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## Hobbesian Sovereignty and the Rights of Subjects: Absolutism Undermined?\*

\* An early version of this paper was given as part of a panel on Hobbesian sovereignty at the meeting of the Renaissance Society of America (RSA), in Berlin in 2015. I would like to thank Rafaella Santi for inviting me to participate and thanks to her and Myriam-Isabelle Ducrocq for their interesting contributions and helpful comments. I would also like to thank two anonymous reviewers for *Hobbes Studies* for their helpful comments and suggestions and the editor for further helpful suggestions.

### *Introduction*

The form of sovereignty that Hobbes argues for in *Leviathan* and elsewhere has long been seen as an exemplar of *absolute sovereignty*. Within Hobbes scholarship, detailed appraisals of his arguments do of course, paint a more complex picture and some commentators make the case that Hobbes's argument for absolutism fails for various reasons. This is usually put down to inconsistencies or weaknesses in his argument, however.<sup>1</sup> There is broad consensus that whether his arguments succeed or not, Hobbes's intention is to establish an argument for absolute sovereignty.

What is meant by "absolute sovereignty"? The notion of absolute sovereignty is usually understood as an idea of political rule in which all power and authority lies with the sovereign; his/their authority is unlimited and undivided and subjects, who must submit to this absolute power and authority, are obligated to obey the sovereign.<sup>2</sup>

I wish to challenge the widely accepted reading of Hobbes as a committed absolutist (whether or not his arguments are deemed successful). I will argue that despite apparently making the case for absolute sovereignty, Hobbes, in *Leviathan*, also undermines certain

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<sup>1</sup> See for example, Jean Hampton, *Hobbes and the Social Contract Tradition* (Cambridge: Cambridge University Press, 1986) and Gregory Kavka, *Hobbesian Moral and Political Theory*, (Princeton: Princeton University Press, 1986).

<sup>2</sup> The definition of absolutism given in the *Oxford Dictionary of Philosophy* by Simon Blackburn is, "[i]n political theory, the view that there are no restrictions on the rights and powers of the government" (Oxford: Oxford University Press, 1994), current online version 2016, eISBN 9780191799556, accessed through University of Kent Library services, 16/5/2019.

aspects of that absolutism. He does this in at least two, and possibly three, ways. First, having made the defining duty of the sovereign that of ensuring the safety of the people, he says that when a sovereign fails in this duty, the subjects are absolved of their obligation to obey. Second, and crucially, he argues that subjects have rights, some of which are inalienable, including rights to resist the sovereign when their preservation is threatened. And the possible third way that Hobbes undermines the absolutism of the sovereign has been set out in two recent jurisprudential arguments. Larry May and David Dyzenhaus argue that the Hobbesian sovereign is limited (and therefore not absolute) by constraints on what he may make as law. They argue that the sovereign is restricted in his law-making function by his obligation to obey the laws of nature, which contain procedural and perhaps also substantive limitations on what laws can legitimately be made.<sup>3</sup> I will argue that in linking these jurisprudential arguments to my political arguments, both sets of arguments are strengthened.

While arguing that Hobbes can be said to undermine absolutism in these ways, I also acknowledge Hobbes's view that sovereignty cannot be shared or divided. Sovereign power and authority are held absolutely in this sense and so the nature of Hobbesian sovereignty and its relationship to absolutism is both complex and puzzling. Before discussing in more detail the arguments about Hobbesian sovereignty, it may be helpful to start by saying something about the context of Hobbes's writing on this subject. It is also important to emphasize that my argument that Hobbes undermines the absolutism of the sovereign applies specifically to *Leviathan*. There are significant changes between *De Cive* and *Leviathan* with regard to the subject of rights that lead me to argue that in *Leviathan* Hobbes gives a less absolutist argument for government than that which he gives in *De Cive*. The failure to recognise these

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<sup>3</sup> Larry May, *Limiting Leviathan, Hobbes on Law and International Affairs* (Oxford: Oxford University Press, 2013); David Dyzenhaus, "Hobbes on the Authority of Law" in Dyzenhaus and Thomas Poole, eds., *Hobbes and the Law* (Cambridge: Cambridge University Press, 2012).

significant differences has contributed to the continuing perception of Hobbes as a straightforward absolutist.

### *Background*

If we are to understand what Hobbes might be doing or trying to do with the notion of sovereignty we might start by looking at the possibility, often mooted, that he is building on Jean Bodin's development of the idea of sovereignty in the sixteenth century.

Bodin moves the idea of sovereignty away from its medieval roots to explore the limits of a fully politicised notion of sovereign power and authority. The medieval understanding was that a sovereign was a person with power over others who could be described as the "highest, final decision-making authority" *in a particular area and in a particular regard* and who could coexist with many other sovereigns within one territory. On this understanding of sovereignty, "one could only be relatively and not absolutely sovereign."<sup>4</sup> For example, the notion of sovereignty extended down to the Barons who were each sovereign in their own Barony. There is a notion of an ultimate, absolute sovereign at this time but that position is reserved for God. And, so it follows, no earthly ruler can be absolutely sovereign.

Bodin transforms this medieval notion of sovereignty into the one recognizable as that of the early modern era, helping to establish the idea of the modern sovereign state. This is the notion of absolute, temporal sovereignty, over a defined territory, encapsulated in Bodin's words, "Sovereignty is the absolute, and perpetual power of a commonwealth, which the

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<sup>4</sup> Dieter Grimm, *Sovereignty, The Origin and Future of a Political and Legal Concept*, trans. Belinda Cooper (New York: Columbia University Press, 2015),14.

Latins call *Majestas* . . . that is, the highest form of command.”<sup>5</sup> And to underline the absolutism of the sovereign he says,

But if the prince is sovereign absolutely, as are the genuine monarchs of France, Spain, England, Scotland, Ethiopia, Turkey, Persia and Muscovy, whose power has never been called into question and whose sovereignty has never been shared with subjects – then it is not the part of any subject individually, or all of them in general, to make an attempt on the honor or the life of the monarch, either by force or by way of law, even if he has committed all the misdeeds, impieties, and cruelties that one could mention.<sup>6</sup>

This new understanding of sovereignty puts the sovereign ruler at the pinnacle of political power and authority over a defined territory and makes his position unassailable. The sovereign is neither open to challenge nor to limitation in terms of his power and authority to rule, to make law and to command obedience from his subjects.

### *Hobbesian Sovereignty*

Bodin’s conception of sovereignty is often mirrored in what Hobbes says about sovereignty in *Leviathan*. After going through all the rights of the sovereign in chapter eighteen—including the exclusive right to make law, to be the ultimate judge in disputes, to decide on what doctrines should be taught, to make war and peace and so on, he declares these rights to be indivisible and inseparable.<sup>7</sup> In chapter twenty-six, he states that the sovereign is the sole legislator and that he is not subject to the civil laws.<sup>8</sup> Undoubtedly,

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<sup>5</sup> Jean Bodin, *On Sovereignty: four chapters from the six books of the commonwealth*, ed. Julian Franklin (Cambridge: Cambridge University Press, 1992), bk.I, ch. 8, 1.

<sup>6</sup> Bodin, *Sovereignty*, 115.

<sup>7</sup> Thomas Hobbes, *Leviathan*, ed. Noel Malcolm (Oxford: Clarendon Press, 2012), vol.2, ch. 18, 274, 272, 278, 280.

<sup>8</sup> Hobbes, *Leviathan*, ch. 26, 416.

Hobbes is no supporter of the notion of the separation of powers, or its equivalent in his time, “mixed monarchy.” He does not, however, say that the sovereign is completely unrestricted in what he may do. He says that the sovereign *is* bound by the law of nature. “The OFFICE of the Sovereign, . . . consisteth in the end, for which he was trusted with the Sovereign Power, namely the procuration of *the safety of the people*; to which he is obliged by the Law of Nature.”<sup>9</sup> He is still echoing Bodin, however, who also says that the sovereign must obey the law of nature.

### *Hobbes’s Arguments for Absolutism*

Hobbes’s entire political theory can be seen as an argument for absolutism but he has two types of explicit arguments for absolutism and they both concern the question of whether sovereignty might be divided or shared. The first are pragmatic arguments and variations on the theme that any division or sharing of sovereignty will allow factionalism and lead to civil war or rebellion. For example, he says the following about the idea, popular amongst the parliamentarians, that England was a “mixed monarchy” and that sovereignty lies in the combination of the three estates. “If there had not first been an opinion received of the greatest part of *England*, that these Powers were divided between the King, and the Lords, and the House of Commons, the people had never been divided, and fallen into this Civill Warre.”<sup>10</sup>

The second sort of argument he gives for absolutism is about the logic of the notion of sovereignty. If sovereignty denotes supreme political authority within a commonwealth then some person or institution must have that supreme authority. If it is the sovereign, then any other person or institution that is able to challenge the sovereign and check what he does is

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<sup>9</sup> Hobbes, *Leviathan*, ch. 30, 520.

<sup>10</sup> Hobbes, *Leviathan*, ch. 18, 278.

surely demonstrating that sovereignty, after all, lies with that person or institution. So, for example, if Parliament can challenge or check the king then it is Parliament that really has sovereignty. Similarly, if the courts can challenge the sovereign and change or reverse what he has done then surely the courts are actually sovereign. ,

. . . to those Lawes which the Soveraign himselfe, that is, which the Common-wealth maketh, he is not subject. For to be subject to Lawes, is to be subject to the Common-wealth, that is to the Soveraign Representative, that is to himselfe; which is not subjection, but freedom from the Lawes. Which error, because it setteth the Lawes above the Soveraign, setteth also a Judge above him, and a Power to punish him; which is to make a new Soveraign; and again for the same reason a third, to punish the second; and so continually without end, to the Confusion, and Dissolution of the Common-wealth.<sup>11</sup>

He is alerting us to the dangers of an infinite regress once we allow sovereign power over sovereign power. He concludes that there can only be one sovereign and he or they must possess sovereignty to the exclusion of all others.

To put it another way, once one accepts the definition of sovereignty as “the supreme political authority within a territory,” one has to accept that within a state (in the modern period) someone or some assembly or institution must have supremacy. Sovereignty is where the buck stops. The sovereign has the final say on all matters and cannot be challenged. This is built into the idea of sovereignty as Hobbes sees it.

He also says, “[t]here is a Sixth doctrine, plainly, and directly against the essence of a Common-wealth; and ‘tis this, *That the Soveraign Power may be divided*. For what is it to divide the Power of a Common-wealth, but to Dissolve it; for Powers divided mutually

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<sup>11</sup> Hobbes, *Leviathan*, ch. 29, 504.

destroy each other.”<sup>12</sup> And the examples he gives of where sovereignty has been divided are shown to have led to disaster. We can be confident, then, that for Hobbes, sovereignty cannot be divided. The remaining question is to what extent, and how, sovereignty might be limited.

### *The Undermining of Absolutism?*

“The OFFICE of the Sovereign, . . . consisteth in the end, for which he was trusted with the Sovereign Power, namely the procuration of *the safety of the people*; to which he is obliged by the Law of Nature”.<sup>13</sup>

This pronouncement by Hobbes in chapter thirty of *Leviathan* strikes a note that may seem odd for an absolutist. First, he is saying that the most important duty of the sovereign is that of ensuring the safety of the people. Second, he reminds us that this is why the people entrusted him with the sovereign power. It is the *raison d’être* of the office itself. And the next part of the passage in *Leviathan*, which is often left out of quotations, illustrates the scope of the notion “the safety of the people.” Hobbes tells us, “. . . by Safety here, is not meant a bare Preservation, but also all other Contentments of life, which every man by lawfull Industry, without danger, or hurt to the Common-wealth, shall acquire to himselfe.”<sup>14</sup> So, in order to fulfil his office, the sovereign must rule in such a way that he ensures, not just the physical survival of his subjects, but also that his rule enables them to live a good life, a commodious life.

Hobbes states in chapter twenty-one of *Leviathan* that “[t]he Obligation of Subjects to the Sovereign, is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them.”<sup>15</sup> This provides the first part of an argument that, in *Leviathan*, the

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<sup>12</sup> Hobbes, *Leviathan*, ch. 29, 506.

<sup>13</sup> Hobbes, *Leviathan*, ch. 30, 520.

<sup>14</sup> Hobbes, *Leviathan*, ch. 30, 520.

<sup>15</sup> Hobbes, *Leviathan*, ch. 21, 344.



Hobbesian sovereign is not entirely absolute, in the sense that if the sovereign fails (or ceases) to ensure the safety of the people then “[s]ubjects are absolved of their obedience to their Sovereign.”<sup>16</sup> He has been entrusted with the sovereign power by the subjects, for the end of their protection. If he fails in this, each subject ceases to owe him obedience and is free once more to seek his own protection: “The end of Obedience is Protection; which, wheresoever a man seeth it, either in his own, or in anothers sword, Nature applyeth his obedience to it, and his endeavour to maintaine it.”<sup>17</sup> The situation is imagined from the individual subject’s point of view here and obedience is owed only as long as something (protection) is received in return. The subjects are not obliged to obey if the sovereign cannot or will not protect the subjects. “Soveraignty, . . . hath in it, from the very institution, many seeds of a naturall mortality.”<sup>18</sup> It must be for the subjects to judge when they cease to be protected as only the subjects are guaranteed to have their own interests at heart. Hobbes acknowledges this when, as quoted above, he says, “[t]he end of Obedience is Protection; . . . wheresoever a man seeth it . . . .”

In *Leviathan* Hobbes, undermines the absolutism of the sovereign. Once the sovereign fails to ensure the safety of the people including their right to a commodious life, the subjects are no longer obliged to obey him and sovereignty dissolves. In other words, in *Leviathan*, Hobbes presents a position on sovereignty that does not conform to a conventional understanding of absolutism.

### *The Rights of the Subjects*

In *Leviathan*, the rights that Hobbes puts in place for all individuals include many which are retained into the commonwealth. Hobbes states in chapter fourteen “*Not all Rights*

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<sup>16</sup> Hobbes, *Leviathan*, ch. 21, 344.

<sup>17</sup> Hobbes, *Leviathan*, ch. 21, 344.

<sup>18</sup> Hobbes, *Leviathan*, ch. 21, 344.

*are alienable*<sup>19</sup> and “. . . there be some Rights, which no man can be understood by any words, or other signes, to have abandoned, or transferred.”<sup>20</sup> In chapter twenty-one, “*Of the LIBERTY of Subjects*,” Hobbes gives the extensive list of things which the subject “though commanded by the Sovereign, he may neverthelesse, without Injustice, refuse to do.”<sup>21</sup> He starts with the statement that the subject has the right to disobey if the sovereign commands a person “(though justly condemned,) to kill, wound or mayme himselfe; or not to resist those that assault him; or to abstain from the use of food, ayre, medicine, or any other thing, without which he cannot live.”<sup>22</sup> He then extends the list to include: a right not to incriminate himself when being interrogated; a right not to kill “any other man”; and a right not to “execute any dangerous, or dishonourable Office” so long as such refusal does not frustrate the “End for which the Sovereignty was ordained”.<sup>23</sup> Hobbes also poses the hypothetical question that if “a great many men” have already “resisted the Sovereign Power unjustly,” then do they not have a right to “joyn together, and assist, and defend one another?”<sup>24</sup> This has been taken by some to imply a right to rebellion and it is hard to dismiss this as a possible interpretation.

#### *Leviathan - Rights Given up and Rights Retained*

Hobbes says that under the second law of nature each individual agrees to give up his “*right to all things*” held in the state of nature and to “*be contented with so much liberty against other men, as he would allow other men against himselfe.*”<sup>25</sup> All dangerous, invasive rights are given up (renounced) or transferred to others and when individuals transfer or

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<sup>19</sup> Hobbes, *Leviathan*, ch. 14, 202.

<sup>20</sup> Hobbes, *Leviathan*, ch.14, 202.

<sup>21</sup> Hobbes, *Leviathan*, ch. 21, 336.

<sup>22</sup> Hobbes, *Leviathan*, ch. 21, 336.

<sup>23</sup> Hobbes, *Leviathan*, ch. 21, 338.

<sup>24</sup> Hobbes, *Leviathan*, ch. 21, 340.

<sup>25</sup> Hobbes, *Leviathan*, ch. 14, 200.

renounce a right to another they take on a duty not to interfere with the recipient's exercise of her right.<sup>26</sup>

What concerns us here is what rights are left after the transfer and abandonment of dangerous or invasive rights (that is, rights which we would not want held against ourselves). Hobbes is clear in saying that each subject must retain those rights whose abandonment would not result in any good for herself: “. . . there be some Rights, which no man can be understood by any words, or other signes, to have abandoned, or transferred.”<sup>27</sup> This is because “the motive, and end for which this renouncing, and transferring of Right is introduced, is nothing else but the security of a mans person, in his life, and in the means of so preserving life, as not to be weary of it.”<sup>28</sup> So, it is not only the right to self-defence for bare physical survival that is retained, as many commentators have argued. Rather, it is all the rights we require for self-preservation, broadly conceived and amounting to all the rights we need in order to live a commodious life. All these rights are retained and held into the commonwealth and held even against the sovereign.<sup>29</sup> In chapter fifteen, Hobbes describes the process of giving up and transferring dangerous or invasive rights, saying that “. . . it is necessary for all men that seek peace, to lay down certaine Rights of Nature; that is to say, not to have libertie to do all they list.” He then adds, “so it is necessarie for mans life, to retaine some; as right to governe their own bodies; enjoy aire, water, motion, waies to go from place to place; and all things else, without which a man cannot live, or not live well.”<sup>30</sup>

So, Hobbes puts in place for subjects a number of inalienable rights. I argue that this undermines the absolutism of the sovereign in several ways. Most obviously, it significantly

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<sup>26</sup> “And when a man hath in either manner abandoned, or granted away his Right; then is he said to be OBLIGED, or BOUND, not to hinder those, to whom such Right is granted, or abandoned, from the benefit of it” (Hobbes, *Leviathan*, ch. 14, 200).

<sup>27</sup> Hobbes, *Leviathan*, ch.14, 202.

<sup>28</sup> Hobbes, *Leviathan*, ch. 14, 202.

<sup>29</sup> For a detailed version of this argument see Eleanor Curran, *Reclaiming the Rights of the Hobbesian Subject* (Basingstoke: Palgrave Macmillan, 2007).

<sup>30</sup> Hobbes, *Leviathan*, ch 15, 234.

weakens the duty of the subject to obey the sovereign. Subjects are not always obliged to obey. They may legitimately resist sovereign commands that are potentially harmful to them. By implication, the subjects may (indeed must) rely on their own judgement, when considering a potentially harmful sovereign command. The fact that Hobbes opens the door to allowing subjects to rely on their own judgment rather than that of the sovereign, and then to exercise their rights to self-preservation, has been seen by some commentators as a fatal weakness in Hobbes's political argument for absolute sovereignty. Jean Hampton goes so far as to say, "... all of Chapter 21 of *Leviathan* is devoted to explaining when it is right (i.e., prudent) for subjects in a commonwealth to renege on their contract creating the sovereign."<sup>31</sup>

Granting inalienable rights to subjects changes, in a fundamental way, the relationship of subject to sovereign. Absolute sovereignty is characterised by the notion that all the power and authority lies with the sovereign and all the obligations (to obey) lie with the subject.<sup>32</sup> If, on the other hand, the subjects may question and then disobey the sovereign, then his authority is no longer supreme or absolute.

### *Jurisprudential Arguments Against Hobbesian Absolutism*

The first two arguments made above are that making the defining duty of the sovereign that of procuring the safety of the people and giving subjects inalienable rights are both ways in which Hobbes undermines the absolutism of the sovereign. A third way in which he possibly also undermines the absolutism of the sovereign is set out in two recent jurisprudential arguments made by David Dyzenhaus and Larry May, to the effect that Hobbesian sovereignty is indeed limited in the sense that there are limitations on what laws the sovereign may legitimately make.

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<sup>31</sup> Hampton, *Hobbes and the Social Contract Tradition*, 56.

<sup>32</sup> See note 2 above.

May's and Dyzenhaus's jurisprudential arguments against Hobbesian absolutism are important and, in my view persuasive, when they argue that the sovereign is limited in what he may legitimately make as law. Their arguments rest on Hobbes's declaration that the sovereign is obliged to obey the law of nature. At the start of chapter thirty of *Leviathan* Hobbes makes this part of his definition of the "Office of the Sovereign," which he says "consisteth in the end, for which he was entrusted with the Sovereign Power, namely the procuration of *the safety of the people*; to which he is obliged by the Law of Nature."<sup>33</sup> He reiterates this a few pages later, when discussing the requirement that the sovereign administer justice equally: "For in this consisteth Equity; to which, as being a precept of the Law of Nature, a Sovereign is as much subject, as any of the meanest of his People."<sup>34</sup> In chapter twenty-six of *Leviathan* Hobbes makes clear the connection of the law of nature to the civil law. In a state of nature the laws of nature "are not properly Lawes, but qualities that dispose men to peace and to obedience. When a Common-wealth is once settled, then are they actually Lawes." And he explains in what sense they are laws. "Civill and Naturall Law are not different kinds, but different parts of Law; whereof one part being written, is called Civill, the other unwritten, Naturall."<sup>35</sup> The sovereign, being obliged to obey the law of nature, must make (civil) laws that do not violate the laws of nature.

The laws of nature also comprise morality for Hobbes: hence the arguments of Dyzenhaus and May that these limitations on the sovereign are moral limitations. Their argument that these limitations on the sovereign are *only* or *merely* moral is given support by Hobbes's statement in chapter fifteen of *Leviathan* that the laws of nature oblige "in foro interno"<sup>36</sup> that is, they always oblige in conscience but not always in action.<sup>37</sup>

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<sup>33</sup> Hobbes, *Leviathan*, ch. 30, 520.

<sup>34</sup> Hobbes, *Leviathan*, ch. 30, 534.

<sup>35</sup> Hobbes, *Leviathan*, ch. 26, 418.

<sup>36</sup> Hobbes, *Leviathan*, ch. 15, 240.

Thus, they argue, Hobbes places limits on the sovereign by giving him obligations to obey the laws of nature and thus to make civil laws that are in keeping with the laws of nature. However, the fact that these obligations are purely moral weakens their arguments against the absolutism of Hobbesian sovereignty. In describing the limitations on sovereign power as moral in nature (1) they rely on the conscience of the sovereign and, therefore, (2) they rely on a self-limiting or self-restraining sovereign. This view weakens the argument against absolutism. Arguments *supporting* absolutism often include the notion of a self-limiting or self-restraining sovereign. When, for example, the divine right theorist Filmer describes the duties of the king as being like those of a father caring for his children, he is not arguing for any reduction in or check on his absolute power and authority.<sup>38</sup> If one ascribes duties to the sovereign that rely on him acting solely from his own sense of duty rather than on any enforceable claims by other political entities such as the people or parliament, it leaves the absolute power and authority of the sovereign intact.

My argument, on the other hand, is that Hobbes puts in place two key political elements that undermine the absolutism of the sovereign. In other words, as part of his political argument,

1. He makes sovereignty *conditional* upon fulfilling the duty to ensure the safety of the people (and by safety here is not meant mere preservation . . .).
2. He provides a mechanism by which the sovereign may lose the right to the obedience and loyalty of his subjects. This mechanism is provided by the inalienable right to self-preservation, broadly conceived, held by each subject, even against the sovereign.

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<sup>37</sup> “The Lawes of Nature oblige in Conscience always, but in Effect then onely when there is Security” (Hobbes, *Leviathan*, ch. 15, 240).

<sup>38</sup> “[T]he king, as father over many families, extends his care to preserve, feed, clothe, instruct and defend the whole commonwealth. . . . so that all the duties of a king are summed up in an universal fatherly care of his people” (Robert Filmer, *Patriarcha and Other Writings*, ed. Johann Sommerville [Cambridge: Cambridge University Press, 1991], 12).

So, he puts in place rights for subjects which, if the sovereign fails to uphold them, lead to the sovereign's loss of his right to command obedience from subjects.<sup>39</sup>

If this argument is added to the jurisprudential arguments given by Dyzenhaus and May, above, then their arguments and my political argument are both strengthened. The jurisprudential arguments are strengthened by not having to rely solely on the conscience of the sovereign. The defining duty of the sovereign, to ensure the safety of the people, is given detailed expression in the laws of nature, which are those rules, found out by reason, which are most conducive to our preservation. And the political consequence of failing to ensure the safety of the people is the sovereign's loss of the right to command obedience from subjects coupled with the subjects' loss of obligation to obey the sovereign. Under such circumstances sovereignty dissolves. So there are real political consequences for a sovereign who fails to follow the laws of nature, rather than (at best) a crisis of conscience.

My political argument is strengthened by the addition of restrictions on what the sovereign may do as law-maker. These restrictions might be described as 'rule of law' type restrictions such as the duty to treat people equally provided by the eleventh law of nature, the law of equity.<sup>40</sup> This duty is easily translated to the rule-of-law principle that all are equal under the law. May's argument that the duty of the sovereign to provide for the safety of the people is tied to his obligation to obey the law of equity means that there are also specific rule-of-law obligations on the sovereign, in addition to the general obligation to provide for the safety of the people. "The sovereign is restricted from propounding laws that are unreasonable, superfluous, or arbitrary."<sup>41</sup> Thus, the duty to provide for the safety of the

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<sup>39</sup> Hobbes, *Leviathan*, ch. 21, 344.

<sup>40</sup> Hobbes sets this out in the eleventh law of nature "if a man be trusted to judge between man and man, it is a precept of the Law of Nature, that he deale Equally between them" (Hobbes, *Leviathan*, ch. 15, 236).

<sup>41</sup> May, *Limiting Leviathan*, 68.

people is filled out and given a detailed and nuanced interpretation by May in terms of restrictions on what laws the sovereign may legitimately make.

### *Significant Changes On Rights from De Cive to Leviathan*

The arguments I have made supporting the view that Hobbes undermines absolutism in *Leviathan* stand as they are, but I also wish to make the case that those arguments mark a change regarding absolutism from *De Cive* to *Leviathan*.

In *De Cive* all rights to resistance are given up.<sup>42</sup> When the sovereign is instituted, “each man subjects his *will* to the *will* of a *single* other . . . that is, of one *Man* . . . or of one *Assembly*.” This comes about when “each of them obligates himself, by an Agreement with each of the rest, not to resist the *will* of the *man* or *Assembly* to which he has submitted himself.”<sup>43</sup> There is some ambiguity regarding giving up the right of resistance inasmuch as Hobbes adds that a subject “is understood to retain the right of defending himself against violence.”<sup>44</sup> But he also says “this *Right to give Commands* . . . consists in the fact that each of the citizens has transferred all his own force and power . . . to that *man* or *Assembly*. To have done this simply means . . . that he has given up his right to resist.”<sup>45</sup> So, in *De Cive* there is a possible bare right to physical self-defence that Hobbes says is retained, but he also says that the right of resistance is given up.

The additional rights that Hobbes lists in *Leviathan* are added, despite the repetition of some statements and some phrases from *De Cive*, when describing individuals instituting a sovereign. He says, repeating what he has said in *De Cive*, that individuals “conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their

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<sup>42</sup> “. . . he has given up his right to resist” (Hobbes, *On the Citizen*, ch. V.11, 74). “*Each man retains the Right to defend himself at his own discretion, as long as his security is not provided for*” (ch. VI, 75).

<sup>43</sup> Hobbes, *On the Citizen*, ch. V.7, 72.

<sup>44</sup> Hobbes, *On the Citizen*, ch. V.7, 72.

<sup>45</sup> Hobbes, *On the Citizen*, ch. VI.11, 73-74.



Wills, . . unto one Will: . . . and therin to submit their Wills, every one to his Will, and their Judgements, to his Judgement.”<sup>46</sup> The repetition of such phrases adds ambiguity. Yet, it is clear that on the inalienable rights of subjects, Hobbes has moved a long way from the bare right to physically defend one’s body that is stated in *De Cive* (and even that, as shown above, is not without ambiguity, due to the statement that the subject has given up his right to resist).

In *Leviathan*, the subjects’ rights are given much more detailed discussion and focus than in *De Cive*. Even the definition of a right has changed significantly. In *De Cive*, he says, “And what is not contrary to right reason, all agree is done justly and *of Right*. For precisely what is meant by the term *Right* is the liberty each man has of using his natural faculties in accordance with right reason.”<sup>47</sup> In *Leviathan* Hobbes says simply, “RIGHT, consisteth in liberty to do, or to forebeare.”<sup>48</sup>

In *De Cive*, Hobbes is using the traditional notion of natural law as right reason and conflating objective and subjective understandings of the term “right.” To say that something is done according to right reason is to say, as above, that it is done “justly and of right,” that is, “right” used in the objective sense. One might say, “it is right and just that I do x,” that is, it is right according to (objective) natural law. But, then “right” is also said to refer to liberty, the freedom to do something. Here, the term is being used in the subjective sense: “I have the right to x or to do x.” Now the right is in me rather than in the natural law. It is my subjective right. In *Leviathan*, Hobbes has his own version of the laws of nature, defined narrowly as rules (“found out by reason”) for self-preservation.<sup>49</sup> Thus he makes a clear move away from

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<sup>46</sup> Hobbes, *Leviathan*, ch. 17, 260.

<sup>47</sup> Hobbes, *On the Citizen*, ch. I,7, 27.

<sup>48</sup> Hobbes, *Leviathan*, ch. 1, 198.

<sup>49</sup> Hobbes, *Leviathan*, ch. 14, 198.

objective right to a purely subjective understanding of a right as simply the liberty to do or to forebear that is now *opposed* to law.<sup>50</sup>

### *Rights Renounced and Transferred*

It is worth briefly addressing the view that in all versions of the political theory, including *Leviathan*, Hobbesian subjects surrender all their rights to the sovereign (or all except the bare right to physically defend ourselves), as it is a view that has been influential and still commands support.<sup>51</sup> A passage in chapter seventeen of *Leviathan* is often quoted in support of the view that in *Leviathan* subjects surrender their rights to the sovereign. The passage is really concerned with the authorisation of the sovereign and with what that entails, rather than with the rights of subjects. Despite this, it has often been interpreted as a crucial passage on subjects' rights in relation to the sovereign. It is this interpretation that I wish to draw attention to and to challenge.

Hobbes puts into the mouths of the individuals, as they form the social contract, the words,

*I Authorise and give up my Right of Governing my selfe, to this Man, or to this*

*Assembly of men, on this condition, that thou give up thy Right to him, and Authorise*

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<sup>50</sup> “For though they that speak of this subject, use to confound *Jus*, and *Lex*, *Right* and *Law*; yet they ought to be distinguished; because *RIGHT*, consisteth in liberty to do or forebear; Whereas *LAW*, determineth, and bindeth to one of them: so that *Law*, and *Right*, differ as much, as *Obligation* and *Liberty*” (Hobbes, *Leviathan*, ch. 14, 198).

<sup>51</sup> See, for example, Alan Ryan, “Hobbes’s Political Philosophy,” in *The Cambridge Companion to Hobbes*, ed. Patricia Springborg (Cambridge: Cambridge University Press, 1996), “It appears that we must renounce *all* our rights, save only the right to defend ourselves *in extremis*”(223); “[T]he subject, having given up his rights, cannot now appeal to them” (235). Quentin Skinner, *Hobbes and Republican Liberty* (Cambridge: Cambridge University Press, 2008) argues that in return for protection subjects give up their rights, including rights to defend themselves: “He already lays it down in *The Elements* that ‘the end for which one man giveth up, and relinquisheth to another, or others, the right of protecting and defending himself by his own power, is the security he expecteth thereby’” (180-81). He goes on to say that the same argument is repeated in *De Cive* and *Leviathan*: this principle “had been fundamental to his theory of political obligation at all times” (182).

*all his Actions in like manner.* This done, the Multitude so united in one Person, is called a COMMON-WEALTH, in latine CIVITAS.<sup>52</sup>

The mistake that is often made in interpreting this passage is taking the “Right” referred to as an aggregate right to govern myself that incorporates all the rights I have in the state of nature to any actions (or inactions) I choose that will help me to preserve myself. This is not the case, as Hobbes makes clear. There is one specific right that Hobbes is referring to here, and that is “my right of governing myself.” Hobbes refers to this right in the singular, which is not accidental as he refers in many other places to “rights” in the plural. It is the right to govern myself in a political sense.<sup>53</sup> In other words, it is a right to be my own sovereign. To suggest that it is a general right to govern myself in all the other ways in which a person might run their own life is to ignore the many references Hobbes makes in *Leviathan* to all the retained rights the subject has in a commonwealth as well as the more general right of the subject to order her own life in a way that is conducive to living a commodious life.<sup>54</sup> It is also to ignore the nature of the process which Hobbes describes in great detail under the second law of nature, whereby subjects agree amongst themselves to give up the “right to all things” of the right of nature<sup>55</sup> “and be contented with so much liberty against other men”<sup>56</sup> as they would allow other men to hold against themselves. Subjects go through a process of abandoning and transferring dangerous and invasive rights *to each other, not to the sovereign*. In the long passage in chapter fourteen describing this process there is no reference to surrendering or transferring any rights to the sovereign; they are all given up or

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<sup>52</sup> Hobbes, *Leviathan*, ch. 17, 260.

<sup>53</sup> I am grateful to Bernard (Stefan) Baumrin, who first pointed this out to me.

<sup>54</sup> As above, “so it is necessarie for mans life, to retain some; as right to governe their owne bodies; enjoy aire, water, motion, waies to go from place to place; and all things else, without which a man cannot live, or not live well.” (Hobbes, *Leviathan*, Ch 15, 234).

<sup>55</sup> Hobbes says in chapter 14, “Naturally every man has Right to everything” and he goes on, describing the state of nature, “in such a condition, every man has a Right to every thing: even to one anothers body” (Hobbes, *Leviathan*, ch. 14, 198).

<sup>56</sup> Hobbes, *Leviathan*, ch. 14, 200.

transferred to other individuals.<sup>57</sup> At this point in Hobbes's argument, the sovereign has not even been instituted. Further evidence that subjects do not give up their rights to the sovereign is provided by Hobbes's use of the notion of contract to illustrate the way in which subjects transfer (some of) their rights to each other. Hobbes states that this "mutual transferring of Right, is that which men call CONTRACT."<sup>58</sup> And, as all commentators agree, Hobbes is unequivocal on this point. There is no contract between individuals and the sovereign but only between individuals themselves.

#### *Commentators - Support for Hobbesian Absolutism Despite Inalienable Rights*

There is a recent argument that directly opposes the position I have taken on the undermining of Hobbesian absolutism by the inalienable rights of subjects. It is made by Susanne Sreedhar in *Hobbes on Resistance: Defying the Leviathan*. One argument of the book is that granting inalienable rights to subjects does *not* undermine Hobbesian absolutism. She argues that, despite allowing that subjects have inalienable rights including what she terms "resistance rights," Hobbes does not undermine his absolutist argument for government. This, she says, is because these rights are "rendered politically innocuous by Hobbes's political theory." The theory is not "damaged," she says, because

[h]is delimited set of cases of justified resistance also serves to underscore all of the ways in which subjects are *not* at liberty to disobey the sovereign. Permitting resistance in very particular cases allows him to highlight the idea that in the vast majority of cases, people's obligations are to obedience.<sup>59</sup>

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<sup>57</sup> For a detailed analysis of the way in which subjects in *Leviathan* transfer and give up some of their rights to each other while other rights are retained and held in the commonwealth, see Curran, *Reclaiming the Hobbesian Subject*.

<sup>58</sup> Hobbes, *Leviathan*, ch. 14, 204.

<sup>59</sup> Susanne Sreedhar, *Hobbes on Resistance: Defying the Leviathan* (Cambridge: Cambridge University Press, 2010), 171.

Sreedhar develops a carefully worked through and nuanced position and provides an argument that is attractive not least because it demonstrates a way of resolving the tension between Hobbes's absolutist pronouncements on sovereignty and, in this case, his seemingly non-absolutist arguments on the matter of subjects' rights. It is also a new version of an older argument that has often been used to resolve the tension between Hobbesian absolutism and his apparently more liberal arguments on subjects such as equality and subjects' rights. This older argument was that Hobbes used the assumptions of his parliamentary enemies to reach royalist, absolutist conclusions. In Sreedhar's version, "[t]he conceptual tools that were, and still are, so powerfully used to underwrite ideological opposition to the state – rights, liberty, and justice – are thus rendered politically innocuous by Hobbes's political theory."<sup>60</sup> She goes on, "In short, by appropriating the language of resistance rights, Hobbes undermines actual political resistance."<sup>61</sup>

Two objections can be raised to the case made by Sreedhar. The first is simply that once Hobbes has allowed that in principle subjects have some inalienable rights he has opened the door to legitimate resistance and this alone surely undermines the absolutism of the sovereign. The obligation to obey the sovereign, I have argued, is now conditional upon the sovereign ruling in the right way (such that he provides for the "safety of the people"). This runs counter to, e.g., Bodinian absolutism as described above.<sup>62</sup> One response to this might be, as Sreedhar argues earlier in the book, that "Hobbes does not think that absolute sovereignty requires absolute obedience."<sup>63</sup> Indeed she acknowledges that the Hobbesian sovereign does not have unlimited or absolute power in the sense of "all possible power to

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<sup>60</sup> Sreedhar, *Hobbes on Resistance*, 171.

<sup>61</sup> Sreedhar, *Hobbes on Resistance*, 171.

<sup>62</sup> "if the prince is sovereign absolutely . . . then it is not the part of any subject individually, or all of them in general, to make an attempt on the honor or the life of the monarch, either by force or by way of law, even if he has committed all the misdeeds, impieties, and cruelties that one could mention" (Bodin, *Sovereignty*, bk. I, ch. 8, 1).

<sup>63</sup> Sreedhar, *Hobbes on Resistance*, 129.

issue commands that bind subjects” because “the subjects retain rights to disobey and resist.”<sup>64</sup> Nevertheless, she argues, a sovereign may rule with absolute power and, as she puts it, “command with impunity” without receiving absolute obedience from every subject at all times. In other words, the sovereign can *accommodate* a small amount of disobedience from a small number of individual subjects under special and particular circumstances. Sreedhar gives the examples of a condemned man and a son ordered to kill his father, saying that their obedience is not “essential to the government of the commonwealth.”<sup>65</sup> So, she is arguing that Hobbes thinks he can allow a few restricted instances where resistance rights will come into play without threat to the commonwealth or to the absolute power and authority of the sovereign. What is being assumed here is that having allowed disobedience in principle, Hobbes is able to set out precisely when and under what circumstances it is allowable and therefore to *limit* any possible applications of a principle of justified disobedience.

The second objection concerns Sreedhar’s argument that resistance rights apply only in particular cases, that is, in cases of individual subjects being exposed to potential harms by the sovereign. Her argument continues, “in a well-functioning commonwealth . . . we can expect legitimate resistance to be not only relatively rare (most likely, only in cases of punishment) but to be entirely unthreatening to the maintenance of the political order.”<sup>66</sup> One might grant this point—that as long as the sovereign is protecting the subjects and doing everything he should be doing—the subjects will have no reason to exercise rights against him. But this does not address the question “what about a commonwealth that is not functioning well?” What Sreedhar assumes is that the only sorts of instances in which legitimate resistance rights might arise are cases involving threats to individual subjects, usually taking the form of legitimate punishment by the sovereign. The main point is that the

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<sup>64</sup> Sreedhar, *Hobbes on Resistance*, 97.

<sup>65</sup> Sreedhar, *Hobbes on Resistance*, 129.

<sup>66</sup> Sreedhar, *Hobbes on Resistance*, 171.

“the particular kind of organized resistance [Hobbes] was so concerned to oppose – namely the parliamentary rebels – would not have been justifiable according to his theory.”<sup>67</sup>

It is not clear how Hobbes can avoid the possibility that a sovereign who rules in a way that harms the subjects (say by oppressing particular groups or restricting freedoms to the point of causing harm) will be open to the legitimate disobedience and resistance of subjects. They would surely be within their rights (the rights that Hobbes has explicitly said they have) to disobey and even resist the sovereign under these circumstances. Sreedhar’s argument seems to rely on Hobbes’s stipulation that there is no liberty to disobey when that disobedience will harm the commonwealth. Yet, she also grants a Hobbesian right to rebellion, albeit only in cases of “necessity,” that is, when self preservation requires it. She states that Hobbes is determined not to allow rebellion for ideological or political reasons, but it remains unclear how he can restrict a right to rebellion once he has allowed it.

Also, how can we say it is beyond possibility that a sovereign might enact policies or laws that threaten the well-being of groups of subjects, or even of all subjects, rather than isolated individuals? And if he does so, then subjects, who are no longer obliged to obey the sovereign once he fails to protect them, would, it seems, according to Sreedhar’s argument, have the right to rebel. Furthermore, Hobbes says that they have the right to submit to another leader who might protect them.<sup>68</sup> It is fair to conclude that if the subjects were to assert such a right to rebellion it may, indeed must, threaten the commonwealth.

### *The Undermining of Absolutism: Deliberate or a Weakness in the Argument?*

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<sup>67</sup> Sreedhar, *Hobbes on Resistance*, 171.

<sup>68</sup> “The Obligation of Subjects to the Sovereign, is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them. For the right men have by Nature to protect themselves, when none else can protect them, can by no Covenant be relinquished. . . . The end of Obedience is Protection; which, wheresoever a man seeth it, either in his own, or in another’s sword, Nature applyeth his obedience to it” (Hobbes, *Leviathan*, ch. 21, 344).

Does Hobbes consciously and deliberately undermine the absolutism of the sovereign? There is an undeniable tension between the many declarations Hobbes makes to the effect that sovereignty should be absolute and his simultaneous undermining of that absolutism. It is impossible to know exactly what Hobbes's thinking is on this crucial matter. A likely explanation, though not an answer to the conundrum, is that he is gripped by two conflicting anxieties: the first, of the violence and chaos that he believes are consequent to a weak or divided sovereignty and the second, that subjects must not and indeed cannot give up their rights to protect themselves and to pursue security and happiness. After all, it is the desire to preserve ourselves and to live in peace that lies behind the institution of a sovereign in the first place. Hobbes stands out from many other absolutists because his argument for government is driven by the needs and rights of the individual, to seek a safe and commodious life, as opposed to the needs and rights of a sovereign to govern well and/or effectively. Hobbes is not a divine right theorist, deriving the sovereign's absolute power and authority from an unassailable divine source; nor is he like a modern absolutist such as Carl Schmitt, deriving absolute power and authority from the sovereign's right and duty to protect the state at all costs.

### *Postscript*

Some light may be shed on Hobbes's own view of absolute sovereignty by looking at it in the context of Carl Schmitt's writing on sovereignty. In the opening sentence of *Political Theology*, Schmitt says "sovereign is he who decides on the exceptions."<sup>69</sup> and the idea of the state of exception has been said to point to a "threshold of indeterminacy between democracy

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<sup>69</sup> Carl Schmitt, *Political Theology* (1922), trans. George Schwab (Cambridge: MIT Press, 1985), 1.



and absolutism.”<sup>70</sup> Schmitt’s view, that the sovereign is above all constitutional law and can make decisions for the survival of the state rather than for the survival of its individual citizens during times of emergency, including the suspension of any laws or rights, could be said to define absolutism in its purest or most extreme form.

Would Hobbes agree that he is sovereign who can decree the state of exception? In my view, it is clear that he would not because this would be to say that individuals can have their rights taken away or, in other words, that all individual rights are alienable in a state of emergency. All rights and all law, according to Schmitt, are subject to the overarching need of the state to protect itself. Hobbes, on the other hand, is emphatic that the sovereign must always act for the good of the people. The sovereign may never act for his own good or the good of the state. As he says, regarding the sovereign’s authority to make law, “A good Law is that, which is *Needfull*, for the *Good of the People*, and withal *Perspicuous*.” And he hammers the point home:

A Law may be conceived to be Good, when it is for the benefit of the Sovereign; though it be not Necessary for the People; but it is not so. For the good of the Sovereign and People, cannot be separated.<sup>71</sup>

So, using the state of exception as a test for Hobbesian absolutism, we can see that for Hobbes there cannot be a justification for harsh laws or the suspension of laws or rights in order to protect the state. The sovereign represents the people in the closest way possible for Hobbes, and the state or sovereign’s good cannot be seen separately from the good of the

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<sup>70</sup> Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago: The University of Chicago Press, 2005), 3. Agamben says that the state of exception, while common in German theory, is difficult to define and compares it to the terms ‘martial law’ and ‘emergency powers’ in Anglo Saxon theory. He says it is closely related to civil war, insurrection, and resistance and is “state power’s immediate response to the most extreme internal conflicts” (p. 2). Finally, he says “[t]he state of exception is not a special kind of law (like the law of war); rather insofar as it is a suspension of the juridical order itself, it defines law’s threshold or limit concept” (p. 4).

<sup>71</sup> Hobbes, *Leviathan*, ch. 30, 540.

individuals who gave him his power. What is more, the inalienable rights of the subjects are untouchable by the sovereign. He has no authority to suspend them. Unlike many other writers of the period, Hobbes did not see the rights of individuals as being held originally by the sovereign and then distributed (or not) according to his will or as being “surrendered” to the sovereign upon his institution. Rather, Hobbes sees the rights as attached to individuals originally and, in many cases, inalienably. This is in stark contrast to Schmitt, for whom the sovereign and his right to make decisions are superior to all rights of individuals and of all law.

Schmitt was, at least in his early work, an admirer of Hobbes for what he saw as a laudable attempt to argue for absolutism and he tried to co-opt *Leviathan* to his cause. Later, however, he was also scathingly critical of what he characterised as the “barely visible crack in the theoretical justification of the sovereign state”<sup>72</sup> that he said Hobbes opened up when he allowed freedom of private judgement on matters of religious belief. This “crack,” according to Schmitt, was then noticed and exploited by Spinoza, “a liberal Jew” who “immediately recognised the telling inroad of modern liberalism” and, he continues, “Spinoza expanded this thought . . . into a universal principle of freedom of thought, perception, and expression.”<sup>73</sup> Schmitt argues that Hobbes, by opening up this “crack,” provided the seed of an argument that developed into the modern liberal notion of individual freedom of thought, which would so weaken the sovereign that “the leviathan’s (sic) vitality was sapped from within and life began to drain out of him.”<sup>74</sup>

Hobbes had, in Schmitt’s terms, taken too much away from the sovereign in allowing individuals the freedom to make their own judgements. This puts into stark relief the

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<sup>72</sup> My thanks to Myriam-Isabelle Ducrocq, for drawing my attention to this criticism of Hobbes by Schmitt.

<sup>73</sup> Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes* (1938), trans. George Schwab and Erna Hilfstein (Chicago: University of Chicago Press, 2008), 57.

<sup>74</sup> Schmitt, *Leviathan in the State Theory*, 57.

distinction between the starting points of Schmitt and Hobbes. Hobbes starts with the individual, and her inalienable right to protect herself in a state of nature, and to join with others to institute a sovereign who can guarantee the peace and provide for the safety of all. Schmitt starts with the total state and the state's right to protect itself by declaring, in emergencies, a state of exception, during which any rights and laws may be suspended.

### *Conclusion*

I have proposed that there are parts of Hobbes's argument in *Leviathan* that undermine or are inconsistent with absolutism. This has been recognised by some commentators but not as evidence against Hobbesian absolutism. The response has been instead to conclude that Hobbes is inconsistent on this matter or that his argument for instituting an absolute sovereign simply fails. The question that I find interesting concerns what Hobbes is trying to do regarding absolutism. Is he fully committed to absolute sovereignty? Or does he believe that even though the inalienable rights of the subjects undermine the sovereign's absolute power and authority, it is in the end more important to preserve those rights for individuals than to sacrifice them for the sovereign's right to rule absolutely?

The argument here has been that by making the case in *Leviathan* that all subjects have important rights that cannot be given up, even to the sovereign, Hobbes is arguing that there are limits to the sovereign's authority. The implication of this is that, contrary to most modern Hobbes scholarship, Hobbes's political theory, in *Leviathan*, is not one of thoroughgoing absolutism.