



*America will never be destroyed
from the outside. If we falter
and lose our freedoms,
it will be because we
destroyed ourselves.*

A. Lincoln

TRUMPISM, CARL SCHMITT, AND THE THREAT OF ANTI-LIBERALISM IN THE UNITED STATES

**THE POLITICAL THOUGHT OF DONALD TRUMP
AND TRUMPISM**

ROBERTA A. ADAMS

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the Threat of Anti-Liberalism
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Donald Trump and Trumpism**

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*For
David and Levi*

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Acknowledgments

Though I first conceived of this project in the fall of 2020, I began working on it in 2021, after January 6, to be presented at the Western Political Science Association's annual meeting. At that time, some believed that Donald Trump and Trumpism were doomed, and my original project, conceived as a conference paper, was narrow. I remember being asked as I began my work, "Why are you writing about Trump? He's done." My answer then, as now, was that with or without Trump there is the phenomenon of Trumpism which is worth understanding and investigating.

With that in mind, certain things have changed over the past few years. Not only was Donald Trump not finished in politics, but arguments made originally merely became cited facts. My argument that the logical conclusion of Donald Trump's assertions is that he believes he should not be bound by any law, changed when Donald Trump claimed he should not be bound by any law. There may be instances where it can be apparent that the majority of the writing was completed by the end of summer 2023, with some editing early in 2024.

I had conceived of my conference paper as an exploration of Donald Trump's reliance on Carl Schmitt's conception of friend and enemy. While working on the project, however, it quickly became clear that the connections between Trumpism and Schmittian thought were much broader. Schmitt and his political thought help to make sense of Donald Trump and his political strategy. Schmittian views of sovereignty and the exception help explain Trumpist views of presidential power. Even Trumpist democratic theory makes sense when viewed through the Schmittian lens. It is *not* true that there is no unifying theory behind Donald Trump. Indeed, it became clear that once Trumpism was examined through Schmitt's lens, it gained a coherency with which it is rarely treated. It is this coherency that led to the production of this book.

The production of a book is not an easy task, and there are a whole host of people who helped me with this one, and I want to thank some of them here. I first want to thank the Western Political Science Association for providing a forum for my paper “Carl Schmitt Political Philosopher of Donald Trump?” I would specifically like to thank the participants in that session for their feedback and questions, which were helpful in the preparation of this manuscript. I also want to thank Elsa J. Favila of the Western Political Science Association for all her hard work on the yearly conferences. I also want to thank Joseph Parry of Rowman & Littlefield for his suggestion of continuing the paper into a book and his work in helping make that happen.

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Lastly—and I mean this earnestly but not treacly—I want to thank those who choose active constitutional citizenship, no matter their views and in whatever form. This includes those elected, or in the public eye, and average citizens such as those who work at polling places. The truth of a constitutional democracy is that there is no calvary other than us; we must save the constitution by being active constitutional citizens.

Chapter 1

Trumpism and Anti-Liberalism

Donald Trump became president as a political neophyte. He had no political network; he did not even have the institutional support of the political party he purported to represent. He was inexperienced, “unskilled in the machinery of government and unmoved morally by the calling of the position, but aglow in his unmatched power” (Leonnig and Rucker 2021, 1). In the decade since Donald Trump’s political ascendancy, he has remade the Republican party in his image, and it is evident from his behavior that his understanding of politics and constitutionalism departs from mainstream American understandings. Trump and Trumpists fail to show a commitment to the basic precepts of American liberal constitutional democracy in ways both big and small.¹ Donald Trump even advocated “the termination of all rules, regulations, and articles, even those found in the Constitution” because of his supposed grievances (Truth Social, December 3, 2022).

This behavior, and support for it, appears nonsensical when viewed through the American tradition of liberal constitutional democracy. Donald Trump, and Trumpists more broadly, however, base their politics on a different philosophical worldview. Any hope that Donald Trump would rise to his presidential position and adhere to constitutionalist guidelines was based on the faulty belief that Trumpists have similar values or understand the world in the same way as liberal constitutionalists; they do not. Trumpists subscribe to an alternative paradigm which, unlike liberal constitutionalism, does not value the institutions, stability, competence, and fidelity to constitutional principles that most Americans believe are fundamental. Indeed, Trumpism rejects the liberal constitutional paradigm traditionally used in the United States. Trumpists replace that traditional Madisonian paradigm, based on equal citizenship, with an alternate conception of friend and foe, destroying commitment to the liberal constitutional sovereign, and liberal constitutional democracy.

While Trumpism is distinct from traditional American constitutional democracy, it does have intellectual and political forerunners. Trumpist anti-liberalism is particularly aligned with the political thought of Carl Schmitt. Carl Schmitt was a twentieth-century German political and legal theorist who was a critic of liberal constitutional democracy and a philosopher of the state. Schmitt was well known for his criticism of parliamentary democracy and his definition of the political. Carl Schmitt's political theory provides the theoretical justification for, and the logic behind, Trumpist politics in the United States.

I want to be precise about my claim here. My argument is not designed primarily to add to the highly contested field of Schmitt studies, but rather to use Schmitt's work—the broad outlines of which are generally well-established and understood among scholars—to shed light on the Trump presidency, and even more importantly to begin to fully realize what the Trump presidency and Trumpism presage for the embattled project of liberal constitutional democracy in the United States. I also do not claim that Carl Schmitt's political thought necessarily or inevitably leads to a Trumpian figure and Trumpian politics. Instead, I claim that Schmitt's theory provides a framework for understanding Trumpian politics; the chaos, babel, and unpredictability of Trump's presidency and Trumpism make sense through that lens. Journalist Michael Wolff, for example, writes, "From the beginning of Trump's intrusion into American political life, the striving, orderly, result-oriented, liberal world and its media were unable to fathom his carelessness and cluelessness or understand him or his supporters by any standard political measures" (Wolff, 2021 XIV). I argue that this is because, through the liberal constitutional democratic lens, Trumpian politics are nonsensical. Fareed Zakaria explains that

it has been difficult to recognize this problem because for almost a century in the West, democracy has meant *liberal* democracy—a political system marked not only by free and fair elections, but also the rule of law, a separation of powers, and the protection of basic liberties of speech, assembly, religion, and property. In fact, this latter bundle of freedoms— what might be termed constitutional liberalism—is theoretically different and historically distinct from democracy. (Zakaria 1997, 22–23)

When seen through the lens of Carl Schmitt's theories, Trumpian politics comes into focus and does not seem disordered.²

SCHMITTIAN POLITICS AND PARADIGM

Carl Schmitt begins *The Concept of the Political* with the claim that "the concept of the state presupposes the concept of the political," which he explains

is understanding the state through defining “us,” and distinguishing “us” from “them.” Carl Schmitt’s theory focuses on the division between friends (us) and enemies (them) and its salience in the polity. Schmitt also argues that the state should have a strong unified sovereign (he was against the separation of powers and checks and balances) which should focus the state on working for the benefit of “us” and the protection of “us,” particularly from “them.” The identification of this unitary active sovereign is vital because only it (the sovereign) has the power to decide “the exception,” when ordinary politics need to be supplanted by “exceptional” actions for the state’s protection. During the exception, there is “fundamentally unlimited authority . . . meaning the suspension of the entire existing order” (Schmitt 2020a, 9).³ The exception, when all rules, laws, and policies come directly from the sovereign, was likened by Schmitt to a miracle in theology. The constitutional and political restraints which limit sovereign power are absent during the exception; thus, the personified sovereign becomes divine because it acts without constraint. In liberal constitutional states, citizens look toward the constitution or precedent to determine the role of the government; Schmitt argues, however, that it is impossible to have the constitution provide operating standards for “exceptional” or crisis situations. To address these situations, it is necessary, according to Schmitt, that a powerful unitary sovereign have access to and control of unrestrained power.

Carl Schmitt’s theory of politics includes an understanding of democracy that allows, and even calls for, minority rule. Schmitt argues that an authentic democracy requires certain substantive outcomes—for example, state decisions must be made in defense of national norms. This justifies overriding legitimate liberal constitutional democratic decisions. According to the liberal constitutional procedural understanding of democracy, if the procedure of decision-making is fair, the outcome is fair. There are limits in liberal constitutional democracy, but they are designed to be ideally content-neutral and to promote fairness and justice. The people cannot vote for and the government cannot implement, for example, policies that infringe on freedom of speech based on its content, promote religious or political beliefs, or limit others. Content-neutral restrictions, such as time, place, and manner restrictions, can be valid, however. The difference between the two kinds of limitations is that the liberal constitutional government cannot decide one set of ideas should be the only ones spoken (or not spoken), or that one religion should be the one practiced or supported.⁴ Fareed Zakaria describes constitutional liberalism as

the tradition, deep in Western history, that seeks to protect an individual’s autonomy and dignity against coercion, whatever the source—state, church, or society. The term marries two closely connected ideas. It is *liberal* because it

draws on the philosophical strain, beginning with the Greeks, that emphasizes individual liberty. It is *constitutional* because it rests on the tradition, beginning with the Romans of the rule of law.” (Zakaria 1997, 25–26)

This means that the liberal democratic state protects a sphere of privacy, but in a Schmittian version of the state, the state requires adherence to orthodoxy on any issues and can infringe on any liberty if the state uses it to enhance and clarify to the friend group.

TRUMPIAN POLITICS AND PARADIGM

Donald Trump gained political renown during the Obama Administration for questioning the legitimacy of Barack Obama’s membership in the political community. This is a trope Trump has returned to again and again since he began his presidential campaign. Coming down the escalator of Trump Tower in June 2015, it immediately appeared Trump was drawing on Carl Schmitt’s view that the political is fundamentally and necessarily the distinction between friends and foes.⁵ Trump divided “us” from “them” and politicized that division. He said in part,

The U.S. has become a dumping ground for everybody else’s problems. . . . When Mexico sends its people they’re not sending their best. They’re not sending you. They’re not sending you. They’re sending people that have lots of problems, and they’re bringing those problems with us. They’re bringing drugs. They’re bringing crimes. They’re rapists. And some, I assume, are good people. . . . It only makes common sense. They’re sending us not the right people. It’s coming from more than Mexico. It’s coming from all over South and Latin America.

The division Trump draws is very stark. He repeats, “They’re not sending you,” dividing his listeners from the “problem” who he associates with the “other” from Mexico, South, and Latin America. Indeed, dividing “us” from “them” is so important that Trump wanted to (and partly did) build a wall separating “us” from “them.”

Trumpists are similarly attached to Schmitt’s idea of the strong unified sovereign. Indeed, these ideas are evident in Trumpist conceptions of the presidency. While I do not want to completely discount the possibility that individually Trump may be a megalomaniac, Trumpists encourage the strong sovereign for the same desire as Schmitt—predictability or control over law, political reality, and national vision.⁶ Any popular decision is irrelevant if it can be countermanded. Trumpists need not worry about popular sovereignty or the state of law; they can even avoid the demographic or cultural change

that they might fear because a strong state with a strong leader (like Trump) can determine law and reality. To accomplish this, Trumpists, like Schmitt, collapse the distinction between public and private, imbuing the state with the power of religious and cultural meaning. Trumpist followers also imbue their movement with religious imagery. QAnon, for example, involves a Manichaeic worldview. The forces of light are headed by Donald Trump, who might also be the mythical Q. All will work out correctly if you have faith and “trust the plan,” which includes trust in the divine, like “Q.”

Trumpist Republicans do not accept the presidential results in an election which was, as explained by those in Trump’s own administration, the most free and fair in U.S. history, because Trumpists have adopted a view of democracy which conflicts with the idea of a fair process that can lead to multiple outcomes. From a liberal constitutional democratic point of view, the Trumpist failure to accept the results of the 2020 presidential election appears inconsistent for many reasons, including that Republicans accepted results if they won. From the Trumpist perspective, however, their view is logical because they believe the wrong outcome was reached. Democracy, as argued by Schmitt and understood by Trumpists, must lead to a particular set of substantive outcomes. This means that only certain candidates can win office. If they fail, the process is faulty and the outcome wrong.

TRUMPISTS AND TRUMPISM

Donald Trump first put together his “stop the steal” movement in opposition to established Republican candidates in the 2016 presidential primary.

Days after the state Republican convention, a couple of hundred people assembled on the steps in the state Capitol in Denver. “Stop the steal!” they chanted, “Stop the steal!” They had assembled to protest the process by which the caucuses had allotted delegates to [Ted] Cruz, demanding that the state party hold a new straw poll. (Homans 2022)

In 2016, this exercise appeared foolish, but in the years since Donald Trump transformed the Republican party, so it is dominated by Trumpists—those who have adopted Donald Trump’s style and his reliance on Schmittian rather than liberal constitutional democratic politics—and now this behavior is expected. Even Republicans who at one time opposed Donald Trump and Trumpism have become defenders of the Trumpist worldview. Republican Lindsey Graham, who had been a close ally of John McCain, tweeted on May 3, 2016, that “if we nominate Trump, we will get destroyed . . . and we will deserve it.” Graham, however, is now aligned with Trumpism and

vocally supports Donald Trump. A similar transformation has occurred with Ted Cruz. Cruz is now aligned with Trump, but in 2016, after Donald Trump claimed Cruz's father may have been involved in the JFK assassination, Cruz said, "I'm gonna tell you what I really think of Donald Trump: This man is a pathological liar. He doesn't know the difference between truth and lies. He lies practically every word that comes out of his mouth, and in a pattern that I think is straight out of a psychology textbook, his response is to accuse everybody else of lying." Cruz continued, "Whatever lie he's telling, at that minute he believes it, but the man is utterly amoral" (Quoted in McCaskill 2016).

In the past few years, not only have Graham and Cruz changed their views, but the structure of the U.S. political system has undergone changes. Steven Levitsky and Daniel Ziblatt, authors of *How Democracies Die*, wrote in *The Atlantic* on July 9, 2021, that "Last year, for the first time in U.S. history, a sitting president refused to accept defeat and attempted to overturn election results. Rather than oppose this attempted coup, leading Republicans either cooperated with it or enabled it by refusing to publicly acknowledge Trump's defeat." Levitsky and Ziblatt argue that more than just accommodating Trump, Republicans have adopted Trumpian politics and have been electorally rewarded for this by their base. As of now, the Republican party is not just in the hands of Trump, it operates with a Trumpist form of politics. There are those who identify themselves as Republican but are not Trumpist. In my home state of Maryland, former Governor Larry Hogan and former Lieutenant Governor and Republican National Chairman Michael Steele, are prominent examples of those who still claim to be Republicans but oppose Trump and Trumpism. The Republican Party as an institution, however, has become Trumpist. At one time, it was possible to divide Republicans into a Trumpist (insurgent) wing and an institutionalist wing, but the institutionalist wing has become Trumpist. The Republican National Committee (RNC) labeled the events of January 6, 2021, as legitimate political discourse, solidifying the Trumpist nature of the Republican party and installed Trump's family members to lead the party.⁷

Senator James Lankford of Oklahoma had plans to object to the legitimate, duly selected, and state-certified electors committed to Joe Biden on January 6, 2021, but by the time the joint session was able to reconvene late that night, he decided he should not. Lankford still voted to acquit Donald Trump in both impeachment trials and voted against a January 6 commission. Still, the Oklahoma Republican party supported a primary challenger against Senator Lankford in 2022 because he voted to certify the election; the institutionalist wing has become the Trumpist wing. Liz Cheney, who had been the third-ranked Republican in the House of Representatives, lost her leadership position and was disavowed by the Wyoming Republican party. Cheney lost to a primary challenger due specifically to her commitment to constitutional norms and

procedures. The Alaskan Republican party also supported a challenger when Lisa Murkowski voted to convict Trump in his second impeachment trial and in favor of the January 6 commission. Murkowski, however, as explained in chapter 9, was able to win reelection. Alaska's election system allows Murkowski to criticize Trump by sidestepping any need for support from the institutional (Trumpist) Republican Party.

The change in the Republican political party is evident through its changing standards of behavior and boundaries of membership. In 2019, Steve King, Republican from Iowa's 4th district, was already known for making white nationalist and anti-semitic comments when the *New York Times* published the following from King, causing a furor: "White nationalist, white supremacist, Western civilization—how did that language become offensive?" he asked. "Why did I sit in classes teaching me about the merits of our history and our civilization?" Kevin McCarthy, Republican leader in the house, responded, "In light of the comments—these are not the first time we have heard these comments. That is not the party of Lincoln, and it is definitely not America. All people are created equal in America, and we want to take a very strong stance about that." McCarthy explained that the strong stance included more than just rhetoric: "We will not be seating Steve King on any committees in the 116th Congress. It was a unanimous decision . . ." (Shabad and Moe 2019). The decision was made jointly by Republicans and Democrats shortly after King was seated in January 2019. This common action was reflective of commonly held commitments. Even if Democrats and Republicans disagreed on policy, they agreed on the nature of the United States democratic constitutional system.

In the short time since King was disciplined, the view of Kevin McCarthy and the Republicans in the House of Representatives has changed markedly. On February 3, 2021, leader McCarthy issued the following statement about Marjorie Taylor Greene and her various anti-Semitic, racist, and anti-LGBTQIA+ comments, as well as the denial of school shootings:

Past comments from and endorsed by Marjorie Taylor Greene on school shootings, political violence, and anti-Semitic conspiracy theories do not represent the values or beliefs of the House Republican Conference. I condemn those comments unequivocally. I condemned them in the past. I continue to condemn them today. This House condemned QAnon last Congress and continues to do so today.

I made this clear to Marjorie when we met. I also made clear that as a member of Congress we have a responsibility to hold ourselves to a higher standard than how she presented herself as a private citizen. Her past comments now have much greater meaning. Marjorie recognized this in our conversation. I hold her to her word, as well as her actions going forward.

Only eleven Republicans joined with the Democrats to strip Greene of her committees despite the comments she endorsed about “school shootings, political violence, and anti-Semitic conspiracy theories” as well as her support for QAnon. By November 2021, leader McCarthy’s response to Paul Gosar’s tweet of an anime video in which he killed Democratic congresswoman Alexandria Ocasio-Cortez and attacked President Biden with lethal force was the defense of false equivalency. There were only two Republicans who voted to discipline Mr. Gosar through censure for something that would get him fired, and likely escorted off the property (and possibly arrested) in nearly any other workplace in America. The Trumpist Republican party is no longer the liberal constitutionalist party whose view of Steve King was the same as the Democrats because of liberal constitutionalist commitments to equal citizenship. Republicans need not protect the citizenship rights of all because the Trumpist commitment to the friend group destroys the equality necessary for American constitutional citizenship. Without such a commitment, processes can be created that privilege those who deserve to be privileged by some standard. The Trumpist Republican party believes sanctioning Liz Cheney for failure to be loyal is more justified than sanctioning Marjorie Taylor Greene or Paul Gosar. This is because the party’s focus has become dividing us rather than maintaining any idea or pursuing any issue. Republicans in the House of Representatives, therefore, have used censure, a rarely used tool, to sanction Adam Schiff (D-CA). Schiff’s crime was that he made allegations that Trumpists did not like, but which were substantiated by the Muller report.⁸ Separating us from them has become the focus of the Trumpist party and winning power has become more important than policy. It no longer shares a liberal constitutional democratic view or engages in liberal constitutional politics.⁹

PARADIGM CONFLICT

The United States is experiencing a paradigm conflict between the American tradition of liberal constitutionalism and the Schmittian-Trumpist paradigm. The term paradigm as it is used here means a community’s shared assumptions and framework of thinking. I borrow the term paradigm from the way the word was used by Thomas Kuhn (1970). Adherents to different paradigms give different meanings and interpretation to the same events and facts, making mutual endeavors difficult.

For most of the history of the United States, people may have disagreed about policy but broadly have operated in a common paradigm, and with the same overall political philosophy and constitutional rules in a system of consensual party relations. Democracies operating with consensual party

relations are more stable and function more effectively. This is because, with consensual party relations, political parties' conflicts "are typically limited to matters of how best to achieve the realization of commonly agreed-on values, such as how best to secure democratic outcomes or strengthen capitalism" (Grigsby 2009, 216).¹⁰ Part of consensual party relations includes mutual toleration and institutional forbearance toward political losers, which Levitsky and Ziblatt (2018) argue are necessary for working constitutional democracies. Evidence of consensual party relations can be seen in John McCain's concession speech to Barack Obama in 2008:

I urge all Americans who supported me to join me in not just congratulating him, but offering our next president our good will and earnest effort to find ways to come together to find the necessary compromises to bridge our differences and help restore our prosperity, defend our security in a dangerous world, and leave our children and grandchildren a stronger, better country than we inherited. Whatever our differences, we are fellow Americans. And please believe me when I say no association has ever meant more to me than that.

McCain argued that the winner of a single election is not the most important part of the democratic process, it is the maintenance of the process. America and its values are more important than any single issue. The successful operation of the election and respect for its results are more important than any particular winner. McCain and Obama might have different policy views, but they agree on the rules of the American political system and have the same goal: policies should benefit the people and the country of the United States of America.

Donald Trump and Trumpist Republicans operate in an anti-liberal Schmittian-based paradigm and no longer have the same commitments or constitutional understanding as John McCain or most Democrats or Republicans before 2017. The obverse of this claim is also true: Donald Trump and Trumpism represent a break from previous American politicians. This includes politicians with whom he is sometimes linked. One might link, for example, Ronald Reagan's "Morning in America" to Donald Trump's "Make America Great Again," but this misses the fundamental break between the two positions. The Reagan administration was committed to the United States' liberal constitutional democracy, whereas Trumpists are not. Ruth Ben-Ghiat, in her book *Strongmen*, identified the line which led her to include Trump but exclude other right-wing politicians like Margaret Thatcher: while "some . . . may have had certain strongman traits (Thatcher's nickname was 'The Iron Lady') or engaged in repressive actions against minority population, none of them sought to *destroy democracy*, and so they are not addressed here" (Ben-Ghiat 2021, 5, emphasis added).

What makes Trumpism different is that it does not have a commitment to liberal democratic philosophy or even a theory of limited Republican government. Despite some political antecedents, I argue Trump does represent a distinct break. As Levitsky and Ziblatt (2021) write, in 2018, “when we wrote *How Democracies Die*, we knew that Donald Trump was an authoritarian figure, and we held the Republican Party responsible for abdicating its role as democratic gatekeeper. But we did not consider the GOP to be an antidemocratic party. Four years later, however, the bulk of the Republican party is behaving in an antidemocratic manner.”¹¹

While Ben-Ghiat, and Levitsky and Ziblatt are not the only scholars to note the authoritarian nature of Donald Trump’s political persona, my claim is both narrower and broader than theirs. It is narrower, in that I argue that Schmittian political thought explains the theoretical underpinnings of the Trumpist Republican party. These theoretical underpinnings are what leads to the authoritarian and antidemocratic behavior. Not only does Donald Trump’s apparent erratic behavior make sense when put in this theoretical context, but it also explains why a significant minority of Americans, steeped in the secular constitutional democratic religion, are attracted to Trumpist, anti-liberal politics. The Trumpian paradigm provides a worldview that mandates the abandonment of liberal constitutional democracy but provides benefits for adherents which may be political, tangible, or even intangible.

I am also making a broader claim. Because Trumpists reject the philosophy and process with which there had been broad agreement since the Civil War, there is an existential threat to the constitutional polity. Trumpism is not a political movement that can be defeated by policy, no matter how well-reasoned, designed, beneficial, or popular, because its attraction is not based on policy. Trumpism, regardless of the fate of Trump, is a threat to, and indeed incompatible with, the American constitutional democratic project. This makes the argument political, but not partisan. I should state my paradigmatic belief at the outset in favor of liberal constitutional democracy. Insofar as Trumpism is incompatible with that, I believe it to be problematic. I take as equally problematic, however, those views of Trumpism which dismiss it as clownish or ignorant. Trumpism should be taken seriously as an alternative ideology with an attraction of its own. Adherents are not illogical, their understandings are based on a distinct cultural and political worldview. Based on these understandings, Trumpism arrives at different goals than Madisonian constitutional democracy.¹²

PLAN OF THE BOOK

This book is divided into eight parts. In the next chapter—“The Political World of Carl Schmitt”—I sketch an intellectual biography of Carl Schmitt,

his political life and thought. The focus of this chapter is the time after World War I until Schmitt retired to the university approximately eighteen years later. This is by no means a comprehensive examination of Schmitt's work and views. Schmitt published over the span of sixty years. Later in his life, Schmitt's work was more international in focus, and not all of his work is entirely consistent. He also wrote on a wide variety of topics, including politics, theology, philosophy, literature, and cultural criticism. My focus is Schmitt's work in political thought, which he produced during "Schmitt's period of maturation" while he was active academically and politically in the 1920s and 1930s (Meierhenrich and Simons 2016, 7). My aim is to distill several key principles of Schmittian thought, each of which I address in subsequent chapters to illuminate understanding of Trumpism and the political environment.

The third chapter—"Friends and Foes"—focuses on Carl Schmitt's distinction between friends and enemies and how it has been adopted and deployed in Trumpism. According to Schmitt, for the state to exist, there must be an understanding of the political, and the political requires a distinction between friend and enemy. Schmitt argues that one of the primary problems with liberal constitutional democracies is their neutrality, which means they cannot recognize or even protect fundamental political distinctions, leading to their instability. Schmitt believed that if the state does not have a strong form of a friend and enemy distinction, one for which people are willing to kill and die, the polity and its way of life will be destroyed by enemies, be they internal, external, or of its own creation. Trumpists, like Schmitt, divide the world into friends and enemies. While the friends are patriots, the others are viewed as an existential danger to the patriots, their way of life, and the state. Trumpism defines insiders and outsiders, and who is validly part of the polity and who is not. Those who are not part of the friend group (others) should be marginalized, often because they are evil or at least evildoing, not because they merely misunderstand the best policy. It is this distinction that leads to the Trumpist theory of democratic disruption. Trumpists claim that "they" voted and only the votes from "us" should count.

The fourth chapter—"The Sovereign State"—explores Carl Schmitt's understanding of sovereignty and its deployment by Trumpists. Schmitt criticizes the liberal constitutional state because there is no identifiable bearer of sovereignty, as he believed a functioning legal order requires. Without such authority, he believed government and law are arbitrary. Indeed, the Schmittian logic pushes toward fewer decision-makers. Schmitt claims that while liberal constitutional democracies attempt to protect people from arbitrary political power by replacing an individual's whim with predictable law, the reverse is true; it is the individual unified sovereign that gives stability to law. Trumpist Republicans have also pushed for a consolidated, powerful, authoritarian sovereign. By leaning on Trump as the representation of the sovereign

state, Trumpists gain the legal clarity Schmitt describes. This legal clarity is unaffected, moreover, by those who are other (enemies), and who can corrupt the legal meaning that exemplifies national ideals. For Trumpists, it is not the constitution that will provide the answer to political or policy problems; it is Donald Trump.

Chapter 5—“The Exception”—explains the role of the exception, when the sovereign has unlimited authority, and its tie to the political. Schmitt argues that in unusual or emergency times, regular legal systems do not work and attempts to use them in these abnormal situations will merely make challenging any crisis ineffective. In unusual times, or times of crisis, it is necessary to govern by exception, and Schmitt argues it is the sovereign who decides there is a crisis, mandates exceptional rule, decides what those exceptional rules should be, and if or when the exceptional times end and normal politics are reinstated. All legal orders, according to Schmitt, are based on the sovereign “who decides the exception” (Schmitt 2020a, 5). Trumpists are also attracted to the exception. During Trump’s presidency, he tried to manufacture exceptions and to declare situations exceptional—like the racial justice protests in the summer of 2020—so he could claim exceptional authority. Trump attempted to use his authority, exceptional and otherwise, to pursue his quasi-religious worldview. Trumpists argue that, “they” (Democrats, immigrants, people of color, coastal elites, etc.) are evil, criminal, immoral, and endeavoring to do ill to the American people. This is why Trumpists advocate the marginalization of “them.” On the other hand, Trump himself is the source of light and can save America and the Americans from the encroachment by “them.” As Trump said at the 2016 Republican National Convention, “I alone can fix it.”

Chapter 6—“Democracy”—is the first of two chapters about the issue of democracy in a constitutional republic. While Schmitt defends democracy, he does not believe in democracy in the sense of majority rule. Instead, according to Schmitt, majority rule threatens the stability and cohesiveness of the state and its people. Schmitt’s version of democracy stands in opposition to majority rule as a normative good and a practical ideal. According to Schmitt, parliamentary democracy destroys the possibility of the national good. “Historically, the deliberative conception of politics was associated with highly exclusivist forms of parliamentarianism; moreover, according to one influential line of thought, mass democracy destroyed the possibility of deliberative political decision making” (Cohen, 1996, 117n). Schmitt believed that a minority might have a better understanding of the nature of the polity; therefore, minority rule may be more democratically legitimate than the majority. While liberal constitutional democracy defends and protects procedures, it is largely neutral toward outcome. Schmitt argues that true democracy must lead to certain substantive outcomes while procedural

neutrality makes the state unable to defend itself or its people. The Trumpist belief that the legitimate president is Donald Trump, or more exactly, the belief that the only legitimate outcome of the 2020 presidential election was a Trump presidency fits with Carl Schmitt's understanding of democracy. This view of democracy also explains Trumpist comfortability with minority rule. If Trump's "patriots" have an accurate view of the meaning of America and Americans, their votes are valid. Others, who do not understand America as well and, therefore, vote differently, cast by their very nature illegitimate votes. Because Trumpist Republicans believe that democracy requires a particular substantive outcome, they have no commitment to the process of democracy either practically or philosophically. The process of democracy merely has instrumental value: it is useful if it leads to the desired outcome. If it does not, the process should be abandoned.

In chapter 7—"Antiliberal Democracy"—I address why Carl Schmitt's and Trumpist's views are fundamentally incompatible with liberal constitutional democracy. Schmitt believes the state should divide those who rightly belong as full members of the polity from those who do not. Such division destroys any commitment to a liberal constitutional democracy because it destroys the interactions that make it possible. James Madison describes American constitutionalism as a process of democratic mediation and negotiation between groups. The effort to divide friends from enemies and to exclude enemies from state operation destroys the possibility of Madison's model because only those who agree with the state have valid views. Liberal constitutional democracy becomes problematic for Trumpists, as for Schmitt, because it requires negotiation and conciliation rather than division and marginalization. Freed from a commitment to the constitution and constitutionalism, Trumpists pursue their individual interests, which undermine liberal democratic institutions. Trumpists act in what appears to be their short-term narrow interest, overriding what is likely the long-term or collective interest of the polity and its individual citizens who benefit from the liberal constitutional state because they lack a commitment to the constitutional view.

In chapter 8—"Friends, Enemies, and Citizenship"—I explain the liberal constitutional form of citizenship. I also explain how the Schmittian understanding of citizenship, which has been adopted by Trumpists, destroys the American constitutional citizen. Liberal constitutional democratic citizenship, as reflected in the Madisonian model, is based on moral and political equality. This is broad-based equality not only between two men of the same class but also between parents and children, and between masters and servants. It is this equality that leads to and mandates not only government. but all obligations are based on consent. Schmitt, however, believes wide-scale equality is dangerous and that equality should be limited. It should be limited such that membership in the friend group should be coextensive

with citizenship in the state and should replace the theoretical understanding of citizenship. Because all friends, and therefore true citizens have uniform characteristics, those without these characteristics can be removed from citizenship rights and functions. This antiliberal ideology eliminates the input of people and ideas who do not agree with the orthodoxy. While American constitutional democracy, especially according to its Madisonian model, accommodates many different ideas and forms of life, this is explicitly excluded in the Schmittian-Trumpist model. The negation of citizenship is what justifies the state's intrusion into private life or the exclusion of those other than the friends.

In the final chapter—"The American Constitutional Paradigm"—I explain how the challenge to liberal constitutional democracy's hegemonic position by Trumpism has changed the way politics has worked in the United States. Trumpist Republican politics is not about philosophical ideas or constitutional precepts—not states rights vs. federalism, or even free market economics vs. interventionism—but merely about maintaining power, or keeping political power in the "correct" hands. The evidence that the Republican party has no platform or agenda is that it literally has no platform or agenda. The one-page 2020 Republican platform statement only served to augment Schmittian goals identifying friends and foes. First, the statement attacked the Obama-Biden administration; second, it attacked the media (repeatedly); and third, claimed that the "Republican Party has and will continue to enthusiastically support the President's [Trump's] America-first agenda."

The effort to engage with the Trumpist wing of the Republican party as an ordinary political party or actor is doomed to failure. Constitutionals and Trumpists are talking at cross purposes. One side wants to negotiate policy, and the other side, as a logical consequence of Schmittian identity or us-them conceptions of the political, wants to show how different it is from the other side. Chris Hayes explained, "Hating the right people and being hated by the right people seems to be the . . . thing that has become so definitional for the Republican party" ("All In with Chris Hayes" 4/4/2022). There are those who accept or even support Trumpist policy or even Donald Trump himself who believe Trump's anti-liberal, anti-democratic, and anti-constitutional behavior is an unfortunate byproduct. These byproducts are often the point of Trumpism, however, and those who support Trumpism encourage this alternative paradigm incompatible with the American constitutional system. This is distinct from policy concerns. Individual Trumpist ideas, building the wall, for example, can be good, bad, or neutral and pursued by constitutional or unconstitutional means. The issue is not the policy. Without common frameworks to judge disagreements according to John Locke, "the Appeal lies to God in Heaven" (Locke, 1988, 282).

NOTES

1. I adopt the convention, explained by Harris (1993) for other than quoted material, in which I use Constitution (capital C) to refer to a constitutional text and constitution (small c) to refer to a constitutional system beyond just the text, including institutions, principles, and practices.

2. Bringing order to disorder is what some scholars believe was the very point of Schmitt's political endeavors. For discussions of Schmitt and his desire for order, see, for example, Meierhenrich (2016) and Meierhenrich and Simmons (2016).

3. I use two translations of *Concept of the Political* for no intellectual, ideological, or linguistic reason. I began with the Schwab (1976) translation but transferred to a C.J. Miller translation, which included *Political Theology* and *Theory of the Partisan* in the same volume. While this was produced by a right-leaning publisher, the translation appears to be substantively the same as Schwab's. The publisher's note reads, "The most convincing apologia is allowing him to stand on his own without cringing justification to the liberalism he attacks. These translations are an attempt to stand closer to the original German and present Schmitt as he is."

4. On content neutrality in the United States constitutional system, see, for example, *Brandenburg v. Ohio* 395 U.S. 444 (1969) on protest, *Police Department of the City of Chicago v. Mosley* 48 U.S. 92 (1972), on freedom of speech, *R. A. V. v. City of St. Paul* 505 U.S. 377 (1992), on freedom of silence, *West Virginia v. Barnette* 319 U.S. 624 (1943), and on free expression of religion, *Church of Lukumi Babalu Aye Inc. v. City of Hialeah* 508 U.S. 520 (1993).

5. Donald Trump dabbled in presidential runs three times before his successful 2016 effort. Each campaign was different, and Michael C. Bender (2021) argues that each previous run helped in some way with his successful 2016 campaign. While some of Trump's policy positions have changed, other things have remained consistent, such as his fascination with strongmen leaders.

6. Bob Woodward and Robert Costa (2021) note that Paul Ryan believed after consultation with psychiatrists that Trump has antisocial personality disorder. "Ryan's main takeaway: Do not humiliate Trump in public. Humiliating a narcissist risked real danger, a frantic lashing out if he felt threatened or criticized" (Woodward and Costa 2021, 6).

7. The installation of family in key positions is a way to enforce loyalty.

8. Censure is a rarely used tool. In the one hundred years prior to Schiff's censure, it had occurred only seven other times. Two members were censured in 1979 — Charles Diggs (D-MI) and Daniel Flood (D-PA) — for fraud and bribery respectively. Two members were censured in 1983 — Daniel Crane (R-IL) and Gerry Studds (D-MA) — both for engaging in sexual conduct with congressional pages. In 2010, Charles Rangel (D-NY) was censured for financial irregularities, including a failure to pay taxes. In 2021, Paul Gosar (R-AZ) was censured for his anime-type video depicting violence against both President Biden and a House colleague. In 2023, Adam Schiff (D-CA) was censured for making allegations outlined in the Mueller report.

9. Rather than abide by the word she apparently gave to McCarthy in 2022, Marjorie Taylor Greene began to proclaim herself a White Christian Nationalist. She and

Paul Gosar (R-AZ) also shared stages with Holocaust deniers. There was no public pushback by either McCarthy or the Republican party.

10. The alternative, conflictual party relations, can be described as “divided by sharp ideological disagreements . . . and party coalitions tend to be less stable . . . [because] disagreements among parties concern basic core values” (Grigsby 2009, 216).

11. While Donald Trump represents a distinct break from the American constitutional tradition, he was able to make that break because he exploited fissures that had already developed in American politics. I am unprepared now to decide exactly where or how these fissures began or became malignant. They may be traced to the Tea Party, the impeachment of Bill Clinton, the Robert Bork Supreme Court confirmation hearings, or as Hofstadter argues, much before then. Donald Trump decided to exploit the cracks in a new way that is against the American constitutional tradition.

12. The larger theoretical and practical question of the ability of a constitutional democracy to defend itself through the terms of constitutional democracy or, as Clinton Rossiter writes, “can a democracy fight a successful total war and still be a democracy when the war is over,” is addressed only indirectly here (Rossiter 2017, 3).

Chapter 2

The Political World of Carl Schmitt

Carl Schmitt's work has been debated for more than a century. Since World War II, Schmitt's readers often fall into one of two camps: critics and apologists. Joseph Bendersky writes in his political biography of Schmitt:

Often compared with such thinkers as Hobbes, Machiavelli, and Max Weber, Schmitt is considered by many as a man of brilliant intellect whose original ideas and incisive analyses have retained their significance in the contemporary world. In the opinion of others, however, Schmitt symbolizes the worst tendencies in German political thought. He has been described variously as a fascist, nihilist, or opportunist. Some argue that his writings were essentially nihilistic and contributed to the collapse of the Weimar Republic by creating an intellectual wasteland in which Nazism could flourish. Others go further, contending that he was a prophet of the totalitarian state whose ideas found their realization in Hitler's Third Reich. (Bendersky 1983, X)

It is not my intention to take a position in this debate. I hardly think it matters; Schmitt's theory and actions should be examined on their own terms, no matter his intentions. I hold this view for two major reasons. The first is that I believe the facts of Schmitt's life can be interpreted in a variety of ways. I do not think it is knowable with any certainty what Schmitt thought or believed at any particular point. Even if it were possible to determine what Schmitt believed at a specific time, it would not change the content or power of his theory.¹ Schmitt's state of mind may be interesting for scholars studying Schmitt's life, but not relevant to an analysis of his theory and its deployment. Between the years 1933 and 1936, for example, when he was a politically active member of the Nazi Party,

Schmitt published forty-seven popular and academic articles defending and legitimizing the Nazi regime. But Schmitt not only wrote he also *acted* in support of the new order by helping it build some of its institutional foundations. He contributed to the drafting of the *Reichsstattaltergesetz* (Reichsthalter law) [foundational law of the Nazi regime]. (Meierhenrich and Simons 2016, 8)

These facts can be interpreted in a myriad of ways, one of which is that Schmitt was a supporter of the Nazi regime. Another is “that Schmitt was just a fellow traveler, a careerist turncoat who joined the new order for instrumental gain” (Meierhenrich and Simons 2016, 8). Still another is that he chose order over disorder (Meierhenrich 2016; Mehring 2016). Indeed, in Mehring’s biography of Schmitt in a section titled “The topography of reasons for Schmitt’s decision to back National Socialism,” Mehring lists “some of his [Schmitt’s] motives and reasons” (Mehring 2022, 282–284). There are forty-two items on the list. Whether it is one of these motivations or others that compelled Schmitt, analysis of his theory should not change.

The second major reason I avoid the debate over Carl Schmitt’s motives is that, contrary to most commentators, I believe the kinder reading of Schmitt is that he was a true believer. If Schmitt was a true anti-semite and distinguished between “‘decent’ or ‘upright’ Jews; [and] the problem [that] was posed by Jewry as a whole,” his actions though deplorable, are understandable. On the other hand, Schmitt’s defenders generally cite “the invocation of various Jewish acquaintances—not only the unavoidable ‘good Jewish friend’” to show that he was not an anti-semite (Gross 2016, 99).² If Schmitt truly held the position that Jews were equal and innocent, then his goals to rid the judiciary and academia of “Jewish influences” become much more devious. He is either willing to sacrifice those he knows are innocent for career advancement, material gain, personal safety, or some other reason. This may be a higher level of moral failing than to be hoodwinked into the wrong idea.³

At the end of the war, while in Russian custody, Schmitt described his experience with Nazism and likened it to Pettenkofer’s experiment in which he drank Cholera bacillus. Pettenkofer drank a glass of water filled with Cholera bacilli to show that the bacillus was not enough on its own to cause infection in a healthy individual. He did not get Cholera. Schmitt said, “You see, I did exactly the same thing. I drank the Nazi bacillus, but was not infected” (Linder 2016, 194). My goal, rather than to make sense of this statement or explain Carl Schmitt the man or his personal opinions, is to explain the role and effect of Carl Schmitt’s theoretical work on politics, the state, and its relationship to the people. Specific components of Schmitt’s theory are addressed in the subsequent chapters; this chapter provides an intellectual biographical sketch of Carl Schmitt to illuminate the context in which his ideas were formed.

SCHMITT'S ORIGINS

Carl Schmitt lived a long life during times of great political upheaval. He was educated in the German Empire, for which he served during World War I. Schmitt worked as a young man in the Weimar Republic, of which he was both a critic and a defender. Later, Schmitt was a prominent jurist in the Nazi regime. After the war, he lived through the establishment and flourishing of West Germany, dying only a few years before German reunification. Despite the fame and turmoil of his nearly ninety-seven years, Schmitt's origins were quite provincial. Carl Schmitt was born in Plettenberg, in the western part of the German Empire, on July 11, 1888, when it was newly industrializing, reaching a population of about 5,000 around the turn of the twentieth century (Mehring 2022, 5). The Schmitt family was devoutly Catholic. Carl Schmitt had three great-uncles who were priests and Carl's mother expected him to be a priest when he was young (Bendersky 1983, 5). Carl's father, Johann, was a lifelong member of the Catholic Center Party, and he had family members involved in the *Kulturkampf*.⁴

Schmitt's parents were migrants to Plettenberg from the Moselle region near the French border. They were of modest means, and when Schmitt began studying at the University of Berlin in 1907, "the son of such modest people would not normally study at a university in those days, and certainly not law" (Mehring 2022, 7). Movement between universities was not unusual for German undergraduates at the time, and after a couple of semesters, Schmitt transferred to the University in Munich and then to the University of Strasbourg, where he completed his degree in law. Schmitt graduated *summa cum laude* in 1910 with his dissertation about criminal guilt titled, "On Guilt and Types of Guilt." Upon his graduation, Schmitt got a job as a junior barrister in the Prussian civil service. This kind of civil service work was necessary before being formally admitted to the juridical profession. In Germany, judges and lawyers are part of two separate professions, and therefore, pursue separate educational tracks. Schmitt was interested in the judicial side of law and served in this job in Düsseldorf until 1915 when he passed the state assessor's exam and officially became a jurist.

Young jurists in Schmitt's position generally had two career paths: the academy or the bureaucracy. Schmitt had by 1915 already published four articles and three books, all of which had been well received, making the academy a more natural fit.⁵ Schmitt had a potential problem for future advancement in either field, however, because he was Catholic, and Catholics were viewed as inherently suspect by both professors and bureaucrats, the majority of whom were Protestant. The belief was common among the establishment that Catholics held foreign allegiance and "folk" beliefs. This added to the reasons why Catholic scholars (along with other minorities, including

Jews, and those holding unconventional political views) could be denied academic appointments. It might be easier for Schmitt than other Catholics because “Schmitt’s deference to the state, and to authority in general, might mollify some of this distrust, as his exceptional talents might compensate for his social origins. But he still had to confront the traditional anti-clericalism of the bureaucratic and university elites” (Bendersky 1983, 13–14). The other reason Schmitt found it difficult to settle into university life was World War I.

WORLD WAR I

World War I began in the summer of 1914, while Schmitt was working in the civil service as a junior barrister. He had yet to pass the state assessor’s exam and therefore did not enter the war; however, on February 15, 1915, the day after his final assessor’s exam, Carl Schmitt volunteered for reserve infantry. Schmitt expressed distaste for his service, describing it as “‘coercion’, the barracks as a ‘prison’” but “on 23 March Schmitt was moved to the office of the deputy general command. . . . He was now allowed to leave the barracks and slept in his own apartment in Gabelsberger Straße again. His basic military service did not last even a month” (Mehring 2022, 61). This is where Schmitt spent most of the war. While he was at the General Staff, he continued his research, publishing, and the pursuit of his academic career. On February 16, 1916, Schmitt received his habilitation (qualification as a teaching professor) from the University of Strasbourg. For his degree, Schmitt wrote his thesis, *The Value of the State and the Significance of the Individual*, which shows his attachment to Neo-Kantian philosophy. Schmitt had been educated during a time—from unification in 1871 through World War I—when Neo-Kantians ideologically dominated the German academy. Schmitt’s early work, including *The Value of the State and the Significance of the Individual*, fits that ideology (Bendersky 1983, 2016; Paulson 2016). In *The Value of the State*, Schmitt not only argued that the “*Recht* [right] must exist before the world and after it,” but he also argued that “the value of the state emanated not from its sovereign authority or power but rather from its purpose of transforming this transcendent *Recht* into a worldly phenomenon” (Bendersky 2016, 123).

While stationed at the general staff headquarters, Schmitt worked for a section involved in administering martial law. “Although his diaries suggest that he was bored by the day-to-day bureaucratic routines, in September 1915 he was assigned the task of providing a justification for an expansive interpretation of emergency powers with the aim of extending them for ‘a few years after the war.’” (Scheuerman 2016, 549). This task helped to create a new academic focus for Schmitt. Instead of Neo-Kantian idealism, Schmitt

focused on dangers to the state and turned his work at the general staff headquarters into a pair of articles published in 1916: “The Impact of the State of War on Ordinary Criminal Procedure,” and “Dictatorship and State of Siege: A Study in Public Law.” During Schmitt’s military experience, his “youthful Kantianism was abandoned. . . . What remained was a fundamental antipathy toward liberalism and materialism, as well as a belief in the primacy of the state” (Bendersky 1983, 16). By the time *Political Theology* was published in 1922, Schmitt had moved away from his neo-Kantian views. In *Political Theology*, Schmitt views the neo-Kantian “doctrines he had taken up in *The Value of the State* in altogether unfavorable terms” (Paulson 2016, 518). Instead, Schmitt’s work was now focused on “the extent to which constitutional laws could be suspended in order to meet a present danger and to reestablish a normal state of affairs” (Bendersky 1983, 19). This was the beginning of Schmitt’s work on dictatorship and the *Ausnahmezustand* (the state of exception).

THE WEIMAR REPUBLIC

Military uprisings at the end of October 1918 marked the beginning of the German Revolution. With defeat to the Allies looming, the German military command, in the hope of restoring some imperial honor, issued an order on October 24, 1918, for the Navy to engage British forces in a grand final battle. Refusing to be used in such a foolhardy and useless engagement, the naval troops in Wilhelmshaven revolted five days after the order. A few days after that, the sailors in Kiel also revolted. The revolt quickly spread across the country, collapsing the old regime. A republic was proclaimed in the city of Weimar, and Kaiser Wilhelm II abdicated on November 9, 1918. Germany surrendered, and the war ended two days later.

The drafting of the Weimar Constitution (the Republic is named after the city of its founding) began in January 1919 and was ratified on August 11, 1919. The Weimar Constitution changed the Imperial Reich to a Republic. The entirety of chapter one, Section one, Article one, of the Weimar Constitution reads, “The German Reich is a Republic. Political authority emanates from the people.” For jurists trained in the imperial bureaucratic system, the move to a republic represented an uncomfortable intellectual shift. “The democratic republic replaced the autocratic, semi-parliamentary monarchy and thus created a new political universe” (Preuß 2016, 471). For some jurists, this adjustment to the legal forms of a republic was made minimally and reluctantly. Right-wing and anti-republican biases were apparent in many rulings; Hitler’s minimal sentence for treason (below) can be seen as an example.

Schmitt was discharged from the military on July 1, 1919, and found that his world had changed. Imperial Germany was no more, and the legal world in which he trained had vanished. The University of Strasbourg, where Schmitt had been teaching, closed at the end of the war and only reopened after the Treaty of Versailles was signed on June 28, 1919, as a French institution. Schmitt moved to Munich, where he was able to get a lectureship at the School of Business Administration.

Schmitt seemed open to the idea of a republic, but like many of his colleagues, his understanding of the new political system was linked to the past. Schmitt argued that the Weimar Constitution was legally constituted, but that it did not represent a fundamental break with the Imperial Reich. In *Constitutional Theory*, Schmitt explained:

By accepting the Weimar constitution the German nation does not want to disavow its identity with the German nation of the constitution of 1871; it wants to renew its Reich ...but not establish a new Reich. Just because it is a democratic constitution, the new constitution does not establish a new German state. It only signifies that a people which until now believed [in] . . . monarchical principles . . . [has decided to] continue its existence on the basis of a constitution which it has granted itself. (quoted in Bendersky 1983, 29)

According to Schmitt, the Weimar constitution does not create a new people or state. The people are the same as the imperial people, who have reorganized the state's structure.⁶ Whatever form the state takes, it still has, according to Schmitt, the obligation to define and defend the pre-existing nation. "Schmitt defines the state as the 'political unity' of a people and interprets the 'positive' constitution as the 'complete decision over the form and type of the political unity'" (Mehring 2022, 191).

The early years of Weimar Germany were turbulent. Even before the constitution was ratified, the fledgling republic needed to battle against several communist uprisings. In Berlin, the Spartacist uprising in January included periodic violence and a general strike. Berlin then had another communist uprising in March. There was an uprising in Munich, which declared a Soviet Republic on April 6, 1919. This led to a conflict that lasted some time before the government could assert its authority. Indeed, it led to "the taking and executing of hostages on 30 April in Munich" (Mehring 2022, 90). In 1920, there was another communist uprising from the industrialized Ruhr Valley, but it was not only communists causing unrest. In March of 1920, for example, there was a revolt by monarchists (Preuß 2016, 474).

To deal with these and other challenges the new Weimar government could invoke Article 48 of the Weimar Constitution. Article 48 reads:

In the event of a State not fulfilling the duties imposed upon it by the Reich Constitution or by the laws of the Reich, the President of the Reich may make use of the armed forces to compel it to do so.

If public security and order are seriously disturbed or endangered within the German Reich, the President of the Reich may take measures necessary for their restoration, intervening if need be with the assistance of the armed forces. For this purpose he may suspend for a while, in whole or in part, the fundamental rights provided in Articles 114, 115, 117, 118, 123, 124 and 153.

The President of the Reich must inform the Reichstag without delay of all measures taken in accordance with Paragraphs 1 or 2 of this Article. These measures are to be revoked on the demand of the Reichstag.

If danger is imminent, a State government may, for its own territory, take temporary measures as provided in Paragraph 2. These measures are to be revoked on the demand of the President of the Reich or of the Reichstag.

Details are to be determined by a law of the Reich

There are questions about the role Article 48 would play in the establishment of the Nazi regime almost fifteen years later, but in the 1920s, the *Ausnahmezustand* was used to protect the Weimar constitutional republic. Article 48 allows a strong executive leader to take decisive action against national danger. This was thought necessary since the legislative process can be slow. While the legislature debates, the president could declare a state of emergency and establish emergency rule. In 1923–1924, German President Friedrich Ebert used the article repeatedly to deal with the economic crisis facing the country. Each time he exercised the exceptional powers, he abrogated them after a short period of time. Article 48 itself, however, does not demand such abrogation, and it is dependent on the dictator giving up her or his power. The use of “dictator” is not meant to be pejorative. Schmitt in *Dictatorship* writes that dictatorship is not necessarily bad and the exercise of absolute power can be necessary.

In 1921, Schmitt was appointed a full professor of public law at the University of Greifswald. The University of Greifswald was located on the Baltic coast and was the smallest university in Prussia. Schmitt remained there for only a short time before moving to the University of Bonn, where his courses were among the first in Germany that could be called political science. Prior to the formation of the Weimar Republic, political science was essentially an unknown course of study in Germany. This means, according to Bendersky, that “a major obstacle to responsible participation in the political process was the lack of political education of the average German citizen as well as of the intellectuals” (Bendersky 1983, 54). The process and responsibilities of active citizenship were not woven into society.⁷

POLITICS IN EARLY WEIMAR

Weimar Germany operated on a proportional representation system. In a proportional representation system, electors vote for their preferred party, and then each party is allotted seats in parliament according to the proportion of the vote they earned. Proportional representation systems are, in general, multiparty systems, and coalition governments are often formed, combining two or more parties into a ruling coalition. Ideally, this allows compromise across party lines. In Weimar Germany, however, the system led to instability: in the first five years of the republic, there were six separate chancellors, and in the less than fifteen years of the Weimar Republic's existence, there were twenty-one separate coalition governments.

One of the reasons for the instability of the Weimar coalitions was that the parties in the Weimar Republic largely represented reinforcing social cleavages rather than cross-cutting social cleavages. Reinforcing social cleavages exist when members of racial, religious, or ethnic groups live in the same areas, are of the same economic and social class, and, of course, join the same political party. This is contrasted with cross-cutting cleavages. With cross-cutting cleavages, members of a political party can include people from various racial, religious, or ethnic groups, who live in various areas and are from various economic and social classes. The dualist party system in the United States and its interest group politics have been historically portrayed as having cross-cutting cleavages.⁸ This allows voters to move their support between parties and parties to compete with each other. Only one party in Weimar Germany—the Catholic Center Party—could be seen as a potential coalition partner with both the left and the right, because as a religion-based party, its appeal cut across class and economic lines.⁹

Weimar not only had reinforcing social cleavages, it had no tradition of democracy. “With the exception of the socialists and the more progressive-minded in the liberal and Catholic parties, the authoritarian state was accepted as almost a natural condition” (Bendersky 1983, 4). Without any tradition of self-government, people “divided into irreconcilable social groups. As a consequence, Weimar parties represented specific and antagonistic class interests and ideologies; the welfare of the nation, though frequently mentioned, was usually seen through the spectacles of one's own party.” In Weimar, the parties themselves were committed to their political goals more than they were committed to democracy or the continuation of the republic. This left the Weimar Republic on shaky ground. “Several parties refused to recognize the Weimar order as legitimate, whereas those which accepted the constitution could find no firm basis for lasting cooperation” (Bendersky 1983, 64–65). Adding to the antipathy toward Weimar was that its primary author, Hugo Preuss, was Jewish, and there were overtly

anti-semitic parties in Weimar. These included not only the Nazi party and its various forerunners but the largest conservative and third-largest party in the first parliamentary election of the Weimar regime, the DNVP (*Deutschnationale Volkspartei*—German National People’s Party), and several smaller parties.

Most parties in Weimar Germany saw the constitution in utilitarian terms; they sought to use it to gain power but did not believe it was worth defending on its own. Schmitt wrote about the constitution that way as well. In the introduction to the second edition of *Crisis of Parliamentary Democracy*, Schmitt writes that, “the parliamentary enterprise today is the lesser evil, that it will continue to be preferable to Bolshevism and dictatorship, that it would have unforeseeable consequences were to be discarded, that it is ‘socially and technically’ a very practical thing.” While this amounts to a defense of the Weimar constitutional system, Schmitt also notes that these things “do not constitute the intellectual foundations of a specifically intended institution” (Schmitt 1988, 2–3). Schmitt argues that the republic should exist as a bulwark against worse consequences but does not express a commitment to the constitutional republic on its own terms.

Carl Schmitt also believed that at least some of the Weimar Republic’s problems were innate to all liberal constitutional democratic states. The liberal constitutional democratic state endeavors to restrain the dangers of state power through procedural constraints, but Schmitt argues that technical procedures alone could not hold together the people and state. Rather, he argues there must be wide-scale homogeneity across every potential divisive characteristic uniting the nation, which is defended by the state (Schmitt 1988, 2020a, 2020b). Schmitt criticizes the liberal constitutional state further, arguing that it is not, nor can it be, democratic. Schmitt reasons that for the liberal constitutional state to function, there must be parliamentarianism, and one of the vital elements of parliamentarianism is public discussion. Schmitt labels this anti-democratic. He writes, “The belief in parliamentarianism, in government by discussion, belongs to the intellectual world of liberalism. It does not belong to democracy” (Schmitt 1988, 8). It is not democratic because it may lead to the wrong outcome. This problem is augmented because people vote or advocate for their individual interests rather than those of the people or state—a kind of “general will” (Rousseau 1993). Despite Schmitt’s belief in parliamentarianism’s inherent problems, he argues that Weimar does not even live up to those standards. Parties in Weimar, argued Schmitt, do not engage in open parliamentary debate. Instead, he argues that small groups meet secretly and short-circuit open debate; this makes the Weimar Republic problematic even by liberal constitutionalist standards.

On November 8–9, 1923 after four turbulent years of the Weimar Republic, a Nazi Party-led coalition under the leadership of Adolf Hitler attempted

a *coup d'état*. This became known as the Munich *Putsch* or the Beer Hall *Putsch*, named because it began at the *Bürgerbräu Keller* beer hall in the Bavarian city of Munich. Rallying around the slogan, “the fate of Germany will soon be decided by Bavarian fists in Berlin,” the Nazi plan was to first take control of the Bavarian state government and then take over the government of the German federal state (Abel, 1986, 68). This idea had been modeled after Mussolini’s march to Rome. Initially, it appeared the *coup* attempt was a setback for the Nazi party. Bavarian authorities prosecuted and jailed nine men, including Hitler, for their roles in the *putsch*. Hitler was convicted of high treason, but the judge, Georg Neithardt, gave him the least possible sentence, five years, of which he served only eight months. This meant that despite the failed *coup*, the Nazis were able to reformulate the events of that day as a heroic and patriotic effort to save the fatherland; it helped Hitler establish and maintain a following.

CONCEPT OF THE POLITICAL

By the mid-1920s, the Weimar Republic seemed more secure. The political violence and disorder, which appeared omnipresent at the beginning of the republic, had waned. It was at this time that Schmitt began to work out the friend-enemy distinction on which *The Concept of the Political* hinged. He publicly introduced the idea at a lecture on May 10, 1927, at Hochschule für Politik, and the article “The Concept of the Political” was published in late summer. The book based on the article was published in 1932. In it, Schmitt argues that,

The state as the authoritative political entity contains an enormous power concentrated in itself: the possibility of waging war and thus openly having human lives at its disposal. The *jus belli* contains such a disposition; it indicates a double possibility: that of demanding from members of one’s own people readiness to kill and die, and that of killing people standing on the enemy side. (Schmitt 2020b, 81)

Maintaining the distinction between the people on our side—friends—and those on the other side—enemies—is the primary function of the state, on which all other functions either rely or depend, according to Schmitt. Schmitt’s *The Concept of the Political* was immediately criticized and praised. Hermann Heller, a social democratic political theorist, argued, for example, that Schmitt’s friend-enemy basis of politics means “there would no longer be any basis for rational discussion and the political goal would be the annihilation of the enemy. All politics and history would then be reduced to

‘a naked power struggle’ (Bendersky 1983, 92). Schmitt’s supporters, on the other hand, argue that Schmitt was defending the Weimar Republic: “he was not an opponent of the Weimar constitution or the republic. But Schmitt’s sense of realism, along with his almost chronic fear of political disorder, led him to formulate a very distinctive interpretation of the constitution . . . ” (Bendersky 1983, 96).

Schmitt’s “distinctive interpretation” of the Weimar Constitution is that it is flexible. This flexibility makes the constitutional system able to meet new challenges, but depending on how that flexibility is applied, the polity’s distinctive constitutional principles may be destroyed. While Schmitt’s work can be read as an attempt to save a floundering Weimar constitutional republic, he did not advocate doing so by doubling down on constitutional principles (e.g., the answer to objectionable speech is more speech; the answer to democratic problems of representative democracy is more representation and/or more democracy) but by leaning on authoritarian and anti-republican principles. Insofar as Schmitt advocates protecting liberal constitutional democracy, he does so by instituting, at least for a time, authoritarian principles. Schmitt argues this is constitutional because the purpose of the constitution is the protection of the German people and state, not the maintenance of particular procedures or ideas. The goal of the constitution is more important than its process, and Schmitt believes the only difference between the Weimar Constitution and its 1871 German constitutional forebear is process. Both constitutions seek the overriding goal of providing protection for the German people and nation. The form by which this protection is provided becomes less, if at all, relevant.

Any constitution is not a self-executing document, and Schmitt was skeptical that any set of laws or practices could protect a constitutional system. He writes that, “One law cannot protect another law.” Instead, Schmitt argues that for order and protection, authoritarian control is needed over the instruments of state; “a true defender of the constitution required the political authority to distinguish the friend from the enemy, and the power to enforce that decision” (Bendersky 1983, 112). Schmitt argued that the president could best serve as the true neutral defender of the constitution because the president is a representative of all the people. Presidents take an oath to defend the constitution, moreover, obligating them to behave this way.¹⁰ The government Schmitt envisioned was one which, instead of relying on the parliamentary coalitions whose negotiations and deliberations marked the representative government, would rely on the president who could circumvent the need for Reichstag coalitions. The authority of the president, including but not limited to the powers outlined in Article 48, could help maintain the government’s focus on the nation.

LATE WEIMAR

In 1928, the year after the release of “Concept of the Political,” Schmitt became the Hugo Preuss chair of law at the Berlin Graduate School of Administration. The following year, 1929, the worldwide economic crisis ended the stability that the Weimar Republic had experienced since the mid-1920s. The economic crisis in Germany changed voting patterns and threatened to collapse the Republic. Theodore Abel, an American sociologist from Columbia University, went to Germany in early 1934 and solicited autobiographies from six hundred Nazi party members, in which each explained where he came from and why he joined the party. To obtain the autobiographies, Abel ran a fake contest for “the best personal life story of a supporter of the Hitler movement.” To be eligible, the writer needed to be a member of the party by January 1, 1933. “In 20 per cent of the autobiographies the inflation and its effects are registered as a major crisis in the life of the individual.” There were also large-scale employment problems—5,615,000 people were unemployed by the end of 1931—and of the respondents between 20 and 40, “Twenty-one percent of our contributors were unemployed more than a year, while a number of them had no jobs for practically the entire period from 1928 to 1933” (Abel 1986, 121–122). As Weimar’s economic problems rose, Germany’s dominant liberal and social democratic parties began to give way to other ideologies and parties less committed to the Weimar constitutional republic, including the NSDAP (*Nationalsozialistische Deutsche Arbeiterpartei*) or Nazi party. In December of 1929, the Nazi party achieved its first significant electoral victory in Thuringia; it received 11.3 percent of the vote (Abel 1986, 308). In the early 1930s, the violence that marred the early Weimar Republic returned, but now it commonly included paramilitaries, particularly those aligned with the Nazis and the communists. Indeed, the *Sturmabteilung* (SA) or brownshirts, the Nazi paramilitary arm, would grow to four times the size of the German army (Bendersky 1983, 144, 146).

This time of economic and political upheaval was also the time that Carl Schmitt gained political influence. In 1929, Schmitt began a friendship with Johannes Popitz, a state secretary from the Reich Finance Ministry who was soon to become *Reichsminister* and then Prussian minister of finance.¹¹ This friendship helped to give Schmitt access to political actors. He also began a friendship with General Kurt von Schleicher, an adviser to Paul von Hindenburg, the German president. It was through Schmitt’s relationship with Schleicher that the former’s constitutional ideas became politically prominent and Schmitt was able to become the “crown jurist” of the Reich, arguing in front of the constitutional court and defending the government in what became known as the Prussian Coup or *Preußenschlag* (Mehring 2022, 253, 260). The Prussian government’s ruling coalition was a center-left coalition

(Social Democrats, Center, and German Democratic parties) which had been in office since the World War I. After the election of April 24, 1932, that coalition no longer had a majority of seats; indeed, the communists and the Nazis joined to hold a majority. These two parties would not work together to form a ruling coalition, however, and no other coalition which held a majority of seats could be formed.

The Prussian constitution required constructive votes of no confidence. Many parliamentary-style legislatures have votes of no confidence. This is when the prime minister loses a key vote and a new government must be formed; this may necessitate new elections. Constructive votes of no confidence require that the previous prime minister and government serve until a new government is formed. This ensures that the country (province, state, etc.) is not without a government. Sometimes, as in the case of Prussia, it can take some time to form a new government and may take repeated elections. This meant the old cabinet, run by Minister-President Otto Braun, was still effectively operating the Prussian state despite the election results. The federal chancellor, Franz von Papen, convinced President Paul von Hindenburg to dissolve the Prussian parliament and directly appoint the Prussian government. Altona Bloody Sunday, an outbreak of violence between the SA and the communists during which eighteen people died, sixteen of them killed by police, helped spur the federal government to action. After this, Hindenburg dissolved the Prussian parliament and appointed a right-wing minister to lead Prussia. Otto Braun objected to the federal government takeover of the Prussian state and appealed to the federal judicial authority.

Schmitt served as counsel for the federal government and defended its actions. He argued that the Prussian state could not maintain order or fulfill its constitutional obligations, and therefore, Hindenburg had the authority under Article 48 to establish a commissar and even institute martial law in Prussia. “In long discourses before the court, Schmitt contended that the president had acted out of necessity, with the best interest of Germany in mind, and in accordance with constitutional duties” (Bendersky 1983, 162). On October 25, 1932, the German constitutional court declared its verdict and handed each side a partial victory. The court reached three major conclusions:

- 1: The court itself has the right of judicial review and constitutional interpretation.
- 2: Article 48 should *not* apply in this situation and the Prussian cabinet cannot be removed because Prussia had fulfilled its constitutional obligations.
- 3: The Reich can appoint a commissar; however, because of the danger of unrest and insecurity.

These rulings meant that the Reich commissar would serve, but so would the Prussian state government. The Prussian cabinet represented the state in the Reichsrat, but the federal government held the remaining state powers.¹²

THE END OF WEIMAR

In 1932, in the same environment as the turmoil in Prussia, there were two federal elections.¹³ In both these elections, the NSDAP or Nazi party received a plurality of the seats in the parliament.¹⁴ In the first election of 1932, the NSDAP got more than 37 percent of the vote and the KPD (Communists) received more than 14 percent of the vote. The two parties combined for more than half of the seats. This essentially duplicated the problem that existed in Prussia. Franz von Papen from the Center party, who was appointed chancellor at the end of May and who wanted to avoid a takeover by the extremist parties decided, therefore, to dissolve the Reichstag during its first meeting after the July election on September 12, 1932. This outraged Hitler, who argued that this move allowed Papen to continue in office illegally. Schmitt, on the other hand, seemingly contrary to his position in the Prussia coup, “had declared continuation in office, despite a vote of no confidence, as compatible with the constitution” (Bendersky 1983, 175).¹⁵

The next election, the last free election of the Weimar Republic, was held on November 6, 1932. In the November election, the Nazi share of the vote went down to 33 percent. The KPD share of the vote increased, however, by 17 percent essentially leading to the same conundrum: the two parties together had a majority, 317 of the 585 seats, but refused to work together. After the November election, no stable government could again be formed. In January 1933, however, the Nazis managed to convince President Paul von Hindenburg to appoint Hitler as the chancellor. To gain a parliamentary majority, new elections would again be necessary, but this time Hitler, not Papen, would be chancellor.

The election was scheduled for March 5, 1933. On February 27, six days before the election and exactly four weeks after Hitler became chancellor, an arson in the Reichstag shook up the electoral landscape. While Nazis blamed the fire on a massive communist conspiracy, it appears to be the work of one person, a twenty-four-year-old Dutch communist Marinus Van der Lubbe, who was executed for the crime on January 10, 1934. In response to the fire, the parliament passed the *Reichstagsbrandverordnung* (the Reichstag fire decree) based on its powers under Article 48:

On the basis of Article 48 paragraph 2 of the Constitution of the German Reich, the following is ordered in defense against Communist state-endangering acts

of violence: Articles 114, 115, 117, 118, 123, 124 and 153 of the Constitution of the German Reich are suspended until further notice. It is therefore permissible to restrict the rights of personal freedom [habeus corpus] freedom of (opinion) expression, including the freedom of the press, the freedom to organize and assemble, the privacy of postal, telegraphic and telephonic communications. Warrants for House searches, orders for confiscations as well as restrictions on property, are also permissible beyond the legal limits otherwise prescribed.

In the short time before the election, the NSDAP actively used its power under the *Reichstagsbrandverordnung* to curtail civil rights. The Nazi Party also used extra-legal violence to restrict the participation of primarily the Communist Party and its members, but also members of the Social Democratic Party, the Center Party, trade unionists, and those identified with the left.

Even when legally restricting and extra-legally intimidating other parties, the NSDAP again failed to achieve either a popular or legislative majority, earning 43.9 percent of the popular vote and 288 of the 648 Reichstag seats on March 5. The Nazi party did obtain a plurality but needed a coalition partner to form a government. The NSDAP was joined by the Kampffront Schwarz-Weiß-Rot, an alliance primarily made up of the German National People's Party (*Deutschnationale Volkspartei / DNVP*), which received 8 percent of the vote and fifty-two seats, enabling the NSDAP to form a slim majority.¹⁶ This election, even with its restricted participation, was the last multiparty election in Germany until after the end of World War II, and the last multi-party election in a united Germany for nearly sixty years.

On March 23, the *Reichstag* passed the Enabling Acts (Law to Remedy the Distress of People and Reich), which the *Reichsrat* passed unanimously, without discussion or debate, and was signed by President Hindenburg the same day. In the same way, the Nazis used legal and extralegal methods to coerce votes in the March election, the party also employed suspect maneuvers, generally thought illegal in liberal constitutional democracies, including Weimar, to ensure the passage of the enabling acts.¹⁷ The Enabling Acts gave the chancellor, Adolf Hitler, plenary powers; he and the cabinet could enact laws without the consent of the Reichstag or President Hindenburg. The Enabling Acts also made it possible to override any element of the Weimar Constitution and abolished most civil liberties, already curtailed by the Reichstag fire decree.¹⁸

The Reichstag has enacted the following law, which is hereby proclaimed with the assent of the Reichsrat, it having been established that the requirements for a constitutional amendment have been fulfilled:

Article 1—In addition to the procedure prescribed by the constitution, laws of the Reich may also be enacted by the government of the Reich. This includes the laws referred to in Articles 85 Paragraph 2 and Article 87 of the constitution.

Article 2—Laws enacted by the government of the Reich may deviate from the constitution as long as they do not affect the institutions of the Reichstag and the Reichsrat. The rights of the President remain unaffected.

Article 3—Laws enacted by the Reich government shall be issued by the chancellor and announced in the Reich Gazette. They shall take effect on the day following the announcement unless they prescribe a different date. Articles 68 to 77 of the constitution do not apply to laws enacted by the Reich government.

Article 4—Treaties of the Reich with foreign states, which relate to matters of Reich legislation, shall for the duration of the validity of these laws not require the consent of the legislative authorities. The Reich government shall enact the legislation necessary to implement these agreements.

Article 5—This law enters into force on the day of its proclamation. It expires on April 1, 1937; it expires furthermore if the present Reich government is replaced by another.

The two laws together gave Hitler and his cabinet a dictatorship and were the foundation of the Nazi totalitarian regime. Schmitt wrote an article for the *Deutsche Juristen Zeitung* on the passage of the Enabling Acts in which he “does not mention any legal reservations and expresses in all clarity that the government is now installed as the new legislature, and that it is legitimate as the ‘expression of the victory of the national revolution’. . . . The article demonstrates that Schmitt fully recognized the revolutionary character of the developments” (Mehring 2022, 277–278). The Enabling Acts set their date of expiration in four years, but since the Reichstag was now a rubber stamp, the acts were renewed twice and expired only with the end of the Nazi regime.¹⁹

SCHMITT AND THE NAZI PARTY

After the political takeover, Carl Schmitt joined the Nazi party on May 1, 1933.²⁰ In the early years of the Nazi regime, Schmitt experienced a political rise. He quickly obtained an influential job in which he was responsible for enforcing and maintaining the ideological purity of professional and academic jurists. In this capacity, he argued that it was necessary to rid the legal profession of Jewish influences and argued at a convention of law professors in Berlin that German law needed to be cleansed of the Jewish spirit, presenting himself as a proud anti-Semite. Schmitt was appointed Prussian State Councilor on his forty-fifth birthday (July 11, 1933). Shortly after on July 14, 1933, a law proclaimed the NSDAP the only political party in Germany and outlawed the existence of other parties. Even though he now had a political

career, Schmitt kept his academic affiliation, joining the Law faculty at the University of Berlin in October 1933.

In December 1933, the Law to Safeguard the Unity of Party and State, on which Schmitt worked, was passed. This law centralizes the power of the state, but is so vague that it allows for enormous power in defense of “*fuehrer*, people and state.”

Section One: After the victory of the National Socialist revolution, the National Socialist German Workers’ Party is the bearer of the concept of the German State and is inseparable from the State. It is a corporation under public law. Its organization will be determined by the Führer.

Section Two: The deputy of the Führer and the Chief of Staff of the SA will become members of the Reich government, in order to ensure close cooperation of the offices of the party and the SA with the public authorities.

Section Three: The members of the National Socialist German Workers’ Party and the SA (including its subordinate organizations), as the leading and driving force of the National Socialist state, will bear greater responsibility toward Führer, people and state. If they violate these duties, they will be subject to special jurisdiction by both the party and state. The Führer may extend these regulations in order to include members of other organizations.

Section Four: Every action, or failure to act, on the part of members of the SA (including its subordinate organization) that attacks or endangers the existence, organization, activity, or reputation of the National Socialist German Workers’ Party – in particular, any infraction against discipline and order – will be regarded as a violation of duty.

Section Five: Custody and arrest may be imposed in addition to the usual penalties.

Carl Schmitt, again, defended the enormous power of the Fuhrer when in June 1934 he published “*Der Führer schützt das Recht*” (The Leader Protects the Law) in which he justified the political murders of the Night of the Long Knives claiming the Führer’s authority is the highest form of administrative justice. The Night of the Long Knives refers to purges carried out between 30 June and 2 July 1934 during which at least 77 (officially) and likely more than 100 people were killed. Most of the people killed were members of the SA, including Ernst Röhm, head of the SA.²¹ “Convinced that Germany would have been threatened by civil conflict if Röhm’s SA had not been curbed, Schmitt justified Hitler’s actions against the SA leader and his entourage” (Schwab 1996, xvi). Unlike liberal theory which cites the importance of due process, Schmitt argued the importance of the state taking decisive action—even if it is violent and otherwise thought illegal—in support of its goals.

Notwithstanding Schmitt's seeming popularity and his Nazi credentials, he was attacked by the SS (*Schutzstaffel*) in its publication *Das Schwarze Korps* (The Black Corps) in late 1936. The virulent anti-Semitic publication was also opposed to the Catholic Church and "accused him [Schmitt] of 'Catholic thought,' opportunism, and having numerous Jewish connections" (Linder 2016, 147). Schmitt began to be investigated, the results of which could subject him to a concentration camp or exile. Hermann Göring, commander-in-chief of the *Luftwaffe* and president of the *Reichstag*, from whom Schmitt was awarded the title of Prussian State Councilor in the summer of 1933, stopped the investigation, however. Schmitt, anxious to maintain a lower profile after the investigation, returned to academia for the remainder of the Nazi regime and withdrew from political life. "1936 was a watershed for Schmitt. . . . Schmitt 'left' the Nazi legal organization that he had joined in 1933 and confined his activities to those primarily associated with a university career: teaching and writing" (Schwab 1996, ix). In the expansion of ideas outlined in an article he authored the previous year, Carl Schmitt published in 1938 *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*. In this work, Schmitt uses Hobbes and *The Leviathan* to refine his ideas of sovereignty and obligation to the state. After *The Leviathan* Schmitt's political work became more international and historical, such as *Land and Sea* and *Nomos of the Earth*.²²

POST WAR

In April 1945, Carl Schmitt was detained and interrogated by Soviet troops but was let to go quickly. After the collapse of the Nazi regime, Schmitt was re-arrested by American troops in late September 1945. He was sent to an internment camp and was not released until October 1946. Less than six months after his release, in March 1947, Schmitt was again arrested and held as a possible defendant for the Nuremberg International Military Tribunal. He apparently cooperated with the tribunal, however, and "on 6 May, Schmitt was moved to a house 'for voluntary witnesses,' where he was able to move around" (Mehring 2022, 418). In late May 1947, Schmitt was released and returned to his childhood home of Plettenberg, where his wife and daughter had moved during his confinement.

After the war, Schmitt resisted denazification, claiming it was unnecessary as he had not been nazified. When questioned about his own culpability, he defended himself by arguing that, "if he was to be held responsible for Hitler . . . then Rousseau should also be held responsible for the Jacobins" (Linder 2016, 149). Due to Schmitt's continued rejection of denazification, however, he could not obtain an academic job. He was not allowed to publish until the

establishment of the Federal Republic of Germany in 1949, and even then, the West German President Theodor Heuss argued in 1951 that Schmitt should never get a teaching position again. Yet, Schmitt maintained a reputation in certain academic circles and “began to establish contacts with friends abroad again” (Mehring 2022, 453).²³ As the 1950s and 1960s wore on, Schmitt was able to gradually rebuild his intellectual life. At his home in Plettenberg, he was visited first by former students and then by other intellectuals. Schmitt also spent time in Spain, where his daughter Anima moved after her marriage in 1957. During this period, one of Schmitt’s interests became the Spanish Civil War and Francoist Spain. This led to the publication of *Theory of the Partisan* in 1963 which is based on lectures Schmitt gave while in Spain.

In 1970, Schmitt moved to a small house in Pasel on the outskirts of Plettenberg. This is where he would largely spend his last decade and a half. In these final years, Schmitt was mostly at home entertaining guests and students with whom he could engage in academic discussions. On February 1, 1984, Schmitt, who was by then in poor health, changed his will due to the death of his only child, Anima. Later that year, in September 1984, at the age of 96, Schmitt became very ill with “cerebral sclerosis with accompanying hallucination” (Linder 2016, 165). Over that fall, Schmitt became nearly blind and deaf, and on New Years’ Eve Schmitt fell, breaking his thigh and pelvis. Carl Schmitt died on Easter Sunday 1985. He was buried a few days later with a funeral service held in the parish church and containing themes of Easter and resurrection.

NOTES

1. An initial version of this project was presented at the 2021 Western Political Science Association conference as a paper titled “Carl Schmitt: The Political Philosopher of Donald Trump?” At the conference I received a question about the suitability of adopting conservative readings of Schmitt’s thought because he enjoyed a cosmopolitan personal life. Mehring, for example, writes of Schmitt’s use of sex workers and notes, “During his time in Munich, Schmitt had led a kind of double life as a jurist and bohemian” (Mehring 2022, 241, 211). Reading Schmitt’s private life as emblematic of his philosophic thought is problematic because it fails to account for the complexity of human nature, which often separates normative theory and empirical actions. John Locke had financial interests in the slave trade but wrote about the immorality, irrationality, and political impossibility of slavery. Brian J. Fox (2015) argues that apologists take Schmitt’s review of his own work and life as truth, but even those views changed over the decades. Schmitt’s recollections, even if truthful, may not be accurate. This leaves his work to stand alone.

2. Mehring implies that “the good Jewish friend” scenario in Schmitt’s case, generally identified as Georg Eisler, might be more complicated than generally

understood. Schmitt “received a monthly draft from the Eisler family, but that was dependent on his friendship with Georg” (Mehring 2022, 65). In 1928 Schmitt’s “anti-Semitism became more radical and was also directed at Eisler.” He wanted to get rid of “the Jews” and live a “clean life” (Mehring 2022, 197). Late in life, Schmitt reconciled with Eisler (Mehring 2022, 535–536).

3. Timothy Snyder (2017) quotes Leszek Kołakowski: “In politics being deceived is no excuse.” I take Snyder’s use of this quote as an admonishment to be an active citizen; yet, between deceived and deceiver, the deceived can be reached and his opinion changed, while the deceiver cannot, because she already knows the facts. The discussion between Socrates and Hippias in Plato’s (2008) *Lesser Hippias* about whether he who does wrong knowingly or unknowingly is more just, seems pertinent to the question of which is the greater moral failing.

4. Although *kulturkampf* can refer to any conflict between sizable factions within a state, be it between secular and religious forces or between two different secular factions, the *Kulturkampf* in Germany refers to the period after German unification, in 1871, when control over clerical appointments and education was contested by Otto von Bismarck, the Prussian leader, and Pope Pius IX.

5. Schmitt had also published additional works not related to law or politics. “The cultural journal *Die Rheinlande*, in which he published no fewer than six smaller articles between 1911 and 1913,” is one example (Mehring 2022, 27).

6. Liberal constitutions, such as the United States Constitution, are thought to create, not amend, a polity. This belief is evident in the United States’ founding and historical documents, such as the Declaration of Independence, and is reflected later in Lincoln’s Gettysburg Address, for example. Schmitt, on the other hand, believes that the power is in the state, any new constitution just organizes it differently. The liberal constitutionalist idea that people can withdraw sovereignty from the state and reorganize does not make sense to Schmitt.

7. Reinhard Mehring, on the other hand, links Schmitt’s teaching in political science back to his time in Munich: “At this Hochschule, Schmitt taught jurisprudence within the context of other ‘political sciences’” and ties his interest in political science to his interest in the work of sociologist Max Weber (Mehring 2022, 101).

8. There is evidence that the cross-cutting nature of social cleavages in the United States party system has waned. Parties divide more along geographic, religious, racial, and ethnic lines, but less along economic lines than they did a generation ago (see chapter nine). Still, these parties are “big tent” parties compared with many parties in proportional representation countries, who divide themselves along ethnic, religious, economic, geographic, and additional lines.

9. Some parties in the Weimar Republic had narrow constituencies, such as the “Schleswig-Holstein Farmers and Farmworkers Democracy,” which did manage to gain a single seat in the constituent assembly with 0.19 percent of the vote. It gained representation because there was no electoral threshold, a minimum percentage a party must receive to gain representation. States deploy thresholds because a party with scant representation can often command outsized power. The number of seats a small party holds may be essential for the formation of a coalition government. Due to

their outsized influence without a threshold, the formation and maintenance of these small political parties can be incentivized.

10. Basing constitutional rule on this oath relies on presidential Aristotelian virtue. There is no mechanism, however, to ensure that any president has this requisite virtue. Without such certainty, this is a dubious basis on which to have a constitutional system rely because the ascendancy of a president who does not have the requisite virtue can damage or destroy the nation or state. See Clinton Rossiter's discussion of "Constitutional Dictatorship" (2017).

11. "Johannes Popitz (1884–1945) was part of the resistance circle. He offered Hitler his resignation after the pogroms of November 9, 1938 [Kristallnacht], but it was not accepted. Popitz tried to win Himmler for a *coup d'état* and prepared a provisional constitution for a post-Hitler Germany. He did not take part in the events of July 20, 1944, but, like other members of the resistance, was arrested immediately after the failed assassination and executed on February 2, 1945" (Mehring 2022, 207n).

12. The *Reichsrat* was the upper house of the legislature in Weimar Germany. It was the Republic's version of the *Bundesrat* of the German Empire. While the *Reichstag* had members elected by the people in a proportional representation system, the *Reichsrat* had members appointed by the German states and only reviewed laws under certain circumstances, particularly legislation that dealt with state or constitutional powers.

13. This is not an accounting of the complicated story of the Weimar Republic's collapse, but a brief overview designed to explain the environment in which Carl Schmitt worked.

14. Unless otherwise noted, the election data are adapted from Childers (1983).

15. Once the Reichstag was dissolved, the constitution required that new elections be held within sixty days. Schmitt argued, however, that a "temporary postponement could be constitutionally justified" and that it would only be a "technical violation of the constitution" (Bendersky 1983, 176). As a practical matter, the point was moot as the election was held with the requisite speed, but this illustrates Schmitt's belief that constitutional rules are irrelevant, or at least malleable, in favor of the larger goals of the state.

16. Kampffront Schwarz-Weiß-Rot was an "electoral alliance of DNVP, Stahlhelm (the organization of soldiers who fought in the Great War), and the Landbund (farmers' organization). It was founded on February 11, 1933, and this was the only election in which it took part" (Mehring 2022, 277n).

17. For example, the Reichstag changed its quorum rules. Its president barred the KPD (Communist Party), which had earned more than 12 percent of the vote and eighty-one seats, from the Reichstag and then recalculated the quorum number based on the remaining number of delegates. While the NSDAP was able to gain the agreement of the Catholic Center Party through a promise to protect the Church, the party also had members of the SS and the SA "encouraging" (physically threatening) non-Nazi members to vote for the acts.

18. While I cannot address the argument here, the laws passed by the NSDAP, though seemingly in line with the procedures established by the Weimar Constitution,

are not constitutional. The actions are designed to undermine the constitutional system, which distinguishes them from what can be called “constitutional hardball” (Tushnet 2004). The NSDAP positions are not constitutionally defensible, as Tushnet claims they must be, because they depend on ideas contradictory to constitutionalism and limited government.

19. Passing emergency legislation with time limits can be problematic for liberal democracy. John E. Finn (2010) argues that sunset clauses do not often work in any setting.

20. Schmitt was neither an early nor late joiner of the Nazi party. Abel restricted his research to those who joined the party before January 1, 1933. On the other hand, it was not until July that other parties were banned. As a member of the judiciary, Schmitt was incentivized to join the party earlier. After the Enabling Act, the Reich government enacted two laws on the Coordination of the States with the Reich, on 31 March and 7 April. These laws dissolved most state legislatures, reconstituted them under Nazi control, and appointed Nazi Reich governors to oversee them. Also enacted on April 7, 1933, was the Law for the Restoration of a Professional Civil Service. This extended *Gleichschaltung* (party coordination) to the civil service, including the judiciary. It banned non-Aryans with the exception of “civil servants in office from August 1, 1914, who fought at the Front for the German Reich or its Allies in the World War, or whose fathers or sons fell in the World War.” It further banned “civil servants whose previous political activities afford no assurance that they will at all times give their fullest support to the national State.”

21. The SA had grown large and powerful, and Ernst Röhm wanted it to be the core of the German army. German military leaders, who were already suspicious of Röhm due to his homosexuality, however, pushed Hitler to constrain the SA and Röhm’s ambitions.

22. In *Land and Sea*, Schmitt argues that history is a grand story between sea powers (like Britain) versus land powers (like Germany). In *Nomos of the Earth*, Schmitt makes claims about *Jus publicum Europaeum*—common unwritten European legal standards.

23. As Linder notes, “Heuss had voted for the Enabling Act in 1933 while a representative in the Reichstag” (Linder 2016, 155). Since Schmitt had not, the issue of culpability was difficult in post-Nazi Germany.

Chapter 3

Friends and Foes

Despite Carl Schmitt's variety and depth of work, he is perhaps best known for his claim that the basis of the political is the public distinction "between friend and enemy" (Schmitt 2020b, 63). According to Schmitt, this distinction is essential to the creation, functioning, and maintenance of both nation and state. The absence of a public distinction between us (friends) and them (enemies) causes the absence of the political or what Schmitt called depoliticization, which endangers the continued existence of the state and the nation. Schmitt argues the liberal constitutional state poses the threat of depoliticization. Insofar as the liberal democratic state is—or is on the road to becoming—"depoliticized," according to Schmitt, it allows for the incursion into the nation and state of those who might destroy it. Schmitt, therefore, concentrates on the necessity of the political distinction between friend and enemy, and for it to be maintained as sharply as possible. Schmitt also argues for the marginalization or exclusion from the political community of other than friends and for a homogeneous national group controlling the democratic structures of the state because the state should exclusively be a representation of a particular people and national culture.

Donald Trump and Trumpists also view the political as an essential competition between friends and enemies and exploit the insiders and outsiders such a distinction creates. Donald Trump has built his political identity by distinguishing those who rightfully belong inside the political community's friend group, those he often calls patriots or simply MAGA—coming from his slogan: Make America Great Again—and those who should be deemed other and barred from the political community, such as "antifa" (anti-fascists), "conspirators," "liberals," "Democrats," or "RINOs" (Republicans In Name Only). This includes those who fail to show commitment to Trump or Trumpism. Trumpists, like Schmitt, hold that without a recognition of

“them” and an appropriate defense against “them,” the state is endangered. Trump, for example, pursued as some of his first and most important policy goals protection from “them” in the form of a border wall, and a Muslim immigration ban. Both these actions implicitly create friends by identifying foes, be they cultural, physical, economic, or otherwise. These actions also purportedly protect friends from foes. Trumpists act to avoid Schmittian depoliticization by reinforcing the strength of the distinction between friends and others by, for example, linking domestic political rivals with various transnational enemies, thereby delegitimizing them. Trumpists no longer want to win a debate in competition with legitimate rivals, they want to destroy their enemies to protect their particular version of the state.

THE POLITICAL

In *The Concept of the Political*, Carl Schmitt cites his traditional definition of the political: “The concept of the state presupposes the concept of the political. The state, according to current usage, is the political status of a people organized in territorial unity” (Schmitt 2020b, 57). Schmitt notes, however, that if this definition is followed through to its logical conclusion, one ends up with a tautology. “The state then appears as something political, the political as something related to the state—obviously an unsatisfactory logical circle” (Schmitt 2020b, 58). Schmitt notes that alternatively the “‘political’ is often used today as synonymous with party politics” (Schmitt 2020b, 68). This, Schmitt believes, renders the term meaningless; it does not add to the discourse about politics and restricts the term to liberal democratic politics. Schmitt tries to disentangle these political definitions by defining the political independently from the process of politics.

For his independent definition of the political, Carl Schmitt distills his understanding to “*the distinction between friend and enemy*.” He notes, however, this is “a definition in the sense of a criterion, not an exhaustive definition or summary,” but it is an “independent criterion” (Schmitt 2020b, 63). Schmitt argues that it is possible to be political enemies with those believed to be morally good, or those believed to be morally bad. Linguistic, religious, or cultural differences can serve as the markers of an enemy’s identity, but they do so because the group is an enemy, not because the markers themselves are distasteful. Schmitt explains that

the political enemy need not be morally evil; he need not be aesthetically ugly; he need not be an economic competitor—it may even seem advantageous to do business with him. He is just the *other*, the stranger, and it is sufficient to his

nature that he is existentially different and foreign in a particularly intense way, so that in extreme cases conflicts with him are possible. (Schmitt 2020b, 63)

Schmitt also notes “[c]onsequently, the reverse is also true: that which is morally evil, aesthetically ugly, or economically harmful need not be the enemy; that which is morally good, aesthetically beautiful, and economically useful is not necessarily the friend in the specific, i.e. political, sense of the word” (Schmitt 2020b, 64). This means that one can be enemies with those whom it is in one’s interest to be friends. It is part of the sovereign’s power to decide which characteristics are politically important and who are friends and who are foes.

While Schmitt describes enemies as dangerous, the danger he describes seems limited: “in extreme cases conflicts with him are possible,” but the point of drawing the distinction is to create an association, a community of common interest, with “us,” and a disassociation, a constant opposition between us and the others who serve as our foes. The object of the “otherness,” the thing that causes the other to be labeled foreign and serves as a dividing line between us and them, is meaningless; the important thing is that there is a dividing line. This means any distinction between two groups can eventually become political. “Any religious, moral, economic, ethnic, or other antagonism will turn into a political antagonism if it is strong enough to effectively group people by friend and enemy.” Schmitt explains: “A religious community that wages wars as a community, be it against members of other religious communities or other wars, is more than a merely religious community: it is a political entity” (Schmitt 2020b, 73).

For Schmitt, not only does the political include the friend and enemy distinction, but that distinction actually creates the political and remains its essential feature. This means, according to Schmitt, that the Christian call of love is a purely private goal because politics must include conflict. He writes that never

in the thousand year struggle between Christianity and Islam, has it ever occurred to any Christian that out of love for the Saracens of the Turks, instead of defending Europe, we should hand it over to Islam. One need not hate the enemy in the political sense personally and only in the private sphere does it make sense to love one’s enemy, i.e., one’s opponent. (Schmitt 2020b, 66)

ASSOCIATIONS AND DISASSOCIATIONS

Carl Schmitt’s ideas about political association with friends and disassociation with foes are the inverse of those expressed by Dr. Seuss (Theodor Seuss Geisel) in his 1961 civil rights parable *The Sneetches*. In Dr. Seuss’ story there

are two kinds of Sneetches: those who have stars on their bellies and those who do not have the stars. This is an insignificant difference “but, because they had stars, all the Star-Belly Sneetches would brag, ‘We’re the best kind of Sneetch on the beaches’” (Geisel, 1961, 4). As the story continues, the Plain-Belly Sneetches get stars on their bellies so they can appear the same as, and associate with, the Star-Belly Sneetches; yet, the disassociation between the two groups persists. The Star-Belly Sneetches remove the stars from their bellies so they can identify who is “us” and who is “them.” The star is only an emblem of the animosity between the groups; it is not the cause. After the stars are removed from their bellies, the insiders in the friend group become the plain belly sneetches. At the end of Seuss’s book, however, the Sneetches, spurred by their inability to keep removing and reinstating the stars on their bellies, recognize that they are all the same, “they decided that Sneetches are Sneetches And no kind of Sneetch is the Best on the beaches” (Geisel 1961, 24). Seuss’s ending and its lesson about universal equality would be problematic for Schmitt because it advocates depoliticization—the abandonment of the distinction between friend and enemy—and will, therefore, endanger the state and the particular people, or nation, which inhabit that state. The Plain-Belly Sneetches have become the same as Star-Belly Sneetches; therefore, the Star-Belly Sneetches (and the Plain-Belly Sneetches) fail to exist as a distinct group. This is an outcome unacceptable to Schmitt.¹

For the friend and enemy distinction to work for the state, Carl Schmitt believes it must be clear. Political enmity and true political dissociation includes the possibility of killing and war between the dissociated groups. Political association is at its height when people are willing to fight and die for the “us”; political disassociation, on the other hand, is at its height when people are willing to kill the other, merely because they are “them.” “The terms friend, enemy, and conflict receive and retain their real meaning by the fact that they refer specifically to the real possibility of physical killing. War follows from enmity, for it means the existential negation of another being. War is only the most extreme realization of enmity” (Schmitt 2020b, 68).

Carl Schmitt finds the height of association with us, and disassociation with them, desirable because it provides protection for *the people* of a state even if it does not protect all of *the persons* who live in the state. Schmitt clarifies that some of “us” may live outside the boundaries of the state, while some of “them” may live within the state’s border. Schmitt’s association and disassociation are designed to protect a particular people, its society, and culture, the parameters of which are determined by the government designed to protect it. He explains that, “The state is according to its literal sense and its historical appearance, a specific kind of status of a people” (Schmitt 2020b, 57). The state exists to protect and defend the lives and culture of its specific people. Unlike the liberal state, which is

a collective enterprise to which diverse people can agree, the Schmittian state is a people to which only particular individuals can belong. One can be “naturalized” into a liberal citizenship, but one can not become part of a Schmittian friend group because the state represents identity, not a political or ideological commitment.

Because the purpose of the state is to protect the particular people of that state, Carl Schmitt argues that discrete people with sharp boundaries distinguishing them from others are presupposed. This may lead to the question: “Where, to begin with, does the line between groups come from? Schmitt refers easily to *peoples* as if they were built in categories of world society” (Moyn 2016, 296). It is the state, however, that shapes the people with its authority that it reflects. The people can be seen as a “proto” or potential people made up of those with the possibility of fitting into the state’s aspirational polity.² The character of the people is both created and defended by the state, which still has the responsibility to shape and mold the people and polity, defining “us” and clarifying our necessary characteristics. The state also defines the others, their characteristics, and the kinds of marginalization necessary. By doing this, the people are unified, as is their attachment to the state. For example,

Nehru, in his *Discovery of India*, tells a narrative of Indian identity, the basis of a pan-Indian secular nationalism that would take precedence over the potentially warring communal allegiances, Hindu and Muslim. There is thus a sort of dialectic of state and nation. It is not just that nations strive to become states; it is also that modern states, in order to survive, strive to create national allegiances to their own measure. (Taylor 2011, 91)

While the people’s character is not predetermined, Schmitt believed it must be unique and distinguishable from others. It is also formed, at least in part, by the political enemies around which the friends and society are defined. “For Schmitt, the category of *enemy* clearly predominates over that of *friend*. Schmitt actually speaks only of what *foe* or *enemy* means and restricts its usage to a public enemy or enemy of the state. *Friend* is inferable and reconstructible from what sorts of people enable a nation to ward off its enemies” (Botwinick 2016, 350). Schmitt, at a fundamental level, defines “us” as those who have an association which is caused by the disassociation with “them.” “People give meaning to their nationalities” by “the conscious differentiation of self and other, of the body politic from other bodies politic. The differentiation of subject and object, self and other, requires both an object of likeness and an object of difference” (Norton 1988, 53). For Schmitt, the object of difference, though seen as pejorative, is given a preeminent status. Differences are used to highlight the friends’ similarity.

Boundaries between us and them must be discrete and impermeable. Permeability and indiscreteness ignites twin fears in the community: the first is not being able to recognize “them” and the second is the related fear of not being able to keep “them” away from “us.” The need to recognize “them” is why the Nazi party required that its enemies be marked. Most known of these markings is that Jews had to wear a yellow star in all areas under German control, but the Nazis had a more complicated system. Even in concentration camps, the Nazis identified the various “others” and clarified which other each person was. Homosexuals and transsexuals wore pink triangles, Jehovah’s Witnesses wore purple triangles, political prisoners wore red triangles, and Romani men wore black ones.³ These markings served as a visible reminder of the “others” and their kind of threat. It also guaranteed that none of these enemies slipped unknowingly among the state’s national group. The yellow Jewish star emblem,

enabled “national comrades” to tell at a glance who was a Jew, a matter difficult to establish by other criteria. The introduction of this visible stigma also marked the formal transition from defamation and economic ruination to the total exclusion of Jews from the “national community.” (Burleigh and Wiperman 1991, 95)

Identifying and making foes visible enhances unity in the national community; the existence of the enemy serves to unite “us.” There is a benefit, therefore, if the other, or at least the threat of the other, is present in society. The complete obliteration of all foes would be problematic because there would be nothing for “us” to unite against. Those supporting centralized power “justify continued repression by showing that the enemy is still numerous and active” (Ben-Ghiat, 2021, 167). Because the friend group is defined in opposition to the enemies, if a foe is vanquished, an additional one needs to be found because it is only through enemies that the nation understands itself. Without enemies, the group unity and justification for the state will be lost, and Schmitt’s depoliticization can occur. A new enemy or its threat needs to be found. “One often gets the impression that he [Schmitt] makes the possibility of friendship dependent on the existence of enmity, that only those who are challenged by enemies are associated with each other and experience their political “tensions” with intensity” (Mehring 2022, 186–187).

SCHMITT AND LIBERAL CONSTITUTIONAL DEMOCRACY

Schmitt criticizes the liberal constitutional state not only because it fails to identify enemies but also because it tries to avoid the concept of enemies

entirely. Because of its commitment to universalism and equality, “liberalism has tried to dissolve the enemy from a business standpoint into a competitor, from the intellectual standpoint into a debate opponent. In the field of economics there are however, no enemies, only competitors, and in a completely moral and ethical world perhaps only debate opponents” (Schmitt 2020b, 65). Schmitt believes this view denies “ontological reality” and claims that “the enemy is not a competitor or opponent in the general sense” (Schmitt 2020b, 65). A problem with liberalism, according to Schmitt, is that liberal states are not only in danger of depoliticization; the goal of the liberal state is to depoliticize conflicts and the state. “Liberal political theory thus depends on the assumption that political conflict can be transformed into a matter of opinion” (Kennedy 1988, xix).

Liberal constitutional states try to categorize and regularize situations through law and reason. It becomes difficult, using reason to identify enemies in Schmitt’s model because they need not be selected for any logical reason or pose any particular threshold of danger; they “can neither be decided by a previously determined general norm, nor by the decree of a ‘disinterested’ and therefore ‘impartial’ third party” (Schmitt 2020b, 63). Only a member of the friend group can determine if one is a danger and if a group must be opposed by force. The others need not understand the reasons for enmity or disassociation, but the categories can still do political work for the state and friends. Groups that disassociate need not view the friend and enemy distinction the same and animosity need not be symmetrical. The German polity during the Nazi regime was mobilized to exterminate all Jews, for example, but Jews did not mobilize to kill all Germans. Because both the need for, and intensity of, enmity can only be known by those on the inside of the friend group, there can be no mediation between groups. Any bias can be justified as legitimate, and there is nothing any targeted group can do to overcome bias.⁴

Because the distinction between friend and enemy is necessary for the state to function, the dividing line between friends and foes itself can become an important way to identify friends and enemies. “Whoever calls the friend/enemy distinction—his [Schmitt’s] construction of the political—into question is the *true enemy*, for with his universalistic vocabulary he is, according to Schmitt a deceiver. Such a doubling of the ‘enemy’ concept is the basis for the polemic force possessed by this influential essay on politics” (Gross 2016, 109). Those who fail to recognize the true danger of the “others” are the greatest danger themselves because they can provoke depoliticization and make the forming of new political enemies difficult. Ecumenical views and policies cause the destruction of the particular people. Those who try to destroy the dividing line between friends and enemies are as dangerous or even more dangerous than the enemies themselves because they not only discount specific enemies but make the possibility of any enemies impossible.

Those who deny a threat become the threat and, therefore, enemies themselves. This spurs Schmitt's "sharp criticism of liberalism, which is his real opponent because he derives the political difficulties, the Weimar 'situation,' from the liberal delusion of the political agents. The individualist basis, Schmitt holds, negates the 'political idea'" (Mehring 2022, 189).

Adherents to liberal democracy and Schmittian politics see the political world in fundamentally different terms. One side—advocates for the liberal constitutional state—believes in a universalist view of democracy, advocating the potential inclusion of all. The other side—advocates for the Schmittian political view—believes in a particularistic view of democracy, where only those who are part of the state-defined friend group can be part of the nation, state, and democratic electorate.

DONALD TRUMP: INSIDERS AND OUTSIDERS

Donald Trump, like Carl Schmitt, has long divided the political world into friend and foe. Even before he began running for president in June 2015, he had already created boundaries within the valid American political community. During the Obama administration, Donald Trump became known as a "birther"—someone who claims that Barack Obama was born outside of the United States, usually in Kenya, making his eligibility to serve as president of the United States constitutionally suspect. The provision of Article II of the Constitution, which lays out the criteria for presidential service, states that one needs to be a "natural born citizen," but it does not explain what that means. Since Barack Obama's mother was a United States' citizen, he would have been entitled to citizenship from birth no matter where he was born; therefore, the most common interpretation of this article makes his place of birth meaningless. The same ineligibility claims were not widely levied against the candidacy of Ted Cruz, who was born to American parents in Canada, for example. Such a factual untangling of the argument misses the point of the claim, however. Trumpists are making a claim about identity and belonging, not about legality. This is evidenced by Trump's constitutionally irrelevant claim that Obama was a Muslim. There are no formal religious criteria for federal public office, but Trump used this claim to brand "Obama the Muslim" (and Kenyan) as an "outsider." As Schmitt suggests, this is sufficient criteria for an enemy: "He is just the *other*, the stranger, and it is sufficient to his nature that he is existentially different and foreign" (Schmitt 2020b, 63).

In defining Obama this way, Trump implicitly defines "us," valid Americans, by explaining who is not: An American is a person who is born within the United States' borders to American parents and is a (white) Christian. There is an insidiousness and invidiousness about the division between

insiders and outsiders. During the 2008 campaign, at a John McCain event, when a woman called Obama a Muslim, McCain corrected her, “No, Ma’am,” he said—clarifying that Barack Obama was not a Muslim. In McCain’s correction, however, he reinforced the division and the implicit othering of Muslims, as well as the politicization of that difference. While Colin Powell’s response, unlike McCain’s, undermined the insidiousness of the claim—he said, “What if he is? Is there something wrong with some 7-year-old Muslim kid believing that he or she can be president?”—it did nothing to correct the misinformation or invidious comparisons.

Trump also linked Obama’s presumed outsider status with Obama’s illegitimacy. If, as Trump claimed, Obama was not a valid member of the polity, Obama not only could be, but perhaps should, or must be, opposed. Barack Obama represented an existential threat to the state because rule by an outsider is a usurpation of state power. Trump’s claim that a political opponent is illegitimate is rare in functioning liberal constitutional democracies. In liberal constitutional democracies, political opponents are generally challenged not because their identities or even perspectives are considered invalid; rather, political competitors generally argue that their policies are more effective. Trumpists do not claim Obama is representing another valid point of view. He is an illegitimate outsider invading us: Obama is imposing “others’ policies” which are designed to destroy us or our way of life. This changes the mode of evaluation from whether a policy is good or useful to whether its advocates are legitimate, or valid members of the polity. Because Obama is an invalid choice on its face, those who make such a choice must also be invalid.

“Birthers” maintain their beliefs despite any and all evidence to the contrary, even if it appears to be the very evidence they previously claimed would satisfy their doubts, because of the primacy and strength of the division between friends and foes. Donald Trump, for example, joined calls for Barack Obama to release his birth certificate and prove his eligibility for president. Obama released his long-form birth certificate showing he was born in Hawaii. Trump rejected its authenticity, however. More exactly, he suggested the document could not be proved authentic. This is the way Trumpists dismiss evidence interrogating their worldview. They fold it into the very thing that they are questioning. “How do we know that the evidence is real?” they ask. Individuals who produce (the demanded) evidence become “them” and are likely to be labeled as conspirators involved in the cover-up. Once one is committed to being a birther, it is unlikely any evidence would be sufficient to sway a person’s opinions.

In *When Prophecy Fails* (1956), the investigators conclude that when “an individual believes something with his whole heart” or when “one has taken irrevocable actions because of it” and that person “is presented with evidence, unequivocal and undeniable evidence, that his belief is wrong: what will

happen? The individual will frequently emerge, not only unshaken, but even more convinced of the truth of his beliefs than ever before. Indeed, he may even show a new fervor about convincing and converting other people to his view” (Festinger, Riecken, and Schachter 1971, 3).⁵

If demanded to provide evidence of their own—in this case that Barack Obama was born in Kenya—a birther can claim that this is what they heard or that “people” have questions that need to be addressed. Presentation of facts does not respond to birther complaints because they fail to address the basis of their argument that Obama is not like a true American; therefore, he cannot be one of us (an American). Because Obama cannot be one of us, he should not be able to prove that he is. Birthers’ arguments and interpretation of evidence, and facts, are different from non-birthers (others), and one can be revealed as the other, or friend, through one’s framing of the issue.

Since Donald Trump began his 2016 presidential campaign, he has continued to cultivate this framing of friends and others who are enemies. Donald Trump’s first speech of his presidential campaign in June 2015 claimed “we,” native-born Americans, are in danger from “them,” immigrants, whom Trump associated with murderers, thieves, and people who are generally destructive to society. “The U.S. has become a dumping ground for everybody else’s problems,” he claimed. Immediately, people who are not Americans are the enemy. They are not even people but problems and someone else’s who are being “dumped” on “us.” These “problems” are “coming from more than Mexico. It’s coming from all over South and Latin America.” Americans (or true Americans), Trump claims, know on whom to blame their problems and whom to unite against: immigrants who are “bringing drugs. They’re bringing crimes. They’re rapists.” While Native Americans came to North America thousands of years ago and those brought in chains primarily through the Middle Passage did not choose to immigrate, for most Americans, their arrival, or that of their ancestors in this country was voluntary. The immigrants in Donald Trump’s speech have no volition; they are being sent and are part of a plot. They are unlike us or our ancestors. This is a dehumanizing framing. In a speech in Ohio on March 16, 2024 when addressing immigrants, Donald J. Trump said: “I don’t know if you call them ‘people,’ in some cases they’re not people, in my opinion.” Donald Trump wants to formally divide “us” from “them,” and he proposed doing it with his 2016 defining issue: a wall on the southern border of the United States.

Americans, or perhaps true Americans, or “patriots,” as Trump terms them, recognize the danger of the immigrants. Those who do not recognize the danger cannot be “patriots” and are, therefore, part of the problem. At one level, Trump’s defining of a “patriot” seems merely rhetorical, but it is doing some of the work of the Schmittian political. If patriots are those who believe as Trump does, those who do not believe like him are not patriotic,

and therefore, their points of view should be silenced as illegitimate. Trump and subsequent Trumpist rhetoric are used to divide not only foreigners from Americans but those who do not see the “danger” from those who do. Those who fail to correctly (from the Trumpist perspective) recognize distinctions allow enemies to integrate with friends.

COMMUNITY STANDARDS

Liberalism argues for the universality of human reason. All are also persuadable through the use of that reason, and everyone can choose what she or he believes is best through the use of dispassionate reason. Dispassionate reason is a problem for Trumpism, however. Trumpists are worried, as was Schmitt, that if one can be dissuaded from beliefs or commitments, especially the belief that the “other” is a danger, the national group has weak commitments. Because of this, commitments like those of the birthers appear to liberal adherents to be taken on faith rather than reason.

In *Political Liberalism*, John Rawls writes about an overlapping consensus on which liberal society depends. Rawls argues that when adopting criteria by which to structure society, the idea is not to reach elusive “truth,” but rather to find a point that the participants find mutually reasonable and acceptable (Rawls 1993, 94). This aspect of liberalism is problematic for Trumpists because it requires “friends” to mediate with rivals, in the liberal constitutional state’s depoliticized view, or “enemies” in a Schmittian or Trumpist understanding. It also requires that others be accommodated—political membership is open to all, no matter their religious, cultural, ethnic beliefs, and practices.⁶ Trumpists do not advocate mediation between those with different worldviews. Instead, they define and reinforce their beliefs, which serve as the boundaries of their friend group. They endeavor to protect the distinction between friends and enemies and keep friends from being encroached on by enemies. Indeed, among Trumpists, friends and foes are decided based on loyalty.

This loyalty criterion is one that Trumpists use openly. Trump, for example, fired and then ordered “Joseph Maguire, the acting director of national intelligence, to vacate his office. Maguire’s crime? His office had privately briefed a bipartisan group of key member of congress, as the law required, on intelligence—specifically that Russia was interfering in the 2020 election and had developed a preference for Trump” (Leonnig and Rucker 2021, 50). According to what Trump told Maguire, the reason he was fired was that the legally mandated briefing could be used as campaign fodder; essentially, Maguire was fired because he showed obedience to law rather than to Trump. Not only are there no universal standards or characteristics on which to judge

friends and foes, but even conformity toward the law can no longer serve as a standard to judge political fidelity. Only members of the friend group know what the standards are and only those who are part of the association can understand the needs and nature of disassociation.

The concept of “friends” is fundamentally limited to only those who properly understand the enemy. Those who do not properly understand the problem the enemies pose become enemies themselves because they might destroy the friend and enemy distinction. This is evident in the Trumpian myth of voter fraud. If an individual does not believe in the voter fraud myth, that person becomes, in the Trumpist telling, an enemy of American democracy and the constitution. On the other hand, only those who believe in the stolen election can be members of the friend group. The Republican National Committee (RNC) made this clear in 2021 when it publicly censured and declined to further support Republican members of the House of Representatives, Liz Cheney and Adam Kinzinger. The RNC did this because those two members joined the committee investigating the events of January 6, 2021. The RNC or Trumpists did not like either the focus or the information uncovered from the committee, so it has been labeled as the illegitimate work of enemies.

MEMBERSHIP, IMMIGRATION, AND DEMOCRACY

Trumpism views Americans as a national, ethnic, and cultural community rather than a political one. This helps explain the Trumpist view of immigration and why one of the main animating ideas behind Donald Trump’s 2016 campaign was a wall on the U.S. southern border. This wall was meant to protect the United States and Americans from others (them) who would destroy “us” and our way of life. Since potential immigrants are others, we can treat them in ways that would be unacceptable to us, such as separating parents and children. In a CNN town hall in May 2023, Donald Trump suggested that immigrants should be treated badly enough to disincentivize migration to the United States. “When you say to a family that if you come, we’re going to break you up, they don’t come. And we can’t afford to have anymore. . . . Our whole country is being destroyed.” This harsh treatment is validated because those coming across the border are an existential threat to Americans and the U.S. way of life; because they are others, they should not even be considered people. Indeed, while campaigning for the 2024 Republican primary in New Hampshire, Donald Trump said, “They Let — I think the real number is fifteen, sixteen million people into our country. [according to Pew the number is between ten and eleven million] . . . They’re poisoning the blood of our country. . . . They poison mental institutions and prisons all over the world, not just in South

America, not just to three or four countries that we think about but all over the world. They're coming into our country from Africa, from Asia, all over the world." Trump did not misspeak in the heat of the moment. Overnight, in his all-caps style, Trump posted, "illegal immigration is poisoning the blood of our nation. They're coming from prisons, from mental institutions—from all over the world."⁷

Trumpist policy echoes Schmitt's beliefs, including his advocacy for the "right type of settler." Both advocate that the state use its power to make sure it cultivates and maintains the right kind of homogeneity with immigration. Ben Ghiat puts Trump's child separation policies within a larger anti-liberal pursuit for homogeneity, arguing, "the scale of these forced separations—almost 70,000 in 2019 —brings Trump's practices in line with states . . . where children were taken from Jewish, leftist, and indigenous parents to be raised by more 'appropriate' individuals" (Ben Ghiat 2021, 188). Trumpists do not believe immigrants can ever adequately assimilate into the American way of life; they remain others.

Liberal constitutional states understand immigration in a different way. In accordance with liberal ideals, immigrants and asylum seekers are not inherently unacceptable, but bearers of universal rights and liberties. Even if a potential immigrant has no legal right to stay in the country, she should be treated according to standards of universal human dignity. Liberal constitutional states have immigration standards which include human rights and legal processes. The Trumpist policy to allow immigration from friends alone leads to a short-circuiting of due process. Theories of the "melting pot," where all kinds of people come together to add to the society, but they become indistinguishable in the soup, or theories of the "mosaic," where all kinds of people are still recognizable but come together to form one national picture, are problematic for Trumpists because both would mean the political identity of "us" is not stable. The soup or picture can change: this is unacceptable.⁸

Trumpists, like Schmitt, argue that democracy can only be used when the state is homogeneous in the sense that it is only friends—members of the nation that the state is designed to protect—who should be involved in the democratic process. Trumpists argue that democracy needs to be protected *for us* and also *from them*. This is why the fear of illegal, but also legal, immigrants is so strong. French novelist Renaud Camus wrote *Le Grand Remplacement* (2019), in which he argues for what has been termed "replacement theory." This theory has been espoused by Trumpists as a way to explain the danger of "others" and why they need to be excluded from the democratic process. Replacement theory is the idea that immigrants, usually non-white, are being imported, often by Jews, but sometimes by the vague political left, to overwhelm the white population and their voting power. Trumpists believe that the immigrants are a threat against the white, Christian, cis-gender,

native-born (or as Tucker Carlson calls them “legacy”) Americans. On April 8, 2021, Tucker Carlson explained on his Fox News show:

I know that the left and all the gatekeepers on Twitter become literally hysterical if you use the term “replacement,” if you suggest that the Democratic Party is trying to replace the current electorate, the voters now casting ballots, with new people, more obedient voters, from the third world. But they become hysterical because that’s what’s happening actually. Let’s just say it: That’s true. . . . Every time they import a new voter, I become disenfranchised as a current voter.

It is not clear what exactly Tucker Carlson means by the third world. Originally, this term was used to refer to countries that were not aligned with either of the major bipolar superpowers of the Cold War: the United States and the Soviet Union. After the Cold War, “third world” has been used to refer to countries with smaller economies, and even further refined to refer to the non-white, poorer countries of Africa and Asia. I think this is closest to what Carlson meant. Those from the third world are others, but immigrants from, presumably, Europe are fine. Carlson believes they are like him and, therefore, not a threat or will not lead to his disenfranchisement. According to Carlson, immigrants, or more broadly any citizen who aligns with the Democratic Party, is other and not truly American.

Through this formulation, Carlson is representing a nationalist understanding of the state rather than a traditional liberal constitutional democratic point of view. Like Schmitt, Carlson believes that the state is designed to protect the nation, its particular people, and culture. Immigrants can join American political society, but Carlson does not see them as ever equal to “legacy” Americans, nor should their votes ever be equal. Immigrants, especially those from the third world (non-white), can never have a vote as valid as Carlson’s or those of similar identity. Because they are “others” by their nature, Carlson does not consider that these “others” could vote like him and strengthen his electoral voice; they can never be part of his friend group with its particularistic characteristics of membership.

Carlson also claims that “they” (the foes) are importing new voters to hurt “us.” In his statement, he said that “[e]very time they import a new voter, I become disenfranchised as a current voter.” Tucker Carlson delegitimizes his domestic political opponents by conflating them with international foes. The left and Democrats are associated with the non-American others who can overrun the valid American voters and citizens because they are aiding and importing others. Carlson links the external foe to the internal democratic rival, aligning both and assigning them similar attributes. This helps to argue that the votes of political opponents are illegitimate, adding to the Trumpist idea of voter fraud. For liberal constitutionalists, democracy is a limited

process which reaches an indeterminate conclusion. Trumpism, on the other hand, starts with a conclusion at which a well-run process would lead. If a process does not lead to the preferred conclusion, it should be changed. Since Democrats are often actively working against Trumpists, Trumpists conclude that Democrats are trying to undermine, or even subvert, the American commitment to democracy; therefore, non-MAGA candidates cannot be the logical or correct choice. Trumpism has turned the clash that existed between rivals in the liberal constitutional democracy into a fight between enemies.

ENEMIES VS. RIVALS

Trumpists, as Schmitt would suggest, are focused on the others, or the foes. This requires the redefinition of the foes through time, adding new distinctions to older ones which have become insufficient to define and unite the friend group. In 2016, Trump divided Americans who were citizens from birth against (mostly Hispanic and undocumented) immigrants with his rhetoric and border wall. While this was somewhat limiting, most Americans could be counted in “us.” Over time, the issue of the border wall or immigration has become insufficient to identify Trumpists. A new animating device to unite “us” was needed. This requires the creation of a new “them,” clarifying and purifying “us.”⁹ Trump began his presidency, for example, by limiting immigration from Muslim-majority countries. The Trump administration found internal enemies, too. “America’s new president began his tenure by launching blistering rhetorical attacks on his opponents. He called the media the ‘enemy of the American people,’ questioned judges’ legitimacy, and threatened to cut federal funding to major [Democratic] cities” (Levitsky and Ziblatt 2018, 176). As time went on, Trumpists turned their ire toward liberals, then Democrats, then non-Trumpists, further purifying the “us.” Trumpist foes now include (among others) those who are immigrants, the media, Democrats, LGBTQIA+, and RINOs (Republicans In Name Only), which is the Trumpist name for any Republican who disagrees with Trumpist views. Eventually, Donald Trump’s own vice president became one of his enemies. Donald Trump not only calls moderate Republicans, e.g., Lisa Murkowski a RINO, but in 2022 when Mike Pence said before the conservative Federalist Society that neither he, nor any one person, had the right to take away the choice of president from the American people—a fundamental democratic and constitutional idea—Pence too was delegitimized by the epithet RINO by Trump.

Being labeled an outsider has real-world consequences, including the possibility of violence. In spring 2022, Missouri GOP Senate candidate Eric Greitens, for example, released a political advertisement in which he

takes his rifle to go RINO hunting. Liz Cheney notes some of her colleagues believed that Trump should have been impeached but were scared to vote for it:

One concern I hear repeatedly was this member believed Trump should be impeached, but they feared a vote for impeachment would put them—and their families—in danger. We were now entering territory where the threat of violence was affecting how members voted, preventing them from voting to impeach the president who had already unleashed violence. . . . When one member (who ultimately voted against impeachment) told me that he knew what Trump had done was impeachable but he couldn't vote to impeach because "I am afraid it will put my wife and my new baby in danger," I absolutely understood his fear. But I also thought, "Perhaps you need to be in another job." (Cheney 2023, 131)

As Schmitt advocates, the threat of violence against foes is ever present. This can turn into real violence. Ruth Ben-Ghiat cites research that showed "a 226 percent increase in hate crimes in counties that hosted a Trump rally in 2016" (Ben-Ghiat 2021, 187). Donald Trump was leveraging this threat of violence in his attempt to get Mike Pence to aid in his plans for January 6, 2021. The evening before, however, Pence told Trump that he would not do what the latter wanted and that he did not have the power to substitute his judgment for the will of the voters. "'No, no, no!' Trump Shouted. 'You *can* do this. I don't want to be your friend anymore if you don't do this'" (Woodward and Costa p. 229). After that, Trump issued inflammatory tweets about Pence, even when he was in physical danger on January 6.¹⁰

Mike Pence's jeopardy was caused by the merging of the private and the public. Donald Trump's private enemies become public and political in the Schmittian sense as Trumpian private enmity serves as the justification for public opprobrium. Indeed, Trump often uses public discourse and the organs of state to address personal concerns. On January 4, 2021, when Donald Trump was campaigning for the two senate run-off elections in Georgia, he reviewed his personal grievances. He said of Mike Pence, "He's a great guy, . . . of course, if he doesn't come through, I won't like him quite as much" (Woodward and Costa 2021, 227). A couple of days later, when it was clear Pence had not "come through," Trump supporters invaded the United States Capitol building. "Many were looking for Mike Pence. 'Hang Mike Pence!' they chanted as they roamed the halls. 'Bring out Mike Pence! Where is Pence? Find Him!' Outside a makeshift gallows had been erected" (Woodward and Costa 2021, 241). Ben-Ghiat argues that the merging of public and private is common when an individual is tied to the state. If one person is responsible for law, it makes sense that "states turn the ruler's obsessions into policy" (Ben-Ghiat 2021, 73).

Trumpists engage in a project of redefining enemies and punishing failures of commitment or loyalty to the friend group. Karl Rove, the former Republican strategist, noticed this dynamic at play. There are people “who say, ‘You know what, you can’t disagree with me unless—if you’re not with me, you’re a zero and I’m going to punish you’” (Woodward and Costa 2021, 286). No dissent or heterogeneity should be allowed on any issue. Otherwise, the political lines are not clear. The elimination of heterogeneity is at odds with practice in liberal constitutional democracies generally, and in the United States in particular, where there is a long tradition of political parties treating each other as rivals rather than enemies. The idea of rivalry is objectionable to Schmitt. Indeed, he criticizes liberal states because they can “dissolve the enemy . . . into a competitor” (Schmitt 2020b, 65). One can engage in political negotiation with rivals. Rivals are those you may want to beat for a particular goal, but competitiveness between rivals is restricted to that goal. One may want, for example, to beat a rival on the tennis court, but that competitor could be part of the same family or the same religious or cultural community. Rivals may be opponents now, but it is possible to engage in a separate common endeavor with them, be it football or politics. Enemies are different, in that one does not have common ground with them.

John McCain’s (R-AZ) 2008 concession speech illustrates the liberal constitutional democratic view of rivals.

Senator Obama and I have had and argued our differences, and he has prevailed. No doubt many of those differences remain. These are difficult times for our country. And I pledge to him tonight to do all in my power to help him lead us through the many challenges we face. I urge all Americans.

I urge all Americans who supported me to join me in not just congratulating him, but offering our next president our good will and earnest effort to find ways to come together to find the necessary compromises to bridge our differences and help restore our prosperity, defend our security in a dangerous world, and leave our children and grandchildren a stronger, better country than we inherited. Whatever our differences, we are fellow Americans. And please believe me when I say no association has ever meant more to me than that.

McCain acknowledges in this speech that he and Barack Obama were rivals for the same goal: the presidency. He also recognizes that both wanted the presidency for the same purpose: to implement policies that are best for the United States and its citizens. It is, therefore, relatively simple to say, “We’ll get them next time.” It is difficult to say the same thing and surrender control of the government if one views the election as subjecting the state to an enemy takeover. This is why McCain’s understanding of political rivalry is *problematic* for Trumpism. While multi-party negotiation is often considered

good in the liberal constitutional state, in Trumpism it makes more sense to punish members for failing to maintain ideological purity. For example, Trumpists attempted to punish the thirteen Republicans who voted for Joe Biden's bipartisan infrastructure bill, because they engaged in a common endeavor in the House with the Democrats.

For Trumpists, like for Schmitt, rivalry is objectionable because it can destroy the ability of a group to be discrete and insular. Treating political opponents as enemies, however, leads to an inability to negotiate or mediate between different views. Donald Trump, emblematic of the view that others must be marginalized if not destroyed, acts against his enemies as a method to ensure the purity of "us." "After his acquittal [in his first impeachment trial], Trump began a retribution campaign to root out the so-called deep state foes and punish his perceived enemies within his government, including anyone he believed contributed to his impeachment or had otherwise crossed him in the Ukraine saga" (Leonnig and Rucker 2021, 50). Indeed, Trump had hired "Johnny McEntee, [as] the twenty-nine-year-old director of presidential personnel whom Trump had empowered to root out his perceived enemies from government and to seed the bureaucracy with loyalists" (Leonnig and Rucker 2021, 100). Trump politicized his private friends and enemies. One could not oppose him on one issue and still be committed to the Trumpist vision of America. Any opposition makes one an enemy who must be kept away from "us" and our state.

For Trumpists, political opponents are not equals competing for the same goal; they are enemies endangering the very existence of the national group. They should not be tolerated, therefore, as political equals. According to Trumpists, Democrats do not have a different philosophy or are misguided about what is best for the country; they are enemies with designs on destroying America and its identity. This means that what they (and those who support them) want and their votes can be opposed as fundamentally anti-American. Trump's political opponents are not misguided but illegitimate: "lying" Hillary Clinton should be locked up, and senile and old Joe Biden is part of a criminal family. Indeed, there could have only been one legitimate electoral outcome—a win by Donald Trump. This conclusion justifies restrictions on the democratic process and the right to vote, and furthermore, justifies violence against the incorrect outcome.

CONCLUSION

Trumpism adopts the Schmittian view that the political is an essential competition between friend and enemy. To maintain such a distinction, Trumpists support a strong separation between us and them. They have identified

various foes but have also “doubled” this political identity by labeling as foes anyone who does not agree with Trumpism’s categorizations. Trumpists agree with Schmitt that without a recognition of “them” and an appropriate defense against “them,” the state is endangered. It is important, therefore, to reinforce the fundamental distinction between friends and foes. The use of this distinction advocates the notion of enemies over rivals with whom we have a common goal, and therefore, challenges liberal constitutional democracy. Because Trumpists see their political opponents as enemies, mediation and interaction between them are at most limited, and disagreements may even escalate to violence. Instead of a democracy where the losing side believes it has a chance to achieve electoral victory next time, Trumpism’s view leads it to abandon discussion and mediation in favor of destroying their enemies.

NOTES

1. While consistent with the “melting pot” ethos of the day, *The Sneetches* can be read as an assimilationist model of pluralism and can be attacked and defended as that pluralistic model. For a discussion of various forms of pluralism, see Newman (1973) and chapter 2 of my dissertation, *Consenting to Pluralism* (2000).

2. Sheldon Wolin argues this is true of all constitutional orders, “a constitution has a circular nature: it is constituted by the collectivity . . . and the actions performed under it, in turn, constitute the collectivity.” (Wolin 1990, 12–13) Will Harris writes about the inevitable interplay between framers and citizens, “It is likely that these two roles, usually separated widely by time and nature, should merge in a coherent theory of the constitutional enterprise, in that framers of a constitutional order must anticipate themselves as citizens, and citizens of the constitution must imagine the circumstances of their ratifying it—so that framing and interpreting are again interwoven, this time through real political actors who make the constitutional order fundamental and who make it meaningful” (Harris 1993, 32n).

3. These systems varied somewhat from locality to locality, but Romani and Sinti (a Romani subgroup which had existed in Germany since the Middle Ages) women were generally assigned the same color as “undesirables” or “anti-socials” along with prostitutes. The system also had gradations. Jews, for example, could be forced to wear combination symbols. If one was homosexual and Jewish, the star could be made of one yellow and one pink triangle.

4. One can look to Madeleine Albright for evidence of this. Albright, in an effort to avoid anti-Semitism, was raised Catholic without knowledge of her Jewish heritage; yet, one can easily find those (mostly white nationalists) who still discuss Albright’s Jewishness and its effect on foreign policy, and do not consider her a legitimate member of the polity. The “other” does not have control over characteristics that cause marginalization. Hannah Arendt comments, “if you are attacked as a Jew you have got to fight back as a Jew. You cannot stay “Excuse me, I am not a Jew; I am a human being.” This is silly.” (1979, 334). Discrimination is based on the

interlocutor's perceptions, and "Judaism like some nationalities is a club which one can join but which none can escape" (Rubinstein, 1971).

5. *When Prophecy Fails* arose from a study of an eschatological cult whose religious beliefs surrounded date- certain events which failed to occur. The authors studied the members' reactions to the failed prophecies.

6. Rawls (1993) maintains that the views debated in the public sphere must be reasonable. He fails to define reasonable, but he wants all views to be able to engage the others: one cannot negate other reasonable comprehensive views. Rawls wants all publicly debated views to be compatible with liberalism.

7. The 2024 Biden campaign criticized Trump's statement by releasing one which read in part: "Donald Trump channeled his role models as he parroted Adolf Hitler, praised Kim Jong Un, and quoted Vladimir Putin while running for president on a promise to rule as a dictator and threaten American democracy." Hitler did use the term "blood poisoning" in *Mein Kampf*, writing, "All great cultures of the past perished only because the originally creative race died out from blood poisoning."

8. For a discussion of these metaphors, see Griffen (1998), Horowitz (1984), and Porter (1965).

9. John E. Finn (2019), in his investigation into the alt-right and the constitution, calls the dynamic, which requires new enemies to be continually uncovered, "purity cycling;" this is a good term for Trumpists as they are continually in pursuit of a pure version of the movement.

10. Mike Pence was presented with two major options by Trump and his collaborators. The first was that Pence would reject electors from several states that had voted for Biden. He could then declare either that Trump had a majority of the remaining electoral votes or declare the need for a contingent election in which each state delegation in the House of Representatives gets a single vote. Trump believed he would win because more states were in Republican hands (at least a majority of the delegation was Republican); this is at best a debatable proposition. Trump was relying, for example, on the vote of Wyoming, as one of the twenty-six GOP-controlled states. It was controlled by Liz Cheney as its sole representative. Additionally, it is not clear that all other Republican states would have voted to overturn the election results. The second option presented was that after Pence rejected the electoral votes he could send them back to the states for reconsideration. A Commander-in-Chief asking for extraordinary, extralegal reconsideration of legally certified votes is coercive and is meant to be.

Chapter 4

The Sovereign State

Carl Schmitt claims that the essence of the political is the division between friend and enemy, but he fails to define friends and enemies with specificity. This is because, for Schmitt, friends and enemies are distinct to each polity, and identifying them is a task for the polity's sovereign. The nature and elements of unification are also unique to each polity. Individuals can determine their own personal enemies in the remaining limited private sphere, but political enemies are determined by the sovereign and must be held in common. Carl Schmitt believes that, unlike in liberal democratic theory in which the people are sovereign, decisions about legitimacy, stability, and society should be made by the state *as sovereign*. This consolidated power can be directed powerfully, quickly, and easily. The sovereign, according to Schmitt, has the responsibility to do several important things. One of these is that the sovereign establishes law. As a god creates laws of the natural world, a political sovereign creates the juridical order. The sovereign is also responsible for creating legal stability; Schmitt argues that without a strong single sovereign interpreter, it is impossible to know what law means. The sovereign must also determine enemies and friends and establish the boundaries of the state and the nation.¹

Trumpists view sovereignty not in the hands of the people, as is commonly understood in liberal democratic states (and outlined in the United States Constitution), but rather, like Schmitt, in the hands of the state, which is controlled directly in a unitary way. Trumpian politics reject the popular sovereignty of liberalism because it allows the participation of citizens who are not part of the friend group. The sovereign rules, if not with divine authority, at least with divine-like power, creating and making sense of the world. This comprehensive, totalizing, and religious-like view can be seen in contemporary American conspiracy views such as QAnon. QAnon is an evidence-free

belief system that ties prominent Democrats and Hollywood elites to a far-flung pedophilic conspiracy. QAnon is of recent origin, but conspiracy theories are not new in American politics. Richard Hofstadter (1964) argues that there have long been those who operated in what he terms as the paranoid style in the history of American politics. This paranoid style includes individuals like Joe McCarthy, who understood the American project as one which is under attack from without and within. While Trumpism can be seen as part of this trend of conspiracy theories, it is different. Trumpism has called for the abandonment of the liberal constitutional state in favor of a Schmittian-style state in which the sovereign state creates and modifies the juridical world. It abandons liberal constitutionalist principles in which the state is limited by a natural or a conventional juridical world controlled by the sovereign people.

SOVEREIGN AUTHORITY

Sovereignty, according to Carl Schmitt, is a religious concept in both origin and function. Schmitt believes that, “All significant concepts of the modern theory of state are secularized theological concepts” (Schmitt 2020a, 25). Before the Enlightenment, religion provided both the structure and legitimacy for states in Western Christendom. The authority of the state had long been tied to divine authority, predominantly under a belief in the divine right of kings. Under this theory, an earthly sovereign (king) has God’s *imprimatur*; therefore, the sovereign carries divine authority, as do the sovereign’s political and policy decisions. As James I said in his 1610 address to the parliament:

Kings are justly called gods for that they exercise a manner or resemblance of the divine power upon earth. For if you will consider the attributes of God you shall see how they agree in the person of a king. God has the power to create, or destroy, or make, or unmake at his pleasure, to give life, or send death, to judge all, and to be judged not accountable to none; to raise low things, and to make high things low at his pleasure, and to God are both soul and body due. And the like power have kings: they make and unmake their subjects; they have the power of raising and casting down, or life and of death; judges over all their subjects, and in all cases, and yet accountable to none but God only. They have the power to exalt low things and abase high things, and make of their subjects like men at chess: a pawn to take a bishop or a knight, and to cry up and down and of their subjects, as they do their money. And to the king is due both the affection of the soul and the service of the body of his subjects. (James I 2007, 4)

People obeyed the state because if they did not, they would be disobeying divine authority and, therefore, be subject to eternal damnation. The state

recognized and promoted its part in individuals' religious beliefs, helping to create a common and obedient people; the stakes were too high for the people to oppose the state.

Divine right of kings helps people know their place in the world, especially when paired with another popular idea in medieval Europe—the great chain of being. The medieval European great chain of being is a Christian concept that ranks all kinds of life and matter in a hierarchical static chain (it is impossible to move between the links). Everything and everyone has a clear and known place. At the top of the chain is God. The level immediately below contains the angels divided into their various orders, e.g., seraphim, cherubim, etc. Each stratum, except God's, has multiple gradations. The king of the beasts—the lion—is so named because it is the highest ranking of the animals, and the oak tree is the highest ranking of the plants. In the stratum of humans, which exists between angels and animals (beasts), there are also gradations. If one is an earthly king, he is meant to rule others by a divine natural hierarchy. If one is a serf, that too is part of God's plan. The serf should be satisfied with her station despite that it is below others in the social, political, and religious hierarchy, because "something proper is due to each class of person in respect of his particular office" (Aquinas 1988, 143). Since people believe society is divinely ordered, disobedience can result in the consequence of eternal damnation. The person of the king or sovereign, moreover, is tied with the existence of the state.

The liberal democratic state, founded in opposition to divine hierarchy, must source its legitimacy from something other than divine authority. It does this by replacing the divine right of kings with individual authority and a rational, but equally self-interested reason for people to agree to join the commonwealth.² In the *Second Treatise of Government*, John Locke argues that the only legitimate authority of government is each individual person who comprises the governed. Without the divine right of kings or some similar threat of divine retribution, however, it is not clear why one would continue to obey the dictates of a state with which one disagrees. The state of nature—the state people would be in without the benefit of society—serves that purpose; it is the alternative method by which the commonwealth can be derived and by which commitment can be secured. The state of nature keeps the commonwealth stable because it is an omnipresent alternative, making the continued commitment to the state a rational choice for each individual.

Citizens stay committed to the liberal constitutional state because it is in their interest. Individuals consent to the commonwealth or "Leviathan," according to Hobbes, if it yields a better life than that in the state of nature. This is a low bar because life in the state of nature is so uncertain. Individuals in the state of nature (have the potential to) engage in a war of all against all because everyone is equal, making each person vulnerable. As Hobbes

writes, “when all is reckoned together, the difference between man, and man, is not so considerable, as that one man can thereupon claim to himselfe any benefit, to which another may not pretend, as well as he” (Hobbes 2017, 100). All are subject to the will of others, but can equally make others subject to their own will. Because each person recognizes others as a threat, one is liable to strike out in a method of “preemptive self-defense.” This results in a war of all against all. Hobbes describes the state of nature, therefore, as making “the life of man solitary, poor, nasty, brutish, and short” (Hobbes 2017, 103). The chaos and disorder of the state of nature make an individual want to join the commonwealth. The more people join the commonwealth, the greater and stronger its ability to act, spurring any individuals remaining outside the commonwealth’s order to join. Not every policy decision might be to the individual’s liking, but each individual believes that life inside the commonwealth is better than life in the state of nature.

Post-enlightenment, when one disobeys the state, most no longer fear divine retribution. Instead, people stay committed to the state because it is in their rational self-interest to do so. People believe the alternative to the order of the commonwealth is the chaos and violence of the state of nature, making the commonwealth a superior choice despite its imperfections. As the threat of foes must be present to effectively unite the friends for Schmitt, the threat of the state of nature must be omnipresent to keep individuals committed to the state. “Schmitt’s implicit reading of Hobbes, therefore suggests that a return to the state of nature is an ever-present possibility for any society” (McCormick 2016, 278). Schmitt writes that Hobbes understands, “the quint-essential nature of the state of nature, or the behemoth, is none other than civil war, which can only be prevented by the overarching might of the state, or the leviathan” (Schmitt 1996, 21). The leviathan, or commonwealth, is necessary because it protects people from the state of nature, (the threat of) disorder, and its consequences; therefore, each individual keeps an attachment to the state, reinforcing its stability. “For both Hobbes and Schmitt the threat of danger is always present, even when the actual danger is not” (McCormick 2016, 278). This way, the commitment to the commonwealth remains desirable even when its actions are counter to one’s immediate interest.

Traditional religion is unnecessary for the operation of the liberal constitutional state, so religious ideology, choice, and practice are left to the private sphere. While a medieval person might not like her lot in life, she understood her place in the grand scheme of the world, and insofar as the state was co-extensive with religious authority, the state was essential to imbue this meaning in an individual’s life. The separation of religion and state may lead to the search for different sources of meaning in one’s life. Hannah Arendt argues that human fulfillment still comes from placing oneself in the context of a larger community. Without such a context—provided by religion or something

else—people may feel adrift. “The task and potential greatness of mortals lie in their ability to produce things—works and deeds and words—which would deserve to be and, at least to a degree, are at home in everlastingness, so that through them mortals could find their place in a cosmos where everything is immortal except for themselves” (Arendt 1959, 19). Beliefs, such as the divine right of kings or the great chain of being, helped people understand their role in not only the state but also their “home in everlastingness.” As Charles Taylor (1989, 1991) also argues, people need a normative context, a “horizon of meaning.” The failure to develop such a context is one cause of human “malaise.” Taylor writes that we now “live in a world where people have a right to choose for themselves their own pattern of life, to decide in conscience what convictions to espouse, to determine the shape of their lives in a whole host of ways that their ancestors couldn’t control” (Taylor 1991, 2). This form of life is exactly what liberal theory advocates and Taylor admits that, “very few people want to go back on this achievement.” Taylor, however, recognizes this as problematic as well. It helps to lead to a “disenchantment” of life (Taylor 1991, 3). It has a “dark side . . . which both flattens and narrows our lives, makes them poorer in meaning, and less concerned with others of society” (Taylor 1991, 4).

The liberal democratic state cannot fulfill the role of an alternative to religion. Schmitt argues the liberal democratic state cannot even provide any normative answers, as such positions would destroy liberal neutrality. “For technically represented neutrality to function, the laws of the state must become independent of objective content, including religious tenets or legal justifications and propriety, and should be accorded validity only as the result of the positive determination” (Schmitt 1996, 44).³ For Schmitt, however, the lacuna of meaning created by the separation of religion and the state should be filled by the state. The individual attachment to the state helps people structure their lives even absent the formal religious attachments of the past. The state does this by solidifying the national character and focusing on the national distinction between us (a united people with a national identity) and them. Individuals in the Schmittian paradigm are committed to the state because the state is the placeholder for religion, providing a moral and normative universe. Even if the logic of state formation is akin to the liberal explanation, the power and authority of the Schmittian state are more akin to the medieval state than to the liberal constitutional democratic one. The elements of national identity are held with the ferocity previously committed to religion.

THE SCHMITTIAN STATE

Carl Schmitt tries to split the difference between the medieval and modern theories of the state: he adopts the modern liberal theory of polity creation

while maintaining the premodern worldview, which keeps authority and legitimacy in the hands of the state rather than the people. Schmitt, like liberal theory, abandons the divine right of kings as a basis of legitimacy, but he finds the liberal solution of popular sovereignty inadequate. Instead, using Thomas Hobbes' *Leviathan* to explain his views, Schmitt argues for a personified Leviathan to become the sovereign authority. "Hobbes' Leviathan, a combination of god and man, animal and machine, is the mortal god who brings to man peace and security. Because of this—and not on account of the "divine right of kings—his leviathan demands unconditional obedience" (Schmitt 1996, 53).⁴

While Schmitt abandons religious notions of legitimacy, he likens the creation and maintenance of the state to a religious exercise. In *Political Theology*, Schmitt argues that the political sovereign creates the juridical order in a way akin to a divine power establishing a new world and dictating its order. As the natural divine sovereign who establishes the world can alter or suspend the laws of nature, the political sovereign can change or remove the law because it need not look beyond itself to confirm its authority. Schmitt writes, "The sovereign is not the *Defensor Pacis* of a peace traceable to God; he is the creator of none other than an earthly peace. He is a *Creator Pacis*" (Schmitt 1996, 32–33). The political sovereign not only supplants god, but becomes god in the earthly realm.

Though Schmitt agrees with liberal theorists as to why people join the commonwealth—because it provides "peace and security"—he fails to see peace and security as a necessary continuing animating device to maintain individual commitment to the commonwealth. "After assessing the relationship between protection and obedience [Schmitt concludes] that it was tilted in favor of obedience at the expense of protection" (Schwab 1996, xix). Quoting Schmitt from *Constitutional Theory*, "The state does not *have* a constitution . . . The state *is* constitution," Meierhenrich and Simons comment that Schmitt has tried "to reverse the intrusion of liberal concepts in constitutional theory" (Meierhenrich and Simons 2016, 33). One of the ways he does this is by transferring sovereignty from the people to the state. In Schmitt's understanding, once one joins the commonwealth, any sovereignty or authority that person has is transferred to the state, where, Schmitt claims, all sovereign power resides in the hands of a "mortal god," the Leviathan. Because of this, people, contrary to liberal theory, do not retain any rights, even the right to self-defense. Schmitt writes, "There exists no right of resistance to him [the leviathan], neither by invoking a higher nor a different right, nor by invoking religious reasons and arguments. He alone punishes and rewards" (Schmitt 1996, 53). Instead of the state being coextensive with religion, it becomes more important and powerful than religion because all other world views need to be subsumed under the viewpoint of the state. It is possible that the

hegemonic power of the state could be mobilized to protect liberal democracy as Rossiter (2017) addresses, but there is nothing to mandate it be used this way, and the Schmittian logic is that it will not be. The focus of the state is dependent on the decision of the sovereign authority whose power is juridically and constitutionally absolute. Schmitt believes the failure to make the state's normative claims and worldview hegemonic will cause the state to fail by depoliticization.

Schmitt claims (building on Hobbes) that to join the commonwealth, individuals must surrender their sovereignty, including their sovereignty to punish and kill, and their right to decide who to spare in the war of all against all. Schmitt is often likened to Hobbes, as they both focus on order and stability, but linking the two theorists might misunderstand a fundamental difference. Schmitt's theory is about constituting authority and maintaining order through that authority. Hobbes' theory, though also addressing how and why political society is constituted, is about limits on political authority. Hobbes believed it is in each individual's sovereign power to decide to join the commonwealth. Everyone does this because they are equally and similarly rational. Since the people are sovereign and choose to enter the commonwealth for their own good, they retain any rights it would be illogical for them to give up. Individuals enter the commonwealth for self-defense; this is why individuals retain the right to self-defense in the Hobbesian model. Schmitt denies this right. According to Hobbes, self-defense is also the reason why individuals can oppose the state. As Hobbes explains,

To resist the Sword of the Common-wealth, in defence of another man, guilty, or innocent, no man hath Liberty; because such Liberty takes away from the Sovereign, the means of Protecting us, and is therefore destructive of the very essence of Government. But in case a great many men together have already resisted the Sovereign Power unjustly, or committed some Capitall crime for which every one of them expecteth death, whether have they not the Liberty then to joyn together, and assist, and defend one another? Certainly they have: For they but defend their lives, which the guilty man may as well do as the Innocent. There was indeed injustice in the first breach of their duty; Their bearing of Arms subsequent to it, though it be to maintain what they have done, is no new unjust act. And if it be onely to defend their persons, it is not unjust at all. But the offer of Pardon taketh from them, to whom it is offered, the plea of self-defence, and maketh their perseverance in assisting, or defending the rest, unlawful. (Hobbes 2017, 179)

Schmitt's sovereign state, unlike the liberal constitutional state, has no limits to its authority. Schmitt does not see the state as the representation of the people either; instead, he sees the state as a separate body constraining and molding, or correcting the people. "It follows that one of the monsters, the

leviathan ‘state,’ continuously holds down the other monster, the behemoth ‘revolutionary people’ . . . , the leviathan is ‘the only corrective’ for the behemoth” (Schmitt 1996, 21).

Carl Schmitt views this right to self-defense as largely irrelevant. He claims there is little practical distinction between claiming people are the theoretical holders of sovereignty, as liberalism does, and claiming sovereignty resides in the state. According to Schmitt, people obey the state because they have neither the right nor the ability to resist. He argues that if one can exercise a power, then one has that power. The reverse of this claim is also true: if one cannot exercise a power, one cannot be said to possess it. The state can keep any individual or group from exercising an individual or collective right to self-defense; therefore, individuals or groups cannot be said to have such a right according to Schmitt.

Carl Schmitt believes that the concept of individual sovereignty is meaningless. The state controls who lives and who dies, which is the ultimate sovereign power. Liberal constitutional theory rejects this view. While the state can execute its citizens, it can only use that or any power for legitimate and limited reasons. The logic behind this traces back to the state’s founding. If the state were to kill people without good cause, it would make exiting the state of nature a bad bargain for the individual who enters the commonwealth to gain protection from violent arbitrary death and the fear of it. Locke writes of state power that it “is *not Arbitrary* by being absolute, but is still limited by that reason, and confined to those ends, which required it in some Cases to be absolute” (Locke 1988, 361). For example:

Neither the Serjeant, that could command a Souldier to march up to the mouth of a Cannon, or stand in a Breach, where he is almost sure to perish, can command that Soldier to give him one penny of his Money; nor the *General*, that can condemn him to Death for deserting his Post, or for not obeying the most desperate Orders, can yet with all his absolute Power of Life and Death, dispose of one Farthing of that Soldiers Estate, or seize one jot of his Goods; whom yet he can command any thing and hang for the least Disobedience. Because such a blind Obedience is necessary to that end for which the Commander has his power *viz.* the preservation of the rest; but the disposing of his Goods has nothing to do with it. (Locke 1988, 362)

Schmitt’s view is different. He claims that the sovereign state has the power, right, and authority to decide who lives and who dies. The sovereign state has a collective right to self-preservation and can, or must, kill anyone who threatens the continued existence of the nation and/or state as defined by the sovereign. Schmitt views the state like: “Mandeville’s fable about the bee (1714) [who] speaks in a typically Hobbesian manner: ‘The gods decided that millions of you, well attached to each other, compose the strong leviathan’”

(Schmitt 1996, 25). As one bee gives his life for the hive or the queen so should a citizen or subject of the state give his or her life for the state or the sovereign. The problem with such a view of the state is that, “The decision for nationalist homogeneity is not a rational choice, as was the original Hobbesian bargain” (McCormick 2016, 280). Schmitt fails to explain why individuals would agree to his design initially if it is not for their individual benefit. While such an explanation is necessary in the liberal constitutional paradigm, because the individual retains sovereign power, it is unnecessary in Schmitt’s model because the people have neither the right nor the ability to resist.

Schmitt believed that when drawing friend and enemy distinctions, there are “cases [in which] the state must decide upon the *Staatsfeind* (domestic enemy). Any group which seriously threatens domestic peace or the existence of the state must, out of necessity, be declared a *Staatsfeind*” (Bendersky 1983, 90). John Rawls (1971, 1993) argues that one would not agree to a system in which one could be put in the position of *Staatsfeind* or be sacrificed for the whole.⁵ Such a system is not legitimate because it does not abide by liberalism’s basic limitations. Schmitt, however, does not believe any such limitations apply. The lack of standards conforming to liberalism’s criteria of rationality is evident in the claim that the domestic enemy must be a “group which seriously threatens domestic peace” because any group can serve that purpose. If there is no enemy which threatens the peace, one needs to be found to bind the friend group, making this claim tautological. The nation should be united against the enemies which are determined by the sovereign no matter if they pose a threat by any articulatable standard.

Because of the state’s role in regulating identity and in determining friends and foes in Schmitt’s model, the public and private spheres come together. Individual choices of religion or language, for example, are considered part of the private sphere in liberal constitutional democracies and are mostly unregulated by the state. In Schmitt’s model, however, private choices can become markers of public identity and subject to state regulation. These “identities” (like the stars on the Sneetches) can be one of the ways the state defines friends and foes. “Schmitt’s institution of the sovereign, in other words, is conditioned by politics *and* by law *and* by culture” (Meierhenrich and Simmons 2016, 51). As god decides who is suitable to enter the kingdom of heaven and who should be condemned to hell, the sovereign decides who is eligible for membership (citizens) or not (aliens or even a *staatsfeind*) in the political order. The sovereign must also decide what kind of power is necessary to enforce friend and enemy distinctions once settled.

The notion of sovereignty on which Carl Schmitt’s theory is based on “A close affinity between categorizing and ‘othering’” (Meierhenrich and Simons 2016, 16). The primary othering, that of an enemy, invades all other areas of life. Indeed, the principle of *distinguo* was for Schmitt the “proper

foundation of both political and personal identity: ‘I think, therefore I have enemies: I have enemies, therefore I am myself’” (Meierhenrich and Simons 2016, 15). The sovereign further cultivates these friends and enemies by establishing, suspending, and defining law.

LEGAL MEANING

In addition to being the (re)creator of law, the sovereign also determines the meaning of existing law. To protect people from arbitrary power, liberal constitutional democracies replace the sovereign’s whim with predictable law, but Schmitt views this method as faulty. He argues that law requires interpretation for the application of legal norms, and the necessity of this interpretation makes the law arbitrary without a single ultimate authority over law and its meaning. Liberal states have an unstable juridical order because they lack this identifiable ultimate authority. Schmitt believes that liberal constitutional states, with their diffuse, schizophrenic sovereign, can never provide predictable and stable law and are ultimately ineffective or dangerous. He argues, instead, for the sovereign power to be united into one individual or body, negating ideas of separation of powers or checks and balances in any meaningful sense.

The issues of legal interpretation and its difficulties have long been the subject of debate. One of the best-known of these has been inspired by H. L. A. Hart’s “Positivism and the Separation of Law and Morals” (1958). In this article, Hart discusses a “legal rule [which] forbids you to take a vehicle into the public park.” As Hart argues, “There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out” (Hart 1958, 607). Hart and the scholarship rising from the article include all sorts of proposed vehicles for debate as to whether they may or may not be prohibited from the park based on the rule: baby carriages, electric wheelchairs, bicycles, ambulances, even statues, and more. This rule may be poorly worded, but similar problems exist if you try to substitute for the word “vehicle,” the word “car,” “gas propelled vehicle,” or any other more exact wording. *Smith v. the United States* 508 U.S. 223 (1993) presented a real-world example of this problem. *Smith* hinged on what it meant to “use” a firearm; does the law’s firearm enhancement apply if the firearm is used as an element of barter or does the firearm need to be used as a firearm is intended—as a weapon of violence or intimidation—for the weapon’s enhancement to apply.⁶ A single authoritative interpreter can explain what she meant by this or any law on a consistent basis. Without law or some other process, however, there is no requirement that the interpreter himself be consistent.

The single interpreter is not the only alternative to resolve questions about the law's ambiguous meaning and use, however. The common law, for example, helps define these debatable cases, and therefore, what the rule generally means. In the common law, while people decide the law, no person decides the meaning of the law. The law is interpreted through a large number of individual instances. There may not be a law that applies exactly to each situation; however, as laws are applied to various situations, the meaning and limits of the law become clear (e.g., whether *this* baby carriage is allowed in the park in *this* instance). Schmitt thinks, however, that because there may be various ways to interpret a law, interpretation itself is meaningless and arbitrary.⁷ This is part of a broader disagreement between Schmitt's antiliberalism and liberal constitutional democracy. Legal interpretation is seen as valid in liberal constitutional democracy when decision-makers are dispassionate; Schmitt believes a dispassionate ruling makes it invalid. One must be a member of the friends and have their bias to be valid. Schmitt believes that *authority* and not truth is the basis of law because one may have to accept a decision as final even if one believes it to be wrong. The sovereign creates and enforces its legal determinations. This is designed to provide certainty to the population.

Carl Schmitt argues that the primary role of the sovereign is to protect the nation-state and its right to exist over other alternative conceptions of the people, as well as actual alternative people. He takes what Hobbes and liberal theorists have seen as the individual right to self-preservation and transfers it to the state for the preservation of the nation. This happens in part because "the people should be first and foremost members of a homogeneous identity organization, not individual rights-bearing citizens. This means that identity trumps protection in the consolidation of the political community" (McCormack 2016, 280). This is a fundamental change to the liberal constitutional state, however, because it questions the legitimacy of the original Hobbesian bargain through which the state provides security. While it is explicable why an individual would choose the commonwealth in the state of nature if it is designed to protect her, it is not as obvious why she would join the commonwealth if she knows she can be sacrificed by the community for its benefit.⁸ Liberal theorists generally argue one will not enter such an agreement, making it invalid. John Locke writes that one "*cannot*, by Compact, or his own Consent, *enslave himself* to anyone, nor put himself under the Absolute, Arbitrary Power of another" (Locke 1988, 284). Accepting that one might be sacrificed for a community fits Locke's description.

John Rawls argues that people would not agree to any political system that would ask them to sacrifice their rights for collective anything. Rawls claims his theory is deontological rather than teleological. This means it is based on rights rather than a good (telos). A teleological theory is one that seeks the

maximum benefit of whatever it defines as the good, putting rights secondary. The difference between Schmitt's theory and Rawls' characterization of a teleological theory is that Schmitt commits to no real telos, or good, at which the state is aimed, like the goal of happiness in Utilitarianism.⁹ Rather, the sovereign's goal is authority itself, which can be exercised for any aim chosen. While one can argue, as Mill does, that a state committed to Utilitarian principles is predicated on equality and consent-based attachment to the state, Rawls argues teleological theories cannot give such an assurance. Rawls claims teleological commitments can lead to broad authority in the hands of the state. In accordance with liberalism's commitment to universalism, Rawls believes that "justice denies that the loss of freedom by some is not made right by the greater good shared by others" (Rawls 1971, 3).

The liberal constitutional state is limited by the purposes for which individuals choose to join the commonwealth. The Schmittian state has no such limitation. "In his writings on Hobbes from the 1920s and 1930s, Schmitt attempts to preserve, strengthen, and even redefine the sovereign state by reviving the source of its development, the fear of violent death, and by recasting its foundations on collective rather than individual grounds" (McCormack 2016, 287–288). The service the state provides is not the protection of the individual, but the protection of "us" as a people and our characteristics.

THE AMERICAN CONSTITUTIONAL SOVEREIGN

Since 1791, the United States has specifically eschewed the connection between state and religion. While the meaning of the separation has been under constant debate, arguments are, by and large, about the nature of the separation, not against the idea of "separation of church and state." Without a state religion as an alternative method of binding citizens and finding meaning both privately and publicly, the United States developed a strong civil society and a civic religion. Instead of looking to the state to provide a "horizon of meaning" for its citizens (Taylor 1989), people look toward private commitments, be they religion-based communities or other communities of interest. A noted observation of interest groups in the United States was recorded by Alexis de Tocqueville in *Democracy in America* (1961). Tocqueville argued that in the United States, interest groups served to limit and pressure the government. He believed that these interest groups were formed by "voluntary associations of citizens," which created a decentralized order beneficial for freedom. These different groups, including business, temperance, anti-slavery, child welfare, and others, can help provide the meaning and understanding people seek in their lives; yet, that meaning can be different from the meaning sought by others. The flourishing of civil society

makes it unnecessary for individuals to seek their life's meaning and purpose through the state.

The civil society, with its myriad interest groups, works with the political model presented by James Madison in *Federalist #9*, *Federalist #10*, and *Federalist #51*.¹⁰ Madison argues for the coexistence of many different groups and interests. He argues, indeed, that there needs to be enough choices so that no one can take control of the organs of the state. Because no one group should, on its own, be able to commandeer the organs of the state, alliances must be made. These alliances are malleable, however, changing from issue to issue; no one group should continually be on the winning or losing side. Though each individual needs to find purpose privately, everyone engages collectively in the common process of politics.

With this model, liberal constitutional democracies, such as the United States, can stay united without a common religious or ethnic national identity. They develop secular religions with secular sacred symbols to which all can adhere. In the United States, for example, the Declaration of Independence and the United States Constitution form sacred texts of the American republic. Barbara Jordan, explaining her vote to impeach President Nixon, said, “[m]y faith in the Constitution is whole. It is complete. It is total. I am not going to sit here and be an idle spectator to the diminution, the subversion, the destruction of the Constitution” (Quoted in Levinson 1988, 15). Chairman of the Joint Chiefs Mark Milley at a Veterans Day celebration in 2020 agreed when he said, “We do not take an oath to a king, or a queen, to a tyrant or a dictator. We do not take an oath to an individual. No, we do not take an oath to a country, a tribe, or a religion. We take an oath to the Constitution. . . . Each of us will protect and defend that document regardless of personal price” (Woodward and Costa 2021, 154). While differences exist on ethnic, religious, national, and political levels, all join together in defense of the constitution. Explaining this commitment in his description of liberal political identity, Charles Taylor writes, “I love my fatherland, and what makes it essentially mine is its laws. Outside of these, it is denatured and no longer really mine” (Taylor 2011, 91).

The constitution serves to unite disparate people and ideas into one unified polity. Rather than the ethnic and national homogeneity called for by Schmitt, the American liberal constitutional state asks for common commitments to the constitutional project and maintains the flourishing of wide-ranging individual (or smaller collective) commitments. Margaret Chase Smith on June 1, 1950 in defending constitutionalism from Joseph McCarthy, referred to the “basic principles of Americanism”: “The right to criticize, the right to hold unpopular beliefs, the right to protest, the right of independent thought.”

TRUMPIST STATE SYMBOLS

The traditional American model is at odds with the Schmittian-aligned Trumpist paradigm. Trumpism departs from the usual veneration of common American symbols. While it does not outright reject common American symbols like the constitution, its understanding of these symbols is both practically and normatively different. The constitution alone cannot provide answers to novel political or social situations: it is Donald Trump, the centralized constitutional (re)interpreter, who provides political answers. Those who reject Trumpist views are enemies and, therefore, can be dismissed from the political and social arena. Like Schmitt, Trumpists do not advocate diverse, privately held beliefs, but a commonly held worldview cultivated by the state. Trumpism promotes an alternative civil religion, one with the state, not the constitution, at its center.

Donald Trump is a prophet of this Trumpist national religion, and his political rallies serve as church meetings for the Trumpist religious communities. In 2016, during the presidential campaign, Trump averaged almost five rallies a week, but more surprisingly, he averaged a rally every ten days after he was sworn in. “That perpetual tour attracted a coterie of political pilgrims who traveled across the country and camped outside arenas for days at a time for the opportunity to stand in the front row and, for ninety blissfully frenzied minutes, cheer on the man they credited with changing the country and, in many cases, their own lives” (Bender 2021, 1–2). At these rallies, pilgrims could hear their creed and repeat mantras about friends and foes. In a part of Donald Trump’s January 6, 2021, speech, for example, he said, “Our media is not free. It’s not fair. It suppresses thought. It suppresses speech, and it’s become the enemy of the people. It’s become the enemy of the people. It’s the biggest problem we have in this country” (Wolff 2021, 223). This repetition helps reinforce the common beliefs and worldview. As pollster Tony Fabrizio explained to then-president Trump, “your voters believe whatever you tell them to believe” (Wolff 2021, XV).

Unlike traditional liberal constitutional beliefs, those asserted and adopted by Trumpists are designed to be exclusionary and shared by the friend group alone. Some Trumpists even believe that they have access to secret knowledge or know something others do not. These beliefs have spawned interest in a variety of groups, including QAnon, from which adherents, it appears, cannot be dissuaded no matter the evidence. QAnon began in October 2017 when an individual only known as “Q” (for Q-level security clearance) posted on the 4chan message board. These messages, known as “Q drops” or “breadcrumbs,” were pro-Trump and written in cryptic language. QAnon is in some ways the descendant of the satanic panic of the 1980s. It is an unfounded belief system that claims a broad-based unseen conspiracy is harming

children and doing evil in plain sight, but unseen by the regular masses. The forces of light are headed by Donald Trump, who might also be the mythical, divine-like Q. All will work out correctly if you have faith and “trust the plan,” which includes trust in “Q.” Specifically, adherents to QAnon believe Donald Trump has a plan to bring down a cabal of pedophile elites associated with the Democratic Party and Hollywood actors and insiders. Believers claim that this fight between the forces of good (Trump) and the forces of evil (particularly former presidential candidate and secretary of state Hillary Clinton, but also Nancy Pelosi and other Democrats or Jews such as George Soros) will lead to a public reckoning where the evildoers will be swept away.

QAnon likely has millions of supporters who harbor many nontraditional beliefs.¹¹ What makes QAnon problematic for liberal constitutional democracy is that those who believe in it are impervious to contrary evidence. Indeed, as the BBC noted, QAnon’s “popularity hasn’t been diminished by events which would seem to debunk the whole thing . . . True believers contend deliberate misinformation is sown into Q’s messages—in their minds making the conspiracy theory impossible to disprove.” It is impossible to argue against any set of facts because they become folded into the followers’ faith beliefs as the will of Q.¹² Included in the QAnon belief system is a claim that Donald Trump knows all about the evildoing of the powerful cabal. Indeed, according to adherents it is one of the reasons he became president. QAnon adherents believe in a “coming storm”; the people who have opposed Trump, such as Representative Adam Schiff (D-CA) or Hillary Clinton (D-NY), as well as all the Democratic and Hollywood elites (who are pedophiles), will be arrested and publicly executed.¹³

THE PARANOID STYLE

Richard Hofstadter wrote an article published in Harper’s Magazine in 1964 that helps explain the rise of movements like QAnon and their place in American politics. Hofstadter wrote his article in the aftermath of McCarthyism, but much of what he wrote in 1964 is relevant to Trumpism. Hofstadter explained why he believed Americans subscribe to conspiracy theories:

the modern right wing, . . . feels dispossessed: America has been largely taken away from them and their kind, though they are determined to try to repossess it and to prevent the final destructive act of subversion. The old American virtues have already been eaten away by cosmopolitans and intellectuals; the old competitive capitalism has been gradually undermined by socialistic and communistic schemers; the old national security and independence have been destroyed by treasonous plots, having as their most powerful agents not merely outsiders and foreigners as of old but major statesmen who are at the very centers of American

power. Their predecessors had discovered conspiracies; the modern radical right finds conspiracy to be betrayal from on high.

These conspiracies include what is now called the “deep state,” or as Hofstadter writes, “the very centers of American Power.” Donald Trump has laid out a long list of those conspiring against him, including Democrats, the media, and even some of his own supporters. During Trump’s speech on January 6, 2021, he listed conspiracies against him orchestrated by the media that implicated the states of Wisconsin, Georgia, Arizona, Nevada, and Michigan, and were supported by pollsters. It is easier for Trumpists to believe, with no evidence, in a far-flung but unseen conspiracy involving thousands, than those who disagree with them are honest.

Hofstadter’s article describes how, in a lament for a lost way of life, belief in these conspiracies replaces religious commitments and provides a state’s structure and organization of the world. This role is evident in Donald Trump Jr.’s speech at a Turning Point U.S.A. gathering on December 19, 2021. His speech had “a pulsating sense of aggrieved victimhood and persecution, all of it coming from the elitist, extravagantly rich son of a former president” (Wehner 2021). Donald Trump Jr. fits what Hofstadter calls a “paranoid spokesman” who

sees the fate of conspiracy in apocalyptic terms—he traffics in the birth and death of whole worlds, whole political orders, whole systems of human values. He is always manning the barricades of civilization. He constantly lives at a turning point. Like religious millennialists he expresses the anxiety of those who are living through the last days and he is sometimes disposed to set a date for the apocalypse . . . (Hofstadter 1964).

In his speech, Trump Jr. denigrated traditional religion and argued for a new common cause and unifying theme—one more important and powerful than religion—(MAGA) political beliefs.

He portrayed it [the political battle] as an existential battle between good and evil. One side must prevail; the other must be crushed. This in turn justifies any necessary means to win. And . . . the scriptures are essentially a manual for suckers. . . . the ethic of Jesus has gotten in the way of successfully prosecuting the culture wars against the left. . . . it needs to go. (Wehner 2021)

There needs to be a new faith in the secular god. As this Trumpist view abandons traditional religion, it also abandons the traditional American secular religion of the constitution and its ancillary symbols (e.g., the flag, the Capitol). While Trumpists cite these symbols, they no longer serve the same civic purpose. The constitution which serves to unite Americans and

limit political actors, is in conflict with the political paradigm advocated by Trumpists. The Trumpian paradigm is a secular religion with unbounded power, and its community is only open to good, correct, or patriotic Americans based on the definition decided by the sovereign.

As traditional religious beliefs need to give way to the primacy of the political, so must constitutional precepts give way in the Trumpist political world. If the constitution poses any impediment to the substantive goals decided by the sovereign, its procedures need to be abandoned. Donald Trump, when realizing he might not win the 2020 presidential election, thought of procedural fixes. Trump “had another way of dealing with COVID. If the Democrats were using COVID against him, he would use it against them: they could just use COVID as a reason to delay the election” (Wolff 2021, 23). This would violate the constitution but Trump viewed himself as the state’s sovereign and not subject to the law; he believed he is the law.

TRUMPIST POLITICAL SOVEREIGN

Trumpists, even if they share some policy predilections with traditional American conservatives, do not share their conservative understanding of the world. Trumpists, for example, adopt the view that it should be the state which provides a context for understanding the world, rather than the individual in the private sphere. While American conservatives like to portray themselves as supporting individual choice, for Trumpists individuals are free only insofar as they do not do anything that might disagree with the state’s views. Evidence of this can be seen in Florida, which has been proclaimed by its governor Ron DeSantis as “a free state.” On the one hand, DeSantis argues for American freedoms; on the other hand, his “anti-woke agenda” allows those freedoms to be denied to those he has determined to be enemies. Free speech, for example, applies to friends. Others, such as the Walt Disney Company (a publicly traded company responsible to its shareholders) which supported its LGBTQ employees and customers against a DeSantis policy, or university professors—who may give students access to ideas DeSantis believes are “woke”—are constrained. Instead of competing in the marketplace of ideas, Trumpists seek to curate not only their own reading habits or those of their children but they force all to conform to their views. All state and public organizations exist to benefit and must represent the friend group. One’s “free” choice is dependent on whether it accords with the desires or cultural beliefs of the state. The private sphere shrinks as private decisions, such as one’s choice of what to read, become the business of the state. Personal rivals can become public ones, and private views can become matters of public debate.

These divisions are evident in the way Trumpists have dealt with those involved in the events of January 6, 2021, versus the Black Lives Matter protesters from the previous summer. Whether or not a particular action elicits support or condemnation by the state relates to whether an actor is seen as part of the envisioned national community. Journalist Michael Wolff describes Donald Trump's reaction to Black Lives Matter protesters in Portland and Seattle. After White House attorney Pat Cipollone told Trump that "they had things in motion," to deal with the protest, Trump reportedly replied, "I don't give a shit what you have in motion, I want them in jail. They should get ten years in prison for toppling a statue. And that Mayor Wheeler . . . '—the mayor of Portland—'what a loser. Can't we just send in the Guard?'" (Wolff 2021, 15). When faced with the destruction from the rioters on January 6, 2021, Donald Trump's reaction was quite different. Donald Trump expressed sympathy and empathy and told them, "we love you," and to "go home in peace." What is viewed by most as a failed coup has been reformulated by Trumpists as a heroic and patriotic rally of "us" against "them." Trumpists now go to "Justice for J6" rallies to defend the "political prisoners" arrested because of their actions that day. Elise Stefanik, the number three House Republican—replacing Liz Cheney—has called those jailed for their actions that day—including assaulting police officers and damaging federal and personal property—"hostages." How the government should react, according to Trumpists, is based on who the people are and the content of the speech, rather than their actions.

Rather than various executors of sovereign authority represented in multiple forms within the political system, Trumpists believe in a personalized sovereign. This sovereign (most often Donald Trump) would have the power and authority to override the will of the people. In Alexander Hamilton's contribution to *The Federalist Papers*, he emphasized that presidential power was limited. He asks of the presidential office whether it "combines the requisites to safety in the republican sense—a due dependence on the people" and concludes that it does because, according to Hamilton, the president is limited. It does because "the election of the President once in four years by persons immediately chosen by the people for that purpose, and his being at all times liable to impeachment, trial, dismissal from office, incapacity to serve in any other, and to the forfeiture of life and estate by subsequent prosecution in the common course of law." The ultimate control of the president, according to Hamilton, lies in checks and balances and the authority of others. He asks, "What more can an enlightened and reasonable people desire" (Hamilton 1961, 462–463). Donald Trump, on the other hand, has made the argument that presidential power is unlimited. Indeed, it is more unlimited than the eighteenth-century British king the revolution sought to constrain. As Jon Stewart said on *The Daily Show*, "Forget the

constitution, accountability to the law of the land is basic *Magna Carta* shit” (March 11, 2024).

Trump is the avatar of the friend group, so any person or group deemed other by him can become a political target of Trumpism.

By 2019 he [Trump] was declaring in meetings attended by former national security adviser John Bolton and former defense secretary James Mattis that journalists should not just be jailed if they refused to divulge their sources, but physically eliminated. “These people should be executed. They are scumbags,” he said sounding like strongmen from Mussolini to Putin. (Ben-Ghiat 2021, 117)

In Trumpism, Trump or another leader decides who is worthy of having rights and who is not.

Donald Trump portrayed himself as the unified sovereign authority and controller of the legal system. He ordered the Justice Department to do his bidding and deployed the department in his personal defamation suit.¹⁴ Trump has also made clear that loyalty to him rather than to the constitution was (Republican) lawmakers’ primary responsibility. This became evident in the weeks after the election of 2020 when Trump demanded Republicans act on their personal loyalty to him, and he did not believe that any part of the government was independent of his authority. Interference in the transition process started just days after the election through manipulation of the *Presidential Transition Act* (1963). This act calls on the administrator of the General Services Administration when she “ascertains” the “apparent successful candidate” to release the funding for the transition process. Please note the head of the GSA is not declaring a winner; she is only releasing funds if there is an apparent winner to aid in the transition. On Saturday, November 7th, all the major news networks had determined Joe Biden had won the election. This had always satisfied the “ascertains” requirement before. Emily Murphy, head of the General Services Administration, instead of acting independently and legally, refused to release the funding without the consent of Donald Trump; independent authority is lost because all authority belongs to Trump.¹⁵

It is easier to justify overriding the democratic will of the people when having adopted, like Trumpists, that sovereignty is in the hands of the state rather than the people. When a reporter told Rudy Giuliani at his infamous press conference at Four Seasons Landscaping company that the networks had just called the election for Biden, his response was, “Come on, don’t be ridiculous, Networks don’t get to decide elections. Courts do” (Woodward and Costa 2021, 145). This idea that courts decide elections is another way to argue that the state is preeminent over the people. The courts are organs of the state.

This is one of the reasons for the jury system. It interposes the people between the accused and the state. The state can charge someone and even hold them for a time, but it cannot convict them without the validation of the people. When there are elections, the electors (people) decide elections, not the courts. Courts only resolve disputes. Courts decide elections the way referees decide basketball games. They exist just to call the fouls. If a court decides an election, something has already gone really wrong in either the substance or process.¹⁶ It is possible that Rudy Giuliani believed that the courts would support Trump's electoral claims because of the numerous judges and justices the Trump administration had appointed. Indeed, Trump came "to believe the Court was wholly stacked in his favor, and when push came to shove, would surely have his back. 'We've got the Supremes,' Trump assured various of his callers" (Wolff 2021, 123). In 2020, however, the courts largely stayed within the referee role, leaving the election in the hands of the people and recognizing the will of the liberal constitutional state's sovereign.¹⁷

CONCLUSION

Carl Schmitt accepts the post-Enlightenment version of polity creation, but unlike the liberal constitutional state whose neutrality could never adequately maintain the friend and enemy distinction, Schmitt does not advocate for the decentralized sovereign and freedom of thought, which are part of the liberal constitutional state's tradition. Instead, Schmitt believes all sovereign power needs to be consolidated so it can be powerfully, quickly, and easily directed to deal with any issues in the society and polity. Schmitt advocates that the whole society adopt the worldview of the sovereign, who serves as a secular god. By creating and interpreting the laws and deciding the common definition of friends and foes, the sovereign unites the friends and helps to form the state's stability. In the ongoing attempt to strengthen and refine the difference between friends and foes and the identity of the state and nation, Trumpism has narrowed the friend group. Trumpism seeks to make what was previously mainstream politics the other, or the outsider, in the United States. By unifying sovereign authority, Trumpism seeks to replace liberal constitutional democratic politics with a state embodied by a single unitary personal sovereign.

NOTES

1. The primary responsibilities of the Schmittian sovereign include implementing and executing the exception—distinguishing between ordinary and exceptional

political times. The sovereign decides when ordinary politics are no longer able to address an issue or moment and what methods should be used. The next chapter deals with the exception; this chapter addresses other issues of sovereignty.

2. This section explores Schmitt's philosophical understandings of sovereignty and legitimacy and how they differ from liberal constitutional democracy. It does not make historical claims about the origination or ascendancy of secular law. See Harold Berman (1983) for a discussion of the origin of Western secular law.

3. Schmitt's claim about the law's lack of moral content in liberalism seems questionable, especially regarding common law. Common law declarations are normative statements about what the world should be. For example, if one owns a private roadway but allows public use, eventually the roadway will become a public thoroughfare unless one takes action to keep it private. This is a normative, if not overtly religious or sectarian, position: the public has come to rely on the road, so it would be unfair to treat it as private.

4. Schmitt's and Hobbes' use of "Leviathan" is different. While Hobbes writes that the leviathan is an artificial god, he also writes of it as "sovereignty is an Artificiall Soul, as giving life and motion to the whole body" (Hobbes 2017, 5). It is not the state.

5. There is the question of *which* bees in Mandeville's fable or which people are to be sacrificed for the good of the whole. Democratic political theorists, such as Iris Marion Young (1990) and Carole Pateman (1985), indicate that the burden will fall on those who already have the least power.

6. The answer, according to a 6–3 decision of the Supreme Court written by Sandra Day O'Connor, was that: "We decide today whether the exchange of a gun for narcotics constitutes 'use' of a firearm 'during and in relation to .. [a] drug trafficking crime' within the meaning of 18 U.S.C. § 924 (c) (1). We hold that it does."

7. Germany is a civil law country. The role of judges in countries with civil law traditions is more constrained than in countries with common law traditions such as the United States. In civil law systems, judges cannot extend the logic of the law to new instances. In the common law tradition, it is possible to extend the law's logic into new situations. *Kyllo v. United States* 533 U.S. 27 (2001) is an example in which the Court extends Fourth Amendment protections to electronic monitoring. There are also limits on judges' and justices' rulings and ability to rule. The need for public justifications and "cases or controversies" is meant to limit the scope of rulings and the ability of judges to choose issues. Public justifications include explanations of why a judge rules similarly or differently than in previous cases or than colleagues in this or a similar case. For discussions of constitutional interpretation methods, see Barber (1986), Ely (1981), Murphy, et al. (2008), and Whittington (1999).

8. Rawls appears to be investigating this issue as the basis of the decision-making calculus behind the veil of ignorance. See Rawls (1971).

9. John Rawls (1971) uses utilitarianism and its focus on the goal of happiness to explain teleological theories. Utilitarianism seeks to maximize happiness, whether it is the version espoused by Mill (1989) or by Sidgwick (1981).

10. The *Federalist Papers* is a series of letters published in New York newspapers under the pseudonym *Publius* and designed to persuade the people of New York to ratify the constitution.

11. In 2020, “an internal investigation by Facebook has uncovered thousands of groups and pages, with millions of members and followers, that support the QAnon conspiracy theory” (Sen and Zadrozny 2020). Facebook estimated the number of QAnon-affiliated Facebook users to be between one and three million based on the popularity of Facebook groups related to QAnon.

12. In the 1950s, three psychologists became part of a small spiritual group predicting the imminent end of the world. The psychologists were interested to see what would happen post-disconfirmation. What they found was that while some members left the group, particularly those less committed or unsupported in their belief, other believers recommitted to the faith after the disconfirmation event, and they noted “the increase of proselyting following unequivocal disconfirmation of a belief” (Festinger, Riecken, and Schachter 1956, 216).

13. These pedophiles also eat children according to many QAnon believers, in a version of medieval blood libel.

14. After his presidency, Donald Trump has continued to try to use the financial resources of the RNC for his various civil and criminal defenses.

15. The transition is not irrelevant. George W. Bush believes that the stalled transition process in 2000 helped lead to the terrorist attacks of 2001. The future Biden administration attempted an informal transition process during the hold-up, e.g., person-to-person contacts.

16. This can be seen in the election of 2000 when, in a dissent to *Bush v. Gore* 531 U.S. 98 (2000), Gerald Ford-appointed Justice John Paul Stevens wrote, “One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year’s Presidential election, the identity of the loser is perfectly clear. It is the Nation’s confidence in the judge as an impartial guardian of the rule of law.”

17. There is no guarantee that the courts will stay in this role in the future. The role and paradigmatic commitment of judges is addressed in chapter nine.

Chapter 5

The Exception

Both Schmitt and Trumpists propose the existence of a unified sovereign who retains all state functions, because they argue that without such unity, several important elements of sovereignty are lost. These include the regulation of the law, the clear division between friends and foes, and the defense of the nation's identity. For Schmitt, the most important element of sovereignty, however, is the power to decide the exception. The exception is when the state governs outside its normal political, legal, and constitutional limits; the sovereign uses its power as the secular god and controls all elements of the state and law it deems necessary. The exception can be used for a variety of reasons, but the most fundamental reason for the power is its use to defend the state and nation and to prevent encroachment upon them by enemies. Schmitt viewed the exception as an inherent condition of a well-operating and well-defended state. Schmitt criticizes the liberal constitutional state for its attempts to create a "technical system," the structure of which is designed to make rule by exception both unnecessary and impossible. Schmitt believes that insofar as the liberal constitutional state delineates the exception into nothingness, it has no sovereignty because it lacks the authority to maintain its status as a unique state and people.

Like for Schmitt, the restraints of the liberal constitutional state are problematic for Trumpists. Trumpism objects to restraints, be they customary—such as respect for institutions, or constitutional—such as the transfer of power. Donald Trump sought to rule by the exception and exercise enhanced authority, particularly in situations in which the state's "foes," as he saw them, were encroaching on what he understood to be the "friends" and the national identity. This is the opposite of the strategy advocated by James Madison, one of the founders of the American constitutional tradition, who argues for diversity rather than uniformity as a method for maintaining

the stability of the state. The Madisonian view is unacceptable to Trumpists because it fails to define the political or distinguish between friends and foes. The exception is better suited for that task. Trumpism seeks to save America and Americans from encroachment by “them,” but it seeks to do this outside of liberal constitutional democratic constraints, in other words, in rule by the exception.

THE SCHMITTIAN EXCEPTION

During rule by exception, according to Schmitt, ordinary law gives way, and the sovereign has unlimited authority to rule in any way it sees fit. The exception is necessary, Schmitt argues, because in unusual times or times of emergency, regular legal systems do not work, and an attempt to make them work will merely make challenging any crisis ineffective. Indeed, if legal and administrative systems attempt to sustain the same laws and rules as they use in ordinary political times, the administration of those rules and laws will become arbitrary.¹ It is necessary in these times to govern by exception, according to Schmitt, and the sovereign has the responsibility for that governance. The sovereign decides if there is a crisis that requires exceptional rule, how exceptional rule should proceed, implements that new order, and decides when or if exceptional rule ends. All legal orders are based on the sovereign “who decides the exception,” according to Schmitt (Schmitt 2020a, 5).

During the World War I, Carl Schmitt worked at the general staff headquarters in Munich for a division responsible for administering martial law. In the fall of 1915, while he was there, “he was assigned the task of providing a justification for an expansive interpretation of emergency powers with the aim of extending them for ‘a few years after the war.’” (Scheuerman 2016, 549). His work produced a pair of academic articles published in 1916: “The Impact of the State of War on Ordinary Criminal Procedure” and “Dictatorship and State of Siege: A Study in Public Law.” This was the beginning of Schmitt’s work on the exception and the question of “the extent to which constitutional laws could be suspended in order to meet a present danger and to reestablish a normal state of affairs” (Bendersky 1983, 19). Schmitt’s interest in exceptional powers began before the adoption of the Weimar Constitution and its Article 48 which authorized a constitutional version of an exception listing the authority under which some rights could be curtailed and authority centralized. Schmitt’s discussion of the exception was, therefore, always broader than Article 48 and he believed it innate to a well-functioning state. Schmitt believed in the primacy of the exception; without the ability to exercise exceptional power, the state lacks sovereignty because it can no longer defend the people or their state.

Schmitt believes the exception is vital because it is used to differentiate between particular peoples and states. In its absence, all states and nations can become alike. Carl Schmitt quotes Søren Kierkegaard, “the exception explains both the general and itself,” and comments: “The exception is more interesting than the normal case. The normal proves nothing, the exception proves everything; it not only confirms the rule—the rule only exists because of the exception. In the exception, the power of real life breaks through the crust of a mechanism grown sclerotic through repetition” (Schmitt 2020a, 11). Only by concentrating on the exception can one learn what is essential to society or what it is necessary to defend by the exception. Particularly, the exception should be used to achieve the substantive goals of the state, including protecting the people’s distinctiveness through the preservation of friends and marginalization of enemies. Insofar as something is inhibiting the national project, the exception needs to be invoked to ensure the nation remains the primary goal of the state.

This amounts to a reversal of the original relationship between normalcy and the exception: it is not the normal situation and its normativity that define the standard according to which the dictator has to restore order in an exceptional situation; rather, it is the decision of the dictator that defines the standards of normality—a normality he has to create in the first place. (Preuß 2016, 475)

The law the sovereign creates is designed to defend the parameters, whether physical or cultural, of the nation and state; however, the sovereign is the one who creates those parameters and translates them into the world.

That the sovereign’s authority should be unlimited and unrestrained to protect the boundaries and identity of the nation is something Schmitt advocated not only theoretically but in practice. In June 1934, for example, Schmitt became editor-in-chief of *Deutsche Juristen-Zeitung*. In the issue dated August 1, Schmitt included an editorial he authored, “*Der Führer schützt das Recht*” (The Leader Protects the Law) about the Night of the Long Knives, in which he defends Hitler’s politically motivated extrajudicial murders of the Night of the Long Knives. Schmitt claimed that the Führer’s authority is the highest form of administrative justice and that there are no bounds to the Führer’s authority because he has control over the political order. He can create the law and change it if he deems it necessary for the benefit of the state. The SA purges, therefore, fit into the sovereign Führer’s authority. For Schmitt, it is not relevant if the one who exercises exceptional authority has the formal legal authority to do so, either because such authority is legally assigned elsewhere or because it is thought not to exist at all. Schmitt argues that if one is able to exercise a power, then one has that authority; therefore, once exceptional rule is engaged, it is justified.

There are no legal or even moral constraints on exceptional authority. Schmitt argues that emergency or crisis powers cannot be codified because, by their very nature, crises are outside of law; therefore, legal specificity or limits are impossible. It is the sovereign's responsibility to (re)create a normal polity, but the sovereign also gets to decide what methods are appropriate for normality to be restored, or what normal politics is. Normality, in this context is what the sovereign believes it to be, and the sovereign restores normality by aligning the polity with the sovereign's view of the state. Advocates of views contrary to, or any views other than the sovereign's own, are enemies. This is because such views can inhibit the creation and maintenance of the sovereign's vision, which is by definition, normal politics.

WEIMAR'S CONSTITUTIONAL EXCEPTION

Even though Schmitt did not believe it was coextensive with his view of the exception, he supported the Weimar Constitution's Article 48 which reads:

In the event of a State not fulfilling the duties imposed upon it by the Reich Constitution or by the laws of the Reich, the President of the Reich may make use of the armed forces to compel it to do so.

If public security and order are seriously disturbed or endangered within the German Reich, the President of the Reich may take measures necessary for their restoration, intervening if need be with the assistance of the armed forces. For this purpose he may suspend for a while, in whole or in part, the fundamental rights provided in Articles 114, 115, 117, 118, 123, 124 and 153.

The President of the Reich must inform the Reichstag without delay of all measures taken in accordance with Paragraphs 1 or 2 of this Article. These measures are to be revoked on the demand of the Reichstag.

If danger is imminent, a State government may, for its own territory, take temporary measures as provided in Paragraph 2. These measures are to be revoked on the demand of the President of the Reich or of the Reichstag.

Details are to be determined by a law of the Reich

Article 48 was used often in the early years of the Weimar Republic. "[T]he German state had been beleaguered by so many crises that the *Ausnahmezustand* (the exception) had become a common occurrence. Emergency situations would prove to be a heavy burden from which the republic would never escape; they would remain an integral part of Weimar political life" (Bendersky 2016, 38). In the Weimar Republic, Article 48 was invoked to

combat various crises; after public order was reinstated, however, regular power was restored to the ordinary organs of the state.

After the Munich *Putsch*, when Hitler and the SA attempted to overthrow the government, Article 48 was again invoked. This invocation inspired renewed attempts to pass legislation that would curtail powers of Article 48. Carl Schmitt argued against such a measure; insofar as the powers under Article 48 are limited, they were likely to be ineffective. He argued that by its nature “the exception” is a situation for which one cannot plan. The implicit power of the president goes beyond the textual constitutional limits of Article 48, moreover. Schmitt argued against “jurists who interpreted Article 48 as permitting only specified abrogations of a narrow range of basic rights” (Scheurman 2016, 552). Instead, Schmitt believed the exception meant that the president should be able to “suspend almost all the articles of the Constitution if necessary to save it, and not just the seven mentioned in Article 48 itself” (Rossiter 2002, 69; quoted in Scheurman 2016, 552). For Schmitt, constraining exceptional power makes the power not really exceptional at all. After the Munich *Putsch*, President Paul von Hindenburg agreed with Schmitt that limiting Article 48 would be problematic and rejected the proposal. Hindenburg explained to Chancellor Marx his reasons why in a twelve-page letter after he considered the issue for months:

the multiplicity of potential dangers threatening state security, [and the necessity of] . . . allowing the president a free hand in instituting measures according to the demands of each individual case. . . . A rigid formalistic definition of [a president’s] right, would represent a weakening of his authority and a serious danger to state security. . . . he [the president] can institute all necessary measures to restore public security and order. (Quoted in Bendersky 1983, 83)

LIBERAL CONSTITUTIONAL DEMOCRACY AND THE EXCEPTION

Carl Schmitt is critical of liberal constitutional states because they separate the state from the exception. Liberal constitutional states design technical systems in an attempt to constrain the need to ever exercise exceptional power. By technical systems, Schmitt means constitutional or legal constraints which are used to circumscribe the need for the exception—the use of power beyond law. These attempts, Schmitt argues, are doomed to fail, and states eliminate access to the exception to their detriment. Schmitt believes that the limited version of the exception represented by Article 48 in the Weimar Constitution makes it consistent with the liberal democratic state and carries with it the problematic elements of limited sovereign power. He writes,

According to Article 48 of the German constitution of 1919, a state of exception is declared by the president of the Reich but is under control of the Reichstag, which can at any time demand its suspension. This regulation corresponds to the development and practice of the constitutional state, which, through a division of powers and mutual control, attempts to postpone the question of sovereignty as much as possible. (Schmitt 2020a, 8)

It is necessary to distinguish between “the exception” and laws designed to deal with unusual or crisis situations, the implementation of which is designed to make the exception unnecessary. An example of the latter is the U.S.A. PATRIOT Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act). This law is not the implementation of the exception, it is the opposite. The law becomes part of the technical system and part of liberal society’s attempt to codify every situation so an exception is unnecessary. Schmitt explains, not every police emergency measure or emergency decree is a true state of exception. Fundamentally unlimited authority appertains to this much more, meaning the suspension of the entire existing order. If this situation occurs, it becomes clear that the state persists while the law recedes. Because the state of exception is something entirely different from anarchy and chaos. (Schmitt 2020a, 9)

The exception is designed to create order in society and achieve a specific substantive outcome, not to maintain or protect any rule or process. The U.S.A. PATRIOT Act is designed to maintain the regular order by prescribing precise limits to a situation in which they do not apply.

The exception is not absent from (attempted) implementation in liberal democratic states. An incident showing both the limits and expanse of the exception in the United States was Abraham Lincoln’s suspension of *habeas corpus*. *Habeas corpus* is the right of an imprisoned person to have judicial review of his or her situation. This independent review determines if one’s rights have been violated and necessary remedies. *Habeas corpus* has long been considered a fundamental right in the Anglo-American legal tradition. It protects citizens from arbitrary, illegal, or extralegal detention. Under the authorization of the United States Constitution Article I (which is focused on legislative powers and limits), section 9: “The privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” Following this clause, Abraham Lincoln suspended *habeas corpus* during the Civil War in the states which had seceded. Abraham Lincoln went further, however, when he suspended the right of *habeas corpus* in the case of John Merryman, a prominent

Baltimore County, Maryland, planter and Confederate sympathizer. Merryman was arrested for destroying bridges in Maryland as a method of interfering with Union troops as they marched toward Washington D.C. After his arrest, he was held at Fort McHenry in Baltimore by Union forces, but he was not charged with a crime. Maryland had remained part of the Union and the civilian courts were still operating in the state. Merryman's lawyer, therefore, filed for a writ of *habeas corpus*, arguing his client's detention violated the law.² Officials at Fort McHenry, under the direction of Abraham Lincoln, refused to release Merryman and Merryman's attorney appealed. The appeal was heard by Chief Justice Roger Taney (likely in a circuit court). Taney ruled that Lincoln could not suspend *habeas corpus* without congressional authorization in a state where civilian tribunals are working.

The legal question of whether Lincoln had the authority he claimed is not completely settled. While in Schmitt's model the unified personified sovereign decides constitutional meaning, which is then adopted by the populace, in the liberal constitutional state, it is the sovereign people whose beliefs are made known and then adopted by the state. Lincoln argued he had the authority to suspend *habeas corpus* in this case; the exception was necessary to prosecute the war and put down the rebellion. Lincoln continued to assert his power to invoke the suspension of *habeas corpus* despite the judicial ruling. Taney, who was from Maryland, had a different interpretation of the clause than Lincoln, but Lincoln had the power to enforce his view while Taney did not. Lincoln was able to exercise the authority; therefore, according to Schmitt, he had the authority. Schmitt would further conclude that insofar as Lincoln does not have the ability to exercise this exception, either Lincoln does not have sovereign power or the state is without sovereignty. There may be some pushback against labeling the suspension of *habeas corpus* the exception. Lincoln neither suspended electoral contests nor did he suspend the constitution overall. Lincoln's use of the exception was somewhat limited and could have even been constitutionally enshrined, but insofar as Abraham Lincoln acted through his power and beyond legal authority, he acted through the exception.

In Schmitt's view, a liberal constitutional state, which circumscribes the exception, lacks sovereignty because it cannot enforce its particular vision of the state. Indeed, Schmitt sees the liberal constitutional state as trying to remove sovereignty entirely from the polity. "The liberal constitutional tendency to regulate the state of exception as thoroughly as possible simply indicates an attempt to precisely circumscribe the case in which the law suspends itself" (Schmitt 2020a, 10). Liberalism's goal of universal validity is problematic. The liberal constitutional state pursues neutrality, which lacks the distinctions necessary for the political, and therefore, cannot determine when the exception is necessary. Because the technical system established through liberal constitutional legal systems is meant to be universally valid,

supplanting the need for the exception, Schmitt believes the liberal constitutional democratic state cannot defend the particular or respond to crises; it might not even recognize them.

THE EXCEPTION, REVELATION, OR DEISM

Carl Schmitt understands the exception, like he understands sovereignty, in religious terms with the exception akin to miracles created by the divine sovereign. Schmitt writes about the “omnipotence” of the sovereign, which he claims “one hears about in every textbook of constitutional law, [and which] is not only linguistically derived from theology” (Schmitt 2020a, 26). Schmitt thinks the sovereign is like a secular political god, as unrestrained in political power as the god of nature is in natural power. That power is at its apex when the legal order needs to be suspended or recreated. The sovereign, as a creature of the constitutional order, is part of it, but also separate from it because the sovereign can, at any time deemed necessary, suspend or even recreate it. As Schmitt writes, “He will stand outside of the normally valid legal system and yet belong to it, for he is responsible for the decision as to whether the constitution can be suspended entirely” (Schmitt 2020a, 6). The sovereign can create laws, suspend laws, or change them at its will; it is as if god has made the sun shine during the nighttime. As a god can break out of the natural order, so can the sovereign break out of the structures of the law.

Relying on the religious imagery of the sovereign, Carl Schmitt argues that liberals are to the political what Deists are to the Christian world. Christian Deists believe in a god, but not an active one. While they believe that god created the world, they eschew the notion that any god is interfering with life on earth. Christian Deists also deny revelation, so while they believe in the moral teachings of Jesus, they reject the concept of his divinity. Schmitt claims that the Deists’ view of god is like liberals’ conception of the sovereign because as the Deists banish the power of god, liberals banish the power of the sovereign. Deists believe in divine power but also believe it to be in the heavens—away from possible interference with daily life. The liberal constitutional state also has a sovereign power but it is constitutionally banished to where a sovereign can be less dangerous and less useful. Schmitt describes the god-like sovereign in the United States:

the after-effects of the idea of god remain recognizable for some time to come. In America this becomes the rationally pragmatic belief that the voice of the people is the voice of god, a belief that underlies Jefferson’s victory of 1801. Tocqueville said in his description of American democracy that in democratic

thinking the people hover like god over the whole of state life, as cause and end of all things, from which everything starts and to which everything returns. (Schmitt 2020a, 33)

This sovereign voice of the people is used in the creation of the constitution; beyond that, the sovereign power is constrained and limited in a variety of ways by the constitution; *the* people do not act anymore. They are too powerful and must be limited.

According to Schmitt, this dynamic means liberal constitutionalism has a theory of sovereign creation, but not one of sovereign use. Rather than relying on the sovereign, the liberal constitutional state attempts to account for contingencies through the constitution and law so an exception need not ever be invoked. In doing this, the sovereign (or its representatives) is restrained from using its power to change the political and social order. Schmitt claims that trends in “the modern constitutional state are towards eliminating the sovereign in this sense” (Schmitt 2020a, 6). This means neither the sovereign nor the state can act in response to emergent situations. Schmitt believes that

The State is thus, on the one hand, the realization and expression of the cultural ideas of every party; on the other, merely the visible vestures of civic life and only *ad hoc* almighty. It should be able to do everything, yet allowed to do nothing. In particular, it must not defend its existing form in any crisis—and after all, what men want more than anything else is to retrieve their share of its exercise of power. Thus the form of the state is increasingly questionable and its radius of power increasingly great. (Jacob Burckhardt, Quoted in Schmitt 2020b, 61)

The liberal constitutional state, Schmitt argues, has no power to enforce its culture or values outward on other peoples or inward preserving its particular culture and values among its own people. This is because the liberal constitutional state has nothing to protect. It has no culture or ideology of its own, and therefore, no people (in the sense of a nation) it can defend.

Schmitt argues that the people in a liberal constitutional state lack sovereignty because an individual is sovereign only insofar as the state of which one is part has sovereignty. The liberal constitutional state cannot be sovereign because of its inability to access the exception, which augments its inability to exercise its substantive will and divide friends from foes. The sovereign power includes the ability to decide who to include and exclude from the state and people, as well as the ability to change the boundaries and requirements for membership. Through the exception, the state confronts the forces that can interfere with the national concepts and lead to their destruction. Without the ability to exercise an exception, the sovereign is immobilized and the people powerless, vulnerable, and without sovereignty. If the

state can decide on the exception, then the people are empowered to protect themselves as a collective, but not as individuals.

JAMES MADISON'S AMERICAN CONSTITUTIONAL MODEL

James Madison is closely associated with the United States constitutional system because of his work at the constitutional convention, publication of the convention debates, advocacy for constitutional ratification, and essential role in crafting the Bill of Rights. Madison advocates a constitutional democratic theory that conflicts with Schmitt's. Carl Schmitt's view of sovereignty conflicts with the concepts of separation of powers and checks and balances that are commonly seen as part of the United States constitutional system and taught to American school children. Separation of powers denies the possibility of the Schmittian unitary actor with sovereign authority. Any checks and balances would likewise defeat the purpose of Schmitt's sovereign. The fear of a sovereign like Schmitt's was part of the theoretical impetus of the American founding. Patrick Henry worried that "your dearest rights may be sacrificed by what may be a small minority; and a very small minority may continue forever unchangeably this government, although horribly defective. Where are you checks on this government?" Henry was concerned that the people be able to exercise their power over the state. In particular, the power to dislodge unwanted officeholders. The president and the concentration of power in that office were of particular concern.

If your American chief be a man of ambition and abilities, how easy is it for him to render himself absolute! The army is in his hands, and if he be a man of address, it will be attached to him, and it will be the subject of long mediation with him to seize the first auspicious moment to accomplish his design. (Henry 1985, 257)

The proclaiming of a delegate of the sovereign people as the sovereign is evidence of the problem Henry fears.

The technical or "deist" nature of the system is designed to guard against needing to rely on the virtue of state actors to protect from individual malfeasance. Without such a technical, or "deist system" as Schmitt terms it, it is necessary that the sovereign rule with a kind of national virtue. The polity takes on the character of the sovereign, so a virtuous leader would lead to a virtuous polity, and if the leader lacks virtue, so will the polity. James Madison argues in the *Federalist Papers* that a system can be designed to lead to virtuous outcomes no matter who rules. As Madison points out in *Federalist 51*.

If men were angels no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be

necessary. In framing a government which is to be administered of men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. (Madison n.d., 262)

Madison believes that a technical system which can be devised such that it not only avoids bad outcomes but leads to positive political outcomes. Instead of believing the liberal constitutional state blocks sovereignty as Schmitt argues, Madison claims it enables sovereignty and frees people to pursue their individual ends. Restraining the ability of individuals to turn their desires into reality without joining with others of differing views protects everyone from acute dangers. The constitutional system may not create the virtue, but it simulates virtue.

James Madison argues for the preservation and flourishing of diversity. He believed that given liberty, diversity will occur, and that people with different interests will form factions. Madison defines factions as a group “who are united and actuated by some common impulse of passion, or of interest adverse to the rights of other citizens, or to the permanent and aggregate interests of the community” (Madison n.d., 54). The state needs to control the destabilizing elements, potential violence, and negative competition caused by factions. Madison sees two ways of accomplishing this: addressing the cause of factions or addressing the effects. Madison dismisses the idea of controlling the cause of faction, liberty, because the price, the destruction of liberty, is too high. Madison views liberal democracy as a “world characterized by the pursuit of self-interest and the existence of ‘factions and convulsions,’” and focused on creating politics dependent on these factions rather than their elimination. In focusing on the effect of factions, “a new theory and science of government was required in order to prevent the failures that had characterized past experiments in popular government. The basic problem . . . was domestic faction springing from diverse social and economic interests” (Gunnell 1996, 254).

Carl Schmitt argues that hegemonic views and identity should achieve a homogeneous status in the polity, but this is the path that Madison fears. While Schmitt concentrates on limiting diversity, Madison focuses on limiting diversity’s problematic effects. “Madison’s answer to this pathology [of diversity] was to find a cure for the disease by rendering it acute, that is, to inhibit the power of factions that sought goals inimical to the aggregate public good by extending their number and activity over a large territory” (Gunnell 1996, 254–55). To deal with diversity’s potential problems, Madison presents a two-pronged solution. The first is to increase the number of existing factions, and the second is to make the members of each faction

somewhat diffuse by expanding the territory over which they exist. Madison believes that having many factions on several issues will mute their negative influences. Making interests diffuse will further make it difficult for strong factions to form and coordinate, increasing the likelihood of negotiation and mediation between groups. While communications advancements have made it easier for groups to coordinate across distances, the geographic federalism of the United States will increase their minority status, especially as they spread out more widely. The Madisonian system provided technical solutions that can be used to provide stability and avoid the need for a single authoritarian decision maker.

Schmitt, as opposed to Madison, believes there is a need for a single authoritarian decision maker to determine hegemonic views and when and what exceptional power is needed. Once exceptional power is implemented, the only reason for restraint or the reinstatement of “normal politics” is the achievement of the substantive goals determined by the sovereign. Non-hegemonic views can or should be forcibly suppressed to create the normal polity. Schmitt’s view of sovereignty, in this sense, is the opposite of the concept in liberal constitutional democracy. In liberal constitutional democracy, sovereignty is the power of the people collectively and no one person can, therefore, be solely responsible for deciding the exception and its limits. Rossiter explains that exceptional power in liberal constitutional democratic states is always different than in the Schmittian model because it is necessarily limited. “This strong government, which in some instances might become an outright dictatorship, can have no other purpose than the preservation of the independence of the state, the maintenance of the existing constitutional order, and the defense of the political and social liberties of the people.” The government power is limited “to end the crisis and restore normal time” (Rossiter 2017, 7; italics removed). This is different from the unlimited power advocated by Schmitt.

TRUMPIAN EXCEPTION

In August 2017, white nationalists gathered in Charlottesville, Virginia, for a rally to “unite the right.” They marched through the streets of the city chanting, among other slogans, “Jews will not replace us.” Their behavior shocked many people in the town, which houses the university designed by Thomas Jefferson, and a protest against white nationalism also began. One white nationalist rally-goer intentionally drove into the crowd of counter-protesters, injuring at least thirty-five people and killing a peaceful counter-protester, Heather Heyer. Donald Trump’s response to this rally and murder included his famous equivalency: “There are good people on both sides.” Republican

Paul Ryan, then speaker of the house, confronted Donald Trump about his response to Charlottesville. Ryan argued, “You have a moral leadership obligation to get this right and not declare there is a moral equivalency here.” For Trump, however, the issue was simple: “These people love me. These are my people, . . . I can’t backstab the people who support me.” Paul Ryan reminded him that these people included “white supremacists and Nazis.” Trump responded, however, “But there’s some of those people who are for me. Some of them are good people” (Woodward and Costa 2021, 89). Trump believed these “white supremacists and Nazis” supported him and were, therefore, part of the friend group, which makes them good people. The “others” who likely do not support Trump politically cannot be good people because they are enemies. They should be treated accordingly, as enemies, rather than friends.

In 2020, after the killing of George Floyd, there were demonstrations across the country against police brutality, specifically as directed against those of African descent.³ Unlike the protesters in Charlottesville three years before, whom Donald Trump defended, many of the people engaging in these protests were “Black Lives Matter” protesters, minorities, or leftists whom Trump did not want to defend. Politically, this group was more like the counter-protesters from Charlottesville. The difference between the two groups of protesters is clear; one group is more likely to include Donald Trump’s supporters (friends), while the other would be less likely to do so (enemies). The exception can be used to reinforce or defend this division, marginalizing the enemies so they do not endanger the state.

Because from the Trumpian perspective, Black Lives Matter protesters are politically other, after George Floyd’s murder Trump wanted “a law-and-order crackdown—10,000 active-duty, regular troops in the city. He asked about the Insurrection Act, an 1807 law which gave the president the authority to use active-duty troops domestically by simply declaring an insurrection” (Woodward and Costa 2021, 89). Considering this a wild overreaction to what had been mostly peaceful protests, Trump’s advisors tried to talk him down; however, “Trump was adamant: He wanted the storied 82nd Airborne stationed at Fort Bragg, North Carolina, the military’s elite crisis responder, to arrive in Washington before sunset when a protest was planned” in Lafayette Square, the open seven-acre park between the White House and St. John’s Church (Woodward and Costa 2021, 91).⁴ It was not only the protests near the White House that concerned Trump; he also argued in favor of taking exceptional actions across the country. On Monday, June 1, in the White House Rose Garden, before protesters were violently cleared to make way for Trump’s walk to the front of St. John’s Church for a posed photograph, Trump “denounced ‘professional anarchists, violent mobs, arsonists . . . Antifa and other ‘terrorists’ involved in the protests. He warned local and state officials that if they did not end the unrest ‘then I will deploy the United States military and quickly

solve the problem for them.” If one had a doubt about what Trump meant by “solve the problem,” “while he spoke security forces used tear gas, flash-bang shells, and mounted police to clear protesters from Lafayette Square Park, just in front of the White House. He then walked to St. John’s Church and posed for photographs, holding a Bible like a prop” (Ben-Ghiat 2021, 257).

Unlike the protesters in Charlottesville of whom he was solicitous, Trump wanted the Black Lives Matter protesters marginalized. This is part of Trump’s dichotomous view of the country, “in the aftermath of Floyd’s killing Trump . . . principally governed for a minority of the country—his hard-core political supporters—and chose neither to try to unite the nation nor to reimagine a postpandemic America” (Leonnig and Rucker 2021, 5). The primary Trumpian goal is to identify and keep distinct friends and foes. In defense of this goal, which by nature is always under attack by foes, the exception can be used. According to Congressman Jamie Raskin,

Trump and House GOP leaders have been acting on the dictum of the right’s favorite philosopher, Carl Schmitt, who said “Sovereign is he who decides on the exception.” We have come to the exception. Trump and his enablers have forced us into a politic in extremis, a place where the rule of law is trampled and violence redefines the terrain of struggle to make an authoritarian deviation from the rule of law possible. (Raskin 2023, 32)

This deviation from the rule of law is made clear in Trump’s argument for “absolute immunity” in his federal criminal trial arising out of his attempt to violate the constitution’s executive vesting clause, culminating in his actions on January 6.⁵ The United States Court of Appeals for the DC Circuit issued a *per curiam* opinion which rejects the absolute immunity claim. In a concurring opinion, Judge Jackson writes,

We cannot accept former President Trump’s claim that a President has unbounded authority to commit crimes that would neutralize the most fundamental check on executive power—the recognition and implementation of election results. Nor can we sanction his apparent contention that the Executive has *carte blanche* to violate the rights of individual citizens to vote and to have their votes count.

The reason the judges come to this conclusion is that

At bottom, former President Trump’s stance would collapse our system of separated powers by placing the President beyond the reach of all three Branches. Presidential immunity against federal indictment would mean that, as to the President, the Congress could not legislate, the Executive could not prosecute and the Judiciary could not review.⁶

The sovereign people would no longer be sovereign.

The Trumpist justification for rule by exception is based on power rather than law. Power can be used to divide the politically disfavored from the friends. Trump's attempted use of troops to constrain legal (or even illegal) protesters in 2020 violates the *Posse Comitatus Act* of 1878, which bars federal troops under penalty of imprisonment from participating in civilian law enforcement except when expressly authorized by law.⁷ A posse comitatus is any group of people authorized by a sheriff to address breaches of the law in a county. The *Posse Comitatus Act* forbids the use of soldiers as the posse; civilians must be used. The act was passed after Reconstruction to ensure that the army would not be used in the reestablishment of white supremacy in the former confederacy. It also reinforces the American principle that the military is subordinate to civilian government and cannot interfere with the civilian government's operation.

There are statutory exceptions to the *Posse Comitatus Act*. Even liberal constitutional states recognize, through law, or what Schmitt calls the technical system, that there are times for the military to act domestically. Trump initially appeared interested in these legal maneuvers, particularly the *Insurrection Act*. Under the *Insurrection Act*, the president can deploy the military to suppress an insurrection or rebellion against federal authority or to protect civil rights if the state is unable to do so.

Faced with Trump's desire to call in the military without the cause of an insurrection, Secretary of Defense Mark Esper in a Pentagon news conference said,

I've always believed and continue to believe that the National Guard is best suited for performing domestic support to civil authorities in support of local law enforcement . . . I say this not only as a secretary of defense, but also as a former soldier and a former member of the National Guard. . . . The option to use active-duty forces in a law enforcement role would only be used as a matter of last resort, and only in the most urgent and dire of situations. We are not in one of those situations now. I do not support invoking the Insurrection Act. (Woodward and Costa 2021, 100)

Donald Trump was furious about Esper's comments and yelled at him. "Why did you do that . . . You took away my authority!" (Woodward and Costa 2021, 101). While Esper's actions did nothing to curtail Trump's authority, Esper made it clear that the *Insurrection Act* did not apply and pretending it did is just a power grab.

Donald Trump acquiesced to not have the 82nd airborne in downtown Washington, D.C. but became interested in the idea that only federal military personnel are covered under the *Posse Comitatus Act*. He activated several

state's national guards and used them beyond legal authority. A national guard, depending on its state, can perform law enforcement activities. If a guard becomes federalized, however, they can no longer exercise law enforcement duties.⁸ National guards can operate, on the other hand, in Title 32 status which allows for the federalization of a state's national guard while nominally keeping authority in the state. The members of the state guard are paid with federal funds, but they remain under the command of the state governor who then can direct the guard to perform duties requested by the president. This is how Donald Trump chose to address the 2020 protests in Washington D.C., despite Washington D.C. Mayor Muriel Bowser's vehement objections. The Trump administration asked states to send their national guard to Washington, D.C. in Title 32 status and eleven (Republican) governors did so. According to the Brennan Center for Justice,

Although these out-of-state forces were nominally under their governors' control, it was later revealed that they were reporting up through the DC Guard's chain of command for "coordination" purposes. That meant they were ultimately taking orders from the president. In this way, the Trump administration brought a large, federally controlled military force into Washington and used it for civilian law enforcement, all while skipping over the procedures in the Insurrection Act and evading the political costs of invoking it. That is exactly what the Posse Comitatus Act is meant to prevent.

Donald Trump used the power he had to organize the troops in the city beyond the limits of his legal authority. This is an example of the exception.

THE PERSONALIZED EXCEPTION

Since a unified personified sovereign decides when situations are exceptional, private grievances can become part of the public order, or "turn the ruler's obsessions into policy" (Ben-Ghiat 2021, 73). This became apparent when Trumpists tried to exercise power beyond authority and change the American electoral rules. After the 2020 presidential election, Donald Trump and his supporters wanted to seize voting machines in states he lost but he believed he should have won. Without any way to do this (elections are run separately and independently by individual states and localities in the United States), Trump wanted to implement the *National Emergencies Act* to seize locally owned and operated voting machines. Trump's plans, however, would violate the legal precedents defining and limiting the act.

In April 1952, President Harry Truman, in the face of a steelworker strike, issued an executive order, in his role as commander-in-chief, under the

National Emergencies Act to have the commerce secretary seize and operate steel mills. Truman's justification was that a steelworkers strike would have a negative effect on the steel industry and, therefore, the country's ongoing operation of the Korean War. His executive order, tied to the president's explicit power as commander-in-chief, was rejected by the Supreme Court of the United States. In *Youngstown Sheet and Tube Company v. Sawyer* 343 U.S. 579 (1952) the 6–3 court held that President Truman did not have unilateral authority to seize and operate the steel mills despite the national interest. Any such order must be done in conjunction with a congressional statute that authorized the president to take possession of the property. The court wrote that, “the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.” In liberal constitutional democracies, all are responsible to obey the laws. The United States Court of Appeals for the DC Circuit in the case of *The United States v. Donald J. Trump* adds: “It would be a striking paradox if the President, who alone is vested with the constitutional duty to ‘take care that the Laws be faithfully executed,’ were the sole officer capable of defying those laws with impunity.”

The United States Supreme Court's opinion in *Youngstown Sheet and Tube Company v. Sawyer* did more than refute President Truman's argument; it also ruled contrary to Schmitt's preferred view of a unified sovereign by recognizing the constitution divides the state's power. While Schmitt argues that state power cannot be divided or sovereignty ceases to exist, the Supreme Court claimed that while the president is commander-in-chief and has the power to prosecute war, the president does not have the same sovereign powers in the realm of domestic policy. This assigning of powers circumscribes the need for, and opportunity to, enact the exception. When Donald Trump wanted to invoke the *National Emergencies Act* to seize voting machines after the 2020 presidential election, it was clear to his advisers that this would be beyond the president's constitutional authority. Woodward and Costa note that Trump's lawyers commented on the exceptional nature of the act, “Seizing voting machines through executive action could have drastic consequences. How would you do it? With the military?” It was, indeed, martial law that former General Michael Flynn had suggested Trump use in an interview with Newsmax (Woodward and Costa 2021, 195).

Trumpian politicians and followers have largely supported the Schmittian view over a Madisonian liberal constitutional practice, including Schmitt's conflation of power and authority. As it neared January 6, 2021, the day that Congress would certify the 2020 presidential election, Donald Trump pressured Vice President Mike Pence to throw out the legitimate electoral votes and either not use them in the tally or disqualify them and substitute “electors” who had voted for Trump. This is beyond the vice president's authority as

outlined in the constitution, the Twelfth Amendment, or the *Electoral Count Act*. When Trump proposed the idea of substitute electors to Mike Pence, however, Pence, defending American constitutional tradition, reportedly told Trump, “I wouldn’t want any one person to have that authority,” but Trump persisted,

“But wouldn’t it almost be cool to have that power?” Trump asked.

“No,” Pence said. “Look, I’ve read this, and I don’t see a way we do it.

“We’ve exhausted every option. I’ve done everything I could and then some to find a way around this. It’s simply not possible. My interpretation is: No.

“I’ve met with all of these people,” Pence said, “they’re all on the same page. I personally believe these are the limits to what I can do. So, if you have a strategy for the 6th, it really shouldn’t involve me because I’m just there to open the envelopes. You should be talking to the House and Senate. Your team should be talking to them about what kind of evidence they’re going to present.” (Woodward and Costa 2021, 229)

In this exchange, Donald Trump represents a view of the sovereign and the state similar to Schmitt’s, while Mike Pence supports a liberal democratic constitutional view. Pence defends the legal process and the technical system, and his behavior conformed with the legal and customary political guardrails. Pence also defends the liberal democratic sovereign, negating the consolidation of power by Trump, or anyone. Trump and Trumpists, however, argue that in the face of an exceptional situation, Trump could direct whatever power he deemed necessary to (re)assert what order he deems necessary on the state.

The loss of a legal and well-run election might seem like a poor excuse for an exception in a democracy, but Trump is the one who decides if the exception is needed and what criteria are necessary to reinstate normal politics. Joe Biden’s win does not conform with the Trumpian view of America; therefore, exceptional power is justified.

Mike Pence, despite agreeing with Trump on most policies, is advocating rule by the liberal constitutional state and its content-neutral procedures. Pence was a lynchpin of what Trump administration White House advisor Peter Navarro calls “the green bay sweep.” This was an extralegal, pseudo-constitutional plan for a government-led coup designed to keep a legally elected leader illegitimately in power by extra-legal means.⁹ The plan involved members of the House of Representatives and the Senate rejecting the legitimate electoral votes committed to Biden in seven states that Trump lost, five of which he had won in 2016. The hours of debate on the electoral votes would give Mike Pence the pretense to decide that the electoral votes are too questionable to accept. This is based on the rule by exception. The

only way to prevent the constitutional transfer of power is to operate against the constitutional standards. Navarro insists, however, in his public statements, that this plan is not illegal. There is a distinction between not illegal and legal or constitutional; a distinction Navarro attempted to exploit to make the plan unstoppable. Navarro does not claim these actions are constitutional, in the sense of being procedurally intended. It is more as if he had found a glitch in a computer game. If Navarro and other Trumpist actors pressured Pence properly, they would have found a way to achieve their goal without playing the game properly or at all.¹⁰

Trumpists often argue that the changes that they want, for example, surrounding the 2020 election, are constitutional. This is designed to lead one to believe that Trumpists are not proposing an exception; but it is a false claim of constitutionality which serves a purpose similar to the divine right of kings in medieval Europe: it is used to overcome objections to the exception, easing its implementation. Many Trumpists do not even believe their proposals are constitutional. According to the federal indictment regarding the 2020 election, lawyer John Eastman, when advising the vice president about certification and the Electoral Count Act (ECA) *after* the violence on January 6, sought to have him “violate the law and seek further delay of the certification” and “wrote, ‘I implore you to consider one more relatively minor violation [of the ECA] and adjourn for 10 days to allow the legislatures to finish their investigations, as well as to allow a full forensic audit of the massive amount of illegal activity that has occurred here’” (Paragraph 122; brackets in original). Eastman’s advocating of illegal activity is justified because of some teleological or greater goal to which the state is committed, in this case: Trumpism.

According to the 2020 election indictment, Trump made the exceptional argument, “regular rules no longer applied, stating, ‘And fraud breaks up everything, doesn’t it? When you catch somebody in a fraud, you’re allowed to go by very different rules’” (Paragraph 104, c). One can only make this claim workable if, as Schmitt claims, the distinction between authority and power disappears. If there were fraud, a legal neutral arbiter such as the courts, or a neutral recount, would have ruled on Trump’s behalf. They have not; so Trump insists on being both the judge and jury in his own case. John Finn (1991) argues that the distinction between authority and power is crucial to the liberal constitutional project. The desire to separate authority from power is what propels people to leave the state of nature according to liberal theory. John Locke writes that, “Want of a common Judge with Authority, puts all Men in a State of Nature: Force without Right, upon a Man’s Person, Makes a State of War” (Locke 1988, 281). Trump’s claims, however, counter demands that his power is restrained by any other authority.

From a Lockean perspective, Trumpian politics are not only apolitical but mimic the state of war because there is no common judge which Trumpists

accept, retreating to the state of war against all others. Because Trumpism advocates unlimited power, its claims are inherently antithetical to liberal constitutionalism, generally, and the United States Constitution, in particular. The Trumpist elector plan was an attack on the American constitutional democratic system, and if successful, it would destroy it because it is the fulfillment of Patrick Henry's fears. Anyone in power can resist being displaced, undercutting the government's legitimacy and its limits. The Trumpian plan does agree with Schmittian views, however. The power the sovereign exercises is valid and, as the secular god, the sovereign can step outside legal and constitutional norms and insist that reality conforms to its vision.

CONCLUSION

The structure of liberal constitutional democratic systems is designed to make the rule by exception both unnecessary and impossible. In doing this, according to Schmitt, the sovereign gives up its ability to protect the state and the people. Schmitt argues, therefore, that the liberal constitutional state lacks true sovereignty because it banishes the active and unified sovereign through its procedural technical system. Schmitt believes, therefore, that instead of relying on these technical legal systems to protect the state and its people, the unified personified sovereign should access a fundamental part of the state—the exception. Without the exception, friends and enemies can become confused and the nation and state endangered. This Schmittian understanding, which has been adopted by Trumpists, means that any legal technical procedures can be abrogated in defense of the sovereign's goals. Donald Trump believes he is unconstrained by the American constitutional system and has tried to the rule by exception when the state failed to conform to his view. The exception need not be reserved for times in which the state is subject to the threat of physical annihilation. More exactly, the notion of an existential threat is much broader. Trumpists have argued that their leader should be unrestrained by law. Whoever has the power to exercise the exception gets to decide if and when it is warranted. This takes decisions considered “private” in liberal constitutionalism and brings them into the public square. Donald Trump's personal failures—his election or business losses—become things on which the whole polity can become focused.

NOTES

1. This argument is not only part of Schmitt's criticism of liberalism but has also been adopted in some form by defenders of liberal constitutional democracy, such as Rossiter (2017) and Abraham Lincoln (see below), who argue for an expansive

interpretation of political authority during emergencies. See also Karl Lowenstein's (1937) idea of "militant democracy."

2. In addition to *habeaus corpus*, Merryman's Fifth and sixth amendment rights appear violated. The fifth amendment reads: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger." The sixth amendment reads: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation."

3. George Floyd was a Black Minneapolis man whose murder, by police officer Derek Chauvin, was captured on a bystander video. Chauvin knelt on Floyd's back until Floyd asphyxiated while bystanders and Floyd himself begged to be released. The video sparked worldwide outrage and protests across the United States.

4. While many tried to talk Trump down, there were those in who egged him on. Woodward and Costa report the following exchange: "'Mr President,' [Steven] Miller said, piping up from one of the Oval Office couches, 'they are burning America down. Antifa, Black Lives Matter, they're burning it down. You have an insurrection on your hands. Barbarians are at the gate.'" Milley spun around from his seat in front of the resolute Desk. "Shut the fuck up, Steve. Mr. President," Milley said turning back to Trump, "they are not burning it down . . . They used spray paint, Mr. President," Milley said. "That's not insurrection. That guy up there." He pointed to the portrait of Abraham Lincoln on the wall in the Oval Office. "That guy up there, Lincoln, had an insurrection" (Woodward and Costa 2021, 87) .

5. The executive vesting clause is Article II, Section I, Clause I, of the Constitution: "The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years."

6. The majority of this text was finished in the summer 2023. I acknowledge that as I finish the final editing in early 2024, there are already examples that might be better (or more dramatic) than the primary examples I have used. This is one such example. I, therefore, address it briefly here as a confirmatory example, rather than the primary explanatory one.

7. The *Posse Comitatus Act* reads: "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both."

8. The *Posse Comitatus Act* only refers to the Army and Air force. 10 U.S. Code § 275 extends the rule to the Navy and the Marines. The Coast Guard has the authority to provide law enforcement (e.g., drug interdiction) and is not bound by either act. The Washington D.C. National Guard is under presidential control, and the Department of Justice has asserted in an April 4, 1989, memorandum that the DC National Guard can operate in some law enforcement capacities.

9. One way democratic systems become authoritarian is when a legally elected government stays in power illegally, violently or non-violently, sometimes called an

autogolpe. It was the method used by Hitler and Putin, and was attempted by would-be authoritarians like Brazil's Bolsonaro.

10. This plan, which became the basis of multiple indictments, should be distinguished from an instance of "constitutional hardball" (Tushnet 2004). Constitutional hardball has three characteristics, according to Tushnet: it involves constitutionally defensible behavior by political actors, the actions and claims made do not agree with settled constitutional understandings, and it involves control over the national government or a transformation of the constitutional order. While this plan accords with the second and third criteria, it fails the first. While Trump's team endeavored to present their plan as (barely) constitutionally defensible, it was only defensible under a Schmittian understanding of politics, not under the understandings of American constitutionalism and limited government. As noted in the federal election indictment against Trump, when Pence questioned the constitutionality of the plan, the retort he received was that "nobody's tested it before." Pence said to Trump, "Did you hear that? Even your own counsel is not saying I have that authority." (Paragraph 93).

Chapter 6

Democracy

Carl Schmitt posits a strong role for a unified authoritarian sovereign, a vision embraced by Trumpists as seen in the last chapter, but Schmitt and Trumpists still believe themselves to be supporters of democracy. It is not the same version of democracy as the one recognized by the liberal constitutional state, however. “Despite Schmitt’s fervent antiliberalism (not to mention antisemitism), he, too, was concerned with democratic order, though few contemporary political theorists would countenance Schmitt understanding of what democracy meant and with good reason” (Meierhenrich 2016, 172). Schmitt believes that democracy in a liberal constitutional state makes the mistake of concentrating only on the maxim, with which he agrees, that equals should be treated equally, instead of concentrating on the more important corollary, with which he also agrees, that unequals should be treated unequally. A democracy, according to Schmitt, should give priority to the opinions, thoughts, and needs of those who understand the national people and can help the state achieve its national goals. Those who are part of the friend group should be given electoral priority over those who are not. This negates the liberal constitutional procedural understanding of democracy and moral equality. Instead of a neutral process with an unknown outcome, in the Schmittian state, the outcome of any democratic process must be to further reinforce the nature and cohesiveness of a friend group (as understood by the state and its sovereign). Insofar as it does not, the outcome is invalid and procedures need to be altered. Schmitt rejects the technical or procedural structures of the liberal constitutional state in favor of substantive outcomes. The people cannot be given free choice to decide in a democracy because they may make decisions that are incorrect by the state’s standards.

Trumpism, as a logical outgrowth of Schmittian understandings of the political and sovereignty, has a similar view of democracy. It, too, questions

the procedural equality on which the constitutional democratic system of the United States relies. Trumpists divide America into us and them and do not view the groups as equal. Because the groups are unequal, their rights to political access should be unequal. Trumpists advocate, like Schmitt, a substantive or results-oriented view of democracy. Democratic processes are just only if a particular outcome is reached. The Republican party's desire to limit voting access and abandon neutral processes is a desire to engineer the "correct" outcome. The move to the Trumpist political vision has changed the way politics is understood in the United States from a neutral process between an equal self-governing people or a method to pursue a particular policy to a world where politics is merely about "hating the right people and being hated by the right people" (Chris Hayes 2022).

THE SCHMITTIAN ELECTORATE

In James Madison's explanation of the United States constitutional system, he advocates the coexistence of different factions and ideas. Carl Schmitt believes, counter to Madison, that democracy requires a homogenous people and society. "[I]n *The Crisis of Parliamentary Democracy*, in 1923, [Schmitt] appears to be agnostic regarding the specific substance of democratic homogeneity. He suggests that an appropriately political way of life could be constituted by identities formed around the phenomena of class, language, religion, or ethnicity" (McCormick 2016, 280). Any of these characteristics, if clear and unified, can be the fundamental basis of community. Schmittian and liberal constitutional democratic politics also disagree about the nature of the private sphere, individual choice, and the issues around which people might create communities of interest. What are parts of civil society in liberal democratic states are public markers of identity in Schmittian politics, limiting the scope of the private sphere.

Schmitt believes that when private commitments become communal, they also become political. Identity exists on more than one axis, therefore. If it did not, people might share a common touchstone but have robust disagreements in other areas. Schmitt writes, however, that democracy can really only "exist where the people are so homogeneous that there is essentially unanimity. According to the *Contract social* there can be no parties in the state no special interests, no religious differences, nothing that can divide persons, not even a public financial concern" (Schmitt 1988, 13). To keep a people from losing its identity, Schmitt warns that states should make citizenship dependent on having membership in the nation. Because of these commitments, Schmitt believes a closed democracy is better than an open system. It must be closed to the "wrong" people and allow participation only by the right people who

share the correct views of friend and foe. This is opposite from the notions of democratic equality in the liberal constitutional state which allows those of diverse beliefs or identity to participate equally in the public sphere. Indeed, Schmitt criticizes the liberal constitutional state for its failure to represent a single unified people, and for allowing diversity.

In *Legality and Legitimacy* (2004), Schmitt claims that democracy can only exist if the ruler and the ruled also share an identity. When they share an identity, the ruler and ruled are part of the same whole and share in the same desires, interests, and goals, similar to Rousseau's general will. When diversity exists, there is no guarantee that any representative speaks for any represented individual on an issue. Schmitt uses this representational gap to justify exclusion and to remake the polity in the image of the state, rather than to seek better representation.

If a difference exists between the representative and the represented according to Schmitt, the polity cannot be democratic, even if it is representative.

In other words: in a heterogeneous, deeply divided society such as Germany after World War I, the majority decision in the parliament is not able to obligate the whole citizenry because it acts only for the majority, while the "suppressed" minority regards the majority party in legal control of state power as illegal. (Preuß 2016, 483)

Schmittian democracy cannot exist in an environment of diversity.

For Schmitt, the liberal version of democracy, in which all electors are equal, allows the input of those with an inferior understanding of the polity to join equally with the input of those who have the correct understanding. Those with wrong views might even drown out those with the correct ones. This is more likely with a diverse polity and electorate because an electoral majority might not be representative of the state's character and its people. Another problem with liberal constitutional democracy, according to Schmitt, is that people may vote for their individual rather than the state's interests. For Schmitt, the liberal constitutional democratic commitment to treat all people as equal in a system of procedural neutrality is against the democratic goal of having the state protect the nation.

Akin to his belief that the participation of individuals with "incorrect" views is dangerous, Carl Schmitt also believes that allowing every political party equal access to the levers of power is problematic. The requirement of the liberal constitutional democratic state that all parties have equal access to elections, and to power if elected, is dependent on a belief that all parties engage in negotiation and compromise.¹ Schmitt saw problems with this liberal tradition of interaction and discussion. Instead, Schmitt believed, there is no good reason to mediate a correct view with an incorrect one; "it would be

totally impossible to give the equal chance to a party which is an enemy of the state,” furthermore (Bendersky 1983, 159).

Carl Schmitt argues that the Weimar system is faulty even under the standards of the liberal constitutional state. He claims that in Weimar “the realities of parliamentary and party practice bore little resemblance to the liberal ideal. Instead of open parliamentary debate, small party committees or party coalitions convened secretly to decide the political fate of Germany” (Bendersky 1983, 68). Even though Schmitt believes that Weimar Germany falls short of liberal constitutional democratic standards, he also believed a perfectly operating liberal constitutional democratic state would be problematic. The liberal constitutional state advocates neutrality and gives all an equal opportunity to participate. It also supplies, in one model, a marketplace where ideas are traded. Ideally, it is a fair marketplace in which no prejudice is shown toward which ideas will be adopted and by whom. For Schmitt, this neutral marketplace is one of the liberal constitutional democratic state’s failures. It allows participation by the wrong people and the inclusion of wrong ideas, rather than focusing on the nation’s and state’s correct ideas and endeavors. Schmitt believes that even if the Weimar constitutional system was a perfect model of a liberal constitutional democratic state, it would not be “fair” because of this neutral marketplace. Neutrality allows inferior voices to drown out other “better” ones. An overall decision maker mitigates this problem by setting limits and protecting the state from the wrong view.

POPULAR DEMOCRACY

Liberal constitutional democratic states advocate a procedural form of democracy. Instead of politics necessitating certain outcomes as Schmitt believes, liberal constitutional democracy provides a process for decision-making. As explained above, Schmitt criticizes liberal constitutional democracies because they ideally avoid metaphysical concerns, believing these are better left to the private sphere. The government should, for example, allow an individual the freedom to choose a particular religious practice or lack thereof. Insofar as state action prejudices, knowingly or unknowingly, certain views, the process is thought unfair. A neutral process is believed important because it is through it that the will of the people can prevail.²

While Schmitt argues a single authoritarian interpreter is necessary for the sake of both clarity and correctness, the liberal constitutional democratic state dismisses the idea of a single interpreter who has greater or better knowledge than others. Instead, liberal constitutional democratic states argue for popular sovereignty. In 1324, Marsilius of Padua (1270–1342) finished the *Defensor Pacis*, in which he defends the idea of popular sovereignty. Marsilius

argues that the sovereign power is the sum total of the entire people. He writes, “‘every whole is greater than its part,’ . . . From this it clearly follows of necessity that the whole body of the citizens, or the weightier multitude thereof, which must be taken for the same thing, can better discern what must be elected and what rejected than any part of it taken separately” (Marsilius 1980, 51).

Marsilius was responding to ecclesiastical leaders who had claimed, under a form of divine right, that temporal kings were subordinate to the popes and the papal hierarchy in spiritual affairs and secular affairs. Marsilius claimed, however, that the people are the sole legitimate source of political authority. The “weightier part” of the people are the ones, themselves or through their representatives, who can create laws, and elect, correct, or depose the government. Marsilius also argues, contrary to what Schmitt claims, that the will of the entire people is better than any segment thereof. Wisdom is additive—no portion of the population has as much wisdom as the whole population. It makes no sense to exclude anyone, therefore. Due partly to the same principle, the secular outcome is valid and binding not only over secular authorities but, according to Marsilius, over the church. He writes, “coercive power does not, therefore, belong to any priest or bishop, but they as well as the rest must in this respect be subordinate to the secular judges” (Marsilius 1980, 136).

Contrary to Marsilius, Schmitt believes that a segment of the population is better for decision-making than the whole. This segment, which might be as small as a single individual, defines the boundaries of the friend group and keeps the enemies marginalized in the political and social system. In Schmitt’s view, the best way to deal with disagreements and ensure a unity of focus and purpose is to put authority into the hands of a unified power. The most democratic and legitimate rule is done in defense of the people and the state. A single individual can arguably accomplish this, so there is no need for popular sovereignty. Indeed, popular sovereignty is dangerous because pernicious or insidious ideas can be advocated and its outcomes are imperfect. Democratic or constitutional procedures should be limited in the name of substantive goals.

PROCEDURAL VS. SUBSTANTIVE DEMOCRACY

The difference between Marsilius’ and Schmitt’s versions of democracy is the difference between a procedural form of democracy and a substantive form of democracy. In a procedural democracy, if the rules are fair and the participants legitimate, the outcome is fair. It is like a 100 meter foot race. Whoever reaches the finishing tape first wins—provided the procedures are fair: for example, all participants waited for the gun to start and all started the

same distance from the finishing tape. In a substantive democracy, there is a predetermined correct substantive outcome that the procedure should reach. If the outcome is not reached, there is something wrong with the procedure. It is as if runner X *should* win because we have predetermined that runner X is the fastest. If runner Y wins the race, instead of accepting the results, the rules are changed in runner X's favor and the race run again. If races were actually run this way, runners other than X would stop participating.

Carl Schmitt believed the goal of the state is the protection of a particular version of the people and nation. This should be pursued even at the expense of constitutional rules and laws. The Weimar Constitution was merely an instrument designed to pursue that goal. Schmitt believed Weimar was merely a different approach to aid the same goals as the previous configuration of state power—the imperial state. Schmitt writes that, “By accepting the Weimar constitution the German nation does not want to disavow its identity with the German nation of the constitution of 1871 . . . the new constitution does not establish a new German state” (quoted in Bendersky 1983, 29).³ The imperial and Weimar constitutions have very different constructions but Schmitt argues these changes do not fundamentally change the state; therefore, any process can be abrogated or changed and the state, constitution, or people remain unchanged. Indeed, “Schmitt identified the greatest danger to the Weimar constitution as a ‘value-neutral’ and ‘purely functional’ interpretation of that document” (Bendersky 1983, 147).

Such interpretation, which would prohibit the conflating of the two constitutions, is dangerous, according to Schmitt, because of at least three things. The first is that it denies the flexibility necessary to achieve the state's primary goals. Any outcome, even those deemed necessary by the sovereign, cannot be ensured through a “value-neutral” and “purely functional” process. This is linked to the second problem of liberal neutrality. The neutrality of the Weimar system would give each party an equal chance at swaying the sovereign power, which can lead to some unacceptable partners in the government. “According to a strictly ‘value-neutral’ interpretation it would be unconstitutional to limit a party's equal chance to the legal acquisition of power. But Schmitt held that the concept of the equal chance made sense only when the parties” conformed to acceptable criteria (Bendersky 1983, 148).⁴ The sovereign decides what the acceptable criteria are, and only it can know if a party has accepted the required views and principles to participate in the political arena. This would be an advantage in a competitive democratic arena.

There is a third problem with the value-neutral constitutionalist paradigm, according to Schmitt: “A misplaced faith in institutional formality (e.g., liberal norms and procedures) was responsible, in Schmitt's view, for the production of meaningless politics, which for him meant a set of activities that were incapable of inspiring existential or metaphysical concern” (Meierhenrich and

Simons 2016, 23). Liberal constitutional democratic politics are meaningless, according to Schmitt, because the important existential and metaphysical issues of friend and enemy and the boundaries of the nation and the state are not addressed. Liberal theorists, however, do not view the bracketing of these issues as a flaw. These issues are consciously left in the private sphere, beyond state power. People are free to make their own choices regarding these issues, be these choices the same or different from others. Schmitt understands politics differently; he believes it should be focused on the political. “The activity of ‘politics,’ for Schmitt, was tied to modernity and rationality, while the activity of ‘the political’ was tied to tradition and mythology” (Meierhenrich and Simons 2016, 23). Carl Schmitt believed liberal commitment to detached of rationality dismisses *the political* in favor of a series of political activities often termed politics. This is because of liberal constitutionalism’s concentration on formalistic interpretation and the rule of law, which is designed to maintain a fair process while attempting to be as neutral as possible on substance. Schmitt advocates the reverse: the process should be subordinated or even abandoned in favor of content and outcome. Schmitt believed, “the concrete situation should prevail over abstract principles, or strictly formalistic interpretation, when analyzing constitutional questions” (Bendersky 1983, 100).

LOGIC OF MINORITY RULE

Because Schmitt’s view of democracy is content-based, it allows democratic authoritarian forms of government. Schmitt explains,

Bolshevism and Fascism by contrast are, like all dictatorships, certainly antiliberal but not necessarily antidemocratic. In the history of democracy there have been numerous dictatorships, Caesarisms, and other more striking forms that have tried to create homogeneity and to shape the will of the people with methods uncommon in the liberal tradition of the past century. (Schmitt 1988, 16)

Schmitt argues in *Dictatorship* that the Leninist dictatorship is based on popular sovereignty. As long as a leader rules for the benefit of the people, the government can be democratic in Schmitt’s view. Carl Schmitt’s understanding of democracy leads to the conclusion that a dictatorship can be more democratic than a government based on popular sovereignty.

Schmitt’s ideas are paternalistic; someone other than the people themselves needs to decide what is best for them because the people might not vote in their best interests or that of their community. While some of the procedures of liberal democracy can remain, those effective or consistent with liberalism’s universalist principles of equality and rationality must be terminated.

The people's power is limited such that views are coextensive with the national ideal. Schmitt thought that in Weimar, the president was ideally situated to serve the role as the neutral defender of the nation and its identity. He believes this, in part, because the presidential oath "obliged him to defend the constitution against anti-constitutional movements" (Bendersky 1983, 112). Schmitt argues the president would be bound by that oath, but his argument also requires that the president not be bound by similar (binding) oaths made regarding other Constitutional procedures. If the constitutional text, or the oath to it, fails to constrain other political actors, it is not clear why another oath would bind any one individual more tightly. This seems to depend on the honor of one actor (the president) which, if absent, can destroy the people and polity.

The liberal constitutional democratic state relies on wide-ranging participation. Common interests should drown out divisive individual and group interests. According to James Madison's model, as outlined in the *Federalist Papers*, people vote their interests, which include civic concerns, but because there are so many different interests, no one "faction" will capture the state. The resulting Madisonian system of procedural justice leads to a reasonable outcome because of the system's mechanics. The outcome would be just without anyone individually needing to act with the benefit of all in mind. Carl Schmitt, on the other hand, argues that a ruler needs to rule for the benefit of the nation to be effective. This is the basis of Schmitt's model—the individual actor with a singular lofty perspective—as the ultimate decision-maker. This dismissal of popular sovereignty is countered by advocates such as Marsilius, who argue that varying perspectives carry more information than any one person can have, no matter from how high their view.⁵

Schmitt believes majority rule and its representative counterparts are inherently dangerous to the state because it requires that one who may have greater knowledge, ability, or understanding of the people acquiesce to the will of one's inferiors. Unlike what is advocated by liberal constitutionalism, Schmitt believed it is possible, if not likely, that the minority can better represent the identity of the whole than individuals voting their interests. This makes a Schmittian democracy a fundamentally different exercise than the liberal constitutional democratic project. Indeed, Schmitt claims that authoritarians or dictators rule democratically if they rule in the interest of the people. This is true even if they lack support from the people or if they fail to commit to what people want.⁶

An authoritarian dictatorship rules democratically without regard to how it arrives in power; democratic rule is based on the interests of the collective people, not on the method of power acquisition (Schmitt 1988, 30). Because Schmitt advocates that ruler and ruled share a political identity, those who do not match the requisite national identity (disagree with the sovereign) can

be excluded from the polity. The sovereign should not change its identity to match the people; the people should change to match the sovereign. Indeed, since election and policy-making institutions have only one, pre-known, legitimate outcome, procedures become merely performative. Once seen as merely performative procedures, be they designed to protect constitutionality, democracy, or legality, can be discontinued.

PROCEDURAL JUSTICE

Schmittian politics rejects procedural justice through which many liberal democratic procedures are designed to achieve an outcome. With imperfect procedural justice, one is committed to a process despite the fact that the process cannot be guaranteed to lead to the correct outcome. An example of imperfect procedural justice is a criminal trial. Its procedures are designed to convict the guilty and vindicate the innocent. Sometimes the designed procedures do not work: either the guilty go free or the innocent are convicted; yet, the procedures are considered important and people remain committed to those procedures even if they fail in a specific case because the process is most likely to achieve the outcome desired. This is especially true if other commitments, such as the protection of civil liberties, are also considered. Suppose there is a particular case in which people know the system failed—a suspect is acquitted and then a clear video of the person committing the crime appears. The person who committed the crime still gets to stay “legally innocent” of it.⁷ If one were to challenge the verdict of legal innocence, one would be challenging fundamental elements of the justice system, making them increasingly malleable and limiting any protection they provide. It is not worth abandoning the system and its process to achieve that single win. Destroying the protection against double jeopardy, in this example, may destroy it for all in the future, even in cases of government abuse. Instead of risking that outcome, the acquitted individual remains legally innocent.

Elections are also examples of imperfect procedural justice. They are designed to measure the will of the people. Elections may be the best way to reflect popular opinion, but that does not mean they are a completely accurate reflection. Still, losers stay committed to the electoral system. Democratic presidential candidates accepted an electoral system which twice in sixteen years led to the election of the Republican even though they received a superior number of votes because of such a commitment.⁸ Imperfect procedural justice is imperfect because the procedures are designed to advance the criteria for justice, but they do not always work. One abides by the procedures of imperfect procedural justice, even if some outcomes may be undesirable, for the same reason one stays committed to democracy even if one loses:

because on a whole, it leads to better outcomes and no one instance is worth jeopardizing the system. One would only jeopardize the system if the system is no longer deemed necessary or useful.

After the Nazi consolidation of power, the party held elections that fall (1933), and in 1936 and 1938. In these elections, all elected ministers were NSDAP members, as that was the only legally electable party. Only one kind of vote, one party, and one outcome were legitimate. The Nazis found a procedure that would lead to their desired outcome. While these elections do not have the elements of a liberal constitutional democracy, they do accord with Schmitt's vision of a democratic state. Since all parties other than the NSDAP could be viewed as enemies, they could be excluded from an equal chance to rule, treated disproportionately, and were subject to various kinds of exclusion. Schmitt would still call these elections, with foregone conclusions, "democratic" because the state rules on behalf of, and exceptions are created for the benefit of, and in the name of, the people (Schmitt 1988, 32). Even after 1938, when elections were abandoned in Nazi Germany, the system could still be democratic in Schmittian terms as long as the focus of the rule remained the people. By "people," Schmitt does not mean the collective will of all the people. He means the democratic focus should be a specific nation with a certain national character. Those who misunderstand or who do not represent the national character can be discounted. For the Nazis, this included leftists, socialists, homosexuals, Jews, Roma, and other people who were considered non-Aryan, no matter their percentage of the population.

ACCURACY NOT VERACITY

The Cybersecurity and Infrastructure Security Agency (CISA) of the Department of Homeland Security released a statement on November 12, 2020, claiming "The November 3rd election was the most secure in American History. . . . There is no evidence that any voting system deleted or lost votes, changed votes or was in any way compromised" (Woodward and Costa 2021, 159). This clear, factual statement led Donald Trump to fire the head of CISA, Republican Chris Krebs, via Twitter. Trump publicly scolded Krebs and claimed Krebs was clearly incompetent for not knowing that the election was rigged. One of Trump's lawyers publicly "raged in an interview that Chris Krebs should be 'drawn and quartered and taken out and shot at dawn'" (Cheney 2023, 19). Krebs, for his part, has been steadfast; the electoral process was entirely fair and the results accurate. Trump, on the other hand, views not only the election but democracy differently. Trump believes the outcome of the election is wrong; therefore, something is wrong with the election process. Even before the election, insofar as Trump seemed to think

that the process would lead to his defeat, he viewed it as illegitimate. Donald Trump did not have evidence of election fraud, believe the election was run in a faulty manner, or have any evidence indicating actual problems. He believed the outcome of the election was “wrong” because it did not lead to his victory. Trump’s discussion of rigged machines and fraud is about labeling enemies and not an actual claim about the accuracy of voting machines or vote totals.

Early in 2020, even months before the election, Donald Trump liked to talk about the Democrats’ attempts to “steal” the election. “*Steal* was rather a term of art, meaning not really stealing the election, but lobbying state and local authorities to liberalize election rules to make it easier for people to vote who were less inclined to vote—that is, getting more Democrats to vote. . . . The Democrats, under the guise of COVID, were out to ‘rig’ the election, albeit (it was sometimes added) ‘legally’” (Wolff 2021, 25). Trump viewed the COVID-based voting regulations allowing wide-scale mail-in voting in places where it was not used before as rigging the election because they might not help his desired result. It was a way for Democrats to get their less-likely voters to vote “and a way to counter the Republicans’ longtime successful efforts to discourage those same voters from turning out. Now the low-propensities didn’t have to go to the polls. It was this loss of an advantage that Trump found personally galling and somehow, by turning COVID into an opportunity, downright unjust” (Wolff 2021, 67).⁹ For Trump, “COVID was being used to the Dems’ advantage—hence, *rigging* the election” (Wolff 2021, 67). This is a view of cheating where there is nothing Trumpists can cite that violated the rules or procedures of American constitutional democracy. Had violations existed, there could be legal sanctions for forcing procedural changes. For Trumpists, however, the procedure is wrong only because it led to the wrong outcome. This was seen when, “In the months before the election, Trump systematically claimed the outcome would be rigged. If he didn’t win, the election would be stolen. It was his unless there was massive fraud” (Woodward and Costa 2021, 131). The process of the election was fine if Trump won, but problematic if he lost; the evidence of the problematic process being Trump’s loss. As Trump said “in his own Republican National Convention speech on August 27, [2020] - . . . [-], ‘the only way they can take this election away from us is if this is a rigged election’” (Woodward and Costa 2021, 131). There could only be one true outcome despite how accurate the election results might be. For Trumpists, accuracy does not equal veracity. The true democratic results would be those that supported the Trumpian outcome.

This distinction between accuracy and veracity also explains why, on the one hand, Trump argues wide-ranging vast conspiracies against him, indicating large-scale opposition; yet, he still claims he is the landslide winner of a

democratic election. The large-scale opposition from, for example, the population in the coastal cities, does not count because if they were “patriotic,” or real Americans, part of the friend group, they would vote for Trump. The only way for Donald Trump to lose the 2020 presidential election, according to Trumpists, is if the will of illegitimate enemies overrides that of the legitimate patriotic friends. *Such an adverse result is an illegitimate, if accurate, reflection of the will of the people.*

It is in this light that Donald Trump’s call to Georgia’s secretary of state, Brad Raffensperger on January 2, 2021, makes sense. Trump’s idea was that the process must have been wrong because the election came to the wrong answer (after all, Georgia is a red state with a Republican Governor and Republican Secretary of State). Trump and his supporters concluded that Republicans running the election must be part of the problem. As the call shows, Trump is committed to an outcome rather than any particular process or standard of accuracy. Trump does not ask for an accurate reassessment of the numbers; instead, failure to agree with him can even lead, according to him, to criminal sanction.

Oh, I don't know, look Brad [GA. Secretary of State, Brad Raffensperger]. I got to get . . . I have to find 12,000 votes and I have them times a lot. And therefore, I won the state. That's before we go to the next step, which is in the process of right now. You know, and I watched you this morning and you said, uh, well, there was no criminality. But I mean, all of this stuff is very dangerous stuff. When you talk about no criminality, I think it's very dangerous for you to say that. I just, I just don't know why you don't want to have the votes counted as they are.

Because the process did not lead to the “correct” Trumpist outcome, it must be faulty.

The same way those who fail to understand the distinction between friends and foes become enemies themselves, according to Schmitt, failure to agree with Trump about problematic democratic and procedural outcomes means that one becomes part of the enemy group. Brad Raffensperger, therefore, despite his conservative policy commitments, is an enemy who needs to be forced—hence the threats—to do the “right” thing and achieve the Trumpian outcome. This does not mean Donald Trump did not know he received fewer votes than Joe Biden—it appears he did know—but such facts would not mitigate his view that he should be declared the winner. Because Trump does not believe that the election’s accuracy is the same as its veracity, he claims that the results are wrong even in the face of multiple recounts, including a hand recount reaffirming the election’s results. Insofar as the voters make a choice Trumpists do not like, it is invalid and, therefore, necessarily corrupt.

Because Trump believes he is the correct winner, the process must be faulty to lead to any alternative conclusion. Trumpist voters must not have been counted or not counted enough, while other votes were overcounted or weighed too heavily. Real Americans, Trumpists believe, vote for Trump. The votes for Biden, on the other hand, should be discounted based on the voters being less authentic Americans. It seems that the argument is that X percent of Democratic votes are illegitimate because the votes are manipulated, foreign, or false. This is a way to argue that Democratic voters are X percent less authentically American, or X percent less worthy. It is not clear why any of these things: election manipulation, foreign voters, or illegal voters would be inherently to the benefit of Democrats. Trumpists imply that any illegal vote must be the vote for a Democratic candidate, while legitimate votes are Republican. Since illegitimate voters choose non-Trumpist options, Trumpists then also advocate the converse: non-Trumpist voters are illegitimate. This is not a claim about factual illegal voters but the boundaries of the friend group. “Sidney Powell responded to a defamation lawsuit against her by arguing that ‘no reasonable person would conclude that the statements were truly statements of fact’” (Cheney 2023, 22). These are claims about the nature of Trumpist enemies: they are manipulators and foreigners who do illegal things. Because all illegitimate voters are Democrats and every illegitimate vote is Democratic, removing votes from those overcounted, or adding votes from those undercounted is, therefore, *just* regardless of actual polling results. Indeed, if Republicans believe, as Trumpists advocate, that all procedure is a meaningless sham and is being manipulated against them, the taboo against breaking the electoral rules might weaken. In the Trumpist electoral view, there is no prohibition, and indeed a push toward, abandoning electoral normative standards.¹⁰

Donald Trump’s electoral attack on the city of Philadelphia is emblematic of his “democratic” views. In the first presidential debate of 2020, without any evidence of procedural problems, Trump made the generalizable statement that, “bad things happen in Philadelphia.” He preemptively called into question whatever results came from Philadelphia. Rather than questioning any specific procedure in the election in Philadelphia, Trump’s outburst likely had to do with his ability to only get 15 percent of the votes in Philadelphia in 2016. Trump, therefore, “knew” there would be something wrong with the vote in the city and called supporters to protest Philadelphia voting. Donald Trump actually fared significantly better in the election of 2020 than in 2016, winning 17.9 percent of the vote. Still, even before the vote, Trump knew it to be invalid. He advocated that the vote in the state’s largest district, Philadelphia, be discounted, and the vote just be counted elsewhere. This allows the places in the state where his voters predominate to be given a greater voice. Neither Trump nor his advocates cited any real procedural problems but just

vague insinuations justified by the kind of people who live in the city (minorities, immigrants, Democrats).

TRUMPISM AND LIBERAL CONSTITUTIONAL DEMOCRACY

Because Donald Trump considers legal activities that might lead people to vote for someone else as cheating, Trump considers cheating a part of the election process. Trump believes that elections are “fundamentally corrupt: *of course*, in a close election, somebody’s thumb would be on the scale. You weren’t supposed to fight about it—or you weren’t supposed to be *seen* fighting about it; you just let the heaviest thumb win, ‘but fuck that’” (Wolff 2021, 130). In belittling the idea that the process has ever been fair, Trump is expressing skepticism that any process can lead to a just outcome. Trumpists, indeed, argue against the entire idea of a neutral electoral process through which all can compete and potentially rule, which is essential to the liberal constitutional democratic state. “In considering the razor-thin 1960 Kennedy-Nixon race, Trump seemed to go back and forth between admiration for Kennedy’s ability to steal the election from Nixon and contempt for Nixon’s refusal to challenge the outcome” (Wolff 2021, 130). Trump also claimed that Nixon stole the 1968 election from Hubert Humphrey.¹¹ Donald Trump’s belief that the results of this election is still up for grabs more than half a century later shows that he does not believe elections are ever final or determinative.

Trumpists engage in a general dismissal of electoral democracy in defense of a particular version of the country. Donald Trump won the electoral vote in 2016 but lost the popular vote; yet Trump and many of his defenders in 2016 insisted that Trump was cheated and that he really won the popular vote. Arguing he was the popular victor is more than a mere vanity project for Trump; claiming more people chose him than Hillary Clinton belittles the whole idea of any effective electoral process and its ability to be part of the democracy. Even in 2016, Trumpists claimed that people casting votes for other candidates were illegitimate voters or their votes were illegitimate.

Because the outcomes are known, procedures and elections themselves are malleable. Strange as it may seem, Trump “juggled the election in his mind not necessarily as a win or lose proposition. Rather, it was a roadblock or technicality to get around, like taxes or zoning regulations or refinancings, or some advantage the competition might employ unless he came up with a sharper countermove” (Wolff 2021, 25). Trump showed the ultimate belief that the process was malleable; he had the idea that he could just call the election off. The state, as the controller of all sovereign power, need not seek the permission or ratification of the people.

When Donald Trump first approached Mark Meadows with the plan to call off the election, Meadows informed him that there was no way that he could. Still, when later talking with Chris Christie, Trump reportedly said, “I’m thinking about calling it off.” Christie thought he meant the debate prep in which they were engaged, but Trump set him straight. “No, the election—too much virus.” Christie replied lightly, “Well, you can’t do that man.” Then more seriously, “You do know, you can’t declare martial law.” He then added, “You do know that right?” Journalist Michael Wolff comments that, “It was both alarming and awkward that he might not. Trump’s preposterousness often combined with the possibility of his dead seriousness to create a moment in which embarrassment and crisis seemed indistinguishable” (Wolff 2021, 24–25). Trumpists believe elections, like all processes, are flexible because no process is superior to political goals. Trump believed his continuation in power should predominate over process.¹²

This runs counter to the tradition of the peaceful transfer of power in the United States, which continued even during the Civil War.

Until January 2021, every American president had fulfilled his solemn obligation to safeguard the peaceful transfer of power. Every four or eight years, down through our history, candidates of both parties have put aside personal ambition and political battles for the good of the nation—even after the closest of presidential races. (Cheney 2023, 363)

Jamie Raskin goes even further, explaining that even at the outbreak of the Civil War, adversaries protected the democratic process.

Abraham Lincoln’s electoral count was never violently interrupted or deviously diverted by enemies of the republic. Back then the *Baltimore Sun* reported on the chances of the Capitol’s being blown up, and there were large and unruly pro-sucessionist crowds trying to force their way into the building. But Gen. Winfield Scott kept the turmoil at bay with armed guards and his vivid warning that any disrupters “should be lashed to the muzzle of a twelve pounder and fired out of the window of the capitol,” adding that “I would manure the hills of Arlington with the fragments of his body.” According to Ted Widmer’s authoritative *Lincoln on the Verge*, the vehemently pro-slavery vice president of the United States, John Breckenridge, personally carried the famous mahogany boxes containing the electoral votes from the Senate over to the House and proceeded to execute his duties faithfully despite the fact that he was fiercely anti-Lincoln. (Raskin 2023, 12)

Al Gore may have really believed he won the presidency. He still oversaw the certification of the electoral vote for George W. Bush’s victory. Before the advent of Trumpism, this would not have been notable or seemed exceptional; it was just the American process.

TRUMPIST ENEMIES, FRIENDS, AND DEMOCRACY

Liberal constitutional democratic states endeavor to make voting restrictions content neutral, for example, age restrictions. While people of different ages may vote differently, the age requirement is not aimed at exploiting such a distinction. Trumpists, on the other hand, want electoral rules based on content rather than universalistic standards. They demand that the liberal democratic neutral process be abandoned and an alternative method of decision be substituted. Like Schmitt, Trumpists propose a method based on the state's sovereign biases. It is Donald Trump himself who determines enemies and exclusion. These enemies include those who live in urban centers (not just Philadelphia) where there is a concentration of Democrats, people of color, LGBTQIA+ people, etc. Since these groups are a danger to the friend definition of a true patriotic American way of life, it is easy for Trumpists to ascribe nefarious motives or actions to them, and then further to their votes. Such logic works because Trumpists start with the outcome they desire (Trump won the election) and endeavor to create a process to achieve that outcome.

This Trumpian electoral viewpoint legitimizes, if not mandates, anti-majoritarian moves. Gerrymandering as well as laws that increase the difficulty of voter registration become not only theoretically valid but beneficial. Cleta Mitchell, a Trumpist election lawyer, said before a meeting of donors in April 2023, "What are these college campus locations? What is this young people effort that they do? They basically put the polling place next to the student dorm so they just have to roll out of bed, vote, and go back to bed" (Dawsey and Gardner 2023). Mitchell implies waking up to vote is somehow illegitimate, likely because she does not like these voters' overall choices. At one point in Mitchell's presentation, she said that voting practices needed to be changed "for any candidate other than a leftist to have a chance to WIN in 2024." Indeed, she claimed, "the Left has manipulated the electoral systems to favor one side . . . theirs. Our constitutional republic's survival is at stake" (Dawsey and Gardner 2023). Marc Elias, an election lawyer who seeks to expand the right to vote, commented "'Imagine if in every place in this presentation where she references campuses, she talked about African Americans,' . . . 'Or every place she says students, she instead talked about Latinos. There is a subtle but real bigotry that goes on when people target young voters because of their age'" (Dawsey and Gardner 2023). Mitchell's claim is not that the process is problematic because it makes the measurement of the vote less accurate, but it is problematic because the *accurate* measure might lead to an outcome she does not like.

This opposition to "others" voting has become a major Trumpist concern. Kevin D. Williamson makes a Trumpian democratic argument in "Why Not Fewer Voters?" (2021). In this article, Williamson defends Republicans'

proposed changes to voting laws which limit participation.¹³ Williamson writes that “the republic would be better served by having fewer—but better—voters.” In a troubling analogy, Williamson compares the push to increase voter participation with the desire to have more doctors and notes that “there would also be more doctors if we didn’t require a license to practice medicine.” Reducing the need for a medical license might increase the number of doctors but not likely the number of qualified ones. Comparing an unlicensed doctor with a voter who needs to vote by mail, or outside usual voting hours because she is disabled, working, or for whatever reason, is concluding that a person who needs those voting accommodations will somehow cast an inherently less qualified or less knowledgeable vote. There is no evidence of why this would be true. Williamson may concur, writing that, “the fact that we believe unqualified doctors to be a public menace but act as though unqualified voters were just stars in the splendid constellation of democracy indicates how little real esteem we actually have for the vote, in spite of our public pieties.” The problem is how one recognizes an unqualified voter or a presumptively qualified one. The medical license shows a certain standard of education, knowledge, and training, but it is not clear what the ability to stand in line has to do with either voter security or sophistication. Williamson implicitly claims that if voters show good understanding, i.e., understanding like his, they are valid voters. If they show disparate understanding, however, they are unqualified. Because each person cannot be quizzed as to their political understanding, a placeholder must be used. If someone else lives like him, they are presumptively qualified; those in different circumstances should be barred.

Without a detached and neutral process, whoever decides the electorate’s standards of qualification is deciding the outcome of the election by choosing the electorate. An example of this is the Jim Crow system of discrimination, which existed for most of the twentieth century. It included, for example, the implementation of a literacy test requirement to vote. This test was *not* designed to ensure all people who voted could read; it was designed to exclude certain types of people, particularly African-Americans, from voting. This was clearly the purpose of the grandfather clauses; they exempted others (white people who had a grandfather voting before the Civil War) from having to take the arbitrary tests given or pay the poll taxes charged to African Americans. The state’s anti-miscegenation laws further locked in the social hierarchy. African Americans would never be able to access the grandfather clauses like white southerners. Current restrictions appear similarly designed. Researchers at the University of Southern California did a study ahead of the 2012 election which indicates that those who support contemporary voter ID laws have a similar discriminatory intent. The purpose of such laws, they argue, is to keep certain types of people from voting while not inhibiting others (Ingraham 2014). Judith Shklar (1990)

argues, moreover, that the struggle to gain the right to vote in the United States is often about the abstract benefits of citizenship, rather than the practical benefits that a vote may bring. The right of franchise is a symbolic acceptance of one as a member in the polity.

While Williamson recognizes discrimination can exist, he is not concerned about process neutrality. He acknowledges that his proposed changes would alter the process so it would be substantively beneficial for his (right-wing) interests. He knows the rules “would also tend to make voting somewhat more difficult for at least some part of the population. . . . Is there motivated reasoning at work there? Of course. But the mere presence of political self-interest does not tell us whether a policy is a good one or a bad one.” Although Williamson acknowledges that his limitations are designed to address a problem which does not exist in any significant way—voter fraud—he writes, “Of course that would put some burdens on voters. So, what? We expect people, including poor and struggling people, to pay their taxes—why shouldn’t we also expect them to keep their drivers’ licenses up-to-date? If voting really is the sacred duty that we’re always being told it is, shouldn’t we treat it at least as seriously as filing a 1040EZ?” Even in this comment Williamson shows prejudice about who is qualified and about what qualified means. Voting intrusions and the burden of up-to-date drivers’ licenses or tax returns are justified in liberal constitutionalism because they provide a good, not because they fail to cause enough bads to be stopped.¹⁴ Locke argues power “is necessary to that end for which the Commander has power” (Locke 1988, 362). Williamson is advocating voting roadblocks which might be minimal for some (if you drive a car and have a license) and be onerous or overwhelming for others. City dwellers, particularly low-income ones, for example, often do not have driver’s licenses as they are expensive and unnecessary. While a medical license has a direct bearing on one’s qualifications for the practice of medicine, as does a driver’s license for driving, it is not clear what relevance a driver’s license has to one’s ability to cast a knowledgeable and thoughtful vote. The lack of a driver’s license, however, is relevant to whether one lives in a city or how much money one has. These two characteristics may be linked to people’s propensity to vote for Democratic candidates.

Another problem with Williamson’s analogy is that he misses its significance. He writes, “shouldn’t we treat it [voting] at least as seriously as filing a 1040EZ?” If elections were taken as seriously as paying taxes, the United States would be more like Australia, which compels every eligible citizen to vote. Australians are subject to a monetary fine if they do not vote. This is the analogy of taxes to voting—create a system to enforce everyone to comply with the civic duty of voting, like the government does for tax compliance. The United States does not, however, largely treat voting as a civic duty as some other Western liberal constitutional democracies do, but instead as

a right. In the United States, one should be allowed to vote if he chooses, but it is not mandatory or even considered a societal obligation. Kevin Williamson's argument, rather than calling on voting as an obligation, calls on Americans to view voting as a privilege. A privilege which may be open to certain Americans and foreclosed to others.

MASS DEMOCRACY: A TRUMPIST DANGER

Because the people are sovereign in American liberal constitutional democracy, the greater the participation, the closer the representation of the sovereign. Williamson, like Schmitt, Mitchell, and Trump, however, not only dismisses the need for mass participation but proclaims its dangers. Williamson writes, "One argument for encouraging bigger turnout is that if more eligible voters go to the polls then the outcome will more closely reflect what the average American voter wants. That sounds like a wonderful thing . . . if you haven't met the average American voter." In this short statement, Williamson negates the liberal constitutional democratic paradigm and rejects its idea of individual sovereignty. Williamson dismisses it because he believes he is a better decision maker than the average American voter or American voters as a whole. There are objectively better answers, or goals, which Williamson believes he and his cohort are better at reaching. Like Schmitt, this view leads to a rejection of popular sovereignty in favor of a sovereign state whose authority and power can be held by a single individual.

The process would be better, according to Williamson, if it involved fewer people, a greater proportion of whom would share his point of view than do all Americans. Like Schmitt, Williamson does not believe that what the majority wants is the most democratic outcome. "Voters—individually and in majorities—are as apt to be wrong about things as right about them, often vote from low motives such as bigotry and spite, and very often are contentedly ignorant" (Williamson 2021). Williamson proposes voting or electoral control be transferred to a smaller group of Americans, but he fails to explain a way to assure there is "no bigotry or spite" in this smaller group or why they would be more virtuous. James Madison believed that small groups will always act in part from what Williamson cites as "low motives." To ensure a stable democracy, Madison suggested it be as broad and widespread as possible so none of those biases hold sway.

In *The Wisdom of Crowds* (2005), James Surowiecki contends that the existence of bias is the very reason to expand the number of participants. Surowiecki contends that the large-scale canvassing of opinion is more reliable than letting a smaller group, even if that group is made up of "experts," determine the outcome. This argument echoes both Madison's and Marsilius

of Padua's beliefs that a decision made by the whole community is better than one made by a segment of the population. Surowiecki even lauds particularistic or eccentric interpretations of facts because he believes people should make decisions based on their own information rather than the prompting of others. Williamson argues, however, that the opinions of (the correct) few are better than the opinion of others or the entire population together.

Williamson even tries to decouple issues of consent and legitimacy, which are linked in the liberal constitutional democratic states. He writes, "The real case—generally unstated—for encouraging more people to vote is a metaphysical one: that wider turnout in elections makes the government somehow more legitimate in a vague moral sense. But *legitimacy* is not *popularity* and *popularity* is not *consent*. The entire notion of *representative* government assumes that the actual business of governing requires fewer decision-makers rather than more." Putting aside the confusion in Williamson's argument between two different kinds of participation—that of citizen and that of delegate—he also neglects the liberal constitutional democratic ideas of equality, which require that all people be equally represented. What validates fewer decision-makers is that they *represent* the entire population. Williamson appears to argue instead for the early modern British notion of virtual representation. In the eighteenth century, some American colonists argued "no taxation without representation," but the British crown claimed they were represented. They were represented because they were British, and all British commoners are represented in the House of Commons; no geographical representative is needed. Williamson presents a similar idea; he advocates a democratic representative system that requires no actual representation. "Legitimacy involves, among other interests, the government's responsibility to people who are not voters, such as children, mentally incapacitated people, incarcerated felons, and non-citizen permanent residents. Their interests matter, too, but we do not extend the vote to them. So we require a more sophisticated conception of *legitimacy* than one-man, one-vote, majority rule." This, of course, contradicts the method for becoming a representative in the United States, which requires one to focus on constituents at the expense of others.¹⁵ Rather than focusing on increasing representation for the marginalized, Williamson expands the category of those who are marginalized.

Trumpists advocate abandoning procedures oriented toward maximizing participation and maintaining neutrality, in favor of new procedures and rules leading to a guaranteed outcome. Madisonian democracy would advocate minimum restrictions on political participation, but Williamson dismisses the idea of liberal equality in favor of a hierarchy. The person who needs to vote absentee or does not maintain a driver's license is put in the same category as someone who is mentally incapacitated. The logic of Williamson's argument would lead to fewer and fewer decision-makers. The least

intellectual, knowledgeable, patriotic, or “qualified” decision-maker can always be logically removed. This would lead to political participants who are more intellectual, knowledgeable, patriotic, or “qualified” by whatever criteria are considered important. This could eventually lead to rule by one “correct” individual. Based on these arguments, there is no reason to expand participation. This change in the understanding of democracy feeds into the modern version of the Trumpist Republican Party, which wants to control the state and society and claim legitimacy without ever earning or gaining majority support.

Majority rule itself is a procedure which Trumpists want to override.¹⁶ Indeed, Donald Trump and lawyer John Eastman proposed that Pence essentially declare Trump victorious in his re-election bid. Electors committed to Donald Trump from seven states sent false documents to Congress. The electors from five of those states asserted they were the rightful electors when they were not. The plan was to have Vice President Mike Pence, who would preside over the certification of the election in Congress, choose which slate of electors he preferred (presumably the Trumpist ones). If Pence did this, he would discount the majority vote of the people. Alternatively, Eastman argued, Pence could just throw out the electors for the seven states because they were now under dispute (albeit a fake dispute manufactured by the loser). The Trumpist claim of voter fraud is meaningless by constitutionalist standards as evidenced by Trumpists submitting an electoral slate for New Mexico, a state which Biden won by close to 9 percent of the vote.

At the end, he [Mike Pence] announces that because of the ongoing disputes in the 7 States there are no electors that can be deemed validly appointed in those States. That means the total number of “electors appointed”—the language of the 12th Amendment—is 454. . . . A “majority of the electors appointed” would therefore be 228. There are at this point 232 votes for Trump, 222 votes for Biden. Pence then gavels President Trump as re-elected. (Quoted in Woodward and Costa 2021, 211)

Essentially, Eastman has Trump winning the majority because he discounted seven states that Biden won as invalid because they voted in a way the Trumpists did not like. In an email released by the January 6 commission, John Eastman wrote, “Actual fraud is irrelevant *when the election itself is unlawful* [emphasis added].” Without fraud, it is not clear, at least from the liberal constitutional democratic perspective, what Eastman believes is unlawful. From the Trumpian perspective, on the other hand, it is enough that the wrong person won.

Donald Trump agreed with Eastman, who believed to win the election, “you had to argue against the very nature of an election: that at an appointed

moment, it was a *fait accompli*, counted, done, decided, agreed. . . . You had to keep the election in play” (Wolff 2021, 130). This is something Trump has done—never concluding the election of 2020 or even admitting he lost the 2016 popular vote. Eastman had a method to keep the election from being concluded by continually changing the rules of the game. Eastman noted that if the above method did not work, there was another way to keep the election in play. His memo continued:

Howls, or course, from the Democrats, who now claim, . . . that 270 is required. So Pence says, fine. Pursuant to the 12th Amendment, no candidate has achieved the necessary majority. That sends the matter to the House, where the [sic] “the votes shall be taken by states, the representation from each state having one vote. . . .” Republicans currently control 26 of the state delegations, the bare majority needed to win that vote. President Trump is re-elected there as well.¹⁷ (Quoted in Woodward and Costa 2021, 211)

As Eastman’s procedural flexibility shows, the process is not designed for fairness but to lead to the predetermined “correct” outcome. If one process fails to achieve the end in mind, just move to the next process which might work.

CONCLUSION

Carl Schmitt believed that the state should control and direct the people rather than the reverse. Schmitt’s idea of democracy would allow the opinions and thoughts of those who understand the nation, the state, and its needs to be given electoral priority over those who do not. The Trumpist form of democracy is similar to Carl Schmitt’s understanding, and they are both differ from how democracy is understood in liberal constitutional democratic states. Donald Trump and Trumpists question the procedural equality on which the traditional United States democratic system relies. This is an outgrowth of the division between friends and foes to which they are committed. The Trumpist view of democracy relies on rule being an accurate reflection not of the population as a whole but of the friend group exclusively. This makes any of the procedures of democracy superfluous, as Kevin Williamson’s argument indicates. Trump’s separation of the state and its voters indicates adopting a qualitative distinction between people. The Trumpist argument seems to be, “we win ‘us’; so, we win.” They claim that certain voters are better defenders of America or at least the Trumpist version of it. Others—all those who disagree with them—are indistinguishable from invaders.

NOTES

1. As Bendersky explains: “After examining two centuries of liberal political theory, Schmitt identified the distinctive feature of parliamentarianism as ‘public discussion’ . . . Ideally, ‘*la discussion substituée à la force*,’ and social progress would follow this victory of law of *Macht*” (Bendersky 1983, 68).

2. Since the Enlightenment, the principle of free choice has also been held as a religious principle. See John Locke (1958).

3. To see how strange this is in the American context, try substituting the Articles of Confederation for the Constitution of 1871 and the Constitution of 1789 for the Weimar Constitution. It is the Constitution of 1789 that created a federal “We the People,” which previously did not exist.

4. Many liberal democratic constitutional states have representation thresholds, generalizable neutral standards which are used to keep small parties (no matter their ideology) from representation. These exist because small parties can hold disproportionate power, which is problematic in a representative democracy. In Schmittian politics, a party is valid if it supports the state.

5. Dr. Seuss’ *Yertle the Turtle and Other Stories* provides commentary on this as well. For King Yertle to get his perspective, the other turtles must be subjugated. The higher Yertle climbs, however, the more unstable the tower on which he sits.

6. Limiting abortion access, for example, is justified by this model, even if the policy is widely unpopular. Some Republicans continue to pursue it under the belief that it is right and represents some metaphysical truth.

7. In this example, there may be other ways to pursue legal accountability, for example, through civil court, through pursuit of charges in another court with overlapping jurisdiction, or the pursuit of separate but previously uncharged conduct.

8. The electoral college currently has five hundred thirty-eight voters. These are the only votes that count toward the election of the United States President. Each state has the number of electoral votes as their total representation in Congress (number of representatives + two for the senators), and District of Columbia has an additional three electors. Forty-nine of the fifty-one contests (Maine and Nebraska are the outliers) are winner-take-all; if a candidate wins Maryland by one vote, for example, she wins all ten electoral votes. Electors from different states also represent different numbers of people. While the electors distributed based on representation in the House of Representatives are *roughly* proportional, those distributed based on the Senate are not. This can lead to disproportionate outcomes between electoral and popular votes. There are many ideas to reform the electoral college system. Plans not necessitating Constitutional amendment are more likely to be successful, e.g., the National Popular Vote Interstate Compact. At the time of this writing, sixteen states controlling approximately 36 percent of the electoral votes have agreed that upon the commitment of states controlling 270 electoral votes, all signatory states will grant their electoral votes to the federal (rather than state) popular vote winner, thus moot-ing the electoral college system.

9. It is not clear if or how much the 2020 procedural changes favored Democratic candidates. Down-ballot Republicans did better than Donald Trump.

10. There are very few cases of true voter fraud, but when they occur they are certainly not exclusively Democratic. Las Vegas Republican businessman Donald Kirk Hartle, for example, gained some notoriety when he claimed disgust and bewilderment at the apparent fraud of his dead wife's vote. Someone had obtained an absentee ballot and voted in her name. In November 2021, however, Mr. Hartle pleaded guilty to using his dead wife's vote and voting twice in the same election.

11. Trump's claim that Humphrey won seems odd as the 1968 election was not really close. Richard Nixon won thirty-two states and 301 electoral votes, and Hubert Humphrey won thirteen states and the District of Columbia for only 191 electoral votes. There was a third candidate, George Wallace who won five states in the South for forty-six electoral votes. The popular vote was closer, with Nixon receiving 43.4 percent of the popular vote and Humphrey receiving 42.7 percent of the votes. Still, Nixon won the popular election by several hundred thousand votes.

12. Donald Trump's sometime lawyer, Rudy Giuliani, floated a similar idea after September 11, 2001 in which he would have continued as mayor of New York City without an election.

13. I am interested in the logical implications of Williamson's argument favoring fewer voters. This argument is a Trumpist one, but I am not claiming he is a Trumpist. He was in favor of the second impeachment of Donald Trump and "thought impeachment would have been justified even before the January 6 attack, based on Trump's pre-1/6 efforts to overturn the election, including Trump's call to Georgia Secretary of State Brad Raffensperger, on January 2. He wrote, "If that's not an impeachment-worthy offense, I don't know what is." (Cheney 2023, 138).

14. This does seem to violate the jurisprudence arising out of Justice Harlan Stone's footnote four from the Court's opinion in *United States v. Carolene Products Co.* (1938). Justice Stone writes: "It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to a more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation." ". . . Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national, . . . or racial minorities, . . . whether prejudices against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily thought to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry (case citations removed)."

15. This has been augmented by the practice of gerrymandering, as addressed in Chapter 9.

16. This was evident in 2023 Ohio. Abortion rights advocates secured a referendum for November 2023 to enshrine abortion rights in the state's Constitution. Opponents of the measure then secured their own referendum for August (which overrode a law banning August elections) to change the rules for the November referendum. The August measure would, if passed, by a simple majority, change the support needed to pass any subsequent referendum to sixty percent. The support for the November

measure and against the August referendum (according to the polls listed on ballotpedia.org) was comfortably above 50 percent but consistently two to three points below 60 percent. The August referendum failed and the November one succeeded, both by approximately fifty-seven percent of the vote.

17. As noted above, Eastman may not be correct. It seems improbable that Liz Cheney, at least, Wyoming's sole representative, would have voted to install Trump.

Chapter 7

Antiliberal Democracy

Even if Carl Schmitt wanted to protect the Weimar Republic, the Schmittian political and the role of the state make liberal constitutional democracy impossible because it destroys the conditions necessary for a liberal state to exist. Liberal constitutional democracy advocates participation based on equality and is designed to mediate between individuals and groups to reach a common understanding. Liberal constitutional democracy and the American constitutional tradition specifically require integration and participation. Steven Levitsky and Daniel Ziblatt, authors of *How Democracies Die* (2018) argue that “mutual toleration” and “institutional forbearance” are necessary for liberal constitutional democratic states. Conflict and marginalization, however, are fundamental parts of the Schmittian state because of the state’s goal to divide friends from enemies and to exclude enemies from state operation and decision making. It is impossible to practice, in the Schmittian system, the political and social interactions of democratic constitutionalism. Indeed, the desire to maintain the principles of the Schmittian political within a system of liberal constitutional politics leads to conflictual party relations and the destruction of the liberal democratic system. The Schmittian system authorizes people to abandon the constitutional system to maintain not only political but also social hegemonic power.

Unlike the motto on United States currency—*E PLURIBUS UNUM* (out of many, one)—Trumpists, following Schmittian ideas, seek not to unify all Americans, but to use politics to divide people, to separate the insiders from the outsiders of the polity. Those who are outsiders (non-Trumpists) need to be marginalized in a tangible and recognizable way from the democratic process. Trumpism views the other as a danger and therefore requires a commitment to inequality. Trumpism commits, therefore, to rule by some rather than rule by all, which it joins with a commitment to rule for some and not for

all. In limiting universal equality, mutual toleration, and institutional forbearance, the tradition of consensual party relations itself becomes impossible, and conflictual party relations become the dominant mode of interaction.

Because of the importance of insiders and outsiders in Trumpism, an arbiter deciding those insiders and outsiders, or who is a patriotic American and who is not, needs to exist. It is in an individual adherent's interest to prove one's Trumpist bona fides. The failure to maintain proof of membership in the friend group can cause one to be labeled an outsider. When labeled an outsider, one can become a target of the friends, as happened to Vice President Mike Pence when those invading the capitol on January 6, 2021 called for him to be hanged. This bears some similarity to Carl Schmitt's experience in 1936. Maintaining and conforming to membership standards is a focus of the state and its members. The desire to prove one's Trumpist bona fides has created a system in which it is in the individual Republican's interest (at least in the short term) to undermine democracy as each individual attempts to prove that they are Trumpists and are entitled to be in the closest friend group. Even if actions are not in the long-term or collective interest of the polity, or in the individual's long-term interests (Trumpists also benefit from being citizens of the liberal constitutional state), individuals act in their short-term narrow interests, ultimately endangering the existence of the liberal constitutional democratic state.

PARTY RELATIONS

In states with consensual party relations, parties' conflicts "are typically limited to matters of how best to achieve the realization of commonly agreed-on values, such as how best to secure democratic outcomes or strengthen capitalism" (Grisby 2009, 216). The alternative, conflictual party relations, occurs when political parties engage in existential (and Schmitt would argue meaningful) topics. Parties in conflictual party relations systems "are divided by sharp ideological disagreements . . . and party coalitions tend to be less stable . . . [because] disagreements among parties concern basic core values" (Grisby 2009, 216). In consensual party relations, major political parties believe in the same broad political philosophy and constitutional rules; conflicts between parties are not existential. They have a common commitment to the democratic and constitutional process and accept other participants who are also committed to the polity and its values.

When engaged in conflictual party relations, parties disagree on major philosophical points or the government's construction. They can disagree, for example, whether to have a market or a state-run economy or whether to organize around a concept of popular sovereignty or not. Countries with

consensual party relations tend toward political stability because it is fairly simple to change control between political parties as policy and philosophical disagreements between the parties are restricted to a fairly narrow range of views. If control of the government changes hands, constitutional rules and political, economic, and social systems remain broadly stable. While policies may change, for example, a change in marginal tax rates, the overall system, such as the system of private property ownership, will remain. This allows various parties to continue to engage in a defined and limited debate. It is the limited nature of political debate that benefits liberal democracy but is opposed by Schmitt. Schmitt accuses liberals of being political deists (see chapter five): important issues are banished from the political arena in favor of the trivial. Rather than viewing the narrow nature of politics as trivial, liberal constitutionalism views the sovereign people as agreeing to place important issues beyond political debate. The United States Constitution limits topics that are accessible through political determination. Issues, such as those of spirituality, are consigned to the private sphere by the sovereign people through the constitution. Schmitt acknowledges this is part of liberalism's political design, but for him, it is evidence of the ineffectiveness and meaninglessness of liberal politics.

Steven Levitsky and Daniel Ziblatt, the authors of *How Democracies Die* (2018) argue that the attributes of “mutual toleration” and “institutional forbearance” are essential elements of consensual party relations and well-functioning liberal constitutional democracies. These elements are necessary to maintain consensual party relations because they are required for the interaction and mediation necessary in the liberal constitutionalist polity. Schmitt's theory of democracy, however, makes it impossible for either of these to function. Mutual toleration is the idea that political opponents will be treated with procedural equality. They should have equal rights to function, seek electoral victory, and govern if they achieve power according to legal procedures (Levitsky and Ziblatt 2018, 102). Various parties may disagree strongly on policy but still accept each other as legitimate because they believe in the process. While mutual toleration requires each party to accept the others as equal, institutional forbearance is the idea of a loyal opposition; the winning side does not try to vanquish its opponents. Instead, the opposition is considered to be a legitimate participant in the process. When actors practice mutual toleration and institutional forbearance, it allows the losers in any election or on any policy issue to continue to participate with the belief that their side might win later—a core element of democratic pluralism. A common commitment among all participants, at least to the process, is also required so that all can commonly agree on who won contents. There may be disagreement about what goals to prioritize or the best policy methods needed to achieve them, but there is wide-scale agreement that the process used to determine those answers is valid.¹

While in liberal constitutional democratic states, the people should be bound together by a common belief in the purpose of the constitution, that commitment is limited. The United States Constitution's preamble begins "We the People" but does not lay out an extensive common endeavor, only a general one with goals such as "promote the general welfare." The process and institutions to which participants commit are more detailed in the text, but the process allows various political and policy ideas to flourish. Carl Schmitt believes a more extensive commonality must bind the people. Those who share the state's views can participate politically; all others are excluded. This is the opposite of mutual toleration. Mutual toleration allows those with differing views to express them and seek their implementation in policy. This pluralistic decision-making can be destabilizing, however. Schmitt believes if power remains exclusively in the hands of the friend group, stability is increased. This is true even if the friends, or national group, are a minority of the people, or if the people do not want a culturally or ethnically particularistic polity. Schmitt's democracy is not based on what the people might want, but what is thought to be best for them by the correct group. Mutual toleration is a challenge to Schmittian politics because it requires that one be accepting of others rather than drawing a sharp distinction between us and them.

Karl Lowenstein (1937) presented an alternative view when he wrote about "militant democracy," as a defense against fascism.² According to Lowenstein, the alternative to liberal constitutional democracy is autocracy. He, therefore, advocates "fighting" or "militant" democracy to oppose anti-liberal or anti-constitutional political forms. Lowenstein warns against "democratic tolerance [being] used for their [the democratic state's] own destruction" (Lowenstein 1937, 423). He argues, instead, that only those who respect the constitutional and democratic conditions should be tolerated. Fascists do not respect other actors, for example, and the state would be fundamentally changed if a fascist party gains power. Fascists need not be respected, therefore. They would end the system which allows for the continued participation of all, including themselves. Those who are not committed to the system or who refuse to engage in consensual party relations are excluded. A full treatment of this issue is beyond the scope of this work, but militant democracy can exist within liberal constitutional democratic systems, and versions can be constitutionally enshrined in a "technical" system.

For the same reasons mutual toleration is problematic, according to Schmitt, so is institutional forbearance. In the Schmittian model, every view which is alternative to that espoused by the state is genuinely a threat to the existence of the state and its people because it undermines the hegemony necessary for Schmittian politics. Liberal constitutional democracies are willing to test ideas and policies in the marketplace of ideas; Schmitt (and Trumpists) are not. While Lowenstein advocates not tolerating those who fail to commit

to the rules, e.g., agree to abide by the outcomes, Schmitt advocates not tolerating anyone who holds views contradictory to those sanctioned. It is impossible, according to Schmitt, to allow the “others” who advocate pluralistic ideas to participate individually or collectively according to the same rules as the friends. This is what leads to the marginalization or destruction of those who might not agree with the state. The desire to curtail these alternate views is “certainly antiliberal but not necessarily anti-democratic” and Schmitt’s theory of democracy demands such antiliberalism (Schmitt 1988, 16). In the Schmittian paradigm, institutional forbearance is impossible because a Schmittian political actor cannot treat opponents as legitimate alternatives or with equal respect. Schmittian politics is based on the idea that alternatives are not legitimate. This dynamic is what led to the stalemate of the *Prussiaflag*. The parties refused to accept others as legitimate, or mediate, or cooperate with each other.

IMPORTANCE OF CONFLICT

Consensual party relations are actively harmful to Schmittian politics for the same reasons they are seen as beneficial for a liberal constitutional democracy. Consensual party relations make it easy for political control to move between parties and policies, and individual support for parties or policies can change. Politics in liberal societies ideally becomes, according to many, another neutral marketplace where ideas are created and traded. The marketplace of ideas has been widely discussed in the study of liberalism. The idea is often associated with John Stuart Mill, who writes that,

He who knows only his own side of the case (argument) knows little of that. His reasons may be good, and no one may have been able to refute them. But if he is equally unable to refute the reasons on the opposite side, if he does not so much as know what they are, he has no ground for preferring either opinion. (Mill 1989, 38)

This idea of the marketplace also has a strong American tradition and has been cited in defense of the First Amendment. Oliver Wendell Holmes Jr. wrote in *Abrams v. United States* (1919),

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

The model is still evoked a century later. Justice Stephen Breyer wrote in his concurrence to the unanimous decision in *Reed v. Town of Gilbert* (2015), “Whenever government disfavors one kind of speech, it places that speech at a disadvantage, potentially interfering with the free marketplace of ideas and with an individual’s ability to express thoughts and ideas that can help that individual determine the kind of society in which he wishes to live, help shape that society, and help define his place within it.”

While this marketplace is viewed as an ideal in liberal democratic society, for Schmitt, such a marketplace should be foreclosed. If options other than those sanctioned by the state are seen as legitimate, the political has failed, and depoliticization has occurred. Schmitt’s political system needs to avoid consensual party relations because, in such an environment, politics, culture, and identity may change in unknown and, therefore, unacceptable ways. The other must not become a valid choice. The star-belly sneetches facing the former plain-belly sneetches, now with stars on their bellies, engage in the only possible Schmittian solution: they change their main identifying characteristic—their star. This way, they can continue to identify the others and themselves. Former star-belly sneetches, now without stars, create a new friend group. In the story, the newly starless sneetches say, “We know who is who! Now there isn’t a doubt. The best kind of Sneetches are Sneetches without!” (Geisel 1961, 18). They would rather adopt the emblem of their foes (be without stars) than be confused with them. Keeping the others distinct is at least as important as asserting identity.

Because politics is ultimately about dividing friends from foes, the political, for Schmitt, if not currently causing conflict, has power because it contains the possibility of conflict. Inherent in every Schmittian political distinction is the conflict which includes the possibility of killing and dying, and the possibility of war: “War as the most extreme political means reveals the possibility of this distinction between friend and enemy, which underlies every political idea, and is therefore only meaningful as long as this distinction is actually present in mankind or at least actually possible” (Schmitt, 2020b 70). Instead of defining the common end of the state as being part of a joint endeavor and peace as good, Schmittian politics praises exclusion and sees conflict as inevitable. Religion and its moral calling are secondary to the political and its need for exclusion. Once religious issues, moreover, become political, they become about conflict. Or, as Schmitt explains, “when this conflict grouping occurs, the decisive opposition is no longer purely religious, moral, or economic, but political. The question is then always only whether or not such a friend-enemy grouping exists as a real possibility or reality, regardless of which human motives are strong enough to bring it about” (Schmitt 2020b, 70). While any difference can become political, Schmitt also notes the

reverse is true. If something cannot cause conflict, it is meaningless, at least in the metaphysical sense, and does not rise to the level of the political. As Schmitt writes,

a war waged for “purely” religious, “purely” moral, “purely” legal, or “purely” economic motives would be senseless. A friend-enemy grouping, and therefore also a war, cannot derive from the specific oppositions of these areas of human life. A war need be neither pious, nor morally good, nor profitable; today it is probably none of these things. This simple observation is often confused by the fact that religious, moral, and other oppositions can intensify into political oppositions and bring about the decisive conflict grouping according to friend or enemy. (Schmitt 2020b, 70)

Friend and enemy are a politically acknowledged and cultivated distinction.

Because of the inherent danger of others, Schmittian politics would force multi-party democracy into conflictual party relations. The change of party control may necessitate the change of constitutional rules, or elements of the political, economic, or social system. If there is a system of conflictual party relations, when a leftist party wins a legislative majority, instead of raising the marginal tax rates as it does in a system with a shared commitment to democratic capitalism and social welfare, it might nationalize industry; if a rightist party wins, instead of lowering marginal tax rates and environmental controls, it might end constitutional protections or the independence of the judiciary. Advocating changes of representative government in these conditions is destabilizing. The destabilizing nature of changing political parties is good for Schmitt; it disincentivizes political challenges and incentivizes and justifies the ruling party putting the powers of the state and elements of democracy beyond the reach of others. When the Taliban retook control of most of Afghanistan, for example, it dismantled the Western educational and political systems, but one need not look beyond European countries to find examples. Hungary once seemed to be a liberal democracy. It even gained entrance into NATO (North Atlantic Treaty Organization), but now “Orbán [Hungarian Prime Minister Viktor Orbán] celebrates his transformation of Hungary into an illiberal democracy” (Ben-Ghiat 2021, 6).³

In a state without a tradition of a peaceful transfer of power, it is common for previous leaders of the state and their supporters to be, without cause, marginalized, jailed, exiled, or worse. Leaders also try to hold on to power, changing constitutional rules, if need be. Each election can, depending on the vote, be the last one. Winners, to defend their “friends,” can change the process to exclude future challengers. The Schmittian political dismisses mutual toleration and institutional forbearance because it concentrates, rather than on protecting systems or processes, on avoiding depoliticization. Instead

of respecting process or constitutional rules, for Schmitt, the state must have the power and focus necessary to protect communal identity. Integration and inclusion do not work to achieve that goal, but separation and exclusion does.

TRUMPISM AND DEMOCRATIC ANTI-TOLERATION

Trumpists, in an effort to sharpen the friend and enemy distinction, declare themselves real Americans and others as ersatz Americans who endanger the people and state. Levitsky and Ziblatt note that this can have tragic results, “In just about every case of democratic breakdown we have studied would be authoritarians . . . have justified their consolidation of power by labeling their opponents as an existential threat” (Levitsky and Ziblatt 2018, 212). Trumpists argue that it is because their opponents are existential threats that they should refuse to acknowledge them or engage in a common endeavor with them. Because it is a war, politics is a zero-sum game. Any win necessitates an opponent's loss, and when opponents lose, Trumpists believe they win. This is what led some commentators to fear a United States credit default when the deadline to raise the debt limit came in spring 2023. Some MAGA members of the House of Representatives and Donald Trump wanted to default because they believed it reflected poorly on President Joe Biden. Donald Trump discussed the prospect of default at a CNN town hall. He said he would have avoided it when he was president but he thought Congress should force a default now. The difference was, “Because now I’m not president.” Forcing the default was proper, he claimed, because “It could be really bad. It could be maybe nothing. Maybe it’s a bad week, or a bad day—who knows?” As long as the turmoil was on Biden’s watch, he was in favor of it. When a deal was struck, the Freedom Caucus, the Trumpist wing in the House of Representatives, was dissatisfied with the compromise (or any compromise), which caused increased difficulties for Speaker Kevin McCarthy. This eventually led to McCarthy’s ouster after he compounded his Trumpist problems by agreeing with the Democrats not to shut down the government at the end of the fiscal year.⁴ The caucus decided it would rather stay pure than achieve goals. Purity makes it easy to recognize enemies.

As with Schmitt, Trumpists’ substantive view of democracy runs counter to the concepts of mutual toleration and institutional forbearance that Levitsky and Ziblatt tout as necessary for a functioning liberal constitutional democratic system. Mutual toleration is necessary to have a true procedural democracy, but Trumpists do not subscribe to mutual toleration. “Mutual toleration refers to the idea that as long as our rivals play by constitutional rules, we accept that they have an equal right to exist, compete for power, and govern. We may disagree with, and even strongly dislike, our rivals, but we nevertheless

accept them as legitimate” (Levitsky and Ziblatt 2018, 102). Trumpists do not subscribe to this as a political good. Donald Trump, for example, often calls for disparate treatment based on whether he has an affinity for a group and demands to have his opponents imprisoned disconnected from due process. In Donald Trump’s 2016 campaign, he often led crowds in chants of “lock her up” referring to his campaign opponent Hillary Clinton’s potential mishandling of classified information as secretary of state. After Trump’s presidency, classified information has been found at his Florida resort which, according to a federal indictment, he purposely hid from the National Archives and Records Administration and his own attorneys. For these items, Trump has developed a different standard based on a Schmittian view of the sovereign. Trump argues his actions are legal because he is the sovereign who shares an identity with the people. As the sovereign, he has the right of access to, and ownership of, government materials. He views himself as an avatar of the people, a view he reinforces when he claims, “They are going after you; I am just in the way,” and similar statements meant to reinforce common pursuit. The issue is identity.

“They” are coming after “us.” The other, by its nature, is a threat. Violence against the other is, therefore, justified as self-defense. The attitude “we must exterminate them or they will exterminate us” is used to originate or inflame conflict (Ben-Ghiat, 2021, p. 177). For Trumpists, if one is not part of the community, that person is a danger and the attacks against them can be justified as self-defense. Charles Taylor, writing on the “Sources of Violence,” explains this dynamic:

The logic is: We have been unfairly treated, so we can strike out. This is invoked by most terrorist movements today. We see lots of it today in Palestine and not just on one side.

Note the terrible alchemy: how does an identity threat become a mortal threat? A minority can be an identity threat by just being there. So this is turned first into an act of aggression. But wanting to wipe us out as a political identity is close to wanting to wipe us out tout court. It just needs some believable atrocity stories. But there are always men, often young, who are ready to act out aggression, violence, as discussed above. ...The mechanisms of vendetta take over. What is tragic here is the terrible destruction of trust, even where people have lived together for years and intermarried. And then it spirals downward. (Taylor 2011, 203)

Institutional forbearance, which keeps the state from destroying political losers, is also necessary to have a functioning constitutional democracy. Without institutional forbearance, each election becomes one where the losers’ political and perhaps physical existence is at stake: a kind of political *Hunger Games* (Collins 2008). Trumpists do not practice forbearance because that

would mean others would be legitimate interlocutors. Trumpist Representative Paul Gosar (R-AZ) exemplified Trumpist intolerance when he created an anime-style video of himself murdering Representative Alexandria Ocasio-Cortez (D-NY) and attacking President Biden with lethal force. Despite this one example being a bit over the top, Trumpists as a whole do not tolerate or acknowledge their opponents' equal right to govern. Trump's birther claims were an example of an attempt to destroy forbearance. It delegitimized Obama as a foreign usurper. When Nikki Haley became Donald Trump's principal challenger in the 2024 presidential primary, Trump began to attack Haley on her Americanness. Trumpist opponents are dismissed because they are foreign or foreign-controlled, communist, leftist, socialist, not patriots, or part of some other group which is not "American" enough.

TOLERATION AND FORBEARANCE

In 2000, when faced with an uncertain presidential election, Al Gore showed his commitment to and his belief in his opponent's commitment to mutual toleration and institutional forbearance. In his concession speech, Al Gore said:

Just moments ago, I spoke with George W. Bush and congratulated him on becoming the 43rd president of the United States . . .

Almost a century and a half ago, Senator Stephen Douglas told Abraham Lincoln who had just defeated him for the presidency, "Partisan feeling must yield to patriotism. I'm with you, Mr. President, and Gd bless you." . . .

Other disputes have dragged on for weeks before reaching resolution. And each time, both the victor and the vanquished have accepted the result peacefully and in the spirit of reconciliation. . . .

I call on all Americans—I particularly urge all who stood with us to unite behind our next president. This is America. Just as we fight hard when the stakes are high, we close ranks and come together when the contest is done.

In 2016, Hillary Clinton conceded publicly the morning after the election, also showing a commitment to toleration and forbearance. While Clinton knew that some of her supporters would be angry and consider Trump a usurper, she reminds them of their dedication to the process.

Last night, I congratulated Donald Trump and offered to work with him on behalf of our country. I hope that he will be a successful president for all Americans. . . . We have seen that our nation is more deeply divided than we thought. But I still believe in America and I always will. And if you do, then we must

accept this result and then look to the future. Donald Trump is going to be our president. We owe him an open mind and the chance to lead. Our constitutional democracy enshrines the peaceful transfer of power and we don't just respect that, we cherish it.

Clinton, Gore, and McCain (discussed above) are all acting according to the American tradition of toleration and forbearance arising from liberal democracy. Donald Trump is not committed to toleration and forbearance and handled his election loss differently, overturning the tradition of a peaceful transfer of power.

The reason Donald Trump's response is different is that he does not recognize the common endeavor of which the other candidates believe they are part—the United States' political project. Instead of forbearance, Trump calls for violence against those who disagree with him through comments like, “In the good old days, this doesn't happen, because they used to treat them very, very rough. And when they protested once, you know, they would not do it so easily again” (Levitsky and Ziblatt 2018, 64).⁵ While Trump extols free speech and the right to protest (both rights protected in the First Amendment to the United States Constitution), he applies those only to friends, not those with whom he disagrees. On June 1, 2020, at the White House Rose Garden, Donald Trump gave a speech in which he claimed to be “an ally of all peaceful protesters” (Woodward and Costa 2021, 94). While he gave this speech, Trump directed officials to use pepper balls, smoke bombs, and loud noises to clear peaceful protesters out of Lafayette Square, the park across from the White House. He explained at that Rose Garden speech,

If a city or state refuses to take the actions that are necessary to defend the life and property of their residents, then I will deploy the United States military and quickly solve the problem for them. As we speak, I am dispatching thousands and thousands of heavily armed soldiers, military personnel and law enforcement officers to stop the rioting, looting, vandalism, assaults and the wanton destruction of property. (Woodward and Costa 2021, 94)

The peaceful protest was illegitimate because its message was from the others and needed to be suppressed. These alternative views may challenge the state's or nation's hegemonic position and should be labeled criminal, and their advocates by definition are rioters and vandals. An example of how these standards apply when Trumpists engage in violence is Kyle Rittenhouse. If violence is against those purported to be other, the perpetrator can become lauded.

Kyle Rittenhouse was 17 in August 2020 when he shot three people, two of whom died, as he was “patrolling” the streets of Kenosha, Wisconsin, with

an AK-15 style rifle during the third night of protests against the police killing of Jacob Blake, a black man who was shot in the back by police. *Before* the shooting, Tucker Carlson's *The Daily Caller* did an interview with Rittenhouse. He said, "So people are getting injured, and our job is to protect this business," though he had no authority to protect the business and was a child. Rittenhouse also said, "And part of my job is to also help people. If there is somebody hurt, I'm running into harm's way. That's why I have my rifle—because I can protect myself, obviously." After he was acquitted, Rittenhouse became a right-wing media star for killing the "others."

Mutual toleration and institutional forbearance require a commitment to a common political enterprise but also a commitment to engage with others because both are invested in the common enterprise. "Treating rivals as legitimate contenders for power and underutilizing one's institutional prerogatives in the spirit of fair play" would negate the Trumpian political division (Levitsky and Ziblatt 2018, 102). Once forced to interact and mediate with each other, it is possible that the people or the state would reflect the others' character and beliefs because of that mediation. This is what scares Trumpists—the "normalization" of what they consider unacceptable: gay marriage, transgender rights, and any other group or idea they want to marginalize. Trumpists, therefore, choose the opposite of mediation, demonizing those not members of the "patriot" or "MAGA" movement. Consensual party relations make it easy for a government control to move between parties, and citizen support for parties or ideas to change. Trumpists, like Schmitt, believe movement between groups and ideas is dangerous; the other must always be kept separate, and there must be only one available choice. One's political enemies must be recognizable and marginalized by the friend group so that one will not accidentally associate with them. In labeling others as an existential threat, toleration and forbearance are not only unnecessary; they are counterproductive.

COLLECTIVE ACTION

Collective understandings are important because politics is a collective enterprise. Whether it is believed that politics is for collective betterment, for the distribution of scarce resources, dividing us from them, or something else, politics involves translating collective power into action. In pursuing collective power, people encounter collective action problems. Economist Mancur Olson in *The Logic of Collective Action* (1965) explains these problems. Though groups or collectives with common interests are thought to act rationally on behalf of those interests, Olson notes that groups are made up

of individuals who operate on their rational individual interests. Individual interests might not coincide with collective ones. Olson comments,

“It does *not* follow, because all of the individuals in a group would gain if they achieved their group objective, that they would act to achieve that objective, even if they were all rational and self-interested. Indeed, unless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest, *rational, self-interested individuals will not act to achieve their common or group interests*” (Olson 1965, 2).

Olsen explains why people might not commit to a collective enterprise, even one from which they benefit. The most common description of this is a free rider. A free rider is someone who enjoys the benefits without bearing any of the *mandated* costs.⁶ It is in the common interest, for example, that people pay their taxes. People need roads, fire departments, national defense, and other collective goods which are funded by taxes. It may be in the individual person’s interest, however, to cheat on their taxes. Absent one person’s contribution, none of the aforementioned collective goods will be endangered, and that person can keep their money. It is not in any cheater’s interest if other people do not pay their taxes, however, because then the cheater would not have access to any of the collective goods. The problem of free riding can be contagious, moreover, because a person who pays their taxes when they know their neighbor is not paying theirs might be less likely to pay their share in the future. The impulse to free ride can be countered, however. The government tries to address free riding on taxes, for example, by sanctioning with fines or jail time those who do not contribute their share. The hope is that such moves change the individual calculus about paying taxes. This means that the sanction is handed out frequently enough and is severe enough so that free riding will cease to be a rational choice; one considering not paying taxes would now view cheating as no longer cost-effective and a bad deal.

The incentive to free ride may exist in collective enterprises, but Trumpism also creates an incentive to disrupt the collective enterprise entirely and destroy collective goods. Garret Hardin’s “Tragedy of the Commons” (1968) uses a model of herders grazing cows on common land to explain how collective goods can be eroded and destroyed through the pursuit of narrow self-interest. Suppose there are ten herders sharing common grazing ground. Each herder, by common consent, tradition, or some other device, grazes ten cows on the common. One herder (the standout) tries to get extra benefit by putting an additional cow on the common.⁷ The grazing land is really only big enough for one hundred cows, however, so each cow is slightly smaller. Hardin notes the positive benefit of the additional cow to the standout herder is +1 (the standout herder gets all the benefit), and the negative effects are shared by everyone in the community, including

the standout herder—in my model $-1/10$ per herder as it is shared among the entire community of ten. The additional cow turns out to be a good deal for the standout herder ($+9/10$), so standout herder repeats the behavior. The others, for whom this is a bad deal ($-1/10$), might also adopt the behavior of adding the extra cow on the common because they see it was a good deal for the standout. For each individual, the positive of adding a cow outweighs the negative; yet collectively, it is to their detriment. Each additional cow damages the common until the common is destroyed and all the cows die. The end result hurts all the herders. The logic of the model is that the search for maximum individual good damages or destroys the collective goods and well-being.

Trumpism has turned the American system of constitutional democracy, with its reliance on mutual toleration and institutional forbearance, into a tragedy of the commons. All benefit from a stable liberal constitutional democracy and consensual party relations. These interactions are a public good, like the commons in Hardin's model. As in Hardin's model, cheating or undermining the public good can benefit the individual. The dynamic of the tragedy of the commons takes many forms in the Trumpian world, but each iteration is caused by the same thing: the desire to solidify one's position among Trumpists. The Trumpian friend group will expel and attack those who vary from orthodoxy and defend the behavior of supporters. It is in the citizens' interest to have a well-functioning professional election system and a consensual party system. It might be in a particular candidate's or politician's individual interest, however, to attack a well-functioning system and treat the other side like enemies rather than rivals. Doing so gets their electoral base excited and more likely to vote, but this behavior is like the extra cow on the commons. It is not only a bad idea but destructive of the entire system when widely adopted or when adopted by a political party. It destroys the whole system of consensual party relations, and the electorate is less likely to trust in the electoral system or its outcomes. As the electoral, judicial, or other neutral processes used in liberal constitutional democracy come increasingly under attack, commitment to the common process which serves to bind all together can falter, endangering liberal and constitutional guidelines and their overall commitments.

This dynamic of individual interests overriding community welfare can be seen with the suit filed by the Texas attorney general against the state of Pennsylvania, trying to overturn the latter's 2020 presidential election. This suit was utterly ridiculous and everyone knew or should have known that it was. Yet once it was filed, many state's attorneys general joined in the suit. This is odd in one sense because

It was simply not possible that so many people with a basic legal understanding would have held this position—except if they weren't actually holding it. They

seemed to take two leaps of logic. In the first, it was obviously ridiculous—ridiculous to anyone with any empirical reasoning capabilities, ridiculous to the various state AGs who had dragged their feet in support of it, ridiculous even to a deeply conservative Court. But, in the second step, it was necessary and productive to support Trump’s asinine and hopeless suit because Trump had mustered so much support among so many voters with no interest in or capacity for empirical reasoning, or, at least, who were preoccupied with other issues. (Wolff 2021, 159)

In seeking the favor of Donald Trump and his supporters, which individual Republican politicians believe is to their individual electoral benefit, they support something that redounds to the detriment of the whole constitutional democratic system. The claim that there was no harm done to the constitutional system in this case because the Supreme Court rejected it misses the damage that claims like this can do. These Trumpian claims and suits change the way people understand the constitutional system and undermine their commitment to it.

In a chapter titled “Just Humor Him,” Liz Cheney describes the pressure Republican members of Congress received to vote against certifying a democratic election. “They had not even been sworn in yet, and they were going to have to cast what would likely be the most important vote of their careers in an atmosphere of intense political drama and pressure. They were looking for guidance.” That guidance could be based on individual interests or the collective interests of the country. According to Cheney, Kevin McCarthy was acting like the standout herder on the common. “I heard from several of them that Kevin was advising them to object and telling them the vote really wasn’t a big deal. Objecting was the safe thing politically. It would keep Trump happy, and besides, what harm could it do?” Cheney comments that “Kevin McCarthy was essentially telling members of Congress to ignore their constitutional obligation and instead, do what Trump wanted” (Cheney 2023, 59). Cheney contrasts McCarthy’s behavior with that of Senate Republican leader Mitch McConnell, who she reports saying:

We’re debating a step that has never been taken in American history, whether Congress should overrule the voters and overturn a presidential election. . . . The Constitution gives us here in Congress a limited role. We cannot simply declare ourselves a national board of elections on steroids. The voters, the courts, and the states have spoken. If we overrule them all, it would damage our republic forever. . . . If this election were overturned by mere allegations from the losing side our democracy would enter a death spiral. . .

I will not pretend such a vote would be a harmless protest gesture while relying on others to do the right thing. I will vote to respect the people’s decision and defend our system of government as we know it.

What McConnell said that night in the Senate is what McCarthy should have said in the House. But Kevin McCarthy had an entirely different agenda—one based on personal ambition not principle. (Cheney 2023, 113)

The allegation about the elections came from the loser: “Donald Trump and his allies had spent months making these allegations, spreading stolen-election lies they knew to be false. . . . these 11 senators were taking the position that because Donald Trump had successfully spread falsehoods about election fraud, and because a poll showed many people believed those falsehoods, Congress could refuse to do what the Constitution explicitly required.” This included the 10-day “audit” proposed by Ted Cruz “that would have violated both the constitution and the Electoral Count Act.” . . . “[Cruz] had [also] coordinated this proposal with the White House” (Cheney 2023, 61). The coercive and illegal nature of the project is clear. The votes need to be reconsidered because there is a “problem” found by the loser. The problem can be continually found and returned for “reconsideration” until the “correct” outcome is reached. Cheney notes that “Historian Timothy Snyder has described the deep damage this was doing to our country: ‘Making [Trump’s] fictions the basis of congressional action gave them flesh’” (Cheney 2023, 82).

Cheney argues that personal ambition has become exemplified in the Trumpist Republican party. Cheney blames McCarthy’s personal interests for Trump’s reemergence after January 6, 2021. “The truth was pretty simple. Kevin McCarthy went to Mar-a-Lago because his ability to raise money had dried up after January 6 when nearly every major corporate donor announced it would stop making campaign contributions to Republicans who had voted to object to the Electoral College votes. Kevin’s strength in our conference was derived largely from his fundraising ability. He was not a policy expert or a natural leader. And now his strength was gone” (Cheney 2023, 148). Kevin McCarthy, according to Cheney, acted according to his individual interest despite the fact that it caused the destruction of the common good.

Despite many congressional objections, journalist Michael Wolff claims that only Rudy Giuliani and Donald Trump possibly believed that protesting the electors would result in “having Trump declared the Electoral College winner or, failing that, prolonging the election and returning the fight to the disputed states.” Such “derangement” was not shared by Trump’s advisors or family. He does note, however, that

this derangement was certainly encouraged by the various members of Congress and the Senate who were saying they would participate in the melodrama—for their own attention-getting or symbolic reasons. It was not, though, shared by them. No one in Congress, not even among the most spirited or yobbish of the Dead-Enders, actually believed there was any imaginable chance that

certification would be delayed (at least for more than a few hours) and that Joseph Robinette Biden Jr. would not be the president of the United States in fifteen days. (Wolff 2021, 194–195)

By participating in this “melodrama” for their own reasons, the members of Congress did two things: they helped give life and legitimacy to the January 6 insurrection, and they damaged—perhaps permanently—the system which they are sworn to protect.

The hope that the dynamic which encourages Trumpists to act contrary to the collective liberal democratic good would wane after Trump left office was faulty. This became obvious with the search of Trump’s Florida estate Mar-a-Lago. Trying to endear themselves to Trump, many—who would have been considered mainstream Republicans committed to liberal constitutional democracy before Trump’s ascendancy—have likened the Federal Bureau of Investigation and the Justice Department to the Gestapo and even called for them to be defunded. These claims help raise their standing among the most committed Trumpist followers. The same claims, however, hurt the entire system of constitutional liberal democracy. This can be seen when these claims are reiterated by the perpetrators of political violence. David DePape, for example, in October 2022 attacked Paul Pelosi with a hammer while looking for Speaker Nancy Pelosi. After DePape was arrested, he parroted election disinformation and claimed he needed to make Nancy Pelosi “confess.”

This ongoing dynamic was evident with Kevin McCarthy’s behavior as Republican speaker of the House of Representatives. To obtain this position, McCarthy needed to withstand numerous leadership votes and negotiate away much of the leadership power and prerogatives to the Trumpist members of his conference. McCarthy, for example, bowed to the pressure of some of these members and released all security video of the January 6 insurrection exclusively to Tucker Carlson, then employed by Fox News. This involves the tragedy of the commons dynamic in at least two ways. In releasing the video, Kevin McCarthy claimed he was fulfilling a promise made to the hardline Trumpists in his political party. By doing this over the objections of Congressional Democrats, other media organizations, the Capitol police, security officials, and some Republicans, McCarthy was providing evidence of his Trumpist credentials and kept his credibility as a member of the friend group. McCarthy was not the only one acting based on the narrow incentive structure. Tucker Carlson also needed to maintain his MAGA credibility. Carlson heavily edited the tapes before airing them to support his thesis that the violent insurrection was just a “tourist visit.” Though this exercise provided some individual benefits for Trump, McCarthy, and Carlson, including increased publicity and MAGA credibility, it appears to be negative for the overall collective political enterprise(s). It not only implicates constitutional

concerns but the tapes could also compromise congressional security and criminal cases. Standing within the friend group is more important for the individual actors, however, than the commitment to the collective enterprise.

There are more than just politicians caught in this incentive structure. In the Schmittian state, all media should be part of the friend group and focus on its message. Trump would like the same, but the United States has a constitutional commitment to a free press. At the time of the tape's release, Tucker Carlson and his network (Fox News Corp) were under fire for making claims which included "actual malice" about Dominion voting systems and a "stolen" election. When public figures or officials sue for libel or slander, they need to show that what was written or said was done with "actual malice" or "with knowledge that it was false or with reckless disregard of whether it was false or not." Private persons need not make such a showing. The actual malice standard comes from the Supreme Court's unanimous decision in *New York Times v. Sullivan* (1964). It appears that Fox News Corp was also caught in a tragedy of the commons dynamic. Those who insist that the election was fair and/or accurate earned the displeasure of Trumpists because those who insist the election was fair are "them." Since the base of Fox News Corp viewership is Trumpists, Fox News Corp continued to seek their favor and argue voter fraud. Such arguments provided Fox News Corp with short-term economic benefits. It was not in the long-term interests of Fox or the country to make such an argument, however. Indeed, Fox News was forced to settle with Dominion voting systems for 787.5 million dollars for *some* of their false election claims. While courting and pleasing the ardent Trumpists and avoiding surging upstart Trumpist networks, Fox News might have added to the increase in violence against the neutral administrators of the procedural system. The pursuit of Trump's favor hinders liberal constitutional democracy.⁸

CONCLUSION

Joseph Bendersky in his biography on Carl Schmitt claims that one of the reasons that democracy never took firm hold in Weimar Germany was that people lacked any tradition of self-government. He argued representatives "represented specific and antagonistic class interests and ideologies; the welfare of the nation, though frequently mentioned, was usually seen through the spectacles of one's own party." The United States has a tradition of liberal constitutional democracy and consensual party relations where the national welfare is superior to one's party or faction. When party or faction becomes superior to the national welfare, common commitment and consensual party relations become impossible. In the Weimar Republic, for example, the parties were committed to their political goals more than they were committed

to democracy or the continuation of the republic. “Several parties refused to recognize the Weimar order as legitimate, whereas those which accepted the constitution could find no firm basis for lasting cooperation” (Bendersky 1983, 64–65).

A similar situation exists among Trumpists. They refuse to accept the legitimacy of the Biden Administration, which is one reason they will not find a basis for cooperation with them. In the same way, the lack of commitment endangered the Weimar Republic, it now endangers the United States. On January 6, 2021, a part of the Republican party was willing to ignore the constitution if it led to a choice that they did not like—some in Congress and some in the street. Republican members of Congress voted to block the will of the people, and Trumpist supporters rioted at the capitol to aid them. Instead of unifying Americans with a form of common commitment, Trumpian politics is used to divide a group of favored people from everyone else, making it impossible for people to be part of the same joint exercise. The mediation necessary for liberal democratic politics does not exist in Trumpian politics. Trumpists create a dynamic in which the others lose their ability to participate, and liberal constitutional democracy wastes away.

NOTES

1. In addition to consensual and conflictual party relations, political scientists also speak of consociational party relations (See Lijphart 1969). In these systems, “parties differ radically on fundamental issues (as in conflictual systems) but possess established routines of bargaining and compromise conducive to stable government (as in consensual systems)” (Grisby 2009, 216). Consociational party relations allow radically different groups to coexist when there is a mutual commitment to the process.

2. Karl Lowenstein had been admitted to the Bavarian bar in 1918, and in 1931 was a lecturer at the University of Munich. After the Nazi takeover in 1933, he promptly immigrated to the United States as he was Jewish. In the United States, he first lectured at Yale and then at Amherst College and became a member of the Massachusetts bar. In 1945, Lowenstein went back to Germany to work as a legal adviser to the American Military Government of Occupied Territories. When Schmitt was in American custody, “his library was inspected by Löwenstein, confiscated and then collected” (Mehring 2022, 411). “The Americans returned his [Schmitt’s] books in September 1952” (Mehring 2022, 460).

3. Orbán has been extensively praised by Donald Trump, and in early 2024, Orbán visited the United States without any official government business; Orbán stayed at Mar-a-Lago, Trump’s Florida residence, and meet with Donald Trump.

4. Republicans learned there are consequences for failing to adhere to orthodoxy. This led in 2024 to Speaker Mike Johnson’s killing of a bipartisan immigration deal which included funding for Ukraine’s defense, something for which he, like the majority in the House, was in favor. Republicans refused to fund Ukrainian defense

without a border deal. Biden negotiated an extremely conservative border deal in exchange for the military funding. The border package was not, or could not be, passed when Trump was president and Republicans controlled both houses. Donald Trump, however, decided the issue was better for him than the deal. The deal, which was negotiated for the benefit of the American people, was killed, for the benefit of Donald Trump.

5. Trumpists, Donald Trump in particular, are also associated with violence. “‘I’d like to punch him in the face,’ said Trump of a heckler at a February 2016 campaign rally in Las Vegas, ‘In the old days,’ protesters would be ‘carried out on stretchers. . . . A Study by political scientists showed a 22 percent increase in hate crimes in counties that hosted a Trump rally in 2016’” (Ben-Ghiat, 2021, 187).

6. A free rider does not merely get a ride for free. Free riding carries the notion of cheating or failing to uphold an agreement. Imagine three people going to a public college or university: one pays 2X for out-of-state tuition, one pays X for in-state tuition, and one pays nothing on a need-based scholarship. While two of these people are getting for free something for which others must pay, they are not free riding because they are paying the mandated cost, even if it is nothing. The state decided its interest is to set that specific fee schedule; therefore, no one is free riding. The free rider is the person who, when the group goes out to lunch, mysteriously loses his or her wallet, so that person’s cost must be absorbed by the rest of the group.

7. Garrett Hardin’s model has been criticized as historically inaccurate. It is claimed that a noncompliant herder would have been sanctioned and not allowed to graze the additional cow (see Susan Buck Cox 1985). While as a historical description Hardin’s model may be faulty, it still works as a logical model and thought experiment. Additionally, Hardin’s model is likely more accurate in competitive open access systems, for example, the North Atlantic cod fisheries.

8. Fox “news” is still actively engaged in this pursuit. Mike Pence live on a Friday on Fox News said he would not support Donald Trump for President in 2024. This was the first time a vice president has not endorsed the president with whom he served. According to Media Matters, the Pence news got coverage that weekend on CNN and MSNBC. CNN covered the story for one hour and nineteen minutes, and MSNBC for one hour and fourteen minutes. By Monday, however, Fox News gave it four minutes of total coverage.

Chapter 8

Friends, Enemies, and Citizenship

Schmittian politics takes the ideas of sovereignty and democracy and reverses them from how they are ordinarily understood in liberal constitutional political systems. The Schmittian political cannot maintain a constitutional sovereign or constitutional democracy because of its understanding of power and authority. It also makes liberal constitutional sovereignty and democracy impossible because focusing on friends and enemies destroys citizenship. In liberal constitutional democracies, individuals are transferred from the subjects of sovereignty to the sovereign itself, but the Schmittian political reverses that process on which the American project relies. The United States Constitutional system was established not based on a national identity but on a joint ideological conception of equal and active citizens. While representatives hold delegated power, delegates do not hold additional sovereignty compared to other citizens. It is the moral and legal equality that enables diverse forms of life. Different people who lead different kinds of lives or are involved in different kinds of associations are able to equally be part of civic and political life. Individuals who are part of different factions, in Madison's model, can each maintain constitutional commitment—a Lutheran farmer citizen can have the same relationship to the constitution as a Congregationalist minister—and be equal parts of the constitutional enterprise. This is the basis of the American liberal constitutional democratic political community.

Frederick Schauer argues that “a meaningful sense of community exists only insofar as the individuals who comprise that community are willing to take actions on behalf of the community not only that they would not take on their own behalf, but that are quite possibly detrimental to their own interests” (Schauer 1981, 1504). This notion of sacrifice counters Mancur Olsen's description of unfettered individuals and gives meaning to mutual commitment and acts of consent. In liberal constitutionalism, what makes

these individual restraints valid is that the citizens choose them. While the government cannot enforce religious vows, individuals can make such vows and choices. Groups can bind their members because membership is voluntary and individuals have freedom.

For Schmitt and Trump, this liberal voluntary consent is undercut by the inclusion of others than friends. While all political communities place some limits on who can consent to the community, the kinds of limitations proposed by Trumpists are different from those of the liberal constitutional democratic polity. “Constitutions provide, therefore, a representation of democratic citizenship. Definitions of citizenship matter because they organize popular understandings of the relationship between the individual and the state. They describe the rights and duties of the citizens as well as designating the responsibility for the state for protecting citizens and their rights” (Jenson 1992, 205). The Trumpian understanding and “representation of democratic citizenship” is based on Schmitt’s friends and enemies, not on American constitutionalism’s understanding of equal citizenship. Trumpists remove citizens from the community if they are not members of the friend group in good standing and make American constitutional citizenship impossible.

SUBJECT TO CITIZEN

At the time of the founding, Americans redefined citizenship. While Schmitt links the Weimar liberal democratic constitution to the Imperial one, in the United States, the constitutional break from Great Britain represented a change where people “did not merely transfer their allegiance from one sovereign to another; nor did they simply substitute citizenship in the new nation for subjectship to the British Crown.” As subjects of sovereignty, the British Crown believed that the representation for American colonists need not be specific to them, i.e., they were represented in the House of Commons, if they were commoners, or Lords, if they were of noble birth. The Founders “were also engaged in a far more radical, imaginative venture—the transformation of the political identity of an entire people. Before the Revolution, the Americans had been the subjects of a royal sovereign, and they inherited their political status as English subjects along with their patrimonies” (Shuck and Smith 1985, 1). In advocating, as it reads in the Declaration of Independence, “dissolving the political bands which have connected them” to Britain, colonists advocated a change in ideology even if many political structures were maintained. “By throwing off their allegiance to the Crown, however, they resolved to become something very different—citizens of a new state constituted solely by the aggregation of their individual consents. Voluntary

adherence rather than a passive, imputed allegiance was the connective tissue that would bind together the new polity” (Shuck and Smith 1985, 1).

This change in ideology rejects any natural right to rule. John Locke devotes the *First Treatise of Government* to an explanation of why the divine right of kings is wrong. He bases his argument on the idea that all people are born free and equal. While Hobbes (see above) believes in equality such that even the weakest man is a threat to the strongest one, the Hobbesian equality is limited. Hobbes writes about equal adult men. When equality was defined, such as in the *Magna Carta*, it was often understood in those terms, i.e., adult men of the same social standing. Locke, however, advocated the radical idea of equality between all, including parents and children.¹ Government by consent is based not only on the equality of some adult men but “was based on his radically new view of the relationship of children to their parents and to the polity. . . . To Locke, the most fundamental fact about children was that they were creatures of God, intended to occupy that equal and independent status that is the natural condition of mature, rational beings. This fact, for Locke defined the limited nature of parental and political authority” (Shuck and Smith 1985, 23–24). This change means each individual has a sovereign power from which one cannot be divested. Individuals are not subjects of political society but are citizens, each equal to the other.

SOIL, BLOOD, OR CONSENT

In the seventeenth century, citizenship in the English common law was attached to the principle of *jus soli*, literally “right of the soil.” This was confirmed in *Calvin’s Case* (1608) which, according to Blackstone’s commentaries, recognized the principle of “natural allegiance.” Blackstone explains that, “Natural allegiance is due from all men born within the King’s dominion immediately upon their birth.” This does not contain any choice as it “is a debt of gratitude which cannot be forfeited, canceled, or altered, by any change of time, place or circumstance.” Sir Edward Coke in *Calvin’s Case* writes that, “by the law of nature; it followeth that Calvin the plaintiff being born under one ligeance to one King, cannot be an alien born.” Coke further explains that those owe allegiance when “1. That the parents be under the actual obedience of the King. 2. That the place of his birth be within the King’s dominion” (7 Coke Report 18b, 77 ER p. 399). Blackstone further explains that not only is one born a member of a polity, that membership is permanent: “the natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another put off or discharge his natural allegiance” (Blackstone 1915, 69). This is a nation of membership, but one’s citizenship is attached to the soil. While Coke focuses on the individual, not exclusively on his ancestry, individuals still

lack the ability for any volitional act regarding political membership. One is a member at birth—which is inescapable.

Ancient notions of citizenship did not focus on the individual but leaned heavily on ancestry. This is evident in the work of Aristotle, who argued that those with incorrect ancestry are permanently unacceptable. Because of the need to defend a polity's character,

The ancient republics also make it very difficult for outsiders to obtain citizenship; Athens, for example, left large numbers of persons, including Aristotle himself, as permanent resident aliens or “metics.” There was little question, then that new citizens had to obtain the consent of the political community as well as exercise their own volition to join. (Schuck and Smith p. 29)

Those who are ethnically different can never adequately understand the community and its needs and should never fully participate. The city's citizenship was used to limit diversity and preserve the common end. Citizenship in the liberal constitutional democratic model is a marker of equality and responsibility.

For Schmitt, the state exists to protect and defend the lives and culture of its nation rather than the people who make up that nation. While in any collective enterprise, the individual voluntarily becomes less important or is subsumed for the collective, as Schauer notes, the Schmittian commonwealth is different. In the Schmittian state, any individual other than the sovereign (or its avatar) ceases to have political meaning. The liberal state is a collective enterprise to which diverse people can consent, but the Schmittian state is a representation of a nation, and only the members of that nation get the benefit of the state. Consent is irrelevant. All consent can be overturned for the benefit of the nation. “In 1941, the year the Nazis invaded the Soviet Union, the jurist Carl Schmitt justified Germany's colonization of a space ‘without masters, uncivilized or only semi-civilized’ as a means for the nation to get the food and resources it needed” (Ben-Ghiat 2021, 175). The land was not under German control. It was less organized and not used for the national benefit. It was free for the taking.²

Schmitt believes that equality and universalism inherent in liberalism mean that liberal constitutional democracies do not, and cannot, correctly distinguish between friends and enemies, and this redounds to their detriment. Liberal democracies, for example, incorrectly allow those who are not members of “us” to participate politically through the granting of political membership. Schmitt notes that liberalism holds as a principle that, “Every adult person, simply as a person, should *eo ipso* be politically equal to every other person.” He criticizes this as “a liberal, not a democratic, idea; it replaces formerly existing democracies, based on a substantial equality and homogeneity, with

a democracy of mankind” (Schmitt 1988, 11). “Democracy of mankind” is, for Carl Schmitt, a terrifying proposition because it would end the politicized state, which would also be the end of the nation. The liberal constitutional democratic state is, therefore, dangerous to the political because in treating each person as an equal individual and as a potential interlocutor, the dividing line between friend and foe is abandoned.

Schmitt’s “moral-metaphysical-political indictment of liberal society is that it is depoliticized—and therefore weak, apathetic, materialistic, directionless, and disoriented. By contrast, a political society that has clearly identified its enemies and has psychologically if not yet fully materially girded itself up to do battle against them has attained properly speaking to the level of the political” (Botwinick 2016, 357). Open membership, or the wrong kind of membership criteria, leads to the death of the polity. Though by death, Schmitt notes that the life of a polity is different from the life of its members. It is possible for the polity to die even though all its members might live; it is also possible for the polity to live though all of its members might die. Schmitt avoids the liberal and consent-based converse of his claim. The protection of the old nation prevents the birth of a new nation—a nation of, and chosen by, the people.³ The liberal state is weak according to Schmitt’s understanding because it is vulnerable to being overcome by its enemies, be they external or internal. Any group that has a stronger sense of the political can become an inherent danger to the national group. Schmitt argues that the universal equality of liberalism mandates depoliticization.

Schmitt argues, as evidence for his claims, that even liberal constitutional states are not as universal as liberalism would mandate. He asks, “Does the British Empire rest on universal and equal voting rights for all of its inhabitants? It could not survive for a week on this foundation; with their terrible majority, the coloreds would dominate the whites. In spite of that the British Empire is a democracy. The same applies to France and the other powers” (Schmitt 1988, 10). Schmitt believes that the answer to liberal societies’ failure to live up to their ideals is not in the expansion of equality, but in limiting notions of equality and expanding notions of friends and foes. “Every actual democracy rests on the principle that not only are equals equal but unequals will not be treated equally. Democracy requires, therefore, first homogeneity and second—if the need arises—elimination or eradication of heterogeneity” (Schmitt 1988, 9). Schmitt argues that democracy only really “exists where the people are so homogeneous that there is essentially unanimity. According to the *Contract social* there can be no parties in the state no special interests, no religious differences, nothing that can divide persons, not even a public financial concern” (Schmitt 1988, 13).⁴ For Schmitt, this means that the political community and the democracy must be closed and available only to the right type of people. He writes highly of Australia, “which restricts

unwanted entrants through its immigration laws, and like other dominions only takes emigrants who conform to the notion of a ‘right type of settler.’” He advocates that a state uses “its political power by knowing how to refuse or keep at bay something foreign and unequal that threatens its homogeneity” (Schmitt 1988, 9). The state should only be open to those of national blood, according to Schmitt.

Schmitt is describing what appears to be John Rawls’ worst fear (see Rawls 1971, 1985, 1993). All processes and rights become secondary to one overarching good—the continuation of a particular unique people. Rights can be continually subverted, therefore, for the benefit of this good. This subversion of liberal rights is not only a danger to those deemed “others” but, Rawls would argue, to the very people the state is designed to protect. Any individual’s rights can be limited for the good of the people. In Schmitt’s view, there are no rights or processes that can supersede the effort to define and maintain the unique character of the particular people. “The people should be first and foremost members of a homogenous identity organization, not individual rights-bearing citizens. This means identity trumps protection in the consolidation of the political community” (McCormick 2016, 280). Rawls advocates the reverse; he argues that rights that cannot be abridged for any goals.⁵

Both citizenship ideas—the common law idea of soil and Schmitt’s idea of blood—are inadequate according to Locke, because neither can be ideologically resolved with natural equality.

The assaults on the medieval world of Coke and Filmer that produced political and ideological revolution in England and America challenged not only governmental absolutism but also patriarchal supremacy. That dual focus was necessary because, as we have seen paternal and political rule were both defended as ordained by nature, and apologists for autocracy often relied on the more obviously natural authority of fathers to buttress monarchical claims, especially the claim to the perpetual birthright allegiance of native-born subjects. Consequently, when Enlightenment proponents of limited, consensual government sought to challenge absolutist views they had to reconsider the “natural” authority of fathers over children. (Shuck and Smith 1985, 22)

Based on the ideas of equality, Locke negates both forms of “natural allegiance.” He writes, the view that “*by being born under any Government, we are naturally Subjects to it*” is a “hindrance to the freedom of Mankind” (Locke 1988, 345). Instead, the principles of equality must mean that “*a Child is born a Subject of no Country or Government*” (Locke 1988, 347). Whatever political arrangements are made by the parents cannot limit the freedom of the children: “*any act of the Father can no more give away the liberty of the Son, than it can of any body else*” (Locke 1988, 346). Children must, when they reach adulthood, have the right to choose a polity like their

ancestors. Based on choice, each person can (or not) bind themselves to a polity. “For *every Man’s Children* being by Nature as *free* as himself, or any of his Ancestors ever were, may, whilst they are in that Freedom, choose what Society they will join themselves to, what Common-wealth they will put themselves under” (Locke 1988, 315). This citizenship is not conferred from the circumstances of one’s birth, or the political allegiance of one’s ancestry, but is based purely on choice.

“Natural” and consent citizenship exist on a continuum and rarely in their pure form. Locke acknowledges that the two are often conflated, in that one’s political identification is usually the same as that of one’s parents. While Locke opposed the “natural” form of citizenship and argued that citizenship should be based on consent, he noted other forces empirically determined political attachment. Individuals can create their citizenship and their political identity, but one is likely to want to be in a community with one’s significant others. This is due to ethnic or familial and geographic ties. In this way, the right to choose does not lead to massive demographic reorganization. Locke’s theory would not in practical terms lead to the end of the nation, the same way Amish citizenship practices have not led to the death of the Amish.⁶

The pursuit of common civic or group identity helps inspire not only individuals to limit the polities to which they would consent but also polities to limit the individuals who can consent to any political community. Swiss theorist Jean-Jacques Rousseau “indicated that consent to membership must be mutual” (Schuck and Smith 1985, 34). There are models like this. Some Swiss cantons in the late twentieth century used a model where each prospective citizen had to be voted on and supported by the canton’s current citizens to obtain citizenship.⁷ In the United States, the Amish, as do some other religious communities, require that an individual freely consent only after a period of education and with knowledge of what joining the community will entail.⁸ While most groups might not conform as precisely to the Lockean model, what makes all constraints valid is the idea of choice. Members can exit these groups, despite the consequences -- social, financial, or other -- if they do so. Chandran Kukathas (1997) argues that the essential right in a liberal democratic society is the right to exit. If individuals are part of communities by consent, then the constraints put on that community are valid. Freedom allows people to be free of constraint, but freedom and equality also allow them to make restraining choices.

ANTIFEDERALIST CITIZENSHIP

After the *Declaration of Independence*, the first constitutional system in the United States was the *Articles of Confederation and Perpetual Union*.

That constitution designed the federal government to exclusively relate to the states rather than the individual. The Constitution of 1787 changed the relationship so that individuals had a relationship with the constitution.⁹ The United States Constitution specifically moved away from the idea of thirteen distinct nation-states. This led the anti-federalists to complain about the new constitution. They were concerned that the people's consent could not reach the government in a large multinational state, the kind designed by the new constitution. "A Republican Federalist," for example, argues to the constitutional ratifying convention in Massachusetts, that the federal constitution would change the Massachusetts constitution and, therefore, could not be ratified without destroying the consent of the Massachusetts sovereign, "if a majority, or every member of the Convention, should vote for an acceptance of the new Constitution, because a Convention cannot be called for *altering*, much less *dissolving* the government of Massachusetts, before the sentiments of the qualified voters are collected on the *necessity* or *expediency* of revising the Constitution" ("A Republican Federalist" 1985, 122). This, he argues makes the new federal Constitution illegitimate.

In this way, Antifederalists claimed to be ideologically Lockean but worried about the practical implications of operating in such a theory. Their concern was about alternative majorities. In broadening the base of consent, the community could change. Indeed, it can be overtaken by a larger community of which we are only a small part. James Madison believes the United States Constitution addresses, through diversity, the issues discussed by Montesquieu (1989), who argued that geography and location change which forms of government are suitable for the polity.¹⁰

The Antifederalists feared that civic identity would be overrun. They would lose the ability to participate fully in civic life and lose the advantages that participation itself garners. They feared that the sovereign of their state would become a minority and lose the opportunity to govern the affairs of the state. John C. Calhoun's argument in *Disquisition on Government* (1953), with its theme of concurrent majority, expresses the same concerns. Calhoun wanted to protect civic and democratic equality and the nature of constitutional citizenship by empowering the minority with vetoes. This is neither a defense nor a criticism of Calhoun's theory; I am specifically noting that as a theory, it is quite different from the distinctively anti-liberal Schmittian and Trumpist deployment of us versus them. While it is difficult to separate Calhoun from his practical goals (he was pro-slavery), on a theoretical level, he was trying to answer the same question as Madison: What is a majority in a large diverse society? Still, some anti-liberal ideas have an American pedigree.

One of the most significant examples of the use of blood citizenship in the United States is *Dred Scott v. Sandford*, 60 U.S. 393 (1857). In its decision in the case, the Supreme Court nullified citizenship for all Americans of African

descent, regardless of their social status, location of residence, or occupation. Indeed, there was nothing that these people could do which would give them access to citizenship because of their blood status. This is despite, as one dissent noted, Americans of African descent voted for the constitution's ratification. It does not make sense that people would vote for a constitution which would take away their citizenship. That would be irrational. "The state of nature where each individual has an equal chance of remaining alive must surely be better than a situation where one has completely given over one's right to and capacity for self-protection to an inordinately stronger force that offers no guarantee, no assurance of protecting one's life" (McCormick 2016, 287), as Locke explains.

Whereas, by supposing they have given up themselves to the *absolute arbitrary power* and will or a Legislator, they have disarmed themselves and armed him to make a prey of them when he pleases, he being a much worse condition who is exposed to the arbitrary Power of one Man who has the Command of 100,000 that he that is exposed to the Arbitrary Power of 100,000 single Men, nobody being secure that his will who has such a command, is better than that of other Men, though his Force be 100,000 times stronger. (Locke 1988, 359–360)

No one would agree to make themselves a target of a unified combined force. Instead, one would stay in a state of nature.

Justice McLean, in his dissent, advocates the common law understanding: "Being born under our Constitution and laws, no naturalization is required, as one of foreign birth, to make [one] a citizen." Justice Taney and the court, however, neither adopt the common law nor Lockean logic. Instead, it argues that Americans of African descent, whether free or enslaved, were not, nor could they ever be, citizens. This is based on a principle of citizenship called *jus sanguinis*, or law of blood. Citizenship is only open to those of certain blood. The Fourteenth Amendment's citizenship clauses—"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside"—was specifically designed to override the anti-liberal nature of the *Dred Scott* decision and ensure that everyone has an equal chance to engage in civic life; it provides an equal starting point.

FOURTEENTH AMENDMENT: CITIZENSHIP

In the United States, citizenship is conferred by the Fourteenth Amendment; anyone born in the United States or who is the child of a citizen of the United States becomes a citizen his or herself. In *United States v. Wong Kim Ark*, 169 U.S. 649 (1889), the court ruled that anyone born within the

territorial boundaries of the United States is a United States citizen regardless of their parent's nationality.¹¹ Ark's Chinese parentage is irrelevant to the question of citizenship because of his place of birth. *Wong Kim Ark* has been affirmed, often peripherally, since 1889. An example is the case *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Yasser Esam Hamdi was born in Louisiana to Saudi citizens in the United States on temporary visas but raised in Saudi Arabia. During military action in Afghanistan, Hamdi was captured, transferred to the naval base at Guantánamo, and then to military prisons in Norfolk, Virginia, and Charleston, South Carolina. Hamdi filed a petition for *habeas corpus*, which eventually reached the Supreme Court. In adjudicating the issue, the court affirmed Hamdi's detention and his right to see a lawyer, but his citizenship was never in doubt. Justice Scalia argued that Hamdi's *habeas corpus* petition should be granted: "Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime."

While the laws of the United States dispense citizenship based on descent, the constitutional understanding of citizenship is more Lockean. It seems that the constitutional description of citizenship "is something of a bastard concept in American ideology. . . . In a polity whose chief organizing principle was and is the liberal, individualistic idea of consent, mere birth with a nation's border seems to be an anomalous, inadequate measure or expression of an individual's consent to its rule and a decidedly crude indicator of the nation's consent to the individual's admission to political membership" (Shuck and Smith 1985, 2–3). The citizenship clause in the constitution is what enables Lockean citizenship; it is the citizenship floor. It enables consent. Those who have birthright citizenship have the right to actively consent if they choose, while those without birthright citizenship may not be able to access that right.

Birthright citizenship in the United States is akin to Lockean tacit consent in some ways, but if one does not have it, one can never be a full member of the political community. Larry Sabato notes, "We promote the cultural myth that any mother's son or daughter can grow up to be president, but it isn't even literally true" (Sabato 2007b). Only the "naturally born" have the opportunity to take the presidential oath of office. Others, such as popular governors Arnold Schwarzenegger (R-CA) or Jennifer Granholm (D-MI), do not have that opportunity because of their place of birth and parentage.¹² The reason for this inability to ever fully consent was that "The founders were concerned about foreign intrigue in the early days of an unsettled republic, so they limited the presidency to those who were "natural born" citizens" (Sabato, 2007b). They feared for the United States' "own distinct identity and worried appropriately about undue foreign influence from the Great Powers

of the day: Britain, France, and Spain. . . . At the time of the Constitutional Convention, there were already rumors that some delegates hoped to attract a European of royal blood to serve as America's constitutional monarch" (Sabato 2007a, 104). The founders also feared that electors could be bribed. They wanted to ensure that a president would not be beholden to other interests. This is the same justification for the emoluments clause. Both clauses are designed to protect the government from foreign influence. If a candidate or office holder is financially beholden to other interests, then that person's duty is no longer to the citizens of the state. In Lockean terms, the president is now a servant whose actions are owned by a foreign master. As Locke writes, "Thus the Grass my Horse has bit; the Turfs my Servant has cut . . . become my *Property*" (Locke 1988, 289).

For full citizenship, oaths which provide Lockean consent are required. In a political democracy, oaths are required in the polity to become a voter, police officer, judge, member of the military, member of Congress, or president. It is only after an oath that the citizen becomes a full citizen. It is then that the person can exercise their citizenship by voting or holding office. It is also only then that a citizen can be held fully to account as a citizen. Locke "denied that political membership and allegiance were natural in any sense: far from acquiring a civic identity at birth, a child could not truly become a subject of any political ruler until adulthood. Political allegiance could originate only from an act of personal consent, which only adults were competent to perform" (Shuck and Smith 1985, 24). Since as a practical matter it is impossible to give all people the equal opportunity to consent to a polity, those with birthright citizenship are guaranteed the ability to consent.

According to Lockean citizenship, those who do not expressly consent to the commonwealth can withdraw from it, though without much of their tangible property. The reason for this is that, "The jurisdiction of the government over its territories is permanent. The jurisdiction of a government over those who reside in its territories but have not given express consent is not permanent; it lasts only as long as such residents dwell in its territories" (Russell 1986, 301–302). One who expressly consents may never secede. Locke explains that, "Whereas he that has once, by actual Agreement, and any *express* Declaration, given his *Consent* to be of any Commonweal, is perpetually and indispensably obliged to be and remain unalterably a Subject to it, and can never be again in the liberty of the state of Nature" (Locke 1988, 349).

Aliens, in obeying the laws and contributing to society, are entitled to the protection of that society, which includes the protection of limited civic participation. Those who tacitly consent receive benefits from the polity as long as they meet their legal obligations, but only those who actively consent

are full citizens. Because active consent is permanent and can never be withdrawn, only those who engage in active permanent consent are eligible for certain positions of trust. This is logical. If one in a position of trust can remove consent, there may be irreparable harm to the commonwealth and its citizens. A harm can be compounded if the officer decides to join a different polity. This explains why the Fourteenth Amendment bar against serving in federal office after insurrection applies only to those who have already taken an oath. It applied only for those who have violated their citizenship.

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

This difference between active and tacit consent explains why Donald Trump should be barred from running in federal elections. For reasons discussed in chapter nine about the inability and inadvisability of relying on the courts for a project of constitutional maintenance, it is my personal preference to have Donald Trump stand for election; however, I believe the constitutional conclusion is not in line with my personal preference. My preference, therefore, should give way to the democratic choice of the sovereign.

Justice Jackson asked counsel for Colorado during the oral argument in *Trump v. Anderson* 601 U.S. (2024) about erring on the side of democracy. Her implication was that a commitment to democracy would equal keeping Trump on the ballot, when the reverse is true. Colorado removed Donald Trump from the ballot after multiple court proceedings, hearings, and witnesses. The courts made a factual determination that he had engaged in insurrection. The sovereign people of the United States decided under certain circumstances, which they laid out in the Constitution, when a person would be barred from office. One of these circumstances is if he has engaged in insurrection after swearing an oath to support the constitution. This is the same as banning someone who has served more than six years as president. Both these rules can be viewed as antidemocratic, as are banning non-citizens or those under 35, but they are constitutional. People are unable to choose a particular candidate, but the sovereign people decided to exclude candidates like this. If the sovereign desires different standards in democratic candidates, it can change the rules. The sovereign people have had many years, even since the events of January 6, 2021, to reconsider their opinion. Those events

have long been labeled as insurrection and Donald Trump's participation in them has long been known. Still, the sovereign people made no serious effort to change the clause. The people have reconsidered their opinion before, not only in the repeal of prohibition but in the 11th and 27th Amendments. The judgment of Colorado's highest court was based on facts, evidence, and the constitution. Indeed, a majority of the United States Senate declared Trump guilty of engaging in this insurrection. With their bipartisan votes, these senators declared Trump should be permanently barred from office. This is a far cry from the "two-thirds of both houses of congress" voting that he could serve as outlined in the constitution. A belief in democracy does not mean an agreement with every choice of the democratic sovereign. What the Supreme Court decided in this case was that the sovereign democratic people chose a path that did not square with its theoretical version of democracy.

Donald Trump's disregard of his constitutional oath might be problematic for Schmitt as well in a rare area of agreement between Schmitt's antiliberalism and American liberal constitutional democracy. Schmitt's justification during the Weimar years to have the president in control of the exception was based on a president's constitutional oath and obligation. Schmitt's argument is based, at least partly, on the idea that fidelity to the political oath obligates the president to rule in the interests of the people and not just for himself. This would seem to exclude from office anyone who had previously violated any public, and certainly any political, oath.

In chapters four and five, I address Trump's belief in unrestrained sovereign power, which includes determining who is a citizen. Trump desires to use his presumed authority to unilaterally end "birthright citizenship." Despite the constitution's clear demands, "Trump wanted an executive order that would deny citizenship to people born in the United States whose parents were in the country illegally. The U.S. would then not issue citizenship documents to them" (Woodward and Costa 2021, 78). The constitution can not be unilaterally amended by the executive, which is what Trump proposes. For Trump, constitutional commands are irrelevant. Concerns center exclusively around whether the power can be exercised to create the world of his vision. "These people were mostly Democrats, Trump believed, and if they didn't have citizenship, they couldn't vote" (Woodward and Costa 2021, 79). For this reason, they should be excluded from citizenship, not merely the friend group. The American constitutional system can end birthright citizenship with sovereign consent and at the demand of the sovereign people, but Trumpist want it done at the demand of a political candidate because he believes it is in his interest. Akhil Reed Amar (1988) argues that the liberal constitutional sovereign makes it possible for the people at any time, because they are sovereign, to amend the constitution without the constraints of Article V of the constitution. His argument is that the sovereign, acting as sovereign, can exercise

its sovereign power in the way it sees fit. The sovereign is not constrained, but a delegate would be. Trump, however, does not believe he is a delegate with constrained powers, but the sovereign. The powers and limits on power are laid out in the constitution, so the sovereign need not be consulted. Since Trump is the sovereign, he need not ever consult the constitution.

CITIZENSHIP AND DIVERSITY

The American liberal constitutional ideal of citizenship can be understood as one in which “particular identities can only flourish within democratic polities if sustained by a shared commitment to universal citizenship which neither transcends particular identities nor uncritically embraces chauvinist or anti-democratic aspects of such identities” (Schwartz 1995, 231). Rather than the uniformity proposed by Schmitt or Trump, liberal constitutionalism allows alternatives. The Supreme Court’s decision in William Schneiderman’s citizenship case serves as a liberal democratic counter model. Schneiderman arrived in the United States as a toddler and joined the Young Workers League at the age of sixteen. At the age of twenty-one, he filed to become a naturalized citizen. Shortly after that, Schneiderman joined the Workers, later the Communist, Party (Liss 1976, 501). Schneiderman was naturalized in 1927, but in 1939, citizenship revocation procedures were started because, it was argued, he lied on his citizenship application. The state claimed Schneiderman lied when he claimed to be committed to the constitution; the proof provided by the state was that Schneiderman was an avowed communist. Writing for a 5–3 majority, Justice Frank Murphy notes in *Schneiderman v. United States*, 320 U.S. 118 176 (1943) that:

We are directly concerned only with the rights of this petitioner and the circumstances surrounding his naturalization, but we should not overlook the fact that we are a heterogeneous people. In some of our larger cities, a majority of the school children are the offspring of parents only one generation, if that far, removed from the steerage of the immigrant ship, children of those who sought refuge in the new world from the cruelty and oppression of the old, where men have been burned at the stake, imprisoned, and driven into exile in countless numbers for their political and religious beliefs. Here, they have hoped to achieve a political status as citizens in a free world in which men are privileged to think and act and speak according to their convictions, without fear of punishment or further exile so long as they keep the peace and obey the law.

The majority held that Schneiderman had the same free speech rights as other citizens. Like other citizens, Schneiderman can be committed to the constitution and work to improve it. The only evidence that Schneiderman has

shirked his citizenship duties is that he disagrees with a state's view. That is not enough. The founders held widely different views. One can be a citizen and have the same attachment to the state despite one's unconventional views. It was also noted that if denaturalization can happen for political activities which represent unconventional opinions twelve years after the fact one is never free. It is not real citizenship.

Citizenship through the consent model is sometimes viewed as membership in civic organizations, but those two kinds of membership are "qualitatively different" because of commitment to the community (Addis 1997, 125). The level, nature, or manner of commitment is not relevant as far as the liberal constitutional society is concerned. It protects the conditions making such consent possible. Groups, be they religious, or even a bowling league, apply their own standards to which they expect people to conform. One may only obtain religious rites if one abides by certain rituals, or one can only maintain full membership on a team if one attends practice, pays the fees, or whatever. Membership in the two groups can be dissimilar or spawn different affective ties, but both groups demand constraints and limit members' freedom. Liberal constitutional democracies allow both limitations because people are free to accept or deny them. Neither the state nor society needs to make judgments about the truth or importance of each particular act of consent.

Carl Schmitt argued that friends must be willing to fight and die for the "us" and to kill the other. "The terms friend, enemy, and conflict receive and retain their real meaning by the fact that they refer specifically to the real possibility of physical killing," he writes (Schmitt 2020b, 68). Because of the national view—the state is in "its literal sense and its historical appearance, a specific kind of status of a people"—there will likely be members of the group outside of the state and non-members within (Schmitt 2020b, 57). The violence exists then, not between states and citizens, but between friends and enemies. Because "they" are always among us. Without the organization provided by the state and citizenship, the Schmittian state has two ways to deal with them increasing among us. The first is to regulate what would be the private sphere in liberal constitutionalism, e.g., religion, speech, dress, and the second is the violent elimination of the other. Schmitt writes, "War is only the most extreme realization of enmity," the friend group is always on the precipice of violence with others (Schmitt 2020b, 68).¹³ Citizenship does not have the same inherent violent component.¹⁴ In the Schmittian state, anyone with a different view than the state must be marginalized. In the United States, all, from any background, can have equal access to being a good American. Frances Wright writes, "what is it to be an American? Is it to have drawn the first breath in Maine, in Pennsylvania, in Florida, or in Missouri? Pshaw! . . . They are American who, having complied with the constitutional regulations of the United States . . . wed the principles of America's Declaration to their

hearts and render the duties of American citizens practically in their lives” (Quoted in Levinson 1988, 5).

The difference between the Schmittian or Trumpist view of democracy and the liberal constitutional version is it includes a different understanding of who can be part of the democratic society. In liberal constitutional democracy, “the practice of democracy involves ethically treating each individual in accord with his or her moral worth. Of course, just who counts as a full citizen and how to guarantee the exercise of full citizenship rights is an issue confronted daily by antiracist and feminist movements” (Schwartz 1995, 231). Trumpism, unlike the Madisonian liberal constitutional democracy, does not endeavor to make space for all in democratic society, but instead, whittles society down to a smaller and smaller group of friends.

FRIENDS AGAINST CITIZENS

Because Trumpists do not accept equal citizenship, they negate the very structures designed to protect the people’s sovereignty and limit the powers of the state. Instead, they rely on friends rather than citizenship. This is how the election lies work; it is based on the irresolvable tension between friends and all the citizens, which include many of the “others.” This is not a 2020 invention but part of the Trumpist understanding of the world. Donald Trump also

made the unprecedented suggestion that he might not accept the results of the 2016 election. Levels of voter fraud in the United States are very low, and because elections are administered by state and local governments, it is effectively impossible to coordinate national-level voting fraud. Yet throughout the 2016 campaign, Trump insisted that millions of illegal immigrants and dead people on the voting rolls would be mobilized to vote for Clinton. (Levitsky and Ziblatt 2018, 61)

Trump’s claims in 2016 were originally thought to be illogical and largely marginalized. In the past decade, his antidemocratic mantras have moved away from a small faction of Americans to a broader segment of society. Trump is a representation of this change, as well as a driver of it. Despite the absence of any significant or coordinated voter fraud, “In a survey carried out prior to the 2016 election 84 percent of Republican voters said they believed a ‘meaningful amount’ of fraud occurred in American elections, and nearly 60 percent of Republican voters said they believed illegal immigrants would ‘vote in meaningful amounts’ in November” (Levitsky and Ziblatt 2018, 196–97). Citizens are divided into legitimate friends and illegitimate

foes. Voter fraud carries more meaning than a belief in problems with election administration. It includes the possibility that opponents are not political rivals but usurpers who are trying to destroy the democratic system. What voter fraud allegations do is disassociate Trumpists from those who are not. It serves as the badge of identification—the shibboleth—into the friend group. “By the time a July 2017 poll showed that 47 percent of Republicans believed that Trump had won the popular vote (which Clinton won by 3 million), the era of what his campaign manager Kellyanne Conway called ‘alternative facts’—falsehoods that support Trump’s view of reality—had arrived” (Ben-Ghiat 2021, 62).

James Madison’s model is driven by the fear that a particular interest will achieve a hegemonic position which will ultimately negate the existence of liberty. This is why Madison wants groups to become numerous and diffuse, so that interests will overlap and rival one another, preventing true conceptions of what is common from being formed. Madison fears that what is in the common interest will be overcome by a single self-interested faction destabilizing the system. The Madisonian model creates stability because citizens engage in bargaining, and coalitions are formed between various groups of people. These coalitions are strategic and useful to the participants and dissolve when they cease to be so. The model works in part because of a belief in a common enterprise. It does not work if certain groups are continually excluded from the decisive coalition, like the antiracists and feminists Schwartz mentioned above. It is often assumed that such exclusion is caused by discrimination against certain groups, factions, or interests by the rest of society or because a group is too small to effect a coalition. This is not always the case; some factions wish to be excluded. It is one thing when a small minority group withdraws from the bargaining process, as Kymlicka (1989) discusses, but if larger groups with power refuse to participate, the model becomes faulty because it is more likely to be to the collective detriment. In 1989, Gary Jacobsohn argued that even if the model of interest group pluralism works in the United States, it is unlikely to be transportable because some countries, such as Israel and some in Western Europe, have groups more discrete, insular, and stable than the United States. Those same challenges he saw to the exportation of the American model thirty-five years ago may now exist in the United States. For a successful common polity, adherents need to be able to bargain, and groups must believe they are part of the whole. Madison believed that the existence of many different groups would prevent the existence of any group of sufficient size to gain control of the political process, but he did not address the possibility that some groups are excluded or might never be able to assert their interests in the mediation process.

CONCLUSION

According to Coke and the common law, if one was born within the dominion of a prince or king, then that individual owed permanent allegiance to that prince or king. In exchange for the allegiance, the individual is entitled to protection. This idea is similar but not the same as the principle enshrined in the Fourteenth Amendment of the Constitution. While the Fourteenth Amendment advocates *jus soli*, it does it with a Lockean twist. Birthright citizenship provides an opportunity to pursue Lockean consent in the United States. This is seen in a variety of ways. Lockean consent means all can agree to what constraints they would like. The marketplace of ideas should prevail in the public sphere, but in the private sphere, individuals can establish any constraints they want. Instead of pursuing the constitutionalist idea of individual factions working independently to achieve their individual and collective goals, Schmitt and Trump seek to abandon all factions. Since, according to antiliberalism, the others among us are always a threat, they should be forced into uniformity with the dictates of the state. This leads to the death of the liberal democratic citizen.

NOTES

1. Classical patriarchy includes the right of parents to make decisions for their children even after the age of majority. Locke believed parental rule of their children is justified only when their children's reason is not fully formed.

2. John Locke makes an argument about America that has some similarity. He writes, "in the beginning all the World was *America* and more so than it is now" (Locke 1988, 301). Unlike Schmitt's comment, Locke fails to understand the property in the new world because of paradigmatic incommensurability (see chapter nine). Locke understands the land to be used for profit; therefore, America is not useful and the English can just take it because it is still in the common. Schmitt understood the Soviets' use of the land; his political theory justifies, however, overriding any consideration of their view.

3. It is for this reason that Schmitt is labeled a conservative, but he is a different kind of conservative than is usually understood by the political theory use of the term. While there are things Schmitt does to conserve political or social elements, he is largely not deferential to institutions of traditional authority in the mode of Edmund Burke. How to categorize Schmitt might largely be an academic exercise, but traditional conservatism in the United States, for example, the ideology of Ronald Reagan or Dick Cheney, includes an institutional deference that Schmitt lacks.

4. While American politics is most often thought to align with the political thought of John Locke, Schmitt likens his understanding of democracy to Rousseau, who he claims "stands at the beginning of modern democracy" (Schmitt 1988, 13). Gordon S. Wood (1969, 1992) argues for the Lockean influence on the founding

generation, while Wolin (1990, 100–119) makes an argument for Montesquieu's influence on the founding. See also Pocock (1980) for a discussion on founding influences.

5. To what extent cultural or social differences can continue to exist in the polity is a matter of discussion among theorists and critics of liberalism. See for example: Addis (1997), Buchanan (1989), Flathman (2005), Gans (1997), Griffen (1998), Kukathas (1992), Kymlicka (1989, 1992), Macedo (2000), Taylor (1991, 2007), and Walzer (1983).

6. This is the companion to John Locke's right to revolution argument. The right to revolution does not lead to continuous revolutions. As explained in the Declaration of Independence: "Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security." Similarly, the right to choose to become part of a different polity than one's ancestors does not often lead to the wide-scale practice of doing so.

7. See Dahrendorf (1988) for a discussion of the twentieth-century Swiss process of mutual consent. This model was changed after courts ruled it was violative of individual rights. While an immigrant still needs to obtain local approval, it can no longer be withheld on characteristics deemed irrelevant. As a graduate student at the European Summer School in Local Government centered at the University of Bordeaux in 2000, one of the Swiss students from a canton using a version of a "mutual consent" system said each citizenship candidate in his canton would be on the ballot with a picture.

8. Steven Mazie (2005) notes that the Amish, despite illiberal attitudes, practice prototypical Lockean liberal citizenship. Amish are also not "shunned" until after they consent following the Lockean model, though there are more informal models of exclusion. See also Kraybill (1989, 1993) for an explanation of Amish citizenship practices.

9. This relationship has theoretical meaning, but it need not for my purposes here. It is empirically true: the new federal government holds a census where it counts everyone.

10. Thomas Jefferson, it appears may have disagreed that the Constitution addresses Montesquieu's concerns. He wrote to James Madison from Paris on 20 December 1787, "I think our governments will remain virtuous for many centuries; as long as they are chiefly agricultural; and this will be as long as there shall be vacant lands in any part of America. When they get piled upon one another in large cities, as in Europe, they will become corrupt as in Europe" (Jefferson, 1999, 363).

11. 8 U.S.C. §1401 lists ten categories under which a person would be considered a citizen of the United States at the time of birth. Still, "birthright citizenship" generally refers to the principle of *jus soli*. Wong Kim Ark noted exceptions including members of Native American Tribes—see *Elk v. Wilkins*, 112 U.S. 94 (1884). This is

no longer relevant since the Indian Citizenship Act of 1924. Other exceptions include diplomats and enemy forces in occupation of the United States. Each of these categories are people or the children of people who have actively consented to be part of another political organization. There are also laws regarding nationals who are not citizens, e.g., American Samoans.

12. Arnold Schwarzenegger was born in Austria in 1947. He moved to the United States in 1968 and eventually became the thirty-eighth Governor of California (2003–2011). Jennifer Granholm was born in Vancouver in 1959 and moved to California 4 years later. She served as the forty-seventh Governor of Michigan (2003–2011). Despite it a restriction on democratic choice, neither can run for president.

13. In considering the possibility of a Trumpist political victory, one may consider how Trumpists expel political friends like Mike Pence to understand how they might expel their political foes.

14. Citizenship defines the community over which constraints are exercised. The shared equality of citizenship is necessary because in its absence not only can one be subject to authority without their consent, but the community to which people have previously consented can be radically altered without consent. This is the argument of A Republican Federalist. As Michael Walzer explains, “The restraint of entry serves to defend the liberty and welfare, the politics and culture of a group of people committed to one another and to their common life” (Walzer 1983, 39). Birthright citizenship and liberalism’s bracketing of the “meta-physical” concepts mute this concern. Certainly, it cannot be allowed to run amok. Anyone’s children change the character of the polity as does their absence. While this seems like a straw man argument, recent history shows it is not. It should not matter if the President is Catholic, Muslim, White, Hmong, Jewish, or Laotian; the relationship to the constitution and law should be the same. Unlike the Sovereign of the United Kingdom, the president is only the defender of the constitutional order, not a religious faith.

Chapter 9

The American Constitutional Paradigm

American political tradition has been attached, if imperfectly, to liberal constitutional democratic ideals since its founding. These commitments can be seen in founding documents and the political and legal history of the United States. Children are schooled in this tradition and commitment to procedural democracy from a young age, including how to win and lose in electoral contests. They often, for example, vote in elementary school classes for president, which movie to watch, whether to go outside for recess, and learn to abide by the decision and shake hands when done. Even if most Americans are committed to the liberal constitutional democratic state, Trumpism shows that some have now abandoned its principles. General Michael Flynn, for example, during his interview with the January 6 committee, oddly cited the Fifth Amendment when asked if he believed in the peaceful transfer of power, leading one to assume he does not. Trumpism, despite failing to command a majority, endangers American constitutional democracy. The tradition of liberal constitutional democracy in the United States makes the goals, commitments, and motivations of Trumpism obscure to most constitutionalists, and that obscurity is used by Trumpists to their advantage.

It seems odd within a tradition of American liberal constitutional democracy that so many Americans have abandoned it. They have, moreover, become attracted to a different paradigm—an alternative way to understand the American polity. For Trumpists, their Schmittian- inspired paradigm explains something that the Madisonian pluralistic democratic paradigm does not. Trumpist politics is about who is a real American and who belongs, something Trumpists believe the American constitutional system and liberal constitutional democracy more broadly fail to address. Trumpism, moreover, wants politics to focus more succinctly, on topics banned by liberal constitutionalism from political determination. These disparate understandings

of politics and democracy make it impossible for the two sides to join in a common endeavor. While American constitutionalists try to engage politically across party lines and come to agreements on policy, Trumpists engage politically about identity, necessitating the drawing of lines which negates all agreement. This is why Trumpists often act in a way that would seem, from the constitutionalist perspective, to be detrimental to their interests.

In the Madisonian system of American constitutional democracy, the majority coalition should hold sway over any minority faction. This is the ideal, but in a two-party system, political outcomes are based on many influences. Politically, Trumpists broaden their anti-liberal faction when they are joined by those who prefer a liberal constitutional democracy but vote for Trumpist candidates for a variety of gains. While consideration of the long-term common good would likely forestall such an alliance, Republican behavior indicates a marked lack of willingness to engage in a reflection of the long-term good, and an unwillingness to act responsibly as a political party in liberal constitutional democracy. Since citizens like these cannot always be relied upon, constitutional procedural elements of liberal constitutionalism should be used to defend itself. Madisonian democracy relies on all interests and factions participating in the representative system. Protecting American constitutional democracy, therefore, should include the protection and expansion of democratic representation. This argument is a paradigmatic one akin to “the solution to objectional speech is more speech.” It does not, by its nature, determine any policy outcome, nor does it forestall the democratic sovereign’s ultimate choice of a different paradigm. The representative nature of American constitutional democracy, however, is in opposition to Trumpism, which abandons notions of majoritarianism in defense of an alternative view of sovereignty, democracy, and citizenship. By advocating participation, rather than abrogating responsibility, American citizens can defend themselves against minority factions. Independent redistricting commissions and instant runoff systems would assist in representing factions fully and defending them against the Trumpist minorities. This marginalizes the Trumpist coalition in a way advocated by liberal constitutionalism; a coalition of factions continually and convincingly defeats a minority faction (Trumpism) at the ballot box.

PARADIGMS

The Trumpian movement is not about particular policies but a community’s shared assumptions and framework of thinking, or paradigm. Thomas Kuhn (1970) argues that a paradigm determines the focus and role of science and the substance of inquiry. Other times, the focus of science changes. ”Led

by a new paradigm, scientists adopt new interests and look in new places” (Kuhn 1970, 110).¹ The concept of a paradigm, as the way one understands the world, is useful in non-scientific contexts. An example is the conversion of Saul to Paul on the road to Damascus. After his conversion, Saul made no sense to Paul, and Paul pursued a different life that would have made no sense to Saul. The same “facts” can have different meanings depending on one’s paradigm, which makes different paradigms “incommensurable.” They cannot communicate or work together effectively because adherents of different paradigms understand the world in fundamentally different ways. William F. Harris argues that the “concept of *constitution* is quite closely parallel to Thomas Kuhn’s (1970) concept of *paradigm* —most obviously in its setting up of a pattern of an order that imposes constraints on authentic discourse at the same time that it releases the potential of the order to be known and acted upon” (Harris 1993, 133n). The Trumpian paradigm of a unified sovereign with wide-ranging power focuses on the issue of friend against enemy and contrasts with the liberal constitutional paradigm of pursuing a common endeavor and constitutionally limited separation of powers, leading to a different structuring of the social and political world.

Paradigms illuminate what is fundamental. They provide different “first principles” that give a context through which endeavors can be judged. Alisdair MacIntyre writes that “genuinely first principles, so I shall argue, can have a place only within a universe characterized in terms of certain determinate, fixed and unalterable ends, ends which provide a standard by reference to which our individual purposes, desires, interests and decisions can be evaluated as well or badly directed” (MacIntyre, 1990, 7). The problem with a multiplicity of paradigms or first principles is that they are impossible to interrogate by others’ standards. MacIntyre argues that rationality and understanding are dependent on traditions or epistemology, each distinct in their concepts and standards of assessment.

The lack of common rationality and understanding and the battle of paradigms lead to large and small problems. I noticed this in my introductory American government class (at a MD state school). In a section on voting and opinion measurement, a student insisted that Trump won the popular vote in 2016. He was impervious to any evidence that indicated the real number of invalid electors was quite small and *not* disproportionately Democratic. Later in the (spring 2018) semester, the student rejected data which indicated the number of undocumented migrants had fallen in the country between 2008 and 2016. I confirmed the data in the article with multiple sources and a colleague whose work included the topic. When the student was told the confirmed data, his response was, “With all due respect to [my colleague], he doesn’t know what he is talking about.” This (MAGA) student refused to even engage with facts or data. The decrease in undocumented migrants could

easily have been accommodated into this student's worldview—for example, Obama's America is so bad even undocumented migrants were leaving—but any facts which challenged what this student “knew” had to be labeled wrong. By asking him to entertain ideas that conflicted with things he “knew,” we were, essentially, challenging his faith.

My colleague, who had been studying the issue for as long as this student has been alive, was dismissed because of data that conflicted with this student's known facts. What counts as legitimate facts, because it is determined by the paradigm, varied between the student, me, and my colleague. For Trumpists, facts are determined by Trump or the Trumpian friend group. This is one of the advantages of the Trumpian view of sovereignty. My colleague and I operated on what we perceive as a rational view; it demands facts, evidence, and argument. From our perspective, the student has a position that is impossible to interrogate: there are no facts (or none that we understood) which even addressed the issue.

Paradigm conflict can lead to more than just intellectual casualties. One of the threats of Trumpism and its focus on alternate facts is a form of Lysenkoism. Trofim Lysenko was a Soviet scientist who set up a system of genetics based on Leninist politics rather than science. Lysenko was rewarded politically, and genetics in the Soviet Union was remade according to his very unscientific, theories. It did not matter how hard he pushed his theories; the science would not change. (Lysenko believed he could change the character of plants and animals.) The Trump administration's 2020 handling of the COVID pandemic was also driven by its political beliefs. The administration seemed to dismiss scientific information if it did not conform to either the Trumpist political beliefs or Trump's personal ones, e.g., regarding masks. Lysenkoism resulted in the purging of some of the best geneticists in the world and the starvation of millions (see Soyfer 2001).

Liz Cheney describes the paradigmatic problem of incommensurability in her home district. She recounts an interaction with a couple who placed “their LIZ CHENEY IS A TRAITOR sign carefully at their feet” to talk politely to her. Cheney says she attempted to explain her commitment to the rule of law and “why Mike Pence lacked the authority to undo an election,” but “the husband interrupted to stress that he opposed Biden's policies.” She agreed with him on that. But, she said, “we can't abandon our constitutional duties simply because we oppose Joe Biden's policies.” This was where they reached incommensurability. Cheney is committed to the constitution and opposes Joe Biden's *policies*; in the MAGA world, Biden is an enemy and needs to be opposed at every opportunity and by all methods. Cheney writes,

It was as if they believed we in Washington could seize power based on what they had been reading on the internet and watching on cable news.

It was an entirely civil discussion. But the notion that I was bound by our constitutional system, and by the rule of law, was simply not sinking in.

A woman nearby interrupted politely to thank me for what I was doing and saying. Others applauded. But the husband could not be persuaded. He was repeating back to me almost verbatim, what Donald Trump had been saying in his social-media posts and on certain cable outlets at the time. (Cheney 2023, 187–188)

Alisdair MacIntyre writes that when trying to communicate across paradigms, the only way to judge between different world views is to show that one succeeds better in its rival's terms, for example, by solving a problem that the rival recognizes but fails to address.

The first principles of a particular science are warranted as such if and only if, when conjoined with whatever judgments as to what exists may be required for that particular science, they can provide premises for a theory which transcends in explanatory and understanding-affording power any rival theory which might be advanced as an account of the same subject-matter. (MacIntyre 1990, 31–32)

Unlike Newtonian and Einsteinian physics, Trumpism and liberal constitutionalism, however, fail to even recognize politics as having the same goal.

AMERICAN CONSTITUTIONAL PARADIGM AND TRUMPIAN CHALLENGES

James Madison claims in the *Federalist Papers* that to be stable, the American democratic system should be large and diverse. Diversity ensures no interest or “faction” has enough power on its own to control the state or society. Different interests, instead, must join together to form winning coalitions which are continually changing. Ideally, everyone is part of both winning and losing coalitions. Schmitt agrees that factions are destabilizing but proposes a dealing with them differently; he eliminates them. Madison discusses this possible solution for dealing with the destabilizing nature of faction but dismisses it as anti-liberal. He writes, “[i]t could never be more truly said than of the first remedy [destroying factions], that it is worse than the disease. Liberty is to faction, what air is to fire, an ailment without which it instantly expires” (Madison n.d., 43).

The diversity mandated by Madisonian democracy necessitates consensual party relations and the mediation and negotiation that go with it. Because no faction can win on its own, it is in every faction's interest to work with others to effect or resist policy change. All factions are mediated and moderated before they hold sway. The Madisonian system can be seen as a technical

solution to the collective action problem; the democratic system achieves stability and a just outcome despite anyone's personal commitment to system stability or a just outcome. It does this by harnessing the individual pursuit of self-interest, not by eliminating it. It is in each faction's interest to align with others to achieve their goals. Unlike the prisoner's dilemma or tragedy of the commons, the individual incentive is aligned with the collective.

From a Madisonian perspective, because Trumpists are a faction, to achieve their goals in a Madisonian environment, Trumpists, too, should behave as Madison suggests. Madison presupposes, however, a liberal constitutionalist faction, which Trumpists are not. They refuse to engage in toleration, forbearance, or even policy. Trumpists prefer a purer candidate over a winning one. Incommensurability occurs "when disagreements between contending views are sufficiently fundamental . . . those disagreements will extend even to the answers to the question of how to proceed in order to resolve those same disagreements" (MacIntyre 1988, 4). Prior to the ascendancy of Trumpism, Democrats and Republicans might disagree but agreed how to resolve disagreements, at least periodically. Trumpists have no such détente. Indeed, given the sanctions for lapses of ideological purity, Trumpists would rather keep ideological purity than resolve disagreements. They, for example, instituted reprisals for the agreement to raise the debt ceiling in spring 2023, shutting down business on the floor of the House of Representatives until Republican Speaker Kevin McCarthy made concessions. On January 24, 2024, Donald Trump claimed that anyone who donates to Nikki Haley "from this moment forth, will be permanently barred from the MAGA camp." No opposition or diversity of opinion is allowed.

Thomas Kuhn argues that people adopt a new paradigm when it explains something that the current paradigm cannot. For most people, the Madisonian paradigm explains how both their preferred ideas and candidates win and lose politically and how their interests become or fail to become policy. Trumpists, however, abandon the liberal democratic paradigm because it fails to address their view of politics, which is competitive, exclusionary, and focused on defining a national identity. That includes labeling non-Trumpists as illegitimate participants rather than potential partners. While the Madisonian paradigm provides an explanation of why and how Trumpism does and does not command a majority, Trumpism provides an explanation that better conforms to Trumpists' other criteria and values. The Trumpian paradigm is appealing, moreover, because it provides a straightforward and simple story, lacking the complexities of American constitutionalism.

The Trumpian paradigm changes the understanding of facts. There is a problem, it is claimed, with the current electoral system which cannot be self-remedied. Donald Trump has argued, for example, that the presidential elections of 2008 and 2012 produced illegitimate results because Barack

Obama was elected. In the 2016 election, Donald Trump claimed there was coordinated election cheating by “others,” noncitizens coaxed by the Democrats, which cost him the popular victory. These earlier election denials are evidence that Donald Trump has never accepted the liberal constitutional democratic process which is essential to the workings of the polity. In June 2020, Trump had already dismissed the November 2020 election insofar as it would not lead to his election, tweeting, “MILLIONS OF MAIL-IN BALLOTS WILL BE PRINTED BY FOREIGN COUNTRIES, AND OTHERS. IT WILL BE THE SCANDAL OF OUR TIMES!” The Trumpian paradigm predicts an outcome which is true because the inner logic of the position requires it to be true, whether it is or not by any outside metric. The argument’s logic is similar to: my prayers to the Church of Gumby will keep the sun rising for the next year. Later, when the sun is rising, I can claim I was right. Such an argument might sway someone *if* they believe in the Church of Gumby *and* the power of the yearly prayer *and* its connection with the sun. If discussing the issue with a scientist, or a logical rationalist, such an argument will likely fail. Outside of the paradigm, the argument might seem illogical, but for those who adopt it, it all makes sense.²

Trumpists believe their America is being taken over by an illegitimate other. The outcome of the 2020 election was used to reinforce this self-understanding. There is no way a legitimate reflection of the people—the “us”—can lead to an election of the other. The Trumpist model also provides adherents an opportunity to engage in a moral endeavor against the “other.” When correctly engaged in the righteous battle, the people can keep themselves from ever being endangered again. This idea leads to a focus on the preservation of power rather than a focus on justice and legitimacy. Because Trumpian, like Schmittian politics, is separated from technical procedures, it “is an open invitation to those who struggle for political power to claim that *they* have understood the silence or the diffuse acclamation of the people correctly or, respectively, the overwhelming feelings of public opinion and hence are legitimized to act on their behalf outside the constitution” (Preuß 2016, 479).

From a constitutional democratic paradigm, the Trumpian claim of an electoral victory is nonsensical. One must believe that there are vast conspiracies involving not only opponents of Donald J. Trump, but various states, media, other Republicans, and even elements of Trump’s own administration. If all these conspirators are actually against Trump, the claim that he won a majority of the electorate, or “won by a landslide” seems improbable at best. Because the United States electoral system is decentralized, for Trump’s complaints about election fraud to be true, it would require the participation of thousands or more likely tens of thousands, perhaps even millions if it encompasses the court system, precisely and strategically cheating; yet, not one of these

conspirators has been found, or left verifiable evidence. The problem is that constitutionalists are presenting numerical facts—Biden won more votes than Trump. For Trumpists, the election is about American identity. *Trumpists are voting on the truth of their view of America.* The idea that they may not have won an election becomes nonsensical to Trumpists because it would mean they agree to a different, and in their minds, illegitimate version of America. Trump must have won because that outcome accords with their version of reality.

Aaron Blake writes in his article “GOP election deniers increasingly admit they’re just going off vibes” that nearly half of election deniers (48 percent) acknowledge that there is no real evidence for their position. He writes that this is “not the only indication that election denial, while still strong in the GOP base, has waned” (Blake 2023). Blake’s interpretation of the data in the article seems based on a belief in a shared constitutional paradigm. This is a misapprehension. Blake cites the statistic that in January 2021, 71 percent of Republican-leaning voters believed that the presidential election was illegitimate, a number that had fallen to *merely* 63 percent in March 2023. While this shows that some Republican-leaning voters have given up on election denialism, it is the basis of election denialism that is interesting. In January 2021, the vast majority of election deniers (three-quarters) claimed that there was “solid evidence” for their belief, while two years later, only half are willing to make the same claim. Blake claims this is a win because “All told, back in January 2021, a majority of Republican-leaning voters (54 percent) said they believed that the election was stolen *and* that there was solid evidence. Today, that’s fallen to just 33 percent.” Rather than an indication of a positive trend, this statistic indicates that a large number of Republicans are, indeed, Trumpists, who have withdrawn from the American constitutional liberal democratic paradigm.

Those who believe there were provable claims of voter fraud can potentially be reasoned with, or are at least still speaking the same procedural language as their non-Trumpist counterparts: Republican, Democratic, and independent. If there was fraud, presumably Democratic supporters would also join efforts to rectify the election. If shown there was no fraud, moreover, at least some of these people would likely accept Joe Biden as president. Those who do *not* believe there is evidence of voter fraud, yet still support Trump’s endeavors to displace Joe Biden have withdrawn from the liberal constitutional democratic paradigm. Only half of election deniers believe the election was procedurally illegitimate. For the other half, the election is illegitimate because of its conclusion; they have different standards or understandings of elections. This is more ominous.

Blake also examines 2022 post-election polls, which indicate that fewer people believed those elections were illegitimate compared to 2020. There was, indeed, more than a 50 percent decline in the percentage of people who

believed the 2022 election was illegitimate compared to 2020. Blake also believes this is positive. The 50 percent decline, however, indicates fewer opportunities for controversy.³ The 2020 objections, despite how they were framed, were about dissatisfaction with the outcome rather than the process. As Montesquieu (1989) might note, the more local the vote, the more likely the representative represents the electors.

In the face of polls claiming Biden would win the 2020 presidential election, exit polls saying he had, individual states—many of them Republican-controlled—declaring Joe Biden had won, and independent news services declaring Joe Biden the winner, it is easier for Trumpists to believe in a vast conspiratorial system without any evidence than to believe that Joe Biden won. The Trumpist worldview makes the conspiratorial outcome more reasonable than facts which would counter that conclusion. According to the Trumpist paradigm, the American system is fundamentally flawed if it reaches the wrong conclusion. “Others” who might destroy “us” and “our” way of life must have participated to reach this conclusion.

For people who are committed to the liberal constitutional paradigm, the Madisonian system makes sense. Once people abandon commitment to constitutional democracy and replace it with Trumpian commitments, participation in the Madisonian or any technical democracy becomes meaningless and faulty. Instead of broadening its partisan message and appeal, as makes sense in the Madisonian system, Trumpists prefer a Schmittian strategy to remove heterogeneity as that conforms with their vision. Trumpists pursue a purer and purer version of themselves in their determination of the boundary of the political. In such a pursuit, any commitment to the constitutional process is abandoned.

THE LIMITS OF PARADIGM AND POLICY

Despite the Trumpist paradigm’s appeal, its spread has also had limits. In the same way that those committed to liberal constitutional democracy fail to understand Trumpism, Trumpists see the world from the Trumpist perspective and fail to understand the liberal constitutionalist democratic paradigm. Because Donald Trump believes in the Trumpist paradigm, he thinks if one agrees with him on policy, they also share his view of the world (paradigm) and vice versa. This is why Trump believed that the unusually high number of federal judges he nominated were “*his*” judges who would rule the way he would like, disregarding the United States constitutional tradition, and hand him the election. “‘We’ve got the Supremes,’ Trump assured various of his callers” (Wolff 2021, 123). Trump believed that judges appointed by him,

and even those appointed by other Republicans, would agree with his view that constitutional democracy is instrumental and subordinate its mandates to his goals.

This shows both a miscalculation and a misunderstanding. Most judges and justices remain, at least for now, committed to liberal constitutional democracy.⁴ This meant that many Republican and even Trump-appointed judges and justices could not fathom agreeing to Trump's requests. This does not mean that all judges and justices have been unswayed by Trumpism. It appears, for example, that Judge Aileen Cannon wanted to create new rights exclusively for Donald Trump in 2022 regarding his retention of United States security documents. A three-judge panel, which included two Trump appointees from the Court of Appeals for the Eleventh Circuit, however, reinstated American constitutional standards.⁵ Leaving constitutionalism to the courts is problematic, however. There is no reason to assume that all judges at all times will be committed to liberal constitutional democracy.

Many defenders of liberal constitutional democracy make the same mistakes as Trump when discussing "his" judges: they confuse policy and paradigm. Imagine a constitutionalist citizen who supports a certain policy goal, such as corporate deregulation. Such a person might conclude that Trump advocates a general laissez-faire economic policy and choose to support him as a way to achieve that policy. This person may also believe that the United States constitutional system is the best environment for economic activity and for daily life. Because paradigms are incommensurable, this citizen might believe that a Trumpist candidate pursues policy as constitutional goals. All policy is secondary in Trumpism to the larger political goals forming identity, however, and no process and policy is secure. Trumpism's identity-building project may or may not result in a regulatory project. Ron DeSantis in Florida, for example, has attempted to heavily regulate speech not only for educators but corporations and media in his identity-building project. This regulation is used for identity building rather than for constitutional, democratic, or capitalistic purposes. When one supports Trumpist candidates, one is supporting the Trumpian paradigmatic project. This is true even if the individual is a constitutionalist and against the Trumpist project. Russell "Rusty" Bowers, the 2020 Arizona Speaker of the House, is emblematic of this confusion.

Mr. Bowers testified in front of the House select committee investigating January 6, 2021, that he was committed to the United States Constitution and its liberal democratic elements. Indeed, he stated his belief that the constitution was divinely inspired. After the election of 2020, when Trumpists approached Mr. Bowers and asked him to work against the people of Arizona's choice of Joe Biden for president, he resisted. Bowers resisted because he believes in the constitutional process that declared Joe Biden the winner. He also notes that he took an oath to defend the constitution, which

he would not violate. It appears as if Rusty Bowers is committed to liberal constitutional democracy, but he claimed he would vote for Donald Trump again. He would do so even though when he refused Trumpist overtures, he and his family were attacked. There is a paradox between Rusty Bowers, who defends the constitution as a religious principle, and his willingness to vote for someone who subordinates constitutional principles to personal goals. While Bowers' policy preferences might be closer to Donald Trump's than to Joe Biden's, he may also fail to perceive the Trumpist threat to American constitutionalism because he does not understand the Trumpian paradigm.⁶

Trumpists seek to exploit the confusion between policy and paradigm. While it is possible that the majority of Americans reject liberal constitutional democracy, it is more likely that if Trumpists win, they do so politically but not ideologically. A Trumpist win could rely (similar to 2016) on anti-majoritarian elements of the electoral system boosted by Americans who take the Madisonian system for granted. The difference is that if Trumpists achieve control of the American political system, there is no reason to believe that American constitutional democracy, having served its purpose, will be preserved in the future; the electoral process could be discarded in favor of more important goals. As Trump published on his own social media platform in 2022 shortly after declaring for president, "A Massive Fraud of this type and magnitude allows for the termination of all rules, regulations, and articles, even those found in the Constitution." Rather than preserve the American constitutional democratic tradition, which Trumpists believe to be faulty and unable to lead to just outcomes, the state would be in a position to increase its power and scope. This victory can be achieved with less than a majority, including the support of some who reject the Trumpist paradigm. Timothy Snyder notes,

Some of the Germans who voted for the Nazi Party in 1932 no doubt understood that this might be the last meaningfully free election for some time, but most did not. Some of the Czechs and Slovaks who voted for the Czechoslovak Communist Party in 1946 probably realized that they were voting for the end of democracy, but most assumed they would have another chance. (Snyder 2017, 28–29)

The Trumpist state means the end of all challengers.

CONSTITUTIONALISM WITHOUT COMMITMENT

The liberal democratic constitutional system's reliance on popular commitment is endangered by the Trumpian Paradigm, and Trumpism is endangered by popular commitment to the constitution. James Bradley Thayer (1893)

argues that it is the citizens who need to maintain constitutional standards. People cannot rely on courts to maintain constitutionality in a democratic republic according to Thayer; instead, it is each citizen's responsibility to protect the constitution. Thayer writes, "Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere." If people do not believe in constitutionalism or constitutional principles, the state cannot save it. If they do believe in the constitution and its principles, the state and courts cannot destroy it.⁷ Thayer warns that people fail in their constitutional duty by pursuing unconstitutional laws and actions. Such failures include nominating or confirming judges or justices who are not committed to constitutional democracy, the use of power to bypass constitutional review, or ignoring legitimate judicial rulings. Even if courts maintain a constitutionalist commitment, the constitutional decisions of courts can be ignored by an aconstitutional people. Thayer argues American constitutionalism should not require an appeal to courts. He explains that reliance on the courts—the push of constitutional questions not only to the government but to a corner of it—is dangerous for the continuation of the constitutional system. Each citizen must take the responsibility of constitutionality for himself or herself.

Courts still need to be maintained and respected because, as liberal theorists like Locke believe the primary reason that individuals enter a state of war is that they lack a common judge.

For where there is an Authority a Power on Earth, from which relief can be had by *appeal*, there the continuance of the State of War is excluded, and the Controversie is decided by that Power. . . . Where there is no Judge on Earth, the Appeal lies to God in Heaven. That Question then cannot mean, who shall judge? whether another hath put himself in a State of War with me, and whether I may as Jephtha did, appeal to Heaven in it? Of that I my self can only be Judge in my own Conscience, as I will answer it at the great Day to the Supream Judge of all Men. (Locke, 1988, 282)

On January 6, 2021, it was evident that thousands of people failed to accept the decision of over sixty courts ruling against the Trump campaign. Trumpists only accepted the decision of their one sovereign secular god—Donald Trump. They recognize no common judge. This leads to the Lockean conclusion that Trumpists are in a state of war with the rest of the commonwealth.⁸ The United States House Select Committee on the January 6 Attack quotes Donald Trump referring to his declaring election fraud without any evidence, "Just do it and let the courts sort it out." He makes such a statement because he believes the courts are loyal to him, not because he believes they are dispassionately fair. When the decision of the courts is not to their liking, Trumpists do not consider it binding. The Supreme Court decided in *Allen v.*

Milligan 599 U.S. (2023) that Alabama's redistricting after the 2020 census violated Section 2 of the Voting Rights Act in June 2023. By July 2023, the Alabama legislature had drawn a map which did not address the Supreme Court's Section 2 concerns. This is not an isolated case, but a Trumpist model. Greg Abbott, governor of Texas, uses courts to enforce his orders, but refuses to obey court orders regarding the limits of his authority at the southern border.

It appears that the court decisions are irrelevant for Trumpists, as they have been for Trump. Chris Christie, during his 2024 presidential campaign, said when he became governor of New Jersey and the state was in debt, Trump told him to declare bankruptcy on behalf of the state. Christie informed Trump that the state could not discharge its debts in bankruptcy, but Trump reportedly replied that the inability to get a bankruptcy was irrelevant. Trump argued that the bankruptcy would be tied up in the courts for years, and all people would remember was that Christie fought for them (and presumably not all the additional court costs). Legalities are not so much malleable as irrelevant for Trump.

The Trumpian democratic understanding has altered the way party politics has worked in the United States. Parties no longer debate philosophical or policy ideas like battles between the federalists and anti-federalists or between laissez-faire and interventionist economic views. Instead, at least for Trumpists, politics is merely about drawing a distinction between themselves and others and maintaining power to protect themselves and society from the other. The evidence that the Republican Party no longer chooses to pursue policies or the agenda is that they literally have no policy platform or agenda. Republican leaders, in accordance with their 2020 "platform," which is a one-page statement, declined to issue a platform for the 2022 midterm elections. The 2020 short statement not only failed to advocate policy but dismissed the idea of policy proposals and the American liberal constitutional paradigm. What the platform statement did do, however, was draw a line which separates Trumpist Republicans from others whom it attacks.

It might not be clear what the platform statement is advocating, but it is clear *who* the statement is against. For example, in a preemptive strike, the statement reads, "The media has outrageously misrepresented the implications of the RNC not adopting a new platform in 2020 . . . rather than providing the public with unbiased reporting of facts." The statement explains who is the other and their danger to us: "The RNC continues to reject the policy positions of the Obama-Biden administration, as well as those espoused by the Democratic National Committee." Trumpists, like Schmitt, advocate their identity because they are not the others, and because of how they are opposed to their foes. This reshapes the political debates that have existed in American politics in two important ways. The first way is that it changes the

understanding of what politics is about. The liberal political focus, largely centered around the creation and distribution of collective resources, is changed to a Schmittian focus on valid political identity. The second way it has changed the political debate is it takes the constitutional politics, which is bounded and limited (Schmitt would argue meaningless), and replaces it with the high-stakes politics of identity and belonging.

The Republican party itself becomes Richard Hofstadter's paranoid spokesman who, "sees the fate of conspiracy in apocalyptic terms—he traffics in the birth and death of whole worlds, whole political orders, whole systems of human values. He is always manning the barricades of civilization. He constantly lives at a turning point. Like religious millennialists he expresses the anxiety of those who are living through the last days and he is sometimes disposed to set a date for the apocalypse . . ." Adherents to Trumpism believe that their way of life will be destroyed without the Trumpian party; however, with the Trumpian party, their way of life can be saved. Because of the existential stakes, others must be excluded from the political arena. The other includes the immigrant (especially those from the third world, as Tucker Carlson calls them), or even the unacceptable among us, be they non-white, non-Christian, non-heterosexual, non-cis-gender, or non-Trumpist. Trumpists want to narrow what it means to be American and make politics focused on the metaphysical concern about the nature of "Americanness."

The 2020 platform statement not only fails to address policy but belittles the need for any policy, letting its readers know that, "All platforms are snapshots of the historical contexts in which they are born." Trumpist politics is more fixed on identity. The RNC (Republican National Committee) relies on Schmittian understandings of the sovereign: whatever policy the Trumpist state adopts has the backing of the RNC. The statement claims that, "The RNC enthusiastically supports President Trump" and later refers "to the strong support of the RNC for President Trump and his Administration," without regard to any specific agenda.

There was also a notable change in the primary process. The RNC, rather than behaving like a fair broker executing a process to an indeterminate conclusion, as the Democratic National Committee did in 2008, 2016, and 2020, has been squarely behind Donald Trump. After the New Hampshire primary, Donald Trump had earned thirty-two delegates compared to Nikki Haley's seventeen. With more than one thousand delegates still to be distributed, the RNC wanted to declare Trump the nominee. In Trumpism, Trump is an object of veneration; indeed, in the first Conservative Political Action Committee (CPAC) conference of 2021, there was a golden Donald Trump idol to which attendees could pay homage. There is a belief, tied to secular religious notions, that Trump can and should decide the legal order.

This was evident in Donald Trump's defenses against his unauthorized retention of classified documents. Donald Trump has made numerous claims about why he had the right to possess, declassify, have more time to produce, or not be prosecuted for the retention of documents. On September 21, 2022, in an interview with Sean Hannity on Fox News, Trump claimed he could declassify a document by thinking it so. This is not only a problem practically, from the perspective of national security—for example, different parts of the state, including intelligence operations, are operating with different information—but it challenges sovereignty and limited government. Trump's claim that the political world is merely a creation of his mind echoes the Gospel of John: "In the beginning was the Word, and the Word was with God, and the Word was God." Similar to the divine notion, the Republican 2020 platform statement resists the idea that anyone other than Donald Trump determines the platform: "*RESOLVED*, That any motion to amend the 2016 Platform or to adopt a new platform, including any motion to suspend the procedures that will allow doing so, will be ruled out of order." The 2016 platform is good enough, having achieved power; any additional democratic power or procedure is unnecessary.⁹

Elections are a form of imperfect procedural justice—the outcome is just if the procedures are fair. It is as if two people bet one dollar on a coin flip. As long as the coin is fair, at the end of ten flips, one person can have all the money (twenty dollars) or it could end up more equitably divided. No matter how the money is divided at the end of ten flips, the outcome is just because the process is fair. Commitment to procedural democracy, even if in a particular instance it fails to achieve goals such as the accurate reflection of the popular will, remains because it provides other goods, such as the protection of civil rights and liberties without which individuals might be subject to the whim of the state. Even if the immediate decision is problematic in some way, destroying the system is not in citizens' interest because it is needed in the future. Trumpists do not maintain such a commitment because they operate from a different paradigm. Trumpists believe the process is instrumental and only has value insofar as it leads to the desired goals. Trumpists are not interested in making the process fair in the Madisonian sense or maintaining equality in the Lockean or constitutional democratic sense. From the Trumpian view, the electoral process established by the American constitutional system cannot be made fair because there is no way to ensure the Trumpist-preferred outcome.

TRUMPIST POLITICAL VICTORY

While Donald Trump may represent a pernicious form of Trumpism, he does not always represent the most virulent form. When I began working on this

project early in 2021, I believed that while Trumpism would likely be an ongoing issue in American politics and society for some time, I did not think Donald Trump himself would be. The political pursuit of individual interest, however, has rehabilitated Trump, and he is a particularly malignant anticonstitutional threat. A Trumpist victory would be the end of forbearance and toleration and the constitutional republic. This is because the acceptance of Trumpism is the acceptance of violence and disregard for the courts. It is also because the Trumpist vision is dependent on a different view of sovereignty, democracy, and citizenship. The liberal constitutional democratic state, which rules or attempts to rule in people's interest, is rejected by Trumpists. The Trumpist state builds an idealized vision of the nation whether it conflicts with what the people want or not.

Mutual toleration is impossible in the Trumpist state because of the Trumpist effort to marginalize others. Marginalization of others is one of the primary state goals. This gives the patriots a threat they can rally against, which can be supported by a strong propaganda arm that helps spread its own reality, including the danger of the other. The change of facts to fit ideological or policy purposes can be seen throughout the Trump administration. In the early days, for example, the then press secretary, Sean Spicer, insisted that the Trump inauguration was the best attended ever. It continued with the claim that there was coordinated Democratic cheating in the 2020 presidential election. Reality does not matter if there are "alternative facts" to which the friends have unique knowledge.

RESPONDING TO TRUMPISM

In January 2016, at Dordt College in Sioux Center, Iowa, Donald Trump said, "I could stand in the middle of Fifth Avenue and shoot somebody, and I wouldn't lose any voters." While many took this as a joke or bluster, it is representative of the Trumpian view of sovereignty: Donald Trump is not subject to the law; he is the law. Donald Trump believes he is the American sovereign, but most Americans reject that view. In 2016, he only received 45.9 percent of the popular vote (Hillary Clinton earned about 48%), and Donald Trump earned 46.8 percent of the vote compared to Joe Biden's 51.3 percent in 2020. While the percentage of the population who believe in the Trumpist paradigm is likely no more than 30 percent (the approximate number of Americans who believe Joe Biden's presidency is illegitimate, based on polling numbers), these numbers can be boosted by those who seem committed to constitutional democracy but, in another version of a Tragedy of the Commons, work against common interest for some marginal benefit. In Donald Trump's second impeachment trial, Mitch McConnell, though insisting that Trump should be held to account,

refused to hold Trump to account. Seven Republicans, including Ben Sasse (R-NE), who said “Congress cannot lower our standards on such a grave matter, simply because it is politically convenient. I must vote to convict,” were joined by all fifty Democrats. They were not joined by the Republican leader, nor the votes he could have brought with him. Afraid of alienating Trumpist voters, Mitch McConnell decided not to take a stand against Trumpism or defend the American constitutional system; instead, he made the strategic decision to push the responsibility for holding Trump accountable to others.

This is despite many of the Senators who voted to acquit Donald Trump appearing to agree with Mark Milley who “believed January 6 was a planned coordinated, synchronized attack on the very heart of American democracy, designed to overthrow the government to prevent the constitutional certification of a legitimate election won by Joe Biden” (Woodward and Costa 2021, xviii). Mitch McConnell took such a position publicly in and out of the Senate chamber. Donald Trump argues that he was acquitted in the second impeachment, despite the bipartisan 57—43 vote to convict, but Liz Cheney counters that a variety of individual pressures saved Trump from the two-third threshold. She writes:

Ten more Republican votes would have been needed to convict. There were at least 10 more Republicans who had publicly condemned Trump’s conduct but voted *against* conviction because Trump was already out of office when the trial took place. Another 16 Republicans made no mention of Trump in their statements, but said they were voting to acquit because they had concluded that the US Senate lacks the authority to convict a former president. Only a handful of Republican senators seemed to argue that Trump’s conduct did not actually warrant conviction. (Cheney 2023, 162)

Thayer would argue that McConnell—like all citizens—has the responsibility to defend the constitutional system. McConnell’s solution for Trumpism, however, was to abdicate responsibility and hope that the Democrats or the typically slow justice system could deal with the problem. Predictably, Mitch McConnell agreed to support Donald Trump in the 2024 election because Trump won the party’s presidential nomination; therefore, he is showing a willingness to support someone who he said should be in jail and who openly advocates dismantling the American constitutional system because of convenience. McConnell’s behavior is akin to putting an additional cow on the common; it is destructive of the common good and American constitutional democracy. Republicans need to stop expecting the justice system or Democrats to address the problems they have institutionalized.

Republicans especially need to address their problem because, even if the justice system solves the problem of Donald Trump, it will not address the

challenges of Trumpism. There are other standard bearers. Having committed to an alternative paradigm, without Donald Trump they are not likely to return to liberal constitutionalism, especially without any counter-explanations. Trumpists, it appears, are enough of a force in the Republican party that few disavow them. Trumpists, on the other hand, are eager to disavow others and deploy tactics like those directed against Rusty Bowers. Some fear these tactics, being expelled from the group, and labeled other. As the Trumpist paradigm has taken over the Republican party and its institutional power, little has been done to protect the party from destroying constitutionalist standards. Most Republicans have also acted like the herder who adds an additional cow to the commons for marginal personal benefit. They keep adding additional cows despite many of them knowing it is leading to the degradation of the commons and killing of the cows. Republicans at one time believed in the liberal constitutional democratic ethos. This was evident not only in the sanctioning of Steve King of Iowa in 2019 (see chapter One), but candidates such as Todd Akin. In 2012, when Todd Akin ran for the United States Senate as a Republican from Missouri, he argued against abortion rights. He claimed protections were unnecessary for women who were raped because women do not get pregnant from “legitimate rape.” While there was an outcry from Democrats, it was Republicans who ended Akin’s political career. Presidential candidate Mitt Romney disavowed Akin, who was pressured to withdraw from the race by the national GOP. This sealed his fate and he lost to Democrat Claire McCaskill, who would become a one-term Senator. Republicans now only enforce Donald Trump’s standards and loyalty to him.

MADISONIAN SOLUTIONS

While an appeal to action on common interest could end selfish behavior, as Garrett Hardin and Mancur Olsen both argue, reliance on such commitment is problematic. The appeal to conscience might not work for a different reason: it assumes a preexisting common moral agreement.¹⁰ Madison suggests a model in which the common interest can be achieved by relying on disparate interests, whether individual or collective. Madisonian mechanics can also be enhanced to help overcome the conflicts between the destructive elements of factional interest and the common good. Providing encouragement for participation, mediation, and representation can help ensure that unmediated extreme beliefs do not reach dominance. While the pursuit of policy in the current environment can be problematic because of the Trumpist desire to oppose something the other side might support, two relatively depoliticized steps can help achieve this goal without the major difficulties of constitutional

amendment.¹¹ Those who agree with Trumpists on policy but not on paradigm can join with others committed to constitutionalism to institute non-partisan redistricting commissions and implement instantaneous runoff systems.¹² Neither of these proposals is aligned with particular political positions and can be promoted as fundamental fairness to which Americans gravitate.

Gerrymandering is a problem for majoritarian democracy. People can still vote, but electors are concentrated or dispersed in such a way as to maximize or minimize a particular representation. Wisconsin, after the election of 2018, is a stark example. The 2018 election resulted in a Democratic state governor and lieutenant governor but a Republican state legislative majority holding 64.6 percent of the seats. This is despite only 44.7 percent of the people voting Republican for the state legislature. While gerrymandering can give the minority outsized representation, its effects are broader than unequal representation. It also makes mediation and negotiation less likely. When one party has a seat designed by the party, it is difficult for members of another party, or even a representative's own party's range of opinion, to moderate a representative. A candidate only needs to appeal to true believers rather than to a broad section of the community. Of the seven Republicans who voted to convict Trump in the second impeachment, only one was facing re-election in 2022, and she did not have to face a Republican primary. She was, therefore, less subject to small or extremist factions. It is the power of the institutional Republican party which is helping prop up Trumpism by providing its institutional strength and votes.

The problems of gerrymandering have become more acute due to the ability to scientifically gerrymander. An article in *Scientific American* on gerrymandering illustrates how it is possible to take the same electorate, which is 60 percent in favor of party X and 40 percent in favor of party Y, and create districts for ten representatives that are vastly different. Through scientific gerrymandering, the outcome can vary from party X receiving 60 percent of the representatives or all ten. It is also possible for party Y to get 60 percent, a majority, of the representation even though only 40 percent of the people support that party (Duchin, 2018). When a minority faction or coalition obtains a representative majority, it should be a transient condition. If all sides are committed to the common liberal constitutional democratic enterprise, representative inaccuracies can be sorted out in the next election. Trumpists have shown an unwillingness to abide by electoral outcomes, however. If one side no longer has a commitment to continue participation in the electoral system or any electoral process, there is no way to correct the inaccuracy. It is difficult for "others," even if they command the majority, to protect themselves through the majoritarian process.¹³

The Trumpist identity has been supported by increasing insularity and aided by the gerrymandering of political groups. For most of the history of the

United States, political parties involved cross-cutting cleavages. This meant they were big tent parties uniting various factions under their umbrella. Today this is less the case; political parties now align around more than a left-right axis, representing identity as much as policy. Increasingly, Democrats live in urban areas, while Republicans live in more rural ones. When Bill Clinton ran for president in 1992, he won over 1,100 rural counties in the United States. Barack Obama in 2008 only won about 400 rural counties, while Joe Biden won only about 200 in 2020. Indeed, Joe Biden only won 509 total counties, while Donald Trump won 2,547. Biden's less than 16.6 percent of the counties produced 71 percent of the country's economic output, however, creating geographic and class divides.

The electorate is more than geographically and economically divided. According to the Pew Center, Donald Trump won 64 percent of white non-college-educated voters in 2016 and 65 percent in 2020. Other parts of the electorate are even more united: Democrats poll 84 percent *better* with black voters than Republicans, and 90 points *better* with black women. These parties no longer represent policy positions alone but also represent cultural differences. As the Public Religion Research Institute notes, while "the religious make-up of Democrats generally resembles that of younger Americans . . . no age group is as White and Christian as Republicans."

in the 1950s, married white Christians were the overwhelming majority—nearly 80 percent—of American voters, divided more or less equally between the two parties. By the 2000s, married white Christians constituted barely 40 percent of the electorate, and they were now concentrated in the Republican Party. In other words, the two parties are now divided over race and religion—two deeply polarizing issues that tend to generate greater intolerance and hostility than traditional policy issues such as taxes and government spending. (Levitsky and Ziblatt 2018, 171–172)

Schmitt notes any difference can become political if important enough, by which he means one for which people are willing to kill and die. Issues of fundamental identity can be "politicized" in a way that liberal politics cannot. Capital gains tax rates, no matter people's feelings on the issue, are unlikely to inspire revolutionary fervor. This is why Schmitt argues these issues are meaningless. If people believe their way of life or their very existence is under attack, they may be inspired to revolutionary fervor, even if the actual policy is about how to tax capital gains. Trumpist politics turn what, in liberal constitutionalism, are benign issues into "politicized" ones in the Schmittian sense. Gerrymandered districts reinforce the Schmittian political by creating an environment where identifying enemies and friends is easier because of overlapping cleavages. Instituting independent districting commissions

would create a different kind of successful representative—one who must engage a broader range of people and views. Instantaneous runoff voting would also undermine the Schmittian political by pushing participants toward mediation and negotiation.

In the United States, most elections are decided on the plurality winner rule. This helps Trumpist candidates gain votes as one of only two real alternatives. A few elections (such as senatorial ones in the South) require a majority rule and, therefore, may require a runoff. In a runoff, the electorate is usually smaller than during the earlier elections and is limited to choosing between two candidates. Fewer elections still, such as those in Alaska, use a majority rule but only require voters to vote once in a system known as instantaneous runoff voting (IRV). IRV uses ranked choice voting. Each elector ranks candidates in order of preference. To win the election, a candidate needs a majority (50 percent + 1) of the remaining valid votes. If no one achieves the majority, the lowest performing candidate is eliminated. The electors who chose the eliminated candidate now have their votes transferred to their second choice. If no candidate still reaches the quota, the next lowest performing candidate is eliminated, and those who voted for that candidate have their votes distributed to those electors' second, or by now possibly third, choices.

IRV elections are different from traditional runoff elections, in that they help both small interests and more moderate candidates. It does this because IRV allows electors to vote their first choice, even if that candidate has a slim chance of winning, without that elector abandoning their voice in the ultimate outcome or being concerned that their vote could be dispositive in the election of a less favored candidate. Minority interests can show their strength, but the IRV system, on the other hand, requires an appeal to the majority and eliminates more extreme candidates or those with high negatives. Extreme candidates may have enthusiastic support, but they often have detractors, making it easier for them to achieve pluralities than majorities.

The only Republican Senator facing a 2022 election who voted to impeach Donald Trump was Lisa Murkowski. Murkowski faced an open primary where IRV was used; therefore, she did not have to court the Trumpists who captured the Alaska Republican party and who had chosen the Trump-endorsed Kelly Tshibaka for the Alaska senate seat. Under the Alaskan system, each registered voter, no matter their affiliation, gets one ballot for the primary election, with all candidates, no matter their party, in a given race. The top four vote-getters in the primary advance to the general election. At the general election, voters again rank candidates in order of preference. Because she did not need the imprimatur of Trumpists to succeed through the primary, Lisa Murkowski was not subject to the same political dynamic as other Republicans. Not only did she retain her Senate seat, but because the

primary is non-partisan, Murkowski earned the most votes in that contest. Tshibaka finished a close second, but in the general election, Murkowski again finished first on the first ballot, and after several rounds, achieved the majority.

Independent redistricting commissions and instantaneous runoff voting give candidates and voters the opportunity to circumvent the need for an imprimatur from the institutional political party. They allow the democratic system to operate more like the Madisonian model. Instead of relying on systems pushing insularity, these modest changes promote, encourage, and even mandate input from a variety of sources as described by Madison and would be helpful to maintain a diverse American constitutional democracy. The Trumpist Republican party is a minority faction “who are united and actuated by some common impulse of passion, or of interest adverse to the rights of other citizens, or to the permanent and aggregate interests of the community” whose danger comes when it inhibits other factions from uniting to ensure majority interests are advanced. The United States, because of its two-party system, is particularly vulnerable to an anti-democratic party. Donald Trump and the Trumpist party have made it clear that they would prefer Joe Biden to fail in a variety of ways, even if it is to the detriment of the country and its citizens.

The assumption of the tragedy of the commons is that the standout herder gets some benefit, but the standout does not understand the harm being done to the common good. Trumpists may operate differently: one is willing to trade harm done to them for greater harm done to their opponents. Trumpists have been overt in this goal, not only when Donald Trump advocated not raising the debt ceiling, or when the Trumpists canceled the bipartisan border deal so it can remain a campaign issue, or when Trump advocated Russia invading NATO countries, or spying on Hillary Clinton, but in everyday interactions. There are those who in defense of American constitutional Democracy focus on stopping Donald Trump, but the political end of Donald Trump is not enough to signal the end of Trumpism and the protection of American constitutionalist democracy. Trumpism is an anti-liberal worldview that has its own appeal. During the fight over Kevin McCarthy’s speakership early in 2023, close Trump ally Lauren Boebert (R-CO) revealed that Donald Trump was pushing those refusing to support McCarthy to do so. Her response was not to acquiesce, but to essentially claim that Donald Trump needed to support her position because it was the more authentically Trumpist. Trump has even responded to Trumpists and modified what he advocates. He did this, for example, when he went from touting the COVID-19 vaccine as a major accomplishment of his administration to—in a relatively short time—not mentioning it at all. While some hope Trumpism is a mere cult of personality, if Donald Trump disappeared

today Trumpists would not. They would lose an avatar of their belief system, not the belief system itself.

This does not mean the period of active paradigm conflict is permanent. While there are some who believe in Ptolemy's geocentric view of the solar system, the superiority of the feudal system, or that the earth is flat, those paradigms have largely been overtaken. The Trumpist paradigm cannot coexist in the long term with liberal constitutional democracy. Trumpism will either end liberal constitutional democracy or will be marginalized and become like that of the geocentric solar system. This is because effective democracy, once abandoned, cannot so easily be reinstated. In 1997, Fareed Zakaria wrote about Boris Yeltsin's attack on the Russian parliament: "He then suspended the constitutional court, dismantled the system of local governments and fired several provincial governors. From the war in Chechnya to his economic programs, Yeltsin has displayed a routine lack of concern for constitutional procedures and limits. He may well be a liberal democrat at heart but Yeltsin's actions have created a Russian super-presidency." Looking toward the future, Zakaria comments, "We can only hope his successor will not abuse it" (Zakaria 1997, 34). Once the power is available, it is more likely someone, in this case Putin, would use it than not. Republicans need to decide if winning THIS election, whichever election it is, is more important than having elections; most seem to have decided it is.

THE FATE OF AMERICAN CONSTITUTIONAL DEMOCRACY

Chairman of the Joint Chiefs Mark Milley, at a Veteran's Day celebration in 2020, said, "We do not take an oath to a king, or a queen, to a tyrant or a dictator. We do not take an oath to an individual. No, we do not take an oath to a country, a tribe, or a religion. We take an oath to the Constitution. . . . Each of us will protect and defend that document regardless of personal price" (Woodward and Costa 2021, 154). The Constitution has long served not only as a practical legal document but also as a secular sacred symbol uniting disparate people and ideas into one unified polity. Trumpist politics rejects that in favor of homogeneity and the othering of those who do not share in the homogeneity, however defined. While in the United States today, Democrats, joined by Republicans and independents committed to American liberal constitutional democracy, act to defend that paradigm, Trumpists, aided and abetted by the institutionalist Republican party more broadly, act according to a paradigm that attacks the United States constitutional system. They have adopted a system of Schmittian particularism which destroys American constitutional democracy.

Trumpists cannot be drawn back to liberal constitutional democracy by using liberal constitutional democratic standards. Mark McKinnon, in an August 2023 *Vanity Fair* article, argued (hoped) that Trump was in trouble with Iowa caucus goers. He writes, "at a certain point even ardent Trumpers with an ounce of common sense are going to realize that he's too beat up to win a national contest" (McKinnon 2023). McKinnon again made the mistake of assuming that Trumpist caucus goers think the way he would as a Republican caucus goer. They do not. As Schmitt notes, when people operate to protect their friend group identity, it may be against other interests. McKinnon and others cannot rely on Trumpists to "wake up." It is up to all citizens to fulfill their obligations to protect the constitutional system.

The ideology of the Trumpist faction has led it to withdraw from participation in the American constitutional democratic system. It refuses to mediate or negotiate or accept another as a legitimate partner. Its goal is to remain pure and to expel people rather than form a coalition. From a Madisonian view, Trumpists' overall electoral failures in the political system are because of their inability to appeal to a broader range of interests. If Trumpist Republicans mediate and moderate their message, they can extend their appeal to a wider variety of people, but this is not how Trumpists understand democracy or the political process. Mediating their interests would lead to a dilution of identity and culture, which fundamentally conflicts with their worldview. Unless Trumpist Republicans cease acting like the herder who keeps putting the extra cow on the common for individual, marginal benefit despite the clear degradation of the commons and the cows, the procedural representative nature of the democratic system needs to be defended. As the constitutional system shows, that is the obligation of the people.

NOTES

1. Kuhn believes that people most often mistakenly look at science as an ongoing accumulation of knowledge but claims that science only appears to be a teleological enterprise. This is because, at most times science operates as "normal science," or within a paradigm. An adherent to Newtonian physics can use it to explain and gain an understanding of objects in motion. In the pursuit of normal science, however, adherents become aware that the paradigm through which they understand the world fails to explain something. This can lead to a revolutionary moment. For example, if investigators see anomalies in Newtonian physics but believe that Einsteinian physics explains those anomalies, investigators begin to understand the world in an Einsteinian rather than a Newtonian way. This is not a compromise nor a gradual movement, but a sudden switch. This model is an alternative to the generational ideological switch, i.e., Newtonians die and Einsteinians replace them.

2. To the best of my knowledge, there is no Church of Gumby; it was voted into existence by a class one semester to be a religion (one day: ritual users of a banned substance; the next day: ascetics; and the next: ritual worshipers of the sun) and is, therefore, content and concept free.

3. While election fraud claims were fewer in 2022, some did happen. Trumpist Kari Lake (R-AZ), for example, never conceded in her 2022 race for Governor and continues to claim voter fraud, even as she looks to run for Arizona Senate.

4. Not all judges have the same level of commitment to liberal constitutional democratic principles. If Trumpists take control of the executive or congressional branch, they can demand Trumpist *bona fides* for a seat on the federal court.

5. Judge Cannon has also been assigned Donald Trump's criminal case under the Espionage Act.

6. Mr. Bowers lost his reelection to a Trumpist-backed candidate in a primary. He later clarified that he would hope that the Republican Party could put up a better candidate than Donald Trump; this is short of an outright rejection.

7. Thayer's argument is similar in some ways to Rousseau's in the *Government of Poland*. Rousseau argues that Poles need to commit to a Polish way of life and use it as a political foundation. Such a commitment protects them from outside forces despite power or position. Rousseau writes, "Think twice, brave Poles! Think twice, lest by seeking to be too well off you make yourselves less well off than you are now. Never forget, as you dream of what you wish to gain, what you might lose. Correct the abuses of your constitution if you can; but do not think poorly of it. It has made you what you are" (Rousseau 1995, 2–3). Rousseau argues that if Poles are authentically Polish, they will remain so when the Russians invariably invade again.

8. This idea deserves further exploration elsewhere, both from the perspective of liberal theory and legal constitutionalism.

9. The Heritage Foundation's Project 2025 has a plan for Donald Trump's second term that would accumulate more power in the hands of the authoritarian president.

10. For example, Marjorie Taylor Greene made a speech linking Joe Biden to Franklin Delano Roosevelt and Lyndon Baines Johnson. She meant it to be an indictment of Biden, who immediately used it as a campaign message.

11. These recommendations are not meant to exclude other possible changes which may improve representation or political functioning, such as voting rights, changes in the primary process, congressional rule changes, or other proposals.

12. The Constitution gives state legislatures control over congressional districting and voting. It is not that simple, however. The reconstruction amendments (13, 14en, and 15) each contain a clause stating, "The Congress shall have power to enforce this article by appropriate legislation." This includes the Fourteenth Amendment, which contains the Equal Protection Clause, and the fifteenth amendment which reads, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The federal government can also institute bureaucratic solutions by fiscally encouraging states to change their systems, like it did with the national twenty-one-year-old drinking age. See *South Dakota v. Dole* 483 U.S. 203 (1987).

13. Justice Stone tries to address this problem in the third paragraph of footnote four of *United States v. Carolene Products Co.* (1938). “..Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national, . . . or racial minorities, . . . whether prejudices against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily thought to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry” (case citations removed). This again would require respect for law.

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