

On the person and office of the sovereign in Hobbes' *Leviathan*

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ABSTRACT

I contextualize and interpret the distinction in Hobbes' *Leviathan* (1651) between the capacities of the sovereign and show its importance for contemporary debates on the nature of Hobbesian sovereignty. Hobbes distinguishes between actions the sovereign does on personal title (as a natural person), and actions he undertakes in a political capacity (as artificial person and in the office of representative of the state). I argue that, like royalists defending King Charles I before and during the English civil war, he maintains that the highest magistrate is sovereign in both his natural and political capacities because the capacities are inseparable, though distinct. This position goes back to the treatment of *Calvin's Case* by Francis Bacon and Edward Coke and has further precedents in medieval English constitutional thought. An important reason for Hobbes to include this doctrine in *Leviathan*, I suggest, is to provide a response to parliamentarians who employed the sovereign's multiple capacities to justify armed resistance against the king. I show the relevance of this contextualization by intervening in two recent debates, regarding the possibility of constitutionalist limitations on the actions of the Hobbesian sovereign and regarding whether sovereignty is held by the commonwealth or by the person of the sovereign.

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1.

An important, but often overlooked innovation in Hobbes' *Leviathan* (1651), is the distinction between actions the sovereign does on personal title (as a natural person), and actions he undertakes in a 'Politically' or 'Publique' capacity (as artificial person and in the office of representative of the state).¹ In *The Elements of Law* (1640) and *De Cive* (1642, 2nd ed. 1647) Hobbes had maintained that the sovereign is a natural person (or an assembly of natural

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¹But see Chwaszcza, 'The Seat of Sovereignty'.

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persons). The sovereign is he to whom citizens have alienated their right to all things and who consequently wields preeminent power in society (EL 1.19.10, p. 104; DCv 5.11, pp. 73–4). In *Leviathan*, prospective citizens institute a commonwealth, not only by alienating their right to govern themselves, but also by authorizing a man or assembly to represent them in all his or their judgments and actions. The authorized representation establishes the commonwealth and the sovereign as occupying the office of representative of that corporate body. The sovereign therefore

representeth two Persons, or (as the more common phrase is) has two Capacities, one Naturall, and another Politique (as a Monarch, hath the person not onely of the Common-wealth, but also of a man; and a Sovereign Assembly hath the Person not onely of the Common-wealth, but also of the Assembly).
(L 23.2, p. 376; also, L 19.4, p. 288; L 24.8, p. 392)²

Insofar as the sovereign acts in his political capacity he represents the entire commonwealth; when acting in his natural capacity he represents only himself (and he is not, properly speaking, sovereign at all).³

In this paper, I contextualize the distinction and show its relevance for contemporary debates on the nature of Hobbesian sovereignty. A closer study of Hobbes' position reveals that, like royalists defending King Charles I before and during the English civil war, he maintains that the highest magistrate is sovereign in both his natural and political capacity because the capacities are inseparable, though distinct. This is a position with clear precedents in medieval and early modern English constitutional thought. An important reason for Hobbes to include this doctrine in *Leviathan*, I will suggest, is to provide a response to parliamentarians who employed the sovereign's multiple capacities to justify armed resistance against the king. They maintained that Charles had committed a breach of trust, thereby forfeited his political office, and, as natural person, could lawfully be resisted. In *Leviathan* Hobbes accepts the distinction that made this argument possible only to subvert it and bolster his account of absolute sovereignty in which no breach of trust by the sovereign can ever be sufficient to justify rebellion.⁴

I bring this conclusion to bear on two recent debates in the literature. The first concerns the extent to which Hobbes is committed to constitutionalist

²Abizadeh, 'Sovereign Jurisdiction' (409, fn. 50), observes that the claim that the sovereign represents two persons is not meant to be exhaustive since the sovereign certainly also represents God, and most probably, also the citizens individually.

³See Hobbes' definition of sovereignty: 'he that carryeth this Person [the commonwealth] is called SOVERAIGNE' (L 17.14, p. 262). In what follows I use the terms 'sovereign' and 'supreme magistrate' to refer to both the natural and political person of the sovereign.

⁴The parliamentarian pamphleteers only developed these lines of argument after Hobbes had already published *De Cive* in 1642. Quentin Skinner has shown that *Leviathan* reveals extensive engagement with parliamentarians and that Hobbes at many turns 'is seeking to discredit them by demonstrating that it is possible to accept the basic structure of their theory without in the least endorsing any of the radical implications they had drawn from it' (Skinner, 'Hobbes on Representation', 168–9). Hobbes' treatment of the sovereign's multiple capacities is a further example of that strategy.

limitations on the actions of the sovereign. Several interpreters, including David Dyzenhaus, have suggested that Hobbes came to accept that the sovereign's capacity to occupy public office is conditional on his compliance with principles of legality and natural law, principles that form 'fundamental norms of the moral community of which all legal subjects are members and that make it possible for the artificial person of the sovereign to have and to exercise authority' (Dyzenhaus, 'Hobbes on the Authority of Law', 208). If the sovereign violates these norms he no longer acts in his capacity as representative of the state. I will argue that this interpretation is in tension with Hobbes' response to the parliamentarians: like the supporters of Charles I, Hobbes wished to distinguish between the capacities of the sovereign precisely to show they are inseparable.

The second debate involves the question who, in *Leviathan*, holds sovereignty. Quentin Skinner has in several influential articles argued that *Leviathan* is epoch-making since, for the first time, sovereignty is attributed to the impersonal state or commonwealth, with the person of the sovereign acting merely as the state's temporary representative.⁵ In response, a number of critics have reiterated the traditional view that not the commonwealth but the natural person of the sovereign – the monarch or sovereign assembly – holds sovereignty. I argue that, since the two capacities of the sovereign are inseparable, the sovereign holds sovereignty in both his personal and political capacity, and accordingly, that both Skinner and his critics give an incomplete account of the location of sovereignty in the Hobbesian state.

2.

Hobbes' frank admission in *Leviathan* that the sovereign has multiple capacities appears quite astonishing if one considers that this claim was central to parliamentary justifications of resistance against Charles I.⁶ As the royalist cleric Peter Heylyn recalls in his *Aerius Redivivus, or, the History of the Presbyterians* (1670), parliamentarians drew on several familiar arguments by George Buchanan, John Knox and other protestant resistance theorists to limit the monarch's legitimate powers. However, the contention 'which served their turn best' was 'a new distinction which they had coined between the *Personal* and *Political* capacity of the Supreme Magistrate'. It allowed them to make war on the king in his personal capacity while claiming allegiance to him in his political capacity, and so 'destroy CHARLES STVART, without hurting the King'.⁷

⁵Skinner, 'Hobbes and the Purely Artificial Person of the State'; Skinner, 'Hobbes on Representation'; Skinner, 'A Genealogy of the Modern State'. Also, Lee, *Popular Sovereignty in Early Modern Constitutional Thought*; Nelson, *The Making of the Modern State* (esp. 67–9).

⁶Greenberg, *The Radical Face of the Ancient Constitution* (204), calls the doctrine of the king's two bodies 'indispensable to the rebel cause'.

⁷Heylyn, *Aerius Redivivus* (447); Heylyn, *The Rebels Catechism* (20).

This inflammatory case for the legality of armed resistance depended on two further arguments. First, following the author of *Vindiciae contra tyrannos* (1579), parliamentarians such as Henry Parker and William Prynne maintained that the king occupied the royal office only conditionally, by a grant from the people that imposed duties on the office holder; the king was able to act in a political capacity only by virtue of a 'donation of the people' that was 'in part conditionate and fiduciary' (Parker, *Observations Upon Some of His Majesties Late Answers*, 4). This implied that if the highest magistrate should breach the trust placed in him by attempting to deprive the people 'of their Lives, Goods, Liberties, Religion, Lawes or make open warres upon them', he could rightfully be resisted by 'defensive Armes' (Prynne, *The Sovereigne Powers of Parliaments and Kingdomes*, 91). The second argument established Parliament in these circumstances as temporarily acting on behalf of the king's political office. England was, as the pamphleteer Charles Herle had it, a 'coordinative' or mixed monarchy in which the Houses of Parliament and the King had a joint right to govern. In cases of imminent danger, however, Parliament could act without the participation of the King who would then nevertheless be present 'virtually' or 'in law'.⁸ After establishing that Charles had become a threat to the safety of the people, and that, in the words of the protestant minister Samuel Rutherford, 'the *Parliaments* are as Legall, as if he [the king] were personally present with them', they could justify, in name of the king, the overthrow of Charles who now acted on behalf of no-one but himself (Rutherford, *Lex, Rex the Law and the Prince*, 271).

The two Houses of Parliament put their case plainly following the confrontation at the city of Hull, just months before the start of the war. Responding to Charles' accusation that Sir John Hotham had committed treason by forcefully preventing the king's entrance to the city, they claimed that Hotham had faithfully acted 'in Obedience to his majesty and his authority' as expressed in instructions from Parliament. To violently resist the king's law and authority would indeed be treasonous, but 'the levying of force against his personal commands, though accompanied with his presence; and not against this law and authority, but in the maintenance thereof, is no levying of war against the king, but for him'.⁹

In *Behemoth* (1668, publ. 1681), his history of the civil war, Hobbes shows himself familiar with, and exceedingly critical of these attempts to drive a wedge between the king's personal and political capacities. Summarizing Parliament's response to Charles, he writes that

⁸Herle, *A Fuller Answer* (3–8); Marsh, *An Argument or, Debate in Law* (7, 16, 36); the declaration of the Parliament in response to the King's proclamation of 27 May 1642, in Cobbett, *Cobbett's Parliamentary History* (vol. 2, cols. 1355–7). For a discussion of these arguments, see Weston and Greenberg, *Subjects and Sovereigns* (ch. 3).

⁹Remonstrance of both Houses, in Answer to the King's Declaration concerning Hull, May 26', in Cobbett, *Cobbett's Parliamentary History* (vol. 2, col. 1310).

the leuying of forces against the personall Commands of the King (though accompanied with his presence) is not leuying Warre against the King; but the leuying of Warre against his Politick person, viz. his Laws etc. though not accompanied with his person, is leuying Warre against the King,

and accordingly that 'Treason cannot be committed against his person, otherwise then as he is intrusted with the Kingdome, and discharges that trust' (B p. 244). This summary is copied almost verbatim from *His Majesties Answer to a Printed Book*, written for the king by Edward Hyde, with that difference that Hyde followed the Parliament in referring to the king's 'Law and Authority' while Hobbes speaks of the king's 'Politick person'.¹⁰ Hobbes scornfully denies that one could distinguish in this manner between the king's 'person Naturall and Politick', or that the king could be 'vertually' in the two Houses of Parliament. These arguments, Hobbes asserts, were 'but an Unversity quibble, such as boys make vse of, in maintaining (in the Schooles) such tenents as they cannot otherwise defend' (B pp. 273, 297).¹¹

Why, then, does Hobbes admit in *Leviathan* that the sovereign has multiple capacities? I wish to suggest that he was committed to what had until then been the prevailing treatment of the position of the monarch in the English constitution. This view, which in the turmoil of the civil war became associated with the supporters of Charles I, admitted that the monarch has distinct bodies or capacities, but stressed that they are inseparable. It received its canonical expression by Sir Francis Bacon in a set of speeches given as Solicitor General in *Calvin's Case* (also known as the *Case of the Postnati*) and by Sir Edward Coke in his subsequent account of the case in the seventh part of his *Reports*.¹² The case considered whether so-called *postnati*, individuals born in Scotland after the accession of James VI of Scotland to the throne of England in 1603, were entitled to the privileges of English citizenship. In English law the monarch was long considered to have two bodies or capacities.¹³ Besides being a natural person, the king also has a corporate body or political capacity, 'framed by the policy of man' as Coke put it, and constituted by the law of the land (Coke, 'Calvin's Case', 189). Those wishing to deny English citizenship to the *postnati* argued that allegiance and citizenship were in relation to the king's political capacity (Howell, *Cobbett's Complete Collection*, vol. 2, col. 567). Drawing on the civil law maxim '*quando duo jura concurrunt in una*

¹⁰Compare [Hyde], *His Majesties Answer, to a Printed Book* (31).

¹¹Hobbes' response is discussed in Brito Vieira, *The Elements of Representation in Hobbes* (126–7).

¹²The seventh volume of Coke's *Reports* was available to Hobbes in the Hardwick library. See Talaska, *The Hardwick Library* (78). Hobbes, who had been Bacon's amanuensis, would have been familiar with Bacon's general account of the case in 'A brief discourse touching the happy union of the kingdoms of England and Scotland' and 'Certain articles or considerations touching the union of England and Scotland' which were included in Hardwick M.51, a collection of sixteen transcriptions of Bacon's works. See Bunce, 'Francis Bacon, Thomas Hobbes' (25–6); Aubrey, '*Brief Lives*' (vol. 1, 331).

¹³Plowden, *The Commentaries* (212a). The classic study of this idea is Kantorowicz, *The King's Two Bodies*.

persona, aequum est ac si essent in diversis – when two rights or offices are united in one person they are held as if by two distinct persons – they concluded the *postnati* owe allegiance to the king in his capacity of King of Scotland, and therefore remain English aliens (Howell, *Cobbett's Complete Collection*, vol. 2, col. 565). In response Bacon and Coke argued that, since one's allegiance to the monarch is prior to positive law, citizenship depends on one's allegiance to the king in his natural capacity, making one a citizen of all kingdoms he governs in his political capacities.¹⁴ Hence, they rejected the applicability of 'the Rule *cum duo iura*' (Bacon, *Three Speeches*, 25). Bacon admitted the rule as principle, 'not of the Civill Law onely, but of common reason', but denied it applied in the specific case of the Crown (Bacon, *Three Speeches*, 24). The Crown is unlike any other corporation, since, as the sixteenth-century common lawyer Edmund Plowden had documented, there is a reciprocal communication of qualities between the king's natural and political capacities. For instance, it is treasonous to seek the death of the king's spouse although corporations cannot marry, and the Crown goes by descent, 'which is a thing strange, and contrary to the course of all Corporations'.¹⁵ Analogously, the *postnati* must be considered English citizens since their alliance, due to the king in his natural capacity, is communicated to his political capacities: the 'subjection to the Kings person, and to the Crown, are inseparable, though distinct' (Bacon, *Three Speeches*, 44). Indeed, to admit that the capacities of the monarch are separable could give rise, in the words of Coke, to the 'damnable and damned opinion' that allegiance was due 'more by reason of the King's Crown (that is, of his politic capacity) than by reason of the person of the King', warranting treasonous rebellion against the king's person in name of the office he occupies.¹⁶

Unsurprisingly, Coke and Bacon's treatment of the status of *postnati* was taken up by defenders of Charles I. In *Salmasius His Buckler, or, a Royal Apology for King Charles the Martyr*, a pseudonymous Restoration tract, *Calvin's Case* was praised as the 'weightiest case that ever was argued in any Court', since it indisputably demonstrated that obedience had been due 'to the natural body ... of King Charles' during the civil war.¹⁷ The royalist judge David Jenkins, who was imprisoned for much of the civil war and the Interregnum, emphasized in several of his writings that '[t]o affirme that the Kings power ... is separable from his person, is high Treason by the Law of the Land; which is so declared by that learned man of the law, Sir Edward

¹⁴Bacon, *Three Speeches* (8–9); Coke, 'Calvin's Case' (190–2).

¹⁵Bacon, *Three Speeches* (41). See also Plowden, *The Commentaries* (242–242a); Kantorowich, *The King's Two Bodies* (9).

¹⁶Coke, 'Calvin's Case' (192); Bacon, *Three Speeches* (43); Kantorowicz, *The King's Two Bodies*, (364–72).

¹⁷Bonde, *Salmasius His Buckler* (229, 233). MacLean, *The Return of the King*, identifies the author as the lawyer and poet Giles Duncombe.

Cooke'.¹⁸ Even Charles I availed himself of the argument shortly before the start of the war. After noting that some of his subjects 'have gone about subtilly to distinguish betwixt Our Person and Our Authority', he drew on *Calvin's Case* to demonstrate that 'their Allegiance is due unto the naturall Person of their Prince, and not to His Crown or Kingdome distinct from His naturall Capacitie'.¹⁹

3.

The royalist response to the notion that the king's capacities may be severed, I wish to suggest, is also Hobbes'. In *Leviathan*, Hobbes is committed to the view, originally defended by Coke and Bacon, that the king's capacities are distinct, yet indivisible. Since there is a communication of juridical incidents between the two capacities, allegiance to the sovereign is as much due to him as natural person as it is to him in his capacity as representative of the commonwealth.

Defending this reading of *Leviathan* requires rejecting a natural account of Hobbes' doctrine of authorized representation, according to which he is committed to the *cum duo lura* rule. This account is implied in Michael Green's recent argument for the claim that Hobbes' use of the authorization doctrine in *Leviathan* is 'to establish *mere ownership* of an action' (Green, 'Authorization and Political Authority', 29). Hobbes maintains that 'when the Actor [the representative] maketh a Covenant by Authority, he bindeth thereby the Author [the represented], no lesse than if he had made it himselfe; and no lesse subjecteth him to all the consequences of the same' (L 16.5, p. 246; also L 16.7, p. 246; L 16.8, p. 246). By authorizing an action, Green concludes, we make it ours for 'moral and legal purposes'.²⁰ It is as if the represented, not the representative, acts. Hence, while the representative bears or represents two persons (his own and that of the represented) it is as if these persons are borne by distinct individuals.

Green develops his interpretation of the authorization doctrine in response to commentators who have thought that Hobbesian authorization involves extending rights.²¹ To extend a right is to allow another person to act on one's right. Hobbes maintains that in the original agreement prospective citizens both authorize, and alienate the right of governing themselves to, the prospective sovereign (L 17.13, p. 260). A contradictory account of the original

¹⁸Jenkins, *The Vindication of Judge Jenkins* (5). In Jenkins, *Lex Terrae* (10), he cited *Calvin's Case* for the claim that the monarch's 'body naturall and politique make one body, and are not to be severed: Ligeance is due to the naturall body, and is due by nature'.

¹⁹'A Proclamation forbidding all Levies of Forces without His Majesties expresse pleasure', in [Husbands], *An Exact Collection* (370).

²⁰Green, 'Authorization and the Right to Punish' (118); Green, 'Authorization and Political Authority' (29–30).

²¹Among others, Martinich, *Hobbes* (115–25); Sreedhar, *Hobbes on Resistance* (93); Lloyd, *Morality in the Philosophy of Thomas Hobbes* (284). See Green, 'Authorization and Representation' (30).

agreement looms if prospective citizens both extend rights to the sovereign (by authorizing him), while they simultaneously alienate those very rights.²² Conceiving of authorization instead as establishing ownership of an action resolves the contradiction. It can account for cases where the action, while authorized, is unlawful or without right. As Green notes, 'I can bear responsibility for actions that I own even though I lack the right to do them. This happens when one party authorizes another to violate the law' (Green, 'Authorization and Political Authority', 30). When I authorize someone to act in violation of the law and my representative acts on that authorization, a wrong has been committed for which I bear responsibility.

This solution is not fully satisfactory, however. What must be explained is not only that I can own, and bear responsibility for, actions that are *unlawful because* I lack the right to do them, but also that I can own, and bear responsibility for, actions that are *lawful even though* I lack the right to do them. In the Hobbesian commonwealth, citizens own all actions of the sovereign, including those they themselves lack the right to do – such as, to take an extreme example, arbitrarily seizing citizens' property – actions that are nevertheless lawful or done with right. The sovereign may rightfully seize property and he may do so in my name. This is possible because, like Coke and Bacon, Hobbes rejects the *cum duo lura* rule in the case of sovereignty. There is a communication of juridical incidents between the distinct capacities of the sovereign. I own the actions of the sovereign done in his capacity as my representative, yet in that capacity he may act on rights acquired and held in his personal capacity. I can therefore bear responsibility for actions I lack the right to do, which are nevertheless lawfully done in my name *because my representative has the right to do them*.

4.

Hobbes' rejection of the *cum duo lura* rule is evinced by the fact that the supreme magistrate, in his political capacity, exercises rights acquired and held in his personal capacity. The rights in question are the 'essential Rights of sovereignty', including the rights to judge what opinions are fit to be taught publicly, to legislate, to adjudicate legal controversies, and to punish offenders (L 18.10, p. 274; also L 18.9, p. 272; L 18.11, p. 274).²³

That the supreme magistrate acquires and holds the rights of sovereignty in his personal capacity follows both from his account of the original covenant

²²Martinich, *Hobbes* (118); Martinich, 'Authorization and Representation' (316–18).

²³Hobbes is disappointingly vague about the nature of the right to legislate. Since it is 'derived' from the 'Institution of the Common-wealth' (L 18.10, p. 274; also L 18.2 p. 264), and concerns 'the whole power of prescribing the Rules, whereby every man may know, what Goods he may enjoy, and what Actions he may doe' (L 18.10, p. 274), I posit that the right, like other rights of sovereignty, is (partly) correlative to the obligations citizens have by virtue of having given up the right to govern themselves (L 17.13, p. 260).

and his conception of treason. In the original covenant outlined in *Leviathan* prospective citizens agree to alienate the rights of sovereignty, characterized there as the 'right to govern themselves', to the 'Man, or Assembly' bearing the person of the commonwealth (the sovereign's natural person), not the commonwealth itself (the sovereign's political person).²⁴ Nor could it have been otherwise. An alienation of rights to the sovereign's political person would be in vain. In his political capacity the sovereign represents, besides the commonwealth, also each of the citizens individually; indeed, Hobbes appears to treat these two forms of representation as equivalent (L 23.2, p. 376; L 16.13, p. 248). This is, for instance, why a citizen cannot accuse the sovereign of a breach of covenant: any such breach is 'the act both of himself, and of all the rest, because done in the Person, and by the Right of every one of them in particular' (L 18.4, p. 266).²⁵ Insofar as the sovereign is their authorized representative, the juridical effects of his actions or agreements fall on the citizens as represented, not on the sovereign as representative (L 16.5, p. 246). The implication is that if prospective citizens were to alienate a right to the sovereign in his political capacity, they would alienate that right (also) to themselves. The alienation would therefore lack the requisite effect of binding them to submission to the rule of another. Accordingly, Hobbes presents the commonwealth (the sovereign's political person) as temporally posterior to the covenant within which citizens alienate their right to govern themselves. 'This done', Hobbes writes after reciting the covenant establishing sovereign, 'the Multitude so united ... is called a COMMONWEALTH' (L 17.13, p. 260). Since the commonwealth only exists after the original covenant has taken place, the commonwealth cannot have been the beneficiary of a conferral of rights. The rights of sovereignty must have been acquired by the sovereign on personal title.²⁶

From Hobbes' treatment of treason it follows that the supreme magistrate not only holds the rights of sovereignty in his personal capacity but also can demand allegiance from his subjects in that capacity. (This is to be expected since allegiance is due by virtue of having alienated the right to govern oneself.) Treason is a violation of the natural law requiring one to perform one's covenants (L 15.1, p. 220). By denying the authority of the sovereign traitors break the original agreement that established the commonwealth, which is a 'transgression of natural, not civil, law' (DCv 14.21, p. 166; L 28.13, p. 486). The reason, Hobbes explains in *De Cive*, is that

the obligation to civil obedience, by force of which all civil laws are valid, is prior to every civil law ... If a sovereign prince made a civil law in the form: *do not*

²⁴L 17.13 (p. 260). See also Green, 'Authorization and Political Authority' (33).

²⁵As Green, 'Authorization and Political Authority' (35), argues, the phrase 'by the Right' must be read as 'by the authority'.

²⁶See also Martinich, 'Authorization and Representation' (332).

rebell, he would achieve nothing. For unless the citizens are previously obligated to obedience ... every law is invalid; and an obligation which binds one to do something which one is already obligated to do is superfluous.

(DCv 14.21, p. 166; also L 30.4, p. 522)

As treason is the violation of the contract that establishes the commonwealth, the 'obligation to civil obedience' due to the sovereign must be due in his natural capacity; it is an obligation acquired before the establishment the commonwealth and the sovereign's political capacity. Hobbes' account of treason closely resembles that of both Coke and Bacon in *Calvin's Case*. Both Coke and Bacon present the possibility of treasonous acts in the absence of positive law (for instance, in kingdoms 'governed by *natural equity*') as evidence that allegiance to kings is by natural law and therefore due to them in their personal capacity (Bacon, *Three Speeches*, 38; Coke, 'Calvin's Case', 190–1). Coke notes that it would have been

vain to have prescribed Laws to any, but to such as owed Obedience, Faith, and Ligeance before, in respect whereof they were bound to obey and observe them: *Frustra enim feruntur leges nisi subditis et obedientibus* [It is in vain to make laws unless there are subjects and persons who will obey them].

(Coke, 'Calvin's Case', 197)

While positive law may subsequently make the citizens' obligation of obedience 'more formall' (Bacon, *Three Speeches*, 5, 9), this obligation is prior to positive law. Acts of treason are therefore always (also) a breach of the law of nature (Coke, 'Calvin's Case', 190). Since the king's political capacity is constituted by positive law and allegiance to the king is due by natural law, Coke and Bacon conclude, allegiance must be due to the king in his natural capacity.²⁷

While sovereigns in their personal capacity acquire the rights of sovereignty (and can demand allegiance from citizens), they exercise these rights in their political capacity and as representatives of the commonwealth. They do so necessarily because sovereigns cannot act without authority from their subjects: prospective citizens '*Authorise all the Actions and Judgements of that Man, or Assembly of men*', so that they are the '*Author of all his Sovereign shall do*' (L 18.1, p. 264; also L 17.13, p. 260; L 20.1, p. 306; L 21.10, p. 336; L 21.14, p. 338; L 22.9, p. 352, L 24.6, p. 390; L 18.3, p. 266; L 18.7, p. 270; L 20.13, p. 314). Hobbes' treatment of several specific government functions shows this more plainly. Take legislation. The sovereign cannot, in his personal capacity, enact laws. Legislation, on Hobbes' understanding, is a public act with the law expressing the will of the commonwealth. Laws are not private commands but '*Rules Authorised*' (L 30.21, p. 540). Accordingly Hobbes

²⁷Coke, 'Calvin's Case' (197). In a significant departure from Coke, Bacon maintains that this is only the case in monarchies since commonwealths ruled by assemblies are necessarily constituted by positive laws such that allegiance may be due by positive, not natural, law (Bacon, *Three Speeches*, 4–5).

attributes to the commonwealth the authority to legislate, speaks of the subject's obligation to obey 'the commands of the Common-wealth', and maintains that '[a]ll breaches of the Law, are offences against the Common-wealth' (L 26.2, p. 414; L 26.4, p. 416; L 33.24, p. 604; L 30.15, p. 534; L 29.6, p. 502; L 30.14, p. 532). It is true that he also sometimes speaks of the legislative capacity as 'residing in the Sovereign' (L 33.24, p. 604). However, he clarifies that this is consistent with attributing the capacity to the commonwealth because 'the Common-wealth is no Person, nor has capacity to doe any thing, but by the Representative, (that is, the Sovereign;) and therefore the Sovereign is the sole Legislator' (L 26.5, p. 416).

Hobbes' treatment of punishment forms a second example. He defines punishment in part as '*an Evill inflicted by publique Authority*' (L 28.1, p. 482). The sovereign can punish citizens only insofar as he represents the commonwealth. This is why a citizen is always the 'author of his own punishment' (L 18.3, p. 266). Conversely, harm inflicted by the sovereign in his purely personal capacity would not count as an instance of punishment but would rather constitute an 'act of hostility': the 'injuries of private men' cannot 'properly be stiled Punishment' since they 'have not for Author, the person condemned; and therefore are not acts of publique Authority' (L 28.6, p. 484; also L 28.3, p. 484). Nevertheless, the right by which the sovereign punishes is a right he holds on personal title.²⁸ Unlike other rights of sovereignty the 'Right which the Common-wealth (that is, he or they that represent it) hath to Punish, is not grounded on any concession, or gift of the Subjects'. Rather, the 'foundation of that right of Punishing' is the sovereign's natural right to 'do whatsoever he thought necessary to his own preservation', which, since it dates from before the establishment of the commonwealth, must be held by the sovereign in his personal capacity (L 28.2, p. 482).

The conclusion in these cases must be that Hobbes rejects the *cum duo iura* rule and that there is a communication of juridical incidents between the distinct capacities of the sovereign. In this respect Hobbes follows medieval treatments of the mystical union between the king's two bodies that formed the basis of the ruling in *Calvin's Case*. As one of the judges notes in *Willion v Berkley* (1561) – a case cited by both Coke and Bacon – 'the King has two Capacities' and accordingly can acquire property either in his natural or his politic capacity (Plowden, *The Commentaries*, 242). Yet, as the judge continues, these capacities or bodies are indivisible, 'not distinct, but united, and as one Body'. Property owned by the king in his natural capacity therefore receives the gloss of the royal office:

²⁸Ristroph, 'Respect and Resistance' (615, fn. 65), who assumes that Hobbes accepts the *cum duo iura* rule, argues that sovereigns must hold the natural right to punish in their political capacity, but admits this is 'perplexing' since 'it is not clear why sovereigns [in their political capacity] – who are not obviously mortal beings – would have a similar right [to self-preservation]'.

the Land which he takes in the Capacity of his Body natural he has not merely as a Common Person, but as a natural Man and as a King also, and as to such Land he shall have the Prerogatives of King, because the royal Estate is conjoined to the Person who holds the same.

(Plowden, *The Commentaries*, 242–242a)

Hence, property privately acquired by the king cannot be sold except by letters-patent, and if it is granted to a subject in fee it is held ‘in capite by Knight’s Service’ (Plowden, *The Commentaries*, 242a). The king’s political capacity subsumes his personal capacity in matters of the law. So too, for Hobbes’ sovereign.

One may question whether the legal fiction of a union between the king’s two bodies is consistent with Hobbes’ view that sovereignty may be held, not only by a monarch with a ‘Body natural’, but also by an assembly with a body that is constituted by artificial bonds. Hobbes certainly answers this question in the affirmative. He plainly admits that, like monarchs, sovereign assemblies bear a natural and a political person (a sovereign ‘has two Capacities, one Naturall, and another Politique ... [as] a Sovereign Assembly hath the Person not onely of the Common-wealth, but also of the Assembly’) (L 23.2, p. 376). This counter-intuitive claim follows from his definition of a natural person as someone (or something) representing itself (L 16.1–2, p. 244). To the extent that a sovereign assembly acts in its own name (rather than in name of the commonwealth) it acts as a natural person and in a personal capacity. Additionally, while Hobbes does not explain how assemblies are formed, he does assume that their formation has been completed before they are granted sovereignty: in the original covenant establishing a sovereign assembly, individuals authorize, and alienate their right to govern themselves to ‘*this* Assembly of men’.²⁹ Accordingly, whatever are the bonds holding together the body of the assembly, they are not the bonds of positive law (since there is no positive law prior to the establishment of the sovereign).³⁰ Hobbes can therefore treat the multiple capacities of sovereign assemblies as fully analogous to the multiple capacities of monarchs. The rights of the natural person of the sovereign (whether a monarch or sovereign assembly) are also attributable to the artificial person of the commonwealth, apparently because the same man or assembly represents both persons. Conversely, subjects owe allegiance to the monarch or sovereign assembly both as a natural person and as representative of commonwealth. The capacities of the supreme magistrate are, as Bacon put it, ‘inseparable, though distinct’.

²⁹L 17.13 (p. 260, my italics). For a different argument for the same conclusion, see Martinich, ‘Authorization and Representation’ (334).

³⁰Hobbes follows Coke in this regard, see fn. 27.

5.

Several recent commentators, including most notably David Dyzenhaus, have sought to present a constitutionalist reading of Hobbes, according to which the supreme magistrate's capacities *are* separable.³¹ According to Dyzenhaus, the sovereign only acts in his public capacity and as representative of the commonwealth as far as his acts conform to certain fundamental, publicly identifiable laws: the sovereign 'is an artificial person, who acts as a sovereign only as long as he acts within the constraints of his role' (Dyzenhaus, 'Hobbes's Constitutional Theory', 461). These constraints include a legal rule of recognition, which, if violated would render acts of sovereignty unrecognizable as acts of sovereignty, and, the laws of nature, which, if violated would make the acts of sovereignty unintelligible for subordinate officers who have a duty to interpret positive law as intended to be consistent with natural law.³² Dyzenhaus calls the former constraint the 'validity proviso' and the latter constraint the 'legality proviso' (Dyzenhaus, 'Hobbes on the Authority of Law', 198–9).

Noel Malcolm has raised some objections to the legality proviso (Malcolm, 'Thomas Hobbes: Liberal Illiberal', 131). I focus on the validity proviso (which Malcolm concedes 'should not be difficult to accept') (Malcolm, 'Thomas Hobbes: Liberal Illiberal', 130). On the validity proviso, actions are only attributable to the sovereign in his political capacity if they are 'publicly accessible and recognizable to his subjects as an expression of will' (Dyzenhaus, 'Hobbes on the Authority of Law', 198). I doubt the introduction of this proviso succeeds as an attempt to place constitutional constraints on what counts as an act of the commonwealth as opposed to an act of the sovereign's natural person. We may accept that for any act to be recognizable as an act of the sovereign in his political capacity, it must satisfy a rule of recognition. However, it does not follow that acts that fail to satisfy a rule of recognition are therefore acts of the sovereign in his natural capacity. Hobbes may also hold that the acts in question are unrecognizable as acts in either the sovereign's natural or political capacity, and accordingly that the sovereign did not act at all.

It is true that sovereigns in their political capacity are artificial persons in the sense that in that capacity they 'have their words and actions *Owned* by those whom they represent' (L 16.4, p. 244). Yet, it is impossible that sovereigns (as natural persons) act outside the bounds that constrain this artificial person. Citizens have authorized 'without stint' *all* actions of the 'Man, or

³¹Dyzenhaus, 'How Hobbes Met the "Hobbes Challenge"'; Dyzenhaus, 'Hobbes's Constitutional Theory'; Dyzenhaus, 'Hobbes on the Authority of Law'. Also, Fox-Decent, *Sovereignty's Promise* (esp. 14ff.); Klimchuk, 'Hobbes on Equity'.

³²Dyzenhaus, 'Hobbes's Constitutional Theory' (466); also Klimchuk, 'Hobbes on Equity' (176); Fox-Decent, *Sovereignty's Promise* (14–21).

Assembly of Men' in the original agreement (L 16.14, p. 250; L 18.3, p. 266). The sovereign therefore never fails to act as representative of the commonwealth (if he acts at all). This conclusion is central to Hobbes' response to parliamentary writers opposing Charles I. It permits him to accept the premises of their theory while rejecting the rebellious conclusions they derived from it. He accepts, as authors such as Parker and Prynne had done, that the king possesses a natural and political capacity or office, and that he holds the latter by a grant from the people. Yet, he denies that this implies that the king could commit a breach of trust and thereby forfeit his public office. Since the sovereign is the 'Representative unlimited' the sovereign never acts as a merely natural person and citizens never have grounds 'to make warre upon, or so much as to accuse of Injustice, or any way to speak evill of their Sovereign' (L 22.9, p. 352; also L 24.7, p. 390).

The indivisibility of the capacities of the supreme magistrate is observable in Hobbes' treatment of the rule of recognition. In conformity with the validity proviso Hobbes accepts as an existence condition of positive law that it can be known to be an expression of the will of the sovereign (L 26.16, p. 426). Citizens are not bound by positive law before they know (or can be reasonably expected to know) the identity of the legislator (the sovereign in his political capacity – since positive laws, as noted, are commands of the commonwealth). This condition, Hobbes submits, is easily satisfied given the contractualist foundations of the state: the 'Legislator is supposed in every Common-wealth to be evident, because he is the Sovereign, who having been Constituted by the consent of every one, is supposed by every one to be sufficiently known' (L 26.16, p. 426). Citizens are expected to have knowledge of the identity of sovereign since they have 'constituted' him in the now obsolete sense of having appointed him to an office or position of authority.³³ The person they have so 'constituted' is the natural person of the sovereign (the 'Man, or Assembly of Men') whom they have authorized and to whom they have alienated their right to govern and owe allegiance.³⁴ Accordingly, knowledge of the (will of) the legislator – the sovereign in his political capacity – is acquired by means of knowledge of the (will of) the sovereign's natural person. This is in conformity with Hobbes' rejection of the *cum duo lura* rule and implies that if we can attribute the action to the supreme magistrate in his personal capacity we can always also attribute it to him in his political capacity.³⁵

³³*Oxford English Dictionary*, 'constitute, v.' The entry cites L 22.1 (p. 248) as example of this antiquated use of 'constitute'.

³⁴See also Hobbes' claim that the rights of sovereignty 'are the markes, whereby a man may discern in what Man, or Assembly of men, the Sovereign Power is placed, and resideth' (L 18.16, p. 278).

³⁵This is not to deny that Hobbes accepts the possibility that some actions cannot be successfully attributed to the sovereign. He observes that if the sovereign seems to grant away some rights of sovereignty, without explicitly renouncing sovereignty itself, 'the Grant is voyd', and if the sovereign appears to tolerate within the commonwealth a corporation with unlimited authority over its members, this is

It may appear implausible that what the sovereign does on personal title can always also be attributed to the commonwealth. S.A. Lloyd, for instance, supposes that, '[o]f course, monarchs may have private wills about matters not concerning the public. "Honey, make me a sandwich" is not a command issued as the representative of the person of the commonwealth' (Lloyd, 'Authorization and Moral Responsibility', 172, fn. 9). Yet, one will be hard-pressed to find instances where Hobbes admits that the sovereign can act in a purely private capacity.³⁶ His treatment of the sovereign's public ministers and personal servants is a case in point. Servants such as ushers attending to assemblies or chamberlains employed in the household of a monarch serve the sovereign in his 'naturall Capacity', while public ministers serve the sovereign in his 'Politique' capacity (L 23.2, p. 376). One might suspect that insofar as the sovereign addresses servants he represents only himself while he acts in name of the commonwealth when directing public ministers. However, this is not how Hobbes conceives of the distinction. Public ministers serve the sovereign in his 'Politique' capacity by virtue of being employed 'with Authority to represent in that employment, the Person of the Commonwealth' (L 23.2, p. 376). They are authorized to 'represent the person of the Sovereign' meaning that their actions, as public ministers, 'have the Common-wealth for Author' (L 23.7 p. 380; also L 23.6, p. 378; L 23.12, p. 382). Personal servants of the sovereign, conversely, assist the sovereign in his natural capacity in the sense that they do not, as servants, represent the commonwealth. What makes their service private is that they remain private citizens. The same holds for ambassadors who concern themselves with the private matters of the sovereign. 'An Ambassador sent from a Prince, to congratulate, condole, or to assist at the solemnity, though the Authority be Publique, yet because the businesse is Private, and belonging to him in his natural capacity; is a Private person' (L 23.12, p. 382). The Ambassador, sent to attend to the sovereign's private affairs must be considered a servant or private person. While this identifies matters that concern the sovereign in his private capacity only, it does not show that the public and

something 'the Sovereign cannot be understood to doe' (L 18.17, p. 280; L 22.5 p. 350). However, such passages do not entail that Hobbes is committed, in these instances, to attributing an action exclusively to the sovereign's natural person. The conclusion must rather be that that the sovereign does not act in either his natural or his political capacity.

³⁶One may find some evidence for the possibility of attributing an action solely to the sovereign in his personal capacity in *Behemoth* where Hobbes observes that 'the King though as a Father of Children, and a Master of Domestick seruants command many things which bind those children and seruants, yet he commands the people in general neuer but by a precedent Law, and as a Politick not a Naturall person' (B p. 174). See Dyzenhaus, 'Hobbes on the Authority of Law' (192). However, as Malcolm notes referring to L 21.7 (p. 330), in *Leviathan* 'Hobbes clearly allows that a sovereign, acting in his, her, or its sovereign capacity, can issue commands that are ad hoc or indeed ad hominem' (Malcolm, 'Thomas Hobbes: Liberal Illiberal', 130). The English *Leviathan* contains one passage where Hobbes maintains that benefits bestowed out of fear to appease powerful subjects are actions by the sovereign 'considered in his natural person, and not in the person of the Common-wealth' (L 28.25, p. 496). In the Latin *Leviathan* he removes the clause (LL 28, p. 497).

private capacities of the sovereign are separable: the ambassador acted on public authority. It only shows that being authorized by the sovereign is a necessary, not a sufficient condition, to be regarded a public minister. When Hobbes maintains that servants or ambassadors attend to the sovereign in his private capacity, he is not admitting that the sovereign can act in a purely private capacity. The request ‘Honey, make me a sandwich’, uttered by the sovereign, is also made on behalf of the entire commonwealth. It is the implication of Hobbes’ commitment to the indivisibility of the sovereign’s natural and political capacities.

6.

Quentin Skinner has argued that the publication of *Leviathan* forms a groundbreaking moment in the development of western political thought. In *Leviathan*, Skinner maintains, Hobbes articulates for the first time the theory of state sovereignty that has dominated much of our political discourse since. He highlights passages where Hobbes assigns the exercise of government functions to the commonwealth rather than the (natural person of the) sovereign and speaks of the ‘Authority’ and ‘Sovereign Power of the Common-wealth’ (L 26.22, p. 430; L 22.23, p. 366; L 28.23, p. 494; L 33.24, p. 604; L 22.3, p. 348; L 10.52, p. 146; L 22.27, p. 368; L 29.12; p. 506; L 30.14, p. 534). He concludes that, for Hobbes, sovereigns ‘are not the proprietors of their sovereignty’ but representatives and temporary holders of an office (Skinner, ‘Hobbes and the Purely Artificial Person’, 20). It is the commonwealth that ultimately ‘must be regarded as the true possessor of sovereignty’ (Skinner, ‘A Genealogy’, 347; Skinner, ‘Hobbes and the Purely Artificial Person’, 20).

Several critics, including notably Arash Abizadeh and A.P. Martinich, have remained unconvinced. They respond that in *Leviathan* Hobbes continues to defend the view that the sovereign, not the commonwealth, holds sovereignty.³⁷ In *The Elements* and *De Cive* he had, in conformity with the traditional Aristotelian conception of property as defined by the right of alienation, emphasized that the sovereign has the right to alienate sovereignty (Aristotle, *Rhetoric* 1.5.7 [1361a]). The sovereign ‘hath the dominion in his own right’ and therefore ‘may dispose thereof at his own will’, including by appointing a successor (EL 2.4.11, p. 135; DCv 7.16, pp. 98–9; EL 2.2.9, p. 122; DCv 7.15, p. 98; DCv 9.12, p. 112). In *Leviathan* this position reappears unaltered. Hobbes again maintains that sovereigns, not commonwealths, have ‘Sovereign Power in propriety’, and that they therefore have the ‘right to dispose of the Succession’ including to ‘sell, or give his Right of governing to a stranger’ (L 19.18, p. 300; L 19.23, p. 304; L 18.16, p. 278; L 42.19, p. 796; L 42.114, p. 902). Therefore, as Abizadeh concludes, the sovereign ‘owns sovereignty in the

³⁷Abizadeh, ‘Sovereign Jurisdiction’; Martinich, ‘Authorization and Representation’.

precise sense that he can control it, use it, lend its use or exercise to others, and even sell or transfer it as he sees fit'.³⁸

Although not conducted in these terms, the debate between Skinner and his critics concerns the question in what capacity the supreme magistrate enjoys his sovereignty. Does the sovereign hold sovereignty in his political capacity, as Skinner maintains, such that he can exercise sovereignty only insofar as he bears the person of the commonwealth? Or does he hold sovereignty as a natural person and as object of private property, as Abizadeh and others have it? I have argued that Hobbes' treatment of how sovereign power is held by the sovereign follows a broadly traditional structure, with clear precedents in medieval and early modern English constitutional thought. Hobbes is unwilling to assign sovereignty to a fully impersonal state, precisely because it would permit the 'damnable and damned' doctrine that one owes allegiance to the royal office independently of the person occupying that office. It is of course true, as Skinner maintains, that 'whatever actions he [the sovereign] performs in his official capacity are always attributed to the state and count as actions of the state' (Skinner, 'A Genealogy', 347). However, the exercise of sovereignty may be attributed to the impersonal commonwealth only by virtue of the existence of a natural person which is inseparably tied to it. Hobbes remains committed to the traditional common law notion of a sovereign who in his natural capacity commands allegiance from the citizens. Hence, while the person of the state may be regarded as the 'true possessor of sovereignty', so may the natural person of the sovereign. There is a communication of qualities between the multiple capacities of the highest magistrate that makes it possible for Hobbes to maintain both with equal vigour. It probably also makes his position less revolutionary than Skinner has thought.

This does, however, not fully vindicate the opposing view that the supreme magistrate holds sovereignty as natural person and as object of private property. While it is true that the rights of sovereignty are held by the sovereign on personal title, Hobbes' rejection of the *cum duo lura* rule allows him to assign the same rights to the sovereign in the exercise of his public office. In *Leviathan* Hobbes appropriates an account of authorization advanced by parliamentary authors aiming to conceive of the supreme magistrate as a delegate of the people.³⁹ Yet, rather than admitting to their radical conclusions, he shows their theory to be consistent with his initial theory, defended in *The Elements* and *De Cive*, of sovereignty as the object of full ownership of the highest magistrate. Nevertheless, the implication is that all exercises of sovereign power are equally attributable to the commonwealth, even the act of appointing a successor or transferring sovereignty to a foreign ruler; if the

³⁸Abizadeh, 'Sovereign Jurisdiction' (410); see also Martinich, 'Authorization and Representation' (332).

³⁹Skinner, 'Hobbes on Representation'; Brito Viera, *The Elements of Representation* (150).

sovereign exercises his 'right to dispose of the Succession' he does so (also) in name of the commonwealth. The sovereign, therefore, cannot assert ownership of sovereign power against the commonwealth. It is impossible, in other words, for the sovereign in his personal capacity to assert ownership against himself in his political capacity. The reason is simply that the rights he holds in both capacities are equivalent.

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