

2014

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Recommended Citation

Ryan P. Alford, *Is an Inviolable Constitution a Suicide Pact? Historical Perspective on Executive Power to Protect the *Salus Populi**, 58 St. Louis U. L.J. (2014).

Available at: <https://scholarship.law.slu.edu/lj/vol58/iss2/4>

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**IS AN INVIOABLE CONSTITUTION A SUICIDE PACT?
HISTORICAL PERSPECTIVE ON EXECUTIVE POWER TO
PROTECT THE *SALUS POPULI***

RYAN PATRICK ALFORD*

INTRODUCTION

One of the thorniest issues ever put to jurists of the western legal tradition is the question of the proper scope of executive powers in a time of crisis. It has been disputed vigorously during key episodes in history; this has helped to define the boundaries of constitutional government against tyranny, absolute monarchy, and dictatorships. Despite apparently decisive rejections of overbroad executive powers at formative moments of legal history, the issue has proven itself perennial; even as threats to the state take on ever more frightening proportions, the issue is repeatedly reopened.

A written constitution can be seen as an attempt on the part of a nation to tie itself to the mast of the rule of law, such that no emergency can tempt the people to dispense with the principle that they are governed by laws, and not by men. However, the idea that the chief executive should have the power to dispense with impediments to his effective management of a crisis has proven itself a powerful siren song. The traditional rebuttal to those who have insisted on inflexible adherence to the written text has been the rhetorical assertion attributed to Justice Goldberg, who declared that “while the Constitution protects against invasions of individual rights, it is not a suicide pact.”¹ This argument fails to note that in the same opinion, in a passage that is less well-known than Goldberg’s pithy epigram, he also stated:

The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that

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1. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963).

there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action.²

Ever since Polybius, constitutional theorists have grappled with the correct balance between adherence to fixed legal principles and the desire for flexibility in protecting the public welfare during times of war, rebellion, and political crisis. Polybius believed in a cycle of constitutions, in which every democracy will inevitably devolve into a dictatorship.³ His work proved prescient; history is replete with examples of tyrants who rose to power out of the ashes of the constitutional crises that led to broad grants of emergency powers, of which Julius Caesar, Oliver Cromwell, and Napoleon Bonaparte are only the most prominent examples. However, as Aristotle countered, constitutional government has proven surprisingly resilient despite these reversals of fortune, coming back in ever-stronger forms after periods of tyranny and repression.⁴

In recent years, rather than asking the historical question of whether the Framers of the Constitution of the United States had a particular intention to grant the executive emergency powers to disregard specific constitutional protections during a crisis, many American legal theorists have turned instead to the philosophical question of whether a constitution must, by necessity, contain such a provision. These theorists (among them, John Yoo, Richard Posner, and the late Chief Justice William Rehnquist) have pointed to events subsequent to the founding to argue that the Framers could not possibly have meant to prevent such great presidents as Thomas Jefferson and Abraham Lincoln from overstepping the letter of the law.

These arguments have taken on a new prominence—and a darker countenance—in the wake of terrorist attacks on the United States. Certain theorists now argue that we must balance our liberties against the very real threat of catastrophic shocks to the nation. These assertions require a serious and thoughtful response. What light can legal history shed on this issue? One must first consider how the issue has been framed: Michael Stokes Paulsen has argued that the President has an implied constitutional power to declare an emergency after detecting a serious threat to the state, and accordingly he has a constitutional power to take any action he deems necessary to deal with this situation, up to and including authorizing acts of war and torture.⁵

2. *Id.* at 165.

3. See POLYBIUS, *THE HISTORIES* bk. VI, at 287–89 (W.R. Paton trans., Harvard Univ. Press 1954).

4. See ARISTOTLE, *POLITICS* bk. IV, at 325–35 (H. Rackham trans., Harvard Univ. Press 1977).

5. Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1258, 1280, 1282 (2004).

Legal history can be used to prove three relevant points in refutation of Paulsen's assertion. First, the greatest minds of a constitutional tradition that stretches across millennia have described this as the idea most dangerous to both democracy and constitutionalism itself. Second, no constitutional order has ever tolerated such a broad principle of executive privilege, although it has been repeatedly advocated by legal theorists in support of absolutism. Third, the Framers not only did not include an implicit principle of this type in the Constitution of the United States, but also possessed no inclination to do so, such that it is absurd to imagine that they would have failed to make their departure from millennia of constitutional tradition explicit.

I. NECESSITY, THE SALUS POPULI, AND THE RULE OF LAW

A. *The Argument that Safety Demands a Constitutional Doctrine of Necessity*

Paulsen is very frank in his advocacy of the proposition that the President has the power to ignore explicit constitutional restraints on his powers whenever he believes he must act to protect the public welfare during an emergency:

The Constitution itself embraces an overriding principle of constitutional and national self-preservation that operates as a meta-rule of construction for the document's specific provisions and that may even, in cases of extraordinary necessity, trump specific constitutional requirements. . . .

. . . In short, the Constitution either creates or recognizes a *constitutional law of necessity*, and appears to charge *the President* with the primary duty of applying it and judging the degree of necessity in the press of circumstances.⁶

From the point of view of legal history, this description of the President's powers is simply astonishing. It would invest him not only with authority that far exceeds that of George III, but one that exceeds even the absolutist impulses of the Stuart monarchs. To find an English king with emergency powers this broad, one must reach back across the Middle Ages to a time before these kings recognized that the Magna Carta bound them to the rule of law, that is, to the reign of Edward II.⁷ Paulsen explicitly sidesteps the argument that the Framers could not have wished to grant the President powers that were substantially greater than any English monarch,⁸ and instead insists that this is a necessary feature of any durable constitutional order: "Either a constitutional law of necessity exists or it does not. . . . [I]f it does not, the Constitution is a suicide pact."⁹

6. *Id.* at 1257–58.

7. See Ryan Patrick Alford, *The Rule of Law at the Crossroads: Consequences of Targeted Killing of Citizens*, 2011 UTAH L. REV. 1203, 1204–06.

8. Paulsen, *supra* note 5, at 1287–89.

9. *Id.* at 1259.

His argument countenances no limits on what the President can do when faced with an emergency, which he alone has the power to define.¹⁰ Paulsen explicitly states that this would make torture not merely morally defensible but constitutional.¹¹ Foreshadowing Judge Posner's arguments,¹² Paulsen states that "[t]he reasonableness of the intrusion is a function of the circumstances, and the magnitude of the imminent danger can justify what otherwise might be . . . unreasonable."¹³ Accordingly, Paulsen provides a justification for John Yoo's argument that no law or treaty could be passed that could prevent the President from crushing the testicles of a terrorist's child in a vise, should he believe that this would save American lives.¹⁴ Indeed, Paulsen argues that the President is obliged to violate specific provisions of the Constitution in such an emergency, and that he should use every possible tool at his disposal:

The first duty of the President of the United States is to preserve, protect, and defend the Constitution of the United States by preserving, protecting, and defending *the United States*, by every indispensable means within his power. . . . [T]he existence of such a constitutional duty of the President very strongly implies the existence of legitimate constitutional power on the part of the President to carry out that duty.¹⁵

Despite the apparently radical nature of this position—reminiscent of a claim that one must sometimes destroy something in order to save it—this interpretation of the Constitution has been influential. Oren Gross has provided substantial scholarly support for Paulsen's thesis.¹⁶ Gross argues that the rule of law is a "Business as Usual model," which disregards the actual use of emergency powers by the executive in times of emergency, which, following principles of legal realism, are actually embedded within the constitutional order.¹⁷ Gross describes the "radical solution" to the problem of terrorism as one that acknowledges:

Legal rules and norms are too inflexible and rigid to accommodate the security needs of states. . . . Maxims such as "necessity knows no law," "*salus populi suprema lex est*," "*inter arma silent leges*," and "*raison d'état*" reflect this

10. *Id.* at 1291.

11. *Id.* at 1280.

12. RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 14 (2006).

13. Paulsen, *supra* note 5, at 1280.

14. MAJORITY STAFF OF H. COMM. ON THE JUDICIARY, 110TH CONG., REINING IN THE IMPERIAL PRESIDENCY: LESSONS AND RECOMMENDATIONS RELATING TO THE PRESIDENCY OF GEORGE W. BUSH 113–14, 126 (Comm. Print 2009).

15. Paulsen, *supra* note 5, at 1263.

16. Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?* 112 YALE L.J. 1011, 1028–29, 1036, 1039, 1041–42, 1134 (2003).

17. *Id.* at 1021–23.

approach. Where the survival (or fundamental interest of the state) is concerned, there ought to be no holding back on governmental action¹⁸

Gross concludes that “[t]here may be circumstances when it would be appropriate to go outside the legal order, at times even violating otherwise accepted constitutional dictates, when responding to emergency situations.”¹⁹ Other theorists reach this same conclusion for similar reasons, including John Yoo,²⁰ Thomas Crocker,²¹ Eric Posner and Adrian Vermeule,²² and Richard Seamon.²³ Other scholars disagree with Paulsen. Kevin Jon Heller has pointed out there is great danger inherent in the argument that the President alone can declare the emergency and determine both the scope of his constitutional powers and the appropriateness of the response that he chooses.²⁴ He notes how the nature of the emergency that Paulsen believes requires the President to override specific constitutional rights shifts in the course of his article from “a nation-destroying outcome” to situations where there is merely a “prospect of grave risk or danger to the nation.”²⁵

It was a commonplace of classical political theory that assertions of threats of this kind are endemic to constitutional states, since this is the manner in which the executive branch of government typically seeks to extend its powers. Consequently, constitutional theorists across millennia (many of whom were known to and respected by the Framers) have rejected the emergency-based rationale for the expansion of executive powers. Indeed, it will be demonstrated below that the development of both the notion of constitutional government and the rule of law often stems from resistance to these claims on the part of consuls, emperors, and kings.

At the time that Paulsen first made his argument, it appeared as if the United States might make a dramatic break with the western constitutional tradition. Writing in 2006, Sanford Levinson argued that “[i]t is not, I believe, an exaggeration to view us as approaching what Bruce Ackerman has famously labeled a ‘constitutional moment,’ with the possibility of attendant

18. *Id.* at 1042.

19. *Id.* at 1134.

20. JOHN YOO, *THE POWERS OF WAR AND PEACE* 5, 8–9 (2005).

21. Thomas P. Crocker, *Overcoming Necessity: Torture and the State of Constitutional Culture*, 61 SMU L. REV. 221, 278 (2008).

22. Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 644 (2003).

23. Richard Henry Seamon, *Domestic Surveillance for International Terrorists: Presidential Power and Fourth Amendment Limits*, 35 HASTINGS CONST. L.Q. 449, 504 (2008).

24. Kevin Jon Heller, *The Rhetoric of Necessity (Or, Sanford Levinson’s Pinteresque Conversation)*, 40 GA. L. REV. 779, 804 (2006).

25. *Id.* at 788, 790 (emphasis omitted) (quoting Paulsen, *supra* note 5, at 1269, 1275).

fundamental transformation,²⁶ brought about by sweeping assertions of executive power to ignore the laws during the period of crisis following the terrorist attacks of September 11, 2001.²⁷

During this period, “President George W. Bush claim[ed] monarchlike authority . . . to flout any statute . . . [prohibiting] warrantless electronic surveillance, breaking and entering, mail openings or torture.”²⁸ During the three years following, however, it appeared as if the legal system had rebuked these assertions, after the U.S. Supreme Court penned its decisions in *Hamdan v. Rumsfeld*²⁹ and *Boumediene v. Bush*,³⁰ and after the Office of Legal Counsel (OLC) repealed the memoranda³¹ asserting that the President had the constitutional power to take the nation to war without congressional approval,³² to authorize forms of interrogation that were inconsistent with the Convention Against Torture,³³ and to ignore laws prohibiting warrantless wiretapping.³⁴ It appeared as if jurists had concluded that this vision of executive power was incompatible with the vision of separation of powers and the rule of law embodied by the Constitution.

The “constitutional moment” had passed—or so it seemed. In 2011, another critical moment seemed to be upon us. The President asserted and

26. Sanford Levinson, *The Deepening Crisis of American Constitutionalism*, 40 GA. L. REV. 889, 891–92 (2006).

27. See also David Cole, *After September 11: What We Still Don't Know*, THE N.Y. REV. OF BOOKS (Sept. 29, 2011), <http://www.nybooks.com/articles/archives/2011/sep/29/after-september-11-what-we-still-dont-know/>.

28. Levinson, *supra* note 26, at 892 (quoting Bruce Fein, Commentary, *Hemlock Hallmarks*, WASH. TIMES (Apr. 11, 2006), <http://www.washingtontimes.com/news/2006/apr/10/20060410-091458-8835r/>).

29. *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006).

30. *Boumediene v. Bush*, 553 U.S. 723, 733 (2008).

31. Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001, at 2 (Jan. 15, 2009), available at <http://www.justice.gov/opa/documents/memostatusolcopinions01152009.pdf>.

32. Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., Office of Legal Counsel, to the Deputy Counsel to the President, The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001), available at <http://www.justice.gov/olc/warpowers925.htm>.

33. Memorandum Opinion from John Yoo, Deputy Assistant Att’y Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep’t of Defense, Military Interrogation of Alien Unlawful Combatants Held Outside the United States 16, 49 (Mar. 14, 2003), available at http://www.aclu.org/files/pdfs/safefree/yoo_army_torture_memo.pdf; see also 18 U.S.C. § 242 (2010).

34. U.S. Dep’t of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President *1, *8 (2006).

exercised, on the basis of nothing more than a secret OLC memorandum,³⁵ that he has the power to kill an American citizen accused of terrorism without trial, in direct violation of the Treason and Bill of Attainder Clauses.³⁶ His Secretary of State now asserts³⁷ that the President has the power to continue hostilities with a foreign nation in contravention of the War Powers Resolution of 1973,³⁸ even if Congress were to pass a bill curtailing that mission.³⁹ The fact that John Yoo is applauding this assertion of presidential power should give pause to those who believe that the threat to the rule of law ended with the election of President Obama. Yoo argues persuasively that the administration has implicitly adopted his view of the President's constitutional powers;⁴⁰ this President, or his successor, might as easily adopt Paulsen's.

Accordingly, it is now incumbent upon legal historians to return to the argument made by Paulsen, Gross, and others who claim that a constitutional order logically entails a doctrine of necessity that trumps citizens' constitutional rights. That this task should be entrusted to legal historians is supported by Saikrishna Prakash's excellent analysis of Paulsen's article.⁴¹ Prakash reasons as follows:

Paulsen regards it as obvious that any constitution without a rule of necessity is deeply flawed. . . .

. . . [But] constitutional framers might value other things . . . more than the durability of the constitution and the nation. In particular, constitutional framers might not wish to frame a constitution that permits the expedient sacrifice of such principles, even temporarily. Moreover, constitution-makers might believe that officials will violate the constitution on grounds of necessity anyway, and that we ought not to multiply those violations by explicitly sanctioning what otherwise might occur once in a blue moon.⁴²

The possibility that the Framers valued the rule of law more than anything else should be taken seriously, as they risked being attainted and executed as traitors—largely due to their belief that Parliament was violating their

35. Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 9, 2011, at 1.

36. Alford, *supra* note 7, at 1210–17.

37. Charlie Savage, *Clock Ticking on War Powers Resolution*, THE CAUCUS: THE POLITICS AND GOV'T BLOG OF THE TIMES (Apr. 1, 2011, 6:21 PM), <http://thecaucus.blogs.nytimes.com/2011/04/01/clock-ticking-on-war-powers-resolution/>.

38. War Powers Resolution of 1973, 50 U.S.C. §§ 1541–1548 (2011).

39. Savage, *supra* note 37.

40. John Yoo, *Antiwar Senator, War-Powers President*, WALL ST. J., Mar. 25, 2011, at A17.

41. Saikrishna Prakash, *The Constitution as Suicide Pact*, 79 NOTRE DAME L. REV. 1299, 1300 (2004).

42. *Id.*

constitutional rights as freeborn Englishmen.⁴³ Moreover, Prakash correctly notes that this is not merely a question of what any individual founding father might have believed; it is a question about the range of opinions upon which they might have drawn, such that they could be considered to have left a monumentally important question of executive power implicit in a constitutional text that is otherwise explicit and restrictive in its treatment of delegated powers:

Paulsen's claim ultimately rests on the historical understanding of executive power

. . . I know of no history suggesting that the executive branch . . . w[as] given the constitutional power to suspend [its] constitutions in times of crisis. English history, at least, suggests that chief executives enjoyed no such power.⁴⁴

As this Article will establish, this is indeed a correct assessment of English law. However, the Framers were well-read and drew upon many other sources.⁴⁵ As Gross noted, “[I]ssues . . . such as how a constitutional regime should respond to violent challenges . . . [are] as ancient as the Roman Republic,”⁴⁶ something which no doubt led him to consider the enduring appeal of “[m]axims such as . . . *salus populi suprema lex est*.”⁴⁷ Accordingly, to rebut Paulsen's historical oversights more adequately, one should first consider in detail Prakash's claim that “no . . . executive branch [in a constitutional government] w[as] given the constitutional power” to dispense with the laws in order to protect the public welfare.⁴⁸ As will be demonstrated below, he is correct; from the time of the Roman Republic to the time of the Framing, no government that can be considered constitutional (including the Roman Principate, the Dominate, the Byzantine Empire, and medieval constitutionalist monarchies) has ever embraced a theory of a meta-constitutional principle which claims that because *salus populi suprema lex est* the executive has the power to dispense with fundamental rights in a crisis.

43. JOHN PHILLIP REID, *THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION* 14–17 (1988).

44. Prakash, *supra* note 41, at 1301–02.

45. PAMPHLETS OF THE AMERICAN REVOLUTION 1750–1776, at 28–29 (Bernard Bailyn ed., 1965) (“What brought these disparate strands of [intellectual influences] together, what dominated the colonists' miscellaneous learning and shaped it into a coherent whole, was the influence of . . . [a] tradition [which] lay in the radical social and political thought of the English Civil War and of the Commonwealth period The colonists identified themselves with these *seventeenth-century* heroes of liberty.”) (emphasis added).

46. Gross, *supra* note 16, at 1014.

47. *Id.* at 1042 (internal quotations omitted).

48. Prakash, *supra* note 41, at 1301–02.

B. *The Article's Use of Legal History to Rebut this Argument About Necessity*

To demonstrate that none of the constitutional regimes that might have served as a precedent for the Framers embraced unbounded executive power to defend the *salus populi* as detailed above, this Article will first address the origins of this maxim and its implicit acceptance of the limits of executive power, as embodied by the prevailing constitutional norms of Roman law, which later served as the foundations upon which all conceptions of monarchic and presidential power in western law ultimately rest.⁴⁹ It will be demonstrated that significant constitutional restrictions persisted during the imperial periods, which are codified in the *Corpus Iuris Civilis* and which defined the theory and limits of the Byzantine emperors' powers.⁵⁰

This Article will then detail how the theories of imperial power found in the *Corpus* were elaborated upon by late medieval jurists. Building upon Roman jurisprudence, these theorists carefully delimited the powers of the Pope and Holy Roman Emperor (and later, kings) to prevent them from dispensing with the emerging norms of judicial process in emergencies. This theory of limitations on regal power, which is called medieval constitutionalism,⁵¹ had a formative influence on the common law, as can be seen in the discussion of the works of Henry of Bracton and Sir John Fortescue.

This Article will then discuss the emergence of a theory of undivided and unlimited sovereignty possessed by kings, which is first found in the work of the French theorist Jean Bodin, whose revolutionary views supported an absolutist French monarchy that abandoned constitutional limits during the French Wars of Religion. In England, Bodin's theories would influence James I, Sir Francis Bacon, and Thomas Hobbes. However, as will be detailed below, these ideas and the theory of emergency executive powers to defend the welfare of the people were rejected and anathemized within Anglo-American constitutional theory during the late seventeenth century.

Even treatises that include a reference to the maxim *salus populi suprema lex est* demonstrate this rejection of broad emergency powers to ignore the constitution when defending the state. While Sir Francis Bacon attempted to advocate for this theory of the defense of the *salus populi*, and despite his maxims becoming a seminal early source of common law principles, his views were rejected in every later collection of maxims, including those that influenced the Framers.

49. HAROLD J. BERMAN, LAW AND REVOLUTION 204 (1983).

50. BRIAN Z. TAMANAHA, ON THE RULE OF LAW 13 (2004).

51. See CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 14–17 (1947).

Lastly, it will be demonstrated that John Locke's comments on the *salus populi* do not provide any basis to assume that the Framers could have relied upon his views in creating an implied executive power to ignore the constitution when protecting the public welfare. Rather they would have read him as presenting a diametrically opposite view to Hobbes's ideas about sovereignty, which were universally unpopular among the founders' generation. When confronted with the choice of sovereigntist or constitutionalist theory, the Framers clearly chose the latter. Their heroes were Locke, Lord Coke, and Sir Matthew Hale, and the villains of their historical narrative were Hobbes, James I, and the English politicians who had later adopted a theory of an omnipotent parliament.

The Framers drew upon a diverse set of intellectual influences. Foremost among these were the works of enlightenment philosophers such as Locke, the common law, the writings of the constitutionalist heroes in the struggle against Stuart absolutism, and classical sources. None of these influences would have led them to adopt the theory of executive powers to defend the public welfare that Paulsen and others believe is implicit within the Constitution of the United States. It will be evident at the conclusion of this Article that there is no basis to think that the Framers, had they adopted a point of view on executive power that entailed a rejection of all their key intellectual influences, would have left such a rejection only implicitly in the text of the Constitution.

II. CICERO ON SALUS POPULI AND HIS ROMAN CONSTITUTIONAL CONTEXT

Since the maxim *salus populi suprema lex est* is thought to have been coined by Marcus Tullius Cicero,⁵² the first task is to understand the meaning it was given in *De Legibus*, which is not a description of the legal order of the late republic, but rather a proposal for its reform.⁵³ To appreciate the nature of Cicero's appeal to the idea of public safety, one must put in context his proposals for constitutional change. By first detailing the existing Roman constitution and earlier hostility to Cicero's ideas about how it included a metaprinciple of self-preservation by the executive, it will be possible to explain more adequately what Cicero meant to say later in *The Laws* and why he abandoned his attempts to argue for extraordinary executive powers.

As will be established in this Part, when Cicero wrote *The Laws*, the Consuls did not possess a constitutional privilege to act outside of the laws to safeguard the security of the state, even when the Senate granted them emergency powers to deal with serious civil strife. While Cicero had earlier been a vocal supporter of the proposition that the constitution did grant the

52. JON R. STONE, *THE ROUTLEDGE DICTIONARY OF LATIN QUOTATIONS* 202 (2005).

53. ANTHONY EVERITT, *CICERO: THE LIFE AND TIMES OF ROME'S GREATEST POLITICIAN* 179–80 (2003).

Consuls (via the Senate) these sorts of powers in emergencies,⁵⁴ by this time his argument had been decisively rejected.⁵⁵ Accordingly, by the time that he composed *The Laws*, he was aware that this would not have been a viable position, and he did not advocate its adoption.⁵⁶

Detailed attention to Cicero's arguments in the trials of Gaius Rabirius, Publius Cornelius Lentulus, and those made in his own defense reveal the limited scope of late republican emergency executive. Cicero was foremost a rhetorician and an advocate.⁵⁷ However, he had sought not only to defend his clients, but also to urge a program of law reform that included a substantial expansion of emergency powers.⁵⁸ Had this been accepted, late republican Rome would have had a constitution of the type that Paulsen and the others cited above would clearly approve, as the Consuls would have the same implicit powers they believe the President has under the Constitution of the United States. Cicero's arguments, however, were rejected so forcefully that in his later efforts at comprehensive law reform, he abandoned this goal.⁵⁹ One must first understand the limited scope of his later proposals before attempting to discern the precise meaning of his most quoted phrase.

A. *The Origin of the Maxim in De Legibus*

Cicero wrote *The Laws* between 51 and 46 B.C.⁶⁰ In Book Three, he makes what he clearly considered plausible proposals for reform, which were not radical, but merely "a revived version of the Roman Constitution described in the *Republic*."⁶¹ Nevertheless, some of his proposals are novel, most

54. OREN GROSS AND FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE 148 (2006).

55. *See infra* Part II.B.

56. Much of Roman law has been misinterpreted because modern legal commentators fail to note that the sources that many earlier writers have relied upon are extremely partial. Cicero himself is the epitome of a partial source, and many generations of students who have been exposed to Cicero because of his excellent prose have failed to note that his biases color his interpretation of the Roman constitution. For instance, many commentators have concluded that the maxim *inter arma silent leges* (during a time of war, the laws are mute) is an accurate description of Roman law, on the basis of Cicero's speech for the defense of Titus Annius Milo (*Pro Milone*), which was widely disseminated, ignoring the historical account of the verdict, which was not. That is most unfortunate, since Cicero's argument that Milo's killing of Publius Clodius Pulcher was not a crime was rejected by the court, which levied on the defendant a sentence of internal exile, the highest punishment available at the time. This is only one example of misinterpretation among many.

57. RANDALL LESAFFER, EUROPEAN LEGAL HISTORY 90–91 (2009).

58. *See infra* Part II.B.

59. *See infra* Part II.B.

60. CICERO, THE REPUBLIC AND THE LAWS, at xxiii (Niall Rudd trans., Oxford Univ. Press 1998) (51–46 B.C.E.).

61. *Id.* at xxv.

pertinently his idea that the Senate should have greater powers in emergencies.⁶² However, close attention to the passage where the maxim is coined reveals that by 51 B.C., Cicero was no longer advocating for an extraordinary executive power to protect the public welfare.

First, one should note that “the welfare of the people is the supreme law” is not an accurate translation of the relevant Latin phrase, which is “*ollis salus populi suprema lex esto*,” and not “*salus populi suprema lex est*,” (as Gross and others render it).⁶³ This paraphrase omits any reference to the vital pronoun *ollis*, which precedes the phrase and to some degree explains it, along with the hortatory element of future imperative tense. A better translation, then, is as follows: to him (the Consul) the welfare of the people shall be the highest principle. Recognizing that this maxim functioned as an exhortation to the Consuls is of particular importance to our understanding of its correct meaning; examining Cicero’s particular purposes in making the proposals found in *The Laws* is vital. That said, even at this stage one can already see that the maxim is not evidence of a principle of constitutional interpretation, since it is directed solely at the Consuls.

This phrase is found in Cicero’s discussion of powers of the Senate, shortly before he lays out his proposal for its new emergency powers.⁶⁴ It is not the Senate that is to be guided by this maxim, but rather the Consuls, who are to be wholly subordinate to that legislative body.⁶⁵ It is for this reason that commentators normally view the function of the maxim in this section as largely rhetorical, as Keyes notes: “The only other possible interpretation—one which has been universally rejected as unthinkable—seems to be the literal one that Cicero actually intended to place the consuls above the law.”⁶⁶

Dyck suggests that this misinterpretation only appears plausible because of the “tendency to take *lex* in this sentence too literally; the *suprema lex* is surely ‘the supreme principle’ for their conduct of office.”⁶⁷ He advances other textual evidence for this view, arguing that the phrase is merely a paraphrase of a statement of the Consuls’ duties: *animum . . . saluti populi consulentem*.⁶⁸ On this view, Cicero is admonishing the Consuls to consider the welfare of the people and not their own interests when performing their duties. Had he believed that their will was law when they perceived a danger to the public, the

62. *Id.*

63. Gross, *supra* note 16, at 1042.

64. ANDREW R. DYCK, A COMMENTARY ON CICERO, DE LEGIBUS 459 (2004).

65. We must leave aside for the moment the question of whether the Roman Senate can be properly said to have the powers and status of the legislature during the late Republic, or whether it had usurped this role from the Tribal Assembly.

66. C.W. Keyes, *Original Elements in Cicero’s Ideal Constitution*, 41 AM. J. PHILOLOGY 309, 317 (1920).

67. DYCK, *supra* note 64, at 459.

68. *Id.*

sections that follow this conclusion would be extraneous. This is not plausible, considering the fact that, following the maxim, there are other proposals that were of the highest importance to Cicero,⁶⁹ given his personal stake in debates related to emergency powers.

In the section of *The Laws* that follows directly after his use of the maxim, Cicero describes his proposed procedure for the appointment of a dictator, who is to be appointed by the Senate.⁷⁰ Interestingly, his proposal departs from previous precedents, where the Consuls appointed the dictator;⁷¹ this would have denied the executive one of its traditional emergency powers, by instead remitting these to the legislature. Crucially, Cicero also takes pains to communicate that the dictator does not have arbitrary authority, by specifying that the dictator would have only the powers of the Consuls.⁷² “Cicero is careful to define the power accruing to the . . . dictator . . . with reference to the regular ones [the ordinary magistrates].”⁷³

Cicero limits the Consuls’ powers to those defined by the constitution, since it is a fundamental principle for him that “the magistrate’s function is to take charge and to issue directives which are right, beneficial, and in accordance with the laws. As magistrates are subject to the laws, the people are subject to the magistrates.”⁷⁴ Dyck, who is properly attentive to Cicero’s philosophical training and his key influences, traces this view directly to Plato’s *Laws*.⁷⁵ There, the Greek philosopher wrote that “the ministration of the laws must be assigned . . . to that man who is most obedient to the laws . . . [W]herever the law is lord over the magistrates, and the magistrates are servants to the law, there I descry salvation and all the blessings that the gods bestow on States.”⁷⁶

Cicero’s close attention to (and reverence of) Plato’s *Laws* also makes it clear that the meaning of the maxim is found in its function as an imprecation to the Consuls. In Plato’s work, the Athenian (who stands in for the author and states his views) describes what it is that gives a law its status:

[W]e deny that laws are true laws unless they are enacted in the interest of the common weal of the whole State. But where the laws are enacted in the

69. *Id.* at 427–28.

70. *Id.* at 15.

71. *Id.* at 461.

72. The benefit of a dictator stems from the fact that his executive acts cannot be vetoed by the other Consul.

73. DYCK, *supra* note 64, at 462.

74. CICERO, *supra* note 60, at 150.

75. DYCK, *supra* note 64, at 432.

76. PLATO, *LAWS* bk. IV, at 291–92 (R.G. Bury trans., Harvard Univ. Press 1961).

interest of a section, we call them “feudalities” rather than “polities”; and the “justice” they ascribe to such laws is, we say, an empty name.⁷⁷

Accordingly, whenever one finds references to the welfare of the people in Cicero, one should bear in mind that his primary concern was always the unity of the orders that comprise the state,⁷⁸ and understand that one must read in the word “entire” before people. This clarifies that the original purpose of the maxim was to express the hope that the Consuls would not use their office to advance their own selfish interests, or those of their own class exclusively. The contrary interpretation—that it grants emergency powers when the state is in danger—has no evidence, and is for this reason, as Keyes noted, “universally rejected as unthinkable.”⁷⁹

B. *Cicero and Emergency Powers in the Late Republic*

It is clear from a careful reading of *The Laws* that Cicero conceded that there should be no implicit constitutional power for the executive to ignore the laws when the state was in danger, and that the dictator, while unchecked by an executive veto, was equally bound by the laws. Unfortunately, this does not resolve the question of whether this power existed at any point during the late Roman Republic. While Cicero’s writings do not provide definitive proof on this question, evidence related to his political and legal career are quite probative. One should begin with a consideration of a dictator’s powers under the late republican constitution. This is because although the constitutional provisions for the appointment of such a person existed, they are often wrongly considered proof that this official would also have the power to operate without the constraints of the laws. To that end, the discussion must turn to an analysis of the procedures that were developed for dealing with public emergencies during this period.

1. The Scope of Dictatorial and Consular Powers During Public Emergencies

By the time of Cicero’s birth, the procedure for the appointment of a dictator had fallen into desuetude, having not been invoked since the end of the Punic Wars.⁸⁰ (This included the emergency precipitated by Hannibal’s surprise attack on Rome.⁸¹) However, in 82 B.C., Lucius Cornelius Sulla was appointed a dictator of an entirely new type, and given broad and

77. *Id.* at 291.

78. CICERO, *supra* note 60, at xv.

79. Keyes, *supra* note 66, at 317.

80. DAVID M. GWYNN, *THE ROMAN REPUBLIC* (2012).

81. Strictly speaking, in the time of Hannibal the Romans appointed a pro-Dictator (Quintus Fabius Maximus) to respond to the invasion of Italy. THEODORE A. DODGE, *HANNIBAL* 314 (1891).

unprecedented powers.⁸² In the wake of a civil war between the populist party of Gaius Marius and the Roman oligarchy, the Senate appointed Sulla a “[d]ictator for making laws and settling the constitution.”⁸³ After using these unprecedented powers to ruthlessly suppress all opposition, Sulla set up a new constitutional order, which survived until the end of the Roman Republic.⁸⁴

This new regime did not include any procedure for the appointment of dictators, and accordingly none were appointed until Caesar was given a similarly large mandate “to set the State in order,”⁸⁵ something which was done “[d]espite odious memories of Sulla”⁸⁶ and which was—to say the least—constitutionally problematic. Accordingly, at the time that Cicero was writing, it is unclear whether or not a procedure for the appointment of a dictator existed at all. Instead, during the period between Sulla and Caesar’s reforms, the procedure for dealing with emergencies was known as the *senatus consultum ultimum*.⁸⁷ This is “[a] declaration of emergency by the Senate, which was generally supposed to authorize the magistrates [Consuls] to use any means against the public enemies; the right of appeal was temporarily suspended.”⁸⁸

This definition is largely correct, but must be limited to what it actually states, not what it might be thought to imply. The declaration did authorize the Consuls to take emergency measures against public enemies, and the right to appeal was suspended (something which was eminently reasonable, since appeal involved the massing of the *comitia centuriata*, which consisted of all citizens⁸⁹), but the view that this authorized any and all methods of dealing with disorder is incorrect. It is obvious that the right to appeal would not need to be abolished if suspects did not have the right to a trial after being captured.

Closer inspection of the trials related to abuses of emergency powers reveals that there were two laws that guaranteed a Roman citizen’s right to a trial that could not be overridden by a senatorial decree.⁹⁰ This conclusion seems to follow naturally, since these laws had been passed by the Tribal Assembly they could not be overridden by *senatus consulta*, which could not

82. GWYNN, *supra* note 80, at 101, 104.

83. THOMAS M. TAYLOR, A CONSTITUTIONAL AND POLITICAL HISTORY OF ROME 294 (Gaunt, Inc. reprint 1997).

84. ARTHUR KEAVENEY, SULLA: THE LAST REPUBLICAN 214–23 (1982).

85. RONALD SYME, THE ROMAN REVOLUTION 52 (1967).

86. *Id.*

87. Bula Melissa Gardner, Development of the Senatus Consultum Ultimum 33–56 (1929) (unpublished M.A. thesis, University of Wisconsin) (on file with University of Wisconsin-Madison Libraries).

88. R.E. SMITH, THE FAILURE OF THE ROMAN REPUBLIC 85 n.1 (1955).

89. This was accomplished by the interdiction of fire and water outside of a specified location for internal exile, namely an island or some far-flung province.

90. *See infra* Part II.B.3.

override a law.⁹¹ After these state trials, it was reasserted over the objections of Cicero and the *optimates* that the Senate could not abolish the right to trial by passing a *consultum ultimum*.⁹² This undoubtedly led Cicero to abandon his drive for stronger emergency powers, as evidenced by his more modest proposals in *The Laws*.⁹³

2. The Trial of Rabirius Reveals the Scope of Roman Emergency Powers

One of the most sensational trials in Roman history—involving both Cicero and Julius Caesar—was the case brought against the Senator Gaius Rabirius for personally murdering Lucius Appuleius Saturninus in 100 B.C.⁹⁴ Since the killing occurred during a state of emergency declared with a *senatus consultum ultimum*,⁹⁵ this trial sheds considerable light on the late republican constitution. The verdict contradicts the unfortunate modern misinterpretation of *salus populi supreme lex est*—that a threat to the state would allow the executive to take any action necessary to protect the existing constitutional order.

In fact, the trial demonstrates that such a broad principle was not part of the republican constitution as eminent classicists have concluded:

[N]either in theory nor in fact did it [the *consultum ultimum*] add to the legal powers which they [the Consuls] already had. It conferred on them no new authority nor did it even purport to remove any of the restrictions which were imposed by statute on the use of their *imperium* [i.e., power to punish according to law].⁹⁶

The facts underlying the trial are as follows. Saturninus, a tribune of the plebeians, was declared an enemy of the people by the Senate.⁹⁷ After Saturninus fled to the Capitol, Marius captured Saturninus and imprisoned him in the Senate house.⁹⁸ Marius had intended to put him on trial, but the more oligarchic members of his forces instead climbed onto the roof of the *Curia Hostilia*, pried off its roof tiles, and used them to stone Saturninus and the other prisoners;⁹⁹ witnesses would later testify that Rabirius had thrown the

91. See ROBERT C. BYRD, THE SENATE OF THE ROMAN REPUBLIC: ADDRESSES ON THE HISTORY OF ROMAN CONSTITUTIONALISM, S. DOC. NO. 103–23, at 181 (2d Sess. 1995).

92. See *infra* Part II.B.3.

93. CICERO, *supra* note 66, at 323.

94. JOHN WILLIAMS, THE LIFE OF JULIUS CAESAR 67 (1854).

95. Gardner, *supra* note 87, at 50–54.

96. TH. N. MITCHELL, *Cicero and the Senatus Consultum Ultimum*, 20 HISTORIA: ZEITSCHRIFT FÜR ALTE GESCHICHTE 47, 49 (1971).

97. *Id.* at 52.

98. *Id.*

99. EVERITT, *supra* note 53, at 19.

fatal tile and that he had carried Saturninus's head around with him afterwards.¹⁰⁰

Thirty-seven years had passed since the murder and the defendant had prospered within the Roman oligarchy, attaining senatorial rank and great wealth.¹⁰¹ Caesar wanted to shame the oligarchic party for failing to prosecute an obvious and scandalous crime.¹⁰² Accordingly, Rabirius was not charged merely with assassination (*sicariis*), or high treason (*perduello*), but with scandalous immorality.¹⁰³ "It was calculated to rally the popular party round the '*unicum libertatis praesidium*' [the defense of the unparalleled palladium of Roman liberties] . . . it sounded a significant note of warning, clearly not lost upon Cicero, against careless application of martial law by senate or consuls, or failure to punish regrettable or illegal incidents."¹⁰⁴

Rabirius was convicted at trial, but rather than exiling himself to avoid execution,¹⁰⁵ he exercised his right of *provocatio*, that is, the right to appeal to the people of Rome through the assembly known as the *comitia centuriata*.¹⁰⁶ Cicero decided to use his defense of Rabirius at this appeal *de novo* to argue for a broad reading of the extraordinary powers granted by the *consultum ultimum*.¹⁰⁷ In an audacious attempt to rewrite the constitution of the republic, Cicero argued that the *consultum* gave anyone enforcing it the power to kill a prisoner without trial:

If you admit that Rabirius had the right to take up arms, you must admit that he had the right to kill Saturninus If Rabirius has committed a capital crime in taking up arms against Saturninus, what is to be said of all those noble patriots who did the same . . . ? There is not a loyal citizen in Rome to-day, who is not in the name of Rabirius the subject of a capital charge.¹⁰⁸

The argument was clearly unavailing and numerous classicists have averred that Rabirius was about to be convicted by the *comitia centuriata*.¹⁰⁹ Cassius Dio concluded that "Rabirius would certainly have been condemned but for the intervention of [the Praetor Quintus Caecilius] Metellus [Celer]."¹¹⁰ Metellus

100. *Id.*

101. MARCUS TULLIUS CICERO, PRO RABIRIO POSTUMO 18–19 (Mary Siani-Davies trans., Oxford Univ. Press 2001). Gaius Rabirius's wealth is evident from the fact that he is the adoptive father of Gaius Rabirius Postumo, whose wealth was legendary. *Id.*

102. ERNEST GEORGE HARDY, SOME PROBLEMS IN ROMAN HISTORY 109 (1924).

103. *Id.* at 118.

104. *Id.* at 109–10.

105. A right created by the *lex Porcia* of 195 B.C.

106. Established by the *lex Valeria* of 299 B.C.

107. HARDY, *supra* note 102, at 108.

108. *Id.* (quoting Cicero's speech, *Pro Rabirio*).

109. See, e.g., HARDY, *supra* note 102, at 121; Evan T. Sage, *The Senatus Consultum Ultimum*, 13 CLASSICAL WEEKLY 185, 187 (1920).

110. HARDY, *supra* note 102, at 124.

hauled down the red flag flying over the guard-post on the Janiculum hill, which by custom required the *comitia* to disperse and for the dismissal with prejudice of all pending cases.¹¹¹ As Sage notes, “By this ruse Rabirius escaped conviction.”¹¹² This seems to be clear evidence that the argument that an emergency decree allowed Consuls to execute rebels without trial was considered extraconstitutional and unacceptable.

3. The Constitutional Background to Cicero’s Failed Attempt at Legal Reform

To understand why Cicero’s argument was unacceptable to the Romans, one must explore the state of civil liberties and due process in the late republican period and how it created a palladium of liberties that were held in high esteem by the populace. Owing to periods of struggle between the various social classes, members of Rome’s lower orders had demanded a manifold of procedural safeguards.¹¹³

These laws included the *lex Valeria*, which required granting an appeal to the people after any conviction on a capital charge.¹¹⁴ One of these laws effectively converted death sentences into internal exile, since it allowed the defendant to flee before sentence would be passed.¹¹⁵ The *leges Porciae* explicitly provided for the trial and punishment of magistrates who attempted to circumvent the Valerian laws,¹¹⁶ and the *lex Sempronia ne quis iudicio circumveniat* forbade the creation of special courts or judicial commissions, even during periods of turmoil or after emergency decrees were passed.¹¹⁷ These laws were so prized that their violation was thought to be not only wrong, but also sacrilegious.¹¹⁸ This is evident from the fact that Caesar was able to revive a special procedure involving *duumviri perduellionis* for the prosecution of Rabirius, which was justified by reference to the fact that the murder was so scandalous that it angered the gods.¹¹⁹

111. *Id.* at 123. The lowering of the flag dispersed the assembly since it had once indicated that an attack from the Etruscans (who had ceased to become an adversary long ago after their complete assimilation into the republic) was imminent.

112. Sage, *supra* note 109, at 187.

113. DENTON J. SNIDER, EUROPEAN HISTORY: CHIEFLY ANCIENT IN ITS PROCESSES 461 (1908).

114. GEORGE MOUSOURAKIS, A LEGAL HISTORY OF ROME 209 n.48 (2007).

115. GORDON P. KELLY, A HISTORY OF EXILE IN THE ROMAN REPUBLIC 20–28 (2006).

116. MOUSOURAKIS, *supra* note 114, at 209 n.48.

117. N. J. Miners, *The Lex Sempronia Ne Quis Iudicio Circumveniat*, 8 CLASSICAL Q. 241, 241 (1958) (citing THEODOR MOMMSEN, HISTORY OF ROME 355 (Dickson trans., 1894)).

118. ANDREW LINTOTT, THE CONSTITUTION OF THE ROMAN REPUBLIC 150–51 (1999).

119. See EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 50 (W. D. Halls trans., 1984).

There is no inherent tension between the principles of due process embodied in these laws and the *consulta ultimum* when the powers these decrees granted to the Consuls are properly understood. The law that allowed for these emergency measures to be passed by the Senate was understood to authorize only action “in strict conformity . . . [to what had been done by Lucius] Opimius,”¹²⁰ who had led the forces of order in the wake of the death of the populist Gaius Gracchus.¹²¹ It had been held that “Opimius did not violate the *lex Sempronia* when he killed Gracchus *iniussu populi* [without the command of the people speaking the *comitia centuriata*], because the latter was . . . an open enemy under arms.”¹²² Accordingly, as Hardy noted:

If, therefore, there was a state of war in the city, and riotous citizens with arms in their hands threatened the safety of the state, the senate was justified in passing its decree The consuls were then justified in “calling the people to arms”, putting themselves at its head, and carrying into effect the state of war. It followed that all riotous citizens who were killed by members of this armed force acting under the consuls’ order, lost their lives as overt enemies of the state—*perduelles* [traitors]—so that neither the Sempronian law requiring trial by the people, nor the Porcian law requiring appeal, was applicable to the case.¹²³

Hardy argues that this was the common understanding of the scope of the powers conferred by the *consulta*.¹²⁴ The popular rejection of Cicero’s theory at the conclusion of Rabirius’s trial—that the decree authorized any action in defense of the state—reveals that a *consultum* did not allow every constitutional provision to be broken in defense of the state, and also reveals the limitations of the precedent set by the approval of Opimius’s acts. One must note that “Saturninus on surrendering and being made prisoner had ceased to be an open *perduellis* in arms against the State, whose safety demanded his instant death,” and that accordingly Rabirius had been found guilty for murdering him.¹²⁵ This was only possible if the Roman people understood that the Senate’s decree did not absolve anyone acting pursuant to its authorization to break the law, but only to kill rebels “with arms in their hands” in open battle.¹²⁶ As the next subsection will demonstrate, even Cicero needed to accept that this was the correct interpretation later that year when the Senate called upon him personally to take the field against rebels, pursuant to a *consultum ultimum*.

120. HARDY, *supra* note 102, at 102.

121. ERIK HILDINGER, *SWORDS AGAINST THE SENATE* 52–57 (2002).

122. E. G. Hardy, *The Catilinarian Conspiracy in its Context: A Re-Study of the Evidence*, 7 J. ROMAN STUD. 153, 212 (1917).

123. HARDY, *supra* note 102, at 102–03.

124. *Id.* at 103.

125. *Id.* at 107.

126. *Id.* at 103.

4. The Catilinarian Conspiracy Reveals a *Consultum Ultimum*'s Limitations

In 63 B.C., another populist conspiracy to overthrow the republic was alleged.¹²⁷ Catiline was said to have been plotting along with a rebel army in Etruria to seize the city.¹²⁸ Cicero, by then Consul, denounced Catiline in a series of famous orations even before hard evidence came into his hands.¹²⁹ In these blistering speeches, he “constantly reiterate[ed]” that “Catiline and his associates were *hostes* [enemies of the state].”¹³⁰ Cicero obtained what appeared to be solid proof of the conspiracy from Fabius Sanga.¹³¹ Subsequently, Catiline’s second-in-command, the *praetor* Publius Cornelius Lentulus and his associates were seized by Cicero’s men.¹³² By this point Cicero had secured the *consultum ultimum* from the Senate, which authorized him to use lethal force against armed enemies.¹³³

Following the precedent set in Rabirius’s trial, Cicero should have turned Lentulus over to the magistrates. After a verdict, Lentulus would have had the right to choose either exile or appeal that sentence to the people. If Cicero really believed that this was not the correct interpretation of the law, he could have followed Rabirius’s example and simply killed his prisoners. Realizing that this second choice was too dangerous, Cicero instead attempted to expand the powers granted under the emergency decree to abrogate the procedural protections of the Porcian and Valerian laws, but in a novel way. His solution was to put the question to the Senate, which he argued was a duly empowered court of justice.¹³⁴

Cicero suggested that the Senate had a right to convict and sentence Lentulus and his associates rather than to execute them pursuant to his own consular power after the decree, despite the urgings of other members of the oligarchic party.¹³⁵ He “asserted that all the *leges de provocatione* [the Porcian

127. See LESTER HUTCHINSON, *THE CONSPIRACY OF CATILINE* 9 (1966).

128. *Id.* at 44.

129. *THE ORATIONS OF MARCUS TULLIUS CICERO* (C. D. Yonge trans., George Bell & Sons 1879).

130. George Willis Botsford, *On the Legality of the Trial and Condemnation of the Catilinarian Conspirators*, 6 *CLASSICAL WEEKLY* 130, 131 (1913).

131. Elizabeth Deniaux, *Patronage, the Exchange of Favors, and Social Harmony*, in *A COMPANION TO THE ROMAN REPUBLIC* 401, 411 (Nathan Rosenstein & Robert Morstein-Marx eds., 2010).

132. *A CHRONOLOGY OF THE ROMAN EMPIRE* 239 (Timothy Venning ed., 2011). *Accord SALLUST, THE CATILINE AND JUGURTHA* 40–41 (Alfred W. Pollard trans., 1882).

133. *VELLEIUS PATERCULUS, THE ROMAN HISTORY* 51–52 & n.105 (J. C. Yardley & Anthony A. Barrett trans., 2011).

134. *4 THE ORATIONS OF MARCUS TULLIUS CICERO* 27 (C. D. Yonge trans., George Bell & Sons 1879).

135. EVERITT, *supra* note 53, at 107–08.

law requiring appeals to the people of capital sentences] were for the protection of the citizens only, and that those who attempted flagrantly to overthrow the republic ceased, by that very act, to be citizens, and were accordingly no longer under the protection of the laws.”¹³⁶ However, Cicero proved “unwilling to take upon himself the responsibility of deciding their [the prisoners’] fate[s], even though backed by the *consultum ultimum*. He has determined that the [S]enate is to be the court for the trial of the case of these conspirators.”¹³⁷ By suggesting the Senate try Lentulus, Cicero was accepting that the conspirators retained the benefit of the laws.¹³⁸ This was tacit acceptance of the holding in Rabirius’s case.

If the people accepted Cicero’s proposition that the Senate was a duly constituted court, it would also protect him from the charge that he was violating the Sempronian law, which “forb[ade] the appointment of extraordinary judicial commissions with power to impose a capital sentence.”¹³⁹ Unfortunately for Cicero, this interpretation of the Sempronian law was untenable, and would be vigorously rejected by Julius Caesar in a speech before the Senate.¹⁴⁰ Hardy highlights Caesar’s “ignoring of Cicero’s precedents [for a trial before the Senate], and the insistence that a *novum exemplum* is involved . . . [and making a] veiled warning [of illegality] contained in the reference to the *lex Porcia*.”¹⁴¹

After Cato the Younger intervened in the debate and bolstered his resolve, Cicero ordered that Lentulus and the other prisoners be strangled in their cells.¹⁴² This reckless action led to serious consequences. The Tribune of the Plebeians moved against Cicero, forbidding Cicero from addressing the people on the grounds “that he had put Roman citizens to death untried.”¹⁴³ Hardy agrees with this conclusion: “It was obviously no adequate defence to say that the senate had passed its last decree [*consultum ultimum*]. . . . That in itself was neither an order nor even a permission to break a fundamental law.”¹⁴⁴ This also follows from Rabirius’s trial.

Later, Publius Clodius Pulcher responded to this extrajudicial execution by introducing a plebiscite to the Plebian Council, which subsequently became a

136. Botsford, *supra* note 130, at 131.

137. *Id.*

138. *Id.* (“Cicero accordingly applies the term *iudicare* to the action of the [S]enate”).

139. Miners, *supra* note 117, at 241; *see also* HARDY, *supra* note 102, at 211–12.

140. SALLUST, CONSPIRACY OF CATILINE AND THE JURGURTHINE WAR 50 (John Selby Watson trans., Aeterna 2011).

141. HARDY, *supra* note 102, at 214.

142. *Id.* at 217–18.

143. Botsford, *supra* note 130, at 131.

144. HARDY, *supra* note 102, at 219.

law.¹⁴⁵ The *lex Clodia de civibus romanis interemptis* authorized prosecutions of any official who executed a Roman citizen without trial.¹⁴⁶ Cicero believed that it was directed at him personally, so he went into voluntary exile before he could be charged.¹⁴⁷ As Botsford notes, there was nothing novel about this law, it was simply a recognition that the fundamental laws were not suspended by the *consultum ultimum*: “Notwithstanding Cicero’s repeated denunciations of the unconstitutionality of the latter act [the Clodian law], the tribunician assembly, in passing it, kept itself strictly within the limits of precedent.”¹⁴⁸

Cicero never really recovered from the stain of these executions.¹⁴⁹ Instead, he retreated into literary affairs, writing his best-known works.¹⁵⁰ As described in subsection one above, in *The Laws*, one can see that he decisively rejected the position of the extremists within the oligarchic party that the *salus populi* allowed the Consuls to execute citizens without trial or appeal, even after a declaration of a public emergency. Additionally, these arguments were decisively rejected by the people of Rome when they prepared to sentence Rabirius and when they passed the Clodian law. Accordingly, one can conclude that there is simply no support for the proposition that the republican constitution contained a meta-principle that empowered the executive branch to ignore the principles of due process when defending the welfare of the people.

III. THE IMPERIAL CONSTITUTION AND MEDIEVAL RULE OF LAW

One might argue that the real legacy of the Roman law stems not from the comparatively brief Late Republican Period but rather from the Imperial Period, which was not only considerably longer but gave birth to the legal codes that would have the greatest influence on the formation of the Western legal tradition—in particular the *Corpus Iuris Civilis*.¹⁵¹ Such an observer might also argue that even if the maxim of *salus populi suprema lex est* was not embedded into the republican constitution, it may have been a part of the imperial constitution, as the emperor must have had the power to act whenever he thought it was necessary to preserve the public welfare. As will be shown below, this supposition has no support.

145. ERICH S. GRUEN, *THE LAST GENERATION OF THE ROMAN REPUBLIC* 244–45 & n.142 (1974).

146. *Id.* at 245.

147. KELLY, *supra* note 115, at 225–28.

148. Botsford, *supra* note 130, at 131–32.

149. *Id.* at 131.

150. EVERITT, *supra* note 53, at 251–54.

151. ELLEN GOODMAN, *THE ORIGINS OF THE WESTERN LEGAL TRADITION* 221–22 (1995); 1–3 *CORPUS IURIS CIVILIS* (Theodor Mommsen & Paul Krueger eds., 1954).

The popular understanding of the power of the emperor is that it was unbounded.¹⁵² This ignores the fact that the Roman citizenry justified their opposition to emperors by arguing that they did not rule in accordance with the laws.¹⁵³ The distinction between a king (or an emperor) and a tyrant was already a popular *topos* in antiquity,¹⁵⁴ and thus it was essential for the imperial constitution to define legal boundaries for the exercise of the emperor's powers. Accordingly, "[t]he emperor was on principle bound by the law," and "[t]his classical law remained in force until A.D. 533,"¹⁵⁵ when the *Digest* became the law of the empire.¹⁵⁶ Paulus is perfectly clear on this point:¹⁵⁷ "*Testamentum, in quo imperator heres scriptus est, inofficiosum argui potest: eum enim qui leges facit pari maiestate legibus obtemperare convenit.*"¹⁵⁸ Ulpian expressed the same opinion.¹⁵⁹

Unfortunately, this understanding has been clouded by the erroneous belief that Ulpian also advanced very strong opinions to the contrary. He has been associated with the opinion that "[t]he emperor is not bound by statutes,"¹⁶⁰ and second, that "[a] decision given by the emperor has the force of a statute."¹⁶¹ This is assumed to be correct since the *Digest* asserts that these were his views. However, to understand imperial constitutional theory correctly, one must pay much closer attention to both the nature of this code and the society that produced it.

152. See, e.g., 1 EDWARD GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE* 423 (Alfred A. Knopf Inc. 1993) (1776) (explaining the immense power that the emperor had over the Roman world).

153. See MICHAEL MAAS, *READINGS IN LATE ANTIQUITY: A SOURCEBOOK* 2, 5–6, 10–11 (Routledge 2d ed. 2010) (showing that although the emperors had great power, many times opposition against them was justified because of the abuse of that power). Accord Benjamin Kelly, *Riot Control and Imperial Ideology in the Roman Empire*, 61 PHOENIX 150, 151, 156, 162, 165 (2007) (showing Roman opposition to the emperor's power and authority).

154. Fritz Schulz, *Bracton on Kingship*, 60 ENG. HIST. REV. 136, 151 (1945).

155. *Id.* at 156.

156. GEORGE MOUSOURAKIS, *THE HISTORICAL AND INSTITUTIONAL CONTEXT OF ROMAN LAW* 385–86 (2003).

157. Julius Paulus Prudentissimus, the last and most authoritative of the Roman jurists.

158. PAULI SENTENTIAE 4.5.3, available at <http://ancientrome.ru/ius/library/paul/paul4.htm>. See also Schulz, *supra* note 154, at 160.

159. 1 *THE DIGEST OF JUSTINIAN* 176 (Alan Watson ed. & trans., Univ. of Pa. Press rev. ed. 1998).

160. *Id.* at 13.

161. *Id.* at 14.

A. *Understanding That the Corpus Iuris Civilis Is Not an Accurate Reflection of Even the Late Imperial Constitution*

The *Digest* was promulgated in 529, more than a century after the fall of the West.¹⁶² It was commissioned by Justinian to serve as the law of the Eastern Roman Empire.¹⁶³ One must also remember that the East had always been culturally different, as it was more influenced by the Hellenistic civilization that it had displaced than by the *mos maiorum* particular to Rome.¹⁶⁴ The code was compiled by Tribonian after centuries of cultural and political divergence from Rome, and it was not an entirely straightforward compilation of traditional Roman legal principles.¹⁶⁵

Fritz Schulz has conclusively demonstrated that the above two statements, attributed to Ulpian in the *Digest*, are not authentic. He noted that during Ulpian's era, the emperors derived their authority from the *lex de imperio Vespasiani*,¹⁶⁶ which, as its name indicates, invests the emperor with the *imperium* of a Roman magistrate.¹⁶⁷ As for the first assertion, that the emperor was not bound by the laws, Schulz demonstrated that Ulpian had actually said only that he was not bound by *one law*—the *caduca ex lege Papia*,¹⁶⁸ which pertained to inheritance rights (the emperor had been given a special dispensation from this law by statute).¹⁶⁹ As for the second statement, that whatever pleased the ruler had the force of law, Schulz presented textual evidence that shows that Ulpian had stated merely that the emperor had a “strictly limited power” to enact certain laws pursuant to the Vespasian imperial law (analogous to the President's power to promulgate executive orders).¹⁷⁰

As the emperor was required to follow the laws, no argument can be made for the proposition that the maxim at issue was any stronger in the empire than in the republic.¹⁷¹ However, the inclusion of these views attributed to Ulpian in

162. Alan Watson, *Preface to the Original Edition of THE DIGEST OF JUSTINIAN*, *supra* note 159.

163. See JAMES ALLAN EVANS, *THE EMPEROR JUSTINIAN AND THE BYZANTINE EMPIRE* 24–25 (2005) (showing that the *Digest* was promulgated to serve as law and subsequently fulfilled this purpose).

164. See Sten Ebbesen, *Greek-Latin Philosophical Interaction*, in *BYZANTINE PHILOSOPHY AND ITS ANCIENT SOURCES* 15, 15–18, 21–22, 25 (Katerina Ierodiakonou ed., Oxford Univ. Press 2002) (showing the Hellenistic influence even when under Roman rule).

165. MOUSOURAKIS, *supra* note 156, at 384, 388–89.

166. Schulz, *supra* note 154, at 154.

167. See P. A. Brunt, *Lex de Imperio Vespasiani*, 67 *J. ROMAN STUD.* 95, 100, 104 (1977) (showing the power and authority conveyed in the *lex de imperio Vespasiani*).

168. Schulz, *supra* note 154, at 158.

169. *Id.* at 156.

170. *Id.* at 154.

171. This Article will not discuss the *interrex's* powers of *justiciam*, since it cannot be said that the *interrex* was an executive *stricto sensu*.

the *Digest* raises the question of whether or not a Byzantine emperor might have had emergency powers to ignore the laws when acting for the public welfare, and if so, whether this constitutional principle was transmitted via the *Corpus* to the jurists of the Middle Ages.

B. The Structure of Byzantine Imperial Power

When Tribonian and his collaborators wrenched these citations out of context, they were attempting to bring the Roman theory of *imperium* (which was a legal construct) together with Hellenistic ideas about the power of the king, namely that he is a law unto himself. These eastern ideas were “[contrary] to the ideas of the Augustan principate,”¹⁷² which also undergirded those of the Dominate, by way of the Vespasian imperial law.¹⁷³ Accordingly, they were “not the Roman constitutional law of the third century . . . [which] was not superseded earlier than Justinian.”¹⁷⁴ These views, promulgated in a more explicit and forceful form in Justinian’s *New Laws*, were the foundation not of the Roman, but rather the *Byzantine* theory of imperial powers, and “[b]y this passage the Hellenistic conception of the emperor as the animated law was handed down to the middle ages.”¹⁷⁵

It is important to note that the Byzantine emperors did not obtain absolute power despite the statements from the novels referenced above, as will be demonstrated here. There was a clear tension in its theory of the emperor’s powers owing to the inclusion of another passage derived from a declaration of Theodosius and Valentinian included in the *Digest*: this law, which is known as *Digna Vox*, would prove to be of singular importance to both Byzantine and medieval conceptions of a ruler’s power, serving as “a touchstone for juristic discussions of the prince’s obligations to respect cause and norms.”¹⁷⁶ It holds that:

For a sovereign to acknowledge himself bound by the laws is a statement befitting the majesty of a ruler, and, therefore, our authority depends upon the authority [of] law. And for a sovereign to submit himself to the laws, is in fact a greater thing than imperial power. And by the announcement of the present edict we show what we do not permit ourselves to do.¹⁷⁷

172. Schulz, *supra* note 154, at 157.

173. Brunt, *supra* note 167, at 101, 105, 107, 109, 113–14 (showing the strengthened power of the emperor through the Vespasian imperial law).

174. Schulz, *supra* note 154, at 158.

175. *Id.* at 160.

176. KENNETH PENNINGTON, *THE PRINCE AND THE LAW, 1200–1600*, at 63 (1993).

177. ANNOTATED JUSTINIAN CODE 1.14.4 (Timothy Kearley ed., Fred H. Blume trans., 2008), available at http://www.uwo.edu/lawlib/blume-justinian/_files/docs/code-revisions/book1rev-copy/book%201-14rev.pdf.

Here, it is evident that even an emperor who derives some of his legitimacy from Hellenistic ideas about kingship must be aware that he still cannot govern in the manner of a tyrant. However, given that an emperor, unlike a consul, cannot be prosecuted or impeached, how can he be said to be subject to the laws? The solution was for the sovereign to bind himself. Under “Justinian’s *Corpus iuris* the emperor was . . . legally not subjected to the law. Morally, however, he was regarded as under an obligation to observe it: a number of pre-Justinian texts containing this principle were inserted in the *Corpus iuris*.”¹⁷⁸ Hence, it cannot be said that the Byzantine emperor could dispense with the laws when the public welfare required it. This principle was reaffirmed and transmitted.

C. *The Transmission of Byzantine Ideas About Imperium to the Middle Ages*

When discussing the reception of the Roman law in the Middle Ages, one must bear in mind that although the *Corpus Iuris Civilis* formed a significant part of the substrate of medieval law, it was not the sole source of early medieval ideas about kingship.¹⁷⁹ Outside of a Hellenistic cultural context, Greek ideas had considerably less appeal. The idea that a king would be above the law was alien to the Germanic tribes that occupied what had been the Western Roman Empire, where rulers obtained their powers pursuant to complex laws of succession that involved popular consent.¹⁸⁰ Thus, it is not surprising that their hybrid systems of law (for example, the *Lex Burgundiorum* and Isidore of Seville’s *Lex Visigothorum Reccesvindiana*) were hostile to absolute powers.¹⁸¹ Under Isidore’s code, the king is put on a par with the people and is therefore not only morally but also “legally bound to observe the law.”¹⁸² This weaker conception of royal powers was transmitted to England, where it figures prominently in the work of John of Salisbury and Bracton.¹⁸³

Medieval theorists conceptualizing the tension between the king’s duty to observe the laws and to protect the people noted that Aquinas had not resolved the issue perfectly.¹⁸⁴ The theologian had left open the door to the argument

178. Schulz, *supra* note 154, at 163.

179. See Ian N. Wood, *Gentes, Kings and Kingdoms—The Emergence of States: The Kingdom of the Gibichungs*, in 13 REGNA AND GENTES 243, 243–70 (Hans-Werner Goetz et al. eds., 2003).

180. *Id.*

181. See Katherine Fischer Drew, *The Barbarian Kings as Lawgivers and Judges*, in LIFE AND THOUGHT IN THE EARLY MIDDLE AGES 7, 7–29 (Robert S. Hoyt ed., 1967).

182. Schulz, *supra* note 154, at 163.

183. *Id.* at 168.

184. See THOMAS AQUINAS, OF THE NATURAL LAW, reprinted in THE POLITICAL IDEAS OF ST. THOMAS AQUINAS: REPRESENTATIVE SELECTIONS 49–51 (Dino Bigongiari ed., 1953) (discussing Quare 42, reply to Objection 3). See also Schulz, *supra* note 154, at 165.

that a medieval king, in protecting the common good, is not bound (either legally, in classical Roman practice, or morally, according to Byzantine precedent) by the laws when emergencies require extra-legal action.

This question was resolved differently across Europe, but the clearest response to this thorny question in medieval legal theory can be found in English jurisprudence. Bracton was “a serious student of Roman law” who “wished to point out that St. Isidore’s doctrine was in conformity to Roman law. . . . In truth Bracton’s opinion was indubitably that the king was legally bound by the law”¹⁸⁵ Bracton, like other “Romanistic outsiders” (such as Franciscus Accursius) used arguments derived from Ulpian’s *Edicts* when concluding that “the law is above the king.”¹⁸⁶ He also cited the *Digna Vox* as evidence on this point, relying upon the literal wording of the original text.¹⁸⁷ Bracton apparently translated Theodosian and Valentinian’s order as “[t]he emperors declare that henceforth the emperor is legally bound by the law.”¹⁸⁸ Relying upon Azo, Bracton also concluded that since the law created the king, he must make a tribute in return by obeying the laws.¹⁸⁹

One should also note that Bracton’s comments might have been given an even stronger reading than he had intended owing to the realities of English politics. (Interpolations into text “D” of Bracton argue that “[i]f the king is regardless of law then the counts and barons must interfere” which justifies placing the king underneath a council of his nobles of the type originally contemplated by the original Magna Carta’s clause 61.)¹⁹⁰ Bracton’s English reading of Roman law inclined itself against absolutism, but even civilians in such bastions of Roman law had resisted the more absolutist interpretations of the *Corpus*.

The key problem was “when and under what circumstances could the prince set aside, distort, or ignore the rules of the legal system(s) that he was normally obligated to preserve and uphold?”¹⁹¹ Pennington concluded that despite the reception of the quasi-absolutist misreadings of Ulpian, “[J]urists besieged the fortress of absolute power by investing it with judicial norms, natural law, reason, custom, privilege, obligations, in effect, the ‘constitution’ of the realm.”¹⁹² To determine whether under these constitutional orders the king possessed emergency powers of the type that would allow us to conclude that the maxim at issue here had the status of a constitutional or meta-

185. Schulz, *supra* note 154, at 165.

186. *Id.* at 166 (citing GLÜCK, 1 AUSFÜHRLICHE ERLÄUTERUNG DER PANDECTEN § 43, at 280 (1797)).

187. MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW 40 n.124 (2010).

188. Schulz, *supra* note 154, at 168.

189. *Id.* at 168.

190. *Id.* at 174.

191. PENNINGTON, *supra* note 176, at 2–3.

192. *Id.* at 76.

constitutional principle one must consider whether the rights created by these constitutions were absolute, in a manner that prevented their abridgment even during emergencies.

IV. MEDIEVAL CONSTITUTIONALISM AND THE CREATION OF DUE PROCESS

During the late Middle Ages, principles of due process emerged that prevented rulers from using emergency measures against subjects that did not comply with emerging norms of judicial procedure. Although many rulers attempted to create and invoke exceptions where the public welfare was at stake, medieval jurists rejected their arguments. Accordingly, it became clear that the rulers were legally bound to observe these limits, or face the allegation of tyranny and resistance from their subjects that would be viewed as justifiable.

These developments can be found in both England and continental Europe. On the continent, the jurisprudence of the Holy Roman Empire and the papal rescripts defined constitutional limits on emergency powers; in England, the boundaries of executive power were decisively shaped by the Magna Carta and the statutes that bolstered its status as a fundamental law. Other statutes closed any loopholes that might have allowed for the development of royal power to protect the public when the state was allegedly in crisis.

A. *Checks on Imperial Authority in the Law of the Holy Roman Empire*

Before the thirteenth century, continental rulers had sometimes asserted that they had a right to abrogate what modern observers would consider due process when they deemed it necessary. These views were not without some scholarly support, especially when the ruler in question was the Pope. Hostiensis, who promulgated an absolutist theory of the Pope's powers,¹⁹³ cited Roman law in support of his argument that since criminal procedure was merely a feature of the positive law—not part of the natural law—the entire trial could be dispensed with when the defendant's crimes were notorious.¹⁹⁴ Had this principle been accepted within the emerging medieval constitutional order, one could conclude that early medieval jurisprudence had indeed contained a constitutional metaprinciple that *salus populi suprema lex est*. However, the argument that the right to a trial was merely a feature of the positive law¹⁹⁵ was rejected in the second half of the thirteenth century by

193. See Francis Oakley, *The Absolute and Ordained Power of God in Sixteenth- and Seventeenth-Century Theology*, 59 J. HIST. IDEAS 437, 442 (1998).

194. PENNINGTON, *supra* note 176, at 147.

195. See Brian Tierney, "The Prince is Not Bound by the Laws." *Accursius and the Origins of the Modern State*, 5 COMP. STUD. SOC'Y & HIST. 378, 382 (1963).

jurists who “began to argue that the *ordo iudicarius* (the normal trial procedure) was not derived from civil law, but from natural law.”¹⁹⁶

Stephen of Tournai described the *ordo iudicarius* in this manner:

The defendant shall be summoned before his own judge and be legitimately called by three edicts or one peremptory edict. He must be permitted to have legitimate delays. The accusation must be formally presented in writing. Legitimate witnesses must be produced. A decision may only be rendered only after someone has been convicted or confessed.¹⁹⁷

Even before these jurists made it clear that no emergency could authorize a ruler to dispense with the requirement of a trial, Pope Innocent III had “maintained that a prince could not abolish the judicial process or ignore an action because he was bound by natural law to render justice.”¹⁹⁸ Hostiensis, when coming to the opposite conclusion, had “left out the crucial passage . . . [and] shortened Innocent’s comments almost to the point of incomprehensibility.”¹⁹⁹ Accordingly, “although [Hostiensis] concurred with Innocent that the pope should never pervert the *ordo iudicarius* and was always obligated to render justice . . . Hostiensis emphasized the occasions when the pope could subvert due process.”²⁰⁰

Perhaps due to his misuse of Innocent’s arguments, Hostiensis’s opinion was not adopted by subsequent jurists, who concurred with Innocent on different grounds. Citing Roman precedent, Odofredis de Denariis argued that since the emperor could never take away that which belonged to a person without legal process, nor could any ruler take away the right to legal process.²⁰¹ Guido of Suzzara agreed, and following Accursius²⁰² argued that a statute that purported to do so would be void.²⁰³ Through the works of anonymous commentators and Guido’s student, Jacobus de Arena (who later taught at Bologna, Padua, and Toulouse), this view became widely influential.²⁰⁴

In the jurisprudence of the early fourteenth century, one can observe signs that these formative constitutionalist ideas about the rule of law were spreading across Europe and being used to explicitly rule out exceptions to the requirements of due process. Johannes Monachus undercut the idea that the procedural norms could be dispensed with even when the crime was notorious.

196. PENNINGTON, *supra* note 176, at 148–49.

197. *Id.* at 143 (citation omitted).

198. *Id.* at 150.

199. *Id.*

200. *Id.* at 150–51.

201. PENNINGTON, *supra* note 176, at 151.

202. Tierney, *supra* note 195, at 398.

203. PENNINGTON, *supra* note 176, at 94, 155.

204. *Id.* at 155.

He concluded in his commentary on Pope Boniface VIII's *Rem Non Novam* that not even the Pope—who had the most power of all rulers to ignore positive laws—could proceed against a defendant who had not been served with a summons, even when the crime was notorious.²⁰⁵ In those circumstances, “[T]he judge may proceed in a summary fashion in some parts of the process, but the summons and [public] judgment must be observed.”²⁰⁶ Guilielmus Durantis agreed: “[T]hose accused of notorious crimes should have a proper trial.”²⁰⁷

This principle became entrenched in the still-developing *ius commune* during the fourteenth century and is prominent in the juristic commentary on the struggle between the Holy Roman Emperor Henry VII and King Robert of Naples. In 1312, Henry decided to bring charges of treason against Robert, alleging that his vassal was guilty of treason for having stirred up resistance to imperial rule over traditionally Guelph cities in northern Italy.²⁰⁸ Henry summoned Robert to answer the charges, but he claimed that the summons could not be delivered personally due to the danger of bandits on the roads.²⁰⁹

Henry then declared that he still had the power to proceed against Robert under these circumstances. In a decree entitled *Ad Reprimendum*, he “decreed that whoever committed the crime of treason . . . could be condemned *in absentia* in summary proceedings.”²¹⁰ Henry justified his condemnation of Robert as follows: “Robert’s crimes were public and notorious . . . Robert did not appear for the hearing, and having heard and recorded the testimony of witnesses, we condemned him in an interlocutory judgment. We now make this judgment [that Robert be beheaded and his lands confiscated] definitive.”²¹¹ Henry’s assertions of his own powers conflicted with jurisprudence stating that rulers had no power to dispense with summons. The jurists of his day did not take kindly to his assertions.

Commentaries on this dispute establish that the prevailing legal opinion was solidly against Henry: “The tracts defending Robert and the papacy far outnumber those supporting Henry VII.”²¹² Following Monachus, Oldradus de Ponte argued in his *consilia* that a judgment rendered without giving the defendant a chance to defend himself was invalid: “[T]he prince could not deny a subject the right to due process because it was grounded in natural

205. Kenneth Pennington, *Sovereignty and Rights in Medieval and Early Modern Jurisprudence: Law and Norms Without a State*, in *RETHINKING THE STATE IN THE AGE OF GLOBALISATION* 117, 123 (Heinz-Gerhard Justenhoven & James Turner eds., 2003).

206. PENNINGTON, *supra* note 176, at 161–62.

207. *Id.* at 163.

208. *Id.* at 165–66, 169.

209. *Id.* at 169.

210. *Id.* at 170.

211. PENNINGTON, *supra* note 176, at 170.

212. *Id.* at 175.

law.”²¹³ Other jurists followed in the same vein, arguing that “[o]ne may not object that the emperor is a ‘*legibus solutus*’ and can, therefore, particularly for the crime of treason, omit a summons and proceed to judgment.”²¹⁴

These responses to the struggle between Henry and Robert generated precedents that were then developed further within the *ius commune*. For instance, Nicholaus de Orsone “disputed the right of the King of Sicily to allow royal judges to proceed against notorious suspects of violent crimes without a hearing *in the interest of public order*.”²¹⁵ This catalyzed the creation of general norms that undermine any assertion that the prince had the power to dispense with due process when the welfare of the state required it. Responding favorably to these jurists’ consilia in the constitution known as *Saepe Contingit*,²¹⁶ Pope Clement V set the limits beyond which summary procedures for emergency matters could not exceed, for instance in omitting the summons and the opportunity to present a defense.²¹⁷ This document “came to form the substratum of most of the modern Continental systems” of procedure.²¹⁸ “The canonists were quick to gloss the *Clementines* [a later collection issued by Pope John XXII that included *Saepe*] and incorporate its provisions into the *ius commune*.”²¹⁹

These collections were received, accepted, and glossed by the most prominent fifteenth-century commentators.²²⁰ Although there were jurists who did not agree with the principle that due process could not be abrogated in the interest of public order,²²¹ they were “completely out of step with the jurisprudence of the *ius commune*,” as the mainstream had “rejected any infringement on the right to due process.”²²² By 1479, “two centuries of Romano-canonical procedure law . . . [held] these procedural rules [forbidding condemnation without summons and defense] were not just part of positive canon law, but were based on a higher, natural law” which could not be ignored.²²³ Accordingly, in his defense of Lorenzo de’ Medici, Francesco Accolti (then acknowledged as the greatest living jurist) argued that Pope

213. *Id.* at 181–82.

214. *Id.* at 184.

215. *Id.* at 186.

216. STEPHAN KUTTNER, *The Date of the Constitution “Saepe”, the Vatican Manuscripts and the Roman Edition of the Clementines*, in *MEDIEVAL COUNCILS, DECRETALS, AND COLLECTIONS OF CANON LAW* 427, 427 (1980).

217. JAMES A. BRUNDAGE, *THE MEDIEVAL ORIGINS OF THE LEGAL PROFESSION* 450 (2008).

218. Robert Wyness Millar, *Three American Ventures in Summary Civil Procedure*, 28 *YALE L.J.* 193, 193 (1928).

219. PENNINGTON, *supra* note 176, at 190.

220. *See, e.g.*, DOROTHY OWEN, *THE MEDIEVAL CANON LAW* 10 (1990).

221. PENNINGTON, *supra* note 176, at 225.

222. *Id.*

223. *Id.* at 243.

Sixtus IV had no right to condemn Lorenzo, since “[n]either the pope nor the emperor can dispense with this part of the judicial process because no one can ignore a precept of divine law.”²²⁴

B. From Bracton to Fortescue: English Restrictions on the Executive in the Late Medieval Era

1. Bracton’s Insistence That the Law Is Superior to the King

Late medieval commentary on the powers of the English king begins with the reaction to the work of Henry of Bracton (who was Guido of Suzzara’s contemporary). Like Guido, Bracton was concerned with establishing the fact that the king was subject to the laws. While he conceded that the king has no superior²²⁵ (in a passage that has been frequently been misunderstood as a statement extolling royal authority),²²⁶ Bracton asserted that “in spite of his general authority, the king enjoys no privilege when he is the *plaintiff* in a lawsuit . . . the judge has to give his judgment just as if the plaintiff were the humblest of the king’s subjects.”²²⁷ More importantly, Bracton argued that the king is limited to using the laws, which give him no advantage against even the least of his citizens: “[F]or the king is beneath no man, but under God and the law.”²²⁸ This argument sets the tone for the development of a significant body of English medieval jurisprudence that established that the king has no extraordinary power to convict, attain, or otherwise punish his subjects outside of the channels of due process.

Following Isidore of Seville, Bracton concluded that the king must observe not only the divine laws; he must also observe the human laws of the *Corpus iuris* that had bound the emperor.²²⁹ He combined this view with his interpretation of *Digna Vox* (and of Azo and the decretals of Innocent III described above) and concluded that the king was not merely morally, but also legally bound to observe the laws.²³⁰ His views had a formative effect on English legal thought: Bracton “does not stand alone with this interpretation [of the king’s legal duty to observe the law]. . . . [I]t may be observed that in later times his interpretation was defended by writers on public law.”²³¹ An

224. *Id.* at 252.

225. 2 HENRY DE BRACON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE 33 (G.E. Woodbine ed., Yale Univ. Press 1992).

226. *See, e.g.*, CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM 73 (Great Seal Books rev. ed. 1958) (1947).

227. Schulz, *supra* note 154, at 149.

228. BRACON, *supra* note 225, at 33.

229. Schulz, *supra* note 154, at 166.

230. *Id.* at 167–68.

231. *Id.* at 166, 168.

interpolated text long thought to be authentic²³² endorses the creation of an enforcement mechanism should the king fail to govern according to the laws.²³³ This appears to be an endorsement of the security clause of the original Magna Carta.²³⁴

2. The Magna Carta as Touchstone of English Constitutionalist Thought

Late medieval constitutionalism was no more popular with the Plantagenet kings than with the Holy Roman Emperors, and accordingly, thirteenth and fourteenth century England saw many attempts by its kings to liberate themselves of the strictures of law. King John appealed almost immediately to Innocent III for a bill that would declare the Great Charter invalid;²³⁵ this was almost inevitable, since it unambiguously “placed the law higher than the King” by imposing a clear “limitation on the power of the sovereign.”²³⁶

Obviously, this purported invalidation did not settle the issue. First, the “reasons the pontiff gave for annulling the Charter were not the model of lawyerly clarity.”²³⁷ Second, the idea behind the Magna Carta managed to endure and grow, as Richard Helmholz asserted:

Despite its imperfections, Magna Carta survived. More than survive, it flourished. It outlasted the death of King John, annulment by Pope Innocent III, and revisions pruning the extent of the powers granted to the barons. It assumed first place in the book of English statutes, served as a touchstone of the liberties of the English nation during constitutional conflicts of later centuries, and came in time to stand as a symbol of the rule of law against tyranny by the state.²³⁸

Edward Corwin suggested that the Charter grew in significance because it had been “cast into a milieu favoring growth,”²³⁹ something which is evidenced by the scope of legal commentary on the *Corpus iuris* and the incorporation of these anti-absolutist provisions into the *ius commune*. However, in England, “[Its] successful maintenance . . . demanded the cooperation of all classes and

232. H. KANTOROWICZ, BRACTONIAN PROBLEMS 54 (1941). Kantorowicz believed this text had been written by Bracton himself.

233. *Id.*

234. MAGNA CARTA, Art. 61 (1215), reprinted in CONTEXTS OF THE CONSTITUTION: A DOCUMENTARY COLLECTION ON PRINCIPLES OF AMERICAN CONSTITUTIONAL LAW 665 (Neil H. Cogan ed., 1999).

235. R.H. Helmholz, *Magna Carta and the Ius Commune*, 66 U. CHI. L. REV. 297, 361 (1999).

236. Charles McC. Mathias, Jr., *Ordered Liberty: The Original Intent of the Constitution*, 47 MD. L. REV. 174, 179–80 (1987).

237. Helmholz, *supra* note 235, at 362.

238. *Id.* at 299.

239. Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law*, 42 HARV. L. REV. 149, 176–77 (1928).

so the participation of all classes in its benefits,”²⁴⁰ something which contributed to the extra appeal and durability of these principles within English law.

The Great Charter was reissued as a concession to the Barons a year after King John’s death by the supporters of his son Henry III—who himself would later be forced to call the first Parliament.²⁴¹ This suggests how important the idea that the king was subject to the law had grown in a short time. Corwin’s assertion of the appeal of the Charter of Liberties to all classes was confirmed when it was reissued by Henry III in 1225; Article 29’s application to all “free [men]” was taken to mean that it granted liberties far beyond the knightly class.²⁴² The people’s desire for its liberties led them to pay the high price that Henry charged for its reconfirmation—one fifteenth of every subject’s moveable goods.²⁴³

The Charter’s power was greatly expanded through its reconfirmation by Edward I, when in the Confirmation of Charters he ordered that:

[A]ll “justices, sheriffs, mayors, and other misters which under us and by us have the laws of our land to guide,” to treat the Great Charter as “common law,” in all pleas before them. Furthermore, any judgment contrary to the Great Charter . . . was to be “holden for naught”; and all archbishops and bishops were to pronounce “the sentence of Great Excommunication against all those that by deed, aid or counsel” proceeded “contrary to the aforesaid [Charter].”²⁴⁴

Once again, an English king had made it clear that there could be no dispute whether he was bound by the laws. However, it was during the reign of Edward’s grandson, Edward III, that the charter achieved its medieval zenith.

In exchange for the taxes necessary to wage the Hundred Years’ War, Edward III confirmed the Charter no less than fifteen times, a process that was motivated by “a desire to get the king’s acknowledgement *in general* that he was bound by the law.”²⁴⁵ Thanks in part to his repeated affirmations, this principle was no longer disputable in England during the late Middle Ages after Edward’s reign. The most important reaffirmations were the “six statutes” interpreting Clause 29.²⁴⁶ The most important of these is the 1354 Statute of 28

240. *Id.* at 176.

241. *Parliament*, in HISTORICAL DICTIONARY OF LATE MEDIEVAL ENGLAND 403 (Ronald H. Fritze & William B. Robison eds., 2002). *See also* WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 154 (2d ed. 1914).

242. Corwin, *supra* note 239, at 177.

243. MCKECHNIE, *supra* note 241, at 154.

244. Corwin, *supra* note 239, at 177–78 (quoting SELECT DOCUMENTS OF ENGLISH HISTORY 86–87 (George Burton Adams & Henry Morse Stephens eds., 1911)).

245. G. B. Adams, *The Origin of the English Constitution*, II, 13 THE AM. HIST. REV. 713, 721 n.15 (1908).

246. RALPH V. TURNER, MAGNA CARTA: THROUGH THE AGES 123 (2003).

Edward III.²⁴⁷ Chapter Three of this statute states that “no man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor put to death *without being brought in answer* by due process of the law.”²⁴⁸ This reinforced the Charter, which stated that:

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.²⁴⁹

It was now abundantly clear that Magna Carta’s guarantees of due process applied without exception. Parliament also acted repeatedly to ensure the protections of the Great Charter (as clarified and extended by the six statutes) were made more durable. The 1368 Statute of 42 Edward III established (as Coke noted in his *Institutes*) that any future statutes that purported to narrow the protections of the Magna Carta would be null and void.²⁵⁰ This shows that already by 1368, the Charter had become a critical element of the legal tradition of England, which now contained rights that were permanent and inviolable. Chapter Three of the statute states that “no man [shall] be put to answer . . . [except] according to the old law of the land. And if anything from henceforth be done to the contrary, it shall be void in the law, and holden for error.”²⁵¹

Additionally, Parliament attempted to ensure that the people were aware of the protections of the Charter and ready to enforce their rights. Repeatedly, it demanded that the king have the Magna Carta read out by his officials point by point, that officials take oaths to uphold it, and that they be held accountable when it was broken.²⁵² The clergy were also called upon to excommunicate those who offended it.²⁵³ It appears to be beyond dispute that Coke was right when he asserted that by the conclusion of the reign of Edward III the Magna Carta had attained the status of fundamental law; in modern terms, it was now part of England’s unwritten constitution.²⁵⁴

After the reign of Edward III, the abuses of the early Plantagenet monarchs were considered a source of shame for the English state and a salutary reminder that the rule of law bound the king even in the most extreme circumstances. The execution without trial of various rebels before the passage

247. 1354, 28 Edw. 3, c. 3 (Eng.).

248. *Id.* (emphasis added).

249. Magna Carta, 1297, 25 Edw. 1, c. 29 (Eng.).

250. 1368, 42 Edw. 3, c. 1 (Eng.).

251. *Id.* at c. 3.

252. Faith Thompson, *Parliamentary Confirmations of the Great Charter*, 38 THE AM. HIST. REV. 659, 664–68 (1933).

253. *Id.* at 668–69.

254. 1 WILLIAM BLACKSTONE, COMMENTARIES *127–28.

of the Edwardian law of treason and the six statutes of due process—which now clearly barred this practice, and made it clear that Magna Carta contained no exceptions for those accused of treason—were seen as bad precedents and repudiated.²⁵⁵ This was true even for the case of Roger Mortimer, who had deposed and murdered Edward II.²⁵⁶ A clearer example of treason could scarcely be imagined, but his execution without due process was now held to be odious and contrary to Magna Carta, such that Parliament was subsequently eager to differentiate posthumous bills of attainder from Mortimer's sentence.²⁵⁷

While the late Plantagenets would clearly have preferred to govern as absolute monarchs, that was now impossible: “[T]he royal power was decisively curbed by [the reconfirmed] Magna Carta.”²⁵⁸ By the fifteenth century, they could not appeal the logic of an emergency power to defend the *salus populi* in the event to open treason and civil war, since this had now been decisively rejected within English legal theory, and where now “the illegal execution even of an outlawed felon could cause considerable outcry”²⁵⁹ from the legal profession and the nobles, who remembered how they had been oppressed by means of extraconstitutional assertions of emergency powers by Edward II. The elevation of the Magna Carta to the status of fundamental law and the condemnation of the sentencing of traitors contrary to its provisions made it clear that the King of England possessed no power to ignore the constitution even when confronted with serious threats to the state.

3. Fortescue's *The Governance of England* as Constitutionalist Thought

The final reconfirmation of the Magna Carta occurred in 1423, shortly after the accession to the throne of Henry VI, who had become king at nine months of age when his father, Henry V, died while on campaign in France.²⁶⁰ This was done to secure popular consent to the regency council headed by his uncles, who in doing so affirmed their commitment to the principles of medieval constitutionalism.²⁶¹ The later Plantagenets and Lancastrian kings had been required to govern in a constitutional manner, as the consent of the people had become more important to effective governance due to the endemic

255. J. G. BELLAMY, *THE LAW OF TREASON IN ENGLAND IN THE LATER MIDDLE AGES* 184 (1970).

256. *Id.* at 66.

257. *Id.* at 184 n.1.

258. *Id.* at 6.

259. *Id.* at 184 n.1.

260. DAVID HUGHES, 1 *THE BRITISH CHRONICLES* 329 (2007).

261. *See* SUSANNE SAYGIN, HUMPHREY, DUKE OF GLOUCESTER (1390–1447) AND THE ITALIAN HUMANISTS 51–53 (2002).

labor shortages created by the Black Death.²⁶² At the dawning of the early modern era, however, England again faced challenges from rulers who sought to depart from the established constitutionalist consensus.²⁶³

At this moment, England's leading jurist felt compelled to write a text that best demonstrates the full flowering of late medieval constitutionalism. Sir John Fortescue, Lord Chief Justice of England under Henry VI from 1442, had been driven into exile along with his king during the Wars of the Roses. From 1468 to 1470, he wrote a treatise entitled *The Governance of England: Otherwise Called the Difference Between an Absolute and a Limited Monarchy* (hereinafter *Governance*).²⁶⁴ Fortescue was concerned with describing the constitutional principles that had been long established by the end of a dynasty, where "royal authority was placed upon a proper footing, and seen to rest upon the consent of the nation" and where "the Lancastrians always professed to rule as constitutional kings."²⁶⁵ The main thrust of this text was to reaffirm that the English monarch was constrained by the laws.

This text elaborated upon an argument Fortescue had made earlier in *De Natura*, which asserted that England's government was a mixture of monarchical and republican principles.²⁶⁶ Fortescue concluded that only laws to which the people had given consent could be binding.²⁶⁷ Furthermore, the king only had freedom to act in a manner that was defined by the laws; his "absolute power," or power to act directly without legal process, was confined to a carefully circumscribed set of customary areas, but these may only be exercised when they are not "contrary to law."²⁶⁸

His next treatise, *De Laudibus Legum Angliae* (hereinafter *Laws*), exercised great influence on the evolution of English jurisprudence. Fortescue, following Roman precedents, asserts that the powers of the king are derived from a grant of the people, a fact that establishes that he is subordinate to the laws, since they predated the monarchy and allowed for the creation of the monarchy.²⁶⁹ In his *Laws*, Fortescue asserts that a "king of England can not, at his pleasure, make any alterations in the laws of the land, for the nature of his government is not only regal, but political [i.e., not merely monarchical, but

262. See ROBERT C. PALMER, *ENGLISH LAW IN THE AGE OF THE BLACK DEATH, 1348–1381*, at 59–61 (1993).

263. See THOMAS GARDEN BARNES, *John Fortescue, in SHAPING THE COMMON LAW* 46, 50–58 (Allen D. Boyer ed., 2008).

264. SIR JOHN FORTESCUE, *THE GOVERNANCE OF ENGLAND: OTHERWISE CALLED THE DIFFERENCE BETWEEN AN ABSOLUTE AND A LIMITED MONARCHY* (Charles Plummer ed., 1885) [hereinafter *GOVERNANCE*].

265. *Id.* at 2–3.

266. NEAL WOOD, *FOUNDATIONS OF POLITICAL ECONOMY* 52 (1994).

267. *Id.*

268. *GOVERNANCE*, *supra* note 264, at 83.

269. WOOD, *supra* note 266, at 52.

republican].”²⁷⁰ He disavows the common misinterpretation of Ulpian (which he follows Bracton and Fleta in regarding as “the very principle of autocracy”)²⁷¹ stating that while an absolute monarch could affirm this maxim, and English king cannot, as its laws:

[A]re made by their [the peoples’] own consent and approbation [and they] enjoy their properties securely, and without the hazard of being deprived of them, either by the king or any other . . . St. Thomas [Aquinas] . . . wishes . . . that the king might not be at liberty to tyrannize over his people; which only comes to pass in the present case; that is, when the sovereign power is restrained by political laws.²⁷²

On the basis of this general theory, it is not surprising that Fortescue concluded, with respect to emergency powers in particular, that there is a “legal principle that no one may be put to death without trial.”²⁷³

In his *Governance*, Fortescue presents a well-elaborated and particularly English variation of the early medieval argument that the king is bound to observe the normal *ordo iudicarius* because they are not merely positive laws, and adds to this a chilling predication of what would happen to the country if they consented to absolutism:

Wherefore as often as such a king does anything against the law of God, or against the law of nature, he does wrong . . . [A] king should do to his subjects what he would have done to himself, if he were a subject, which may not be that he would be almost destroyed, as are the commons of France.²⁷⁴

This theme would prove very influential to English political thought, especially as differences emerged between the medieval constitutionalism retained in England and the novel theories of sovereignty that developed on the continent.

V. MEDIEVAL CONSTITUTIONALISM AND ITS TRANSFORMATION IN EARLY MODERN ERA FRANCE AND ENGLAND

Fortescue and Francesco Accolti represent respectively the broad consensus of the common and civil law jurists at the end of the Middle Ages on the subject of the prince’s duty to obey the laws of due process under all circumstances. One can also observe how they developed arguments to counter the increasing absolutist claims being made by the rulers in this era who purported to have emergency powers or who merely attempted to rule on this

270. SIR JOHN FORTESCUE, *DE LAUDIBUS LEGUM ANGLIAE: A TREATISE IN COMMENDATION OF THE LAWS OF ENGLAND* 26 (Andrew Amos ed., Francis Gregor trans., 1874).

271. *GOVERNANCE*, *supra* note 264, at 184–85.

272. FORTESCUE, *supra* note 270, at 27.

273. *GOVERNANCE*, *supra* note 264, at 205.

274. *Id.* at 117.

basis whenever they were strong enough to prevail against the guardians of the medieval constitutionalist order.

During the first century of the early modern era, the rulers of what were rapidly becoming centralized states put severe pressures on the existing constitutional order found in both the common law and the *ius commune*. The legal restraints on medieval rulers were challenged during the crises brought about by the reformation, the dismemberment of the Holy Roman Empire, the emergency of what would become modern states, and the warfare and rebellion that erupted because of all of these developments.

It is at this time that a clear divergence emerges—as foreshadowed by Fortescue—between the legal orders of England and France. This breach became a rupture after these two countries' civil wars. In the wake of France's civil war (usually called the French Wars of Religion), Henry IV was able to rapidly consolidate and expand his power, setting the stage for the creation of an absolute monarchy. The English Civil War took place forty years after the conclusion of its French equivalent; conversely it was won by those who resisted the Stuarts's assumption of unconstitutional powers and drive towards absolute rule. The English constitutionalists who prevailed advocated the rule of law and the principle that a king had no emergency powers in a time of crisis, which was the opposite of the legal regime created in France.

A. *The Demise of French Constitutionalism and the Rise of Jean Bodin's Ideas of the Undivided Sovereign Unbound by the Laws*

Until the decisive turn taken in 1572, the French kings could be considered constitutional monarchs.²⁷⁵ France's "'Renaissance monarchy' was thus expected to respect established law and not to alter it without consent."²⁷⁶ However, due to the monarch's greater degree of financial independence from the other branches of government than in most other kingly states, the French monarchy was able to govern between 1484 and 1560 without calling together the Estates-General.²⁷⁷ This is because, as Fortescue noted, the burden of regular taxation was much higher on the French people than that imposed on the English, where the King of England would frequently need to appeal to Parliament for emergency taxation during a crisis.²⁷⁸

However, the French king's fiscal independence from his subjects did not necessarily mean that he had a greater degree of control over these subjects than his English counterpart. Just as Coke had argued in *Bonham's Case*,

275. 2 MARVIN PERRY ET AL., WESTERN CIVILIZATION: IDEAS, POLITICS, AND SOCIETY 377 (10th ed. 2011).

276. JULIAN H. FRANKLIN, JEAN BODIN AND THE RISE OF ABSOLUTIST THEORY 3 (1973).

277. JAMES B. COLLINS, THE STATE IN EARLY MODERN FRANCE xxiv (1995).

278. GOVERNANCE, *supra* note 264, at 117. See also FORTESCUE, *supra* note 270, at 142–43.

French judges argued that the king had no power to invoke his emergency powers to draft rescripts that ignored the existing regulations of due process:

[A]mong French jurists of the early sixteenth century there was a cautious but definite tendency to hold that *plenitudo potestatis* [the king's absolute privilege] could not be legitimately invoked in derogation of a rule of law that the people had accepted and the ruler had confirmed

. . . .

One consequence of this conception of the rule of law was the right of the courts to repudiate orders of the king in the ordinary course of doing justice. . . . The subjection of the king to law seemed so fundamental to the commentators that they often insisted upon it without the slightest of reservations.²⁷⁹

In early sixteenth century French legal theory, one can see a clear echo of the *Corpus iuris*: the king is held to have regal power, but he is bound not to exercise it in a manner contrary to law.

Towards the end of the sixteenth century, it was clear that the French state could no longer be governed in the old way. By 1572, there had been three distinct “wars of religion,” civil wars waged by the Catholic and Huguenot parties largely without the involvement of the monarch.²⁸⁰ That year, the monarchy intervened decisively, and in a manner that clearly indicated their abandonment of the principles of constitutional monarchy.²⁸¹ After the attempted assassination of the Admiral de Coligny, Charles IX's mother Catherine de' Medici ordered the Swiss Guard to expel the remaining Huguenot leaders from the Palace of the Louvre and to kill them in the street.²⁸² This was taken by the Catholic population of Paris as the green light for a pogrom.²⁸³ Thousands were killed in Paris and perhaps tens of thousands throughout the rest of the country, in what was later named the Saint Bartholomew's Day Massacre.²⁸⁴

On the fourth day of the killings, Charles issued a *lit de justice*, which granted amnesty to those who participated in the massacre, alleging that he had

279. FRANKLIN, *supra* note 276, at 13, 15.

280. See MACK P. HOLT, *THE FRENCH WARS OF RELIGION, 1562–1629*, 70–72, 95, 96 (1995) (discussing the monarchy's inability to defeat the Huguenots during the three wars of religion). See also BRUCE LINCOLN, *DISCOURSE AND THE CONSTRUCTION OF SOCIETY: COMPARATIVE STUDIES OF MYTH, RITUAL, AND CLASSIFICATION* 92 (1989) (stating that three wars of religion were fought between 1562 and 1570 against the Catholics and the Huguenots).

281. See FRANKLIN, *supra* note 276, at 43 (noting the French government turned to a criminal solution for their problems with the Huguonots by assassinating their leaders).

282. BARBARA A. SOMERVILL, *CATHERINE DE MEDICI: THE POWER BEHIND THE FRENCH THRONE* 10–13 (2006).

283. HOLT, *supra* note 280, at 85.

284. THOMAS F.X. NOBLE ET AL., *WESTERN CIVILIZATION: BEYOND BOUNDARIES* 451 (5th ed. 2008).

authorized the first killings in order to preempt a conspiracy to assassinate his family.²⁸⁵ “In this fashion a weak and incompetent government finally decided upon a criminal solution to its difficulties.”²⁸⁶ In fact, within the paradigm of medieval constitutionalism, it was worse than criminal: it was tyrannical. There was a long line of jurisprudence stretching back to Aquinas that clearly justified the conclusion that Charles IX was no longer a king and could be justifiably overthrown.

As this conclusion was unacceptable to the French Catholic polity, the massacre necessarily prefigured a transformation of ideas about sovereignty and indeed, ethics:

[T]he doctrine of political murder . . . flourished during the sixteenth century when the principles of social morality and Christian politics elaborated by the theology of the Middle Ages, were replaced . . . [by] theories of a certain *raison d'état* according to which the end justified the means.”²⁸⁷

However, these views also needed a legal justification, lest the Huguenots be able to present a persuasive justification for tyrannicide. This task fell largely to an obscure and heterodox jurist who had been influenced by humanist ideas in general and by Petrus Ramus in particular.²⁸⁸

Jean Bodin's early work touched upon the idea of sovereignty and clung largely to constitutionalist views,²⁸⁹ but four years after the Saint Bartholomew's Day massacre, he published his *Six Books of the Commonwealth*, which created a new paradigm for both sovereign and executive power during emergencies.²⁹⁰ Bodin rejected the prevailing foundations on principle.²⁹¹ This meant a rejection of the idea of sovereignty derived from the *Corpus iuris*, which had undergirded all Western public law for millennia. He also flatly rejected the idea of a mixed constitution, in which sovereignty was divided between various branches of government. Drawing upon partial and incomplete surveys of history, Bodin:

285. LINCOLN, *supra* note 280, at 98.

286. FRANKLIN, *supra* note 276, at 43.

287. Georges Goyau, *Saint Bartholomew's Day*, in 13 THE CATHOLIC ENCYCLOPEDIA (Charles G. Herbermann et al. eds., 1912), available at <http://www.newadvent.org/cathen/13333b.htm> (last visited Nov. 14, 2013).

288. For details on the half-educated, grandiose and thoroughly specious anti-scholasticism of Petrus Ramus, see Ryan Patrick Alford, *How Do You Trim the Seamless Web? Considering the Unintended Consequences of Pedagogical Alterations*, 77 U. CIN. L. REV. 1273, 1277 (2009).

289. See FRANKLIN, *supra* note 276, at 23 (explaining that Bodin's earlier work excludes absolutism from his discussion on the principle of sovereignty).

290. JEAN BODIN, *SIX BOOKS OF THE COMMONWEALTH* 10–11, 14–15, 24–25 (M. J. Tooley trans., 1967) (1955).

291. Martin van Gelderen, *Aristotleians, Monarchomachs and Republicans: Sovereignty and republica mixta in Dutch and German Political Thought, 1580–1650*, in 1 REPUBLICANISM: A SHARED EUROPEAN HERITAGE 195, 197 (Martin van Gelderen & Quentin Skinner eds., 2002).

[A]ttempted to derive the contents of supreme authority [that which a king possesses] from the concept of supremacy itself He was always thinking of ‘the sovereign’ as one part of the society that rules the rest, according to the familial model of a kingship . . . a mixed constitution seemed a contradiction The fallacy in all of this is so transparent to the modern reader, and so profoundly foreign, that it is sometimes tempting to look for deeper lines of reasoning.²⁹²

There is no deeper logic to Bodin’s essential argument about the indivisibility of sovereignty, which is the sole basis for his argument that the king of France is not bound by the laws. “The entire case is thus colored by a *petitio principii* [an argument that asks the listener to grant the conclusion in the guise of a premise]: Sovereign authority is absolute; The king of France is sovereign; [therefore] The king of France is absolute.”²⁹³ Bodin argues away all the evidence that kings are bound by laws, first by dispensing with all Roman law for allegedly being inadequate, and by arguing that coronation oaths (in which many European kings explicitly promised to be bound by the laws) are not supported by consideration.²⁹⁴

“Bodin’s only justification of this odd result is drawn from practical necessity.”²⁹⁵ The Huguenots—adhering to medieval constitutionalism—were right in saying the king has exceeded his powers to the point of being no king at all, but rather a tyrant who may be lawfully resisted. The only solution is to reject their legal paradigm claim that the king cannot be bound by the laws, and when faced with an alleged emergency such as the rumored plot to murder Charles IX, he was not bound to put the conspirators on trial. Instead, he could simply condemn those subjects he accused of treason on his own authority.

This theory served to legitimize a range of notorious abuses. In 1574, the Huguenot leader the Duke François of Montmorency was arrested and jailed in the Bastille on nothing more than Charles’s verbal orders, later affirmed by letters-patent.²⁹⁶ This action set the precedent for the *lettres de cachet* that authorized the indefinite detention of innumerable political prisoners.²⁹⁷ These orders, which sent the named person directly to prison without any contact whatsoever with the judicial system became ubiquitous:

The *lettres de cachet*, one of the most typical institutions of old French society, have been aptly called ‘the very essence of public life’ before the Revolution. Upon them rested the authority of king Although it is

292. FRANKLIN, *supra* note 276, at 25–28.

293. *Id.* at 68.

294. *Id.* at 57–59.

295. *Id.* at 59.

296. FRANCOIS-ANDRE ISAMBERT, 14 RECUEIL GÉNÉRAL DES ANCIENNES LOIS FRANÇAISES DEPUIS L’AN 420 JUSQU’À LA RÉVOLUTION DE 1789, at 278 (1829).

297. See BRIAN E. STRAYER, *LETTRES DE CACHET AND SOCIAL CONTROL IN THE ANCIEN RÉGIME*, 1659–1789, at xi (1994).

commonly believed that the employment of *lettres de cachet* was largely confined to affairs of state, yet this is far from the truth.²⁹⁸

Jacques Maritain notes “Jean Bodin is rightly considered the father of the modern theory of Sovereignty.”²⁹⁹ Maritain traced the development of the theory of absolute executive power from Bodin through Hobbes³⁰⁰—who also wrote during a civil war with a motivation similar to Bodin’s—and “versions of sovereignty evocative of Hobbes’s and Bodin’s have carried forth into the twentieth century.”³⁰¹ The divergence between classical, continental, and Anglo-American approaches to emergency powers hinge on the acceptance or rejection of Bodin’s theses about the necessary features of a sovereign power. The next section will demonstrate that it was the reaction to this absolutism that led to the triumph of constitutionalist thought in England and to its transmission to America.

A. *The Rejection of Stuart Absolutism in Seventeenth Century England*

Seventeenth century England faced a crisis similar to that which had led to the St. Bartholomew’s Day massacre after the dynastic transfer from the House of Tudor to the House of Stuart.³⁰² Like the Bourbons, the Stuarts were outsiders;³⁰³ they hailed from a country with a monarchy that was much stronger than the one they came to govern.³⁰⁴ James had views on executive power that were clearly not compatible with the constitutionalism of the English bar. Before coming to the English throne, he had written a defense of quasi-absolutism entitled *The True Law of Free Monarchies*: “[T]he essence of a free monarchy was that royal power was limited by no human law.”³⁰⁵

Unfortunately for James, the political conditions under which James I came to the throne were very different from those of Henry IV thirty years earlier. The existing constitutional restraints were much more formidable, thanks to the reaffirmation of “higher law” or “fundamental law” constitutionalism during the Elizabethan era.³⁰⁶ In the Jacobean era, common

298. Fred Morrow Fling, *Mirabeau, a Victim of the Lettres de Cachet*, 3 THE AM. HIST. REV. 1, 19 (1897).

299. JACQUES MARITAIN, MAN AND THE STATE 31 (1951).

300. *Id.* at 28–53.

301. Dan Philpott, *Sovereignty*, STAN. ENCYCLOPEDIA OF PHIL. (June 8, 2010), <http://plato.stanford.edu/archives/sum2010/entries/sovereignty/>.

302. See J. P. SOMMERVILLE, POLITICS AND IDEOLOGY IN ENGLAND, 1603–1640, at 9 (1986).

303. SIOBHAN KEENAN, RENAISSANCE LITERATURE 14 (2008).

304. John Cairns, *Historical Introduction*, in 1 A HISTORY OF PRIVATE LAW IN SCOTLAND: INTRODUCTION AND PROPERTY 74, 77–78 (2000).

305. See SOMMERVILLE, *supra* note 302, at 37.

306. Ryan Patrick Alford, *The Star Chamber and the Regulation of the Legal Profession 1570–1640: Re-evaluating Revisionism*, 51 AM. J.L. HIST. 639, 662–63 (2011). See also ALAN

lawyers still agreed with Fortescue that the executive prerogative was subject to legal definition and subordinate to the subject's legal liberties, such as the absolute rights to one's property and to the guarantees specified in the Magna Carta.³⁰⁷

1. Constitutional and Absolutist Ideas of the Stuarts' Royal Prerogative

From the beginning of James's reign, divergent views of the king's ability to define the scope of his own powers emerged. Three key court cases from early Stuart era illustrate the decline in relations between the Crown and the constitutionalist opposition in Parliament. These cases also demonstrate that the issue that was most fundamental to this conflict was the rule of law. *Bates's Case* involves powers to regulate matters related to foreign affairs so as to serve (the king's views of) the public interest;³⁰⁸ *The Five Knights' Case* relates to the power to imprison citizens for reasons of state without formal charge;³⁰⁹ and the *Case of the Ship Money* is about the power of the purse after the king declares a public emergency.³¹⁰ In the course of these lawsuits, one can observe the emergence of a robust theory of the rule of law at a crucial juncture in Anglo-American jurisprudence. One can also note that this was catalyzed by the rejection of Stuart arguments that the executive has the power to ignore the laws when it allegedly acts to protect the public welfare.

a. Bates's Case: James's Absolute Prerogative to Protect the Common Good

In the course of many attempts to raise funds, James often asserted that his powers were unlimited because of his duty to attend to matters of state and to protect the nation.³¹¹ He asserted further that he was the sole judge over whether any danger to the public existed, and resisted any attempts to force him to disclose his reasons or justify his conclusions.³¹² One pertinent early example of this argument can be found in the record of *Bates's Case* (1606), where a merchant challenged the king's power to raise the import duties, something which he argued belonged to Parliament alone since time immemorial.³¹³ However, in a very controversial decision Chief Baron

CROMARTIE, *THE CONSTITUTIONALIST REVOLUTION: AN ESSAY ON THE HISTORY OF ENGLAND, 1450–1642*, at 148, 153 (2006).

307. See, e.g., CHRISTOPHER HILL, *INTELLECTUAL ORIGINS OF THE ENGLISH REVOLUTION: REVISITED* 234 (1997).

308. *Bates's Case*, (1606) 145 Eng. Rep. 267.

309. *The Case of the Five Knights*, (1627) 3 How. St. Tr. 1 (K.B.).

310. *Ship Money*, (1637) 3 How. St. Tr. 825.

311. See JAMES I, *THE TRUE LAW OF FREE MONARCHIES AND BASILIKON DORON* 72 (Daniel Fischlin & Mark Fortier eds., 1996).

312. *Id.*

313. *Bates's Case*, (1606) 145 Eng. Rep. 267.

Fleming ruled that the King possessed a plenary power to act for the welfare of all his subjects that was not restrained by the law.³¹⁴ This prefigured many later arguments for broad emergency powers for the executive drawing upon the concept of necessity. Discussing *Bates's Case*, Johann Sommerville (quoting Fleming) described its rationale as follows:

'The king's power is double, ordinary and absolute' . . . His ordinary power applied in cases where the public interest was not involved, and here the monarch was bound by the common law. . . . But in matters which concerned 'the general benefit of the people' the king possessed an absolute power, subject only to the rules of 'Policy and Government.' The implications of these rules, said Fleming, were to be determined by 'the wisdom of the king, for the common good' and 'all things done within these rules are lawful.' If the king decided that something was in the public interest, it was not fit for subjects to question his judgment³¹⁵

Despite the looming implications of this interpretation of the executive prerogative when matters of state were invoked, following *Bates's Case*, this action was legally unassailable: the king had merely to say that he was acting in the public interest to settle the issue, even when he was clearly abusing his power and damaging the common interest that he was sworn to protect.

Unfortunately for James, the precedent provided by this case could not protect him from Parliament or their closest allies among the common-law judges, since they believed that the decision had ignored certain basic premises of the English constitution.³¹⁶ More importantly, the constitutionalist opposition believed that this extraparliamentary taxation threatened to destroy the English constitution itself and would allow James to govern as an absolute monarch, since if he had ready access to revenue without needing to call Parliament, no laws could ever be passed to challenge or even censure his abuses.³¹⁷

b. Charles's Alleged Prerogative to Imprison Dissidents for Reasons of State

James's successor, Charles I, inherited the same constitutional and financial dilemmas endemic to his father's reign. As the Parliamentary opposition had feared, Charles suspended Parliament in order to prevent them from presenting a public complaint about the collection of taxes that they had not approved, something which they argued made "the hearts of your people

314. *Id.*

315. SOMMERVILLE, *supra* note 302, at 152 (quoting *Bates's Case*, (1606) 145 Eng. Rep. 267).

316. *Id.* at 162.

317. *Id.*

... full of fear of innovation and change of government.”³¹⁸ Accordingly, Charles chose to pretend that these taxes were merely loans from his subjects.³¹⁹ The “Forced Loan” fooled no one at the time, and arguments circulated that this specific practice had been banned by medieval statutes.³²⁰ These arguments further stated that the king could not use his prerogative to ignore a statute and violate his subjects’ absolute right to their property.³²¹ The resistance to this policy led to two historically significant confrontations between the king and Parliament on the issue of the scope of the prerogative.

The first of these battles was waged over the passage of the Petition of Right, a statute that would later be seen as part of the fundamental laws of England, in which—like Magna Carta—Parliament held the king could not ignore the laws under any circumstances, including national emergencies.³²² “The Petition [of Right] acknowledged no emergency royal powers of taxation. The claim of necessity, in short, did not justify the king in flouting the law. It was, in any case, self-contradictory to infringe the liberties of the subject for the sake of promoting the public good.”³²³

The Petition of Right also sought to take away the king's prerogative to imprison citizens without formal charge in exceptional cases.³²⁴ This practice had also been called into question during the *Five Knights’ Case*, which is known today as a precedent stating that *habeas corpus* may not be suspended by the executive branch.³²⁵ The petitioners had been arrested in 1627 under Charles’s orders for having resisted the forced loan.³²⁶ The matter was of paramount importance, as the king’s prerogative to temporarily imprison a subject on the basis of his emergency powers to protect the public had never before been challenged.³²⁷ While the case was decided on very narrow grounds, the case—and more importantly, its aftermath in Parliament—made it clear that the king’s allegedly absolute prerogative had some legal limits.³²⁸

In the course of proceedings, Attorney General Sir Edward Heath argued that the king had both the power to issue commands that were defined by the

318. 1 JOHN RUSHWORTH, HISTORICAL COLLECTIONS OF PRIVATE PASSAGES OF STATE: 1618–1629, at 626 (1721), available at <http://www.british-history.ac.uk/report.aspx?compid=70154>.

319. L. J. REEVE, CHARLES I AND THE ROAD TO PERSONAL RULE 14 (2003).

320. *Id.*

321. Alford, *supra* note 306, at 691–93.

322. DAVID L. SMITH, CONSTITUTIONAL ROYALISM AND THE SEARCH FOR A SETTLEMENT, c. 1640–1649, at 29 (2002).

323. SOMMERVILLE, *supra* note 302, at 158.

324. See FRANCES HELEN RELF, THE PETITION OF RIGHT 1, 27 (1917).

325. Riddhi Dasgupta, *Boumediene v. Bush and Extraterritorial Habeas Corpus in Wartime*, 36 HASTINGS CONST. L.Q. 425, 443 (2009).

326. SMITH, *supra* note 322, at 29.

327. JUDITH FARBEY ET AL., THE LAW OF HABEAS CORPUS 8–9 (3d ed. 2011).

328. *Id.* at 10–12.

law of the land and an “*absoluta potestas* that the sovereign has. But when I call it [absolute power] I do not mean that it is such a power as that a king may do what he please, for he has rules to govern himself by.”³²⁹ However, royalist theorists argued that only the king himself could judge his own adherence to these rules.³³⁰ Following Fleming, they argued that no one else could challenge him when he argued that special circumstances existed that allowed him to use his absolute power in defense of the common good, or question whether he had done so within the appropriate limits set by the law of God.³³¹ Unsurprisingly, the constitutionalists considered this argument unacceptable.

Disputes over this argument for absolute emergency powers spilled over into the debates surrounding the drafting and passing of the Petition of Right. Constitutionalists complained that the king’s theory was precluded by the explicit terms of the Magna Carta;³³² royalist theorists such as William Lambarde³³³ had earlier argued that while:

[The] Magna Carta had re-established the rule of the common law in many areas . . . kings retained the old ‘absolute Authoritie’ in ‘a few rare and singular Cases’ . . .

. . . [Accordingly, the Member of Parliament Edward] Alford had warned the Commons that as long as ‘matters of state’ remained undefined the royal power was subject to abuse.³³⁴

Charles resisted the passage of the Petition of Right, as he correctly predicted that his power to raise taxes without Parliament and to imprison those who resisted without showing any cause would prove vital to his survival in the years to come.³³⁵ Summarizing the arguments of his supporters, Sommerville notes the royalists’ argument that:

[K]ings rule not only by the common law but by ‘a law of state’ . . . ‘The common law,’ he said, ‘doth not provide for matters of state.’ Where such matters were at issue, the king was to govern by the law of state, and could ride roughshod over liberties guaranteed by the inferior and irrelevant common law. The king’s power of imprisoning without cause shown was ‘committed to him by God.’ Of course he could suppress the cause, for ‘every state hath *secreta regni*’ (secrets of the kingdom—i.e., state secrets).³³⁶

329. J. W. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* 72 (1955).

330. LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 49 (1999).

331. *Id.*

332. RELF, *supra* note 324, at 29–33.

333. Alford, *supra* note 306, at 653–58.

334. SOMMERVILLE, *supra* note 302, at 164–65.

335. Alford, *supra* note 306, at 715–23.

336. SOMMERVILLE, *supra* note 302, at 167–68 (quoting the speeches of Serjeant Ashley in Parliament).

Owing to considerable financial pressures, Charles finally proved willing to sign the Petition of Right into law by the spring of 1628 if a caveat were to be added—namely, that the statute did not affect his sovereign power.³³⁷ Parliament refused.³³⁸ Alford used the debate to both rebuke the king and to explicitly denounce the new concept of sovereignty as it had been articulated by Jean Bodin, which undergirded the royalist position.³³⁹ He asked, rhetorically: “What is sovereign power? Bodin says that it is free from any condition. By [agreeing to] this, we shall acknowledge a regal as well as a legal power.”³⁴⁰ Parliament, following Alford's advice, refused to acknowledge the existence of an extraordinary prerogative or indeed any *absoluta potestas*.³⁴¹ For similar reasons, it rejected an amendment proposed by the House of Lords that would allow the king to imprison subjects for a limited time without showing cause “for reasons of state.”³⁴² Coke noted that allowing this would amount to Parliament's recognition of “an intrinsic prerogative . . . [that] no law can take . . . away.”³⁴³

c. *Hampden's Case* and the Rule of Law's Applicability to Wartime Powers

In 1635, Charles again resorted to extra-parliamentary taxation in order to raise funds.³⁴⁴ On the legal advice of his councilors, he attempted to disguise this taxation with various transparent fictions, so that his measures might pretend not to be unprecedented.³⁴⁵ The raising of “Ship Money” (as these levies were imposed in lieu of the obligation to furnish ships) was justified with the assertion that these funds were to be spent on coastal defense, although it was obvious that they would instead be used to pay Charles's debts.³⁴⁶ Despite Charles's dubious assertions, there had been no general

337. PAULINE GREGG, KING CHARLES I, at 172 (1984).

338. *Id.*

339. GLENN BURGESS, ABSOLUTE MONARCHY AND THE STUART CONSTITUTION 64 (1996).

340. *Id.*

341. GREGG, *supra* note 337, at 173–74.

342. H. G. KOENIGSBERGER, MONARCHIES, STATES GENERALS AND PARLIAMENTS: THE NETHERLANDS IN THE FIFTEENTH AND SIXTEENTH CENTURIES 333 (2001).

343. Paul Christianson, *Ancient Constitutions in the Age of Sir Edward Coke and John Selden*, in THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF THE RULE OF LAW 115, 172 (Ellis Sandoz ed., 1993).

344. CHRISTOPHER HAIGH, THE CAMBRIDGE HISTORICAL ENCYCLOPEDIA OF GREAT BRITAIN AND IRELAND 200 (1990).

345. *Cf. id.* (the fines in distraint of knighthood, based upon long-obsolete and forgotten thirteenth-century statutes).

346. F. C. MONTAGUE, 7 THE POLITICAL HISTORY OF ENGLAND: THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES I TO THE RESTORATION 1603–1660, at 178 (William Hunt & Reginald L. Poole eds., 1969).

resistance to the imposition of Ship Money in 1634.³⁴⁷ This is likely because there had been some recent precedents for raising Ship Money in times of peril.³⁴⁸ However, in 1635 Charles made the mistake of attempting to raise Ship Money in inland counties further from the maritime communities, which had never been previously subjected to the imposition.³⁴⁹ Charles gave only his implicit promise that it would fund the Navy, but he insisted that he had no duty to answer any questions from his subjects about whether or not it had actually been spent on maritime defense.³⁵⁰

John Hampden's refusal to pay set the stage for the last great confrontation between the king and the constitutionalist opposition before the Civil War. In Sir David Keir's words, "[T]he point before the Court . . . was the same that had already been decided in *Bates's Case* and *Darnel's [the Five Knights'] Case* The problem was to determine the King's discretionary power to act for the public good."³⁵¹ Oliver St. John argued for Hampden that if the king alone was the judge of whether an emergency existed and also the sole judge of the scope of his prerogative, then no English subject had any property rights.³⁵² This of course was a summary of the primary complaint found in the Petition of Right, which had asserted that this absolutist principle was not consistent with the "fundamental propriety in his goods and a fundamental liberty of his person," rights which the constitutionalists argued that king was bound by the law to respect, even during emergencies.³⁵³

Summarizing and quoting the King's Counsel's response, Keir describes it in the following terms:

[The king] is an absolute monarch. . . . 'As he is an absolute monarch, so all these *iura summae magistratis* [powers of the supreme majesty] are given unto his person by the common law.' . . . His *bona fides* must be presumed. . . . Parliament must not even inquire into whether the King has used his ordinary revenue for the purpose. It is improper to scrutinize his expenditure.³⁵⁴

Sir Edward Crawley (another barrister for the king) "quoted Commynes and [Jean] Bodin in support of the king's right to levy money . . . remarking that these 'wrote not according to the law of any one kingdom, but according to the

347. KENNETH R. ANDREWS, SHIPS, MONEY AND POLITICS: SEAFARING AND NAVAL ENTERPRISE IN THE REIGN OF CHARLES I, at 131 (1991).

348. SIR WILLIAM HOLDSWORTH, 6 A HISTORY OF ENGLISH LAW 49–50 (7th ed. 1957).

349. ANDREWS, *supra* note 347, at 131–50.

350. *Id.*

351. D. L. Keir, *The Case of the Ship-Money*, 52 LAW Q. REV. 546, 548 (1936).

352. WILLIAM PALMER, THE POLITICAL CAREER OF OLIVER ST. JOHN, 1637–1649, at 26–27 (1993).

353. GOUGH, *supra* note 329, at 70.

354. Keir, *supra* note 351, at 560 & n.73.

law of reason,”³⁵⁵ asserting that necessity, as assessed by the king, was always superior to the law of the land.

Gough noted that Sir Robert Berkeley’s judgment conceded the existence of “fundamental policy, and maxims, and rules of law for the government of the realm,” that barred extra-parliamentary taxation, but:

[The idea] that this ‘fundamental policy in the creation of the frame of this kingdom’ meant that the king could be restrained if he tried to raise money except through parliament, he was ‘utterly mistaken herein’ . . .

Berkeley described the arguments of Hampden’s counsel, in often-quoted words, as ‘a king-yoking policy’, and declared [quoting one of King James I’s most provocative assertions of absolute power] that he ‘never heard that *lex* was *rex* [that law was king] but rather the reverse, for the King was *lex loquens*, a living, a speaking, an acting law’.³⁵⁶

This theory of the king’s prerogative prevailed in this case with a narrow majority,³⁵⁷ despite the fact that it reversed centuries of precedent from Bracton to Fortescue and beyond. The ruling depended on the argument from necessity: “In a case of necessity, [Justice Berkeley] said, the king had ‘regal power’ to make extra-parliamentary levies,”³⁵⁸ and held that he alone was the judge of the necessity, rejecting Littleton’s arguments that these emergencies should be brought to Parliament’s attention.³⁵⁹ This judgment was an extension of the logic of Baron Fleming’s decision in *Bates’s Case*.³⁶⁰

What was different about this decision was that it explicitly ignored an intervening statute—the Petition of Right—that Parliament had passed in order to prevent the king from taking precisely these sorts of actions.³⁶¹ Following Berkeley’s reasoning, Parliament could never bind the king, since he could operate above the statutes whenever he declared an emergency, even in peacetime. On this logic, he was not even bound by the Magna Carta, which had been repeatedly reaffirmed by successive monarchs in exchange for grants of taxes and other impositions.³⁶² The court had thus declared England to be closer to an absolute monarchy—not only in practice, but also in theory—than at any time since the reign of Edward II.

355. GOUGH, *supra* note 329, at 75.

356. GOUGH, *supra* note 329, at 71.

357. ROBERT BUCHOLZ & NEWTON KEY, *EARLY MODERN ENGLAND 1485–1714: A NARRATIVE HISTORY* 241 (2d ed. 2009).

358. SOMMERVILLE, *supra* note 302, at 162.

359. *Id.* at 158, 162.

360. *Id.* at 161–62.

361. PALMER, *supra* note 352, at 45.

362. William Conrad Gibbons, *The Origins of the War Power Provision of the Constitution*, in *CONGRESS AND UNITED STATES FOREIGN POLICY: CONTROLLING THE USE OF FORCE IN THE NUCLEAR AGE* 9, 16–17 (Michael A. Barnhart ed., 1987).

It would not be long until the backlash against absolutism and the accompanying reckoning. The judges who had concurred in Berkeley's judgment were impeached in 1641.³⁶³ Soon thereafter Charles himself was executed for treason to the realm, after being convicted for violating his coronation oath to rule in accordance with the law of the land.³⁶⁴ In a direct rebuke to the opinions detailed above, the prosecutor at Charles's trial asserted that "it is one of the fundamentals of law, [t]hat the king is not above the law, but the law above the king."³⁶⁵ The maximalist interpretation of *salus populi suprema lex est* has only ever been advanced openly by one English monarch (Charles I), and this led directly to his execution.³⁶⁶ Later attempts to revive this maxim in a more limited form only led to the destruction of his dynasty and its replacement by the House of Hanover.³⁶⁷ More importantly, one can see that the maxim was decisively rejected within the Anglo-American constitutional tradition because of its absolutist implications.

VI. THE MAXIMS OF EARLY MODERN ANGLO-AMERICAN TREATISES

The question that remains is this: if the principle that *salus populi suprema lex est* was repeatedly and decisively rejected within Anglo-American law, why does it seem to have some weight within modern American legal discourse? It will be demonstrated in this Part that the maxim was given some attention in the early modern era, but only with a carefully circumscribed meaning that is rather different from that assigned by Gross and Paulsen. One must first consider the status of a maxim within English law.

A. *Sir Francis Bacon and the Idea of the Maxims of the Common Law*

Maxims are defined by Black's Law Dictionary as: "A traditional legal principle that has been frozen into a concise expression. Examples are 'possession is nine-tenths of the law' and *caveat emptor* ('let the buyer beware'). Also termed *legal maxim*."³⁶⁸ They are considered legal principles

363. STAFF OF H. COMM. ON THE JUDICIARY, 105TH CONG., IMPEACHMENT: SELECTED MATERIALS 642 (Comm. Print 1973).

364. BLAIR WORDEN, *GOD'S INSTRUMENTS: POLITICAL CONDUCT IN THE ENGLAND OF OLIVER CROMWELL* 263 (2012).

365. *The Trial of Charles Stuart, King of England: Before the High Court of Justice, for High Treason: 24 Charles I. A.D. 1649*, in 4 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT 989, 1019 (Thomas B. Howell ed., 1809).

366. WORDEN, *supra* note 364, at 263.

367. Edward Vallance, *The Dangers of Prudence: Salus Populi Suprema Lex, Robert Sanderson, and the 'Case of the Liturgy*, in THE RENAISSANCE CONSCIENCE 100, 116–17 (Harald E. Braun & Edward Vallance eds., 2011). Accord JOHN R. GRAHAM, A CONSTITUTIONAL HISTORY OF SUCCESSION 70 (2002).

368. BLACK'S LAW DICTIONARY 1068 (9th ed. 2009).

only in the loosest sense of that word, since they are not sources of law in and of themselves, but only paraphrases of general principles, which do not define the scope of their own application.

This modern understanding of the legal force of a maxim is in line with the traditional view of English common lawyers. Sir James Fitzjames Stephen observed, "It seems to me that legal maxims in general are little more than pert headings of chapters. They are rather minims than maxims As often as not, the exceptions and qualifications to them are more important than the so-called rules."³⁶⁹ However, civilian jurists had a much higher opinion of maxims, since in the *Corpus Iuris* they had binding legal force; they were *regulae iuris*.³⁷⁰ Not coincidentally, the first collection of the 'maxims' of English law³⁷¹ involves an attempt to create entirely new sources of English law that would align it with the civil law, and which would displace existing precedent. This task was undertaken by Sir Francis Bacon, who was heavily invested in the attempt to reframe the laws of England so as to make them much more accommodating to James's authoritarian impulses.³⁷²

James's first attempt to recast English law came couched within a proposal for the union of the realms of Scotland and England.³⁷³ This realignment would surely have been advantageous to the crown, as Scotland was (and is) a civil law jurisdiction, where the king was not bound by such fundamental laws as the Magna Carta and the six due process statutes of Edward III, but merely by *Digna Vox*.³⁷⁴ Bacon had already been advocating a codification of English law, and "following the example of the great law reformers Justinian and Edward I [authoritarians both]" he "repeatedly urged the role of Solomonic lawgiver on both Elizabeth and James."³⁷⁵ Bacon used the proposal for the union of the realms to advocate for codification of English common law.³⁷⁶ After this failed, Bacon proposed a codification of the penal laws of the realm, something he again recommended to the King in 1614.³⁷⁷

369. 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 94 n.1 (1883).

370. See PETER STEIN, REGULAE IURIS: FROM JURISTIC RULES TO LEGAL MAXIMS 2, 90, 101 (1966).

371. Apart from a "small stock of maxims" drawn from Boniface VIII's *Liber Extra* of 1234 found in the early yearbooks. See Roscoe Pound, *The Maxims of Equity*, 34 HARV. L. REV. 809, 828 (1921).

372. See, e.g., DANIEL R. COQUILLETTE, FRANCIS BACON 31, 70 (1992).

373. See, e.g., Brian P. Levack, *Introduction* to THE JACOBAN UNION: SIX TRACTS OF 1604, at ix-x (Bruce R. Galloway & Brian P. Levack eds., 1985).

374. *Id.* at xxxv-xlii (1984).

375. Barbara Shapiro, *Sir Francis Bacon and the Mid-Seventeenth Century Movement for Law Reform*, 24 AM. J. LEGAL HIST. 331, 338 (1980).

376. *Id.* at 350.

377. 3 ROSCOE POUND, JURISPRUDENCE 705 (1959).

In 1621, Bacon presented the results of a five-year effort to “recompile” the law of England and strike down over 600 statutes.³⁷⁸ Unfortunately for Bacon’s proposal, this was also the year in which he fell from grace. At his impeachment, Bacon plead guilty to charges of bribery, confessing in response to every charge “that I am guilty of corruption.”³⁷⁹ His official influence having come to an end, Bacon attempted to build broader support for his reform efforts informally, by circulating three preparatory texts.³⁸⁰

Each of these texts was distributed in inverse proportion to its frankness. Early in his career, Bacon had written *A Collection of Some Principal Rules and Maxims of the Common Laws*.³⁸¹ Note that he was already identifying the maxims not as paraphrases of general principles (as was customary at common law, and as found in the work of Bracton and Fortescue),³⁸² but rather with binding *regula iuris*, as did the civilian jurists.³⁸³ When he was at the height of his power and codification seemed an attainable goal, he wrote the *Example of a Treatise on Universal Justice or the Fountains of Equity, by Aphorisms* and finally the *Aphorisms on the Greater Law of Nations, or the Fountains of Justice and Law*.³⁸⁴

The first text was in English, the better for the wide audience Bacon hoped to receive.³⁸⁵ Curiously, the maxims themselves are in untranslated Latin.³⁸⁶ Bacon noted in his preface that he chose Latin since it was “of the greatest authority and majesty to be avouched and alledged [sic] in argument.”³⁸⁷ He was attempting to invest them with “a kind of mysterious halo” that frequently “has had . . . the effect of preventing proper inquiry into their meaning.”³⁸⁸

378. Shapiro, *supra* note 375, at 351.

379. Markku Peltonen, *Bacon, Francis, Viscount St Alban (1561–1626)*, OXFORD DICTIONARY OF NAT’L BIOGRAPHY, <http://www.oxforddnb.com/view/article/990> (last visited Nov. 15, 2013).

380. *Id.*

381. FRANCIS BACON, *Maxims of the Law*, in 4 THE WORKS OF FRANCIS BACON 16 (James Spedding et al. eds., 1803).

382. Pound, *supra* note 371, at 832.

383. *See, e.g.*, STEIN, *supra* note 370, at 2, 101.

384. Francis Bacon, *Aphorisms on the Greater Law of Nations or the Fountains of Justice and Law*, edited by Mark S. Neustadt as part of his Ph.D. thesis, *The Making of the Instauration: Science, Politics, and Law in the Career of Francis Bacon* (1987) (unpublished Ph.D. dissertation, John Hopkins University).

385. Latin was being rapidly supplanted by English as the language of literary culture in seventeenth-century England. *See* Richard L. Venezky, *The Development of Literacy in the Industrialized Nations of the West*, in 2 HANDBOOK OF READING RESEARCH 60 (Rebecca Barr et al. eds., 1996).

386. FRANCIS BACON, *Preface to Maxims of the Law*, in 4 THE WORKS OF FRANCIS BACON, *supra* note 381, at 13.

387. *Id.*

388. Jeremiah Smith, *The Use of Maxims in Jurisprudence*, 9 HARV. L. REV. 13, 25 (1895).

Bacon seems to have considered this an implicit argument for the conclusion that his maxims should have the force of the civil law's *regulae*.

In this Elizabethan work, there is very little mention of *salus populi*. However, he slips the maxim into his discussion of Regula XII.³⁸⁹ This twelfth maxim (which Bacon creates by synthesizing a set of rather diverse precedents) is *receditur à placitis juris, potius quam injuriae et delicta maneat impunita* (pleas of law shall be receded from, so that crimes and injuries shall not go unpunished).³⁹⁰ Here, Bacon turns his endeavor entirely on its head, stating that in this case, those principles to which the maxim refers do not deserve the status of *regulae* at all, but merely a *placita juris* (pleas of law, being grounds of learning rather than binding rules).³⁹¹ Bacon is forced to admit that it is a “rule” that “penal statutes shall not be taken by [construed with principles appropriate to]³⁹² equity.”³⁹³ However, he clearly wishes that this were not the case, as he argues that it is better that the law dispense with principles that protect the accused “rather than crimes . . . [go] unpunished,” as “*quia salus populi suprema lex*; and *salus populi* is contained in repressing offences by punishment.”³⁹⁴

Another more tangential discussion of the *salus populi* in this text comes in his explanation of the maxim *necessitas inducit privilegium quoad* [sic] *iura privata* (necessity induces a privilege because of a private right). This principle, still extant in the common law, establishes such rights as that of a ship's master to tie his ship to a private dock when it would otherwise be destroyed (subject to the dock owner's right of compensation should the dock be damaged thereby).³⁹⁵ Bacon then takes this principle and twists it further than it can bear, without any citation of authority. He argues that the right created by private necessity does not run against the state.³⁹⁶ With no statute or case to rely upon, Bacon states, “[T]he law impose[s] [the duty] upon every subject, that he prefer the urgent service of his prince and country before the safety of his life.”³⁹⁷ However, his *Maxims* make no attempt to define the

389. BACON, *supra* note 381, at 50–52.

390. *Id.*

391. *Id.*

392. *See, e.g.*, 7 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT 1539 (Thomas B. Howell ed., 1816).

393. BACON, *supra* note 381, at 52.

394. *Id.* at 50.

395. *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910).

396. BACON, *supra* note 381, at 35.

397. *Id.*

powers of the king towards his subjects, since discussion of the scope of the privilege was assiduously avoided during Elizabeth's reign.³⁹⁸

When this subject exploded to the forefront of legal discourse in the wake of *Bates's Case* and the *Five Knight's Case*, Bacon had much to say about his patron's powers, although he took precautions against his words being fully understood by his enemies. Both the *Aphorisms on Universal Justice* and the *Aphorisms on the Law of Nations* were written entirely in Latin, a language that many lawyers of that time could not have read without difficulty.³⁹⁹ In *Aphorisms on the Greater Law of Nations*, his approach was more ambitious:

The *Maximes* considered only the first level of law The *Aphorismi* went beyond this level to look at first principles: the origins of law, how and why law grew over time, and what *authority* meant and how it legitimated law. Certain of the aphorisms Bacon set down are clearly the work of a man who had read Machiavelli and who would serve as the mentor of a young Thomas Hobbes.⁴⁰⁰

His analysis in these works was wholly consistent with the absolutist theory of the function of law and its position that the constitutional order must enable the executive to act when necessary to protect the state, as elaborated by James I, and later Thomas Hobbes. However, it is not compatible with the constitutional settlement of the English Civil War and the delimiting of executive powers after the Glorious Revolution, in which English jurists explicitly rejected James and Hobbes's ideas of sovereignty.

In the *Aphorisms on Universal Justice*, Bacon argues that private rights are subordinate to the rights of the sovereign, since “[p]rivate right depends upon the protection of public right. For the law protects the people, and magistrates protect the laws; *but the authority of the magistrates depends upon the sovereign power of the government* [not, as in medieval constitutionalism, on the natural law].”⁴⁰¹ This passage betrays Bodin's influence, his *Six Books* having been published in English fifteen years earlier.⁴⁰² In particular, it is possible to detect how in this later work Bacon rejects both the rule of law and his earlier acknowledgement that penal statutes must be strictly construed:

398. See, e.g., Daniel E. Seward, *Civic Voice in Elizabethan Parliamentary Oratory: The Rhetoric and Composition of Speeches Delivered at Westminster in 1566*, at 111–56 (May 2008) (unpublished Ph.D. dissertation, The University of Texas at Austin) (on file with author) (discussing Onslowe's case).

399. See Venezky, *supra* note 385, at 60.

400. Allen D. Boyer, *Light, Shadow, Science, and Law*, 92 MICH. L. REV. 1622, 1627 (1993).

401. 9 FRANCIS BACON, *THE WORKS OF FRANCIS BACON* 312 (James Spedding et al. eds., 1864) (emphasis added).

402. JEAN BETHKE ELSHTAIN, *SOVEREIGNTY: GOD, STATE, AND SELF* 95 (2008).

Fresh cases [involving alleged wrongs that are not recognized as crimes at common law or by statute] happen in criminal causes which require punishment

Let the Censorian Courts have power and jurisdiction, not only to punish new offences, but also to increase the punishments appointed by law [i.e., by statute] for old ones For an enormous crime has somewhat of the nature of a new one.⁴⁰³

To understand what Bacon means by “Censorian Courts,” which are undefined in this text, one must turn to Bacon’s *History of the Reign of King Henry VII*, where he argues that the “Star-chamber had the Censorian power,”⁴⁰⁴ and therefore was a sort of court of criminal equity,⁴⁰⁵ which could severely punish wrongs that were not crimes, despite the fact that the jurisdiction of the Star Chamber had been carefully defined by statute, and both Parliament and the Justices had repeatedly rejected attempts to expand that jurisdiction.⁴⁰⁶ Accordingly, it is possible to conclude that as “Bacon sought to regularize English law” by way of “a kind of codification,”⁴⁰⁷ his “New Digest of the Law” would have contained a theory of sovereignty that granted the Stuart monarchs the same powers as the kings of France.

Finally, in his *Aphorisms on the Law of Nations*, Bacon indicated how he hoped emergency powers could justify the introduction of absolute royal power into English law:

[I]t must be noted that legal bonds do not prevail in all cases. . . . If the power of any subject is so great that when he commits a crime he is safe from prosecution, then a king, who puts this subject to death without a legal proceeding, does not break the law. . . . [For] *the safety of a private person is owed to the state, particularly in times of danger.*⁴⁰⁸

Here, Bacon repeats the exact legal theory that Henry VII had invoked in his dispute against Robert of Naples, which had been decisively rejected for running contrary to medieval jurisprudence, which then served as the base for

403. 5 FRANCIS BACON, THE WORKS OF FRANCIS BACON 94–95 (James Spedding et al. eds., 1858).

404. FRANCIS BACON, THE HISTORY OF THE REIGN OF KING HENRY VII AND SELECTED WORKS 57 (Brian Vickers ed., 1998) (Bacon compares the jurisdiction of the Star Chamber to the court of the Roman Censor). *See also* FRANCIS BACON, BACON’S HISTORY OF THE REIGN OF KING HENRY VII WITH NOTES 62 (J. Rawson Lumby ed., 1885).

405. FRANCIS LUDLOW HOLT, THE LAW OF LIBEL 38 (1818); SIR DAVID LINDSAY KEIR, THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485, at 28 (9th ed. 1969).

406. Alford, *supra* note 306, 645–53.

407. Boyer, *supra* note 400, at 1628.

408. Mark S. Neustadt, *The Making of the Instauration: Science, Politics, and Law in the Career of Francis Bacon* 296–97 (1987) (unpublished Ph.D. dissertation, Johns Hopkins University) (microformed on University Microfilms Dissertation Information Services, 1990) (emphasis added).

medieval constitutionalism.⁴⁰⁹ This decretal had established that exigent circumstances could never excuse the king from the requirement that a subject be given an opportunity to defend themselves at law.⁴¹⁰ To justify his own view, Bacon rejects constitutionalism (and foreshadows the work of his admirer Hobbes), writing that since laws change, “It follows necessarily that there is in any commonwealth a certain power above the laws, that can abolish them and make them anew [T]he authority of laws does not depend upon consent alone, but wholly upon ruling authority [imperium].”⁴¹¹

Bacon’s conception of imperium (and of Roman law generally) is fundamentally flawed. Betraying ignorance of all the medieval commentary on *Digna Vox* and the differences between Byzantine and Roman theories of *imperium*, he states that:

[I]n the Imperial Roman law . . . there was the opinion . . . that for any law either proposed or already submitted, the people had already transferred their universal power to the Emperor. . . . [O]nce the supreme power has transformed itself, [i.e., it has been given by the people to the sovereign] it cannot be restored to its former state.⁴¹²

As both a matter of law and of history, this assertion is incorrect.

“In law by his concept of the legal maxim [Bacon] hoped to stand higher than Coke in the eyes of posterity and by his digests of case and statute law to emulate on English soil the innovations of Justinian.”⁴¹³ However, “if Bacon wanted to be an English Trebonianus, James . . . could not be an English Justinian,”⁴¹⁴ owing to the fierce resistance of the common lawyers, namely the opposition in Parliament of Whitelocke, St. John, Coke, and Alford. Bacon wrote, “I am in good hope, that when Sir Edward Coke’s Reports and my Rules and Decisions shall come to posterity, there will be (whatsoever is now thought) question who was the greater lawyer.”⁴¹⁵ The answer of posterity is obvious. Following his impeachment in 1621 and the abolition of his beloved Star Chamber in 1641,⁴¹⁶ Bacon’s legal work became a historical footnote. Coke, who told James that he could not sit in judgment personally, who in judgment held that the judiciary had the power to strike down unconstitutional proclamations, and who authored the Petition of Right (which specified that

409. See PENNINGTON, *supra* note 176, at 190–201.

410. *Id.*

411. Bacon, *supra* note 384, at 281.

412. *Id.* at 285.

413. Paul H. Kocher, *Francis Bacon on the Science of Jurisprudence*, 1 J. HIST. IDEAS 3, 3 (1957).

414. *Id.* at 16.

415. PEREZ ZAGORIN, FRANCIS BACON 196 (1998).

416. See Damian X. Powell, *Why Was Sir Francis Bacon Impeached? The Common Lawyers and the Chancery Revisited: 1621*, 84 HIST. 511, 513 (1996).

the king had no emergency powers to ignore the laws) became a hero to generations of constitutionalists, including the Framers.

B. Maxims of the Common Law Related to Salus Populi After Bacon

Bacon's legal work was ignored by posterity, with one exception. His Elizabethan *Maxims*, owing perhaps to their moderation, became an inspiration to treatise-writers, who emulated his example in producing collections of legal principles. These followers, as this section will demonstrate, were much more modest, noting that they needed to rely on precedent, and in general refrain from synthesizing what were purportedly new rules. In these treatises the strong interpretation of *salus populi* given by Bacon (and Paulsen and Gross) had been rejected by eighteenth-century Anglo-American legal thought.

The first jurists to follow Bacon's example and produce a book of maxims was William Noy. His *The Principal Grounds and Maxims with Analysis of the Laws of England* is also an implicit rebuttal to some of Bacon's assertions.⁴¹⁷ Indeed, wherever he departs from Bacon, one can discern some clear intent to make a point, since he otherwise follows Bacon very closely. Noy made no attempt to cast his maxims as rules or *regulae* but merely "grounds" (what Bacon called *placitis*).⁴¹⁸

Noy also makes no direct mention of the *salus populi*, which seems solid evidence that it was not a recognized concept within common law thought at the time. He comes to this maxim when illustrating the principle that "[t]he law favours things for the good of the commonwealth,"⁴¹⁹ but he makes no stronger case for executive power than saying that "if a sheriff pursue a felon to a house, and to apprehend the felon, he breaks open the door of a house, he may justify it."⁴²⁰ He does not even imply that the king has any power to act against the laws or otherwise take advantage of his subjects in emergencies, except perhaps for the perennial example of allowing a house to be knocked down to prevent the spread of a conflagration. In the manner befitting a common lawyer, Noy does not attempt to derive a general principle from this custom, and instead notes cautiously that the citizen's house must already be "burning."⁴²¹

Noy's discussion of the maxims related to the doctrine of necessity also provides a counterpoint to Bacon. He cleaves closely to Bacon's discussion of

417. WILLIAM NOY, *THE PRINCIPAL GROUNDS AND MAXIMS WITH ANALYSIS OF THE LAWS OF ENGLAND* (1824).

418. *Id.*; 7 FRANCIS BACON, *THE WORKS OF FRANCIS BACON* 358 (James Spedding et al. eds., 1879).

419. WILLIAM WALLER HENING, *MAXIMS IN LAW AND EQUITY* 32 (9th ed. 1824) (citing Noy's Maxim 26).

420. *Id.*

421. *Id.*

private necessity,⁴²² but he adds one gloss not found in the *Maxims*. Citing the reports of that great constitutionalist justice Edmund Plowden, he notes that the king's power to act out of necessity was limited by a statute that had become part of the fundamental laws of England: "[B]efore the statute of *Magna Charta*, the King might enter into another's woods, and cut the trees for reparations of castles."⁴²³ Here, Noy impliedly asserts that the king cannot act out of necessity in a way that has been foreclosed by the law. This is a rejection of the broader interpretations of the doctrine *salus populi suprema lex est*, as here it is the Great Charter that is the supreme law, such that it prevails over even the principles of public necessity.

The third major compilation of maxims of the early modern era was written by an anonymous "Gentleman of Middle Temple" in 1751.⁴²⁴ For the first time, *salus populi suprema lex est* is listed as a separate maxim in its own right.⁴²⁵ Several precedents formerly listed (in Noy and Bacon) under the headings of the maxims related to necessity are found in this section, which details the right to "raze houses *in publico incendio*" and to erect "bulwarks upon another's land" or to "[turn] the plough upon the head-land of another."⁴²⁶ These precedents all create defenses for members of the public and confer no rights upon the government.⁴²⁷

The Gentleman makes no mention of any right of the king to act unilaterally to safeguard the security of the state or its population in his discussions of the maxims related to private necessity.⁴²⁸ He also omits Bacon's principle that necessity is not a defense against the crown.⁴²⁹ Lastly, in his discussion of the rule that penal statutes are not to be construed by equity, he makes a stronger case in more general language. The maxim here is phrased "statutes penal to be construed strictly," turning a negative statement into a stronger positive proscription.⁴³⁰ This rejects the argument for investing any court with the Censorian authority, as Bacon had argued the Star Chamber possessed in his *Aphorisms*. The Gentleman's statement of the rule also contains no exceptions.⁴³¹

It should be noted that this particular book of maxims was frequently found in the libraries of colonial lawyers during the revolutionary period

422. *Id.*

423. NOY, *supra* note 417, at 36–37.

424. A GENTLEMAN OF THE MIDDLE TEMPLE, *THE GROUNDS AND RUDIMENTS OF LAW AND EQUITY* (2d ed. 1751) [hereinafter *THE GROUNDS AND RUDIMENTS OF LAW AND EQUITY*].

425. *Id.* at 312.

426. *Id.*

427. *Id.*

428. *See id.*

429. *THE GROUNDS AND RUDIMENTS OF LAW AND EQUITY*, *supra* note 424, at 217–19.

430. *Id.* at 317.

431. *Id.*

(1761–1783) and in the libraries of the Framers during that time.⁴³² Accordingly, it is now evident that the idea that the executive should have broad powers to protect the public welfare during an emergency—if indeed it was known to the Framers—did not come from the maxims or principles of the common law at the time, just as it could not have come from Cicero, from the history of Roman or medieval constitutionalism, and certainly not from their heroes amongst the Parliamentarian opposition to the Stuarts in the seventeenth century. However, since this maxim is frequently traced to John Locke, one must consider whether his words comprise support for the interpretation given to it by Paulsen and Gross.

VII. JOHN LOCKE, THE MAXIM, AND THE HOBBSIAN EXECUTIVE PRIVILEGE

It is indisputable that John Locke influenced the Framers, and it is likewise impossible to deny that on the title page of the *Two Treatises of Government*, the phrase “*salus populi suprema lex est*” is found directly beneath the author’s name.⁴³³ Locke, in the section of his treatise which comes directly before his discussion of executive privilege, made use of the maxim, saying: “*Salus populi suprema lex, is certainly so just and fundamental a rule, that he, who sincerely follows it, cannot dangerously err.*”⁴³⁴ Accordingly, a case might be made that at the time of the framing the view that the executive should have the power to transcend the constitution in a time of crisis was part of the consensus, owing to Locke’s views on government. However, it will be evident after a detailed review of the *Two Treatises* that Locke did not in fact advocate this view, and accordingly that he cannot be a source for these views at the time of the American Revolution.

A. *The Misrepresentation of Locke’s Views on Executive Privilege*

Locke’s views on executive power have lately been mischaracterized.⁴³⁵ While it has long been the conventional wisdom to ascribe views to Locke that were largely in conformity with his whig and puritan contemporaries, this view was jettisoned in the twentieth century, and “Locke has thus been made out to be very like Hobbes.”⁴³⁶ This revisionism can be ascribed largely to the neoconservative theorist Leo Strauss⁴³⁷ and his pupil Richard H. Cox:

432. See Howell J. Heaney, *A Signer of the Declaration of Independence Orders Books from London: Two Documents of George Read of Delaware in the Hampton L. Carson Collection of the Free Library of Philadelphia*, 2 AM. J. LEGAL HIST. 172, 173, 178 (1958).

433. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (6th prt. 1764).

434. JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 80 (J. W. Gough ed., 3d ed. 1966).

435. J. W. Gough, *Introduction to LOCKE*, *supra* note 434, at vii.

436. *Id.* at xxiii.

437. See SHADIA B. DRURY, *LEO STRAUSS AND THE AMERICAN RIGHT* 199 n.8 (1999).

It is largely Locke's partnership with Hobbes in promoting this alleged drastic deterioration of the European natural-law tradition which Leo Strauss has been concerned to expose in his treatment of Locke, and a former pupil of his, Richard H. Cox, has analysed exhaustively . . . in the *Two Treatises*.⁴³⁸

Their influential account of Locke, which posits that his vision of executive power constitutes a clear break with earlier constitutionalist views was subjected to Dunn's criticism:

The argument *ex silentio* . . . is deployed on the basis of a crude and question-begging biographical hypothesis and in a fashion which repeatedly ignores the characters of the texts analysed. . . .

. . . .

There are two major points at which Cox misrepresents Locke's position. The first is his assertion of primacy of right over duty and the second is the meaning he gives to the primacy of security over consumption. . . .

. . . [I]t is not a defensible analysis of Locke's work to turn it in this fashion into an apology for the *machtstaat*.⁴³⁹

J. W. Gough also responded negatively to the revisionist view that equated Locke and Hobbes's ideas:

So paradoxical a conclusion should surely make the critics pause. Admittedly one can find resemblances between the political doctrines of Hobbes and Locke, but it is not difficult to think of wide areas of divergence: for example, Hobbes's sovereign [like Bodin's] is not only undivided but indivisible, whereas Locke separates executive and legislative, and rejects "arbitrary" personal power. . . . Locke himself . . . spoke of Hobbes and Spinoza as "justly decried names." . . . He wrote to . . . refute Filmer's patriarchal version of the divine right of kings. . . . Filmer and Hobbes held similar views about law and sovereignty, so that rejection of the one involved rejection of the other also.⁴⁴⁰

Gough explained that the key to understanding Locke is to understand his influences, which are precisely those influences that Hobbes rejected:

[H]e was the inheritor from the middle ages of an ancient tradition which had come down, continually being modified in the process, from . . . the Roman jurists. Locke inherited this tradition . . . partly perhaps from other English writers . . . who had used the concept of the law of nature in a reply to Hobbes.⁴⁴¹

Accordingly, to discern the meaning of the *salus populi* quotation from *The Two Treatises*, one must first understand that Locke believed that the

438. JOHN DUNN, *THE POLITICAL THOUGHT OF JOHN LOCKE* 158 (1969).

439. *Id.* at 160.

440. Gough, *supra* note 435, at xxiv–xxv.

441. *Id.* at xxi.

executive is normally bound to observe the laws. However, Locke noted that the duties of the executive flow from two sorts of obligations.⁴⁴² One is contractual, while the second comes from the law of trusts.⁴⁴³ The first of these is a conventional idea drawn from medieval constitutionalism, while the second is more innovative.⁴⁴⁴ Pursuant to this second source of duties, Locke held that the legislature and the executive are given a power akin to that of a trustee over the public welfare, insofar as they are not bound to perform particular actions, but rather to attempt to achieve certain ends and to prioritize the well-being of the beneficiaries.⁴⁴⁵

Locke also believed that the executive power needs prerogative powers because they are entrusted with the duty to preserve the state. While he concluded that the executive may exercise its prerogative “against the direct letter of the law,”⁴⁴⁶ it could only ignore those positive laws of the state that do not establish or shape the fiduciary relationship between the executive and the citizenry. For Locke, the creation of the trust that created the prerogative powers flowed from the specific promises of the executive to govern in accordance with the constitutional order.⁴⁴⁷ The key difference between Locke’s view and Hobbes’s is Locke’s view of the function of these promises: “[P]romises . . . even bind the Almighty. . . . [T]his stress on the status of promises is one of the taboos which the exponents of *raison d’état* [Bodin, Hobbes] regarded with the greatest contempt, as the merest superstition.”⁴⁴⁸

Dunn asks and answers the vital question about Locke’s invocation of the maxim:

What then are we to make of Locke himself when he says that whoever sincerely follows the Rule *Salus Populi Suprema Lex* ‘cannot dangerously err’ . . . ? One possibility is to point severely to the context in which he uses this particular expression . . . [and] insist that it does not involve any breach of a promise or oath . . . [and note] that if Locke wished to exempt princes from

442. See RANDALL LESAFFER, *EUROPEAN LEGAL HISTORY: A CULTURAL AND POLITICAL PERSPECTIVE* 388 (2009).

443. Martyn P. Thompson, *Locke’s Contract in Context*, in *THE SOCIAL CONTRACT FROM HOBBS TO RAWLS* 73, 75 (David Boucher & Paul Kelly eds., 1994).

444. Brian Tierney, *Corporatism, Individualism, and Consent: Locke and Premodern Thought*, in *LAW AS PROFESSION AND PRACTICE IN MEDIEVAL EUROPE* 49, 66 (Kenneth Pennington & Melodie Harris Eichbauer eds., 2011).

445. A. JOHN SIMMONS, *ON THE EDGE OF ANARCHY: LOCKE, CONSENT, AND THE LIMITS OF SOCIETY* 71–72 (1993).

446. LOCKE, *supra* note 434, at 84.

447. Locke derived these views from his mentor George Lawson. See JULIAN H. FRANKLIN, *JOHN LOCKE AND THE THEORY OF SOVEREIGNTY* 53–86 (1981).

448. DUNN, *supra* note 438, at 162.

their obligations he would be in the odd position of supposing Charles II (or, later, William III) not to be bound by a practice which bound God himself.⁴⁴⁹

It is obvious that Locke—unlike such theorists as Gabriel Naudé, who followed Bodin and “used the *salus populi* axiom to justify virtually any sort of evil in order that public good might come of it,”⁴⁵⁰—had a more modest idea in mind. Like Cicero, he hoped that the trustee of the public welfare would consider the health of the people as their foremost guiding principle. There is no support for the conclusion that he intended that the maxim should justify the executive’s breaking their promises and disregarding the constitution. This would have required a theory of undivided and unbounded sovereignty, while Locke had written *Two Treatises* precisely to rebut this theory—as espoused by Filmer, and later, Hobbes.⁴⁵¹

B. *The Framers’ Rejection of Hobbes*

If Thomas Hobbes was a key influence on the Framers, then it is possible that a much more robust vision of executive power and a strong version of the maxim of *salus populi* might have been contemplated by the founding fathers. However, since there is ample evidence that Hobbes’s view on these subjects is entirely inconsistent with Locke’s, it is unlikely that this is the case. Even those who advocate this theory admit that “[t]he most generous view of Hobbes’s influence is that the Founders generally accepted his view of the problem of politics while rejecting his solution.”⁴⁵² Hobbes (the so-called “monster of Malmsbury”⁴⁵³) was seen by the entire founding generation as an opponent of freedom. This opinion was shared by both patriots and loyalists:

Writers the colonists took to be opponents of Enlightenment rationalism—primarily Hobbes, Filmer, Sibthorpe, Mandeville, and Mainwaring—were denounced as frequently by loyalists as by patriots . . . [W]ith the exception of Filmer none of the authors . . . were in fact referred to favorably by Tories.⁴⁵⁴

Hobbes was also denounced and rejected by one of the key legal theorists of the previous century, one who was held in high esteem by the Framers, Sir Matthew Hale, who authored several influential treatises. His *History and*

449. *Id.* at 163–64.

450. *Id.* at 163.

451. STERLING POWER LAMPRECHT, *THE MORAL AND POLITICAL PHILOSOPHY OF JOHN LOCKE* 41–42 (1918).

452. Gary L. McDowell, *Private Conscience and Public Order: Hobbes and The Federalist*, 25 *POLITY* 421, 424 (1993).

453. LAURA LUNGER KNOPPERS, *THE OXFORD HANDBOOK OF LITERATURE AND THE ENGLISH REVOLUTION* 394, 407 n.2 (2012).

454. *PAMPHLETS OF THE AMERICAN REVOLUTION*, *supra* note 45, at 25.

*Analysis of the Common Law of England*⁴⁵⁵ was a mainstay of the constitutionalist tradition. For the purposes of this Article, however, another work of Hale's is particularly pertinent: his *Reflections on Hobbes's Dialogue of the Laws*,⁴⁵⁶ which illustrates the vast gulf between the constitutionalist tradition that influenced the Framers and the theory of sovereignty that they rejected.

Hobbes's dialogue had been a strenuous criticism of Coke; following Bodin, he argued that "Law . . . is the command of a sovereign which, though it may be iniquitous, cannot be unjust. Neither case law, nor custom, is truly law."⁴⁵⁷ Hobbes believed that the sovereign's power knew no bounds: "[T]hese laws cannot bind him, since otherwise he would lose his supreme power to keep order."⁴⁵⁸ Like his royalist antecedents, he claimed that the subjects of the sovereign cede to it all of their natural rights, as condition of the protection that the sovereign provides from the potential war of all against all; in order to provide this protection, the sovereign had a right to demand undivided and unlimited authority.⁴⁵⁹ As Hale summarized Hobbes's views: "[T]here can be no qualifications or modification of the power of a sovereign prince . . . [H]e alone is judge of all public dangers and may appoint such remedies as he please and impose what charges he thinks fit in order thereunto."⁴⁶⁰

Conversely, Hale championed the traditional view⁴⁶¹—the constitution may "in many cases hinder the kings acts and make them void if they are against law."⁴⁶² It is not surprising that Hale would be unsympathetic to Hobbes's views, since constitutionalism imposes limitations "on the sovereignty of the lawmaking power."⁴⁶³ This is a natural consequence of the fact that the constitutionalist lawyers had "emphasized the ancient tradition of limitations upon the royal prerogative."⁴⁶⁴

455. SIR MATTHEW HALE, HISTORY OF THE COMMON LAW OF ENGLAND (1713).

456. Sir Matthew Hale, *Reflections on Hobbes's Dialogue of the Laws*, in 5 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 500 (1973). This was not printed in Hale's lifetime, although it circulated in manuscript form and was frequently copied, as was Hobbes's work before it was itself posthumously printed. See also Sir Frederick Pollock, *Sir Matthew Hale on Hobbes*, 37 L.Q. REV. 274, 274–75 (1921).

457. Pollock, *supra* note 456, at 277.

458. Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale* 103 YALE L. REV. 1651, 1718 (1994).

459. *Id.*

460. Pollock, *supra* note 456, at 297 (author's translation from Early Modern to Modern English).

461. See, e.g., HENRY FINCH, LAW, A DISCOURSE THEREOF 75 (4th ed. 1759) (laws contrary to the natural law "lose their force, and are no laws at all").

462. Pollock, *supra* note 456, at 283.

463. Berman, *supra* note 458, at 1708.

464. *Id.*

Hale “countered Hobbes’ ideal type not with only moral and political arguments but also with the reality of English constitutional history, to which he attached normative significance,”⁴⁶⁵ pointing in particular to the boundaries on the powers of the executive, which he argued were desirable.⁴⁶⁶ He noted that the king was bound by his coronation oath to observe the nation’s fundamental laws, and that those laws, as named in such acts as the Magna Carta, particularly mentioned the liberties of the subject.⁴⁶⁷ In doing so, he argued that “the sovereignty of the king exists within a legal framework.”⁴⁶⁸ Drawing on a tradition that extends as far back as Bracton, he asserted that the king is not above the law, but is constrained by those very laws that give him legitimacy.⁴⁶⁹

Hale’s response attests to the essential continuity of English legal thought,⁴⁷⁰ reviving the argument that:

[Owing to] the great solemnity of the oath which he takes at his coronation to observe and keep those laws and liberties . . . no man can make a question whether [the king] be not in the sight of God and by the bond of natural justice be obliged to keep it.⁴⁷¹

Furthermore, he answered Hobbes’ argument that the sovereign required unlimited powers to protect the public in unforeseen emergencies by saying:

[I]t is a madness to think that the model of laws of government is to be framed according to such circumstances as very rarely occur. It is as if a man should make agaric and rhubarb his ordinary diet, because it is of use when he is sick, which may be once in seven years.⁴⁷²

Finally, when addressing the question of the Framers’ vision of executive power, one must remember that one of the key objections the patriot party had with existing British constitutional theory was its turn to a theory of sovereignty that drew heavily upon continental theory,⁴⁷³ much to the chagrin of their colonial subjects, who cleaved to the theory of the ancient constitution and the fundamental law tradition.⁴⁷⁴ The American patriots believed that “Parliament had adopted wholeheartedly the doctrine of sovereignty as stated by Hobbes, that in every state there must be a sovereign, uncontrolled by law

465. *Id.* at 1719.

466. Hale, *supra* note 456, at 508.

467. *Id.* at 507–08.

468. Berman, *supra* note 458, at 1720.

469. HOLDSWORTH, *supra* note 348, at 507–08.

470. *See* Berman, *supra* note 458, at 1702–21.

471. HOLDSWORTH, *supra* note 348, at 511.

472. *Id.* at 512.

473. JOHN PHILIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 17–21 (1986).

474. *Id.*

. . . a theory of law that had cost Charles I his head and James II his throne,”⁴⁷⁵ as the English Parliament had adopted the theory of sovereignty that “emerged with the writings of Thomas Hobbes . . . departing from the common law tradition and from the constitutionalism that would dominate American legal thought both before the Revolution and into the age of the early republic.”⁴⁷⁶

Accordingly, the burden of proof is squarely on those who assert that the Framers had adopted a view of sovereignty that was Hobbesian and fundamentally antithetical to Hobbes’s.⁴⁷⁷ This is what Paulsen has argued, against the great weight of all of the historical evidence adduced above. He has not met his obligation to refute, or indeed even address this argument.

CONCLUSION

This Article has demonstrated that it is certainly not the case that the preservation of a constitutional order requires the state to vest the executive with the power to ignore its constitution. No other previously existing constitutional state had done so, and they frequently rejected rulers’ attempts to create the constitutional metaprinciple that Paulsen prizes.

Since the Roman Republic, states with mixed constitutions have invariably limited the emergency powers of their executives, since the abuse of this privilege has been rightly regarded as more dangerous to the constitution than any external threat. Following Polybius’s conception of the cycle of constitutions, the theorists of antiquity noted that a ruler “will ask for extraordinary powers to cope with . . . violent opposition. Once he has obtained these powers, together with command over an armed force that obeys him blindly, he becomes a tyrant.”⁴⁷⁸ While Cicero had pressed very hard for such extraordinary powers, he was repeatedly rebuked for doing so and ultimately sent into exile. Having learned his lesson about the unacceptability of these proposals, he abandoned them in the comprehensive program for the reform of the republican constitution found in his *The Laws*.

Cicero’s conviction drove home the principle that—even after passage of the *senatus consultum ultimum*—Consuls were required to observe certain constitutional norms. These precluded such actions as Rabirius’s murder of Saturninus and the Senate’s execution of Lentulus. Even in emergencies, the executive was required to observe the laws that provided the accused with due process and the right of appeal. In the imperial period, the executive was still bound to observe these laws. While Trebonian and Justinian distorted Ulpian’s

475. ARTHUR L. GOODHART, *LAW OF THE LAND* 60 (1966).

476. REID, *supra* note 473, at 64.

477. See VINCENT OSTROM, *THE POLITICAL THEORY OF A COMPOUND REPUBLIC* xxix (1987) (describing Hobbes’s view of sovereignty).

478. KURT VON FRITZ, *THE THEORY OF THE MIXED CONSTITUTION IN ANTIQUITY* 65 (1975).

jurisprudence to give the Byzantine emperors more powers, they were still held to be morally bound to observe the laws by *Digna Vox*.

Medieval constitutionalism shows how this Roman theory of mixed government and limited powers was rediscovered and pressed into service as the cornerstone of early European theories of regal power. Legalistic interpretations of *Digna Vox* created powerful limits on a king's ability to deviate from the *ordo iudicarius* when they contended that civil emergencies demanded that the defendant receive less than due process would otherwise require. The *Magna Carta* and the *Saepe Contingit* established that kings did not have a constitutional power to dispense with the laws in emergencies (in countries governed by the common law and the *ius commune*, respectively).

Jean Bodin's theory of undivided and unlimited sovereignty was a radical break with existing legal theory. It was adopted in France in order to justify Charles IX's blatant criminality in the wake of the Saint Bartholomew's Day massacre. However, when the Stuarts attempted to transplant this theory of strong executive power into England, the legal profession led the successful resistance to this drive towards absolutism. The early Stuart monarchs attempted to justify an unbounded executive privilege by arguing that they could ignore the laws when protecting the country in a time of emergency. The incompatibility between this assertion and medieval constitutionalism was exposed in three key cases, which led to a backlash against strong executive powers in general and broad emergency powers in particular.

The jurists who decried these attempts to smuggle absolutism into the common law through the back door of emergency powers—such as Lord Coke and Sir Matthew Hale—subsequently became heroes to the founding fathers. Likewise, Sir Francis Bacon's attempt to introduce these principles into the maxims of the common law failed, as jurists such as William Noy rooted out Bacon's corruptions from later books of maxims. By the time of the framing, influential books of maxims explicitly disavowed the notion that the executive can ignore the law in defense of the state, as evidenced by the remarks of the anonymous "Gentleman of Middle Temple" in a treatise that found its way into the libraries of the Framers.

Finally, this Article demonstrated that the Framers might have derived a strong theory of executive defense of the *salus populi* from their exposure to John Locke's use of this concept. While Locke held that the executive could ignore the technicalities of law to preserve public welfare (since he was not specifically bound by such means as the coronation oath to observe all the laws), he in fact did make explicit promises to uphold the fundamental laws (i.e., the constitution), a commitment which Locke clearly held to be not only binding, but unbreakable. There is ample evidence that the Framers read Locke correctly as a rejection of Filmer and Hobbes's views on sovereignty, since they embraced Locke and abhorred Hobbes.

All of the founding fathers' intellectual influences pointed them away from the theory of executive powers that Paulsen and others believe to be implicit within the Constitution of the United States. Accordingly, in addition to showing that a strong theory of executive privilege to defend the *salus populi* is not necessary to the preservation of the constitutional order, this history demonstrates something else. Namely, it illustrates that there was a strong presumption against an executive privilege to ignore the laws, such that the Framers—had they decided to depart from two thousand years of constitutionalist tradition—would have incorporated it explicitly. In view of this history and its influence on the Framers, the argument that the Constitution adopted this view implicitly is absurd.

A constitution without an executive privilege to ignore its limits is not a suicide pact: constitutions without this have survived for centuries. Rather, it is merely a constitutional order that would require the executive, should he ignore the constitution in order to protect the public, to accept responsibility and the possibility of punishment for its actions. Should the people conclude that this was necessary, although unconstitutional—as with Lincoln's suspension of *habeas corpus*—there will likely be no repercussions.⁴⁷⁹ However, pretending that the executive has an implicit constitutional power to ignore the constitution whenever he or she deems necessary gives them the power to break the laws with impunity, something that constitutionalist writers since Polybius have concluded will pave the way to tyranny.

479. See Abraham Lincoln, Amnesty to Political or State Prisoners (Feb. 14, 1862), in 2 ABRAHAM LINCOLN: COMPLETE WORKS, COMPRISING HIS SPEECHES, LETTERS, STATE PAPERS, AND MISCELLANEOUS WRITINGS 123–25 (John G. Nicolay & John Hay eds., 1894).