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Is an Inviolable Constitution a Suicide Pact? Historical Perspectives on an Overriding Executive Power to Protect the Salus Populi

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

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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 that:

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

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² Id. at 164–65.
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. 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.

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 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.

Legal history can be used to prove three relevant points in refutation of Paulsen’s assertion. First, the greatest minds of a constitutional tradition

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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
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

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6 Id.
7 See Ryan Patrick Alford, The Rule of Law at the Crossroads: Constitutional
8 Paulsen, supra note 5, at 1287–89.
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 . . . . if it does not, the Constitution is a suicide pact.”

His argument countenances no limits on what the President can do when faced with an emergency, which he alone has the power to define. Paulsen explicitly states that this would make torture not merely morally defensible but constitutional. Foreshadowing Judge Posner’s arguments, Paulsen states that “the reasonableness of the intrusion is a function of circumstances, and the magnitude of the imminent danger can justify what otherwise might be . . . unreasonable.” 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. 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 . . . . the existence of such a constitutional duty of the President very strongly implies the existence of a legitimate constitutional power on the part of the President to carry out that duty.

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. 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,

9 Id. at 1259.
10 Id. at 1291.
11 Id. at 1280.
13 Paulsen, supra note 5, at 1280.
15 Paulsen, supra note 5, at 1263.
which, following principles of legal realism, are actually embedded within the constitutional order. 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 approach. Where the survival (or fundamental interest of the state) is concerned, there ought to be no holding back on governmental action.

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.” Other theorists reach this same conclusion for similar reasons, including John Yoo, Thomas Crocker, Eric Posner & Adrian Vermeule, and Richard Seamon. 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. 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.”

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

17 Id. at 1021.
18 Id. at 1042 (italics in original).
23 Heller, supra note 22, at 790 (quoting Paulsen, supra note 5, at 1275).
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 fundamental transformation,“24 brought about by sweeping assertions of executive power to ignore the laws during the period of crisis following the terrorist attacks of September 11, 2001.25

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,”26 During the three years following, however, it appeared as if the legal system had rebuked these assertions, after the Supreme Court penned its decisions Hamdan v. Rumsfeld27 and Boumediene v. Bush,28 and after the Office of Legal Counsel repealed the memoranda29 asserting that the President had the constitutional power to take the nation to war without congressional approval,30 to authorize forms of interrogation that were inconsistent with the Convention Against Torture,31 and which asserted that the President could ignore laws prohibiting warrantless wiretapping.32 It appeared as if

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26 Levinson, supra note 24, at 892 (quoting Bruce Fein, Commentary, Hemlock Hallmarks, WASH. TIMES, Apr. 11, 2006).
32 Legal Authorities Supporting the Activities of the Nat'l Sec. Agency Described by
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. Four years later, another critical moment may already be upon us. The President has asserted and exercised, on the basis of nothing more than a secret OLC memorandum, 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. His Secretary of State now asserts that the President has the power to continue hostilities with a foreign nation in contravention of the War Powers Resolution of 1973, even were Congress to pass a bill curtailing that mission. 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; 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. 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.

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 constitutional rights as freeborn Englishmen. 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 implicit 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 their constitutions in times of crisis. English history, at least, suggests that chief executives enjoyed no such power.

As the article will establish, this is indeed a correct assessment of English law. However, the Framers were well-read and drew upon many other sources. As Gross noted, “issues . . . such as how a constitutional regime should respond to violent challenges [are] as ancient as the Roman Republic,” something which no doubt led him to consider the enduring appeal of “[m]axims such as . . . salus populi suprema lex est.” Accordingly, to rebut Paulsen historical oversights more adequately, one

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41 Prakash, supra note 39, at 1301.
42 1 Bernard Baily, Pamphlets of the American Revolution 1750-1776, 24 (1967) (“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 Commonwealth period . . . the colonists identified with these seventeenth century heroes of liberty.”).
43 Gross, supra note 16, at 1014.
44 Id. at 1042.
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. 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, Dominate, the Byzantine Empire and medieval constitutionalist monarchies) have ever embraced a theory of a meta-constitutional principle which claims that because *salus populi est suprema lex* the executive has the power to dispense with fundamental rights in a crisis.

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 paper 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. It will be demonstrated that significant constitutional restrictions persisted during the imperial periods, and which are codified in the *Corpus Iuris Civilis*, which defined the theory and limits of the Byzantine emperors’ powers.

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, 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

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46 HAROLD BERMAN, LAW AND REVOLUTION 204 (1983).
rejected and anathemized within Anglo-American constitutional theory during the late seventeenth century.

Even treatises that include a reference to the maxim salus populi est suprema lex 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 with which influenced the Framers.

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’ 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 est suprema lex is thought to have been coined by Marcus Tullius Cicero, 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. 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 section, 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 Consuls (via the Senate) these sorts of powers in emergencies, by this time his argument had been decisively rejected. 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.47

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 advocate. 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. 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. One must first understand the limited scope of his later proposals before attempting to discern the precise meaning of his most quoted phrase.

47 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.
A. The Origin of the Maxim in De Legibus

Cicero wrote *The Laws* between 51 and 46 B.C.\(^{48}\) 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*.”\(^{49}\) Nevertheless, some of his proposals are novel, most pertinently his idea that the Senate should have greater powers in emergencies.\(^{50}\) 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). 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. 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.\(^{51}\) 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 interpretation—one that has been universally rejected as unthinkable—seems to be the literal one that Cicero actually intended to place the Consuls above the law.”\(^{52}\)

\(^{49}\) *Id.* at xxv.  
\(^{50}\) *Id.* at xxv.  
\(^{51}\) 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.  
Dyck suggests that this misinterpretation only appears plausible because of the “tendency to take lex too literally; the suprema lex is surely ‘the supreme principle’ for their conduct in office.” 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. 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 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, 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. Interestingly, his proposal departs from previous precedents, where the Consuls appointed the dictator;\textsuperscript{53} 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.\textsuperscript{54} “Cicero is careful to define the power accruing to the . . . dictator . . . with reference to the regular ones [the ordinary magistrates].”\textsuperscript{55}

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 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.”\textsuperscript{56} Dyck, who is properly attentive to Cicero’s philosophical training and his key influences, traces this view directly to Plato’s Laws.\textsuperscript{57} There, the Greek philosopher wrote that “the ministration of the laws must be assigned . . . to that man who is most obedient to the laws . . . wherever the law is lord over the magistrates, and the magistrates are servants to the law, there I decry salvation and all the blessings the gods bestow on States.”\textsuperscript{58}

\textsuperscript{53} Andrew W. Dyck, A Commentary on Cicero, De Officiis 461 (1997).
\textsuperscript{54} The benefit of a dictator stems from the fact that his executive acts cannot be vetoed by the other Consul.
\textsuperscript{55} Dyck, supra note 53, at 462.
\textsuperscript{56} Cicero, supra note 52, at 150 (Niall Rudd translation).
\textsuperscript{57} Dyck, supra note 53, at 432.
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 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.  

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, 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, was “universally rejected as unthinkable.”

### 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 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.

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59 *Id.* at § 715b.

60 Rudd, *supra* note 48 at xv.

61 Keyes, *supra* note 52, at 317.
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. (This included the emergency precipitated by Hannibal’s surprise attack on Rome.) However, in 82 B.C., Lucius Cornelius Sulla was appointed a dictator of an entirely new type, and given broad and unprecedented powers. In the wake of a civil war between the populist party of Gaius Marius and the Roman oligarchy, the Senate appointed Sulla a “dictator for the making of laws and the settling of the constitution.” 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.

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,” something which was done “despite odious memories of Sulla” and which was—to say the least—constitutionally problematic. Accordingly, when 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 ultimatum. 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.”

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 citizens), 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.

64 Id.
66 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.
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. 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 override a law.\(^67\) 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*. This undoubtedly led Cicero to abandon his drive for stronger emergency powers, as evidenced by his more modest proposals in *The Laws*.

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. Since the killing occurred during a state of emergency declared with a *senatus consultum ultimum*, this trial sheds considerable light on the late republican constitution. The verdict contradicts the unfortunate modern misinterpretation of *salus populi est supreme lex* — 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 that they [the Consuls] already had. It conferred upon them no new authority nor did it even purport to remove any of the restrictions that were imposed by statute on the use of their imperium [i.e., power to punish according to law].\(^68\)

The facts underlying the trial are as follows. Saturninus, a tribune of the plebeians, was declared an enemy of the people by the Senate. After a siege at the Capitol, Marius captured Saturninus and imprisoned him in the senate house. 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

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prisoners; witnesses would later testify that Rabirius had thrown the fatal tile and that he had carried Saturninus’ head around with him afterwards.69

Thirty-five years had passed since the murder and the defendant had prospered within the Roman oligarchy, attaining senatorial rank and great wealth. Caesar wanted to shame the oligarchic party for failing to prosecute an obvious and scandalous crime.70 Accordingly, Rabirius was not charged merely with assassination (sicariis), or high treason (perduello), but with scandalous immorality.71 “It was calculated to rally the popular party around the ‘unicum libertatis presidium’ [the defense of the unparalleled palladium of Roman liberties] . . . it sounded a significant note of warning, clearly not lost on Cicero, against careless application of martial law by senate or consuls, or failure to punish regrettable or illegal incidents.”72

Rabirius was convicted at trial, but rather than exiling himself to avoid execution,73 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.74 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. 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 Satuninus, what is to be said of all those noble patriots who did the same . . . . There is not a loyal citizen in Rome today who is not in the name of Rabirius the subject of a capital charge.75

The argument was clearly unavailing and numerous classicists have averred that Rabirius was about to be convicted by the comitia centuriata.76 Cassius Dio concluded that “Rabirius would certainly have been condemned but for the intervention of [the Praetor Quintus Caecilius]

69 De vir. ill. 73.
70 ERNEST GEORGE HARDY, SOME PROBLEMS IN ROMAN HISTORY 109 (1924).
71 Id. at 118.
72 Id. at 109–110.
73 A right created by the lex Porica of 195 B.C.
74 Established by the lex Valeria of B.C. 299.
75 Hardy, supra note 70, at 108. (quoting Cicero, Pro Rabirio, 6.19, 10.29, 11.31.)
76 See, e.g., Evan T. Sage, The Senatus Consultum Ultimum, 13 CLASSICAL WEEKLY no. 24 at187 (1920); Hardy, supra note 70, at 124.
Metellus [Celer].”\textsuperscript{77} Metellus hauled down the red flag flying over the guard-post on the Janiculum hill, which by custom required the \textit{comitia} to disperse and for the dismissal with prejudice of all pending cases.\textsuperscript{78} As Sage notes, “by this ruse Rabirius escaped conviction.”\textsuperscript{79} 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 they 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.

These laws included the \textit{leges Valeriana}, which required granting an appeal to the people after any conviction on a capital charge. One of the Valerian laws effectively converted death sentences into internal exile, since it allowed the defendant to flee before sentence would be passed. The \textit{leges Porciae} explicitly provided for the trial and punishment of magistrates who attempted to circumvent the Valerian laws, and the \textit{lex Sempronia ne quis iudicio circumventiatur} forbade the creation of special courts or judicial commissions, even during periods of turmoil or after emergency decrees were passed.\textsuperscript{80} These laws were so prized that their violation was thought to be not only wrong, but sacrilegious.\textsuperscript{81} This is evident from the fact that Caesar was able to revive a special procedure involving \textit{duumviri perduellonis} for the prosecution of Rabirius, which was justified by reference to the fact that the murder was so scandalous that it angered the gods.

There is no inherent tension between the principles of due process embodied in these laws and the \textit{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

\textsuperscript{77} Hardy, \textit{supra} note 70, at 124. (citing Cassius Dio, Histioria Romana, Bk 38, Ch 27.)

\textsuperscript{78} 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.

\textsuperscript{79} Sage, \textit{supra} note 76, at 187.

\textsuperscript{80} N. J. Miners, \textit{Lex Sempronia Ne Quis Iudicio Circumventiatur}, 8 CLASSICAL Q. 241 (1958) (citing THEODORE MOMMSEN, HISTORY OF ROME 355(1894)).

understood to authorize only action “in strict conformity [to what had been done by Lucius] Opimius,”82 who had led the forces of order in the wake of the death of the populist Gauis Graccus. 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.”83 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.84

Hardy argues that this was the common understanding of the scope of the powers conferred by the consulta. The popular rejection of Cicero’s theory at the conclusion of Rabirius’ 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’ acts. One must note that “Saturninus on surrendering and being made prisoner had ceased to be an open perduellonis in arms against the State, whose safety demanded his instant death,” and that accordingly Rabirius had been found guilty for murdering him. 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. 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.

82 Hardy, supra note 70, at 102.
83 Ernest George Hardy, The Catilinarian Conspiracy In Its Context, 7 J. OF ROMAN STUD. 153, 212 (1917).
84 Hardy, supra note 70, at 102–03.
4. The Catilinarian conspiracy reveals a *Consultum Ultimum*'s limitations

In 63 B.C., another populist conspiracy to overthrow the republic was alleged. Catiline was said to have been plotting along with a rebel army in Etruria to seize the city. Cicero, by then Consul, denounced Catiline in a series of famous orations even before hard evidence came into his hands. In these blistering speeches, he “constantly reiterate[ed]” that “Catiline and his associates were *hostes* [enemies of the state].”\(^{85}\) Cicero obtained what appeared to be solid proof of the conspiracy from Fabius Sanga. Subsequently, Catiline’s second-in-command, the *praetor* Publius Cornelius Lentulus and his associates were seized by Cicero’s men. By this point Cicero had secured the *consultum ultimum* from the Senate, which authorized him to use lethal force against armed enemies.

Following the precedent set in Rabirius’ 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’ 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.\(^{86}\)

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. He “asserted that the *leges de provocatione* [the Porcian 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.”\(^{87}\) 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 Senate is to be the court for the trial of the case of these conspirators.”\(^{88}\) By suggesting the Senate try Lentulus, Cicero was accepting that the conspirators retained the benefit of the laws (“Cicero

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\(^{85}\) G.W. Botsford, *On the Legality of the Trial and Condemnation of the Catilinarian Conspirators*, 6 CLASSICAL WEEKLY 130, 131 (1913).


\(^{87}\) Botsford, *supra* note 85, at 131.

\(^{88}\) Id.
accordingly applies the term *iudicare* to the action of the Senate*).\(^{89}\) This was tacit acceptance of the holding in Rabirius’ 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.”\(^{90}\) 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.\(^ {91}\) 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.*”\(^ {92}\)

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.\(^ {93}\) 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.”\(^ {94}\) Hardy agrees with this conclusion: “It was obviously no adequate defense 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.”\(^ {95}\) This also follows from Rabirius’ trial.

Later, Public Clodius Pulcher responded to this extrajudicial execution by introducing a plebiscite to the Plebian Council, which subsequently became a law. The *lex Clodia de civibus romanis interemptis* authorized prosecutions of any official who executed a Roman citizen without trial. Cicero believed that it was directed at him personally, so he went into voluntary exile before he could be charged. 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.”\(^ {96}\)

Cicero never really recovered from the stain of these executions. Instead he retreated into literary affairs, writing his best-known works. As

\(^{89}\) *Id.*

\(^{90}\) Miners, *supra* note 80, at 241. See also Hardy, *supra* note 70, at 211–12.


\(^{92}\) Hardy, *supra* note 70, at 214.

\(^{93}\) *Id.* 217–18.

\(^{94}\) Botsford, *supra* note 85, at 131.

\(^{95}\) Hardy, *supra* note 70, at 219.

\(^{96}\) Botsford, *supra* note 85, at 132.
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 late republican period (which was comparatively brief) 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. Such an observer might also argue that if even if the maxim of salus populi est suprema lex 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.

The popular understanding of the power of the emperor is that it was unbounded. This ignores the fact that the Roman citizenry justified their opposition to emperors by arguing that they did not rule in accordance with “the right.” The distinction between a king (or an emperor) and a tyrant was already a popular topos in antiquity, 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 . . . . the classical law remained in force until A.D. 533,” when the Digest became the law of the empire. Paul is perfectly clear on this point: “Testamentum, in quo imperator heres scriptus est, inofficiosum argui potest.” Ulpian expressed the same opinion.

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 “the sovereign is not bound by the

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97 Fritz Schulz, Bracton on Kingship, 60 ENG. HIST. REV. 136, 151 (1945).
98 Id. at 156.
99 Julius Paulus Prudentissimus, the last and most authoritative of the Roman jurists.
100 Paul, Sententiae, 4.5.3; see also Schulz, supra note 97 at 160.
101 Id. at 5.2.
laws,”102 and second, that “whatsoever pleases the prince has the force of law."103 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.

A. Understanding that the Corpus Iuris Civilis is Not an Accurate Reflection of even the Late Imperial Constitution

The Digest was written in 534, more than a century after the fall of the West. It was commissioned by Justinian to serve as the law of the Eastern Roman empire. One must also remember that 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. The code was compiled by Theodosian after centuries of cultural and political divergence from Rome, and it was not an entirely straightforward compilation of traditional Roman legal principles.

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 imperio Vespasiani,104 which, as its name indicates, invests the emperor with the imperium of a Roman magistrate. 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,105 which pertained to inheritance rights (the emperor had been given a special dispensation from this law by statute). 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).106

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

104 Schulz, supra note 97, at 154.
105 Id. at 158.
106 Id.
empire than in the republic. However, the inclusion of these views attributed to Ulpian in 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 king, namely that he is a law unto himself. These eastern ideas were “contrary to the ideas of the Augustinian principate,” which also undergirded those of the Dominate, by way of the Vespasian imperial law. Accordingly, they “were not the Roman constitutional law of the third century . . . [which] was not superseded earlier than Justinian.” 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.”

It is important to note that the Byzantine emperors did not obtain absolute power despite the statements from the novels referenced above. 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.” 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

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107 This article will not discuss the interrex’s powers of justiciam, since it cannot be said that the interrex was an executive stricto sensu.
108 Schulz, supra note 97 at 157.
109 Id. at 158.
110 Id. at 160.
announcement of the present edict we show what do not permit ourselves to do.\textsuperscript{112}

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.” 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. 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. Thus, it is not surprising that their hybrid systems of law (e.g. the Lex Burgundorium and Isidore of Seville’s Lex Visigothorum Reccesvindiana), were hostile to absolute powers. Under Isidore’s code the king is put on a par with the people and is therefore not only morally but “legally bound to observe the law.”\textsuperscript{113} This weaker conception of royal powers was transmitted to England, where it figures prominently in the work of John of Salisbury and Bracton. 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.\textsuperscript{114} The theologian had left open the door to the argument that a medieval king, in protecting the common good, is not


\textsuperscript{113} Schulz, supra note 97, at 163.

\textsuperscript{114} See The Political Ideas of Thomas Aquinas: Representative Selections, 49–51 (Din Bigongiardi ed. 1953) (discussing Quare 42, reply to Objection 3). See also Schulz, supra note 97, at 165.
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 the 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.”¹¹⁵ 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’.¹¹⁶ He also cited the Digna Vox as evidence on this point, relying upon the literal wording of the original text. Bracton apparently translated Theodosian and Valentinian’s order as “The emperors declare that henceforth the emperor is legally bound by the law.”¹¹⁷ Relying upon Azo, Bracton also concluded that since the law created the king, he must make a tribute in return by obeying the laws.¹¹⁸

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.)¹¹⁹ 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?”¹²⁰ Pennington concluded that despite the reception of the quasi-absolutist misreadings of Ulpian, “jurists 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.” 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-constitutional principle one must consider whether

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¹¹⁵ Schulz, supra note 97, at 165.
¹¹⁶ Id. (citing GLUCK, 1 AUSFUHRLICHE ERLAUTERING DER PANDECTEN, §43, 280 (1797)).
¹¹⁷ Id. at 168.
¹¹⁸ Id. at 169.
¹¹⁹ Id. at 174.
¹²⁰ Pennington, supra note 111, at 3.
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,\(^\text{121}\) 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.\(^\text{122}\) 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 est suprema lex*. However, the argument that the right to a trial was merely a feature of the positive law\(^\text{123}\) was rejected in the second half of the

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\(^{122}\) Pennington, *supra* note 111, at 147.

\(^{123}\) See generally Brian Tierney, “*The Prince is Not Bound by the Laws.*” Accursius
thirteenth century by jurists who “began to argue that the *ordo iudicarius* (the normal trial procedure) was not derived from civil law, but from the natural law.”

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.

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.”

Hostiensis, when coming to the opposite conclusion, had “left out the crucial passage . . . [and] shortened Innocent’s comments almost to the point of incomprehensibility.” 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.”

Perhaps due to his misuse of Innocent’s arguments, Hostiensis’ 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. Guido of Suzzara agreed, and following Accursius argued that a statute that purported to do so would be void. 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.

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124 Pennington, supra note 111, at 148–49.
126 Pennington, supra note 111, at 150.
127 Id. at 150–51.
128 Id. (citing Corsete, *La Norma* I 133-34).
130 Pennington, supra note 111, at 155.
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. 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. In those circumstances, “the judge may proceed in a summary fashion in some parts of the process, but the summons and [public] judgment must be observed.”\(^\text{131}\) Guilelmis Durantis agreed: “those accused of notorious crimes should have a proper trial.”\(^\text{132}\)

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. 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.

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.”\(^\text{133}\) Henry justified his condemnation of Robert as follows:

Robert’s crimes were open 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.\(^\text{134}\)

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.

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\(^{131}\) *Id.* at 162.

\(^{132}\) *Id.* at 163.

\(^{133}\) *Id.* at 170.

\(^{134}\) *Id.* (author’s translation of *Constitutiones et acta publica imperatorum et regum*, J. Schwalm ed. (1911)).
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.” Following Monachus, Oldradus de Ponte argued in his consilia that a judgment rendered without giving the defendant a chance to defend himself was invalid: “the prince could not deny a subject the right to due process because it was grounded in natural law.” 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.”

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.” 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, 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. This document “came to form the substratum of most of the modern Continental systems” of procedure. “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.”

These collections were received, accepted, and glossed by the most prominent fifteenth century commentators. Although there were jurists who did not agree with the principle that due process could not be abrogated in the interest of public order, 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.” 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

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135 Id. at 175.
136 Id. at 181–82.
137 Id. at 184.
138 Id. at 186.
141 Pennington, supra note 111, at 190.
142 Id. at 225.
Accordingly, in his defense of Lorenzo de’ Medici, Francesco Accolti (then acknowledged as the greatest living jurist) argued that Pope 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.”

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 superior (in a passage that has been frequently been misunderstood as a statement extolling royal authority), Bracton asserted that “in spite of his general authority, the king enjoys no privilege when he is the plaintiff in a law-suit . . . the judge has to give his judgment just as if the plaintiff were the humblest of the king’s subjects.”

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: “for the king is beneath no man, but under God and the law.” This argument sets the tone for the development of a significant body of English medieval jurisprudence which 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. 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 legally bound to observe the laws. His views, which 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]. . . .

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143 Id. at 243.
144 Id. at 252.
145 Schulz, supra note 97, at 149.
147 Schulz, supra note 97, at 166.
148 Id. at 167–68.
may be observed that in later times his interpretation was defended by writers on public law.” An interpolated text long thought to be authentic endorse the creation of an enforcement mechanism should the king fail to govern according to the laws: This appears to be an endorsement of the security clause of the original Magna Carta.

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 bull that would declare the Great Charter invalid; this was almost inevitable, since it unambiguously “place[d] the law higher than the King” by imposing a clear “limitation on the power of the sovereign.”

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.” Second, the idea behind the Magna Carta managed to endure and grow, as Richard Helmholtz 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.

Edward Corwin suggested that the Charter grew in significance because it had been “cast into a milieu favoring growth,” 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.

149 Id.
150 ERNEST KANTOROWICZ, BRACTONIAN PROBLEMS, 50 (1941). Kantorowicz believed this had been written by Bracton himself.
153 Id. at 362.
154 Id. at 299.
However, in England “its successful maintenance demanded the cooperation of all classes and so the participation of all the classes in its benefits,”\(^{155}\) 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. 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.\(^{156}\) 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.\(^{157}\)

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

\[\text{[A]ll justices, sheriffs, mayors, and other misters which under us and by us have the laws of our land to guide,} \]

“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 the Great Excommunication against all those that by deed, aid or counsel” proceeded “contrary to the aforesaid Charter.”\(^{158}\)

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.”\(^{159}\) Thanks in part to his repeated affirmations, this principle was no longer disputable in England during the


\(^{156}\) Id. at 177.

\(^{157}\) William S. McKechnie, Magna Carta, A Commentary on the Great Charter of King John 154 (2d ed. 1914).

\(^{158}\) Id. at 178 (quoting George Burton Adams & Henry Morse Stephens, Select Documents of English History 86–87 (1911)).

\(^{159}\) Id. at 158.
late Middle Ages after Edward’s reign. The most important reaffirmations were the “six statutes” interpreting Clause 29.\footnote{160} The most important of these is the Statute of 28 Edward III.\footnote{161} 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.”\footnote{162} 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.\footnote{163}

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 statute of 42 Edward III (1368) established (as Coke noted in his \textit{Institutes}) that any future statutes that purported to narrow the protections of the Magna Carta would be null and void.\footnote{164} 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 country, it shall be void in the law, and holden for error.”\footnote{165}

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.\footnote{166} The clergy were also called upon to excommunicate those who offended it.\footnote{167} It appears to be beyond dispute that Coke was right when he asserted that by the conclusion of the reign of

\begin{footnotes}
\item[161] 28 Edw. III (1354).
\item[162] 28 Edw. III, c. 3, (1354).
\item[163] Magna Carta, 25 Edw. 1, c. 29 (1297).
\item[164] 42 Edw. III, c. 1, (1368).
\item[165] 42 Edw. III, c. 3, (1368).
\item[167] Id. at 669.
\end{footnotes}
Edward III the Magna Carta had attained the status of fundamental law; in modern terms, it was now part of England’s unwritten constitution.  

After the reign on 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 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. This was true even for the case of Roger Mortimer, who had deposed and murdered Edward II. 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.  

While the late Plantagenets would clearly have preferred to govern as absolute monarchs, that was now impossible: “the royal power was decisively curbed by [the reconfirmed] Magna Carta.” By the fifteenth century, they could not appeal the logic of an emergency power to defend the salus populi in the event of 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” 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 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. 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

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168 WILLIAM BLACKSTONE, COMMENTARIES *124.
170 *Id.* at 6.
171 *Id.* at 184 n. 1.
medieval constitutionalism. 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 labor shortages created by the Black Death.\(^{172}\) At the dawning of the early modern era, however, England again faced challenges from rulers who sought to depart from the established constitutionalist consensus.

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 and Absolute and a Limited Monarchy* (hereinafter Governance). 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 seemed to rest upon the consent of the nation . . . . [and where] the Lancastrian always professed to rule as constitutional kings”\(^{173}\) 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 monarchial and republican principles. Fortescue concluded that only laws to which the people had given consent could be binding. 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.”\(^{174}\)

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. In his *Laws*, Fortescue asserts that a “king of England cannot, at his pleasure, make any alterations in the law of the land, for the nature of his government is not only regal, but political [i.e., not merely monarchial, but republican].”\(^{175}\) He disavows the common


\(^{174}\) Id. at 83.

\(^{175}\) John Fortescue, *De Laudibus Legum Angliae* (A. Amos, trans.)(1775), 26.
misinterpretation of Ulpian (which he follows Bracton and Fleta in regarding as “the very principle of autocracy”) stating that while an absolute monarch could affirm this maxim, and English king cannot, as its laws:

[A]re made by their [the peoples’] consent and approbation [and they] enjoy their properties securely, and without the hazard of being deprived of them, either by the king of 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 retrained by political laws.\(^{177}\)

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.”\(^{178}\)

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 iudicari*us 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.\(^{179}\)

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.

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\(^{176}\) *Id.* at 185.


\(^{178}\) Plummer, *supra* note 173, at 204.

\(^{179}\) *Id.* at 117.
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 basis whenever they were strong enough 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 the 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’ 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. France’s “Renaissance monarchy” was expected to respect established law and not to alter it without consent. 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. 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.

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*, 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 *plentitudo 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."\(^{181}\)

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. That year, the monarchy intervened decisively, and in a manner that clearly indicated their abandonment of the principles of constitutional monarchy. 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. This was taken by the Catholic population of Paris as the green light for a pogrom. 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.

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\(^{181}\) *Id.* at 13, 15.
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 authorized the first killings in order to preempt a conspiracy to assassinate his family. “In this fashion a weak and incompetent government finally decided upon a criminal solution to its difficulties.” 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 not 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.”

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.

Jean Bodin’s early work touched upon the idea of sovereignty, and clung largely to constitutionalist views, 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. Bodin rejected the prevailing foundations on principle; 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:

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182 *Id.* at 43.


[A]ttempted to derive the contents of supreme authority [that which a king possesses] from the concept of supremacy itself.

. . . He was thinking of ‘the sovereign’ as one part of the society which 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.\textsuperscript{185}

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 \textit{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.”\textsuperscript{186}

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.\textsuperscript{187}

“Bodin’s only justification for this odd result is drawn from practical necessity.”\textsuperscript{188} 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 legitimate 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’ verbal orders, later affirmed by letters-patent. This action set the precedent for the \textit{lettres de cachet} that authorized the indefinite detention of innumerable political prisoners. These orders, which sent the person named directly to prison without any contact whatsoever with the judicial system became ubiquitous:

The \textit{lettres de cachet}, one of the most typical institutions of old French society, have been aptly called ‘the very essence of public

\textsuperscript{185} Franklin, \textit{supra} note 180, at 27–28.
\textsuperscript{186} \textit{Id.} at 68.
\textsuperscript{187} \textit{Id.} at 58.
\textsuperscript{188} \textit{Id.} at 59.
life’ before the Revolution. Upon them rested the authority of king . . . . Although it is commonly believed that the employment of *lettres de cachet* was largely confined to affairs of state, yet this is far from the truth.\textsuperscript{189}

Jacques Maritain notes “Jean Bodin is rightly considered the father of the modern theory of Sovereignty.”\textsuperscript{190} Maritain traced the development of the theory of absolute executive power from Bodin through Hobbes\textsuperscript{191} —who also wrote during a civil war with a motivation similar to Bodin’s—and “versions of sovereignty evocative of Hobbes’ and Bodin’s have carried forth into the twentieth century.”\textsuperscript{192} 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.

B. *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. Like the Bourbons, the Stuarts were outsiders; they hailed from a country with a monarchy that was much stronger than the one they came to govern. 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*; “the essence of a free monarchy was that royal power was limited by no human law.”\textsuperscript{193}

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.\textsuperscript{194} In the Jacobean era,
common 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.

1. Constitutional and absolutist ideas of the Stuarts’ royal prerogative

From the beginning of James’ 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 which 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, the Five Knights’ Case relates to the power to imprison citizens for reasons of state without formal charge, and the Case of the Shipmony is about the power of the purse after the king declares a public emergency. 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, and 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’ 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. 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. 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. However, in a very controversial decision Chief Baron 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. 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:

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‘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 rule 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 were lawful.’ If the king decided that something was in the public interest, it was not fit for subjects to question his judgment.  

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. 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.

b. Charles’ alleged prerogative to imprison dissidents for reasons of state

James’ 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 . . . full of fear of innovation and change of government.” Accordingly Charles chose to pretend that these taxes were merely loans from his subjects. The “Forced Loan” fooled no one at the time, and arguments circulated that this specific practice had been banned by

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195 Sommerville, supra note 193, at 152, (quoting An Information Against Bates (Bates’s Case), 145 Eng. Rep. 267 (1606)).
196 Remonstrance of Parliament 1628; For complete text of the Remonstrance, see JOHN RUSHWORTH HISTORICAL COLLECTIONS 428 (1692).
medieval statutes. These argued further that the king could not use his prerogative to ignore a statute and violate his subjects’ absolute right to their property.\textsuperscript{197} 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. “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.”\textsuperscript{198}

The Petition of Right also sought to take away the king’s prerogative to imprison citizens without formal charge in exceptional cases. 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. The petitioners had been arrested in 1627 under Charles’ orders for having resisted the forced loan. 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. While the case was decided on very narrow grounds, it was a clear victory for the partisans of the rule of law, as the king was forced to accept that his allegedly absolute prerogative had some legal limits.

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 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.”\textsuperscript{199} However, royalist theorists argued that only the king himself could judge his own adherence to these rules. 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. Unsurprisingly, the constitutionalists considered this argument unacceptable, and the judges agreed. They forced Charles to specify a legal rationale for imprisonment.

\textsuperscript{197} Alford, \textit{supra} note 194 691–93 (2011).
\textsuperscript{198} Sommerville, \textit{supra} note 193, at 158.
\textsuperscript{199} J. W. \textsc{Gough}, \textsc{Fundamental Law in English History}, 72 (1955).
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; royalist theorists such as William Lambarde had earlier argued that while

Magna Carta had re-established the rule of the common law in many areas . . . kings retained the old ‘absolute authority’ 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 remained open to abuse.

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. 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, ‘does 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 has secrets of the kingdom.’

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. Parliament refused. 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. 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.” Parliament, following Alford's advice, refused to acknowledge the existence of an extraordinary prerogative, or indeed any

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200 Alford, supra note 194, at 653–58.
201 Sommerville, supra note 193, at 164-65.
202 Sommerville, supra note 193, 167-68, (quoting the speeches of Serjeant Ashley in Parliament).
absoluta potestas. For similar reasons, they 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.” Coke noted that allowing this would amount to Parliament’s recognition of “an intrinsic prerogative . . . [that] no man can take away.”

c. Hampden’s Case and the rule of law’s applicability to wartime powers

In 1628 and 1635, Charles again resorted to extraparliamentary taxation in order to raise funds. 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.203 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’ debts. Despite Charles’ dubious assertions, there had been no general resistance to the imposition of Ship Money in 1634. This is likely because there had been some recent precedents for raising Ship Money in times of peril.204 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. 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.

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, “the 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.”205 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. 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.

203 Cf. the fines in distraint of knighthood, based upon long-obsolete and forgotten thirteenth century statutes.
Summarizing and quoting the King’s Counsel’s response, Keir describes it in the following terms:

[The king] is an absolute monarch and ‘as he is an absolute monarch, so all these iura summae magistatis [powers of the supreme majesty] are given to him 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.206

Sir Edward Crawley (another barrister for the king) “quoted Commines 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 law of reason,’”207 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 extraparliamentary 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, speaking, acting law.’

This theory of the king’s prerogative prevailed in this case with a narrow majority, despite 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 extraparliamentary levies,”208 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. This

206 Id. at 560, n. 73.
207 Gough, supra note 199, at 75.
208 Sommerville, supra note 193, at 162.
judgment was an extension of the logic of Baron Fleming’s decision in Bates’s Case.\(^\text{209}\)

What was different about this decision was that it explicitly ignored an intervening statute—the Petition of Right—which Parliament had passed in order to prevent the king from taking precisely these sorts of actions. 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 Magna Carta, which had been repeatedly reaffirmed by successive monarchs in exchange for grants of taxes and other impositions. 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.

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. 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. In a direct rebuke to the opinions detailed above, the prosecutor at Charles’ trial asserted “it is one of the Fundamentals of Law that the King is not above the Law, but the Law above the King.”\(^\text{210}\) The maximalist interpretation of \textit{salus populi est suprema lex} has only ever been advanced openly by one English monarch (Charles I), and this led directly to his execution. 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. 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 \textit{salus populi est suprema lex} 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 section 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.

\(^{209}\) Id. at 161–62.
\(^{210}\) 4 St. Tr. 1019, 24 Car I.
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.” They are considered legal principles 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 that “[i]t 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 are more important than the so-called rules.” However, civilian jurists had a much higher opinion of maxims, since in the Corpus Iuris they had binding legal force; they were regula juris. Not coincidentally, the first collection of the ‘maxims’ of English law 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’ authoritarian impulses.

James’ first attempt to recast English law came couched within a proposal for the union of the realms of Scotland and England. 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. Bacon had already been advocating a codification of English law, and “following the example of the great law givers Justinian and Edward I [authoritarians both] [h]e repeatedly urged the role of Solomonic lawgiver on James.”

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211 BLACK’S LAW DICTIONARY 1190 (9th ed. 2009).
212 2 JAMES FITZJAMES STEPHEN, HISTORY OF THE COMMON LAW OF ENGLAND, 94 n.1 (1883).
213 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).
proposal for the union of the realms to advocate for codification of English common law. After this failed, Bacon proposed a codification of the penal laws of the realm, something he again recommended to the King in 1614.

In 1621 Bacon presented the results of a five-year effort to “recompile” the law of England, and strike down over 600 statutes. 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.” His official influence having come to an end, Bacon attempted to build broader support for his reform efforts informally, by circulating three preparatory texts.

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*. 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), but rather with binding *regula iuris*, as did the civilian jurists. 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*.

The first text was in English, the better for the wide audience Bacon hoped to receive. Curiously, the maxims themselves are in untranslated Latin. Bacon noted in his preface that he chose Latin since it was “of the greatest authority and majesty to be avouched and alleged in argument.” 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.” 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. This

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216 *Id.* at 350.

217 *Id.* at 351.


219 See Pound, supra note 211, at 832.

220 Preface to Francis Bacon, COLLECTION OF SOME PRINCIPAL RULES AND MAXIMS OF THE COMMON LAW B 3(v)(1630) in THE WORKS OF FRANCIS BACON 13 (James Spedding et al. eds. 1803).

twelfth maxim (which Bacon creates by synthesizing a set of rather diverse precedents) is receditur a placitis juris, potius quam injuriae et delicta maneant impunita (pleas of law shall be receded from, so that crimes and injuries shall not go unpunished.) Here, Bacon turns his endeavor entirely on its head, by 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). Bacon is forced to admit that it is a “rule” that “penal statutes shall not be taken by [construed with principles appropriate to] equity.” 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 offenses by punishment.”

Another more tangential discussion of the salus populi in this text comes in his explanation of the maxim necessitas inducit privilegium quoad 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 it 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). 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. With no statute or case to rely upon, Bacon states “the law imposes [the duty] upon every subject that he prefers the urgent service of his Prince and Country before the safety of his life.” However, his Maxims make no attempt to define the powers of the king towards his subjects, since discussion of the scope of the privilege was assiduously avoided during Elizabeth’s reign.

When this subject exploded to the forefront of legal discourse in the wake of Bates 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. In Aphorisms on the Greater Law of Nations, his approach was more ambitious:

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222 See, e.g., William Cobbett et al., 7 STATE TRIALS 1540 (Trial of the Five Popish Lords, 1680).
223 BACON, supra note 220 at 55.
225 BACON, supra note 220, at 32.
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.\(^{226}\)

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’ 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 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]”.\(^{227}\) This passage betrays Bodin’s influence, his *Six Books* having been published in English fifteen years earlier. 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 statues must be strictly construed:

> 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 Censorian Courts have power and jurisdiction, not only to punish new offenses, but also to increase the punishment appointed by law [i.e., by statute] for old ones . . . . for an enormous crime has somewhat the nature of a new one.\(^{228}\)

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


\(^{227}\) 7 *THE WORKS OF FRANCIS BACON* 312 (James Spedding et al. eds. 1803).

\(^{228}\) Id. at 320–321.
power, "and therefore was a sort of court of criminal equity, 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. Accordingly, it is possible to conclude that as "Bacon sought to regularize English law [by way of] . . . a kind of codification," 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.

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 in Saepe Contingit, which then served as the base for medieval constitutionalism. 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. 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 . . . the authority of laws does not depend upon consent alone, but wholly upon ruling authority [imperium]."

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231 Alford, supra note 194, 645–653.


233 Id. at 281.
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.\(^{234}\)

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.”\(^{235}\) However, “if Bacon wanted to be an English Trebonian, [James] . . . could not be an English Justinian”\(^{236}\) owing to the fierce resistance of the common lawyers, namely the opposition in Parliament of Whitelocke, St. John, Coke, and Alford. Bacon wrote “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?”

The answer of posterity is obvious. Following his impeachment in 1621 and the abolition of his beloved Star Chamber in 1641, 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 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, however, were much more modest, noting that they needed to rely on precedent, and in general refrain

\(^{234}\) Id.


\(^{236}\) Id. at 16.
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 the Bacon’s assertions. 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 *regula*, but merely “grounds” (what Bacon called *placitis*).

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 favors a thing for the good of the commonwealth,” 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.” 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.”

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 private necessity, 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: “before the statute of *Magna Charta*, the king might enter into another’s woods, and cut the trees for the reparations of castles.” 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 est suprema lex*, as here it is the Great Charter that is the supreme law, such that it prevails over even the principles of public necessity.

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238 *Id.*
239 *Id.*
240 *Id.* at 36.
The third major compilation of maxims of the early modern era was written by an anonymous “Gentleman of Middle Temple” in 1751. For the first time, *salus populi est suprema lex* is listed as a separate maxim in its own right. 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 public incendio” and to erect “bulwarks upon another’s land” or to “turn the plough on the headland of another.”241 These precedents all create defenses for members of the public, and confer no rights upon the government.

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. He also omits Bacon’s principle that necessity is not a defense against the crown.242 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. 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.243

It should be noted that this particular book of maxims was frequently part of in the libraries of colonial lawyers during the revolutionary period (1761-1783) and were found in the libraries of the Framers during that time.244 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.

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241 THE GROUNDS AND RUDIMENTS OF LAW AND EQUITY, 321 (1751).
242 *Id.* at 217–18.
243 *Id.* at 317.
VII. John Locke, The Maxim, and The Hobbesian 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 on Government*, the phrase “salus populi est suprema lex” is found directly beneath the author’s name. 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.”

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. 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.”

This revisionism can be ascribed largely to the neoconservative theorist Leo Strauss and his pupil Richard H. Cox: “It is largely Locke’s partnership with Hobbes in promoting this alleged drastic deterioration of the European natural-law tradition which Leo Strauss, and a former pupil of his, have analyzed exhaustively . . . in the *Two Treatises*.”

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

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247 *Id.* at xxiii.
fashion which repeatedly ignores the characters of the texts analyzed . . . . 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 . . . . it is not a defensible analysis of Locke’s work to turn it in this fashion into an apology for the *machtstaat*.

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. Hobbes’ 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.” . . . [H]e wrote to . . . refute Filmer . . . Filmer and Hobbes held similar views about law and sovereignty, so that rejection of the one involved rejection of the other also.\textsuperscript{250}

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

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

Accordingly, to discern the meaning of the *salus populi* quotation from *The Two Treatises*, one must first understand that Locke believes that the executive is normally bound to observe the laws. However, Locke notes that the duties of the executive flow from two sorts of obligations. One is contractual, while the second comes from the law of trusts. The first of these is a conventional idea drawn from medieval constitutionalism, while the second is more innovative. Pursuant to this second source of duties, Locke held that the legislature and the executive are given a power akin to

\textsuperscript{250} Gough, *supra* note 246, at xxv.
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.\footnote{A. John Simmons, On the Edge of Anarchy: Locke, Consent and the Limits of Society, 71 (1993).}

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,”\footnote{Locke, supra note 245, at 164.} 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. The key difference between Locke’s view and Hobbes’ is Locke’s view of the function of these promises:

\[\text{[P]romises . . . even bind the Almighty . . . this stress on the status of promises is one of the taboos which the exponents of raison d’état [Bodin, Hobbes] regarded with the greatest contempt, as the merest superstition.}\] \footnote{Dunn, supra note 249, at 163.}

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 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.\footnote{Id. at 163-64.}

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,”\footnote{Id. at 163.} had a more modest idea in mind. Like Cicero, he hoped that the trustee of the public

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\footnote{A. John Simmons, On the Edge of Anarchy: Locke, Consent and the Limits of Society, 71 (1993).}
\footnote{Locke, supra note 245, at 164.}
\footnote{Dunn, supra note 249, at 163.}
\footnote{Id. at 163-64.}
\footnote{Id. at 163.}
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.

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 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’ influence is that the Founders generally accepted his view of the problem of politics while rejecting his solution.”

Hobbes (the so-called “monster of Malmsbury”) was seen by the entire founding generation as an opponent of freedom. This opinion was shared by both patriots and loyalists: “Writers those colonists took to be opponents of Enlightenment rationalism—primarily Hobbes, Filmer, Sibthorpe, Mandeville and Mainwaring—were denounced as frequently by loyalists as by patriots . . . . with the exception of Filmer none of the authors . . . were in fact referred to favorably by Tories.”

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 Analysis of the Common Law of England 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’ Dialogue of the Laws, which illustrates the vast gulf between the

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257 Bailyn, supra note 42, 28–29.
259 Sir Matthew Hale, Reflections on Hobbes’ Dialogue of the Laws, in 5 William Holdsworth, A History of English Law (London: Methuen, 7th ed., 1957). This was not printed in Hale’s lifetime, although it circulated in manuscript form and was frequently copied, as was Hobbes’ work before it was itself posthumously printed. See also Sir Frederick Pollock, Sir Matthew Hale on Hobbes, 37 L.Q. Rev. 274, 275 (1921).
constitutionalist tradition that influenced the Framers and the theory of sovereignty that they rejected.

Hobbes’ 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.”260 Hobbes believed that the sovereign’s power knew no bounds: “these laws cannot bind him, since otherwise he would lose his supreme power to keep order.”261 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.262 As Hale summarized Hobbes’ views:

[T]here can be no qualifications or modification of the power of a sovereign prince . . . . he 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.263

Conversely, Hale championed the traditional view264—the constitution may “in many cases hinder the kings acts and make them void if they are against law.”265 It is not surprising that Hale would be unsympathetic to Hobbes’ views, since constitutionalism imposes limitations “both on the sovereign and the lawmaking power.”266 This is a natural consequence of the fact that the constitutionalist lawyers had “emphasized the ancient tradition of limitations upon the royal prerogative.”267

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,”268 pointing in particular to the boundaries on the powers of the executive, which he argued were

260 Id. at 277.
262 Id.
263 Pollock, supra note 259, at 297 (author’s translation from Early Modern to Modern English).
264 See e.g., HENRY FINCH, LAW, A DISCOURSE THEREOF 75 (4th ed. D. Pickering 1759) (laws contrary to the natural law “lose their force, and are no laws at all”).
265 Pollock, supra note 259, at 283.
266 Berman, supra note 46, at 1708.
267 Id.
268 Id.
desirable.\textsuperscript{269} 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.\textsuperscript{270} In doing so, he argued that “the sovereignty of the king exists within a legal framework.”\textsuperscript{271} 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.\textsuperscript{272}

Hale’s response attests to the essential continuity of English legal thought,\textsuperscript{273} 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.”\textsuperscript{274} Furthermore, he answered Hobbes’ argument that the sovereign required unlimited powers to protect the public in unforeseen emergencies by saying

\[\text{[I]}t \text{ is a madness to think that the model of laws of government is to be framed according to such circumstances as very rarely occur. It is as if a man should make agaric and rhubarb his ordinary diet, because it is of use when he is sick, which may be once in seven years.}\textsuperscript{275}\]

Finally, when addressing the question of the Framer’s 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,\textsuperscript{276} much to the chagrin of their colonial subjects, who cleaved to the theory of the ancient constitution and the fundamental law tradition.\textsuperscript{277} 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 . . . a theory of law that had cost Charles I his head and James II his throne,”\textsuperscript{278} as the English Parliament had adopted the theory of sovereignty that “emerged with the writings of Thomas

\begin{itemize}
\item \textsuperscript{269} Holdsworth, supra note 259 at 294–303.
\item \textsuperscript{270} Id. at 296.
\item \textsuperscript{271} Id. at 1720.
\item \textsuperscript{272} Id. at 296.
\item \textsuperscript{273} See generally Berman, supra note 261, at 1702–1720.
\item \textsuperscript{274} Holdsworth, supra n. 259, at 301.
\item \textsuperscript{275} Id. at 302.
\item \textsuperscript{276} See generally Reid, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS (1986).
\item \textsuperscript{277} Id.
\item \textsuperscript{278} ARTHUR L. GOODHEART, LAW OF THE LAND 60 (1966).
\end{itemize}
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.”

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’. 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’ 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 control over an armed force that obeys him blindly, he becomes a tyrant.” 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 the Rabirius’ 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 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 both 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’ 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.\(^{282}\) 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.

\(^{282}\) Amnesty to Political or State Prisoners, Feb. 14 1862, in ABRAHAM LINCOLN: COMPLETE WORKS, COMPRISING HIS SPEECHES, LETTERS, STATE PAPERS, AND MISCELLANEOUS WRITINGS (John G. Nicolay and John Hay eds.) (1894), 123–25.