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Hobbes on Property: Between Legal Certainty and Sovereign Discretion

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Abstract

Hobbes treats individual property as regulated by stable law, yet dependent on the arbitrary will of the sovereign. In this paper I catalogue the different definitions of property present in his main political and legal works – *The Elements of Law* (1640), *De Cive* (1642, 2nd ed. 1647), *Leviathan* (1651) and *A Dialogue between a philosopher and a student* (1681) – with the aim of showing how he attempted to square those commitments. I record how the definitions of property affect his views about how sovereigns hold property, the nature of the liability of subjects to having their property confiscated by the sovereign, and the legal conflicts that may arise between subjects and their rulers regarding such confiscations.

Keywords

Hobbes – property – possession – sovereignty – rights

That Hobbes considered individual property to be of vital political concern is beyond doubt. In the Epistle dedicatory of *De Cive* (1642, 2nd ed. 1647) he confesses that he first turned to political philosophy in order to consider the origin and nature of individual property.¹ *The Elements of Law* (1640), *Leviathan* (1651) and the posthumously published *A Dialogue between a philosopher and a student* (1681) all contain discussions of the institution of individual property and its significance in securing peace. Nevertheless, the literature contains

1 Thomas Hobbes, *On the Citizen*, ed. Richard Tuck and Michael Silverthorne, trans. Michael Silverthorne (Cambridge: Cambridge University Press, 1998), 5–6 [Epistle dedicatory, §9].

few detailed treatments of Hobbes's views of property.² This may in part be explained by the fact that Hobbes was a systematic philosopher, rendering the precise nature of property a “second-order issue,” to be determined once the characteristics of sovereign power and the commonwealth were established. Additionally, Hobbes's position appears at base to be “very simple.” He treats individual property as a human convention, dependent on an effective legal system backed by the coercive power of an absolute sovereign. He concludes that all property therefore ultimately originates in a grant of the sovereign and is dependent on his continued grace. In a well-ordered commonwealth property may be held securely against fellow citizens but not against the sovereign who has the right to tax or confiscate property at his own arbitrary will and discretion. Although this made Hobbes an outlier, even among the absolutist thinkers of his age who generally did accept that citizens could have rights of property against the crown, there could be little doubt about the inflammatory upshot of his theory.³

While all this is true, I wish to suggest that a careful reading of the political and legal works—*The Elements*, *De Cive*, *Leviathan* and *A Dialogue*—reveals that Hobbes in various ways revised his views on the nature of property. To this end I catalogue the definitions of property present in these works and several shifts of emphasis that have hitherto gone unnoticed. I also record how the changing definitions of property affect Hobbes's treatment of the manner in which the sovereign can hold property, the nature of the liability of subjects to having their property confiscated by the sovereign, and his characterization of

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- 2 Authors who discuss Hobbes's views on property include Arash Abizadeh, “Sovereign Jurisdiction, Territorial Rights, and Membership in Hobbes,” in A.P. Martinich and Kinch Hoekstra (eds.), *The Oxford Handbook of Hobbes* (Oxford: Oxford University Press, 2016), 404–411; Laurens van Apeldoorn, “Property and Despotism,” in Robin Douglass and Johan Olsthoorn (eds.), *Hobbes's On the Citizen: A Critical Guide* (Cambridge: Cambridge University Press, 2020) 108–125; Maurice Goldsmith, *Hobbes's Science of Politics* (New York: Columbia University Press, 1966) 193–194, 197–200, 207–212; Benjamin Lopata, “Property Theory in Hobbes,” *Political Theory* 1 (1973): 203–218; Johan Olsthoorn, “Why justice and injustice have no place outside the Hobbesian State,” *European Journal of Political Theory* 14 (2015): 19–36; Johan Olsthoorn, “Hobbes on Justice, Property Rights and Self-ownership,” *History of Political Thought* 36 (2015): 471–98; Christopher Pierson, *Just Property: A History in the Latin West, Vol. I: Wealth, Virtue, and the Law* (Oxford: Oxford University Press, 2013), 172–188; Richard Schlatter, *Private Property: The History of an Idea* (New Brunswick, N.J.: Rutgers University Press, 1951), 138–143; Yves Charles Zarka, *Hobbes et la pensée politique moderne* (Paris: Presses Universitaires de France, 1995).
- 3 Michael Lobban, “Thomas Hobbes and the Common Law,” in David Dyzenhaus and Thomas Pool (eds.), *Hobbes and the Law* (Cambridge: Cambridge University Press, 2012), 62; Pierson, *Just Property*, 172; Johann Sommerville, *Royalists and Patriots: Politics and Ideology in England 1603–1640* (London: Routledge, 2014), 152.

the legal conflicts that may arise between subjects and their sovereigns regarding such confiscations. I hope to show that, while Hobbes's main conclusions on these vital topics remained largely the same, he applied much philosophical ingenuity in developing changing justifications for them. This reveals a life-long struggle to conceive of individual property as at once regulated by stable law and dependent on the discretion of the sovereign.

1 The Early Works: *The Elements* and *De Cive*

1.1 *The Definition of Property*

Commentators traditionally attribute to Hobbes a conception of property as an exclusive right, "a claim with an implication of exclusivity, or a duty of forbearance and abstention on the part of others."⁴ This interpretation does not fit the early works. In *The Elements* and *De Cive* Hobbes operates with an unconventional conception of property as an effective natural right—a right with the capacity or power to exercise it—that may, but need not be exclusive.⁵ The closest Hobbes comes to a definition of property in the early works is the following passage from *De Cive*:

a person's property is what he can keep for himself [*sibi retinere potest*] by means of the laws and the power of the whole commonwealth, i.e. by means of the one on whom its *sovereign power* has been conferred.⁶

Central to this definition—which must be strictly speaking incomplete because it does not reference a right (exclusive or otherwise)—is effective possession: the ability to exercise control over what is one's own. Elsewhere in *De Cive* Hobbes treats this capacity to exercise control as conceptually necessary for property, for instance when stating that "required for a man to have property in goods is not that he be able to use them, but that he alone be able to use them [*non ut quis iis possit uti, sed possit solus*]," and when admitting that

4 Michael Zuckert, *Natural Rights and the New Republicanism* (Princeton: Princeton University Press, 1994), 275; also Abizadeh, "Sovereign Jurisdiction," 400, 405; Goldsmith *Hobbes's Science of Politics*, 197; Olsthoorn, "Hobbes on Justice," 485.

5 See also Van Apeldoorn, "Property and Despotism Sovereignty."

6 Hobbes, *On the Citizen*, 85 [ch. 6 §15]; also Thomas Hobbes, *The Elements of Law Natural and Politic*, ed. Ferdinand Tönnies, 2nd ed. Maurice Goldsmith (London: Frank Cass & Co), 84 [pt. 1 ch. 16 §5], 127–28 [pt. 2 ch. 3 §2].

a slave may have property in things “in the sense that he can keep and protect them against a *fellow slave*.”⁷

That the definition is incomplete and that property also includes a right to possession must be gleaned from the way in which Hobbes presents the legal system as securing citizens’ property. This presentation starts with an account of the state of nature, before the advent of the commonwealth, in which “every man was permitted to do to anybody, and to possess, use and enjoy whatever he wanted and could get.” This right is a liberty and overlaps with the same right of all others.⁸ Therefore, it cannot be effectively exercised and is of “little use and benefit.” Rather, these overlapping liberties render the state of nature fundamentally insecure and warlike and nothing can properly be said to be one’s own. The introduction of the commonwealth, and in particular its legal system, establishes property.⁹

Property is established, first by rendering rights “exclusive” in the sense that the natural right of one person to “to possess, use and enjoy” a thing (from now on I summarize this conjunction as “to possess”) goes together with the lack of a right of all others to that thing (or a duty not to interfere with that person’s possessions). This is accomplished through what Hobbes terms the “distributive” part of the law,

by which his own right is distributed to each man, that is, the law which lays out the rules for all things, by which we may know what belongs to us and what to others, so that others may not obstruct us in the use and enjoyment of our own, and we may not obstruct them in the use and enjoyment of theirs.¹⁰

As example of the distributive part of the law, he gives us: “*let that be yours which you have caught with your own net in the sea.*” When such a law declares something “yours” it cannot be the mere attribution of a liberty right, since everyone has an abundance of liberties by nature. Rather it means that the thing is “yours in the sense that all are prohibited from obstructing your ability to use and enjoy it at all times in security at your discretion.” It is the attribution of an exclusive right. Secondly, by means of the “vindicative or penal” part of the law these exclusive rights are enforced, which is to say that citizens are

7 Hobbes, *On the Citizen*, 157 [ch. 14 §7] translation altered, 104 [ch. 8 §5].

8 Hobbes, *On the Citizen*, 28 [ch. 1 §10].

9 Hobbes, *On the Citizen*, 28–29 [ch. 1 §10–11]; *The Elements*, 72 [pt. 1 ch. 14 §10], 174 [pt. 2 ch. 8 §8].

10 Hobbes, *On the Citizen*, 157 [ch. 14 §6–7].

protected against violations of the duty of others not to interfere. The law is “useless [*frustra*],” Hobbes emphasizes, if it solely distributes exclusive rights without also ensuring that those violating the duties constituting these rights are punished. Only then are individuals granted a protected sphere where they have the power or capacity to effectively possess the things they own.¹¹

Does Hobbes’s outline of the function of the law not confirm that property conceptually consists in having exclusive rights to possession? Allocating exclusive rights certainly is a precondition for property in practice, since it is how a legal system must empower individuals to effectively exercise natural rights and “keep and protect” things as their own. Yet this is due to a contingent feature of the human condition: because individuals are “equal to each other in point of strength and natural powers,” they are not by nature able to exercise preeminent power over anything without the help of law that imposes enforceable duties on others.¹²

1.2 *Property of Sovereigns*

The conception of property as effective natural right enables Hobbes to defend a philosophically rigorous form of despotism. On a despotic conception of political rule, the sovereign owns the citizens and their possessions by virtue of his sovereignty. In his *Les Six Livres de la République*, Jean Bodin had described the despotic monarch as “lord (*dominus*) of the goods and persons of his subjects ... governing them as the master of a familie doth his slaves.” The “lordly” sovereign holds his subjects and their possessions as objects of individual property. Subjects, conversely, cannot claim property against their sovereign, not even property in their own persons. While Bodin considered this treatment at odds with natural law, he accepted that it could be legitimate on the basis of the law of nations that allows for despotic rule over those who have been “in good and lawfull warre vanquished.”¹³ Hobbes, who in *Elements* at several junctures draws on Bodin and “seems to have been writing with an open copy of the *République* close at hand,”¹⁴ argues in the early works that all political rule is despotic, regardless of whether it was acquired through conquest. Although “patrimonial” commonwealths acquired through conquest and commonwealths “by design,” established by means of a voluntary contract, differ

11 Hobbes, *On the Citizen*, 157–58 [ch. 14 §6–7].

12 Hobbes, *On the Citizen*, 173 [ch. 15 §5], 26 [ch. 1 §3–4].

13 Jean Bodin, *The Six Bookes of a Commonweale*, ed. Richard Knolles (London: Impensis G. Bishop, 1606), 199–201 [pt. 2, ch. 2].

14 Deborah Baumgold, *Contract Theory in Historical Context: Essays on Grotius, Hobbes, and Locke* (Leiden: Brill, 2010), 123.

in their origin and manner of formation they have “all the same properties.” Citizens in any well-ordered commonwealth are therefore necessarily subject to a “despotic (that is lordly)” sovereign; they, and all that is committed to them, are the “property” of the sovereign.¹⁵

It is worth observing that Hobbes could complete this radical defense of despotic rule only by introducing the unconventional definition that made effective control, not exclusive right, determinative of property. The sovereign lacks an exclusive right to either the citizens themselves or what is committed to them by means of the law. The sovereign’s right to possess citizens is not exclusive of the inalienable rights of citizens,¹⁶ and more broadly of the liberties granted to citizens by the civil law. For instance, the sovereign may kill a subject if he so pleases but he cannot rightfully demand that the subject—who has an inalienable right to resist—does not interfere with him killing him. The sovereign, however, does have property in the sense of an effective natural right. He has a (non-exclusive) natural right because he has not alienated any natural rights in the original covenant nor is he subject to the distributive (or penal) laws that establish enforceable exclusive property rights (more on this below). He has the power to exercise those natural rights because it lies in the nature of sovereign power, which is “the greatest power that men can confer, greater than any power that an individual can have over himself,” that the sovereign can exercise effective control over the citizens and all they possess.¹⁷

The early works contain little by way of discussion of how the commonwealth secures and holds resources for public financing. In *The Elements*, Hobbes is satisfied with the observation, consistent with the theory that the sovereign has property in the citizens’ belongings, that “the riches and treasure of the sovereign, is the dominion he hath over the riches of his subjects.” In *De Cive*, he notes the need for the commonwealth “to have money readily available” and accordingly the need to “to exact money” from citizens in peacetime, especially with the purpose of financing national defense. However, perhaps because he has already established that the sovereign owns everything, neither there do we find an attempt to characterize the sovereign’s title to the public treasury.¹⁸

15 Hobbes, *On the Citizen* 73 [ch. 5 §11], 104 [ch. 8 §5], 111–112 [ch. 9 §9–10]; *The Elements*, 129 [pt. 2 ch. 3 §5], 134 [pt. 2 ch. 4 §9].

16 As noted by Zarka, *Hobbes*, 185–7. On inalienable rights see Hobbes, *On the Citizen* 39–40 [ch. 2 §18–19].

17 Hobbes, *On the Citizen*, 82 [ch. 6 §13].

18 Hobbes, *The Elements*, 137–138 [pt. 2 ch. 5 §1]; *On the Citizen*, 146 [ch. 13 §8].

1.3 *Property of Citizens*

While distributive laws may allocate property to citizens, Hobbes denies that subjects of despotic rule can hold such property against the sovereign. Citizens lack “*absolute Dominion [Dominium] over their possessions,*” as he puts it in *De Cive*. His main reason for this conclusion is that they are subject to despotic rule: “those who have a *Lord [Dominus]* do not have Dominion, as was proved at VIII.5.”¹⁹ In paragraph 8.5, where we are told to look for the proof, he explains:

For he who has the right to dispose of a man’s *person* as he pleases also disposes of all the things the *person* could dispose of. There is therefore nothing that the *slave* can keep as *his own* against his *Master*.²⁰

The argument clearly trades on the definition of property as including effective possession: since the sovereign rules with preeminent power over citizens (and “disposes of all things” the citizens could dispose of), citizens lack the power, necessary for property, to keep anything for themselves in relation to the sovereign. Even if the distributive laws have granted property to citizens that they can keep for themselves in relation to their fellow citizens, they lack the power to also hold it securely against the sovereign.

What this argument does not clearly show is why the sovereign may exercise preeminent power over the belongings of citizens with right. Hobbes must thus explain why the sovereign necessarily has a right to the property of subjects. He addresses this point as follows:

individual citizens hold *their property*, over which none of their fellow citizens has any right, because they are bound by the same laws; but he does not hold any property on such terms that the holder of sovereign power has no right over it, [1] since his commands are the laws themselves, [2] his will comprehends the will of individuals, [3] and individuals have appointed him their sovereign judge.²¹

In this passage Hobbes provides three reasons why the sovereign is at liberty to possess the goods committed to the citizens, two of which can be traced to the paragraph immediately preceding it where he explains that sovereigns are not bound by laws of their own making or by contracts with citizens. First, the sovereign is not bound by the civil law because he cannot bind himself

19 Hobbes, *On the Citizen*, 136 [ch. 12 §7]; *The Elements*, 174 [pt. 2 ch. 8 §8].

20 Hobbes, *On the Citizen*, 104 [ch. 8 §5].

21 Hobbes, *On the Citizen*, 85 [ch. 6 §15].

to obedience: “he can release himself at his own discretion, and anyone who can do this is in fact free.” Hence, he cannot be bound by the distributive (and penal) laws that allocate property amongst the citizens. Second, neither can the sovereign be bound by (alleged) contracts with citizens. His reasoning is that, since “the will of each citizen is comprehended in the will of the commonwealth in all matters,” the sovereign can release himself from any contract with the citizens and therefore is, again, free. The enforceable duties that may render citizens’ property exclusive on the basis of either a law or a contract cannot apply to the sovereign. The sovereign is therefore always at liberty to possess things committed to the citizens.²² What about the third reason given in the passage just quoted? It concerns suits against the sovereign, discussed in the next section.

1.4 *Suits Against the Sovereign*

Hobbes admits that citizens may sue the sovereign concerning conflicts about property. He writes in the first edition of *De Cive*:

There are indeed many things permitted to citizens by the commonwealth, and legal action may sometimes be taken against the holder of *sovereign power*; but such action [*actio*] is not a matter of *civil law* [*iuris ciuilib*] but of *natural equity* [*aequitatis naturalis*]; and the question is not what the holder of *sovereign power may* rightly do, but what he *willed*; hence he himself will be the judge [...].²³

A note appended to the second edition, intended to clarify this passage, reads:

Whenever a citizen is given a legal action [*actio legis civi*] against the Sovereign, i.e. against the commonwealth, the question of the action is not whether the commonwealth may possess [*possidere jure possit*] the thing which is the object of the action, but whether in its existing laws it has willed to possess it. For law is the declared will of the Sovereign. The commonwealth can exact money from the citizen on two grounds, namely as a tax or as a debt. In the former case, no legal action is given because it cannot be contested that the commonwealth has the right to exact taxes. In the second case an action is given, and the reason is that the commonwealth does not want to take anything from the citizen in underhanded ways, and yet is willing to take everything from him in an open fashion.

²² Hobbes, *On the Citizen*, 84 [ch. 6 §14].

²³ Hobbes, *On the Citizen*, 85 [ch. 6 §15].

Hence the facile criticism that on the basis of this doctrine princes could release themselves from the obligation of debts, misses the point.²⁴

The main reason for discussing these passages is to consider the implications for Hobbes's notion of individual property. If citizens may sue the sovereign over property, must not there be the possibility that citizens have a legal title they can hold against the sovereign, even if the sovereign himself is the judge of the matter? This is doubtful. In both passages Hobbes points out that sovereign right is not in question. The question of the action is not one of civil right nor concerning the commonwealth's right to possess the thing in question. Rather, it is a matter of natural equity (in the first edition) and concerns the question whether the sovereign "in its existing laws" has willed to possess it (in the second edition). This is an apparent contradiction: if it is a matter of natural equity it is a matter of the law of nature; if it is a matter of the existing laws, it would appear a matter of civil law. (Note also that in the second edition Hobbes speaks of an *actio legis civi*, rather than an action of natural equity as he did in the first edition.) The contradiction is resolved if one accepts that the question whether "in its existing laws" the sovereign has willed to possess something is a question of natural law in the following sense: the sovereign has a reason to resolve the dispute in accordance with the civil law based on the natural duty of equity, which applies to the sovereign when "awarding" or "distributing" rights to others.²⁵ What the civil law requires may itself be equitable, and even if it is not, equity may demand that the sovereign gives a ruling in conformity with the civil law, for instance because citizens have developed legitimate expectations on its basis. Yet, citizens lack a legally enforceable right to such equitable adjudication: the civil law itself does not bind the sovereign, who is above laws of his own making, to resolve the dispute in accordance with the civil law. Citizens may appeal to what the existing laws require, but the judgement of the sovereign is ultimately based on natural equity.

When Hobbes admits that a suit against the sovereign may concern the question "whether in its existing laws" the sovereign has willed to possess something, he is therefore not committing to the possibility that distributive laws allocate rights to goods or lands that are exclusive also in relation to the sovereign. Note first that he puts the question in terms of "possession," not property, which suggests—in conformity with his defense of despotism—that the question is not whether the sovereign owns (and accordingly has a right to) the thing in question but whether the sovereign wishes that his property

24 Hobbes, *On the Citizen*, 85–6 [ch. 6 §15 note].

25 Hobbes, *On the Citizen*, 50 [ch. 3 §15]; *The Elements*, 88–89 [pt. 1 ch. 17 §2].

remains in the possession of his subjects. Second, even if the civil law suggests the existence of a right on the part of the creditor that a sovereign debt be repaid, the sovereign's duty to do so is based on natural equity: equity may require that the sovereign makes good on his promise as reflected in the law of his own making but it is not an obligation grounded in the civil law. In effect, all property relations with the sovereign are ultimately governed by natural law alone. This is why the criticism that, on his theory, princes could release themselves from the obligation of debts is "facile": the duty of a sovereign, who has a right to all things, can necessarily only be found in the law of nature.

2 Leviathan

2.1 *The Definition of Property*

Whereas in the early works, Hobbes conceived of property as an effective natural right, in the *Leviathan* he defines property more conventionally as a right grounded in civil law that is exclusive, at least in relation to fellow citizens. The following passage contains the best definition of property in *Leviathan*:

the Propriety which a subject hath in his lands, consisteth in a right to exclude all other subjects from the use of them; and not to exclude their Sovereign [...].²⁶

In *De Cive* he had maintained that property is secured *by means of* the law. He now accepts that property *consists in* the rights that are allocated by the civil law. Indeed, elsewhere in *Leviathan* he writes that the introduction of "*Propriety ... consisteth in the laws.*"²⁷ And whereas in *De Cive* he had defined the dominion of citizens as effective possession—that which they "can keep and protect" against their fellows—in *Leviathan* he defines dominion not as effective possession but as "the Right of possession."²⁸

According to the definition just cited, property consists in a "right to exclude." That Hobbes means to speak (also) of an exclusive right follows from the marginal note accompanying the definition, which states that "*Propriety of a Subject excludes not the Dominion of the Sovereign, but onely of another Subject.*" Dominion, as noted, is the right to possession, which means that

²⁶ Thomas Hobbes, *Leviathan*, ed. Noel Malcolm (Oxford: Oxford University Press, 2012), 390 [128].

²⁷ Hobbes, *Leviathan*, 388 [128].

²⁸ Hobbes, *Leviathan*, 244 [81].

property excludes the right of possession of fellow citizens. Elsewhere he accepts explicitly that “[e]very man has indeed a Propriety that excludes the Right of every other Subject.”²⁹ It also follows from his explanation of how property is established by “distributive” and “penal” laws.³⁰ Distributive laws are those that “determine the Rights of the Subjects, declaring to every man what it is, by which he acquireth and holdeth a propriety in lands, or goods, and a right or liberty of action: and these speak to all the Subjects.” Penal laws attach penalties to violations of the law. Since he accepts, as he had done in *De Cive*, that distributive laws can be violated it must be the case that distributive laws allocate duties. This remains implicit in the formulation of the character of distributive laws: explicit is only the allocation of what appear to be liberty rights (“a right or liberty of action”). That distributive laws distribute exclusive rights appears from the fact that he elsewhere defines (distributive) civil laws as “the Rules, whereby every man may know, what Goods he may enjoy, and what Actions he may doe, without being molested by any of his fellow Subjects: And this is it men call *Propriety*.” Distributive laws, accordingly, secure the exclusivity of rights, spheres of liberty of action protected by imposing on others an enforceable duty not to interfere.³¹

The introduction of a “right to exclude” in the definition is nevertheless tantalizing. It suggests the possibility that Hobbes may have realized that property includes not only first-order exclusive rights to possession but also second-order legal powers to affect the incidents of the first-order rights, in particular the power to permit others to take possession while retaining a title and the power to transfer or alienate one’s title.³² Hobbes’s right to exclude could be understood as describing the power of the property holder to decide whether or not to deny others the (exclusive) right to possess the thing they own. To attribute this power to property holders is also to attribute (the possibility—depending on the will of the owner—of having) an exclusive right. This reading is therefore consistent with the other passages cited but remains speculative. Certain, though, is that Hobbes now assumes that property holders have these powers. This is clear from the additional detail he brings to bear on distributive laws. He

29 Hobbes, *Leviathan*, 390 [128], 504 [169].

30 He now considers them different kinds of law rather than two parts of the same law, as noted by Goldsmith, *Hobbes’s Science of Politics*, 276. This gives further credence to the view that Hobbes now thinks that distributive laws in isolation may establish property, although without the penal law one will not be able to enjoy one’s property since others will habitually violate the duties in which one’s property consists.

31 Hobbes, *Leviathan*, 274 [91], 442 [148].

32 For an analysis of property along these lines see e.g. James Penner, *Property Rights: A Re-Examination* (Oxford: Oxford University Press, 2020), 13.

notes the importance of “*Laws of transferring propriety*,” as the marginal note has it, which consist in rules concerning “in what manner, all kinds of contract between Subjects, (as buying, selling, exchanging, borrowing, lending, letting, and taking to hire,) are to be made; and by what words, and signes they shall be understood for valid.”³³ Such laws should be classified as distributive laws: they concern how one may acquire and on what terms one may hold property. However, they do not attribute to citizens exclusive rights but rather powers to affect changes in those first-order rights by transferring them partly or in whole, temporarily or permanently. In this light, the traditional reading of Hobbes that attributes to him a conception of property as an exclusive right—a claim with an implication of exclusivity—appears not fully appropriate for *Leviathan* either. Hobbes accepts (albeit obliquely) that property consists of a bundle of rights that includes an exclusive right as well as a number of legal powers.

Hobbes has sometimes been faulted for not developing these observations further: he did not address the question that would have been central to the common lawyers of his day, namely how precisely property is acquired and transferred, so leaving “large swaths of law ... to ad hoc adjudications.”³⁴ While Hobbes, indeed, does not provide any detailed account of the laws of conveyance, he does accept that a well-functioning legal system should include such rules. There is, accordingly, no reason to think that Hobbes would celebrate a legal system where the exercise of legal powers in relation to property is subject to arbitrary adjudication. What he can be faulted for, perhaps, is that he does not provide a definition of civil law that can effectively accommodate this function of the law as establishing and regulating legal powers. He continues to conceive of civil law—which he treats as including the “Rules of Propriety (or *Meum* and *Tuum*)”—as commands: the civil laws are “*those Rules, which the Common-wealth hath Commanded ... to make use of, for the Distinction of Right, and Wrong.*”³⁵ The commands impose duties on those subject to the laws. But legal powers are not duties and distributive laws, insofar as they establish legal powers, are therefore not best understood as commands. Hobbes must have realized this as he treats legal powers elsewhere as liberties the sovereign has “pretermitted: such as is the Liberty to buy, and sell, and otherwise contract with one another.”³⁶ Yet, this characterisation of legal powers is unsuitable too, since he conceives of liberties as cases where “the Sovereign has prescribed

33 Hobbes, *Leviathan*, 392 [129]; compare Hobbes, *On the Citizen*, 213 [ch. 17 §10].

34 Lobban, “Thomas Hobbes and the Common Law,” 62.

35 Hobbes, *Leviathan*, 274 [91], 414 [137].

36 Hobbes, *Leviathan*, 328 [109].

no rule” and as an “exemption from Laws.”³⁷ Hobbes thus appears to lack the vocabulary to adequately characterise his developing views on the nature of property.

2.2 *Property of Sovereigns*

In *Leviathan*, Hobbes no longer asserts that the sovereign owns the citizens or their belongings. This must be attributed to the change in the definition of property as outlined above. He now defines property as an exclusive right to possession and the sovereign lacks such an exclusive right when property is allocated by means of distributive laws to citizens. The sovereign therefore cannot be said to have property in the belongings allocated to citizens (or in their persons). The despotism of the early works—which treats citizens as objects of property—is almost entirely absent in *Leviathan*. This is an important shift away from the earlier view, not always fully appreciated by commentators.³⁸

Can the sovereign (as representative of the commonwealth) hold property in the commonwealth? Some commentators treat the affirmative answer to this question as evident.³⁹ Hobbes speaks in some detail of the “publique Treasure” which has income in the form of taxes and expenses in the form of the wages for officials. Robbery of the public treasure is robbery of the “publique” or “many at once,” which suggests that the public treasury is the property of the commonwealth.⁴⁰ Additionally, Hobbes discusses the possibility of crown estates. The distribution of land is originally due to the arbitrary will of the sovereign, who establishes a pattern of ownership—“assigneth to every man a portion”—by means of the “First” distributive law. In this original distribution of land, the commonwealth “may be conceived to have a portion, and possesse, and improve the same by their Representative.” He further admits that this land originally allocated to the commonwealth can be “Subject to Alienation” and that the commonwealth “may sell, or give it away; and does sell, and give it away when tis done by their Representative.”⁴¹

37 Hobbes, *Leviathan*, 340 [113], 414 [137].

38 Abizadeh, “Sovereign Jurisdiction”; compare Daniel Lee, “Sovereignty and Dominion: The Foundations of Hobbesian Statehood,” in Robin Douglass and Johan Olsthoorn (eds), *Hobbes’s On the Citizen: A Critical Guide* (Cambridge: Cambridge University Press, 2020), 138; Charles Turlon, “The Despotical Doctrine of Hobbes, Part II: Aspects of the Textual Substructure of Tyranny in *Leviathan*,” *History of Political Thought*, 23 (2002): 61–89.

39 E.g. Goldsmith, *Hobbes’s Science of Politics*, 209.

40 Hobbes, *Leviathan*, 396 [130], 478 [160], 494–496 [166]. The public treasury is among other things used to pay citizens “Wages” for the performance of services “by Contract” to the commonwealth.

41 Hobbes, *Leviathan*, 388–392 [128–129].

The difficulty lies in the fact that Hobbes continues in *Leviathan* to maintain that the sovereign is not subject to civil law. He repeats his argument from *De Cive*, an argument that trades on conceiving law as essentially imposing obligations, arguing that since the sovereign has the power to “make and repeale Lawes,” he can free himself from the subjection of the law if he so desires and “consequently he was free before.”⁴² It is true that, even if the sovereign is not subject to the law, the law can allocate property to the sovereign in the sense that it can impose on all citizens an obligation not to interfere with the sovereign’s possession of the public treasury or the crown lands. The existence of such an exclusive right requires only that the subjects are bound by the law, not that the sovereign is so as well. However, as noted, by the time of writing *Leviathan* Hobbes treats property as including more than just exclusive rights: it is essential for “the Sustentation of a Common-wealth” that property can be transferred, bought, sold, hired and borrowed.⁴³ Distributive laws establish the legal powers that make such transactions possible. In order to grant that the sovereign has property, it appears, Hobbes must accept that the sovereign is subject to the civil law, at least in the sense that he is enabled, for instance, to sell part of the crown lands in a way that is recognized in the legal system as establishing a valid title for the buyer. To deny that the sovereign is subject to the distributive laws would leave property transactions with the sovereign governed only by natural law. This would, on his own admission, render the property of those who transact with the sovereign uncertain: “*Take away the Civill Law, and no man knows what is his own, and what another mans.*”⁴⁴ Hobbes’s conception of property is thus in tension with his treatment of the sovereign as unbound by law and the conception of law that underpins it.

2.3 *Property of Citizens*

In *De Cive*, Hobbes had derived the conclusion that citizens cannot hold property against the sovereign from the despotic character of sovereign rule: the sovereign has property in the citizens’ possessions, and citizens therefore can hold anything as their own only by his dispensation. This argument is no longer available to him in *Leviathan*. He replaces it with the following argument, curiously overlooked (or misunderstood) in much of the literature. After declaring that the property of subjects does “not exclude their Sovereign,” he goes on to explain:

42 Hobbes, *Leviathan*, 416 [138], see also 504 [169].

43 Hobbes, *Leviathan*, 392 [129].

44 Hobbes, *Leviathan*, 388 [128].

For seeing the Sovereign, that is to say, the Common-wealth (whose Person he representeth,) is understood to do nothing but in order to the common Peace and Security, this Distribution of lands, is to be understood as done in order to the same: And consequently, whatsoever Distribution he shall make in prejudice thereof, is contrary to the will of every subject, that committed his Peace, and safety to his discretion, and conscience; and therefore by the will of every one of them, is to be reputed voyd.⁴⁵

Goldsmith takes the phrase “in prejudice thereof” to refer to the initial distribution of lands in accordance with the first distributive law, and concludes incredibly that here we see “a trace of the absolute right of subjects to property: after land has been distributed by the sovereign he may not redistribute it.”⁴⁶ Quite the contrary. The point of the passage is to *deny* subjects an absolute right to property. The phrase “thereof” is meant to refer to the sovereign’s “*Dominion*,” mentioned in the marginal note to the passage.⁴⁷ Void is any property distribution that attributes to citizens a right to exclude their sovereign, since denying the sovereign’s dominion of (i.e., his right to possess) the property of their subjects is inconsistent with the common peace and safety. This reading is confirmed by the rest of the paragraph, which concerns Hobbes’s admission that sovereigns may display poor judgement in relation to their subjects’ property but that any such indiscretions are violations of natural law, not cases of injustice (injustices being actions without right).⁴⁸

Hobbes here taps into a new set of arguments he has developed in relation to the essential rights of sovereignty. Hobbes derives a number of essential rights of sovereignty from the purpose for which sovereignty was established and forms the object of the natural law duty or “OFFICE” of the sovereign: to secure the “*the safety of the people*.”⁴⁹ For this purpose the sovereign is attributed a number of essential rights, which are the rights without which the commonwealth could not subsist. Not only is the sovereign duty-bound to retain the essential rights of sovereignty, he is also juridically disabled from acting in ways that erode them. If the sovereign “disclaime” or grants away “any Right essentiall to the Sovereignty” the grant is “voyd” (unless the sovereign

45 Hobbes, *Leviathan*, 390 [128].

46 Goldsmith, *Hobbes’s Science of Politics*, 199; also Pierson, *Just Property*, 178.

47 Hobbes, *Leviathan*, 388 [128]: “*All private Estates of land proceed originally from the Arbitrary Distribution of the Sovereign*.” See also Noel Malcolm’s editorial note at Hobbes, *Leviathan*, 391.

48 Hobbes, *Leviathan*, 202 [65], 220 [71].

49 Hobbes, *Leviathan*, 520 [175].

renounces sovereignty in its entirety). Hobbes also applies this doctrine to the question of property.⁵⁰ He identifies as one of the essential rights, the right “of levying Mony ... when, and as much as in his own conscience he shall judge necessary.”⁵¹ Accordingly, to grant every man “*an absolute Propriety in his Goods; such, as excludeth the Right of the Sovereign*” is to place the sovereign’s ability to rule in peril: “if the Right of the Sovereign also be excluded, he cannot performe the office they have put him into; which is, to defend them both from forraign enemies, and from the injuries of one another.”⁵² Hence, any such grant of absolute property must be void, since inconsistent with the duty of the sovereign which is to procure the safety of the people.

2.4 *Suits Against the Sovereign*

Commentators generally attribute to Hobbes a different position in *Leviathan*. They argue that distributive laws could in principle grant property rights to citizens that are exclusive also of the sovereign. When Hobbes tells us that citizens lack an exclusive right against the sovereign he only means to say that citizens lack an immunity against having such exclusive rights abolished by (legislative) fiat. For instance, Abizadeh writes that since the sovereign establishes rights of property through the exercise of legislative authority he may “grant his subjects property rights to things—rights that they may legally hold against him.”⁵³ Authors find evidence for this reading in the following passage, where Hobbes repeats his admission from *De Cive* that it is sometimes possible for subjects to petition their sovereign concerning conflicts about property:

If a Subject have a controversie with his Sovereaign, of debt, or of right of possession of lands or goods ... grounded on a precedent Law; he hath the same Liberty to sue for his right, as if it were against a Subject; and before such Judges, as are appointed by the Sovereaign. For seeing the Sovereaign demandeth by force of a former Law, and not by vertue of his Power; he declareth thereby, that he requireth no more, than shall appear to be due by that Law. The sute therefore is not contrary to the will of the Sovereaign; and consequently the Subject hath the Liberty to demand the hearing of his Cause; and sentence, according to that Law. But if he demand, or take any thing by pretence of his Power; there lyeth, in that case, no action

50 Hobbes, *Leviathan*, 470 [157].

51 Hobbes, *Leviathan*, 520 [175].

52 Hobbes, *Leviathan*, 504 [169–70].

53 Abizadeh, “Sovereign Jurisdiction,” 405. Goldsmith, *Hobbes’s Science of Politics*, 197–8 suggests that “private rights are not secure against public invasion” because the sovereign is “capable of changing laws.” Also Olsthoorn, “Hobbes on Justice,” 490.

of Law: for all that is done by him in Vertue of his Power, is done by the Authority of every subject, and consequently, he that brings an action against the Sovereign, brings it against himselfe.⁵⁴

Does this passage give reason to think that the sovereign should be able to allocate fully exclusive rights to citizens? Edward Hyde, Earl of Clarendon, certainly thought so. In his review of *Leviathan* he maintains that the liberty to sue the sovereign presupposes the possibility that they have property they can hold against the sovereign. It is impossible that “any man who hath right to nothing ... can sue his Sovereign for a debt which he might take, if it were due from any other man, but can by no means be due from him to whom all belongs.” Abizadeh agrees. He concludes that it would be impossible to sue the sovereign to recover property “if the subject could literally have no property rights against the sovereign.”⁵⁵

While the passage contains a number of notable changes compared to the corresponding passage in *De Cive*, the upshot of it is the same. Suits against the sovereign are possible because the sovereign can desire to have his actions regulated by law (by demanding only that which is due to him by law). The sovereign, however, is not legally bound to act in accordance with the law. If the sovereign acts extra-legally he does so with right, for instance when he expropriates something “by pretence of his power,” and whether citizens receive their due is always rightfully a matter of the sovereign’s discretion. Hence, Hobbes’s admission that citizens may sue their sovereign over property does not imply that citizens have property rights against the sovereign.

This is not to say that this position is in all respects congenial to Hobbes’s purposes. By denying that the sovereign can be subject to distributive laws and by denying that subjects can have rights exclusive of the sovereign, Hobbes is significantly limiting the ability of the sovereign to effectively partake in economic life. Take the possibility that the sovereign indeed acquires some land from a citizen “by pretence of his Power.” From the foregoing follows that such action is with right, in the sense that the sovereign exercises a liberty by dispossessing the land the distributive laws had assigned to the citizen (and on the basis of which the citizen had a right that was exclusive of fellow citizens but not the sovereign). Does the sovereign now own the land he expropriates? Insofar as the sovereign’s action was not legislative, and did not affect

54 Hobbes, *Leviathan*, 342 [113].

55 Edward Hyde, *A Brief View and Survey of the Dangerous and Pernicious Errors to Church and State, In Mr. Hobbes’s Book, Entitled Leviathan* (Oxford: Theater, 1676), 88–89; Abizadeh, “Sovereign Jurisdiction,” 405.

the existing legal rights of his subjects, the sovereign now possesses something with a right that is not exclusive, as the dispossessed citizen also has a right to it on the basis of the distributive laws that continue to identify the citizen as owner of the land. This renders the subsequent sale by the sovereign of the land uncertain. As argued, it is doubtful that the sovereign, not being subject to distributive laws, can exercise the legal power necessary to achieve a successful transfer. But even if he can, the transfer would in this case lead to a duplication of property holders as the distributive laws would identify as owner of the land both the buyer and the person from whom it was originally taken.

3 Dialogue

3.1 *The Definition of Property*

When arguing in *A Dialogue between a philosopher and a student*, as he had done before, that the sovereign establishes property by means of “Statute Laws,” Hobbes defines property as follows:

a distribution of Lands, and Goods, that each Man may know what is proper to him, so as none other might pretend a right thereunto, or disturb him in the use of the same.⁵⁶

This definition suggests two necessary conditions for property. First, property consists in a right that is exclusive, which is to say that others lack a similar right. As he puts it a few pages later, to give every man “his own” is to give every man “that which is his Right, in such manner as to Exclude the Right of all Men else to the same thing.” Secondly, property consists in having the capacity to exercise the right. This appears both from the fact that he maintains that establishment of property is a “distribution of Lands, and Goods” (not rights to lands and goods) and that property ensures that no one can (in fact) “disturb” the owner in his possession. The passage that follows further supports this reading. Hobbes asks how it is possible that by means of law one may secure property: “but how can any Laws secure one Man from another?” His answer: “By the Laws, I mean, Laws living and Armed.” Required is not only the “word” of the law but the “Power of a Man that has the strength of a Nation” that makes the law “effectual.” Hobbes denies, as he had done in the early works, that one can

⁵⁶ Thomas Hobbes, *A Dialogue Between a Philosopher and a Student, of the Common Laws of England*, ed. A. Cromartie (Oxford: Oxford University Press, 2005), 14.

have property, properly speaking, without one's rights being made effectual by means of the coercive force of the sovereign.⁵⁷ And, as in the early works, this denial features as an important premise in his argument that citizens lack property against the sovereign, as discussed below.

3.2 *Sovereign Property*

A significant, but ultimately disappointing, development in *A Dialogue* concerns Hobbes's treatment of sovereign property. In *Leviathan* Hobbes could not claim that the sovereign has property in the possessions of the citizens because he had defined property (in part) as consisting in exclusive rights. The sovereign lacks such exclusive rights insofar as the civil law allocates property to citizens (granting them at least a liberty to possess the object of property). In *A Dialogue* Hobbes continues to hold that property consists (in part) in having exclusive rights but is nevertheless able to revert to a position close to that of *De Cive* by drawing on the feudal doctrine of *duplex dominium*. He recounts how in ancient times property was held by fathers who were the "absolute Lord" of their families and could hold as their property the land they "sat down upon," as well as conquerors who secured a title to any land they conquered, even against the original inhabitants. If sovereigns, descending from these original kings, own everything, the question is how it is possible for the citizens to have any property. This was the question Hobbes was unable to answer in *Leviathan* given his definition of property, which led him to drop the doctrine of full sovereign ownership. Hobbes now answers that there are in fact "two sorts of Propriety." The first is "absolute," as when someone holds his land "from the gift of God only," while the second is "conditional" and is held as "Fee," since it is given on the condition of service and obedience to the absolute owner.⁵⁸ On this feudal theory of land tenure, property is divided into two kinds of right, with the tenant holding what was traditionally called *dominium utile*, a (perpetual) use-right, and the lord holding *dominium directum*, the remaining rights and powers constitutive of property, such as the power to transfer or dispose of the land.⁵⁹ This means that both can have property in the same thing in the sense that the rights and powers that constitute property are divided between them. Hobbes, however, does not actually present this theory when he concludes that:

57 Hobbes, *A Dialogue*, 14, 34.

58 Hobbes, *A Dialogue*, 136, 141.

59 Hobbes's exposition of the feudal theory of divided property appears at this point (directly or indirectly) derived from John Cowell, *The interpreter* (Cambridge: Printed by John Legate, 1607), under "Property (*proprietas*)."

The first kind of propriety excludes the right of all others; the second excludes the right of all other Subjects to the same Land, but not the right of the Sovereign, when the common good of the People shall require the use thereof.⁶⁰

Attributed to the sovereign and the subjects are (partly) exclusive rights in a way that is logically impossible: insofar as the citizens are granted a liberty to possess land (and they must be, otherwise they could not have a right that excludes their fellow citizens) the sovereign simply cannot have a right that is fully exclusive (property that “excludes the right of all others”). While Hobbes correctly perceives that the feudal theory of divided property could help him to defend the view that both the sovereign and the citizens have property in the same things, he fails to adequately develop it and remains stuck in his old analysis.

3.3 *Citizens' Property*

In *A Dialogue* Hobbes continues to hold that subjects cannot hold property against the sovereign. His argument for it is novel. In *Leviathan* he had suggested that the sovereign simply cannot grant away any of the essential rights of sovereignty, which include the right to tax and appropriate the lands or goods of the citizens. Any law or grant to that effect is void. Hobbes now draws on his definition of property that includes effective possession as a necessary condition, to maintain that it is (conceptually) impossible to hold property on such terms that include a claim against dispossession by the sovereign. Property, as already noted, requires laws that are “armed” by the coercive power of the sovereign. However, the sovereign, Hobbes again stresses, lacks the necessary coercive power if he lacks the ability “to Leavy Souldiers” and therefore “may Lawfully, as oft as he shall really think it necessary to raise an Army (which in some occasions [may] be very great) I say, raise it, and Money to Maintain it.” That is why the sovereign may “take from us what he please, upon pretence of a necessity whereof he makes himself the Judg.” To demand otherwise is to demand “Impossibilities.”⁶¹

This novel argument allows him to take more seriously than he had done before, the possibility that the sovereign binds himself through loans, grants or charters. He admits by mouth of the lawyer the existence of “Statutes express, whereby the King hath obliged himself never to Levy Money upon his Subjects

60 Hobbes, *A Dialogue*, 141.

61 Hobbes, *A Dialogue*, 15, 23.

without the consent of his Parliament.”⁶² Certainly, he immediately has the philosopher respond: “All this I know, and am not satisfied.” It is impossible to avoid “the Destruction that may arise from the cruelty of Factions in a Civil War” unless the sovereign can raise the funds necessary to supply an army.⁶³ If grants or charters prevent the sovereign from securing the peace this would be inconsistent with natural law (which is equivalent to natural reason and “if it be not Reason, then you have granted it is not Law”).⁶⁴ In these remarks we may recognize the position from *Leviathan* that the sovereign cannot grant away the essential rights of sovereignty. Yet, while in *Leviathan* Hobbes concluded on this basis that *any* distributive law is void that attributes to citizens exclusive rights in relation to the sovereign, he now appears to accept the possibility of such a distributive law if consistent with the sovereign’s natural law duty to secure the safety of the people. He praises laws that bind the king: “[t]hose Statutes are in themselves very good for the King and People” since they may prevent unwise financial and military policy.⁶⁵ And most remarkably he admits that “I am satisfied that the Kings that grant such Liberties are bound to make them good, so far as it may be done without sin.”⁶⁶ Does this mean that the distributive laws are legally binding on the sovereign, except when they are inconsistent with natural law? Perhaps, and it would imply the possibility (at least conceptually) of a property right that is exclusive also in relation to the sovereign. Ultimately, though, Hobbes concludes what he had concluded before: since the safety of the people depends on it, the king may “at all times, that he thinks in his Conscience it will be necessary for the defence of his People” levy taxes and the king himself is the “Judge of the Necessity.”⁶⁷ Sovereign expropriation can never be without right.

3.4 *Suits Against the Sovereign*

Hobbes does not in *A Dialogue* discuss the possibility that citizens sue their sovereign over conflicts regarding property. That his thinking on this issue took a new direction, however, can be seen in his suggestion that charters are laws, addressed to public officers. In *Leviathan*, he had maintained that charters are not laws but liberties: “Charters are Donations of the Sovereign; and not Lawes, but exemptions from Law.”⁶⁸ He now accepts that “Charters are not so merely

62 Hobbes, *A Dialogue*, 17.

63 Hobbes, *A Dialogue*, 17.

64 Hobbes, *A Dialogue*, 18.

65 Hobbes, *A Dialogue*, 21.

66 Hobbes, *A Dialogue*, 20.

67 Hobbes, *A Dialogue*, 22.

68 Hobbes, *Leviathan*, 450 [150].

Grants, as that they are not also Laws; but they are such Laws as speak not to all the Kings Subjects in general, but only to his Officers; implicitly forbidding them to Judge, or Execute any thing contrary to the said Grants.”⁶⁹ This suggestion may help Hobbes to conclude that citizens have rights, based on these charters, that impose duties on public officers (representing the commonwealth). While the sovereign has a right to all things, public officers do not, and suits against the commonwealth concerning duties or debts of the commonwealth could now be conceived as suits against the public officers.

These late changes to the theory of property do not affect the upshot of his views: in the civil state, individuals securely hold property against their fellow citizens but not against the sovereign who can with right expropriate anything at will. Yet, they indicate again Hobbes’s search for a theory that allows the state (and the sovereign as its representative) to be at once legally unencumbered—beyond the law—and a participant in economic life, not only as having a title to the citizens’ possessions but also as a proprietor in its own right, enabled to acquire and sell property and have controversies relating to it be settled in the court of law. In *De Cive* and *Leviathan*, Hobbes in effect leaves property relations between the sovereign and citizens governed by natural law alone, ultimately identifying the duty of equity as operative when the sovereign determines the allocation of property among himself and his citizens. In *A Dialogue* the possibility of positive law governing the property of the state is more apparent, with his admission that grants and charters are laws that bind public ministers as well as the sovereign in so far as he can execute them without sin. These suggestions are tentative, to be sure, but they are as close as Hobbes comes to showing that individual property is regulated by law and simultaneously dependent on the discretion of the sovereign.

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69 Hobbes, *A Dialogue*, 38.

