

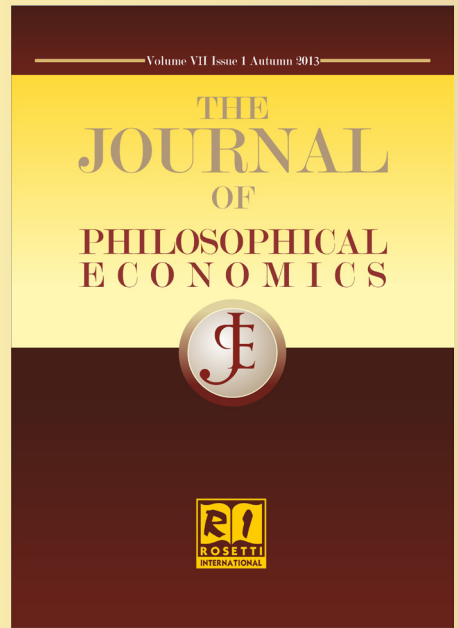
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*On the problem of scale: Spinozistic
sovereignty as the logical foundation
of constitutional economics*

Benjamin F. Gussen



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Abstract: This paper argues that sovereignty, as envisaged by Spinoza, is the logical foundation of constitutional economics. Constitutional constructs such as sovereignty weave an evolutionary dialectic between different organizational scales (the local, national, and global). This dialectic continues to wreak havoc at the local scale, and can be interrupted only through explicit constitutional constraints on the size of jurisdictions. The paper argues for more emphasis on constitutional orders in the spirit of Spinoza's understanding of sovereignty. This entails preference for federal polities in which sovereignty is shared between different cities rather states where once capital cities dominate.

Keywords: constitutional economics, sovereignty, Spinoza

Introduction

In *The Calculus of Consent*, Buchanan and Tullock (1962) state that the political ideas of Baruch Spinoza, 'in many respects ... may be taken as the most appropriate chosen classical precursor to [constitutional economics]' (p. 313). Notwithstanding this endorsement, the authors do not investigate Spinoza's rendition of sovereignty. Instead, they point out that:

Spinoza's influence on our own ideas has been limited to his general and indirect effects on the Western intellectual tradition. In a specific sense, we have carefully reviewed Spinoza only after the completion of an initial draft of the main body of this book [*The Calculus of Consent*]. (p. 313)

In *The Calculus*, one of the foundational works in constitutional economics, the word 'sovereignty' appears only four times; two of these appearances are in the appendices, and not as the subject of analysis but as a reference point for the models therein. A similar marginalization of sovereignty can be seen in recent works. For example, in a monograph entitled *The Calculus of Consent and Constitutional Design* (Dougherty 2011), the word 'sovereignty' appears only once—in the introduction. This is problematic not only because sovereignty is closely related to the evolution of the state, but because, through the temples of constitutional order, sovereignty became the shaman of all economic activity.[1]

Sovereignty is a fundamental pillar of the capitalist world economy. Mercantilism led to the first constitutional rationalization of the exercise of sovereign power as a practice of government (Foucault 1991). Later, the nation state, through its legislative monopoly, became indispensable to the conduct of economic enterprise. Probably the strongest evidence of the link between sovereignty and economics comes from the idea of legal tender and the historical evolution of (national) territorial currencies. The same can be said about the rise of central banks and their influence, through sovereignty, on economic activity. Some would argue that the tendency to grant independence to central banks and the creation of non-national currencies such as the euro signify the increasing irrelevance of sovereignty (Helleiner 2003). However, a quick glance at the euro crisis (which continues to unfold in 2013) shows why such logic is wanting. In fact, the current drive within the European Union for economic integration (through the euro) is matched with a similar political integration.[2] If anything, this suggests a resilient link between economics and politics. Even the analysis of what some theorists perceive as the 'decline' of sovereignty is also framed in reference to economic systems, in which the 'decline' of sovereignty today is seen as a 'sign of the acute crisis of capitalism as an historical system' (Wallerstein 1999, p. 33).

The link between economics and sovereignty suggests that the latter should be at the heart of economic analysis. This is more so in the case of constitutional economics, given its focus on the analogy between markets and politics. It is difficult to see how constitutional economics can treat the subject of choice among constraints without an examination of as fundamental a constitutional concept as sovereignty. Observing that sovereignty is becoming less and less relevant in a world with increasing economic integration not only misses the point of the choice *among* constraints, but also amounts to a misunderstanding of the concept of sovereignty

itself. Historically, sovereignty has been, and continues to be, a response mechanism to forms of *universitas*, the current exemplar of which is globalization.[3]

Admittedly, just as with most political concepts, sovereignty is intrinsically controversial (Walker 1990). Nevertheless, sovereignty has a common denominator that makes it a viable explanatory variable. This denominator is seen in a (political) power struggle between three scales: the local, the national, and the global. Within the European context, sovereignty grew from the impulse towards independence following protracted tensions between medieval kings and external powers in the form of popes and emperors (Hinsely 1966). From the sixteenth century and up to the 1920s, power was transferred from local to national levels of governance, and then, through globalization, from national to global governance. The weakening of the role of the nation state since World War I led to a reversal of this transfer.

This paper attempts to elucidate the role of sovereignty within constitutional economics. In particular, an investigation is made into the nature of Spinozistic sovereignty and how it moves beyond an analysis of power relations, and into providing a normative discourse on the form of the state. To this end, the second section of the paper furnishes a brief introduction to sovereignty. The third section expands on sovereignty under the analogy between markets and politics. The fourth section elaborates on Spinoza's understanding of sovereignty, especially his preferred structure for the state. The paper ends with some concluding remarks.

Sovereignty between absoluteness and divisibility

The literature on sovereignty provides a plethora of classes and categories.[4] Only a few of these are explored in some detail here. The aim is to clarify the links between constitutionalism and sovereignty, and trace the concept's transformation from absolute sovereignty to a divided sovereignty. A key feature of sovereignty is power exchange. This exchange leads to a specific structure of the state. For example, Hobbesian sovereignty leads to a unitary state, whereas that of Spinoza favours a federal polity.

Etymologically, the word 'sovereign' derives from the popular Latin for 'above' (*superānus*), as in 'more powerful' ('Sovereign' 1989). The issues that arose in the early history of sovereignty were centred on the legitimization of this power by investigating its source and extent. However, sovereignty on the most part is a legal concept (Macdonald and Nielsson 1995). It is the power to make binding law in

a particular territory. Within the European context, sovereignty grew from the impulse towards independence following protracted tensions between medieval kings and external powers (popes and emperors). The genesis of sovereignty lies in claims to local supremacy. It is this point that will be developed further by examining the link between sovereignty and constitutionalism.

Constitutionalism, especially in the context of states, is integral to sovereignty. Sovereignty is 'constitutional independence', 'a claim to the exclusive right to make rules' (Smith et al. 1999, 2.55), and hence 'the first bulwark of constitutional government— as it implies the right to say no to outsiders' (Rabkin 2005, p. 69). The starting point is to interpret the concept of constitution widely as the fundamental law principles from which the state draws its authority. Under this interpretation, constitutionalism can result either from a (revolutionary) contractarian approach, or through an evolutionary approach based on norms and conventions. Constitutionalism moderates the absoluteness of the sovereign's power, making its exercise subject to authorization, while supplying internal sovereignty through legitimacy. Sovereignty is inseparable from constitutionalism.

The pedigree of the link between sovereignty and constitutionalism can be traced through the long history of the contractarian approach.^[5] Aristotle (2013) states that the constitution is the government, and the government is the sovereign in the state. This constitutional link to sovereignty is also seen in medieval Europe (Beard 1935). In the history of sovereignty leading up to the European revolutionary upheavals in the sixteenth and seventeenth centuries, there is almost universal agreement that the foundation of sovereign power comes from an original contract (Merriam 1900), either between the government and the people (Althusius 1965), or between the people among themselves followed by a further agreement between people and government (Pufendorf), or a single contract in which the sovereign and the state are created simultaneously (Hobbes and Rousseau). Early formulations of sovereignty focused on deriving the power of the sovereign from the people as a whole, whereas later formulations reverted to individual 'natural rights'.

The sovereign state came to be conceived of as a territorial jurisdiction at the national scale (Jackson 1999). It was not until the rise of the federal states, as exemplified by the United States that a shift occurred in the analysis towards a possible divisibility of sovereignty. Hence, for Bodin (1955), who developed a political theory to serve as a fortification against anti-nationalism, sovereignty is always in service of a nation. Bodin signalled the advent of sovereignty's absolutism, which reached its zenith in the seventeenth century with the *Leviathan*

of Thomas Hobbes (1947). This absolutism meant that sovereignty could not be shared or divided. Absolutist sovereignty had intellectual opposition in the form of the *Monarchomachs*, epitomized by Johannes Althusius (1965), who revived the middle ages (democratic) trust-based theories of sovereignty. This approach was also dominated by a contractarian approach— again emphasizing the nexus between sovereignty and constitutionalism. More recently, Habermas (1996) elaborated on the idea that sovereignty is the people, underscoring the importance of involving 'the people' actively in rational decisions that guide sovereigns.

To the absolutist and trust-based theories of sovereignty is added a Germanic 'natural rights' strand, which led to the articulation of theories by Samuel Pufendorf, John Locke, and Christian Wolff, among others. Under these theories, sovereignty's absoluteness was watered down to mere supremacy, either in the person of a monarch, in the case of Germany, or through a (fiduciary) legislature, in the case of England. In France, however, the 'natural rights' discourse, especially that of Jean-Jacques Rousseau (1797), was committed to a sovereignty that was absolute, infallible, and inalienable. In the 1794 French Revolution, sovereignty resided in the nation. Similarly, after the July 1830 Revolution, sovereignty emanated from the reason (intelligence) of the collective (community) as a whole. Now, it was the nation that was recognized as sovereign, not the monarch, nor reason in the absolute. By the time of the 1848 Revolution, the idea of sovereignty of the nation had gained general acceptance (Merriam 1900).

The German States exhibited a similar evolution, in which the seat of sovereignty was also shifted from the people to the state. However, the German tradition emphasized the need for an organic law— a constitution— binding the sovereign. The state, as a Platonic organism, was promoted as the new bearer of sovereignty. Here, the state was a product of evolution rather than revolution. This organic conception of the state follows a tradition extending from the Greeks through the middle ages, and registering acceptance in the theories of Althusius, Hobbes, and Pufendorf.

However, Buchanan and Tullock (1962) reject the organic conception of the state. They point out that 'Only some organic conception of society can postulate the emergence of a mystical general will that is derived independent of the decision-making process in which the political choices made by the separate individuals are controlling' (p. 12). This rejection negates the possibility of treating the state as a legal person and hence closes the door on the jurisprudential dimension of the state, at least as discussed by Max Weber (1981). The organic-state tradition is diagonal

to the Roman approach, in which the state never appeared as a distinct personality, 'but always the sum of the Roman citizens' (Merriam 1900, p. 109). This is also the Wicksellian ideation at the crux of constitutional economics— that the state is the sum of its citizens: 'If utility is zero for each individual member of the community, the total utility for the community cannot be other than zero' (Wicksell 1994, p. 77).

Historically, a shift in theoretical emphasis was triggered by the growth of state federations, especially in the Swiss, German, and American contexts. The emphasis was now on division of sovereignty. A salient example is the 1789 United States Constitution, in which sovereignty was divided between the states and federal government. In the *Federalist Papers*, James Madison elaborated on the theoretical foundations of the possibility of a divided sovereignty in which the states were sovereign as long as their sovereignty was not affected by the constitution (Hamilton et al. 1852). The idea of divided sovereignty later found its way to Europe through Tocqueville (1856), although he was of the opinion that a divided sovereignty would be impractical in Europe given the presence of the great military monarchies of Europe. Similarly, John C. Calhoun (1853), in what could be considered an overture to the American Civil War, attacked the doctrine of divided sovereignty because it was contrary to the logical basis of secession. After the American Civil War, the nationalist movement gained the upper hand. The writings of Francis Lieber (1861), who found the location of an organic sovereignty in the nation, capture the essence of their drive. The same logic was followed by Jameson, Brownson, Hurd, Mulford, and Pomeroy (Merriam 1900).

The above brief history of sovereignty illustrates the origin of the state as a response to crises, at least in the European context. The evolution of the concept of sovereignty goes hand in hand with the civil wars of the sixteenth and seventeenth centuries. The key point is the tension between absolute (i.e. undivided) and divided sovereignty, and the dominance of the former strand since the eighteenth century.

Sovereignty and the analogy between markets and politics

This section examines how sovereignty is positioned relative to a core premise in constitutional economics, namely, the analogy between markets and politics. This analysis suggests that sovereignty under constitutional economics would have the characteristics of being relational (contractarian) and divided. As delineated in the next section, both characteristics dominate Spinoza's conception of sovereignty. Without any constitutional safeguards in place, this relational basis continues to

fray as sovereignty, predominantly through its economic rationale, amplifies the jurisdiction of the state.

To bring sovereignty into the exchange process inherent in markets, we need a relational definition. In constitutional economics, the market, as an evolutionary selection process, was extended to politics, by using an exchange paradigm to describe cooperative interactions (Buchanan 1991, 1993). This exchange analogy carries 'relational' tones in which '[b]oth the economic relation and the political relation represent co-operation' (Buchanan and Tullock 1962, 19).[6]

Baruch Spinoza provides a relational definition of sovereignty. Sovereignty *à la* Spinoza is an abstract notion (albeit not ahistorical one) of 'the relationship between rulers and ruled for the exercise of political power [and] the independent status of the body politic on the international stage' (Prokhovnik 2001, p. 291). Under this understanding, sovereignty 'is not a substantive quality to be possessed but rather a condition of political interactions, embedded in [relations] that ground association' (Smith 2011, p. 426). Through this relational definition, sovereignty becomes the exchange taking place at the input to the process in which the state transforms power into authority. It is the source from which the state makes binding law in a particular territory.

A relational definition of sovereignty imports a small-scale organization of the state.[7] A stark difference exists between economic exchanges in large 'modern' societies and those registered in so-called 'primitive' societies (societies of relatively small size and lacking in technological and economic development). In these societies, economic transactions cannot be understood apart from 'relational' social obligations. For the analogy to work, a 'relational' level commensurate with that of politics is required, one in which participants take the interests of other participants (especially their long-term interests) into account. In contrast, the 'theory of markets postulates only that the relationship be economic, that the interest of [the other party] in the exchange be excluded from consideration' (Buchanan and Tullock 1962, 16). Politics is seen to exhibit efficiency similar to that of voluntary markets in which unanimity around the political process can judge the efficiency of collective action. This analogy suggests that 'the average individual acts on the basis of the same over-all [*sic*] scale when he participates in market activity and political activity' (Buchanan and Tullock 1962, p. 18). In this sense, there is a continuum between economic and political 'exchanges'.

Constitutional economics emphasizes cooperative forms of interaction through a contractarian approach in which legitimacy is assured through the agreement of all parties concerned. In contrast, politics—'orthodox' politics, to be precise—has a non-cooperative, 'conflictual' perspective, focusing on the distribution of value among winners and losers. However, in constitutional economics there would be no net losers. This last point has been critiqued on the grounds that 'the analogy between politics and markets made by constitutional economists is theoretically weak and clouds rather than enhances our understanding of political economy. Politics has very little in common with non-coercive, voluntary exchange in the marketplace' (Block and DiLorenzo 2000, p. 567). Note, however, that the theoretical approach to the state as a voluntary institution can be traced to Aristotle's conviviality theory of the origin of the state, especially as delineated by Leopold Kohr (1978). The conflict-based origin of the state (notwithstanding its long tradition through the scholarship of Bodin, Hume, Turgot, and Nietzsche, among others) conflates the origin of the state with its operation beyond the constitutional phase. A sustained 'production of scale' phase (which increases the size of the political community) will result in such conflict. This is when the state continues to grow in size (larger territory, larger population, and larger government). However, that does not mean that the origin of the state is conflictual. The Hobbesian state of nature, in which he opined that conflict was the *raison d'être* for the state, was the product of Hobbes's own *Zeitgeist*. At the constitutional level, politics would also lend itself to a cooperative analytical framework: 'The market and the State are both devices through which co-operation is organized and made possible' (Buchanan and Tullock 1962, p. 19).

Reconciling markets and politics as cooperative at the constitutional phase formulates the core issue as one of scale (Block and DiLorenzo 2000):

[D]isagreement with constitutional economics is more than a definitional one. Buchanan and Tullock label a wide range of seemingly voluntary collective choice institutions as 'government' and, admittedly, a reasonable case can be made that, say, a village fire department might make a good example of voluntary government, at least *on a relatively small scale* (emphasis added). But the distinguishing characteristic is that in a truly voluntary setting the parties to an agreement have a right to secede from the agreement. (p. 580)

The key words are 'on a relatively small scale'. Of course, the above quote refers to only an element of the state, namely that of 'government' (the other main elements being population and territory), but it still gives a good illustration of the scalar

anchor between markets and politics. The right to secede itself can be seen as indicative of a large polity still viable in the event of secession.

The analogy between markets and politics imports another dimension, in addition to the *homo economicus* and the exchange process. For markets to function properly (i.e. to be Pareto efficient), one needs to ensure a level of competition in the provision of goods and services. An analogy with politics would see this competition reflected in the provision of goods of a public nature, through competing jurisdictions.¹⁸ Such competition, which is discussed in the next section, is salient in Spinoza's sovereignty.

Spinozistic sovereignty

Constitutional economics (*a la* Buchanan) does not accept absolute sovereignty (Brennan and Buchanan 2000). It sides instead with Spinoza (Buchanan and Tullock 1962). Spinoza separates the constitutional and operational levels of collective decision-making, hence paving the way for the possibility of a divided sovereignty. His preferred structure follows from this divided sovereignty and results in a polycentric commonwealth between independent cities.

Note that some commentators question whether Spinoza in fact had a conception of sovereignty. Interested readers are referred to Prokhovnik (1997, 2001, 2004) for a detailed analysis on this point. For its purposes, this paper starts from the proposition that 'Spinoza must by definition have a conception of sovereignty. According to this perspective, sovereignty is a general feature of all political societies across time and place, underlying the diversity of laws and institutions' (Prokhovnik 2001, p. 290). His approach is similar to that of Hobbes, when he was able to use sovereignty to rank different forms of the state. However, while Hobbes reaches a conclusion in favour of the unitary state, Spinoza finds the form of federal polity superior.

Taking Holland as the point of reference for his analysis, Spinoza intended to show that 'the failure of the experiment in Holland was not due to lack of zeal but to lack of theoretical understanding, and that the lack of theoretical understating requires more than mere theoretical understanding to remedy it' (Gross 1996, p. 123). Hence, on the cover of his *Treatise on Politics* (TP), Spinoza (1958) declares his objective as 'to show] how a Monarchy and an Aristocracy must be organized if they are not to degenerate into Tyranny, and if the Peace and Freedom of the citizens is to remain

intact'. Spinoza declares that his 'objective in applying [his] mind to politics is not to make any new or unheard of suggestions, but to establish by sound and conclusive reasoning, and to deduce from the real nature of man, nothing save the principles and institutions which accord best with practice' (TP I 4).

For Spinoza, sovereignty is not repugnant to principles of provincial autonomy. In fact, it could be argued that 'Spinoza's notion of sovereignty is crucially designed as an instrument to defend the constitutional tradition, and not as an instrument to unify and strengthen the state. Its purpose is to check the development of centralized government, not to promote it' (Prokhovnik 2001, p. 297). Spinoza (1958) follows a contractarian approach to sovereignty in which 'breach of the contract [by the sovereign] is not punished by civil right but by the right of war' (TP IV 6).

Spinoza (TP III 10) puts emphasis on understanding human nature and its effect on the obedience demanded of them as subjects. Spinoza sees the 'right of the sovereign ... in the fact that it was ... the mind of the state by which all its subjects had to be guided ... [the sovereign] alone had the right to make laws ...' (TP IV 1). He stresses that 'the causes and natural foundations of the state are not to be sought in the precepts of reason, but must be deduced from the common nature or constitution of men' (TP I 7).

According to Spinoza, 'the virtue of a state is stability' (TP I 6). Spinoza was writing in Latin and the word he used for stability is '*securitas*', which could also be translated as security. Spinoza's stability is akin to the idea of being protected from danger, which suggests an evolutionary connotation. Spinoza sees sovereignty in an evolutionary light: 'Man, like everything else in nature, does his utmost to preserve his own being' (TP II 7). In this sense, sovereignty guides the analysis for the structural form that best *stabilizes* the state. Hence, for Spinoza, sovereignty is a logical necessity (Prokhovnik 2001), a function of evolutionary fitness that prevents the state from collapse, and degeneration into tyranny is the first step into extinction. Accordingly, he states that:

if a state is to be capable of lasting, its administration must be so organized that it does not matter whether its rulers are led by reason or passion ... In fact it makes no difference to the stability of a state what motive leads men to conduct its affairs properly, provided that they *are* conducted properly. (TP I 6)

Spinoza then goes on to state that '[t]he best condition of a commonwealth is easily discovered from the purpose of political order: which is simply peace and security of life' (TP V 2).

Spinoza advocates a sovereignty vested in several cities, in which:

all the cities are joined and bound together, not as allied states, but as constituent parts of one state ... the power of the city constitutes a great part of the power of the state itself, and the larger the city, the greater its contribution to the power of the state; hence the cities cannot all be regarded as equal, but the right of each, like its power, must be determined by its size. (TP IX 4)

Under this arrangement, 'each city must remain in possession of its own right as far as possible, and must have more right in the government in proportion as it exceeds the others in power' (TP IX 6). For Spinoza, this polycentric arrangement in which sovereignty is vested in several cities is superior to one in which a capital city dominates the state. He gives several arguments supporting his position. First, the fact that each city is represented in proportion to its power would increase competition between cities. This competition would lead to cities increasing their populations 'by ruling more by kindness than by fear' (TP IX 14). Moreover, sovereignty vested in several cities 'needs no safeguards to prevent [it] from being overthrown by a sudden attack', since the freedom 'enjoyed by several cities' makes it 'not sufficient for [usurping] sovereignty to seize one city in order to gain control over the rest' (TP IX 15).

Note that this arrangement is different from the arrangements we see today in the United States and Australia. Spinozistic sovereignty provides a model:

in which powers are shared between sovereign bodies ... which reaffirm their separateness ... In federal systems such as the United States or in Australia, legislative, judicial and executive powers are distributed between federal and different state governments ... under [Spinozistic sovereignty], however, 'confederal' powers ... were extremely closely restricted ... Rather than attempting to harmonize differences ... [it upholds] the constructiveness of difference ... (Prokhovnik 2007, p. 228)

Polycentric states are at the centre of Spinoza's discourse. Buchanan (1900) echoes Spinoza when he explains his idea of federalism as 'diversity among separate co-operative communities, of shared sovereignty, of effective devolution of political authority and, perhaps most importantly, of the limits on such authority' (p. 3–4). Buchanan envisaged a 'federal union within which members of separate units cooperate' (p. 18) and share sovereignty, in which constitutional requirements guarantee free trade, and with a monetary constitution based on competing national currencies.

Coda

Historically, sovereignty succumbed to the concept of 'nation'. This resulted in sovereignty being conceived of as a one-dimensional possibility: a nation state either has it or it does not. It became an absolute quality. Sovereignty as understood today is 'a right of membership, historically determined, in what amounts to a very exclusive political club' (Jackson 1999, p. 449). This club of nation states is 'the most exclusive political club in the world and has been so for several centuries' (Jackson 1999, p. 449). A sovereign state is conceived of as an exclusive territorial jurisdiction. Since the signing of the Peace of Westphalia in 1648, and especially in the post-Napoleonic era (after 1815), 'a prominent operating principle regulating the size and shape of states has indeed been that states should be contiguous and non-perforated' (Kurrild-Klitgaard 2002, p. 146). This should be understood in relation to the observation that 'the Westphalian State is ... bound symbiotically to the ideology of nationalism' (Tierney 2006, p. 245). The relationship between sovereignty and territory is captured by the principle of *uti possidetis juris* (Jackson 1999). In particular, this principle subordinated the principle of self-determination to boundaries decided by colonial power: juridical territories trumped sociological territories.

It was not until the rise of federal states exemplified by the United States that a shift in the analysis towards the possible divisibility of sovereignty occurred. Today, the political state is 'characterized by polycentric centers of power' (Jayasuriya 2006, p. 372). These centres of power are an extension of the idea of divisibility of sovereignty. However, using the analogy with the idea of a 'polycentric' legal order (implying a multiplicity of independent centres of decision-making) (Bell 1991; Hayek 1983), there is no extensive (economic) evaluation of the need for, or merit of, an analogous 'polycentric' constitutional order (Barnett 1998). The assumption is usually made that 'there is a state or a commonwealth, without exploring the question of which domain [a scalar construct] this commonwealth or state should actually occupy, and in relation to what other public bodies' (Backhaus 1999, p. 137). While conceding that some literature touches on the structure of the state and its relation to economic structures, emphasis should be on maximizing constitutional options rather than deciding among constraints *per se*. The 'choice among constraints' does not explain where the total set of available constraints arises in the first place. Constitutional economics seems to treat these constraints as exogenous— a consequence of not engaging sovereignty. The ability to distinguish between different scales (from the global to the local) goes a long way towards

explaining how options are limited (and hence constraints created). This in turn results in a dynamic set of constraints from which to choose. However, this is available only when the structure of the state is made the subject of analysis. In particular, when questioning the national scale as the default level of analysis, a very different set of constraints emerges.

Unfortunately, in constitutional economics, a taste of 'Westphalia sovereignty' and its emphasis on the nation state still lingers. Although ideas on sovereignty and jurisdiction are not usually treated explicitly, they can be gleaned from the assumptions typically made by constitutional economics. The central feature here is still the same as it has been since early discourse on political economy, which in fact is the same impetus underlying most theories of sovereignty: legitimization of the nation state. Even when scalar differentiation is engaged, it is never in relation to the state, but rather to government— leaving other elements of the state, especially territory and population, beyond systematic inquiry. Hence, we find discourse on the optimal size of government, but not on the optimal size of states, in which government is understood as only one element of the state, distinct from the latter's territory. There has even been a tendency to treat 'government' and 'state' interchangeably, further disguising the essential issue of territoriality and the ensuing possibilities of divided sovereignty (Hayek 1983, p. 48).

A nuanced reading of Spinozistic sovereignty militates against the existence of colossal jurisdictions. One can trace the logic of limiting the jurisdiction of states within a polycentric constitutional set-up back to Aristotle. Although some pronouncements from constitutional economics echo the same ideas, constitutional economics would not pass muster unless it is understood that the golden principle for constitutional design is the inquiry into how states can be engineered along the lines of Spinoza's federal polity. This aspect of the analysis has not yet received much emphasis when it comes to normative constitutional design. It is submitted that such emphasis would lead to countries as large as Russia and China, and even the United States, being questioned as to their stability in the post-constitutional phase.

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Endnotes

[1] See for example Beard (1935).

[2] See for example Halleberg (2011).

[3] For the key work on the concept of *universitas*, see Oakeshott (1975).

[4] A caveat Veitch et al. (2007):

Sovereignty, like so many terms that straddle the boundary between law and politics, is a concept denoting a cluster of related ideas rather than one single clearly defined one. Moreover, in nearly all its clustered elements, it is a contested concept, in the sense that different theoretical approaches dispute over its correct explanation or definition, usually also disagreeing about its practical relevance. (p. 10–11)

[5] For the purposes of this paper, no distinction needs to be made between contractarian-ism and the original-contract approach.

[6] This formulation of a political power exchange has a Foucauldian overtone, in which power is a 'certain type of relation between individuals' (Foucault 2000, p. 324).

[7] For a clearer understanding of the size of population that would constitute a small organization, refer to Kohr (1978).

[8] This jurisdictional competition could be linked to what came to be known as systems competition (Sinn 2002).

References

- Althusius, Johannes (1965), *The Politics of Johannes Althusius; An Abridged Translation of the Third Edition of Politica Methodice Digesta, Atque Exemplis Sacris et Profanis Illustrata, and Including the Prefaces to the First and Third Editions* (Frederick Smith Carney, trans. and ed.), Eyre & Spottiswoode, London.
- Aristotle (2013), *Aristotle's Politics* (Carnes Lord, trans. and ed.), The University of Chicago Press, Chicago.
- Backhaus, Jürgen G. (1999), 'Subsidiarity', in Jürgen G. Backhaus (ed.), *The Elgar Companion to Law and Economics*, Northampton, MA: Edward Elgar, 136, Northampton.

Gussen, Benjamin F. (2013) 'On the problem of scale: Spinozistic sovereignty as the logical foundation of constitutional economics', *The Journal of Philosophical Economics*, VII:1

Barnett, R. E. (1998), *The Structure of Liberty: Justice and the Rule of Law*, Clarendon Press, Oxford.

Beard, Charles A. (1935), *The Economic Basis of Politics*, George Allen & Unwin, London.

Bell, Tom W. (1991), 'Polycentric law', *Institute of Humane Studies Review*, 7 (1).

Block, Walter and DiLorenzo, Thomas J. (2000), 'Is voluntary government possible? A critique of constitutional economics', *Journal of Institutional and Theoretical Economics*, 156 (4), 567–582.

Bodin, J. (1955), *Six Books of the Commonwealth* (M. J. Tooley, trans.), Blackwell, Oxford.

Brennan, Geoffrey and Buchanan, James A. (2000), *The Power to Tax*, Liberty Press, Indianapolis.

Buchanan, James (1990), *Europe's Constitutional Future*, Institute of Economic Affairs, London.

_____ (1991), *The Economics and the Ethics of Constitutional Order*, The University of Michigan Press, Ann Arbor.

_____ (1993), 'Public choice after socialism', *Public Choice*, 77, 67–74.

Buchanan, James and Tullock, Gordon (1962), *The Calculus of Consent: Logical Foundations of Constitutional Democracy*, University of Michigan Press, Ann Arbor.

Calhoun, John C. (1853), *A Disquisition on Government and a Discourse on the Constitution and Government of the United States*, D. Appleton and Co., New York.

Dougherty, Keith L. (2011), *The Calculus of Consent and Constitutional Design*, Springer, New York.

Foucault, Michel (1991), 'Governmentality', in Graham Burchell, Colin Gordon, and Peter Miller (eds.), *The Foucault Effect: Studies in Governmentality*, Harvester Wheatsheaf, 87–104, London.

_____ (2000), *Power*, New Press, New York.

Gross, George M. (1996), 'Spinoza and the federal polity', *Publius*, 26 (1), 117–136.

Gussen, Benjamin F. (2013) 'On the problem of scale: Spinozistic sovereignty as the logical foundation of constitutional economics', *The Journal of Philosophical Economics*, VII:1

Habermas, J. (1996), *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, MIT Press, Cambridge.

Halleberg, Mark (2011), 'Fiscal federalism reforms in the European Union and the Greek crisis', *European Union Politics*, 12 (1), 127–142.

Hamilton, Alexander, Madison, James, and Jay, John (eds.) (1852), *The Federalist: On the New Constitution Written in 1788; With an Appendix Containing the Letters of Pacificus and Helvidius on the Proclamation of Neutrality of 1793; Also the Original Articles of Confederation and the Constitution of the United States, with the Amendments Made Thereto*, Hallowell, ME: Masters & Smith.

Hayek, Friedrich A. (1983), *Law Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*, vol. 1, The University of Chicago Press, Chicago.

Helleiner, Eric (2003), *The Making of National Money: Territorial Currencies in Historical Perspective*, Cornell University Press, Ithaca.

Hinsely, F. H. (1966), *Sovereignty*, C. A. Watts & Co., London.

Hobbes, Thomas (1947), *Leviathan*, J. M. Dent & Sons, London.

Jackson, Robert (1999), 'Sovereignty in world politics: a glance at the conceptual and historical landscape', *Political Studies*, 47 (3), 431–456.

Jayasuriya, Kanishka (2006), 'Globalization, sovereignty, and the rule of law: From political to economic constitutionalism?', in Neil Walker (ed.), *Relocating Sovereignty*, Ashgate Dartmouth, 521–550, Aldershot.

Kohr, Leopold (1978), *The Overdeveloped Nations: The Diseconomies of Scale*, Schoken Books, New York.

Kurrild-Klitgaard, Peter (2002), 'Opting-out: the constitutional economics of exit', *Journal of Economics and Sociology*, 61 (1), 123–158.

Lieber, Francis (1861), *What is Our Constitution: League, Pact, or Government? Two Lectures on the Constitution of the United States ... Delivered in the Law School of Columbia College, During the Winter of 1860 and 1861, to Which is Appended an Address on Secession Written in the Year 1851*, Printed by direction of the Board of Trustees, New York.

Gussen, Benjamin F. (2013) 'On the problem of scale: Spinozistic sovereignty as the logical foundation of constitutional economics', *The Journal of Philosophical Economics*, VII:1

Macdonald, Scot and Nielsson, Gunnar (1995), 'Linkages Between the Concepts of "Subsidiarity" and Sovereignty: The New Debate Over Allocation of Authority in the European Union', presented at the Fourth European Union Studies Association (EUSA) Biennial Conference.

Merriam, Charles Edward (1900), *History of the Theory of Sovereignty since Rousseau*, Columbia University Press, New York.

Oakeshott, Michael (1975), *On Human Conduct*, England Clarendon Press, Oxford.

Prokhovnik, Raia (1997), 'From democracy to aristocracy: Spinoza, reason and politics', *History of European Ideas*, 23 (2–4), 105–115.

_____ (2001), 'Spinoza's conception of sovereignty', *History of European Ideas*, 27 (3), 289–306.

_____ (2004), *Spinoza and republicanism*, Palgrave Macmillan, Basingstoke.

_____ (2007), *Sovereignties: Contemporary Theory and Practice*, Palgrave Macmillan, New York.

Rabkin, Jeremy A. (2005), *Law without Nations? Why Constitutional Government Requires Sovereign States*, Princeton University Press, Princeton.

Rousseau, Jean-Jacques (1797), *A Dissertation on Political Economy: To Which is Added, A Treatise on the Social Compact, or, The Principles of Politic Law*, Barber & Southwick, Albany, New York.

Sinn, Hans-Werner (2002), *The New Systems Competition*, Blackwell, Oxford.

Smith, Adam T. (2011), 'Archaeologies of sovereignty', *Annual Review of Anthropology*, 40, 415–432.

Smith, David A., Solinger, Dorothy J., and Topik, Steven C. (eds.) (1999), *States and Sovereignty in the Global Economy*, Routledge, London.

'Sovereign', (1989), *The Oxford English Dictionary*, Oxford University Press.

Spinoza, Baruch (1958), *The Political Works: The Tractatus Theologico-Politicus in Part and the Tractatus Politicus in Full* (A. G. Wernham, ed. and trans.), Clarendon Press, Oxford.

Gussen, Benjamin F. (2013) 'On the problem of scale: Spinozistic sovereignty as the logical foundation of constitutional economics', *The Journal of Philosophical Economics*, VII:1

Tierney, Stephen (2006), 'Reframing sovereignty? Sub-state national societies and contemporary challenges to the nation-state', in Neil Walker (ed.), *Relocating Sovereignty*, Ashgate Dartmouth, 239–261, Aldershot.

Tocqueville, Alexis de (1856), *The Old Regime and the Revolution* (John Bonner, trans. and ed.), Harper & Brothers, New York.

Veitch, S., Christodoulidis, E. A., and Farmer, L. (2007), *Jurisprudence: Themes and Concepts*, Routledge-Cavendish, London.

Walker, R. B. J. (1990), 'Sovereignty, identity, community: Reflections on the horizons of contemporary political practice', in R. B. J. Walker and Saul H. Mendlovitz (eds.), *Contending Sovereignties: Redefining Political Community*, Lynne Rienner Publishers, 159–185, London.

Wallerstein, Immanuel (1999), 'States? Sovereignty? The dilemma of capitalists in an age of transition', in David A. Smith, Dorothy J. Solinger, and Steven C. Topik (eds.), *States and Sovereignty in the Global Economy*, Routledge, 20–33, London.

Weber, Max (1981), 'Essay on some categories of interpretive sociology', *The Sociological Quarterly* 22(2), 145–150.

Wicksell, K. (1994), 'A new principle of just taxation', in Richard Musgrave and Alan Peacock (eds.), *Classics in the Theory of Public Finance*, Macmillan and Company, 72–118, New York.

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