

Principles of Constitutional Design

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Sovereignty

The Reality Addressed by Sovereignty

Constitutionalism and, with it, the design of constitutions rest ultimately on an idea that today is rarely used in political analysis and, when it is, is generally misunderstood. That idea is sovereignty. The disuse into which the concept has fallen, and the misuse to which it is sometimes put when not ignored, impoverishes our political discourse at the very point where it should be the richest and most subtle – at the point where justice and power meet in constitutionalism. Constitutionalism is a human creation that results from the interaction between human nature and the brute facts of social existence in a postneolithic world. One brute fact is the absolute need for some form of order in any organized society; another is the inevitable chaos that results when such order is not achieved. Sovereignty is a human creation, an idea that attempts both to denote the factual necessity of order in human society and to connote a preferred way of relating to that fact. The preferred way of relating to the brute facts of social existence connoted by sovereignty is a constitutional order that marries justice with power in such a way as to tame that power and turn it to the service of a civil society.

Constitutionalism is one way of organizing sovereignty, but not the only way. Other possibilities that humans have tried historically include the identification of the best among them according to some criterion of military prowess or secular wisdom and handing power

to them and then their descendants under the assumption that virtue breeds virtue; the use of a religious or priestly caste to watch over, guide, or admonish secular leaders; and the extension of social mores into the political realm under the guise of traditions or some common moral code, perhaps even a common law. One central premise of this analysis is that constitutionalism has emerged as the best technology, the best human invention for organizing sovereignty. Indeed, the word “sovereignty” is itself a part of the political technology that has come to be known as constitutionalism. Any understanding of constitutionalism must therefore include a clear sense of what “sovereignty” denotes and connotes, as well as how it has evolved over the past several hundred years. Before we get to that exercise in linguistic exegesis, however, it will be useful to first lay out in broad strokes how and why the supreme political power for which “sovereignty” is one possible identifier is a topic that must be addressed in constitutional design.

Humans use language to name things that they experience. In addition to being denotative, the words humans devise frequently involve connotations that significantly affect how those using the language relate to the experience that is named. For example, the word for “wind” may imply for some “the breath of God,” in which case the wind will take on more than a simple climatological role in the lives of these people. Words are also used to describe things that cannot be seen and are taken for granted until they are missing. “Oxygen” is such a word, as is “sovereignty.”

Words are stipulative, and in this sense they are artificialities; but this should not lead us to the erroneous conclusion that because words are artificial that their referents are also always human creations. I can call that green, leafy plant that grows outside my window a “tree,” a “furd,” an “arbol,” or perhaps a “car,” but that green, leafy thing will remain there and go on doing what it is doing regardless of what I call it. The word I use for it will be part of a language with other words and a grammar for their interrelated usage. I can use this language to imply a number of relationships between me and that “furd.” However, although the relationship implied by the name I give this green, leafy thing may change what I do in relation to it, my relationship with it – whether my actions toward it are placatory, admiring, indifferent, dominating, or destructive – will not alter the existential fact of the

“furd.” It is simply there and does what it will do regardless of my name for it.¹

The example of a “brute fact” used here comes from physical nature – the realm studied by biology, chemistry, physics, and the other hard sciences. But brute facts also exist in the realm of the social sciences. In effect, any aspect of human life that does not rely on artificial creation by humans, any aspect of human life that will occur without our willing it to, and despite any wish we may have to deny its existence, is a fact with the same status as the brute facts of the physical world. Human institutions result from, and are responses to, such brute facts. The need for nourishment is a brute fact of human existence. Humans, faced with this brute fact, use the possible sources of nourishment in their immediate environment, and invent ways of preparing food. Groups of people develop sets of food preparation techniques that are called cuisines. The variety of invented cuisines does not negate the brute fact that we need to eat. That we develop a need for prepared food as opposed to eating carrion is a second-order need that results from the interaction of other facts: we need to eat, humans easily invent new behavior, and humans have the natural ability to coordinate complex behavior to produce cuisines. Once the benefits of innovation in food preparation are experienced, it becomes close to impossible to not use these innovations. Political institutions, like cultural ones, teach us to want nonnatural experiences with a strength that approaches a need.

Political, social, and cultural institutions are human inventions or innovations. An institution is defined by a set of rules and expectations understood and followed by the relevant actors. These rules do

¹ The discussion here moves quickly through a theoretical minefield with little or no development of some important philosophical underpinnings. Because my project is the explication of a theory of constitutionalism rather than the defense of a meta-physical or epistemological position, I can only point to others who together develop what I consider to be the essential underpinnings for my assumptions and theoretical approach. For an explanation of the overall approach, see Larry Arnhart, “The New Darwinian Naturalism in Political Theory,” *American Political Science Review* 89, no. 2 (June 1995): 389–400. On the relationship between social construction and the world of “brute facts,” as well as the nature of human institutions, see John R. Searle, *The Construction of Social Reality* (New York: Free Press, 1995). On the relationship between persons, institutions, and communities, see Philip Selznick, *The Moral Commonwealth* (Berkeley: University of California Press, 1992).

not exist independent of human will the way a tree does, but institutions do result from human experience with brute facts of existence. Humans do not live according to unconscious tropisms like trees, or simple instincts like animals, but can choose to behave in ways that have a large element of unpredictability to them. Put another way, humans can invent behavior. This fact is the basis for what we often term liberty or freedom. It is also the ground for human institutions, because without this innate inclination for innovative behavior there would be neither the need to coordinate potentially diverse behavior nor the ability to do so. Therefore, institutions, although not natural in the form they take, are natural in that their existence is an expression of human nature. The existence of human institutions can be considered a second-order brute fact. Institutions will exist whether we want them to or not; the possibility for, and inclination toward, creating institutions is grounded in human nature, and the need for institutions results from nature at large. Without the coordinated behavior produced by human institutions, we cannot compete with other species or survive the conditions of nature to the extent we have. Humans have learned how to transform themselves from just another struggling species into one that increasingly dominates all other species. The natural need for survival has been translated into the learned need to reduce the dangers to survival progressively by dominating that environment through human invention.

It is well recognized, even obvious, but generally forgotten, that humans derive a competitive advantage over other species through the coordinated behavior that results from culture, society, and political organization. Humans have learned to “evolve” through the creation of institutions at a much faster rate than can occur in the rest of nature through genetic evolution. Humans at first used this comparative advantage to defend themselves against predatory species and to survive the challenges posed by nature, but eventually they used this advantage to dominate nature in general. One can argue that the process of humans learning to dominate nature has gone too far, but one cannot argue that this process has not occurred.

To summarize the major propositions to this point: humans share with other species the intense desire to survive as long as possible; humans tend strongly to prefer their own species to others; and humans share, as humans, the ability to learn new ways of doing things

(innovate) and to pass on this new knowledge. The first of these three facts is the basis for what we experience as self-preservation in its crudest manifestation and self-interest in more developed form. The second fact is the basis for our social inclinations and thus for the willingness to coordinate behavior. The third fact is the basis for innovation, and thus for the ability to create institutions. Powerful inclinations in all humans for self-preservation, sociability, and innovation serve to condition human natural freedom and lead us to choose some actions over others and to coordinate rather than act as unconnected individuals.²

Humans learn that rule-governed sociability has profoundly positive consequences for self-preservation. Indeed, the evolution of culture leads to societies with larger and larger numbers of humans as the competitive advantage plays out over time in nature. At some point, coordinated behavior requires more specialized institutions, which we now call political. This development results from the endless ability of humans to learn, and thus to learn to want and “need” things promised by more effectively coordinated behavior; the need to deal with conflict between societies as they grow to collide with each other over natural resources, preferred geographical settings, and conflicting rules of coordination; and the need to deal with the internal conflict that results from the friction of large numbers – especially in the distribution of benefits and the inculcation of rules, the antisocial behavior of members seeking comparative advantage by breaking the rules, and the need to control or moderate social pathologies that result from higher-density living patterns. At some further point, coordination requires peace-keeping, the enforcement of rules, and more sophisticated mechanisms of decision making than can be accomplished through daily face-to-face discourse.³ In short, natural and unchangeable human inclinations lead

² These extremely strong tendencies in human nature do not preclude exceptions. Humans are known to commit suicide, to engage in antisocial or criminal behavior, and to become hermits. In an evolutionary context these contrary examples, although recurrent, tend to be self-limiting because they are not conducive to successful propagation. In a nonpejorative sense these individuals become the losers in long-term human development, and the competitive advantage of humans over other animals also holds true for those humans able and willing to coordinate behavior over those who can not or will not. History is not made by criminals, suicidal individuals, or hermits, but by men and women who can induce coordinate behavior.

³ The study of communities by historians, anthropologists, and other social scientists reveals that no cultural group has ever reached 200,000 members without developing specialized institutions of coordination that we can clearly term political. With

to the eventual need for political institutions, which in turn requires a supreme enforcer of coordination if there is to be successful coordination at all. Thus is born political power, and with it comes the hope that power can continue to serve the ends that led to its need – freedom, individual self-preservation, sociability, and continuing beneficial innovation.

The term “sovereignty” has tended to be associated with the nation-state, but this masks the generality of the phenomenon. Somalia during the early 1990s lacked a supreme political power to enforce coordination among the warring factions and clans, but within each faction or clan there was a supreme power that enabled each to act in human history as an organized, effective entity. Thus, contrary to the words of some newscasters, Somalia was not an example of chaos, but of a name for an entity that at that time lacked a supreme power to enforce coordination. Without this coordination there really was no Somalia, only a name for a nonfunctioning entity. The same can be said for Bosnia in the 1990s – the absence of a supreme power effectively makes Bosnia a name without a referent in the real world. Instead, there are smaller entities, each with its own respective supreme power, vying to become the supreme coordinator of something that could be called Bosnia. Organized behavior of humans acting in groups requires some way of saying “this is what we will do” and having the group’s members act together in that way. Whether the group is an extended family, a clan, a town, a nation-state, or an empire is merely a matter of the “span of control” involved.⁴

relatively few exceptions political institutions develop by the time a society reaches 5,000 to 10,000 members, unless the society is quite isolated from contact with other societies. Indeed, political institutions seem necessary to reach even this number, or at least to maintain a society this size, since the comparative advantage of political institutions leads to the defeat and absorption of the politically unorganized by the politically organized.

⁴ The argument here is intentionally at variance with that of F. H. Hinsley, who grounds his analysis of sovereignty on the emergence of the nation-state. That the concept of sovereignty is logically and empirically independent of the nation-state is implicit, but unnoted, in Hinsley’s own analysis when, he says that sovereignty exists when “no final and absolute authority exists elsewhere”; see *Sovereignty* (New York: Basic Books, 1966), p. 25. A second, somewhat revised edition was published with the same title in 1986 by Cambridge University Press. Because there is no alteration in the analysis, the first version is used here. For those in favor of world government to end wars between nation-states, this necessarily amounts to a world sovereign. Sovereignty

The examples used thus far seem to imply that the supreme power always rests on the direct, successful application of force, which is not the case. More often than not coordination takes place without the use of force and violence, although the threat of such use may be more or less explicit – even in the instances where supreme power rests on consent. In this discussion we are working toward an understanding of why the use of “sovereignty” is a preferred descriptor for this supreme power rather than others, and one major reason is that “sovereignty” implies the minimal use of force and violence and, thereby, minimal injustice. The main points here are three:

1. Without a supreme power, successful human coordination cannot take place, and we are left open to domination by the nature around us.
2. Without coordination with a sufficient span of control by a supreme power, humans are left open to the threat of domination and violence to a far greater degree than is the case with such coordination – that is, we are better off with a supreme power than without one.
3. The use of a “sovereign,” properly understood, allows the creation of a supreme power that minimizes violence and injustice.

Human nongenetic evolution leads to the creation of a supreme power, an entity that will have the final say concerning matters of coordination. This supreme power is the *sine qua non* of political institutions and is a second-order brute fact that becomes an unavoidable reality. It is a reality we like because of the fruits of coordination it can give, but at the same time we fear for its ability to deny those fruits and thwart those human inclinations that led to its creation. Complex societies with emerging political institutions have straightforward and natural pathologies – the failure to maintain order, the destruction of liberty, the undermining of sociability, and the halting of beneficial innovation. Because the latter three pathologies can all result from the first, the greatest temptation is to create a central power that is too strong. The possibility that a supreme power can produce one or more of the pathologies just mentioned is the reason why the necessity for a

would be worldwide in its span but would still exist even without nation-states. In the same way, entities smaller than nations can exhibit sovereignty.

supreme power carries with it an equally strong requirement for some means of restraining, controlling, or directing it in beneficial directions. Although the notion of a constrained, supreme power may seem more than a little paradoxical, the various facts of human nature play out in such a way that the paradox is now a permanent fact of life. The bottom line is still that, without a supreme power, coordination breaks down.

The basic literature is in agreement on these fundamental points. As Bertrand de Jouvenel puts it:

Two preoccupations will always obsess the minds of men who reflect on politics. First, in any organised society or state, there must be a supreme authority which all admit. This authority mobilises the subjects in the event of danger from without, and quells and appeases internal disputes. The state of a country in which there is no authority able at need to issue commands and get them obeyed is one of misery, desolation and ruin. At certain times persons of an authoritative temper become completely obsessed by the vital need for a sovereign, and by the need for him to be an absolute sovereign if he is to quell disputes. This obsession gets to the point at which they overlook the second problem presented by sovereignty. A legitimate sovereign is necessary – that is the first point. But, secondly, he must command nothing which is not legitimate, and not every order which issues from a legitimate source is legitimate.⁵

F. H. Hinsley says in a similar vein:

The concept of sovereignty . . . is not in terms of history or in terms of political science a concept which may properly be used to explain – let alone justify – whatever the state or the political society does or may choose to do. It is a principle which maintains no more than that there must be a supreme authority within the political community if the community is to exist at all, or at least if it is to be able to act as its character and circumstances require it to do.⁶

These representative quotations use the implicit language of sovereignty in their respective definitions when they refer to “authority” rather than “power.” If power is the ability of some person or entity A to get some person or entity B to do something that B would otherwise not do, authority usually implies power that rests on the assent,

⁵ Bertrand de Jouvenel, *Sovereignty: An Inquiry into the Political Good*, trans. J. F. Huntington (Chicago: University of Chicago Press, 1957), pp. 200–201.

⁶ Hinsley, *Sovereignty*, p. 219.

consent, or agreement of those over whom it is exercised.⁷ The strong tendency for theorists to use “authority” when discussing sovereignty is recognition that to speak of a supreme power as a sovereign is to alter our expectations of that supreme power, and thus to change the rules within which power operates. The word “sovereign” has historically carried a double connotation that virtually requires the use of “authority” when describing it. On the one hand, sovereignty implies supremacy in respect of power while, on the other hand, it simultaneously implies supremacy in respect of excellence such that the supreme power is characterized by superior qualities that make it better than the normal supreme power, usually in a moral sense. A sovereign has supremacy in decision making, but a sovereign is also supposed to surpass others of its kind – for example, happiness as the sovereign of goods, justice as the sovereign of virtues, and Arthur as the sovereign of knights. It is of more than passing interest that this dual implication of sovereignty has, when it is operationalized as popular sovereignty, strong implications concerning the characteristics of the population that is functioning as sovereign. These implications will occupy much of the discussion in the [next chapter](#).

“Sovereignty” is one of several terms I might use to describe the reality of ultimate or supreme power. The term I use will not change the fact that supreme power exists, but it will tend to structure my expectations, and thus my responses to supreme power. The term I use may well affect whether I even notice the phenomenon. Part of the argument here is that it makes a great deal of difference whether we use “sovereignty” as opposed to “absolute power,” or “power,” for the simple reason that the historical linguistic network is such that the implications of “sovereignty” can change my behavior and the behavior of others in ways that are extremely beneficial for us all. Put another way, even though we cannot destroy the reality that these words denote, we can choose words within a working vocabulary such that we create alterations in that reality by our relationship to it. Because some realities are more in accord with our shared human nature, or make us happier, or have more beneficial results for those mixed up with that reality, it then makes sense for us to prefer or seek the creation of that

⁷ This definition of power is based on the classic formulation by Robert Dahl, “The Concept of Power,” *Behavioral Science* 2 (July 1957): 203.

better or superior reality. Because words and the ideas related to them can have consequences for the choices we make, political theories using these words and ideas can lead us to create different institutions for dealing with the reality of political power, and thus we are able, to an important degree, to determine how political power works itself out. In sum, given the fact of a supreme political power, it is worth asking what difference it makes if we view it as sovereign.

The Genesis of “Sovereignty”: Before Bodin

The term “sovereignty” expresses the idea that there is a final and absolute power somewhere in the political community. From the beginning it also implied the idea that this final authority was somehow limited, about which we will have more to say in a moment. That there must be a final and absolute power somewhere in the political community was generally taken for granted by most political theorists before Jean Bodin, although medieval Europe was characterized by a complex struggle between the church and secular authorities over this very question, and Bodin’s work was part of the final effort that led to the demise of the medieval “two sword” arrangement. Published in 1576, Jean Bodin’s *Six Bookes of a Commonweale* contains the first systematic analysis of sovereignty in Western political thought. Although discussions of sovereignty usually begin with Bodin’s work, it is helpful to spend a little time on what came before in order to better understand his contribution.

Classical political discourse did not use the term “sovereignty” because it is rooted in medieval French; however, the idea was still expressed in somewhat different terms before Bodin wrote for the simple reason that the problem addressed by sovereignty is as old as politics.

As every political society possesses some political institution, however primitive, so every system of rule, however undeveloped, rests on some method of legitimation of the ruler and some pattern of accountability that the ruler observes. For it is in this way [the observation of a pattern of accountability] that rule has ever distinguished itself from mere political power. Sovereignty is a concept by which men have sought to buttress older forms of legitimation and accountability or on which they have hoped to base new versions of these means by which power is converted into authority. Its [sovereignty’s] function