

(in advance, so to speak) against constitutionalism as now understood. One side of his case was purely juridical: he began from the idea of a state of nature, a condition in which there is no government, but in which everyone possesses what he called the right of nature. This right in the first instance is a right to preserve oneself, which implies a right to take whatever action is needful in order to do so. It is a right, Hobbes argued, which expands under conditions of the anarchic state of nature into a right to everything, including the possessions (and even the bodies) of others. Hobbes wished to give an account of how political power, the power to coerce, arises as a matter of right. His argument is familiar: the equal possession of the right of nature in the state of nature produces a condition of war of all against all, a condition quite intolerable and ultimately at odds with the self-preservation to which all men have a right. The natural playing out of their rights to self-preservation leads to a situation where self-preservation is, in a severe understatement, "very insecure." In order to remedy that situation, men contract with each other to cede their right of nature to an individual or group, who either receives their rights or retains his (their) own. The juridical result is that the citizen/subject has no rights but what the positive law (or silence of the law) of the sovereign allows him, with the exception of a narrow right to preserve himself from immediate violence. There can be no idea of a constitution in the modern sense because all right, all power to act, must be surrendered to the sovereign individual or body. Any attempt to divide or limit authority is a mere illusion: there must always be some body that decrees and enforces the limitations, and that body, according to Hobbes, is sovereign. Sovereignty can be hidden but not evaded.

In addition to his juridical argument, Hobbes had another, different kind of argument, which perfectly reinforced the juridical argument. Not only do human beings have the right to harm each other in the state of nature, but they have the ability and the desire to do so. That they have the ability to do so Hobbes took to be the basis for his claim that all men are equal, that is, equally able to harm or (more accurately) equally vulnerable to harm. "All men are mortal"—and all men's lives are contained in a more or less fragile body that must at some time sleep. Even the weakest can harm or kill the strongest one-on-one.

Moreover, human psychology being what it is, men add to their natural vulnerability a natural desire to empirical reality is conflict and violence. So rooted in the nature of man is the propensity to conflict that only a very powerful state, only the sovereign state outlined in Hobbes's juridical theory, can keep the peace and secure for men what they rationally desire—peace as a means to self-preservation. The threats to civil peace are so extensive that it makes no empirical sense to limit or divide powers. The sovereign ruler is the only logically and juridically possible political arrangement. Openly sovereign absolutism is the only right order.

Hobbes was one of the targets against whom modern constitutionalism was aimed, but the Hobbesian argument was never simply defeated. In the twentieth century, for example, the German jurist and philosopher of law Carl Schmitt revived a Hobbes-like position in his now well-known doctrine of the "exception." According to Schmitt, the "liberal constitutional state," what we are calling modern constitutionalism, attempts to "repress the question of sovereignty by a division and mutual control of competences." It is that possibility of repression of sovereignty that Schmitt denies.