
Anarchy, Sovereignty, and the State of Exception

Schmitt's Challenge

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“Sovereign is he who decides on the exception.” So begins an iconic work by Carl Schmitt (2005), one of the twentieth century’s most controversial scholars. Schmitt, arguably also one of that century’s greatest legal theorists, poses a serious challenge to anarchist theory that, so far as I can determine, has never been explicitly confronted from within the anarchist tradition. It is true that Schmitt had liberalism in mind when he made his challenge, and anarchists would concur with parts of his challenge as they relate to liberalism in particular. Nevertheless, even if he were not addressing himself to anarchists, his core challenge on the question of sovereignty is one that anarchist theory cannot disregard. Schmitt pushes us to confront the hardest case in what many would consider anarchy’s soft underbelly. In the face of the direst threat, such as a potential extinction event, would not the coordinating and coercive power of the state, with its capacity to make a universally enforceable decision, be the best means of overcoming the threat? Given the gravity of such a scenario and the Schmittian solution’s necessity for central state intervention, it behooves anarchists to meet his challenge. Failure in this regard would leave anarchism exposed as inadequate in the moment of greatest human need. I argue here, however, that statist solutions are subject to a paradox that subverts their apparent advantages. Even in the direst circumstances, voluntary association still trumps coercion.

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The Independent Review, v. 17, n. 3, Winter 2013, ISSN 1086-1653, Copyright © 2013, pp. 415-428.

The revival of Schmittian scholarship in recent times has included an all too common tendency to dismiss his critiques as a function of his practical politics. He was a relentless critic (some might say intellectual saboteur) of the Weimar Republic and apparently an enthusiastic embracer of National Socialism when it came to power. He thereafter seems to have engaged in intellectual dishonesty of Orwellian proportions in his support of the Nazi regime. The final word on his collaboration, though, remains contested.¹ Nevertheless, however distasteful may be the character or motives involved, ad hominem argument remains only ad hominem argument. If Schmitt's claims are not true or their import is not what he alleges, we must demonstrate that they are so on intellectual grounds, not by resort to biographic demonology.

Here I explore Schmitt's development of the nature and relevance of the state of exception—exception to the legal norms and routine law—in order to isolate the core challenge that he poses to anarchist theory. The key concept to grasp is his notion of sovereignty. As we unpack the historical ground of his concept of sovereignty, though, the shortcomings of his purview will become evident. His partial story lends itself to his valorization of sovereignty as the solution to the state of exception, which is ultimately an inevitable political fact. That very partiality, however, misleads him into underappreciating the larger consequences of that same history. Where Schmitt sees only a liberalism defeated by the gruesome realities of the French Revolution, a wider purview reveals not a defeat, but a renewed radicalism of liberty's longer revolution. In liberalism's comeuppance, anarchism was born. Failing to recognize this historical fact or to appreciate its theoretical relevance leaves Schmitt's claim for sovereignty, as the inescapable solution to the state of exception, inadequately defended. It is necessary first to understand this historical lacuna in Schmitt's analysis if his more general blindness to the free-market alternative is to be appreciated.

Faced with the state of exception, the decentralized, spontaneous, emergent, adaptive system of the free-market laboratory of experimental trial and error turns out to be not merely an alternative, but the only viable option that is not susceptible to becoming a cover for advancing special interests—that is, the only option that does not actually derail genuine solution seeking. This system's rewards for successful discovery of widely preferred options alone provide the means for the most committed to pool their effort and resources toward finding the solution that the state of exception requires. And, indeed, *this conclusion holds ever more strongly as the threat converges toward a truly existential one*. Like Schmitt, those, such as the global-warming lobbyists, who presume that only the sovereign state has the integrity, disinterest, and social benevolence necessary to carry out this mission suffer from inadequate acquaintance with the anarchist theoretical tradition. They therefore must receive the same verdict as he at the hands of reason.

1. For a particularly vigorous and harsh verdict on Schmitt's role in these affairs, see Wolin 1990. More nuanced treatments of these events appear in Bendersky 1987 and 2007 and Gottfried 1990.

Sovereignty and Schmitt's Challenge

The concept of sovereignty developed along a winding route through the thought of the medieval scholastics, but, building on Machiavelli's innovations, Jean Bodin began to give the concept its peculiarly modern meaning. Schmitt picks up the story at this point.² In the hands of Bodin and later Hobbes, in contrast to earlier versions in which something like sovereignty was always subject to natural law and obedience to god, the sovereign comes to be seen as above the law. A logical argument might be made along these lines. After all, how can the sovereign give and enforce the law to everyone else if he is himself a mere equal to his subjects? If he were, then any of his subjects would be thought equally competent and entitled to give and enforce the law.

Only because the sovereign is above the law can he be sovereign. After all, if the law has to be changed, it cannot be changed from within because doing so would be breaking the law. Only someone above the law can change it. This principle of the sovereign's standing above the law was important for Schmitt and his eventual articulation of the state of exception because in his view the sovereign not only had to decide how to respond to a state of emergency but also had to determine when such a state exists or must be invoked. Again, authority superior to the normal law is required.

This superior power of the sovereign arrived through a transition of the Christian concept of the two bodies of Christ into the secular realm, so that one starts to speak of the two bodies of the king: the one that can die as an individual man and the one that lives on eternally, embodied in his heirs and rightful successors to the throne. Along with this notion of the two bodies, the idea of "the mystical body" was smuggled into the language of sovereignty (Kantorowicz 1981)—the notion that the subjects are somehow organically joined into the king's enduring body. (He, of course, is the body's head.) This conceptual leap would become important a little later in the modern development of sovereignty theory. It is prominent in Schmitt's *Volk* valorization in his "concept of the political" (Schmitt 1996).

Arguably in Bodin, but certainly in Hobbes, an important theme of the legitimization of the sovereign is its role as an umbrella for liberty. Precisely because such sovereign authority creates the conditions for everyone else to live in liberty—decisively for Hobbes, because this authority provides security—it has legitimacy as a proper consequence of the social contract.³ The other important development for this history

2. Some might argue that choosing this beginning gives Schmitt's "political theology" a particular character that does not necessarily do justice to the larger picture of his analysis. Indeed, a more historically attentive approach might have provided greater benefit for his theoretical project. Exploring this dimension of the question exceeds the bounds of the current article, though it may well prove to be a valuable part of the larger intellectual enterprise of which this article is a preliminary effort. For a taste of what kind of considerations would inform this more historically attentive approach, see Jouvenel 1949 and Gray 2007.

3. The alternative, of course, is Hobbes's notorious war of all against all in which life is nasty, brutish, and short. It is strange that many still take this argument at face value even though in Hobbes's own century Samuel von Pufendorf demonstrated the central flaw in Hobbes's failure to appreciate the civilizing role of trade in serving mutually compatible preferences (Hont 2005). For an argument that arrives at the same

of sovereignty theory, combining the social contract for the common good and the glossed-over but always immanent mystical body, was Rousseau's contribution, in which sovereignty comes to be embodied in all and only in all in the form of the General Will. In the guise of transferring sovereignty from the dictatorship of the king to the people, what really evolves is the dictatorship of the collective over the individual: an observation developed by both Jouvenel (1949) and Maritain (1951). Absolutism is not overcome, but transposed, so it makes perfect sense to shift discussion from the divine right of kings to the divine right of majorities. Both Bodin and Hobbes, although preferring kings, acknowledged that sovereignty could still be exercised in aristocracies or democracies. Rousseau merely took them at their word.

Rousseau's twist on sovereignty had its decisive historical moment in the French Revolution. Although Schmitt perhaps failed to analyze Rousseau's contribution adequately, he certainly paid close attention to the French Revolution. Alas, from the anarchist's perspective, he learned the wrong lesson. It is true, of course, as Schmitt observed, that the French Revolution became the cauldron and template for liberalism's state of exception and taught a vivid lesson in liberal democracy's dilemma. He criticized liberalism and liberal democracy for their predisposition to talk rather than to decide. When the rubber hit the road, though, and everything was on the line, only a decision would do: sovereignty was essential and inescapable. In Schmitt's estimation, the liberals and democrats should have learned this lesson from the French Revolution. This landmark cataclysm served to validate Schmitt's decisionism.

In anarchist theorists' estimation, of course, a very different lesson *from* the French Revolution and *for* Schmitt was manifest.⁴ Before 1789, the liberty movement had a strong element that sought to use state sovereignty to achieve liberty. Through the seventeenth century and most of the eighteenth century, of course, some—for example, the Levellers, John Locke, the spontaneous order strain of the Scottish Enlightenment, and many involved in the independence movement of the thirteen colonies—took a much more cautious view of such a strategy. Yet a distinct branch of the cause hoped precisely to harness sovereignty to the liberty revolution. Especially in France in the decades leading up to the Revolution, the Physiocrats were notorious for this strategy; Turgot's reform platform as minister of finance under Louis XVI was the best prospect for realizing this hope, though it finally came to naught. The liberal Burgundy Circle had earlier aspired to educate the duke of Burgundy—eventually to be next in line to the throne of Louis XIV—in *laissez-faire* principles, only to have him die of measles (Rothbard 2006). Indeed, the internal story of the French Revolution, rarely told in high school textbooks, tells how the project of harnessing sovereignty to

conclusions about the civilizing role of trade, without Pufendorf's aid but by simply applying praxeological reason, see McConkey 2012b.

4. Murray Rothbard's seminal essay "Left and Right: The Prospects for Liberty" (1965) has greatly influenced my understanding of the role of the French Revolution in the context of a longer liberty revolution.

the liberty revolution morphed into the widespread delusion that capturing sovereignty itself constituted fulfillment of that revolution.⁵

The horrors into which the French Revolution descended put this sovereignty-mastering delusion in an entirely new light. It is no coincidence that in multiple places in the decades that followed the revolution and Napoleon's defeat the first unambiguously anarchist thinkers began to advance new conceptual models that no longer represented the *ancien régime* as the primary object of struggle, but rather the sovereign state itself—the effective tool of the parasite class, old and new. William Godwin's *Enquiry Concerning Political Justice and Its Influence on Modern Morals and Manners* (1793) is widely considered the first work of explicit anarchist theory. Under the French Restoration, Charles Dunoyer and Charles Comte first articulated anarchist class theory. Soon afterward Belgian émigré to Paris Gustav de Molinari was the first to argue explicitly that every function of the state—even that perennial last holdout, defense and law enforcement—should be privately performed in the voluntary market. Similar developments were evident in Germany in Julius Faucher's circle, in England in the work of Herbert Spencer and eventually Auberon Herbert, and then in the United States in the Boston circle around Benjamin Tucker and Lysander Spooner.

Schmitt was not oblivious to the possibility of anarchy. On the contrary, toward the end of *Political Theology* are several pages that pertain to what he calls atheistic anarchy (2005, 55–57, 66). His object of analysis there, however, is the communalist (what I would not consider it unfair to call “cryptostatist”) “anarchy” of Babeuf, Proudhon, Bakunin, and Kropotkin.⁶ Because these writers are cryptostatists, though, Schmitt's dismissal of their antistate posturing (wanting the political rectitude of state power without being willing to accept its decisionist implications) is not entirely unfair. However, he does not consider the libertarian or free-market anarchism of Molinari, Spencer, or Spooner. The decisionist critique cannot stick to their views as it can to communalist anarchy. This historical lacuna in Schmitt's analysis suggests the theoretical cul-de-sac that his approach evokes when confronted with the free-market alternative to sovereignty.

Challenging Anarchy's State of Exception

Without recognizing this dimension of the story, Schmitt's evaluation of the French Revolution's legacy and its implications for sovereignty theory are fatally flawed in

5. Gary Kates's article “From Liberalism to Radicalism: Tom Paine's Rights of Man” (1989), a fascinating case study of these matters, nicely illustrates the conceptual trajectory from liberty-through-sovereignty to sovereignty-as-liberty in Thomas Paine's thought between the writing of the two parts of *The Rights of Man*. Yet Kates himself tells the story in a rhetoric fully immersed in the assumptions of the sovereignty-as-liberty position.

6. How, after all, can one effectively oppose capitalism and free markets, as all of these writers do to one degree or another, without the very application of rulership that the very term *anarchy* etymologically excludes?

regard to a consideration of the modern world's prospects. The point here is not to resuscitate or valorize Schmitt's political conclusions. None of that qualification, though, allows even market anarchy a free pass from Schmitt's challenge: the state of exception as an extraordinary possibility cannot simply be wished away, however misconstrued its roots in Schmitt's historiography. Although Schmitt's failure to explicitly consider free-market anarchy does not provide the latter a free pass, this failure constitutes a fatal flaw in Schmitt's confident dismissal of the French Revolution's legacy. As correct as his decisionist critique may be for liberalism and communal anarchy, it collapses in the face of the radical alternative of free-market anarchy. However, to appreciate the quality and strength of this alternative, it is important not to be waylaid by the red herrings that can be mistakenly offered as answers to Schmitt. His challenge is more resilient than it might seem at first.

In the free-market anarchist (hereafter, simply "anarchist" or "anarchy") paradise, everyone goes about his own business, engaging in exchanges with others that allow him to satisfy best his own subjective preferences. There is ideally no violence or theft. Yet if there is, anarchist theory has this contingency covered, too, because many theorists going back to Molinari have explored different methods by which systems of justice can work well or even better on the free market (e.g., see Friedman 1973 and Hoppe 2009). Schmitt's exception, however, is an ontological hound. Whatever the anarchist says that he has prepared for, the state of exception says, is not the exception because, by definition, the exception is the threat against which no one has planned or can have planned in advance.

Schmitt was concerned primarily with the dangers posed by war in its various forms. The anarchists may well reply that sovereignty itself is the main cause of war in all its various forms (Hoppe 2003). Again, however, this response amounts to skirting the challenge rather than confronting it. There are surely other kinds of exceptions for which anarchy—on the surface or in popular perception at least—would seem to be not nearly so well equipped. For example, one hardly need accept the hysterics of the worst global-warming scare mongers to imagine a scenario in which widespread human practices, such as some kind of pollution, might possess both the qualities of mass terminal danger and observational inconclusiveness. Even if we posit the terminal danger as an objective given, the lack of observational conclusiveness might easily leave enough people unpersuaded of the objectively true danger that they would persist in the danger-generating activity. This scenario might indeed be the occasion for an unwitting creation of an extinction event for humanity.

To deny this possibility categorically is to engage in Panglossian denial on an epic scale. Nevertheless, for the sake of argument, I ask all professors Pangloss to suspend their disbelief in the human capacity for tragedy and grant the prospect that unintended and generally unknown consequences might in fact constitute such an existential threat for our species. If we grant this prospect, it surely is an exception for which many will insist that the strong power of the sovereign is

not only justified, but necessary.⁷ Only a power above the routine law can act rapidly, decisively, thoroughly, and disinterestedly enough to avert such an extinction event. Even those fully cognizant of Julian Simon's (1996) pioneering post-Malthusian insights into the market as the guarantor against nonrenewable resource exhaustion under normal conditions might harbor serious reservations about the validity of identifying markets as the optimum instrument of crisis resolution in the state of exception. If any situation requires effacement of self-interest and demands universal self-sacrifice in the interest of the common good, the state of exception posed by the existential threat of an approaching extinction event would seem to be that situation.

Indeed, in many people's minds this situation may well be the limiting case for deontological anarchism: the one in which anarchism definitively fails the litmus test. If the choice truly is one between sacrificing liberty and extinction, how can insisting on liberty be the morally superior choice? Surely some liberty has to be sacrificed so that not all liberty is lost. One hears this argument often enough, admittedly more among minarchists (not to mention disingenuous enemies of liberty), but pointedly directed at anarchists. If this case is not the defining one for the argument in favor of Schmittian sovereignty, what case possibly can be? If nothing else, this situation well represents Schmitt's state of exception for anarchy. However, the sovereign exceptionalists must counter two major anarchist counterpunches before the anarchists can be expected to grant any berth on this claim.

Sovereignty's Nirvana Fallacy

The two counterpunches are the critiques of the state—the modern embodiment of sovereignty—as both too incompetent and too corrupt to rise to the challenge. If the offering of sovereignty as the solution to the exception rests only on the Nirvana fallacy—the condemnation of anything that falls short of a fantastically perfected condition unencumbered by reality—it hardly constitutes the solution it purports to be. Even among the general public with no education in anarchist theory, stories of state bureaucracy's inertia and smothering red tape are legendary; one can hardly pick up any newspaper (assuming a remotely free press) in the world on any given day without finding at least a couple of articles documenting such self-inflicted incompetence.

However, the framing of bureaucratic inefficiency often takes for granted both capacity and intentions that are unwarranted assumptions. Ludwig von Mises (1935) and Friedrich Hayek (1945) described in seminal works the calculation and knowledge

7. Although in this article I am using the longer and more conventional tradition of reading Schmitt's view of sovereignty as a justification for a strong central state, some Schmittians (neo-Schmittians?) have interpreted the implications of globalization as calling not for centralized but for decentralized state power. A salient case in this regard has been the Northern League in Italy, whose program has been theoretically contextualized by the neo-Schmittian Gianfranco Miglio (1993, 1994). However, smaller states, if in fact still states, remain as susceptible to the capture and failure problems I discuss here. The extent of the harm may be less with smaller states, but the dynamics of the process remain unchanged.

problems that make even the best-intended central-state planning impossible as rational undertakings. This situation is gloriously evident in the domain of state central planning that is supposed to be the most rational and scientific: regulation (Winston 2006). Some iconic examples of regulatory failure, stretching over decades, that illustrate the calamity of such central planning include Hurricane Katrina, both preparation and response (Anderson 2005); the *increase* in coal-generated air pollution as a direct result of scrubber technology mandates (Ackerman and Hassler 1981); increased electrocution rates as a result of strengthened electrician licensing standards (Carroll and Gaston 1981); and the unnecessary deaths of tens of millions of people, mostly in Africa, from the decades-old DDT ban (Seavey 2002).

As these examples illustrate, regulatory failure is not merely a lack of success in achieving the central planners' stated aims; it also comprises perverse outcomes in diametrical opposition to stated aims: a phenomenon so common that it has taken on the name of the economist who theorized the effect, the "Peltzman Effect" (Peltzman 1975). This outcome is hardly surprising when one considers the widespread prevalence of the Baptist-and-bootlegger effect, in which the benefiting special interests in any regulatory initiative are already embedded in the process, however invisible they may be to general public scrutiny owing to the distractions provided by the virtuous "Baptists" (Yandle 1983). No discussion of the standard calamity of regulatory "failure" would be complete without acknowledging the degree to which sovereign regulation by the state does not and never was intended to serve the ostensible public good but rather has been part of the collaborative pilfering by the rulers' capitalist cronies (Kolko 1963). Indeed, in a real sense, what is called regulation is in fact antiregulation because it interferes with the actual processes of regulation built into the market (McConkey 2011).

Thus, even to assume state actors' good intentions one has to willfully ignore a long history of rent seeking, regulatory capture, discretionary bailouts, and general cronyism that is endemic to any rent-generating opportunity and that was well displayed in the creation of and response to the 2008 housing-finance crisis; the pharmaceutical industry's support for the U.S. health-care reforms under both Bush and Obama; and the ongoing travesty of the military-industrial complex that distorts the domestic economy and foreign relations in scores of countries, obviously including the United States of America.

Perhaps a benevolent, efficient, incorruptible, and omniscient dictatorship would coerce everyone into contributing to an extinction-avoidance program. However, history and logic undermine confidence that any real-life dictatorship actually possesses any one of these qualities, *much less all four*. Moreover, another level of risk also besets the unleashing of the sovereign to ward off impending extinction: because, as Schmitt makes clear, the sovereign decides not only the solution strategy, but also the need to implement such strategy—thus triggering the deployment of its exceptional powers—abuse is all too likely, as history reveals again and again. The most dramatic case of this outcome, of course, is the Nazi's enabling legislation, which gave

dictatorial powers to a constitutionally elected party. The past few generations of Americans have become accustomed to this tendency in the president's creeping exercise of executive privilege on matters such as congressionally unapproved war; and Canadians had a taste of Schmitt's solution to the exception in 1970 with Trudeau's precipitate overreaction to a pair of kidnappings by imposition of the War Measures Act and its attendant suspension of civil and natural rights. When those who take supreme power in the state of exception also determine whether such an exception exists, the lures of corruption are simply too tempting to resist.⁸

Hence, lapsing into the Nirvana fallacy in regard to the state's utility and morality at the last minute before human extinction would hardly seem to be a rational or efficacious strategy. Desperate times may call for desperate measures, but surely they do not call for absurd disregard of reality and experience. The anarchists' rejection of Schmitt's solution is hardly surprising, yet such principled consistency does not actually answer his challenge. If reliance on Schmittian sovereignty is not the proper response to such a critical exception, can we really expect that the anarchists' endearing faith in the market will provide a solution?

Anarchy's Solution

The travails of market failure, the tragedy of the commons, and the scrounge of free riders are rehearsed often enough that, given the extinction crisis event hypothesized here, we should expect market responses powered by narrow, short-term self-interest simply to pile one negative externality atop another as we fade into extinction. No one is either charged or uniquely empowered to take the problem in hand and focus on finding a solution. Is this oft-repeated truism a realistic or probable outcome in the market? Let us assume a minority in the know. We may even assume it is a small minority. But, whatever its size, we are now discussing those who firmly believe that the existing conditions are carrying us toward an extinction event. Recall, too, that we have agreed for the sake of argument that these people are objectively correct in their assessment. Consider the options available to this dispersed group, who are convinced that certain common human practices are carrying us toward extinction. Three obvious approaches present themselves for this minority: coercion, education, and solution.

Coercion would be the approach of sovereignty, which we have already ruled out on grounds of disutility arising from corruption via rent seeking. On a smaller scale, no doubt, some people may resort to various actions, from civil disobedience to sabotage and even terrorism. However, the minority that carries out such actions will be resisted and suppressed by the majority, which is both understandable and in several instances the correct stance on the part of the majority insofar as the free use

8. In a turn that Schmitt might well find sympathetic, Giorgio Agamben (2005) argues that throughout the twentieth century, the state of exception has become increasingly the rule rather than the exception.

of its liberty and property is denied by the concerned minority's actions. Hence, this approach is both impractical and ethically suspect from the start.

Education avoids such ethical quandaries but is not necessarily any more practical. We have already posited the approaching extinction event as sufficiently imminent to warrant dramatic action by the minority in the know. However, the minority's education of a majority is a long, slow process, unlikely to bring results soon enough to avert the imminent extinction. Moreover, there is no guarantee and only a modest expectation of ever making any progress in changing the majority's consciousness. So although education may be superior to coercion, it too is not a promising approach in our posited scenario.

The third approach is to find a solution, a practical alternative to the specific human actions that are creating the encroaching event. If the majority cannot be effectively forced or persuaded to change their practices, they can be induced to do so by the creation of alternative practices that serve their self-interest. One thinks of how the hunting of whales to extinction and the relentless deforestation of much of the world were dramatically slowed and, in the short term, even arrested, not by sanctimonious appeals to cut back on energy consumption, but by the innovation of a different fuel source. The discovery that oil, formerly a nuisance that damaged the quality and value of farmland, could be made into kerosene and provide a fuel source that was less expensive, ended excessive whaling and deforestation not through force or persuasion, but by serving the self-interest of those whose preferences were driving the activity and its ecological impacts.⁹

With this example as a guide, it is evident that anyone who believes in the imminence of the extinction event would be fully motivated to invest entirely in the search for a solution. After all, the situation is not one in which inadequate investment in seeking a solution leads simply and solely to distressing financial outcomes; rather, it leads to extinction. Moreover, successful solution seeking leads to widespread adoption of the solution in the free market. For the minority in the know, the option is either not to find the solution and go extinct or to find it and get rich. As Adam Smith noted in a famous passage about the virtues of the Invisible Hand, altruism is not superior to self-interest as a motive for the pursuit of such a solution. It is entirely irrelevant whether one is motivated to invest in such a solution for humanitarian purposes or in selfish hopes of the payoff that will come if humanity survives as a result: if the solution is found, everyone wins, and every investment increases the resources with which to find the solution.

Free riding among the minority in the know would be masochistic and have to be explained by self-destructive psychological impulses—which would be equally sabotaging and counterproductive under Schmittian sovereignty. Aside from self-destructive

9. Though not making as broad a theoretical case as is made here, Matthew Kahn, an adherent of the theory of global warming, applies this market logic to the global-warming context in his book *Climatopolis: How Our Cities Will Thrive in the Hotter Future* (2010).

masochism, free riding provides no advantage. Aspiring free riders among the minority in the know would not benefit from not investing in the search for a solution, regardless of the outcome. If a solution were found and the world survived, they would not cash in on that solution (other than by continuing to live), and if it were not found, the species would go extinct, and they would not enjoy free-rider benefits from others' investment because they would be dead. So, however small the number of true believers, they would be maximally motivated. Moreover, the direr the event threat, the more highly motivated the believers would be to go all-out to find the solution. After all, they can't take it with them.

Juxtaposed to this market-based solution, the sovereignty option is revealed as additionally counterproductive. As long as some of the minority in the know believe they have practical resort to coercion, they will be tempted to forgo investment in solution seeking. Only the anarchist option of forbidding all exercise of state sovereignty closes off the coercive option and directs all the efforts and resources of all true believers into the creative and productive option of investing in the search for solutions.

There might be merit here in anticipating a couple of potential objections from the reader, which in fact one of the reviewers for this article did raise. The reviewer put the objection this way: "The author [wants] to deal with the most difficult case? If the world were held hostage by a mad bomber or under control of the government of the United States, it seems the author would simply say, 'We just need a solution to create benefits for those at risk.' . . . But is it that easy? If it were, why haven't the solutions already emerged? The author gives no in-depth argument about why someone would be able to quickly find a solution to [the] most difficult problems."

First, contrary to the extreme claims of some global-warming alarmists, it is not clear that we do face or have faced such an extinction threat, so the case has hardly been tested, but even if we were facing it (to the degree that global warming might be perceived as being such a threat), the whole point of the argument here is that as long as the state provides the attractive (if inherently ineffectual) coercion option, solution finding is all too likely to be distorted by the temptation of a Schmittian state of exception as the more direct path to a resolution. So, for example, if all the resources and creativity put into lobbying, protesting, rent seeking, and dinner-table arguments on behalf of the solar-power energy industry had in fact been put into actual solar-power research and innovation, who knows how much closer that option would be today to providing a market-viable alternative to fossil fuels?

As for the mad bomber scenario: it is not a harder case, but rather an easier one because, by definition, holding the world hostage entails the world's already knowing about the threat. Therefore, neither a knowledge problem nor a collective-action problem exists. My scenario here has been the much more challenging one in which only a small minority knows and understands the actual situation of an existential threat. Finally, the reviewer is quite right that I do not and cannot provide any assurance that such an existential threat will be resolved quickly—or indeed resolved at all. My argument offers no guarantee, no existential "get out of jail free" card.

It merely claims that in light of the alternatives—the self-defeating coercion of sovereignty and the overly time-constrained educational option—marshaling the resources of the convinced minority in the know through market-coordinated seeking of a solution offers the best prospect of success were we to face an imminent existential threat.

Conclusion

A consistent free-market anarchistic position, far from falling prey to the Schmittian critique of liberalism under the state of exception, proves to be not merely the best hope, but actually the only hope for finding a solution to an existential threat such as an extinction event. Decisions may be necessary, but the probability of self-serving capture hardly recommends a single, centralized decision over many decentralized ones. The direr the circumstances in terms of imminence of the threat and the lack of popular awareness and commitment, the more efficacious is the market in providing the mechanism for the true believers in the know to go all-in to find a solution. No one has any structural reason to interfere with their investment choices, and they have every reason to spare no effort or expense because they face an all-or-nothing prospect: either they succeed and prosper or they fail and die.

In stark contrast, in the same dire scenario, with only a small minority being true believers, not only would the best-intended sovereign state be less effective than the market, but the likelihood of the state's failure would rise with the direness of the scenario. The logic of Schmittian sovereignty is that the direr the threat, the greater the exception to routine law that is justified. However, the more extralegal powers the state wields, the greater the opportunities for rent seeking because rent seeking is precisely the taking advantage of free-market constraining opportunities. Yet because in this scenario the vast majority of the population is either not cognizant or not convinced of the threat, they have no incentives to refrain from exploitation of the increased rent-seeking opportunities created by the state of exception. Here, then, is a paradox in sovereignty's state of exception (McConkey 2012a).

The more existential the threat, the less efficacious is Schmittian sovereignty as a solution because the state's fatal flaw grows with the expansion of rent-seeking opportunities: the very qualities that recommend against the sovereign state as an exception-resolving strategy are accentuated by that exact use. The more the state's focus and disinterestedness are needed, the more likely it will be derailed in both these regards by self-serving rent seekers. Liberty, expressed through the experimental, trial-and-error, profit-and-loss mechanisms of the free market, actually strengthens the collaborative investment power that alone can focus effort and resources in the face of the direst existential threat.

So, in fact, it appears that even for the direst kind of existential threat, the free market's complex, adaptive, creative, anarchist dynamics provide more promising solutions than does the emergency powers of Schmittian sovereignty. The knee-jerk resort to just such a sovereignty solution on the part of so many of those who fear an

imminent crisis, such as the global-warming lobbyists, not only reveals their inadequate familiarity with state critiques from anarchist and public-choice theory but perhaps even more disturbingly illustrates how impoverished is their understanding of the intellectual roots of their own statist default assumptions. Unbeknownst to them, Schmitt haunts the antimodernist, anticapitalist agendas and rhetoric of the mainstream oppositional movements.

References

- Ackerman, B., and W. T. Hassler. 1981. *Clean Coal/Dirty Air: Or How the Clean Air Act Became a Multibillion-Dollar Bail-Out for High-Sulfur Coal Producers*. New Haven, Conn.: Yale University Press.
- Agamben, G. 2005. *The State of Exception*. Translated by K. Attell. Chicago: University of Chicago Press.
- Anderson, W. L. 2005. *Katrina and the Never-Ending Scandal of State Management*. Auburn, Ala.: Ludwig von Mises Institute, September 1. Available at: <http://mises.org/daily/1909>. Retrieved January 2, 2012.
- Bendersky, J. W. 1987. Carl Schmitt at Nuremberg. *Telos* 72: 91–106.
- . 2007. Carl Schmitt's Path to Nuremberg: A Sixty-Year Reassessment. *Telos* 139: 6–34.
- Carroll, S. L., and R. J. Gaston. 1981. Occupational Restrictions and the Quality of Service Received. *Southern Economic Journal* 47, no. 4: 959–76.
- Friedman, D. 1973. *Machinery of Freedom*. Available at http://www.daviddfriedman.com/The_Machinery_of_Freedom_.pdf. Retrieved June 4, 2011.
- Gottfried, P. 1990. *Carl Schmitt: Politics and Theory*. Westport, Conn.: Greenwood Press.
- Gray, P. W. 2007. Political Theology and the Theology of Politics: Carl Schmitt and Medieval Christian Political Thought. *Humanitas* 20 (1–2) : 175–200.
- Hayek, F. 1945. The Use of Knowledge in Society. *American Economic Review* 35: 519–30.
- Hont, I. 2005. *The Jealousy of Trade: International Trade and the Nation-State in Perspective*. Cambridge, Mass.: Harvard University Press.
- Hoppe, H.-H., ed. 2003. *The Myth of National Defense: Essays on the Theory and History of Security Production*. Auburn, Ala.: Ludwig von Mises Institute.
- . 2009. *The Private Production of Defense*. Auburn, Ala.: Ludwig von Mises Institute.
- Jouvenel, B. d. 1949. *On Power, Its Nature, and the History of Its Growth*. New York: Viking Press.
- Kahn, M. E. 2010. *Climatopolis: How Our Cities Will Thrive in the Hotter Future*. New York: Basic Books.
- Kantorowicz, E. H. 1981. *The King's Two Bodies: A Study in Medieval Political Theology*. Princeton, N.J.: Princeton University Press.
- Kates, G. 1989. From Liberalism to Radicalism: Tom Paine's Rights of Man. *Journal of the History of Ideas* 50, no. 4: 569–87.

- Kolko, G. 1963. *Triumph of Conservatism*. New York: Free Press.
- Maritain, J. 1951. *Man and the State*. Chicago: University of Chicago Press.
- McConkey, M. 2011. *Whither Regulation*. Ludwig von Mises Institute of Canada, December 14. Available at <http://www.mises.ca/posts/articles/whither-regulation>.
- . 2012a. *The Paradox of State Crisis Resolution*. Free Markets and Voluntary Governance, January 8. Available at <http://michaelmconkey.com/talk/the-paradox-of-state-crisis-resolution>.
- . 2012b. *Voluntary Governance: A Roadmap*. Free Markets and Voluntary Governance, January 1. Available at <http://michaelmconkey.com/talk/voluntary-governance-a-roadmap>.
- Miglio, G. 1993. The Cultural Roots of the Federalist Revolution. *Telos* 97: 33–39.
- . 1994. Beyond Schmitt. *Telos* 100: 125–28.
- Mises, L. von. 1935. Economic Calculation in the Socialist Commonwealth. In *Collectivist Economic Planning*, by F. A. Hayek, 87–130. London: George Routledge.
- Peltzman, S. 1975. The Effects of Automobile Safety Regulation. *Journal of Political Economy* 83, no. 4: 677–726.
- Rothbard, M. 1965. Left and Right: The Prospects for Liberty. *Left and Right: A Journal of Libertarian Thought* 1, no. 1: 4–22.
- . 2006. *Economic Thought before Adam Smith: An Austrian Perspective on the History of Economic Thought*. Vol. 1. Auburn, Ala.: Ludwig von Mises Institute.
- Schmitt, C. 1996. *The Concept of the Political*. Translated by G. Schwab. Chicago: University of Chicago Press.
- Schmitt, C. 2005. *Political Theology: Four Chapters on the Concept of Sovereignty*. Translated by G. Schwab. Chicago: University of Chicago Press.
- Seavey, T. 2002. *The DDT Ban Turns 30—Millions Dead of Malaria Because of Ban, More Deaths Likely*. American Council on Science and Health. Available at http://www.acsh.org/healthissues/newsid.442/healthissue_detail.asp. Retrieved January 2, 2012.
- Simon, J. 1996. *The Ultimate Resource 2*. Princeton, N.J.: Princeton University Press.
- Winston, C. 2006. *Government Failure versus Market Failure: Microeconomics Policy Research and Government Performance*. Washington, D.C.: AEI–Brookings Joint Center for Regulatory Studies.
- Wolin, R. 1990. Carl Schmitt, Political Existentialism, and the Total State. *Theory and Society* 19, no. 4: 389–416.
- Yandle, B. 1983. Bootleggers and Baptists: The Education of a Regulatory Economist. *Regulation* 7, no. 3: 12–16.

Acknowledgments: I thank Robert Higgs and the two anonymous reviewers for their encouragement and critical contributions to the improvement of this article.

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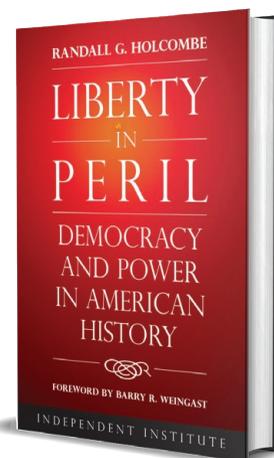
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