THE LANGUAGE OF LIBERAL CONSTITUTIONALISM

HOWARD SCHWEBER

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The Language of Liberal Constitutionalism

The Language of Liberal Constitutionalism explores two basic questions regarding constitutional theory. First, given a commitment to democratic self-rule and widespread disagreement on questions of value, how is the creation of a legitimate constitutional regime possible? Second, what must be true about a constitution if the regime that it supports is to retain its claim to legitimacy?

Howard Schweber proposes answers to these questions in a theory of constitutional language that combines democratic theory with constitutional philosophy. He observes that the creation of a legitimate constitutional regime depends on a shared commitment to a particular and specialized form of language. Out of this simple observation, Schweber develops arguments about the characteristics of constitutional language, the relationship between constitutional language and the language of ordinary law or morality, and the authority of officials such as judges to engage in constitutional review of laws.

The Language of Liberal Constitutionalism will be read by professionals and students in public law, the philosophy and sociology of law, and democratic theory, as well as general readers interested in constitutional law and political theory.

Howard Schweber is associate professor of political science at the University of Wisconsin-Madison. He is the author of *The Creation of American Common Law, 1850–1880; Speech, Conduct, and the First Amendment*; and book chapters and articles in journals such as *Law and History Review*, *Law and Society Review*, and *Studies in American Political Development*.

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HOWARD SCHWEBER
University of Wisconsin-Madison

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Introduction

This book is devoted to an exploration of two closely interrelated questions. First, under what conditions is the creation of a legitimate constitutional regime possible? Second, what must be true about a constitution if the regime that it grounds is to retain its claim to legitimacy?

The focus on legitimacy derives from the fact that a constitution is fundamentally an instrument of legitimation for a set of juridical practices. By the term "juridical" I mean the combination of legal, political, and administrative actions that are undertaken in terms of laws or law-like rules as elements of formal institutions of governance. A constitutional regime is one in which the claim to legitimacy of these juridical practices rests, at least in part, on a prior claim of legitimacy on behalf of a constitution. This is not to say that the constitutional and legal claims of authority are coextensional; the relationship between a constitution and ordinary law will be the subject of a great deal of discussion in later chapters. But describing a system as a "constitutional regime" implies that the system of institutional organization and a set of basic guiding norms are authoritatively contained in the constitutional "text," however conceived. As a result, I will conceive of a constitutional system as one that has two critical elements: institutionalized mechanisms for collective action, and a set of law-like rules supreme within their domain. For a constitutional regime to be legitimate, each of these elements requires an adequate justification.

The scope of this discussion is therefore narrowed to a particular kind of political system that confronts particular kinds of challenges in asserting a claim to legitimacy. In addition, the inquiry that is undertaken here is not a search for the conditions of possibility of any conceivable constitution, but rather takes place within the tradition of liberal constitutionalism, a tradition that assumes the inescapability of value pluralism and accepts the fundamental importance of basic democratic principles. The challenge for liberal constitutionalism, then, is that we cannot answer the questions that this book asks by referring to a necessary set of universally shared moral values or belief in a higher law external to the constitution itself, nor may we accept an explanation that depends on the coercion of the population by force. If liberal constitutionalism is to be made legitimate, the answers to the two questions that motivate this study have to be couched in terms that are consistent with value pluralism and democracy.

The first traditional step in trying to answering these questions derives from the nature of liberal constitutionalism itself. Liberal constitutionalism assumes the acceptance of basic democratic norms in addition to the social fact of value pluralism. Respect for fundamental democratic commitments to self-rule, in turn, implies that legitimation depends on some version of consent of the governed. In the context of a theory of liberal constitutionalism, the question "under what conditions is the creation of a legitimate constitutional regime possible?" becomes shortened to "Consent How?" And the question "what must be true about a constitution if the regime that it grounds is to retain its claim to legitimacy?" becomes, in its shortened version, "Consent to What?"

The argument of this book is extensive and in places complex, but the answers that I propose can be stated simply. Broadly stated, the argument of this book is that the necessary conditions of possibility for legitimate constitutional rule ultimately involve the creation and maintenance of a language of liberal constitutionalism. What is required for the creation of a legitimate constitutional regime is an initial shared commitment to the creation of a system of constitutional language in a manner consistent with the principle of justification by consent. And for a constitutional regime to retain its claim to legitimacy, the integrity of the system of constitutional

language must be preserved, again in a manner consistent with justification by consent. In their third and final iteration, then, the questions to be answered will become "How is consent to a system of constitutional language possible?" and "What must be true about that system of constitutional language in order that consent to its creation and maintenance is sufficient to ground a liberal constitutional regime?"

Each of the formulations just mentioned raises further questions. It is all very well to say that the creation of a constitutional regime requires an initial commitment to language, but how can such a commitment be shown to exist? Thereafter, how can an initial commitment to language be legitimately understood to bind subsequent generations? The idea of a constitutional language system similarly raises further questions. What is the relationship between constitutional language and systems of language employed in legal and moral discourse? And what qualities of form and content is a system of constitutional language required to have if it is to do the work that is being asked of it here?

There are a number of ways to approach these inquiries: One might ask about the sociological conditions that enable a population to engage in a certain kind of collective action; one might investigate the conditions of historical and cultural development that are required to make the phrase "constitutional order" meaningful; or one might ask what juridical traditions and institutions are needed for a project of constitutional construction have a high likelihood of success. My goal in this book, however, is to gain some purchase on the two original questions from a theoretical perspective. That is, I am not attempting to identify a set of historical circumstances under which constitutional democracy is likely to arise, but rather to derive a persuasive argument about legitimacy. My approach in developing the argument is minimalist, in the sense that I am only trying to determine the conditions of possibility for legitimate constitutionalism, not the ideal conditions for the best form of constitutional rule. The further questions of what conditions are sufficient to *ensure* a *desirable* constitutional regime – which are arguably both more difficult and more important than the questions I ask here – are left for another day.

There is also a non-trivial argument that while a constitutional order legitimates juridical practices, that order either cannot or

need not be legitimated itself. Such an argument might take the form of the proposition that the project of legitimating a constitutional order is a waste of time. The creation of a constitutional system, it may be said, is a brute historical fact that defines the scope of "legitimacy" for a particular system, and there is no external basis for challenging or affirming the legitimacy of the constitutional order itself. Moreover, one can imagine a society in which the vast majority of persons are perfectly willing to abide by a system of laws without any commitment to principles that recognize those laws as "legitimate" by virtue of the operation of any specifiable principle. Persons might be said to accept a particular set of such rules without any particular view about their legitimacy because they believe that there is a chance that at some point in the future their side will win. Alternatively, the argument might be that persons might simply feel that they are materially better off under the present set of rules than under available alternatives. All of these are arguments for the position that the search for grounding principles of legitimation is both futile and unnecessary.

On closer inspection, however, these turn out to be arguments about the grounds of legitimacy rather than the relevance of the concept. Even in the most interest-driven and instrumental description of a person's reasons for accepting a juridical order, there are implicit appeals to meta-rules, or rule-like norms; an adequate likelihood of ultimate success under existing rules; the equal or characterizable "fair" application of the rules to different parties; and some notion of sufficient reciprocal commitment to the rules on the part of other players and authorized enforcers. The reference to "authorized enforcers," in turn, names another layer of the lurking set of meta-rules that are always involved in any formalized situation of strategic competition.

It is also not the case that appeals to interests and strategic advantage are ever completely absent from a theory of juridical legitimacy. It is, frankly, difficult to imagine an argument for legitimacy that does not coincide with at least one of these instrumental justifications. But these are not persuasive arguments against the necessity for legitimacy. They are arguments about the terms of that discussion. The possibility that today's losers may be tomorrow's winners, the promise of better conditions, or an appeal to

rules for the game that are sufficiently rule-like are all ways of invoking legitimating principles quite familiar in constitutional and philosophical debates. In the same way that the most altruistic act can be described as self-interested ("I have an interest in thinking of myself as a moral person"), the most self-interested motivation becomes the basis for a legitimating principle when it is translated into juridical institutions. This observation provides the basis for one of the fundamental tenets of liberalism, that meaningful arguments for the legitimacy of a political system may emerge even in the face of a genuine pluralism of interests and values.

Furthermore, legitimation is an essential condition of possibility for sustained collective action. The term "collective action" refers to a classic problem in political science: How do groups coordinate themselves to act in ways that individual members accept as binding despite disagreements about the desirability of the group decision? An institutionalized system of collective action is one in which it is possible to know when a decision has been reached, the decision-making process is understood to involve direct or indirect participation by the relevant community, and the decision that is reached is understood to apply to community members. In other words, a system of politics.

A system of politics is a necessary implication of any constitutional system. By contrast, imagine a situation of truly absolute monarchial rule. In such a situation, it would be both possible and plausible that a single ruler would issue contradictory mandates to two subordinates, then leave it to them to fight it out. It would also be possible for such a monarch to change his or her mind without notice, or to dictate actions that are entirely destructive of the welfare of those subject to their edicts. Such a system of decision making yields neither collective action nor institutionalization. Decisions by such a governing authority cannot be described as meaningfully "collective" insofar as they rest entirely within the unfettered discretion of an individual actor, and any "action" is obtained through the direct coercion of individuals (excepting members of the coercing organizations, such as an army personally loyal to its commander). And there are none of the elements of predictability, transparency, and rationalization that are required for institutionalization. Multiplying the number of rulers into an

oligarchy obviously does nothing to change this equation from a perspective external to the ruling group.

Systems of government that do not satisfy the criteria for institutionalized collective action are neither impossible nor necessarily unstable, but they are not "constitutional" in any meaningful sense. Rather than being maintained by politics, such regimes can be maintained only by the exercise of force, leading inevitably to the question that has bedeviled every dictatorship in history, "Do we hold the army?" If the assumption of the discussion is that we are concerned with regimes that can be sensibly characterized as "constitutional," the necessity that constitutional systems be legitimated is a matter of definition.

The necessity of legitimation is also evident as a matter of sociolegal practice, a conclusion that can be demonstrated by consideration of the prosaic example of the adjudication of private disputes. If participants in a system of dispute resolution cease to accept the outcomes as legitimate, there is a danger that they will either ignore the system or ignore the outcome of its proceedings. At a certain point, in turn, the willingness or ability of the state to mobilize coercive authority to compel respect for the judicial process will be exhausted. At that point, the absence of legitimacy in the system of laws results in a failure of that system as an institution of collective action at all. The statement "there is no right without a remedy" recognizes the meaninglessness of a legitimating standard in the absence of effective institutions of collective action to enforce it; conversely, those institutions cannot be effective for long – or even, in the sense described earlier, remain "institutions" – unless they are themselves viewed as legitimate. To the extent that "constitutional system" is understood to mean "constitutional system stable over time," the need for legitimating arguments is inescapable. By the same token, any description of the conditions of constitutional adequacy is also simultaneously a description of the possibility of constitutional failure.

Recognizing that the question of legitimacy is inescapable has important consequences for the understanding of the term "constitution" even before any particular argument is considered. A "constitution" is often described as a charter for government that performs the dual functions of organizing and defining the limits of

the exercise of power. But it will not do to define any system that includes a written charter that fits that description as "constitutional," nor to exclude systems that have no formal charter from the discussion. The former category, after all, would include such regimes as the Soviet Union, while the latter limitation would arguably exclude constitutional systems such as Great Britain, not to mention less clear cases such as Israel. What is missing is the recognition of the special role that a constitution plays in articulating the legitimating principles for the political regime. This is not an observation that depends on the adoption of some particular theory of constitutionalism. Whether one conceives of a constitution as an aspirational statement of highest political goals, or purely as a compact between autonomous entities, consistency with that conception becomes the litmus test for the legitimacy of subsequent juridical acts. Any theory of constitutional rule requires justification by an appeal to a legitimating principle.

As I noted earlier, throughout the discussion that follows I have employed a minimalist approach. That is, I have not attempted to describe the circumstances under which a constitutional order will be the "best" – most just, most moral, most egalitarian, or most free – only the circumstances under which we can speak of a legitimate constitutional order at all. Similarly, I have not attempted to derive everything that might or should follow from the fact of a constitutional system – the most developed possible set of rights, the most effective system of democratic participation, or the most virtuous juridical order – only those consequences that are *necessarily* required for a constitutional system to be able to assert a claim to legitimacy. Nonetheless, I will argue that there are substantial conclusions to be reached with regard to both questions.

With respect to the first motivating question of this book, "Under what conditions is the creation of a legitimate constitutional regime possible?" as I have already indicated, I intend to argue that the creation of a legitimate constitutional regime depends on a prior commitment to employ constitutional language, and that such a commitment is both the necessary and the sufficient condition for constitution making. I will also argue that this initial observation requires us to reconsider the nature and operation of popular sovereignty and the basis for the authority of juridical officials. In

response to the second question, "What must be true about a constitution if the regime that it grounds is to retain its claim to legitimacy?" having refocused the inquiry toward the language of constitutional discourse I will argue that a specific set of characteristics described in terms of exclusivity, completeness, and substance, are the analytically necessary answers.

Throughout the discussion, I will argue that the unequal political burdens that these answers impose on democratic action are not only justified, but are actually the inevitable results of the commitment to constitutional self-government. Finally, I will argue that serious errors of modern constitutional practice appear in the failure to preserve the boundaries of constitutional language against a variety of competing forms of discourse, including the languages of religious morality and ordinary law. I will also argue that the analysis requires us to reject claims of emergencies that cannot be expressed in terms recognizable in constitutional discourse. To explain the path of the argument, however, a somewhat more detailed description of its elements is required.

Chapter 1 begins with an exploration of some of the early roots of liberal constitutionalism. In the earliest Western political writings, the solution to the problem of collective action and the need for legitimating principles led to the focus on law as both a legitimating and a legitimate set of organizing principles. Those principles, in turn, derived their legitimacy from some version of natural law principles. That is, laws, and political regimes generally, were legitimate (or "just," or "desirable," or "moral") insofar as they accorded with the natural order of things (as in Aristotle and Cicero), or with divine revelation (as in the Hebrew Bible and Augustine). There were also hints in early writings on the subject of a specific focus on universal human nature – characteristics unique to humans and unconnected to the ontology of the rest of the universe – as the test for legitimacy, leading Justinian to distinguish *jus naturae* (universal laws of nature), *jus gentium* (laws universal to human societies) and *jus civile* (laws specific to particular societies). The natural law tradition is far from absent in modern constitutionalism, where it takes the form of an appeal to substantive moral norms. It should be noted that, in terms of the form of the argument, it makes no difference whether these moral norms are

asserted to be uniquely suited to a community, universal to humans, or grounded in metaphysical authority. The argument remains that law is legitimate insofar and to the degree that its content is morally sound.

In the Early Modern period of European history, a different approach to the legitimation of juridical regimes appeared in the form of the theory of sovereignty developed by, among others, Jean Bodin, Thomas Hobbes, and John Locke. The text that is thought of as the beginning of this theory of legitimate government is Bodin's *The Six Books of the Republic*. Bodin was motivated, in large part, by a desire to establish a basis for secular authority capable of withstanding the divisive forces of religious conflict. His solution was to turn away from the content of laws as the basis of their legitimacy, and to focus instead on the identity of the human lawmaker. Contrary to the tradition of medieval constitutionalism, in which a monarch's rule was understood to be constrained by customary norms, the scope of authority in Bodin's version of sovereignty was bounded only by the conditions of its creation. So long as laws emanated from a sovereign and did not contradict the basic nature of its rule, Bodin argued, their legitimacy did not depend on their agreement with other, established normative principles.

Hobbes, and then Locke, developed the idea of sovereignty further, pointing to the centrality of authority over language as an element of lawmaking authority. In the process, the meaning of sovereignty underwent a transformation. For both Bodin and Hobbes, sovereignty was a fundamentally other-directed phenomenon, in which the sovereign exercised authority over others. With Locke, sovereignty comes to be understood as a collective form of self-rule, a formulation that leads to the conclusion that legitimate rule requires consent. In the process, Locke makes the definition of a legitimate governing sovereign the basic test for legitimacy in liberal constitutionalism, characterized by the assertion of collective self-sovereignty, legitimation by consent, and the exercise of authority over language. At the end of Chapter 1, after reviewing these three writers' arguments, I propose that some version of Lockean constitutionalism remains the strongest analytical approach to the problem of defining the conditions of constitutional legitimacy.

Chapters 2 and 3 look beyond Locke's prescriptions to an understanding of the problem in its modern form. These chapters are devoted to exploring the question that was earlier phrased as "Consent How?" Modern challenges to the possibility of legitimate constitutional rule focus on the problems of defining conditions of genuine "consent," describing an understanding of collective action appropriate to the process of constitutional creation, and justifying the possibility of precommitment. Responding to these challenges requires a reconceptualization of popular self-sovereignty as the first necessary step in describing a legitimate constitutional regime. Older models such as those of Bodin and Hobbes depended on a characterization of collective self-rule in terms of an anthropomorphic metaphor of the state as an "artificial person." This metaphorical understanding of collective action, however, is inadequate to provide satisfactory justifications for liberal constitutionalism. Locke's description of a commonwealth began the process of moving away from an anthropomorphic metaphor to something more descriptive of a modern state. To develop a Lockean theory of modern constitutionalism, we must look more deeply into the idea of an initial commitment to linguistic practice that provides the basis for subsequent acts of political consent.

The simple observation that there can be no social contract without a common language in which to express that agreement is the first step toward a theory of constitutional language. Locke's recognition that the creation of language precedes moments of political consent resolves many of the difficulties in establishing conditions of legitimacy at the moment of constitutional creation. At the same time, recognition of the critical fact that constitutional authority operates in the first instance as authority over the creation of new forms of juridical language requires the possibility of forward-looking "consent" of a different kind. Here, the content of constitutional language comes into play. Grounding the legitimacy of a constitutional text in the creation by consent of language-generating authority parallels the approach to grounding the legitimacy of a legal system in facts of sociolegal practice, thus cementing the connection between legitimate and effective constitutional rule in the very terms of its possibility. To apply an argument of this kind to the question of constitutional legitimacy,

however, requires a consideration of the differences between constitutional and ordinary law, and rethinking the effect that the creation of a constitutional regime must have on the relationship between language and legitimacy thereafter. The creation of a constitutional regime alters the terms in which claims to legitimacy are asserted, including claims to the legitimacy of the constitutional regime itself.

But this must not be allowed to become an exercise in avoiding the problem of consent by an appeal to an infinite regression to ever-earlier moments of agreement. Ultimately, the conclusion is unavoidable that at the moment of constitutional creation, refusal to consent to some initial commitment to constitutional language does indeed challenge the legitimacy of the creation of a constitutional regime. Similarly, past the point of constitutional establishment, a refusal to accept the regime's authority over language equally denies the legitimacy of its rule. Rather than denying that conclusion, I try to use it to illustrate the ways in which an argument based on a theory of constitutional language has the potential to reshape our understanding of both challenges to, and defenses of, constitutional legitimacy. To avoid an infinite regress, furthermore, it is impossible to ignore the fact that certain specifiable characteristics of a system of constitutional language are required. If a prior moment of consent to a system of constitutional language is the necessary condition for the creation of a constitutional regime, what must, necessarily, be true about that language if it is to provide a sufficient basis for constitutional rule?

Chapters 4 and 5 of this book are devoted to consideration of this second question, which was earlier rephrased as "Consent to What?" Even in light of the commitment to asking the minimalist question of necessary, rather than ideal, conditions for constitutional formation, the problem of establishing an adequate basis for constitutional rule requires consideration. "Legitimate," to be sure, does not equate with "successful," as there are myriad reasons why a legitimate constitutional regime might fail, just as illegitimate regimes frequently flourish. Instead, the term "legitimate" refers to something else: the circumstances under which a regime can be said to deserve to succeed. Nonetheless, if a constitution is to serve as the basis of legitimation for a political regime, it must be plausibly

described as serving that function in practice, not merely to stand as an exemplar for a hypothetical state unrelated to the reasoning and actions of real juridical actors.

As a result, constitutionalism has both formal and a substantive elements: a constitutional regime is one that produces an *effective* institutionalized system of collective action, and a legitimate constitutional regime is one in which that effectiveness can be sustained over time by an adequate argument for the authority of juridical institutions of governance. A legitimate constitution requires a persuasive claim to be the exclusive legitimating mechanism for the exercise of political authority. Preserving the conditions of possibility for continued consent to a system of constitutional language therefore requires a consideration of the content of that language in light of what would be required for the claim to legitimacy to be plausibly maintained over time.

To get at an answer to these questions that arise out of the inquiry "Consent to What?" it is necessary to consider the relationship between a constitutional regime and the operation of the various kinds of "law" in practice. In liberal political societies, law plays a special role as the arbiter of disputes between other bases for social organization and action. "Law," in this sense, is the name of an institutionalized set of rules for collective action that establish fixed practices, modes of communication, and decision-making authority. Fixed practices, modes of communication, and decision-making authority, in turn, require justification, which in a constitutional system ultimately rests on accord with a legitimate constitutional regime. Constitutional principles thus function as background tests for legitimacy against which juridical practice occurs as a foreground. A crucial question is how to describe the norms or institutions that a constitutional system invokes in this legitimating role without falling into an entirely circular argument in which the legitimacy of the constitution is grounded in the legitimacy of the laws that it is called upon to test. What, in other words, is the relationship between the legitimation of a system of laws in general and the legitimation of a constitution, specifically? That the principles of legitimation in these two cases might not be identical follows from the relationship between constitutional law and ordinary public or private law.

Furthermore, the background/foreground metaphor must not be reified; in other contexts, the roles are reversed, as when a discussion of constitutional principles turns on outcomes for juridical practice. It follows that a question that was previously settled can become unsettled by a shift in the dominant constitutional understanding or by a shift in juridical practice. This process of unsettling is alarming and unnerving to some, exhilarating to others, but inevitable in any constitutional system. It also follows that the location of these points of connection between constitutional principles of legitimacy and juridical practice are themselves contested, as when debate occurs over the question of whether a particular juridical act "really" invokes a question of rights, or when there is disagreement about the "correct" significance of juridical outcomes in resolving questions of constitutional principle. These elements of uncertainty in the relationship between constitutional, legal, and social norms necessitate going beyond the question of constitutional form to the question of content. In a system of liberal constitutionalism, a legitimate constitutional regime requires both a minimum degree of autonomy and a minimum degree of grounding in the prevalent juridical culture, and the content of constitutional language must provide an adequate basis for both if the system is to remain "constitutional" in the sense that I have just described.

The content of constitutional language that is required for a regime that has the possibility of legitimacy in practice is analyzed in Chapters 4 and 5 in terms of three dimensions: exclusivity, completeness, and normative substance. To what degree does the possibility of a legitimate constitutional regime depend on the adoption of a system of constitutional language to the exclusion of other modes of discourse? To what extent is that system of constitutional language required to be sufficient to articulate all arguments that actors might wish to make, and what follows from the possibility of linguistic incompleteness? And to what extent does the claim to legitimacy of a constitutional regime inescapably rest on an appeal to shared substantive norms that originate outside the system of constitutional discourse?

The consideration of these three questions gets at the larger question of what kind of a system of constitutional language is required if consent to that language is to provide an adequate basis

for a legitimate constitutional regime? Once again, the answer is not that this problem can be simply made to disappear, but rather that consideration of the requirements of exclusivity, completeness, and normative substance provide a different way of asking the question.

The argument, in brief, is that a constitutional language that is sufficient to provide the basis for a legitimate constitutional regime must combine an essentially absolute claim to linguistic exclusivity with a high level of incompleteness. The question of substance is then addressed from the perspective of such an exclusive but incomplete constitutional language, an approach that points to a reconciliation of the fact of value pluralism with the necessity for shared grounds of constitutional legitimation. What connects these various characteristics is the strict requirement of "translation," a requirement that I propose in the full recognition that it operates unequally with respect to differing voices and viewpoints, and with a clear appreciation of the exclusionary consequences that follow as a result.

The final chapter (Chapter 6) explores some of the implications of the arguments of the preceding chapters, with a particular focus on the implications of the requirement of translation. Ultimately, the conclusion is that the preservation of a legitimate constitutional system requires a willingness not only to adopt a system of constitutional language, but also a willingness to exclude forms of discourse derived from other spheres. Religious and moral claims and non-constitutional law, in particular, are sources of extraconstitutional language that must be excluded from constitutional discourse. By "excluded" I mean here that propositions formulated in these languages must be required to undergo translation into constitutional language before they can become elements of a legitimate constitutional discussion.

The requirement of translation also provides an argument against the possibility of "emergency" exceptions to constitutional norms, if that idea is understood to imply the legitimacy of actions that cannot be legitimated in the language of the constitutional regime. This not to say that a constitution cannot, or even should not, contain provisions identifying situations such as wartime in which extraordinary rules come into play. What is rejected is the proposition that the commitment to constitutional rule itself can be set aside for the duration of an "emergency" defined by criteria that

do not appear in the system of constitutional language. These conclusions identify a besetting weakness of modern constitutional practice, in the United States and elsewhere. The purely theoretical argument of this book, in other words, ultimately has specific and important consequences for our understanding of the practice as well as the philosophy of constitutionalism.

This introductory discussion would not be complete if I did not express my appreciation for the assistance that I have received in the course of writing this book, and also offer an apology. The apology is to those writers whose work has received less attention than it deserved and those writers who can very fairly complain that I have chosen to focus only on certain elements of their work. In both instances, the explanation is that I was trying to use others' work to develop my own arguments. There is far too much excellent, thoughtful, constitutional theory and related research available in the literature for me to engage more than the small portion that most directly relates to the particular points of my immediate concern.

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As always, the greatest debt is owed to my wife and editor, Lynn Schweber. The errors that remain in this book are mine.

1

The Search for Sovereignty

Law, Language, and the Beginnings of Modern Constitutionalism

Liberal constitutionalism is a recent invention, but its historical roots lie deep in Renaissance and Early Modern thought. An examination of the problems and the arguments that gave rise to the concept of liberal constitutionalism goes a long way toward clarifying the special role that authority over language plays in establishing the legitimacy of a constitutional regime.

At the beginning of the modern era, the question of political legitimation became the search for the true source of sovereignty. The search for sovereignty arose from the desire for a basis for human political authority unmoored from assertions of theological orthodoxy. In the fifth century C.E., Augustine had proposed that the survival of a state depended on its being governed in accordance with Christian teachings, rather than on the republican virtues that had been emphasized by writers such as Aristotle and Polybius. As a consequence, Augustine concluded that a government owed a duty to its people to provide Christian governance by virtue of its duty to promote the state's existence. In the fifteenth century, Florentine republican writers, among whom Machiavelli was the leading figure, argued that Augustine had it wrong. Confronted by the record of a millennium of religious conflict, and inspired by the recent rediscovery of ancient texts of classical republicanism, Machiavelli proposed that the key to creating and preserving the state was either a restoration of republican virtue or else the tyrannical but effective rule of a Prince bereft of either republican or Christian virtue. Since

it is difficult, at best, to guarantee the virtue of a populace, as a practical matter the alternative to an appeal to theology meant accepting the authority of a sovereign ruler.

But Machiavelli's answer raised a critical question: by what authority does a Prince rule in the first place, particularly in the face of challenges from religious authority figures? The attempt to answer this question became the basis for modern constitutional theory. In this chapter, the development of that theory will be traced through the arguments of Jean Bodin, Thomas Hobbes, and John Locke. These three were not by any means the only writers to contribute to arguments about political and legal legitimacy. Among many others, John of Salisbury, Samuel Pufendorf, and David Hume could be mentioned, while Rousseau's challenges to fundamental assumptions built into the model of liberal constitutionalism continue to resonate to this day. But through the arguments of Bodin, Hobbes, and Locke it is possible to trace the line of development that culminated in modern liberal constitutionalism, and in particular to see the central relationship between constitutionalism and language.

Bodin contributed the idea of sovereignty, a category of justification for political rule that departed from both Christian and classical republicanism models by its emphasis on secular authority exercised over unequal others. In Bodin's account, a true understanding of "sovereignty" would go beyond the task of explaining why the rule of a Prince might be desirable to explain why such a form of government could be made legitimate, a project that led him to discover that the authority of the sovereign was limited by constraints inherent in its very nature.

In Hobbes' telling, the authority of the sovereign became, if anything, more absolute, and was both rooted in and extended over the field of language. At the same time, however, Hobbes introduced the possibility of democratic theory by grounding sovereignty in a moment of consent justified by an appeal to reason. Hobbes shifted the focus of his analysis away from the nature of the world, finding a form of natural law rooted in the facts of human psychology and epistemology rather than in a divinely prescribed order of the world. In the discussion that follows, I will refer to the idea of laws derived from the universal facts of human nature as "human

natural law,'' to distinguish it from the Thomistic idea of natural law contained in the order of creation writ large.

Locke, finally, completed the move from sovereignty to liberal constitutionalism. For Locke as for Hobbbes, the sovereign's authority extended over language and was grounded in consent, but in Locke's telling, sovereignty took the form of self-rule rather than rule over others, and consequently was limited by much more substantive constraints than any recognized by either Hobbes or Bodin before him. Equally important, Locke described the legitimate sovereign as the product of not one, but a series of moments of consent, a description that focused attention on the question of the conditions that would make each successive stage of development possible. This move, more than any other, set the stage for modern theories of liberal constitutionalism. An examination of the progression of the argument for sovereignty through the works of these three writers illuminates the intellectual roots of liberal constitutionalism, and in the process demonstrates the points of criticism to which that theory must respond if it is to remain persuasive today.

JEAN BODIN: SOVEREIGNTY OVER LAW

In 1576, Jean Bodin provided an answer to the question of authority with the word ''sovereignty,'' the assertion of legitimate absolute and exclusive authority over lawmaking on the part of a secular political ruler.[1] The term ''secular'' is slippery, here. Bodin's theory of sovereignty was emphatically based on Thomistic natural law in the sense that he appealed for his ultimate ground to a divinely created, normatively charged ontology discoverable by reason. But the

[1] The date 1576 refers to the publication of the first French edition of *Six Livres de la République*. The book was revised and reissued in French in 1578, then issued in a drastically revised Latin edition in 1586. The Latin edition included an entire additional chapter on classes of citizenship, and numerous emendations to the earlier French text. In 1606, Richard Knowles (or ''Knolles'') authored an English translation of the Latin edition that incorporated elements of the earlier French. In the discussion that follows, the primary text is the 1606 English edition; this may not be the most accurate reflection of Bodin's original ideas, but it is the clearest articulation of a unified thesis, and, moreover, it is the version of Bodin's masterpiece that was most widely influential on the subsequent development of constitutional thought. (McCrae, 1962.)

sovereigns whose authority was so justified were political rulers whose authority was grounded in their secular role as the creators of laws, in distinct contrast to religious figures whose claim to authority was based on their privileged knowledge of the laws promulgated by God, either through the authoritative interpretation of scripture or the equally authoritative reading of laws embedded in the order of Creation. "Sovereignty" was the name for the secular, political basis for the authority of the ruler; the absolute authority of the sovereign was not a divine dictate. In Quentin Skinner's words, sovereignty was "an analytical implication of the concept of the state." (Skinner, 1978: 287.)[2]

The secular nature of sovereignty was evident from the manner in which the argument was presented. Bodin only rarely appealed to biblical texts or Christian teachings; by far the bulk of his illustrations were drawn from the history of political regimes, primarily those of the Romans and Greeks, but also those of the Tartars, Swiss, and every other imaginable nation. The lessons that he drew from these histories were practical. Like Machiavelli, Bodin looked to the lessons of history to find an alternative to religious civil war, the "poison to make empires and states mortal, which else would be immortal." (Bodin [1606], 1962: 91.)

As a result, Bodin simultaneously rejected a key element of both Christian providentialism and classical republicanism – the appeal to some version of "virtue" as the key to a state's success. Virtue was no guarantee of success, and consequently the right form of government did not guarantee a commonwealth's prosperity. "For a commonwealth may be right well governed, and yet nevertheless afflicted with poverty, forsaken of friends, besieged by enemies, and overwhelmed with many calamities." (Bodin [1606], 1962: 3.) The difficulty, moreover, was not only that virtue could not guarantee success, it was also that there was no consensus concerning the measure of success, either for individuals or for communities, because the interests of the individual and the interests of the community need not always coincide.

[2] As Quentin Skinner notes, "[a]lready the foundations are fully laid for Hobbes's later construction of 'that great Leviathan' as a 'mortal God' to whom 'we owe under the immortal God our peace and defence ....'" (Skinner, 1978: 287.)

But for as much as men of affairs, and princes, are not in this point agreed, every man measuring his good by the foot of his pleasures and contentments; and that those which have had the same opinion of the chief felicity of a man in particular, have not always agreed, That a good man and a good citizen are not all one; neither that the felicity of one man, and of a whole commonwealth are both alike: this hath made that we have always had varieties of laws, customs, and decrees, according to the diverse humors and passions of princes and governors. (Bodin [1606], 1962: 4).[3]

These comments were more than an ironic rejection of republican utopianism. Bodin here also set forth the problem that he accused earlier writers of avoiding. Given a plurality of views concerning a good outcome, and given that adherence to moral law and performance of civic duty might not be coextensional, what general principles can be articulated and defended concerning the nature of legitimate political rule? This was arguably the first articulation in political theory of the problem of liberal constitutionalism: how is political rule justified in the face of a genuine pluralism of values?

To answer his question, Bodin began with a natural form of human organization, the family. Every form of state, he argued, begin with the combination of families into a "commonwealth," which is characterized by the common ownership of property and the identification of a ruling sovereign.[4] "[T]hree principal things especially [are] required in every commonwealth ... the family, the sovereignty, and those things which are common to a city, or commonwealth." (Bodin [1606], 1962: 3.) The family unit was not only the material out of which a commonwealth is constructed, it was also the commonwealth in microcosm, "the true seminary and beginning

[3] Bodin was likely inspired by Aristotle's *Politics*, which contains the proposition that the virtues of citizenship and the virtues of private life are different for everyone except a ruler. "But will there be no case in which the excellence of the good citizen and the excellence of the good man coincide? To this we answer that the good ruler is a good and wise man, but the citizen need not be wise." (Aristotle, 2004: 66.)

[4] "A Commonwealth is a lawful government of many families," the books begin, "and of that which unto them in common belongeth, with a puissant sovereignty." (Bodin [1606], 1962: 1.) Although nominally a Catholic, Bodin was heavily influenced by Petrus Ramus and other Calvinist dialecticians, and their influence shows in his insistence on always proceeding by naming, definition, and characterization. He was also heavily influenced by Jewish philosophy, and for a time considered converting to Judaism.

of every commonwealth, as also a principal member thereof." (Bodin, 1962 [1606]: 8).

The family – or rather, to use a more precise term, the household – was to the state as "members" to "the body," an image that echoed Aristotle's description of the relationship between a citizen and his *polis*,[5] but did not yet reach the anthropomorphic metaphor of the state as a "person" possessed of a "will" that is characteristic of later writing.[6] But the sovereign prince was only analogically equivalent to the natural authority of the head of a household. "[T]he prince ... hath power over his subjects, the Magistrate over private men, the Father over his children, the Master over his scholars, the Captain over his soldiers, and the Lord over his slaves. But of all these the right and power to command, is not by nature given to any beside the Father, who is the true image of the great and almighty God the Father of all things." (Bodin, 1962 [1606]: 20.)

The emphasis on the household rather than the family as the natural unit of social order had important political consequences. Even the natural sovereignty of a father over his children gave way to a juridically defined relationship of subordination within a household, by virtue of the fundamental political principle that authority over lawmaking must settle on a single ruler. Thus, a slave or an adult son living in the household would have no authority over his wife; instead, all would be subject to the rule of the head of the household. "The reason whereof is, for that a family should have but one head, one master, and one lord: whereas otherwise it if should have many heads, their commands would be contrary, one forbidding what another commandeth, to the continual disturbance of the whole family." (Bodin, 1962 [1606]: 15.) And even the authority of the head of household could be superseded by the political authority of the sovereign in an appropriate case. Magistrates were authorized to interfere with the patriarchal management of the

[5] "Further, the state is by nature clearly prior to the family and to the individual, since the whole is necessarily prior to the part; for example, if the whole body be destroyed, there will be no foot or hand." (Aristotle, 2004: 14.)

[6] The analogy of the state to a human body, with different elements representing different organs and bodily functions, appears in its earliest form in the writings of John of Salisbury, a twelfth-century English Scholastic who studied in France and Rome and served for a time as the bishop of Chartres. (Rubin, 2005: 45–7.)

household to protect "the private goods of orphans, of mad men, and of the prodigal .... As in like case the laws oftentimes forbiddeth a man to procure, to alienate, or to pawn his own goods or things, except upon certain conditions ... for that the preservation of every private mans goods in particular, is the preservation of the commonwealth in general." (Bodin, 1962 [1606]: 12–13).

In other words, having begun with an appeal to Thomistic natural law, Bodin quickly moved to a purely political argument. The justification for the subordination of the family to the sovereign was the same as the justification for a single ruler in the family: the need for order and the fundamental republican commitment to the idea that the good of the collective trumped the interests of the individual. And the need for order ran both ways. Just as a household relied upon a well-ordered state, the state relied upon well-ordered households. Bodin bemoaned the consequences of arguments that there were circumstances under which a son would be justified in resisting his father. "O what a number of fathers should be found enemies unto the commonwealth, if these resolutions should take place? And what father is there which in the time of civil war could escape the hands of his murderous child?" (Bodin, 1962 [1606]: 26.)

The reference to civil war is telling. Bodin's greatest fear was chaos, the greatest promise of the commonwealth, social order. A strong patriarchal family might survive the absence of a state intact, but anything less would fall into the general chaos of civil war; conversely, should the state fail to support order in the household, the claim on the loyalty of heads of household would be forfeit.[7] The

[7] Bodin later uses almost identical language in describing the risks of defining citizenship in a way likely to arouse discontent among the populace. Bodin rejects Aristotle's definition of a citizen as one who participates in government. "[I]t is better and more truly said of Plutarch, that they are to be called citizens that enjoy the rights and privileges of a city. Which is to be understood according to the condition and quality of every one; the nobles as nobles, the commoners as commoners; the women and children in like case .... For should the members of man's body complain of their estate? Should the foot say to the eye, Why am not I set aloft in the highest place of the body? or is the foot therefore not to be accounted amongst the members of the body? Now if Aristotle's definition of a citizen should take place, how many seditions, how many civil wars, what slaughters of citizens would arise even in the mildest of cities." (Bodin, 1962 [1606]: 53.) The constant theme, again, is a warning of chaos, and especially of civil war.

natural order of the household was thus justified by its political consequences, not the other way around.

The absolute priority that Bodin placed on order as the highest good led him to the conclusion that the power of the prince was greater than the power of the people whom he rules. "So we see the principal point of sovereign majesty, and absolute power, to consist principally in giving laws unto the subject in general, without their consent." (Bodin, 1962 [1606]: 98.) The sovereign was the sole authoritative source of human law as the head of the state, which was an entity separate from the people, despite their possible role in its creation, "except the king be captive, furious, or in his infancy, and so needeth to have a protector or lieutenant appointed him by the suffrages of the people." (Bodin, 1962 [1606]: 95.)[8]

Bodin's sovereignty was a form of rule over others, in which a prince ruled over a people from which he, himself, stood apart. At the same time, however, the analogy of households to parts of the body pointed toward the introduction of the anthropomorphic metaphor of the state as a vehicle for a collective "people" capable of acting as sovereign, a theme that appears in the reference to "the suffrages of the people" in the case of monarchial incapacity. This points to one of the most ambiguous elements in Bodin's theory. Although he had a great deal to say about the nature and characteristics of sovereignty, he said very little about the *source* of such absolute authority. At several points, Bodin stated that a prince occupies a throne by divine providence, but in numerous other places, he seemed to grant at least the possibility, in some political systems, that power is initially transferred from "the people." For example, where authority was given to rulers for a certain term, as in the case of non-hereditary monarchy, sovereignty remained with the people. "I say no sovereignty to be in [the rulers], 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."

[8] "It is of course true that Bodin continues to speak of la Republique rather than l'Etat .... Nevertheless, it is clear from Bodin's analysis of the concept that he thinks of the State as a distinct apparatus of power .... [Bodin] thus arrives at a conceptualization of the State as a locus of power which can be institutionalized in a variety of ways, and which remains distinct from and superior to both its citizens and their magistrates." (Skinner, 1978, vol. 2: 355–56.)

The people are the true sovereigns because "the ... people themselves, in whom the sovereignty resteth, are to give account unto none, but to the immortal God." (Bodin, 1962 [1606]: 8, 86.)

Where "the people" were sovereign, as in a democracy, Bodin preserved sovereignty-over-others by drawing a sharp and critical distinction drawn between the sovereign collective "people" and individual persons, as in his discussion of oaths and the obligation to obey the law.

> [A]ll the citizens particularly swore to the observation of the laws, but not all together; for that every one of them in particular was bound unto the power of them all in general. But an oath could not be given by them all: for why, the people in general is a certain universal body, in power and nature divided from every man in particular. Then again to say truly, an oath cannot be made but by the lesser to the greater, but in a popular estate nothing can be greater than the whole body of the people themselves. But in a monarchy it is otherwise, where every one in particular, and all the people in general, and (as it were) in one body, must swear to the observation of the laws, and their faithful allegiance to one sovereign monarch; who next unto God (of whom he holds his scepter and power) is bound to no man. (Bodin, 1962 [1606]: 99.)

In every political society, there could be only one sovereign, whose authority was second only to that of God, but God was not the direct source of sovereign authority.

Sovereignty, as noted earlier, was fundamentally the authority to make laws.[9] (Bodin, 1962 [1606]: 159) The very term "law," according to Bodin, contained a necessary reference to a sovereign lawgiver. "This word the Law, in the Latin importeth the commandment of him which hath the sovereignty." (Bodin, 1962 [1606]: 91.) From the implication that law implies a sovereign, Bodin concluded that lawmaking is a necessary and exclusive prerogative of a

[9] In an earlier text, *Methodus*, Bodin identified five fundamental powers of sovereignty, four of which are clearly related to the administration of a system of laws: "The first and most important is appointing magistrates and assigning each one's duties; another is ordaining and repealing laws; a third is declaring and terminating war; a fourth is the right of hearing appeals from all magistrates in last resort; and the last is the power of life and death where the law itself has made no provision for flexibility or clemency." (Quoted at Franklin, 2003: xvi.) The version of sovereignty that is presented in *Methodus*, however, is far less absolute than that which appears in the *Six Books of the Republic*. (Franklin, 2003: xxi-xxii.)

singular sovereign. (Bodin, 1962 [1606]: 156.) The fact of sovereign authority, in turn, defined the legitimacy of the law, without reference to any external standards. "The laws of a sovereign prince, although they be grounded upon good and lively reasons, depend nevertheless upon nothing but his mere and frank good will." (Bodin, 1962 [1606]: 92.) The idea of sovereign as lawmaker was sharply different from the earlier, quasi-constitutionalist idea of a monarch, familiar in both French and English writings, as one who is bound to uphold the laws of his realm.[10] As Skinner observes, the shift in the role of sovereign from the guardian of the law to lawmaker meant that the role of the monarch was no longer "upholding the sense of justice already embodied in the laws and customs of the commonwealth," (Skinner, 1978: 289), but rather to create norms by the positive exercise of will.

Nonetheless, the lawmaking authority of the sovereign remained subject to three sets of limitations.[11] First, sovereigns remain subject to the "laws of God and nature." "[A]s 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." (Bodin, 1962 [1606]: 90, 92.) Remarkably, this led Bodin directly to the protection of private property. "Now then if a sovereign prince may not remove the bounds which almighty God (of whom he is the living and breathing image) hath prefined unto the everlasting laws of nature: neither may he take from another man that which is his,

[10] Medieval notions of monarchial authority limited by customary law were the basis for the arguments of Claude de Seyssel in 1519. (Franklin, 2003: xxi.) Something of this idea also appears in Fortescue's description of the authority of an English monarch. (Pocock, 1975.) Julian Franklin suggests that Bodin saw an inevitable, logical progression from the idea of a monarch bound by customary law and an ultimate claim to a right of resistance. "Bodin must thus have seen, at least intuitively, that binding restraints upon the ruler implied some sense in which the community was higher than the king, and that some right of resistance was inherent in its representatives." As a result, Franklin argues, Bodin concluded that absolute monarchial authority was required to forestall the assertion of right of revolution. (Franklin, 2003: xxiv.)

[11] Skinner identifies the three traditional checks on monarchial power as "*la police*, *la religion*, and *la justice*." Of the three, it is *la police*, the authority of customary law, that Bodin denies outright. "His own view is that law and custom must be distinguished so completely that the idea of a check of custom on the right to legislate is automatically ruled out." (Skinner, 1978: 298.)

without just cause, whether it be by buying, by exchange, by confiscation." (Bodin, 1962 [1606]: 109)[12]

The second limitation on sovereignty inhered in a distinction between public and private spheres that appeared in several forms, not always consistently.[13] The analogy of *pater familias* to sovereign prince applied only in those areas in which the sovereign dealt with property owned in common by the commonwealth. These were not insubstantial areas of activity, to be sure,[14] but "the master of a family hath the government of all domestical things, and so of his whole family with that which is unto it proper." Bodin presented this as an argument about the conditions that would be required to foster republican virtue, rather than as an outer bound to sovereign authority. "It is needful in a well-ordered commonweal to restore unto parents the power of life and death over their children," because "domestical justice and power of fathers [are] the most sure and firm foundations of laws, honor, virtue, piety, wherewith a commonweal ought to flourish." (Bodin, 1962 [1606]: 22–3.)

In this argument, the justification for the limitation on sovereign authority appears to be as much prudential as ontological, just as Bodin was at pains to ground the distinction between public and private property on an argument that private property owners could be counted on to care for their property, whereas property owned in

[12] It is desirable, however, that citizens willingly part with their property when it is needed for the safeguarding of the general good, as in a case of a peace treaty that involves ceding territory to another sovereign. "But forasmuch as the welfare of private men, and all the goods of the subjects are contained in the health of our country, it beseemeth private men without grudging to forgive unto the Commonwealth, not only their private displeasures, and injuries received from their enemies, but to yield also for the health of the Commonwealth, their goods." (Bodin, 1962 [1606]: 109.)

[13] Franklin describes Bodin as "evasive" on the subject of absolutism, and argues that his account "was ... the source of confusion that helped prepare the way for the theory of royal absolutism, for he was primarily responsible for introducing the seductive but erroneous notion that sovereignty is indivisible." (Franklin, 2003: xiii.)

[14] Common ownership, in a commonwealth, extends to "their markets, their churches, their walks, says, laws, decrees, judgments, voices, customs, theaters, walls, public buildings, common pastures, lands, and treasure." "[A]ll which I say are common unto all the citizens together, or by use and profit, or public for every man to use, or both together.... For otherwise a commonwealth cannot be so much as imagined, which hath in it nothing at all public or common." (Bodin, 1962 [1606]: 11.)

common was likely to become the subject of disputation.[15] This admixture of forms of argumentation – definitional, natural, and prudential – is characteristic of Bodin's writing throughout *The Six Books*, and leaves the question of the ultimate ground for the limitations on sovereign authority as unresolved as the question of the ultimate source for that authority. Sovereign authority is absolute within its sphere, but its sphere is limited; both of these propositions required justifications that Bodin was ultimately unable to provide.

Laws of God and divisions between public and private affairs were only two of three sets of constraints on the sovereign. The third was a set of "laws" that followed definitionally from the nature of "sovereignty," itself only analogically a phenomenon of the natural order. A sovereign was bound by laws establishing the legitimacy of his authority, such as the rule of male succession. "But touching the laws which concern the state of the realm, and the establishing thereof; forasmuch as they are annexed and united to the crown, the prince cannot derogate from them." (Bodin, 1962 [1606]: 95.)[16] In addition, a sovereign was bound by a duty of self-preservation such that he could never act in a way that threatened to diminish his own sovereignty. "Those royal rights cannot by the sovereign be yielded up, distracted, or any otherwise alienated; or by any tract of time be prescribed against. ... And if it chance a sovereign prince to communicate them with his subject, he shall make him of his servant, his

[15] "For that which thou shouldst dearly love must be thine own, and that also all thine: whereas community is of the Lawyers usually called of it self, the mother of contention and discord. Neither are they less deceived, which think greater care to be had of things that be common, than of things that be private; for we ordinarily see things in common and publick to be of every man smally regarded and neglected, except it be to draw some private and particular profit thereout of." (Bodin, 1962 [1606]: 12.)

[16] As Kenneth McRae wryly observes, Bodin's inclusion of the law of succession as a binding limitation on the authority of an absolute sovereign posed "a stiff exercise in logic for all later commentators on his theory." (McRae, 1962: A16.) McRae is perhaps overenthusiastic in the importance that he attaches to the limitations on sovereign authority when he proposes that Bodin "was being more sophisticated than Hobbes, more modern than John Austin. He was, in fact, developing a theory of sovereignty strikingly similar to those of the present time." (McRae, 1962: A19.) Nonetheless, it is clearly true that for all his language of absolute authority, Bodin worked the idea of structural constraints on the legitimate exercise of power into his definition of sovereignty, a move with clear resonances in later theories of constitutional rule.

companion in the empire: in which doing he shall loose his sovereignty, and be no more a sovereign: for that he only is a sovereign which hath none his superior or companion with himself in the same kingdom."[17] (Bodin, 1962 [1606]: 155.)

Despite these limitations,[18] the outstanding features of Bodin's version of sovereignty, to modern eyes, were the complete absence of any political basis for questioning the legitimacy of the sovereign's actions and the emphasis on the idea of sovereignty as rule over others. Restrictions on the exercise of sovereign authority might be instrumentally useful, but the only necessary restrictions were those that were analytically necessary elements of the definition of sovereignty itself or if they were voluntarily undertaken by the sovereign. Thus the sovereign could not be compelled by any outside power to limit the authority to which he was entitled, he could only be persuaded (by Bodin) to do so voluntarily, and the sovereign was never bound by his own rules but only followed them out of convenience (Holmes, 1995: 110, 113.) As a result, Bodin's argument appears essentially morally neutral. (McRae, 1962: A20-A21.) In Bodin's understanding, a sovereign who ran roughshod over the laws and customs of his people was a tyrant, but he remained a sovereign, and his subject did not have any right of resistance or revolt as a result of his actions. Where a sovereign acted contrary to the laws of nature – "makes war on God" – his

[17] Drawing on these and other passages, Stephen Holmes concludes that the prohibition on self-binding itself reflects a deeper prohibition on self-destruction by the sovereign of his power. "More profound than the self-binding taboo, and underlying it, therefore, is the self-destruction taboo. Self-binding is illicit when it entails a diminution of royal power. For the same reason, self-binding is permissible and even obligatory when it helps maintain or increase royal power." (Holmes, 1995: 113–14.)

[18] In addition to the limitations on the power of the sovereignty, it was also the case that a sovereign was bound by his commitments in the same manner as any other person. "We must not then confound the laws and the contracts of sovereign princes, for that the law dependeth of the will and pleasure of him that hath the sovereignty, who may bind all his subjects, but cannot bind himself: but the contract betwixt the prince and his subjects is mutual, which reciprocally bindeth both parties" (Bodin, 1962 [1606]: 93.) Even in the absence of an explicit commitment, duties between sovereign and subject were mutual, even if the basis for sovereignty itself was not. "As the subject oweth unto his lord all duty, aid, and obedience; so the prince also oweth unto his subject justice, guard, and protection: so that the subjects are no more bound to obey the prince, than is the prince to administer unto them justice" (Bodin, 1962 [1606]: 500.)

subjects were relieved of the duty of obedience, but remained bound to avoid resistance; judgment would be visited on the tyrant by God.

THOMAS HOBBES' *LEVIATHAN*: SOVEREIGNTY OVER LANGUAGE

Thomas Hobbes continued Bodin's project of defining the terms of political sovereignty, but he went much farther in defining the source of sovereignty and of its limitations. Hobbes shared Bodin's commitment to an ideal of a political sovereignty whose authority was both equally absolute and equally securely legitimated as that of religious authorities. But by Hobbes' time, the analogy to the natural order of the family had become the basis for the early modern doctrine of the divine right of kings.[19] For Hobbes, as for Bodin, such a claim was untenable, if only because of the inherent insecurity that was entailed. If political authority depended on religious doctrine, then the rejection of religions doctrine would lead directly to a rejection of secular authority, raising the familiar specter of religious civil war. Like Bodin, Hobbes sought a basis for political authority that would be immune to challenge on the basis of competing claims of religious orthodoxy.[20] Unlike Bodin's appeal to a natural order, however, Hobbes drew his grounding principles from

[19] Skinner identifies the source of the doctrine of the divine right of kings in a combination of Bodin's theory of sovereignty and Protestant theology. "They all begin by taking over Bodin's claim that an absolute form of legislative sovereignty needs by definition to be located at some determinate point in every state. To this they add the originally Protestant belief that all such powers are directly ordained of God, so that to offer any resistance to the king is strictly equivalent to resisting the will of God. With the union of these two arguments, the distinctive concept of the 'divine right of kings is finally articulated." (Skinner, 1978, vol. 2: 301.)

[20] A number of writers have found an implicit theological understanding at the basis of Hobbes' political ideas, particularly in terms of his commitment to natural equality. Joshua Mitchell argues that Hobbes' theory of sovereignty "should not be viewed as an absolutist *political* theory, but as a worldly extension of a theological insight." For Mitchell, Hobbes' politics is a worldly solution to the problem of pride, based on the anti-foundationalism of Hobbes' epistemology that treats the attempt to derive moral principles from reason as an example of vainglory. (Mitchell, 1993: 79, 81.) Mitchell concludes that the necessity for submission to a single sovereign "recapitulates aspects of Reformation theological speculation about the (prideful) priesthood of all believers under one sovereign (Christ)." While this is an interesting and plausible interpretation of Hobbes' project, it does not diminish the significance of the observation that Hobbes' arguments did not fit

the universal facts of human epistemology, locating both the source and the limitations on the authority of the sovereign in the nature of language.

The key move in separating political authority from its religious roots was a shift in focus in the meaning of "natural law." For Bodin, natural laws were the laws of God. For Hobbes, by contrast, "laws of nature"[21] were consequences of the universal facts of human psychology, and fundamentally of the desire for self-preservation.[22] In the preface to *On the Citizen*, Hobbes explained that his initial project was to explore "the faculties of human nature" in order to

into any orthodox Christian teachings of his day, an observation that leads Mitchell to describe Hobbes as a "perverse Christian." (Mitchell, 1993: 86, 84.)

[21] The use of the term "law" is tricky, here, as Hobbes declares that "dictates of reason, men used to call by the name of laws, but improperly; for they are but conclusions, or theorems concerning what conduceth to the conservation and defense of themselves; whereas law, properly is the word of him, that by right hath command over others." (Hobbes [1651], 1996: 90. See Gauthier, 1979: 551–52.) This positivistic definition of the word "law" is arguably in tension with Hobbes' occasional references to laws of God. One explanation is that God created Man to have a certain nature, including the desire for self-preservation, an understanding that fits well with the idea that is described here as "human natural law." Michael Oakeshott uses the distinction between a "law" and "conclusions, or theorems" to argue that Hobbes would have rejected the distinction that I have drawn between categories of "natural" law. "[N]o proper distinction can be maintained between a Natural or Rational and a Revealed law. All law is revealed in the sense that nothing is law until it is shown to be the command of God by being found in the Scriptures." (Oakeshott, 1991: 268–69.) English Calvinists, however, took a different view. "Thus there are two books from whence I collect my divinity," wrote Thomas Browne in 1643, "besides that written one of God, another of his servant Nature." (Browne, 1643: 1.) In 1639, William Ames went so far as to declare that "[a]ll the precepts of the moral law, are out of the Law of Nature, except the determination of the Sabbath day ... there is nothing in them, which is not so grounded upon right reason, but it may bee solidly defended and maintained by human discourse, nothing but what may bee well enjoined from clear reason." (Ames, 1639: 107.) Skinner points out that the mode of reasoning characteristic of this strain of Calvinist thinking, associated with the teachings of Petrus Ramus, is evident in Bodin's arguments. (Skinner, 1978: 291.)

[22] Gregory Kavka elucidates Hobbes' reliance on human natural law as follows: "[I]f some of our dominant shared ends, like survival, are unavoidable givens of our nature, rational beings with such natures will be unable to avoid pursuing what they perceive to be the necessary means to those ends. It follows that the requirements of any moral system capable of effectively guiding human action must be compatible with undertaking these means, that is, these means must be at least morally permissible. Here is a derivation of moral permissions, if not ought-judgments, from facts (about our natures) and the logic of the moral concept 'ought.'" (Kavka, 1986: 292.)

determine "whether [men] are born fit for society and for preserving themselves from each other's violence, and which faculty makes them so." From the conclusions reached in that regard, Hobbes proposed to "explain the policy which they had inevitably to adopt for that purpose ... which are simply the fundamental *laws of nature* under another name." (Hobbes [1642], 1998: 21.) Hobbes' "laws of nature" thus revealed aspects of what I have referred to as human, as opposed to divine, natural law – that is, laws grounded in specifically human nature. Hobbes did not deny the proposition that humans receive this nature from their divine Creator, but his immediate subject of concern was the set of universal human traits rather than their origin or their connection to a global normative order.

In *Leviathan*, Hobbes both began his study and ultimately relied for the verification of his findings on an introspective analysis of the psychology of human experience.[23] "[W]hen I have set down my own reading orderly, and perspicuously, the pains left another, will be only to consider, if he also find not the same in himself. For this kind of doctrine, admitteth no other demonstration." (Hobbes [1651], 1996: 11.) To the extent that analysis could be shown to be universal, and his political conclusions shown to follow necessarily from his psychological analysis, Hobbes would have created a universal theory of the conditions of possibility of political rule in human society. "I say the similitude of passions, which are the same in all men ... not the similitude of the objects of the passions, which are the things desired, feared, hoped, etc.: for these the constitution individual, and particular education do vary." Natural laws would reflect the goods than any person must rationally desire as the product of prudence, "a presumption of the future, contracted from the experience of time past" (Hobbes [1651], 1996: 10, 23.)

To establish universally desired goods, Hobbes began by constructing an epistemolgical theory of language. For Hobbes, thoughts began with perceptions. Borrowing from Galileo, Hobbes

[23] "Read thyself .... for the similitude of the thoughts, and Passions of one man, to the thoughts, and Passions of another, whosoever looketh into himself, and considereth what he doth, what he does think, opine, reason, hope, fear, &c., and upon what grounds; he shall thereby read and know, what are the thoughts, and Passions of all other men, upon the like occasions." (Hobbes [1651], 1996: 2.)

identified perception as the sensation produced by change, or motion.[24] But sense perceptions could not yield direct knowledge, only mediated observations indistinguishable from illusions or "fancy." The only certainty was the sensation of perception itself, a proposition with obvious connections to the Cartesian invocation of the *cogito*.[25] Consequently, the "thoughts of man," or "understanding," could not be certainly grounded in direct perception, but could only reflect the organization and recollection of sense-impressions that were themselves no more than "fancies" in response to external motions of objects.

To get from the sensation of perception to coherent thought, organization was required. The "train of thoughts ... that succession of one thought to another ... is called mental discourse." (Hobbes [1651], 1996: 20) By itself, however, the train of thoughts had no necessary logic. Thoughts became coherent when the train of imaginations was "regulated by some desire, and design." "From Desire, ariseth the Thought of some means we have seen produce the like of that which we aim at; and from the thought of that, the thought of means to that mean; and so continually, till we come to some beginning within our power." (Hobbes [1651], 1996: 20–21.)

[24] "If we should suppose a man to be made with clear eyes ... but endued with no other sense; and that he should look only upon one thing, which is always of the same colour and figure, without the least appearance of variety, he would seem to me ... to see, no more than I seem to myself to feel the bones of my own limbs by my organs of feeling." In another move that prefigures twentieth-century epistemology, Hobbes denied the existence of a "ghost in the machine," an observing "I" capable of recognizing the experience of perception. "[A]lthough someone may think that he was thinking (for this thought is simply an act of remembering), it is quite impossible for him to think that he is thinking, or to know that he is knowing. For then an infinite chain of questions would arise: 'how do you know that you know that you know....?' " (quoted in *Objections to Descarte's* Tuck, 2002: xvi–xvii, xix). Joshua Mitchell relies on this physical character of thought to draw a sharp distinction between truths knowable by reason and those that depend on metaphysical sources. (Mitchell, 1993: 80.) If one accepts the idea that Hobbes' natural law principles are grounded in human psychology, rather than derived from religious teachings, however, then the necessity for importing this distinction disappears.

[25] "[S]ense in all cases, is nothing else by original fancy, caused (as I have said) by the pressure, that is, by the motion, of external things upon our eyes, ears, and other organs thereunto ordained. "(Hobbes [1651], 1996: 14.) Richard Tuck comments that the emphasis on perceptions of motion was the dividing principle that separated Hobbes' epistemological system from that of Descartes. (Tuck, 2002: xvi.)