

Principles of Constitutional Design

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primary political actor in Europe for the simple reason that the nation-state could produce the level of internal order and foreign exclusion that sovereignty implied. In his scheme of things the pope was just another prince ruling over his own nation-state, and the emperor was devolving into just another king, albeit with an exalted title. In sum, Bodin saw clearly that the traditional discourse concerning supreme earthly power was characterized by conceptual confusion born of false hopes and a failure to recognize the new European order on the horizon.

Bodin's Theory of Sovereignty

Bodin was not simply an apologist for kingly power. Like Machiavelli before him, and Hobbes afterward, Bodin attempted to develop a more realistic, empirical, and conceptually coherent view of politics. In a certain sense he was describing events more than prescribing them, although at the same time he had some shrewd and helpful advice to give the king – much as Machiavelli attempted to provide clear-eyed advice to his prince. Bodin's discussion of sovereignty therefore proceeded at three levels. First, he attempted to clarify the concept of sovereignty and then develop a theory of sovereignty that could be used by anyone, regardless of his political inclinations. In this respect, he was a political theorist. Second, he mapped out the different possibilities for the placement of sovereignty and thereby produced a new catalog of possible regimes and their characteristics. In this respect, he was a political scientist describing the catalog of political systems that he saw around him in terms of his new, empirically grounded theory. Third, he was a political partisan advocating the rule of kings as an antidote to the confusion and potentially dangerous political struggles he saw swirling around Europe. Too often he is interpreted at only this third level. His real contribution lay in developing a theory that could be used by anyone – pope, emperor, king, or commoner.

Although Bodin was analyzing the present and looking to the future, he did not abandon completely medieval political thought but built upon it. Most important, he framed his entire theory with the conventional medieval premise that God is above all earthly powers and is thus the only true sovereign. Also, in keeping with medieval theology he

worked from the premise that sovereignty was alienable, and thus God could alienate sovereignty to the extent that an earthly power could be sovereign locally, that is, on Earth, while God retained His status as true sovereign. Bodin departed from medieval thought in his conclusion that God could allow multiple sovereigns on Earth, thus breaking with the assumption of universality that the Stoics, Roman natural law, Augustine, and the major medieval thinkers took for granted. This raised a fateful question: If God could assign multiple earthly sovereigns, to whom should it go? During the seventeenth century the king, Parliament, and the people would contend for the honor, but as far as Bodin was concerned sovereignty was a fact that could reside in any of these entities, although in only one at a time in a given political system. Bodin's analytic neutrality has led some commentators to conclude that he was inconsistent in his idea of sovereignty. There are difficulties with Bodin's presentation, but inconsistency is not one of these, even when he was expressing his preference for resting sovereignty with the king.

Bodin lays out his essential position at the opening of chapter VIII, entitled "Of Sovereignty."

Majesty or Sovereignty is the most high, absolute, and perpetual power over the citizens and subjects in a Commonweale . . . that is to say, the greatest power to command . . . so here it behooves [us] first to define what majesty or Sovereignty is, which neither lawyer nor political philosopher has yet defined; although it be the principal and most necessary point for the understanding of the nature of a Commonweale.⁹

First of all, "majesty" and "sovereignty" are treated as equivalent terms, an equivalence that is pregnant with implications. Majesty is rooted in the Latin term *majestus*, which was used in classical Rome to signify the power and dignity of the people, especially with respect to offenses against it. *Majestus* was the primary attribute of the *populus Romanus* and was thus the Latin equivalent of the modern term

⁹ Jean Bodin, *Six Bookes of a Commonweale* (1576), book I, chap. VIII, from the 1606 English translation, as edited by Kenneth Douglas McRae (Cambridge, Mass.: Harvard University Press, 1962), p. 84. Spelling has been modernized from the original text so that, for example, soueraigntie becomes sovereignty, vnder becomes under, certaine becomes certain, and commaund becomes command.

sovereignty, as Bodin correctly puts it. In medieval Europe, however, majesty was used to describe the greatness and glory of God, a usage that can be found in the works of Chaucer, Malory, and Milton, to use examples from those writing in England. Literary use paralleled that of theology and philosophy in which *majestaticus* technically described the glorious presence or inhabitation by God. By implication, then, to describe someone as possessing majesty was to say that in some sense God was present in that person. One can see how, in the struggle between pope and emperor, language gave the pope a certain edge, but by crowning the emperor the pope passed this majesty from God onward and also confirmed his own majesty. If he did not crown the emperor, the pope left open the possible claim that the emperor could crown himself, which happened on more than one occasion, and the pope would thereby lose political leverage. By the time Bodin wrote, the premise of God's sovereignty, combined with the idea that rulers were designated by God and thus ruled through his favor, had resulted in the implicit notion of divine right that would be explicitly codified during the century after Bodin, most famously in England by Robert Filmer in his book *Patriarcha*.

By linking sovereignty with majesty Bodin called up and built upon two thousand years of tradition, but, as the difference between Roman *majestus* and medieval *majestaticus* implied, where sovereignty naturally should fall was not clear. Bodin took this potential weakness and turned it into a strength by declaring there was no natural designate of God's sovereignty. Sovereignty lay with whoever could successfully claim he possessed the essential character of sovereignty – a power that is “most high, absolute, and perpetual.” A few lines later Bodin says:

We have said that this power ought to be perpetual, for that it may be, that that absolute power over the subjects may be given to one or many, for a short or certain time, which expired, they are no more than subjects themselves: so that while they are in their puissant [mighty] authority, they cannot call themselves Sovereign princes, seeing that they are but men put in trust, and keepers of this sovereign power, until it shall please *the people or the prince* that gave it to them to recall it; who always remained leased thereof. For as they which lend or pawn unto another man their goods, remain still the lords and owners thereof: so it is also with them, who give unto others power and authority to judge and command, be it for a certain time limited, or so great and long

time as shall please them; they themselves nevertheless continuing still leased of the power and jurisdiction, which the other exercise but by way of loan or borrowing.¹⁰

Whoever can enforce their claim is sovereign, but this sovereign can “put in trust,” “pawn,” “loan,” or “lease” the execution of sovereignty to some agent or agents who act under the authority of the sovereign. The agent(s) has absolute power; the agent does not have most high and perpetual power. Bodin thereby draws a distinction between the holders of sovereignty and the executors of sovereignty. The distinction seems tailor-made to use with popular sovereignty, for which he initially seems to argue.

But let us grant an absolute power without appeal or control to be granted by the people to one or many to manage their estate and entire government: shall we therefore say him or them to have the state of Sovereignty, when as he only is to be called absolute sovereign who next unto God acknowledges none greater than himself? Wherefore I say no sovereignty to be in them, but in the people, of whom they have a borrowed power, or power for a certain time, which once expired, they are bound to yield up their authority. Neither is the people to be thought to have deprived itself of the power thereof, although it have given an absolute power to one or more for a certain time . . . the Sovereignty still remaining with the people.¹¹

Despite this and other statements of popular sovereignty, there are also just as many statements that seem to assume that the prince or king is the sovereign on his own. Also, recall that in the initial quote from his text Bodin said that an executor of sovereignty remained so until he was replaced by the “people or prince.” This dualism is not peculiar to Bodin. Otto Gierke refers to a “double majesty” perspective that was typical of medieval ambivalence toward kings.¹² One notion held that kings had authority from God such that the positive law of the king must be accommodated to natural law but was otherwise not limited in his authority when acting as a true sovereign. A second notion, which supplemented but did not serve as an alternative or competitor to the

¹⁰ Ibid. (italics added).

¹¹ Ibid., p. 86.

¹² Otto Gierke, *Natural Law and the Theory of Society, 1500–1800*, trans. Ernest Barker (Cambridge: Cambridge University Press, 1934), pp. 43–45, 54–55.

first, was the proposition that the king derived his power by grant from the people. On the one hand, this meant that the king could be viewed as above positive law, for he makes it and gives it its coercive power; on the other hand, the people can make a law by custom that has more weight than the ordinances of the prince. In theory, then, the king should voluntarily abide by human law as well as follow the natural law. However, the essential points made by Bodin at this point are that, first, sovereignty can be seen as vested in any entity that can maintain the claim; and, second, sovereignty resides in whoever grants fiduciary power to the executor of sovereignty. The first point speaks to the nature of sovereignty, while the second speaks to how one identifies the sovereign. He repeats the second point again in a way that reinforces the first: “. . . who never gives so much power unto another, but that he always keeps more unto himself; neither is he ever to be thought so deprived of his sovereign power, but that he may take unto himself. So that Sovereignty is not limited either in power, charge, or time certain.”¹³

Sovereignty resides in that entity whose power is not limited in extent or time, whereas any entity whose power is limited in extent or time is not sovereign, even though, as Bodin has made clear, the executor of sovereignty, although limited in some sense, is still as executor temporarily absolute. The sovereign is thus seen as having some of the essential attributes of God, who is after all the model for sovereignty as well as the only true sovereign. For this reason, supporters of popular sovereignty will in later years say that the voice of the people is the voice of God. But we should not be distracted by Bodin's cautious circumlocutions. What he is working up to is the very Hobbesian notion that sovereignty on Earth belongs to whoever can make the claim good. Successful social organization requires a supreme power, and this supreme power can be discovered by tracing back grants of power to the entity that stands behind them all. We may call this supreme power a sovereign in the hopes of keeping it in the service of the common good, but that does not change the fact that in the end there will be a supreme power. Bodin is here stating what he thinks is a fact grounded in necessity – there must be a supreme earthly power – and then telling

¹³ Bodin, *Six Bookes of a Commonweale*, p. 85.

us how to empirically locate that supreme power. The implications of this neutral, empirical stance turn out to be straightforward, but stark. The sovereign “must either be by the good liking of him that gave the power, or else by force: if by force, it is called tyranny; and yet nevertheless the tyrant is a sovereign: as the violent possession of an intruder is in nature a possession, although it be contrary to the law, and they which had the possession before are so thereof disseised.”¹⁴

Sovereignty is a characteristic possessed by whatever entity does possess it – that is, the ability to enforce order and coordination. There is no “natural” earthly sovereign, which is why Bodin speaks of both the people and the prince as potential sovereigns. Furthermore, just as God, the model sovereign, has alienated part of his sovereignty to an earthly sovereign who is to act in accordance with his will, and in effect be the earthly executor of God’s sovereignty, so too earthly sovereigns can partially alienate their sovereignty to executors who temporarily wield absolute power in the name of the earthly sovereign.

But because the earthly sovereign is but God’s executor, and there is no natural entity in which sovereignty must necessarily be vested, earthly sovereignty is capable of being completely alienated, presumably if the earthly sovereign feels unable, or is unwilling, to act as the supreme power. Bodin thus explains that a sovereign people may turn to monarchical sovereignty.

But what shall we then say of him to whom the people have given absolute power so long as he lives? In this case we must distinguish: if such absolute power be given [to] him purely and simply without the name of a magistrate, governor, or lieutenant, or some other form of deputation; it is certain that such a one is, and may call himself a Sovereign Monarch; for so the people have voluntarily disseised and despoiled itself of the sovereign power, to seal and invest another therein; having on him, and upon him transported all the power, authority, prerogatives, and sovereignty thereof; as if a man should by pure gift deliver unto another man the property and possession that to him [the giver] belongs; in which case such a perfect donation admits no conditions. . . . But if the people shall give all their power to any one so long as he lives, by the name of a magistrate, lieutenant, or only to discharge themselves of the exercise of their power; in this case he is not to be accounted any sovereign, but a plain

¹⁴ Ibid., p. 87.

officer, or lieutenant, regent, governor, or guardian and keeper of another man's power.¹⁵

This passage is interesting and important for a number of reasons. First, it implies that earthly sovereignty always begins in the people. Second, it explains the obvious fact that there are sovereign monarchs. Third, it implies that there is always a covenant, compact, or agreement of some sort at the beginning of each regime. Fourth, it indicates that the content, terms, or conditions of this original agreement are crucial. Finally, it implies that there are good reasons why a people might want to alienate their sovereignty completely. As to the last implication, although Bodin never tells us explicitly what these reasons might be, implicit in all of his text is the notion that we are better off with a sovereign than without one, and a people may designate a sovereign monarchy in order to produce the order that for some reason they cannot by themselves produce. Put another way, an organized people may be able to wield sovereignty effectively, but a disorganized people may not be able to do so and are better off throwing their support to a prince who can impose order rather than living with the disorder. Otherwise, it can be expected that a sufficiently organized people may want to retain sovereignty to pursue not only order but also the commodious life and other common ends that first brought them together. At this point, Bodin looks to have worked himself to a position not much at variance with that of Hobbes. Although there has been no explicit discussion of a state of nature, an original compact or covenant among the people themselves, and then a covenant with the monarch ceding temporary or permanent power, Bodin's argument sets the stage for Hobbes. Here we have clearly stated the first aspect of sovereignty – absolute, enforceable power. A few pages later Bodin restates the first essential aspect of sovereignty – the need for absolute power – but then he immediately, unlike Hobbes, provides an extended discussion of the other face of sovereignty when he tells us that every earthly sovereign, however it comes into being, is inherently limited in a number of ways. These limits are not automatic or certain, but they are inherent in the term “sovereign,” and together provide us with a way of clearly distinguishing sovereignty from an unlimited supreme power, at least in words.

¹⁵ *Ibid.*, p. 88.

This so great a power given by the people unto the king, may well be called absolute and sovereign, for that it have no condition annexed thereunto, other than is by the law of God and nature commanded.¹⁶

But as for the laws of God and nature, all princes and people of the world are unto them subject: neither is it in their power to impugn them, if will not be guilty of high treason to the divine majesty, making war against God.¹⁷

All sovereigns, even those to whom a people have permanently ceded their power, are still limited by the laws of God. That these laws of God seemed in practice to be effectively inoperative was the very reason that later theorists felt more comfortable retaining sovereignty in the people as a means of giving force to natural law. However, a sovereign is a sovereign, and popular sovereignty still faces the problem that the people can ignore God's law as well. Initially it was assumed that popular sovereignty is much more difficult to activate than monarchical sovereignty, and therefore inherently less dangerous. It was also assumed that popular sovereignty would be more or less episodic, expressing itself primarily in the selection of its agents, and therefore the agents of popular sovereignty were the ones who needed their everyday actions limited. Hence, constitutions were created initially to specify the limits placed by the people on the executors of their will, and only later as a means of placing public limits on popular sovereignty as well. Only as the evolution of constitutionalism reached this latter phase do we encounter the idea that constitutions should embody the natural law – or, not necessarily the same thing, the laws of nature.

Also, from the very beginning Bodin is implying that the sovereign, whoever it is, is limited by those ends for which a sovereign is established. The opening sentence of the first quotation placed sovereignty in the service of the “commonweale.” We have become used to reading this as “commonwealth,” especially since Locke, who seems to imply that only wealth or property is held in common. However, the original meaning of both words implied much more – something more along the lines of common good. “And forasmuch as we have before defined a Commonweale to be the right government of many families,

¹⁶ *Ibid.*, p. 89.

¹⁷ *Ibid.*, p. 92.

and of things common among them, with a most high and perpetual power: it resteth to be declared, what is to be understood by the name of a most high and perpetual power.”¹⁸ Bodin does not speak of sovereignty outside the context of a commonweale, and thus what constitutes “right government” and “things common” among many families is an essential part of what is meant by sovereignty. Without sovereignty there is no commonweale, and without the commonweale there is no sovereignty.

The opening line of Bodin’s book defines a commonweale as “a lawful government of many families, and of that which unto them in common belongs, with a puissant [mighty] sovereign.”¹⁹ On the same page he distinguishes a commonweale based on lawful and rightful government from all other “assemblies,” which he terms “robbers and pirates.” His explication makes clear that many or most so-called governments are little more than piracies. Commonweales are formed by the joining of many families for the provision of life’s necessities as well as for the provision of lives that are “commodious” and better than might be had outside of a commonweale.²⁰ A commonweale does more than enhance our ability to meet material needs. It allows the pursuit of common projects that cannot be pursued, or perhaps even conceived, by isolated men, and in the process of pursuing common projects the relationship between the men involved is transformed.

Now when the master of the family goes out of his own house where he commands, to entreat and traffic with other heads of families, of that [which] concerns them all in general, he then loses the title of master, head, and lord, to be a companion equal and fellowlike with others, leaving his family to enter into a city, and his domestic affairs to entreat of public; and instead of a lord calls himself a Citizen, which is no other in proper terms than a free subject holding of the sovereignty of another man.²¹

This “free subject” is a “citizen,” who is also a subject, because “some small part of his liberty [is] diminished by the majesty of him to whom he owes abeyance.”²² Citizens can be born into a commonweale or naturalized into it. Naturalization consists in voluntarily subjecting

¹⁸ *Ibid.*, p. 84.

¹⁹ *Ibid.*, p. 1.

²⁰ *Ibid.*, p. 5.

²¹ *Ibid.*, pp. 46–47.

²² *Ibid.*, p. 48.

oneself to the common sovereign.²³ What defines a commonweale, however, is not the common sovereign per se, but the common laws passed under the authority of the sovereign. Note that this definition is neutral with respect to what entity serves as sovereign, and though Bodin preferred a king, the definition leaves open popular sovereignty as an option. Unlike the medieval theorists who defined a sovereign in terms of a set of privileges, Bodin shifts the definition of a sovereign to a single criterion that is the same everywhere – the sovereign is the one with the power to make laws. A nation-state is therefore defined by a common set of laws, and a commonweale by a set of laws made by a sovereign with respect to citizens.

The concept of a citizen who is also a subject requires further discussion in order to prevent confusion on an important matter that has been held in abeyance since the opening discussion on the advantages of coordinated behavior. Too often today the term “coordination” will automatically be read as equivalent to “directed.” The implicit pyramid model in which those at the top tell those further down what to do and not do is precisely what is not connoted by “coordinate.” If entity A says that entity B will drive on the right-hand side of the road, and will drive on road X today to deliver a message given him by person C, this is an example of directed behavior. If, on the other hand, entity A says that all persons will drive on the right-hand side of the road but leaves up to those affected by this rule to decide when and where they go, as well as for what reason, this is an example of coordination. Rules of coordination apply generally to all actors, not to specific ones; enhance rather than restrict the range of action; and structure a process of combining and recombining that is open-ended because those engaged in it mutually adjust actions that are spontaneous and individually motivated. This is what Bodin means by everyone being a subject vis-à-vis the sovereign but citizens with respect to each other. We are all subject to the laws, and Bodin defines the lawgiver as sovereign; we are free and equal as citizens to pursue our nondirected ends within the space that is defined by and enhanced by the laws – the rules of coordination – put in place by the sovereign.

Hobbes will generate a concept of Leviathan, a supreme power that is directive and threatens to extinguish the public realm of freedom

²³ Ibid., p. 49.

within which citizens operate. This potential for the supreme power to become Leviathan is attacked by the concept of sovereignty. A sovereign is absolute in the application of power but limited in the matters over which it can be absolute. A sovereign coordinates and does not direct. A sovereign creates a public space for the operation of citizenship and does not threaten this space with extinction. Supreme power is the reality we inevitably face in a postneolithic world. Sovereignty describes a kind of supreme power that we can choose, but which must be created and sustained through advanced human invention.

The distinction between “direction” and “coordination” helps us to understand why Bodin saw the sovereign to be, at least in theory, limited to those means of coordination appropriate to citizens as opposed to mere subjects. When people think of themselves as citizens, as opposed to merely subjects, they have expectations about how they should be treated that lead to their resisting laws from the sovereign that are inappropriate in terms of being too directive, too restrictive, or less than general in their application. Thinking of a supreme power as a sovereign, and thus of oneself as a citizen, then becomes an important self-executing means for limiting the supreme power.

Bodin also sees the sovereign as limited by *legis imperii* – laws that concern the form of government. These general laws are particular to each commonweale and consist of prohibitions on actions that would undercut or tend to destroy the sovereign. In the case of France he cites the prohibition on female succession to the throne and prohibition of any action that would alienate any part of the public domain. Both rules are essential to the continued existence of the particular sovereign of France. The first helps assure orderly transmission of sovereignty, and the second safeguards the sources of revenue needed in order for the sovereign to perform his duties.

Finally, Bodin attempted to strengthen the force of natural law by deriving from it two specific limitations on all sovereigns. First, a sovereign is bound like any and all humans to keep his promises, which usually include those made by his predecessors. All civilized order, said Bodin, rests on “the keeping of faith and the performance of covenants.” Bodin then suggests that the sovereign can minimize these restrictions by not explicitly promising to maintain the laws of previous sovereigns when he or it is installed. Since at least 1219, with the

adoption of the Golden Bull, it had become common for the investiture of king and emperor to include in the ceremony just such a promise to uphold and enforce existing laws made by previous sovereigns. Bodin's advice to the king that avoiding this oath during investiture would give him a freer hand can also be viewed as advice to the citizens not to overlook the inclusion of this investiture oath. Theoretical principles worthy of the name can be used by anyone of any political faction, and this is a good example.

A second limitation rested on the principle commonly derived from natural law by philosophers and jurists that "every man shall have his due." Bodin used this natural-law principle to construct an impressive defense of the sanctity of private property and placed it firmly outside of governmental control or regulation. Among other things, Bodin argued that this precept precludes taxing property owners without their consent. He suggested that in France the Estates General was the proper mechanism for conveying this consent, but because in France at that time the Estates General did not have any authority independent of the king, the prohibition on taxation without consent was more theoretical than real. The same principle enunciated in Magna Carta became in England the basis for common-law limits on the monarch and eventually contributed importantly to the development of parliamentary supremacy. Whether Bodin saw this constitutional possibility is not clear, although if someone had suggested the king-in-parliament formulation of sovereignty that was adopted by Britain in the Glorious Revolution of 1688–1689, he might have agreed that this is what he meant. Regardless, Bodin was able to derive at least two clear limiting injunctions from natural law beyond the unconvincing "appeal to heaven."

The sum total of these limits we would today rightly view as inadequate safeguards against tyranny, but they are listed here to illustrate the manner in which Bodin continues the tradition of having the term sovereign automatically include limits on the supreme power. When we consider Bodin's earlier statement that even a tyrant, if he has *de facto* supreme power as a result of the force of arms, is still a sovereign, his view of sovereignty looks quite similar to that of Hobbes. Sovereignty, established to attain ends not attainable without the coordination that such supreme power makes available, looks much like a "beast" that needs taming. To those not accustomed to take for granted God's

retribution in the next world as a realistic limit on sovereignty, the concept looks to need a great deal more development.

Those writing immediately after Bodin worked to develop his idea of popular sovereignty more fully, but popular sovereignty is no more self-executing than any other means of taming power. For this reason future development of sovereignty theory focused more and more on the development of constitutional means that were self-executing once put into place. In the short run, Hobbes was to restate Bodin's theory in a way that not only clarified Bodin's first face of power, but also, by divorcing sovereignty theory completely from medieval assumptions, pointed toward the terrible possibilities inherent in sovereignty and clarified the need for much stronger secular institutions to prevent a sovereign from degenerating into an unlimited supreme power – a Leviathan.

The Hobbesian Gloss on Bodin

Hobbes, unlike Bodin, is still widely read today, so there is no need to explicate his argument to the same extent. The discussion here is limited to what Hobbes contributed to our understanding of sovereignty, as well as the challenge he left to others.

Part II of his *Leviathan* entitled “Of Commonwealth” begins with the famous chapter XVII, “Of the Causes, Generation, and Definition of a Commonwealth.” Hobbes begins by rejecting natural law as relevant to sovereignty. “For the laws of nature (as justice, equity, modesty, mercy, and (in sum) doing to others as we would be done to) of themselves, without the terror of some power to cause them to be observed, are contrary to our natural passions, that carry us to partiality, pride, revenge, and the like. And covenants without the sword are but words, and of no strength to secure a man at all.”²⁴ Hobbes goes on to say that if the natural law were operative and self-executing, there would be no need for government in the first place “because there would be peace without subjection.”²⁵

Because of natural human passions, and because the natural law is not self-executing on Earth, “it is no wonder if there be somewhat

²⁴ Thomas Hobbes, *Leviathan*, ed. Edwin Curley (Cambridge: Hackett, 1994), p. 106.

²⁵ *Ibid.*, p. 107.