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Hobbes on treason and fundamental law

Laurens van Apeldoorn

Faculty of Law, Open University, Heerlen, The Netherlands

ABSTRACT

This article considers Hobbes' contribution to the development of constitutionalist thought by contextualizing his treatment of the concepts of treason and fundamental law in *De cive* (1642, 2nd ed. 1647) and *Leviathan* (1651). While in *Leviathan* he adopts the controversial conception of treason as a violation of fundamental law that had been employed to convict Charles I of high treason in 1649, he draws on the original meaning of the term "fundamental law", as outlined in the most influential early analysis of Innocent Gentillet, to deny that fundamental laws can constrain the rights and powers of the sovereign. He bolsters this position by treating fundamental law as natural, not civil, law. While citizens commit treason when they violate the original covenant that establishes the sovereign, citizens cannot appeal to a human court for violations of fundamental law by the sovereign (who must render account for violations of natural law only to God). Hobbes' ingenious reconceptualization of fundamental law, hence, shows that, when understood correctly, the theory of treason embraced by parliamentarians could never support the violent resistance against, and overthrow of, a monarch like Charles I.

KEYWORDS

Thomas Hobbes; treason; fundamental law; Statute of Treasons; constitutionalism; innocent gentillet[1]

As Hobbes composed the manuscript of *Leviathan* (1651), England had just witnessed the extraordinary trial and execution of Charles I.[2] After capturing the king, Parliament had passed an act erecting a High Court of Justice, alleging that the king was guilty of "high and treasonable offences" for having attempted to "subvert the antient and fundamental laws" of the kingdom and "introduce an arbitrary and tyrannical government".[3] When the court subsequently found Charles guilty of high treason, this was not only an event of momentous political importance, it also expressed a radically new interpretation of the nature of treason that drew on nearly half a century of conceptual development. In *Behemoth* (*c.* 1668, publ. 1679), his history of the English civil war, Hobbes is highly critical of this development, maintaining that, "in the vse of their words when they accused any man", Parliament had "neuer regarded the signification of them, but the weight they had to aggrauate their accusation to the ignorant multitude".[4] Yet, in *Leviathan*, Hobbes closely follows the conception of high treason employed in Charles' trial – defining treason as a "designe, or act, contrary to a Fundamental Law"[5] – and

CONTACT Laurens van Apeldoorn Laurens.vanApeldoorn@ou.nl

supplanting the definition as a breach of faith that he had first introduced in *De cive* (1642, 2nd ed. 1647).

This raises the question of Hobbes' engagement with the then-prevailing conceptualizations of treason and fundamental law.[6] This article contextualizes Hobbes' treatment of these concepts with a twofold aim in mind: first, to outline and assess the philosophical significance of Hobbes' changing views of the nature of treason from *De cive* to *Leviathan* and, second, to determine what his adoption of the concept of fundamental law can tell us about his contribution to this important moment in the development of constitutionalist thought. After describing the change in the definition of treason from a traditional feudal conception, indebted to the Statute of Treasons, to a conception of treason revealing Roman influences (Sections 1 and 2), I investigate the intellectual backdrop of this transformation. I provide a novel account of the reception of the concept of "fundamental law" in England by identifying the (hitherto neglected) publications that first introduced the concept to an English audience and which decisively show the French origin of the term. In his *Anti-Machiavel* (1576), the French Huguenot author Innocent Gentillet provided the most detailed early analysis of fundamental laws as those laws without which the state cannot subsist, and draws on a Roman law conception of treason, as contained in the *Lex Julia de maiestate*, to condemn any violation of a fundamental law as treasonous (Section 3). I then show how the term took on a new meaning in England, where (parts of) the common law were classified as fundamental, especially those laws that protect the property of English citizens. Charles I could be convicted of high treason because the Managers of the trial combined these two conceptions of fundamental law, arguing that the arbitrary expropriation of citizens' property – of which they accused the king when he had raised taxes without Parliament's consent – threatened the destruction of the state (Section 4). Against this backdrop, I place Hobbes' adoption of the conceptual framework employed in Charles' trial. I argue that Hobbes draws on Gentillet's original conception of fundamental law to argue that fundamental laws constitute, rather than limit, the right and power of the sovereign. His innovation, which renders his account of treason in *Leviathan* consistent with that of *De cive*, is that he treats fundamental law as natural, not civil, law. Fundamental law, as he puts it in *Behemoth*, is "that Law of Nature that binds vs all to obey him, whosoeuer he be, whom lawfully and for our own safety we haue promised to obey".[7] Accordingly, Hobbes accepts the existence of constitutional law, but denies that it is positive law. On this basis, he can hold that violations of fundamental law by citizens are treasonous because they constitute a breach of the original covenant and the fidelity due to the sovereign (Section 5). Yet, fundamental law cannot constrain the sovereign, who must render account for violations of natural law only to God, thereby making acts of treason by the sovereign an impossibility (Section 6).

1. Treason from *De cive* to *Leviathan*

In *De cive*, which contains his first treatment of (high)[8] treason, Hobbes presents a largely traditional conception that owes much to the Statute of Treasons (25 Edw. III stat. 5, cap. 2) and the feudal origins of the law contained in it. The Statute of Treasons lists a large number of offences but has at its core the act of "compassing or imagining" the death of the king. This reveals treason as essentially a breach of trust by a vassal

against his lord and ultimately dependent on the personal bond between them.[9] The feudal source of the conception is also reflected in some of the ancillary offenses, such as adultery with the king's wife and the violation of his daughter, which were among "the vilest breaches of the vassal's troth".[10] Certainly, the English law on treason contained civilian influences. Glanville, the medieval jurist and author of *Tractatus de legibus et consuetudinibus regni Angliae* (*c.* 1187), for instance, already spoke of treason as the crime "quod in legibus dicitur lese maiestatis", the Roman term for treason.[11] Yet, under the statute, the crime is not primarily an offence against the state or the people, but against the king, his rights and interests, and a violation of allegiance each citizen owes to him.

That this allegiance is due by natural law and owed the king's natural person, was confirmed in *Calvin's Case* (1608). The case concerned the question of whether individuals born in Scotland after the accession of the Scottish king James VI to the throne of England were eligible for the privileges of English citizenship. It was decided in the affirmative, based in part on the argument that these individuals owed a natural allegiance to the king that made them eligible for citizenship in all kingdoms he ruled by positive law. As Sir Edward Coke notes in his seventh *Report* (1608), every citizen, "as soon as he is born he oweth by birth right ligeance and obedience to his Sovereign".[12] That this allegiance is owed to the natural person of the king, contends Coke, appears from "the said Act of 25 Edw. 3", that speaks of a breach of "the Ligeance of the King",[13] as well as from the many documented indictments of treason, which identify a breach of faith "*contra dom' Regem supremum et naturalem dominum suum* [against the Lord King, his sovereign and natural lord]".[14] Indeed, indictments of treason that charge intending or compassing the destruction of the king *must* charge a breach of allegiance due to the king's natural person, as his "politique body", as he represents the state, "is immortal, and not subject to death".[15]

In *De cive*, Hobbes defines treason or the "CRIME OF LÈSE-MAJESTÉ" as "a deed or word by the citizen or subject by which he reveals that he no longer intends to obey the man or council to whom the sovereign power in the commonwealth has been committed".[16] In doing so, the traitor "renounces the general pact of obedience" and thereby "all the laws together".[17] One indication of Hobbes' familiarity with the Statute of Treasons is that he takes care to discuss those crimes mentioned in the statute that are not easily conceived as a renunciation of the original covenant, such as forging money or counterfeiting the seals of the commonwealth. (Tellingly, these entries in the statute appear to have been of Roman origin.)[18] He admits that they are not by themselves treasonous but can be made so by positive law: such an action, if it were "committed before the introduction of a civil law was not the crime of lèse-majesté, but would be if it were done after its introduction".[19] Another indication is his emphasis on the fact that treason is the breach of faith: the violation of the law "by which we are forbidden to break agreements and our pledged faith".[20] Hobbes may have been innovative in identifying the breach of the original covenant as essential to treason, so effectively embedding treason in his contractualist theory of political authority.[21] Yet, this feature confirms, rather than challenges, his debt to the treason statute. By conceiving of treason as a breach of the original covenant, he treats the offense as a breach of the personal bond between citizen and sovereign, a bond inherent in the citizens' obligation of "absolute and universal obedience" to the sovereign.[22]

Moreover, this bond is grounded in natural, not civil, law.[23] In presenting his argument for that conclusion, Hobbes closely follows Coke on *Calvin's Case*. Coke submits that allegiance cannot be due by virtue of positive law, as it would have been "vain to have prescribed Laws to any, but to such as owed Obedience, Faith, and Ligeance before, in respect whereof they were bound to obey and observe them".[24] Hobbes agrees:

> If a sovereign prince made a civil law in the form: *do not rebel!*, he would achieve nothing. For unless the citizens are previously obligated to obedience […] every law is invalid; and an obligation which binds one to do something which one is already obligated to do is superfluous.[25]

Treason is a violation of natural, not civil law, "since the obligation to civil obedience, by force of which all civil laws are valid, is prior to every civil law, and the crime of treason is by nature simply violation of that obligation".[26] Hence, in *De cive*, Hobbes closely follows the Statute of Treasons in conceiving of the crime of lèse-majesté as a breach of faith modeled on a feudal bond between a vassal and a lord.[27] Hobbes' innovation consists in locating that bond in the original contract that establishes the state. By rejecting the original covenant, traitors denounce the obligation, grounded in natural law, they owe to the natural person of the sovereign to obey the civil law.

By the time of the publication of *Leviathan*, Hobbes appears to have changed his mind about the nature of treason. He now defines treason as a "designe, or act, contrary to a Fundamental Law",[28] a fundamental law – a concept that is also new to *Leviathan*[29] – being "in every Common-wealth […] that, which being taken away, the Common-wealth faileth, and is utterly dissolved".[30] No longer does treason seem to be a breach of the personal bond between citizens and sovereign; rather, treasonous are those actions that threaten to undermine the state: they are "Facts of hostility against the present state of the Common-wealth", which include "all attempts upon the Representative of the Common-wealth, be it a Monarch, or an Assembly", including attempts to "diminish the Authority" of the sovereign.[31] This raises the question of what the context of this conceptual innovation is. What led Hobbes to introduce this new notion of treason? And what is the philosophical significance of the change? I start by answering the former question and return to the latter in the final section of the paper.

2. The treason trial of Charles I

It is no coincidence that, in the previous decade, several treason trials had been conducted in precisely the terms also used in *Leviathan*, culminating in the trial and beheading of Charles I in 1649. Among those tried were influential political advisors and supporters of the king, including Thomas Wentworth, First Earl of Strafford, William Laud, Archbishop of Canterbury, and John Lord Finch, Keeper of the Great Seal. They were all accused of high treason for having attempted to "subvert the fundamental laws" of the realm and to "introduce an arbitrary and tyrannical Government against law".[32] Taxation by prerogative, over which the king and Parliament had repeatedly clashed, loomed large in these accusations. The long list of articles for the impeachment of the Earl of Strafford primarily concerned his conduct in Ireland as Lord Deputy, but also included the charge that he had counselled the king in support of the legality of *Ship Money* and had asserted the king "might use his Prerogative as he pleased, to levy what he

needed".[33] Lord Finch, too, was accused of advising the king in support of *Ship Money*, having been, as Lord Chief Justice of the Common Pleas, primarily responsible for an opinion that had initially convinced the king of its legality.[34] The articles supporting Bishop Laud's impeachment contained allegations of striving to overextend the bounds of ecclesiastical jurisdiction and the king's prerogative, and of having "wickedly and traitorously advised his majesty, that he might, at his own will and pleasure, levy and take Money of his subjects without their consent in parliament".[35] By attempting to introduce arbitrary government, so violating the fundamental laws of the realm, these men had attempted the destruction of the kingdom and the people of England, because, as the parliamentarian John Pym put it in a speech during Strafford's trial, "Arbitrary, and Tyrannical Power […] is inconsistent with the Peace, the Wealth, the Prosperity of a Nation".[36]

Whether these accusations would be covered by the Statute of Treasons is uncertain, however. The statute, as noted, is limited to offences against the king, his rights, and interests, and does not (at least directly) include crimes against the people or the commonwealth. Parliament could not avoid tackling this obstacle head on when it pursued the trial of Charles himself. How could Charles be guilty of treasonous offences against his own person?[37] In a speech John Cook, the Solicitor General, had prepared to deliver if Charles – who did not recognize the jurisdiction of court – had pleaded to his charge, he answered that here another law of treason was at work. The Charge of High Treason stated that Charles had, "out of wicked design", attempted to "erect and uphold in himself an unlimited and tyrannical power to rule according to his will, and to overthrow the rights and liberties of the people", which, "by the fundamental constitutions of this kingdom were reserved".[38] Cook accepted that the fundamental law by which the king was condemned was unwritten, but that "this law need not be expressed" and was "naturally implied", as every kingdom "by intrinsical rules of government must preserve itself".[39]

These arguments were echoed in pamphlets published in the immediate aftermath of the trial. In response to authors such as William Prynne, who suggested that it rather had been the execution of the king that was treasonous and formed a violation of fundamental laws,[40] John Goodwin observed that they

> understand not, (at least, consider not) what the word, *fundamental*, imports. Certain it is, that no other Law [… can] be termed *fundamental*, but onely such, the observation whereof by the body of the Kingdom, is of absolute necessity to the wel-being of it.

The execution of Charles I had been lawful because it was "absolutely and essentially necessary to the preservation and well-being of the State".[41] In *The Parliament justified in their late proceedings against Charls Stuart* (1649), John Fido labeled the king a tyrant because he had acted "contrary to the end of the Government of that Fundamental Law, which is *Salus Populi*" and appealed to the same "Fundamental Law of Reason, to execute Justice upon a man degenerated into Tyranny".[42] The anonymous author of *The resolver, or. A short word, to the large question of the times* (1649) concurred, observing that the

> security of a *Kingdome* is to be prized, above the security of a *King*. And when it cannot be otherwise, beter one man dye, by the Sword of *Justice*, then many (yea a Kingdome) bleed by the Sword of *Tyranny*.[43]

Many commentators have noted the rise of this new "manufactured theory of treason"[44] – foreign to established legal doctrine – that treated the offence as a violation of unwritten fundamental laws meant to prevent alterations to the frame of the state and the introduction of arbitrary government.[45] They have not, however, attempted to explain its origins. As the next sections show, those origins not only provide a better understanding of the theory used in these trials, they also explain why Hobbes, no friend of regicides, felt confident that he could include this theory in *Leviathan* without impairing its absolutist conclusions.

3. The French origins of "fundamental law"

Scholars have long suspected that the term "fundamental law" finds its origin in France, where treatments of "lois fondamentales" started appearing in political tracts in the last decades of the sixteenth century.[46] They were, however, unable to trace this reception, because they identified Sir Francis Bacon's *Maxims of the Law* (1596) as containing the first recorded occurrence in England.[47] In fact, there are several earlier instances in England that conclusively establish the French source of the term. The very first occurrence, it appears, is contained in the translation of a declaration by Henry of Bourbon, published in London over a decade before Bacon composed his *Maxims of the Law*.[48] Subsequently, the term quickly gained ground as the result of widely reported attempts by the French King, Henry III, to appease the Catholic league during the last of the Wars of Religion. At issue was Henry III's succession. According to the ancient Salic law that excluded women from the throne and dictated succession by the closest relative in the male line, Henry of Bourbon – who was protestant – would succeed the present king. This was unacceptable to the Catholic League, which pressured Henry III, after he lost control of Paris in 1588, into signing the Edict of Union, which excluded non-Catholics from the French Crown. To stress his commitment to the Edict, Henry III shortly thereafter convened the combined Estates General at the French town of Blois where he joined them in swearing, in witness of the "correspondence et consentement universel de tous les estats", to observe, from then on, the Edict of Union as a "loi fondamentale".[49]

Details of these events were soon available to an English-speaking audience. In *The true history of the civill warres of France*, published in 1591, Antony Colynet provides a faithful translation of the proceedings at Blois, and recounts Henry III's wish, directed at the Estates, that the Edict of Union would "be holden for a fundamental law of this realm, to binde both you and your posteritie".[50] Another pamphlet, published the year after, reports that the French king had established "a foundamentall law of his kingdom, whereby no heretike, or fouourer of heresie might euer come to the Crowne".[51] Several other accounts were published in subsequent years, some of which appeared to be motivated specifically by a desire to warn the English of the threat of Catholic usurpation.[52]

The intellectual origins of Henry III's legal innovation – codifying the term "fundamental law"[53] – must be sought in sixteenth-century Huguenot political thought. The protestant theologian Theodorus Beza is likely the first to have employed the term "lois fondamentales".[54] In *Du Droit des magistrats sur leurs subiets* (1573), he complains of a violation of "the fundamental laws of the French kingdom established at the time of

its foundation", because the Estates General were no longer assembled at regular intervals to consent to matters of public interest.[55] The most detailed early analysis of the nature of fundamental law and its operation in the French legal order, however, can be found in *Discours, sur les moyens de bien gouverner et maintenir en bonne paix un Royaume* (commonly known as *Anti-Machiavel*), by the lawyer and politician Innocent Gentillet. Originally published in 1576 in France, the work became widely available in England when a translation appeared in 1602 and a reprint in 1608.[56] Fundamental laws, Gentillet explains, are those laws upon which the monarch's "estate is founded, and without which his said estate cannot subsist nor endure: for so might he abolish and ruinate himself".[57] Non-fundamental laws can be altered as circumstances dictate, but fundamental laws are unalterable and irrevocable because any action contrary to them would fatally damage the monarch's capacity to govern. In France, Gentillet observes, there are three such fundamental laws: the Salic law, the law constituting the Estates General, and the law prohibiting the alienation of the Crown domains. These are the "verie true pillars, bases, and foundations of the kingdome and the royaltie, which none can or ought to abolish".[58]

Gentillet's assessment of violations of these fundamental laws is clear and significant: violations constitute treason. They are attempts to "overthrow and ruinat the Realm, the Roialtie, and the King, in taking away the principall pillar which sustained them", and violators must be branded "enemies of the Commonwealth, which doe subvert & overthrow the foundations upon which our Ancestors have with great wisdom founded and established the estate of this goodly and excellent kingdome".[59] In support of this conception of treason, Gentillet cites the Roman *Lex Quisquis* and *Lex Julia de maiestate*.[60] These are conventional references, reflective of the fact that France lacked legislation comparable to the English treason statute. These Roman laws, therefore, in effect formed the basis of the French law of treason.[61] It is noteworthy, however, that in the *Lex Julia*, treason is conceived as an action committed primarily against the commonwealth, or, in the words of the Roman jurist Ulpian, an action "against the Roman people or against their safety". Certainly, it is also treasonous to kill a magistrate of the Roman people, but not because one thereby breaks one's allegiance to a superior, but rather because it is detrimental to the "interests of the state [*res publica*]".[62] Gentillet's view that offences against fundamental law constitute treason was familiar to Henry III. As reported by Colynet, he warned his subjects at Blois that "he dooth declare himselfe, to haue made the edict of reunion, for an irreuocable lawe of the realme, condemning already by this his declaration, all such as will not sweare nor obey the same, as guiltie of high treason".[63]

It is this Roman conception of treason that underpinned the treason trials of Charles I and his supporters. Although Gentillet himself does not draw attention to the implication, magistrates, too, can be guilty of treason when they violate fundamental laws and act to the detriment of the commonwealth. As the author of *Vindiciae contra tyrannos* (1579) observes, a tyrant who "commits *lèse majesté* against the kingdom" may be "punished under the *lex Julia* for acts against the public majesty".[64] What it does not explain is why Charles I could have been accused of treason for having attempted to "overthrow the rights and liberties of the people". This characterization of fundamental law as protecting the property of subjects was an English innovation.

4. Fundamental law protecting "the liberties of subjects"

While it was Gentillet's notion of fundamental law that first entered the discourse in England, it did not take long for the term to take on a new meaning, as James I was compelled to recognize in a speech to Parliament in 1607. The occasion of his speech was his attempt to unify the kingdoms of Scotland and England after ascending the thrones of both. To this end, a commission had been formed, consisting of parliamentarians of both countries, to investigate the possibility of introducing a uniformity of laws in both kingdoms. The act authorizing the English commissioners had carefully stipulated that it was not the king's wish

> to alter or innovate the fundamental and ancient laws, privileges, and good Customs of this Kingdom, whereby not only his legal Authority, but the People's Security of Lands, Livings, and Privileges, both in general and particular, are preserved and maintained.[65]

When the corresponding Scottish authorization, however, made the same stipulation – allowing no derogation of "any fundamentall Lawes, ancient Priviledges, Offices, Rights, Dignities, and Liberties of this Kingdome of Scotland"[66] – the English Parliament seems to have strongly objected. James, at any rate, found it necessary to clarify in his speech that the introduction of the qualification by the Scots had been a mistake, caused by "pressing to imitate, Word by Word, the English Instrument, wherein the same Words be contained". When speaking of "fundamental laws", the Scottish parliament had used the term in its traditional sense and intended "thereby only those Laws, whereby Confusion is avoided, and their Kings Descent maintained […] not meaning it, as you do, of their Common Law; for they have none, but that which is called *jus Regis*".[67]

On the novel conception expressed in the English act, fundamental law was identified with (parts of) common law and, in particular, written or unwritten laws protecting the property (the "Lands, Livings, and Privileges") of English citizens. Bacon may have been the first to express *this* conception when, in the Epistle Dedicatory of his *Maxims of the Law*, he praises king Edward I as the English Justinian who endowed "his state with sundry notable and fundamental laws, upon which the government ever since hath principally rested".[68] It is, however, likely that when James I associated fundamental law with the English common law, he had, in particular, had in mind the judgment of Coke, whom he had just promoted to Chief Justice of the Common Pleas. In the preface to the fourth part of his *Reports* (1604), the first part to be published after the accession of James, Coke sounds a caution for a king hoping to forge a union between two countries by harmonizing their legal systems. Coke notes that English law "consists of three parts, the common law, customs, and acts of Parliament" and warns that one ought not to meddle lightly with the first two, because, "for any fundamental point of the ancient common laws and customs of the realm, it is a maxim in policy, and a trial by experience, that the alteration of any of them, is most dangerous".[69] Coke has in mind such principles as the "fundamental rule of the common law, that all estates of inheritance were fee-simple". When this rule was altered (by the introduction of the statute *De donis conditionalibus*), and the possibility was introduced of restricting the ability of recipients of property to alienate that property except to their heirs, he observes many "inconveniences ensued" owing to the uncertainty it produced in market exchanges.[70]

Coke does not, however, suggest in these remarks that the fundamental laws are unalterable and irrevocable.[71] Indeed, the purely legal case for the existence of inviolable laws protecting individual property, especially from encroachments by the king, was always tenuous. In the significant legal confrontations over taxation by prerogative between the Parliament and the early Stuart kings, the latter repeatedly prevailed: *Bates' Case* or the *Case of Impositions* (1606) was found in favor of James I; both the *Five Knights' case* (1627), on the forced loan, and the *Ship Money case* (1637), were found in favor of Charles I.

The debate held by the House of Commons in 1610 on the legality of impositions by prerogative, and in particular the contributions by William Hakewill and James Whitelocke, did much to shape the parliamentarian case against taxation by prerogative in subsequent decades. William Hakewill maintained that the "wise providence of the common-law" provides the king with sufficient measures to protect the realm, for instance by compelling subjects to fight in defensive wars, and, accordingly, that there can never be a need to impose taxes without the assent of Parliament. Hence, if the king would exercise his prerogative to take property from subjects, this must be understood as causing "the utter dissolution and destruction of that politike frame and constitution of this commonwealth".[72] James Whitelocke, a lawyer and later a justice of the Court of King's Bench, expanded on Hakewill's position by distinguishing between arguments based on statute and common law on the one hand, and arguments concerning "the naturall frame and constitution of the policie [i.e. polity] of this kingdome" on the other.[73] The latter were not, strictly speaking, legal arguments, but depended on passages from early writers on English law, including Bracton and Sir John Fortescue. In the ninth chapter of *De laudibus Legum Angliae*, Whitlocke observes, for instance, Fortescue had written that, because the king of England rules with a power that is "not only *royall*, but also *politique*", he cannot alter the laws at his pleasure or "charge his subiects with Tallage & other burdens without their consent".[74] Any imposition by prerogative violates this longstanding principle and so "subverth the fundamentall law of the realme, and induceth a new forme of state and government".[75] The existence of such unwritten fundamental laws, however, was controversial enough to allow majorities of the court to side with the king when the king's opponents invoked them. For instance, when John Hampden's counsel in the *Ship Money case* asserted that, "by the fundamental policy of England, the king cannot out of parliament charge the subject",[76] one of the judges, Sir Robert Berkeley, simply responded by stating that "[t]he law knows no such king-yoking policy".[77] Another judge, William Jones, cited Bracton, who had observed that the "subject's goods are at the king's pleasure",[78] and accordingly concluded that impositions do not violate the subjects' property rights.

Although an appeal to this conception of fundamental law was hence of limited success in the legal proceedings concerning taxation by prerogative, it formed an essential component in the treason trials of the king and his advisors. These cases crucially rested on merging the two conceptions of fundamental law identified above: the traditional view introduced by Gentillet that saw violations of fundamental law as treasonous because they would "overthrow and ruinat the Realm", and an English adaptation of the concept that emphasized as foundational those laws that protect the property, lives, and estates of citizens. This amalgamation was possible by stressing the ruinous consequences of arbitrary rule. As Cook argued in his speech prepared for

the trial of Charles, the king's actions had been at odds with the "preservation and sustenance" of the people: when "any man is intrusted with the sword for the protection and preservation of the people […] shall employ it to their destruction" and "durst presume to inrich himself by that which might endanger the lives of so many citizens", he commits treason and becomes the enemy of the people. This is "the first necessary fundamental law of every kingdom, which by intrinsical rules of government must preserve itself".[79]

5. Fundamental law in *Leviathan*

Hobbes preambles his discussion of fundamental law in *Leviathan* with the observation that, although one might "very reasonably" distinguish between fundamental and non-fundamental law, he "could never see in any Author, what a Fundamentall Law signifieth".[80] In his *An examination of the political part of Mr. Hobbs his Leviathan* (1657), George Lawson duly objects that Hobbes thereby "doth argue his ignorance in Politicks",[81] and reiterates the notion, already expressed by Whitelocke, that fundamental laws "determine the Soveraign who he is, and what his power, and also define the bounds of the liberty and subjection of the subject".[82] Hobbes, of course, was hardly unaware of this notion. Although, in the Latin *Leviathan* (1668), he removes the passage that could perhaps too easily be construed as a profession of ignorance by unsympathetic readers,[83] he was merely repeating a widely voiced grievance by opponents of the parliamentarian appeal to (unwritten) fundamental laws in support of their particular interpretation of the rights of the king and the liberties of subjects. For instance, in response to Philip Hunton's conclusion that the decision to resist a monarch that tramples the rights of subjects must be made with an appeal to "the fundamentall Laws of that Monarchy",[84] Sir Robert Filmer declares in *The anarchy of a limited or mixed monarchy* (1648) that he "would very gladly learn of him, or of any other for him, what a fundamental law is".[85] In a similar vein, Charles I, on the eve of the civil war, repeatedly objects to Parliament invoking a fundamental law to demonstrate the legality of the Militia Ordinance which purported to bring the militias under parliamentary control even though Charles had withheld his assent to the bill. When Parliament maintains that the kingdom was founded on laws allowing legislative acts without royal assent in cases of necessity, Charles retorts that it has failed to give "any direction, that the most cunning and learned men in the Laws may be able to finde those foundations";[86] the Ordinance could be binding on subjects only if Parliament "would have told Our good Subjects what those Fundamentall Laws of the Land are, and where [they are] to be found".[87]

After repeating this royalist objection to appeals to fundamental law, Hobbes takes up the term's original meaning, outlined by Gentillet, as those laws upon which the power of the monarch is erected and which, if taken away, lead to the devastation of the commonwealth. Fundamental are those laws without which the state "faileth, and is utterly dissolved",[88] and the state cannot subsist without the combined power of the citizens being securely held in the hands of the sovereign. Like Gentillet – who maintains that, by means of fundamental law, "we establish" the power of a monarch "and make it more firme, greater, and as it were invincible"[89] – Hobbes characterizes fundamental laws as those laws "by which Subjects are bound to uphold whatsoever power is given to the Soveraign […] without which the Common-wealth cannot stand".[90] In

explication of the nature of the sovereign power, he immediately enumerates some of the essential rights of sovereignty ("the power of War and Peace, of Judicature, of Election of Officers"),[91] treated more fully in Chapter 18 of *Leviathan*. These rights, constitutive of the sovereign's absolute power, are foundational for the survival of the state: "if the essentiall Rights of Soveraignty […] be taken away, the Common-wealth is thereby dissolved, and every man returneth into the condition, and calamity of a warre with every other man".[92]

However, unlike Gentillet, and like Cook, the Solicitor General in Charles I's treason trial, Hobbes holds fundamental law to be natural law. This may not at first be apparent. When distinguishing fundamental from non-fundamental law, Hobbes characterizes the latter as civil law; positive law promulgated by the sovereign.[93] As an example of non-fundamental law, for instance, he offers "the Laws concerning Controversies between subject and subject",[94] a characterization closely aligned to his description of "Civill Lawes", as laws "wereby every man may know, what Goods he may enjoy, and what Actions he may doe, without being molested by any of his fellow Subjects".[95] One could therefore suspect that fundamental law, too, is a species of civil law. Hobbes nevertheless denies this, and in doing so revealingly repeats his argument from *De cive* for the conclusion that treason must be a violation of natural, not civil, law. The essential rights of sovereignty, he observes,

> cannot be maintained by any Civill Law, or terrour of legall punishment. For a Civill Law, that shall forbid Rebellion, (and such is all resistance to the essentiall Rights of Soveraignty,) is not (as a Civill Law) any obligation, but by virtue onely of the Law of Nature, that forbiddeth the violation of Faith; which naturall obligation if men know not, they cannot know the Right of any Law the Soveraign maketh.[96]

This argument may require some unpacking. The last phrase – "the Right of any Law the Soveraign maketh" – refers to one of the essential rights of sovereignty, namely the right to legislate. This right, Hobbes observes, cannot ground subjects' obligation to refrain from rebellion, as rebellion is the resistance against, and the denial of, that right itself. (Of course, this characterization of rebellion – which is treasonous – is precisely in conformity with his revised definition of treason as an act contrary to a fundamental law requiring subjects to uphold the essential rights of sovereignty.)[97] Rather, rebellion is prohibited by the third law of nature that requires keeping covenants. The essential rights of sovereignty are established when prospective citizens "conferre all their power and strength upon one Man, or upon one Assemby of men" by giving up their "Right of Governing" themselves.[98] The essential rights of sovereignty are thus correlative to the duty of citizens, on the basis of the third law of nature and by virtue of the original covenant, to let the sovereign govern them instead. By resisting the essential rights of sovereignty, rebels deny the authority of the sovereign to rule them. They thereby violate a fundamental law, which, it must be concluded, is the third law of nature – the law "that forbiddeth the violation of Faith" – insofar as it grounds the contract that establishes the essential rights of sovereignty and sovereign power. Thus, when Hobbes defines fundamental law in the Latin *Leviathan* as the law requiring "that individual citizens should give obedience to the person of the commonwealth, that is, to the sovereign",[99] and in *Behemoth* as "that Law of Nature that binds vs all to obey him, whosoeuer he be, whom lawfully and for our own safety we haue promised to obey",[100] he is

not correcting a mistake in the original definition, as has sometimes been alleged.[101] In *Leviathan*, as in the subsequent works, fundamental law is the law that binds subjects to uphold the power of the sovereign, which is the law of nature requiring the performance of valid covenants.[102]

6. Treason in *Leviathan*

It is now possible to assess the meaning and significance of Hobbes' introduction of a new conception of treason in *Leviathan*. Hobbes appropriates the "manufactured" theory of treason utilized in Charles I's trial in a way that, first, renders it consistent with the theory of treason he had developed in *De Cive* and, second, shows that the sovereign can never commit treason, thus rendering the trial itself a treasonous offense.

By reconceiving the notion of fundamental law as the natural law requiring upholding the essential rights of sovereignty, Hobbes presents an account of treason in *Leviathan* that is consistent with that of *De Cive*. On both accounts, treason is ultimately the rejection by citizens of their allegiance, grounded in natural law, to the person of the sovereign. In *De Cive*, this is true by virtue of the definition of treason as the renunciation of the "general pact of obedience". In *Leviathan*, it follows from his reconceptualization of the notion of fundamental law as the third law of nature insofar as it requires observing the original contract and upholding the essential rights of sovereignty. On this revised conception, too, citizens commit treason by a breach of the original contract. The two conceptions are not precisely equivalent, however, because the revised theory does not definitionally rule out the possibility of treasonous offences by the sovereign. In *De Cive*, it is conceptually impossible that the sovereign is guilty of treason. Treason consists in the breach of faith through a renunciation of the pact of obedience and the sovereign is unable commit such crimes against his own person: he is not party to the original contract and cannot be obligated to obey himself (because an "obligation to oneself would be meaningless, because he can release himself at his own discretion, and anyone who can do this is in fact free").[103] In *Leviathan*, however, treasonous acts by the sovereign are *not* conceptually precluded. The sovereign, too, is bound by fundamental law conceived as a natural law by which one is obliged to uphold the essential rights of sovereignty.[104] Hobbes admits as much when discussing the "office" or duty of the sovereign. This duty consists in the "procuration of *the safety of the people*; to which he is obliged by the Law of Nature".[105] In *Behemoth*, Hobbes states more forthrightly that there is not "any other fundamentall Law to a King, but *Salus Populi*".[106] It was, as we have seen, precisely this notion – that the monarch is bound by fundamental laws to protect the well-being of the people – on which Cook, Goodwin and others rested their case for Charles I's trial and execution.

Hobbes provides two arguments to complete his response to the parliamentarian opponents of Charles I. First, Hobbes clarifies what fundamental law requires from sovereigns: as the commonwealth is dissolved and the people ruined if the essential rights of sovereignty are disturbed, it is "the Office of the Soveraign, to maintain those Rights entire" and never to renounce or transfer any of them.[107] The implication is that the sovereign would commit treason if he violates this duty, for instance, by introducing self-imposed constraints on his absolute power, such as admitting to be subject to the civil law or accepting that citizens have "absolute property". Such

actions are contrary to a fundamental law and therefore treasonous, as they diminish the power of the sovereign and may perilously threaten the survival of the state. However, Hobbes denies that the sovereign is able to renounce or transfer individual rights of sovereignty, even if he appears to do so. The rights are "incommunicable, and inseparable",[108] from which follows that if, "in whatsoever words any of them seem to be granted away, yet if the Soveraign Power it selfe be not in direct terms renounced […] the Grant is voyd".[109] Hence, part of Hobbes' solution to the threat that a sovereign is accused of treason is that the sovereign can only renounce or transfer sovereignty altogether, and he is therefore juridically incapable of committing treason in this way.[110]

Second, Hobbes emphasizes the implication of treating fundamental law as natural law. As noted, on this point Hobbes agrees with Cook. For Cook it means that the laws that constitute, and protect the continued existence of, the commonwealth can be appealed to in a court of law, as the "law of nature is an undubitable legislative authority of itself, that hath a suspensive power over all human laws".[111] This is why Charles I could be impeached for treason in the absence of any statutory grounds for it: "when our Law-Books are silent, we must repair to the Law of Nature and Reason".[112] Hobbes, by contrast, does not allow natural law to play a role as independent legal source in judicial proceedings.[113] As Hobbes' treatment of treason reveals, the laws that constitute the commonwealth are prior to, and act as foundations for, the system of positive law enacted by the sovereign. Indeed, because of the looming possibility that the sovereign himself might be accused of treason by failing to effectively secure the safety and prosperity of the people, Hobbes denies that fundamental law can be appealed to by citizens in relation to their civil sovereign: the sovereign is bound by the law of nature but he must "render an account thereof to God, the Author of that Law, and to none but him".[114]

Of course, by suggesting that the execution of Charles I had been treasonous, Hobbes was agreeing with authors like Prynne and Salmasius. However, Prynne simply harked back to the traditional definition of treason in the Statute of Treasons for this conclusion.[115] Salmasius, in his widely read *Defensio Regia* (1649), drew on a range of legal sources, including the treason statute, the views of Glanville and Bracton, and the Roman law of treason, to show that not Charles I but those who had undertaken a war against him and were responsible for his death were guilty of treason.[116] Yet he did not consider the possibility that the king could violate a fundamental law.[117] Hobbes did: his ingenious reconceptualization of fundamental law is meant to show that the theory of treason as adopted by the parliamentarian opponents of Charles I, when understood correctly, could never support the violent resistance against, and overthrowing of, a rightful sovereign.[118] Hobbes' disagreement with the managers of the treason trial of Charles I ultimately concerns what is needed for the safety and the prosperity of the people. They maintain that such prosperity is unattainable without protection of the people's liberty and property against arbitrary impositions by the supreme magistrate. In *Leviathan*, Hobbes adopts their appeal to fundamental law to show that the charge against Charles is false; a commonwealth can only remain stable for as long as all essential rights of sovereignty are securely held in the hands of the sovereign and citizens' liberty and property are fully dependent on his grace.

Notes

1. The following abbreviations are used:
   B Hobbes, *Behemoth*.
   CJ *Journal of the House of Commons*, vol i.
   DCv Hobbes, *On the Citizen*; Hobbes, *De cive*.
   L Hobbes, *Leviathan*.
   LL Hobbes, "Latin Leviathan".
   ST Cobbett et al., *A Complete Collection of State Trials*.
   References to DCv are by chapter, paragraph, and page numbers of the English translation. References to L are by chapter, paragraph, and page number. References to LL are by chapter and page number.
2. Malcolm, "General Introduction", 9, estimates that Hobbes started writing *Leviathan* in the (late) summer of 1649, roughly half a year after Charles I's execution.
3. ST vol. iii, col. 1046.
4. B p. 195.
5. L 27.37, p. 478.
6. The contemporary literature on Hobbes' treatment of treason and fundamental law (separately or jointly) is sparse. On treason and fundamental law, see, in particular, Olsthoorn, "Forfeiting Citizenship: Hobbes on Rebels, Traitors and Enemies". Brief discussions of Hobbes on treason are in Abizadeh, *Hobbes and the Two Faces of Ethics*, 214–15; Boonin-Vail, *Thomas Hobbes and the Science of Moral Virtue*, 122; Goldsmith, *Hobbes's Science of Politics*, 248; Hüning, "Hobbes on the Right to Punish", 221; Jaede, "Hobbes on the Making and Unmaking of Citizens", 91–2; Orr, *Treason and the State*, 56; Ristroph, "Criminal Law for Humans"; Warrender, *The Political Philosophy of Hobbes*, 147–9. Brief discussions of Hobbes on fundamental law can be found in Dyzenhaus, "Hobbes's Constitutional Theory", 447; Thompson, "The History of Fundamental Law in Political Thought from the French Wars of Religion to the American Revolution" 1114–15.
7. B p. 195.
8. The statute distinguishes between high treason and petty treason. As Hobbes is only concerned with the former, this qualification will be omitted in what follows.
9. Bellamy, *The Law of Treason in England in the Later Middle Ages*, 1; Anson, *The Law and Custom of the Constitution*, vol. ii, part. 1, 243.
10. Pollock and Maitland, *The History of English Law before the Time of Edward I*, vol. ii, 528.
11. Quoted in Cuttler, *The Law of Treason and Treason Trials in Later Medieval France*, 8. Hence, Hobbes' use in *De cive* of the term "CRIME OF LÈSE-MAJESTÉ" (DCv 14.20, pp. 164–5) does not, by itself, reveal a debt to Roman sources.
12. Coke, "Calvin's Case" , vol. i, 175. The seventh volume of Coke's *Reports* was available to Hobbes in the Hardwick library. See Talaska, *The Hardwick Library and Hobbes's Early Intellectual Development*, 78.
13. Coke, "Calvin's Case", 194.
14. Ibid., 178.
15. Ibid., 190.
16. DCv 14.20, p. 165.
17. Ibid.
18. Pollock and Maitland, *The History of English Law*, vol. ii, 528–9.
19. DCv 14.20, p. 165.
20. DCv 14.21, p. 166.
21. Contrary to Coke, for instance, who held that individuals owe allegiance simply by virtue of birth. See also Olsthoorn, "Forfeiting Citizenship", 240.
22. DCv, 14.20, pp. 164–5.
23. DCv 14.21, p. 166.
24. Coke, "Calvin's Case", 197.

25. DCv 14.21, p. 166.
26. Ibid.
27. For this reason, D.A. Orr's assessment that Hobbes' conception of treason (in *De cive*) "was in many respects a garden-variety Roman law concoction" is misleading at best (Orr, *Treason and the State*, 56).
28. L 27.37, p. 478.
29. It is true that Hobbes speaks in *De cive* (and continues to speak in *Leviathan*) of some natural laws as "fundamental" in the sense that all other natural laws can be derived from them. (DCv 2.3 p. 34; DCv 4.3, p. 59; compare L 14.4-5, p. 200; L 15.16, p. 230; L 15.17, p. 232; see also Malcolm, "General Introduction", 203) In the novel usage introduced in *Leviathan*, however, "fundamental" does not contrast with derivative but with non-essential: a law is fundamental if the preservation of the commonwealth requires its operation. Nevertheless, the resulting ambiguity may have led Hobbes to leave out most instances of the qualification "fundamental" in the Latin *Leviathan*.
30. L 26.42, p. 448.
31. L 27.37, p. 478. One might object that Hobbes intends to limit the designation treason to crimes against the monarch, which would be more consistent with his earlier view in *De cive*, but note that the entire paragraph is covered by the margin note "*Laesa Majestas*". Also, given his definition of treason as a breach of fundamental law, it does not follow conceptually (as it did in *De cive*) that treason is a breach of faith.
32. Eg. ST, vol. iv, col. 326.
33. Rushworth, "The Articles Against Strafford", 72–3.
34. ST vol. iv, col. 12.
35. ST vol. iv, col. 326.
36. Pym, *The Speech or Declaration of John Pym*, 13.
37. See e.g. [Salmasius], *Defensio Regia, pro Carolo I*, 658, who argued that it had been impossible for the king to be guilty of treason because the majesty was inherent in his own person and consequently he could not offend or diminish it.
38. ST vol. iv, col. 1070.
39. ST vol. iv, col. 1032.
40. Eg. Prynne, *Summary Reasons Against the New Oath & Engagement*, 3.
41. Goodwin, *Hybristodikai. The Obstructours of Justice*, 39–40.
42. Fidoe, *The Parliament Justified in Their Late Proceedings Against Charls Stuart*, 12–13.
43. N.T., *The Resolver, Or. A Short Word, to the Large Question of the Times*, 7.
44. Russell, "The Theory of Treason in the Trial of Strafford", 47, following Wedgewood, *Thomas Wentworth, First Earl of Strafford, 1593–1641*, 359.
45. Hast, "State Treason Trials During the Puritan Revolution, 1640–1660", 39; Walzer, *Regicide and Revolution*, 43–5; Stacy, "Matter of Fact, Matter of Law, and the Attainder of the Earl of Strafford", 324–5; Orr, *Treason and the State*, 52, 63. For a corrective, Timmis, "Evidence and I Eliz. I, Cap. 6."
46. Höpfl, "Fundamental Law and the Constitution in Sixteenth-Century France"; Gough, *Fundamental Law in English Constitutional History*; Thompson, "The History of Fundamental Law"; Loughlin, "Fundamental Law".
47. Gough, *Fundamental Law*, 51; Thompson, "The History of Fundamental Law", 1110, 1119; Loughlin, "Fundamental Law", 5; Sommerville, *Royalists and Patriots*, 11, suggests the term is used in Bilson, *The True Difference between Christian Subiection and Unchristian Rebellion*, but this appears a mistake.
48. [Henry IV], *A Declaration and Protestation, Published by the King of Nauarre*, 37.
49. Lalourcé and Duval, *Recueil de pieces originales et authentiques concernant la tenue des Etats Généraux*, vol. iv, 134.
50. Colynet, *The True History of the Ciuill Warres of France, betweene the French King Henry the 4 and the Leaguers*, 289.
51. Figueiro, *The Spaniards monarchie, and Leaguers olygarchie*.

52. [Anon.], *A pleasant satyre or poesie wherein is discouered the Catholicon of Spayne, and the chiefe leaers of the League*, 119; [Anon.], *The mutable and vvauering estate of France from the yeare of our Lord 1460, vntill the yeare 1595*, 125; de Serres, *An Historical Collection, of the Most Memorable Accidents, and Tragicall Massacres of France*, 161–2; [Anon.], *An ansvvere to the last tempest and villanie of the League*, 41.
53. See Höpfl, "Fundamental Law", 333.
54. Höpfl, "Fundamental Law", 329; Thompson, "The History of Fundamental Law", 1105.
55. Beza, "Du droit des magistrats sur leurs subiets",122.
56. Gentillet, *A discourse vpon the meanes of vvel governing and maintaining in good peace, a kingdome*.
57. Ibid., 19.
58. Ibid., 25.
59. Ibid., 21.
60. Ibid., 32.
61. Cuttler, *The Law of Treason*, 28.
62. Mommsen, Kruger, and Watson, *The Digest of Justinian*, 48.4.1, vol. iv, 802.
63. Colynet, *The True History of the Ciuill Warres of France*, 290.
64. [Anon.], "Vindiciae Contra Tyrannos", 181; compare [Salmasius], *Defensio regia*, 655–6.
65. 1 Jac. I cap. 2, CJ p. 318.
66. CJ p. 319.
67. CJ p. 361. For a discussion, see Gough, *Fundamental Law*, 52–3, who, however, mischaracterizes the context of James' statement.
68. Bacon, "Maxims of the Law",vol. iv, 6.
69. Coke, "The Fourth Part of the Reports", v.
70. Coke, "The Fourth Part", vi.
71. Thus C.H. McIlwain's controversial case in *The High Court of Parliament and its Supremacy*, for reading Coke as defending the whole common law as inviolable fundamental law must be based on other material.
72. ST vol. ii, col. 420. Published as Hakewill, *The Libertie of the Subject Against the Pretended Power of Impositions*.
73. ST vol. ii, col. 481, where the speech is wrongly attributed to Yelverton. Published as Whitelocke, *A Learned and Necessary Argument to Prove That Each Subject Hath a Propriety in His Goods*. See "policy. *n.* 2.b" *Oxford English Dictionary*.
74. ST vol. ii, col. 486. Selden, *De laudibus legum Angliæ writen by Sir Iohn Fortescue*, 25.
75. ST vol. ii, col. 481. These debates ultimately resulted in a list of grievances that were presented to the king in a speech by Bacon in the House of Commons, in which Bacon observed that it is "vndoubtedly the ancient, and fundamentall law of the land" that "no taxes, aides, or impositions of any kinde whatsoever" may be imposed without the consent of Parliament; a law that was "for more abundant clearness" many times reaffirmed in statutes. [Anon.], *A Record of Some Worthy Proceedings in the … Howse of Commons*.
76. ST vol. iii, col. 968–9.
77. ST vol. iii, col. 1098.
78. ST vol. iii, col. 1184.
79. ST vol. iv, col. 1032, 1036. The act erecting the High Court claims that Charles is guilty of "traitorously and maliciously to imagine or contrive the enslaving or destroying of the English nation" (ST vol. iv, col. 1050). It was also Pym's point during Strafford's trial: usurpation of tyrannical power is treasonous because it is inconsistent with "Peace, the Wealth, the Prosperity of a Nation".
80. L 26.41, p. 448.
81. Lawson, *An Examination of the Political Part of Mr. Hobbs his Leviathan*, 108.
82. Ibid., 108–9.
83. LL 26, p. 449.
84. Hunton, *A Treatise of Monarchie*, 18.
85. Filmer, "The Anarchy of a Limited or Mixed Monarchy",296.

86. *An Exact Collection of all Remonstrances, Declarations, Votes, Orders, Ordinances and Proclamations*, 243. Also, *An Exact Collection*, 173.
87. *An Exact Collection*, 175.
88. L 26.42, p. 448.
89. Gentillet, *A Discourse Vpon the Meanes*, 26.
90. L 26.42, p. 448.
91. L 26.42, p. 448.
92. L 30.3, p. 520. See also Hobbes' claim that, "without those Essentiall Rights, (as I have often before said,) the Common-wealth cannot at all subsist" (L 30, p. 548) and his warning against "the Liberty of Disputing against absolute Power" by those who, "animated by False Doctrines, are perpetually medling with the Fundamentall Laws, to the molestation of the Common-wealth" (L 29.21, p. 516).
93. L 26.42, p. 448. For Hobbes' definition of civil law, see, in particular, L 26.3–7, 414–16.
94. L 26.42, p. 448.
95. L 18.9, p. 274.
96. L 30.4, p. 522.
97. Rebels, like traitors, "deliberatly deny the Authority of the Common-wealth established" and "the nature of this offence, consisteth in the renouncing of subjection" (L 28.23, p. 494). In *De cive*, he speaks of "*rebels* [*rebelles*], *traitors* and others convicted of *treason* [*laesae maiestatis*]" (DCv 14.22, p.166, 217).
98. L 17.13, p. 260.
99. LL 26, p. 449.
100. B p. 195.
101. Eg., according to Olsthoorn, "Forfeiting Citizenship", 241, the problem Hobbes supposedly corrects is that "*Leviathan* conflates fundamental laws with the essential rights of sovereignty". Some evidence for this reading can be found in L 30.6, p. 524, where Hobbes speaks of "the Essentiall Rights (which are the Naturall, and Fundamentall Lawes) of Soveraignty". However, in that passage, Hobbes does not quite give an adequate presentation of his considered position in *Leviathan*: he equates fundamental law not with the rights of sovereignty but with the law that requires subjects to uphold the rights of sovereignty.
102. L 26.42, p. 448.
103. DCv 6.14, p. 84.
104. One might argue that this view is already present in *De cive* when Hobbes identifies as treasonous giving voice to the opinion that "rulers have no right to […] make laws, settle disputes, fix penalties or anything else that is essential to the existence of the commonwealth" (DCv 14.20, p. 165). Hobbes is clear, however, that this is treasonous, not because one thereby undermines the essential rights of sovereignty but because one thereby reveals the intention no longer to obey the sovereign (DCv 14.20, p. 165).
105. L 30.1, p. 520.
106. B p. 195.
107. L 30.3, p. 520.
108. L 18.16, p. 278.
109. L 18.17, p. 280. See also Hobbes' denial that the sovereign can tolerate corporations within the commonwealth that have absolute power over its members: it is "to divide the Dominion, contrary to their Peace and Defence, which the Soveraign cannot be understood to doe, by any grant, that does not plainly, and directly discharge them of their subjection" (L 22.5, p. 350). The corollary of this view is that if the sovereign appears grant a citizen a liberty inconsistent with the essential rights of sovereignty, the citizen must ignore the grant, "for he ought to take notice of what is inconsistent with the Soveraignty, because it was erected by his own consent, and for his own defence; and that such liberty as is inconsistent with it, was granted through ignorance of the evill consequence thereof" (L 27.28, p. 470).
110. Neither of these two possibilities renders the sovereign liable to justified accusations of treason. If the sovereign transfers the combined rights of sovereignty to another, the foundation of the commonwealth is as stable as before. If the sovereign renounces sovereignty

and the commonwealth is dissolved, there is no longer a people whose safety he is entrusted to procure.

111. ST vol. iv, col. 1032.
112. ST vol. iv, col. 1035.
113. Hobbes holds that judges must interpret the civil law assuming that "the Intention of the Legislator is always supposed to be Equity", which may require supplying civil law "with the Law of Nature" (L 26.26, p. 436). See Abizadeh, *Hobbes and the Two Faces of Ethics*, 240–1; Dyzenhaus, "Hobbes's Constitutional Theory". Yet, in front of a human judge, it appears impossible to appeal to natural law directly, in the absence of a positive law promulgated by the sovereign that may be interpreted in light of it.
114. L 30.1, p. 520.
115. Eg. Prynne, *Mr. Pryn's Last and Finall Declaration to the Commons of England*, 2.
116. [Salmasius], *Defensio regia*, 674–80.
117. [Salmasius], *Defensio regia*, 667, responding to the accusation that those who have taken up arms against Parliament are guilty of treason in accordance with England's fundamental laws:

> What are those fundamental laws of the kingdom, which are here agreed upon: where in the world do they exist, or in what codices can they be found? [*Quae sunt illae leges fundamentales Regni, quibus hoc constitutum est: Ubinam illae extant, aut quibus in Codicibus reperiuntur?*]

If Hobbes was familiar with Salmasius' work by the time he wrote *Leviathan*, he did not have a high opinion of it: in *Behemoth*, he recalls seeing the book but being disappointed by its "very ill reasoning" (B p. 329).

118. Compare Olsthoorn, "Forfeiting Citizenship", 241, who suggests that Hobbes reconceptualized the concept of fundamental laws because it was "traditionally seen as those laws the sovereign cannot change" and therefore antithetical to his political absolutism. Leaving aside that, on Hobbes' revised notion, the sovereign cannot alter fundamental law either (as natural laws, including the law requiring the performance of contracts, are "Immutable and Eternall" and can by no human law be abrogated; see L 15.38, p. 240), the contextualization presented here shows that Hobbes was concerned with neutralizing the rebellious implications of the theory of treason that had been utilized in the trial of Charles I. If there was something antithetical to his political absolutism in the concept of fundamental law as utilized in that theory, it was primarily treating as fundamental those laws that limit the power of the sovereign by protecting the liberty and property of citizens; a conclusion Hobbes avoided by returning to the French origins of the concept.

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Notes on contributor

Laurens van Apeldoorn is an Assistant Professor of Constitutional Law and Legal Theory at the Open University, the Netherlands. His research is in (the history of) political philosophy and constitutional law.

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