views on politics as friend/enemy relations are found in, e.g. Jürgen Habermas, 兽性与人性：一场法律与道德边界上的战争 [*Bestiality and Humanity: A War on the Border Between Law and Morality*] 读书 [DU SHU] 9 (刘慧儒 [Liu Huiru] trans., 1999) (translation of Jürgen Habermas, *Bestialität und Humanität: Ein Krieg an der Grenze zwischen Recht und Moral*, DIE ZEIT (Apr. 29, 1999); JÜRGEN HABERMAS and 歧人 [QIREN], 还有选择 [*There Are Still Alternatives*], (vol. no.) 马克思主义与现实 [MARXISM & REALITY] 2 (1999) (translation of Habermas, *Es gibt doch Alternativen!*, DIE ZEIT (Aug. 10, 1998 (interview)); see also 张汝伦 [Zhang Rulun], 哈贝马斯和帝国主义 [*Habermas and Imperialism*], 9 读书 [DU SHU] 34–42 (1999) (contrasting Schmitt's "anthropological pessimism" and views about "bestial human nature" with the anthropological optimism of Habermas).

²¹⁴ For an especially distinct set of readings, see those of Gao Quanxi and Zheng Qi, noted *infra*.

²¹⁵ The issue of "judicialization" is taken in both the general sense, of removing issues from the political sphere and turning them into matters for technocratic administration by agencies and courts, and also in the specific sense of turning the political principles of the Constitution, in particular, into Anglo-American style judiciable constitutional norms.

thinkers such as John Rawls.²¹⁶ The second (related) aspect is the overall conservative (rather than radically innovative) argumentation it has tended to produce regarding legal issues, in particular problems of constitutional interpretation.

That Schmitt is often deployed in a defensive mode might be best apparent from some of the early liberal reactions to his nascent popularity in the early 2000s. The ECNU political scientist Wu Guanjun 吴冠军 (b. 1976), for example, wrote a 2003 essay for *Open Times*, the prestigious and officially-sanctioned journal of the Guangzhou Academy of Social Sciences, attacking Schmitt's *Concept of the Political* and other writings as failing to grasp the true content of legitimacy.²¹⁷ He cites Habermas, Hans Blumenberg, Hayek, and Rawls for their richer and more “optimistic” accounts of political legitimacy.²¹⁸

Liberal reactions have often turned on the premise that some value may be present in Schmitt's critical perspectives, but that he should be prevented from achieving a place of ideological guiding authority similar to that of Mill, Rawls, or Hayek.²¹⁹ Gong Renren 龚刃韧 (b. 1954), an influential legal scholar based at Peking University, is one recent example. In a 2015 editorial for the UK's *Financial Times* Chinese-language edition regarding “a bizarre phenomenon I have personally witnessed in Chinese universities,”²²⁰ Gong articulated his dismay with the use of Schmitt's ideas to support a “statist” agenda of privileging sovereign power over individual rights or international norms. While purely academic studies of the thinker should be tolerated per the principle of “allowing a hundred schools of thought

²¹⁶ On Rawls's many Reform Era Chinese readers, see, e.g. SAMULI SEPPÄNEN, IDEOLOGICAL CONFLICT AND THE RULE OF LAW IN CONTEMPORARY CHINA: USEFUL PARADOXES 125–28, 149 (2016).

²¹⁷ 吴冠军 [Wu Guanjun], 现实与正当之间——论施米特的《政治的概念》 [Between Reality and Legitimacy: On Schmitt's *The Concept of the Political*], 开放时代 [OPEN TIMES] (2003).

²¹⁸ *Id.*

²¹⁹ Of course, these figures are “guides” primarily only for avowedly liberal scholars.

²²⁰ 龚刃韧 [Gong Renren], 中国大学目睹之怪现状 [A Bizarre Phenomenon I Have Personally Witnessed in Chinese Universities], FT中文网 [FIN TIMES CHINESE ED.] (June 3, 2015).

to contend,” it would be deeply worrying if Schmitt’s “pathological” views were to directly influence state policy or infect Chinese society more broadly.²²¹ Some Chinese liberal scholars, like certain Western counterparts, have thus portrayed any interest in Schmitt as an inexplicable academic perversity.²²²

Others have instead sought in Schmitt’s thought a means by which the contradictions of liberalism can be evaded, while its virtues might be preserved. Such a project is of course not without its tensions. In 2016, students of the Tsinghua constitutional law professor Lin Laifan 林来梵 (b. 1963) collected a set of “50 Classic Classroom Quotations by Professor Lin,” which he subsequently edited and republished in an online legal periodical. Quotations 9 and 11 deal with his concerns over what others were already referring to as “Schmitt fever”²²³:

[Carl] Schmitt is really famous in today’s China. Many political theorists, philosophers, and legal scholars pay attention to him. They find his thinking very persuasive, very profound, and one after another go worship at his feet. You’d think he was wearing a dress . . . If you have trouble resisting temptation, please don’t casually approach Schmitt. That’s as dangerous as letting a 16-year-old boy get close to a beautiful seductress.²²⁴

Lin’s advice reflects his own engagement with the German scholar. Ten years earlier, for example, he had already co-authored an essay with Zheng Qi of ECNU, regarding Schmitt’s “theistic conception of the constitution,”²²⁵ in which he acknowledged the power of critiques that revealed the inability of legal norms to account

²²¹ *Id.*

²²² Mark Lilla, *Reading Strauss in Beijing*, NEW REPUBLIC (Dec. 16, 2010).

²²³ See *supra* note 5.

²²⁴ 林来梵 [Lin Laifan], 清华大学教授林来梵：50大经典语录 [*Tsinghua University Professor Lin Laifan: 50 Classic Quotations*, 法律读库 [L. READERS] (Apr. 7, 2016).

²²⁵ 林来梵 [Lin Laifan] and 郑琪 [Zheng Qi], 有神论的政治宪法学—对施米特的解读 [*Theistic Political Constitutionalism: Interpreting Carl Schmitt*], 2 同济大学学报 (社会科学版) [J. TONGJI U. (SOC. SCI. SEC.)] 39–47 (2006).

for exceptional situations. Even a legal system fully intended to deliver the protection of individual freedoms and well-being would not be able to supply those goods without, at times, a clear political decision being taken by a state authority to prevent ambiguities and differences of opinion.

Various other liberal-leaning academics had indeed already begun by this early period to selectively incorporate aspects of Schmitt's critical views into their own work (while trying not to be "seduced" by his illiberalism). Beihang University's prominent constitutional theorist Gao Quanxi 高全喜 (b. 1962), for example, writing in the same year as Lin and Zheng also had to admit that "Schmitt's venomous sting,"²²⁶ while dangerous, was not without certain meaningful contributions. Identifying gaps in traditional liberal thought, or certain "hard problems" of political liberalization that had afflicted the Weimar Republic and that could recur in other times and places, was valuable. Schmitt's discussions of the Weimar Constitution could be instructive regarding the susceptibility to overthrow of fragile legal systems without a firm basis in a concrete political consensus. Gao also specifically notes Hayek's engagement with Schmitt's constitutional thought in *The Constitution of Liberty* as a kind of seal of approval indicating that liberals may, after all, find ideas worth discussing in Schmitt's oeuvre.²²⁷

Gao's 2005 effort to understand the Schmitt phenomenon in China was nonetheless limited—he derides the late works on international law and politics *The Nomos of the Earth*, and *Theory of the Partisan*, as "concoctions by which Schmitt degraded himself to an absurd and laughable degree . . . seeking to overturn the great trends of constitutional democracy and cosmopolitanism."²²⁸ In Gao's later work, however, he has increasingly engaged with Schmitt's ideas as a way to define his own model of "political constitutionalism," premised (in his case) on the key institution of the development of a representative assembly as a central feature of modern Chinese legal

²²⁶ 高全喜 [Gao Quanxi], 中國語境下的施米特問題 [*The Question of Schmitt in Chinese Discourse*], (vol. no.) 二十一世紀 [TWENTY-FIRST CENTURY] 95, 119–132 (June 2006).

²²⁷ *Id.* at 122–23.

²²⁸ *Id.* at 125.

history.²²⁹ From the reluctant engagement on display in his 2005 essay, he has since come to argue, often with specific reference to Schmitt's views, that “[i]f one cannot understand the history of existence, revolution, state founding, constitution making [. . .] in the modern China, one cannot understand the theoretical background of the Chinese political constitutionalism [. . .] either.”²³⁰ Anglo-American liberalism (at least in its Chinese reception) could be too simplistic in providing prescriptions to establish a free and democratic legal order. There remains the Schmittian problem of achieving a “politics of transition” from the exception to the “normal situation,” which can occur only via consensus of the popular sovereign.

B. Concrete Order, Political Form, and the Constitution

Gao's version of political constitutionalism, with its focus on the concrete conditions of a specific polity's distribution of legitimate political authority, stakes out one of the positions in a widespread and influential debate over political constitutionalism that is increasingly part of the mainstream of Chinese legal scholarship. Schmitt's thought plays a significant role in this trend. In essence, the scholarship of political constitutionalism has developed via a distinction with judicial constitutionalism, or the use of constitutional norms as the basis for judicial review of and constraint upon government action. It has thus

²²⁹ See especially 高全喜 [GAO QUANXI], 从非常政治到日常政治 [FROM EXTRAORDINARY POLITICS TO ORDINARY POLITICS] (2009). Here and in subsequent works, Gao develops his own theory of political constitutionalism that is intended to reflect a developing concrete political consensus (in the Schmittian sense) for the “de-revolutionizing” of Chinese society and the end of the political state of exception associated with direct Party-control. A useful overview of Gao's ideas, and their relationship with those of scholars advocating forms of Schmitt-influenced political constitutionalism that instead favor direct Party rule, is in Albert H.Y. Chen, *The Discourse of Political Constitutionalism in Contemporary China: Gao Quanxi's Studies on China's Political Constitution*, 14 CHINA REV. 183, 183–214 (2014).

²³⁰ 高全喜 [Gao Quanxi], 政治宪法学: 政治宪法理论, 抑或政治立宪主义? [The Jurisprudence of Political Constitution: Political Constitutional Theory or Political Constitutionalism?], 清华大学学报 (哲学社会科学版) [J. TSINGHUA U. (PHIL. & SOC. SCI.)] 5 (page no.) (2015) (arguing that China's Schmitt-influenced “value-free constitutional studies” [emphasis in original] can be improved by seeking to define “the Chinese road from the law of survival to the law of freedom”).

been highly useful for scholars skeptical of Anglo-American style separation of powers to turn to Schmitt as a resource for their critiques.

The current Chinese discourse of political constitutionalism has developed in particular through the works of Chen Duanhong 陈端洪 (b. 1966), Jiang Shigong 强世功 (b. 1967), Gao, and other legal scholars. All participants in these debates share a basic premise regarding the primacy of questions regarding the distribution of political authority over the meaning and content of law. They differ, however, regarding the actual location of the most authoritative representative of the popular sovereign, or the agent capable of articulating the “Decision” in Schmittian terms. While Gao has argued at length that this agent is the National People’s Congress (following a long history of attempts to establish a representative legislature), Chen argues instead that this authority is shared between the NPC and the Communist Party,²³¹ with the latter taking precedence. China’s constitutional order must be interpreted based on the concrete characteristics of its *quoti* 国体,²³² literally meaning “state body” but also carrying implications related to a polity’s “concrete order”.²³³

Chen argues for five essential legal norms (or “fundamental laws”: *genben fa* 根本法) of the Chinese political order that must be used as the basis for constitutional interpretation: these are (1) “the leadership of the Communist Party”; (2) “socialism”; (3) “democratic centralism”; (4) “modernization”; and (5) “protection of basic rights.”²³⁴ As the order of these norms suggests, individual rights (or judicial attempts to enforce those rights) must be subordinated to the Party’s role as “leader” and the core policies articulating the national will and delivering modernization and development. Chen went on to

²³¹ 陈端洪 [Chen Duanhong], 宪法学的知识界碑—政治学者和宪法学者关于制宪权的对话 [*The Boundary of Knowledge in Constitutional Law: A Dialogue on Constituent Power Between a Political Theorist and a Constitutional Theorist*], 3 开放时代 [OPEN TIMES] 87–103 (2010) (noting, *inter alia*, that “Schmitt tells us that the People continue to exist, without organization or shape, right alongside the Constitution.” *Id.* at 102 citing Schmitt’s *Constitutional Theory*).

²³² 陈端洪 [Chen Duanhong], 论宪法作为国家的根本法与高级法 [*On the Constitution as Fundamental Law and Superior Law*], 4 中外法学 [PEKING U. L. J.] 485–511 (2008).

²³³ *Id.*

²³⁴ *Id.*

describe Schmitt's theories as "the most systematic model of political constitutionalism" in his 2013 work on "Political Logic in the Study of Constitutional Theory."²³⁵ He has said that "Carl Schmitt is the most successful theorist who has introduced political theory into constitutional studies," and that Schmitt's "personal choices" should not detract from his academic value.²³⁶

While Chen argues that state bodies play a key role alongside the Party, Jiang, meanwhile, is more emphatic in placing the sovereign Decision with the Party *tout court* as the agent of the Chinese people's political will.²³⁷ Beginning in 2003, he became one of the most prominent voices opposing "judicialization" of political matters. This was a highly relevant intervention given the steps being taken during that period by liberals seeking to promote Anglo-American style judicial constitutionalism, who had a major, but ultimately isolated victory that year when the Supreme People's Court's issued a pro-judicial constitutionalist interpretation of the law in the *Qi Yuling* case.²³⁸ Jiang and others argued against the appropriateness of a judicial body as the voice of the sovereign decision in Chinese law, paralleling Schmitt's views in his famous "Guardian Controversy" with Hans Kelsen.²³⁹ Like Schmitt, these conservative scholars view the

²³⁵ 陈端洪 [Chen Duanhong], 宪法学研究中的政治逻辑 [Political Logic in the Study of Constitutional Theory], 中国宪法年刊 [CHINESE Y.B. CONST. L.], 196–99 (2013).

²³⁶ *Id.*

²³⁷ Jiang Shigong, *Chinese-style Constitutionalism: On Backer's Chinese Party State Constitutionalism*, 40 MODERN CHINA 2 (March 2014); 强世功 [Jiang Shigong], 违宪审查制度的第三条道路: 中国宪制的建构与完善 [The Third Road of Constitutional Review: The Construction and Improvement of China's Constitutional System], 1 文化纵横 [BEIJING CULTURAL REV.] 40–9 (2016); Jiang Shigong, 中国共产党与法制建设的关系 [The Relationship Between the Chinese Communist Party and the Construction of the Rule of Law], 观察者 [GUANCHAZHE] (Oct. 21, 2014).

²³⁸ 强世功 [Jiang Shigong], 宪法司法化的悖论: 兼论法学家在推动宪政中的困境 [Paradoxes in the Discourse of Constitutional Adjudication: Discussed Alongside the Predicament of Legal Scholars in Promoting Constitutional Government], 2 中国社会科学 [SOC. SCI. IN CHINA] 18–28 (2003).

See also, e.g. discussion in Veg, *supra* note 4.

²³⁹ Cf. Stanley L. Paulson, *Hans Kelsen and Carl Schmitt: Growing Discord Culminating in the 'Guardian' Controversy of 1931*, in THE OXFORD HANDBOOK OF CARL SCHMITT, 510–47 (Jens Meierhenrich and Oliver Simons eds., 2016) (discussing the

importation of a fully-empowered constitutional court as an infiltration by an alien, liberal model of law and politics unsuited to China.²⁴⁰

These debates on fundamental questions of political form and the origins of state legitimacy have touched on a number of specific issues regarding China's constitutional system. For example, Jiang has written about the importance of the "Trinity" system in which the Party, State, and Military leadership is at all times held by the same individual. This, he argues, is an important aspect of maintaining the capacity for decisive authority and avoiding a situation in which the Party's leading role is challenged, or where it is unclear what body in society is the ultimate voice of authority, leading to chaos and conflict.²⁴¹ Like Chen Duanhong, Jiang has also argued for emphasis on the Constitution's Preamble as a guide in its interpretation and application (here both echo Dong Fanyu's similar argument, also explicitly based on Schmitt's constitutional theory, in 1987), which he argued should be accorded recognition as articulating the political basis as the interpretation of the constitutional text.²⁴² As the next section will address, Chen, Jiang, and others have also applied Schmitt's conception of sovereignty to issues such as Beijing's relationship with Hong Kong, and to China's role in international law.

The ongoing progress of developing a Party-centered political constitutionalism along Chen and Jiang's lines seems to be the most concrete expression thus far of the post-1990s turn to Schmittian ideas. The 2018 amendments to the PRC Constitution, strengthening the position of the Executive, importing the Preamble's "leadership of the

jurisprudential assumptions underlying the two different points of view of Schmitt and Kelsen on the "Guardian of the Constitution.")

²⁴⁰ Key issues in the debate between judicial and political constitutionalism, in several respects echoing the Schmitt-Kelsen debate, are presented in 陈端洪 [Chen Duanhong], 林来梵 [Lin Laifan], and 高全喜 [Gao Quanxi], 政治宪法学与规范宪法学'对话'实录 [Record of the 'Dialogue' Between Political Constitutionalism and Normative Constitutionalism], 2 公法研究 [PUB. L. RES.] 469–505 (2011).

²⁴¹ Jiang Shigong, 民主, 如何是好 [Democracy: Which Way Is Best], 读书 [DU SHU] (2009).

²⁴² 强世功 [Jiang Shigong], 从行政法治到政党法治: 党法和国法关系的法理学思考 [From An Executive Rechtsstaat to a Party Rechtsstaat: A Jurisprudential Analysis of the Relationship Between Party Law and State Law], 11 中国法律评论 [CHINA L. REV.] 3, 35,41 (2016).

Party” directly into the first article of the constitutional text, and creating the powerful Party-controlled National Supervision Commission as a new tool for control over state officials, all coincide quite comfortably with Chen and Jiang’s advocacy for a more clearly articulated Decisionist authority in the Party (and its “core” Xi Jinping) vis-a-vis the state.²⁴³

Aside from broad questions regarding the design and function of the Constitution, Schmitt’s thought has also been influential in discourse surrounding a number of more specific legal and political topics. While his ideas have been related to many areas, including even to topics such as environmental law,²⁴⁴ particularly notable are discussions of the concepts of the “state of exception” and emergency powers.²⁴⁵ On the more theoretical side, some such discussions (specifically relating to the interpretations of Schmitt by the Italian critical theorist Giorgio Agamben) have for instance appeared in the influential, officially-sponsored journal *Marxism and Reality*.²⁴⁶ In such discussions, Schmitt is less a legal or political theorist than a thinker whose discussions of sovereignty can be used to diagnose the crisis of values under the conditions of modernity.

However, Schmitt’s critiques of liberalism have, at times, been adopted by scholars explicitly intending to offer the Communist Party ideological justifications for its policies. In December 2018, the international relations scholar Li Meng of the Beijing Foreign Studies University published a short essay in the authoritative Party-run

²⁴³ On the content and effects of the 2018 amendments, see, e.g. Taisu Zhang and Tom Ginsburg, *Legality in Contemporary Chinese Politics*, 59 VA. J. INT’L L. (2), 307-390 (2019).

²⁴⁴ 那艳华 [Na Yanhua], 环境权制度性保障研究 [Research on Institutional Guarantee of Environmental Right], Ph.D. Dissertation, 吉林大学 [JILIN U.] (2016).

²⁴⁵ 王奇才 [Wang Qicai], 例外状态在中国: 反思中国政治宪法学对‘例外状态’的运用 [The State of Exception in China: Reflecting on the Use of ‘The State of Exception’ in Chinese Political Constitutionalism] (vol. no) 中国宪法年刊 [CHINESE Y.B. CONST. L.], 113-23 (2013).

²⁴⁶ 吴冠军 [Wu Guanjun], 生命政治: 在福柯与阿甘本之间 [Biopolitics: Between Foucault and Agamben], 马克思主义与现实 [MARXISM & REALITY] (2015); 张一兵 [Zhang Yibing], 生命政治构境中的赤裸生命: 阿甘本的政治哲学话语之一 [Bare Life in the Situating of Biopolitics: A Term in Agamben’s Political Philosophy], 马克思主义与现实 [MARXISM & REALITY] (2018).

ideological journal *Red Flag Manuscript* on (Li's interpretation of) "the essence of Xi Jinping Thought."²⁴⁷ Treating "taking the People as the center" as the key feature distinguishing socialist from liberal political systems, the essay refers to Schmitt's *The Concept of the Political* to make a point that could have been drawn from any number of Marxist texts: "For the purpose of protecting individual freedom and private property, liberalism provides a series of methods for hindering and controlling state and government power."²⁴⁸

In the broader perspective, the current trajectory of Schmitt's reception might be best apparent from the role of younger scholars who have placed the German thinker's ideas at the core of their research agendas. Fang Xu 方旭 (b. 1984), a professor currently affiliated with the School of Marxism Studies at the Communist Party School of the Chongqing Municipal Party Committee, is an example of an emerging scholar who analyzes, and at times advocates Schmitt's ideas on a number of topics, ranging from the state of exception to geopolitics.²⁴⁹

In May 2016, Fang received his Ph.D. from Chongqing University with a thesis on "The Legal Power of Dictatorship in a Democratic Political System: Research on the Jurisprudence of Presidential Emergency Power as Specified in Article 48 of the Weimar Constitution."²⁵⁰ His thesis advisor was the doyen of Chinese Schmitt-studies, Liu Xiaofeng. In his conclusion, Fang suggests that the

²⁴⁷ 李猛 [Li Meng], '以人民为中心': 习近平新时代中国特色社会主义思想精髓 [Taking the People as the Center: The Essence of Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era], 红旗文稿 [RED FLAG MANUSCRIPT] (2018).

²⁴⁸ *Id.*

²⁴⁹ 方旭 [Fang Xu], '例外状态' 的历史与法的现实意义 [The History of the 'State of Exception' and the Practical Significance of Law], 中国社会科学报 [CHINA SOC. SCI. J.], (2017); 方旭 [Fang Xu], 作为政治客体的生命: 德国地缘政治学派的一个视角 [Life as an Object of Politics: A Perspective on the German School of Geopolitics], 湖北民族学院学报(哲学社会科学版) [JOURNAL OF HUBEI MINZU UNIVERSITY (PHILOSOPHY AND SOCIAL SCIENCES)] 5 (2018).

²⁵⁰ 方旭 [Fang Xu], 民主政制中的专政法权: 《魏玛宪法》第48条总统紧急权的法理学研究 [The Legal Power of Dictatorship in a Democratic Political System: Research on the Jurisprudence of Presidential Emergency Power as Specified in Article 48 of the Weimar Constitution], Ph.D. Dissertation, 重庆大学 [CHONGQING U.] (2016).

experience of Weimar should lead to caution about excessive use of emergency powers, but that, at the same time that it is necessary to carefully study how best to use “‘dictatorship’ . . . as a ‘tool’ to preserve the constitutional order.”²⁵¹ Fang’s ability to cite and advocate Schmitt’s concepts with the authorial affiliation of a Communist Party organ, like Li Meng’s ability to cite him without qualifications as an intellectual authority in *Red Flag Manuscript*, vividly demonstrates Schmitt’s ongoing march into China’s academic canon.

As mentioned, yet another, newly important aspect of Schmitt discourse has recently emerged following the 2017 Chinese translation of *The Nomos of the Earth (Da Di de Fa 大地的法)*.²⁵² This has produced an intensive engagement with this lengthy, detailed attempt by Schmitt to unveil the “true character” of international law (and all law) as a phenomenon based on the demarcation of space. In stark contrast to Gao Quanxi’s one-line dismissal of this work in 2005, (and in equally stark contrast to the 1949 Liu Shaoqi volume in which Trainin labeled Schmitt’s international law ideas a fascist apologia for imperialism), a new consensus seems to be building in some Chinese intellectual circles that Schmitt’s history of international law, and his *Großraum* concept, are among his most insightful and important contributions.

C. Defining China’s Political Space

Issues of territory and space have been an important theme in recent Schmitt receptions. Scholars such as Chen Duanhong have, for example, applied their readings of Schmitt to developing the implications of his interpretation of sovereignty for the relationship

²⁵¹ *Id.* Fang is thus not an unqualified Schmitt advocate in the sense of viewing the latter’s theories as capable of directly generating practical applications. Like most other Chinese Schmittians, Fang uses Schmitt’s ideas to generate diagnoses of the flaws or paradoxes of liberalism, but this can also prompt subsequent engagement with very different normative prescriptions, for example, those of Western Marxists. *See, e.g.* 方旭 [Fang Xu], 超越‘例外状态’: 西方马克思主义者对施米特‘主权决断论’的回应 [Overcoming the ‘State of Exception’: Western Marxists Response to Schmitt’s ‘Sovereign Decisionism’], 贵州社会科学 [GUIZHOU SOC. SCI.] 4 (2018).

²⁵² Schmitt, *supra* note 211.

between Beijing and Hong Kong.²⁵³ These commentaries tend to be focused on relativizing the notion of “Two Systems” to instead emphasize, with Schmitt, that sovereignty is in essence an exceptional authority that confers the “final say” on points of contention. While this power can be framed by institutions and thus have its expressions modified, it should not be understood to be “limited” by mediating factors such as Hong Kong’s common law judiciary (in case the norms expressed by the latter diverge from the interpretations favored by central authorities).²⁵⁴

Applications of Schmitt’s thought to the special space of Hong Kong are generally derived from his constitutional theory. However, to the extent that authors are concerned with the notion of Hong Kong serving as a beachhead for the intrusion of foreign political influences, they also implicate the question of China’s regional and international environment. This serves as a bridge to the final category of Schmitt receptions in China today, which comprises a new and still-emerging intellectual trend. This category consists of discussions seizing upon Schmitt’s concept of the *Großraum* and related ideas as a lens through which to view the contemporary world order and China’s place in it.

²⁵³ See, e.g. 陈端洪 [Chen Duanhong], 论香港特别行政区行政长官提名委员会的合理性与民主正当性 [On the Legitimacy and Rationality of the Nominating Committee for the Hong Kong SAR Chief Executive], 2014 港澳研究 [HONG KONG-MACAU STUD.] 2 (2014); 陈端洪 [Chen Duanhong], 理解香港政治 [Understanding Hong Kong Politics], 28 中外法学 [PEKING U. L. J.] 5 (2016); 陈端洪 [Chen Duanhong], 论‘一国两制’条件下特别行政区国家安全概念的特殊性 [On the Special Qualities of the Concept of National Security Under the Conditions of ‘One Country, Two Systems’] 紫荆网 [ZIJING NET] (2018), available at: <http://hk.zijing.org/2018/0122/750657.shtml>.

²⁵⁴ In addition to Chen, various other Schmitt-influenced scholars have expressed such views regarding Beijing’s authority over Hong Kong. Beihang University’s Tian Feilong 田飛龍, for example, has related this idea to Schmitt’s notion of the “absolute constitution,” in which fundamental norms such as (in China’s case) political unity override specific norms of a written constitutional document such as the Basic Law. See, e.g. 田飛龍 [Tian Feilong], 施米特對魏瑪憲制的反思及其政治宪法理论的建构 [Schmitt’s Reflections on the Weimar Constitutional System and Their Political-Constitutionalist Structure], 南京大学法律评论 [NANJING U. L. J.] (2014). See also JIANG SHIGONG, CHINA’S HONG KONG: A POLITICAL AND CULTURAL PERSPECTIVE (2017) (not citing Schmitt directly but making use of various concepts clearly associated with his work to analyze the Beijing-Hong Kong relationship).

Though some work along these lines was produced during earlier stages, it has received a dramatic boost with the 2017 publication (surprisingly late compared with his other works), of the Chinese translation of Schmitt's 1950 work on the history of international law, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*.

When Gao casually dismissed Schmitt's late work in his 2004 essay, none of the latter's Chinese readers seem to have been focused on the idea of the *Großraum*. Among the reasons for this lack of attention is certainly the lack of Chinese translations of Schmitt's works on this theme, as well as their politically sensitive connection with his Nazi years and with German expansionism, as well as Japanese claims to regional hegemony. Another reason, however, was that there was not yet widespread interest in theorizing China's role as a great power in a multipolar world.

The middle years of the Hu Jintao era (2002-2012), however, already saw a marked increase in work exploring China's role in world affairs and the question as to whether traditional Chinese statecraft could provide new inspirations for diplomatic initiatives.²⁵⁵ The increased official rhetoric surrounding China's "peaceful rise" (*heping jueqi* 和平崛起) gradually prompted attempts by international relations scholars to articulate the basis for China's uniquely peaceful and non-hegemonic approach as a major world power. Increasingly, scholars have sought to spell out visions for a more active and uniquely Chinese approach to international relations, including by seeking to invent modern analogues to traditional Chinese views on world order.²⁵⁶ The

²⁵⁵ See Yaqing Qin, *Development of International Relations theory in China: Progress through Debates*, 11 INT'L REL. OF THE ASIA-PACIFIC 231 (May 2011) (noting that "debate [] on China's peaceful rise [] evolved at the turn of the century[,] and that "[a] new round of debate seems likely to occur and may center on the question of the world order.").

²⁵⁶ See, e.g. Yan Xuetong, *From Keeping a Low Profile to Striving for Achievement*, 7 CHINESE J. INT'L POL. 153, 163 (2014); YAN XUETONG, ANCIENT CHINESE THOUGHT, MODERN CHINESE POWER (2013); on *Tianxia* see, e.g. Zhao Tingyang, *A Political World Philosophy in Terms of All-Under-Heaven (Tian-xia)*, 56 DIOGENES 5, 5-18 (2009). Both Yan and Zhao are influential and innovative theorists of international relations, and have spelled out their visions primarily by reference to Anglo-American international relations theory as well as Chinese thought and history. Their

practical impact of such discourse on policies likely remains limited, but rhetoric surrounding harmony and China's uniquely non-competitive approach to foreign affairs do frequently seem to draw on such ideas. More influential still are debates that seek to define China's role as simultaneously a major power and the "world's largest developing state."²⁵⁷ Many officially-sanctioned discussions portray China as having a special destiny due to its unique capacity to represent the majority of the world population that lives in Third World, non-Western, developing states.²⁵⁸

Beginning early in Xi Jinping's administration, the Party's emphasis on developing its own new forms of internationalism had manifested in a number of major platform announcements (particularly the One Belt, One Road infrastructure investment initiative) and concepts such as calling for the creation of a "community of shared destiny for mankind" (*renlei mingyun gongtongti* 人类命运共同体). Regional platforms such as the "community of shared destiny" for Asian states, "Asian inter-civilizational dialogue," development of Asian security cooperation, and a "South-South Human Rights Dialogue," have also followed suit. New institutions such as China's Asian International Investment Bank and the Belt and Road Forum add concrete order to these abstract ideas. Meanwhile, China's disputes over the South China Sea, as well as the ongoing dilemma presented by Taiwan, directly present the problem of attempting to transform China's surrounding environment into one consistent with the interests of the Party and the state.²⁵⁹

Schmitt's thought regarding international law has now been taken up with growing enthusiasm by a number of scholars, despite its late translation. China's international situation presents the binary

views form an interesting contrast with those of the growing group of scholars influenced by Schmitt's international thought who are discussed in this section.

²⁵⁷ *China Remains World's Largest Developing Country: Experts*, XINHUA (May 30, 2018).

²⁵⁸ See, e.g. 汪亭友 [Wang Tingyou], 新时代在世界社会主义发展中的历史方位及其重大意义 [*The Historical Role of the 'New Era' in the Development of World Socialism and Its Great Importance*], 红旗文稿 [RED FLAG MANUSCRIPT] 24 (2018).

²⁵⁹ See, e.g. Simon Chesterman, *Asia's Ambivalence about International Law and Institutions: Past, Present and Futures*, 27 EUROPEAN J. INT'L L. 945, 945–78 (2016).

dynamic of universal and particular norms, not only in a more concrete form than did the discussions of intellectual history that characterized Mainland Chinese Schmitt receptions in the 1990s and early 2000s, but also even more than the subsequent scholarship applying Schmitt's ideas to domestic legal issues. This is because the issue of international norms, and the question of their scope and forms of enforcement, directly impacts the understanding of China's relationship with other states and with international institutions. Schmitt's views are highly pertinent to such topics, especially his lengthy discussions in *The Nomos of the Earth* on the origins of Western international law—which he defined as a project of framing a common European space, regulated by law, and an extra-European exterior without legal restraints.²⁶⁰

Since 2017, however, there appears to be a new trend of macro-scale discussions aiming to place China into a Schmitt-influenced philosophy of history. Recent essays by Jiang Shigong, Fang Xu, Wang Hui, and Liu Xiaofeng demonstrate this new turn to Schmitt's thought on global order and its relevance to international policy. Jiang has notably marked a new stage in his oeuvre with a 2018 speech that was transcribed as an essay titled “Geography and Right: Mackinder and Schmitt on the Conflict of Empires.”²⁶¹ Turning away from the discussion of domestic constitutional issues and the need for a powerful top-down authority to represent the immanent unity of the state, Jiang turns in this essay to a consideration of modern China in terms of its geographical and civilizational destiny.

Towards the beginning of the essay, Jiang suggests a connection between the domestic and international spheres. As he writes, Western political and legal theory since Montesquieu has begun

²⁶⁰ It is relevant to note that Schmitt himself discusses the impact of Anglo-American universalism on China in *The Nomos of the Earth* as well as in the *Theory of the Partisan*. See, e.g. CARL SCHMITT, *THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF JUS PUBLICUM EUROPAEUM* 191 (G.L. Ulmen trans., 2006). For general background regarding Schmitt's views on the process of European legal/political expansion see *id.* Chapter Three.

²⁶¹ 强世功 [Jiang Shigong], 地理与法权: 麦金德与施米特论帝国间的冲突 [*Geography and Right: Mackinder and Schmitt on the Conflict of Empires*], 爱思想 [AI SIXIANG] (June 26, 2018). The speech was originally presented at the Peking University forum on “Politics: China and the World 2018” and “Modern Global Intellectual Trends and Chinese Political Tradition.”

from the premise of a Westphalian “sovereign state,” and could not (or did not try to) account for the political systems of the large empires of Asia:

Montesquieu was [however] a social theorist, and thus ultimately had to respect social reality. He noted that the great empires of the East were connected with an expansive geography. Because of this, he especially emphasized the inherent connection between geography, nature, and politics. In this sense, the basis for the legitimacy of empires/autocracies was rooted in geography.

It is precisely by starting from the perspective of geography that we can cast aside the “idealist” theoretical structure of social contract theory and observe the concrete operation on political life of more “materialist” forces. If we can say that the “state” is a product of theoretical construction, then “empire” is instead a truly existing part of real political life.²⁶²

There follows a long discussion in which Jiang focuses on the Schmittian theme of the essential difference between legal orders premised on regulation of (particular) land spaces versus those seeking to assert universality by dominating the world’s oceans. He develops this discussion primarily through an analysis of the ideas of the British political geographer Halford Mackinder (theorist of the “world island” and the “heartland”)²⁶³ and, subsequently, those of Schmitt. The opposition of land and sea, in this account, is a basic problem facing every major state, which must determine its essential alignment either towards maritime universalism or towards domination of a particular continental space. Japan, Jiang argues, suffered an especially severe case of this identity crisis at the heart of modern Asian history. It had sought to exclude European conquerors from the Asian space, but it was incapable of determining whether it should itself function as a

²⁶² *Id.*

²⁶³ *Id.* For an overview of Mackinder’s ideas regarding the “world island” and the “heartland,” see, e.g. Geoffrey Sloan, *Sir Halford J. Mackinder: The Heartland Theory Then and Now*, 22 J. STRATEGIC STUD. 2–3, 15–38 (1999).

maritime-oriented Westphalian state, after the European model, or as an empire comprising the massive Asian heartland.²⁶⁴

Modern China, Jiang suggests provocatively, has also been torn between land and sea in its attempts to exclude foreign interference (from Japan itself, and then from the US and Soviet Union, respectively),²⁶⁵ and now continues to face a choice as to its fundamental orientation. In this and other recent writings, Jiang has undergone a “geopolitical turn” explicitly informed by Schmitt’s theorizations of the relationship between space and legal and political institutions. These discussions strongly suggest that China’s fate will be determined by its success or failure in asserting a *Großraum* of its own in the Asian space that is not subject to American interventionism.²⁶⁶

The Chongqing Communist Party School scholar Fang Xu also implies similar suggestions in a July 2018 essay titled “Saying Farewell to Universal Empire with a *Großraum* Order.”²⁶⁷ Although mostly devoted to a detailed overview of *The Nomos of the Earth* and its historical narrative, at various points the essay hints at the need for China to assert its own agency in overcoming the “universal empire” of Western international law. Towards the end, it presents the claim that, as opposed to Schmitt’s projected three possible *alternative* world orders, there had emerged a dialectical *progression* through all three.

As Fang recounts, the Cold War was followed by a period during which America took up a position as the lone world

²⁶⁴ Jiang, *supra* note 261.

²⁶⁵ *Id.*

²⁶⁶ *Id.*; see also 强世功 [Jiang Shigong], 陆地与海洋: ‘空间革命’与世界历史的‘麦金德时代’ [*Land and Sea: ‘Spatial Revolution’ and the ‘Mackinder Age’ of World History*], 开放时代 [OPEN TIMES] 6 (2018); 强世功 [Jiang Shigong], 陆地, 海洋与文明秩序 [*Land, Sea, and Civilizational Order*], 读书 [DU SHU] (2019); 强世功 [Jiang Shigong], 地缘政治战略与世界帝国的兴衰: 从‘壮年麦金德’到‘老年麦金德’ [*Geopolitical Strategy and the Rise and Fall of World Empires: From ‘Mackinder in His Prime’ to ‘Late Mackinder’*], 2 中国政治学 [CHINESE POLITOLOGY] 110 (2018) (discussing Schmitt’s views on the expansion of European law and political power in Chapter 3 of *The Nomos of the Earth*).

²⁶⁷ 方旭 [Fang Xu], 以大空间秩序告别普世帝国 [*Saying Farewell to Universal Empire with a Großraum Order*], 开放时代 [OPEN TIMES] 4 (2018).

superpower. Soon after, though, the US had belied its claims to legitimate universal rule with its response to the 9/11 attacks—a unilateral attempt to play the role of “global policeman” while failing to actually establish global consensus on actions such as the Iraq War. Meanwhile, its encroachments into other nations’ spaces, Fang claims, had led many to see the need for a *Großraum* order of self-sufficient regions able to exclude American interventionism. With his late speculations on the possibility of a “New *Nomos* of the Earth,” Schmitt had “handed over a golden needle in the dark” (*an du jinzhen* 暗度金针), an expression for passing on secret knowledge and techniques.²⁶⁸

Wang Hui, too, has begun to supplement his world-historical reflections with spatial themes drawn from *Nomos*. This is apparent in a 2018 two-part essay entitled “20th Century China as an Object of Thought.”²⁶⁹ The second part, which carries the subtitle, “Spatial Revolution, Parallax Time and Displaced Politics,”²⁷⁰ begins with a reference to Marx’s “18th Brumaire of Louis Bonaparte” and its famous opening line regarding repetitions of historical phenomena. Wang suggests that Marx’s philosophy of history, while providing insights, is still reliant on an essentially homogeneous model of time and space that does not reflect the very different historical experiences of different cultures. By contrast, Schmitt’s idea of a world history defined by the contest of different ways of ordering space, and in which the rise of Europe took place as part of a “spatial revolution” of maritime-oriented states laying claim to the non-Western world, could be a fruitful basis for theorizing China’s unique modern fate.

As Wang writes, “[f]rom the 17th century, the Qing began to have dealings with the ‘two different kinds of hunter’ that Schmitt claims radically expanded [the European] space (i.e. the Russian fur trappers and the Western and Northern European pirates).” In doing so, the Qing began assimilating to the formal characteristics of modern

²⁶⁸ *Id.*

²⁶⁹ 汪晖 [Wang Hui], 作为思想对象的二十世纪中国: 薄弱环节的革命与二十世纪的诞生 [20th Century China as an Object of Thought: The Weak Link of Revolution and the Dawn of the 20th Century], 开放时代 [OPEN TIMES] 5 (2018).

²⁷⁰ 汪晖 [Wang Hui], 作为思想对象的二十世纪中国: 空间革命, 横向时间与置换的政治 [20th Century China as an Object of Thought: Spatial Revolution, Parallax Time and Displaced Politics], 开放时代 [OPEN TIMES] 6 (2018).

statehood, for instance via the Treaty of Nerchinsk, by which the Qing delimited exact geographical boundaries with the Russian Empire on the basis of territorial sovereign equality. Schmitt's philosophy of international legal history based on land appropriation can afford useful reflections to China as it questions what makes it distinct from the Western state system in which it finds itself: "the so-called geographical perspective is not just a matter of geography, behind it lies the issue of how to determine the spatial boundaries and inner content of 'China.'"²⁷¹

A few months after the appearance of the Chinese version of *The Nomos of the Earth*, Liu Xiaofeng published an essay titled "European Civilization's 'Free Space' and Modern China: A Reading of Carl Schmitt's *Der Nomos der Erde*."²⁷² In it, he takes Schmitt's *Nomos* as a model for what "global history" should mean in the context of Chinese Marxism.

In Schmittian terms, as China continues to grow, the US has every reason to be worried. The relationship between the US Mainland and the newly-emerging space of East Asia precisely resembles how Old Europe was squeezed out of the [Western] Hemisphere by the world-historic rise of America. Just so will America be squeezed out of Asia due to the world-historic rise of China: Currently this is happening with respect to [China's] challenges to US-delineated "free space."

China's world-historical rise is connected with the Eastern tradition of Marxism (*Makesizhuyi de dong chuan* 马克思主义的东传). This has meant that Marxism

²⁷¹ *Id.*

²⁷² 刘小枫 [Liu Xiaofeng], 欧洲文明的'自由空间'与现代中国: 读施米特《大地的法》劄记 [*European Civilization's 'Free Space' and Modern China: A Reading of Carl Schmitt's Der Nomos der Erde*], 2 中国政治学 [CHINESE POLITOLOGY] 21-64 (2018).

brought about a kind of new “Nomos of the Earth”
(*yizhong xin de Da Di Fa* 一种新的大地法).²⁷³

As was the case with Jiang and Xu’s world-historical reflections, Liu does not specifically spell out the particular means by which China should deliver upon this promise of a new order, aside from seeking to end American hegemony in Asia and to consolidate its own “great space.” However, he is more concrete in spelling out his view that the character of a Chinese-defined *Großraum* should draw (syncretic) inspiration from traditional Chinese culture, Hegelian and Marxist philosophy, and the political experience of the Chinese Communist Party.

Schmitt was not a Marxist. It was only because he respected historical reality that he emphasized how the Hegelian - Marxian new Nomos of the Earth sought to overcome the Anglo-Saxon and Americanist (*Angelu – Sakexun he Meilijianzhuyi* 盎格鲁 – 撒克逊和美利坚主义) Nomos of the Earth.

Hegel saw that Kantian cosmopolitanism had ignored Aristotle’s emphasis on ethical cultivation, moral education, the development of good mores, and the socialization manifested via the ethical order (*Sittlichkeit*) of various cultures and histories. In a word, Kant was indifferent to the ethical meaning or ethical value of historical and social orders.

As far as we are concerned, the unavoidable political-historical question is: if China relies upon [its own] kind of “-ism” as it rises, it will inevitably bring the world into a new *Nomos of the Earth*. Moreover, that means that the traditional virtues of Chinese civilization must engage in a struggle with the Anglo-Saxon and Americanist Nomos of the Earth. In fact, already in 1946, Mao Zedong “intellectually broke through the restraints of the postwar Great Powers, establishing an

²⁷³ *Id.* at 63–4.

independent and autonomous policy towards America and no longer placing the Soviet Union's attitudes and interests in the place of importance.”

What, then, exactly is the nature of the new Nomos of the Earth? That was given its response in Schmitt's 1963 book *The Theory of the Partisan*.²⁷⁴

Liu's views here go rather beyond both official policy and mainstream intellectual discourse, even among his fellow Schmitt readers. Nonetheless, he articulates a clear set of practical takeaways for China from the philosophy of history contained in *Nomos*. First, like Jiang, Xu, and others, Liu argues that American efforts to police the space of Asia and to enforce “international norms” are in fact efforts at maintaining a universal global hegemony. Second, he views China's destiny as consisting in overcoming this hegemony by becoming the determiner of norms within its own space. Lastly, he views the Chinese Communist Party as the embodiment of the various different influences—traditional Chinese culture, Hegelian–Marxian thought, and modern Asian political experience—that provide the Asian space with an essentially different social and historical character from that of the Anglo-American world.

Even if mainstream scholarship or policy does not follow the path of explicitly advocating a China-based Asian *Großraum* of the sort that the above essays imply, Schmitt's thought on these issues has perhaps begun to influence more concrete discussions of Mainland China's nearby spaces, such as those on the law of the sea as well as the management of Hong Kong issues. Some works have now cited Schmitt's *Nomos* and his *Großraum* theory as playing a role in theorizing “a new approach to the sea,”²⁷⁵ by which China can strategically engage with existing maritime rules where these are favorable, and propose its own alternative forms of order when existing rules work against its interests.²⁷⁶ Given the profound geopolitical tensions associated with

²⁷⁴ *Id.* at 64.

²⁷⁵ 陆炎 [Lu Yan], 中国走向海洋的另一种思维 [*Another Conceptualization of China's March Towards the Sea*], 中国图书评论 [CHINA BOOK REV.] 7 (2014).

²⁷⁶ See, e.g. 郑志华 [Zheng Zhihua] and 郑溶 [Zheng Rong], 卡尔·施米特海洋秩序观初探 [*Initial Research regarding Carl Schmitt's Perspective on Maritime*

freedom of navigation and security issues in the South China Sea and other nearby waters, this seems likely to be an area in which Schmitt's thought will continue to exert a growing influence. Indicating the likelihood of further such developments, in March 2019, the key Communist Party ideological journal *Seeking Truth* published two pieces (including one by the emerging Schmitt scholar with an interest in the *Großraum*, Fang Xu) in which Schmitt's thought is tied to the problem of defining a critique of "empire" in international political economy.²⁷⁷

Overall, the *Großraum* is perhaps the main Schmittian concept that has yet to fully make its mark on legal and political debates. For a Party that has lost much of its firm commitment to doctrinaire Marxist political economy, the subsequent embrace of a "sound economy in a strong state," or a de facto authoritarian developmentalist system, has kept its appeal since the 1980s. If the economic-developmental justification of Party rule ever seems to be seriously in doubt, however,

Order], 云南大学学报 (法学版) [J.YUNNAN U. (L. ED.)] 4 (2012) (recounting Schmitt's discussions of the opposition between Land and Sea, and the different "universal" character of maritime rules as lacking the centralized character of territorial sovereignty, but at the same time noting that China's maritime commerce has been one of the greatest beneficiaries of the existing order); see also 黄一玲 [Huang Yiling], 共建公正合理的海洋新秩序 [Collectively Constructing a Just and Rational New Maritime Order], 1 复旦国际关系评论 [FUDAN INT'L STUD. REV.] 298–311 (2018) (citing Zhang and Zheng, *supra* this note, and noting that the differences between the legal regimes for land and sea lie in part because the resources of the latter have not been fully "divided up"; meanwhile, suggesting on this basis that China needs to establish amenable rules for its "21st Century Maritime Silk Road" policies.).

²⁷⁷ 蓝江 [Lan Jiang] and 王欢 [Wang Huan], 从帝国到数字帝国主义: 重读哈特和奈格里的《帝国》 [From Empire to Digital Imperialism: Rereading Hardt and Negri's Empire], 2019 求是学刊 [SEEKING TRUTH] 2 (2019); 方旭 [Fang Xu], '例外'之幕下的新帝国: 《帝国: 全球化的政治秩序》新读 [The New Empire Under the Curtain of the 'Exception': Rereading Empire: The Political Order of Globalization], 2019 求是学刊 [SEEKING TRUTH] 2 (2019). Jiang Shigong has also published another similar essay in which he dwells on these themes, again drawing clearly on the *Nomos of the Earth*, to make the point that international law up to the present day has been shaped by a "Western Christian Civilization" that used it to establish a "universal empire," in which China and other non-Western civilizations must now seek to define their role and capacity for action. 强世功 [Jiang Shigong], 超大型政治实体的内在逻辑: '帝国' 与世界秩序 [The Intrinsic Logic of Very Large Political Entities: 'Empire' and World Order], 2019 文化纵横 [WENHUA ZONGHENG] 2 (2019).

the spatial logic of the *Großraum*—i.e. the right to defend a pluralistic world order of multiple civilizational centers without intrusions by Western states seeking to enforce liberal norms—may provide an alternative theory of legitimation. Indeed many of China’s current internationally-focused policies, such as the Belt and Road Initiative, could derive support from either of these two legitimation strategies.²⁷⁸

VI. CONCLUSION

There is a considerable diversity in Chinese intellectuals’ engagements with Carl Schmitt, but these have nonetheless shared some dominant themes ever since the encounters of the 1920s–1930s. Then as now, concepts such as the “Decision” that defines the character of a political community, or the concrete order of its form of life that produces Friend-Enemy dynamics, offer a conceptual vocabulary untethered to either Anglo-American liberalism or to orthodox Marxism. The search for a “third way” and for a Chinese *Sonderweg* under the alienating conditions of modernity and global capitalism has prompted many to engage with Schmitt’s ideas, albeit with very different conclusions.

Since the Nanjing Decade, some have found in Schmitt’s ideas of Executive power defending a concrete order of social and legal institutions the justification for projects of “authoritarian liberalism,” wedding a powerful semi-dictatorial state to a relatively free economy. These readings, reappearing in the 1980s and 1990s, played a role in the different processes of liberalization that unfolded in Taiwan and then in Mainland China, in the former case broadening into an embrace of multiparty democracy while in the latter retaining authoritarian Party rule. Given the inability of classic Marxist thought to describe Chinese state-led development policies in the post-1979 Reform Era, Schmitt’s depiction of a “qualitative” strong state that refrains from undue economic intervention, but exercises dictatorial powers as to political matters, remains highly relevant. The course that China has taken during Wang Huning’s rise to theoretical prominence

²⁷⁸ See, e.g. 中国以‘人类命运共同体’破解‘文明冲突,’ [*China Breaks Through ‘the Conflict of Civilizations’ by Means of ‘the Community of Shared Future for Mankind’*], CHINA DAILY (Dec. 28, 2018).

has often echoed this model originally articulated in the vein of Weimar era conservatism, and this likely explains much of the ongoing appeal—and verisimilitude—of Schmitt’s thought to Chinese intellectuals. Even for those advocating democratic or constitutional reforms, Schmitt’s thought can be a useful point of departure precisely because of the considerable overlap between his premises and those of the ruling authorities in an era of economic, but not political, liberalization.

Meanwhile, there have also been those who have cited Schmitt in the service of more radical visions of a China-centered “great space,” excluding incursions by alien powers. In the 1930s, for example, Yao Baoxian disseminated Schmitt’s theory in the name of a more far-reaching system of one-party rule and dictatorship by Chiang Kai-shek, while also pursuing a quixotic pan-Asian and Buddhist revivalist theopolitics. Later, Schmitt’s writings on geopolitical space were made use of by collaborators with the Japanese occupation regime. Though these associations were long forgotten, it is striking that Schmitt’s theories of spatial revolution and international legal history have been the last of his writings to be translated into Chinese. They have only recently begun to be read widely and with great interest vis-à-vis current geopolitical tensions and questions about China’s role in world order.

In general, Schmitt’s status as a source of critical perspectives on liberal constitutional democracy is by now quite firmly established in Chinese intellectual discourse. It is less certain, however, whether his thought will help to build any new special path for Chinese political modernity, or any lasting domestic or international legal structures.