THE ILLUSION OF CONTRACT: HOBBES AND THE NECESSITY OF PATERNAL DOMINION

“The contract must be picked up and thrown down firmly over the parent-child relationship much as one would hurriedly drop a makeshift cage over some set of predatory animals.”

—Philip Abbot

Are all Hobbesian political relationships contractual? This question may seem banal and its answer obvious. Nonetheless, this paper will suggest that the answer is actually quite complicated and surprising, giving reason to think it is in fact an interesting question. Hobbes famously asks us to consider the pre-political state of nature “and to look at men as if they had just emerged from the earth like mushrooms and grown up without any obligation to each other” (DC 102). The state of nature counterfactual, illuminated in this oft-quoted passage from De Cive, is set against a more familiar world, chock full of political relationships. Hobbes offers us a theory about the difference between relationships in the state of nature (if there are any) and their counterparts in the real world, i.e. political relationships. A brief statement of that theory can be found in chapter 21 of Leviathan, where Hobbes claims that there is “no Obligation on any man, which ariseth not from some Act of his own” (L 150). The crucial idea, it seems, is that political relationships, those relationships that involve rightful dominion, are made and not merely discovered. They are not act-independent facts about the world. So on some suitably accommodating definition of contract, where contract is seen as a shared making of a political relationship, Hobbes would answer the question posed above in the affirmative.

2 A political relationship, in the context of Hobbes’s political theory, is best understood as a relationship between persons involving sovereignty/dominion, on the one hand, and obligation, on the other.
But a puzzle arises when one reads this famous passage (“no Obligation on any man…”) alongside a less-famous (but equally interesting) passage from the beginning of chapter 20, “Of Dominion, PATERNALL, and DESPOTICALL.” This puzzle turns on the relationship between commonwealth by institution and commonwealth by acquisition. On Hobbes’s account, commonwealths are *instituted* “when men agree amongst themselves, to submit to some Man, or Assembly of men, voluntarily, on confidence to be protected by him against all others” and *acquired* “when a man maketh his children, to submit themselves, and their children to his government, as being able to destroy them if they refuse; or by Warre subdueth his enemies to his will, giving them their lives on that condition” (L 121). Chapters 17-19, the first three of Part 2, focus almost exclusively on commonwealth by institution. But, when Hobbes begins discussing commonwealth by *acquisition* in detail in chapter 20, he says, “this kind of Dominion, or Soveraignty, differeth from Soveraignty by Institution, onley in this, That men who choose their Soveraign, do it for fear of one another, and not of him whom they Institute: But in this case, they subject themselves, to him they are afraid of” (L 138). This passage, read alongside Hobbes’s claim in the next chapter about the source of obligations, presents a puzzle because, it seems, obligations arising from the actions of persons-to-be-obligated are perfectly consistent with commonwealth by institution, but *not* (*prima facie*) with commonwealth by acquisition.

How is it that obligation depends on the actions of persons-to-obligated, yet can be generated when a conqueror subdues her foe? The political relationship that arises from military defeat seems to depend on the actions of the victor, not the vanquished. Such a puzzle gives rise to what I consider to be the most basic question about Hobbes’s contractarianism: *is* Hobbes a consistent or thoroughgoing contractarian? Is it in fact the case that *all* obligations are grounded in the actions of persons-to-be obligated? On this view, an *inconsistent* contract theory would be
one that required actions on the part of persons-to-be-obligated for some political relationships, but not for others.

Answering this basic question, I submit, requires a thorough examination of the “differeth…onely in this” passage, as well as the rest of chapter 20. Such an examination will show that Hobbes in fact an inconsistent contractarian. That Hobbes, in this passage, should want to equate commonwealth by institution and commonwealth by acquisition is certainly curious. At first blush, it seems that there must be more to distinguish these two types of commonwealth than the source of the fear from which dominion is established.\(^5\) Isn’t it the case that the different sources of fear have repercussions that indicate two materially different types of commonwealth?

Clearly Hobbes doesn’t think so. But instead of grappling with this troubling passage, many contemporary scholars, especially those who desire to place Hobbes in the (real or imagined) ‘contract tradition’ or to treat him as a proto-liberal, tend to ignore or downplay Hobbes’s claim of congruence.\(^6\) Furthermore, many commentators have suggested that the essence of Hobbes’s theory is to be found in the account of commonwealth by institution.\(^7\) Others have explicitly shunted Hobbes’s theory of commonwealth by acquisition.\(^8\) Both of these

\(^5\) Note that Hobbes frequently uses ‘soveraignty’ and ‘dominion’ interchangeably. In De Cive, Hobbes writes: “In every commonwealth, the Man or Assembly to those whose will individuals have subjected their will (in the manner explained) is said to hold SOVEREIGN AUTHORITY [SUMMUM POTESTATEM] or SOVEREIGN POWER [SUMMUM IMPERIUM] or DOMINION [DOMINIUM]” (73). In a passage from Leviathan quoted above, Hobbes writes as if sovereignty and dominion were equivalent: “this kind of Dominion, or Soveraignty…."

\(^6\) As I will call Hobbes’s claim that commonwealth by acquisition and commonwealth by institution are equivalent. Hobbes himself might have approved of the term ‘congruence’ given his affinity for geometry.\(^5\)


strategies refuse to consider institution and acquisition side-by-side (and on equal footing), and in so doing, ignore or implicitly reject this important passage.

But evaluating the proposed equivalence, as I argue we must, is not completely straightforward. It is not immediately clear to what one should compare commonwealth by institution, for Hobbes gives us two ‘versions’ of commonwealth by acquisition—the despotical and the paternal. But I it take that Hobbes treats both despotical and paternal dominion as instantiations of the general form, and, as such, should not diverge in any relevant respect. In the Elements of Law, Hobbes remarks, “there be three titles only, by which one man may have right and dominion over another; whereof two may take place presently, and those are: voluntary offer of subjection, and yielding by compulsion; the third to take place, upon the supposition of children begotten amongst them” (126). This passage suggests that the congruence claim is more accurately threefold—each type of commonwealth is intended to be equivalent to all the others (for each centers on rightful dominion).

There are (at least) two ways to deal with Hobbes’s congruence claim. First, one can accept the claim, but then one must provide an argument showing that despite apparent differences, commonwealth by institution and commonwealth by acquisition are identical in all relevant respects. Such an attempt to vindicate Hobbes could, however, potentially wreak havoc on Hobbes’s status as a contractarian. If it can be shown that commonwealth by acquisition is non-contractual (as I will, later in the paper), then by the proposed congruence, commonwealth by institution, too, is non-contractual. Russell Hardin appears to recognize this possibility when

9 See also DC 102.
10 Some effort has been made (in the literature on contract) to distinguish contractarianism and contractualism. See Stephen Darwall, “Introduction,” in Contractarianism/Contractualism, ed. Stephen Darwall (Wiley-Blackwell, 2003). Nevertheless, I will use contractarianism and contractualism as well as contractual interchangeably.
he says that Hobbes’s “tale of the social contract is a just-so story that many readers illicitly turn into a normative canon by ignoring his acceptance of conquest and usurpation on an equal footing with deliberate construction of government.”¹¹ But this line of argument undermines the perfectly reasonable intuition that commonwealth by institution is contractual (i.e. based on shared makings of political relationships¹²) in some meaningful sense. Thus, in order to ‘save’ Hobbes’s commonwealth by institution as an exemplar of contract theory, one might deal with the congruence claim in a second way, by rejecting it.

Rejecting the congruence claim, however, requires showing that the two forms, commonwealth by institution and commonwealth by acquisition, are in fact, and not just at face, incongruent. To advance this claim, I will show that commonwealth by institution is contractual whereas commonwealth by acquisition is (either wholly or partially) non-contractual.¹³ While commonwealth by institution and the despotical version of commonwealth by acquisition are plausibly contractual (and so congruent in this respect), the paternal version of commonwealth by acquisition is decidedly non-contractual (and so incongruent to the other two forms). This can be shown conceptually, via a close examination of the structure and circumstances of paternal dominion, and supported textually, by looking at Hobbes’s own assertions in earlier work. For instance, in The Elements of Law and De Cive, paternal dominion is not based on any act of the

¹¹ Russell Hardin, Liberalism, Constitutionalism, and Democracy, (Oxford: Oxford University Press, 1999), 55. It is important to note that Hardin is not suggesting that Hobbes’s theory is non-contractual. Instead, he is arguing that contract does no work in Hobbes’s theory. David Schmitdz makes a similar claim when he says that all the justificatory work in Leviathan is done teleologically—that is, consent can be supposed (in the commonwealth by acquisition case) because the state (any state) is teleologically justified. See “Justifying the State,” Ethics 101, no. 1 (1990): 95. A similar idea can be inferred from Hannah Pitkin’s classic two-part paper, “Obligation and Consent—I,” American Political Science Review (1965): 990-9 and “Obligation and Consent—II,” American Political Science Review (1966): 39-52.

¹² After this point I will use ‘agreement’ as shorthand for a ‘shared making of a political relationship.’

¹³ This is not the only way to demonstrate incongruence, but it is rather interesting given Hobbes’s apparent commitment to consent and contract in Leviathan.
child’s—it follows directly from a state of affairs, namely protection. My intention is to delve into observations like this one, providing textual support for the structural argument.

Since the congruence claim and any possibility of thoroughgoing or consistent contractarianism stand and fall together, if I am correct in rejecting the congruence claim, there is a further question as to why Hobbes would make such a dubious claim. Therefore, in rejecting the congruence claim and denying the consistency of Hobbes’s contractarianism one must at least attempt an account of the origins or motivations of the congruency ‘mistake.’ Furthermore, one might wonder what Hobbes’s willingness to make such a claim says about the overall character of his contractarianism. Nothing so strong as either the chapter 20 or the “no Obligation on any man” passage appears in either The Elements of Law or De Cive. The congruence claim and the (strong) attempt at a thoroughgoing contractarianism are new to Leviathan. Does this say something deep about the role Hobbes thought contract played in his political theory?

Rejecting the congruence claim as I do bears directly on our understanding of Hobbes’s contractarianism. Traditionally, however, scholarship on Hobbes’s contractarianism has not been concerned directly with questions of consistency. Instead, approaches to Hobbes’s contractarianism usually fall into one of the following five broad categories: (1) the rational-choice/feasibility approach, (2) the mechanics of contract approach, (3) the legitimacy/hypothetical consent approach, (4) the despotical dominion/de facto approach, and (5) the paternal dominion/family approach. The first three approaches can be discussed here by way of introduction; the final two will be discussed in detail as the argument progresses.
I. False Starts

Though interesting on their own, the rational-choice/feasibility approach, the mechanics of contract approach, and the legitimacy/hypothetical consent approach turn out to provide little assistance in addressing what I introduced as the most basic question about Hobbes’s contractarianism. This question needs to be distinguished from the question of whether Hobbes’s contract theory confers legitimacy. The legitimacy question asks whether the agreements made in Hobbes’s theory are made freely and whether such agreements have justificatory force. The legitimacy question can be posed in various ways, but the unifying feature is normative evaluation. One can see how this question is derivative while the previous question is basic—in order to normatively evaluate an agreement, there has to be an agreement to evaluate. The basic question is to be preferred to the derivative question, at least when grappling with Hobbes’s congruence claim, because it allows one to consider how (and whether) the claim fits into the structure of Hobbes’s theory without having to a) impute a foreign normative theory or b) enter into the morass that is Hobbes’s moral theory. Asking the basic question, this paper argues, allows one to reject the congruence claim with minimal (possibly zero) normative assumptions. Surprisingly little contemporary scholarship bears on the basic question.

Commentators who take what I have called the rational-choice/feasibility approach to Hobbes’s contractarianism are concerned not with whether Hobbes is a consistent or thoroughgoing contractarian but rather with the feasibility of contract as a method for Hobbesian individuals to exit the state of nature. Some question whether it would be rational for individuals

[15] Though it is possible to hold the view that an illegitimate agreement is no agreement at all. This view would, of course, refuse to acknowledge the distinction between the ‘basic’ and ‘derivative’ questions posed above.
[16] If it turns out that I’m wrong and that the congruence claim cannot be rejected vis-à-vis the basic question, one can certainly move on to the derivative question and attempt to reject the claim on normative grounds.
to mutually covenant in order to authorize a sovereign in a situation modeled on an iterated
prisoner’s dilemma or impure coordination game.\textsuperscript{17} Others suggest that mutual covenants are valid in the state of nature if they are “immediate and continuous”\textsuperscript{18} or if Hobbesian individuals are adequately politicized (by accumulating experience and prudence), so that they see the value in entering into such covenants and so authorizing the \textit{Leviathan}.\textsuperscript{19} To reiterate, scholarship taking this approach considers the \textit{feasibility} and not the \textit{existence} of agreement in Hobbes’s theory.

A second approach, which I have dubbed the “mechanics of contract approach,” introduces two wrinkles into the study of Hobbes’s contractarianism. M.T. Dalgarno has noticed that Hobbes’s definition of contract requires a mutual transferring of right, and that commonwealth by acquisition (in both its despotical and paternal forms) involves a \textit{single} covenant and is thus only a unilateral transfer of right.\textsuperscript{20} It is for this reason that I have insisted on a weaker definition of contract than Hobbes’s—for the purposes of this paper, a contract theory need only be based on \textit{agreement}. Thus, as long as servants agree to the dominion of their masters and children agree to the dominion of their parents, commonwealth by acquisition remains contractual.

Geraint Parry, on the other hand, recognizes that Hobbesian covenants involve promises, and suggests that promises must be seen as performative utterances.\textsuperscript{21} But recognizing that a


\textsuperscript{21} Geraint Parry, “Performatory Utterances and Obligation in Hobbes,” \textit{The Philosophical Quarterly} 17, no.
certain utterance is an act of promising requires certain social conventions that are lacking in the state of nature. Without the sword, there can be no covenants, and so there can never be a sword. Parry’s argument seems a bit implausible; it is certainly not clear whether Hobbes would have considered promising a performative utterance, requiring certain social conventions for its possibility. The evidence, that Hobbes clearly thought promising could get individuals out of the state of nature, suggests that Hobbes did not view promising in this way. Parry seems to apply a contemporary philosophical worry to an older problem in a way that does not take Hobbes’s project into account. Parry’s analysis could have been grouped with the ‘feasibility’ approach—it appears here only because it addresses the feasibility of Hobbesian contract via an investigation of the mechanics of contract. Nevertheless, both of these kinds of worries about Hobbes’s contractarianism must be set aside in order to begin addressing the congruence claim.

A third approach, the legitimacy/hypothetical contract approach, falters for precisely the reason suggested in the first paragraph of this section. The question of whether all Hobbesian political relationships are contractual cannot be resolved definitively by asking whether such contracts are legitimate. I will briefly consider these legitimacy questions just to get a sense of how Hobbesian contract theory could be resisted if it could be vindicated vis-à-vis the basic question. If the analysis should ever get that far, there are at least five ways to be worried about the legitimacy of the Hobbesian contract.

First, following Ronald Dworkin, one might worry that Hobbes’s contract is illegitimate because it is not an actual, historical contract. Second, one might worry that the obligation created by a Hobbesian agreement, since forced, cannot properly be said to be “self-assumed.”

Obligation, to be meaningful, must be “self-assumed obligation,” which means it must be truly free and voluntary. This is just to say that consent, in Hobbes’s theory, is not ‘real.’ Third, one might question the legitimacy of Hobbes’s contract by suggesting that the consent involved in the contract is misdirected. That is, Hobbesian individuals do not consent to a particular government or sovereign, but instead consent to being under a sovereign—consent isn’t given to anyone at all. Fourth, one might think that Hobbes is not interested in consent for the standard liberal reasons, and therefore Hobbes’s contract theory is improperly motivated. Hobbes’s interest in consent, one could argue, merely follows from his commitment to a conventionalist methodology. Similarly, it’s possible that Hobbes’s theory of consent and contract just shadow a deeper commitment to the gratitude account of political obligation. Fifth, one might wonder how Hobbes’s determinism squares with any account of consent or agreement as the basis of political obligation. How could any action that is merely the result of a weighing of appetites and aversions result in a legitimate obligation to a sovereign? How is contract meaningful under Hobbes’s theory of the will?

The three approaches outlined above are inadequate in answering my question, not because they provide incomplete or problematic analyses of Hobbes’s contractarianism, but instead because they are answering the wrong type of question. They are concerned with the feasibility, mechanics, or legitimacy of the contract and not with whether there is an agreement in

24 Ibid., 2.
27 Abbott, The Shotgun Behind the Door, 110.
29 The relationship between Hobbes’s determinism and his contract theory raises a deep problem—one that cannot be addressed here. Unfortunately, in order to move forward at all, the paper will have to set Hobbes’s determinism to one side.
the first place. It’s true that the third approach *would* allow for an assessment of the congruence claim; however, the unnecessary imputation of normative claims would ultimately prove needlessly controversial. I want to be able to assess the congruence claim *without* relying on a theory of legitimacy or of morally permissible agreements. It is my contention that scholars following the legitimacy/hypothetical contract approach assume too much, and do so needlessly. The basic question can be answered without these kinds of assumptions.

**II. Method**

In effort to avoid begging the question, the investigation as to whether Hobbes is a consistent or thoroughgoing contractarian must proceed indirectly. It simply would not suffice to provide a definition of contract, however reasonable, and then poke holes in Hobbes’s theory based on that definition. Any comprehensive definition of contract would be far too controversial. The way forward is to notice that *all contracts are conventional/artificial*—that is, they require human action directed at the creation of a relationship that did not already exist—they are not foreordained. Thus, if it can be shown that some political relationships are *not* conventional, then those relationships are also non-contractual. This way of proceeding is also independently interesting because it attempts to challenge a commonly held view among Hobbes scholars. That view, that Hobbes is a consistent conventionalist, is commonly thought to follow from Hobbes’s abstract individualism.  

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30 See the *Oxford English Dictionary* entry for ‘conventional’ (4a): “Characterized by convention; in accordance with accepted artificial standards of conduct or taste; not natural, original, or spontaneous.” [http://dictionary.oed.com/cgi/entry/50049132?single=1&query_type=word&queryword=conventional&first=1&max_to_show=10](http://dictionary.oed.com/cgi/entry/50049132?single=1&query_type=word&queryword=conventional&first=1&max_to_show=10) (accessed February 24, 2010).

Thus one could describe the ‘method’ of this paper as an application of a conventionality test. If the test fails in any one case, Hobbes is not a contractarian in all cases (and is therefore not ‘thoroughgoing’). I will apply the conventionality test to each of the “three titles” to dominion: institution, despotical, and paternal. In the language of *Leviathan*, the first title is called commonwealth by institution, and this type of commonwealth is straightforwardly conventional. Human beings in the condition of mere nature mutually authorize a sovereign. Before such authorization, human beings were in a state of war, and after they experience both peace and subjection, but *it is only through their authorization that the dominion relationship obtains*. The second and third titles, to be discussed in the following section, together comprise commonwealth by acquisition, which can be divided into despotical (second title) and paternal (third title) dominion.

**III. Commonwealth by Acquisition—Potestas Vitae Necisque**

The literature on Hobbes’s contractualism in relation to commonwealth by acquisition is, for the most part, split between treatments of despotical and paternal dominion. Thomas J. Lewis and Mary Nyquist have produced notable exceptions insofar as they consider paternal and despotical dominion simultaneously. Interestingly, they both come to the (what I think to be incorrect) conclusion that despotical and paternal dominion comprise conceptually identical relationships. Though they agree on the conceptual identity of paternal and despotical dominion, Nyquist and Lewis offer widely divergent accounts of the nature and consequences of that identity.

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Nyquist’s explanation of the identity builds on the suggestion that Hobbes’s commonwealth by acquisition is “modeled on a Roman doctrine of war slavery,” appropriated from Grotius, that “provide[s] the juridical terms required for his contractualist construction of absolutism.”33 It is her contention that potestas vitae necisque, exhibited on the field of battle when the victor meets the vanquished, not only reflects Hobbes’s account of despotical dominion, but also provides the “prototype” for paternal dominion as well.34 This power of life and death, it is argued, is so pervasive that it is partially constitutive of the conceptual relationship between sovereign and subject, master and servant, and parent and child. Nyquist further asserts “the essential sameness of civil subjects, children, and unbound servants” thereby “fusing” paternal and despotical dominion.35 Her interpretation fits nicely with Hobbes’s “three titles” claim in The Elements and the “only three ways by which someone can have Dominion over the person of another” claim in De Cive (see EL 126 and DC 102).

Instead of viewing despotical dominion as the prototype for the other two forms of sovereignty, Lewis regards commonwealth by institution as “a definitional standard for the creation of commonwealths by force or acquisition.”36 Whereas for Nyquist the analogical relationship between despotical and paternal dominion flows from potestas vitae necisque, for Lewis it flows from a common source of authority. Lewis has an unconventional understanding of the role of consent in Hobbes’s work. He argues that instead of viewing consent from the point of view of the consenting party, one must look at it from the point of view of mothers and conquerors and how they treat their subjects. Conquerors gain authority, Lewis argues, by “treat[ing] the defeated as if they had a right to consent” and mothers gain their authority in the

34 Ibid., 3
35 Ibid., 11.
very same way (with their children).\textsuperscript{37} If conquerors/mothers did \textit{not} treat the defeated/children in this way, the defeated/children would remain (or become) enemies, which would circumvent the conqueror’s/mother’s desire for peace.

Whereas Lewis and Nyquist are \textit{correct} to consider despotical and paternal dominion simultaneously (this being the only way to get a complete picture of commonwealth by acquisition and thereby assess the congruence claim), I think they are mistaken to view them analogically. Despotical and paternal dominion are in fact disanalogous and the disanalogies are revealing. Moreover, as I will show in the following two subsections, despotical and paternal dominion are so different that one is conventional/artificial (despotical) and the other is non-conventional (paternal).

\textit{(a) Despotical Dominion}

In Chapter 20 of \textit{Leviathan}, Hobbes provides an account of despotical dominion that he thinks upholds the idea that obligation depends on the actions of persons-to-be-obligated:

\begin{quote}
Dominion acquired by Conquest, or Victory in war, is that which some Writers call \textsc{Despotical}, from Δεσπότης, which signifieth a \textit{Lord}, or \textit{Master}; and is the Dominion of the Master over his Servant. And this Dominion is then acquired to the Victor, when the Vanquished, to avoid the present stroke of death, covenanteth either in express words, or by other sufficient signs of the Will, that so long as his life, and the liberty of his body is allowed to him, the Victor shall have the use thereof, at his pleasure. … It is not therefore the Victory, that giveth the right of Dominion over the Vanquished, but his own Covenant. Nor is he obliged because he is Conquered; that is to say, beaten, and taken, or put to flight; but because he commeth in, and Submitteth to the Victor (141).
\end{quote}

Despotical dominion is discussed, albeit indirectly, by those scholars who consider Hobbes’s role in the engagement controversy and his relationship to the so-called \textit{de facto} theorists of political obligation. The \textit{de facto} theorists and their intellectual rivals published a series of tracts between March 1649, when the Council of State issued a declaration calling for a

\textsuperscript{37} Ibid.,57.
justification of the commonwealth government, and late April/early May 1651, when *Leviathan* was first published. The particularities of these arguments are unimportant at the moment—it is sufficient to say that Hobbes presented the views of the *de facto* theorists “in a more systematic and comprehensive style.” Hobbes’s close relationship to the *de facto* theorists bears quite significantly on the question of whether dominion or political power is conventional or non-conventional. The *de facto* theorists were faced with the question of whether the mere existence of Cromwell’s commonwealth government was sufficient reason for it to be obeyed. If obligation could be derived from mere *de facto* power (a state-of-affairs rather than an action), then such a government might be seen as non-conventional, non-artificial or at the very least, non-contractual.

On this question of whether a *de facto* power is also *de jure*, Hobbes (and Quentin Skinner) appears to be of two minds. There are those passages, especially in the “Review, and Conclusion” of *Leviathan* where Hobbes reiterates the conclusions of the *de facto* theorists. He proclaims that he has written *Leviathan* “without other designe, than to set before mens eyes the mutuall Relation between Protection and Obedience (*L* 491, quoted in Skinner, 306). Skinner suggests Hobbes “agrees in the first place [with the *de facto* theorists] that conquest can give a valid title to allegiance.” This makes it seem as though conquest and the ensuing protection are sufficient to generate an obligation to obey. This would be problematic because it would derive obligation from a state-of-affairs, and not an action on the part of the person-to-be-obligated. Nevertheless, Hobbes also says “it is not therefore the Victory, that giveth the right of Dominion over the Vanquished, but his own Covenant” (*L* 141, quoted in Skinner, 235).

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39 Ibid., 304.
40 Ibid., 305. Skinner remarks in the footnote his discomfort with this formulation.
repudiates his claim quoted above when he says the vanquished “is presented with a clear choice, and accordingly acts freely in making it. He can either refuse to submit, or else he can agree to submit. ...”41 Hobbes (and Skinner) appear to have narrowly saved the conventionality of despotic dominion, but Skinner merely echoes this seeming contradiction in Hobbes’s work, instead of illuminating or resolving it.

Kinch Hoekstra has framed the apparent contradiction in *Leviathan* as a tension between Hobbes qua *de facto* theorist and qua consent theorist. An integral piece of Hoekstra’s attempt to address the tension is the distinction between “the *de facto* theory of obligation,” which holds that subjects are obliged to *de facto* powers that are not *de jure*, and “the *de facto* theory of authority” which holds that *de jure* authority is derived from *de facto* power.42 Hobbes’s theory is not one of the first type, but *is* a peculiar version of the second.43 The ordinary version of the second type, exemplified by Marchmont Nedham, suggests that *de jure* authority is derived *immediately* from *de facto* power.44 Hobbes’s derivation of *de jure* authority from *de facto* power, on the other hand, is mediated by consent. It is still true that *de jure* authority is properly *derived* from *de facto* power because consent is *necessary* insofar as it is necessary for self-preservation.45 Furthermore, consent can be tacit, i.e. derived from certain states of affairs (namely protection), so it can appear as though Hobbes derives right directly from might.46 This of course bears on the question of whether Hobbes is a thoroughgoing contract theorist because,

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42 Hoekstra, “The De Facto Turn in Hobbes’s Political Philosophy,” 50.
43 In *De Cive*, Hobbes states, “that in the natural state of men, sure and irresistible power gives the right of ruling and commanding those who cannot resist” (31, quoted in Hoekstra, 53).
44 Hoekstra, “The De Facto Turn in Hobbes’s Political Philosophy,” 58.
45 Ibid., 61. Hobbes calls this ‘necessity of Nature’: every man “by necessity of Nature, is supposed to endeavor all he can, to obtain that which is necessary for his conservation (L 106). Hobbes also says “every man is presumed to do all things in order to his own benefit” (L 109).
46 Ibid., 67.
it can be argued, rightful dominion derived directly from might is not a shared making of a political relationship. It is not a ‘conventional’ relationship, and certainly not contractual.

To reiterate, Hoekstra argues that because of Hobbes’s view of human nature (see fn. 45, the “necessity of Nature”) the gap between de facto and de jure authority is effectively closed. De facto powers provide peace, human beings necessarily seek peace and so consent to de facto powers, making them de jure. If this were a sound argument it would imply that “the mere fact of being alive counts for assent,” and that “all of the living have consented to the power over them” (for Hobbes thinks we may choose death).47

Hoekstra briefly considers, but does not explore, the possibility that ‘consent’ of this sort is so thin, so empty, that it lacks an absolutely essential feature of the concept of consent.48 If consent is truly necessary for all the living, then “attributed consent” is also “necessary consent” for all the living. But consent, as a concept, requires the possibility of not consenting, which, in this situation, is arguably unavailable to living human beings.49 Consent given without the possibility of not consenting is not consent at all. The relationship that obtains based on this ‘consent’ is not a relationship based on the actions of the person-to-be-obligated, and so it is not, even on the weak definition being used in this paper, contractual. But, as I now want to argue, Hoekstra is mistaken and there is a possibility of not consenting (besides by choosing death), so consent is not necessary. Though I will now argue that in despotic dominion consent is not necessary and is therefore conventional, I only show this as a contrast case with paternal

47 Ibid., 68.
48 Gorden J. Schochet does consider this possibility in “Intending (Political) Obligation: Hobbes and the Voluntary Basis of Society,” in Thomas Hobbes and Political Theory, ed. Mary Dietz (Lawrence, Kansas: University Press of Kansas, 1990), 68: “A consent that definitionally one cannot help but give lest she or he be deemed nonrational and therefore incapable of consenting in the first place is hardly consent in any standard sense of the term.” I have avoided locutions such as “real consent” or “true consent” so as to avoid a normative attack on Hoekstra’s “attributed consent.”
49 Hobbes reply to such a claim would of course be that human beings may ‘not consent’ by choosing death. But this appears to flatly contradict his view of human nature.
dominion, where consent will turn out to be necessary. Despotical dominion passes the conventionality test, but paternal dominion fails it.

Hoekstra’s error seems to stem from a conflation of “necessity of Nature” and another notion of necessity (call it p-necessity). An action X is p-necessary if it is not possible to not X. If there is only one thing I can do (X), and if I must do something, I must X, and X is p-necessary. “Necessity of nature” and p-necessity come apart in precisely the situations involving ‘forced’ consent. When faced with one’s conqueror, it is naturally necessary, given Hobbes’s view of human nature, to consent, because doing so will best lead to one’s conservation. But it is not p-necessary to consent, in the sense that one has the liberty (there is no external impediment) as well as the power to not consent.

Hoekstra misses the possible divergence of natural necessity and p-necessity because he points to passages that show that human beings necessarily intend their own preservation (see fn. 45), but leaves out other important passages relating to judgment. According to Hobbes, the “RIGHT OF NATURE…is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgement, and Reason, hee shall conceive to be the aptest means

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50 The use of ‘possibility’ in this formulation can be seen as the conjunction of Hobbes’s ‘liberty’: “LIBERTY, or FREEDOME, signifieth (properly) the absence of Opposition; (by Opposition, I mean externall Impediments of motion;)…” (L 145) and Hobbes’s ‘power’: “when the impediment of motion, is the constitution of the thing it selfe, we use not to say, it wants Liberty; but the Power to move; as when a stone lyeth still, or a man is fastened to his bed by sickness” (L 146).

51 P-necessity is meant to capture an intuition well expressed by Carole Pateman, writing about the liberal-democratic state: “if theorists and citizens can only passively accept what exists, the result is the liberal democratic state is ‘naturalized’. It is regarded as if it were a natural feature of the world that individuals can do no other than accept as they find it.” The Problem of Political Obligation, 6, emphasis added.

52 The necessity of Nature could also be termed ‘deterministic necessity.’ Hobbes famously claims that liberty and necessity are consistent because God “seeth, and disposeth all things” (L 147).

53 One might think that there is an external impediment to not consenting, i.e. the conqueror’s sword. But the sword cannot stop one from not consenting—it can only render not consenting unattractive, or produce consequences after the fact. Similarly, one might think the impediment to not consenting “is the constitution of the thing itself,” i.e. a lack of power. Such a lack of power would seem to follow from human nature, that one can only will one’s own good. However, Hobbes says, “when a man throweth his goods into the Sea for feare the ship should sink, he doth it nevertheless very willingly, as may refuse to doe it if he will” (L 146).
thereunto” (L 91). Here Hobbes seems to imply that what counts as preservation is determined subjectively. This just means that, however unlikely, a certain human being faced with *potestas vitae necisque* might judge continued resistance the best course of action. Of course doing so would exhibit an especially heinous irrationality (from Hobbes’s point of view), but it is not psychologically impossible. This leaves open the possibility of not consenting.

Elsewhere, however, Hobbes suggests otherwise: “And therefore if a man by words, or other signes, seem to despoyle himselfe of the End [“*Good to himself,*” “security of a mans person”], for which those signes were intended; he is not to be understood as if he meant it, or that it was his will” (L 93). Here, Hobbes implies that the actions of a human being who attempts continued resistance when faced with *potestas vitae necisque* can be interpreted as willing submission to the *potestas*. This would seem to say that not consenting is impossible because the *potestas* can interpret anything as consent.

Yet, in the *Elements of Law*, Hobbes says that when

> it happeneth that a man signifieth unto two contradictory opinions whereof the one is clearly and directly signified, and other either drawn from that by consequence, or not known to be contradictory to it; then (when he is not present to explicate himself better) we are to take the former of his opinions; for that it is clearly signified to be his, and directly, whereas the other might proceed from error in the deduction, or ignorance in the repugnancy and that “[s]ilence in them that think it will be so taken, is a sign of consent; for so little labour being required to say No, it is to be presumed, that in this case he that saith it not, consenteth” (EL 77). It is not entirely clear whether the *Leviathan* passage above is directly contradicting this *Elements* passage. The question is whether Hobbes would allow a clearly and directly signified refusal to submit to stand, given that such a refusal would “despoyle himselfe of the End.”

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54 Also see *DC* 27-28.
55 *Why* the *potestas* would interpret resistance as submission is another question.
Hobbes does seem to stake the very possibility of taking silence as a sign of consent on the ease with which one can say ‘No.’ Presumably this means Hobbes thought it possible.

This question can be resolved definitively by reference to Hobbes’s view of slavery. In *Leviathan*, Hobbes says, “if a man be held in prison, or bonds, or is not trusted with the libertie of his bodie; he cannot be understood to be bound by Covenant to subjection; and therefore may, if he can, make his escape by any means whatsoever” (154). This shows that there is a way to live without submitting to the victor’s power. One may proclaim (rather foolishly, but easily), “I DO NOT SUBMIT,” and be taken in and bound as a slave. One cannot be forced to be free, but one may choose (and hope) to be a slave. Surprisingly, the ability to choose bound slavery renders despotical dominion conventional and therefore plausibly contractual.

Charles D. Tarlton, in a slightly different line of argument (textual and conceptual, rather than historical), also claims that “*Leviathan* embraced a *de facto* legitimization of power and with it all the cynical distortion to be expected in the position that might is right.” But his argument also inaccurately concludes that despotical dominion is non-conventional. The line of argument Tarlton pursues centers on the plausibility of ‘voluntary’ submission and the ‘sufficient signs’ necessary for covenant. The first relevant observation is that for Hobbes, “there is no such thing as involuntary action,” and therefore that ‘voluntary’ is used without its traditional, obligation-producing connotation. The second is that signs can be “Expresse, [which] are words spoken with understanding of what they signify. … [or] Signs by Inference, [which] are

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56 Or be killed for one’s refusal. But it does not matter what happens to someone who does not submit as long as it is possible to *not* submit. The slavery case merely shows (contradicting Hoekstra) that it is possible to both *not* submit and live. Thus, not all the living have assented.
57 Tarlton, “To Avoyd the Present Stroke of Death,” 245.
58 Ibid., 238.
59 Ibid., 240.
sometimes the consequences of Words; sometimes the consequence of Silence; sometimes the consequence of Actions; sometimes the consequence of Forbearing an Action” so that virtually *anything* can serve as a sign of submission (*L* 94, quoted in Tarlton, 243). Together these two observations are supposed to show that merely hesitating on the field of battle, as a sign of submission, is to have covenanted. And for covenants to be enacted this way is to say that they are non-conventional.

This argument fails on two counts. First, Tarlton’s problematic reading of the passage quoted in fn. 60 leads him to think that it is really up to the conqueror to decide when a covenant has been made. This contradicts Hobbes’s suggestion that it is quite easy to say “No” to one’s conqueror. A conqueror cannot take a bellowing, “I DO NOT SUBMIT” as sufficient sign of submission. Second, mere hesitation cannot be taken as a sign of submission, except at the conqueror’s own risk. Temporarily lowering one’s sword in order to assess the field of battle, on Tarlton’s view, would amount to submission. Submission is tantamount to covenant, which creates both dominion and obligation. But such dominion would be short-lived, for the ‘conquered’ party soon raises her sword and re-enters the state of war. The ‘conquered’ party, no longer under the protection of her conqueror, is released from her obligation to obey (which she had never acknowledged). Consent is not quite as ‘automatic’ as Tarlton suggests.

Whether one argues via history, as do Skinner and Hoesktra, or via the structural features of conquest, one cannot escape the fact that both death and bound slavery are possible options for the vanquished. Vanquished parties may either continue fighting, facing certain death, or they may, without any ambiguity, proclaim, “I DO NOT SUMBIT.” Both are possible options,

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*Further recall that “a sign is not a signe to him that giveth it, but to him it is made; that is, to the spectator” (*L* 249, quoted in Tarlton, 244). Tarlton may have misread this passage. First, it appears in a paragraph in chapter 31 about worship and honor. Second, another possible reading is that Hobbes is just saying something trivial. Of course a sign is not a sign to the giver of the sign—signs, by definition, are directed outward.*
consistent with Hobbes’s view of liberty. Furthermore, consenting to a conqueror is not p-
necessary (and is thus not foreordained), so the dominion relationship between conqueror and
conquered is straightforwardly conventional.\textsuperscript{61} It follows that if despotical dominion were the
only type of commonwealth by acquisition, Hobbes’s congruence claim would hold. However,
commonwealth by acquisition also includes paternal dominion, upon which the congruence
claim founders.

\begin{quote}
(b) Paternal Dominion

This section will (a) demonstrate the disanalogies between paternal and despotical dominion, and in so doing (b) show that while despotical dominion is plausibly conventional/artificial, paternal dominion is non-conventional and therefore non-contractual. This will show that not all Hobbesian political relationships are contractual, and that the congruence claim should be rejected.

Hobbes discusses paternal dominion in Chapter 20 of \textit{Leviathan}: “The right of Dominion by Generation, is that, which the Parent hath over his Children; and is called \textit{Paternall}. And is not so derived from the Generation, as if therefore the Parent had Dominion over his Child because he begat him; but from the Childs Consent, either expresse, or by other sufficient arguments declared” (139). Three comparisons can be made at the outset. First, Hobbes thinks both the parent/child and master/servant relationships are based on agreement—in the case of parent/child it is consent, and for the master/servant it is covenant. Second, dominion is not derived from the situational facts, so to speak. Hobbes is clear that dominion is not derived from either “the Generation” or “the Victory.” Third, covenant for a servant “is either in expresse words, or by other sufficient \textit{signes} of the Will,” but consent for a child is “either expresse, or by

\textsuperscript{61} This is \textit{not} to say that such a relationship is \textit{contractual}. Further argumentation would be needed for this claim.
other sufficient arguments declared” (emphasis added). The distinction between signs and arguments will turn out to be non-trivial.

Before discussing the relevance of this distinction, it is worthwhile to step back and consider the peculiarity of what Hobbes is doing here. First, recall that for Hobbes the dominion relationship between a parent (or protector) and child constitutes a family (L 142). Second, as Richard Allen Chapman has pointed out, Hobbes saw the family “strictly in rational terms, as an artificial institution rather than a natural one” and thus as “a diminutive state, as Leviathan writ small.”\(^{62}\) Surely then, on Hobbes’s view, the family is conventional.\(^{63}\) This much is counterintuitive, for the family ‘feels’ like a natural (non-conventional) entity. More confusing still, these conventional families exist in the pre-conventional state of nature. In De Cive, Hobbes suggests that we must look at men in the state of nature “as if they had just emerged from the earth like mushrooms and grown up without any obligation to each other” (102). Yet, it is the fathers of families who institute a commonwealth, and so “the state-of-nature no longer appears to have been altogether individualistic; rather it was composed of familial social units that faced each other as autonomous entities.”\(^{64}\) Together these observations seem to imply that some conventional entities (families) exist in the pre-conventional state of nature. This apparent contradiction leads one to reconsider the common assumption that Hobbes is a “completely consistent conventionalist” and to press on his abstract individualism.

The specific status of the parent/child relationship is most lucidly explored by Philip Abbott. He presses on the fact that Hobbes bases paternal dominion on consent, yet thinks


children are incapable of covenant: “Over natural fooles, children, or mad-men there is no Law, no more than over brute beasts; … because they had never power to make any covenant, … and consequently never took upon them to authorize any Soveraign, as they must do that make to themselves a Common-wealth” (L 187). If consent must wait until a child gains the capacity to covenant, the “period before adulthood must then be understood as domination sans contract and would make the parent-child relationship unique in Hobbes’s system.”

This, I think, is the correct conclusion to make about paternal dominion, but more can be said. One can ask, quite directly, whether paternal dominion is conventional/artificial. Or one can approach the question by asking whether a child’s giving consent to her parent is p-necessary, which is just to ask if it is possible for a child to not consent. Abbott has given a trivial (but correct) answer to this question—of course it is impossible to not consent because children lack the power and capacity to give or withhold consent. But even if one sets this fact to one side, it is still true that it’s not possible for a child to not consent. To see this, consider the only two options other than consenting. Recall, from the despotical dominion case, that the vanquished could a) submit (consent/covenant), b) declare unambiguously “I DO NOT SUBMIT,” or c) kill herself/allow herself to be killed. Can a child do b or c so as to avoid a? At a certain age, children gain the capacity to kill themselves, but there is some age, for all children, when this is certainly impossible. If children below a certain age cannot kill themselves, their only other option (besides consenting) is to clearly and vigorously, through a sufficient sign, not consent. This, too, is impossible, for two reasons. First, just as children below a certain age cannot kill themselves, some children (e.g. infants) are incapable of giving a sufficient sign of their not consenting. Second, in the case of children, Hobbes does not actually require a sign to indicate

66 Ibid., 245.
consent—he says that a child’s consent can be ascertained “by other sufficient arguments declared.” Such arguments can be made via gratitude. Parents, by providing protection, are owed gratitude—and consent can be given as payment for such a debt. But it should be noted that recourse to gratitude as an argument for consent makes consent both required and imposed from the outside. The child is not making the argument, her parent is.

Thus, for children it is impossible to not consent to the rule of their parents. This is because “children are dependent as soon as they are born” (and so owe their consent) and thus “dominion follows from protection in the state of nature.” Since dominion follows from protection, and protection is given to those children not left on the slopes of Cithaeron, ‘consent’ is necessary. But the fact that ‘consent’ is necessary shows that for Hobbes, paternal dominion is not artificial/conventional.

In *The Elements of Law*, Hobbes writes, “[o]f necessaries therefore there is no deliberation” and in *De Cive*, he says, “[a]greements are made only about actions which are susceptible to deliberation; for an agreement requires the will of its maker, and will is the final act of deliberation” (38). Putting these passages together, necessary agreements are not agreements, or they are simply impossible. In Hobbes’s terminology, necessary consent, necessary covenant, or necessary agreement are examples of inconstant signification: “when men make a name of two Names, whose significations are contradictory and inconsistent” (*L* 30).

If all of this is true, then there is a fundamental disanalogy between paternal and despotic dominion. Despotical dominion is artificial in the sense that the vanquished can not consent. So by consenting they make something that would not have otherwise been made. Paternal dominion, on the other hand, is not artificial because there is no way for children to

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67 Ibid., 245-249.
withhold their consent. The dominion relationship obtains directly from a state of affairs, and so is not made in any coherent sense. Children enter into the dominion relationship by being born. That is, paternal dominion is so derived from the generation—the parent has dominion over his child because he begat him.

IV. Interlude

Two objections to my analysis of the non-conventional nature of paternal dominion might present themselves here. Nonetheless, neither of these objections succeeds in undermining my analysis, nor do they threaten the overall claim about Hobbes’s contractarianism that this analysis of paternal dominion supports. My contention has been that because a child’s consent to the dominion of her parent is p-necessary, the parent-child relationship is non-conventional.

The first objection is that the parent-child relationship is conventional because the parent may choose whether or not to expose the child. By providing protection, the parent creates a relationship that otherwise would not have existed. For this reason, so the objection goes, the parent-child relationship is conventional and so could be contractual. The response, I believe, must be that exposing a child is an artificial ending of a political relationship. Even on the trip to the slopes of Cithaeron, protection is being provided, and the child has given her ‘consent.’

A more general, though ultimately unsuccessful, objection to my claim regarding the non-conventional nature of paternal dominion is that what I have shown is merely trivially true. Of course, so the objection goes, if one plays with the temporality of paternal dominion, one can show that at some time, dominion over a child cannot be based on even a weak notion of consent. But, the objection continues, the necessity of a child’s consent, though making ‘consent’

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70 Undoubtedly, this objection can be raised in even more sophisticated and fantastical forms. The point to recognize, though, is that there is no way for the child to avoid consenting. And this is what Hobbes requires, for there is no “Obligation on any man, which ariseth not from some Act of his own” (L 150, emphasis added).
meaningless in this case, only chips away at the periphery of Hobbes’s theory. This objection cannot stand for the simple reason that Hobbes does not allow paternal dominion to occupy the periphery of his theoretical apparatus. Hobbes thinks paternal and despotical dominion are analogous, and that commonwealth by acquisition is congruent to commonwealth by institution. So my argument shows the falsehood of both the congruence claim and the claim that paternal dominion is based on consent. Even so, the triviality of the temporal move shows just how absurd it is for anyone (perhaps including Hobbes) to think that dominion over a child is based on consent.\textsuperscript{71} Sure, it is conceivable that consent is possible above a certain age, but to think infants consent is just to think consent follows necessarily from protection, which simply removes anything consent-like from the concept of consent.

The remainder of this essay will reconsider the main conclusions (as drawn from the structural and conceptual features of \textit{Leviathan}) from a textual standpoint, drawing on all three of Hobbes’s major political texts, \textit{The Elements of Law}, \textit{De Cive}, and \textit{Leviathan}.\textsuperscript{72} An analysis of the relationship of these texts, as a window into the development of Hobbes’s thinking, will provide further support for the claims made in section III: that paternal and despotical dominion are disanalogous, that paternal dominion is not based on consent, and that the congruence claim should be questioned.

\textit{V. Textual Explorations}

Kinch Hoekstra’s thesis in “The De Facto Turn in Hobbes's Political Philosophy,” is that there wasn’t actually a \textit{de facto} turn in Hobbes’s political philosophy. The \textit{de facto} elements of Hobbes’s theory were there all along—they can be spotted just as easily in \textit{The Elements of Law},

\textsuperscript{71} Either rightful dominion must be based on something else, or the relationship between parent and child can be seen for what is most likely is—a relationship of domination, not dominion.

in *De Cive*, and in the main text of *Leviathan*. In this section I want to go one step further and argue that not only is there not a *de facto* turn in Hobbes’s political philosophy, there is actually something of a ‘turn to consent’.\(^{73}\) Hobbes ‘consentifies’ *Leviathan* by *a*) asserting the analogy between despotical and paternal dominion, and *b*) by removing earlier references to ‘natural’ commonwealth and emphasizing the artificiality of commonwealth, thereby making way for the strong congruence claim. But I also want to argue that the attempt to consentify *Leviathan* ultimately fails, for the reasons outlined in section III. This may show that Hobbes’s consentification is rhetorical rather than conceptual/structural. The most striking, and so most tenuous, conclusion to be drawn from this idea is that perhaps Hobbes got it right in *De Cive*, and that the theory couldn’t bear the cosmetic additions found in *Leviathan*.

(a) *The Despotical/Parental Dominion Analogy*

There are two arresting pieces of textual evidence in Hobbes’s work that lead one to doubt the despotical/parental dominion analogy. First, unlike in *Leviathan*, in both *The Elements of Law* and *De Cive*, despotical dominion and paternal dominion are treated in separate chapters. In the *Elements*, despotical dominion is discussed in chapter 12 “Of the Power of Masters,” and paternal dominion is discussed in chapter 13 “Of the Power of Fathers, and of Patrimonial Kingdom. In *De Cive*, despotical dominion is discussed in chapter 8, “De Iure Dominorum in seruos,” and paternal dominion is discussed in chapter 9, “De Iure parentum in liberos, & de Regno Patrimoniali.” Only in *Leviathan* are they discussed together, in the infamous chapter 20, “Of *Dominion PATERNAL, and DESPOTICALL*.” In addition to the organizational disjuncture between *The Elements/De Cive* and *Leviathan*, there is a minor (but interesting) terminological

\(^{73}\) Leo Strauss argues that the “genesis of Hobbes’s political philosophy” involves “the movement away from the recognition of natural obligation as the basis of morality, law, and the State to the deduction of morality, law, and the State from a natural claim (and thus to the denial of every natural obligation).” See *The Political Philosophy of Hobbes, Its Basis and Its Genesis*, (Chicago: University of Chicago Press, 1952), 129.
disjuncture between *The Elements* and *De Cive/Leviathan*. Hobbes uses “power” in the chapter titles of *The Elements*, but “right” (*jure/dominion*) in *De Cive* and *Leviathan*.

Second, Hobbes does not actually base paternal dominion on consent in either *The Elements of Law* or *De Cive*. Thus, paternal and despotical dominion are (indirectly) admitted to be disanalogous in both *The Elements* and *De Cive*. Consider the following comparisons (using boldface for analogous features, underlining for disanalogous features—italics are Hobbes’s):

### The Elements of Law

<table>
<thead>
<tr>
<th>Despotical Dominion</th>
<th>Paternal Dominion</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Concerning the second title (which is when a man submitteth to an assailant for fear of death), thereby accrueth a right of dominion. For where every man (as it happeneth in this case) hath right to all things, there needs no more for the making of said right effectual, but a covenant from him that is overcome, not to resist him that overcometh. And thus cometh the victor to have a right of absolute dominion over the conquered.” (126-127)</td>
<td></td>
</tr>
</tbody>
</table>

### De Cive

<table>
<thead>
<tr>
<th>Despotical Dominion</th>
<th>Paternal Dominion</th>
</tr>
</thead>
<tbody>
<tr>
<td>“The second way is if, on being captured or defeated in war or losing hope in one’s own strength, one makes (to avoid death) a promise to the victor or the stronger party, to serve him, i.e. to do all that he shall command. In this contract the good which the defeated or weaker party received is the sparing of his life, which could have been taken from him, in men’s natural state, by right of war; and the good which he promises is service and obedience. (103).</td>
<td></td>
</tr>
</tbody>
</table>

### Leviathan

<table>
<thead>
<tr>
<th>Despotical Dominion</th>
<th>Paternal Dominion</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Dominion acquired by Conquest, or Victory in war, is that which some Writers call DESPOTICAL, from [Greek], which signifieth a Lord, or Master; and is the Dominion of the Master over his Servant. And this Dominion is then acquired to the Victor when the Vanquished, to avoid the present stroke of death, coventeth either in express words, or by other</td>
<td></td>
</tr>
</tbody>
</table>

“The right of Dominion by Generation, is that, which the Parent hath over his Children; and is called PATERNALL. And is not so derived from the Generation, as if therefore the Parent had Dominion over his Child because he begat him; but from the Childs Consent, either express, or by other sufficient arguments declared” (139).

sufficient signs of the Will, that so long as his life, and the liberty of his body is allowed him, the Victor shall have the use thereof, at his pleasure” (141).

“Again, seeing the Infant is first in the power of the Mother, so as she may either nourish, or expose it; if she nourish it, it oweth its life to the Mother; and is therefore obliged to obey her, rather than any other; and by consequence the Dominion over it is hers” (140).

The disanalogies are most striking in *The Elements*—there, Hobbes baldly states that despotical dominion is based on a covenant and paternal dominion is based on preservation. *De Cive* is somewhere in between *The Elements* and *Leviathan*. There, despotical dominion is based on a promise and paternal dominion is based on power/possession, but both involve the power of the stronger over the weaker (specifically *potestas vitae necisque*). Finally in *Leviathan*, despotical dominion is based on covenant and paternal dominion is based on consent—the analogizing process is complete. However, the conclusions from section III suggest that the attempt to analogize is forced, and perhaps the ‘true’ relationship between despotical and paternal dominion is best characterized in *The Elements or De Cive*.

*(b) Natural and Artificial Commonwealth*

The ‘consentification’ of *Leviathan*, in addition to the analogizing of despotical and paternal dominion, involves a shift from the possibility of natural commonwealth to the consistent artificiality of commonwealth. This shift is supported by three observations. First, in all three of Hobbes’s main political texts, Hobbes suggests that dominion relationships are artificial, but there is a difference in emphasis between the early and late work.

*The Elements of Law*

“natural concord, such as is amongst those creatures, is the work of God by the way of nature; but concord amongst men is artificial, and by way of covenant” (106).

Men do it “by arbitrary institution” (106).

*De Cive*

“the accord of those brute creatures is natural; but accord between men is based on agreement, i.e. is artificial” (72).

*Leviathan*

“It is true, that certain living creatures, as Bees, and Ants, live sociably one with another (which are therefore by Aristotle numbered amongst Politicall creatures;) and yet have…” (119).

“Lastly, the agreement of these creatures is Naturall; that of men, is by Covenant only, which is Artificiall” (120).
“Artifice,” “artificial,” “artificiall” or “artificer” appear only once in The Elements, but seventeen times in Leviathan, including nine times in the two page introduction.

Second, in addition to emphasizing the artificiality of dominion in Leviathan, Hobbes downplays the naturalness of commonwealth by acquisition (boldface added):

The Elements of Law

“And when many men subject themselves the former way, there ariseth thence, a body politic, as it were naturally; from whence proceedeth dominion, paternal, and despotic and when they subject themselves the other way, by mutual agreement amongst many, the body politic they make, is for the most part called a commonwealth in distinction from the former…” (108).

“...and whereas it hath been said in the last chapter, and last section of the former part, that there be two ways of erecting a body politic; one by arbitrary institution of many men assembled together, which is like a creation out of nothing by human wit; the other by compulsion, which is as it were a generation thereof out of natural force” (109).

HAVING set forth, in the two preceding chapters, the nature of a commonwealth institutive, by the consent of many men together; I now come to speak of dominion, or a body politic by acquisition, which is commonly called a patrimonial kingdom” (126).

De Cive

“But those who subject themselves to another through fear either submit to the person they fear or submit to some other whom they trust for protection. Men defeated in war do the first to avoid being killed; the latter is the way the undefeated avoid defeat. The first mode has its beginning in natural power, and may be said to be the natural origin of the commonwealth; the latter originates in the determination and decision [a consilio & constitutione] of the uniting parties, and that is the origin by design [origo ex instituto]. Hence there are two kinds of commonwealths: one kind is natural, like the Paternal and Despotic; the other is the kind of commonwealth which is by design [institutivum], and which may also be called political (74).

In that last two chapters we have been speaking of the commonwealth by design [civitas institutiva], the commonwealth which is initiated by an accord between a number of men, binding themselves to each other by agreements and by pledging their faith to each other. The next topic to discuss is the natural commonwealth [Cititas naturalis], which may also be called the commonwealth by Acquisition [Acquista] which it is acquired by natural power and strength” (102).

Leviathan

“The attaining to this Soveraigne Power, is by two ways. One by Naturall force; as when a man maketh his children, to submit themselves, and their children to his government, as being able to destroy them if they refuse; or by Warre subdueth his enemies to his will, giving them their lives on that condition. The other, is when men agree amongst themselves, to submit to some Man, or Assembly of men, voluntarily, on confidence to be protected by him against all others. This later, may be called a Politicall Common-wealth, or Common-wealth by Institution; and the former, a commonwealth by Acquisition” (121)

One can easily see that Hobbes has completely dropped any reference to “natural commonwealth” by the time he writes Leviathan. In The Elements, he thinks a body politic can arise ‘naturally,’ in De Cive, he thinks there is a natural commonwealth, but in Leviathan, sovereign power can be attained via natural force. The distinction between a state arising naturally, a natural state, and the acquisition of sovereign power via natural force is subtle but
important given the implications of the distinction between conventional/artificial and non-conventional states. A state arising naturally (in Hobbes’s sense of the word) should not be seen as an artificial/conventional state. Hobbes even contrasts the naturally arising body politic with the instituted body politic, which “is like a creation out of nothing by human wit” (EL 109). In De Cive, Hobbes contrasts the natural commonwealth with the commonwealth that “originates in [...] determination and decision” (74). But in Leviathan, Hobbes does not imply that one type of state is made whereas the other arises naturally— all commonwealths are artificial.

Third, in The Elements of Law and De Cive, Hobbes suggests that irresistible might in the state of nature is right, but in Leviathan, Hobbes intimates that only God could possibly have irresistible might. This rules out the possibility of (mortal) dominion based on mere might in Leviathan, and implies that dominion can only be based on agreement/consent. Consider the following passages:

**The Elements of Law**

“He therefore that hath already subdued his adversary, or gotten into his power any other that either by infancy, or weakness, is unable to resist him, by right of nature may take the best caution, that such infant, or such feeble and subdued person can give him, of being ruled and governed by him for time to come. For seeing we intend always our own safety and preservation, we manifestly contradict that our intention, if we willingly dismiss such a one, and suffer him at once to gather strength and be our enemy. Out of which may be collected, that irresistible might in the state of nature is right” (80-81).

**De Cive**

“The victor may rightly compel the vanquished (as a strong and healthy person may compel the sick or an adult an infant) to give a guarantee of future obedience, unless he prefer to die” (30)

“in the natural state of men, sure and irresistible power gives the right of ruling and commanding those who cannot resist; so that the right to do anything whatsoever is an essential and direct attribute of omnipotence” (31).

**Leviathan**

“Seeing all men by Nature had Right to All things, they had Right every one to reign over all the rest. But because this Right could not be obtained by force, it concerned the safety of every one, laying by that Right, to set up men (with Soveraign Authority) by common consent, to rule and defend them: whereas if there has been any man of Power Irresistible; there had been no reason, why he should not by that Power have ruled, and defended both himselfe, and them, according to his own discretion. To those therefore whose Power is irresistible, the dominion of all men adhaereth naturally by their excellence of Power” (247).

In both the Elements and the De Cive passages, irresistible power is a common feature of everyday life. The relationship between adult and infant, for example, involves an exercise of irresistible power. But in Leviathan, Hobbes is much more tentative: “if there has been any man
of Power Irresistible” (L 247, emphasis added). Hobbes of course thinks God has irresistible power, so his dominion over men is derived directly from might. It is much more doubtful, at least in Leviathan, that Hobbes believes the might of men can produce rightful dominion.75

This section has shown, by way of comparison between all three major political works, that Hobbes added an element of consent to Leviathan that was missing in The Elements of Law and De Cive. Nevertheless, Hobbes’s changes were more substantial than the mere addition of the phrase “from the Childs Consent” to chapter 20. Instead, Hobbes attempted to subtly transform the entire basis of his theory of dominion. Hobbes’s theory in The Elements and De Cive is essentially dualistic—dominion can be based either on “human wit” (conventional) or preservation (non-conventional). In Leviathan, Hobbes makes his attempt at monism, so that all political relationships are based in human action (conventional).

That Hobbes changed his theory in this way has (at least) two implications. First, at some point, Hobbes thought a plausible dualistic theory of dominion existed. He wrote it into the pages The Elements of Law and De Cive. Second, Hobbes had to have had some reason for composing Leviathan and adopting the monistic view. Perhaps he began to doubt the plausibility of the dualistic theory. Nevertheless, I have suggested in the ‘conceptual’ section of this paper that Hobbes’s monistic view does not survive theoretical scrutiny—it collapses into a dualistic view. Leaving aside the question of whether the dualistic theory itself might collapse upon close analysis, the question remains why Hobbes abandoned the more plausible theory.

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75 For a classic treatment of might and right in Hobbes’s political philosophy, see Howard Warrender, The Political Philosophy of Hobbes: His Theory of Obligation, (Oxford: Clarendon Press, 1957), 312-329. Warrender must be thinking of Leviathan, and not The Elements or De Cive, when he says, “[i]n the context of the power of men, therefore, there is always a difference, in Hobbes’s doctrine, between power and authority or between might and right” (322).
I will consider here two possible explanations. First, Hobbes’s desire to pursue civil science as if it were mathematics or natural science and to attempt to establish demonstrable proofs about politics may have produced a desire for consistency that influenced the theory directly.76 Adding consent does make the theory more consistent at face. Second, as Quentin Skinner so often reminds us, context matters. Hobbes wrote Leviathan in the midst of the engagement controversy, when the question of the day was whether to “engage” with the Cromwell government or remain loyal to Charles II.77 Given that “engaging” was a form of consent, Hobbes might have wanted to avoid the appearance that there was a way to get rightful dominion without consent. Hobbes might have worried that his account of paternal dominion in The Elements of Law and De Cive was inadequate for his rhetorical purposes.78

V. Final Remarks

This paper has been about Hobbes’s contractarianism, however indirectly. My main aim has been to show that, at least in Leviathan, there is an illusion of a contract between parents and their children. On its own, this would be a rather unsurprising and trivial claim. That a parent and child do not enter into a contract when the child is born is rather obvious. Even as metaphor, its usefulness is questionable. And it would be trivial if it weren’t for the fact that Hobbes believes

76 Schochet suggests that with his theory of paternal dominion, Hobbes “added greater consistency to his doctrine and was not confronted with the need to explain how men who were subjected to their fathers by nature could ever be sufficiently free to a compact of government.” See “Hobbes on the Family and the State of Nature,” 444. John Dewey considers the possibility that the “final importance of Hobbes's political philosophy is found in its attempt to make the subject secular and scientific.” See “The Motivation of Hobbes’s Political Philosophy” in Studies in the History of Ideas, ed. The Department of Philosophy of Columbia University (New York: Columbia University Press, 1918), 107. Furthermore, Dewey argues, Hobbes makes use of "a deductive method" based on "fundamental axioms" (108). George H. Sabine has argued that Hobbes’s system was pyramidal. See A History of Political Theory, rev. ed. (New York: Henry Holt and Company, 1949), 458. Sabine adds that for Hobbes, science was “a rational construction of the complex by means of the simple, as exemplified by geometry.” Together these comments hint at a possible reason for Hobbes’s preferring a monistic to a dualistic theory. Perhaps Hobbes simply strived for a ‘simpler’ theory of dominion.


that paternal and despotical dominion are analogous, and that commonwealth by acquisition is equivalent, in all relevant respects, to commonwealth by institution. The non-contractual nature of paternal dominion ‘corrupts’ the rest of Hobbes’s theory because his theory contains a chain of equivalence claims, connecting each type of dominion to all the others.

To recapitulate, paternal dominion was shown to be non-contractual because it can be shown to be non-conventional. The idea that all contracts are conventional was taken as a premise. Paternal dominion is non-conventional because it is a relationship that obtains necessarily. I think Hobbes would agree that we cannot will things into being that come to be necessarily. Thus, ‘necessary consent’ is something of a contradiction of terms. ‘Consent’ for a child is necessary because it is not possible for her to not consent. Co-opting Carole Pateman’s phrase, paternal dominion is “regarded as if it were a natural feature of the world that [children] can do no other than accept as they [are born].”

At best, Hobbes is an inconsistent contractarian. He regards some political relationships as natural features of the world, obtaining without human consent. Perhaps his theory would have been stronger if the complicated relationship between parent and child were considered to be apolitical. However, keeping the family out of politics has the unintended consequence of removing the possibility of rightful dominion within the family. One can see why this would have made Hobbes squeamish, as it would imply that the commands of fathers have no special authority, and that children do no wrong when they disobey them. All said, it might turn out that the dualistic version of the theory, as presented in The Elements of Law and De Cive, with two sources of rightful dominion, is the strongest.

Adapted from The Problem of Political Obligation, 6. Pateman (and Hobbes) use ‘natural’ as the converse of artificial.
At the most general level, this paper contends that Hobbes’s contractarianism must be considered carefully. The congruence claim disallows sweeping claims about the supremacy of either commonwealth by acquisition or commonwealth by institution. Furthermore, to even regard Hobbes as a contractarian thinker, one must consider the passages in which Hobbes appears to equate the “three titles” very carefully. Perhaps one must temporarily set them to one side as flourishes of Hobbes the rhetorician and not the calculations of Hobbes the geometer.

In closing, I want to return to a question posed in the introduction. I asked whether Hobbes’s willingness to assert the congruence claim says anything deep about the nature of his contractarianism. We can now add the question as to whether Hobbes’s abandoning a modest but plausible dualistic theory in favor of a ‘consentified’ but implausible monistic theory can tell us anything about his theory of the contract. The answers to these questions, though tentative, point to the possibility that contract was of secondary importance in Hobbes’s political theory. The irony is that Hobbes’s attempt (in Leviathan) to make his contract theory thoroughgoing actually exposes the superficiality of that theory. Contract is there so as to secure protection, but it is not an independently valuable desideratum. In the end, Hobbes the contract theorist doesn’t really care much about contract.


