The American Law of Overruling Necessity: The Exceptional Origins of State Police Power

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One of the most significant legal-constitutional moments in the history of the American republic occurred in the Confederation Congress on September 26 and 27, 1787. On those dates, the handiwork of the historic Constitutional Convention in Philadelphia was now “laid before the United States in Congress assembled.” And the momentous question for the extant official lawmaking body of the US government was what to do next. Under Article 13 of the Articles of Confederation, any alteration of the articles had to be agreed to by Congress and confirmed by the legislatures of every state. Notably, the Philadelphia convention had already decided on a radically different mode of ratification via conventions in only nine of the original states (arguably contravening the very article on which Congress officially recommended a Philadelphia convention in the first place). So what should Congress do with this document so “laid before” it? Should
it independently debate the report anew? Could it amend the proposed constitution? Should it officially vote to approve or disapprove the document? This was a moment of historic constitutional decisionism.¹

In the end, of course, Congress bent to the prevailing will and urgency of the Philadelphia moment and “resolved unanimously” to transmit the proposed constitution through to “the several legislatures in order to be submitted to a convention of delegates chosen in each state by the people thereof in conformity to the resolves of the Convention.”² This crucial decision, however, was not uncontroversial. James Madison wrote George Washington that both Richard Henry Lee and Nathan Dane strenuously objected at the time, noting a “constitutional impropriety in their taking any positive agency in the work” as “the new Constitution was more than an alteration of the Articles of Confederation . . . and even subverted these Articles altogether.”³ As Lee argued: “Congress, acting under the present Constitution definitely limiting their powers, have no right to recommend a plan subverting the government. . . . This plan proposes [to] destroy the Confederation of 13 and [to] establish a new one of 9.”⁴

More than two hundred years later, Bruce Ackerman and Neal Katyal continued to cite Lee for their influential argument about “the Federalist’s flagrant illegalities”: “How did the Founders manage to win acceptance of their claim to speak for the People at the same moment that they were breaking the rules of the game?”⁵

Despite accusations of illegality, however, the original actions of the Continental Congress were not without contemporaneous justification. Teasing out the substantive terms of that justification remains difficult, however, as this significant legal-historical event remains oddly underdocumented. Consequently, scholars have been left to glean the substance they can mainly from the notes of Melancton Smith (as well as occasional correspondence and newspaper reports). And, while much has been established concerning this momentous two-day constitutional deliberation, one important aspect has been overlooked by modern scholars. For at the very center of the crucial debates recorded by Melancton Smith was a seemingly constant reference by the Founders to nothing less than *salus populi*—“the safety or welfare of the people”—as the primary substantive rationale through which the US Constitution would pass through Congress to the state ratification conventions so as to become the new American law of the land.

The final recorded speaker on September 27—before Congress’s resolution to transmit the constitution to the states—was William Grayson, who argued: “If we have no right to amend, then we ought to give a silent passage, for if we cannot alter, why should we deliberate.” Accord-
ing to Smith’s notes, his opinion was that “they should stand solely upon the opinion of [the] Convention,” taking note that “the *salus populi* much talked of.” And, indeed, *salus populi* was much “talked of”—the veritable lingua franca of this moment of foundational constitutional necessity. Henry Lee made the connection explicitly, defending Congress’s “right to decide from the great principle of *necessity* or the *salus populi*.” He concluded: “Necessity justifies the measure.” Richard Henry Lee predictably objected: “The doctrine of *salus populi* is dangerous. . . . If men may do as they please, from this argument all constitutions [are] useless. All tyrants have used it.” James Madison countered that there was nothing inherently exceptional or extraordinary or tyrannical in the idea of *salus populi*, seeing viable precedents in earlier efforts to strengthen the Articles of Confederation as well as in the “sale and government” of “the western country.”

The pivotal role of “necessity” in this crucial founding moment was not lost on later nineteenth-century constitutional commentators. As Thomas Cooley noted in his highly influential *Constitutional Limitations*, the basic exclusion of original states via nine-state ratification was “not warranted by anything in the Articles of Confederation, which purported to be articles of ‘perpetual union.’” For Cooley: “[The] radical revision of the Constitution . . . was really revolutionary in character, and only to be defended on the same ground of *necessity* on which all revolutionary action is justified, and which in this case was the absolute need, fully demonstrated by experience, of a more efficient general government.”

So what to make of this curious juxtaposition of necessity, *salus populi*, and fundamental law at a crucial moment in American constitutional development? Like Richard Henry Lee, should we view this as a problem or an aporia—an exception to the underlying principles and strictures of liberal constitutionalism and a dangerous precedent more at home in “the mouths of all tyrants”—a tyrant’s plea? Or, like James Madison, should we understand this kind of appeal to necessity and an overriding obligation to the people’s health, safety, and welfare as a not uncommon—perhaps even a regular or ordinary—feature of everyday, extemporized governance (especially common in popular or democratic polities)? Moreover, what is the relationship of American law to such exercises of power? Do doctrines and rationales like necessity and *salus populi* stand outside the rule of law, looking in, so to speak—as exceptional and emergency political powers antithetical or hostile to any truly legal regime? Or, on the contrary, are such concepts irreducible elements in the very idea of lawmaking—where the political and the legal are
always inextricably mixed in a pragmatic conception of democratic governance in the people’s interest?

This chapter begins to make a case for the latter perspective, demonstrating the deep and rather unexceptional historical roots of the idea of exception and necessity in American law and democratic governance. It takes its cue from Thomas Kuhn’s famous observation about hermeneutics. “Look first for the apparent absurdities in the text,” Kuhn counseled, “and ask yourself how a sensible person could have written them. When you find an answer, I continue, when those passages make sense, then you may find that the more central passages, ones you previously thought you understood, have changed their meaning.”9 Rather than seeing necessity and salus populi as exceptional anomalies or apparent absurdities in early American jurisprudence, this chapter attempts to take them seriously and to interrogate their pivotal role in some of the baseline concepts in American public law. The original constitutional moment described above was not a totally unique or exceptional occurrence. Rather, in contrast to conventional understandings that try to separate the rule of law and constitutional governance from problems of exception and necessity formalistically, this chapter offers a more pragmatic and realistic accounting of the close and constant interrelationship of necessity and lawmaking from the earliest days of the Republic. This is especially true of the history of the emergence of American police power, which was frequently discussed and often legitimated in the nineteenth century in terms of a law of “overruling necessity” and salus populi.

Salus populi—the safety of the people or the welfare of the people—came from the common law maxim, Salus populi suprema lex est (The people’s welfare is the highest law).10 Salus populi—and its grounds of overruling necessity, public welfare, and the health and well-being of the populace—would go on to become a major principle of American common law and one of the key bases of US police power—a foundation for modern American state power in general.11 One of its key legal-constitutional consequences was the idea that public right was always supreme, trumping private right. In an early American legal-constitutional historiography centered primarily on notions of individual private, limited governance, and sometimes even laissez-faire, it is perhaps not surprising that the central place of salus populi in the very creation of the Republic has been often overlooked. But, from official invocations in the Confederation Congress to the more everyday development of state legislative and administrative power in the nineteenth century, necessity, emergency, and salus populi were regular parts of a long and expansive American regulatory history still in need of further recovery and understanding.
1. Anglo-American Rule of Law versus Necessity, Discretion, and Police

One reason for the comparative neglect of concepts of necessity, exception, and emergency in early American history is the powerful hold of an orthodox and formalist conception of a prevailing Anglo-American rule-of-law tradition implacably hostile to the supposedly foreign (or Continental) political influences of necessity, police, and administration. Though renderings of that rule-of-law tradition are notoriously contested and surprisingly diffuse, they frequently turn on three core principles: (a) legal supremacy (a rule of law above the rule of men), (b) legal determinacy (limiting individual discretion and volition via a system of rules), and (c) legal autonomy (a harsh separation and insulation of the rule of law from democratic politics).

The roots of legal supremacy run deep in American lore, perhaps best captured by Thomas Paine’s founding dictum: “In America, the law is king.” Where absolutism and arbitrary government deemed the king “the law” or even above the law, Paine countered: “In free countries the law ought to be king, and there ought to be no other.” That basic sentiment was chiseled into the bedrock of American constitutional dogma by a host of admiring law writers and scribes. Edward Corwin’s divination of three fundamental doctrines of American constitutional law—vested rights, judicial review, and due process—established the basic metanarrative. To a “higher law” tradition that he traced back to Demosthenes, Corwin grafted a genealogy of great judges, treatise writers, cases, and doctrines that yielded the supremacy of the American rule of law. The main characters in his story are now familiar—from Stoic natural law and Locke’s Second Treatise to Blackstone and Kent, from Dr. Bonham’s Case to Marbury v. Madison, from Magna Carta to the Fourteenth Amendment, from vested rights to the due process of law. Corwin’s perspective was relentlessly textual, court centered, and juridical, yielding a beguiling template for understanding the power and spirit of the American rule of law. The opening lines of Julius Goebel’s first volume of the Oliver Wendell Holmes Devise History of the Supreme Court of the United States could not resist its allure. “When the first colonies were planted on the North American continent,” Goebel began, “the judicial had come to occupy a preeminence in the English constitution.” While he admitted that it might be “a little pretentious to speak of a spirit of the laws” operating in colonial America, he forged ahead with the rule-of-law creation narrative: “Nevertheless, one finds [there] that independently of the laws made by men, a complex of principles is
unceasingly operative—the supremacy of law, the prescription of certainty, the orderly determination of controversies and, above all, the dominating concept of due process.”

In this “suzerainty of the great fundamentals,” legal determinacy—“legal certainty”—was the second great guiding principle. For Antonin Scalia, the rule of law was a knowable and predictable “law of rules,” the main object of which was to limit personal discretion. Scalia explicitly deployed the central dichotomy of “a general rule of law” versus “personal discretion to do justice,” citing Aristotle’s Politics: “Rightly constituted laws should be the final sovereign; and personal rule, whether it be exercised by a single person or body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make exact pronouncement.” While admitting the actual difficulty, if not impossibility, of the jurist’s dream of a truly “gapless” system of such general rules, Scalia’s jurisprudence was dedicated, at least in theory, to the ideal of judicial restraint, where “judges [were] bound, not only by the text of code or Constitution, but also by the prior decisions of superior courts.” For Scalia, stare decisis, originalism, and textualism were but alternative formulations for what John Manning has called an underlying “anti-discretion principle”—where decisions were ultimately “bound by standards,” rules, and sources of authority external to the decider’s will. This vision of Promethean justice distinctly bound by relatively determinate precedents, rules, traditions, and so-called rule-of-law values was key to separating out law and jurisprudence above and beyond those other unbound arenas of open and discretionary decision making—like politics, administration, and police.

But it was Albert Venn Dicey’s Law of the Constitution that most powerfully stitched these themes together in the epic apologia “The Rule of Law—Its Nature.” As Felix Frankfurter captured the impact of Dicey’s formulation: “Few books in modern times have had an influence comparable to that produced by the brilliant obfuscation of Dicey’s Law of the Constitution.” Dicey too emphasized the ultimate suzerainty or “absolute supremacy” of the rule of law: “Englishmen are ruled by the law, and by the law alone.” And he first defended that rule-of-law tradition squarely in terms of its opposition to discretionary power: “In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers.” He found the rule-of-law tradition distinctive or “peculiar” to England and “to those countries which, like the United States of America, have inherited English traditions.” “Wherever there is
discretion, there is room for arbitrariness,” he argued. And that “means insecurity for legal freedom on the part of subjects.” Ultimately, Dicey’s goal was to contrast the distinctive Anglo-American rule of law with the governance of “most continental states” and particularly the French system of droit administratif. For him, administration was too bound up with the kind of potentially abusive and tyrannical discretionary powers of executive action and public officialdom associated in England’s past with royal prerogative and Star Chamber. Dicey thus attempted to re-center a relatively autonomous Anglo-American rule of law and a law of the constitution purged for the moment of their inconvenient historical ties to discretion, necessity, emergency, and the politics of administration and police.

Dicey’s influential rendering of the nature of the rule of law subsequently spawned a whole host of imitators and acolytes, ranging from the profound to the absurd. In The Road to Serfdom, Friedrich Hayek explicitly invoked Dicey’s rule of law (excluding “the existence of arbitrariness, of prerogative, or even of widely discretionary authority on the part of government”) as the antidote to despotic planning: “Stripped of all its technicalities, [the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authorities will use its coercive powers. . . . The discretion left to the executive organs wielding coercive power should be reduced as much as possible.” More recently, Philip Hamburger’s Is Administrative Law Unlawful? has reinvoked the Diceyan specter of a reemergent Continental and “absolutist civilian tradition” wherein “administrative officers” are again “outside and above the law” in a wholesale (and ultimately unconvincing) critique of the modern American administrative state.

Such formalist conceptions of an Anglo-American rule of law poised squarely against discretion, administration, and executive action have also infiltrated the more sophisticated debates about the states of exception and emergency discussed in this volume. Giorgio Agamben’s influential State of Exception, for example, was built squarely on the baseline distinction between law and politics—placing “the state of necessity, on which the exception is founded,” precisely at the “limit” or “intersection” or “border” or “no-man’s land” between the legal and the political. Agamben’s concept of the exception took coherent form through a rigid separation of “public law” from “political fact” and “juridical order” from “life.” Of course, Agamben’s musings on law, state, and exception were but supplements to Political Theology, in which Carl Schmitt too relied on the purported disjunction between liberal law
and exceptional statecraft: “the old liberal negation of the state vis-à-vis law” where it is “not the state but law that is sovereign.” Schmitt rendered exception and emergency as distinctly outside and apart from the conventional rule of law: “What is argued about is the concrete application, and that means who decides in a situation of conflict what constitutes the public interest or interest of the state, public safety and order, le salut public, and so on. The exception, which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like. But it cannot be circumscribed factually and made to conform to a preformed law.”

While Agamben’s and Schmitt’s theories of exception and emergency have appeal in terms of the critical leverage they provide against highly abstracted understandings of the rule of law, they risked further reifying the historical reality of such formalisms in the first place.

But, of course, there are alternative avenues to a critical analysis of the American state of exception and the law of overruling necessity. Indeed, the last century and a half of work in American jurisprudence and legal social science has taken exact issue with formalist separations of law and politics, juridical order and life. Whether that work takes the form of historical jurisprudence, sociological jurisprudence, legal pragmatism, legal realism, legal instrumentalism, legal functionalism, law and society, critical legal studies, or sociolegal history, the verdict is essentially the same—that a modern, antiformalist, nonfoundational, postmetaphysical understanding of law confounds the very idea of separating law from politics and/or society. Oliver Wendell Holmes’s brilliant deployment of the perspective of the “bad man” in his critical realist “The Path of the Law” turned as early as 1897 on confounding the formalist inside/outside or law/outlaw distinction.

Similarly, John Dewey’s concept of law was “through and through a social phenomenon; social in origin, in purpose or end, and in application.” It could not be talked about in isolation from politics or society or history. It could be discussed only “in terms of the social conditions in which it arises and of what it concretely does there.” Unless law was investigated in society and as an irreducibly social and political activity, there were “scraps of paper or voices in the air but nothing that can be called law.”

Dewey’s critique of a purely intellectualist or formalist approach to law was echoed by Karl Llewellyn’s legal realist indictment of the “myth, folderol, and claptrap” that permeated so many formalistic discussions of law and liberalism. Llewellyn’s Bramble Bush exploded the law/politics distinction: “The doing of something about disputes is the business of law. And the people who have the doing in charge, whether they be
judges or sheriffs or clerks or jailers or lawyers, are officials of the law. What these officials do about disputes is, to my mind, the law itself. And rules through all of this are important so far as they help you see or predict what officials will do. That is all their importance, except as pretty plaything.” This skeptical, pragmatic, and realist approach to the rule of law became the foundation of modern sociolegal studies in the United States. The legal historian Willard Hurst had little patience with the formalist law/politics binary: “In deciding what to include as ‘law’ I do not find it profitable to distinguish ‘law’ from ‘government’ or from ‘policy.’” Robert Cover continued the American tradition of washing the rule of law in “cynical acid,” reminding us that legal interpretation took place within a plane of violence, conflict, and coercion—what he famously dubbed “a field of pain and death.”

The American pragmatic and legal realist traditions were, in other words, born in direct revolt against the formalism of legal liberalism, classically construed. Pragmatists and realists systematically challenged the idea of an Anglo-American rule-of-law tradition existing somewhere outside and beyond the problems of necessity, emergency, and exception—as a higher, exceptional alternative to foreign or Continental traditions of administration, politics, and police.

2. Necessity, Salus Populi, and the Early Development of State Police Power

One excellent place to more pragmatically witness and realistically assess the close interrelationship of law, necessity, and public power in American history is in the development of state police power. It is difficult to overstate the significance of this particular legal doctrine and political practice in American history. Police power was basically the crucial site for the expansion of public authority beyond the ancient bounds and jurisdictions of local and municipal self-governance toward a more capacious, centralized, and generalized conception of state regulatory and governing power. In the nineteenth century, this state police power was the preeminent legal-political technology that powered public authority well past older common law conceptions of the legitimate range of public action. Police power thus marked the crucial inflection point for the transition from primarily juridical to increasingly legislative and administrative discretion and authority. Finally, this same police power provided the working template for attempts in the early twentieth century to shift the site of a more open-ended legislative, regulatory, and administrative power to the national level. While technically the idea of a truly
federal or national police power in American law was constitutionally impossible, the nineteenth-century expansion of state police power was the model for the development of a national plenary power over immigration as well as the subsequent growth and transformation of national taxing, spending, postal, and commerce powers. It would thus seem that the story of the seemingly unstoppable growth of American police power offers great potential for exploring the intersection of law and statecraft, constitutionalism and administration, and precedential rules and the nature of exception.

So what is police power? Basically, police power is the name that nineteenth-century American jurists ultimately gave to the powers of a state legislature to pass laws that regulated private interests, properties, and liberties in the more general interest of public safety, health, comfort, order, morals, and welfare. Notably, early American states were actually exercising such powers long before jurists and treatise writers decided on this particular legal nomenclature. Police power was a vibrant and vital political practice long before it was instantiated as a jurisprudential category. Indeed, in its first years of constitutional being—from 1781 to 1801—the state legislature of New York passed police regulations concerning everything from public economy (e.g., lotteries, usury, hawkers and peddlers, etc.), to public morals (e.g., cursing, drunkenness, gaming, etc.), to public health and safety (e.g., firing woods, ship quarantine, the practice of physic and surgery, etc.), to public order and welfare (e.g., beggars, disorderly persons, dogs, poor relief, etc.). Such regulatory powers were seen as necessary and integral parts of the development of general lawmaking authority in a crucial democratic moment as powers once derived from royal prerogative or the High Court of Parliament devolved on newly established American state legislatures.

In many ways, the police power resembles other kinds of government power that are routinely discussed in terms of formal legal categories, for example, the taxing power or the eminent domain power. But what makes the police power more distinct, more problematic, and of more interest to discussions of emergency and necessity (as well as democracy) is its more open-ended, almost unbounded quality. This feature of police power has been a constant topic of jurisprudential discussion and commentary for well over a century. Massachusetts chief justice Lemuel Shaw inaugurated that tradition when he argued classically in Commonwealth v. Alger (1851): “[I]t is much easier to perceive and realize the existence of [police] power than to mark its boundaries or to prescribe limits to its exercise.” New York’s Justice Andrews concurred in People v. Budd (1889): “The generality of the terms employed by ju-
rists and publicists in defining this power, while they show the breadth and universality of its presence, nevertheless leave its boundaries and limitations indefinite.” Andrews went on to warn against circumscription: “The moment the police power is destroyed or curbed by fixed and rigid rules, a danger is introduced in our system.” For Collins Denny, the police power encompassed “one of the most difficult phases of our law to understand”: “[I]t is even more difficult to define it within any bounds.” And Lewis Hochheimer simply analogized police power to plenary power—the “inherent plenary power of a State.” In the late nineteenth century, US Supreme Court justice McKenna described police power as “the most essential of powers—at times, the most insistent, and always one of the least limitable powers of government.” And more recently William O. Douglas echoed: “An attempt to define its reach or trace its outer limits is fruitless.” Consequently, throughout the nineteenth century and into the twentieth, police power was presented as an inherent and irreducible attribute of governance and statecraft in almost existential discussions of society’s relationship to plenary power. As New York justice Woodworth mused as early as 1827, police power was “incident to every well regulated society, and without which it could not well exist.”

Significantly for the purposes of this particular volume, the whole development of nineteenth-century American state police power was grounded in larger ideas of “overruling necessity.” For most historians and commentators, this unmoored, overruling, emergency, and exceptional quality in police power was intimately bound up with more general European notions of police or Polizei. As Marc Raeff, among others, has demonstrated, Polizeiwissenschaft celebrated the broad and positive ambitions of governance beyond the traditional public tasks of mere order maintenance and the administration of justice. Indeed, police embraced the more capacious and open-ended task of fostering all “the productive energies of society.” Consequently, as Michel Foucault simply put it: “The police includes everything.” Maurice Block’s Dictionnaire de l’administration française (1856) captured something of the vastness of police administration in a list of varieties of police: “morals and religion, sanitary police, police relating to public security, rural and forestry police, police of substance—embracing control over butchers, fairs, markets, prices—industrial and commercial police, police control over carriers, and finally judiciary police, or that pertaining to the administration of justice.” Robert von Mohl’s Polizei-Wissenschaft emphasized three overarching objects of police power relating to “the care of the physical, intellectual and moral needs of the public” with chapters
devoted to “the care of the State for population, health, aid to the needy, agriculture, trade, education, and religion.” For Foucault, the eleven categories of police in Nicolas Delamare’s *Traité de la police* (1722) constituted “the great charter of police functions in the Classical period” with three great aims: “economic regulation (the circulation of commodities, manufacturing processes, the obligations of tradespeople both to one another and to their clientele), measures of public order (surveillance of dangerous individuals, expulsion of vagabonds, and, if necessary, beggars and the pursuit of criminals), and general rules of hygiene (checks on the quality of foodstuffs sold, the water supply and the cleanliness of the streets).”

The relationship of police to a capacious and nearly unlimitable conception of necessitous governance has been the subject of several distinguished commentaries. Indeed, scholars like Nikolas Rose, Mitchell Dean, and Pasquale Pasquino have placed this all-important topic—the nature of the legal and political power of police, broadly construed—at the very center of the history of the making of modern sovereignty, modern governance, the modern state, and even modern empire. Like Rose, Dean, and Pasquino, Mariana Valverde has drawn special inspiration from Foucault in delineating an expansive genealogy of police as power over populations shifted from ecclesiastical pastor to secular potentate: “Police is the direct governmentality of the sovereign as sovereign . . . the permanent coup d’etat.” For Christopher Tomlins, the police in the police power marks the central component in an insistently expanding and expansive American sovereignty. And, for Markus Dubber especially, the essence of police power is necessity—overruling necessity—the inherently unlimited, extraconstitutional, discretionary prerogative of the sovereign to act quickly and expediently so as to eliminate threats to the health, safety, and security of the people. Indeed, the links between police power and the state of exception, national emergency power, military/martial law, and criminality and incarceration are most direct and inescapable in Dubber’s formidable oeuvre on this topic.

But one limitation of this otherwise impressive body of work on police is the tendency to separate out the open-ended dimensions of police, policy, necessity, and emergency from the more general operations of ordinary law. Indeed, the separate spheres of law and police is the major trope in both Tomlins’s and Dubber’s explorations of police in the American context. For Tomlins, law is nothing short of “the American modality of rule,” while police is the continental European alternative invoking “a different set of assumptions about social relations.” He quotes the German liberal Eduard Lasker: “Rule of law and rule of po-
lice are two different ways to which history points, two methods of development between which peoples must choose and have chosen.”

For Dubber, reviving the “distinction between law and police” is nothing short of urgent because “it brings out the distinguishing feature of law as a mode of governance.” Indeed, he claims that the law/police distinction is at the heart of most important academic discussions of a distinctly “liberal” legality in “First Amendment theory, in [Lon] Fuller’s distinction between ‘managerial direction’ and ‘law,’ in [Friedrich] Hayek’s vision of law as a ‘rule of just conduct,’ and in Herbert Packer’s distinction between two models of criminal process, ‘managerial’ Crime Control and Due Process.” For Dubber, this fundamental antinomy is central to the preservation of the liberal idea of a jural or law state (Rechtsstaat) distinct from a dangerous police state.

While this robust scholarship has done much to illuminate the central role of necessity, exception, and emergency in the development of police, it goes somewhat astray in positing police as a special sphere of government action and ambition separate from or outside the law. The idea harbors the comforting illusion that law will provide a steady answer and a compelling alternative to the problem of police in the modern state—that it can be used to distinguish good police from bad police easily and to rein in arbitrary and despotic exertions of police power. The idea draws on a deeply rooted set of rule-of-law values that sees law (Recht, Ius) as the antithesis of power, sovereignty, coercion, and violence. It also draws authority from an orthodox American legal and constitutional history that too frequently portrays the rule of law as a nay-saying, outside limitation on state power—checking, balancing, dividing, and constraining power—the ultimate liberal (of late, libertarian) guardian of rights to life, liberty, and property against the artificial usurpations of state authority and regulatory government.

But, contrary to this general trend in theorizing police, administration, and exception as transconstitutional or extralegal decisionist and political forces that know no law, they are better understood as part and parcel of the legal history of democratic states. Indeed, far from being strange bedfellows, law and police have been frequent fellow travelers in the development of American state power. Police power originated and was legitimated in law—in the delegations of prerogative and privilege in the charters of the municipalities, villages, corporations, and subsidiary associations that reflected the intimate interrelationships of the state, the law, and the legitimate power to regulate, expropriate, and punish. The official development of the police power as a legal doctrine is almost inseparable from the story of the rise of the judiciary and
the common law and American constitutionalism. Indeed, the original phrase *police power* comes from none other than US Supreme Court chief justice John Marshall, much as the concept was most fully worked out by Massachusetts chief justice Lemuel Shaw.\(^{41}\) In short, though it is common to separate the jural state and the police state, the norm and the exception, as necessary antipodes in a normatively charged meta-narrative of the promise and perils of rule, the actual legal history of the American version of the modern democratic state suggests a closer interconnection and interpenetration of sovereignty, necessity, police, and the rule of law.

Indeed, after the pioneering case work of jurists like Marshall, Shaw, and Woodworth, American legal treatise writers explicitly insisted on drawing the connection between the police power and the law of overruling necessity. As Ernst Freund put it in his definitive treatise on *Police Power*: “A government cannot be said to be free and liberal in which there is not a considerable margin between the practice of legislation and constitutional limitations; for a government must have powers to exercise in time of emergency which it would be tyranny to use without such necessity.”\(^{42}\) A decade before Freund, W. P. Prentice organized his entire treatise on *police powers* around the basic idea of “the law of overruling necessity,” noting: “The police power inherent in every sovereignty, for the protection of the public welfare, is difficult of exact definition. It has been well said that ‘it is easier to perceive and realize the existence of this power than to mark its boundaries or to prescribe limits to its exercise.’ Followed through the decisions of the courts, police powers . . . arise under what has been termed ‘the law of overruling necessity.’”\(^{43}\) Platt Potter’s notable *Treatise on Statutes* concurred: “There exists another power by which private property may be taken, used or destroyed for the benefit of others, and this is called the *police power*; sometimes called the law of overruling necessity.” George Wickersham’s pioneering article “The Police Power” began with Prentice’s observation that the “law of overruling necessity” was “an exception to all human ordinances and constitutions,” and yet, Wickersham concluded, “the entire doctrine of the police power” was “the creation of the courts.”\(^{44}\) The definitive chroniclers of the actual origins and development of nineteenth-century police power and overruling necessity were unanimous that, far from being something outside or foreign to American law, police power was a product of judges and courts and distinctly legal technologies. Platt Potter was unambiguous: “This doctrine of overruling necessity, or police power, was the common law of this state at the time of the adoption of this state constitution. . . . It was brought from England by our ancestors
as a part of their system of common law; was adopted by our ancestors as the law of the land; it is not clearly repugnant to the constitution; but being adopted by it, is in effect a part of it.”

Indeed, American courts and commentators consistently referred to a canonical line of cases making it “well settled at common law” that in instances of necessity or calamity—for example, fire, pestilence, or war—individual interests, rights, or injuries would not inhibit the preservation of the common weal. As Potter put it: “It was well settled common law, as we find both by the best elementary law writers, and by uniform adjudications in the courts, that in cases of actual necessity,—as that of preventing the spread of fire,—the ravages of a pestilence, or any other great calamity, the private property of any individual may be lawfully taken, used or destroyed for the relief, protection, or safety of the many, without subjecting the actors to personal responsibility.”

In the Case of King’s Prerogative in Salt-Peter (1606), Sir Edward Coke made the classic case for necessity and legal exceptions in times of emergency: “By the common law every man may come upon any land for the defence of the realm, and in such case, and on such extremity, they may dig for gravel for the making of bulwarks, for this is for the public, and every one hath a benefit by it. And for the commonwealth, a man shall suffer damage; as for saving of a city, or town, a house shall be plucked down if the next be on fire;—and the suburbs of a city in time of war, for the common safety shall be plucked down; and a thing for the commonwealth a man may do, without being liable to an action.” In the equally famous “case of necessity” known as Mouse’s Case (1608), a tempest threatened a barge and the lives of its forty-seven passengers, requiring the summary ejectment overboard of “a hogshead of wine and other ponderous things,” all without compensation or legal redress: “Every one ought to bear his loss for the safeguard and life of a man, for interest reipublicae quod homines conserventur; plucking down of a house in time of fire, etc., and this pro bono publico; et conservatio vitae hominis est bonum publicum.” In British Cast Plate Manufacturers v. Meredith (1792), Justice Buller made the rationale and connection to salus populi explicit: “There are many cases in which individuals sustain an injury for which the law gives no action; for instance, pulling down houses, or raising bulwarks for the preservation and defence of the king, done against the king’s enemies. This is one of the cases to which the maxim applies, ‘Salus populi suprema est lex.’”

Here, then, was the link between necessity, salus populi, and, ultimately, the American development of state police power. America’s Blackstone, Chancellor James Kent, made that link explicit in his
commentaries: “Rights of property must be made subservient to the public welfare. The maxim is, that a private mischief is to be endured, rather than a public inconvenience. On this ground rests the rights of public necessity. If a common highway be out of repair, a passenger may lawfully go through an adjoining private enclosure. So it is lawful to raze houses to the ground to prevent the spreading of a conflagration. These are cases of urgent necessity; but private property must . . . yield to the general interest.”

Kent used this rationale to uphold a veritable slew of legislative regulations of unwholesome trades, slaughterhouses, gunpowder, cemeteries, and the like. As Oliver Wendell Holmes accurately noted later in his famous edition of Kent’s Commentaries, this doctrine was the foundation of the state police power.

The American police power flowed directly from these early legal conceptions of overruling necessity and salus populi. If the common welfare and safety of society were the highest law, it followed that, when the preservation of that society was at stake, lesser rules and conventions gave way. As Thomas Cooley reasoned, here individual interest “must yield to that ‘necessity’ which ‘knows no law.’” Any injury to the individual was damnnum absque injuria (an injury without a remedy) under the reasoning that “a private mischief shall be endured, rather than a public inconvenience.”

As New York justice Hubbard synthesized these ideas in Wynehamer v. People: “The police power is, of necessity, despotic in its character . . . and in emergencies, it may be exercised to the destruction of property, without compensation to the owner. . . . It is the public exigency which demands the summary destruction, upon the maxim that the safety of the society is the paramount law. It is the application of the personal right or principle of self preservation to the body politic.” Thus, W. P. Prentice could begin his treatise Police Powers Arising under the Law of Overruling Necessity by drawing directly on this long line of well-established precedent, noting that “police powers arising under the law of overruling necessity are no new topic in any practical administration of sovereign authority.” The powers were as ancient as those precedents that promoted “bulwarks for the defense of the realm.” Here, Prentice concluded, the act of the government was “for the defense of society, or the people whose peace is invaded by any violence.”

And society must be defended.

The actual development of such “police laws” across almost every conceivable aspect of American life and government and regulation is now the subject of some fairly dense books and treatises. From overruling necessity, salus populi, and the common law of public nuisance, the American doctrine and practice of police power grew throughout the
nineteenth century into a powerful font of state and ultimately federal regulatory authority. By 1894, Prentice could already trace the development of police laws and statutes through a host of permutations: local administration, metropolitan and market laws, sanitary regulations, mandatory and restraining laws relative to game, intoxicating liquors, and oleomargarine, health and quarantine laws, laws for the protection of purity in water and food and protection against danger from inflammable oils and explosive substances, vital statistics, the regulation of offensive trades and nuisances, building laws, regulations for tenement and lodging houses, licenses, taxes, regulations for occupations, and urban administration. And that was but the tip of the iceberg. Prentice concluded by noting the ever-larger expanse “for the necessary exercise of police powers . . . as new occasions and new demands arise” in a polity where “the object of government and law is the welfare of the people.”

3. The Nationalization of Police, Necessity, and Emergency

Of course, one of the truisms regarding this initial development of American police power through older legal conceptions of necessity and salus populi was that it remained largely a matter of local, municipal, and state governance. As Gary Gerstle highlighted this peculiar outgrowth of American federalism: “The states operated according to a different governing principle than did the central state.” And that principle was “known in judicial circles as ‘the police power.’” As John Marshall defended the breadth of such state police power even against the claims of the Bill of Rights: “The Constitution was ordained and established by the people of the United States for themselves and not for the government of the individual states.” In United States v. Dewitt (1870), the US Supreme Court echoed the antebellum constitutional consensus that the police power was explicitly a state and local rather than a federal power. Closely following Chief Justice Marshall’s analysis in Barron, Chief Justice Chase held that, though Congress clearly had the authority to regulate interstate commerce, it did not have a general, open-ended national power to pass regulations of internal state police in the interests of public health, safety, and welfare. The police power remained with the individual states and localities, and the national government wielded nothing analogous to the general plenary authority of state legislatures to regulate liberty and property in the public interest.

But, despite this clear, consensual, and formal doctrinal limitation on the legal extent of state police power, larger concerns of necessity and
*salus populi*, of course, knew no such bounds. Indeed, as John Witt’s work on Francis Lieber and his *Lincoln’s Code* make clear, the kinds of national existential issues that faced the Confederation Congress in September 1787 did not dissipate after ratification. To the contrary, as Witt deftly puts the point: “One hundred and fifty years ago, the United States was a world leader in emergency constitutionalism.” Consequently, the same kind of emergency, necessity, and extemporizing pressures—*salus populi*—that allowed for the almost unbounded expansion and exertion of state police powers in the nineteenth century underwrote another momentous transformation in the twentieth century as the locus of modern American governing authority moved ineluctably from the local to the national (and arguably from the state legislature to the national executive).

As Samuel P. Hays, among many other historians, has noted, the period between 1880 and 1920 witnessed a thoroughgoing nationalization and systematization of American social and economic life necessitating a distinctly “upward shift of decision-making” power. Leonard D. White surveyed the extent of state centralization even before the onset of the New Deal in 1933: “The evidence of the last thirty years demonstrates a steady accretion of power and influence by the state governments over the administrative powers of local officials especially in the fields of public finance, education, health and highways, as well as a steady extension of federal influence over the states, particularly in the regulation of commerce.” In 1923, Leonard Thompson surveyed a similar trend toward “federal centralization,” noting that “[s]ince the Civil War there has been a marked tendency for the federal government to increase its activities,” provoking “considerable discussion during the last few years.”

In this respect, one of the more important developments in the transformation of public power in this period was the construction of a *de facto* (if not *de jure*) nationalization of police power culminating in the unmistakable centralization of general-welfare lawmaking authority in the United States—the roots of a modern, central administrative and regulatory state.

This process of nationalization was twofold. First, the police power increasingly became a more positive public law doctrine that defined modern legislative regulatory power. Second, and somewhat more surreptitiously, the police power—and its underlying rationales of necessity and *salus populi*—began to go national.

One of the chief architects of the first transformation was Ernst Freund. Like Francis Lieber, Freund was one of the great, relatively anonymous revolutionaries in American political and legal history, pio-
neering a modern redefinition of legislative, administrative, and regulatory power. He accomplished this through a range of reform activities, numerous scholarly articles, and four influential treatises on the key legal issues surrounding the creation of the modern American state: *Police Power, Standards of American Legislation, Administrative Powers*, and *Legislative Regulation*. His approach was unmistakably pragmatic, realistic, and functionalist. For Freund, modern socioeconomic change—particularly “the growing power, scope, and complexity of private industrial and social action”—brought an increasing demand for positive state action in the public interest. That action appropriately took the form of written, legislative enactments in areas of police, revenue, and administration that were increasingly positive and public rather than declaratory and private. These regulatory statutes were the hallmarks of a modern state highlighting the expansion of “the functions of government” in pursuit of “the public welfare” and “the public interest.”

At the center of this expansion of legislative regulation and the socioeconomic functions of government stood the police power—the major open-ended source of state regulatory authority in American public law. Together with a bevy of other commentaries in this period, Freund’s *Police Power* helped free the conception of police power from the limitations of its common law origins and establish it as the public law foundation of extensive legislative regulatory authority. As Freund put it: “[T]he care of the public welfare, or internal public policy, has for its object the improvement of social and economic conditions affecting the community at large and collectively, with a view to bringing about ‘the greatest good of the greatest number.’” It was here that an expanded conception of police power did its work, no longer primarily preoccupied with negative common law protections or the simple maintenance of civil and criminal justice, but reconstituted as an instrument for the open-ended positive promotion of public welfare and the satisfaction of public needs and necessities. In this way, Freund transformed the police power from a more limited doctrine of community self-defense and protection hemmed in by traditional common law maxims and local and customary legal procedures into a more positive and open-ended authority to legislate broadly on behalf of the general welfare. Modern legislation and regulation needed to be instrumentally responsive to direct public policy needs rather than constrained by traditional common law conceptions and routines.

By linking the police power with the general promotion of public welfare in a positive legislative state, Freund and his compatriots paved the way for the explosive growth of police power regulation in the Progressive
era. Regulatory statute books swelled, case numbers rose exponentially, and expositions on police power proliferated. A new forcefulness and resourcefulness crept into discussions as progressives expanded the scale and scope of American legislative power, calling for the police power to be “more freely exercised and private property more freely controlled to meet the needs of the changed conditions of society.” Some progressives saw in the police power “almost unlimited opportunities for adopting whatever legislation the augmenting demands of social pioneers may require.”

But legislative police power not only dramatically expanded its scale and scope in this period; it also began a steady and surprising ascent up the levels of American government. While Chief Justices Marshall and Chase were technically and doctrinally correct that the police power per se remained a state power, one of the unmistakable developments in modern American legislation and regulation at the turn of the twentieth century was the degree to which Congress insistently expanded its policing powers through the creative exercise of its commerce, taxing, spending, and postal powers. As Charles Evans Hughes told the American Bar Association in 1918, the most significant decisions of the recent Supreme Court involved three aspects of such federal expansion: (a) “[t]he extended application of the doctrine that federal rules governing interstate commerce may have the quality of police regulations”; (b) “[t]he approval of the cooperation of nation and states”; and (c) “[t]he recognition of the sweeping authority of Congress over the relations between interstate common carriers and their employees.”

In the areas of business, labor, transportation, morals, health, safety, and education, powers and issues that were once the exclusive domain of state and local governments moved up into the purview of the national government in one of the most significant expropriations of political power in American history. And, as Ernst Freund argued in 1920, the role of law and the judiciary in that expropriation was pivotal: “The consolidation of our own nation has proved our allotment of federal powers to be increasingly inadequate; and had it not been aided by liberal judicial construction, our situation would be unbearable.”

One of the most important advocates of such an expansive legal construction was Robert E. Cushman. Cushman would eventually go on to write one of the most important treatises on the emergence of independent regulatory commissions on the national level. But first he cut his teeth on the conundrum of federal police power. In one of a series of highly influential articles in the *Minnesota Law Review*, he noted: “The enumeration of the congressional powers in the Constitution does
not include any general grant of authority to pass laws for the protection of the health, morals, or general welfare of the nation. It follows, then, that if Congress is to exercise a police power at all, it must do so by a process something akin to indirection.” Cushman argued that, if Congress wanted to expand progressive state police power experiments to the national level in an ambitious program to secure the general welfare, it would have to “cloak its good works under its authority to tax, or to regulate commerce, or to control the mails, or the like, and say, ‘By this authority we pass this law in the interest of the public welfare.’”68 That is exactly what Congress did in passing such important national morals, health, safety, and economic regulations as the Pure Food and Drug Act (1906), the Mann Act (1910), the Harrison Narcotics Tax Act (1914), the Child Labor Tax Act (1919), and the National Prohibition Act (1919). Through the spending power and federal grants-in-aid to individual states, Congress was able to wield even more national regulatory authority through the incentive power of the public purse. Consequently, the United States achieved a centralization of national legislative police power authority even before the Supreme Court accepted an expansive interpretation of the interstate commerce clause at the height of the New Deal.69 Indeed, many of the central components of a modern, positivist, and central legislative and regulatory state were well established in the United States by the time Ernst Freund died and Franklin Delano Roosevelt won election to the presidency in the fall of 1932.

4. Conclusion

The transformation of the police power from its roots in early conceptions of local self-government and common law notions of necessity and salus populi into a font of modern legislative, regulatory, and administrative power is one of the epic developments in the history of the American state. And, obviously, a short essay like this can only hint at the actual scale and scope of its implications for everyday American life across the public policy spectrum from issues of public health, safety, and welfare to issues of public utility, public provision, public necessity, and even public emergency. Moreover, it is the contention of this essay that this larger history of the police power is implicated everywhere in trying to understand the larger interrelationship of the American rule of law and the problem of emergency. One closing example might suffice to underscore this important final point.

Between the two historic events that usually frame most discussions of law and emergency—Lincoln’s extraordinary wartime presidency and
Article 48 and the rise of Hitler’s dictatorship—there was another important episode in the legal expansion of American state powers of emergency. In World War I, the Woodrow Wilson administration launched another extraordinary program of legislative, executive, administrative, and central state action that included such expansive initiatives as conscription, espionage and sedition acts, national prohibition, and the extraordinary experiment in domestic price controls known as the Lever Act or the Food and Fuel Control Act of 1917. As one contemporary critic put it: “The power demanded is greater than has ever been exercised by any king or potentate of earth; it is broader than that which is exercised by the Kaiser of the Germans. It is a power such as no Caesar ever employed over a conquered province in the bloodiest days of Rome’s bloody despotism.”70 As Clinton Rossiter enumerated the most important statutory delegations of emergency power to the president, these included “acts empowering [the president] to take over and operate the railroads and water systems, to regulate or commandeer all ship-building facilities in the United States, to regulate and prohibit exports, to raise an army by conscription, to allocate priorities in transportation, to regulate the conduct of resident enemy aliens, to take over and operate the telegraph and telephone systems, to redistribute functions among the executive agencies of the federal government, to control the foreign language press, and to censor all communications to and from foreign countries.”71

But though Wilson’s actions have been subject to much scrutiny and commentary, one aspect of this important story has been conspicuously overlooked—the issue of where the Wilson administration turned for historic precedents for this seemingly unprecedented ramping up of American executive and emergency power. One might guess that Lincoln’s presidency would suffice. What is surprising, however, is the degree to which, while briefly noting both Confederate and Federal Civil War precedents, the Wilson administration turned instead to another extraordinary historical record of so-called emergency legislation—the legislative record of the American states during the American Revolution.

In 1918, J. Reuben Clark Jr. was charged by Wilson and the attorney-general of the United States with compiling a compendium of historic American emergency legislation dealing especially with regulations “for the public use, benefit, or welfare.”72 The volume included over one thousand pages of historic American statutes. Civil War legislation consumed about fifty of those pages, but most of the rest of the volume—some eight hundred pages—cataloged the extraordinary leg-
islative activities of the Continental Congress and especially the laws of
the individual states from Connecticut to Virginia.

Clark began by listing the major wartime congressional acts of the
World War I emergency from the Shipping Board Act to the Trading
with the Enemy Act. He then detailed Wilson’s presidential proclama-
tions and executive orders regarding everything from the manufacture
of explosives to the ammonia industry. The accompanying subject digest
for these Wilson wartime-era initiatives consumed almost another hun-
dred pages covering matters from accounting, aircraft, alcohol, ammuni-
tion, arms, and anchorage to warehouses, war material, the War Trade
Board, and wheat.

Then, the vast majority of the eight hundred pages of precedential
emergency legislation in the Wilson administration report makes clear
the direct links between police power, overruling necessity, and emer-
gency in a much longer American legal history. The American revolu-
tionary state legislatures took center stage. In almost all the states, the
legislatures began by taking control of state trade and political econ-
omy and aggressively policing fraud and wartime opportunism. Con-
necticut, for example, early passed an “Act to Encourage Fair Dealing,
and to Restrain and Punish Sharers and Oppressors” that required a
license to purchase a wide range of everyday household products. In
1778, at the urging of an actively engaged Continental Congress, com-
missioners from seven states met in New Haven and agreed to regulate
the price of labor, manufactures, internal produce, and imported com-
modities more aggressively. The Connecticut legislature ordered prices
returned to 1774 levels across another encyclopedic list of commodities
from “white beans” to “common steel.” Beyond such basic economic
and price controls, all the revolutionary states aggressively legislated to
provide adequately for the militia and the armed services. Maryland, for
example, passed ample and detailed statutes to provide for “The Quar-
tering of Soldiers,” “To Procure Cloathing for... the American Army,”
“To Secure (or Impress) Vessels and Carriages,” “To Procure a Supply
of Salt Meat for the Use of the Army,” and to provide “For the Service
of the United States.” The Maryland legislature also frequently and ex-
tensively expanded the powers of the governor and council, prohibited
the distillation of grain into spirits, and regulated auctions. Other states
followed suit with equally aggressive legislative measures distinguished
by peculiar local institutions and customs. Georgia, for example, passed
a law requiring “Negro Slaves to work on the several Forts, Batteries, or
other public Works” within the state.73
This catalog of revolutionary American state police legislation could continue ad nauseam. The point is but to underscore the long and close historical relationship among the development of American police power, the problem of overruling necessity, and the conditions of emergency. Much commentary on the American rule of law and the problem of emergency relies on relatively particularized and stylized portraits of executive prerogative, the nature of sovereignty, and the concept of the exception. This essay contends that more can be learned about both the rule of law and the problem of emergency by investigating their historic interaction in the ongoing construction of a modern American state power—the extent and limit of which is neither a simple question nor a merely academic one.

Notes


10. Salus populi (regard for the public welfare is the highest law) is the first maxim discussed in Herbert Broom, A Selection of Legal Maxims, 6th American ed. (Philadelphia: T. & J. W. Johnson, 1868), 1.

11. For a fuller elaboration of the role of salus populi and police power in nineteenth-century statecraft, see William J. Novak, The People’s Welfare: Law and Regulation in Nineteenth-Century America (Chapel Hill: University of


27. The tale of these first two developments is basically the subject of my *The People’s Welfare*.


42. Freund, Police Power, 42.


45. Potter, Treatise on Statutes, 446.

46. Potter, Treatise on Statutes, 444.


49. For Holmes’s comments, see James Kent, Commentaries on American Law, 12th ed., 4 vols., rev. Oliver Wendell Holmes (Boston: Little, Brown, 1878), 2:441 n. 2.

50. Cooley, Constitutional Limitations, 594–95.


52. Prentice, Police Powers, iii.


54. Gerstle, Liberty and Coercion, 56.


58. This basic transformation is a main topic of my current book project, tentatively titled “New Democracy: Law and the Creation of the Modern American State.”


70. Senator James A. Reed, Congressional Record, 65th Cong., 1st sess., June 14, 1917, 3597.