The idea of sovereignty led to great advances in political and legal thinking. It unleashed the clarifying capacities of general theory abstracted from the complications of established agencies of ruling and administration in particular commonwealths. A focus on the concept of sovereignty facilitated the formulation of absolutist theory, according to which not only must all states be sovereign (or they are not states), but sovereignty therein must be unlimited and undivided (or it is no longer sovereignty). The logic of absolutism has important earlier exponents, but was given its early modern impetus by Jean Bodin (1530–1596). Thomas Hobbes (1588–1679) follows Bodin's arguments against limitations on sovereignty and his rejection of mixed or divided sovereignty. Unable to do justice to both thinkers here, I focus on Hobbes, who is more consistently absolutist. Yet historical and conceptual questions remain about Hobbes's own views of limitation, mixture, division, and administration. Considering such questions can illuminate the intellectual history of constitutionalism in a way that an exclusive focus on republicanism and the development of mixed government cannot.

While limitations on the highest power in the state were associated most notoriously with Calvinist theories of resistance and justifications of tyrannicide, such limitations were often asserted by those who were conservatives or traditionalists about established systems of administration and control, in which they often had a stake. While mostly regarded now as arch-authoritarians, those who instead swept these systems aside or demoted them to the delegated and discretionary dispensations of the sovereign were perceived as philosophical radicals who cut at the roots of established authority. Some known as absolutists were especially keen to rein in or provide for clear authority over the power of the magistrates, officials, and noblemen who were seen as the primary instruments of subjects' oppression. Although the distinctions are ultimately complicated, the debates also highlight methodological
differences: roughly speaking, the theories of medieval constitutionalists were embedded in historical and institutional contexts, whereas absolutists worked to abstract from such contingent features a universal political philosophy that proceeded from logical analysis of the meaning of supremacy. This in turn changed the way in which constitutionalists had to address the issues.

Absolutism, as the negation of limitations on the supreme power and the rejection of any division of sovereignty, would seem to be constitutionalism's other. The history of political and constitutional thought is sometimes told in terms of the opposition between absolutists and constitutionalists (or, somewhat differently, between absolutists and republicans), with the latter slowly winning the argument. On these accounts, absolutists like Jean Bodin and Thomas Hobbes insist that there must be a single unlimited source of legal and political authority, whereas constitutionalists and republicans maintain that sovereignty should be mixed or divided, and that there should be multiple balancing sources of legal and political authority. There are different versions of the history of this debate. So John Pocock argues that a central point of the republicans was that absolutism was tantamount to tyranny, which led to a people inclined to vices such as cowardice and servility, while a republican arrangement of mixed government was the safeguard of virtue. Quentin Skinner agrees that the republicans regarded absolutism as tantamount to tyranny, but reads the republicans as primarily concerned not with virtue but with liberty, which required mixed or limited government.

I think there is good evidence for a third view of the dispute, which Arihiro Fukuda did much to develop. Fukuda argued that providing for stable and authoritative rule or *imperium* was a central concern of classical and neo-classical republicans. Yet absolutists like Bodin and Hobbes also took *imperium* in this sense to be the organizing ideal of

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1 I draw here on the important work of Arihiro Fukuda. ARIHIRO FUKUDA, SOVEREIGNTY AND THE SWORD: HARRINGTON, HOBBES, AND MIXED GOVERNMENT IN THE ENGLISH CIVIL WARS (1997). An early version of this paper was delivered on September 28, 2004 at The Faculty of Law, University of Tokyo, as a memorial for Fukuda. Since then, I have benefited from discussions at the University of Pennsylvania Law School, the University Center for Human Values at Princeton, and the Benjamin N. Cardozo School of Law, and particularly from the comments of Arash Abizadeh, Pablo Gilabert, Paul Guyer, Melissa Lane, Philip Pettit, and Larry Temkin.

2 I do not wish to take up the question of which single account best captures the essence of historical republican constitutionalism. This may vary from work to work, and an author may have multiple unprioritized reasons for defending mixture. Kurt von Fritz summarizes one case: “For this mixed constitution, or system of checks and balances, Polybius had claimed three fundamental advantages over all other kinds of constitutions or political systems: that it was more stable, that it made a country stronger than those... having a different political order, and that it guaranteed the liberty of the citizens...” KURT VON FRITZ, THE THEORY OF THE MIXED CONSTITUTION IN ANTIQUITY: A CRITICAL ANALYSIS OF POLYBIUS’ POLITICAL IDEAS 306 (1954).
their political theories, though they were polemically opposed to the republican tradition of a limiting and balancing constitution. The relevant disagreement, then, would have been between an interpretation of *imperium* according to which it had to be in the hands of a single individual or single assembly, a view articulated most forcefully by Hobbes, and a republican interpretation that *imperium* is best achieved by a balance of powers, a position best represented at the time by James Harrington (1611–1677).3

Following Bodin, Hobbes argues that absolute sovereignty is by definition negated by the division defended by republicans like Machiavelli and Harrington, for if there are two or more component parts of government, each of which holds some part of sovereignty, then no part holds sovereignty, understood as supreme power with unlimited right. The Polybian theory of divided or mixed government, in which different functions are given to different bodies, cannot work, Hobbes argues, because the rights of sovereignty are indivisible. For example, it is worse than fruitless to give the right or power of raising revenue to one body and the right or power of the military to another—far from leading to a happy balance, the military will fail without revenue, and without the military no revenue can be raised. If they remain separated, both rights are worthless, both powers powerless. As soon as it is divided, sovereignty is destroyed.

Hobbes argues that there is a doctrine that is “plainly, and directly against the essence of a Common-wealth; and 'tis this, *That the Soveraign Power may be divided*. For what is it to divide the Power of a Common-wealth, but to Dissolve it; for Powers divided mutually destroy each other.”4 Here Hobbes picks up on precisely the key to Harrington’s later argument for balance, or the “equal commonwealth,” which Harrington regarded as his greatest contribution to political thought.5 Hobbes sees that this equality of the different powers of a commonwealth and the resulting balance is central to the republican case, and replies that this is not the salvation and stability of the republic, but its instability and ultimate destruction. (Harrington’s view that stability is attained by a balance rather than a bellicose contest of powers, and Hobbes’s theory that all such division of rule will lead to conflict that undermines stability, may be seen as two corners of a conceptual triangle, the third of which is Machiavelli’s conception of political longevity as a function of the division of rule between

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3 Harrington’s *Oceana* was published in 1656, five years after *Leviathan*.
5 See JAMES HARRINGTON, THE COMMONWEALTH OF OCEANA 20–27 (London, John Streater for Livewell Chapman 1656) [hereinafter HARRINGTON, COMMONWEALTH]; see also FUKUDA, supra note 1, at 165.
conflictual bodies.) Hobbes provides detail for the argument that roughly equal powers destroy one another in his chapters on the state of nature.6

Harrington, a canonical advocate of mixed government, on this account turns out to be animated by what is often thought to be the distinctively absolutist principle of orderly rule. And the division is complicated on the other side, as we can see when we look at the important distinction, emphasized by both Bodin and Hobbes, between mixed sovereignty and mixed administration of government.7 This is a distinction rooted in Roman law concepts of administratio, usus, or exercitio, and the difference between ownership (dominium) and usufruct. Just as the owner of property may allow another to use that property and enjoy its fruits while nonetheless retaining ultimate ownership rights, so may a sovereign hand over the running of government to a minister or ministers without thereby surrendering the rights of sovereignty. For example, a monarch may hand over the reins of power while he sleeps, or delegate certain duties indefinitely; or a democracy may set up a first minister of the people for a specific time or with specific powers, as the Romans did with their dictators. In such a case, “during the whole interval, sovereign authority (like Ownership) was in the people, though its use or exercise was so long in the temporary Monarch, like a usufructuary.”8 In this situation the people retain the discretionary powers of sovereignty, and “can, if it should please them, relieve him of his office [administratio] even before the appointed time.”9

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7 On this distinction, see Richard Tuck, Hobbes and Democracy, in RETHINKING THE FOUNDATIONS OF MODERN POLITICAL THOUGHT 190 (Annabel Brett et al. eds., Cambridge Univ. Press 2006) (tracing the distinction to Hobbes, who “first... provided... [the] distinction between government and its administration”); and Kinch Hoekstra, A Lion in the House: Hobbes and Democracy, in RETHINKING THE FOUNDATIONS OF MODERN POLITICAL THOUGHT, supra, at 191, 203 (tracing it to earlier sources, especially Bodin).

8 THOMAS HOBBES, DE CIVE 7.16, at 157 (Howard Warrender ed., Clarendon Press 1983) (1642) [hereinafter HOBBES, DE CIVE] (“[T]oto enim medio tempore, summum imperium (vt Dominium) in populo erat, vsus autem, siue exercitium eius tantum in Monarchâ temporario, vt vsufructuario.”). A full treatment of the concepts deployed in such passages would have to trace their inheritance from Roman law. There are a number of agency relations articulated in civil law that are relevant, and the subsequent arguments often refer back to the supposed debate between Azo and Lothair over merum imperium; important later figures include Andrea Alciato and Scipio Gentili.

9 Id. (“[P]otestque populus, si videbitur, eum administratone suâ priuare, etiam ante tempus . . . .”). While the civil lawyers generally hold that usufruct is stronger than precarium as the former cannot be altered, reneged on, or called back at will (during the period of the usufruct), Hobbes essentially eliminates the distinction, reducing usufruct to precarium so that there are no ultimate claim-rights against sovereign discretion. See THOMAS HOBBES, THE ELEMENTS OF LAW, NATURAL AND POLITIC bk. 2.2.9–10, at 122–24 (Ferdinand Tönnies ed., Frank Cass & Co. 1969) (1640) [hereinafter HOBBES, ELEMENTS OF LAW].
With this distinction in hand, we can see what Hobbes is doing when he denies that sovereignty may be limited, divided, or mixed, while insisting that the administration of government must be limited and may be divided or mixed. Not least, he learns from Bodin that this will allow him to hold onto the idea that sovereignty must be absolute and unified while nonetheless taking account of the many apparent cases of mixture. As Hobbes explains in *The Elements of Law*:

> But though the sovereignty be not mixed, but be always either simple democracy, or simple aristocracy, or pure monarchy; nevertheless in the administration thereof, all those sorts of government may have place subordinate. For suppose the sovereign power be democracy, as it was sometimes in Rome, yet at the same time they may have a council aristocratical, such as was the senate; and at the same time they may have a subordinate monarch, such as was their dictator. . . . So also in a monarchy there may be a council aristocratical of men chosen by the monarch; or democratical of men chosen by the consent (the monarch permitting) of all the particular men of the commonwealth. And this mixture is it that imposeth; as if it were the mixture of sovereignty.\(^\text{10}\)

Like Bodin before him, Hobbes says that a commonwealth may appear to have mixed sovereignty, as in Rome; but underlying the mixed or divided administration is the reality of unified sovereignty. Harrington, by contrast, thinks that in Rome the contrary interests of senate and people “produced two Common-wealths, the one *Oligarchical* in the Nobility, and the other a meer *Anarchy* of the People.”\(^\text{11}\) Thus, the defender of the necessity of the divided commonwealth takes one of the classic examples thereof to be instead two separate simple commonwealths; whereas the defender of the necessity of unitary and unmixed sovereignty regards the political situation of Rome as a single full-fledged commonwealth with divided functions of government.\(^\text{12}\)

And if the most stable form of administration is an equal balance or mixture, then Hobbes will come close to the Harringtonian endorsement of equal government.

Yet a crucial difference remains. For Hobbes requires that there be some one umpire who ultimately decides disputed cases, and this judge is the one who has sovereign authority. Without such an authoritative judge, conflict (and ultimately anarchy) will ensue. Harrington disagrees, arguing that as long as one chamber proposes and the other resolves, no separate and superior sovereign is needed. He gives the

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\(^{10}\) *HOBBS, ELEMENTS OF LAW,* supra note 9, bk. 2.1.17, at 115–16.

\(^{11}\) *HARRINGTON, COMMONWEALTH,* supra note 5, at 155.

\(^{12}\) Bodin and Hobbes both characterize the locus of sovereignty at Rome differently at different times, but we will not explore these complications here.
example of two girls splitting a cake. As long as one divides and the other decides, the two parties will come to an equitable arrangement: it is in the interest of the girl who cuts the cake to divide the pieces as equally as possible, or the girl who chooses will get the larger piece. Where sovereignty is placed, as Hobbes would have it, in one source only, it is like having the same girl both cut and choose: the other girl will end up with no cake at all and so be discontented and fractious. Instead, by strictly dividing into separate chambers the roles of proposing and resolving, those who are proposing will not put forward legislation that disadvantages themselves, and those who are resolving will not approve any legislation that disadvantages themselves. The measures that will be both proposed and resolved, Harrington argues, are those that provide an equitable division.

Matthew Wren (1629–1672) provides the Hobbesian reply later in the 1650s. "The stronger of the two Girles would have eaten up the whole Cake" if she wanted it, he writes, unless the weaker could "appeal to the School Mistress." An overarching authority is required to oversee the peaceful solution. But if there is someone with sufficient power to serve that sovereign role, then at that level "there is no room for dividing and choosing, but [only] acquiescing in the Will of him whose power cannot be resisted." An unequal division indicates a recognition by at least one party of an imbalance of power. "When the Lion is to choose, the Fox knows his Division must be such as gives all to One side and leaves nothing to the other; If a People be once inraged, the Senate will find themselves concerned to please them in the Division as well as in the Choice." We might object that this scenario does not respect the equality of the parts of government required by Harrington or the mechanisms supposed to ensure it. The Hobbesian reply would be that the constant struggle for precedence, and the lack of a guarantee of ongoing equality of power or right, will make any such arrangements unstable (and that even an equal result may not be seen or accepted as such).
Just as Hobbes's arguments may be used to question Harrington's later ones, so earlier arguments may be brought to bear against those of Hobbes. Hobbes on this question follows Bodin, so I borrow arguments from thinkers who are deeply influenced by but also at crucial points critical of Bodin: Johannes Althusius in his _Politica_;18 Henning Arnisaeus in the eighth chapter of his 1606 _Doctrina politica_, "De mixta republica"; and Christoph Besold in the 1614 and 1625 editions of _De statu reipublicae mixto_. Given how Hobbes draws on Bodin, arguments replying to Bodin may be effective against Hobbes. Besold's argument in particular is _more_ effective if turned against Hobbes, for Bodin in response could resort to his claim that the only true and absolute sovereignty is monarchy—whereas this route, I shall argue, is not open for Hobbes.

The Roman lawyers typically deployed such concepts as _imperium_ and _iurisdictio_ without defining them. The idea of the power over others conferred by _imperium_, for example, is used in such a way that there is evidently a distinction between pure (_merum_), superior (_maius_), or mixed (_mixtum_) _imperium_. Following Irnerius (c.1060–c.1125), the founder of the Bolognese school of Glossators, Azo (c.1150–c.1230) worked to come up with a theory of how the pieces could fit together. Azo divides jurisdiction into the fullest kind (_plenissima_), exercised only by the prince, and the less extensive jurisdiction (_minus plena_) exercised by lower magistrates. By making _imperium_ a subset of jurisdiction, however, Azo sets up a framework according to which the authority of the ruler is legally defined and according to which a lesser exercise of rule may be independent of the prince's discretion.19 The distinct legal authority of feudal lords or subordinate princes thus sat side by side with the idea of pure authority and fullest jurisdiction, a situation which led to much practical and theoretical wrangling in subsequent centuries. Azo is sometimes looked to as an early exponent of ultimate popular sovereignty, and here there is an interesting ambiguity. Having transferred power to the emperor, Azo says, the people cannot retain the sovereign law-making power as individuals; but he holds that they do retain it as a body, "universitas sive populus."20 How are we to identify this sovereign _universitas_?

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18 The first edition of which was published in 1603, followed by a second in 1610, and a third in 1614.


Johannes Althusius (c.1563–1638) is still addressing a form of this question when he articulates a theory responsive to Bodin’s. Reflecting on the logic of supremacy, Bodin strove to break with theories that consciously or inadvertently built in contingent features of specific ways of administering a government. Given the complexities of contemporary states with which Bodin was familiar, historians may well shake their heads at his theoretical reductions. But Bodin’s idea emerges precisely against the background of thinking of the powers in a state as multiple, for it is this multiplicity that calls for a heuristic for working out who is in charge, or where the ultimate authority lies. Althusius and Hobbes in some way bring us back to one medieval approach, which is that sovereignty lies in the whole: it is the *universitas* (Althusius) or the *civitas* (Hobbes) that is sovereign. For Althusius, this means that the highest individual authority in the state may be deposed; for Hobbes, this means that he (or she or they) may not be deposed, given that the commonwealth or *civitas* only has its being via its singular representative, who thus may with some justice be called the sovereign, sovereignty standing or falling with that person.

Sovereignty for Althusius resides not in the king, who is the supreme magistrate, but instead in the *universitas*, the *regnum* itself, which is represented by the whole magistracy.

The duty of the ephors [i.e., inferior magistrates] is to take care that the supreme magistrate not degenerate by doing or omitting something contrary to his office. So also the duty of the supreme magistrate is to take care that none of the ephors misuses his limited imperium to the ruin of his subjects or the realm. This mutual watchfulness, censure, and correction between the king and the estates or ephors keeps the condition of the realm sound, in good repair, and well protected, and frees the realm from all dangers, evils and inconveniences.21

Bodin and Hobbes argue that such mutual oversight is incoherent; they also denounce it as politically noxious, for it institutionalizes the conflict that commonwealth is intended to transcend. Althusius, however, seems to believe that this objection is based on a mistake, assuming as it does that the division into king and ephors means that there is no locus of undivided sovereignty, and thus that there is no true sovereign power at all. Sovereignty is divided in its exercise, Althusius holds, but it is ultimately undivided when understood as a property of the entire commonwealth. It is not surprising that this has sometimes been interpreted to mean that everyone together is sovereign, thus yielding a kind of popular sovereignty or democracy. Althusius seems to have in

mind, however, not the whole in the sense of merely the entire set of individuals, but the structured way in which those individuals all play their roles and fulfill their duties.

Henning Arnisaeus (1570-1636), who is indebted to and critical of both Bodin and Althusius, provides a way to picture this. One of Bodin’s objections to the idea of a mixed commonwealth was that it collapsed conceptually into an unmixed form, usually that of democracy: for if the many, the few, and the one all share sovereignty, then everyone shares in sovereignty, and when everyone shares in sovereignty the state is popular or democratic. But this is to assume that the aristocracy, for example, is an already established group, each individual member of which is given full and equal political right alongside the full and equal political right given to each member of the popular group. Proponents of the mixed commonwealth have in mind a different model, however, whereby the group is defined constitutionally and thus retains its role as a group in the political system. To give each and every plebeian and aristocrat a vote will result in a democracy where the aristocracy is reduced to a social class and functions as a political agent or entity indirectly if at all; whereas to give the aristocrats as a body one vote and the plebs as a body one vote is to confer a distinct political identity and authority on each body. So, too, if the conjoint sovereignty is parcelled out according to function—whereas Bodin’s tenet that sovereignty is indivisible had prohibited him from allowing that a functional division can produce sovereignty from parts none of which are themselves sovereign.

Arnisaeus refers to this mode of mixture as separation, or “quando jura majestatis separantur,” for sovereignty is not so much blended as it is assembled from distinct component parts.

There are many principals and prerogatives the combination of which constitutes complete sovereignty: it is admittedly impossible for many to share the whole of it in its entirety, but nothing prevents separating its parts and assigning them to many, so that there is a piece of sovereignty in each. In the body as a whole there is properly full sovereignty, resulting from the combination of the parts and the bringing together of the pieces of sovereignty into one.

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23 Henning Arnisaeus, Doctrina Politica in Genuinam Methodum, QvÆ Est Aristotelis Redvcta, Et Ex Probatissimis Qvibusqve Philosophis, Oratoribus, Iurisconsultis, Historiicis 164-65 (Frankfurt, Johann Eichorn for Johann Thieme 1606) [hereinafter Arnisaeus, Doctrina Politica] (“Plura enim sunt capita & jura, quorum concursus efficit maiestatem perfectam, quam quidem totam & in universum pluribus communicari impossible est, sed partes eius nihil prohibet disiungi, & pluribus attribui, ita quidem, ut in singulis sit particula maiestatis: in toto vero corpore summa & plena maiestas, ex concursu partium, suas maiestatis particas in unum comportantium resultans.”). (“Capita”
Arnisaeus makes clear that to say that sovereignty is mixed need not mean that it is mixed like a pile of sand or even like a soup; it can instead be an emergent whole like a complex living body or an assembly like a mechanical device, the parts whereof are distinctive and the whole of which only comes into being as such once the components are present and properly combined.

Another figure, Hermann Kirchner (1562–1620), will serve to introduce Christoph Besold (1577–1638). Kirchner argues against Bodin in 1608 by giving examples of regimes that are of one form but tempered by another form or forms; for example, democracy was tempered by monarchical and aristocratic offices and magistrates in Rome and elsewhere.24 In a formulation echoed by Harrington, he generalizes these observations, saying that none of the classical forms, whether monarchy, aristocracy, or democracy, can exist in a pure form without some tempering or mixing of other forms.25 Besold opens his short treatise with this straightforward line of attack, citing authorities for his assertions that there are plenty of states that are tempered or mixed from two or three of the standard forms of government, and that these are sovereign states with full majesty and supreme power. He then quotes Kirchner's claim that indeed there are no unmixed states.26 Besold argues that a combination of forms may itself constitute a form of commonwealth, and that there are various permutations of the mixed form according to number or function (e.g., few with many, the right of war, the power of punishing, and the right of judicature). This is a faithful recapitulation of a widespread pre-modern view of the locus of majesty, and is the sort of view behind claims of the sovereignty of "king-in-parliament" current in Hobbes's England; but as for so many

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24 HERMANN KIRCHNER, RESPUBLICA ch. 5, § 3, sig. E3v (Marburg, Rudolph Hutwelcker 1608); see also ARNISAEUS, DOCTRINA POLITICA, supra note 23, at 167–70. In the play Coriolanus, however, Kirchner had presented a portrait of Rome as pulled apart by these factions (though placing the blame for sedition particularly on the tribunes and plebs). See HERMANN KIRCHNER, CORIOLANUS, TRAGICO-COMICA (Marburg, Kaspar Scheffer 1599) (especially Act III).


26 CHRISTOPHI BESOLD, HANC COLLEGI POLITICI, CLASSIS PRIORIS DISPUTATIONEM OCTAVAM, DE STATV REIP. MIXTO 1 (Tübingen, J. A. Cellius 1614).
thinkers within the Holy Roman Empire, Besold has in mind above all the contemporary complexities of that regime.\(^{27}\)

What makes Besold’s argument nicely suited to challenge a Hobbesian view is his argument that mixed sovereignty is no more illusory than a simple and absolute aristocracy or democracy. “As in a simple Polyarchic state,” he writes, like that of pure aristocracy or democracy, where the sovereign body is composed of more than one individual, “Sovereignty [\textit{Majestas}] properly and wholly resides in the entire body that shares in Sovereignty.”\(^{28}\) Daniel Otto in 1617 attacks Besold’s treatise on the mixed state, along with Kirchner and Lipsius and others, defending the Bodinian line that the administration of the commonwealth may be mixed, but the state or the commonwealth itself may not be.\(^{29}\) All inferior magistrates depend on the sovereign for whatever dignity, jurisdiction, and power they have, as effects from his cause.\(^{30}\) For power to be of the highest kind or supreme—that is, sovereign—it must be free and unconstrained.\(^{31}\) Following Bodin, Otto puts this as a conceivability constraint: “For never can it be brought about either in nature or even in the imagination that a supreme power or Majesty be mixed with an inferior and yet remain supreme.”\(^{32}\)

\(^{27}\) Id. at 2–3.

\(^{28}\) Id. at 2 ("Ut in Polyarchico simplici statu, propriè & in solidum Majestas apud universum illud corpus residet, quod particeps est Majestatis."). "Majestas" is often tantamount to "sovereignty" in texts of this period, and Besold effectively authorizes such a translation when he defines "Majestas" as "Imperium sumnum." See, e.g., CHRISTOPH BESOLD, HANC COLLEGII POLITICI, CLASSIS PRIMAE DISPUTATIONEM SECUNDAM, DE POLITICA MAJESTATE IN GENERE Desserentem 12 (Tübingen, J. A. Cellius 1614); CHRISTOPH BESOLD, HANC COLLEGII POLITICI, CLASSIS PRIMAE DISPUTATIONEM TERTIAM, DE IVRIBVS MAJESTATIS 1 (Tübingen, J. A. Cellius 1614). He clarifies that by "simple Polyarchic states" he means aristocracy and democracy in the opening lines of CHRISTOPH BESOLD, HANC COLLEGII POLITICI, CLASSIS PRIORIS DISPUTATIONEM SEPTIMAM, DE ARISTOCRÁTICA ET DEMOCRÁTICA CIVITATIS FORMA 1, 4 (Tübingen, J. A. Cellius 1614).


\(^{30}\) Id. at 650.

\(^{31}\) "Libera & indefinita." Id. at 651. Presumably the constraining power will otherwise be supreme. Yet, as Julian Franklin points out, Otto will also say that the sovereign power in the Holy Roman Empire is constrained ("contrahantur"), id. at 653, requiring as he does the assent of the princes, and yet somehow without diminishing his sovereignty. THE CAMBRIDGE HISTORY OF POLITICAL THOUGHT, 1450–1700, at 318–19 (J.H. Burns & Mark Goldie eds., 1991).

\(^{32}\) "Nunquam enim fieri per naturam, & ne quidem imaginatione perfeici potest, ut summa potestas sive Majestas cum inferiori commisceatur, ut tamen maneat summa." OTTO, supra note 29, at 651; see also JEAN BODIN, SIX BOOKES OF A COMMONWEALE, supra note 22, bk. 2.1, at 185 ("But to confound the state of a monarkie, with the Popular or Aristocratical estate, is a thing impossible, and in effect incompatible, and such as cannot be imagined. For if sovereignty be of it selfe a thing indivisible . . . how can it then at one and the same time be divided betwixt one prince, the nobilitie, and the people in common?").
Besold replies in a 1625 revision of his treatise on the mixed state by spelling out what he meant: "[I]t remains supreme, but not in one [person]; it is in truth in the entire body or society of rulers or magistrates: and this is so even if it is not equally distributed among them."33 It may look like this is just what Hobbes goes on to argue: Sovereignty is held by the persona ficta of the sovereign, whether an assembly or a single individual. But for Hobbes, it is vital that absolute sovereignty can be held by an assembly of all or of a few as readily as by an individual. Hobbes cannot argue that monarchy must replace democracy or aristocracy; not least, this would be to encourage rebellion in democracies and aristocracies, thus frustrating the goal of his political doctrine, that of security and stability. The first commandment in Hobbes's political decalogue is "not to affect change of Government": People "ought not to be in love with any forme of Government they see in their neighbour Nations, more than with their own, nor . . . to desire change."34 He prohibits criticism of the form of one's present sovereign power:

Of the three sorts, which is the best, is not to be disputed, where any one of them is already established; but the present ought alwaies to be preferred, maintained, and accounted best; because it is against both the Law of Nature, and the Divine positive Law, to doe any thing tending to the subversion thereof.35

Whichever of the three simple and undivided forms of government is established, it must be obeyed as absolute and defended as optimal, but without simultaneously providing warrant for rebellion against other forms should they prevail at other times or in other places.36

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Hobbes draws on Bodin for his absolutist arguments, and the move from Bodin to Hobbes is toward a clearer and more philosophical absolutism. But this has obscured a critical transformation of the absolutist case by Hobbes, in which the argument for absolutism

34 HOBBES, LEVIATHAN, supra note 4, 30.7, at 524.
35 Id. 42.82, at 868.
36 Hobbes's well-known arguments for the superiority of monarchy over aristocracy and democracy are thus thrown into limbo. They were all published while Hobbes evidently regarded himself as under the protection of a monarch, so he thought himself obliged to have "maintained, and accounted best" that form of government.
depends less on the meaning and entailments of supremacy, and more on the political disasters of civil division or separate powers. Hobbes's absolutist logic may be more consistent than Bodin's, but he depends less on it, and more on making vivid to his readers what he takes to be the practical human cost of the alluring alternative. Thus, in assessing whether Hobbes's arguments withstand the anti-Bodinian challenge, it is important to recognize that the philosopher from Malmesbury is doing something different from the lawyer from Angers.

The theory of mixture put forward by Arnisaeus and others targets the Bodinian conceptual argument, but it does not address the Hobbesian political objection that distinct parties without a supreme power above them are more likely to be in conflict or to prevent one another from functioning than they are to work together. What may at first look like conceptual arguments that sovereignty is necessarily supreme, simple, and unified often prove instead to be arguments based on Hobbes's political anthropology that appeal to the practical unacceptability rather than the logical absurdity of the alternative. Consider this example from *Leviathan*:

> Sometimes also in the meerly Civill government, there be more than one Soule: As when the Power of levying mony, (which is the Nutritive faculty,) has depended on a generall Assembly; the Power of conduct and command, (which is the Motive faculty,) on one man; and the Power of making Lawes, (which is the Rationall faculty,) on the accidentall consent, not onely of those two, but also of a third; This endangereth the Common-wealth, sometimes for want of consent to good Lawes; but most often for want of such Nourishment, as is necessary to Life, and Motion. For although few perceive, that such government, is not government, but division of the Common-wealth into three Factions, and call it mixt Monarchy; yet the truth is, that it is not one independent Common-wealth, but three independent Factions; nor one Representative Person, but three. In the Kingdome of God, there may be three Persons independent, without breach of unity in God that Reigneth; but where men Reigne, that be subject to diversity of opinions, it cannot be so. And therefore if the King bear the person of the People, and the generall Assembly bear also the person of the People, and another Assembly bear the person of a Part of the people, they are not one Person, nor one Soveraign, but three Persons, and three Soveraigns.37

Hobbes may make less use of the more formal arguments for sovereignty in part because he is a better logician. His priority in any case is to address a kind of political incoherence. Mixed sovereignty is an absurdity of action, as it were, as it involves perpetuating the conflict and uncertainty that sovereignty itself is supposed to prevent. None the

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37 HOBBS, LEVIATHAN, supra note 4, 29.16, at 512.
less, the Bodinian logic of indivisible unity continues to structure Hobbes's thinking even in arguments like the one quoted above, and I shall focus in this final section on a few issues that arise for Hobbes's project of proceeding in this philosophical way in order to bring about political purposes.

The upshot of Besold's argument is that Hobbes's insistence on the possibility of a sovereign assembly, whether aristocratic or democratic, is in tension with his rejection of mixed sovereignty. For the same justification that allows for a few people or many people to rule together as a univocal sovereign person should allow different functional branches of sovereignty, or different social or political groupings, to rule together and count as one body. Conversely, the objection to having different offices, like those of king and parliament, ruling as a conjoint sovereign, should also disallow the possibility of absolute democracies and absolute aristocracies, which are composed of different individuals. This is a challenging dilemma for Hobbes: because he cannot accept absolute mixed sovereignty, say of Harrington's kind, it looks like he must deny that there can be an adequate decision procedure for any conjoint sovereign; but because of his fundamental commitment to peace and security, it looks like he must reject the destabilizing doctrine of Bodin or Robert Filmer (c.1588–1653) that only a monarch can be truly sovereign.38

On a historical note, it is worth mention that while Hobbes might have missed the argument as published by Christoph Besold, he is likely to have encountered it as published by Philip Hunton (1604(?)-1682), whose renowned attempt to reunite England, A Treatise of Monarchie,

38 This doctrine is not maintained consistently by either Bodin or Filmer. Shortly after the appearance of Leviathan, Filmer wrote about that work and De cive: "[I]n conclusion the poore people are deprived of their government, if there can be no democracy by his principles." FILMER, Observations upon Aristotle's Politics, Touching Forms of Government, Together with Directions for Obedience to Governours in Dangerous and Doubtfull Times (1652), in PATRIARCHA AND OTHER WRITINGS, supra note 25, at 235, 239. A few months later, Filmer built on this view in his Observations upon Aristotle's Politics. He says that "those governments that seem to be popular are kinds of petty monarchies," and concludes that "there is no form of government, but monarchy only," drawing the corollary that "there is no such thing as an aristocracy or democracy." Id. at 281. Filmer here draws on Bodin: "And although we imagin a bodie of many lords, or of a whole people to hold the soueraigntie; yet hath it no true ground, nor support, if there bee not a head with absolute and soueraigne power, to vnite them together: the which a simple magistrat without soueraigne authoritie cannot do": thus, "the chiefe point of a commonweale, which is the right of soueraigntie, cannot be, nor subsist (to speake properly) but in a Monarchie: for none can be soueraigne in a commonweale but one alone: if they be two, or three, or more, no one is soueraigne, for that no one of them can giue or take a law from his companion." BODIN, THE Six BOOKES, supra note 22, bk. 6.4, at 715. Bodin here sees the same point as Besold, albeit from the other side. Bodin argues that sovereignty is unitary, and that therefore sovereignty must fail not only if it is divided or shared between branches or functional bodies like the executive and legislative, but also if it is shared between different individuals. Besold argues that because sovereignty can be shared by different individuals, there is no reason that it cannot be shared by different branches or bodies.
was published in May of 1643; and Hunton’s recapitulation of this view suggests that it was a live position in the early 1640s.\textsuperscript{39} Hunton argued against the Bodinian notion that the perceived mixture is only a mixture of administration rather than of the commonwealth itself.\textsuperscript{40} In the same year, Henry Ferne defended absolute monarchy, objecting to Hunton’s idea of mixture “in the very soveraigne power” and arguing that limitation of sovereignty should be understood “onely of the exercise of the power” but “not of the power it selfe.” A mixture or sharing of the sovereign power itself “cannot consist with that Supremacy... for it would make several independent powers in the same State or Kingdome, which is most absurd.”\textsuperscript{41} In reply, Hunton offers a version of the argument that Arnisaeus had given, together with the claim that one cannot both accept the simple polyarchies of aristocracy or democracy and reject the possibility of a polyarchy compounded of corporate members. “I grant it is absurd,” Hunton writes, to “speake of several complete independent powers [within a single commonwealth]; but to affirme severall incomplete independent powers concurring to make up one integrall mixt power, it is no absurdity at all, for so it is, in all Aristocracies and Democracies, and must be acknowledged in all mixed States, where the supremacie is not wholy in the hands of one person.”\textsuperscript{42}

For Hobbes, a crucial difference between a sovereign assembly, which he thought possible, and a sovereign composed of different artificial bodies (such as one with different branches of government),

\textsuperscript{39} [PHILIP HUNTON], A TREATISE OF MONARCHIE (London, for John Bellamy & Ralph Smith 1643). Because of this work, the University of Oxford in 1683 officially burned Hunton’s books along with works by Hobbes and Harrington.

\textsuperscript{40} Id. at 40–46.

\textsuperscript{41} HENRY FERNE, A REPLY UNTO SEVERALL TREATISES PLEADING FOR THE ARMES NOW TAKEN UP BY SUBJECTS IN THE PRETENDED DEFENCE OF RELIGION AND LIBERTY 17 (Oxford, Leonard Lichfield 1643).

\textsuperscript{42} [PHILIP HUNTON], A VINDICATION OF THE TREATISE OF MONARCHY 15 (London, G.M. for John Bellamy 1644) [hereinafter [HUNTON], A VINDICATION]. In his valuable edition of Hunton’s 1643 work, Ian Gardner mistakenly marks off this passage as a posthumous addition unlikely to be Hunton’s, apparently not recognizing that the “addition” in a 1689 edition was an incorporation of Hunton’s 1644 work. Ian Gardner, Editor’s Note to PHILIP HUNTON, A TREATISE OF MONARCHY v–vi, 40 (Ian Gardner ed., Thoemmes Press 2000); cf. [HUNTON], A VINDICATION, supra, at 25 (“Such a Government may be established that the supreme Power may be placed in many persons, either of the same, or divers condition, that is, in a mixed Subject: else all formes were unlawfull except simple Monarchie”). Note that Hunton makes what for Hobbes would be a fatal concession (in a way that bears comparison with what Locke will say about the appeal to heaven): “[O]ne inconvenience must necessarily be in all mixed Governments... there can be no Constituted, Legall, Authoritative Judge of the fundamentall Controversies arising betwixt the three Estates. If such doe arise, it is the fatal disease of these Governments, for which no salve can be prescribed; For the established being of such authority, would ipso facto overthrow the Frame, and turne it into absolutenesse... In this case, which is beyond the Government, the Appeale must be to the Community, as if there were no Government.” [HUNTON], supra note 39, at 28–29. Ferne remarks that this is “the high way to confusion.” FERNE, supra note 41, at 38.
which he claimed was impossible, is that only in the first case can there be a single artificial person. This is because there is a reliable way to obtain univocity in the first case, via the votes or voices of the majority. Why, though, does Hobbes think that we can presuppose an unambiguous decision procedure in the one case and not the other? Here we have to speculate. A negative reason is that Hobbes had good evidence that there was no such obvious decision procedure in what some claimed to be the contemporary case of sovereignty composed of artificial bodies, that of "King in Parliament." Far from it, as this became a partisan slogan in the English civil war. A more positive reason might stem from Hobbes's premise of naturally equal right: because each person has as valid a claim as each other, each of their voices should count equally. A different version would call on the equality of power, and the idea that no body of those who are rough equals in power can hope to act effectively if more than half of its members oppose the action. It will be clear why this assumption of equality would not apply to artificial bodies. A further thought might be that once people have gathered together to form an effective sovereign body, they will fail to accomplish what they intend if they do not adopt some such rule as decisive, so they may be assumed to have done so.

The problem here is that a Hobbesian cannot rely on those without a sovereign power above them to agree on majority rule, even if we think of it as the naturally salient solution. For those in the natural condition do not regard others as their equals, and in any case it is easy enough to imagine a situation in which some people assume that they will decide things by the majority of all those voting, others that they will decide by some kind of consensus or absence of significant opposition, and so on. It looks, in sum, just like the sort of dispute that would have to be decided by a sovereign arbiter, rather than an assumption that can be relied upon in the setting up of such a sovereign.

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43 HOBBS, DE CIVE, supra note 8, 7.5, at 153: "Duæ igitur res constiuit Democratiam, quorum vna (nempe condicio perpetua conventuum) Δήμος, altera (quæ est pluralitas suffragiorum) τὸ κράτος siue potestatem constituit." ("Two things thus constitute a Democracy, one of which (namely, a permanent arrangement of assemblies) constitutes the Democracy, and the other (which is a plurality of votes) constitutes to kratos or the power").

44 See HOBBS, DE CIVE, supra note 8, 6.2, 7.5, at 137, 152-53; HOBBS, LEVIATHAN, supra note 4, 18.5, at 268. If we can assume that everyone agrees to whatever is necessary to successfully accomplish the purpose for which they have assembled, it looks like we will end up assuming that everyone agrees to all of the requisites of absolute sovereignty. See, e.g., HOBBS, DE CIVE, supra note 8, 6.2-12, at 137-41.

45 See DE CIVE, supra note 8, 6.20, at 149 ([N]on enim à natura est quod consensus maioris partis habeatur pro consensus omnium . . . sed procedit ab institutione ciuli . . . .) ("For it is not from nature that the consent of the majority should be taken for the consent of all . . . rather, this comes from a civil institution . . . ").
procedure will be uncontested only if there is an overarching power to ensure that it is, appears to work against Hobbes himself.

If absolute sovereignty can be mixed, on the other hand, as Besold maintains, that would seem to provide a strong motive to reconsider the legacy of absolutism. One problem with appealing to a conception like that of Besold's, however, is that in making sovereignty a property of the whole, the explanatory and diagnostic force of the concept dissipates, even if it does not disappear altogether. A modern defender of absolutism might instead exploit the distinction made by Bodin and Hobbes between sovereignty and the administration of government. When Americans first encounter the absolutist outlook, they often surmise that on such a view, sovereignty in this country is supposed to reside in the president, in the legislature, in the judiciary, or in all three together. A defender of absolutism would suggest that this is a sign of how lost we are, and that we the people should not be afraid of absolutism per se, but recognize that in a democracy the absolute sovereign is the people. On this view, the branches of government are nothing more or less than our currently preferred form of administration.

The distinction between sovereignty and administration of government helps to make more plausible the Hobbesian idea of absolute democracy. This will not be an arrangement whereby an assembly of the whole decides all of the issues, as there will be officers, delegation, and so on. And requirements such as transparency, accountability, participation, and the like, normally dismissed as absurd or dangerous from the point of view of Hobbesian absolutism, will look licit and necessary (at least for managerial purposes), given an absolute democracy that must manage its administration while preserving its sovereignty entire.

What is remarkable in the way that Hobbes draws this distinction is the comparative importance that he gives to administration over sovereignty. This brings me to a concluding case of how the logic of sovereign supremacy continues to trouble the depths of Hobbes's civil philosophy. Consider De cive 10.16 on the role of imperium, rule or supreme authority, and its mode of administration:

Nor do the advantages or disadvantages that are found to be greater in one kind of commonwealth than in another proceed from the fact that rule itself [ipse imperium] is better entrusted to one than to many or on the contrary to many rather than fewer, but that the administration of the business of rule is.46

46 Id. 10.16, at 179 (emphasis added) ("Neque commoda vel incommoda quae magis in vna quam in alia ciuitatis specie reperiuntur, ex eo procedunt quod ipsum imperium, sed imperij negotia administranda, melius vni quam pluribus, vel contra pluribus quam paucioribus
The great theorist of sovereignty, perhaps reflecting on what actually affects his fellow citizens, and surely trying to shield the sovereign from blame, insists that the comparative benefits or drawbacks of different commonwealths boil down to how they are administered.

For rule [imperium] is a power [potentia], administration of government is an activity [actus]. And power is the same in every kind of commonwealth; only the activities differ, that is, the motions and actions of the commonwealth . . . . From this we can see that the advantages and disadvantages of a regime result, not from him in whom the authority of the commonwealth resides, but from his ministers [imperiij ministros]. Therefore there is nothing to stop a commonwealth from being well governed though the Monarch be a woman, boy, or infant, so long as those who are put in charge of the ministries and public offices are fit for the job.47

The citizens are more affected by the administration of government, administratio gubernandi, than by sovereignty. The especially striking case here is that of the infant sovereign. Such a sovereign is unreasoning and simply incapable of meaningful political action; everything depends instead on those who represent his or her person. Those representatives could just about as well be representing a bridge or one of the other inanimate objects Hobbes says elsewhere may be represented, for the sovereign in this case is incapable of relevant action and so is, in Hobbes's phrase, "represented by fiction."48 One concern is that if administration can be divided or mixed even in a case like this, where the ministers exercise full power and authority without any potential

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47 HOBBES, DE CIVE, supra note 8, 10.16, at 179 ("Nam imperium potentia, administratio gubernandi actus est; potentia autem in omni ciuitatis specie, aequalis est; soli actus differunt, hoc est motus atque actiones ciuitatis . . . . Ex quo intelligitur regiminis committitur,

48 See HOBBES, LEVIATHAN, supra note 4, 16.9--11, at 246.
sovereign veto of their present decisions or activities, then it is difficult
to see why sovereignty itself cannot be divided. Another concern is that
the sole limitation on the regent for an infant king who is charged with
"the whole Administration" of the commonwealth is that his commands
must not be "inconsistent with [the king's] Soveraigne Power";49 but it
appears that the judgment of such inconsistency rests with the subjects.
And yet, for Hobbes, those who determine what does or does not count
as the word of the sovereign are themselves sovereign. Hobbes adopts a
risky strategy, parallel to one that proved highly effective against the
king in the 1640s: publicly blaming what they regarded as bad policies
and decisions on the king's ministers, the king's critics paid lip service
instead to the putatively true or real king, to whom they attributed the
positions of which they approved.

In protecting the sovereign from criticism by attributing the
goodness or badness of a commonwealth instead to its administration,50
Hobbes also brings up two more general difficulties. One problem is
that there is then in absolutist political philosophy, especially that of
Hobbes and his followers, a woeful lack of emphasis on the issues of
administration. Whereas his predecessors had been preoccupied with
the complex details of the administrative state, especially in the Holy
Roman Empire and in France, Hobbes is admired in part because of his
wholesale dismissal of such intricacies.51 This conceptual clarity comes
at a cost.

Another problem here is that the sovereign of the absolutists
becomes a kind of hidden God, largely irrelevant to our ongoing
thinking about politics. Bodin and Hobbes both emphasize that because
sovereignty is necessarily absolute in every regime, sovereign power is
always the same. This turns sovereignty into a theoretical constant
behind the flux of politics. In chapter thirteen of De cive, Hobbes reflects
on a legitimate way of dividing sovereignty:

It is also necessary to distinguish between the right and the exercise of
sovereign authority [summi imperij]. For they can be separated: as
for instance when he who has the right either cannot or will not
personally participate in adjudicating disputes or deliberating about
public business. For there are times when kings cannot manage
affairs due to their age, or when, even though they can, they
nevertheless judge it to be more appropriate (satisfied with the choice
of ministers and counselors) to exercise rule [imperium] through
them. And when right and exercise are separated, then the
government [regimen] of the commonwealth is like the ordinary

49 Id. 23.3, at 376.
50 See also HOBBES, DE CIVE, supra note 8, 10.2, at 171–72.
51 See, e.g., id., 13.1, at 195 (noting that he leaves aside "the practical politics of individual
commonwealths" (" politicis practicis in singulis ciuitatibus relinquendum est").
government of the world, whereby God, the first mover of all things, produces natural effects through the regular succession of secondary causes. But when he who holds the right of rule [iuris regni] wishes to participate personally in all judgments, consultations, and public actions, then is the administration such, as if God were to devote himself directly to every matter, outside of the order of nature. 52

God could intervene, or would not be God; but as Hobbes frequently reminds us, the age of miracles has passed. 53 The relevant political world is one of division, mixture, and limitation of power, and if these features cannot be attributed to the absolute sovereign, then the sovereign recedes into the role of an abstract first mover. 54 However Hobbes might best address the challenges to the Bodinian theory of sovereignty discussed above, he here suggests that such arguments would shed little light on how we experience the workings of our political world, for such arguments are proper to a kind of political theology.

52 Id. 13.1, at 195 ("Distinguitur summi imperij ius & exercitium; possunt enim separari; vt puta, cūm is qui habet ius, vel non possit, vel nolit litibus iudicandis, vel rebus deliberandis, ipse interesse. Reges enim aliquando per aetatem res gerere non possunt, quandoque etiam eti possunt, rectius tamen esse iudicant, contenti electione ministrorum & consiliiorum, imperium per eos exercere. Vbi autem separatur ius & exercitium, ibi regimen ciuitatis simile est regimen mundi ordinario, quo Deus, primus omnium motor, effectus naturales producit per ordinem causarum secundarum. Vbi vero qui ius regni obtinet omnibus iudicis, consultationibus, actionibusque publicis ipse interesse vult, ibi administratio talis est, ac si Deus praeter naturae ordinem, se ipsum ad materiam omnem immediatè applicaret.").

The heading of this section is "Distinguitur summi imperij ius ab exercitia": Note that according to its title, the subject of chapter thirteen is not the office or duties of the sovereign, as Hobbes puts it in, for example, the title of chapter thirty of Leviathan, supra note 34, at 520 (and 521: "De Officio Summi Imperantis"), but the duties of those who administer sovereign power ("De officiis eorum qui summum imperium administrant"). See the distinction between sovereign power and exercise in Hobbes, De Cive, supra note 8, 7.16, at 157, a distinction that is insisted upon as much by Hunton as by Ferne. See Ferne, supra note 41, at 45.

53 Thomas Hobbes, An Answer to a Book Published by Dr. Bramhall 57 (London, William Crooke 1682); Thomas Hobbes, Elementorum philosophiae sectio secunda de homine 14.4 (London, T.C. for Andrew Crooke 1658); Hobbes, Elements of Law, supra note 9, bk. 2.7.11, at 167; Thomas Hobbes, Historia ecclesiastica carmine elegiaco concinnata 61 (London, 1688); Hobbes, Leviathan, supra note 4, 32.9, 45.9, at 584, 1024.

54 What is more, by definition the power of God does not diminish as he delegates or devolves its exercise. Hobbes is sensitive, however, to the difficulties of retaining a human right of power without its regular exercise, and of delegation of power shading over into transfer of power. See his analysis of sovereign mistakes in Thomas Hobbes, Behemoth (Paul Seaward ed., Clarendon Press 2010) (1679), and the discussion in Hoekstra, supra note 7, at 200–03.