Introduction

Richard Bourke

Popular sovereignty is a key component of modern political thinking, yet a history of the concept has not previously been attempted. This volume does not pretend to offer a comprehensive treatment. It arises from a collaborative project involving scholars specialising across a range of periods – spanning ancient, medieval, early modern and modern political thought. What has emerged is not a continuous and exhaustive account but a series of chapters that analyse some of the principal developments that reshaped the history of the doctrine.

The term 'sovereignty' came into English from the old French word *souveraineté*, itself derived from the medieval Latin name for a superior, *superanus*. Etymology, however, is not a sufficient guide to meaning. For early modern writers trying to explicate the concept, it seemed necessary to place it within a constellation of terms stretching back into the Graeco-Roman past. For instance, in Chapter 8 of Book I of the 1583 French edition of *Les six livres de la République*, Jean Bodin renders *souveraineté* by the Latin noun *maiestas*.[1] In its most basic sense, this Latin word connotes grandeur or authority. For example, in Livy's history of Rome, in the process of recounting a conflict over the nature of dictatorial authority, the author refers to the 'standing' (*maiestas*) of the Roman senate.[2] Furthermore Cicero, in defining the crime of *lèse-majesté* in his manual on oratory, *De inventione*, emphasised that injury to *maiestas* involved a diminution of greatness (*amplitudo*), authority (*potestas*) and dignity (*dignitas*).[3] Majesty combined dignity with dominion in this context. Dignity could also connote ultimate status, as in the invocation of the supreme authority of the Roman people (*per maiestatem populi Romani*) in Sallust's account of the conflict leading to the Jugurthine war.[4] Sallust's description appears as part of a speech by the Numidian prince Adherbal, who was seeking assistance from the Roman senate.

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[1] Jean Bodin, *Les six livres de la République* (Paris: Jacques du Puys, 1576; Paris: n.p., 1583), p. 122. (All page numbers cited in this introduction are from the 1583 edition unless otherwise indicated.)

[2] Livy, *Ab urbe condita* VIII, 34.   [3] Cicero, *De inventione* II, xvii, 53.

[4] Sallust, *Iugurtha* XIV, 25.

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Adherbal stressed his position as an administrative deputy (*procurator*) under the superior authority of Rome. Explaining the implications of his subjection, he ascribed right (*ius*) and control (*imperium*) to the Roman people.[5] Thus in the Latin of republican and early imperial Rome, *maiestas* could be defined in terms of *potestas*, *ius* and *imperium*. Unsurprisingly, therefore, as early modern humanists such as Bodin set out to develop their own ideas about the nature of authority they became interested in the range of classical usage.

Bodin's approach to understanding the nature of sovereignty was philological and analytical at the same time. His interest in philology prompted him to explore the varieties of past idioms while his faith in analysis impelled him to add precision to previous conceptions.[6] He claimed that sovereignty was a feature of all political communities although its precise character had never been properly understood before. For that reason the notion could be found in all languages – in Hebrew, Greek and Italian, for example – although earlier jurists had failed to unravel the implications of its meaning.[7] It was important to Bodin to emphasise that the Greeks had employed the concept, though like other cultures they had failed to use it with perfect consistency. Phrases such as *akra exousia* (supreme power) and *kurion archē* (authoritative rule), which frequently appear in the texts of the ancient Athenians, seemed to Bodin to point to the idea of sovereignty. But while the Greeks had the idea, he went on to observe, they lacked a complete understanding of how to apply it consistently. As Richard Tuck has pointed out, the thought of Aristotle best exemplified Bodin's criticism: as Bodin tells us in the *Methodus ad facilem historiarum cognitionem*, Aristotle's *Politics* had a name for sovereignty or *summum imperium* although the author 'nowhere defines' it.[8] It therefore fell to Bodin to supply a definition. Towards that end, he explained the concept of *maiestas* (or *summum imperium*) in terms of four universally requisite traits: such power had to be supreme, absolute, indivisible and perpetual.[9] Then, in chapter 10 of Book I of *Les six livres de la République*, he presented the 'marks' (*marques*) or attributes of sovereignty as necessary entailments of these basic traits.

[5] Ibid., XIV, 1–2.
[6] J. Franklin, *Jean Bodin and the Sixteenth-Century Revolution in the Methodology of Law and History* (New York and London: Columbia University Press, 1963); D. R. Kelley, *Foundations of Modern Historical Scholarship: Language, Law, and History in the French Renaissance* (New York and London: Columbia University Press, 1970).
[7] Bodin, *Six livres*, p. 122.
[8] Jean Bodin, *Methodus ad facilem historiarum cognitionem* (Paris: n.p., 1566), p. 181; R. Tuck, *The Sleeping Sovereign* (Cambridge: Cambridge University Press, forthcoming), chap. 1.
[9] Bodin, *Six livres*, p. 122. Cf. Jean Bodin, *De republica libri sex* (Paris: n.p., 1786), p. 345.

There was one attribute above all others that Bodin insisted on ascribing to the bearer of sovereignty, and that was the right of making laws. This right, however, required clarification since it did not stop at legislation as such, but included the privilege of declaring war and concluding peace, as well as the right of selecting the highest magistrates in the state. Bodin's principal objective in setting out the attributes of sovereignty in this way was to elucidate the defining characteristics of princely rule. Thus neither democracies nor aristocracies were his primary concern. Nonetheless, he believed that the accuracy of his account of monarchical sovereignty could be tested against examples of other regime forms. According to an important passage in *Les six livres de la République*, the idea of supreme authority was founded on the distinction between subject and sovereign.[10] This meant that a sovereign could not exhibit any characteristics of subjection without reducing the idea of sovereignty to absurdity. Given the pervasiveness of subordinate jurisdictions in monarchies such as France, sovereignty was above all evident in the subjection of these subordinate powers to the ultimate jurisdiction of the king. Bodin believed that this claim could be reinforced by comparing the relatively simple case of supreme authority under a monarchy with the operation of sovereignty in popular regimes. He therefore turned his attention to Athens and Rome, the two 'plus grandes Républiques populaires' that had ever existed, in order to show that the characteristics of supreme power were as applicable in the case of democratic regimes as they were in kingdoms.[11]

The identification of popular sovereignty with democracy therefore begins with Bodin. Nonetheless, it is important to recognise that key elements of the modern concept were constructed out of classical materials. As Kinch Hoekstra makes clear in his chapter on fifth-century BCE Athens that opens this volume, writers such as Aristophanes and Herodotus had a clear conception of supreme unaccountable rule residing in the people. For Aristophanes in particular, if the *dēmos* were not to be overmastered by their leaders, they had to possess what he dubbed 'tyrannical' power. Tyranny might almost be thought to serve as a synonym for sovereignty here since it is understood as unitary, supreme and unaccountable at once. Yet later, when Bodin came to consider the rights of supreme power, he was careful to distinguish the legitimate use of sovereign authority from the practice of tyrannical government. Sovereignty, unlike tyranny, was a supreme *right*. Bodin proceeded to explain his argument by criticising Philipp Melanchthon on the nature of tyrannical power. According to Bodin, Melanchthon had confused the

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[10] Bodin, *Six livres*, pp. 214–15.   [11] Ibid., p. 224.

'rights' of sovereignty with the abuse of magisterial power. Sovereignty, Bodin argued, unlike tyranny, was bound by the laws of nature prescribed by God. While sovereignty was therefore juridically absolute it remained a morally subordinate power. That meant that while *summum imperium* was legally unaccountable it was nonetheless answerable for its conduct to the moral law.[12]

If sovereignty was obliged to act under moral constraints while nonetheless enjoying juridical supremacy, Bodin had yet to clarify whether it was subject to political control. A control on power in this sense could take one of two forms, as Bodin saw it: either the people could thwart the will of their ruler, thus restraining sovereignty by popular resistance; or else the exercise of sovereignty could be divided among distinct powers. Bodin firmly set his face against both options. In the first case, if the people claimed a right of appeal against sovereign authority, they were in effect ascribing supreme jurisdiction to themselves. This appeared to Bodin to involve a confusion of roles whereby the subject mistook its status as ultimately supreme. For the people to assert their supremacy was to claim their right as *summum imperium*. It might of course be the case, in a popular regime, that the people were indeed legitimately sovereign. But then, as with monarchical sovereignty, there could be no appeal against their final authority. For supremacy to function it had to be supreme.

Bodin was equally sceptical about dividing the powers of sovereignty, thereby subjecting supreme jurisdiction to practical restraints. Here he focused on criticising the views of Aristotle, Polybius and Dionysius of Halicarnassus. These writers distinguished among different 'parts' of sovereignty, with the implication that one part could limit the power of another. For Bodin, Aristotle was the most serious culprit in this regard since he went so far as to identify the parts of sovereignty inaccurately. Yet Polybius and Dionysius of Halicarnassus were equally misguided in so far as they built their constitutional theory on the false assumption that the parts of sovereignty could also be divided among different powers. Bodin accepted that legislation, the selection and control of officials, and the rights of war and peace could in principle be identified as distinct attributes of supreme power, yet he denied that these prerogatives could reside in distinct political bodies. How could one coherently deprive legislative power of the right to decide on matters of war and peace? In the same vein, how could the legislature not control the means of administration?

[12] Ibid., p. 211.

Once again, Bodin was anxious to take issue with Aristotelian claims in particular. Above all, he disputed the idea that different parts of the state could somehow 'share' (*metechein*) in its sovereignty.[13] For instance, if the attributes of sovereignty under a monarchy were diversely located, 'there would be no sovereign prince'.[14] The same applied to the other principal forms of constitution: in a democracy or an aristocracy the marks of supreme authority could not be distributed among different parts of the constitution. Certain attributes of rule, such as administration and deliberation, might be exercised by distinct branches of government, but the supreme functions, like legislation and the control of magistracy, could not plausibly be held separately among distinct agents in the state. Thus, from Bodin's perspective, Aristotle was right to say in Book III of the *Politics* that supreme power (*to kurion*) must be in the hands of either the one, the many or the few.[15] Yet he was mistaken when he argued in Book IV of the same work that its attributes could be variously shared.

Aristotle's argument was based on a division of the city into constitutive components. Every polity, he wrote, is composed of many 'elements' (*merē*).[16] These elements consisted of social divisions within the communality – between rich and poor; oarsmen and hoplites; farmers and traders. Different regimes variously reflected these distinctions, giving rise to assorted forms of government: democracy, aristocracy, oligarchy, monarchy and so forth. As Melissa Lane shows in her chapter on Aristotle's conception of democracy, constitutional forms can in part be defined in terms of two significant criteria: access to office on the one hand, and selection to office on the other. Aristotle recognised that deliberative councils, popular assemblies and the judiciary were essential to the operation of virtually every city-state. But he also emphasised the distribution of offices (*archai*) as a pivotal means of categorising regime forms. In one of the more extreme forms of democracy, which Aristotle describes in Book IV of the *Politics*, all power resides in the commerce between the assembly (*ekklēsia*) and its demagogues (*demagōgoi*): decrees (*psephismata*) supplant laws (*nomoi*) and the authority of offices declines.[17] Yet in Book III Aristotle also argues that the multitude (*to plēthos*) might be given prominence without such unfortunate consequences. This is where they are given access to power sufficient to pacify their ambition

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[13] The idea of sharing or participating in power is pervasive in Aristotle, *Politics*, Books III and IV. For Bodin's critique see *Six livres*, p. 212.

[14] Ibid.   [15] Aristotle, *Politics* 1279a25–30.

[16] Ibid., 1289b30. On this theme in ancient and early modern political thought, see P. Pasquino, 'Machiavelli and Aristotle: The Anatomies of the City', *History of European Ideas* 35 (2009), pp. 397–407.

[17] Aristotle, *Politics* 1292a1–10.

without investing them with political control over all aspects of the polity. Specifically, they can be trusted with the power of electing governors to offices and holding them to account without allowing them to occupy the highest offices themselves.[18]

Earlier in Book III Aristotle made plain that the exclusive predominance of the common people (*to plēthos*) in the city subverted constitutional government altogether. Legitimate government, he believed, was a system of rule designed to promote the ideal of justice in the polity. That goal could only be served by catering to the general advantage (*to koinon sumpheron*).[19] Correspondingly, it was undermined by the pursuit of factional or partial interests. Where the majority population (*to plēthos*) ruled for its own benefit, the welfare of the people (*ho dēmos*) as a whole was undermined. As Valentina Arena shows in her chapter on the political thought of Cicero, the Platonic–Aristotelian conception of the republic (*politeia*) as an arrangement of offices shared among different constituencies in the city underlies much of the analysis in *De re publica* and *De legibus*. In the latter work, Plato's *Laws* is singled out as the best guide to understanding the problems of legitimate rule. The Stoics, Cicero conceded, had also applied themselves to political philosophy, but not as a practical science. The empirical study of the forms of government was confined to Plato and his disciples, Aristotle being the most distinguished example.[20] The centrepiece of the fourth-century BCE Athenian analysis was the mixed constitution, which blended the need for prudent or wise deliberation with the popular desire for equality. Aspects of that ideal were later adapted by the Romans.[21] As Cicero put it in *De re publica*, the *civitas* is made harmonious by establishing consensus between different orders.[22] Arena shows how Cicero revised what he took to be the appropriate terms of that consensus between his work on *De re publica* and the completion of *De legibus*. That involved reconsidering how the commonwealth (*res publica*) could best benefit the affairs of the people (*res populi*). This reconsideration led Cicero to develop a series of criticisms of populist provisions under the Roman constitution, including the process of election, the role of the censors and the status of the tribunes. Nonetheless, in both *De re publica* and *De legibus* the welfare of the *populus* as a whole is assumed to depend on constitutionally modified power. Moderation, based on some kind of accommodation between the

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[18] Ibid., 1281b30–35, and Lane, Chapter 2 below.
[19] Aristotle, *Politics* 1279a25–30.   [20] Cicero, *De legibus* III, 14.
[21] For discussion of mixed regimes in classical and early modern thought see W. Nippel, *Mischverfassungstheorie und Verfassungsrealität in Antike und der Früher Neuzeit* (Stuttgart: Klett-Cotta, 1980).
[22] Cicero, *De re publica* I, 45.

liberty of the people and the authority of the senate, is the guiding ideal in both works.[23]

Much of the moral framework standardly employed among classical conceptions of constitutional government was adopted by political commentators in the northern Italian city-states between the twelfth and fourteenth centuries.[24] Marsilius of Padua's *Defender of the Peace* stands out as a rich example. Written, as Serena Ferente emphasises in her chapter, at a time when popular regimes in the *Regnum Italicum* were succumbing to oligarchical manipulation and being squeezed by the rival claims of powerful overlords and the papacy, Marsilius turned back to Aristotle's *Politics*, translated into Latin in the preceding century by William of Moerbeke, in order to develop a conception of legitimate regime formation. According to the scheme developed in *The Defender of the Peace*, just rule was only possible under well-tempered constitutions. These should be based on consent and cater to the general advantage.[25] According to Marsilius, both these criteria were commonly observed in three distinct forms of government, corresponding to Aristotle's 'correct' constitutions. Amongst these correct forms was Aristotle's republic or polity (*politeia*) in which, as Marsilius described it, 'every citizen had some share' in the system of government.[26] Participation, he noted, was by turns; and also according to rank. This last point implied that different orders in the city could divide the governing authority between themselves. We have been emphasising that it was this kind of understanding that provoked Bodin into disputing the viability of mixed regimes. If sovereignty is 'indivisible', he asked, 'how could it be shared by a prince, the nobles, and the people at the same time?'[27]

As Richard Tuck shows in his chapter on the idea of the sleeping sovereign in early modern political thought, Bodin's rhetorical question was made possible by a distinction between sovereignty and government. The distinction seems to be absent in the philosophical commentary of the Greeks. In a famous passage in the *Politics*, Aristotle had written that a constitution should be understood in terms of the 'organisation of the city in respect of its various offices, and especially of the most authoritative of all' (ἔστιν δὲ πολιτεία πόλεως τάξις τῶν τε ἄλλων καὶ μάλιστα τῆσ κυρίας πάντων). He went on: 'For the government is everwhere supreme over the city' (κύριον μὴν γὰρ πανταχοῦ τό πολίτευμα τῆς πόλεως).[28] For Bodin, on

[23] Cicero, *De legibus* III, 17.
[24] Q. Skinner, *The Foundations of Modern Political Thought*, 2 vols. (Cambridge: Cambridge University Press, 1978), I, pp. 3–22.
[25] Marsilius of Padua, *The Defender of the Peace*, trans. Annabel Brett (Cambridge: Cambridge University Press, 2005), pp. 40–1, 47.
[26] Ibid., p. 41.   [27] Bodin, *Six livres*, p. 254.   [28] Aristotle, *Politics* 1278b9–13.

the other hand, it was important to recognise that sovereignty rather than government (*politeuma*) was supreme. As Tuck goes on to show, Bodin's analysis proved fruitful: in Rousseau the distinction between sovereignty and government was still pivotal, being used to differentiate between legitimately sovereign will (*summum imperium*) and specific acts of power (*administratio*). Such acts were by no means insignificant manifestations of authority. Magistracy was the quotidian means of policy implementation. Nonetheless, as Bodin, Hobbes and Rousseau emphasised, these acts of government were authorised by an underlying power which they called sovereignty. As Bodin first formulated the idea, an agent should be distinguished from the authority that empowered it, with the result that the authorising sovereignty had to be distinguished from the governning agents acting in its name: 'the act of an agent (*procureur*) may be disavowed if he has transacted even the slightest matter for another without express permission (*charge*)'.[29]

The idea that political magistracy was ultimately answerable to democratic sovereignty had a complex career ahead of it. It would prove highly controversial during the constitutional debates that divided various partisans during the French Revolution. Many of the terms in which this later controversy was conducted were not, however, without precedent. In the 1640s, for example, the role of the people in relation to government in England was heavily contested in the context of disputes between Parliament and the Crown. As Alan Cromartie argues in his chapter, opponents of the Crown could draw on a tradition of common-law thinking to vindicate the adjudicative role of Parliament in securing the rights of the subject. For advocates of parliamentary privilege such as Henry Parker the defence of popular rights supplanted an older humanistic emphasis on the role of government in the promotion of public virtue. From Parker's vantage point, a desirable system of rule should secure the liberty of the citizen rather than advance the moral perfection of the community. This outcome was best achieved by the operation of representation. Parliament, on Parker's understanding, encapsulated the population at large. It was therefore seen as a virtual approximation of the people and in that capacity entitled to supreme power: Parliament was not a proxy but the embodiment of popular sovereignty. As Lorenzo Sabbadini clarifies the point in his chapter, any initiative by Parliament was a justifiable act of authority, even when opposed by the bulk of the population. Parliament rather than the 'universality' whom it represented was the bearer of popular sovereignty.[30] As Sabbadini emphasises, it was

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[29] Bodin, *Six livres*, p. 227.
[30] [Henry Parker], *Jus Populi* (London: Robert Bostock, 1644), pp. 18–19.

this claim that Levellers such as John Lilburne and Richard Overton were determined to contest by challenging the authority of parliament in the name of the actual people.

Leveller publicists began by accepting Parliament as a vehicle for popular sovereignty, only to end up objecting to the 'absolutism' of the Lords and Commons. Their anxiety about the tendency among representatives to betray the desires of the population whose interests they were entrusted with protecting encouraged them to champion self-ownership among citizens in opposition to the unrestrained privilges of Parliament. At the same time, they helped to entrench a growing uneasiness through the 1640s about the practicality of mixed regimes. Doubts about the viability of dividing supreme power were entertained on both the Republican and Royalist sides. In *De Cive*, Hobbes had been adamant that a 'mixed state' was a contradiction in terms.[31] Yet to many European observers the establishment of a mixed system of government in Britain after 1688 seemed to point to the possibility of just such an arrangement. It has been influentially argued that the idea of absolute sovereignty was then 'blunted' in the eighteenth century as polemicists strove to justify the principle of moderate government.[32] Between Montesquieu and the Federalists the ideal of a *respublica mixta* became a potent political norm. It is nonetheless a mistake to see this widespread commitment to mixed government as antithetical to the principle of *summum imperium*. In the 1766 version of his *Lectures on Jurisprudence*, Adam Smith was happy to distribute the rights of sovereignty among distinct organs of government: 'With regard to governments where the supreme power is divided amongst different persons, there is no great difficulty in ascertaining when any one transgresses the limits of his power.'[33] In the same vein, in the mid-1790s Immanuel Kant could distinguish between *forma imperii*, whose powers were necessarily absolute, and *forma regiminis*, under which the powers of government could be beneficially divided.[34] Absolute sovereignty, it seemed, could be exercised between different branches of government.

A preoccupation with sovereignty in the eighteenth century arose in two distinct contexts. In the first place it emerged in connection with the tribulations of imperial politics. From the late seventeenth century,

[31] Thomas Hobbes, *De Cive: The Latin Version*, ed. H. Warrender (Oxford: Clarendon Press, 1983), pp. 151–2.
[32] F. H. Hinsley, *Sovereignty* (Cambridge: Cambridge University Press, 1986 [1966]), p. 152.
[33] Adam Smith, *Lectures on Jurisprudence*, ed. R. L. Meek et al. (Indianapolis: Liberty Fund, 1982), p. 325.
[34] Immanuel Kant, 'Towards Perpetual Peace: A Philosophical Project', in *Practical Philosophy*, ed. M. J. Gregor (Cambridge: Cambridge University Press, 1999 [1996]), p. 324.

the European balance of states was increasingly understood in terms of a balance of empires. Domestic power was usually seen as a function of the colonial and provincial assets appended by conquest or acquisition to the dominant political players in Europe. The extension of European government both eastwards and westwards into agricultural and trading settlements brought with it a range of subordinate jurisdictions. After the Seven Years War in particular, as subordinate authorities in India and America came into conflict with metropolitan powers, the rights of sovereignty emerged once more as a contentious topic in the politics of the period. In the second place, sovereignty was debated from around the middle of the eighteenth century in the context of disputes about the role of the people in relation to established powers. In Britain these debates intensified from around the middle of the 1760s as parties in Parliament began to mobilise opinion out of doors. The issues involved became still more pressing as insurgency in America after 1775 encouraged a posture of resistance among extra-parliamentary agitators and publicists in the metropole.

It has frequently been noted that popular sovereignty in America helped to inspire the language of opposition in Britain. However, as Eric Nelson argues in his contribution, popular sovereignty in the colonies could take a variety of forms, prominent amongst them being Patriot attempts to reconcile popular authorisation with the prerogatives of the Crown. For many who took issue with the Stamp Act and then the Intolerable Acts, the Revolution was a rebellion against the tyranny of the Westminster Parliament. As James Wilson, Benjamin Franklin, Alexander Hamilton and John Adams made plain in the 1760s and 1770s, Patriots in the colonies were openly alarmed by the British Parliament's claims to bind the will of subordinate legisatures in the Empire. This led to the denial that Parliament represented the Americans merely on account of 'virtually' securing their interests. Instead it was argued that representation had to be authorised by popular consent, whatever the form of government to which the people might pledge themselves. In accordance with this stipulation, the 1787 constitution of the United States combined a mixed system of government with a doctrine of popular sovereignty.

For this reason, when the ratification of the constitution was retrospectively discussed in the British House of Commons during the debate on the Quebec Bill of 1791, Whigs as diverse as Edmund Burke and Charles James Fox were happy to endorse its provisions.[35] For both

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[35] *The Parliamentary History of England from the Norman Conquest in 1066 to the Year 1803*, ed. William Cobbett (London: n.p., 1806–20), 36 vols., XXIX, cols. 359 ff.