

Principles of Constitutional Design

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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.

else required (besides covenant) to make their agreement constant and lasting, which is a common power to keep them in awe, and to direct their actions to the common benefit.”²⁶ Hobbes has the individuals who would constitute the people of a commonwealth covenant with each other to confer the power each has in a state of nature to a common power. This common power he calls Leviathan, which he deems a “Mortal God” (the idea of God is still the model for the sovereign).

And in him [Leviathan] consisteth the essence of a commonwealth, which (to define it) is one person, of whose acts a great multitude, by mutual covenants one with another, have made themselves every one the author, to the end he may use the strength and means of them all, as he shall think expedient, for their peace and common defence. And he that carrieth this person is called SOVEREIGN, and said to have Sovereign Power, and every one besides, his SUBJECT.²⁷

Hobbes differs from Bodin in giving the sovereign a name – Leviathan. This term has been used to connote a beast (often a huge sea serpent), or a man of enormous power. The name Leviathan, however, is rooted in a Hebrew word for Satan.²⁸ It is tempting to see Hobbes as using the name to connote the link between a fallen nature and the need for a supreme power to rein in that nature. It is also interesting to note, as many have, the frontispiece to the original edition of *Leviathan*, supposedly designed by Hobbes himself. It depicts a huge man wearing a crown gazing out onto a peaceful and productive countryside over which he towers. This man, presumably the Leviathan, is composed of thousands of little men compacted into the giant figure. Some see the diminution of individual men into a mass of undifferentiated, dependent beings. Others see a Leviathan that has no existence independent of the people who compose it. Hobbes does say that Leviathan always rests upon consent either voluntarily given in its creation, or post hoc by conquered people who choose to submit rather than leave.²⁹ Hobbes also holds out at least the logical possibility of popular sovereignty when he says, “For elective kings are not sovereign, but ministers of the sovereign; nor limited kings sovereigns,

²⁶ *Ibid.*, p. 109.

²⁷ *Ibid.* (emphasis in original).

²⁸ See Isaiah 27:1.

²⁹ Hobbes, *Leviathan*, p. 131.

but ministers of them that have the sovereign power.”³⁰ The first would seem to refer to the people, and the second to a parliament, but both may refer to a parliament.

Regardless, Hobbes says on page 109 that the people who covenant to create Leviathan may bestow sovereignty “upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will.” The name thus implies not only the bestial power of the sovereign but also the singularity of its will – which, it turns out, can be expressed through the will of those with the most votes in a parliament. Hobbes in this regard has said no more or less than Bodin. Both men speak of domestic peace and common defense as the primary purpose for the supreme power. Hobbes’s reference to everyone as “subjects” vis-à-vis Leviathan would seem to be at odds with Bodin’s distinction between a citizen and a subject. However, in the very next passage Hobbes draws essentially the same distinction.

The attaining to this sovereign power is by two ways. One, by natural force, as when a man maketh his children to submit themselves and their children to his government, as being able to destroy them if they refuse, or by war subdueth his enemies to his will, giving them their lives on that condition. The other is when men agree amongst themselves to submit to some man, or assembly of men, voluntarily, on confidence to be protected by him against all others. This latter may be called a political commonwealth, or commonwealth by *institution*, the former, a commonwealth by *acquisition*.³¹

Men united in a political commonwealth through voluntary consent Bodin would call citizens, whereas those in a commonwealth by acquisition he would call subjects. However, Bodin would not disagree with Hobbes’s statement as written. As noted earlier, Bodin argues that “free subjects” who are citizens are also subjects, because in a commonwealth every citizen has his liberty diminished to a small degree by the majesty of the sovereign.³² In other words, Bodin saw all men in a commonwealth as subjects vis-à-vis the sovereign, and citizens with respect to each other. Hobbes, too, sees those who consent to Leviathan as subjects vis-à-vis the sovereign. The normal interpretation sees Leviathan as ruling, at least potentially, all aspects of life, and thereby providing no space for the exercise of citizenship with respect to each other.

³⁰ *Ibid.*, p. 123.

³¹ *Ibid.*, pp. 109–110 (emphasis in original).

³² *Ibid.*, p. 48.

TABLE 2.1. *Comparison of Rights of the Sovereign*

Bodin	Hobbes
1. Exclusive power to make laws	1. Exclusive power to make laws
2. Exclusive power to make war and peace	2. Exclusive power to make war and peace
3. Sole power to appoint magistrates	3. Sole power to appoint magistrates
4. Power to hear last appeals	4. Ultimate judge of legal controversies
5. Power of pardon	5. Power of pardon (included in no. 4)
6. Due liege, fealty, and homage	6. Position prevents accusation by subjects of injury
7. Coining of money	7. Position prevents punishment by subjects
8. Regulation of weights and measures	8. Power to determine honors and rank
9. Exclusive rights of taxation	9. Judge requirements for internal peace
	10. Determines acceptable opinions and doctrines
	11. Power to determine rewards and punishments
	12. Consent required before power can be transferred to another

Certainly there seem to be few limits on Leviathan, and resolution of this point would seem to be crucial. Both Bodin and Hobbes provide lists of what sovereign power entails. A comparison is instructive (see Table 2.1).³³

The first five powers are the same, but then Bodin's general prescription against dishonoring the king becomes in Hobbes's hands an immunity from accusation and punishment, as well as a power to determine how much anyone should be honored, including, presumably, those acting as and for the sovereign. Although Hobbes's formulation looks stronger, we cannot tell for sure because Bodin does not elaborate on

³³ Bodin laid out and discussed the powers of the sovereign in *Six Bookes of a Commonwealth*, book I, chap. 10, pp. 153–182. Hobbes summarized the powers of Leviathan in *Leviathan*, p. 128, and discussed in detail in part II, chap. xviii, pp. 110–115. The powers are listed in the order in which Bodin gives them, and those listed by Hobbes are matched as best they can be for the sake of comparison, and thus his are not in order.

this power. From what he says elsewhere, it would seem that his intent is virtually identical, and if given the chance, he would probably alter his list to match that of Hobbes in this case. The major divergence comes in the comparison between the last three powers on Bodin's list and the last four on Hobbes's list. Bodin makes the sovereign the coordinator of the economic marketplace, leaving economic activity to the free activities of citizens whose private property, as was noted earlier, remains sacrosanct.

Hobbes, on the other hand, includes four general powers that potentially make the sovereign totalitarian. Economic matters are subsumed under the sovereign's powers, but also anything and everything that creates domestic conflict, including opinions and ideas. Here Hobbes generates the true potential of sovereignty, and Bodin, if pressed, would probably agree that, as far as power goes, the sovereign can potentially do all of these things. However, Bodin is sensitive to the second face of sovereignty, the need to limit power, and perhaps not as imaginative or logically relentless as Hobbes. Perhaps religious and political turmoil was not as desperate in sixteenth-century France as the situation Hobbes experienced during the seventeenth century with the Thirty Years' War on the continent and the Civil War in England. A more desperate, chaotic situation may have prodded Hobbes's imagination beyond Bodin's formulation. In any event two things are clear. Hobbes enunciates more clearly the potential power of the sovereign, and he provides little if anything in the way of limits on sovereignty.

The only available limit seems to be the natural human fear of death on which sovereignty is initially grounded. He says that a covenant not to defend myself from force with countervailing force is void. That is, even though a man can make a covenant to the effect "unless I do so and so, kill me," he cannot make one that says "unless I do so and so I will not resist when you come to kill me." As Hobbes puts it, the danger of death by resisting is "the lesser evil." We can imagine widespread resistance to executioners sent by a tyrant, with the resisters killing the executioners and then deposing the sovereign. The resisters become the new sovereign, just as the former sovereign would remain so if its agents were successful.³⁴ Sovereignty for Hobbes becomes merely a fact that

³⁴ This characterization of a possible scenario is taken from Mulford Q. Sibley, *Political Ideas and Ideologies* (New York: Harper and Row, 1970), p. 352.

someone holds supreme power. Instead of constitutional limits, Hobbes seems to see only contending factions seeking sovereignty in potentially constant warfare unless the supreme power combines overwhelming force with enough good sense and mercy to minimize resistance. Bodin's anemic limits look good by comparison, but the inability of Hobbes to see the possibility that such limits could be extended and made effective supremely lay in a fundamental difference – the replacement of Bodin's natural-law analysis with a law-of-nature analysis in which Hobbes sees a nature without God or any higher law to instruct us that there is more to human life than fear of death.

Hobbes described a state of nature in which life is “solitarie, poore, nasty, brutish, and short” that could only be ended with a covenant grounded in fear of death and dismemberment. Bodin also spoke of an original agreement establishing the sovereign, but his original agreement rested on the hope for a better, more commodious life. That Bodin did not see a hellish state of nature, but a fallen human nature that could lead to violence and injustice breaking out at any time, certainly helps explain why Bodin may have been more positive about the beneficence of government, or at least the lower likelihood that it might have to be repressive. Bodin and Hobbes described the basic beast of supreme power. Each gave it a name. Bodin called it a sovereign, and Hobbes called it Leviathan. Each name describes a version of supreme power that creates expectations, and each set of expectations has the potential for creating a certain kind of supreme power. Hobbes showed us the full logical and empirical potential of this supreme power. Bodin indicated to us how the beast might be tamed through constitutionalism.

Bodin and Hobbes: Their Implications and Legacy

There are various reasons for us to engage in the kind of textual “archaeology” being used here. One is to excavate alternative concepts to use in understanding and dealing with timeless political problems. In effect, the history of political thought is a storehouse of ideas that can be brought to bear on contemporary politics. Another reason for the exercise is to clarify these alternatives and the language that describes them. Bodin and Hobbes together provide us with a language and system of categorization that, when combined with some well-accepted additions gleaned from later theorists, allow us to describe and analyze