

# Principles of Constitutional Design

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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

in the history of politics has been either to strengthen the claims of power or to strengthen the ways by which political power may be called to account.<sup>8</sup>

Bodin's rendering of the concept emphasizes the claims of power while downplaying, yet retaining, the inevitable claims for limiting power that the term also implies. Hobbes and Grotius fall into the same general camp. Others, like Althusius, Philippe du Plessis-Mornay, Spinoza, Locke, Sidney, Rousseau, and Constant fall into the camp of emphasizing the claims for limiting power while retaining the inevitable claims of supreme power contained in the concept. Despite differences in language, customs, and institutions that separate us from ancient and medieval political thought, whenever we encounter pre-Bodin discussions in which there is an attempt to marry supreme power with institutions and practices that limit the operation of that supreme power, we are in the presence of a discussion about what amounts to the concept efficiently conveyed by "sovereignty."

Aristotle captured the paradoxical double thrust of sovereignty – a supreme power that is limited – as well as the inclination to ground the limits in some transcendent order when he suggested that superiority in the political community should be vested in the rational principle embodied in laws handed to men by the gods rather than in any person or persons in the community. Aristotle's formulation, as codified by Cicero in the idea of natural law, became the standard formulation until supplanted by the modern positivist view of law making. Aristotle's view supported the idea that law is found, not made, and thus the sovereign is automatically limited by this higher law. Christianity would gloss this position by declaring God the one and only true sovereign, so that his representative(s) on Earth were always bound by his will. Aristotle also set in motion the thousand-year attempt to link political supremacy with virtue when he argued that the ideal form of government, the best in an absolute sense, would be one in which all citizens were good men and the rulers were the *aristoi* according to a standard of perfection. Because he recognized earthly regimes could aspire to this ideal but never reasonably expect to approach it, he suggested a variety of means to rein in the dangers of tyranny toward which supremacy tended. Aside from admonishing his readers to seek

<sup>8</sup> Hinsley, *Sovereignty*, p. 25.

men of virtue to fill offices, he also advised the use of a mixed regime as the best constitutional design possible, given human nature. We see here the precursor to divided but coordinated power that in the modern world is codified as separation of powers and checks and balances. His doctrine of the mixed regime complemented the marrying of virtue with power, as well as his notion of a higher law limiting the actions of the supreme power. These three approaches continue to be the primary means for limiting the supreme power to produce what we now call a sovereign.

Aristotle's initial formulation of the solution to political power is suggestive in other ways. Although he was emphatic in his opposition to democracy as a degenerate form of government, this resulted from his stipulating that democracy should refer to the rule of many for their class good. He also stipulated that the rule of the many for the common good should be termed a polity, and the polity is what we seek in the modern world when we attempt to create democracy in our understanding of the term. Aristotle's mixed regime created a set of political institutions that together held supreme power. Because these institutions together were the supreme power, and together they included all of the classes within the community, Aristotle's mixed regime stands as a precursor to popular sovereignty. His ability to conceptualize a limited supreme power that was grounded in the broad population required that he first have a notion of a limited supreme power. It is no accident that the first person essentially to articulate a concept of political sovereignty was also the first to develop the theory of constitutionalism. A community organized around an effective but limited supreme power is the essence of constitutionalism. It is also no accident that Aristotle, in thinking deeply about the best way to organize constitutional government, concluded that the polity should be erected on the broadest definition of citizenship that could be justified under the particular circumstances. The idea of constitutionalism was born not only in association with the implicit formulation of sovereignty but also in association with popular sovereignty in embryo.

The idea of sovereignty implicit in Aristotle was worked out institutionally in the ancient Roman Republic. Under the Republic all magistrates enforced the law in the name of the *populus Romanus*. In the same way, *imperium* denoted a power to rule conferred by the Roman

people on specific individuals, who then became public officials in the service of the people. Although the very broad (for its time) definition of citizenship was still too restrictive by our standards to serve as the basis for popular sovereignty as we now know it, the Roman people under the Republic still served as something functionally equivalent. Students today are bewildered by the Roman system of multiple offices in the Republic that seemed to provide no clear political superior. For example, the chief magistrate was known as the consul, but there were two consuls, not just one, with the idea that they would check each other and prevent a return to prerepublican monarchy. There were at first two, and then later four praetors. The *praetor urbanus* decided cases involving citizens, while the *praetor peregrinus* decided cases involving foreigners. There were two quaestors charged with the treasury, and later four when the office was opened to the plebians. There were multiple aediles in charge of roads, games, public buildings, and other public utilities. Finally, there were two tribunes elected by the popular assembly who could veto any decrees of the magistrates. The multiple magistracy did not reflect ignorance about sovereignty but instead revealed a rather sophisticated understanding. The creator is always greater than that which is created, and by making the various magistrates creatures, at least in theory, of the *populus Romanus*, the Roman Republic effectively declared the people as a whole to be sovereign. Furthermore, because every magistrate had at least one other person with an equivalent title or similar power, and the various civic powers were divided between at least a dozen people, no one could claim anything that looked like the supreme power.

At the same time the concept of the people as a supreme power was itself circumscribed in ways that are in line with the limits implied by sovereignty. For example, the law in republican Rome was not supposed to rest on the will of the people but on the higher morality that Cicero identified as the natural law. This subservience of the people's will to a higher law, commensurate with Aristotle's notion that a higher law that limits human will is supposed to be found and not made, was expressed and supported both culturally and institutionally. Those charged with making, interpreting, or enforcing the law had this higher-law doctrine inculcated through socialization. To supplement these internalized norms there was an evolving set of institutions that simultaneously linked the magistrates with the *populus Romanus* and

limited the ability of the *populus Romanus* simply to get whatever it willed.

When the city of Rome deposed its last king in approximately 509 B.C., it established, along with its double consul system, a council of elders called the Senate, which was to advise the consuls, and a periodic assembly of the people organized according to family and religious memberships known as the *comitia curiata* – also as a means to advise the consuls. The *comitia curiata* never developed much power, however, and was supplanted over time by another assembly of the people, the *comitia centuriata*. This second assembly was composed of all men of military age (the committee's title effectively means "the people in arms") and, until 287 B.C., elected the chief magistrates and approved the laws submitted to it by the Senate. Because the military was dominated by those who could afford chariots, horses, and armor, the *comitia centuriata* was always dominated by the wealthier classes. The constant struggle between patricians and plebians led eventually to the formation of another assembly, the *comitia tributa*. This assembly was the successor to the *concilium plebis* (the council of the plebians, or poor), after a general strike by the plebians in 471 B.C. had led to its creation as a body to elect the tribunes, who in turn were supposed to veto decrees seriously at odds with plebian interests. In 287 B.C. the name of the *concilium plebis* was changed to *comitia tributa*. Prior to 287 the *concilium plebis* would meet not only to elect the tribunes but also to talk over political matters so as to advise the tribunes. This unofficial debate became increasingly influential until it reached the point where resolutions of the *concilium plebis* could have the force of law if they voted on matters that had first been submitted to them by the Senate. Also, the tribunes had the power to ask for the advice of the assembly through a vote, which was called a *plebiscitum*, or plebiscite as we call it today. In 287 B.C. the *comitia tributa* inherited these powers.

On paper, republican Rome had a system of popular sovereignty in which the sovereign was limited both by a notion of a higher law and an upper house (the Senate) to impede the will of the people expressed through a lower house, the *comitia tributa*. In fact, the highly aristocratic Senate dominated the mix through its election of all the magistrates except the tribunes, the ability to co-opt the tribunes with the promise of future election to a well-paying high office, and the ability

to manipulate many members of the *comita tributa* through bribery, social patronage, and threats. Still, the Senate was itself denied supreme power by the very real impediments of a lower house and the tribunes elected by this lower house, which stood as roadblocks to Senate capriciousness, as well as the doctrine of the *populus Romanus* and the idea of a higher law. Furthermore, the multiplicity of magistrates impeded the enforcement of arbitrary senatorial will.

In sum, the Roman Republic was not democratic, but it was profoundly constitutional, and the effective use of an implicit doctrine of sovereignty stood at the center of its constitution. Constitutionalism can therefore be based on a doctrine of sovereignty that is not necessarily popular, at least not in the sense associated with what is called “strong democracy.” The Roman Republic strained institutionally toward Aristotle’s mixed regime or “polity,” and Aristotle’s polity was defined by a set of institutions that, while not making the majority of average citizens the dominant voice, did require that all classes of citizens have a voice in the creation and enforcement of laws. We might term this the commonwealth model of popular sovereignty, where the inclusive common good is pursued through a mix of institutions that protects the interests of all parts of the population, but the various parts of the population are not equal in their ability to affect the final outcome. The Senate in republican Rome can also be seen as an approximation of the kind of parliamentary sovereignty typical of Britain until the reformation of the electoral system in the nineteenth century. As with the British Parliament, the Roman republican Senate was effectively the supreme power, but one that was also hemmed in by both a legal doctrine and an institutional design that divided, balanced, and limited political power. Regardless of how democratic or aristocratic the Roman Republic was, its institutions embodied the essential paradox of political sovereignty. The institutional blueprint of the Roman Republic virtually defined the ideal of sovereignty for more than a thousand years of European history.

One can view the Middle Ages as dominated by the struggle for sovereignty. With the breakdown of the Roman Empire during repeated barbarian invasions, supreme power went to whoever could establish local order through force of arms. The fragmentation and localization of political power in Europe severely diminished the span of control of political units, and the seemingly endless warfare and arbitrary rule

that resulted once again did not so much indicate chaos and the absence of sovereignty as much as it reflected a span-of-control problem, and thus an endemic struggle to structure sovereignty more effectively. One can view the gradual pacification of Europe and the eventual, fitful rise of the nation-state as an evolutionary process to discover a span of control that met the dual requirements of sovereignty – an effective, supreme power that could monopolize force within its boundaries, as well as a supreme power limited enough to prevent it from becoming itself a threat to the population for which it provided order and safety.

Local supreme power enforced by arms remained problematic unless a sufficient span of control could be achieved to muster sufficient force either to turn back or to defeat and absorb the barbarian clans. The solution seized upon was a feudal system in which a complex arrangement of fiefdoms allowed the coordination of many localities in a common defense. Often the barbarian leaders were themselves involved in the feudal network as a means of tying barbarian clans to a given place and ending the threat of their nomadic depredations. A gradual and complicated process of consolidation then began as what amounted to local sovereigns started to vie with each other for a greater span of control through the elimination of local competitors. Modern Europe emerged from the process. This difficult and slow process that worked from the bottom up was greatly complicated by a division between religious and secular power that went back to the onset of the Middle Ages and virtually defined the major problems of political theory during that thousand-year era. The consolidation eventually went beyond nation-states to include empires, but an equilibrium seemed to be reached after World War I that excluded units larger or smaller than nation-states until the emergence of the European Union. The European Union is, for the moment, still a loose confederation of what remain nation-states, and if the union is successful the end result will be a nation-state. A successful European Union requires the emergence of a common sovereign, whereas its failure leaves intact the smaller sovereignties. Sovereignty has been the central question in European politics for fifteen centuries, and it remains so today.

Many historians date the beginning of the Middle Ages to the second sack of Rome in A.D. 455. There is no clear and certain date for the onset of the roughly thousand-year period, but it is clear that less than forty years after the second sack of Rome Pope Gelasius I had



formulated a doctrine known as the “two-sword” theory that would ground all discussion of sovereignty until the writings of Bodin. The two-sword theory argued for two equal earthly powers in Christendom with different spheres of responsibility. Religious authorities, with the pope at the apex of the church, were to have supremacy in spiritual matters, whereas secular authorities, with the emperor at the apex, were to have supremacy over the rest. Neither earthly authority was sovereign; rather, God was sovereign. Therefore, both of the supreme magistrates on Earth were supposedly bound by God’s will as revealed in Scripture and through reason. Where God’s will did not command, earthly powers were free to construct as need be.

This rather neat theoretical solution retained the essentials of sovereignty. God is the supreme power, but through the Old and New Testaments we know that he voluntarily limits his omnipotence through a covenant with humankind that allows for human freedom to say yes or no to his grace. God’s will is seen not as capricious but as following a pattern contained in the natural law, which includes freedom for humans. The two-sword theory may satisfactorily justify the simultaneous operation of two earthly, coequal authorities to a population that is Christian, but it did not answer, even for believers, the question of what constituted the proper definition or limits for each sphere of authority. When disagreements arose over the practical application of the two-sword theory, who was to make the supreme decision as to which authority governed? Medieval politics in Europe revolved around a series of controversies that were particular manifestations of this central question of sovereignty. That the system worked at all is testimony in part to the relative weakness of both emperor and pope in a highly fragmented and localized power structure. The system also worked because pope and emperor were interdependent in a number of ways, especially before A.D. 1100.

For example, the Roman emperor Constantine in A.D. 313 granted religious freedom to Christians throughout the empire, and in 314 he convened a synod at Arles to regulate the church in the West, thereby inventing the ecumenical council. In 325 he convened and presided over the famous Council of Nicaea, which dealt with the troubles over Arianism. Even before the Middle Ages began, then, the emperor was involved in resolving religious as well as secular conflicts. The papacy had no great reputation at this time, but as the empire declined in

political power, the pope inherited some of the emperor's position as symbol and defender of civilization. Several popes such as Julius I, Innocent I, Leo I, Gregory I, and Martin I distinguished themselves in dealing with the barbarian invasions and managed to obtain lands as a result of this defense. Most notably, in A.D. 756 Pepin the Short, Charlemagne's father, gave the papacy large tracts of land that became the Papal States. With this Donation of Pepin, the pope became a powerful lay prince as well as an ecclesiastical leader. In the turmoil of late eighth-century Europe, Charlemagne sided with the pope in wars over conflicting claims, and in A.D. 800 Pope Leo III crowned Charlemagne Holy Roman Emperor. Charlemagne had in the preceding years unified the Gauls and conquered the Saxons, as well other tribes, and had thereby re-created a large portion of the Roman Empire in western Europe. Leo III could claim some superiority over the empire since the crowner is presumably the creator and therefore has supremacy over the created. Ironically, Leo at once sponsored the empire and sanctioned the creation of a state, which, as the Holy Roman Empire, was to become the chief competitor with the papacy for sovereignty.

The power of the two competing earthly sovereigns waxed and waned as a result of periodic corruption, political intrigue, and the varying ability of the major actors. In 1122 the Concordat of Worms between Pope Calixtus II and Emperor Henry V ended a long-term struggle over investiture and restated the Galasian doctrine of the two swords, with no clearer definition of which sword ruled when there were competing claims. Much inventiveness went into legal and theological arguments supporting the superiority of one sword over the other, and virtually every major political thinker from William of Ockham and John of Salisbury to Marsilius of Padua had the problem of sovereignty implicitly at the center of his work. The symbolic struggle between pope and emperor increased in importance as the two positions increased in power during the high Middle Ages. By the time Bodin arrived on the scene it was clear that order and progress demanded that one side had to win. Bodin picked neither.

This is not to say that Bodin lacked a preference. He clearly supported the secular power, but not the emperor, the king. Perhaps he saw that the span of control that the emperor needed was too large to bring under sovereignty, and thus was an impractical goal. Certainly he understood that the nation-state was coming into its own as the

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