

The Interval

Law After the Act, Code Before It: An Austrian Critique of State Power Written in Software

When I first read the theme of this competition, I wondered whether there might be a common thread connecting all the arguments listed in the call, the Austrian authors it recommended, and what it means for the state to legislate through code. The idea developed in the following pages grew out of that initial intuition.

Consider a simple contrast between two ways of governing. When a state relies on law, it usually acts after the fact. You say something, make a purchase, sign a document, or injure someone — and only then, if a complaint is filed, does a court examine what happened and decide. When a state relies on code, the sequence reverses. The rule is executed before you move. The algorithm takes down the post before any reader sees it. The payment processor rejects the transaction before a cent changes hands. The identity database returns a denial before you reach the window.

There is something important that disappears in that reversal. Between any action and its legal consequence, time passes — the gap between a general rule and a specific case, between a wrong and its remedy, between earning money and deciding how to spend it. Call that stretch of time the interval. It is not an abstract idea, but one of the most ordinary features of life. It is the period during which you are allowed to try something before anyone passes judgment; during which a court can still consider whether the rule applies to your situation; during which a debt can be settled and closed. This essay argues that the interval is where individual freedom resides, that the Austrian School of economics — without ever using the term — spent generations studying it, and that code lets the state shut the interval before anything happens.

The central argument is this. The state has long enjoyed a particular double advantage — it enforces its will before an act takes place, while simultaneously insulating itself from accountability after harm has occurred. Code is the technology that finally makes this advantage total, because a coded rule fires before any victim, any case, or any judge can even come into being.

I. Why the Interval Matters: Action, Time, and Knowledge

The Austrian tradition provides this intuition with a theoretical foundation through three interconnected ideas.

The first comes from Mises (1949). Human action, he argued, is purposeful behavior aimed at a future the actor would prefer to the one he otherwise expects. Notice what this definition already contains: time. Means and ends are always separated by a gap; the actor commits to a result that may never come. If the future were entirely known in advance, there would be nothing left to choose. That's why uncertainty is the very condition under which action is possible.

The second idea comes from Böhm-Bawerk (1959), who demonstrated that the whole structure of capital and interest rests on the human capacity to wait — to forgo consumption now, to invest in the present for a payoff in the future, to live within the gap between planting and harvest. The third comes from Hayek (1945): the knowledge that makes an economy function is spread across millions of individuals, attached to circumstances of time and place, and much of it cannot be gathered in advance because it only surfaces through the act of doing. Kirzner (1973) drew the implication for entrepreneurship: discovery requires an open future, one in which it is still possible to try something, to fail, and to learn from that failure.

Taken together, these ideas transform the interval from a metaphor into something concrete. It is the space in which choice, saving, and discovery happen. A rule that operates after the act leaves that space intact: you act first and answer for it later if you wronged someone. A rule that operates before the act occupies that space and substitutes its judgment for you before you have made one.

Hayek (1973) supplied legal vocabulary for this difference. He distinguished *nomos* — the spontaneously evolved law of a free order, composed of abstract and general rules that help people coordinate their plans without dictating them — from *taxis*, the constructed order of an organization, in which specific commands tell each member precisely what to do. The distinction is practical, not decorative. A rule of *nomos* ('honor your contracts,' 'do not take what belongs to someone else') leaves open which contracts you enter and what you do with your possessions. A command of *taxis* forecloses those questions. Consider what is marketed today as 'policy-as-code.' A line of software reading if input matches X, block the transaction has the surface form of a general rule, but it functions as a standing order — applied identically to every case, forever, with no judge or deliberation in between. It is *taxis* dressed up as *nomos*. Leoni (1961) anticipated where this leads: genuine law is discovered case by case through adjudication, much as prices are discovered through exchange.

When the state writes its rules into code, it is claiming precisely the kind of advance, comprehensive knowledge, that Hayek showed no central body can possess.

II. Authority, Restitution, and Liability Laundering

Let's look at the political side of this. Who gets to shut down the interval, and why?

Here the late scholastics — whom Huerta de Soto (2006) identifies as forerunners of the Austrian tradition — turn out to be surprisingly relevant. Francisco de Vitoria made a distinction between two forms of authority. There is *potestas*, the capacity to act and direct — a teacher, a guide, and an expert all possess it. And there is *imperium*, the power to compel others by force. In the scholastic framework, *imperium* is never self-justifying: whoever exercises it must be capable of offering public reasons, and the person being coerced must have some standing to be heard (Vitoria, 1991). Vitoria was not a libertarian, and he was writing about princes rather than platforms. But the distinction travels well. An authority that argues — that says 'this claim is false, and here is the reasoning exercises *potestas*. An authority that suppresses without explanation exercises *imperium* and owes a justification.

On the other side of any act stands restitution. Rothbard (1998) argued that the foundation of justice is repair, not punishment: the aggressor owes a debt to the victim, that debt must be proportionate to the harm done, and it must be capable of being discharged. Pay it, and you are free. A debt with no way of being settled is a permanent condition, justice would be impossible. Restitution is a downstream institution. It presupposes that an act occurred, a real victim exists, the harm can be examined, and a claim can be brought before some forum.

Hoppe (2001) defines the state as the territorial monopolist of ultimate decision-making: the one agency that adjudicates its own disputes and exempts itself from the liability rules it imposes on everyone else. Combine that monopoly with upstream enforcement and the result is what we might call *liability laundering*. The mechanism is easy. Restitution requires three things: a finished act, real harm, a victim who can come forward. Upstream enforcement removes all three. If that's the case, there's no complete act. No act means no harm to examine, and no harm means no claim. The state never has to win the argument that your action was wrongful. It must make the action impossible — and then there is nothing left to adjudicate. The coercion is real, but it leaves no legal trace. It has been laundered entirely out of the system.

A concrete and underappreciated illustration: the United States' 'Operation Choke Point' (2013–2017), in which banking regulators informally pressured financial institutions to close the accounts of legal but disfavored businesses — firearms dealers, payday lenders, and others. No statute named these businesses; no court found them liable for anything. The enforcement happened upstream, inside the payment infrastructure, and when affected firms looked for a party to sue, responsibility had dissolved into 'risk guidance.' That is liability laundering without code. Code just automates the process.

III. The Pattern in Action

Here's where it gets uncomfortable. The same pattern repeats itself across five areas of digital governance.

Speech. When a state pressures platforms to filter content automatically, the algorithm can remove the message before any reader encounters it and before the author has had any opportunity to respond. Mises (1949) observed that the meaning of human expression is always context-dependent; the same sentence can function as a warning, a quotation, or a joke. An algorithm only matches patterns without reading the context. I'm not sure how far this distinction can be pushed — Vitoria was writing about princes, not about Meta. But in his terms, the state may legitimately contest a claim by argument — that is *potestas*. Automated suppression is *imperium* exercised without public justification and without any recourse for the person silenced. In 2020 and 2021, major platforms removed discussion of the lab-leak idea for COVID-19 following government communications with the platforms that later became the subject of litigation, with disputed conclusions. The hypothesis was later treated as a legitimate subject of inquiry by U.S. government agencies themselves. The point is not which view was correct. An open question was closed before it could be argued, and when it reopened, no one faced any accountability for having closed it. The Austrian response is not to push for legislative reforms as the traditional political spectrum would. Instead, our solution is competition and exit: rival

moderation regimes, censorship-resistant protocols, and liability where demonstrable harm results from suppression.

Money. Menger (1892) showed that money isn't decreed by the state — rather, it emerges from exchange as the most marketable good. What money does is hold decisions in suspension by letting you sell today and choose how to use the proceeds later. Money is the interval between earning and spending, made portable and transferable. A programmable central bank digital currency rebuilds this institution as a permission system. Design documents for the digital euro openly discuss holding limits and conditional functionality; the Bank for International Settlements (2021) noted that a CBDC would give the issuing authority visibility and potential control over individual transactions in ways that cash never permitted. Hülsmann (2008) argued that even conventional fiat currency constitutes a standing intervention, produced under legal privilege — but fiat money at least behaved like a physical possession: you could hold it, conceal it, decline to spend it. A coded currency is an entry in the issuer's ledger, and every transaction becomes a query the issuer may decline to authorize. Canada, February 2022. Trucks parked outside Parliament, donors hundreds of miles away, bank accounts frozen with no court order under the Emergencies Act — no charge, no trial, no individualized determination (Canada, Department of Finance, 2022). Enforcement upstream; adjudication, if it comes at all, much later and elsewhere. The Austrian alternative is the one Hayek (1976) proposed: currency competition (private currencies or crypto) so that the rigidity of every single payment rail is disciplined by the freedom to hold another.

Identity. A unified, state-backed digital identity converts the self into a database record: one identifier, synchronized across agencies, carrying your history with it permanently. The deep problem here goes beyond surveillance. Identity ceases to be something constructed over time through civil life — through dealings, accumulated reputation, and fresh starts — and becomes instead a status the system assigns and maintains. Kirzner's (1973) entrepreneur needs the possibility of failing and trying again without that failure following him forever; a ledger with no expiration converts every past refusal into a fixed attribute. Hoppe (1993) grounds privacy in property rights: control over one's person and the boundaries of one's sphere — which is, in practice, the precondition of exit. The structural alternative is the absence of a monopoly credential. Competing, voluntary identity providers, each holding a partial and context-specific claim — your bank knows one thing, your employer another — so that no single switch can simultaneously exclude you from everything.

Reputation. China's social credit system makes the underlying logic explicit. The state defines the behavior it regards as worthy, scores citizens against that standard, and executes the consequences automatically: by 2019, official figures reported that tens of millions of air and rail ticket purchases had been blocked for individuals classified as 'discredited' (National Development and Reform Commission, 2019). Compare this with reputation as it functions in a free order: distributed across everyone who has dealt with you, alive, and open to revision by your next move. And contrast the score with Rothbard's (1998) concept of restitution. The coded score is owed to no one, corresponds to no specific harm, and may be impossible to discharge. It dramatically turns responsibility into a permanent status. The appropriate conclusion here is not reform of the scoring system but again its abolition: a coercive monopolist has no legitimate claim to grade the moral standing of people. Reputation belongs to civil society.

Artificial intelligence. Take the European Union's AI Act (2024). It categorizes systems by assessed risk and prohibits or restricts entire classes of technology before they can be deployed — including, real-time remote biometric identification in public spaces by private parties. Whatever one concludes about any specific prohibition, the form deserves attention: a regulatory body decides today which technologies may be attempted tomorrow and embeds that decision in compliance mechanisms that operate before any experiment has been conducted. This kills discovery. Hayek's (1945) dispersed knowledge cannot inform a regulator in advance which architecture will prove safe or useful; that knowledge only emerges from the very attempts the rule prohibits. Our alternative is strict liability: if your system causes harm to an identifiable person, you owe restitution (Rothbard, 1998). Liability keeps the interval open — development proceeds, and harm is answered downstream, where a real victim stands — rather than guaranteeing that no harm can ever be litigated because nothing was permitted to happen in the first place.

IV. So Keep the Interval Open

Put it the other way around: a legal order is free to the degree that coercion arrives after the act, addressed to a particular case, owed to a particular victim, and capable of being discharged — and it is unfree to the degree that coercion arrives before the act, addressed to everyone, owed to no one, and permanent. Code is less a new corruption than the completion of an old privilege — upstream enforcement turned cheap, quiet, and final.

The answer to this problem is not a set of reforms directed at the monopolist, and scholars working within the Austrian tradition should stop writing as though it were. Asking the state to make its code 'transparent' or 'appealable' is simply asking for a more professionally administered cage. The answer must be structural, and every element of it already exists in some form as I said: currency competition in place of a single programmable payment rail (Hayek, 1976); competing credential providers in place of a single identity switch; polycentric, contractual dispute resolution in place of the issuer judging its own code (Leoni, 1961); strict liability and restitution in place of prior permission (Rothbard, 1998); and, underlying all of these, the discipline that only exit can provide — the practical capacity to move from one rule system to another, which is the market's equivalent of the appeal that code will never grant.

None of this depends on being able to predict the future; that is precisely its strength. The entire Austrian argument, from Menger to Hoppe, rests on the recognition that no one can — and that institutions are legitimate to the degree they leave the future open rather than settled. The interval between an act and its judgment is the space in which a person can fail and start over, where creativity, insights and several more crucial characteristics of human nature express themselves, often providing humanity with its most useful discoveries and inventions. At its best, law protected that space. In the hands of the state, code is the first instrument in history genuinely capable of eliminating it by deciding in advance what's left to choose.

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