

Principles of Constitutional Design

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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

TABLE 2.2. *Definitions of Various Regime Types*

Power	The ability of entity A to get entity B to do something that B would otherwise not do
Authority	Power that is viewed as legitimate by those over whom it is exercised, usually because the exercise of that power is in some fashion based on the consent of those over whom it is exercised
Supreme power	A singular entity with power that is unlimited in extent, absolute in its exercise, and in principle perpetual
Leviathan	A supreme power that is authoritative because it rests on consent; that has no function beyond maintaining internal order and excluding external invasion; and that has no limits to the orders it may direct beyond the violence that will be elicited by attempts to kill those over whom it has power
Sovereign	A supreme power that is authoritative because it rests on consent; that in addition to maintaining order coordinates behavior through laws designed to advance common ends; and that is limited by the need to enhance and not thwart those ends for which it was created; by the characteristics of those who created it; by prohibitions on actions that would undercut or tend to destroy the sovereign, including the breaking of promises; ^a and by the requirement to protect private property ^b
Popular control	A situation where a people effectively united into a singularity constitute the supreme power such that nothing occurs without their consent
Popular sovereignty	A situation where popular control is limited by the same means and for the same reasons as any sovereign
Constitution	The covenant that contains the limits that convert a supreme power into a sovereign
Constitutionalism	A set of attitudes shared by relevant actors that the supreme power should be limited, that is, should be a sovereign; that there should be a covenant which lays out the means for limiting the supreme power; and that the covenant should be enforced and obeyed

Monocracy	A political system where an individual is the supreme power
Constitutional monocracy	A political system where the sovereign is an individual, monarch or otherwise, limited by a constitution made operational by constitutionalism ^c
Oligarchy	A political system in which the supreme power is vested in the hands of a relatively small part of the population organized in terms of a party, class, family, and the like
Constitutional oligarchy	A political system where sovereignty is vested in an oligarchy limited by a constitution made operational by constitutionalism
Democracy	A political system characterized by direct popular control
Constitutional democracy	A political system where sovereignty is vested in the people who exercise this sovereignty directly, and who are limited by a constitution made operational by constitutionalism
Republic	A political system where an elected legislature is the executor of popular control
Constitutional republic	A political system where an elected legislature is the executor of popular sovereignty
Tyranny	The thwarting of essential human inclinations and/or the specific hopes and needs of a given people resulting from an uncontrolled supreme power

^a This is a special instance of its authoritative nature since authority rests on consent, consent rests on a promise to fulfill the covenant, and therefore failure to keep or enforce a particular promise negates all promises, including the one which created the sovereign.

^b This is a particular instance of the first limitation listed (the need to enhance), since one of the common ends that led to the creation of the sovereign was the hope of each consenting entity to protect his property.

^c The presence of a constitution but the absence of constitutionalism renders a system of one man rule a simple monocracy.

political systems in terms of a theory of sovereignty. The basic terms of this language and categorization schema are presented here in Table 2.2 for use in later analysis.

Today we use the term “democracy” to denote what is more properly termed a “republic,” and perhaps most properly termed a “constitutional republic.” In this book an attempt will be made to use these terms

according to the definitions laid out in Chapter 1. Until recently these distinctions were well understood and were generally used in political science literature. Later empirical analysis of cross-national polities will illustrate why we should continue to take this theoretical and definitional legacy seriously.

Part of Bodin's overall theoretical contribution was to emphasize that the most fundamental characteristic of a sovereign was the ability, some said the right, to make laws. If a sovereign establishes a commonweale, and a commonweale is defined by a set of citizens governed by a common set of laws, then the requirements for a common set of laws determine the necessary characteristics of a sovereign. A sovereign must be a single entity, or there will be conflicting laws. A sovereign must be absolute in the sense of having no competitor, or the laws will not be enforceable. A sovereign must be perpetual, or the laws will be mutable and therefore unstable and unpredictable. A sovereign must be limited, or there will be no laws, because there will be nothing beyond the sovereign's changing, capricious will.

Bodin's theory of sovereignty had a number of important implications for practical politics. He provided a way of defining the nation-state – any geographical area sharing the same laws enforced by a sovereign who could successfully maintain internal order and exclude any and all competing powers. This produced a way of conceptualizing relations between nation-states, which in turn allowed the creation of rules of conduct in international relations. Although Hugo Grotius would become famous for providing the initial, definitive theory of international relations, Bodin initiates such a theory in a lengthy discussion of the differences between a treaty, a defensive alliance, and a confederation. He also discusses how to think about the conduct of war in a long discussion at the end of the book.

Also important, by moving to sovereignty theory Bodin recast how we can categorize governments. Whereas before an aristocracy was defined by virtue and rule by the wealthy, now sovereignty is placed in the hands of a few no matter what their characteristics. Bodin kept the Aristotelian typology of political forms – monarchy, aristocracy, and democracy – only now government is defined simply in terms of the number of hands in which the supreme power is placed. This removed ethical and normative considerations from descriptions of regimes, made possible comparative empirical analysis, and moved political

theory to consider actual regimes rather than ideal ones. Bodin rejected all discussion of ideal political systems and focused future analysis on how political systems, their institutions, and political actors really operated. In this sense Bodin was closer to Machiavelli than to any medieval political thinker.

Using Bodin's logic, we can even clearly conceptualize and understand political forms that Bodin had trouble dealing with. For example, Bodin rejected the utility of a mixed regime and felt that a federal system was either not possible or merely a smokescreen for the sovereign. With a robust concept of popular sovereignty, we can now view a mixed regime, federalism, and separation of powers in Bodin's own terms. In each case we push beyond the multiple executors of sovereignty to the entity that is "most high, absolute, and perpetual," the people. The people are now viewed as a single entity created by a covenant, a single entity that is the "greater force," and thus the supreme power. The people, through the constant and endless replacement of members as they die with new members as they are born, are perpetual. And finally, the covenant as constitution creates a self-limiting people with all of the necessary characteristics of a true sovereign. This popular sovereign can then distribute pieces of its power to a variety of agents acting in its name. Institutional arrangements like separation of powers, mixed government, and federalism are thus like multiple pipelines of power sent to various agents acting in the name of the popular sovereign.

Bodin himself spoke of the people as a possible perpetual singularity using the generational-replacement argument, as well as speaking of the people as a possible supreme power. At one point, he says flatly that any entity that can enforce its will over all other contenders – and he specifically mentions the people as a possibility – has the characteristics of a sovereign. Bodin had all the elements in his theory for popular sovereignty but did not put them together as a serious contender vis-à-vis monarchy.

Although Bodin is rarely read today, for at least a century after its publication *Six Bookes of a Commonweale* was one of the most widely read and cited works in political theory. Bodin's influence during the seventeenth century was immense. Along with Machiavelli and Hobbes, Bodin helped propel political thinking into the modern era. The strengths of Bodin's analysis allowed thinkers like Grotius and Althusius to make their contributions, while the weaknesses of his

analysis induced Hobbes to develop a purer, even more powerful analysis of the first face of sovereignty. The Hobbesian formulation, however, did not eclipse Bodin for the simple reason that Hobbes showed in sharp relief at least one clear superiority in Bodin's theory – the need for explicit, self-executing limits on the sovereign if it was to be properly termed a sovereign and not merely an arbitrary supreme power. Bodin also indicated the ease with which popular sovereignty and constitutionalism could be harnessed to this task.