Chinese Political Constitutionalism and Carl Schmitt

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Abstract
Carl Schmitt’s influence in China goes far beyond the circle of political philosophers. Two prominent Chinese constitutional theorists, Gao Quanxi and Chen Duanhong, have used Schmitt’s theory to develop their theories of Chinese constitution. They identify their theories as Chinese political constitutionalism. Although Schmitt is not the sole theoretical source for Chinese political constitutionalism, his influence is significant. This article aims to explore this important but much neglected connection between Schmitt and Chinese political constitutionalism.

Keywords
Carl Schmitt, Chinese Political Constitutionalism, Chinese Constitution, Gao Quanxi, Chen Duanhong

There has been a huge interest in Carl Schmitt in China since the beginning of the twenty-first century. Numerous works by Schmitt and secondary literature on Schmitt have been translated and published in Chinese. With the introduction of Schmitt’s thoughts into China, heated discussions have taken place among Chinese political philosophers concerning his theories. In fact, Chinese political philosophers have been polarized by their different attitudes towards Schmitt. Some philosophers believe that Schmitt teaches political truth, while others claim that Schmitt embraces evil (Zheng, 2013; Zheng, 2015, pp. 7-31).

Nevertheless, Schmitt’s influence in China goes far beyond the circle of political philosophers. While philosophers are still debating about the relevance of Schmitt’s theory to China, some prominent constitutional theorists, such as Gao Quanxi and Chen Duanhong, have already diligently studied Schmitt’s works and gained inspiration from Schmitt in their efforts to understand the Chinese constitution. These constitutional theorists generally identify their
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Chinese political constitutionalism refers to a school of Chinese constitutional theorists who adopt a unique constitutional methodology. They treat the Chinese constitution as a political constitution and focus on the relationship between politics and the constitution rather than the normative interpretation of the constitutional text (Gao, 2014a, p. 4). To some extent, Chinese political constitutionalism opens up a new approach to grasping the current Chinese constitutional order. Although Schmitt is not the sole theoretical source for Chinese political constitutionalism, his influence is significant. This article aims to explore this important but much neglected connection between Schmitt and Chinese political constitutionalism.

The article is divided into three sections. Section one explores Gao Quanxi’s political constitutionalism and his complex attitude towards Schmitt. Section two deals with Schmitt’s influence on Chen Duanhong. Although the concept of Chinese political constitutionalism was first proposed by Chen, it is Gao who has developed a systematic understanding of political constitutionalism. Therefore, it makes sense for us to discuss Gao’s thought first and then Chen’s theory. At the end of the article, there will be a brief conclusion.

**Gao’s Political Constitutionalism and his Complex Attitude Towards Schmitt**

Before entering into a detailed analysis of Gao’s political constitutionalism, it is necessary to briefly describe the general picture of Chinese constitutional theory. The dominant constitutional theory in China used to be the constitutional theory of ideology. The constitutional theory of ideology adopts the official political ideology of Marxism to understand the Chinese constitution. For instance, Professor Zhang Guangbo defines the constitution as the expression of the will of the ruling class (Zhang, 1987, p. 2). In contrast to the constitutional theory of ideology, one of the current mainstream constitutional theories in China is normative constitutional theory. It defines the constitution as the fundamental law that embodies the spirit of constitutionalism. And the core value of constitutionalism is the protection of individual freedom. Therefore, the norms that protect individual rights are considered as the most fundamental in the constitution (Lin, 2001, p. 8). With the change of the definition of the constitution, normative constitutional theory claims that “its central task” is not to explore the phenomenon behind norms, but norms themselves (ibid., p. 4). The class nature of the constitution is obviously identified as the ‘phenomenon behind norms’. Therefore, it does not belong to the subject of constitutional theory. Political, social or other elements have been excluded from the sphere of constitutional theory. Similar to normative constitutional theory, constitutional interpretivism, another mainstream constitutional theory in China, proposes that constitutional theory should focus on the ‘text’ of the 1982 Chinese constitution and its values (Han, Lin & Zheng, 2008, p. 136).

However, Gao claims that neither of these Chinese constitutional theories is capable of grasping the “real Chinese constitutional order” (Gao, 2014a, p. 3). For Gao, the constitutional theory of ideology is purely political. It fails to grasp the constitutional or legal dimension of the Chinese constitution (ibid., p. 6). As for normative constitutional theory and constitutional interpretivism, Gao criticizes them for deliberately avoiding the fundamental political dimension of the Chinese constitution. In order to understand the Chinese constitutional system, Gao believes that it is necessary to adopt his political constitutionalism. Political constitutionalism is a new methodology for understanding the constitution. It
is not concerned with the normative interpretation of the constitution. For Gao, the judicial interpretation of the constitution is the concern of the ordinary political moment. The ordinary political moment refers to the moment when the constitution operates and completely regulates political activities. Instead, political constitutionalism focuses on the moment of constitutional making and aims to explore the political foundation of the constitution.

To Gao, political constitutionalism has at least two tasks. First, it should clarify the real Chinese constitution and its dynamics (ibid., p. 21). The real constitution in Gao's theory refers to the constitutional rules that are operating in political reality. To be more specific, these operating constitutional rules are the existing rules of power. Gao claims that the real constitution is the political aspect of the constitution. Without understanding the political aspect of the constitution, it would be impossible to grasp the fundamental nature of the Chinese constitution. By studying the real constitution, Gao argues that political constitutionalism will uncover the origin and the development of the current Chinese constitutional order (ibid., p. 21).

Second, it should also explore the issue of justice in the constitution. Unfortunately, Gao has never clearly defined the meaning of justice in his theory. It seems that the concept of justice and normativity are interchangeable in his thought (ibid., pp. 21-22). And by the normative nature of the constitution he means the tendency to restrain political power. He argues that constitutional theory should not only identify the political constitution as reflecting a political decision of the people, but also aim to establish a normative system to tame political power (ibid., p. 17). Otherwise, it would not qualify as a constitutional theory, but as a means to justify brute force. Therefore, Gao claims that political constitutionalism should “explore how to end revolution, how to subject revolutionary politics to constitutional politics and how to subject the leadership power of the Party to the popular sovereignty of the National People's Congress” (ibid., p. 24).

The two tasks of political constitutionalism embody Gao's central understanding of the current Chinese constitution, which was passed in 1982, since he believes that the current constitution could only be properly understood through political constitutionalism. To Gao, the Chinese constitution is a political constitution. A political constitution is a constitution whose political element has 'an absolute dominant status'. The political element refers to the political foundation of the constitution. It deals with the issue of how the constitution is made by political power (ibid., p. 15). Political constitution in Gao's theory could be understood as a Schmittian concept of constitution, which is defined as a political decision. In contrast to a political constitution, an ordinary constitution is a constitution of an ordinary political time. The key characteristic of an ordinary constitution also lies in the unique status of its political element. Although an ordinary constitution has its political aspect, it ‘disappears’ into the background. The main content of an ordinary constitution is its constitutional laws rather than its political elements (Gao, 2014b, p. 105).

Gao argues that a political constitution has two sub-categories. These are revolutionary constitution and reformist constitution (ibid., p. 105). Unfortunately, Gao has never defined the meaning of the concept of a revolutionary constitution. It properly refers to a constitution that endorses a continuing revolution or radicalism, since Gao considers the constitution during the Great Cultural Revolution to have been a revolutionary constitution (ibid., p. 96, 104). With respect to a reformist constitution, it is something between a revolutionary constitution and an ordinary constitution. It is a constitution that aims to become an ordinary constitution. So it could be called a constitution in transition.
To Gao, the Chinese constitution is a reformist constitution. As a reformist constitution, it has a dual theme of ‘revolution’ and ‘de-revolutionarisation’ (ibid., p. 96). On the one hand, the constitution affirms the achievement of Chinese revolution by people under the leadership of the Chinese Communist Party. China and its constitution are the result of the revolution. Revolution and violence are the foundations of the constitution. This is the theme of revolution in the constitution. On the other hand, the constitution actually tries to put an end to revolution, in particularly the ‘Great Cultural revolution’ and its radical theory of class struggle. It aims to re-establish social and political order by law (ibid., p. 99). The constitution represents ‘a constitutional reform’ and initiates the transition from “extraordinary politics to ordinary politics” (ibid., p. 100). At the end of the process, it will finally establish a constitution of constitutionalism. This process is referred to by Gao as the ‘counter-revolution of revolution’.

Let’s take a more detailed look at the Chinese constitution. Gao argues that the political foundation in the 1982 Chinese constitution is the sovereignty of the people. It has been realized through three different mechanisms. They are leadership by the Party based on truth, the People’s Congress based on procedure, and the system of democratic participation other than through the People’s Congress (Gao, 2014b, p. 107). For the party leadership, Gao writes that the constitution represents the negation of personal dictatorship and the establishment of a democratic style of party leadership. The constitution embodies the unity of the will of the party and the will of the people. The constitution becomes the party’s and the people’s highest will. This means that the constitution requires the party to abide by the constitution. Nevertheless, Gao admits that the party’s leadership has not been subjected to the constitution yet (ibid., p. 110). The establishment of the National People’s Congress is the second major achievement of the constitution. The National People’s Congress is the supreme state organization in the constitution. It is the direct realization of the people’s sovereignty. Gao, however, points out that the realization of the power of the National People’s Congress as the supreme state power in China is still not ideal. The reason lies in the fact that the relationship between the party and the state has not been settled yet. And the Chinese People’s Political Consultative Conference is the third mechanism of the system of democratic participation in the constitution. Gao is actually not very sure whether this mechanism is an element of a political constitution. But he simply declares that Chinese political constitutionalism should study the third mechanism’s relationship with the party and its constitutional significance (ibid., p. 115).

Besides this unique structure of the Chinese constitution, four amendments to the constitution also reflect the reformist spirit of the Chinese constitution. The four amendments re-define the nature of the ‘people’s republic’, separate the state from society, and propose the establishment of the rule of law, protection of private property, and human rights. These amendments contain the forces of reformation. They provide the reform with constitutional principles or guidance.

If we take the constitution and its amendments as a whole, Gao argues that we could find that China is in the state between extraordinary politics and ordinary politics. On the one hand, China is not at the moment of extraordinary politics, since it has established its constitution and ended the revolution. It aims to regulate political power by institutionalizing the relationship between the party and the state and the relationship between the party, the

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1 I do not agree with his claim about the sovereignty of the people. I will analyze who is the real sovereign in China in the second section.
constitution, and the people. On the other hand, China has not fully realized an ordinary politics with a constitution of constitutionalism, since the constitution is a political constitution with a reformist spirit. The authority of the constitution over the party, for instance, has not been fully established. Gao, however, is optimistic that China will finally establish a constitution of constitutionalism. In this process, the political element of the constitution will gradually retreat, while the normative or legal element of the constitution will eventually play a dominant role. This means that constitutional laws will become the main content and fully regulate political power. Therefore, in Gao’s thought, a political constitution will ultimately be replaced by an ordinary constitution.

Gao’s distinction between an ordinary constitution and a political constitution has clearly been influenced by Schmitt (ibid., p. 106). To Gao, a political constitution is a constitution, while an ordinary constitution represents constitutional law. As we know, Schmitt makes a distinction between the constitution and constitutional law. The constitution refers to the fundamental political decision by the subject of constituent power. ‘It determines the entirety of the political unity in regard to its peculiar form of existence’. In contrast, constitutional law refers to individual constitutional norms or provisions whose validity is based on the constitution. To Schmitt, every positive constitution contains its fundamental political decision. It does not matter whether the constitution is a constitution of extraordinary times or ordinary times. As long as it is a constitution, it contains its fundamental political will. In Schmitt’s constitutional theory, the political will or decision of the constitution is more important than the normative element of the constitution. The superiority of the political element applies in normalcy and the state of exception.

Gao obviously absorbs the Schmitt’s dualism between the constitution and constitutional law and that of the state of exception and normalcy. He claims that Schmitt’s dualism is helpful for us to understand the Chinese 1982 Constitution, “the political nature of revolution, war, violence and people’s will’, ‘the founding of China through revolution’, and ‘the achievement of gun by people under Communist Party’s leadership” (ibid., p. 106). Nevertheless, Gao’s usage of the dualism is not completely consistent with Schmitt’s theory. To Gao, the political element is more important in extraordinary political times, while the legal element is more important in ordinary political times. In Gao’s theory, the political element of the constitution in fact ‘disappears’ or ‘retreats’ after the establishment of an ordinary constitutional order. Therefore, the fundamental nature of the constitution changes during different political phases. The political element in Schmitt’s theory, however, is always the most fundamental aspect of the constitution.

This difference is probably the reason why Gao criticizes Schmitt. To Gao, Schmitt’s constitutional theory has two drawbacks. First, it overestimates the importance of the political decision, the fight between friend and enemy, and underestimates the significance of the normative element of the constitution. Second, Gao argues that Schmitt’s constitutional theory ignores the transition from exceptional politics to ordinary politics, from the political decision of the absolute constitution to the normative constitutional law. It does not understand the path from a revolutionary constitution to a constitution of constitutionalism (ibid., p. 106).

Neither of Gao’s critiques of Schmitt is tenable. First, it is true that Schmitt emphasizes the significance of the political decision or the political element of the constitution. Nevertheless, this does not mean that Schmitt underestimates the importance of the normative element of the constitution. What Schmitt tries to do in his constitutional theory is to supplement the formalist understanding of the constitution, which ignores the importance of the political di-
mension of the constitution. Just as David Dyzenhaus has correctly noted that “for he [Schmitt] did not reject the idea of a society comprehensively governed by legal norms, on condition that the political decision that underpins that legal order is made explicit” (Dyzenhaus, 1999, p. 46). To Schmitt, the political will of the people is the foundation of the constitution’s validity. It is also the reason for the unity of the constitution. Although the political element is fundamental for the constitution, it is not the only element in the constitution. To Schmitt, every legal order contains two elements: decision and norm. The relationship between the decision and norm can be found in his analysis of the constitution of the Rechtsstaat. Schmitt argues that the element of rule of law is only one aspect of the constitution. Besides the element of the rule of law, any Rechtsstaat has its political element. The element of rule of law aims to regulate the political power of the state and protect individual freedom. Without the existence of the state, it would be meaningless to talk about regulating the state.

Second, Schmitt proposes three different kinds of relationship between the people and the constitution (Schmitt, 2008, pp. 268-279). In the first kind of relationship, the people is anterior to and above the constitution. Being ‘anterior to’ the constitution means that constitution is the result of a political decision by the people. Without the existence of people capable of political action, there would be no constitution making. And being ‘above’ the constitution means that the people’s power cannot be limited by any constitutional norms. As the subject of constituent power, it can create any constitution that they like. This kind of relationship may apply to the founding moment of the constitution. The second kind of relationship is that the people is within the constitution. Being within the constitution means that people express its wills by exercising ‘constitutionally regulated powers’, such as elections, referenda, etc. After the founding of the constitution, the sovereign people cannot remain above or outside the constitution. It should subject itself to, and operate within, the framework of the constitution. Schmitt makes it clear that although the people’s will is above any constitutional procedure, “the further execution and formulation of a political decision reached by the people in unmediated form requires some organization, a procedure, for which the practice of modern democracy developed certain practices and customs” (ibid., p. 132). This is fundamental to the stability of any constitution. Without this self-subjection, a people could constantly make a new fundamental decision and create new constitutions. This would cause a state of lawlessness. Therefore, Schmitt is never ignorant of the importance of an ordinary constitutional order. And the third kind of relationship is that of people being next to the constitution. After the founding of a new constitution, the people within the constitution cannot exhaust the people’s “potential for political action and significance in a democracy” (ibid., p. 271). In fact, people can assemble in the public sphere. They retain their power to act spontaneously together (Kalyvas, 2008, p. 177). Nevertheless, the people next to the constitution does not have constituent power to make a new constitution. Therefore, the activity of the people next to the constitution belongs to the content of democracy in an ordinary constitutional order. So it is not fair to say that Schmitt’s constitutional theory does not understand the path from revolutionary constitution to a constitution of constitutionalism.

Although Gao misunderstands Schmitt, his use of Schmitt’s theory is still interesting. It actually reflects the nature of his thought as a right-wing political constitutionalist. Being a right-wing political constitutionalist, he does not only believe that the political element is the most important in the Chinese constitution, but also uncovers China’s move towards a constitution of constitutionalism. Although he has never clearly defined the meaning of a constitution of constitutionalism, the constitution at the end of the transition seems to embody the values of liberalism or liberty, since Gao claims that the spirit of the Chinese constitution
is in transition from ‘survival’ to ‘liberty’ (Gao, 2014a, p. 18). Gao, however, is probably too optimistic about the transition and too ambiguous about how the transition can actually be realized. If the Chinese constitution becomes a constitution of liberty, it probably needs a revolution rather than a transition.

**CHEN, CONSTITUENT POWER AND THE CHINESE CONSTITUTION**

In his speech *Political Logic in Constitutional Studies*, Chen praises Schmitt’s constitutional theory as ‘the most systematic model of political constitutionalism’. He says that “Carl Schmitt is the most successful theorist who has introduced political theory into constitutional studies. We admire his constitutional theory. In terms of his personal political choice, that is his own business” (Chen, 2012). It seems that Chen makes a distinction between Schmitt’s theory and his personal political activities in the Third Reich and tries to justify his own reception of Schmitt.

So what has Chen learned from Schmitt? Constitutional theorist Tian Feilong argues that Chen’s article *On the Constitution as the Fundamental Law and Highest Law of the State* embodies Schmitt’s major influence on Chen (Tian, 2014, p. 184). In that famous article, Chen adopts Schmitt’s absolute concept of constitution. According to Schmitt, the absolute concept of constitution means “the concrete manner of existence that is given with every political unity” (Schmitt, 2008, p. 59). It could refer to “the concrete, the collective condition of political unity and social order of a particular state” (ibid., p. 59). Chen accepts Schmitt’s idea and proposes that the first absolute constitution in China is the principle of “Chinese People under the Leadership of the Party” (Chen, 2010a, pp. 283-286). It is true that Schmitt’s influence on Chen in that article is obvious. Nevertheless, the more interesting Schmittian influence probably lies in the way in which he uses Schmitt’s concept of constituent power and the idea of people next to the constitution to understand the Chinese constitution. By using these two major Schmittian ideas, Chen reveals the most fundamental nature of the Chinese constitutional order.

Similar to Gao, Chen is critical of normative constitutional theory. To Chen, the problem with normative constitutional theory is that it focuses only on constituted power and avoids constituent power. Constituted power means the powers that are created by the constitution, while constituent power is the power through which the sovereign creates the constitution. Therefore, normative constitutional theory cannot explain the origin of the constitution. In contrast to normative constitutional theory, Chen argues that the concept of constituent power is fundamental for us to understand the origin of the constitution. Any constitutional theory should not avoid this concept (Chen, 2010b, p. 10). In fact, Chen believes that the concept of constituent power should become the foundation (jiebei) of constitutional theory (ibid., p. 10).

In Chen’s theory, constituent power has political and non-political meanings. First, political constituent power refers to sovereignty. It represents the supreme power within a political unity. By the exercise of constituent power, the sovereign creates the constitution. Therefore, constituent power is the sovereign power of constitution making. Chen writes that “constituent power is extraordinary, but it is the beginning of an ordinary moment” (ibid., p. 14). It means that ordinary politics comes into being through the establishment of a constitutional order. Chen’s definition of constituent power is not much different from that of Schmitt, although Chen does not directly use Schmitt’s theory to define the concept in his
landmark article *A Dialogue on Constituent Power between a Political Theorist and a Constitutional Theorist*. Nevertheless, Chen admits that Schmitt gives a ‘clear definition’ of constituent power in another important article and accepts Schmitt’s definition of constituent power as “a political will, by which the subject of constituent power makes the fundamental decision about the type and form of its own existence” (Chen, 2010c, p. 213).

Second, the non-political constituent power means ‘creative power’. Chen argues that this second meaning of constituent power has nothing to do with sovereignty. It is an objective force (Chen, 2010b, p. 18). To Chen, creative power is a power in society. Chen uses Marx’s power of labour as an example of creative power, and he argues that this kind of power can be changed into political power by the awareness and revolutionary actions of workers (ibid., p. 18). Similarly, creative power in a society can be changed into a political power if the constitution in that country cannot absorb it. “If it reaches a certain scale, creative power will either peacefully use constituent power or use violent revolution to express itself” (ibid., p. 19). It seems that creative power, as a constituent power, is non-political at the beginning. With the development of the strength of the power, it could become political. Being political means that it can create a new constitution and transform itself into political constituent power.

After clarifying the concept of constituent power in his theory, Chen starts to analyse the Chinese constitutional order. To Chen, the Chinese constitutional order is between the constitutional founding moment and normalcy. On the one hand, it is no longer a constitutional founding moment, since a constitutional order was established in 1982. On the other hand, it is not normalcy due to the frequent exercise of constituent power by the party. The frequent exercise of constituent power makes the constitutional order ‘exceptional’. This in-between time is defined by Chen as a reformist era of the Chinese constitutional order.

An obvious question could be raised here. If the party exercises constituent power, doesn’t it mean that it creates new constitutional founding moments? Chen further distinguishes the moment of the original constitutional founding and the moment of constitutional change. And he defines the reformist era as the latter moment. Nevertheless, Chen never clarifies the nature of these two moments. It is reasonable to assume that the moment of original constitutional founding refers to the moment when the most fundamental laws in the constitution have been changed, while the moment of constitutional change involves the changes of constitutional laws that are not that fundamental. In the context of the Chinese constitution, the most fundamental constitutional law is probably the party’s absolute right to rule and lead in China. Therefore, probably only a decision by the party to overthrow itself as the ruling party of China would constitute a new constitutional founding moment in a strict sense. In the reformist era of the Chinese constitutional order, although the party makes fundamental decisions about the constitution, it certainly does not touch the most fundamental law, that is, the principle of the party’s rule in the constitution. The political constituent power exercised by the party has its own boundary. This is probably the first characteristic of the constituent power exercised by the party in a reformist era.

The second characteristic of the constituent power exercised by the party in the reformist era is that it has a strong connection with people’s creative power. This could be demonstrated from the example that Chen uses in his article. The ‘household contractual system’ was initially developed by people from a small village in Anhui. The party made a decision to recognize the legitimacy of the system. Nevertheless, the decision contradicted the constitution at that time. After years of practice, the system proved to be good to the Chinese
The system was later incorporated into the Chinese constitution by the National People’s Congress through a formal constitutional amendment procedure. Anhui village’s example is a classic case which shows how the party exercises its constituent power in a reformist era. In a reformist era, people have non-political constituent power, that is, creative power. To some extent, this creative power pushes the party to exercise its political constituent power to make fundamental decisions about the constitution.

Therefore, Chen argues that the fundamental characteristic of the Chinese constitutional order is that “the representatives of the subject of constituent power are always present. They coexist with constituted power and are superior to the latter. So the moment of constitutional making frequently occurs” (ibid., p. 21). ‘The representatives of the subject constituent power’ are the Chinese Communist Party. The party coexists with the constituted power, that is, the power of the National People’s Congress in China. Nevertheless, the party is superior to the National People’s Congress, due to the superiority of constituent power over constituted power. Chen insists that the subject of constituent power is the people of China. Nevertheless, what the people have is non-political creative power in a reformist era. People do not have political constituent power and are excluded from exercising it. As the representative of the people, the party exercises political constituent power and makes changes to the constitution. Another question can be asked here. If the people do not have political constituent power, how can the party represent the people and exercise this power, which is supposed to be from the people? Chen has never clearly solved this puzzle. I think it actually reveals the fact that the party is the real subject rather than a ‘representative’ of political constituent power. It is a hard fact that Chen does not want to admit.

Chen argues that there are at least three advantages to the unique role of the party. First, the party, which represents the subject of constituent power, can absorb the creative power of the society and prevent the creative power from changing into an opposing political power. Second, it can swiftly respond to reality by making new policies and seize the opportunity for social development. Third, it has the merit of being innovative and cautious. Although the party makes fundamental decisions with respect to the constitution by issuing new policies, policies are still not formal constitutional amendments to the constitution. According to the Chinese constitution, only the National Congress can pass constitutional amendments. Therefore, if the policies prove to be good, they can later be formally incorporated into the constitution by the official procedure of the Congress. If the policies prove to be bad, they will be suspended and not be incorporated into the constitution (ibid., p. 27). It is innovative since the party can make swift decisions. It is cautious since the party’s decisions are still not formal constitutional amendments.

The first two reasons further confirm the fact that people in China have non-political power, while the party holds the political constituent power and has the real ability to change the constitutional order. The party would not allow people’s non-political power to be transformed into political power. If so, Chen argues that people would constitute a threat to the party’s rule. Although Chen repeatedly argues that the party is the representative of the subject of constituent power, the exclusion of people by the party from making the fundamental decisions casts doubts on whether the party is merely the representative of the subject of constituent power. If people’s direct exercise of political constituent power could threaten the party’s rule, it implies that the relationship between the people and the party is not one between a subject and its representative. Instead, their relationship is that either the party or the people are the sovereign. The first two reasons, and in particular the first one, further confirms the fact that the party is the real subject of political constituent power in China.
The third reason shows that the party can make any decision and is above the constitution. Without officially amending the constitution, the party can make policies that contradict the constitution. Even if the results turn out to be bad, Chen believes that the party's decisions would not undermine the authority of the constitution as a whole but only that of individual constitutional laws (ibid., p. 27). The authority of every individual constitutional law embodies the authority of the constitution as a whole. If individual constitutional laws can be suspended by the party if it wishes, what authority does the constitution as a whole have?

Although the picture of an ever-present subject of constituent power in China corresponds to the constitutional reality in China, it seems that they contradict the general understanding of the way in which a constitutional order works. Generally speaking, after the founding moment of a constitutional order, the sovereign who exercises constituent power will retreat and subject itself to the constitution. Without this self-subjection, an ordinary constitutional order could never be established, since the sovereign can always make a new constitution by using constituent power. Interestingly, Chen uses Schmitt's concept of “people next to the constitution” to explain the unique Chinese phenomenon. Chen insists that people are the subject of constituent power. He argues that although people retreat, it does not mean that people do not exist. People stay next to the constitution (ibid., pp. 23-24). Since people cannot exercise their constituent power directly, the party uses the power whenever it finds there is a need for a new decision to better the national existence (ibid., p. 25).

Two points need to be registered here. First, the people next to the constitution in Schmitt’s theory does not have the power to make decisions that contradict the constitution. The people next to the constitution refers to people that spontaneously assemble together and directly express their wills. It describes active citizenship in a democracy (Kalyvas, 2008, p. 180). The reason for Schmitt to propose the idea of people next to the constitution lies in the fact that he is unsatisfied with the formalism of institutionalized politics. Chen, however, uses Schmitt to justify the party’s role above the constitution. It is an abuse of Schmitt’s idea of people next to the constitution. Second, Chen insists that the use of the constituent power by the party actually would not create a complete new beginning for the Chinese constitution. Therefore, the constituent power by the party is actually not real constituent power, since real constituent power cannot be limited by any constitutional law and can initiate a complete new beginning for a constitutional order. This unlimited aspect is the fundamental nature of constituent power. The reason for Chen’s ignorance of this basic fact may lie in the benefit of the use of the label of ‘constituent power’. To describe the party’s power as a constituent power simply justifies the party’s superiority over the constitution. Since the party exercises constituent power, it is legitimate for it to violate constitutional laws. Chen’s ignorance may also have to do with his personal attitude towards the party’s rule in China. He accepts the legitimacy of the rule as unquestionable. Therefore, the possibility of the party exercising constituent power to overthrow itself is beyond his theoretical imagination. In fact, due to his special attitude toward the real politics in China, Gao has defined Chen as a left-wing Chinese political constitutionalist who accepts “what exists must be reasonable” and ignores the question of the legitimacy of political power (Gao, 2014a, p. 17).

**Conclusion**

Although Gao’s and Chen’s readings of Schmitt are probably not accurate, the inaccuracy does not undermine the fact that Schmitt’s theory plays an important role in the emergence of Chinese political constitutionalism. Schmitt’s theory has inspired Chinese political con-
stutionalists to pay attention to the political aspect of the Chinese constitution. They no longer see the constitution as a mere given text. Instead, they have started to look at the constitution from the perspective of how it is made. This new perspective has led them to investigate the relationship between political power and the constitution, an issue that had been neglected by the dominant Chinese constitutional theories.

Due to the methodology that they share, it is not surprising that Gao and Chen hold some similar views. For instance, they both argue that the Chinese constitution is in a reformist era and that the Chinese constitution is political. For Gao, although the Chinese constitution is political at the moment, it will eventually be replaced by an ordinary constitution which embodies the values of constitutionalism. A political constitution's fundamental issues are that of the people, revolution, and constitution making, while an ordinary constitution of constitutionalism would focus on judges, the judiciary, and rights (ibid., p. 4). To Gao, this transition is actually a lesson from other successful constitutional states, such as Britain and America. Therefore, China has to move from an exceptional state to an ordinary state (Gao, 2014c, pp. 311-333; Gao, 2014d, pp. 47–53, 64–68). Maybe Gao is right that China should establish an ordinary constitutional order, but Gao has never provided sufficient evidence to show why and how the Chinese constitution will eventually turn into a constitution that protects 'individual liberties', 'the interest of the polity', and 'social justice'.

Chen has also mentioned the path of the Chinese constitution from a constitution of 'survival' to a constitution of 'liberty' (Chen, 2010a, pp. 294-302). A constitution of survival aims to protect the survival of the nation, while a constitution of liberty would protect individual liberties (ibid., pp. 294-302). It seems that Gao and Chen share the same vision of the Chinese constitution. Chen's understanding of the Chinese constitution, however, is actually different from Gao's (Yan, 2012, p. 68). In Chen's thought, the Chinese constitution would probably never turn into a completely ordinary constitution. Even if the Chinese constitution eventually becomes a constitution of liberty, it could not exhaust the creative power of the people in the country. As long as the people keep their creative power, the party will have to make fundamental decisions about the constitution so as to keep their right to rule. The extraordinary moment will constantly occur.

What would Schmitt say about these two visions of the Chinese constitution? I think he would probably be critical of both. It seems that Gao desires a complete institutionalized regulation of political power by the constitution. At the end of the transition, Gao's vision of the Chinese constitution is the one that completely forgets the political dimension. When an ordinary constitution replaces a political constitution, the clear awareness of the political aspect of the constitution will somehow disappear. Judges rather than the sovereign will rule at the final stage of the transition. This vision goes directly against Schmitt's central thought. To Schmitt, although an ordinary constitutional order is important, it should not forget its political foundation.

Chen's vision of the Chinese constitution accepts the permanent existence of political power. Why would Schmitt disagree with it? Although Schmitt stresses the political foundation of the constitution, it does not mean that he would accept the constant exercise of constituent power. As I mentioned earlier in this article, Schmitt has emphasized the importance of an ordinary constitutional order. This means that the subject of the constituent power has to subject himself to the constitution after the founding of the constitution. Otherwise, it would throw the state into a state of permanent lawlessness. Chen's vision of the Chinese constitution, however, does not include the party being subjected to the constitution. Instead, the party is always above the constitution, ready to exercise its constituent power and make fundamental decisions about the constitution.
REFERENCES


