Too often F.A. Hayek is misunderstood, by both sympathizer and critic alike, as a strident opponent of the state. Convinced, the narrative goes, of the infallibility of the free market, Hayek sought at every turn to deconstruct institutions of government and state provision, weakening the state in accordance with the neoliberal objective of supplanting the political with the economic. But this is incorrect. Rather, Hayek was a social theorist who directed his considerable range of inquiry towards better understanding how to preserve and further protect liberal social order during a century in which its survival was perpetually in question. He can only be fully understood if read as a student of the “crisis of civilization.” Far from a project of state-weakening, Hayek’s political theorizing is more accurately characterized as a decades-long grappling with the puzzle of theorizing a liberal state capable of maintaining its place in a world overrun with enemies without falling to illiberal authoritarianism. Hayek was trying to save the modern liberal state grown weak in its totality. In what again appears to be a precarious moment for liberalism, the political in Hayek’s project is thus of timely concern.

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1 Cristi (1998), 181
2 Boucher (2015)
Accordingly, I advance and defend the claim that to understand Hayek’s political project, we must emphasize the thorough impact Carl Schmitt’s critique of modern liberal democracy had on the former’s thought. Hayek found in Schmitt the most compelling diagnosis of the development and precariousness of the weak, total state. Largely convinced by Schmitt’s analysis of Weimar’s constitutional crisis, Hayek responded by investigating the foundations of a stronger liberalism. Hayek’s legal and constitutional project represents a conservative liberalism leaving behind the passive neutrality of the weak state doomed to impotent totality, and instead affirmatively deciding for itself. This essay provides an extended exegesis and traces the Schmittian impact on Hayek’s liberalism evident even in the very foundations of the latter’s constitutional project: the basis of law and legal order, the protection of the liberal constitution, and the political aspiration and function of catallaxy, Hayek’s alternative to economy. As Quinn Slobodian has noted in an excellent study of what he calls the ordoglobalists, the “dominant mood” of these twentieth century liberals “was not hubris but anxiety”. Hayek’s anxiety concerning the survival of the liberal state is most evident in the Schmittian inflection of his unabashedly political theorizing.

I. The Weak Total State

For Schmitt, and Hayek following him, a state becomes totalitarian not from a position of strength but from weakness. The state is colonized by, controlled, and

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3 The designation of Hayek as a conservative liberal comes from Gissurarson (1987). Gissurarson studies Hayek’s theory of spontaneous order, which while certainly critical to the latter’s project, is not the focus of my project. The use of ‘conservative liberalism’ here tracks more closely with Cristi (1998) and his preferred nomenclature of ‘authoritarian liberalism’.
4 Slobodian (2018), 19
ultimately becomes little more than a façade for particular interests which in turn produce not generally applicable law but rather legislation targeted at specific people and groups. The total state “must yield and satisfy everyone, while simultaneously pleasing contradictory interests.” Unable to “define itself as state nor distinguish itself from what is not state” the expansion of the total state is “the consequence not of its strength but of its weakness.”

Having lost its independence from social, economic, or religious interests the state is no longer able to maintain its general character. The state is hollowed out, made weak, and becomes the plaything for interests rather than an institution of political unity above the pluralism and heterogeneity of civil society. The total state is a weak state.

For Schmitt, the weak total state was one sided; it was merely quantitative. The quantitative total state was a result of the transformation of the state from a legislative state, to an economic state, and finally devolving into the administrative state. In his telling, “after years of attempting to reduce the state to economics, it now appears that economics has been entirely politicized.” The emergence of the economic state marked a decisive shift for Schmitt as it opened the state up to the politization of all domains of human life. The political was no longer distinct from other domains of society. This radical politization leads to a “purely quantitative total state that draws no distinction between the economy and the state, the state and culture, or even between the state and

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5 Schmitt (1932), 218-19, 222-23
6 Ibid., 216
other spheres of human and societal existence.”7 The quantitative state governed by “technical and economic experts” was no longer political, it was total.8

Similarly, in classical liberal thought, the distinction between the political and the social “secured a protected domain for the state, thus granting it the monopoly of the political as such.”9 While classical liberalism is more often associated with its voluntarist conception of civil society, Cristi is correct to emphasize the concomitant strength granted to the state over political matters. To think that classical liberalism advocates for a “weak” state is a particularly egregious misunderstanding because it fails to grasp how seriously classical liberal thinkers must take both the state and the question of the political. Perhaps paradoxically, for classical liberals maintaining a domain of social life free from state coercion requires a state “assured of autonomy and independence.”10

That the total state was both a product of weakness and incompatible with the preservation of liberal principles became clear to Hayek through close reading of Schmitt. The “extraordinary student of German politics” made Hayek vividly aware of the “weakness of the government of an omnipotent democracy”, but Hayek could not follow him down “both morally and intellectually the wrong side.”11 For, whereas Schmitt tried to overcome the total state by uniting the quantitative and qualitative state through a

7 Ibid., 220
8 Ibid., 216
9 Cristi (1984) 521
10 Ibid
11 Hayek (1979) 194-195, note 11
recognition of the concrete order on which he believed all law rests, Hayek tried to find a basis for strength compatible with the universalist normative commitments of liberalism.

Hayek was unwilling to accept the Schmittian solution and sought to discover the foundation upon which to theorize a strong liberal state and its institutions. Ultimately, however, this left Hayek at some distance from democracy. Reflecting on his career, Hayek considered his “system of democracy” to be one of his “two inventions in the social sciences”; his larger theoretical project, however, represents a clear prioritization of liberalism over democracy.\footnote{Caldwell (2004), 206. Quoted from the transcripts of an interview Hayek gave to Armen Alchian in 1978; Hayek considers his other invention to have been his proposal for the denationalization of money.} Ultimately, I agree with Jan Werner-Müller that Hayek’s constitutional model “fails by its own standards.”\footnote{Müller (2015), 276} Nonetheless, only by grasping the extent and the ways in which Hayek’s project is shaped by and is in response to Schmitt’s critique of modern liberalism’s weak, total state can we understand Hayek’s larger project.

I trace Schmitt’s impact on Hayek across three domains. First, Hayek followed Schmitt in seeking a foundation of law and legitimacy rooted in something existential, something beyond normative positivism; a basis of social order more real than the constructs of rationalism. Second, the liberalism Hayek sought to defend needed an institutional device capable of protecting its core principles; following Schmitt, Hayek sought a constitutional guardian capable of making an affirmative political decision – yet unlike Schmitt, Hayek ultimately sought an alternative to a sovereign executive. He
needed a means for liberalism to simultaneously decide for itself and its principles yet resist a devolution into unilateral authoritarianism; a liberal decision without illiberal decisionism. Finally, Hayek accepted Schmitt’s friend/enemy distinction but the former’s liberalism normatively required a social mechanism with the cosmopolitan potential to help strangers “turn from enemy into friend.”

Hayek, like later scholars such as Timothy Mitchell, noticed the 20th century emergence of a conception of the “economy”. Rejecting this as requiring an inappropriate decision on the relative importance of social ends to be pursued – an ordering which must value some ends over others and thus necessarily lead to a friend/enemy relation – Hayek proposed his alternative conception: *catallaxy*.

As other scholars have noted, the classical liberal and especially Hayekian emphasis on evolutionism and emergent order may at times be at odd with a strong commitment to liberal principles. By tracing Schmitt’s impact on Hayek we can see more clearly the ways in which Hayek decided affirmatively for liberalism in his constitutional theorizing, and thus make vivid the ensuing tensions and even contradictions in his project.

**II. The Foundations of Legal Order**

Above all, Hayek was a social theorist firmly grounded in Mengerian methodology. He sought to understand the mechanisms of social order from the individual, to groups, to macro level societies. This isomorphic methodology was the product of Hayek’s

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14 Hayek (1967), 164
15 Paul (1988)
gradual “transformation” from a technical economist to a theorist widely versed in cybernetic and networks theory.\textsuperscript{16} Crucially, whether at the individual, group, or global levels, Hayek sought dynamic order grounded in the tangible world. Convinced by Schmitt’s critique of Kelsenian legal positivism, Hayek sought the foundational mechanisms of human interaction and civilization; like Schmitt he sought the basis of law and legitimacy in the physical world.

Schmitt rooted law in the concrete order of a society— for him “the foundations of a constitution were existential”.\textsuperscript{17} In his conception, \textit{nomos} is grounded in a specific physical space to a particular people and time. Law is rooted in the constitution of a united people; law emanates from a political decision. For Schmitt, the “foundations of a legal order were transcendent” because the constituent power of a people remained the basis of legitimacy.\textsuperscript{18} The people through a decision of identification and unification of themselves as a people provide the basis of legitimation and the existential foundation on which forms of governance and later legislation are constructed. It alone can account for and maintain the capacity for sovereignty: a subject with “the capacity and willingness to make political decisions”.\textsuperscript{19} For Schmitt this subject is always the people, or, better said, a bounded, united people. The “unity of \textit{Ordnung und Ortung}”, \textsuperscript{20} of order and location, \textit{nomos} for Schmitt is always grounded in concrete order: in the decision of an

\textsuperscript{16} See Caldwell (1988) for a detailed account of Hayek’s methodological transformation. For Hayek’s isomorphism see Slobodian (2018), especially pgs 223-227.
\textsuperscript{17} Cristi (1998) 120
\textsuperscript{18} \textit{Ibid.}, 71
\textsuperscript{19} \textit{Ibid}
\textsuperscript{20} Loughlin (2015), 74
“individualized and individualizable community”\textsuperscript{21} for collective self-rule actualized in the “political existence of the state”.\textsuperscript{22} This constituent power is the basis of all legal order.

The foundational political decision may be made for any type of constitution, mixed or otherwise. This has two implications important for our purposes here. First, the friend/enemy distinction grounds the political in a bounded space and provides a basis and measure of legitimation for the legal order subsequently constructed. Additionally, however, this is what he means when Schmitt claims, “democracy can exist without what one today calls parliamentarism and parliamentarism without democracy; and dictatorship is just as little the definitive antithesis of democracy as democracy as dictatorship.”\textsuperscript{23} The constitutive power of the political decision of a people provided the existential unity which grounded subsequent state forms. In this way, Schmitt distinguished constitutions primarily on their recognition of the political foundations of law, with the exact mixture (or embrace) of the three classical state forms (monarchy, aristocracy, democracy) as a secondary concern.

Schmitt’s greatest ire was reserved for the legal theory which he claimed most fully denied the existential foundations of law: Hans Kelsen’s pure theory of positive law. Kelsen’s legal positivism asserted an identification of law and legislation. Here, any supra or meta foundation of law is denied.\textsuperscript{24} Law and statute are the same. Subsequently, “the

\textsuperscript{21} Lindahl (2015), 43
\textsuperscript{22} Schmitt (2008), 65
\textsuperscript{23} Schmitt (1988), 32
\textsuperscript{24} I’m presenting Kelsen here as portrayed by Schmitt and Hayek. For a strong defense of Kelsen see: Vinx (2007).
lawmaker creates what he wants in the lawmaking process; that process is always ‘law,’ and it is always creates ‘right’.”

25 Devoid of any substantive criteria, lawmaking becomes primarily an exercise in counting. Value-neutral and purely procedural, law is severed from any qualitative conception of justice. Law is the “present decision of the momentary parliamentary majority.”

26 Rather than express the nomos of a particular community, Schmitt argues, positive law is a production of coalitional arithmetic, contingent and often fleeting. Law is severed from its existential legitimacy. Positive law is merely quantitative.

Lacking this bounded grounding, positive law becomes limitless. Unchecked by a separate, substantive conception of justice, positive law is primarily the output of parties and coalitional dealing. The result, Schmitt says, is a “peculiar type of justice” in which it is accepted “abstractly that ninety-eight people abusing two persons is by far not so unjust as fifty-one people mistreating forty-nine.”

27 Divorced from any order more foundational than parliamentary procedure, law becomes simply a product of bargaining. In order to maintain the primacy of majority prerogative, Schmitt maintains, positive law becomes neutral vis a vis substantive values while simultaneously dissolving the distinction between the political and non-political spheres of social life. Because “value assertion and value neutrality are mutually exclusive” the positive, quantitative state is gradually stretched, expanded, and hollowed out. The total weak state cannot assert the primacy of its own value. It cannot decide even for its own perpetuation. Unbounded,

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25 Schmitt (2004), 23
26 Ibid., 25
27 Ibid., 41
positive law becomes mired in the pluralist party system, used as an instrument in the immanent conflicts between the heterogeneous interests of society.

Hayek’s reliance on Schmitt is most explicit and frequent in condemning positive law. John Hasnas has compelling shown that Hayek possessed only a confused understanding of British legal theory, especially the difference between customary and common law.\(^{28}\) I submit this misunderstanding draws in part from the fact that the main legal controversy and scholarship with which Hayek engaged was not the Anglo tradition, but rather the debate between Carl Schmitt and Hans Kelsen. Referring the reader in a footnote to Schmitt, Hayek tells us: “the rule of law presupposes a very definite conception of what is meant by law and that not every enactment of the legislative authority is a law in this sense”.\(^{29}\) The positivist idea “that law is only what a legislator has willed” Hayek declares in statement representative of those he makes in various places and in different turns of phrase, “is both factually false and cannot even be consistently put into practice”.\(^{30}\) On the subject of the relation between positive law and the development of the total state, Hayek tells us the writings of Carl Schmitt are “among the most learned and perceptive”.\(^{31}\) “There is indeed no better illustration or more explicit statement of the manner in which philosophical conceptions about the nature of

\(^{28}\) Hasnas (2005)

\(^{29}\) Hayek (1960), 207. Hayek refers the reader to Schmitt’s Unabhängigkeit der Richter, Gleichheit vor dem Gesetz und Gewährleistung des Privateigentums nach der Weimarer Verfassungslehre, as well as to Schmitt’s Verfassungslehre

\(^{30}\) Hayek (1967), 102

\(^{31}\) Hayek (1960), 438. In this note, Hayek recommends the reader consult Schmitt’s Verfassungslehre and Der Hüter der Verfassung
the social order affect the development of law”, Hayek unequivocally states, “than the theories of Carl Schmitt”.32

Hayek, however, condemns Schmitt’s decisionism as itself a constructivist rationalist theory of positive law. To be a constructive rationalist, in the Hayekian worldview, is a most egregious sin. Turning away from Schmitt and adopting instead the language of his peer, Michael Oakeshott, nomos for Hayek (as opposed to positive legislation) requires not only an existential grounding but is incompatible with the pursuit of “telocratic” or purposive ends.33 The distinction Hayek is making is most forceful only when read in reference to Schmitt. While accepting that legitimate law must be rooted in an existential order, Hayek rejects the Schmittian implication that such an order necessarily implies the pursuit of concrete purposes beyond the establishment of peace and order itself. Hayek readily concedes that, “so long as particular purposes are the foundation of political organization, those whose purposes are different are inevitable enemies”.34 He continues, “and it is true that in such a society politics necessarily is dominated by the friend-enemy relation.”35 Thus, “the great importance of nomocracy” he explains, “rests on the fact that it extends the possibility of peaceful co-existence of men ... beyond the small group whose members have concrete common purposes”.36

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32 Hayek (1973), 71
33 Hayek (1967), 163
34 Hayek (1976), 144. The attached note reads: “This is the main thesis of Carl Schmitt, Der Begriff des Politischen (Berlin, 1932)”
36 Hayek (1967), 163
Hayek’s dilemma comes into stark relief: He accepted, from Schmitt, that law must have a grounding in existential order. In contrast to Schmitt, however, Hayek sought an order capable of accommodating the cosmopolitanism of classical liberalism. With Schmitt, Hayek rejected the constructive rationalism of socialism and the dominant forms of positive liberalism. Unlike Schmitt, however, Hayek required an existential order rooted in something other than shared purposive identity. Hayek’s liberalism precluded a common conservative recourse to the natural law of Nature’s God; his conservative skepticism rejected the constructive rationalism of the liberalism fundamental to the social contractarians, *philosophes*, or Benthamite utilitarians.\(^{37}\) Hayek needed to theorize the existential legal order foundational to conservative liberalism.

In a move perhaps surprising and certainly understudied in the literature, Hayek grounded his political theory in a unique account of human psychology and neurobiology. Hayek studied psychology for a time while a student at the University of Vienna, even beginning the draft of a book on the topic. That book would eventually be published in 1952 under the title *The Sensory Order: An inquiry into the foundations of theoretical psychology*. Though ignored by many who study Hayek, a thorough understanding of Hayek’s political theory is impossible without grasping the foundational role of his psychological theory for the rest of his larger project. Human psychology and

neurobiology provided the existential grounding upon which his entire legal and political order rests.

Hayek’s account of social order begins with the mind and builds up from there. At the individual level, Hayek makes three claims: 1) That it is our “capacity for perceiving rules (or regularity, or patterns) in the actions of others” from which we ultimately “derive most of the information which makes the conduct of others intelligible to us.”[^38] That 2) this perception of patterns is always hermeneutical, such that our knowledge is “interpretation in light of a historical horizon” and that the human being is the interpreter who “imposes meanings on reality”.[^39] Finally, 3) that the human mind is itself a “temporally conditioned”, “complex self-organizing system”, “characterized by continuous and unpredictable change of the initial conditions of the explanation”.[^40]

The upshot of this theory of human psychology is two-fold: a radical notion of individual human autonomy similar to that developed by Gadamer and the hermeneutical tradition, along with the development at the individual level of what Hayek called the *Rechtsgefühl* (sense of justice). The resulting theory of human behavior is of autonomous individuals constantly interpreting and reinterpreting the world around them, capable of social coordination through the perception of patterns of regularity of behavior according to which the individual themselves and their fellows behave although largely unable to explain why they are acting in such a manner. In Hayek’s explanation:

[^38]: Hayek (1967), 45; 56
[^39]: Di Iorio (2015), 179
[^40]: *Ibid.*, 186-187
'What we perceive in watching other people (and in some measure also in watching other living things) is not so much particular movements but a purpose or mood or attitude (disposition or set) which we recognize from we do not know what. It is from such perceptions that we derive most of the information which makes the conduct of others intelligible to us. What we recognize as purposive conduct is conduct following a rule with which we are acquainted but which we need not explicitly know." 41

Of crucial importance is that we recognize or perceive these patterns or dispositions at a largely subconscious level. Our individual social behavior is regulated in many ways, Hayek claims, by a sense of appropriate conduct, the exact contents and details of which we would struggle to articulate. He compares this to how the most native speakers of a language follow complex grammatical rules they could not themselves explain: “If what is called the Sprachgefühl [sense of speech] consists in our capacity to follow yet unformulated rules, there is no reason why, for example, the sense of justice (the Rechtsgefühl) should not also consist in such a capacity to follow rules which we do not know in the sense that we can state them.”42 As individuals, through our ability to perceive patterns or regularities of action in society, we are able to regulate our own action, largely subconsciously, in such a way as to make human social coordination more manageable.

Just as grammatical strictures regulate but largely do not determine what we say, so too in the Hayekian scheme, do the rules of social interaction operate on a largely negative basis. These rules, “will often merely determine or limit the range of possibilities within which the choice is made consciously. By eliminating the certain kinds of action

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41 Hayek (1967), 55
42 Ibid., 45
altogether and providing certain routine ways of achieving the object, they [the rules] merely restrict the alternatives on which a conscious choice is required.”⁴³ He makes another comparison, clarifying “like scientific laws, the rules which guide an individual’s actions are better seen as determining what we will not do rather than what he will do.”⁴⁴ As individuals, we are constantly perceiving and (re)interpreting the actions of those around us. We do so mostly sub- (or supra, or un -- consistency of prefixes is not one of Hayek’s strengths) consciously. That is to say, as members of society we develop a feeling for appropriate action which reduces the deliberate conscious choice of action for any given situation. The problem of social coordination, certainly in most mundane situations, is largely overcome by our respective individual minds’ ability to recognize, interpret, and develop a feeling for the regular actions of others. Contra Schmitt, the foundational levels of human social order – of nomos – are present in human social interaction itself without recourse to shared purposive identity. In contrast to the thoroughgoing constructive rationalism of many liberal traditions, for Hayek, we social beings are largely able to figure out how to live with one another without a prior agreement to a detailed contract or plan. The existential grounding of human social order is found in our mind; in our ability to perceive, interpret, and learn from the social world around us.

The immediate question for Hayek then becomes: “What, and how much, must [we] have in common with other people in order to find their actions intelligible or

⁴³ Ibid., 56
⁴⁴ Ibid
meaningful?" He answers: “We need not be wholly alike or even have a similar character with those whose communications we find intelligible, but we must be made up of the same ingredients, however the different the mixture may be in the particular instances.” He continues by way of illustration, “One need clearly not be frequently or even ever violently angry to be familiar with the rage pattern or to recognize and interpret a choleric temper.” It is important to Hayek’s liberal normative commitments that our ability to socially coordinate extends in some measure beyond our particular place and group in the world. The basis of law in Hayekian liberalism is a shared human capacity to interpret the actions of those around us, it makes no fundamental difference whether we share more substantive identities. A general understanding of the relevant general rules of just conduct can be gleaned through social interaction regardless, even, of linguistic, cultural, political, geographic, or ethnic identities.

But, already, Hayek’s posited capacity to understand and explain social order is, at least on the surface, opposed by the defining characteristic of his political anthropology: human ignorance. The move from the existential basis of social order to the consequences of that order for a theory of state largely depends on the political anthropology given primacy. Much depends, obviously, on whether men are angels, devils, social creatures, savages, selfish or altruistic. Schmitt put it bluntly: “One could test all theories of state and political ideas according to their anthropology”. For Schmitt, the question of political anthropology mostly came down to whether a political theory “presupposes man to be by

\[\text{Ibid, 59}\]
\[\text{Ibid}\]
\[\text{Ibid}\]
\[\text{Ibid}\]
nature evil or by nature good”; the answer to this question he claims “is decisive for the presupposition of every further political consideration, the answer to the question whether man is a dangerous being or not, a risky or harmless creature.” A few pages later Schmitt concludes that “the radicalism vis-à-vis state and government grows in proportion to the radical belief in the goodness of man’s nature.” It is because of an unduly positive account of human nature that bourgeois liberalism failed, in Schmitt’s accounting, to properly develop a theory of politics and state.

As to whether man is naturally good or evil, Hayek took no definitive stance. More fundamental for him was man’s inescapable ignorance. In a declaration that could well serve as the motto of his whole intellectual project, Hayek writes “It is high time, however, that we take our ignorance more seriously”. Having established that man is at least capable of perceiving rules of social interaction such that there is a basis for social order, Hayek next turns to the question of democracy and constitutional design for which the problems of ignorance and Schmitt’s powerful critique of parliamentary democracy will exert determinative influence.

III. Nomothetae as Guardians of the Liberal Constitution

Whether Carl Schmitt should be considered a democratic theorist is a matter of controversy. Though this paper puts aside any judgment on that question, it is important for what follows to understand his conception of democracy. His definition of democracy

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48 Schmitt (2007), 58
49 Ibid., 61
50 Hayek (1967), 39
as an “identity of governed and governing” is straightforward and infamous because it provides the basis for Schmitt to assert that “democracy requires first homogeneity and second – if the need arises – elimination of heterogeneity.” 51 It must be seriously admitted, he claimed, that there is an “inescapable contradiction of liberal individualism and democratic homogeneity.” 52 Neither did democracy for Schmitt rest on notions of equality. “All democratic arguments rest logically on a series of identities”, he explained and are, “not a matter of something actually equal legally, politically, or sociologically”. 53 Democracy, for Schmitt, is not the recognition of formal equality under the law, it is not about participatory institutions, or pluralism – rather, democracy is the actualization and protection of the political will of a politically unified people.

At first blush, then, it makes little sense that Schmitt’s theory of democracy should influence at all as staunch an advocate of pluralist liberalism as Hayek. Indeed, Cristi writes that “perhaps no one has denounced Schmitt’s intellectual work so steadfastly as Hayek”. 54 Yet, it is only by reading Hayek’s constitutional project as deeply informed by Schmitt that the former’s project becomes consistent. Hayek’s system of liberal democracy both shares deep similarities to and clear reactions against Schmitt’s opposition to parliamentary democracy. That a strong state could be compatible with, much less the institutional foundation of a theory of limited government is deeply counterintuitive for most liberals. Yet, it is at the core of both Schmitt and Hayek. It is a

51 Schmitt (1988), 15, 9
52 Ibid., 17
53 Ibid., 26-27
54 Cristi (1998), 147
similarity from which Hayek was deeply informed but against which he consistently struggled and reacted.

Politics as a concept, for Schmitt, was, of course, grounded in the friend/enemy distinction. The political unity of a particular people rested in their shared way of life, in a shared identity of some substantive vision of political life. Crucially, however, for Schmitt, in times of normalcy the political is of limited extent and reach relative to the broader social lives of citizens. Other than times of exception, the political provides the foundational order for social life but refrains from interfering into the other spheres of social interaction. The political, he explained, can only be understood by “discovering and defining the specifically political categories” of social life. The “moral, aesthetic, and economic” are “relatively independent endeavours of human thought and action” each with its own “criteria” and characteristic expression. To conflate and dissolve into each other the political and nonpolitical spheres of existence is to at once take too lightly the seriousness of politics while simultaneously imbuing the nonpolitical with undue danger. Schmitt does not mince words when he admonishes the reader:

“There exists no rational purpose, no norm no matter how true, no program no matter how exemplary, no social ideal no matter how beautiful, no legitimacy nor legality which could justify men in killing each other for this reason. If such physical destruction of human life is not motivated by an existential threat to one’s own way of life, then it cannot be justified.”

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55 Schmitt (2007), 25  
56 Ibid., 25-26  
57 Ibid., 49
For Schmitt, a parliamentary system with its strong parties is transformed into little more than an “antechamber in front of the bureaus or committees of invisible rulers”, and thus substantive, qualitative law speaking to the fundamental questions of justice and political value becomes indistinguishable from the administrative or managerial concerns of technical policy.\(^5\) The great danger of the administrative state is not that it considers and decides upon the mundane issues concomitant with any sort of policy development, but rather that truly fundamental questions of politics become unanswerable; the procedures and committees of quantitative governance are unable to resolve the qualitative conflicts or disputes threatening the perpetuation of a shared political community. A system of government, Schmitt insisted, must be able to distinguish between quantitative measures and qualitative law or risk losing the ability to preserve or even speak to the latter at all. The distinction between legislation of the former sort must be both distinguished from and grounded in the latter, substantive and value-laden law. When fundamental questions of law arise, the state, as the protector and guarantor of political unity, must have a mechanism by which to issue an authoritative decision; otherwise the state has no more prerogative to demand obedience than the various parties or interest groups haggling over quantitative legislation.

That there is a difference between fundamental law and administrative management was not an idea made new to Hayek by Schmitt. Though in different vocabularies, various classical liberal and conservative theories have long made such a

\(^5\) Schmitt (1988), 7
distinction. Schmitt’s core contribution to Hayek’s institutional theorizing, then, was the former’s recognition that the parliamentary mechanisms appropriate to administrative legislation are incapable in modern times of reaching decisions on questions of fundamental law and protecting the constitutional order in extraordinary moments. This became a central concern of Hayek’s thinking on constitutional design: Who or what institution is capable of guarding the liberal constitution?

Schmitt’s answer, of course, was the office of the executive. An executive empowered with extraordinary prerogative in exceptional moments, Schmitt reminded us, was needed even in for Locke. In his Der Hüter der Verfassung (The Guardian of the Constitution), Schmitt analyzed the judiciary and legislative branches and found them lacking. A politicized court is neither able to enforce its decision, nor does it have the claim to democratic legitimacy made by elected officials; once politicized, the courts become simply yet another unelected site of interest contestation. Legislative institutions, in the modern party system, are fractious, representing diverse interests and ends. Having spent their days in endless discussions, they possess neither the unified will nor the institutional resolve to make fundamental decisions. The office of the President, Schmitt then concluded, is unique in representing the will of the people has a collected whole. In moments when a decision is required, the ability of the office to wield extraordinary prerogative is the only institution capable of protecting the constitutional order. In democracies, the sovereign power of the people is represented and actualized by the executive.
A close observer of the precarious fate of liberal constitutions, the question of what institutional mechanism could be capable and entrusted to protect the liberal order was for Hayek all too real.

With Schmitt, Hayek had little faith in most of the institutions of deliberative democracy. This skepticism would keep him at a distance from many of his American colleagues, even those sympathetic to the normative objectives of his larger project. By way of example, Frank Knight of the Chicago school fundamentally challenged Hayek’s understanding of liberalism. For Knight, liberalism must be properly understood as “the making of laws through intelligent discussion” which “embody social ideals aimed at solving particular social problems.” Though both understood themselves to be liberal, Hayek could not accept Knight’s belief that “commitment to a free society is commitment to government by discussion.” Hayek’s conservative skepticism has led at least one scholar to ask: “What does Hayek fear, what does he believe about human nature, and what does he think the future holds?” The answer is simple: Hayek was convinced by Schmitt of the institutional fragility of the liberal order and held no faith in the power of

59 James Buchanan, a seminal figure in rational choice theory, Nobel laurate and later president of the Mont Perelin Society put it this way: “In some final analysis, Hayek’s position may be taken to reflect a basic European attitude which is sharply different from the American. …The American cannot, and should not, neglect the fact that his own heritage of freedom... was deliberately constructed in large part by James Madison and his compatriots.” (Buchanan, Law and the Invisible Hand, 38). An unfortunate conflation of thinkers generally on the right (the lumping together of the Chicago, Rational Choice, Ordoliberal, and Austrian schools) has obfuscated trenchant criticisms of neoliberalism from the right. Just as there are many left-neoliberals so are there strong critics of neoliberalism on the right.

60 (Emmett 2007), 79

61 Ibid., 80

62 Ibid
deliberations of experts. Hayek, who had fought in World War One, saw first-hand the dissolution of the multi-national Habsburg empire from Vienna, closely followed the fall of the Weimar Republic, and then spent most of his academic career in a mid-century climate largely enamored with the grand promises of central planning saw little hope in entrusting the liberal order he dearly valued to the discussions of politicians.

Having rooted social order and nomos itself in the unwritten rules of general conduct perceived and followed by people in their daily lives, Hayek sought a constitutional mechanism to preserve and protect this fundamental order. That is, though much the concept of spontaneous order is important to Hayek’s social theory, he understood the principles of liberal order and liberal institutions needed a political guardian. Once again referencing Schmitt, Hayek writes “the progressive displacement of the rules of conduct of private and criminal law by a conception derived from public law is the process by which existing liberal societies are progressively transformed into totalitarian societies. This tendency has been most explicitly seen and supported by Adolf Hitler’s ‘crown jurist’ Carl Schmitt”. 63 Having seen the product of empowering the presidential office with emergency powers, however, Hayek proposed an alternative.

Rather than seeking to restore the democratic “identity of the of the quantitative...with the qualitative” as Schmitt had done through executive decisionism, Hayek sought to codify their separation. 64 The development of totalitarian law, “has become possible as a result of the fact that the same representative assemblies have been

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63 Hayek (1967), 169
64 Kennedy (1988), xxxii
charged with the two different tasks of laying down rules of individual conduct and laying down rules and giving orders concerning the organization and conduct of government."\(^65\)

That is to say, Hayek agreed with Schmitt that quantitative administrative management and qualitative fundamental law must be distinguished. Unlike Schmitt, Hayek’s response was to create two different legislative bodies with distinctive functions.

The result was an institutional design at once anachronistic and odd: the \textit{Nomothetae}. An institutional device once used in ancient Athens, Hayek proposed that this representative body would be distinct from the general legislative assembly and would be concerned exclusively with and maintain exclusive prerogative over the statement of the “general rules of just conduct”.\(^66\) As discussed above, in the Hayekian vocabulary, the general rules of just conduct are \textit{nomos}, the rules we follow which maintain social order. Separate and distinct from the “Governmental Assembly” the \textit{Nomothetae} would not only be tasked with a separate function but also be populated by a different sort of representative. The general Governmental Assembly was to be an elected body, representative of the various interests and parties of society as a whole. Here the “concrete wishes of the citizens for particular results” should be expressed, that is to say their “particular interests should be represented.”\(^67\) As Hayek conceives of it, the Governmental Assembly would be the place for bargaining, rent-seeking, lobbying, and coalition building in pursuit of specific ends for particular groups. The representatives in this Assembly should rightly represent the concrete interests of their particular

\(^{65}\) Hayek (1967), 169
\(^{66}\) Hayek (1979), 111
\(^{67}\) Ibid., 112
constituents. Current legislative bodies and the parties that comprise them produce a “bargaining democracy” which has “nothing to do with the conceptions used to justify the principle of democracy.”\footnote{Ibid., 99} Hayek has no illusions about the nature of what the Governmental Assembly would become: more or less an institutionalized façade facilitating the back-room deals of elites nominally representing the interests of their constituents. The key is to recognize there is little to no connection between the outcomes of such dealing and justice.

Rather than particular interests, the Nomothetae, on the other hand, must concern themselves with more fundamental questions such as “what kind of action is right or wrong”, and such a task requires not effectiveness of strategic politicking, but instead “probity, wisdom, and judgment”.\footnote{Ibid} To secure representatives possessing such qualities, Hayek recommends the following: “each group of people of the same age, say in the calendar year in which they reached the age of 45” will elect representatives from that group to serve for a term of 15 years\footnote{Ibid., 113}; this would result in “a legislative assembly of men and women between their 45th and 60th years, one-fifteenth of whom would be replaced every year”\footnote{Ibid}; this assembly would have no power to “grant particular favors” and as further assurance against corruption and party influence, representatives would not be “re-eligible nor forced to return to earning a living in the market” upon completion of their term, but would instead be “assured of continued public employment... in positions

\begin{footnotes}
\item[68] Ibid., 99
\item[69] Ibid
\item[70] Ibid, 113
\item[71] Ibid
\end{footnotes}
such as lay judges”,72 the average age of 52 ½ years would ensure the representatives had
gained the wisdom of life experience and the opportunity to make a reputation for
possessing the necessary characteristics, but would yet maintain an average age younger
than most representative assemblies73; no persons who had served in the Governmental
Assembly or held employed positions in party organizations would be eligible74; and
members would be removable only for “gross misconduct or neglect of duty” as decided
by “some group of their present or former peers on the principles which today apply to
judges”.75 An institutional design, frankly, at once particular and puzzling.

These carefully selected representatives were to be tasked with two primary
functions: the first, already mentioned, would be to consider fundamental questions of
political value; the second, to decide whether to “sanction all enforceable rules of
conduct”. The first is somewhat self-explanatory. Not committed to a static conservatism
but neither trusting radical rationalism, Hayek wanted an institution capable of deciding
how fundamental political values should adapt over time. Political controversies that
resonate with core concerns of political values and principles should not be decided
either by the same people whose expertise is usually earmarks and favor-swapping nor by
those unelected judges lacking a claim to democratic legitimacy. The second task is best
explained through example. Hayek specifically mentions “not only the principles of
taxation but also those regulations of safety and health, including regulations of

72 Ibid
73 Ibid., 114. For comparison, the average age of the 114th Congress was 57 years old in the House
and 61 in the Senate.
74 Ibid
75 Ibid
production and construction”.\textsuperscript{76} The Governmental Assembly would still be tasked with deciding the specifics of these regulations, but the \textit{Nomothetae} (he also calls them the Legislative Assembly, but this is more confusing than helpful) would provide their sanction only if those regulations are written in such a way as to be generally applicable to all. Hayek was trying to combat the common form of regulation written in such a way as to exempt or benefit particular interests. In this way, the \textit{Nomothetae} were entrusted to protect the Rule of Law and its demand for general applicability of regulation.

Without getting lost in the further specifics of his plan, it’s safe to say Hayek’s attempt at constitutional design was not met with enthusiastic support. Especially regarding the \textit{Nomothetae}, most scholars simply ignore this part of Hayek’s project. On the merits of the suggestion itself, that is probably warranted. In an odd twist, one of the most strident critics of constructive rationalism entrusts the perpetuation of liberal principles to an institution comprised of something at least resembling a committee of middle-aged philosopher kings. Even a passing understanding of political realities would lead us to expect a body highly over-represented by privileged elites; even without the power to grant particular favors, theirs would likely still be a very particular and privileged worldview. Most dangerously by Hayek’s own standards, it remains entirely unclear whether such an institution would actually prove a more durable guardian of liberal principles than a strong unitary executive.\textsuperscript{77}

\textsuperscript{76} Ib\textit{id.}, 115

\textsuperscript{77} Hayek’s model constitution also contains a constitutional court, tasked with making sure the two chambers acted within their respective boundaries.
It is, then, simply incorrect (or a deliberate mischaracterization) to argue that Hayek “wants to abolish democracy”.\textsuperscript{78} While his reading of Schmitt and his own personal experience gave him a thoroughgoing skepticism regarding the durability of purely discursive democracy, Hayek’s detailed constitutional theorizing is, at its core, a project aimed at the political protection of liberal democracy. He sought a political liberal state in the middle ground between unicameral parliamentary proceduralism and executive decisionism.

\textit{IV. The Political Functions of Catallaxy}

Just as Hayek’s legal and constitutional thought is in part characterized by his attempt to simultaneously learn from and leave behind Schmitt, so too his theory of \textit{catallaxy}, of market interaction in economic, social, and political life, evinces a noticeably Schmittian lens. Hayek writes: “Both ‘catallaxy’ and ‘catallatics’ derive from the ancient Greek verb \textit{katallattein} which, significantly, means not only to ‘barter’ and ‘to exchange’ but also ‘to admit into the community’ and to ‘\textit{turn from enemy into friend.}’\textsuperscript{79} This final clause is not only an allusion to Schmitt’s definition of the political, but makes clear how much weight Hayek places on human psychology and capacity for pattern recognition, civil society, and market institutions in combatting tribalism in a political project committed to emergent order, decentralized institutions, and respecting the dispersed nature of knowledge in society. Noticing the addition of this Schmittian allusion into the

\textsuperscript{78} Kirchgässner (1988) makes this claim. Streit and Wohlgemuth (1997) point out a number of errors in the former’s analysis.

\textsuperscript{79} Hayek (1967), 164. Emphasis added. Though the reference here is only by allusion, Hayek cites Schmitt less than a page later.
definition of market exchange is vital to understanding the full aspirations of the
Hayekian liberal political project.

While his definition of catallaxy contains merely an allusion, in the second volume
of his *Law, Legislation, and Liberty* Hayek explicitly cites Schmitt:

“Indeed, so long as the as particular purposes are the foundation of political
organization, those whose purposes are different are inevitable enemies; and it is true
that in such a society politics necessarily is dominated by the friend-enemy relation.”

Just as with his theory of law and his aspirations for the *Nomothetae*, Hayek’s
theory of catallaxy accepts a core element of Schmitt’s political thought while
simultaneously seeking liberal ends. Both Hayek and Schmitt suggest that market
interactions are a proper site for social pluralism. Within the market and other non-
political spheres of social life, coordination and peaceful coexistence is possible without
agreement on ultimate ends to be pursued. Both seek and describe as strong those states
capable of facilitating this pluralism of social life while withstanding the call for such
interests to be become political, in the Schmittian sense. Both believed such states can
only remain strong by cordonning themselves off as much as possible from the “factitious
temperament of civil society.”

Hayek, I suggest, would have agreed with Schmitt that
“only a strong state can remove itself from non-state affairs” and, further, that
“depolitization is a political act in a particularly intense way.” As described above, Hayek

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80 Hayek (1976), 144. Hayek adds in the attached footnote: “This is the main thesis of Carl Schmitt,
*Der Begriff des Politischen*.”
81 Cristi, 74
82 Schmitt (1932), 213, 227
departed from Schmitt, however, by attempting to theorize a political state in which agreement on substantive ends was minimized to only ‘general rules of just conduct’. Hayek sought, as much as possible, to limit the sphere of the political to the articulation and maintenance of general rules of just conduct, rather than any fuller, more comprehensive ends. Hayek wanted a political system capable of protecting and supporting the pluralism of social life he saw facilitated by the extended order of market interaction. His political thought is an insistence that the proper end of political life is the peaceful co-existence of those whose particular social ends are not shared. The diverse and diffuse human interactions facilitated through market activity, for Hayek, provided the best hope (in co-operation with the legal and institutional foundations described earlier) against the populist tribalism antithetical to his liberal project.

For Hayek, there are two challenges to achieving a society undefined by the friend-enemy distinction. First, attention to the excerpt above emphasizes that, for Hayek, a categorical distinction must be made between societies oriented towards particular purposes and those which are not. He understands the core function of law within Schmitt’s concrete order theory to be the “instrument of arrangement or organization by which the individual is made to serve concrete purposes”. The division both within and between societies along lines of support for and resistance to respective foundational purposes cannot be extirpated. It is against theories of social organization oriented towards some higher end(s), then, that Hayek offers his alternative: “the chief point of

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83 Hayek (1973), 71. This is from an extended paragraph in which Hayek is discussing Schmitt.
catallaxy is that, as a spontaneous order, its orderliness does not rest its orientation on a single hierarchy of ends.\textsuperscript{84} The epistemological distance Hayek’s commitment to extended or spontaneous order creates between him and contemporary understandings of neoliberalism will be discussed in the next chapter, but it is here relevant and absolutely clear that Hayekian catallaxy is meant not only as an insistence on epistemic humility but just as fundamentally as a political commitment to an alternative form of social organization, namely one not defined by and subservient to particular ends. Hayek borrows from Oakeshott in referring to this “abstract order” of social organization as “nomocratic”, distinguished from the “telocratic”, “purpose-governed social order”\textsuperscript{85}. Such a society, Hayek suggests, may be able to resist the escalation of social differences into the political division of friends and enemies.\textsuperscript{86}

Even if a given society is unbredon to particular ends, however, the need still remains for some sort of social mechanism by which people can learn to overcome tensions which may arise from both artificial and natural differences ranging from gender, custom, creed, ethnicity, geography, etc. This is the second challenge Hayek’s conception of catallaxy hopes to address. Here it is again worth quoting Hayek at length:

“The great importance of the spontaneous order or nomocracy rests on the fact that it extends the possibility of peaceful co-existence of men for their mutual benefit beyond the small group whose members have concrete common purposes, or were subject to a common superior, and that it thus made the appearance of the

\begin{footnotes}
\item[84] Hayek (1967), 164
\item[85] Ibid., 163
\item[86] It is unclear from Hayek’s description whether he (incorrectly) understood Schmitt’s conception as simply dichotomous. Schmitt himself did understand the friend/enemy distinction as a comprehensive binary but rather as a relative level of intensity along a narrowly confined spectrum, from which the moral, aesthetic, and economic realms of life are explicitly excluded.
\end{footnotes}
Great or Open Society possible. This order which has progressively grown beyond the organizations of the family, the horde, the clan and the tribe, the principalities and even the empire or national state, and has produced at least the beginning of a world society, is based on the adoption -- without and often against the desire of political authority -- of rules which came to prevail because the groups who observed them were more successful; and it has existed and grown in extent long before men were aware of its existence or understood its operation.87

Hayekian catallaxy is meant to serve as a social space and institution conducive to the formation of “bridging” bonds between members of society who do not share more substantive identities or ends.88 It is a misunderstanding to consider the Schmittian friend/enemy distinction a strict binary; rather it is a spectrum across which social relations may move. This is crucial, for the friendship which Hayek hopes catallaxy may facilitate is not an intensive inversion of existential political enmity, rather it is a thin conception hoping for peaceful social cooperation and coordination. The cacophony of worldviews, identities, and aspiration in the Hayekian liberal society must be capable, simultaneously, of bridging closely bonded communities of shared substantive commitments and self-understandings while neither fully displacing nor elevating any particular community. Catallactic interactions, for Hayek, are the social mechanism through which potential substantive enmity can be vented and diffused through thin peaceful coordination and cooperation without threatening the continued existence of any particular closely-bonded sub-community. Catallaxy, for Hayek, was never meant to supplant the more meaningful communal aspects of social and individual life. Following

87 Hayek (1967), 163-164. Original emphasis
88 Meadowcroft and Pennington (2007). They take the language of “bonding” and “bridging” social capital from Putnam (2000). I follow them in applying that language to Hayek.
in the liberal tradition of Smith, Hume, and Tocqueville, Hayek had no intention of reducing the fullness of human experience to mere bartering and exchange. What he hoped, however, was that the thin interactions necessary for continued market activity may serve as a pacifying bridge between members of more meaningful communities and keep at bay the tensions that must certainly arise between groups of people with conflicting understandings of the substantive matters of human life.

It is worth mentioning here that this hope for a political order of “thin” friendship to prevent “thick” enmity between various substantive communities helps to emphasize the “unsentimental” character of Hayekian liberalism. Unlike David Hume and Adam Smith, Hayek’s theory of social and market interaction places no mechanical weight on our moral sentiments, and neither does he ever develop any account of commercial virtue such as that found in Montesquieu. Hayek did not hope that market interaction would help us achieve some sort of “thick moral unity” but rather help “divided creatures” to peacefully co-exist in a free society. While earlier liberals hoped that the spread of international markets would bring about a *pax commercialis* and perhaps even make “warfare obsolete”, Hayek, writing in the mid-twentieth century, could hold no such aspirations. The potential for market interaction to encourage “association with foreigners”, is especially poignant, however, for students and advocates of emergent

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89 McNamara (2013). McNamara provides a helpful comparison of Hayekian and Smithian liberalism.
90 Ibid., 25
91 For a helpful discussion of the optimism of especially Montesquieu, Kant, and Constant see MacGilvary (2011), 94-101.
92 Ibid., MacGilvary notes it was precisely this association with foreigners due to market interaction that Aquinas feared.
orders and the variously classical and conservative liberalisms of Smith, Hume, Oakeschott, and Hayek. Unlike their more rationalist liberal compatriots these thinkers held in high regard the power of customary law, traditional practices, and the limits of and pitfalls of constructivist design. This same emphasis on emergent order, custom, tradition, dispersed knowledge, and decentralized institutions, however, necessarily invites concerns of tribalism and must, somehow, be reconciled with the more cosmopolitan normative commitments of liberalism. While other branches of thought within the larger family tree of liberal ideas have made various recourse to cosmopolitanism by way of appeals to rationalism, moral sentiments, or developed frameworks of rights (natural or legal), Hayek distances himself from all three. As will be the core argument of chapter four, this unsentimental approach to liberalism is particularly poignant for those of us who once again see the future of liberalism as precarious.

This political function of catallaxy within the Hayekian schema is further magnified and clarified when we consider what the conception is meant to replace, namely, the “economy”. The modern application of the term economy to the extended market order, Hayek argues, is a terrible mistake. “An economy in the strict sense of the word”, he argues, “is an organization or a deliberate arrangement of a given stock of

\[93\] Paul (1998) helpfully elucidates the tension in Hayek’s theory between his treatment of some liberal values as “inviolable principles” and the evolutionism at the core of his skeptical epistemics. She ultimately suggests committed liberals should abandon evolutionism, by which she means a reliance on emergent order, custom, and tradition. 

\[94\] Hayek bemoaned this use of the term economy, which he saw as a recent development. Though Hayek noticed it earlier by roughly forty years, Timothy Mitchell has done important work on this topic much more recently. See Mitchell (2008).
resources in the service of a unitary order of purposes. It rests on a system of coherent decisions in which a single view of the relative importance of the different competing purposes determines the uses to be made of the different resources.”\textsuperscript{95} A true economy, such as a within a household, firm, or government budget, presupposes a decision on which purposes are to be pursued and how they are to be relatively valued. “An economy proper”, he writes in another location, “is a deliberate arrangement of the use of the means which are known to some single agency”.\textsuperscript{96} To speak of an economy, for Hayek, is thus to speak both of a known pool of resources and a decision by which means, and towards which ends those resources are to be deployed. As will be discussed at length in Chapter Two, Hayek does not think it is possible to aggregate and concentrate the knowledge requisite to speak of an economy in regard to the exchange activity of society as a whole (this is the Hayekian “knowledge problem”). On the other hand, while it is certainly possible to speak of an economy and political decisions \textit{vis a vis} the means by which resources are to be used towards the accomplishment of various purposes, the very assumption of such decisions constitutes either a misunderstanding of actual market interactions or a call for substantive agreement on the hierarchy of ends to be commonly pursued and which ends are to direct exchange interactions and outcomes. To speak of the economy is, according to Hayek, to speak of an agreed upon order of ends to be pursued according to agreed upon strategy using agreed upon means. Hayek is uncompromising in his assertion that centralized decisions as to the ends and means of

\textsuperscript{95} Hayek (1967), 164
\textsuperscript{96} Hayek (1976), 108
economic order are always political decisions. To speak of the economy, then, is to speak of an array of political decisions potentially totalitarian in its reach and implications. Catallaxy, a decentralized network of market interactions, is the Hayekian alternative to an economic order necessarily premised on the pursuit of specific political economic ends.

Ultimately, then, Hayek’s political rejection of both Schmittian decisionism on the one hand, and command-economy socialism on the other, follows from an obstinate insistence that it is the pursuit of particular, concrete ends which weakens the liberal state and prepares the conditions conducive to totalitarianism. In Hayek’s account, “the whole of socialism is nothing but a demand that the market order...should be turned into an economy in the strict sense, in which a common scale of importance determines which of the various needs are to be satisfied”.97 This mirrors closely his condemnation of Schmitt’s legal theory which saw law as an “instrument of arrangement or organization by which the individual is made to serve concrete purposes.”98 Hayek’s thesis that socialism paves the “road to serfdom” is well known and much maligned. I have no interest here in a full analysis of that claim. What has been overlooked, however, is the core consistency between Hayek’s consideration and rejection of the Schmittian concrete theory of law and socialist political economy. This oversight too often leads to a gross misunderstanding of the Hayekian project.

97 Hayek (1983), 258
98 Hayek (1973), 71
V. Conclusion

This study has investigated the influence of Carl Schmitt’s work on F.A. Hayek. There is no evidence they ever communicated. Hayek almost never fails to mention Schmitt without throwing in some pejorative qualifier. And yet there are important reasons why Schmitt continues to reappear at particularly decisive moments in Hayek’s political thought. Schmitt’s sustained analysis of the precariousness of the liberal democratic state thoroughly convinced Hayek. “Every rationalist interpretation falsifies the immediacy of life”, Schmitt warned, and accordingly Hayek made no overture to the contractarian theories of Locke or the utilitarianism of Bentham.\(^9\)\(^9\) Insofar as the dominant forms of liberal theory made recourse to a political anthropology of optimism, Hayek demurred.\(^10\)\(^0\) Instead, within his political and constitutional thought there is a pattern whereby Hayek both accepts much of Schmitt’s diagnoses of the weakness of the liberal democratic state and yet turns from the Schmittian prescriptions and seeks instead alternative liberal solutions.

Hayek, through Schmitt, realized liberal law and order required a grounding in existential reality if it was to prove both durable and capable of speaking to the fundamental questions of life. Rejecting the tribalism of Schmitt’s concrete order, Hayek offered instead a theory of social order grounded in the human brain and mind. Combining a *gestalt* psychology and a complex systems account of organicist biology, Hayek posited a systematic philosophy of human social order operative through the

\(^{99}\) Schmitt (1988), 71
\(^{100}\) Schmitt (2007), 64
hermeneutical perception and interpretation of patterns of human interaction all the way from the mind-brain problem up through macro societies and orders. We learn to cooperate, or at minimum to live with others through our interactions with them. We understand and mostly adhere to general rules of conduct we could not really articulate even if we tried. This, for Hayek, not only roots mechanisms of social order in something real in the world but also allows for a liberal cosmopolitanism. Even if far from home and separated from those whose shared substantive values make us more than fellow citizens but friends – even then we can at least learn to live with one another. That is the extent of Hayek’s optimism; the political unity of his liberal polity requires little more.

But, even so, Schmitt’s analysis and the subsequent events of the 20th century proved the frailty and contingent nature of constitutions and political institutions. Unwilling to empower a strong dictator, commissarial or otherwise, Hayek nonetheless needed an institutional guardian for his liberal constitution. The *Nomothetae* in Hayek’s constitutional design were meant to serve such a function. Tasked with defending the general character of the Rule of Law and providing judgment on the fundamental questions of political value untainted with allegiances to interests, this second legislative body was to be the guardian of Hayek’s constitution. Rather than united, quantitative and qualitative law were to be kept separate in the Hayekian scheme, the latter the purview of only a carefully elected body of representatives. Hayek’s liberal state was to be neither total nor weak.

Finally, Hayek accepted Schmitt’s conception of the political as inevitable – at least in societies directed according to a hierarchy of ends. Such an ordering would certainly be
contented and indeed require an authoritative political decision, a decision which would necessarily define the *demos* along lines of friend and enemy. Hayek thus believed any liberal state must necessarily circumvent authoritative decision making on material means and ends – a liberal state requires a catallaxy of market interactions rather than an economy, properly speaking. To speak of an economy is to speak of telocracy – it is to always already be speaking of means to specific ends and thus inevitably of friends and enemies. Catallaxy is fundamental to the Hayekian political economy – it is the depoliticized economy indispensable to any state aspiring to a social order undefined by the friend/enemy distinction.

Hayek's political thought was deeply concerned with the very survival of liberalism. Unfortunately, few read him this way. Often placed simply in the tradition of the Scottish Enlightenment and other canonical classical liberals (understandable due to Hayek's own self-positioning), scholars have too often overlooked that his intellectual and lived context is primarily in central Europe during a century of calamity. He wrote his first essay whilst in his last days serving in the army of the defeated Habsburg Empire. He closely observed the collapse of the Weimar Republic and the horrors of the aftermath. He spent most of his intellectual career writing at time in which he felt socialist perspectives were dominant within academic scholarship and appeared ascendant to many, if not most, observers. From Hayek's view, liberalism was on life-support. Happy simply to hear more about the dangers of unintended consequences and

101 “Nobel Prize Winning Economist” (1983), 46
the ignorance of policy planners, most libertarian and classical liberal students of Hayek fail utterly to grasp the existential crisis of liberalism to which the latter desperately hoped to attend. Hayek carefully read Schmitt and spent decades trying to theorize liberal alternatives to Schmitt’s suggestions.

Hayek was unquestionably a master of liberal thought. Hayek’s work took seriously the political problems of liberal theory and in so doing provided a foundation upon which contemporary liberal theorists can build and from which we can learn. With various enemies amassing, anything less than an actually political liberalism will not do.
Works Cited:


Di Iorio, Francesco. 1995. "Hayek And The Hermeneutics Of Mind". Social Science Information 54(2). 177-191


