ABSTRACT

Title of Dissertation: SEEDS OF DISCORD: EXTRAORDINARY COMMANDS AND CONSTITUTIONAL THOUGHT IN THE ROMAN REPUBLIC

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Extraordinary commands remain a controversial subject in the history of the Roman Republic, especially regarding whether (or how) such commands contributed to the ultimate collapse of Rome's republican government. Unfortunately, there is no consensus on the definition of extraordinary commands or the criteria for identifying them in modern scholarship, without which historians are unable to discern the true significance of these commands in Roman history. This dissertation argues that extraordinary commands are best understood as deviations from the Roman constitution, wherein the socio-political norms and laws intended to regulate Rome's magistracies were subordinated, through either senatorial decree or popular vote, in order to accommodate the creation of an otherwise illegal military command. Starting with a historiographical survey of the modern discussion surrounding extraordinary commands, the early chapters of the dissertation also focus on analyzing the socio-political norms and rules that formed the basis of Rome's republican constitution, as well as a detailed examination of Rome's political institutions, especially the development of its executive magistracies. Next, a

philological analysis of the terms *extra ordinem*, *extraordinarium*, and their Greek equivalents examines how Romans and Greeks themselves perceived extraordinary commands. The final chapters of this dissertation argue that the identification of extraordinary commands ultimately comes down to three analytical perspectives: the potential legal criteria of irregular magistracies, the magnitude of their occurrence, and whether they represented a deviation from Roman constitutional law. Finally, the dissertation concludes with an overview of all exceptional and extraordinary commands occurring over the course of the Roman Republic (509-31 BCE), along with a statistical analysis of the changing trends and evolution of extraordinary commands over time. In the end, a proper method of defining and identifying extraordinary commands helps modern historians truly understand the significance of such commands in Roman history. A well-known facet of Rome's constitution was its flexibility, which allowed the Romans to find innovative solutions to crises facing the state over time, but extraordinary commands represented the breaking point of this flexibility.

SEEDS OF DISCORD: EXTRAORDINARY COMMANDS AND CONSTITUTIONAL THOUGHT IN THE ROMAN REPUBLIC

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Dissertation submitted to the Faculty of the Graduate School of the
University of Maryland, College Park, in partial fulfillment
of the requirements for the degree of
Doctor of Philosophy
2023

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Dedication

Maximis parentibus uxorique. Omne quod sum e vobis venit.

To the greatest parents and wife. All that I am comes from you.

Acknowledgements

One of the joys in completing such a large project like a dissertation is the chance to thank those who rendered indispensable help along the way. I am forever grateful to my parents, Stephen and Gwen Cranford, for their unending love and support throughout my life and for instilling in me the values of hard work and resilience. In everything I do, I hope to make them proud. Next, I will always be thankful to my advisor, Arthur Eckstein, for his guidance, patience, and support. In my time at the University of Maryland (UMD), Professor Eckstein always encouraged my intellectual curiosity and made me feel that my ideas had value, even when they may have conflicted with his own. Humble gratitude is also due to Professor Eckstein for enduring my panicked emails and last-minute requests with the patience of a saint. At the same time, Professor Eckstein challenged me to bring out the best in my work and, like a good *pontifex*, was always there to remind me not to go "a bridge too far." For whatever caliber of scholar I am now or will become, I remain indebted to Professor Eckstein. Next, I wish to thank the members of my dissertation committee, Professors Eric Adler, Hayim Lapin, Jeremy Simmons, and Rachel Singpurwalla, not only for agreeing to join the committee and reading the dissertation itself, but also for their invaluable questions and feedback during and after the dissertation defense.

Thanks must also (and happily) be given to all the faculty I have had the privilege of studying under and working with in the History Department at UMD, as well as the administrative staff. Conversations with Gail Russell and Lisa Klein were always a bright spot of my day. In particular, I owe profound gratitude to our graduate coordinator, Jodi Hall. From the time of my arrival at UMD, Jodi always patiently answered all my questions, offered sage advice, and provided help wherever she could. Although it is common knowledge in the

department that Jodi's help is indispensable, in my case this was especially true. In general, I am humbled and grateful for the support that the Department has afforded me in my time at UMD, especially in the case of scholarships, grants, fellowships, and teaching opportunities. My success in completing the doctoral program at UMD was due in no small part to the succor and support from everyone in the History Department.

Considerable thanks are also due to the faculty, students, and staff of UMD's Classics Department, which was a second home to many of us in the History Department. I am grateful to the library as well for their help in my research. Of course, I am also thankful for the students I have had the pleasure of teaching during my time at UMD, many of whom helped further my own research and understanding of the ancient world through our classroom discussions. I will always be grateful to my colleagues and officemates in the graduate student offices with whom I have gained valuable friendships. In particular, the camaraderie shared by various members of our online writing group were instrumental in much of the research and writing of this dissertation. There are so many individual friends and family members who deserve my thanks that I would risk omitting some if I attempted to list them, so I will simply express my sincere gratitude to them all for years of love, support, and encouragement, which were always felt and always appreciated.

Lastly, perhaps my deepest and most heartfelt gratitude is due to my loving wife and partner, Meredith Vaughn, and thanking her is one of my greatest privileges. To say that I could not have completed my doctoral program without Meredith's support would be an understatement. From before my time at UMD and throughout, Meredith was by my side every step of the way in my academic journey, forever a steadfast source of strength and comfort. During the arduous process of researching and writing this dissertation especially, Meredith

never wavered in offering reassurance and encouragement. I can never repay Meredith for her love and support, but I can strive to be worthy of it. This dissertation, then, is but a single step in that journey.

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Introduction

Silent enim leges inter arma. – Cic. *Mil.* 11

Laws are silent under arms.

The subject of extraordinary commands is an inherent component in discussions of the Roman Republic, especially the crises facing the Roman state in the first century BCE.[1] Mention of extraordinary commands is usually placed in the context of questions surrounding their supposed effect on the institutional stability of Rome's republican government. To that end, extraordinary commands are usually understood as massive political and military assignments, which expanded a commander's military authority (*imperium*) beyond traditional and constitutional limits, extended the duration of their terms of office, and were often created through senatorial decree or popular vote. Ostensibly, these commands were created and assigned in response to two main factors. First, various military or political crises (both domestic and foreign) necessitated calling upon specific leaders selected for their competence, in contrast to the traditional and legal practice of assigning provincial or military commands to elected magistrates through sortition (random allotment). Second, the far reach of Rome's conquests throughout the Mediterranean, as well as their subsequent political and military obligations, especially in the late Republic, made it nearly impossible for commanders selected by conventional means to address the exigencies they faced during their legal terms of office effectively. Consuls and praetors, for instance, would spend most of their year in office traveling to their assigned province, leaving no time to exercise their political duties or lead military campaigns before having to return to Rome at the end of their annual term. Consequently,

[1] Hereafter, all ancient dates are to be considered as BCE unless otherwise specified.

extraordinary commands provided effective solutions to the immediate problems facing Rome throughout the history of the Republic.

Yet, despite a seemingly clear function, extraordinary commands have been a controversial subject for historians of the Roman Republic, specifically regarding whether, or to what degree, they weakened the institutional stability of the Republic or contributed to its ultimate collapse. The most prominent example of extraordinary commands, though many more existed, is in the career of Cn. Pompeius Magnus (106-48), or "Pompey the Great," who first raised his own private army in support of L. Cornelius Sulla in 83 and went on to gain increasingly prestigious and powerful extraordinary commands for the next two decades.[2] When Pompey was reaching the height of his power in 67 he was assigned a massive extraordinary command (*extraordinarium imperium*) by the Roman people for the purpose of eradicating the plague of piracy afflicting the Mediterranean world, especially Rome, at that time. According to Velleius Paterculus, "by this decree, the command (*imperium*) over almost the entire world was granted to one man."[3] And yet, after finally returning to Italy in 62, and having wielded *imperium* of various sorts for nearly twenty years in succession, Pompey soon formed the political compact with C. Iulius Caesar ("Julius Caesar") and M. Licinius Crassus known unofficially as the First Triumvirate, through which the three men dominated Roman politics for the next decade. Caesar himself, as is well known, held his own extraordinary command – granted by the people – in Gaul for eight years, which Cato warned was tantamount to setting up a tyrant.[4] Despite the complexity of events leading up to civil war, however, Cato's words will

[2] For the dates of Pompey's life and career, see the biographies of Leach (1978) and Seager (1979).
[3] Vell. 2.30.3: *extraordinaria imperia*; 31.3: *Quo scito paene totius terrarium orbis imperium uni viro deferebatur*.
[4] Plut. *Cat.* 33.3: προλέγοντος Κάτωνος ὡς εἰς ἀκρόπολιν τὸν τύραννον αὐτοὶ ταῖς ἑαυτῶν ψήφοις ἱδρύουσι. See also Plut. *Caes.* 14.10; *Crass.* 14.3; App. *BC* 2.13-14.

nevertheless have seemed prophetic to many when Caesar returned from his Gallic command and to march his army on Rome in early 49.[5]

It is no surprise, then, that any study of the late Republic, and especially any question of its supposed decline, will also invariably feature discussion of extraordinary commands. In such cases, as said above, examinations of these commands focus on whether they indicated or contributed to any decline in republican institutions.

Mommsen, of course, discussed extraordinary commands at length and argued that the increasingly frequent expansion of a commander's power throughout the Republic contributed to the "downfall of senatorial rule" and served as a precursor to the autocratic elements of the Augustan principate.[6] Other scholars see the rise of extraordinary commands also as a reflection of senatorial weakness, not merely a cause of it.[7] According to Victor Ehrenberg, for example, the Roman Senate was more afraid of ambitious aristocrats and their incessant pursuit of prestige than of the extraordinary commands that allowed those same aristocrats to obtain the unprecedented prestige they sought. Ehrenberg goes on to argue that the Senate's repeated willingness to invest large amounts of power into such individuals both "shows its irresponsibility" and demonstrates that it was prepared to adopt reckless measures in the name of immediate security, even at the risk of undermining the Republic's future stability.[8]

Many later scholars rejected this view, of course. Erich Gruen argues that Pompey's motivations, for instance, have been mischaracterized as aiming for *dominatio*, an allegation that reached back to Sallust (Sall. *Hist.* 2.18), due to the exceptional heights of power and authority

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[5] Caes. *BC* 1.8.1; Vell. 2.49.4; Plut. *Cat. Min.* 52.1; *Caes.* 32; *Pomp.* 60.1; *Ant.* 6.1; *Mor.* 206C; Suet. *Iul.* 32-33; App. *BC* 2.35; Dio 41.4.1-2; Eutrop. 6.19; Oros. 6.15.3.
[6] Mommsen 1877: 2.1.660-663.
[7] Steel 2013: 242.
[8] Ehrenberg 1953: 119. Ehrenberg notes the irony that many measures enacted during the late first century for the purpose of ensuring the stability of the Republic in a time of crisis actually went contrary to the reforms implemented by Sulla in 82 and 80, which were also enacted for the same purpose.

that Pompey attained in his extraordinary commands.[9] Contrary to such assertions, however, Gruen argues that Pompey's political successes did not "mark an irreversible victory of the military over the civilian government."[10] As evidence, Gruen emphasizes that all of Pompey's military commands were well within the bounds of Roman law, that he did not use threats or coercions to obtain his consulship in 70, that he instead eagerly adopted a conciliatory stance toward the Senate by dismissing his armies near the end of 71, and that he tried to operate in accordance with senatorial procedure throughout his later career (Plut. *Pomp.* 21.4-22.3). Catherine Steel, on the other hand, has recently stated that Pompey's "constitutional exceptionalism was fueled by and made dangerously destabilizing through the sheer scale of his military achievements" and the rapidity with which he obtained his commands (as the wealth, prestige, and political networks of one success built towards another).[11] Consequently, according to Steel, extraordinary commands became a form of "political currency" to garner socio-political prestige that was detached from the traditional *cursus honorum*.[12]

As this brief overview shows, extraordinary commands remain a controversial issue to this day. There is no shortage of different interpretations among scholars.

But a deeper problem underlies the controversy surrounding the impact of extraordinary commands on Rome's political institutions, specifically the lack of consensus regarding the precise definition of extraordinary commands. As Ronald Ridley states, "When, however, we come to ask what exactly constitutes such a command, the answers given are found to be vague."[13] Gruen similarly quips that the term, extraordinary command, is "often bandied about,

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[9] The description of Pompey here is from a very fragmentary portion of Sallust's *Historiae* (2.17), where Sallust claims that Pompey was "modest toward all other things, except domination" (*modestus ad alia omnia, nisi ad dominationem*).
[10] Gruen 1995: 43.
[11] Steel 2013: 241.
[12] Steel 2013: 239-242.
[13] Ridley 1981: 280.

rarely defined."[14] Instead, scholars define extraordinary commands by different political or legal terminology, while many others apply rather arbitrary standards and criteria to determine what constitutes a true extraordinary command as opposed merely to a general with a large army or an extended tenure of *imperium*.[15]

Historians will be unable to ascertain the true significance of extraordinary commands in Roman politics without a clear understanding of the definition and criteria for the identification of such commands. It is this problem that the current dissertation seeks to address. I argue that extraordinary commands are best understood as deviations from the Roman constitution, wherein socio-political tradition and constitutional law are subordinated, either by popular vote or senatorial decree, in order to accommodate the creation of irregular military commands and magistracies. Such an endeavor is ambitious, requiring discussions of constitutional thought, Roman political institutions, the various definitions employed by modern scholars, as well as an understanding not only of how ancient Greek and Roman writers themselves identified extraordinary commands but also how they judged their importance in Roman politics and society. By establishing a comprehensive definition of extraordinary commands and the criteria for identifying them, historians are better equipped to determine their true significance and effect on the stability and legitimacy of Rome's republican institutions.

Fundamentally, the idea of extraordinary commands as constitutional deviations engages the question of the Roman government's flexibility. The Romans had not survived multiple crises and conquered the Mediterranean by rigid adherence to legal protocol. When arguing in favor of Pompey's extraordinary command in 66, for instance, Cicero famously stated that "our ancestors followed tradition in peace, expediency in war, and always applied the formulation of

[14] Gruen 1995: 534.
[15] See, for example, Ridley on the arguments of Boak and Kloft (Ridley 1981: 282, 287-288).

new plans to new crises of the times."[16] And yet, the Roman Republic was also founded on the principle of imposing legal restrictions on the function of elected magistrates in order to ensure that the Roman people would never again have to suffer under the reign of a monarchy. Indeed, Livy described a free Rome as one with annual magistrates and where the authority of law was superior to that of men.[17] Laws and institutions can be flexible, but they cannot be ignored altogether. For instance, on the opposite side of the debate over Pompey's commands, an exacerbated Q. Lutatius Catulus asked the people, "Why do you even elect annual magistrates if you are not going to use them?"[18] Thus, when establishing the definition and criteria for the identification of extraordinary commands, we do need to acknowledge the inherent flexibility of the Roman constitution but also recognize that this flexibility had its limits.

Indeed, the issue of flexibility and its limitations was the basis of Mommsen's original distinction between commands that were "exceptional" (exceptionelle) and those that were "extraordinary" (ausserordientliche). I elaborate on this issue in chapter 4, but briefly, Mommsen believed that exceptional commands were those derived from legal modifications of existing magistracies (such as prorogation), whereas true extraordinary commands were "deviations from the constitutional order" (Abweichungen von der verfassungsmässigen Ordnung). The problem, however, is that Mommsen did not give a clear distinction between a legal modification or a constitutional deviation, saying only that an extraordinary command, as opposed to a merely "exceptional" command, was one in which *imperium* was granted to an improper office or to an individual who did not hold an elected office, a *privatus*.[19]

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[16] Cic. *Man.* 60: *Maiores nostros semper in pace consuetudini, in bello utilitati paruisse, semper ad novos casus temporum novorum consiliorum rationes accommodasse*.
[17] Livy 2.1.1: *Liberi iam hinc populi Romani res pace belloque gestas, annuos magistratus, imperiaque legum potentiora quam honimum peragam.*
[18] Dio 36.33.2: τίνος μὲν γὰρ ἕνεκα καὶ τοὺς ἐνιαυσίους ἄρχοντας χειροτονεῖτε, εἴγε μηδὲν αὐτοῖς πρὸς τὰ τοιαῦτα χρήσεσθε;
[19] Mommsen 1877: 2.1.627.

These vague and simplistic depictions do not accurately reflect the complexity of the Roman government, nor do they even reflect the perspectives of the Romans themselves. Mommsen, for instance, did not consider Caesar's Gallic command to be extraordinary, as it was nothing more than "a legally extended proconsulship" (rechtlich ein erweitertes Proconsulat). Indeed, it is true that Caesar's tenure in Gaul was granted to him legally by a vote of the assemblies in 59 and again in 55, but the surface-level legality of Caesar's appointment does not necessarily mean that it was not extraordinary.[20] As we have already seen, Cato compared Caesar's initial appointment in 59 to the establishment of a tyranny.[21] Furthermore, if a nine-year command (58-50) in Gaul is not considered extraordinary, then how do we reconcile this with the fact that the seven-year command (217-211) in Spain held by P. Cornelius Scipio, the father of Africanus, was explicitly described as *extraordinaria imperia* by Seneca the Younger?[22] On the one hand, both Caesar and the elder Scipio received their extended commands through legal channels (that is, through votes of the people). On the other hand, Scipio's prorogations were granted without scandal and through the agreement of both the Senate and the Roman people, whereas Caesar used bribery and threats of violence to push through legislation that overturned the allotment of provinces for 58 in order to gain his preferred provincial commands – by a legal vote of the assembly.[23] From only these two examples, it becomes clear that constitutional

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[20] Mommsen 1877: 2.1.627. For the sources on Caesar's appointment via the *lex Vatinia* in 59 and again through the *lex Pompeia Licinia* in 55, see *MRR* 2.187, 190, 214.
[21] Plut. *Cat. Min.* 33.3.
[22] Sen. *Ben.* 3.33.3. On Scipio's consulship in 218 and subsequent prorogations, see the sources listed in *MRR* 1.237-238, 245, 250, 255-256, 260, 264-265, 268-269, 273-275.
[23] Polybius states that Scipio was sent by the Senate with troops to join his brother in Spain (Plb. 3.97.2: στρατηγὸν ἐπιστήσαντες Πόπλιον Σκιπίωνα, … ἐξαπέστελλον μετὰ σπουδῆς πρὸς τὸν ἀδελφὸν Γνάιον). Livy similarly reports that the Senate dispatched Scipio, but also emphasizes that his *imperium* was prorogued, implying the passage of legislation in the assemblies (22.22.1: *prorogato post consulatum imperio ab senatu missus*). Even Appian's use of the word ἀποφήναντες suggests that Scipio's command was extended through popular acclaim, but only after his office had ended (App. *Ib.* 15: Ῥωμαῖοι γάρ, ληγούσης τῆς ἀρχῆς τῷ Ποπλίῳ, … αὐτὸν δὲ ἀνθύπατον ἀποφήναντες ἐς Ἰβηρίαν αὖθις ἔστειλαν). Caesar reportedly used various underhanded and intimidation tactics to secure legislation, especially for the *lex Vatinia*, such as imprisoning Cato for speaking out against his proposals (Plut. *Cic. Min.* 33.1), using Pompey's soldiers to influence the assemblies (Plut. *Caes.* 14.6), and even bribing the people with

deviations cannot be determined solely on the basis of legality. The passage of laws imbued political actions with the appearance of legitimacy, but that is only because laws themselves reflect the collective agreement among members of a state to follow certain socio-political norms and rules, which is the basis of constitutional thought. In Caesar's case, however, many of these norms and rules were broken outright while others were only upheld ostensibly. Therefore, when distinguishing between commands that were exceptional or extraordinary, we cannot look only at specific laws but also more broadly at the relationship between laws, political conventions, and the constitution of a state.

To that end, I also argue that, since extraordinary commands are constitutional deviations, exceptional commands are best understood as constitutional innovations. Constitutional innovations truly reflect the flexibility of Roman institutions in that they temporarily modify but ultimately uphold law and statute in order to provide an exceptional expedient to a current problem. This is best understood through the principle of the "exception that proves the rule," as expressed by Cicero in his speech, *Pro Balbo*. In 56, when arguing for the validity of the citizenship originally granted to L. Cornelius Balbus (cos. 40) by Pompey in 72, Cicero stated that "because an exception makes something illegal, the lack of an exception makes it legal."[24] Cicero's meaning here is that legal exceptions emphasize the regular parameters of a rule by highlighting the irregularity of things that occur contrary to that rule. In other words, the exception to a rule can implicitly prove the validity of the same rule.[25] The device of prorogation, for example, was originally developed in 326 as an alternative to the illegal practice of *continuatio* and *iteratio*, since it extended a commander's *imperium* after their term of office

gifts (App. *BC* 2.13). On Caesar and the *lex Vatinia*, see also Boak 1918: 17; Gruen 1995: 541; Steel 2013: 220n. 26; Vervaet 2014: 349.

[24] Cic. *Balb.* 32: *quod si exceptio facit ne liceat, ubi non sit exceptum, ibi necesse est licere.*

[25] Brunt 1982: 141.

ended but still upheld the annuity of elected office.[26] Thus, the ability of the commander to possess *imperium* outside his elected office was an exception to the general principle of annuity. Because the prorogued *imperium* initially only lasted for a few months, however, and because the elected office still terminated at the end of the year, the result was that the overall annuity of magistracies was ultimately reinforced by the exception of *prorogatio.*

Constitutional deviations, on the other hand, represented a complete circumvention or disregard of law and statute to the point that the constitutional norms and legal protocols originally intended to regulate Roman magistracies instead began to conform to extraordinary measures themselves. When statutes are continually flouted, or when repeated exceptional measures are compiled upon one another, then constitutional orders lose their binding force in law and politics. For instance, Livy states that when the Roman people wanted to reelect Q. Fabius Maximus Rullianus to an iterated consulship in 295, which was contrary to the *lex Genucia* of 342, Fabius asked the people, "Why even bother passing laws that are broken by the same people who made them? The laws are no longer in control but are being controlled."[27] To return to the previous example of prorogation, occasional and short-term extensions of *imperium* put no strain on the integrity of Rome's political institutions. On the other hand, Hans Kloft points out that when prorogations became "expressly extended beyond the one-year period," then "extensive extraordinary *imperia*" became dangerous to the Republic, in which case

[26] Livy 8.23.10-12. See also Jashemski 1966: 1-2, 20; Kloft 1977: 15, 17, 20, 24; Ridley 1981: 288; Brennan 2000: 170; Mousourakis 2003: 81, n. 45; Straumann 2016: 103-104. On the definitions of *continuatio, reficere,* and *iteratio,* see n. 27 below, as well as the discussions in chapters 4 and 6 of this dissertation.

[27] Livy 10.13.10: *Quid ergo attineret leges ferri, quibus per eosdem qui tulissent fraus fieret? iam regi leges, non regere.* Among other measures, the *lex Genucia* stipulated that a magistrate could not hold the same office twice within a span of ten years and thus formally forbade *continuatio* (extension of office), *reficere* (immediately reelection to the same office), and *iteratio* (reelection after at a least an interim of one year). See Livy 7.42.2; Brennan 2000: 66-67, 69, 647, 651; Eckstein 2008: 225. Fabius had already been consul two years earlier in 297 (*MRR* 1. 175n. 1, 175-177).

extraordinary commands, such as those held by men like Pompey and Caesar, were akin to "explosive devices."[28]

Thus, while excessively legalistic interpretations of extraordinary commands do not take into consideration the flexibility of Rome's constitution, a full appreciation of this flexibility itself requires a comprehensive understanding of Rome's political institutions, particularly in regard to Roman magistracies. Limitations on the authority and function of magistrates was central to Roman institutions since the foundation of the Republic. After the expulsion of the kings in 509, the functions of the Roman government were split between the Senate, popular assemblies, and magistracies. The Senate consisted of elder statesmen from aristocratic families, who, among their many roles, proposed legislation to the people. The popular assemblies technically held true political power in Rome, since they approved all legislation and elected all magistrates. The magistrates, on the other hand, were vestiges of the executive and military authority once held by the kings, now disseminated among multiple individuals. If the Senate drafted laws, and the people passed laws, then the magistrates enforced the laws. And while all magistrates possessed some degree of political power (*potestas*), only the highest offices (praetors, consuls, masters of the horse, and dictators) wielded military authority (*imperium*). Despite the dissemination of power among various offices, because *potestas* and *imperium* were originally possessed solely by the kings, there was always the concern that the unfettered authority of a particularly powerful magistrate, especially in regard to his possession of *imperium*, could lead to abuses of power. Thus, a restrictions were progressively imposed on Roman magistracies over time to minimize the potential for tyrannical aspirations. For example, as we have already seen, Livy stated that the root of Roman liberty was in the limitation of

[28] Kloft 1977: 93.

consular *imperium* to annual terms, but he also emphasized that even during their terms of office the two consuls would each wield the *fasces*, symbols of their political power, on opposite days so as to avoid intimidating the people with an otherwise terrifying display of excessive authority.[29] Similarly, Livy also states that Brutus, one of the first consuls, made the people swear to each other never to allow a singular individual to reign in Rome, clearly alluding to the fear of a reemergent monarchy.[30] Therefore, the Romans gradually began to standardize the function and purview of their magistracies through both socio-political tradition (*consuetudo* and *mos maiorum*) and individual statutes (*lex*). As some examples: even after election to high office, *imperium* could only be granted to a magistrate through the passage of a bill in the curiate assembly, the *lex curiata de imperio*. Eventually bills were passed that regulated how often an individual could hold the same office repeatedly and at what intervals. Still other laws established a series of prerequisites for holding elected office, sequences of previous offices to be held, as well as minimum ages for offices, known as the *cursus honorum*.[31]

For every law passed to regulate a magistracy, however, there was the potential for an exceptional or extraordinary circumvention by a candidate or aspirant. In other words, the more regulations there were, the more chances of exceptions being made. We have already seen the example of prorogation, but there were also other blatant violations of annuity, such as *continuatio*, *reficere*, or *iteratio*. Many commanders had *imperium* that was not fit for the

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[29] Livy 2.1.7-8: *libertatis autem originem… annuum imperium consulare factum est… omnia iura, omnia insignia primi consules tenuere; id modo cautum est ne, si ambo fasces haberent, duplicatus terror uideretur*.
[30] Livy 2.1.10: *ne postmodum flecti precibus aut donis regiis posset, iure iurando adegit neminem Romae passuros regnare*.
[31] On the *lex curiata de imperio*, see Cic. *Agr*. 2.30; Caes. *BC* 1.6.6; Gell. 13.15.3; Nicholls 1967; Heurgon 1973: 113; Develin 1977b; Muir 1981: 5; Richardson 1991: 2-4; Stewart 1998: 6, 116, 182; Lintott 1999: 49, 96; Drogula 2007: 430, n. 85; Hölkeskamp 2010: 55-56; Humm 2012: 65-75; Hodgson 2017: 253, nn. 112-114. See also the example of the *lex Genucia*, which formally prohibited *continuatio* and *iteratio* (Livy 7.42.2; 10.13.8-10, 15.9; Brennan 2000: 66-69, 76, 647-648; Eckstein 2008: 225). On the development of various *leges annales* regulating the *cursus honorum*, see Livy 40.44.1 and the broader discussion in Astin 1958: 5-47.

auspices of their present office, such as quaestors with the *imperium* of a praetor, or propraetors with the *imperium* of a consul, or those wielding *imperium* who held no office at all (*privati cum imperio*). Other commanders were sometimes elected in ways that contradicted the *cursus honorum*, as mentioned above, or even had their provinces assigned in a manner that flouted established protocol. Any of these violations were illegal on their own but were only considered exceptional or extraordinary, and then usually in the eyes of the nobility, when occurring as a result of a senatorial decree or after ratification by the popular assemblies.

Structure of Dissertation and Goals

As the current chapter has demonstrated, establishing a comprehensive definition of extraordinary commands is no small task and requires engaging multiple perspectives, including constitutional theory, an understanding of Roman political institutions, and more. In the remainder of this chapter, I outline the subject matter, arguments, and conclusions of subsequent chapters, as well as how they contribute to the overarching thesis of the dissertation, defining and identifying extraordinary commands throughout the Roman Republic.

In chapter 1, I provide a thorough discussion and survey of the historiography surrounding extraordinary commands and the late Roman Republic, as well as the intersection of each field. I begin this chapter by examining the ways that extraordinary commands have been portrayed and depicted in modern history. Though related, the subject matter of this chapter is not the same as that of chapter 4, which focuses exclusively on the ways that previous historians have attempted to define extraordinary commands. In contrast, chapter 1 focuses on how such commands were portrayed and the terminology used in reference to them. I also dispel several misconceptions about extraordinary commands and the limitations inherent to many modern

studies. One problem, for instance, is the tendency to see extraordinary commands solely as a late Republican phenomenon, when in fact examples of such commands can be found throughout the Republic. Another problem is viewing extraordinary commands solely through the lens of their supposed destructive potential in Roman politics. Extraordinary commands were initially used to rescue the Roman state in time of emergency and crisis and should not be viewed exclusively in terms of any danger they posed the Republic. Lastly, I elaborate further on the lack of consensus among modern scholars regarding a definition of extraordinary commands.

Chapter 2 addresses the question of constitutional thought in the Roman Republic. The importance here is that arguing for a distinction between constitutional innovations and deviations, especially in regard to the identification of extraordinary commands, presupposes the existence of a constitution in Rome, which must be ascertained. Furthermore, before asking if the Romans even had a constitution, it is first necessary to establish the actual definition of a political constitution. Thus, I argue in this chapter that constitutions are best understood as a higher order of norms and rules that form the guiding principles and structural framework of a state's government. All social groups eventually establish various norms and rules that provide order and structure to the interpersonal relationships among group members. Whereas norms represent shared beliefs and expected behaviors, rules are specific directives or limitations of action that regulate behavior among individual members of groups. As a social group grows, its organization tends to become more complex necessitating that the norms and rules governing that group begin to evolve as well, which can result in the emergence of states with political institutions and conventions. Norms eventually become conventions tied not only to shared belief but also become inherent to a shared social reality among group members, that is, a tacit agreement of what is right and wrong. Rules become codified into institutional collections of

prescriptive and proscriptive laws with an established hierarchy of precedence and determinations of protocol for certain actions within the group. In both cases, when membership and enfranchisement within a state is contingent upon adherence to these conventions and institutions, then they can be said to have become constitutional. Constitutions, then, are collections of socio-political norms and rules that establish the purpose and structure of a government.

Next, I examine the question of constitutional thought in Rome and the argument over whether the Roman Republic even possessed a constitution. Many scholars have no problem with speaking of a "constitution" in Rome, while others argue that such a term is at best an inaccuracy, or at worst an anachronism that imposes modern concepts onto antiquity. Ultimately, while modern scholars should be careful to minimize bias in their analysis of the ancient world, I argue that we can speak of a constitution existing in Rome in the sense that there was a higher order of norms and rules in Roman political thought that formed the guiding principles and structural framework for Rome's government. These norm and rules consisted of *fas* (right and wrong as defined by the gods) and *ius* (notions of justice and legality in human interaction). From these two norms we then see the development of further unwritten socio-political norms that were inherent to Roman identity and outlined proper behavior in the state, such as customary practice (*consuetudo*) and tradition (*mos maiorum*), as well as the emergence of codified rules that delineated formulaic protocol in public action, namely the broader concepts of legal thought (*ius*) and individual statue (*lex*). We can also see these norms and rules take the form of entrenched, non-negotiable constitutional principles in Roman politics, such as the sovereignty of the Roman assemblies, the imperative to ensure the people's welfare, freedom from monarchic tyranny, the annuity of magistracies, and more.

Chapter 3 builds on the discussion of Roman constitutional thought and examines the function of Rome's political institutions. The importance in this discussion is that it establishes a political baseline for assessing the supposed irregularity inherent to extraordinary commands. In other words, if extraordinary commands are implicitly abnormal (or not ordinary) then we need to establish what was normal (or ordinary) in Roman politics. Roman magistracies did not exist in isolation, but in tandem with other facets of the government. Thus, it is necessary to examine Rome's political infrastructure overall, but with particular emphasis on the function of its magistracies. I begin with an overview of the Roman Senate, focusing not only on their role in drafting legislation, but also as an informal advisory board that nevertheless wielded immense socio-political influence (*auctoritas*) in Rome. The Roman Senate was inextricably linked to Rome's magistracies, since the Senate was itself comprised of former and future magistrates, and indeed many extraordinary commands were based on appointments that originated from senatorial decree, despite such actions being outside the Senate's legal purview. Next, I examine the Roman assemblies, the ultimate source of all legal authority in Rome. Not only did the Roman people approve or reject all proposals of law, but they also elected almost all Roman magistrates. Furthermore, only the highest Roman magistrates could legally wield *imperium* through the passage of a *lex curiata*. But because the Roman people technically possessed full legal authority in the Roman state, the assemblies could even vote to override and grant exceptions to established law whenever they pleased, particularly in the appointment of commanders. Lastly, I provide a thorough overview of Roman elected magistracies, starting with the minor offices and proceeding through the higher magistracies that fielded Rome's commanders. Along the way I examine the legal protocols and strictures governing the election

and function of Roman magistracies, such as the *cursus honorum*, the principles of annuity and *biennium*, as well as the nature of both *potestas* and *imperium*.

Having established an overview of the Roman constitution and its political institutions, I turn in chapter 4 to a thorough and focused discussion of the various modern definitions of extraordinary commands, including a historiographical survey of modern scholarship on the subject, followed by a detailed discussion of my own definition of extraordinary commands as constitutional deviations. Beyond the cursory discussion in the first chapter, I elaborate in chapter 4 on the lack of consensus among modern scholars on the definition of extraordinary commands or the criteria to identify them, which hinders our understanding of the significance of such commands in the history of the Republic. In each case, I also highlight the specific legal and historical reasons that scholars have identified certain commands as extraordinary and their importance in Roman politics. Having done so, I then turn to lay out my own definition of extraordinary commands as constitutional deviations in greater detail, as well as the necessary components to identify such commands, consisting of specific legal criteria, as well as considerations of magnitude and constitutionality.

Two further necessary elements in establishing a modern definition of extraordinary commands in the Roman Republic are the conceptions and judgements of extraordinary commands among Roman and Greek writers themselves, which are the subjects of chapters 5 and 6. In chapter 5, for instance, I discuss how Roman and Greek writers not only conceived of extraordinary commands but also the reasons why. I begin by breaking down the etymology of "extraordinary," specifically its Latin derivations in *extraordinarium* and *extra ordinem*. I then discuss the various possible meanings of each term and specifically their use in describing irregular magistracies and military commands. After this, I turn to Greek descriptions of

extraordinary commands, especially the Greek equivalents to the Latin terms *extraordinarium* and *extra ordinem*. Lastly, I discuss the conceptual and legal emergence of the promagistracy itself in both Roman and Greek sources and its connection to extraordinary commands. Ultimately, this chapter reveals that, although Roman and Greek writers were often inconsistent with their specific terminology, they tended to describe commands as extraordinary when they were deemed excessive, unnecessary, or breached legal protocol.

In chapter 6, I build on the previous chapter's etymological discussions and address the terminological inconsistencies among Roman and Greek writers by arguing that all commands identified in ancient sources as extraordinary exhibited at least one of the legal criteria that I identified in chapter 4. I provide examples of each of these criteria and demonstrate how and why Greco-Roman writers identified them as extraordinary. This also demonstrates that even commands not specifically referred to as extraordinary in ancient sources can be described as such as long as they exhibited the necessary criteria.

Finally, in chapter 7, I provide the final steps in identifying extraordinary commands, the analyses of constitutionality and magnitude. In regard to constitutionality, I look at the interaction between irregular magistracies, the popular assemblies, and established statute. Issues of magnitude return to the legal criteria discussed originally in chapter 4, analyzing them in terms of the frequency of occurrence, their duration (or extensions of powers), and the combination of various criteria in the example of individual commanders. Next, I put theory into practice by providing a very brief, but thorough overview of extraordinary commands throughout the entirety of the Roman Republic. I also provide some statistical analysis to highlight the evolution of extraordinary commands over the course of Roman history. The image that emerges is one of a Roman Republic that confirms Cicero's assessment of Rome's ancestors in his

defense of the *lex Manilia* of 66, that the Romans upheld tradition in times of peace, but always valued expediency in times of crisis (Cic. *Man.* 60). Indeed, the Roman government showed an undeniable willingness to adapt their institutions to meet the demands facing the state, but also a desire to return to normalcy and customary practice when emergencies abated. On the other hand, we can also detect a reluctance among the Romans to overuse certain expedients, demonstrating that flexibility had its limits. Certain measures were deemed too risky and were subsequently restricted, while others proliferated in use to the point that they became normalized in politics. By establishing a comprehensive definition of extraordinary commands, we are able to discern their true significance in Roman politics, as well as how the Romans understood their own evolving political institutions.

Concluding Remarks

In the end, this dissertation will demonstrate that extraordinary commands were constitutional deviations, wherein the laws and norms regulating magistracies were subordinated in order to accommodate the creation of an irregular command. Built on norms such as *fas*, *consuetudo*, and *mos maiorum*, as well as political rules such as *ius* and *lex*, the Roman constitution was simultaneously structured on principles of flexibility and formulaic procedure.[32] One of the most fundamental principles in Roman constitutional thought, according to Cicero, and specifically in regard to the conduct of Rome's magistracies, was that "the highest law should be the prosperity and well-being of the people (*salus populi*)."[33] Benjamin Straumann has argued that this statement should not be taken as a license for magistrates to act in any way they

[32] For a general discussion of *fas*, *ius*, *consuetudo*, *mos maiorum*, and *lex* in Roman law and politics, see Mousourakis 2003: 16-33.
[33] Cic. *Leg.* 3.8: *Ollis salus populi suprema lex esto*.

chose under the "blank check" justification of the *salus populi*, but rather as a guideline limiting their actions and behavior in office.[34] While Straumann is somewhat correct in this interpretation, it does not truly grasp the totality of Cicero's meaning. Rather than simply restricting or empowering the function of Roman magistrates, Cicero's reference to the *salus populi* reflects the intended function of Rome's magistracies. We should take note that the mood of Cicero's passage here is in the imperative and that Cicero was giving instructions on how and why certain magistrates should be created. Furthermore, since the purpose of these magistrates was to ensure the welfare of the people, steps needed to be taken to ensure the fulfillment of that goal if the current magistrates were unable to do so. Thus, Cicero then stated that, if there were any functions that fell outside the scope of the currently elected magistrates, the people should elect someone else and give him the appropriate legal authority for the task, an exhortation which appears to be an endorsement for the creation of extraordinary magistrates or commanders when necessary.[35] From this passage, one might say that there was nothing extraordinary that could possibly lie outside the bounds of Roman law and the voice of the popular assemblies.

And yet, as Straumann also points out, the very fact that certain magistracies and political acts were described as *extraordinarium* and *extra ordinem* demonstrates that there were some actions deemed outside the bounds of Roman constitutional law, which were seen as dangerous to the state and therefore contrary to the *salus populi*.[36] The question was where to draw the line between an exception and an extraordinary measure. As a final example, in 148, when Scipio Aemilianus was running for the office of aedile, the Roman people instead voted to elect him as one of the consuls for the following year. When the consuls protested to the people that Scipio's

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[34] Straumann 2011: 282-283; Straumann 2016: 35.
[35] Cic. *Leg.* 3.10: *Ast quid erit quod extra magistratus coerari oesus sit, qui coeret, populus creato eique ius coerandi dato*.
[36] Straumann 2011: 281; Straumann 2016: 2.

election was illegal on the grounds of his youth, the people responded that it was they who had the authority over the magistracies (τὸν δῆμον εἶναι κύριον τῶν ἀρχαιρεσιῶν), a right which was given to them by the law of the kings. After the tribunes threatened to take away the consuls' right to oversee future elections, the Senate acceded to the demands of the people, who repealed the law prohibiting Scipio's election (likely the *lex annalis* of 180) only to reinstate the same statute a year later. Even further irregularities surrounded Scipio's election. Along with his youth, Scipio's election was also a violation of the *cursus honorum* in that he had not held the prerequisite offices of the aedileship or praetorship. Furthermore, even after his consular election, the provinces were assigned *extra sortem* by popular vote. So, in Scipio's election for 147 it was literally the case that the law did not apply equally to everyone. It is little wonder, then, that Appian described the entire ordeal surrounding Scipio's election to the consulship to have been as if someone had said, "Let the laws sleep today."[37] The difference between exceptional and extraordinary commands, then, comes down to the question of when the law was being upheld or when the law was being put to sleep.

[37] App. *Pun.* 112: "κοιμάσθων οἱ νόμοι τήμερον."

Chapter 1: The Historiography of Extraordinary Commands and the Late Roman Republic

In this chapter, I elaborate on the problems surrounding the study of extraordinary commands and provide a general historiographical survey on Greco-Roman and modern perceptions of extraordinary commands, their historical significance in the study of the late Roman Republic, and an overview of the major arguments in studies of late Republican political history overall. It is important to review these subjects since, as Straumann points out, "Despite their crucial role in the crises of the late Republic there has not been a recent monographic treatment of *imperia extraordinaria* except within the context of biographical works on holders of such powers, such as Pompey, Caesar, or Crassus."[38] The study of extraordinary commands is inextricably linked to the history of the late Republic because of the massive military appointments held by commanders like Pompey and Caesar, which, as many scholars have argued, served as precursors to the formation of the Principate. But Pompey and Caesar were inspired by the *imperia extraordinaria* wielded by commanders that came before them, namely men such as Marius and Sulla, who were themselves preceded by earlier extraordinary commands, such as those held by Q. Fabius Maximus Rullianus (cos. 295) and P. Cornelius Scipio Africanus (cos. 205, II 194), among others. Thus, in establishing a comprehensive definition of extraordinary commands, it is necessary to look for the occurrence of such commands throughout the entirety of the Republic.

The very phrase, "extraordinary command," is problematic, and not even our ancient sources are uniform in their description of what constitutes such a command. I give a more thorough etymological breakdown of the term "extraordinary" in chapter 5, but it will suffice to say briefly here that the term is derived from the Latin words *extraordinarium* and *extra*

[38] Straumann 2016: 101.

ordinem. Neither term is prominent in Latin literature but are nevertheless used over 200 times in Roman sources.[39] *Extraordinarium* and *extra ordinem* were used in a variety of ways to denote the occurrence of something unusual, abnormal, or irregular. The earliest use in a political context, however, and specifically in regard to a magisterial irregularity, is not attested until Cicero's speech opposing the agrarian law proposed by P. Servilius Rullus in 63. Here, Cicero speaks of the dangerous ambitions of a small circle of politicians, comparing the extraordinary power they sought to that of kings, not simply military commanders (Cic. *Agr.* 2.8).[40] Later Cicero goes into detail as to what made the potential commands proposed by Servilius so extraordinary, pointing specifically to extended terms of office, unrestrained legal power, access to the Roman treasury, the right to appoint legates and recruit soldiers, and, most importantly, the possession of *imperium* obtained without the *lex curiata*.[41] It is also interesting to note that Cicero wrote this speech three years after he had defended Pompey's extraordinary command in the *lex Manilia*, where he does not use the term *extraordinarium* at all. While Cicero is the earliest author referring to an extraordinary command in those terms, later writers continued to do so regarding previous commands throughout the history of the Republic, such as those held by P. Cornelius Scipio (father of Africanus), Pompey, Caesar, and more.[42] So, even for the period in which the extraordinary commands existed there is not much textual evidence to define them, nor does the term *extraordinarium* even feature prominently. Nevertheless, we can use the

[39] See also Ridley (1981: 292), who agrees but excessively underestimates the use of either term.
[40] Specifically, Cicero refers to the existence of small groups of powerful elite men, who are depicted as influencing past elections. Cicero paints himself as the exception to this pattern, saying at 2.7 that he was elected not by "the zeal of powerful men, nor the superior favor of a few men" (*non hominum potentium studio, non excellentibus gratiis paucorum*), but by the people. As for the authority they had gathered amongst themselves, Cicero referred to it as a *novae dominationes*, "new rule" or even "tyranny," then only briefly referencing the word *extraordinaria* to point out that this excessive authority was apparently not sought for the purpose of a military command or magistracy but motivated out of ambition similar to that of a king (*extraordinaria non imperia, sed regna*).
[41] Cic. *Agr.* 2.32-34, 75.
[42] As examples, see Sen. *Ben.* 3.33.3; 5.16.4; Val. Max. 4.1.14; Vell. 2.30.4, 31.4; Suet. *Iul.* 9.3, 11; *Aug.* 3.1; *Tib.* 30.1; *Cal.* 18.2; *Otho* 1.2; Tac. *Ann.* 2.32; 13.29.

characteristics associated with the commands that are described as *extraordinarium* and *extra ordinem* as a road map to identify other irregular commands or magistracies that fit the same criteria.

As I show below, modern scholarship on extraordinary commands tends to exhibit three basic problems. First, there is the chronological issue stemming from seeing extraordinary commands as an issue limited solely to the post-Sullan Republic.[43] Indeed, although many scholars do recognize the existence of generals holding extraordinary commands prior to Sulla's march on Rome in 82 BCE, such as in the careers of P. Cornelius Scipio Africanus (fl. 236-183) and C. Marius (fl. 157-86), among others, discussion of these cases is limited and narrow.[44] Little consideration is given for the context of the political emergencies of extraordinary commands occurring earlier in the Republic, or the socio-political impact of these commands. The second problem is the continual focus on either proving or refuting the supposed deleterious impact of extraordinary commands on the Roman government, which constitutes a presupposition that fails to consider any other aspects and thereby narrows the manner in which extraordinary commands are considered to a very limited perspective.[45] Lastly, as was noted at the beginning of this chapter, although modern scholarship is replete with mention and discussion of extraordinary commands, there is very little consensus on the criteria for identifying, characterizing, or even labelling such commands. Thus, as we will see, some scholars categorize certain commands as extraordinary and others do not; some commands are described as "extraordinary commands"

[43] Consider Arthur Boak's "The Extraordinary Commands from 80 to 48 B. C.," which, as its title implied, focused solely on "the history of these extraordinary commands from the reforms of Sulla to the victory of Caesar at Pharsalia" (Boak 1918: 1).
[44] Jashemski 1966: 29; Develin 1977a: 110-113; Ridley 1981: 287; Beck 2011: 93; Steel 2013: 92.
[45] For instance, see Gruen 1995: 541. According to Gruen, "The so-called extraordinary commands of the triumvirs … had neither the purpose nor the effect of stripping the senate of its role in foreign affairs." Against this see Shotter 1994: 13, 97. Shotter argues that "the fact that political and military power was vested in the same people made disorder and anarchy inevitable."

but others as "special" or "great commands," while many are described with different terms interchangeably with little to no explanation given in any case. All three problems can be rectified by establishing a proper and fundamental definition of extraordinary commands and the criteria for identifying them.

For references to extraordinary commands in modern scholarship, the earliest appearance is in Nathaniel Hooke's *The Roman History*, first published in four volumes from 1738 to 1770 CE. Hooke's first use of the term is in reference to Scipio Africanus' command in 210, which he says was "extraordinary, and out of rule" because of the irregular fashion in which the people had granted Scipio his command.[46] Several authors followed Hooke in using this terminology, as did Mommsen most famously, who referred to the extraordinary commands as ausserordentlichen Beamten, or "extraordinary officials."[47] As with Mommsen, Arthur Boak described any command as extraordinary that "exceeded in some way the *imperia* of regularly constituted individuals."[48] Frank March and Michael Rostovtzeff called appointments such as those granted to Pompey in Spain (77-72) as "extraordinary commands" and "magistracies."[49] Later scholars followed this trend in nomenclature in addition to minor variations, especially with references to "special," but also "great commands." Albert Trever, W. R. Loader, and Peter Brunt listed the posts held by Marius, Sulla, Caesar, and Pompey under the category of extraordinary commands, but Trever also refers to M. Antonius' command in 74 as both "special" and "extraordinary."[50] In contrast, Matthias Gelzer describes Pompey's command through the *lex Gabinia* as an extraordinary command, as does Frank Bourne. Aside from

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[46] Hooke 1770: 4.34, p. 491. Here Hooke specifically calls Scipio Africanus' proconsulship "extraordinary, and out of rule," due to the fact that he had not previously held a consulship and gained his command "under the sanction of the *Greater Auspices*" (Hooke's use of italics).
[47] Mommsen 1877: 2.1.626.
[48] Boak 1918: 1.
[49] Marsh 1922: 56-59; Rostovtzeff 1927: 129-130.
[50] Trever 1939: 171-177, 191-197; Loader 1940: 134-136; Brunt 1988: 33.

Pompey, however, Bourne refers to all other irregular magistracies and commands solely as promagistracies, which Reginald Barrow also called "special posts."[51] Similarly, Max Cary, Hugh Last, Howard Scullard, and Michael Crawford all described the *imperium infinitum* of Antonius and Pompey as "special commands." Additionally, Crawford says the same for the "special commands" of Brutus and Cassius in 43, as well as the *maius imperium* held by Pompey in both the *lex Manilia* (66) and grain commission (57), as well as that held by Augustus in 23.[52] Victor Ehrenberg referred broadly to the "special commands" of the late Republic, but also described the pirate commission held by Antonius (74) and the prorogations given to Lucullus (73-63) as "great commands."[53] Towards the latter half of the twentieth century, the trend in terminology started to shift back toward using the term "extraordinary commands," albeit with some exceptions. Gruen called the *extra ordinem* assignment of provinces "special commands," but also dubiously referred to the assignments of the First Triumvirate as "so-called extraordinary commands."[54] Jashemski, in her extensive study of proconsular and propraetorian *imperia*, only uses the term "extraordinary" once to describe how emergency measures in the late Republic provided the foundations of the Principate.[55] Kloft, on the other hand, exclusively described prorogations and *privati cum imperio* throughout the Republic as "extraordinary commands" (Ausserordentliche Imperien).[56] Ronald Ridley labels the emergency military

[51] Bourne 1966: 137, 143, 185-186, 204-205, 269, 475; Gelzer 1966: 33; Barrow 1977: 43. Straumann (2016: 6) also refers to extraordinary command in passing as "irregular."
[52] Cary 1945: 349-350; Last 1947: 160; Scullard 1972: 101; Crawford 1993: 203-204. See also Beard and Crawford 1985: 7-11, 11n. 19, 56.
[53] Ehrenberg 1953: 118, 133. Although Lucullus' command in the Mithridatic War was transferred to Pompey in 66 via the *lex Manilia*, Lucullus did not triumph until 63 and therefore retained his *imperium* until that time for a total of eleven years. On the *lex Manilia*, see Cic. *Man.*; *Mur.* 34; *Dom.* 19; Livy *Per.* 100; Vell. 2.33.1; Ascon. 65 (*de bello Mithridatico Cn. Pompeio extra ordinem mandando*); Plut. *Luc.* 35.7; *Pomp.* 30.1-5; App. *Mith.* 91, 97; Dio 36.42.4-43.1; Eutrop. 6.12.2. On Lucullus' triumph in 63, see *CIL* 11.1832; Cic. *Mur.* 69; *Acad.* 2.3; Diod. 4.21.4; Vell. 2.34.2; Plut. *Cat. Min.* 29.3-4; *Luc.* 37.1-4; Athen. 6.274; Eutrop. 6.10; Schol. Bob. 177.
[54] Gruen 1995: 541.
[55] Jashemski 1966: 99.
[56] Kloft 1977.

appointments of the late Republic in general as "great commands," but does specify grants of *imperium maius* as "extraordinary." David Shotter, however, describes the commands granted to Antonius (74) and Pompey (67) as "special," but nevertheless refers solely to Pompey's appointment as a "great command."[57] By the end of the twentieth century and thereafter, the phrase "extraordinary command" emerges as the most widely used terminology in references to *imperia extraordinaria* within modern scholarship.[58] Most importantly, however, the choice of terminology between "special," "great," or "extraordinary commands" in regard to *imperia extraordinaria* seem to be a matter of preference, and no criteria or explanation is ever given for the choice of one term over another.

Although this range of terminology for referring to *imperia extraordinaria* is the only place where there is any consensus (however small) on extraordinary commands, their labels and names are not indicative of the actual characteristics or criteria for their identification. Put simply, the name of something is not synonymous with its definition. Evaluating these criteria (such as the source of the command's appointment, the size of the forces allotted, the scope of the commander's authority, etc.), which is necessary for determining a general definition of an extraordinary command, requires an analysis of the various terms used by the ancient authors to describe these military and political anomalies, as well as their legal implications on the Roman government. Beyond the difference in terminology, the examples provided above demonstrate a great deal of inconsistency on the criteria that various historians have decided qualifies a command as extraordinary. These debates (and disagreements) must also be explored.

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[57] Shotter 1994: 48, 51-53.
[58] Rodgers 2008: 310; Vervaet 2009b: 431; Beck 2011: 88; Steel 2013: 241; Vervaet 2014: 143-144, 213-215, 254n. 134, 284-285, 299; Yakobson 2015: 171; Coudry 2016: 33, 36, 39-40; Straumann 2016: 6, 18, 49, 101, 109, 113; Hodgson 2017: 251, 310; Morrell 2017: 227.

As we have seen, most scholars focused on extraordinary commands as phenomena limited to the late Republic, though many have looked for examples into the early and middle Republic. One of the key components in the understanding of extraordinary commands lies in the issue of *imperium*, especially its scope, duration, and the source of its assignment to the commander. As we have seen, *imperium* refers to the power granted to certain elected officials, most commonly consuls and praetors, for the express purpose of holding a military command, although *imperium* could also have administrative applications as well.[59] According to Jacques Heurgon, *imperium* "could only be conferred through two acts of religion – the augural act (*inauguratio*) and the taking of auspices (*auspicatio*), which determined both the legitimate possession of *imperium* and the bounds of its function as defined by religion."[60] Indeed, a central tenet of republican government is the limitation placed on offices and magistracies.[61] In such a way, the limitations inherent in Roman *imperium* are also reflected in its hierarchical nature, in which certain elected offices held "greater *imperium*," or *imperium maius*, over subordinate offices. Consuls usually had *imperium* equal to their annual colleagues, for instance, but would have *imperium maius* over praetors and at times even proconsuls serving in the provinces. The notion of *imperium maius* itself had limitations, however, in that Roman political tradition sought ideally to respect individual spheres of authority and avoid instances where ranking magistrates openly overrode subordinates.[62]

Accordingly, one of the simplest and most common ways to define extraordinary commands is in their disruption of the customary hierarchy and limitations for *imperium*. There

[59] Stewart 1998: 7; Lintott 1999: 92-97; Brennan 2000: 12-29.
[60] Heurgon 1973: 113.
[61] Sellers 2003: 1-25. See especially p. 20, where Sellers summarizes Polybius' view on the need for a mixed constitution, saying, "The evil to be avoided was 'tyranny' or the establishment of any 'unlimited power' that some one, few, or many citizens might use to dominate the rest."
[62] Last 1947: 157-164; Ehrenberg 1953: 113-136.

are abundant examples of this one aspect, most famously in the *lex Gabinia* of 67, in which Velleius Paterculus states that Pompey was granted "*imperium* in all provinces equal to proconsuls up to fifty miles from the sea."[63] From reading Velleius' comments, it is understandable that many scholars have previously identified extraordinary commands solely by the inordinate and overbearing extent of their authority. Unfortunately, such characterizations of extraordinary commands are too simplistic and ignore other important factors, such as legality and historical precedent. While writers such as Cassius Dio and Velleius Paterculus may have remarked with dismay at the massive authority held by individual commanders, their shocked expression does not imply that extraordinary commands were necessarily illegal, nor were they even a new occurrence in the late Republic.[64] Indeed, however extraordinary Pompey's appointment may have seemed, the fact that the *lex Gabinia* was passed by the popular assemblies made it absolutely legal.[65]

To avoid making sweeping generalizations or overlooking precedent in Roman history, extraordinary commands need to be understood within the context of Roman constitutional law. In other words, extraordinary commands should not be considered inherently illegal or unconstitutional merely due to the unorthodox or anomalous scope of their authority. The dictatorship, for instance, included *imperium* that surpassed elected officials, but was well within the bounds of Roman constitutional thought, as it was a legitimate position, to which an individual was appointed in times of emergency, and was limited in its duration.[66] It is also necessary to consider the dynamic of precedent in the consideration of extraordinary commands

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[63] Velleius Paterculus 2.31.2-3: *Cn. Pompeius ad eos opprimendos mitteretur essetque ei imperium aequum in omnibus provinciis cum proconsulibus usque ad quinquagesimum miliarium a mari.*
[64] Coudry 2016: 33, 42.
[65] Cic. *Man.* 44, 52-53, 56; Livy *Per.* 99; Vell. 2.31.2-32.2; Val. Max. 8.15.9; Ascon. 72; Plut. *Pomp.* 26.2-26.1; App. *Mith.* 94; Dio 36.23.3-24.2.
[66] Ehrenberg 1953: 122-127.

and the Roman constitution. First, as Mommsen pointed out, the Romans had a well-established tradition of appointing officials with *imperium* that surpassed regularly elected magistrates, but such instances were due to extenuating circumstances and only when the Romans were deprived of the necessary commanders able to address whatever crisis happened to be at hand.[67] A prime example of this is found during the Second Punic War (218-201), specifically the early career of P. Cornelius Scipio (who later gained the agnomen, Africanus). In 210, the young Scipio was granted proconsular *imperium* by the people to command Roman armies in Spain after a Carthaginian victory there had decimated Rome's forces. But because he did not hold any public office at the time, Scipio was a *privatus* and thus legally unqualified for such a command (Livy 26.18-19). Further examples of extraordinary commands can be seen in T. Quinctius Flamininus' efforts to extend his tenure in Macedon and Greece from 197 to 194, the election of P. Scipio Aemilianus during the Third Punic War in 148 (which was a breach of the *cursus honorum* due to Scipio's youth), and C. Marius' repeated consulships in 104-100.[68] As these four cases demonstrate, the Roman government had no qualms with taking innovative steps to address exigencies when necessary, whether through senatorial appointment or the vote of the assembly.[69]

Extraordinary commands did not take the singular form of revolutionary generalissimos wielding unlimited power, nor were they uniformly breaches of constitutional law, or even

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[67] Mommsen 1877: 2.1.626.

[68] On Flamininus, see Plb. 18.10-12; on Scipio Aemilianus, see App. *Pun.* 112; on Marius, see *CIL* 6.41024; Cic. *Prov. Con.* 19; Sall. *Iug.* 114.3; Diod. 36.10.1; Livy *Per.* 67-68; Vell. 2.12.1-2, 6; Plut. *Mar.* 11.1, 12.1-2, 14.9-14, 22.1-5, 28.1-9; Dio fr. 94.1; Exsuper. 14.

[69] As mentioned, Scipio's command came from popular acclaim (Livy 26.18.7-9: *iussi deinde inire suffragium ad unum omnes non centuriae modo, sed etiam homines P. Scipioni imperium esse in Hispania iusserunt*), as did those of Scipio Aemilianus (App. *Pun.* 112: καὶ ὁ δῆμος αὐτὸν ὕπατον ᾑρεῖτο) and Marius (Plut. *Mar.* 11: ἀλλ᾽ ἀπόντα τὸν Μάριον ἀναγορευσάντων). Flamininus, however, received his appointments from the Senate (Plb. 18.12.1: ἡ δὲ σύγκλητος …, τὸν δὲ πρὸς τὸν Φίλιππον πόλεμον ἐψηφίσατο κατάμονον εἶναι, δοῦσα τῷ Τίτῳ τὴν ἐπιτροπὴν ὑπὲρ τῶν Ἑλληνικῶν).

necessarily overt threats to senatorial authority. Instead, extraordinary commands existed on a spectrum of various constitutional irregularities, in that they were contrary to the normal appointment of magistracies with *imperium*. Jashemski and Kloft, for instance, focus on the development of proconsular and propraetorian commands through the process of prorogation and grants of *imperium* to men outside of political office, or *privati*. It will also be important to consider the cases of dictatorships, since, although they are legally prescribed under Roman constitutional tradition, they are also by definition emergency and temporary appointments, as well as possessing *imperium maius* beyond that of consuls and other magistrates.[70] To sum up as working description: Extraordinary commands were emergency measures that bypassed normal electoral procedure and the *cursus honorum*, whose *imperium* could surpass the limits of elected magistrates, were appointed by the Senate or the Roman people, and were assigned either through the prorogation of existing commands or the nomination of *privati*. Extraordinary commands should not be viewed simplistically as illegal but they were "liable to unconstitutional, un-Republican developments or distortions," as Ehrenberg states.[71] Lastly, because the vast majority of extraordinary commands were not illegal, Erich Gruen argues that it would be a presupposition to say that the commands held by men such as Pompey and others contributed to the deterioration of the late Roman Republic.[72] On the other hand, the six-month prorogation of Publilius Philo in 326 (Livy 8.23.10-12), which originated from both the Senate and the people due to the outbreak of the Second Samnite War (326-304), is not the same situation as that of Pompey's first extraordinary command, where he illegally raised his own

[70] Ehrenberg 1953: 122-123; Wilson 2021: 3 ,25, 83-85, 146, 170-179, 229, 398, 400.
[71] Ehrenberg 1953: 115.
[72] Gruen 1995: 534.

army in 83 during a period of civil war (Cic. *Man.* 61).[73] Thus, it is necessary to examine each extraordinary command in the context of its own time. Furthermore, any attempt to ascertain the effect of extraordinary commands on the institutional stability of the late Roman Republic necessitates a clear understanding of the late Republic itself, and it is to this subject that I now turn.

Historiography of the Late Republic

Much of the scholarly discussion on the late Roman Republic focuses on the question of how and by what means the republican government collapsed in the late first century BCE, which ushered in nearly 30 years of recurrent civil war, after which Octavian Caesar (later taking the honorific, Augustus) emerged as Rome's sole ruler and eventual first emperor. The debate over the late Republic's collapse is divided mainly into two basic camps, one arguing that a myriad of factors contributed to a gradual deterioration of the Roman Republic, while other scholars point instead to an unexpected and sudden political crisis, namely the conflict pitting Caesar against Pompey and a small, intractable group of senators known as the *factio paucorum*.[74] According to the latter theory, the political crisis led to civil war, and it was this civil war that destroyed the Republic. In this second line of thought, although such a political crisis was certainly complex, it did not result from (and therefore does not indicate) any systemic

[73] Leach 1978: 24; Seager 1979: 8. The assertion that Livy depicts both the Senate and people in agreement over Philo's appointment as proconsul stems from the joint decision made between the tribunes and the Senate to propose a proconsular command for Philo, which they (the tribunes) would put before the people (*actum cum tribunis est ad populum ferrent ut, cum Q. Publilius Philo consulatu abisset, pro consule rem gereret quoad debellatum cum Graecis esset*, Livy 8.23.12). According to Brennan (2000: 73-74), this appointment was both a *plebiscita* (resolution of the people) and a *senatus consultum* (senatorial decree). For Pompey's self-serving motivations, see Coudry 2016: 38, where she argues that a prevailing theme among the speeches of Gabinius, Pompey, and Catulus was the issue of selfish motivations among Pompey and Gabinius, as opposed to the dedication to the good of the state espoused by Catulus.

[74] I will elaborate on these camps below. In short, however, the modern view of the Republic gradually declining due to several causative factors is best represented in Brunt 1988. For the opposite view, see Gruen 1995.

or inherent deterioration in Rome's republican government.[75] As mentioned above, in any examination of the late Roman Republic, the rise of generals holding massive military assignments with inordinate authority forms a central part of the debate, regardless of any scholar's contention. Thus, an understanding of the extraordinary commands requires grasping the basic schools of thought concerning the last century of the Roman Republic.[76]

For centuries, and well before the modern period, scholars beyond antiquity have tried to determine the reasons for the Republic's ultimate collapse. As far back as the sixteenth century CE, Machiavelli shared the view of Cassius Dio and thought that the fall of the Republic was due in part to the excessive growth of the state and prolonged military commands.[77] Machiavelli believed that, although the extraordinary commands themselves did not cause a discernable political crisis, they did progressively lead to more power being concentrated into the hands of fewer individuals, while the armies became more loyal to their commanders than to the Senate. Two centuries later, Montesquieu followed much of this view, also arguing that a cultural divide developed in the late Republic due to the influx of new citizens.[78] Both of these views remained important, but Theodor Mommsen's work in the nineteenth century, in particular the *Römische Geschichte*, refined their ideas of moral and political decay.[79] Mommsen argued that the Roman Republic became increasingly unstable due to the greed of rich elites, who were corrupt, inefficient, incompetent, and simultaneously weakening the state with their monarchic ambition, which paved the way for revolution, all while refusing to institute the reforms necessary to save the state. While Mommsen's views were certainly provocative and remain important to this day,

[75] For some views on the standoff of 50-49 BCE, see Stanton 2003, as well as Morstein-Marx 2007 and 2009.
[76] Lintott 1994: 1-15; Rosenstein and Morstein-Marx 2007: 625-637.
[77] Machiavelli *Discourses* 3.24 (see Machiavelli, Mansfield, and Tarcov 1996: 269-270).
[78] Montesquieu 1834. See especially chapters 8 and 9.
[79] Mommsen 1854.

his ideas have subsequently been challenged. Lintott describes Mommsen's judgment as "an outsider's view with a vengeance" and states that Mommsen did not judge the Romans according to their own cultural context.[80] Specifically, Lintott says that Mommsen instead evaluated the questions of democracy in Roman constitutional thought in terms based on the standards of the British parliament during his own life (1817-1903).

While Mommsen's views have certainly been challenged, his work provided a launching point for modern historians studying the late Republic, with two distinct camps emerging in the theories regarding the Republic's collapse. Scholars favoring Mommsen's views tended to discount the democratic element of the Roman state, arguing for a more prevalent aristocratic domination, with most pointing to the monarchic ambitions shared among various politicians of the late Republic.[81] Eduard Meyer, for instance, argues that Caesar aspired for absolute monarchy, while Pompey served as a precursor for the Principate, echoing the assessment of Mommsen.[82] Gelzer built upon Mommsen's initial discussion of the *optimates*, those aristocrats favoring the *status quo* of senatorial control, and the *populares*, aristocrats inclined to work within and through the popular assemblies to achieve their goals.[83] Whereas Mommsen considered the *populares* the primary group seeking monarchic power, Münzer contended that the *optimates* also aimed for control of the state, but through small oligarchic circles. The view of an oligarchy dominating the Roman state is best characterized in Ronald Syme's pivotal work, *The Roman Revolution*. According to Syme, "In all ages, whatever the form and name of government, be it monarchy, republic, or democracy, an oligarchy lurks behind the façade; and

[80] Lintott 1994: 10-12.
[81] Lintott 1994: 12.
[82] Meyer 1963. For Mommsen's view on Pompey as a precursor to Augustus' principate, see Mommsen 1877: 2.1.660-663. See also Boak 1918: 1.
[83] Gelzer and Seager 1975.

Roman history, Republican or Imperial, is the history of the governing class."[84] Like all historians, Syme was influenced by the events of his time, as he actually likened the rise of Augustus to that of Josef Stalin.[85]

As the preceding examples have demonstrated, scholarship following Mommsen tended to portray the late Republic in a cynical fashion, being dominated by ambitious, corrupt, and often demagogic aristocrats vying for political supremacy. And while such interpretations had been progressively refined and critiqued, some later scholars have challenged the idea of a corrupt and declining republican government, with many eventually rejecting it outright. Badian maintained Münzer's view on the aristocratic factions but argued that they were much more flexible than rigid family groupings.[86] Lily Ross Taylor pushed against the idea that the *optimates* and *populares* were merely hiding behind false ideology or that the two groups represented some strife between the upper and lower classes of Rome. As Taylor states,

> There was a division between upholders of the authority of the senate and proponents of the people's rights. It was not an alignment of senate against people, but an opposition between groups of men of noble or senatorial rank.[87]

Taylor also points out that the *optimates* and *populares* were both drawn from noble or senatorial families, not "Romans of lower rank." Taylor argues for a nuanced view, preserving the idea of nobles striving for supremacy but critiquing the idea of a simmering class conflict.[88]

While many previous scholars were right to assert that aristocratic competition among the *optimates* and *populares* did not take the form of organized political parties, Peter Brunt has asserted that such contentions can miss a larger point. According to Brunt, the collapse of the

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[84] Syme 1987: 7.
[85] Galster 1990: 3; Linderski 1990: 49.
[86] Badian 1958.
[87] Taylor 1968: 12.
[88] Taylor 1968: 13.

Republic was due to a shattered political consensus of cooperation between the Senate and people that eventually led to irreconcilable conflict. Beginning with the crises of the Gracchi (133, 121) and ending with Caesar's invasion of Italy in 49, Brunt asserted that the Senate eroded its own authority by means of gradual concessions used as short-term solutions to problems facing the Republic, such as granting extraordinary commands to conciliate the ambition of potentially dangerous aristocrats or in response to foreign crises that required competent and expedient generals.[89] To Brunt, expansion throughout the Mediterranean introduced a host of new socio-economic problems in Rome, such as the decline in small farms (the traditional recruiting base for the army) and the rise of landless soldiers with no stake in Rome's traditional political ideology or institutions. In short, expansion brought on inequality, which necessitated political reform. The attempts at such legislative reform were not enough, according to Brunt, leaving these discontented sectors of society susceptible to appeals from ambitious aristocrats, such as Marius, Sulla, and Caesar. But Morstein-Marx and Rosenstein argue that Brunt's views on the consequences of expansion are exaggerated and not supported by evidence. For example, archeology does not support the notion of a disappearance of small farms, and scholarship recently has suggested that Marius' army reforms, specifically the elimination of property requirements due to a shortage of *assidui* for recruitment, may not have been as widespread or as extreme as previously thought.[90]

Christian Meier does not dispute the role of an ambitious aristocracy in the Republic's collapse, but asserts that "all contemporary stakeholders, from the political elite to the plebs," remained committed to Rome's fundamental political ideology and that there was no apparent

[89] Brunt 1971.
[90] Rosenstein and Morstein-Marx 2007: 630-631, 637 n. 18. On the controversy of Marius' army reforms, see Rich 1983: 328-330, who argues that Marius set a precedent regularized in the Social War, which Morstein-Marx and Rosenstein assert is not supported by evidence.

desire anywhere to destroy the republican system.[91] To the contrary, according to Meier, because the Romans lacked an objective perspective on the problems threatening their political institutions, their responses were limited to an impasse of inaction or adhering to tradition even more intensely, which only allowed the problems facing the Republic to fester and worsen. Meier described the approach of the Roman governing elite as a *Gefälligkeitsstaat* (or "accommodation-state"), wherein the state attempted to appease the ambitions of powerful individuals so that they would not see the government as an impediment. In Meier's idea of a "Krise ohne Alternative" (or "crisis without alternative"), the problem facing the Republic was that a gradual moral degradation in Roman politics failed to compel ambitious aristocrats to check their aspirations in favor of Rome's institutional stability. Over time, many of these same aristocrats became generals of powerful armies, and their perpetual endeavors for *dignitas* and *gloria* were not met with the necessary reform to mitigate their damage to the state, but with "temporary expedients and piecemeal reform," thus growing over time to the point that the damage caused by these problematic nobles was irreversible.[92]

Meier's ideas have been met with considerable criticism. Badian, for instance, asserts that Meier places so much emphasis on structural developments in Roman politics that he disregards human agency and the dynamic of individual choice. The result, according to Badian, is that Meier depicts the late Roman Republic as being in an inevitable process of decline, or "a machine that could not be repaired." To the contrary, as Badian states, there were multiple points in the late Roman Republic "where things might have taken a different turn" and where the mistakes of historical individuals could have been avoided. Thus, such a deterministic view does more than disregard human agency, but it also diminishes the accountability of some individuals

[91] Meier 1966: 151-157; Brunt 1968: 230; Rosenstein and Morstein-Marx 2007: 626.
[92] Rosenstein and Morstein-Marx 2007: 626.

regarding their mistakes.[93] Lintott disagrees with Meier on these issues, stating in *Violence in Republican Rome* that the aristocracy may have indeed tolerated political conflict, but it was the toleration that allowed for political hostility to fester, eventually spiraling into civil war.[94] Put succinctly, then, as for the causes of the Republic's collapse, Meier proposes familiar culprits, such as the inability of the aristocracy to address the rise of a non-senatorial elite and the professional armies serving under the long tenure of single commanders.[95] Meier's theory, however, suggests that the Romans failed to diagnose the problems that faced the Republic, but he does not sufficiently explain or prove the existence and origin of these problems.

Erich Gruen put forth a radical and distinct perspective in *The Last Generation of the Roman Republic*, contending that the late Republic's government was functioning well within its normal parameters, while also pointing out the error of other historians in imposing a teleological view on Roman history that presents the collapse of the Republic as an inevitable, unavoidable event. Contrary to the judgments of previous scholars, Gruen argues against the usual factors attributed to the breakdown of the Republic: namely factional competition, violence, class conflict, and extraordinary commands. Instead, Gruen asserts that the severity of such problems is exaggerated by scholars working from a teleological perspective and that there is no evidence of a degradation in Rome's institutional stability. To Gruen, the Romans themselves likely did not think that the Republic was collapsing, despite the exaggerated interpretations of the complaints by writers like Cicero and Sallust. To the contrary, while the Roman government certainly faced difficulties, the assumptions of an inevitable collapse deprives those individuals contemporary to the late Republic of their historical agency. Gruen does not believe that the

[93] Badian 1990: 37-39.
[94] Lintott 1968.
[95] Meier 1966.

Republic declined progressively, but rather had shown "renewed vigor" and collapsed only due to the destructive civil war between Caesar and Pompey. As Gruen himself puts it, "civil war caused the fall of the Republic, not vice-versa."[96]

Gruen makes good points, and he admirably dispels much of the perception that Rome was caught in an irreversible decline brought on by despotic elites, oppressed plebs, ambitious generals, or overall moral corruption. On the other hand, as Morstein-Marx and Rosenstein argue, parts of Gruen's theory are too simplistic, such as in attributing Caesar's civil war to an "'accident' of human choices with world-historical consequences."[97] In particular, since the Republic had been able to survive the civil wars brought on by Marius, Cinna, Sulla, and their followers, it is hard to see how the conflict between Caesar and Pompey was the fatal blow to the Republic, unless preceding crises had already weakened the political structure. Specifically, the repeated instances of charismatic leaders, either at the head of senatorial factions or powerful armies, each claiming to represent the legitimate Roman government and denouncing their rivals as enemies of the state, could undermine the institutional stability of the Roman government over time. We can see evidence of such a strain on Rome's political resiliency in the consulships of M. Aemilius Lepidus and Q. Lutatius Catulus in 78, whom the Senate forced to swear an oath that they would not let their disagreements escalate to the point of war (πολέμῳ, App. *BC* 1.107).[98] Clearly, the memory of the Sullan civil wars had left behind a justified anxiety for many within the Roman government, who feared that the state could easily slip back into civil war. With this being the case, it is understandable also that Cicero, in late 50 or early 49, would see the looming conflict between Pompey and Caesar less an issue of political integrity and more a question of

[96] Gruen 1995: 504; Morstein-Marx and Rosenstein 2006: 628.
[97] Morstein-Marx and Rosenstein 2006: 629.
[98] Hayne 1972: 665-666; Burton 2014: 408.

how best to maintain peace and avoid civil strife.[99] While it is true that Cicero lauded the Romans' historical willingness to adopt expedient measures when necessary, he also emphasizes that such recourse was always in response to an apparent emergency.[100] The frequent need and willingness of Roman politicians in the first century to adopt unorthodox measures to address emergencies and crises, both at home and on the periphery of the empire, does not speak to the stable, thriving Republic that Gruen describes.

On the other hand, modern historians should not let the socio-political events or concerns of their own time influence their evaluation of the past, such as by over-emphasizing class-conflict, the feuding of clear-cut aristocratic factions, the domination of oligarchs, or assuming that any notion of democracy in the Roman Republic was a fiction. In particular, historians should avoid seeing the Roman Republic as being on a path of irreversible and inevitable decline, as such a view deprives historical figures of their agency and diminishes the complexity and stability of Rome's political system. Thus, much of the importance of Gruen's research is that it pushes scholars to resist the temptation of historical *pareidolia*, seeing familiar patterns where none exist, but instead to examine the late Republic on its own terms, which includes acknowledging the significance of single, consciously made decisions by prominent individuals.[101]

Yet, Gruen's conclusions, and of those following him, also have their faults.[102] As already mentioned, for example, Rome's government may not have been on the verge of collapse

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[99] Cic. *Att.* 7.1.4, 3.5.
[100] Cic. *Man.* 60: *Semper ad novos casus temporum*.
[101] For similar arguments on the importance of the choices and decisions of individuals, see Byman and Pollack 2001: 107-146. Although Byman and Pollack are arguing from the perspective of more modern historical examples, their conclusions align with Gruen's approach to analyzing the late Republic. According to the authors, for instance, "Political scientists will have to employ biography and psychology in addition to traditional tools such as economics and history. Such additions, however, will result in a far richer product that is better able to explain our world and anticipate coming challenges" (Byman and Pollack 2001: 146).
[102] See Girardet 1996; Welwei 1996; Morstein-Marx and Rosenstein 2006: 636.

when Caesar crossed the Rubicon in 49, but the spread of political violence, the rise of massive military commands, and previous civil wars cannot have left the Republic unscathed, even if their effects are exaggerated, as Gruen argues. Michael Crawford, for instance, recognizes the utility in Gruen's warnings against historical hindsight, but also points out that some degree of hindsight is always necessary. As Crawford states, "It is only in the light of what happened and in the course of an attempt to explain what happened that some earlier events emerge as important and some as trivial."[103] To that end, even Gruen's own views have admittedly changed. In "*The Last Generation of the Roman Republic*: Revisited," Gruen states that events as far back as the Social War (91-88) had irreversible effects on the Roman Republic's political culture, making political violence a more viable option, while the conflict with fellow Italians made it easier for Romans to consider fighting fellow Romans. Gruen does caution against exaggerating the effects of the Social War, but states that "they markedly intensified the passion and facilitated the recourse to destructiveness that ultimately made that fall possible, and they helped to unravel those threads of continuity that had marked the last generation of the Roman Republic."[104]

Lastly, Morstein-Marx and Rosenstein remind scholars that the various theories on the Republic's collapse do not necessarily need to remain diametrically opposed to each other. As an example, Brunt's assertion that Caesar required an army (and loyal clients) to accomplish his political goals is not contradicted by Gruen's rejection of the idea that Caesar's army was disloyal to the Republic or bent on its destruction. To the contrary, Caesar marched on Rome in the defense of the *libertas* of the Roman people, a sentiment that, as Henrik Mouritsen says, was

[103] Crawford 1976: 214.
[104] Gruen 2017: 562-565.

commonly invoked by Roman politicians, regardless of their objectives.[105] Individuals or groups opposed to one another can both believe their cause to be just, even seeing themselves as "saving" the Republic from the opposition. In this line of reasoning, as Morstein-Marx has discussed thoroughly, the affront to Caesar's *dignitas* due to the rejection of the *ratio absentis* by a small faction in the Senate was not a small matter but was legally a suppression of the people's rights.[106] Thus, it is possible at least that part of Brunt and Gruen's arguments is reconcilable. Modern historians should not feel forced into one of two opposing camps, as doing so only limits our understanding of the past. Byman and Pollack, for instance, in their study of individual leadership in nations, point out that many historians tend to operate erroneously in extremes, either accepting determinism by (non-human) structures and processes or individual agency. In this exclusivist approach, the "paradigms" of historical analysis suffer.[107]

Regardless of the overarching theory on the causes of the collapse of the Roman Republic, the topic of extraordinary commands permeates all sides of the discussion. As we have seen, Mommsen saw extraordinary commands, particularly those of Pompey, as paving the way for the Principate under Augustus.[108] Gelzer agreed with many of Mommsen's views, but also emphasized that the constitutional structure of the Roman government was ill-equipped and did not evolve adequately to address the far-reaching political and military responsibilities brought on by Rome's expansion, a necessity that led to the gradual increase in prorogued and extended commands for magistrates and generals abroad. Accordingly, these accommodations, as

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[105] Mouritsen 2001: 9; Mourstein-Marx 2009.
[106] See Morstein-Marx 2007, 2009 and Stanton 2003.
[107] Byman and Pollack 2001: 109.
[108] Mommsen 1887: 2.1.660-663. Indeed, as Marianne Coudry (2016: 39-40) points out, even Cassius Dio's depiction of Pompey ostensibly demurring at Gabinius' proposal for the pirate command is an attempt by Pompey to dissimulate his ambition (Dio 36.23.4-29.3). According to Coudry, the same scene is closely mirrored in Octavian's speech in January of 27, where he seemingly attempted to retire from office, only to have many in the Senate beg him to remain in power, a scene that Dio believes was staged so that Octavian could have the appearance of voluntarily being given power instead of taking it (Dio 53.2.6-11.5).

necessary as they may have been, planted the seed for the problematic extraordinary commands of the future. For instance, according to Gelzer, Marius's military reforms may have provided a solution to impaired recruitments, but it also created a body of soldiers that could be *clientelae* for their leader.[109] Brunt, following Mommsen and Gelzer, states that the administrative or military difficulties facing the Roman government were increasingly answered and addressed by radical political reforms passed by popular acclaim, which led to a deepening tension between the Roman people and the Senate. To that end, Brunt notes that the commands of Marius in 107 and 88, Pompey in 67 and 66, Caesar in 59, and Pompey and Crassus in 55 were all passed by the popular assembly. To summarize Brunt's reasoning, the people had been forced to step in and take the reins from an ineffectual Senate for the good of the state, while the Senate viewed these measures as "repugnant." The consequence, according to Brunt, was that the "antinomy between the authority of the senate and the rights of the people would issue in civil war."[110]

As Ehrenberg has argued, however, the truest danger inherent to the extraordinary commands was not due to any increase in the frequency of their occurrence or the growing scope of the commander's authority, nor was it the sidestepping or overruling of the Senate. Instead, the real source of danger in extraordinary commands was in the ambition of the commanders themselves, now less restrained by the traditional and constitutional limitations placed on magistracies.[111] John North states that the willingness of the aristocracy "to accept limits on the fulfillment of their ambition" was the key to the successful use of magistracies in Roman government, "so that nobody achieved a concentration of power and success such as to threaten the stability of the *res publica*."[112] Unfortunately, according to David Epstein, many ambitious

[109] Gelzer 1968: 5-10.
[110] Brunt 1988: 33-34.
[111] Ehrenberg 1953: 119.
[112] North 2007: 265-266.

Roman aristocrats "subordinated the interests of the state to their own private goals."[113] As Epstein goes on to say, Pompey's extraordinary commands in 67 and 66 allowed him to undermine his rivals for his own gain, such as with the domineering manner in which Pompey removed Q. Caecilius Metellus Creticus from his post in Crete and took the command of the Mithridatic War away from L. Licinius Lucullus.[114] The result of this antagonism was that both Metellus Creticus and Lucullus went on to oppose Pompey's later legislation, creating further tension within the Roman government.[115] This antagonism from some of the senior senators in Rome came as a surprise to Pompey, as Karl Loewenstein argues, because Pompey "had reasons to expect that, in view of his popularity with the masses and his military and administrative accomplishments, the mastery of the state in whatever form he wished … would fall into his lap like a ripe fruit."[116] As Loewenstein goes on to say, it was this hostility in the Senate that induced Pompey to partner with Caesar and Crassus. In this way, the extraordinary commands allowed for extraordinary ambition that would not accept ordinary institutional limitations.

Just as with the theories attempting to explain the collapse of the Republic, scholars are divided in their conclusions on the supposed damaging effect of extraordinary commands on the late Republic. Gruen, for instance, says outright that, "the deleterious effect of *privati cum imperio* is a red herring."[117] Specifically, Gruen calls on readers to remember that there was ample historical precedent in Rome for extraordinary commands reaching well before the late Republic, that the Roman constitution was flexible enough to allow for these *ad hoc* measures in

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[113] Epstein 1987: 70.
[114] The *lex Manilia*, which granted Pompey the authority to replace Metellus and Lucullus in their commands, was passed legally by the acclaim of the Roman people (Cic. *Pro Mur.* 34; Vell. 2.33.1; Plut. *Pomp*. 30.1-5; Dio 36.43.2). The law was nevertheless perceived by many as an injustice against Lucullus and Metellus (Vell. 2.34.1-2; Plut. *Luc.* 35.7-36.1, *Pomp.* 30.3). Plutarch emphasizes Pompey's apparent desire to undermine and antagonize Lucullus by remitting or undoing many of Lucullus' decrees (Plut. *Luc*. 36.1, *Pomp.* 31.1).
[115] Epstein 1987: 77, 84.
[116] Loewenstein 1973: 206-209.
[117] Gruen 1995: 537.

response to emergencies, that extraordinary commands were conferred legally regardless of their origin in popular acclaim or senatorial appointment, and that the terms and restrictions of the commands were regularly stipulated, thereby avoiding what Gruen terms the "blank checks" of authority.[118] Thus, Gruen's arguments here challenge the common characterization of extraordinary commands as being detrimental to the Roman government's institutional stability.

Josiah Osgood demonstrates that, while the immense power concentrated into individuals holding extraordinary commands was concerning to many Roman politicians, neither the constitutional structure of the Roman government nor the Roman Senate were immediately diminished to the point of irrelevance. Upon returning to Rome in 61, Pompey disbanded his troops and sought to work with the Roman Senate, rather than stand against them. In turn, although Pompey had political enemies, the Roman Senate did not outright reject him and was willing to work with him, so long as he could be sufficiently humbled.[119] As Kit Morrell argues, building on Gruen's ideas, the Roman government in the last years of the Republic displayed a willingness towards reform in contrast to Meier's claim of a "Krise ohne Alternative." Morrell especially states that the *lex Pompeia de provinciis* of 52 may have "helped to address the problem of powerful proconsuls, … and reduced the need for dangerous 'extraordinary commands' by making the regular system more responsive to local and foreign emergencies."[120]

The preceding discussion has been condensed for the sake of brevity, as the scholarly discussion of extraordinary commands in the late Roman Republic is vast. Two final considerations are worth noting, however, regarding how to continue approaching the study of the late Republic, especially when taking into account the plethora of theories that have been

[118] Gruen 1995: 534-543.
[119] Osgood 2018: 108-109, 116-122.
[120] Morrell 2017: 272-273.

proposed and critiqued over the years. Crook, Lintott, and Rawson point out that if we back away from focusing solely on the roles of ambitious individuals and bickering aristocratic factions, but acknowledge the complexity of the Roman government, historians should then look to "the identification of structural faults," and ask "what was it about the institutions" of Rome's government that allowed them to become vulnerable to the changes and conceptual challenges they faced.[121] As for these structural faults in Roman institutions, Morstein-Marx and Rosentein suggest that the Roman state experienced a "fragmentation of legitimacy," wherein the institutional norms of the government were becoming incompatible with the traditional ideals of the Republic. Yet this did not imply that the Romans saw the need to dismantle the republican government, as Meier emphasizes. To the contrary, Roman tradition would require that the wayward government be recovered and returned to its more "paternalistic responsiveness of senatorial leadership to popular needs," even if the idea of saving the Republic required the intercession of charismatic leaders with irregular military commands.[122]

As I have discussed at length above, while extraordinary commands do feature prominently in studies of the late Republic, they are often examined in a narrow fashion, with most scholars focusing on whether such commands had a deleterious effect on the political stability of the Roman government. Many scholars, such as Peter Brunt, claim that Roman armies in the first century BCE became increasingly loyal to their generals, while the *locus* of their commander's authority was less commonly derived from the senatorial government, but more in the ability of a general to sway popular vote through his own charisma and reputation as a successful military leader.[123] We should not exaggerate this dynamic, of course, as several

[121] Crook, Lintott, and Rawson 2008: 770.
[122] Morstein-Marx and Rosenstein 2006: 633-635.
[123] Brunt 1971: 11-19, 97-99; Mouritsen 2001: 100-101.

modern historians have argued that Roman soldiers were not determinedly disloyal to the state, nor were the commanders autonomous warlords paying lip service to the Senate. Nevertheless, the examples of charismatic leaders, such as Marius, Sulla, Pompey, and Caesar, demonstrate how strong and influential the personal adherence of soldiers to their commander could be.

Cassius Dio, who had twice served as a consul and Roman general in the early third century CE, thought as much.[124] He voiced such concerns in his account of Catulus' speech against the *lex Gabinia* of 67, a law passed by the people that gave Pompey his unprecedented command to subdue piracy throughout the Mediterranean (Dio 36.31-36a).[125] Catulus argued that placing such a sprawling special command into Pompey's hands disrupted the constitutional foundation of elected offices in Rome, while also encouraging Pompey and others after him to follow the examples of aggrandizement set by Marius and Sulla, along with the turmoil that their civil wars brought to the Republic.[126] Catulus' point here also demonstrates how the

[124] There is evidence suggesting that Dio may have served as suffect consul in 206 CE (Dio 76.16.4), but this is debated. Cary and Foster argued for a later date of 222, but Markov states that this position lacks conclusive evidence, leaving the earlier date of 206 as more likely (Cary and Foster 1914: ix; Millar 1961: 11; Markov 2016: 57-58). The precise dates for Dio's governorships are difficult to establish, but Dio served as governor of Africa likely between 221 to 223, then Dalmatia around 222 or 224, and later received a command in Upper Pannonia from around 223 or 226 to 228, during which time his troops complained of his harsh enforcement of discipline (Dio 80b.1.2-3, 4.2-5.2). Finally, in 229, Cassius Dio served his term as a consul *ordinarius* during the reign of Alexander Severus (Dio 80b.5.1-2).

[125] Though Dio very likely did alter portions of the speeches of both Gabinius and Catulus, the speeches of both men are well attested in other ancient sources (See Cic. *Man.* 59; Sall. *Hist.* 5.24 M; Val. Max. 8.15.9; Vell. 2.32.1; Plut. *Pomp.* 25.5–6.) According to Coudry, there are no other sources that corroborate a speech given by Pompey (Coudry 2016: 37-38).

[126] The two regularly elected consuls for the year 67, Manius Acilius Glabrio and C. Calpurnius Piso, were both embroiled in political controversies during their term of office. Piso at first refused to enforce some of the provisions of the *lex Gabinia*, refusing to allow recruitment for Pompey's forces in Gallia Narbonensis. This angered the Roman people, who wanted to remove Piso from office, but Pompey convinced Piso to relent in his opposition, thus also mollifying the people's anger toward the consul (Plut. *Pomp*. 27.1-2; Dio 36.37.2). That same year, the Senate (according to Dio) induced both consuls to sponsor a law, the *lex Acilia Calpurnia*, which prohibited anyone convicted of bribery from holding office or being a senator. When members of the Senate (βουλή, Dio 36.38.4; βουλευταῖς, Dio 36.39.2) attempted to pass the law illegally before the elections for that year, C. Cornelius, a *tribunus plebis*, accused the senators of interfering with elections and suppressing the people's right to vote. Indeed, at an assembly, the people attacked and threatened to kill Piso and the senators with him, but Cornelius restrained the crowd and succeeded in adding provisions to the law ensuring that senatorial decrees would require ratification by the people (Cic. *Mur.* 67; Ascon. 69, 75-76, 88; Dio 36.38.1-40.1; Schol. Bob. 78, 166).

consideration of rational/legal legitimacy in regard to extraordinary commands goes beyond the problem of loyalty among soldiers. As Catulus pointed out, the magnitude of Pompey's command undermined the institutional principles of the Roman government, wherein aristocratic men could compete for authority in a controlled political sphere so that the political ambition of statesmen did not tear the state apart in their competition.[127] Both Roberta Stewart and Henrik Mouristen have effectively demonstrated how aristocratic electoral competition played an important role in maintaining Rome's institutional stability during the Republic.[128] Although Dio altered portions of Catulus' speech, Marianne Coudry argues that "there is no doubt that those ideas were really those of Catulus and the senators opposed to the proposal of Gabinius."[129] The laws governing annual elections and officials were integral parts of the political constitution for the Roman state.[130] The opposition to the *lex Gabinia* was not based on any accusation of illegality, since it was passed by the popular assembly.[131] The problem that Catulus' speech addressed, however, was that Pompey's command in the *lex Gabinia* deviated from the customary practices that comprised Roman political procedure.

Although traditional beliefs hold great importance in the politics of modern states, the bond between tradition and politics in the ancient world was even stronger. Most extraordinary commands were not illegal as commanders and their allies endeavored to make the laws work for their purposes. On the other hand, the massive and continual commands held by Pompey and others (both before and after him) broke with Roman tradition in many ways. The legal restrictions on office holders and the expectation of collegiality among former political

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[127] Coudry 2016: 37.
[128] Stewart 1998: 22-23; Mouritsen 2010: 221-238.
[129] Coudry 2016: 42.
[130] Hammer 2008: 38-77, 132-222; Hölkeskamp 2010: 212-222; Straumann 2011; Straumann 2016.
[131] Cic. *Man.* 44, 56, 59; Livy *Per*. 99.3; Vell. 2.32.1-2; Val. Max. 8.15.9; Ascon. 72; Plut. *Pomp.* 25.3; Dio 36.23.5-24.1.

opponents in the Roman government were the bedrock of the Roman political institution.[132] As Richard Smith has pointed out, the traditions set in the *mos maiorum* required obedience to "constitutional authority," or political institutions, and challenges to this authority struck at "the very roots of the Roman *ethos*."[133] We can see this sentiment in Cicero's *de Re Publica* (5.1.1-2), wherein Cicero cites Ennius' assertion that Rome was founded on "customs and on men and might." Cicero elaborates on the poet's words by pointing to the connection between the ancient customs and excellence in men, then finally lamenting that these sacred customs and institutions were not being observed by men in his time, which in turn led to fewer virtuous men. Though we see in this excerpt the typical moralizing of late republican or early Principate writers, Cicero's remarks here also illustrate the importance of tradition in Rome's religious and political customs, while the emphasis placed on men of virtue, excellence, and might demonstrate the link between charisma and tradition in Roman political thought.

Even in the few cases where scholars have attempted to analyze the nature of extraordinary commands, these efforts have focused mainly on legal and political terminology. Such efforts can help explain whether the commands were innovations or departures from Roman political institutions, but they do not address sufficiently how contemporaries perceived these commands and the commanders, or how the extraordinary commands reflected Roman political and socio-cultural traditions.[134] And as for the contemporary accounts, there is disagreement among modern scholars regarding how Romans perceived the vitality of their state.

Gruen makes many valuable arguments, for instance, but his criticism of focusing on the socio-political influence of great individuals in the late Republic is problematic and important to

[132] Hammer 2008: 77, 102-103.
[133] Smith 1976: 24-25.
[134] See, as prominent examples, Boak 1918, Ehrenberg 1953, and Ridley 1981.

note here. To Gruen, the idea that charismatic commanders had a deleterious effect on the Republic's stability comes from the "tortured exaggerations" of Cicero, which he further characterized as "anxious reactions" and limited to the formation and renewal of the "First Triumvirate."[135] Gruen is referring, for example, to Cicero's laments on the disregard for constitutional law displayed by the "triumvirs" in (Cic. *Att.* 2.9.2), Pompey's apparent monarchic behavior (Cic. *Att.* 2.12.1), and Pompey's massive accumulation of power (Cic. *Att.* 2.17.1) in April and May of 59.[136] Yet, a decade earlier, in 66, Cicero spoke in support of the *lex Manilia*, which granted Pompey's eastern command against Mithridates and immediately followed his Mediterranean-wide command against the pirates from the *lex Gabinia* of 67. In this speech, Cicero not only stated that Pompey's many virtues qualified him for such a large command, but also compared Pompey's command to that of Scipio Aemilianus and Marius in an attempt to establish historical precedent (Cic. *Man.* 60). Here, Cicero argues that the command of Scipio Aemilianus demonstrates that Rome's ancestors were willing to adapt innovatively to a particular crisis at hand. This would imply that granting a large command to a single individual was not a violation of Roman tradition and did not carry the numerous dangers that concerned men who were opponents of the *lex Manilia*, such as Catulus.[137]

The problem with this is that Polybius disagreed with Cicero, in his description of the extraordinary command held by Scipio Africanus (210-206), who was himself the adoptive father of Aemilianus. According to Polybius, after Scipio captured New Carthage from

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[135] Gruen 1995: 503. Gruen referred to Cicero's comments at *Att.* 2.9.1-2, 2.12.1, 2.14.1, 2.17.1, 2.18.1-2, 4.8a.2; *Fam.* 1.8.1, 1.9.21; and *QFr.* 2.9.3.

[136] Holliday 1969: 28 n.13; Leach 1978: 130 n.12. It is clear that, even before Caesar's march on Rome in 50/49, Cicero was concerned about Pompey's despotic and monarch ambitions, even sarcastically referring to Pompey as "Sampsiceramus," the name of a client-king that Pompey had set up in the east, likely a comment on Pompey's perceived monarchic aspirations. For Cicero's references to Pompey as "Sampsiceramus," see Cic. *Att.* 2.14.1, 2.16.2, 2.17.1-2, and 2.23.2-3.

[137] Coudry 2016: 37.

Hasdrubal in 209, many Iberian tribes proclaimed Scipio as their king due to his stunning success in recovering from Rome's earlier reverses in Hispania. Scipio, however, refused the offer for a crown, stating that he would prefer to remain a Roman general rather than become a king.[138] Polybius then proceeded to praise Scipio's restraint in refusing this acclamation, but also pointed out that most men would have yielded to the temptation of such an offer. Polybius says that Scipio's soul was "superior to the common standard of mankind" and that the offer he had rejected was something beyond which most men could even dream (Plb. 10.40.8-9). Polybius' implication is clear: most men would have accepted the offer to become a king without hesitation, but Scipio's unique magnanimity and dedication to his country allowed him to turn down such an offer. Thus, to Polybius, Scipio occupied a dangerous position, in that his successes, his popularity, and the power he held brought with them the temptation for royal ambition, though this danger passed in 209 due to Scipio's exceptional virtue. It is true that Polybius is not specifically saying that Scipio's possession of an extraordinary command was the problem by itself. Rather, the Iberian acclamation of Scipio as a king, a result of the young general's sweeping victories, coalesced in a massive amount of power and fame concentrated in the hands of one individual, which was dangerous to the Republican mode of politics (Plb. 10.40.8-9). Indeed, fragments from Cassius Dio state that many senators at Rome were fearful that Scipio's successes in Spain, coupled with his youth, might induce him to establish a tyranny at Rome (Dio 17.57.54-56). It is this same fear of too much power being concentrated in the hand of one commander that Dio expresses in Catulus' speech against the *lex Gabinia* in 67 (Dio

[138] Specifically, according to Polybius at 10.40.5, διὸ καὶ συναθροίσας τοὺς Ἴβηρας βασιλικὸς μὲν ἔφη βούλεσθαι καὶ λέγεσθαι παρὰ πᾶσι καὶ ταῖς ἀληθείαις ὑπάρχειν, βασιλεύς γε μὴν οὔτ′ εἶναι θέλειν οὔτε λέγεσθαι παρ′ οὐδενί . ταῦτα δ′ εἰπὼν παρήγγειλε στρατηγὸν αὑτὸν προσφωνεῖν ("Therefore, he called together the Iberians, and said that he wished to be thought of as kingly by all and to lead them in the truest way, but he indeed was not willing to be called a king by anyone, but instructed them to call him a general").

36.31-36a). Uninhibited power and authority were dangerous to possess and tempting to young men full of ambition, and extraordinary commands provided an avenue for obtaining that power and authority.[139]

Cicero's conflicting views on Pompey in the 60s as opposed to those in the 50s, as well as the comparison between Cicero and Polybius, both demonstrate the complexity of extraordinary commands and how ancient writers a century apart perceived them differently. Narrow analyses, whether cultural, social, or political, are insufficient. The established precedent of extraordinary commands requires historians to look beyond the late Republic, which implicitly demonstrates that the extraordinary commands cannot be studied solely in the context of their supposed threat to the stability of the state. Conversely, scholars should not completely discount the increasing prevalence of the extraordinary commands in the late Republic, since the concerns voiced by Cicero and others (though possibly overstated at times) should not be ignored, especially since Polybius' own apprehensions over the attempt to offer a crown to Scipio align with the same fears expressed by Cicero and Catulus (through Dio) regarding Pompey, which demonstrates a striking continuity in political thought. Lastly, the focus on legality, constitutionality, and terminology reveals only limited information on the nature of extraordinary commands, as it does not take into account the role of charismatic leaders or how the commands had a legitimacy based in Roman socio-political tradition.

Thus, a new assessment is necessary. Roman leaders holding extraordinary commands had to walk a fine line of balance between effective responses to crises facing the state without transgressing or ignoring the laws and constitutional foundations of the state. It is important to note again that most extraordinary commands do not appear to be illegal outright (Pompey's in

[139] Coudry 2016: 44-50.

83 and Octavian's in 43 being the notable exceptions), but did involve the modification of existing laws to ensure the validity of the commander's post and avoid conflict with government statutes that were designed to limit the power of magistracies.[140] Yet, the laws surrounding extraordinary commands were ultimately necessary, since otherwise to tolerate a command that continued beyond its legal limits without senatorial or popular sanction would imply a disregard for Roman constitutional law.[141] Similarly, the very reason for laws restraining the ambition of commanders and politicians is because of the early Roman abhorrence of monarchic rule. But, when the Roman people bestowed a command or legal honor upon an individual, institutional tradition would acquiesce to popular acclaim, which, in turn, could become a tradition on its own.[142] In this way, we can view the increasingly explicit stipulations in laws regarding extraordinary commands (such as the *leges Gabinia, Manilia,* and *Pompeia de provinciis*) as a sign that the Roman government (especially the Senate) was struggling to find a solution to problems introduced by the increase in these commands. As we have already seen, Tacitus agreed, stating that "the laws were most numerous when the state was most corrupt" (Tac. *Ann*. 3.27). Indeed, even the growing regularity of extraordinary commands was a sign that political aberration was becoming a norm. As Duncan Cloud states, measures meant to curb the growing power of the "over-mighty magistrate, promagistrate, and private citizen … tended rather to exacerbate it."[143] The laws specifying term limits, office requirements, and the required time between holding offices, for instance, could instead disguise the massive accumulation of power

[140] Posner 2000: 4.
[141] In other words, if the Romans had not made laws sanctioning and regulating progrogued and extraordinary commands, the implication would be that the existing laws governing magistracies did not matter. The Romans were willing to adopt legal innovations, but not legal indifference. Jashemski 1950: 1-16; Lintott 1999: 113-115.
[142] Mouritsen 2001: 13 n.44.
[143] Cloud 1994: 498.

as valid magisterial statutes, providing a roadmap for ambitious aristocrats to legitimize their endeavors.[144]

[144] Coudry 2016: 44.

Chapter 2: Constitutional Theory and the Roman Constitution

A comprehensive study of extraordinary commands in the Roman Republic must begin with an examination of constitutional theory and the application of this theoretical model to the Roman government. This is due to two factors. First when considering the various debates and arguments regarding the defining characteristics of extraordinary commands, the one common thread that emerges is the issue of deviations from procedural norms in the Roman constitution. Second, many scholars do not adequately examine the nature of constitutional theory itself, especially in relation to the Roman state. In the following section, I will explain in greater detail the nature of these two problems and how they necessitate a deeper understanding of constitutional theory, what qualifies as a constitution, and the question of whether scholars can correctly refer to a Roman constitution.

As Polybius noted, the Romans did not develop the structure of their government from reason and planning, but by the experience gained from responding to the difficulties they faced (Plb. 6.10.13-14). But Polybius also goes on to outline a complex set of structural and procedural rules that made up Rome's government that would suggest a conscious and intentional effort to construct a functioning political system.[145] To many scholars, the existence of a codified set of institutions and laws governing Roman politics indeed makes it possible to speak of a constitutional system in the Roman Republic.[146] For others, the lack of a deliberate, prearranged political system precludes the use of the term "constitution" in reference to the Roman

[145] Plb. 6.11-18, 52.6-57.10.
[146] Meier 1966; Millar 1998: 15, 99, 208; Lintott 1999: 2, 7-8; Mousourakis 2003: 78; North 2007: 256-257; Straumann 2011: 280, 283; Straumann 2016: 18-19; de Wilde 2012: 556-557; de Wilde 2015: 113-116; Erskine 2013: 233-234; Steel 2014: 323-339.

government.[147] Both positions depend fundamentally on an understanding of constitutions as a concept.

Constitutional theory engages a vast and potentially confusing array of concepts and abstract ideas. Before beginning a fundamental discussion of constitutional theory, it is necessary to specify how the conceptual theories of constitutionalism will relate to the Roman constitution. For the purpose of clarity, I propose the following as a definition of a constitution, which can apply to states and societies throughout modernity and the ancient world alike: Constitutions consist of a higher order of norms that establish the fundamental guiding principles and structural framework of a political system. Throughout the subsequent discussion, I will break down some of the theoretical components of constitutional thought, not only from political perspectives, but also from psychological and sociological considerations of interpersonal behavior. Afterward, I will address the controversy over whether or not Rome can be described as possessing a constitution. In that section, I will argue, in agreement with Benjamin Straumann, that we can conceive of constitutional thought existing in Rome and that the Roman state was based on a constitution.[148] I will then show how modern constitutional concepts are compatible with the political system in the Roman Republic, and thereafter explain the structural framework of Rome's constitution.

Constitutional Theory

A constitution consists of legal institutions and political conventions that establish the foundational principles for the government of a state. But even institutions and conventions

[147] For an example of this view see Hölkeskamp 2010: 12-22; Hodgson 2017: 6, 12. See Straumann 2016: 17 for an elaboration of these views.
[148] Straumann 2011; Straumann 2016.

themselves are the result of complex socio-political developments that begin with small groups and communities, namely the formalization and expansion of fundamental social rules and traditional norms. As groups continue to grow, social rules and norms change in response to the increasing need for order and stability in larger, complex groups. As I will explain, these changes take place within three distinct stages of social development: the imposition of function, the emergence of collective intent, and the formation of constitutional rules. These three stages represent an integration of a group's social rules into their communal identity. Constitutional rules give rise to both political conventions and more formalized institutional facts, also referred to as non-legal rules and legal rules. More and more institutions are created as smaller communities grow into complex states, necessitating further organization of a state's institutions. The previous cycle by which institutional facts emerged then repeats itself, this time providing the institutions of a state with an overarching legal structure in accordance with political conventions that reflect the general will of the populace, or a constitution.

Social Rules and Norms

All groups establish norms and rules, which provide structure and order to the relationships and interpersonal behavior of its members. A fundamental pattern exists between rules and groups, namely that the growth in a group's size and complexity of its social organization results in an increase in the number and sophistication of its rules and norms. The differences between rules and norms usually comes down to a difference in formality. According to psychologist Michael Argyle, norms are

> shared patterns of perceiving and thinking, shared modes of communication, interaction and appearance, common attitudes and beliefs, and shared ways of doing whatever the group does. Members will have something in common from the beginning, and there is also convergence towards shared norms, particularly

> on the part of individual deviates. Such norms will govern the styles of social behavior which are approved and admired. Anyone who fails to conform is placed under pressure to do so, and he who does not is rejected.[149]

As Argyle explains, then, social norms are usually sufficient at governing behavior in small groups such as dyads, triads, families, and groups of friends, in which hierarchies naturally emerge, depending on the purpose of the group's formation (such as task fulfillment or socialization), as well as the personality and individual talent of group members.[150] Larger groups, such as communities and states, tend to face more difficulty, whether in completing tasks or managing the socialization of its members, due to the increase in the variety of personalities, motivations, and abilities of individuals within the group, prompting a need for more formal organization and hierarchy. As legal scholar Eric Posner states, social norms are expectations of conformity in behavior, often existing in an "absence of conscious, organized direction by individuals."[151]

Rules, on the other hand, are more explicit in delineating standards of behavior among group members, determining the latitude or limitations of actions for individuals within communities. In this context, social rules usually fall into one of two basic categories, that of mandatory rules and power-conferring rules. Mandatory rules are regulatory in nature, either allowing or forbidding a person to act in a certain manner. This can often take the form of both proscriptive and prescriptive determinations of actions (e.g. "A person may do *x*" or "A person may not do *y*"). Power-conferring rules, on the other hand, enable certain individuals to delineate or alter the rights, obligations, and powers of other people within the community. Power-

[149] Argyle 1972: 129.
[150] Argyle 1972: 126-133.
[151] Posner 2000: 8.

conferring rules are also constitutive in nature, in that they establish authoritatively the accepted scope of certain behaviors, actions, and ideas within a social group.[152]

Beyond regulating and guiding the actions of group members, rules can set the purpose of a group and the cohesion of its members, such as by providing a resolution for individuals in a group to act together. Constitutional scholar Nicholas Barber refers to these particular rules as "rules of recognition," which rely on two factors, the perception of the rule's benefit to the group, and the common acceptance by a majority or community. Both factors rely on conformity to the will of the community, particularly with a conscious awareness among group members of their collective agreement.[153] Groups, communities, and even individuals, can also reject rules, of course, while the continual development of communities mean that rules may change or even be replaced.

Whenever social rules or norms are contested by certain members within a group, the validity of the rule itself is challenged, and the possibility of dissent between members threatens to undermine the group's cohesion. First, defiance of a rule may create an impetus within a group to change the rule in question, so long as other members of the community believe that the rule is unfair or not to their collective benefit. On the other hand, social criticism for breaking a rule implies the collective acceptance of the rule.[154] People follow rules either because they agree with them or because they are afraid of public censure and other penalties for breaking them.[155] Nevertheless, according to Barber, in the face of public criticism or reprimand, ruler breakers have three options: to change their behavior to accommodate the rule in question (e.g. compliance, repentance, or acts of reparation), to change their identity to circumvent the rule (as

[152] Barber 2010: 58-59, 68-69.
[153] Barber 2010: 64
[154] Barber 2010: 61.
[155] Barber 2010: 64.

with issues of class restriction or legal status), or to remain in defiance of the rule (such as acts of protest or resistance to established order).[156] In response to continued defiance of a rule, and where public censure is insufficient to reform behavior, offending individuals can find themselves shunned or expelled from their communities.[157] In cases of disputed rules and norms adjudication takes the form of debate regarding the rule or norm's validity or deficiency, the result of which comes down to the interpretation and perspective of the group's majority.[158]

The fundamental purpose of rules and norms is that they reflect the desired organization and social structure of groups and make social interactions within a community easier by establishing accepted behaviors. [159] At the developmental stage of small groups and communities, norms and rules do not carry the force of law or any legislative institution. As established above, however, there is a discernable correlation between the growth of a community and the increased sophistication of its social norms and rules. It is through the process of three social dynamics, the imposition of function, the emergence of collective intent, and the formulation of constitutional rules, that institutional facts and constitutional conventions develop, which I will now show.

The Creation of Institutional Facts

Imposition of Function

Power-conferring rules can also allow for the imposition of agentive function, in which physical objects or even abstract ideas are associated with performing a role or task. The

[156] Barber 2010: 71.
[157] Argyle 1972: 141. Regarding rules and norms that are deeply entrenched in the social structures of communities, Argyle states that "we are only dimly aware of them until someone breaks them; this is disturbing and may lead to anger, consternation or embarrassment because the regular, predictable flow of social events is disrupted."
[158] Barber 2010: 72. As Barber goes on to state, adjudication on the basis of perspective does not always result in a decisive answer, but sometimes different perspectives on different rules.
[159] Argyle 1972: 141.

imposed function is never intrinsic, however, but always a subjective classification that is relative to the observer. The agentive function imposed on an object or idea has little permanence of its own, however, because the function can always change to fit different circumstances, subjective perceptions, and ultimately the imposed function of separate individuals.[160] Even in the cases where a group of individuals or multiple groups do agree on the imposed function of an object, disagreement can always arise and fracture their shared consensus.

In regard to rules and norms, the imposition of agentive function is a key element in the development of constitutional thought, as it helps establish specific roles and purposes for rules and norms and provides an organizational structure for those rules and norms in relation to one another, based on their status and the prominence of their perceived function. According to Benjamin Straumann, a conceptual hierarchy of socio-political values gives rise to two fundamental aspects of constitutions:

> (a) *entrenchment,* i.e. the fact that certain rules are more entrenched than other rules and less susceptible to change, and (b) political *importance,* that is to say rules that are of great substantive importance in that they govern the institutions through which political power is exercised.[161]

As stated above, however, the imposition of agentive function, and therefore status, is subject to fickle subjectivity. Furthermore, rules and norms are in a continual state of development alongside the growth and increased complexity of the community in which they function, and disputes over the meanings and validity of rules in small groups often come down to a debate over interpretation and perspective. Such an informal adjudication process and perception of rules and norms does not allow for a great deal of stability in societies.

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[160] A simple table, for instance, may function as a communal place of eating for a family, but it can also function as a workplace if necessary.
[161] Straumann 2011: 284.

Collective Intentionality

In order for an imposed function to overcome its fragility and attain more durability, it requires collective intentionality, wherein a group of individuals not only agree on the same imposed function but also collectively acknowledge the same imposed function shared by the other group members and, therefore, the existence of the group as whole. Social philosopher John Searle proposes the example of individuals in a group all saying that "we believe in *x*," as opposed to individuals in another group saying that "I believe in *x*." The distinction is that, in the first category, those espousing "we-intentions" implicitly acknowledge the actual existence of their group identity and cohesion through their collective agreement on the imposed function of an object or concept. In contrast, the second category of "I-intentions" involves individuals, whose shared beliefs on an imposed function are subject to the subjective will of each individual.[162] Groups made up of "I intentions" have no sense of unity, and their ephemeral cohesion would disappear that moment disagreement arose over any social rule or imposed function. Thus, for "I-intentions" there is no collective intentionality, even when multiple individuals agree, since the collectivity is contingent upon on individual agreement. Groups made up of "we-intentions," on the other hand, are more durable, since the group identity implicitly precedes the shared belief. In this way, the formation of "we-intentions" in a group is a sign of collective intentionality, since agreement on an imposed function or social rule can be reinforced by association, membership, or identity within the group. Collective intentionality, then, makes an imposed function more binding and permanent since it is tied to the group's identity. I will now turn to explain further how these social rules and collective intentionality strengthen the cohesion of a group, resulting in the emergence of constitutive rules.

[162] Searle 1995: 20-26.

Constitutional Rules

Rules are constitutive in nature when the fundamental existence of a system or membership within a group depends on its members acting in accordance with those rules. Searle uses the example of chess to illustrate this meaning, in which the game can only be said to exist when the rules are followed, not merely in "pushing bits of wood around on boards."[163] As mentioned above, rules that are regulatory in nature allow and limit certain actions within a community. Regardless of their nature or category, the formation of rules within a community implies a negotiated and hierarchical relationship between "rule-makers" and "rule-receivers," which establishes the perceived validity, importance, and acceptance of those rules when consensus exists between both parties. These perceptions determine a group's adherence to and identification with the rules of their community. Over time, certain regulatory rules become more significant in a community and can take on a role more comprehensive than merely addressing an individual's actions, instead becoming so important that adherence to that rule is tied to the individual's membership within the community.[164] In order for a constitutive rule to have any sense of stability, however, there must be continual collective agreement and acknowledgement within the community of the rule's importance, efficacy, fairness, and the acceptance of its function.

Constitutional rules are tied to a group or community's collective identity since they not only represent the acknowledgement of collective identity, but also link a specified rule to that collective identity. In a political sense, constitutional rules send the implicit message that "in this group, *we* do *x*" or "in this group, *we* do not do *y*." In this way, constitutional rules also articulate

[163] Searle 1995: 27-28.
[164] Barber 2010: 61-67.

a community's identity in terms of oppositional dualism, employing the binary categories of "those *within* the group" and "those *outside* of the group," commonly represented in the dichotomy between "us" and "them."[165] Thus, in this sense, because constitutional rules establish the criteria for inclusion, specifically through compliance with the rules in question, implicitly they also set the standards of exclusion, such as "if you do not do *x*," or "if you do *y*, then you cannot be part of this group," criteria by which membership within a community is denied.

Institutional Facts

The three processes discussed above, the imposition of function on an entity or concept, the expression of collective intention, and the development of constitutive rules are all components that culminate in the emergence of "institutional facts."[166] We can define institutional facts as abstract "social realities," ideas that emerge as accepted truths within communities, which also rely upon collective agreement and the adherence to systems of rules for their perceived validity. Institutional facts are "self-referential" and "declarative" in nature, in that their existence is contingent upon the same rules that created them, while collective agreement makes it possible to call upon institutional facts authoritatively in matters of dispute, determination, or arbitration.[167]

In this way, institutional facts demonstrate how they can exist as social realities, since, when endorsed with collective agreement of the community, the institutional fact is not open for debate, nor is it subjective. Instead, collective agreement empowers institutional facts, making

[165] Steiner-Aeschliman 2000: 253-254. See also Tang 2014: 3173, who argues that "our sensory consciousness … is deeply shaped by language and this shaping plays a very important role in the etiology of the dualism of the Inner and the Outer."
[166] Searle 1995: 29-31.
[167] Searle 1995: 32-34.

them valid, legitimate social entities.[168] We can see the dynamic of institutional facts play out in political debate or speech through the invocation of law. By citing a law that has been ratified or otherwise accepted by a community, a person is referring to a collectively agreed-upon truth, the legitimacy of which is already affirmed by the agreement of other members of the community to acknowledge and follow the laws of the community. Any dissenting party is only left with the option to contest the accuracy or validity of the law, but only within the context of the existing legal system that all group members have agreed to obey. Otherwise, the dissenter is in violation of the law and subject to possible sanction. We can see such an interaction take place in Livy's depiction of the consular election of 354. When two patricians, C. Sulpicius Peticus and M. Valerius Publicola, were elected as consuls by the people, the plebeian tribunes protested that the election of two patrician consuls was in violation of the *lex Licinia*, which stipulated that one consul must be plebeian. In turn, one of the *interreges* (senatorial administrators appointed during gaps in consular magistracies) for that year, M. Fabius, cited a law within the Twelve Tables, which stated that "whatever the people last decreed should be deemed a law, and the vote of the people was a decree." Ultimately, according to Livy, the efforts of the tribunes were unsuccessful, and the two patrician consuls entered office (Livy 7.17.12-13). In this example, we not only see law being cited as institutional fact, a social reality binding on all citizens within the community, but also an instance of the hierarchical entrenchment of law mentioned by Straumann, since the *interrex,* M. Fabius, argued persuasively that a law of the Twelve Tables superseded another statute, the *lex Licinia*.[169]

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[168] Thus, if the losing player contests the checkmate, they do so only on the condition that the rules were not followed properly (or have been misinterpreted), and, if this allegation is disproven, the player is left with two choices: acquiescence to the rules or rejection of the rules. Of the two, however, rejection of the rules invalidates that player's participation within the game.

[169] Straumann 2011: 284-285; Straumann 2016: 36-38. Another example of a similar debate where the supremacy of the people's decree was upheld is in the election of P. Cornelius Scipio (Africanus) as curule aedile in 213, despite

As we have seen, the three components of institutional facts (the imposition of function, collective intentionality, and constitutive rules) all rely on collective agreement. The continuation of collective agreement grants permanence and authority to certain rules, which otherwise might lack stability and be subject to change. For instance, a social rule with a function that is collectively imposed by members of a group can still change if the group's intention changes. Constitutive rules are more stable, in that they bind membership in the group to the observance of the rule. Constitutive rules within a community can always change, of course, but doing so requires a deeper and more considerable overhaul of fundamental political institutions.

Institutions and Constitutional Conventions

Having described institutional facts, I can now return to discuss the development of institutions themselves. Samuel Huntington concisely defines institutions as "stable, valued, recurring patterns of behavior" and the process of institutionalization as the development "by which organizations and procedures acquire value and stability."[170] According to Martin Jehne, a broader conception of institutions includes "patterns of social organization … made enduring by means of symbolic expression of their basic principles and claims to validity."[171] From these two definitions, a fundamental quality of institutions appears to be the aspects of permanence and importance of a rule, which is achieved through the formalized and definitive expression of social rules.[172] Institutional facts are an example of such definitive articulation, as they express the conclusive social reality resulting from adherence to complex social rules. Ultimately,

the objections of the tribunes that Scipio was not legally qualified for the office on account of his youth (Livy 25.2.6-7). I elaborate further on the constitutional significance of the Twelve Tables later in this chapter.
[170] Huntington 2006: 12.
[171] Jehne 2007: 21.
[172] Barber 2010: 74.

political institutions serve the same purpose as rules in a state, providing structure in the conduct among members of complex groups, while the formal codification of institutions, such as laws and legislation, ensures clarity in interpretation and minimizes ambiguity. As "legal-rules," then, political institutions are fundamental in the development of a state's government, being markers of stability within a community, mediating the relations between individuals within a state and its government, and establishing boundaries for the exercise of political power.[173]

In the realm of political development, we can understand institutions as formalized expansions of social rules. As I have discussed, regarding the internalization and dissipation of social rules, we can also understand constitutional conventions as deeply rooted norms, tacitly accepted as mandatory by those participating in a state's government, which act as "non-legal rules" that guide the implementation of a state's political institutions. As Barber argues, political conventions can exist under a variety of labels within a state, such as customary process, usage of procedure, "unwritten maxims," and standards of political morality.[174] Just as rules are either regulative or power-conferring in their nature, conventions similarly take on two forms, according constitutional scholar Geoffrey Marshall: "duty-imposing" and "entitlement-conferring." A convention imposes a duty when it stipulates behavior or action that is deemed as obligatory, such as, hypothetically, an expectation among members of a political committee for maintaining the secrecy of their deliberations. On the other hand, conventions can also confer entitlements, which commonly take the form of individual's acknowledged right to deviate from expected behavior or to exercise a certain behavioral privilege.

Multitudinous institutions need regulation

[173] Hammer 2008: 145-149.
[174] Barber 2010: 83

A common trait of institutions is that they tend to emerge in larger communities, such as cultural groups and political states. Whereas smaller, simpler groups can use rules that are unconscious, "unspoken and deeply internalized," as groups grow in size it becomes more difficult for leaders to rely on unconscious rules or even interpersonal relationships to influence the actions or behavior of a group.[175] To be sure, individual leaders in no way cease to matter, nor are they insignificant, but the sheer number of people within larger groups, each with their own personalities, demeanors, and agenda, limits the ability of a singular individual to direct or unite the collective will.[176] Instead, according to Michael Argyle, as groups become larger and more complex, "a formal structure gradually develops, with a leadership hierarchy and divisions of function," a process that requires "a great deal of planning and coordination."[177] These formalized structures are necessary in societies because they allow for a delineation of responsibilities, power, and authority among members, while also providing clarity in the formal interpretation of rules. As Barber explains, rules become formalized when they are articulated in a definitive fashion, such as by the decree of a leader or the codification of law, and subsequently accepted as valid by members of the community.[178]

In such a way, we can see institutions as abstract ideals in communities that originate from collective intentionality and constitutive rules, but also transcend them. Whereas collective intentionality reflects a consciously shared objective for a group, and while constitutive rules make participation within a group contingent upon certain rules, institutions go a step further by articulating lasting formalized structures that exist as a characteristic of the group or community.

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[175] Barber 2010: 72.
[176] On the importance of individual leadership, even in complex and modern political systems, see Byman and Pollack: 2001: 107-146.
[177] Argyle 1972: 128-129, and esp. 134.
[178] Barber 2010: 73.

Institutions encompass the expressions of "we do *x*" (collective intentionality) and even "to be in this group, you must do *y*, as we do (constitutional rules)" but they also include the additional concept of "this group operates in accordance with *these* rules." The difference is the emphasis on and preeminence of the group itself instead of the members comprising the group. Furthermore, although institutions originate from the collective will of the group members and certainly remain dependent upon it, they no longer require the constant reiteration or confirmation from those members for their continued existence, instead existing as an aspect or outgrowth of the group itself. In other words, although the government of states may derive their legal authority from the citizen body, and although the citizens or legislative officials of that state vote to ratify an institution as a law, the law exists as an institutional extension of that state's government.

This pattern of community growth leading to more complexity in social rules continues even after the emergence of institutions. As states and societies continue to grow and become increasingly complex, even more institutions emerge to structure and formalize the actions of the state and its members. Eventually, large groups, such as political states, produce even more overarching institutions to account for their greater size and the intricacy of their political systems, to guide and regulate smaller, existing institutions. Barber perfectly describes the relationship between institutions and states, and his explanation warrants being quoted in full:

> Complicated groups like states are constituted by large number of rules and in contrast to simple groups, most of the rules that constitute them are not intuitive. States require rules that define and empower office-holders, enable the group to make decisions, resolve disputes between members, and many other tasks besides. All of these rules can have different contents and different forms. Consequently, for the state to exist, a more or less conscious choice must be made between various possible options. The selected rule must therefore be, to an extent, formal.[179]

[179] Barber 2010: 73.

The importance of Barber's explanation is that it highlights how the emergence of multiple institutions necessitates the regulation of those same institutions. The emergence of different institutions in complex groups, such as states, often leads to different relations between members of the group, such as the formation of hierarchal structures. For instance, certain group-members may be involved in devising and enacting rules governing the state, though all or most members of the state are expected to obey the rules uniformly. Here, we see also that Searle's previous models, such as the imposition of status and function, collective intentionality, and constitutive rules come into play again, now in regard to regulating the various institutions of the state itself. For instance, through the imposition of status and function, members of complex states organize and structure the various institutions governing their state in accordance with guiding societal principles that are established by the collective agreement and intentionality of the state's overall community, while membership within the state requires adherence to the state's institutional structure. In this way, the same processes leading to the initial creation of institutions and institutional facts are also present in the process of organizing a state's multiple institutions under the umbrella of constitutional ideals.

The Emergence of Constitutions

One way of understanding a constitution is a collection of the fundamental principles and socio-political conventions regulating the institutions of a state. As I have outlined above, when a state becomes more and more complex the rules and institutions guiding various aspects of its society become increasingly more numerous to the point of disorganization, overlap, and even possible contradiction, necessitating the creation of new institutions to regulate other preexisting institutions. Essentially, the discernable pattern is that groups require rules for social

organization, and that the growth of groups necessitates more rules for even further social organization, and so forth.

In groups of sufficient size and complexity, such as states, formalized institutions are no longer conceived solely to regulate the behavior of multitudinous individuals but are instead created for the benefit of the group as a whole. Although individuality does not disappear in these large groups, individual members of states are subsumed under their collective communal identity. The institutions of states are therefore set over the population as a singular group but are established in accordance with the social conventions that reflect the collective intentionality of the group. The collective intentionality of a community can also be understood as the "general will" in Rousseau's *Social Contract*.[180]

A state's constitution, then, consists of the hierarchical principles governing its institutions and laws (being formalized legal rules), that are themselves oriented and directed in accordance with a community's socio-political conventions and traditions. There is, of course, disagreement over the definitions of constitutions among different scholars, and it is absolutely true that not all constitutions have the same appearance or constituent parts. Thus, some constitutions may be vague or ambiguous in articulation or conception, can consist of both legal and non-legal rules, and not all constitutions are written.[181] Whereas the legal rules in a state's constitution are its institutions and laws, many important and vital non-legal rules take the form of constitutional conventions, acting as socio-political norms and customs that can guide the legal institutions of states according to the collective intent of the state's population.[182]

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[180] Rousseau 1762 (Cole, trans. 2003): 9. According to Rousseau, the "social compact" in relation to the "general will" can be defined as follows: "Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole."
[181] Barber 2010: 75.
[182] Barber 2010: 79-83.

Ultimately constitutions are the set of rules that are the driving force of government and define a government's purpose and function within a state.

The Roman Constitution

Having outlined the basic theoretical components of constitutions, we can now study the application of these concepts in regard to the government of the Roman Republic, particularly the question of whether a constitution existed in the Roman state. The constitution of a state comprises the basic framework and functions of the various parts of a government, from the state's overarching political principles to individual offices or laws focusing on singular issues. In the context of understanding extraordinary commands and their effect on political stability, it is important to consider whether the Roman government possessed a constitution for three main reasons. First, the inherent meaning of the mere term, "extraordinary commands," suggests that they are a specific type of command, of which, therefore, there are many different types. Even from this initial position, then, in order to gain a clearer appreciation of extraordinary commands, it is necessary to examine the full complement of magistracies in the Roman government. Second, "extraordinary" is derived from the Latin, *extraordinarium*, which can refer to something adjectivally as "supplementary," "governed by special rules," "irregular," "enjoying special privilege," "exceeding what is normal," "exceptional," "immoderate," and many other definitions.[183] All of these meanings similarly convey connotations of a deviation or an aberration from an otherwise expected normality. In a political context, then, the portrayal of certain commands as extraordinary implicitly suggests the existence of ordinary, more orthodox

[183] *OLD* 661. I will discuss the use of the term *extraordinarium* in Latin texts (including its etymological root, *extra ordinem*, as well as its corresponding terms and phrases in Greek texts) with reference to the Roman government, especially its magistracies, in chapter 5.

commands in the context of constitutional norms. It is therefore necessary to examine the Roman constitution as whole in order to determine the origin, design, and intended function of military commands and magistracies within the wider Roman government overall, which will demonstrate the significance of extraordinary commands and why they are seen as political aberrations.

These ideas lead to the third reason for ascertaining the existence of a Roman constitution, which is that magistracies and military commands did not exist in political isolation but were inextricably linked to all other aspects of the Roman government. Roman magistrates were elected by the people's assemblies, and nearly all magistrates operated under the supervision of the Senate. Roman magistrates did operate as agents of direct political action, in that they facilitated and implemented the laws and functions of the government, but the existence of systemic political restraints (such as term limits and formal limitations on power) ensured that magistrates were held accountable for their actions and that they functioned within the legal parameters of the same political system which granted authority to their office. The abnormality of extraordinary commands is grounded in their implied deviation from the expected norms of behavior and function associated with ordinary magistracies, and these norms themselves are rooted in much wider constitutional conventions. Roman magistracies were only one part of a much larger political network, in which the laws of the state directed all political action and how the constituent elements of the government interacted with one another, such as in differing levels of authority and obligation. Thus, if we truly seek to understand what constitutes an extraordinary command, its political significance, and its effect on the state, then we must examine the structure of the Roman government and its overarching political principles. Such an aim, however, presumes the existence of a conceptual framework for the Roman state, a

constitution. Therefore, it is necessary first to determine the existence of a constitution encompassing the Roman government.

The use of the term "constitution" to describe the Roman government and political system is usually regarded in one of two ways.[184] Many scholars use the term with little to no qualification and do not question the validity of applying such a modern term in reference to the Roman Republic.[185] There are abundant examples of this tendency in modern scholarship, but it is not due to complacency, rather because "constitution" seems to be an obvious and fitting word to describe the structure of the Roman Republic. As I have shown in the previous section, constitutions take various forms and can possess unique features, but share the characteristics of serving as the political framework of a state's government, even for those in antiquity. As with the etymology of "extraordinary," the word "constitution" is derived also from Latin, specifically the verb *constituere*, and has the various meanings of "to set up," "establish," "place," "arrange," or "form something," all of which are perfectly suited for a political use.[186] Furthermore, there are indisputable similarities between the structure of the Roman Republic and modern conceptions of political constitutions. American and French revolutionaries in the eighteenth century consciously looked to the political structure of the Roman Republic as a model for republican constitutions, especially the ideal form of a mixed government with multiple branches that mutually provided checks and balances for one another, as described by Polybius and others.[187] Yet, although American and French statesmen incorporated many qualities of the Roman government into their own modern constitutional frameworks, it does not necessarily

[184] For a thorough discussion of this issues, see Straumann 2011: 280-292; Straumann 2016: 17-18, 27-62.
[185] Lintott 1999: 1-2; North 2007: 256; Brennan 2014: 19.
[186] *OLD* 420-421.
[187] Sellers 2014: 401-418. On the conceptual influence of the mixed constitution on early American political thought, see especially pages 403, 405, and 408-409.

mean that the Roman political system fits completely into eighteenth century concepts of constitutions. Similarity does not imply synonymity.

On the other hand, many scholars object to describing Rome's political order as a "constitution" on the grounds that such usage imposes modern meaning onto ancient concepts and holds ancient cultures to standards that they would not recognize. As a result, historians employing the term "constitution" can inadvertently describe the Roman government in structural terms that reflect their own contemporary governments or modern constitutional theory.[188] The problem of modern bias influencing the interpretation of ancient political thought is deeply entrenched in the modern historiography of ancient Rome. Lintott, for instance, argues that Mommsen's assessment of the Roman government in the late Republic, centering on "moral corruption" and aristocratic power-struggles, is based on democratic concerns and party strife affecting the nineteenth-century British parliament.[189] The danger brought on by such biased interpretations lies not merely with skewed historical perceptions or anachronistic concept-attribution, but extends also to the possibility of the distortion of evidence and the misrepresentation of historical fact. In other words, whereas the subjective interpretation of historical events and concepts is a problem that every historian must address, the attempt (even unintentional) to make historical evidence and subject matter conform to modern ideals is perilously close to reconstructing history. As another example, according to Hölkeskamp, Millar's theory of the Roman government, that it was grounded firmly in constitutional thought and a strong democratic element, is based on "ideal types and oversystematization," as well as a "simplistic and superficially conventional conception" of Roman government being based on constitutional law that was independent and isolated from "social structures and cultural

[188] Hölkeskamp 2010: 12-14; Hodgson 2017: 12.
[189] Lintott 1994: 10-12.

conditions."[190] To Hölkeskamp and other scholars, the Roman government did not possess a formal, written constitution, based on systemic legislation, but rather a political system based on a balance between tradition (*mos maiorum*), consensus, and innovation.

The central issue surrounding the use of "constitution" as a term is not its efficacy, but rather its accuracy, the fact that modern constitutions have qualities and characteristics that did not exist in antiquity. The problem, then, is one of historical anachronisms and concept-attribution, the act of applying a concept to describe an object or idea. According to Branko Mitrović, debates over anachronisms in historical concept-attribution are very common, yet ultimately unnecessary. Mitrović argues that historians who contest concept-attribution on the grounds of anachronism are making the erroneous assumption that a concept of something must align with a singular and precise set of characteristics, which "articulates the entity's essence or real nature," an approach that Mitrović calls "essentialist."[191] There are, of course, many problems with the type of thinking Mitrović describes. For one, words within all languages can have multiple meanings, while different words from different languages can all refer to the same idea. Thus, it is wrong to assume that a word (such as "constitution," in this case) can only have one meaning in one language.[192] Furthermore, language is fluid, changes over time, and does not exist in isolation, but rather influences and is in turn in influenced by neighboring cultures and languages. Therefore, when we think of the word "constitution," we should remember, as mentioned above, that it is derived from the Latin *constituere*. To assume that a word can only have one definition wrongly implies that words, their meanings, and therefore language do not change over time. The importance here is that scholars should not assume that the meaning of the

[190] Hölkeskamp 2010: 12-13. See also Millar 1998, 2002.
[191] Mitrović 2011: 304.
[192] Mitrović 2011: 305, 308-309, 311-312, 318.

word “constitution” is limited to a single meaning or an exclusive set of criteria, nor should they assume that these criteria did not exist in the ancient world.

It is true, however, that modern scholars should not impose modern interpretations onto people, events, and ideas of the past. On the other hand, we need not acquiesce to the notion that the various criteria subsumed under modern conceptual frameworks are inherently incompatible with the past. The point here is that it is certainly possible to use modern conceptual frameworks to understand various aspects of the past (such as people, ideas, events, behavior, etc.). To this point, Mitrović advises historians to think of concepts as “identifying descriptions,” which he describes as “mental representations comparable to the lists of the sufficient and necessary criteria that something has to satisfy in order to be subsumed under a specific concept.”[193] Thus, even if an ancient society might not recognize a specific concept in the terms used in the modern world, it is still possible to identify evidence in antiquity that corresponds to the definition of modern concepts.

Consequently, in order to claim that the term “constitution” is a suitable concept (or identifying description) in reference to ancient governments, it is necessary to identify the criteria for the modern concept of a “constitution” and to locate evidence of this criteria in antiquity. To return to the previous debate, those scholars who oppose the use of “constitution” to describe Roman politics argue that this evidence is not be found in antiquity, and therefore that the various aspects of the Roman government do not satisfy the criteria of a “constitution.” Benjamin Straumann suggests that such skepticism lies “in a largely implicit conception of constitution that these scholars bring to their sources,” which presumes the following criteria: (1) that constitutions are written and provide textual guidance on political issues, (2) allow for the

[193] Mitrović 2011: 304.

enforcement of basic rights, and (3) possess the potential for judicial review that determines the limit and extent of governmental powers. Straumann goes on to point out, however, that considering the above criteria as essential for the existence of a constitution leads to a very narrow definition of the term, and invalidates other "historical phenomena" that are commonly seen as constitutions, such as the early American republic, as well as the British and Weimar constitutions.[194] The British constitution, for instance, is unwritten in the sense that, although various political rules and conventions have been written down, there is no comprehensive codification of its constituent provisions and elements. "Yet," as Duncan Watts asserts, "those who work in the constitution generally understand the key issues involved."[195] The American constitution did not explicitly establish judicial review, the ability of the judicial branch to determine the validity of an act of congress, an ambiguity which was only clarified in the landmark case, *Marbury v. Madison*.[196] Lastly, although the Weimar constitution contained several provisions guaranteeing equality and a guarantee of inviolable individual rights, Article 48 of the same constitution provided the president with the power to suspend these "fundamental rights" temporarily as an emergency measure, for which there is no clear criteria.[197]

The most common objection raised against the notion of a Roman "constitution" is the absence of a comprehensive, written document outlining the legal structure and political organization. The emphasis placed on the written component of a constitution goes beyond the mere existence of a document. Rather the mention of a "written constitution" is always represented as an indication of a foundational structure and clear organizational framework that guides, directs, and empowers the political functions of government. The problem here, is that

[194] Straumann 2016: 17.
[195] Watts 2012: 27, 31. See also Studlar 1999: 48, Walters 2001: 91-141.
[196] *Marbury v. Madison* 5 US 137 (1803). See also Fisher 1988: 45, and Prakash and Yoo 2003: 887.
[197] Dyzenhaus 1997: 20-21, 33-34, 72-73.

defining constitutions by the existence of a written document, an ability for judicial review, and a guarantee of individual rights, are all different characteristics of the same, central idea, namely the foundational structure and framework that guides a state. Yet, because the written aspect of a constitution is associated with intentional and stable structure, the inverse implication is that an unwritten constitution would lack such qualities.

Indeed, Christian Meier identifies such a correlation in *Res Publica Amissa*, and further asserts that the dichotomy between a "written" and "unwritten" constitution carries a negative connotation. For this reason, Meier argues for a different set of terms, a "foundational constitution" (gestiftete Verfassung) formed through intentional structure and planning, as opposed to an "organic" or "evolved constitution" (gewachsenen Verfassung) that developed gradually and naturally.[198] This gradual development, of course, aligns with Polybius's statement that the structure of the Roman government was formed not through intentional design or reasoning (λόγου), but rather through innovation in adapting their government to fit their present circumstances and struggles (ἀγώνων καὶ πραγμάτων), as well as by the precedent established through past experiences (Plb. 6.10.14).[199] Hölkeskamp points out in his critique of Meier, that, despite reframing the written/unwritten dichotomy in an attempt to avoid the negative

[198] Meier 1966: 56-57, fn. 174. Meier's full quote: "Zu allen Zeiten - von den entscheidenden Epochen der Prägung vielleicht abgesehen - war die Quantität der Veränderungen so klein, daß dadurch eher das Wachstum reguliert als durch einen Prozeß des Regeln und Stiften ersetzt wurde. Die Qualität des Gewachsenen blieb beherrschend. So lange also die Republik bestand, lebte sie in einer gewachsenen Verfassung. Das aber heißt nicht nur, daß sich das römische Verfassungsrecht allmählich gebildet hat und immer viel starker und umfassender aus Konventionen als aus Gesetzen bestand; und ebenso wenig betrifft es nur den relativ hohen Grad von Unausgeglichenheiten und Moral abhängigkeit, der eine solche Verfassung notwendig kennzeichnet (und bis in die Interpretation ihrer einzelnen konventionellen Normen hinein berücksichtigt werden muß)." In addition, Meier elaborates in a footnote, that the description he chooses "should not be understood as romantic," but rather that they seem to be better fitting expressions than "written" and "unwritten constitutions" (see page 56, fn. 174: Dieser Ausdruck ist rein deskriptiv gemeint und nicht romantisch zu verstehen. Er scheint mir besser geeignet zu sein als die rein negative Bezeichnung "ungeschriebene Verfassung", zumal sein Gegensatz nicht eigentlich die geschriebene, sondern die gestiftet - nämlich wesentlich auf Neugründung beruhende - Verfassung ist).

[199] Plb. 6.10.14: οὐ μὴν διὰ λόγου, διὰ δὲ πολλῶν ἀγώνων καὶ πραγμάτων, ἐξ αὐτῆς ἀεὶ τῆς ἐν ταῖς περιπετείαις ἐπιγνώσεως αἱρούμενοι τὸ βέλτιον.

connotations of an unwritten constitution, Meier's alternative concept of "foundational" and organic" constitutions was nevertheless based upon a preconceived framework of normative and irregular constitutional ideas.[200] Hölkeskamp elaborates on the problem of this interpretation and argues that Meier was aware that his conceptual framework was flawed because it relied on modern concepts of "state and society" (Staat und Gesellschaft), ideas that did not exist in Republican Rome.[201] To the contrary, however, Meier's concession on the differences between modern terms and concepts does not contradict his argument on the need to distinguish between "foundational" and "organic constitutions" instead of the false dichotomy between written and unwritten. According to Mitrović, "radical incommensurability is a highly self-contradictory position." If two concepts are perceived as incompatible with one another, then both concepts actually and implicitly share enough similarity to the historian's own conceptual framework that allows the two to be compared to and differentiated from that historian's own notion of an ideal, essential concept.[202] In other words, if historians claim that a modern concept is indisputably incompatible with a corresponding idea in the ancient world, then both concepts actually share enough similarity in their fundamental framework that would allow them to be compared and contrasted with each other in the first place. As a final explanatory example of this dynamic, consider an instance where historians discover an inscription of an untranslatable language, wherein no known phonemes or grammatical structures correspond to it, and its script resembles no previously discovered language. How does the historian even know that he or she is looking at an actual language and nothing more than a random assemblage of scratches and indentations

[200] Hölkeskamp 2010: 15.
[201] Meier 1966: 13 (In reference to the concepts of "private" and "political," Meier stated "Weit entfernt davon, etwa den im Sinne des 18. und 19. Jahrhunderts geschiedenen 'Staat und Gesellschaft' zugeordnet zu sein, sind sie nur ganz relativ zu verstehen") and 156 ("die altrömische Form der Einheit von Staat und Gesellschaft"); Hölkeskamp 2010: 16.
[202] Mitrović 2011: 325.

accumulated at random over many years? The only way that the inscription can even be recognized as a written language is if it shares some very basic fundamental characteristics common to languages. To return to the topic of constitutions, it is insufficient to claim simply that the lack of a written constitution in ancient Rome disproves the existence of a constitution. In line with Mitrović, objections to the use of "constitution" as term to describe the Roman government can only be made because some fundamental element of the Roman government was similar in fact enough to a modern constitution to allow for such a comparison. So, if we are unable to disprove to conceptual possibility of a constitution existing in Rome, let us now turn to the aspects of the Roman government that can positively be argued to comprise the Roman constitution.

Straumann asserts that scholars can indeed speak of a constitution existing for Rome and may do so without using "scare-quotes," which otherwise attributes an anomalous connotation to the concept. Because of the controversy over the definitive qualities of constitutions, Straumann attributes four characteristics as the criteria for a "working concept of constitutionality in the late Republic."[203] These four criteria of Roman constitutionality are: *entrenchment,* wherein some rules are more resistant to change than others; *political importance*, in which certain rules are seen as more important than others and, in fact, govern other rules; *normative importance*, which are rules that form a system's political conventions and its "underlying political theory"; and lastly rules that are of a *juridical quality*, in that they are part of "recognizably legal arguments,"

[203] Straumann 2016: 18. These criteria are an expansion of an earlier conception by Straumann (2011: 284). Although Straumann's constitutional criteria are specifically for the late Republic, this does not preclude them from representing earlier periods in the Roman Republic, since most of our earliest sources on the Roman government and for the history of the Republic overall come from the late Republic and later (with the exception of Polybius and a few others). Thus, we can use late republican depictions of the structure and conceptual framework for Rome's republican government, even from its inception, though with necessary caution to avoid anachronistic descriptions and interpretations from the first century BCE. On this issue with source material, see Heurgon 1973: 163; Lintott 1999: 4; North 2007: 258; de Wilde 2012: 558; Hodgson 2017: 16.

akin to judicial review.[204] This body of criteria is self-referential, in that each type of rule reinforces and interacts with the others in practice. For instance, both the *political* and *normative importance* of rules help determine the structure for the *entrenchment* of rules. The *normative importance* of rules explains or justifies why certain rules carry more *political importance* than others. Similarly, *entrenched* rules, being unchanging, act as the standard by which the *juridical quality* of rules arbitrate *political importance*. These examples of self-reference and interaction are better understood if we view them as the culmination for Straumann's proposed criteria. Rules designating entrenchment, political and normative importance, as well as juridical quality all represent what Straumann calls a "higher order" of norms, rules, and institutions that act as the guiding principle for governments, which is the basis of constitutionalism.[205]

It remains to demonstrate the existence of these criteria within the government of the Roman Republic. A "higher order" of norms certainly existed within the Roman political system, which served as that government's guiding principle. Rules, as we have seen, usually take on a binary form that delineate what is or is not allowed, while principles, on the other hand, provide an impetus to a desired result. In other words, although the distinction is hard to see at times, rules determine action, while principles guide action.[206] According to Roman sources, the overarching principle and purpose of the Roman government, from the very inception of the Republic, was to preserve the liberty (*libertas*) and sovereignty of the Roman people. This aim was achieved through negotiating a balance between the spheres of public and private life that would empower the government to protect the people but prevent a return of tyrannical oppression.[207] Cicero, for instance, says of magistrates in , "For them, let the welfare of the

[204] Straumann 2016: 18.
[205] Straumann 2011: 284, 286; Straumann 2016: 20-21.
[206] Barber 2010: 86-87.
[207] Hammer 2003: 72.

people (*salus populi*) be the highest law," constituting a political rule of *normative importance*, as described by Straumann.[208] Livy expands on this idea in his second book, where he describes the conditions surrounding Rome's newfound independence following the expulsion of Tarquinius Superbus, wherein the preservation of the people's liberty (*libertatis populum*) is secured not only through the imposition of term limits for magistrates, but also by the people swearing an oath never to let a monarch rule in Rome again (Livy 2.1.9-10). The oath sworn by the people corresponds to two of Straumann's criteria for constitutional thought, *entrenchment* and *political importance*, since the avowed prohibition of monarchy in Rome holds greater importance than other rules and (in theory) cannot be overridden. Later, Livy's account of the Twelve Tables highlights the supremacy of the people in all political issues, stating that "whatever the people order last is the law" (Livy 7.17.12).[209] Each of the preceding examples in Cicero and Livy demonstrates the existence of a "higher order of norms" in Roman political thought, in which the welfare, liberty, and sovereignty of the Roman people are paramount.

The Roman Constitution

As stated earlier in this chapter, I argue that we can speak of a constitution existing in Rome during its republican period. I have also defined a constitution as a higher order of norms comprising the fundamental guiding principles and structural framework of a political system. I propose that the fundamental guiding principles of the Roman state centered on the need for benevolent and fair government, which was based on rules and norms originating in divine

[208] Cic. *Leg.* 3.8: "*Ollis salus populi suprema lex esto*." I will discuss the magistracies at greater length later in this chapter, but it is important to note that, as Straumann argues, Cicero's statement here was not meant to empower Roman magistrates or to insinuate that their duty to the Roman people gave them license to disregard the law when necessary. To the contrary, Cicero is underscoring a principle of conduct for magistrates in office, that all of their actions are to be guided by their obligations to serve the people of Rome (Straumann 2011: 283). For Straumann's criterion of *normative importance* in constitutional thought, see Straumann 2016: 18.
[209] Livy 7.17.12: "*ut quodcumque postremum populus iussisset id ius ratumque esset*."

mandate and human nature. These divine and natural justifications are found in the ideas of divine law, *fas* (contrasted by *nefas*), and human law, or *ius* (constrasted by *iniuria*), both of which establish the essential importance of natural law (*ius naturale*) as the organizational foundation for the Roman state. The idea of *ius* permeated through every aspect of Roman political thought, especially in the differentiation between written law (*lex*) and political tradition (*consuetudo* and the *mos maiorum*), two ideas that served as the structural framework for Rome's political system. In the end, the socio-political concepts of *fas* and *ius* established the purpose and values central to Rome's nascent political thought and guided the development of more codified ideas, such as *lex* and *mos maiorum*, both of which in turn provided the structural framework for the gradual development of Rome's republican political system.

The higher order of norms that establish the principles and framework of the Roman government include foundational ideas on the purpose and justification for human organization as well as the formation of communities. Such notions precede Roman literature, of course, and the establishment of political order among mankind was understood to have originated from both divine will and natural law. Plato, for instance, in *Politikos* describes the art of human politics as being the natural consequence and imitation of the gods' divine governance over the cosmos (Pl. *Plt.* 268c-274d).[210] Aristotle, in his famous assertion that mankind is "a political animal," claimed that because humans are naturally inclined to exist in groups and communities, political organization and social structure (such as the formation of the city-state) are an inevitability of human existence (Arist. *Pol*. 1.1253a). Thus, it should be no surprise when Cicero states that "there is nothing in which human virtue approaches the divine more closely than in the founding

[210] See also Vidal-Naquet 1978: 132-141; Wolin 2004: 27-32; Zuolo 2017: 1-16.

of new states or the preservation of existing ones."[211] The idea of a division between politics and religion is a modern notion, not found in ancient society. In archaic Rome in particular the success and prosperity of the state was directly associated with proper worship of the gods, and every aspect of Roman political thought was grounded in the desire for a harmonious relationship with the gods. This does not only mean that a state's success resulted from religious devotion (that the gods will bless pious communities with prosperity) or that divine endorsement was a legitimizing prerequisite for any political action, though it certainly includes these ideas. Rather, the relationship between the gods and the government also implied that harmonious, balanced political activity is itself a form of pious worship of the gods. Dean Hammer shows multiple instances in Cicero's writings where virtue in human governance in expected by the gods.[212] In fact, in *de Re Publica,* Cicero states that virtue itself is a divine attribute.[213] Later, in the same work, the spirit of Scipio Africanus states that those who defend, aid, and strengthen their homeland will enjoy a place in the heavens and eternal blessings, because nothing pleased the gods more than "the assemblies and gatherings of men associated in justice, which are called states."[214] Similarly, Cicero states that the best quality of men by nature are those who dedicate themselves to assisting, defending, and protecting others (Cic. *Tusc.* 1.15.32).

Higher order of norms: *Fas* and *Ius*

[211] Cic. *Rep.* 1.7.12: "*Neque enim est ulla res, in qua propius ad deorum numen virtus accedat humana, quam civitatis aut condere novas aut conservare iam conditas.*"
[212] Hammer 2008: 43-45, 48, 50, 69.
[213] Cic. *Rep.* 6.8: "*tamen illa divina virtus*."
[214] Cic. *Rep.* 6.13: "*Sed quo sis, Africane, alacrior ad tutandam rem publicam, sic habeto: omnibus, qui patriam conservaverint, adiuverint, auxerint, certum esse in caelo definitum locum, ubi beati aevo sempiterno fruantur; nihil est enim illi principi deo, qui omnem mundum regit, quod quidem in terris fiat, acceptius quam concilia coetusque hominum iure sociati, quae civitates appellantur; harum rectores et conservatores hinc profecti huc revertuntur.*"

The desire for political harmony in antiquity, seen as an inherent aspect of human nature and emulation of divine order, went beyond theoretical postulation, but manifested as essential concepts of political behavior in Rome. Early Roman society functioned in accordance with sets of traditional norms, some of which, according to Mousourakis, "were regarded as being of human creation, whilst others derived their binding force from their supposed divine origin."[215] Norms with a perceived divine origin or mandate were *fas* (opposed by *nefas*) and referred to notions of justice, rightness, and proper action. The observance of *fas* as proper, right action was seen as maintaining a harmonious relationship between humans and gods. Norms of human origin, on the other hand, were known as *ius* (opposed by *iniuria*), and reflected relations among humans, but also represented ideas of rightness, power (or ability to act), as well as justice. Servius emphasizes the distinction between the two concepts in his commentary on Virgil's *Georgics*, stating that *fas* specifically referred to human conduct toward the gods, while *ius* referred only to the conduct of humanity toward each other.[216] Yet, both *fas* and *ius* were frequently mentioned together in reference to political behavior, especially in regard to what was considered proper or inappropriate behavior.[217] The two concepts are similar in that they both refer to the regulation of human behavior and indicate a binary conception of ethics; that is, standards of propriety governing a person's conduct. The religious connotations of *fas* provided some moral weight to *ius,* grounding the expectations for interpersonal behavioral expectations in the divine notions of right and wrong. Despite similarities, the ethical concept of *ius* should not be excessively conflated with morality, however, which refers to a person's introspective consideration of their own behavior and cannot be enforced outside of individual volition. Ethics,

[215] Mousourakis 2003: 16.
[216] Serv. *Ver. Georg.* 1.269: "*Nam ad religionem fas, ad homines iura pertinent*."
[217] See, for example, Cic. *Att.* 1.16.6; *Verr.* 2.5.34

on the other hand, are judgements on a person's behavior that come from another person or a group, which can be subject to external pressures and enforcements.[218] The fact that *ius*, as an ethical term, regulates interpersonal behavior among different individuals demonstrates its role in providing governance and structure to social groups. The concept of *ius* acted as baseline for how Romans should treat and interact with one another, which is one of the fundamental elements of constitutional thought.

Thus, we can see again how foundational political concepts in Rome were rooted in religious belief. The constitutional notion of higher norms relies on some sort of comparative ideal in law, a standard against which the validity of Romans laws and statutes could be measured. Both *fas* and *ius* provided this standard, which supplied Roman political thought with the foundational concepts of propriety and justice in political behavior. In this we can see the idea of constitutional entrenchment proposed by Straumann, wherein some laws cannot be overridden.[219]

As with the idea of *fas*, the concept of *ius* had many meanings, carrying the connotations of justice (*iustitita*), rights, fairness, and legal power. The relationship and connection between *ius* and law (*lex*) is clear, and indeed *ius* is often translated as "law," but the two terms are not equivalent. Mousourakis states that the idea of formal law (*lex*) "drew upon *ius* but was not identified with it."[220] *Lex* represented the idea of law in regard to statutes and procedural behavior on specific issues, whereas *ius* represented the principle of "legal rightness," and thus the foundational basis of Roman law. In other words, *ius* acted as the principle of lawfulness that preceded and acted as the basis of individual statute or enacted law (*lex*). As Roman political

[218] Mousourakis 2003: 17-18.
[219] Straumann 2011: 288-292.
[220] Mousourakis 2003: 19.

society continued to develop, the idea of *ius* similarly evolved to address multiple socio-political issues facing the nascent Roman government. The result of this adaptation was the appearance of many different types of *ius* or specific legal concerns addressed by *ius*, usually formed as binary concepts. For instance, the state existed for the benefit of its people, and, although this purpose required it to possess some authority to impose order, there were limits to the state's power to interfere in or impose upon the individual lives of its citizens. The early Roman state saw the need for a balance between public law (*ius publicum*) and private law (*ius privatum*).[221] Similar divisions were conceived for law pertaining to Rome's citizens (*ius civile*) and laws that applied to all, especially foreign peoples (*ius gentium*).

Despite the increasing specificity in the legal application of *ius,* it continued to function as a customary legal principle, and therefore based on tradition. And while the role of tradition in Roman politics never disappeared or became irrelevant, the expansion and complexity of Roman society meant that Rome's political system could not operate on tradition and custom alone. Certain matters of *ius* began to require more permanence and codification, leading to a division between legal principles that were written (*ius scriptum*) and those that remained unwritten (*ius non scriptum*). From this division of *ius* came the more definitive concepts of written law (*lex*) and the continued influence of traditional norms (*consuetudo, mos maiorum*). Much of the relationship between *lex* and *mos maiorum* can be seen in the earlier discussion of norms and rules in society.

Mos Maiorum

[221] Hammer 2008: 72.

Mos maiorum, meaning "the way of the ancestors" or "ancestral tradition," was a set of informal norms, customs, and conventions that centered on the notion that the decisions and conduct of Rome's ancestors were best and should be emulated by subsequent generations. As I will show, the ancestral reverence inherent to *mos maiorum* helped articulate Rome's cultural identity, while *mos* also served as a moral and ethical model for Roman society, as well as a guide for political policy and legal procedure. *Mos maiorum* acted as a source of precedent and constitutional convention that gave weight and legitimate authority to the informal, traditional customs that constituted the basis of Roman political thought.

The veneration and imitation of Rome's ancestors were the central tenet in the concept of *mos maiorum*. Very simply, in the principle of *mos maiorum,* whatever Rome's ancestors had done, whether in action or policy, could generally be considered to be best and a model for later generations to follow. This meant that Roman society judged itself in comparison with an idealized perception of the past, viewing the conduct of their ancestors as superior.[222] Reverence for the ancestors was rooted in Roman religious belief. As one example, Cicero associates the ancestors with antiquity itself, which he says is nearest to the gods, and that observing the ceremonial customs of family and ancestors was like preserving a religion passed down by the gods (Cic. *Leg.* 2.27).[223]

It is important to note, however, that the *exempla* of Roman ancestors were not held in high regard merely because they were rooted in antiquity. Rather, Rome's ancestors were regarded as wise and prudent, always choosing the best decision. Alongside the more general

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[222] Hoffman 1982: 218.

[223] Cic. *Leg.* 2.27: "*Iam 'ritus familiae patrumque seruare', id est, quoniam antiquitas proxime accedit ad deos, a dis quasi traditam religionem tueri*." Although *ritus* does have a religious connotation, it is often used alongside of *mos* and *consuetudo* with similar meaning. Festus, for example, states succinctly that "*Ritus est mos vel consuetudo*" (Fest. *Gloss. Lat.* in Müller 1975: 273). For similar instances, see Lucr. 4.1265; Livy 24.3.12, 30.16.4; Verg. *Aen.* 12.836; Plin. *NH* 7.1.6; Suet. *Tit.* 5; Gell. *NA* 1.12.10.

references to ancestral *mores*, we also find several mentions of specific virtues attributed to the *maiores*, such as *amplitudo, beneficia*, *diligentia*, *liberalitas*, *prudentia, sapientia*, etc.[224] In fact, Cicero recounts a story from Xenophon (*Mem.* 4.3.15), in which the Athenians asked the oracle at Delphi which sacred rites they should practice. The oracles answered that the Athenians should follow "those which are part of the custom of the ancestors" (*eas quae essent in more maiorum*), but when the Athenians replied that these customs often changed and asked which one to choose, the oracle responded simply that they should choose "the best" (*optumum*). "And indeed it is true," Cicero said of the story, "that which is best must be considered the most ancient and nearest to the god."[225] Thus, it was not so much that anything done by the ancestors was inherently considered as "best," but rather that the Romans believed that their ancestors consistently exhibited the requisite wisdom and prudence to do that which was "best."

Because *mos maiorum* was a key component of Roman identity, it also served as a standard for the behaviors, customs, and ways of life considered to be characteristically Roman. And while the importance of *mos maiorum* permeated throughout every aspect of Roman society, it initially acted as a normative standard for social values and only later gained an explicit political connotation.[226] These values (*fides, virtus, honestas, concordia,* etc.) were seen as indispensable in Roman society and tied to the vitality of the Roman state itself. Ennius, for instance, famously stated that "the Roman state stands firm on its men and traditions (*moribus antiquis*)."[227] It is important to note that Ennius does not say that the Roman state prospered

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[224] For examples of these references to Rome's ancestors, see the following: *amplitudo* (Cic. *Cat.* 4.5.9); *beneficia* (Cic. *Verr.* 2.3.123); *diligentia* (Cic. *Verr.* 2.4.9; *Agr.* 2.27.73); *liberalitas* (Cic. *Clu.* 69.196); *prudentia* (Cic. *Caecin.* 30.86); *sapientia* (Cic. *Mil.* 30.83).
[225] Cic. *Leg.* 2.40: "*Et profecto ita est ut id habendum sit antiquissimum et deo proximum, quod sit optumum*."
[226] Hoffman 1982: 218; Straumann 2016: 49.
[227] Enn. *Ann.* 5.156: *moribus antiquis res stat Romana virisque*. Warmington placed this quotation among fragments *Incertae sedis* at line 467 (Ennius and Warmington 1935: 174-175), but Goldberg and Manuwald's edition places the quote among Ennius fifth book, following the research of Otto Skutsch, who attributed the speech to T. Manlius in Livy 8.7.16 (Skutsch 1960: 192-193; Ennius, Goldberg, and Manuwald 2018: 192-193).

because of the adherence to ancient customs in government or political procedure, rather that the traditions themselves alongside the Roman people are tied to Rome's success.

Furthermore, reference to *mos maiorum* could be used as a social critique, pointing out the failure of those unable to adhere to the moral standards of ancient custom. In parody, especially, references to *mos maiorum* could be used to identify the hypocrisy among members of the ruling class who might claim to embody *mos maiorum* but did not do so in their behavior. Zsuzsanna Hoffman shows numerous examples of how Plautus used the concept of *mos maiorum* in his plays as a parody of Roman aristocratic life and critique of Rome's moral failings. Many characters in Plautus' plays often complain about the decline of ancient morals and encourage adherence to ancestral customs, while others invert Roman social structure by showing lower-class individuals (such as slaves) adhering to *mos maiorum* better than the elite.[228] According to Hoffman, aside from social criticism, Plautus' use of satire also showed the importance of *mos maiorum* in everyday Roman life, Roman identity, and its connection to the aristocratic ideal of *virtus*.[229] While *mos maiorum* acted as a standard for social behavior, this did not entail a difference in its relevance between public and private life. The social norms demanding adherence to *mos maiorum* went past the individual, since, as Ennius said, the entire Roman state was built on adherence to ancestral customs.

The political implications of *mos maiorum* are easily seen in all aspects of Roman government and policy. According to Andrew Lintott, *mos maiorum* served a plethora of functions in Republican Rome, from acting as unwritten law to ill-defined precedent (*exempla*), wherein Roman statesman looked to the actions of their forebears for guidance, or "the way

[228] Hoffman 1982: 220-223. See also Plaut. *Mil.* 372-374; *Per.* 53-60, 390-395; *Pseud.* 574-582; *Trin.* 28-32, 292-298,642-649, 1028-1044.
[229] Hoffman 1982: 218-220.

things happened to be done at the time."[230] Before the advent of written law (*ius scriptum*), there was no statute on which the Romans could base the form, function, or conduct of any aspect of their government, only the cultural memory or traditional accounts of what their ancestors did. Similarly, these ancestors, the quasi-legendary founders of the Roman Republic, also had no recourse to written statute and were often forced to act in an *ad hoc* fashion to meet whatever circumstances faced the nascent Republic.[231] But, as I have shown above, Roman tradition revered the prudence and wisdom of the ancestors, which subsequent generations regarded as *exempla* worthy of emulation. In absence of a written constitution, *mos maiorum* was a source of precedent and political convention on which the Romans based the fundamental structure and operation of their entire government, and indeed their society. As Hölkeskamp aptly states, nearly every aspect of Roman politics was "based on received rules enshrined in *mos maiorum*."[232] For magistrates, *mos maiorum* stipulated the annual elections, their duties and powers, and the principle of term limitations. The Senate's responsibilities and purview, as well as the enormous influence (*auctoritas*) it wielded in Roman society (despite its formal role as an advisory body) was not grounded in formal law, but *mos maiorum.* Similarly, the functions of the different popular assemblies, the inherent class divisions in the *comitia*, and the notion that the ultimate power and authority in the Roman state was derived from the Roman people was also rooted in *mos maiorum*. The function of the Roman government as a whole was held to the standard of *mos maiorum*, which the Romans used to determine what was allowed and not allowed in politics. Furthermore, despite the common use of historical (or legendary) *exempla* as

[230] Lintott 1999: 4.
[231] Lintott 1999: 5; North 2007: 256. On the other hand, Heurgon points out that Rome's early leaders likely based a great deal of Rome's political structure on Etruscan practices, noting the similarity between the early office of the *praetor* and the Etruscan *zilath* (Heurgon 1973: 161).
[232] Hölkeskamp 2010: 17-18.

a precedent and guide for the present, *mos maiorum* was not always static and rigid, but was flexible, conducive to innovation, and able to effect change in Roman politics.

Mos maiorum could be used to guide Rome on matters of proposed or disputed procedure, using past precedent in order to instruct contemporary action. Thus, Cicero invoked the principle of *mos maiorum* when emphasizing the need for senatorial approval before a motion could be presented to the Roman assemblies for a vote (Cic. *Corn.* 1). *Mos* could also act as an informal restraint, by which various branches and parts of Rome's government were kept in check. De Wilde has shown, for instance, that adherence to *mos maiorum* prevented early Roman dictators from even attempting to overstep the bounds of their office.[233] Yet, the appeal to *mos maiorum* in politics was not always straightforward and could also be used simultaneously to support opposing arguments. Cicero, for example, advocated severe punishment and execution in response to L. Catilina's treachery, which he claimed to be in accordance with *mos maiorum*.[234] Julius Caesar, on the other hand, cited several instances of restraint in how Rome's ancestors (*maiores nostri*) treated their enemies in order to argue that Catiline's army and co-conspirators should be spared from execution.[235] It is important to note further that Caesar's argument in favor of clemency was not due to any moral opposition to cruelty, but because summary execution seemed "foreign" (*aliena*) to the *res publica* (Sall. *Cat.* 51.17).

Mos maiorum is often associated with conservatism in Roman political culture, particularly among the senatorial elite, who guarded the customs (*consuetudo*) and *mos maiorum*

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[233] De Wilde 2012: 555, 562-563. See also Hartfield 1982: 123-124 and Lintott 1999: 112.
[234] Cic. *Cat.* 2.2.3: "*interfectum esse L. Catilinam et gravissimo supplicio adfectum iam pridem oportebat, idque a me et mos maiorum et huius imperi severitas et res publica postulabat*."
[235] In particular, Caesar stated that Rome's ancestors resisted "their passionate impulses" and instead acted "properly and virtuously" (Sall. *Cat.* 51.4: "*sed ea malo dicere, quae maiores nostri contra lubidinem animi sui recte atque ordine fecere*"), referring specifically (at 51.5-6) to Rome's restraint in their dealings with Macedon and Rhodes in the Third Macedonian War (171-168) and in the various wars with Carthage (264-241, 218-201, 149-146).

against the intrusions of written law (*lex*).[236] This an understandable perception. According to Arena, for instance, the emphasis placed on ancestral reverence in *mos maiorum* implies a "profound conservatism that upholds the centrality of ancestral customs and apparently rejects the introduction of *mores novi*."[237] We can certainly see such a conservative mentality in the debate over the *lex Manilia* in 66, which proposed the creation of another extraordinary command for Pompey, but this time would grant him an unparalleled amount of authority. Here, Catulus and Cicero both cited the principle of *mos maiorum* in opposition to each other in their arguments on the *lex Manilia*. In Dio's account, Catulus argued that no new magistracy needed to be created, but rather that "ancestral custom" (πατρίοις ἔθεσιν) and "ancient precedent" (παράδειγμα ἀρχαῖον) laid out in existing Roman magistracies provided everything needed to accommodate the purpose of Pompey's command (Dio 36.34.1).[238] Here, a conservative interpretation of *mos maiorum* is on full display, as Catulus (through Dio) advocated following ancestral custom without deviation.[239]

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[236] Lintott 1999: 7. Lintott cites Tacitus (*Ann.* 3.27) as an example of this sentiment, who felt that most legislation in Rome was "inspired by ambition and jealousy with a view to self-promotion or injury to rivals." Indeed, Tacitus famously states in this same chapter of the *Annals* that "the republic was at its most corrupt when the laws were most numerous" (*et corruptissima re publica plurimae leges*). On Roman conservatism and *mos maiorum*, see also Hammer 2008: 5.

[237] Arena 2014: 220. See also Cic. *Man.* 60 and Bettini 2011: 96.

[238] Coudry 2016: 42-43.

[239] Dio's account of Catulus' speech (36.31-36) is problematic for several reasons, according to Barbara Rodgers, including the inauthenticity of the speech and inconsistencies with earlier sources, both of which point to bias on the part of Dio (Rodgers 2008: 295-318). The scholarly consensus is that Dio himself wrote Catulus' oration, although Cicero's own speech in favor of the *lex Manilia* was Dio's "ultimate source" (Rodgers 2008: 295-297). Most notably, then, Dio places Catulus' speech in 67 to be regarding the *lex Gabinia*, not the *lex Manilia* of 66 as Cicero clearly states (Cic. *Man.* 59). Rodgers argues that Dio intentionally rearranged the chronology of Catulus' speech to reflect Dio's own belief that Pompey's extraordinary command represented a threat to the stability of the Roman constitution, a belief that Rodgers argues did not exist in the late Republic (Rodgers 2008: 304-308). Rodgers' conclusion is that Dio's account of Catulus cannot be taken as an authentic view of the political climate of 66 (Rodgers 2008: 307, 318). Against, this, however, see Marianne Coudry, who does not dispute Dio's original composition of Catulus' speech, but does argue that "there is no doubt that those ideas were really those of Catulus and the senators opposed to the proposal of Gabinius," citing similar anxieties expressed in other sources such as Cicero and Velleius (Coudry 2016: 37, 43).

In response, Cicero (who supported Pompey's command as proposed in the *lex Manilia*) also appealed to ancestral precedent but actually revealed a more fluid and flexible interpretation of *mos maiorum*. Replying to Catulus' objections, Cicero seemingly starts off by affirming Catulus' conservative reasoning: "But let no innovation be established contrary to the examples and practices of the ancestors."[240] Yet, whereas Catulus referred to ancestral tradition as a means to discourage innovation, Cicero went on to use *mos maiorum* as actual precedent to support innovation. Continuing, Cicero states that, although the Romans did not always follow custom (*consuetudo*), they did follow expediency (*utilitas*) and were willing to adapt their plans to fit the circumstances they faced at any given time.[241] Furthermore, Cicero then reminded Catulus that the Roman government in previous generations had approved the appointment of extraordinary commands, citing the examples of Scipio Aemlianus in the Third Punic War (149-146) and the Numantine War (143-133), as well as that of Gaius Marius in the Jugurthine and Cimbric Wars (113-101). We can see several things in Cicero's short comment here. For one, Cicero clearly does not perceive *mos maiorum* as a static concept, but rather a body of norms sufficiently flexible to adapt to the crisis at hand. In other words, the essence of *mos maiorum* was not in restricting behavior, but rather encouraging correct behavior. Thus, Cicero's point is not that the way of the ancestors was outdated or needed to be changed, but instead that the essence of *mos maiorum* is in choosing the best course of action, including innovation and adaptation as necessary.[242]

Thus, *mos maiorum* was inherently flexible, in that it could be applied and interpreted in a variety of ways that fit whatever circumstance fell before it. Indeed, the flexibility of *mos*

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[240] Cic. *Man.* 60: "*At enim ne quid novi fiat contra exempla atque instituta maiorum*."
[241] Cic. *Man.* 60: "*non dicam hoc loco maiores nostros semper in pace consuetudini, in bello utilitati paruisse, semper ad novos casus temporum novorum consiliorum rationes accommodasse*."
[242] Straumann 2016: 50.

maiorum in politics was a hallmark of the Roman government, allowing it to withstand both external and internal pressures by adapting to meet the problem at hand. But this does not mean that *mos maiorum* could be used without accountability. As an expression or reflection of cultural memory, *mos maiorum* was an implicit association with Roman identity. Therefore, as Arena argues, for any claim to *mos maiorum* to have "performative force" and "legitimizing power," it needed to be accepted as valid though the "consensus of the people at large."[243] If the Roman people did not accept the invocation of *mos maiorum* as authentic, then it lost all conceptual weight. Similarly, if an action was perceived as a breach of *mos maiorum*, then it could also lose any legitimacy. For example, in 121, following the slaughter of Gaius Gracchus and 3,000 of his partisans in Rome, a lustration was performed to cleanse the city, after which the Senate instructed Lucius Opimius, one of the year's consuls, to restore the temple of Concordia in the Forum in an attempt to commemorate and legitimize the killing of Gracchus and his followers as an act of patriotism and for the general welfare of the Roman people, not murder.[244] *Concordia*, also represented as a goddess here, was the Roman concept of social and political harmony and was one the core tenets of the *mos maiorum*.[245] According to Plutarch, however, the Roman people angrily rejected this dedication and expressed their dissent by carving graffito onto the temple, saying "A work of discord makes a temple of Concord."[246] As Arena states, this retort does not depict the people opposing *concordia* as a socio-political norm or ideal, but that they

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[243] Arena 2014: 219.
[244] On Opimius and the Temple of Condordia, see Plut. *C. Gracch.* 17.6; App. *BC* 1.26; Arena 2014: 229. According to Roman tradition, the temple of Concordia was originally built by M. Furius Camillus in 367 (Plut. *Cam.* 42.4; see also Momigliano 1942: 111, 115-117). For further contextual discussion of later dedications of the temple of Concordia as a source of political propaganda, see Flory 1984: 323 and Simpson 1991: 451. For the location of Gracchus' death in the sanctuary of the Furies, see Cic. *Q. fr.* 3.1.12 (for mention of the Temple of Furina only); Vell. Pat. 2.6.6; Plut. *C. Gracch.* 17.2; App. *BC* 1.26; *Vir. Ill.* 65.5-6; Richardson 1992: 235; Beness and Hillard 2001: 138; Griffith 2009: 309-310, 318; Mignone 2016: 207.
[245] Temelini 2006: 5; Russell 2014: 214.
[246] Plut. *C. Gracch.* 17.6: "ἔργον ἀπονοίας ναὸν ὁμονοίας ποιεῖ." On the dedication to the temple, see also Appian *BC* 1.26. On the character of Opimius and the killing of C. Gracchus, see Velleius 2.6.4.

disagreed with the Senate's interpretation and appropriation of the term.[247] Whereas the temple of Concord was founded to commemorate reconciliation between the patricians and plebs in Rome during the "Conflict of the Orders," the people felt that Opimius' restoration of Concord's temple on the occasion of civil strife was akin to celebrating a triumph over the slaughter of Roman citizens.[248] While only one example, this shows us that appeals to the values within *mos maiorum* were scrutinized according to the people's acceptance or rejection.[249]

The conceptual flexibility of *mos maiorum* was a double-edged sword. While it potentially could mean whatever a speaker needed at the moment, the validity of an assertion of *mos maiorum*, and the body of values it contained, depended on the acceptance of the Roman people. On the other hand, it was the people's scrutiny and judgement of public claims to *mos maiorum* that made the concept itself so powerful and influential in Roman politics. As we have seen, any assertion of *mos maiorum* by a statesman was an expression of Roman identity, and the acceptance of this assertion was subject to the collective agreement of the Roman people, or *consensus*.[250] In this way, *mos maiorum*, as a reflection of popular *consensus*, had a legitimizing force. Successful appeals or claims to *mos maiorum* carried the connotation of validity, authenticity, and of being characteristically Roman, while anything contrary to *mos maiorum* was seen as invalid, inauthentic, and characteristically not Roman.

The present discussion of *mos maiorum* is necessarily lengthy, due to its all-encompassing influence in Roman society and politics. By appealing to the actions and conduct of Rome's venerated ancestors, *mos maiorum* was an expression of cultural memory and identity.

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[247] Hillard 2013: 109-112; Arena 2014: 229-230. See also Lobur 2008: 117-117, 182.
[248] Momigliano 1942: 111-120; Morstein-Marx 2012: 197-198; Arena 2014: 230; Davies 2019: 14, 22n. 65.
[249] On graffiti as a "hidden transcript," see Scott 1990: 4; Davies 2019: 15.
[250] Lobur 2008: 8. According to Lobur, the notion of "*consensus omnium* or *universorum*," was the "avowed recognition by the entire citizen body that its management under the circumstances best (and thus uncontestably) represented the exemplar(s) set forth by the *mos maiorum*."

This memory of values in their idealized past helped the Romans articulate how they wanted to shape their present world. From social behavior to political procedure, *mos maiorum* wielded enormous normative force by outlining what was expected, acceptable, and unacceptable conduct in Roman society.[251] Thus, in Roman politics, *mos maiorum* acted as a constitutional convention, the obligatory and unwritten rules inherent to the fundamental operation of Rome's government.[252] As such, *mos maiorum* was remarkably flexible, allowing for innovation when circumstances demanded, but this flexibility meant also that it was difficult to establish a precise definition of *mos*. What we can see indisputably, at least, is that *mos maiorum* reflected the general will of the Roman people, the essence of Rousseau's social contract.[253] But, as we have seen, if the general will changed or circumstances demanded, then the perception and implications of *mos maiorum* changed as well, a fact that Roman politicians had to recognize when appealing to *mos*. Lastly, despite its social and political significance, *mos maiorum* was not a stable form of legal precedent. Matters of legal dispute often required precision and clarity in arbitration, and the flexibility of *mos* meant that it could also be ambiguous, making it potentially unreliable in matters of adjudication. Thus, as I now turn to explain, *mos maiorum* and unwritten law (*ius non scriptum*) was supplemented in Rome's legal and political structure by written law (*ius scriptum*), or *lex.*

Lex

[251] Arena 2014: 221.
[252] Wheare 1966: 122; Marshall 1984: 12; Barber 20120: 83. See also Hoffman 1982: 218 on *mos maiorum* as an "obligatory force of example set by the ancestors."
[253] Rousseau and Cole, trans. 2003: 71. According to Rousseau, "As long as several men in assembly regard themselves as a single body, they have only a single will which is concerned with their common preservation and general well-being. In this case, all the springs of the State are vigorous and simple and its rules clear and luminous; there are no embroilments or conflicts of interests; the common good is everywhere clearly apparent and only good sense is needed to perceive it."

Written law (*lex*) in Rome fell into the category of *ius scriptum,* and regulated matters such as statutes, plebeian resolutions (*plebiscita*), and other legal enactments. Whereas *ius* was a principle that guided action (as with *mos maiorum*), *lex* dictated formulaic adherence by the letter and was enacted by legislation passed in the assemblies. The publication of the Twelve Tables in 451 marks the introduction of systemic written law at Rome, and a significant development of constitutional thought. Beginning in 462, many plebeians began to demand the creation of a written compilation of Rome's laws in order to limit the abuse of power among the magistracies and the Senate (Livy 3.9.5). In 451, this movement was finally realized when all magistracies were concentrated into the hands of the "decemvirate," an extraordinary commission of ten statesmen, the *decemviri* with consular *imperium*, appointed for the express purpose of writing down the laws (*legibus scribundis*) of the state.[254] The decemvirate produced an initial compilation of ten tables (*tabulae*) of Roman law sometime in late 451 or early 450, but an additional two tables were requested, leading to the reappointment of the *decemviri* for the subsequent year of 450/449 (Livy 3.34.6-8). The content of the Twelve Tables addressed various legal aspects of Roman society, spanning court procedure, property rights (of both inanimate objects and slaves), paternal rights, religious laws, types of offenses and their penalties, rulings on marriage, and more.[255] I will discuss the history of the decemvirate at greater length in chapter 7, but it will suffice to say at the moment that, although the decemvirate was successful and efficient in its first year, the second board of ten became tyrants and had to be removed by the threat of plebeian secession in 449 (Livy 3.34-54).[256]

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[254] Livy 3.32.5-34.6. See also. Cic. *Rep.* 2.61. For the title of decemvirate and their purpose in "writing the laws" (*legibus scrubundis*) see the *Fasti Capitolini* as listed in Degrassi 1954: 30-31.
[255] Johnson, Coleman-Norman, Bourne, and Pharr (ed.) 1961: 9-18.
[256] See also Heurgon 1973: 169.

Yet, despite its ultimate descent into tyranny, the decemvirate was successful in the institution of written law in Rome in place of the sole reliance on customary law. According to Jacques Heurgon, the institution of the Twelve Tables signifies a shift in Roman legal thought, namely "the secularization of the law, the renunciation of *fas* in favour of *ius*."[257] On the other hand, although it is true that the importance of human law (*ius*) had been elevated by the publication of the Twelve Tables, there is no evidence for a diminishment in divine law (*fas*). In 449, after the threatened secession of the plebs induced the disbandment of the decemvirate (Livy 3.52-54.5), the election of the plebeian tribunes was overseen by the Pontifex Maximus (3.54.5, 9), while the sacrosanctity, or personal inviolability, of plebeian tribunes was secured by law with "religion sanction" (*religione ... lege ... sanciendo*, 3.55.6-8).[258] In this way, while the publication of the Twelve Tables certainly indicates an increased significance of secular law, especially written law, it nevertheless continued to be steeped in religious belief. As John North stresses, religion and priesthoods were inextricably bound to the operations of Roman politics, as they consulted and advised the Senate and magistrates, arbitrated the "legitimacy of many forms of public action," and determined the presence of irregularity (*vitium*) in public rituals that could invalidate the "legal status" of certain actions.[259]

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[257] Heurgon 1973: 170.

[258] The imposition of a religious sanction to protect the inviolability of the plebeian tribunes was a reinstitution of a similar law passed in the *lex Valeria provocatione* in 509 (Livy 2.8.2), which contained a provision calling for the execution or forfeiture of property for any person who attempted to install himself as king. Similar to the purpose of granting sacrosanctity to the tribunes of the plebs in 449, the guarantee of the *ius provocatione* in 509 was designed to protect the Roman people from possible abuses of power at the hands of magistrates by providing the means for every Roman citizen to appeal to the Roman people if accused of a crime. The fact that this main provision is followed by one enforcing the prohibition on installing a monarch is not a coincidence. Just as the *ius provocatione* restricted magistrates (or monarchs) from wielding unlimited power over the Roman people, so too did the grant of sacrosanctity to plebeian tribunes protect advocates of the Roman people's rights from interference at the hands of magistrates or the Senate.

[259] North 2007: 267-269.

To be clear, the Twelve Tables should not be mischaracterized as constitutional documents on their own, since they were in fact enacted by *decemviri*, who were themselves empowered by a greater constitutional authority, a resolution of the people.[260] Furthermore, despite the fact that written law was now on public display, Mousourakis points out that the Senate held influence over the interpretation of constitutional law. Nevertheless, the Twelve Tables do provide a good example of how *lex* and *ius* functioned jointly in Roman politics. As mentioned above, *lex* was characterized as individual, procedural statutes that gave instructions on specific issues, whereas *ius* could represent a body of laws, the concept of justice, or political rights. Admittedly, *lex* and *ius* are used interchangeably at times, both in ancient and modern sources. Tacitus, for example, refers to the Twelve Tables singularly as an act of "fair law" (*aequis iuris*), in comparison to the corruption of "subsequent laws" (*secutae leges*).[261] Livy, however, differentiates between the two concepts (*lex* and *ius*), describing *ius*, in different places, as an act of administering justice to people (*ius populo … reddebant*, 3.33.8), a legal right (*decessitque iure,* 3.33.10), and as different facets of public and private law (*publici privatique iuris*, 3.34.6). On the other hand, Livy describes the compilation of the laws (*leges condendis*) in the Twelve Tables as separate from the administration of justice (*ius … incorruptum … ferrent*, 3.34.1), and even the overall body of Roman law (*corpus omnis Romani iuris*, 3.34.7).[262]

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[260] Straumann 2011: 284-285. Livy 3.34.6: *Centuriatis comitiis decem tabularum leges perlatae sunt*; Tac. *Ann.* 3.27: *Pulso Tarquinio adversum patrum factiones multa populus paravit tuendae libertatis et firmandae concordiae, creatique decemviri et accitis quae usquam egregia compositae duodecim tabulae, finis aequi iuris. Nam secutae leges etsi aliquando in maleficos ex delicto, saepius tamen dissensione ordinum et apiscendi inlicitos honores aut pellendi claros viros aliaque ob prava per vim latae sunt.*

[261] Tac. *Ann.* 3.27.

[262] The passages in Livy cited above refer to the initial administration of the Roman government under the decemvirate in 451 (3.33.8), the decision of C. Iulius Iulus to waive his legitimate right, as a decemvir, to act as sole judge in a case against a patrician accused of murder and instead prosecuting the case in public (3.33.10), the compilation of the Twelve Tables taking place under the just rule of the decemvirate (3.34.1), and the application of the Twelve Tables to public and private law in Rome (3.34.6), and to the entire body of Roman law (3.34.7).

Specific laws (*leges*) were drafted by the Roman Senate and ratified (or rejected) by the Roman assemblies. As with the statutes in the Twelve Tables, most laws acted as regulative rules, imparting instruction through prescription or proscription (that is, allowing, limiting, or prohibiting specific actions), and usually contained multiple provisions that could address matters ranging from important political and legal procedure, to the arbitration of private disputes, guaranteed certain rights, or set penalties for forbidden behavior.[263] Even before the Republic, new kings in Rome required passage of the *lex curiata de imperio* in order to lay claim to the royal powers of military command (*imperium*), political authority (*potestas*), and the legitimacy of religious auspices (*auspicia*), which continued to be used for curule magistracies during the Republic.[264] One famous Roman law was the *lex Valeria*, passed in 509, that gave the people the right to appeal (the *ius provocationis*), one of the most important rights of the Roman people.[265] Other laws were instrumental in providing needed reform to the Roman state, such as, for example, the *lex Valeria Horatia*, which made the vote of the assemblies binding on the Roman state (Livy 3.55.3), and the *leges Liciniae Sextiae* of 367, which included (among several of its provisions) the institution of the office of praetor and the rule that one consul each year must be a plebeian (Livy 6.35.1-6).[266] In regard to extraordinary commands, any command described as coming from the people or by popular acclaim should be understood as reference to *lex*, such as Sulla's appointment as dictator via the *lex Valeria* of 82, and Pompey's commands in the *lex Gabinia* of 67 and *lex Manilia* of 66. Other laws directly regulated the function of magistracies, such as the *lex Genucia* of 342 that forbade holding the same office twice within

[263] For an example of a law regarding political and legal procedure, see the *lex Acilia de repetundarum* of 123 (*CIL* 1^2 583); for private disputes, see the *lex Atinia* in 197 (Gell. 17.7.1-4); for the guarantee of rights, see the *lex Valeria Horatia de provocatione* in 449 (Livy 3.55.3-5); for forbidden behavior, see the *lex Oppia* (Livy 34.1.3-4).
[264] Mousourakis 2003: 55, n.49.
[265] Livy 2.8.2-3; Mousourakis 2003: 59.
[266] Mousourakis 2003: 63-64.

ten years, the *lex Baebia* of 181 that alternated the election of praetors and actually made prorogation routine, the *lex Villia annalis* of 180 that established prerequisites and age requirements for holding office, and more.[267] The laws just mentioned are only a very small group of examples, of course, and Callie Williamson states that a total of 781 laws were passed or proposed between 509 and 23 BCE.[268]

From Guiding Principles to Structural Framework

So far, I have sketched out the higher order of norms that acted as the fundamental guiding principles in Roman politics. While lengthy, this discussion is necessary to understand the underlying concepts that gave Rome's political system its cohesion and stability and is thus worthy of a brief review before turning to the next chapter to consider the political institutions of the Roman Republic's government, specifically the people's assemblies, the Senate, and the various magistracies. First, I addressed *fas,* norms of a perceived divine origin, and *ius,* norms of supposed human origin. In the Roman Republic, there was no separation of religion and politics, since both the gods and human nature itself demanded fair and virtuous conduct in government, making *fas* and *ius* two sides of the same coin. As Barber states, the successful formation of any constitution rests on the "rule of recognition," wherein members of a community collectively agree that a political or legal system or statute is good, justified, and to the mutual benefit of all members. In Roman society, *fas* and *ius* helped articulate the fundamental notions of rights and justice, to which all customs, traditions, and laws had to adhere. *Ius* eventually became the basis for all Roman legal thought, due to its inherent connotations of justice and fairness in human interaction. As Roman society grew in size and complexity, however, there was a gradual

[267] On the *lex Genucia,* see Livy 7.42.2; on the *lex Baebia,* see Livy 40.44.2; on the *lex Villia annalis,* Livy 40.44.1.
[268] Williamson 2019: xvii.

differentiation between customary unwritten law (*ius non scriptum*) and formalized written law (*ius scriptum*). Unwritten law included ideas of custom (*consuetudo*) and tradition (*mos maiorum*). In particular, *mos maiorum*, the "way of the ancestors," carried significant importance in Roman political thought, acting as a source of constitutional convention and representing popular consensus, which gave it the force of legitimacy. In the category of written law was *lex,* which were formal laws and statutes enacted by legislation.

The preceding ideas (*fas*, *ius*, *mos maiorum*, and *lex*) were the higher order of norms and fundamental guiding principles that comprised the Roman constitution. Understanding these concepts are of particular importance to the study of extraordinary commands, since, as I stated at the beginning of this chapter, the discussion of these commands should not be limited to issues of the duration of command, gradations of *imperia*, or even matters of individual statute (*lex*), but also pertain to issues of constitutional validity (*ius*), religious sanctity (*fas, auspicia*, *sanctitas*), custom (*consuetudo*), and tradition (*mos maiorum*). For instance, the means by which a command was assigned, whether by the Senate or the Roman assemblies, are of obvious importance, but we should not forget that the election of magistrates, the practice of sortition, legislation, and the assemblies themselves were all subject to standards of religious sanctity.[269] Thus, when Caesar sought for the consular elections of 45 to be presided over by a praetor, Cicero objected not only on the legal grounds that a magistrate with lesser *imperium* could not oversee the election of a magistrate with greater *imperium*, but also because the augural books did not allow for such a practice, that was there was no precedent of any similar act taking place,

[269] The Senate was able, for instance, to invalidate the resolutions of Roman assemblies in violation of auspices via the *lex Aelia et Fufia* and the *lex Caecilia Didia*. For discussion on both laws, see Taylor 1949: 82, 206 n. 59, 207 n. 61, 213-214 n. 22; Sumner 1963: 337-358; Astin 1964: 421-445; Lintott 1999: 62, n. 95. For more on the relationship between *fas* and *ius* (especially *ius sacrum*), see Mousourakis 2007: 19-21, 214 n. 15. On the nature of *fas* in regard to Roman voting assemblies, particularly the *comitia centuriata*, see Develin's discussion on *auspicia* and *fas* in regard to the *pomerium* (Develin 1977: 54), as mentioned also in Livy 1.45.5 and Gellius *NA* 15.27.4

and most importantly that such was act would be unconstitutional (*non esse ius*).[270] In other words, all areas of Roman politics involved considerations of law, custom and tradition, religion, and constitutional thought, and so all of these must be understood for a proper discussion of extraordinary commands. On the other hand, analyzing the theoretical aspects of *ius*, *lex*, *fas*, and *mos maiorum* does not supersede examinations of the functional components of the Roman government, namely the Senate, assemblies, and magistracies, but rather both perspectives in fact complement each other. In the next chapter, I will describe in detail the structural framework of the Roman constitution, consisting of the Roman Senate, the popular assemblies, and magistracies. Following this, I will be able to discuss the nature of extraordinary commands, how they functioned and interacted within the context of the Roman constitution, as well as their effect on the institutional stability of Rome's republican government.

[270] Cic. *Att.* 9.9.3: *Nos autem in libris habemus non modo consules a praetore sed ne praetores quidem creari ius esse idque factum esse numquam; consules eo non esse ius quod maius imperium a minore rogari non sit ius, praetores autem quod ita rogentur ut conlegae consulibus sint quorum est maius imperium.* See also Straumann 2016: 55. For more on the different auspices of the higher magistracies (the consuls, praetors, and censors), see Gell. 13.15.4.

Chapter 3: Roman Political Institutions

The previous chapter addressed the foundational elements of constitutional theory and the question of whether the Roman Republic possessed a constitution. To summarize, constitutions consist of a higher order of norms and rules in a state that establish the fundamental guiding principles and structural framework of the government. In this sense, the Roman Republic did indeed possess a constitution, in that a series of informal norms and rules, representing notions of divinely ordained morality (*fas*) and ethical concepts of fairness and justice (*ius*), established the fundamental expectations of communal and political interaction in the burgeoning Roman state. In other words, in early Rome the norms of *fas* and *ius* served as the guiding principles to inform and determine the purpose of government in Rome, what that government should do, and how it should function. From these guiding political principles in the republican Rome came the government's obligation to preserve the Roman people's general welfare (*salus*), their liberty (*libertas*), and their sovereignty in politics.[271] As Roman society grew in both size and complexity, the notion of *ius* continued to develop into more formal concepts of rules and jurisprudence, and further differentiated between written law (*ius scriptum*) and unwritten law (*ius non scriptum*). In the category of *ius scriptum* were individual statutes (*lex*), magisterial edicts, and more. *Ius non scriptum*, on the other hand, manifested as custom (*consuetudo*) or ancestral tradition (*mos maiorum*), non-negotiable socio-political conventions. The Roman constitution, then, was based on the norms of *fas* and *ius*, establishing that the purpose of the government was to serve and protect the Roman people and function in accordance with the

[271] On preservation of the people's welfare, see Cic. *Leg.* 3.8: "*Ollis salus populi suprema lex esto*;" on the people's liberty, Livy 2.1.9: *omnium primum auidum nouae libertatis populum, ne postmodum flecti precibus aut donis regiis posset, iure iurando adegit neminem Romae passuros regnare*; on the political primacy of the people, Livy 7.17.12: *ut quodcumque postremum populus iussisset id ius ratumque esset*." See also Plb. 6.16.4-5 (on tribunes focusing on upholding the will of the people); Lintott 1999: 40, 128; Straumann 2016: 114-115.

principles of law (*lex*) and tradition (*consuetudo*/*mos maiorum*). Though founded on *fas* and *ius* and guided by *lex* and *mos maiorum*, it was the structural framework of the Rome's political institutions that oversaw, enacted, and regulated the day-to-day functions of the Roman state.

The purpose of the current chapter, then, is to discuss the structural framework of Rome's government, the tripartite system consisting of the Senate, popular assemblies, and magistracies.[272] Polybius stated that the success of Rome's government was that it was a "mixed constitution," composed in equal parts of three different government forms, specifically monarchies, aristocracies, and democracies (Plb 6.11.11-13). Each type of government on its own, according to Polybius, is insufficient and locked in a cycle of political development, wherein one type of government is doomed to fall and be replaced by another. In this cycle, the ἀνακύκλωσις, monarchies give way to tyrannies and are replaced by aristocracies. Aristocracies themselves eventually devolve into oligarchies that are supplanted by democracies. Democracies similarly degenerate into mob-rule, wherein the cycle restarts at the monarchy.[273] The mixed constitution, however, had the best chance of any constitutional form at escaping this cycle, as it was a blend of all three types of government (monarchies, aristocracies, and democracies), simultaneously possessing their mutual strengths and mitigating the weaknesses of each government type.[274]

To Polybius, the aristocratic element of the Roman state was the Senate, the council of elders originally composed of the leading men from Rome's most prominent families, which drafted and proposed legislation, oversaw Roman foreign policy, and possessed considerable

[272] For more on tripartite parallels in Roman political thought, see Erskine 2013: 243.
[273] Plb. 6.4.6-10, 6.10-8.9. For specific reference to the ἀνακύκλωσις, see Plb. 6.9.9-10: αὕτη πολιτειῶν ἀνακύκλωσις, αὕτη φύσεως οἰκονομία, καθ᾽ ἣν μεταβάλλει καὶ μεθίσταται καὶ πάλιν εἰς αὐτὰ καταντᾷ τὰ κατὰ τὰς πολιτείας.
[274] Seager 2013: 248.

influence over the conduct of the Roman government. On the other hand, Polybius associated the democratic element of Rome's constitution with its various popular assemblies, wherein all Roman citizens were able to gather according to various socio-economic criteria and vote on any act requiring formal legislation or election. Finally, Polybius identified the monarchic quality of the Roman constitution in the various magistracies that oversaw the implementation of Roman law and the general administrative duties of the state. Each component of Rome's government (the Senate, assemblies, and magistracies) complimented the other, according to Polybius, ensuring that the Roman state could survive any crisis it encountered. Of equal importance was the fact that, if one arm of the Roman government became corrupt and attempted to become dominant (which Polybius says is nearly inevitable), the other two arms were able to restrain and correct their wayward counterpart (Plb. 6.18.1-7).[275] Despite the strengths of Rome's mixed constitution, including its ability to forestall and correct corruption, it was not exempt from the vicissitudes of the ἀνακύκλωσις, but was in fact vulnerable to the same potential (both present and future) of gradual decay that every other state faced, regardless of their constitution (Plb. 6.57.1-9).[276] And yet, although the Roman constitution was neither perfect nor immune to the threat of decline, Polybius nevertheless believed that the structure and operation of Rome's government was the greatest political system that had ever existed at that time.[277]

The importance and necessity of studying the structural framework of the Roman government is that it allows for both a comprehensive and accurate understanding of the myriad aspects and qualities of extraordinary commands. As noted in the previous chapter, extraordinary

[275] Bonner 1922: 144; Heurgon 1973: 164-167; Ridley 1987: 69; Lintott 1999: 100, 120; de Wilde 2015: 115; Straumann 2016: 63.
[276] Straumann 2016: 6.
[277] Plb. 60.50.4, 51.7, 52.5, 56.6; Walbank 1957: 744; Walbank 1990: 154-155; North 2007: 269; Erskine 2013: 235, 244-245; Seager 2013: 248, 253.

commands cannot be studied in isolation, as they are connected to every aspect of Roman government. All extraordinary commands originated from magistracies of some sort that possessed *imperium*, usually praetors and consuls, whose authority and tenure of office were expanded beyond their constitutionally defined limits. Thus, at the very least, it is necessary to determine what limits the Roman constitution did impose on magistracies, but a cursory examination there reveals that the issues surrounding extraordinary commands are linked in some way to every facet of Roman government. Instead, several questions must be considered, such as the nature of *imperium* itself and which magistracies could wield it, the hierarchical relationship of Roman magistracies and their duties, how magistrates were elected and received the powers (in the *cursus honorum*), and more. Extraordinary commands took multiple forms that went beyond the extension of office (*continuatio*) or *imperium* (*prorogatio*) of a consul or praetor. Instead, extraordinary commands also involved cases of commanders holding magistracies for which they did not qualify (due either to youth or lack or prerequisite experience), *imperium* being assigned to magistracies that legally could not wield it (such as quaestors, aediles, and even land commissioners), or even raising and commanding troops despite having never held public office (*privati*) and without the sanction of the Senate or people.[278]

[278] Some of the many examples of these instances include Scipio Africanus' early election to the curule aedileship in 213, despite his youth, followed by a command with proconsular *imperium* in 211, though he was (again) not of legal but also had never held the prerequisite praetorship (Livy 25.2.6-7; 26.18.7-19.9). In 194, two land commissions (*tresviri agris dandis adsignandis*), despite being lower magistracies, were given *imperium* to oversee the establishment of two colonies, Castrum Frentinum near Thurii and Vibo in Bruttium (Livy 34.52.1-2; 35.9.7-8, 40.6; *MRR* 1.345; Taylor 1966: 46, 133 n. 40). As late as 63 even, a decemvirate land commission was proposed in a *lex agraria* that also would have possessed *imperium*, though this measure was successfully opposed by Cicero and did not pass as legislation (Cic. *Agr.* 2.26-32; *Pis.* 4; Plut. *Cic.* 12.2-5). In 83, Pompey, having never held any public office (thus, a *privatus*) illegally raised a private army in support of Sulla during the civil war (Cic. *Man.* 61; *Phil.* 5.43-44; Caes. *BAfr.* 22.2-4; Diod. 38/9.9; Livy *Per.* 85.4; Plut. *Mor.* 203B-C; *Pomp.* 6.3-4; App. *BC* 1.80; Dio 33 fr.107.1), which was only partially legitimized later with a grant of propraetorian *imperium* (Plut. *Mor.* 203C; *Sull.* 28.8; and esp. Gran. Lic. 39B, who refers to Pompey triumphing *pro praetore*).

In addressing all of these questions, the importance of understanding the various functions and responsibilities of both the Senate and popular assemblies immediately becomes apparent. Magistrates were, of course, elected by the people (with the exception of the dictator and the *magister equitum*), and the assemblies were able to confer *imperium*, pass laws that could expand and restrict the powers of magistrates, create new magistracies, or even remove a magistrate from his post.[279] The "ladder of offices" (*cursus honorum*), by which Roman men proceeded through their successive magistrates, also inevitably led to membership within the Senate itself. And while the popular assemblies conducted the actual elections of magistrates, it was the Senate that regulated a significant portion of a magistrate's conduct in office, especially in determining provincial allotments and controlling the Roman treasury. The Senate made up for its lack of official legal authority by possessing considerable influence over politics. As the Senate was a repository of former and future colleagues, most magistrates made a point to cooperate with senatorial guidance and not antagonize the *patres*.

Furthermore, there are also apparent contradictions and some ambiguity regarding the roles of the Senate and popular assemblies in the development of extraordinary commands that require examination. *Prorogatio*, for instance, the extension of *imperium*, is technically under the purview of the people, but there are several instances of *prorogatio* and *continuatio* coming from senatorial decrees, as well as senatorial endorsements of magistrates using their *imperium* in unorthodox ways, such as through the *senatus consultum ultimum*, the "final decree of the Senate."[280] The popular assemblies, however, are similarly accountable in certain cases of

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[279] Plb. 6.14.4, 9-10, 15.2-3, 9-11; Cic. *Rep.* 2.53-54, 63; *Leg.* 3.8, 10, 27.

[280] On *prorogatio* and *continuatio* coming at different times from either the Senate or the popular assemblies, as well as the legal validity of either source, see Boak 1918: 1-25; Henderson 1957: 84; Carney 1959: 72-77; Jashemski 1966; Bauman 1968: 40-41; Develin 1975: 716-722; Kloft 1977; Ridley 1981: 280-297; Stewart 1998: 177; Lintott 1999: 105, 113-114, 117; Mousourakis 2003: 80-81; North 2007: 270; Rodgers 2008: 314; Vervaet 2009: 432; Hölkeskamp 2010: 27; Steel 2013: 5, 48, 220; Straumann 2016: 101-104, 110. On the use of *imperium* in the *senatus consultum ultimum*, see Drogula 2007: 447-451.

intruding upon the Senate's jurisdiction, such as by overriding senatorial sortition of *proviniciae* or by sanctioning the appointment of commands that outright contradicted constitutional law, despite the legitimate protests of senators or other magistrates.[281] And yet, these apparent contradictions can be reconciled by a detailed understanding of the functions and organization of the Roman government. After all, Polybius states that the Senate did have the right to retain generals in their commands at the end of their term of office (Plb. 6.15.6), despite the fact that prorogation should have been under the purview of the people. Lastly, it cannot truly be said that the people broke tradition by usurping the Senate's right to decide sortition or that they promoted magistrates in violation of legal statute, since one of the guiding principles of Roman government stipulated that whatever the people decreed was to be recognized as law (Livy 7.17.12), even if it contradicted or invalidated previous legislation. As Polybius states, Roman magistrates required the support of both the people and the Senate in order to fulfill the duties of their office successfully (Plb. 6.15.2-3). Similarly, the development of irregular magistracies and extraordinary commands are tied to acts of both the Senate and the people.

Thus, it is incumbent upon scholars to incorporate examinations of both the Senate and the popular assemblies alongside studies of extraordinary commands. In what follows in this chapter I analyze in detail each of the three components of the Roman government, the Senate, the popular assemblies, and the magistracies. Although the discussion will center on the overall structural framework of Rome's political system, I will also draw attention to how each political

[281] On the people overriding senatorial sortition of *provinciae*, see the example of Marius in 107 (*CIL* 6.41024; Sall. *Iug.* 84.1-2; Vell. 2.11.2; Plut. *Mar*. 9.1-10.1; Carney 1959: 74) and especially with catastrophic consequences in 88, regarding the transfer of Sulla's command against Mithridates to Marius (Cic. *Phil.* 8.7; Vell. 2.18.6; Val. Max. 9.7 ext. 1; Plut. *Sull.* 8.4; *Mar*. 35.4; Flor. 2.9.6; App. *BC* 1.56; Ampel. 40.1, 42.1; *Vir. Ill.* 67.4, 75.8; Eutrop. 5.4.2; Exsuper. 18; 5.19.3; Henderson 1957: 84; Carney 1959: 76-77; Mousourakis 2003: 82 n. 49; Steel 2013: 219-222). On the people endorsing unqualified candidates for office despite contradiction of the law, see the example of Scipio Africanus becoming proconsul in 211 as mentioned above, as well as his election to the consulship for 205 despite his youth (Livy 28.38.6-11, 40.1-45.7; 29.20.2; Val. Max. 2.8.5; 8.15.1; Plut. *Mar*. 12.1; Dio 27 fr. 57.56; Oros. 4.18.17).

branch related to the development of extraordinary commands. I begin in the following section by focusing on the Senate, its origin, duties, and powers, as well as its relationship with Roman magistracies. Though lacking the legal authority of the assemblies, the Senate's vast socio-political influence was at times regarded as equal to law. Next, I will examine the complex nature of Rome's popular assemblies, since they are directly involved in electing magistrates and especially in conferring *imperium* upon the higher offices, depending on which assembly was convened. As the people were the final arbiter in questions of legality, examining their relationship and interaction with extraordinary commands is paramount. Lastly, because extraordinary commands are fundamentally irregular magistracies, it is necessary to review the regular form, function, and order of Rome's magistracies. This includes a discussion of *provinciae*, the legal powers of magistracies (*potestas* and *imperium*), and especially the "ladder of offices" (the *cursus honorum*), which established the qualifications for holding different offices, as well as the limitations imposed on each magistracy. In reviewing the *cursus honorum*, I finish by briefly discussing each of the higher magistracies individually, namely the quaestors, aediles, plebeian tribunes, praetors, consuls, and censors.

As a final organizational note, I have intentionally refrained from delving into the extraordinary commands themselves in too much detail for this chapter, since it is necessary to ascertain completely the intended functions of ordinary magistrates, those conforming to the *certus ordo*, before scrutinizing and evaluating magistracies that were *extra ordinem*. To that end, detailed examinations of major extraordinary magistracies, as well as the decemvirate (451-449), and the consular tribunes (444-367), are reserved for the following chapters.[282]

[282] In particular, I discuss the decemvirate and the consular tribunes in greater detail in chapter 7.

The Roman Senate

The Senate was the chief administrative body within the Roman government, which possessed few formal powers but massive influence.[283] Roman tradition holds that the Senate (*senatus*) originated in Rome's monarchic period, primarily serving as advisors to the kings and overseeing the selection of a new king upon a monarch's death. From its inception and for much of its existence the Senate was mainly comprised of patricians, though prominent plebeian families gained access over time. During the Republic, the Senate's main role was to advise Roman magistrates and draft legislation, which was then presented to the Roman assemblies for ratification. On the other hand, the Senate was involved (to different degrees) in nearly all political activity in Rome, whether from managing the treasury, overseeing diplomacy and foreign politics, or directing various administrative responsibilities. Thus, despite possessing few legal powers, the Senate's political prominence was such that Polybius observed that (when looking at the Senate only) the Roman government appeared to be an aristocracy (Plb. 6.13.8).[284]

Aside from its advisory role, the Senate also traditionally presided over the state during the selection of a new king, a process known as the *interregnum*. After a king died, his *potestas* and *imperium* reverted to the Senate, which then selected from among its own number one individual to serve as *interrex* for a five-day period, in order to help administer affairs in the city and oversee the nomination of a new king, whom they presented to the people for approval.[285] The office of the *interrex* persisted into the early Republic to help regulate elections when necessary, but gradually fell into disuse.

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[283] North 2007: 266; Hodgson 2017: 12.
[284] Lintott 1999: 65; Seager 2013: 251-252.
[285] Cic. *Rep.* 2.25; Livy 1.17; Dion. Hal. 2.57, 4.40.2, 80.2; Plut. *Numa* 2.6-7; Heurgon 1973: 114; Mousourakis 2003: 55-57, 100. This process of confirming the new king is the supposed origin of the *lex curiata de imperio*, which would be used during the Republic to confer *imperium* on higher magistrates (on this, see von Lübtow 1952: 169, Develin 1977b: 49-65, and Lintott 1999: 28-29).

The Senate during the Republic was a different matter entirely, however, and, while it continued to hold a great deal of influence, the Roman people and magistracies possessed the greatest amount of legal authority in Rome's government. In general terms, the republican Senate's chief responsibilities were to advise magistrates (*consilium*) and to draft legislation that was voted on by the assemblies, but a number of administrative responsibilities and policy decisions were also placed under the Senate's purview.[286] For one thing, the Senate's decrees, the *senatus consulta*, were respected and carried a great deal of influence in Rome's government, though they were not legally binding and only represented the Senate's official opinion on a matter, usually as a recommendation to a magistrate.[287] While the Senate under the kings had the authority to ratify (or reject) any legislation passed by the assemblies, any law passed by the assemblies during the Republic was binding on the entire Roman people (Livy 1.17.9).[288] Nevertheless, although the Roman people had the final word over the ratification of laws, the Senate retained a great deal of political leverage due to their pivotal role in drafting and proposing legislation.

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[286] Lintott 1999: 82; North 2007: 267, 269.

[287] Lintott 1999: 3; Mousourakis 2003: 21, 70; Anderson 2018: 20. As Mousourakis later points out, however, in times of emergency (later in the Republic), "the Senate could pass a special decree (*senatus consultum ultimum*)," granting the consuls extraordinary power and authority, even allowing for the "temporary suspension of certain constitutional norms" (Mousourakis 2003: 74, 78, 100). For examples of the Senate (and assemblies) agreeing to use emergency measures that suspended rules and norms for magistrates, particularly prorogated commands, see Cic. *Man.* 21-22; Livy 27.6.2; *Per.* 56.8. I elaborate more on the *senatus consultum ultimum* later in this chapter.

[288] Forsythe 2005: 169, 183, 347. The later legislative supremacy of the assemblies is the result of three laws, the *lex Valeria Horatia* of 449 (Livy 3.55.1-5), the *lex Publilia Philonis* of 339 (Livy 8.12.4, 12-17) and the *lex Hortensia* of 287. The first provision of the *lex Valeria Horatia* (3.55.4) states that "whatever the plebs had ordered in their tribes would be binding upon the Roman people" (*quod tributim plebes iussisset populum teneret*), thus removing the ability of the Senate to reject a law passed by the People. In 339, the *lex Publilia Philonis* emphasizes this point even further (8.12.15), specifying that any measures brought to the assembly should first be ratified by the Senate, then submitted to the People's assemblies (*legum, quae comitiis centuriatis ferrentur, ante initum suffragium patres auctores fierent*). The people's authority in passing legislation that was binding on the entire Roman population was reiterated yet again in 287 with the *lex Hortensia* (Livy *Per.* 11.11; Pliny *NH* 16.37; Gell. *NA* 15.27.4). See also Ridley 1981: 288; Lintott 1999: 37-38, 40, 122; Mousourakis 2003: 57, 63, 72, 113; Anderson 2018: 19; Bartlett 2018.

Aside from legislation, the Roman Senate had many administrative responsibilities. According to Polybius's overview of the Roman government (Plb. 6.11-18, 50-57), the Senate controlled Rome's treasury, the *aerarium*, as well as "all revenue and expenditure regulated by it."[289] According to Walbank, the "revenue" (εἰσόδου) Polybius mentions consisted of taxes, such as the *tributum* and provincial taxes, income from public lands (*ager publicus*), as well as "gifts and bequests to the state."[290] The quaestors, for instance, could not disburse any funds without the Senate's decree, aside from those funds allotted by the Senate for the consuls. Similarly, the Senate approved funds available to the censors for their public works projects.[291] The consuls too relied on the Senate's approval and support, especially in regard to finances. As Polybius points out, Roman legions depended on a constant flow of supplies (such as grain, clothing, and

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[289] Plb. 6.13.1: ἡ σύγκλητος πρῶτον μὲν ἔχει τὴν τοῦ ταμιείου κυρίαν. καὶ γὰρ τῆς εἰσόδου πάσης αὕτη κρατεῖ καὶ τῆς ἐξόδου παραπλησίως. Loader 1940: 135-136; de Wilde 2012: 561. See also Cicero who states succinctly that the Senate had the "power" of "dispensation of the treasury" (*senatui … potestatem, … aerari dispensationem*, Cic. *Vat.* 36).

[290] Walbank 1957: 678. Walbank goes on to say that the war *tributum* is described as a compulsory loan to the Senate (Dion. Hal. 5.47.1), which the Senate also repaid to the people. It is important to take note, however, as Cicero states, the taxation on the property of Roman citizens was abolished in 167 after the Third Macedonian War due to the massive amount of plunder procured for the Roman government by L. Aemilius Paullus (Cic. *Off.* 2.76.) The controversy over the will of Attalus III, king of Pergamum, demonstrates the Senate's natural assumption that "gifts and bequests" fell under its jurisdiction. When Attalus III died in 133, he left the kingdom of Pergamum, as his estate, to the Roman people in his will (*Attalus rex Pergamenorum, regis Eumenis filius, socii quondam commilitonisque nostri, testamentum reliquit: 'Populus Romanus bonorum meorum heres esto. In bonis regiis haec fuerunt.' Adita igitur hereditate provinciam populus Romanus non quidem bello nec armis*, Flor. 2.20.1-3). When Tiberius Gracchus attempted to distribute the funds and lands from Attalus' will to the People, many in the Senate were alarmed and began to suspect Gracchus of aspirations to a kingship (Plut. *T. Grac.* 1-2).

[291] Plb. 6.13.2-3, 17.2. For an overall reference to this particular function of the censors, see Cicero (Cic. *Leg.* 3.7): "Let them (the censors) watch over the temples, the roads, the baths, the treasury, and the taxes of the city" (*urbis templa vias aquas aerarium vectigalia tuento*). Livy shows an example of censors submitting an official request for an allotment of funds for public works and receiving a year's sum of tax revenue: *censoribus deinde postulantibus, ut pecuniae summa sibi, qua in opera publica uterentur, attribueretur, vectigal annuum decretum est* (Livy 40.46.16). Livy also relates an example of the quaestors allotting public funds to the censors of 169, T. Sempronius Gracchus and C. Claudius, only after the Senate issued its decree: *ad opera publica facienda … ex vectigalibus eius anni attributum ex senatus consulto a quaestoribus esset* (Livy 44.16.9). A year later (in 168) the same censors "sought an extension of their eighteen-month term in order to complete building repairs and the works, which they had placed under contract" (*petentibus, ut ex instituto ad sarta tecta exigenda et ad opera quae locassent probanda anni et sex mensum tempus prorogaretur*, Livy 45.15.9). For a detailed discussion of censors distributing contracts in 184, during the censorships of M. Porcius Cato and L. Valerius Flaccus, see Livy 39.44.4-9, where the Senate actually annulled many of the contracts distributed by the censors, at the request of the *publicani* (contracted tax-collectors), who complained about the high cost that the censors had set for contracts (Livy 39.44.8). For a full discussion, see Walbank 1957: 678-679.

especially their pay), which required the consent of the Senate (Plb. 6.15.4). The Senate's control over Rome's treasury also meant that they controlled whether or not to celebrate the successes of victorious generals with triumphs and ovations, as these spectacles relied on public funding (Plb. 6.15.7-8).

Magistrates needed the support and cooperation of the Senate for many reasons, beyond merely its regulation of the treasury.[292] As the only formal deliberative council and center for debate, the Senate was the nexus for all political activity in Rome. And as a repository of political and military experience, the Senate advised magistrates through its recommendations and could mediate disputes between magistrates over spheres of authority or command.[293] On the other hand, because admission into the Senate was contingent upon holding a higher magistracy, any magistrate in office was either a prospective member of the Senate or had originated from among its number. Thus, most magistrates actively tried to avoid antagonizing the Senate, since they would rejoin their peers at the end of their term in office.[294] Indeed, Polybius states that "the commander's plans come to nothing if the Senate chooses to be deliberately negligent and obstructive."[295] Furthermore, Polybus claims that the Senate controlled whether the consuls remained in command of their troops at the end of their office or if new consuls are sent to

[292] North 2007: 75.
[293] Lintott 1999: 86; Burton 2014: 406-407. There are multiple instances of such mediation, but one example shown by Burton is the Senate compelling Lepidus and Catulus "to swear an oath not to turn their arms against each other" in 78 (App. *BC* 1.107; Gran. Lic. 35).
[294] According to de Wilde, even for dictators, who wielded a great deal of independent authority during periods of crisis, "the senate's 'advice' was rarely disregarded" (de Wilde 2012: 561-562; de Wilde 2015: 115). Marianne Hartfield states that this deference to the Senate's counsel was both out of respect for *mos maiorum* and because dictators (like most magistrates) were "part of the senatorial order" (Hartfield 1982: 123). As proof of this fact, Hartfield cites the case of C. Maenius, who resigned his dictatorship after being accused of political corruption, being "more anxious to clear his reputation than to retain his office" (Livy 9.26.5-20, and esp. section 14 for the quoted excerpt).
[295] Plb. 6.15.5: ὥστ᾽ ἀπράκτους γίνεσθαι τὰς ἐπιβολὰς τῶν ἡγουμένων, ἐθελοκακεῖν καὶ κωλυσιεργεῖν προθεμένης τῆς συγκλήτου.

replace their predecessors (Plb. 6.15.6).[296] For these reasons, Polybius states, when the consuls are not in the city, the government of Rome looked very much like an aristocracy, especially in the eyes of foreign states and kings, since the Senate "managed all business connected with them."[297]

As discussed above, the Senate possessed few formal powers, though its legislative and administrative responsibilities did allow for considerable senatorial authority (*patrum auctoritas*) in some areas.[298] *Auctoritas* is hard to define, despite being the etymological root of "authority," and means more than simply the exercise of power, the ability to compel others towards an action, or the lawful "ability to coerce."[299] *Auctoritas* instead has a broader discursive and performative quality, but can be understood succinctly, as Lowrie puts it, as the "capacity to make things happen through words."[300] By virtue of its *auctoritas*, what the Senate lacked in formal legislative power (*lex*) or coercive force, it made up for in political influence based on

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[296] For example, see Livy 25.2.3: *comitiorum consularium iam adpetebat tempus; sed quia consules bello intentos avocare non placebat* ("The time of consular elections was drawing near, but, since the consuls were focused on the war, it was decided not to recall them"). Magistrates could remain in office through legislative acts known as *continuatio* (where a magistrate was allowed to remain in office after the conclusion of his term), *reficere* (immediate reelection to the same office), *iteratio* (reelection to the same office with at least a year's interim but less than ten year's interim), and *prorogatio* (which extended the *imperium* of a commander but not his magistracy). The question of whether the Senate or the assemblies had the right to enact these measures is a matter of debate, on which I elaborate in subsequent chapters. See also Boak 1918: 1-25; Carney 1959: 72-77; Badian 1962: 58, n. 12; Jashemski 1966: 20, 36-37; Bauman 1968: 40-41; Develin 1975: 716-722; Bauman 1973: 41; Kloft 1977: 1-20; Ridley 1981: 281, 286-290, 295; Raschke 1987: 315; Ridley 1987: 81; Stewart 1998: 91 n. 111, 118, 177; Lintott 1999: 105, 113-114, 117; Mousourakis 2003: 81; North 2007: 270; Rodgers 2008: 314; Vervaet 2010: 133, 141-142, 147; Steel 2013: 5, 48; Straumann 2013: 175; Straumann 2016: 86-87, 103-104, 110; Williamson 2019: 9, 25.

[297] Plb. 6.13.9: διὰ τὸ τὰ σφῶν πράγματα σχεδὸν πάντα τὴν σύγκλητον κυροῦν.

[298] On the *patrum auctoritas* (or *auctoritas patrum*) Lintott 1999: 82; Mousourakis 2003: 57, 113; Arena 2014: 220-221; Straumann 2016: 23.

[299] According to Weber, "the basis of every authority, and correspondingly of every kind of willingness to obey, is a belief, a belief by virtue of which persons exercising authority are lent prestige" (Weber, Roth, and Wittich 1978: 263). Green defines authority more specifically as "a triadic social relation among a superior, a subject, and a range of action" (Green 1988: 46). Barber, drawing on both definitions, posits authority as the recognition of someone or something possessing the ability to compel another by virtue of a command, wherein force is not needed to induce obedience, though it may be implied (Barber 2010: 19-21). For lawful authority as the "ability to coerce," see Lendon 2001: 222.

[300] Lowrie 2009: 285. On political *auctoritas* as formal of extra-legal "influence" derived from *mos*, see Last 1947: 163; Ehrenberg 1953: 113-114, 136; Henderson 1957: 83; Gordon 2007: 370-372; Hölkeskamp 2010: 18; Arena 2014: 217-218; 225, 23. According to Hammer, *auctoritas* is "premised both on the founding of communities and on the subsequent reenactment and renovation of this foundation" (Hammer 2008: 190).

tradition (*mos*), which usually took the form of deference to the Senate's wisdom on political matters by the assemblies and magistrates.[301] Lintott argues that there were pragmatic reasons that the Senate took the lead on many issues in Roman politics. As discussed above, Roman magistrates often cooperated closely with the Senate, as it was the *locus* of political deliberation and policy formation in Rome. Thus, while the Senate's recommendations (*senatus consulta*) had no force of law, the decrees of magistrates did, making them a powerful potential ally and conduit for senatorial policy.[302] We should not necessarily imagine the Senate's *auctoritas* reducing magistrates to unwilling pawns in a senatorial domination of Roman politics, however, nor should we assume that the Senate made any attempt at circumventing the people's legislative authority. To the contrary, because of the formality and slow pace of the legislative process, not every matter could practically be resolved by a vote in the assemblies, nor could magisterial decrees be issued to address every issue. For this reason, certain laws actually delegated and entrusted power to the Senate for specific tasks, such as the distribution of land to repay the state's debts in 200 (Livy 31.13.2-9), the allocation of consular provinces (the *lex Sempronia* of 123), and the ability to strike down laws that had been passed contrary to established procedure (the *lex Caecilia Didia* of 98).[303]

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[301] Lintott 1999: 66-67, 86; Anderson 2018: 20. On the Senate's lack of coercive force, see Lintott 1999: 67; North 2007: 267; Seager 2013: 251; Hodgson 2017: 12.

[302] As an example, see the *Senatus Consultum de Bacchanalibus* in 186, wherein the Senate, after consultation with the consuls, Marcius Albinus and Postumius Philippus, imposed several strong measures to curtail (and practically prohibit) participation in the frenzied Bacchic rituals (the *Bacchinalia*), which were deemed a threat to the state. The consuls were charged with investigating the participation among Rome's elite, while defiance of the decree and illegal association with the cult was to be considered a capital offense. (Cic. *Leg.* 2.37; Livy 39.8-19; Val. Max. 1.3.1; 6.3.7; *CIL* 1^2.2.581 (= *CIL* 10.104); *ILLRP* 511).

[303] Lintott 1999: 87; Mousourakis 2003: 62; Williamson 2019: 311, 396. For the *lex Sempronia*, see Sall. *Iug.* 27.3; Cic. *Dom.* 24; *Prov. Cos.* 3; *Fam.* 1.7.10. On the *lex Caecilia Dida*, see Cic. *Dom.* 41, 50, 53; *Sest.* 135; *Phil.* 5.8; *Schol. Bob.* 140St. The *lex Caecilia Didia* stipulated two provisions: first, requiring a period of three market days, a *trinundinum* (roughly 17 days), had to pass between announcing a proposal (such as elections or legislation) and the actual vote; and second, prohibiting multiple statutes (also known as "riders") from being crowded into one law, a practice referred to as *per saturam*. It was in violation of the second provision, for instance, that the proposal of Marcus Livius Drusus in 91 (aiming at enfranchising Italian allies, redistributing land, and expanding the Senate)

There are, then, some gray areas regarding the extent of senatorial authority, such as the weight of *senatus consulta* on the actions of magistrates and authority delegated to the Senate by actual law. Instead of focusing on a *de facto*/*de jure* distinction, however, Lintott argues that historians should instead think in terms of earlier custom (*mos*) and later innovation, especially in regard to practicality and necessity.[304] As we have seen in the previous chapter, Cicero famously argued in his defense of Pompey's extraordinary command in 66 (Cic. *Man.* 60) that *ad hoc* innovation in response to circumstance was in fact part of Roman tradition. For example, *prorogatio*, the act of extending a magistrate's *imperium*, seems to have been under the legal purview of the Roman assemblies (Livy 8.23.11-12), but later instances of prorogation increasingly came from the Senate, to the point that by the end of the Second Punic War (218-201), according to Ridley, "prorogation became an administrative act of the Senate."[305] Indeed, as we have seen, even Polybius claimed that the Senate had the right of extending a magistrate's command at the end of his term or replacing him (Plb. 6.15.6).[306] Nevertheless, while the Senate's leadership may have been recognized beyond its traditional purview when necessity demanded, there were limitations to senatorial authority. Despite occasions of the Senate taking the lead with determining some prorogations, the people's jurisdiction over regulating magistracies tended to be respected overall.[307]

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was struck down (see Cic. *Dom.* 41, 53; App. *BC* 1.35; Vell. 2.13; Lintott 1965: 281-285; 1999: 44, 62, 87; Straumann 2011: 292; Tweedie 2011: 584).

[304] Lintott 1999: 86.

[305] For the quoted passage, see Ridley, 1981: 289 and 295. For further discussion of the Senate "assuming control of *prorogatio*, see Jashemski 1966: 36-37.

[306] For further discussion on the Senate's role in extending the *imperium* of magistrates, see Boak. 1918: 1-2, 8-10; Ridley 1981: 281, 283, 286-287; North 2007: 270; Burton 2014: 420; Coudry 2016: 34.

[307] Bauman 1968: 41, 44. In 211, after the disastrous Roman defeats in Spain at the hands of the Carthaginians, a military tribune named L. Marcius rallied the remnants of the scattered legions and secured Rome's position north of the Ebro River. In recognition of his bravery and leadership skill, the remaining Roman soldiers held an election and voted to confer the "highest authority" (*cuncti summa imperii*) upon Marcius (Livy 25.37.1-7). In his subsequent correspondence with the Senate, Marcius referred to himself as "propraetor." Many in the Senate were offended (*magnam partem … offendat*) by Marcius' claim to the title of propraetor, despite his bravery and service to the state, because he had not received the propraetorian *imperium* from either popular vote or senatorial decree (*imperio*

Up to now, I have discussed the Senate's official roles and responsibilities in the Roman government, as well as the complex and subtle relationship between the Senate's limited legal authority and its massive, unofficial influence in Roman politics. In general, the source of the Senate's true authority was not in *lex*, but *mos*. The *senatus consulta* were never legally binding, but often treated as such, while certain bills passed by the popular assembly deferred to the Senate's leadership in particular matters that would otherwise be outside of senatorial purview. The Senate's most active role in Roman politics, however, occurred during times of emergency. First, one of the Senate's most important roles in periods of political, social, and military crisis was in the appointment of the dictator. The dictatorship was not based on custom but was instead an official position in the Roman government. In times of political, social, and military crisis, the Senate would request one of the year's consuls to nominate a candidate for the dictatorship, whose appointment the Senate would then confirm by vote.[308] There were no set criteria for what could constitute such an emergency or crisis that necessitated a dictator, but most involved situations where the consuls or praetors were unable to fulfill their tasks, whether military, political, or both.[309]

Arguably the most powerful tool at the Senate's disposal during emergencies was the *Senatus consultum ultimum* (*SCU*), the "final decree of the Senate," in which the Senate called upon a magistrate (usually the consuls) to protect or deliver Rome from a crisis by any means necessary.[310] The substance of the *SCU* is often misunderstood and inaccurately portrays the

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non populi iussu, non ex auctoritate patrum dato). Consequently, in their reply, the Senate refused to address him as propraetor, lest it be thought that they were endorsing his unlawful claim to authority (Livy 26.2.1-6; Val. Max. 2.7.15). On L. Marcius, see also Lintott 1999: 81; Goldsworthy 2000: 253, 269.

[308] Heurgon 1973: 162; North 2007: 264; de Wilde 2012: 558.

[309] Ehrenberg 1953: 124; Mousourakis 2003: 100; Straumann 2016: 65-67.

[310] The origin, or earliest known occurrence, of the exact phrasing is in found in Caesar *BC* 1.5.3: *Decurritur ad illud extremum atque ultimum senatus consultum* (Last 1932: 83). On the above definition see also Lintott 1999: 4, 89-90; Mousourakis 2003: 100; North 2007: 272.

Senate as conferring widespread, unrestricted authority onto a chosen magistrate. In reality, however, the substance of the *SCU* was the same as any other *senatus consultum*, in that it was nothing more than a recommendation from the Senate to a magistrate and did not imply or include any conferment of additional power and authority, nor were magistrates coerced into action.[311] The problem with understanding the *SCU* was its ambiguity, since the Senate also offered no instruction to a magistrate regarding the means by which he was to go about saving the *res publica*. As Lintott states, the composition of the Senate's final decree was intentionally vague, "and it was left to the magistrate who received it to fill in the details."[312] Now, it must be acknowledged that, just as the *SCU* did not endow any additional powers upon a magistrate, there was also no explicit senatorial encouragement toward illegal activity. Nevertheless, in every instance of an *SCU*, there was an understood endorsement by the Senate of political violence, assassinations, martial law, or the suspension of civil rights (such as *provocatio*) on the part of the magistrate acting under the *SCU*.[313] As a consequence, the Senate could absolve itself of a great deal of the legal responsibility for any actions resulting from its "final decree." After all, the Senate could not be held accountable legally for the actions of an individual magistrate, especially considering that the *SCU* was only a suggestion and not a command. On the other hand, the situation was more complex for the magistrate answering the Senate's call. Though receiving no additional legal powers or authorization to bypass laws, the intentional vagueness of

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[311] Last 1932: 84-85; Lintott 1999: 91. Some scholars argue that, upon the issuance of a *SCU*, the Senate became "the state's supreme deliberative body" (Mitchell 1971: 61), while the magistrates were the "executive instruments of the Senate" (Hölkeskamp 2010: 27). Against Mitchell, Lintott argues that the Senate cannot be interpreted as taking charge in a *SCU* since the decrees specifically use hortative language, such as "urging" the consuls into action (Lintott 1999: 93). Furthermore, we cannot say that the magistrates were forced to respond obediently to a *SCU*, since some of the first instances of the Senate's final decree were in response to the perceived inaction of the consuls or other magistrates (Cic. *Cat.* 1.4; Val. Max. 3.2.17-18; Plut. *Cic.* 18.2; 19.3).
[312] Lintott 1999: 88.
[313] Last 1932: 84-85; Lintott 1999: 4, 89. For examples, see Sall. *Cat.* 29.2-3; 51.15-27; Caesar *BC* 1.5-7; Cic. *Cat.* 1.4; *Phil.* 8.13-14; *Rab. Per.* 20-21; Livy *Per.* 61.4, 9; Val. Max. 3.2.17-18; Plut. *Ant.* 5.1-2; *Cic.* 15.4-5; *C. Grac.* 14.3-4, 18.1; *T. Grac.* 19.3-4; *Pomp.* 59.1; Suet. *Iul.* 12; App. *BC* 1.33, 107; Dio 37.31.2; 40.49.5.

the *SCU* seems to have been interpreted by magistrates as an informal license from the Senate to ignore certain legal and constitutional restrictions on their actions and authority, such as the use of *imperium* in the city, which was otherwise illegal.[314] We can see evidence of this reasoning, for instance, in Cicero's speeches against L. Catilina in 63 and M. Antonius in 44-43, in which Cicero sees the *SCU* as justification for putting Roman citizens to death or using troops to quell unrest in Rome.[315]

A magistrate could still be held accountable for his actions in accordance with a *SCU,* however, but in practice the extenuating circumstances precipitating the "final decree" justified many of the extreme measures used by a magistrate in fulfilling it. As an example, L. Opimius (cos. 121) was brought to trial by a plebeian tribune, Q. Decius, in 120 for illegally killing and jailing Roman citizens during the events surrounding the death of C. Gracchus. Opimius was defended by one of that year's consuls, C. Papirius Carbo, who was able to secure an acquittal for Opimius on the grounds that his actions were considered justified and lawful (*iure*) because he was acting in accordance with the *SCU* and for the safety of the state (*pro salute patriae*).[316] According to Straumann, Opimius' successful exoneration established the "crucial, authoritative precedent (an *exemplum*) in favor of the validity of the 'last decree' and thus of the senatorial interpretation of the constitution."[317] That the authority of the *SCU* was accepted as a legitimate function of the Senate can be seen in the fact that there were no prosecutions of magistrates acting in accordance with *consulta ultima* from 120 to 63.[318] On the other hand, the fact that

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[314] On this see Drogula 2007.
[315] Sall. *Cat.* 51.15-27; Cic. *Rab. Per.* 3, 20-21, 30; *Cat.* 1.3-4; *Phil.* 5.31-34; 8.13-16; 11.28; Bonner 1922: 147; Drogula 2007: 450; Straumann 2016: 58-59, 90-93, 105, 116; Hodgson 2017: 121.
[316] For the public outcry against Opimius and his subsequent indictment by Q. Decius, see Cic. *Part Or.* 104-106; *Sest.* 140; *de Or.* 2.106, 132-134, 165, 168-170; *Brut*. 128; Livy 61.9; Plut. *C. Grac.* 18.1. See also North 2007: 273 on the example of Opimius.
[317] Straumann 2016: 59.
[318] Straumann 2016: 59

Opimius was put on trial does at least indicate that the actions of the Senate and magistrates were subject to the people's review. Thus, Opimius's acquittal may have entrenched the *SCU* as a legitimate function of the Senate, but it was not above popular scrutiny.

Lastly, the significance of the *senatus consultum ultimum* went beyond mere statute, but pertained to larger constitutional norms, such as the concept of justice and overall lawfulness (*ius*) in Roman politics. While the gravity and influence of all *senatus consulta* were based on socio-political norms (such as *mos*) and not legal statute (*lex*), the "final decree" went beyond this distinction and instead constituted an example of where *mos* could actually circumvent *lex,* seen in the Senate's endorsement for magistrates to disregard civil rights and legal restrictions.[319] Theoretically, magistrates were subordinate to the Senate and *lex*, but the *SCU* allowed magistrates to disregard many of the constitutional restraints on their authority. According to Cicero in 63, the swift action afforded by the *SCU* allowed the Roman state to respond to crises surrounding C. Gracchus in 121, as well as Saturninus and Glaucia in 100, as opposed to the inefficiency of senatorial deliberation that hindered Rome's ability to deal with the threat rising from L. Catilina's intrigue in 63 (Cic. *Cat.* 1.4). Cicero used similar examples again in his eighth *Philippic*, delivered in early 43, to refute the arguments of Q. Calenus, who wanted to negotiate with M. Antonius and avoid harsh political measures that would result in the unlawful killing of Roman citizens. In his rebuttal, Cicero argued for a distinction between those who are citizens by nature but enemies by choice, meaning that citizens who betray the state thereby relinquished the legal protections afforded by their citizenship.[320] Moreover, Cicero contended that the magistrates acting in accordance with the SCU were dutifully defending the Republic from its internal enemies. The overall point, according to Cicero, is that the suspension of civil rights and

[319] Lintott 1999: 90.
[320] Cic. *Phil.* 8.13: *qui natura cives sunt, voluntate hostes*.

even the killing of Roman citizens can be justified when the sedition, unrest, or rebellion threaten the survival of the Republic. Again, as we have seen, the *SCU* did not bestow additional legal power upon the magistrate, nor did it authorize him to act contrary to Roman law. It did, however, create a situation where magistrates were encouraged to ignore law.

The Popular Assemblies

Polybius begins his discussion on the role of the people (δῆμος) in the Roman government first by addressing an understandable problem of perception. Namely, Polybius says that it would be reasonable to ask "what part in the constitution is left for the people," when the Roman Senate effectively controlled Rome's treasury, while the consuls held absolute power and authority in war.[321] Although it might seem that the Senate and consuls possessed the lion's share of power in the Roman state, Polybius states to the contrary that the part of the Roman government left to the people was very significant (γε βαρυτάτη).[322] Indeed, the people's assemblies were the "sovereign authority" in the Roman government, according to Lintott, because they held absolute authority over the most fundamental political aspects of Roman politics, the right of passing or rejecting laws and electing magistrates.[323] As discussed above, any legislation drafted and proposed by the Senate had to be ratified by the Roman people in order to become law.[324] Similarly, Roman magistrates, being the executive agents of Rome's government, depended entirely on the people for their office. Thus, both the Senate and magistrates relied on popular support for their distinct spheres of operation and neither could

[321] Plb. 6.14.1-2: "ἐκ δὲ τούτων τίς οὐκ ἂν εἰκότως ἐπιζητήσειε ποία καὶ τίς ποτ᾽ ἐστὶν ἡ τῷ δήμῳ καταλειπομένη μερὶς ἐν τῷ πολιτεύματι, τῆς μὲν συγκλήτου τῶν κατὰ μέρος ὧν εἰρήκαμεν κυρίας ὑπαρχούσης, τὸ δὲ μέγιστον, ὑπ᾽ αὐτῆς καὶ τῆς εἰσόδου καὶ τῆς ἐξόδου χειριζομένης ἁπάσης, τῶν δὲ στρατηγῶν ὑπάτων πάλιν αὐτοκράτορα μὲν ἐχόντων δύναμιν περὶ τὰς τοῦ πολέμου παρασκευάς, αὐτοκράτορα δὲ τὴν ἐν τοῖς ὑπαίθροις ἐξουσίαν;"
[322] Plb. 6.14.3.
[323] Plb. 6.14.4, 9-10, 12; Lintott 1999: 3, 40; North 2007: 260-261; Straumann 2016: 84.
[324] Mousourakis 2003: 57-58; Anderson 2018: 19-20.

dispense with the people.[325] In fact, there was theoretically no limit on the legal and political power of the popular assemblies, even if the people voted for measures that contradicted current law in Rome.[326] For example, in 353, when two patrician consuls were elected by the people in violation of the Licinian Law of 367, which required one consul to be plebeian, Livy argues that this irregularity was permitted on the basis of a statute in the Twelve Tables, stating that "whatever was the last order of the people should have the force of law."[327] According to Straumann, such a ruling demonstrates the constitutional principle in Rome that any law was subject to change or repeal by the *populus Romanus* except for the fundamental principle that the vote of people's assemblies was sovereign in Roman politics.[328]

Despite the political power the people's assemblies wielded, it would be inaccurate to ascribe the modern notion of "popular sovereignty" to the Roman government because of the inherent inequality in the Roman voting system.[329] The concept of sovereignty refers to the supreme power in a state that was itself not restrained by the rules or laws of that state.[330] In the idea of popular sovereignty, then, supreme authority in the state is located in the hands of the people, who delegate specific powers to certain elements of the government.[331] But if the people are the sovereign power within a state, then their power cannot have any limitation.[332] Although every Roman citizen was allowed to cast their vote, they were assigned to different assemblies, *comitia*, each of which only voted on particular issues or elected certain magistrates and were

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[325] Lintott 1999: 3; Straumann 2011: 286; Straumann 2016: 38.
[326] Cic. *Caec*. 95-96; Lintott 1999: 40; Straumann 2011: 291-292; Straumann 2016: 61, 107.
[327] Livy 7.7.12: *ut quodcumque postremum populus iussisset id ius ratumque esset*. See also Livy 9.3.7-9. On the *lex Licinia* of 367, see Livy 6.42.9-11.
[328] Harrer 1922: 53; Lintott 1999: 40; Straumann 2011: 285; Arena 2014: 218, 225; Straumann 2016: 37-40.
[329] Straumann 2016: 84.
[330] Huntington 1968: 101; Barber 2010: 122.
[331] Rapaczynski 1997: 9-11; De Marneffe 2004: 225; Kilberg 2014: 1069-1070.
[332] Rapaczynski 1997: 11-12.

organized on the basis of a person's place of residence, class, or property value.[333] Final votes were not totaled individually, rather a person voted to determine the singular vote of his demographic unit, either the *curia*, century, or tribe.[334] And, again, although every Roman citizen had the right to vote (*ius suffragii*), voting only took place in Rome itself, implicitly disenfranchising any citizens who could not come to the city for assemblies. For these reasons, Lintott states that the Roman assemblies were only a "representative group of the population," not an accurate or comprehensive canvass of authentic popular opinion.[335]

Nevertheless, in comparison to the limitations placed on the Senate and magistrates, the powers and responsibilities of the assemblies in the Roman government were enormous. Polybius first comments on the judicial purview of the assemblies, stating that the Roman people had the sole power of conferring honors and imposing official punishments (Plb. 6.14.4-5).[336] Furthermore, it was the Roman people who tried cases that imposed considerable penalties, especially regarding those who had held high office, as well as cases which carried the possibility of a death penalty.[337] All citizens also had the right of *provocatio ad populum*, allowing them to appeal the judgement of serious offenses to the people.[338] The people elected all magistrates to their respective offices, which Polybius calls "the noblest regard of virtue in a state" (Plb. 6.14.9). Even the consuls themselves were held accountable to the people for their actions in office at the end of their term (Plb. 6.15.10). The people could even vote to extend the

[333] Lintott 1999: 4; North 2007: 260-262.
[334] North 2007: 263.
[335] Lintott 1999: 41-42.
[336] Mousourakis 2003: 57; Anderson 2018: 19-20.
[337] Plb. 6.14.6: κρίνει μὲν οὖν ὁ δῆμος καὶ διαφόρου πολλάκις, ὅταν ἀξιόχρεων ᾖ τὸ τίμημα τῆς ἀδικίας, καὶ μάλιστα τοὺς τὰς ἐπιφανεῖς ἐσχηκότας ἀρχάς. θανάτου δὲ κρίνει μόνος.
[338] De Wilde 2012: 560.

imperium of a magistrate (*prorogatio*), as well as to revoke the office of a magistrate who had failed to exercise his duties properly (*abrogatio*).[339]

All laws were subject to the people's approval or rejection, as well as foreign alliances and treaties, and especially declarations of war and terms of peace, which were the most important powers held by the assemblies, according to Polybius (Plb. 6.14.10-11, 15.9). No part of the law or government was outside the reach of the people's assemblies, and, beyond merely approving or rejecting law, a vote of the assemblies could repeal standing law or alter elements of the Roman constitution.[340] In emergencies, the assemblies had the right to create and assign extraordinary constitutional power, especially in regard to magistrates.[341] Thus, most breaches of constitutional norms have their root in the votes of the popular assemblies. Indeed, because nearly all acts of legislation and decrees required the people's approval, Polybius states that both the Senate and consuls tried not to neglect the people, but instead took care to respect their concerns and wishes (Plb. 6.15.11, 16.1). Overall, Polybius states that the power of the assemblies in the Roman government was such that "the Senate fears the masses and is devoted to the will of the people" (Plb. 6.16.5).[342]

The organization and structure of the various assemblies, *comitia*, was complex to say the least, but, according to Lintott, they reflected the "natural growth of the constitution" and the development of the people's participation and agency in Roman government.[343] There were four main voting assemblies over the course of the Roman Republic, though the prevalence of their use varied over time: The *comitia curiata* was the earliest Roman assembly and structured

[339] Lintott 1999: 63; North 2007: 270.
[340] Lintott 1999: 63.
[341] Mousourakis 2003: 78; Straumann 2016: 84.
[342] Plb. 6.16.5: διὸ πάντων τῶν προειρημένων χάριν δέδιε τοὺς πολλοὺς καὶ προσέχει τῷ δήμῳ τὸν νοῦν ἡ σύγκλητος.
[343] Lintott 1999: 61.

around the 30 *curiae*, the basis of Rome's early military organization. The *comitia centuriata* was based on a person's property value, specifically in proportion to their capacity to participate in the Roman army. The *comitia tributa* consisted of all Roman citizens, but voters were assigned to geographic voting districts based on where they lived in and around the city. Finally, the *concilium plebis*, or "plebeian council," was technically an offshoot of the tribal assembly but functioned as a separate assembly in its own right, was open only to the plebeian social class in Rome, and passed its own legal resolutions, the *plebiscita*, which were binding on the Roman people as a whole.[344]

The *Comitia Curiata*

One of the earliest Roman voting assemblies was the "curiate assembly," or *comitia curiata*, composed of thirty *curiae*, which were allotted equally between the three ancient Roman tribes (the Ramnes, Luceres, and Tities).[345] The *curiae* may have been based on geographic divisions of the Roman population at first, though the names of some *curiae* suggest that membership was also tied to a person's *gens*, or clan.[346] Furthermore, the *curiae* did serve as the organizational foundation for the Roman military early on (Dion. Hal. 2.7.2-4), but this function became obsolete as Rome's population grew and the legionary structure was reformed.[347] Nevertheless, the *curiae* retained much more of its religious significance over the course of the Roman Republic. As a voting body, ten *curiae* were allotted to each of the three ancient tribes,

[344] Heurgon 1973: 172; Mousourakis 2003: 65, 113; North 2007: 261.
[345] Lintott 1999: 49; Forsythe 2007: 25; North 2007: 261-262. During Rome's regal period, the *comitia curiata* may have been preceded by another assembly, the *comitia calata*. The details surrounding its composition and activities are vague but were similar to many of those in the *comitia curiata*, such as confirming and hearing announcements from the kings, Senate, and priests, as well as confirming wills and inheritances. Taylor 1966: 5; See Heurgon 1973: 123-125.
[346] See Gell. 15.27.5: "When voting is done according to families of men, the assembly is called 'curiate'" (*Cum ex generibus hominum suffragium feratur, 'curiata' comitia esse*).
[347] Forsythe 2005: 108

with thirty *curiae* in total. All citizens voted within their respective *curia*, which was then counted as one singular vote and presented to the *comitia* alongside those of the other twenty-nine *curiae*. The *comitia curiata* likely originated during Rome's regal period with the main responsibility of confirming the political power (*potestas*), military authority (*imperium*) and religious sanctity (*auspicium*) of a newly appointed Roman king, known as the *lex curiata de imperio*. The curiate assembly continued to function in this capacity during the Republic, and, when presided over by a consul or praetor, similarly confirmed *imperium*, *potestas*, and *auspicium* upon elected magistrates.[348] The assembly's remaining duties were conducted under the supervision of priests or the pontifex maximus and included the confirmation of wills, adoptions, and religious matters (holidays, ritual observances, etc.).[349] The *comitia curiata* had no judicial function, was not responsible for passing new legislation, and did not elect any magistrates. Over the course of the Republic the actual political significance of the curiate assembly declined, becoming "symbolic and ritualized," according to Lintott, likely because it quickly ceased to reflect the growing population, and because it was superseded in importance by other assemblies based on more precise (though imperfect) representations of the Roman people.[350]

The *Comitia Centuriata*

The centuriate assembly, *comitia centuriata*, was arguably one of the most important assemblies in the early Roman Republic. Whereas the basis of the curiate assembly was

[348] Taylor 1966: 3-5; Heurgon 1973: 121-125; Lintott 1999: 49; Mousourakis 2003: 55, 105; Forsythe 2005: 179; North 2007: 263. For further discussion on the *comitia curiata* and especially the *lex curiata de imperio*, see Nicholls 1967: 257-278 and Develin 1977b: 49-65.
[349] Taylor 1966: 4; Heurgon 1973: 124-125; Lintott 1999: 49; Forsythe 2005: 109, 179; North 2007: 261.
[350] Lintott 1999: 49.

population divisions and a person's lineage, the organization of the *comitia centuriata* was based on wealth and a person's status in the Roman army (*exercitus*).[351] As a reflection of early Roman legionary structure, voters were sorted into large groups called centuries, or *centuriae*, named after the military units consisting of 100 men.[352] Because the centuriate assembly was, according to Forsythe, "considered to be an army sitting as an assembly, it was not permitted to convene within the sacred boundary (*pomerium*) of the city," and therefore met on the *Campus Martius*, the "Field of Mars," the military grounds outside of Rome.[353] Roman tradition states that the centuriate assembly originated during the reign of Servius Tullius (578-535) and consisted of around 193 centuries.[354] Although all registered citizens voted in the *comitia centuriata*, the votes of wealthier citizens, who could afford more or higher quality armor and equipment, carried more weight than those of less affluent citizens, who were consequently marginalized.[355] The rationale behind this design was that those who carried more of the collective burden in tax revenue and in defending the state ought to have the greater share of political influence.[356] As Cicero argues, "the distribution of the people by wealth, rank, and age brings greater wisdom to the ballot than when they are summoned broadly by tribes."[357] As with the curiate assembly, citizens voted within their assigned century in the *comitia centuriata*, and the consensus of each

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[351] For the association between the army (*exercitus*) and the *comitia centuriata* as a voting assembly, see Varro *LL* 6.88; Livy 39.15.11; Gell. 15.27.5; Macr. 1.16.13-15.
[352] Despite the similarities in the name, the *centuriae* in the centuriate assembly were obviously not limited to 100 men (Taylor 1966: 86).
[353] Forsythe 2007: 27. For a similar view, see Taylor (1966: 85), who states that "although as an *exercitus urbanus* the voters appeared unarmed in the toga …, they were viewed as soldiers under the orders of the presiding officer." See also Lintott 1999: 41; North 2007: 261.
[354] See Cic. *Rep.* 2.39-40; Livy 1.42.4-43.10; Dion. Hal. 4.21.1; Lintott 1999: 56-57; Forsythe 2005: 114; North 2007: 261.
[355] Lintott 1999: 55; North 2007: 261-262.
[356] Cic. *Rep.* 2.40; Livy 1.43.10; Dion. Hal. 4.21.2; Lintott 1999: 56.
[357] Cic. *Leg.* 3.44: *Descriptus enim populus censu, ordinibus, aetatibus, plus adhibet ad suffragium consilii quam fuse in tribus conuocatus.* See also Straumann 2016: 46-47. This contrasts with Aristotle, who, though seeing the merits in stratification in voting according to class, also argued that "the many … can, when they have come together, be better than the few best people, not individually, but collectively" (Arist. *Pol.* 3.1281.40a-1281b.10). For more on Aristotle and democratic voting, see Lintott 1992: 115-117.

century was cast as a single vote. Meetings of the *comitia centuriata* were presided over by the most senior magistrates, consuls, praetors, dictators, and less commonly the *interrex*.[358] Similarly, the election of the most senior magistrates (the consuls, praetors, and censors) fell to the centuriate assembly.[359] And while the *comitia centuriata* possessed a broad purview initially, its responsibilities narrowed over time, and by the second century the assembly was of limited importance.[360] By 218, for instance, it became less common for the *comitia centuriata* to vote on actual legislation, aside from declarations of war. Nevertheless, the fact that *comitia centuriata* persisted demonstrates, according to Lintott, that "worth, wealth, and age" were prominent in people's minds throughout the Republic.[361]

The *Comitia Tributa*

The third popular assembly, and perhaps the most prevalently used, was the tribal assembly, the *comitia tributa*. The tribal assembly was particularly important in the middle and late Republic as it used a more straightforward system to canvass the votes of Rome's growing population.[362] In contrast to the kinship groups in the *curiata* and the complex gradations of the *centuriata*, the *comitia tributa* was based on voting districts derived from geographic divisions of the population in and around the city of Rome.[363] Like the other assemblies, the *comitia tributa* was open to all citizens, but the tribal membership played a larger role in Roman society than the criteria for other assemblies as it was a key component of Roman citizenship. Every Roman citizen was assigned to a tribe, and a person's tribal affiliation was an official component of

[358] North 2007: 261.
[359] Lintott 1999: 56; Mousourakis 2003: 107.
[360] Lintott 1999: 61.
[361] Lintott 1999: 1961.
[362] Lintott 1999: 49.
[363] Lintott 1999: 50; North 2007: 262-263.

Roman nomenclature.[364] Historically, the origin of the *comitia tributa* is unclear, but it was certainly established as a legitimate assembly by the early to mid-400's, since in 471 the plebeian magistracies were transferred from the *comitia curiata* to the *tributa*.[365] In 495 there were four urban tribes in Rome and seventeen rural tribes in the surrounding countryside (Livy 2.21.7). As Roman territory in Italy expanded, the number of tribes began to increase. Four tribes were added in 387 after the conquest of Veii (Livy 6.5.8), with ten more tribes being created between 358 and 241, bringing the total number of tribes up to thirty-five (four urban and thirty-one rural).[366] After 241, territory annexed by Rome and newly enfranchised citizens were distributed among existing tribes, either by expanding tribal districts to incorporate new land or by designating new non-contiguous regions of land for those tribes that were boxed in and unable to expand.[367] As a consequence, over time the composition of Roman tribes throughout Italy became a confusing mix of massive districts and smaller areas distributed among the thirty-five tribes.

The *comitia tributa* was much more versatile in its responsibilities than other assemblies, voting on most matters of legislation, including criminal trials that required a fine as punishment, and served as the electoral body for aediles and quaestors.[368] The structure and procedure of the tribal assembly clearly indicate an attempt to create a more balanced, equal, and fair arena for voting.[369] Most notably, votes in the *comitia tributa* were not weighted as in the *comitia*

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[364] Taylor 1966: 59; Lintott 1999: 50-51; North 2007; 261. As an example, Cicero's full name with his filiation and voting tribe would be Marcus Tullius M(arci) f(ilius) Corn(elia tribu) Cicero.
[365] Livy 2.56.2-3; Dion. Hal. 9.41.2-5, 49.5; Taylor 1966: 59-60; Forsythe 2005: 177-178, 183.
[366] Taylor 1966: 59-60, 64-65; Lintott 1999: 50; Mousourakis 2003: 110-111; Forsythe 2005: 178-179; North 2007: 261.
[367] Taylor 1966: 65-66; Lintott 1999: 50. There were some experiments to expand the number of tribes after the Social War, according to Lintott, but the population of these tribes were eventually folded into the existing thirty-five (App. *BC* 1.49, 53).
[368] Taylor 1966: 74; Millar 1998: 16; Lintott 1999: 55; Mousourakis 2003: 110-111; North 2007: 261.
[369] Taylor 1966: 73.

centuriata, but instead each tribe possessed only one vote. The use of sortition to determine voting order, an attempt to eliminate any appearance of favoritism or hierarchy among the tribes, was held in such high importance that it was preserved in an elaborate ritual that had religious connotations.[370] The result was that the *comitia tributa* represented the voices of a wider group of people in the Roman state, and a much more democratic assembly than the *comitia curiata* or *centuriata*.[371]

The *Concilium Plebis*

There is debate among scholars regarding the nature, origin, and even veracity of the *concilium plebis,* the "plebeian council" or "assembly." First, many scholars claim that the *comitia tributa* was split into two distinct assemblies, one for both all citizens, the *populus*, which included both patricians and plebeians (the original *comitia tributa*), and another for the plebs only (the *concilium plebis*).[372] Against this, others maintain that there was only ever a single *comitia tributa* and that it had always served plebeian interests exclusively.[373] A third perspective, which seems to represent the current historical consensus, argues for a synthesis of both preceding views, asserting that the *comitia tributa* was indeed the sole tribal assembly, but that it also could take two forms that addressed different sectors of the Roman population depending on the presiding magistrate and the matter put before it. When presided over by a consul or praetor, the *comitia tributa* addressed and represented all Roman citizens (the *populus*), but a tribal assembly under the presidency of a plebeian tribune was convened on behalf of and

[370] Taylor 1996: 71-73; Lintott 1999: 46, 55.
[371] Taylor 1966: 83; Forsythe 2005: 182.
[372] Mommsen 1887: 3.321-325; Staveley 1955: 4.
[373] Heurgon 1973: 172; Develin 1975: 337; Sandberg 1993: 96.

addressed only the plebeian population of Rome.[374] The division in opinion on the differences between the *comitia tributa* and the *concilium plebis* is understandable, given the undeniable similarities between the two assemblies in both origin and function. Despite their similarities, however, several distinctions between both assemblies can be seen upon close inspection. For instance, although Roman sources use the term *comitia* interchangeably to refer to every type of assembly, the curiate, centuriate, and tribal assemblies are never referred to as a *concilium*, a term reserved only for the plebeian assembly.[375] And while the meeting place and organizational structure was the same for both bodies, only the *concilium plebis* was convened by the tribune of the plebs. Similarly, only the *concilium plebis* could elect magistrates reserved for the plebs, namely the plebeian aediles and tribunes.[376] The most important and unique component of the plebeian assembly, however, was the *plebiscitum*, or "plebiscite," a resolution that could only be passed by the *concilium plebis* but was binding on the entirety of the Roman people.[377] Plebiscites did not need to be proposed by the Senate, were not subject to the approval of any other assembly, and carried the full force of law (*lex*).[378]

The Magistracies

The Roman magistracies functioned as the executive component of the Roman government.[379] After the monarchy was abolished in Rome (c. 509 BCE), the king's political power (*potestas*) and military authority (*imperium*) were distributed among the annually elected

[374] Botsford 1909: 138; Taylor 1966: 60-64; Lintott 1999: 53-55; Mousourakis 2003: 102, 112, 114; North 2007: 261.
[375] Botsford 1909: 135; Taylor 1966: 60; Lintott 1999: 43.
[376] Livy 2.33.3, 56.2-3 (the *lex Publilia Voleronis* of 471 secured this right for the plebs exclusively); Cic. *Rep.* 2.59; Mousourakis 2003: 62, 112; North 2007: 261.
[377] Mousourakis 2003: 21, 113; North 2007: 261.
[378] Heurgon 1973: 172; Mousourakis 2003: 65, 113.
[379] Mousourakis 2003: 76.

magistrates.[380] Although the tradition of two magistrates occupying the highest political office in Rome seems to be historically accurate (as verified by the *Fasti*), the forms of the magistracies, as well as their powers, responsibilities, and terms of office appear to have developed over time.[381] Evidence of this can be seen in the fact that the highest Roman magistrate was not even the consul originally, but was possibly a *praetor maximus* or *iudex*.[382] As executive offices, the primary functions of Roman magistrates were to carry out the laws of the state, act as public administrators, and (for higher magistracies) to serve as military leaders. In this sense, magistrates represented the Roman government put into action and allowed the people to engage or interact directly with their government. Although bound by the laws of the state, magistrates operated with relative autonomy in carrying out the responsibilities of their offices without consulting the Senate and people. This discretion of action was only granted, however, with the expectation that magistrates would act "in accordance with the public interest and their good faith."[383] To be sure, magistrates were indeed held accountable to the people for their actions in

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[380] Kunkel 1966: 14-17; Lintott 1999: 94-94; Mousourakis 2003: 69.

[381] This refers to a disagreement among scholars over the origin of Rome's magistracies. One theory, espoused by Mommsen, is that the two magistrates directly inherited the king's *imperium* following the dissolution of the monarchy (Mommsen 1887: 71-72). On the other hand, other scholars see the multiple colleges of magistracies (such as praetors, *iudices*, consuls, the *decemviri*, and the consular tribunes) as evidence that the Senate exercised control over the early Roman government and appointed magistrates as needed (Kunkel 1966: 14; Mousourakis 2003: 69). For the *Fasti*, see Degrassi 1954.

[382] Lintott 1999: 104. According to Varro (*LL* 6.9.88), when a consul was going to summon the army (*qui exercitum imperaturus erit*), he instructs his assistant (*accensus*) to order the citizens to assemble before the consul (*voca … omnes Quirites huc ad me*). The assistant then calls out to all citizens and orders them to come before the consuls, referring to them as *iudices (omnes Quirites … ite huc ad iudices*); Livy (3.55.11) also refers to a tradition in which consuls were called judges (*iudicem enim consulem appellari*). As for consuls referred to as praetors, Livy also discusses an "ancient law" (*lex vetusta*), which mentions a *praetor maximus*, meaning "the highest commander." Zonaras also states that consuls were "previously called praetors," and the first consuls referred to as such were L. Valerius and M. Horatius in 449 (Zon. 7.19).

[383] The quote for this expectation is "a standard phrase found in legal texts," according to Lintott (1999: 94). Lintott specifically refers to the *lex agraria* of 111 (*CIL I*^{2} n. 585.29, 45): *consulis praetoris censoris queiquomque tum erit de ea re iuris dictio iudici iudicis recuperatorum datio esto ita utei eis e re publica fideque sua videbitur esse*. Similar phrasing can be seen much earlier in 172, in a *senatus consultum* responding to a request by the Macedonian city of Thisbe for Roman arbitration regarding property disputes. In this case, several matters were delegated by the Senate to individual magistrates, each of whom were to act "in accordance with the public interest and his own good faith" (*RDGE* 2; *Syll.*^{3} 646). See the translation of this decree in Bagnall and Derow 2004: 83-85. Livy (27.38.9-10) also records a decree by the Senate in 207 to allow the consuls M. Livius Salinator and C. Claudius Nero to

office at the end of their term (Plb. 6.15.10-11).[384] Over time, various laws provided more structure to Rome's magistracies and limited the extent of their power, such as the law of *provocatio*, allowing citizens to appeal to the people against coercion and punishment from magistrates, as well as the *lex Villia Annalis* in 180 (Livy 40.44.1), which specified the minimum ages and the required order in which magistracies were to be held.[385]

A hierarchy did exist between and among Roman magistracies, though it "was usually more latent than apparent," according to Lintott, since higher ranking magistrates rarely intervened in the business of their junior colleagues.[386] Nevertheless, obstruction was not only possible, but did occur, and magistrates were not compelled to act in unison or agree on all issues.[387] In general, higher magistracies, such as consuls and praetors, could act to prevent the acts of magistrates of lower rank through the use of the veto (*intercessio*), while magistrates of equal rank could only act in response to each other, by issuing a resolution that rescinded the decree of a colleague.[388] Plebeian tribunes, on the other hand, had a much wider purview of *intercessio* and could veto the acts of any magistrate, senatorial decrees, and even legislation.[389] But for magistrates of equal rank, there were other preemptive methods to obstruct the acts of a colleague through the use of legal and even religious technicalities, such as consulting auspices

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reinforce and distribute their forces "as they thought best" (*vellent*) and "as they considered was best for the Republic" (*quo e re publica censerent*).

[384] Lintott 1999: 94.

[385] On the *lex Valeria de provocatio* of 300, see Bauman 1973; Lintott 1999: 33-38, 97-99; Mousourakis 2003: 55; Williamson 2019: 199. For the *cursus honorum*, on which I elaborate below, see Lintott 1999: 144-146. On the lack of age restrictions before the *lex Villia Annalis*, see Tac. *Ann.* 11.22. By the time of the Second Punic War (218-201 BCE), at least, there was apparently some legal basis for objecting to a person's candidacy on the basis of age, such as in the election of P. Cornelius Scipio (later Africanus) in 213, who was 22 years old at the time, though popular support secured his election (Livy 25.2.6-7). Scipio's youth would become a mark of concern again in 211, when he was elected as proconsul in Spain, and in 205, when he stood for the consulship and command in North Africa. In these two commands, however, the concerns over his age related to a perceived lack of experience and not a legal objection (Livy 26.18-19; 28.40-43).

[386] Lintott 1999: 94.

[387] Lintott 1999: 99-100.

[388] Lintott 1999: 101.

[389] Lintott 1999: 124; North 2007: 264; Mousourakis 2003: 75.

or prohibiting any public business to take place on a given day. For instance, in 133, Tiberius Gracchus attempted to forestall opposition to his agrarian bill by forbidding any other magistrate from conducting public (that is, political) business until Gracchus himself was able to bring his proposal before the assemblies.[390] As another example, one of the consuls of 59, M. Calpurnius Bibulus, unsuccessfully attempted to block the passage of his colleague Caesar's agrarian bill by sequestering in his own home and proclaiming "a sacred period," during which assemblies could not meet.[391]

Although disagreement and conflict among magistrates were not unusual and did occur, they were not necessarily inevitable. To the contrary, collegiality, cooperation, and the avoidance of conflict among colleagues were much more common for Roman magistrates than outright or persistent opposition. As Lintott points out, when consuls shared joint commands in the Second Punic War, leadership was alternated daily between colleagues or determined by taking auspices.[392] We can also find evidence of cooperation between rivals in office, even in sharing the prestige of a Roman triumph, which is especially noteworthy considering the importance of personal distinction and *gloria* among Roman aristocrats.[393] In 207, the consuls, M. Livius Salinator and C. Claudius Nero, were respectively assigned the *provinciae* of facing an invasion of Cisalpine Gaul by Hasdrubal Bacra and containing Hannibal in southern Italy. Despite the

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[390] Plut. *Ti. Gracch.* 10.5-6: διαγράμματι τὰς ἄλλας ἀρχὰς ἁπάσας ἐκώλυσε χρηματίζειν, ἄχρι ἂν ἡ περὶ τοῦ νόμου διενεχθῇ ψῆφος. A similar tactic was used in 88 by that year's consuls, L. Cornelius Sulla and Q. Pompeius Rufus, against the pro-Marian machinations of the tribune, P. Sulpicius. In this case, however, the consuls' effort was unsuccessful, since Sulla was compelled to rescind the decree, after which Sulpicius removed Pompeius from office and sponsored a bill to transfer Sulla's command against Mithridates to Marius (Plut. *Sull.* 8.3-4, *Mar.* 35.3-4; App. *BC* 1.55-56).
[391] Cic. *Har. resp.* 45; Vell. 2.44.5; Sen. *Dial.* 6.14.1-2; Plut. *Caes.* 14.9, *Pomp.* 48.5; Suet. *Iul.* 20.1; App. *BC* 2.12; Dio 38.6.4-6; Gray-Fow 1990: 180; Canfora 2007: 78-79; Lebovitz 2015: 432-433 442; Frolov 2017: 987.
[392] Plb. 3.110.4, 113.1; Livy 21.41.2; Lintott 1999: 100.
[393] On the predisposition toward competition and ambition to achieve distinction and glory among Roman aristocrats, see Plb. 54.3, 57.5-6; Sall. *Cat.* 7.3-6, 10.5, 11.1-2; Tac. *Ann.* 3.27-28; Biagini 1994: 339; Lintott 1999: 7, 101, 119, 145, 180; North 2007: 266, 274-275; Hammer 2008: 50, 136, 141, 160, 195-196, 209-210; Mouritsen 2011: 221-225, 230-232; Straumann 2016: 10, 104; Hodgson 2017.

shared enmity toward each other, both consuls worked together and coordinated their joint efforts "in perfect harmony," according to Livy.[394] Following their collaborative victory over Hasdrubal Barca in the Battle of the Metaurus, both consuls were granted a triumph.[395] According to Livy (28.9.9-11), rather than celebrating separate triumphs, the consuls worked out an accommodation on their own volition wherein Livius assumed the higher honor of leading his troops in the triumphal procession in a chariot, while Nero followed his colleague on horseback and without his own soldiers in the procession (who had been left in southern Italy to oppose Hannibal).[396] The joint triumph of Livius and Nero in 207 also shows that cooperation between magisterial colleagues could also involve the acknowledgment of hierarchy. Both Livy and Valerius Maximus state that Livius was accorded the higher honor in the triumph because the battle was conducted in his assigned province and under his *auspicia* as commander.[397]

Again, although conflict was possible between magistrates and certainly did occur, the norm was cooperation among colleagues.[398] Especially for higher magistrates, established hierarchies served more to prevent conflicts between commanders rather than to enforce the subordination of lower magistrates. *Imperium*, for instance, could be distinguished as "greater" (*maius*) or "lesser" (*minus*), not only between different magistracies, such as consuls and praetors, but also between colleagues.[399] Though not impossible, it was common for one magistrate to interfere in another's jurisdiction and, as Lintott states, even more rare for a higher

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[394] Livy 27.38.9: *Ea omnia cum summa Concordia consulum acta.* See also Livy's reiteration of their cooperation at 28.9.9: *bellum communi animo gessissent.* See also Scullard 1973: 71-73; Eckstein 1987: 43-48.
[395] On the Battle of Metaurus, see Plb. 11.1-3.3; Nepos *Cat.* 1.2; Hor. *Od.* 4.4.37-40; Livy 27.43-49, 36.36.6; Val. Max. 3.7.4, 7.7.4; Front. *Str.* 1.1.9, 2.3.8, 4.7.15; Silius 16.522-808; Flor. 1.22.50; App. *Hann.* 52-53; Ampel. 18.12, 36.3, 46.6; Eutrop. 3.18.2; Oros. 4.18.9-14; Zonar. 9.9.
[396] On the triumph, see Enn. *Ann.* 299; Livy 28.9.6-14; Val. Max. 4.1.9; *Vir. Ill.* 48.5, 50.2.
[397] Pseudo-Aurelius Victor states that Nero received an *ovatio* (*Vir. Ill.* 48.5), which corresponds to his procession on horseback (*equo*) as reported by Livy and Valerius Maximus (Livy 28.9.6-14; Val. Max. 4.1.9). On *ovationes*, see Gell. 5.6.20; Plut. *Marc.* 22.1-4; Sumi 2015: 30-31, 65, 175-176, 247-249.
[398] Lintott 1999: 100.
[399] On *imperium maius*/*minus*, see Last 1947: 157-164; Ehrenberg 1953: 113-136; Ridley 1981: 295.

magistrate (such as a consul or a praetor) to act with "overarching authority in any way similar to that of the emperors later."[400] The overall tendency for cooperation among magistrates, or the lack of conflict as a defining rule of interaction, challenges the perception that collegiality in the Roman Republic was solely a method of using magistrates to check the power and actions of their peers. The multiplicity and collegiality of magistrates reflected the vast array of political responsibilities brought on by Rome's expansion throughout the Mediterranean over the course of the Republic and the need for efficiency, coordination, and flexibility in addressing those obligations.[401]

The specific duties and responsibilities of Roman magistrates were determined by the assignment of *provinciae*. Originally the term broadly referred to a formal task assigned to a magistrate, but its most common usage was to specify the theater of combat for a magistrate bearing *imperium*, such as a praetor or consul. Later in the Republic's history, roughly around the third century, when Rome began to retain territorial possessions outside of Italy, the term *provincia* took on an additional connotation that indicated the administration or governance of delineated territory, a meaning akin to its modern derivative, "province."[402] As discussed above, the separation and distribution of responsibilities between magistrates partly served to mitigate the potential for conflict among colleagues. Similarly, in place of a strictly enforced hierarchy (between magistrates of equal rank, such as consuls), the allocation of *provinciae*, especially in regard to military commands or territorial administration, could help prevent magistrates from encroaching upon a colleague's jurisdiction. There were two standard methods for the allotment of provinces, the practice of sortition (*sortes*), or drawing lots, or an agreement among the

[400] Lintott 1999: 102. See also Henderson 1957: 84.
[401] Lintott 1999: 100.
[402] Lintott 1999: 101; Gargola 2017: 69.

magistrates themselves (*comparatio*).[403] From a practical standpoint sortition was designed, according to Lintott, "to control aristocratic rivalry and to save aristocratic pride," by ensuring impartiality in provincial assignment.[404] In addition, as with its use in voting assemblies, sortition was conducted as a religious ritual and its results were treated as omens, thus imbuing provincial assignments with divine legitimacy as an endorsement by the gods of the lot's validity.[405] On rare occasions, the Senate could bypass sortition and assign a province to a magistrate directly if a particular task was better suited for one official and so long as his colleague did not object, though this was considered extraordinary and very controversial.[406] Similarly, popular votes and plebiscites could also decide provincial assignments, as happened in the consulship of Scipio Aemlianus in 147, or even override *provincia* predetermined by sortition, as was the manner in which C. Marius gained the command against Jugurtha in 107, but such acts were also considered extraordinary.[407]

Potestas and *Imperium*

[403] Stewart 1998: 12-13, 22-38; Lintott 1999: 101; Mousourakis 2003: 81-82 n. 49; North 2007: 267. On Scipio and Laelius, see Livy 37.1.7: *cum senatus aut sortiri aut comparare inter se provincias consules iussisset*.
[404] Lintott 1999: 101.
[405] Stewart 1998: 38-51; Mouritsen 2011: 228-232.
[406] In 465, the newly elected consul, Q. Fabius Vibulanus, was given the *provincia* against the Aequi because of his previous victories over them, a measure that Livy called "extraordinary" (Livy 3.2.2: *Fabio extra ordinem, quia is uictor pacem Aequis dederat, ea prouincia data*). Over a century later, in 335, both consuls for that year, M. Valerius Corvus and M. Atilius Regulus, requested that the sortition be skipped (*extra sortem*) and that Corvus should directly receive the command against the Italian Sidicini due to his renown as a commander (Livy 8.16.5): *petitum ab consulibus ut extra sortem Corui ea prouincia esset*.
[407] In 147, L. Cornelius Scipio Aemilianus was not only elected as consul by the people, despite being too young for the office and officially standing for election to the aedileship, but was also received Africa as his province by popular decree (App. *Pun.* 112). Forty years later, in 107, when C. Marius was elected as consul, the people overwhelmingly voted (on the instigation of a tribune) for Marius to receive the command against Jugurtha. Most importantly in this example, although the African command had already been allotted to Q. Caeclilius Metellus, Sallust states that "the arrangement was in made in vain" (*ea res frustra fuit*) as a result of the people's overriding vote (Sall. *Iug.* 73.7, as well as 85.10 and 28 for similar reiterations in Marius' recorded speech). See also Boak 1918: 2-3. Marius' *elogia* in the Forum Augustum refers to his obtainment as *extra sortem*, although the popular vote is not mentioned (*CIL* 6.41024).

Magistrates were accorded specific legal power and authority which empowered them to execute the responsibilities of their offices, namely *potestas* and *imperium*. Both powers had legitimizing force, since they imbued the functions of magistrates with legal (that is, institutional) authority, but also because both *potestas* and *imperium* ultimately derived from the people, who elected the magistrates and conferred such authority upon them.[408] All magistrates had *potestas*, literally "power" or the ability to compel people to follow a directive, and represented the magistrate's constitutional and legal authority in the civic and domestic sphere (that is, non-military action).[409] *Potestas* gave a magistrate authority to undertake a broad set of actions, including the ability to render legal judgement, publish edicts, intercede against another magistrate, issue summons, impose punishments for legal infractions, convene the Senate and public assemblies, and undertake administrative tasks.[410] A magistrate's *potestas* also gave him the power of coercion (*coercitio*) which added force to his authority and could be used as a means to force into compliance anyone who resisted his orders.[411] It is important to remember, however, that *potestas* and *coercitio* were not beyond reproach, and were at all times subject to *provocatio* (protecting citizens from abuse of power and summary beatings or execution) and the *intercessio* of other magistrates, especially that of the plebeian tribune.

While all magistracies possessed *potestas*, only higher magistrates (namely consuls, praetors, and dictators) had access to *imperium*, which granted a magistrate the authority to command troops outside of Rome.[412] The fundamental meaning of *imperium* (which itself stems from the verb, *imperare*) was the ability to give commands or orders, a type of authority that

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[408] Lintott 1999: 95.
[409] Brennan 2004: 26-27; Drogula 2007: 422.
[410] Mousourakis 2003: 79; Drogula 2007: 424.
[411] Nippel 1984 22; Mousourakis 2003: 79-80; Drogula 2007: 428-429.
[412] On the necessity of *imperium* for a military command, see Cic. *Phil.* 5.45: *sine quo res militaris administrari, teneri exercitus, bellum geri non potest*. See also Develin 1977a: 110-111; Lintott 1999: 96; Mousourakis 2003: 79; Vervaet 2009: 429.

Cicero compared in strength to the force of law itself.[413] Many scholars believe that *imperium* was derived from *potestas* and ultimately was "*potestas* in its strongest form."[414] Drogula argues to the contrary that *imperium* was not an augmentation of *potestas* but was a distinct power on its own, and multiple Roman sources do refer to *imperium* and *potestas* as separate concepts.[415] Furthermore, while *potestas* was used in domestic functions, *imperium* was reserved for specific magistrates and intended solely for military purposes. In other words, *potestas*, possessed by every office, supplied all the power and authority necessary for a magistrate to carry out his civic responsibilities; *imperium* was not necessary for civic affairs.[416] Indeed, as I elaborate below, Roman law actually stated that a magistrate could not possess *imperium* inside the *pomerium*, meaning that there was no aspect of *imperium* appropriate for use in the domestic sphere (*imperium domi*) in normal circumstances.[417] It is true that a magistrate's *imperium* in the field did indeed give him authority over administrative and judicial matters, such as carrying out executions, arbitrating legal disputes, and engaging in foreign diplomacy, but this must be

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[413] Cic. *Rep.* 1.3: *qui id cogit omnis imperio legumque poena*. Cicero elaborates on this comparison, stating that a person with such authority (*imperium*) can accomplish at all times that which philosophers and teachers could only induce their best students to do on occasion, namely "to do what the laws compel them to do by their own free will" (*ut id sua sponte facerent, quod cogerentur facere legibus*). For this reason, according to Cicero, a person bearing *imperium* is preferable to greatest philosophers or teachers. Lintott 1993: 55; Ridley 1987: 79-80; Richardson 1991: 1; Gargola 2007: 155; Beard 2015: 196. On the etymology of *imperium* stemming from *imperare*, see Richardson 1991: 2.

[414] Lintott 1999: 96. Robert Develin states furthers that "full *imperium*," that is, for military use, was "an augmented version of the authority which had originally operated in the city" (Develin 1977b: 58).

[415] Drogula 2007: 422-426, 431, 451, nn. 57-58. See Fest 43L; Cic. *Rep.* 1.63; *lex agraria* §87: *inperio iudicio [potestateve]* (*CIL* I^2 585; *Fragmentum Falerinum II*: *imperio p[otestateue ---]* (*CIL* I^2 2677b; Crawford 1996: 329-330); *lex Coloniae Genetivae* 1.94: *imper(io) potestat(e)ve*; 1.125.12-16: *imperium potestatemve… imperio potestateve* (*CIL* II^2 5.1022 Crawford 1996: 393-454); *lex Gallia Cisalpina* (also, *lex Rubria*) 1.20.48: *imperio potestateve* (*CIL* I^2 592; Crawford 1996: 461-477).

[416] Drogula 2007: 438-439.

[417] The conception of two types of *imperium* (*domi* and *militiae*) is most famously represented by Sallust (*Cat.* 29.3) in his description of the extraordinary powers wielded by a magistrate acting under a *senatus consultum ultimum*. For only a few scholars who refer to the civic use of *imperium*, see Stewart 1998: 117, 122-123, 130, 135, 196, 203; Brennan 2004: 38; North 2007: 263. Interestingly, Stewart seems to contradict herself, later stating that *imperium* was "for outside the city (*pomerium*) and unconnected with his [that is, a magistrate's] allotted duty" (Stewart 1998: 196; see also 61, n. 18 and 124). For examples of scholars arguing for the sole military function of *imperium*, see Drogula 2007: 419 (*imperium* as a "strictly extra-mural military power."), 422, 431, 440, 442, 451; Gargola 2007: 155; Straumann 2016: 71.

understood in the context of a military command. According to Gargola, "away from Rome, consular and praetorian *provinciae* were military in nature," meaning that any activity outside the *pomerium*, whether judicial or administrative, could fall under the military authority of a magistrate's *imperium*, so long as it was within the commander's assigned *provincia*.[418]

During the republic, possession of *imperium* did not simply represent military authority, but was a legal requirement in order to hold a legitimate military command.[419] Cicero explicitly stated in his proposal to grant Octavian a propraetorian command in early 43 that without *imperium* "military affairs cannot be managed, the army cannot be commanded, and war cannot be waged."[420] Possession of *imperium*, however, was restricted to the highest magistracies (*magistrates maiores*) that were elected by the *comitia centuratia*, namely the consuls and praetors, as well as the dictators who were appointed in times of emergency (Gell. 13.12.6).[421] Although only a higher magistracy could wield *imperium*, it was not intrinsically connected to the office itself. In other words, consuls did not possess *imperium* by default upon being elected to office; it had to be granted and confirmed through both legal and traditional procedure. First, *imperium* was conferred upon a qualifying magistrate through a law passed in the curiate

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[418] Gargola 2007: 155.

[419] Cic. *Man.* 47, 61; *Sest.* 41; *Red. Sen.* 43; Livy 23.30.10, 34.14; 26.18-26; 27.24.1; 35.23.6-7; 39.21.2-4; Val. Max. 3.7.1; Develin 1977a: 110-111; Ridley 1987: 79-80; Lintott 1993: 55; 1999: 96; Mousourakis 2003: 79; Drogula 2007: 426n. 59 North 2007: 263; Vervaet 2009: 429.

[420] Cic. *Phil.* 5.45: *Demus igitur imperium Caesari sine quo res militaris administrari, teneri exercitus, bellum geri non potest."* Earlier in 63, in his speech against the *lex agraria* proposed by P. Servilius Rullus (Cic. *Agr.* 2.30), Cicero similarly stated that a consul who had not been invested with legitimate authority (that is, *imperium*) through the *lex curiata* should be allowed to undertake any military affair (*quod consuli, si legem curiatam non habet, attingere rem militarem non licet*). I elaborate further on the importance of the *lex curiata* and its role in legitimizing *imperium* below. See also Drogula 2007: 430-431, nn. 85, 87.

[421] Quoting Varro, Gellius states "'*In magistratu,' inquit, 'habent alii vocationem, alii prensionem, alii neutrum: vocationem, ut consules et ceteri, qui habent imperium*.'" On Varro's *Antiquitates rerum humanarum et diviniarm*, quote by Gellius, see Rüpke 2014: 246-268. On the limitation of *imperium* to higher magistracies, see also Lintott 1993: 55; 1999: 130; Drogula 2007: 451-452; Gargola 2007: 155; North 2007: 263-265; Steel 2013: 5, 48. On *magistratus maiores* and the role of the *comitia centuriata*, see the discussion on Roman voting assemblies in this chapter, as well as Taylor 1966: 5; Stewart 1998: 60, 182, 210-211; Mousourakis 2003: 83. Only other consuls could preside over elections of other *magistratus maiores* (Stewart 1998: 111; North 2007: 263).

assembly, the *lex curiata de imperio*.[422] Afterwards, the *magistratus cum imperio* participated in a ritual procession out of the city called the *profectus*, beginning with offering prayers to the gods (*vota nuncupata*) and followed by the "change of attire" (*mutatio vestis*), where the general donned the military cloak (*paludamentum*), symbolizing a magistrate's shift from a civic official to his role as a military commander. Before leaving the city, the commander ceremonially touched the spears and shield of Mars at the Regia and was then escorted out of Rome "under arms" (*paludatus*), accompanied by his lictors.[423] The traditions for conferring and confirming *imperium* were not mere symbolic ceremony, however, but were viewed as absolute necessities for any commander leaving Rome.[424] In fact, without receiving the *lex curiata* and undertaking the *profectus*, a magistrate's claim to *imperium* was considered illegitimate and his authority as a commander could be rejected entirely.[425]

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[422] On the necessity of the *lex curiata*, see Cicero (*Agr.* 2.30): *consuli, si legem curiatam non habet, attingere rem militarem non licet.* Caesar (*BC* 1.6.6) expresses a similar view. Gellius (13.15.3) states that the full powers for any magistracy (whether elected by the tribal or centuriate assemblies) was conferred by law in the *comitia curiata*. See also discussion in Nicholls 1967; Heurgon 1973: 113; Develin 1977b; Muir 1981: 5; Richardson 1991: 2-4; Stewart 1998: 6, 116, 182; Lintott 1999: 49, 96; Drogula 2007: 430, n. 85; Hölkeskamp 2010: 55-56; Humm 2012: 65-75; Hodgson 2017: 253, nn. 112-114;

[423] Sumi 2005: 35, 90. On the *paludamentum* and *vota nuncupata* in performance of the *profectus*, see also Varro 7.37; Caes. *BC* 1.6.6; Cic. *Phil.* 5.24; Livy 4.32.8; 22.1.6; 21.63.1-12; 31.14.1-2; 40.46.8; 41.10.5-13; 42.49.1; 45.39.11; Val. Max. 1.1.8, 6.11; 5.1.11; Suet. *Iul.* 64; Apul. *Apol.* 22; Flor. 1.5.11; Festus 253L; Servius *ad Aen.* 7.471; Pomeroy 2006: 176-177; Drogula 2007: 436, n. 120-122; Koortbojian 2020: 40. On the expressive, ceremonial aspects of politics and legitimacy, see Hölkeskamp 2010: 55-56.

[424] As Drogula points out, Appius Claudius Pulcher was in serious danger of not receiving a provincial command after his consulship in 54 because he had never received *imperium* through the *lex curiata*. Although Appius ultimately succeeded in circumventing the requirement of the *lex curiata*, Drogula argues that the sheer effort necessary for Appius to obtain this exception demonstrates the normal significance of the *lex curiata* (Cic. *Att.* 4.17.2; *Fam.* 1.9.25; 3.6.3, 6.6, 10.6; *QFr.* 3.2.3; Drogula 2007: 436-438, nn. 124-128. See also similar examples in the objections to a triumph for C. Pomptinus on the basis of the *lex curiata* (Cic. *Att.* 4.18.4; *Cat.* 3.2; *Prov. Cons.* 32; *QFr.* 3.4.6; Caes. *BC* 1.6.2; Sall. *Cat.* 45; Livy *Per.* 103.3; Dio 37.47.1, 48.2-3; 39.65).

[425] Festus 298-299L directly correlates the status of *paludatus* not only with military garb (*ornamentus*) and mere formality, but specifically with being under arms and prepared for war (*armatus*). On a consul's recognition as *paludatus* after the completion of appropriate rituals as a confirmation of his legitimacy as a commander, see also Stewart 1998: 125, n. 105; Zollschan 2011: 53-54; Driediger-Murphy 2014: 108; Konrad 2015: 162-164; Vervaet 2015: 220-221; Koortbojian 2020: 19, n. 18. Cicero even stated that soldiers had a right to refuse the orders of a commander whose *imperium* was deemed illegitimate, and there was precedent for this (Cic. *Phil.* 10.12, 13.14; Hodgson 2017: 169, 217). For example, the legitimacy of C. Flaminius' *imperium* was challenged on the grounds that he had not departed the city *paludatus* in both 223 and 217 (Plb. 2.32-33; 3.81.12-85.6; 5.101.3, 105.3; Cic. *ND* 2.8; *Div.* 1.77; 2.21; Nepos *Hann.* 4.3; Livy 21.63.2, 7; 22.4-7.9; Ovid *Fast.* 6.765-766; Strab. 5.2.9; Val. Max. 1.6.6; Plut. *Fab.* 2-3.3; *Marc.* 4.1-5; Front. *Str.* 2.5.24, 6.4; 4.67.24; Silius 5.644-678; Flor. 2.6.13-14; App. *Hann.*

Thus, even before a magistrate set out from the city, the legitimacy of his *imperium* was contingent on compliance with legislation and tradition. A commander in the field did possess relative freedom of action after the confirmation of his *imperium*, but he was still subject to both formal and informal restrictions in his exercise of that *imperium*, namely the will of the people, the influence of his peers in the Senate, and Roman law.[426] If necessary, for instance, the people could vote to rescind the *imperium* previously granted to a magistrate, even if he was on campaign, via a motion called *abrogatio*.[427] A multitude of laws were passed throughout the Republic to regulate the behavior of magistrates *cum imperio* in order to prevent commanders from abusing their authority.[428] According to Williamson, out of 559 laws proposed between 350 and 50 BCE, which addressed a total of 254 different matters, 98 of those laws focused solely on the behavior of magistrates and military commanders.[429] These laws dealt with a wide variety of issues relating to the exercise of *imperium*, but the most prominent restrictions and regulations can be grouped under three main themes: tenure of office, *provincia*, and the *pomerium*.

First, of all, *imperium* was subject to the same temporal limitations as the term limits placed on Roman magistracies. Since *imperium* was legally connected only to the appropriate magistracies (consuls, praetors, and dictators), a grant of *imperium* expired whenever the recipient ceased to hold the qualifying office. Thus, Livy states that in the earliest days of the Republic, when all the former power of the kings was concentrated into the hands of the consuls,

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10; Dio 12.20; Eutrop. 3.9.2; Oros. 4.15.5-6; Zon. 8.20. On Flaminius, see also Konrad 2015: 161-163). As a similar example, in 177, the proconsuls M. Junius Brutus and A. Manlius Vulso, as well as all the troops under their command refused to obey one of that year's consuls, C. Claudius Pulcher, because he also had not completed the *profectus* and was not *paludatus*. Claudius was eventually compelled to return to Rome and complete the *profectus* (Livy 41.10.5-13; Hodgson 2017: 169).

[426] Lintott 1993: 43, 97; 1999: 86-87; Hodgson 2017: 22-24; Williamson 2019: 66.

[427] Val. Max. 2.9.5; Carney 1959: 77; Bauman 1968: 37-50; Stewart 1998: 133; Lintott 1999: 62; Mousourakis 2003: 81; Williamson 2019: 9.

[428] Lintott 1993: 44; Hodgson 2017: 22-23, 169.

[429] Williamson 2019: 9-10.

the *libertas* was preserved by the limitation of consular *imperium* to one year and the cooperation of the consuls in sharing their supreme authority (Livy 2.8.7-8). On the other hand, when deemed necessary due to emergencies, a commander's *imperium* could be extended through a process known as *prorogatio*, which was granted either by the Senate or the popular assemblies.[430] Prorogated *imperium* did not imply extension of office (*continuatio*), or even reappointment to office (*iteratio*), but only extended possession of the *imperium* normally associated with, or "in place of" (*pro*) the appropriate magistracy.[431] Thus, the prorogated *imperium* of a former consul was considered proconsular, or *pro consule*, signifying that the commander wielded the *imperium* of a consul, but did not hold the office itself.[432] Second, *imperium* could only be used within the bounds of the *provincia* allotted to the commander, whether defined by the nature of the task or geographical limits. Although this meant that a general's *imperium* was absolute within his own *provincia*, it meant that he could not (or ought not) use his *imperium* elsewhere, especially within another commander's *provincia*.[433] As with the extensions of *imperium* past their terms of office, there were also allowances for commanders exercising *imperium* outside of

[430] Ridley 1987: 356-357; Stewart 1998: 177; Gargola 2008: 155; Straumann 2016: 71; Williamson 2019: 9.
[431] For a discussion of *iteratio* and *continuatio*, see Vervaet 2010: 104, 134, 141-142, 147. For annual, regular magistracies, Vervaet states that *continuatio* was technically outright illegal, while *iteratio* was heavily restricted by law. "Non-annual" and irregular magistracies, on the other hand, were difficult to regulate, as they did not fit easily in the structural framework of the Roman constitution, which is likely why (according to Vervaet) there was "no overall law regulating continuation and iteration for this kind of office" (pp. 141-142).
[432] Similarly, the *imperium* of a former praetor was propraetorian, *pro praetore*. Initially, prorogated *imperium* was allotted according to its corresponding magistracy, former consuls with proconsular *imperium* and former praetors with propraetorian *imperium*. Irregularities emerged over time, however, where former magistrates were granted prorogated *imperium* beyond their rank, such as former praetors with *imperium pro consulare*, with the first case being M. Claudius Marcellus, praetor of 216, who was granted proconsular *imperium* in 215 (Livy 23.30.19; Stewart 1998: 207-208, n. 87. In rarer instances, even some quaestors wielded propraetorian *imperium* (Hodgson 2017: 106). Eventually prorogations of *imperium* became so common and normalized that they developed into irregular political offices themselves, or promagistracies. In the most extreme cases, *imperium* could even be granted to individuals who did not hold political office, *privati* (such as Pompey in 82 and Octavian in 43), though this was widely recognized as illegal and quickly legitimized via legislation whenever it occurred (Cic. *Fam.* 8.10; *Agr.* 2.30; *Phil.* 5.45, 11.17-20, 26-27; Livy 23.30.19, 39.21.4; Mommsen 1887: 1.3.61-75; Hölkeskamp 2010: 55; Drogula 2007: 430, 434, nn. 85, 113; Hodgson 2017: 224-225, 251-254).
[433] Lintott 1993: 55; Gargola 2007: 155; Hölkeskamp 2010: 32; Hodgson 2017: 217.

their provinces (*aliena provincia*), such as those in transit to or from their province, assisting another commander, or awaiting their successor.[434]

Lastly, one of the most fundamental and misunderstood limitations on *imperium* was its relationship with the *pomerium,* the sacred boundary of Rome.[435] Although nearly all scholars agree that *imperium* was designed for use in a military context, there is some debate over whether *imperium* could be used within the *pomerium*, as well as its capacity for civic functions (*imperium domi*).[436] Most Roman sources explicitly state that *imperium* could only be used outside the *pomerium* and immediately ceased to exist when a commander crossed into the city.[437] Cicero, for example, waiting outside Rome in December of 50, having returned to Italy from his governorship of Cilicia, wrote to Atticus of his fear that Pompey was planning to send him to Sicily because he still possessed *imperium* from his governorship the year before. Calling his *imperium* a nuisance (*molestum*), Cicero stated that, if Pompey did indeed send him to Sicily, Cicero would make use of the first city gate (*porta*) he saw, so as to rid himself of his pesky *imperium*.[438] Nevertheless, there were three main exceptions in which *imperium* could be used inside Rome, namely the Roman triumph, the dictatorship, and the *senatus consultum ultimum*. Otherwise, the use of *imperium* inside the city was legally prohibited.[439]

As for the triumph, any commander seeking a triumph procession had to wait outside of Rome and secure the Senate's approval for the celebration. If a commander in question stepped

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[434] Hassall, Crawford, and Reynolds 1974: 214; Kloft 1977: 66; Stewart 1998: 90-91.
[435] On the *pomerium* as the sacred boundary of Rome, see Varro *LL* 5.143; Gell. 13.14.1; Stewart 1998: 124; Drogula 2007: 435, nn. 116-119.
[436] Stewart 1998: 126; Lintott 1999: 97; Drogula 2007: 430, n. 84, 436-437, n. 120-121, 436-437, n. 125-129, 441 n. 143-144; Hodgson 2017: 22, 179n. 61; Williamson 2019: 374.
[437] Cic. *Pis.* 58; Caes. *BC* 1.2; Sall. *Cat.* 31.3-4, 32.3; Livy 24.7.11-12, 8.18-20, 9.1-4; *Per.* 99-100; Gell. 15.27.5; App. *Sic.* 6; Ridley 1987: 79-80; Stewart 1998: 126; Lintott 1999: 97; Drogula 2007: 430, 435-438, 441, 451, nn. 84, 120-121, 125-129, 135, 143-144; Hodgson 2017: 22, 179n. 61; Williamson 2019: 374.
[438] Cic. *Att.* 7.7.4: *itaque si hoc imperium mihi molestum erit, utar ea porta quam primum videro*.
[439] For a complete discussion of the relationship between *imperium* and the *pomerium*, see Drogula 2007: 419-452.

across the *pomerium* into Rome before receiving permission, he would lose his *imperium* immediately and with it any hope for a triumph.[440] In the above case, for instance, Cicero was in fact lingering outside of Rome in Formiae so as not to lose his *imperium*, possibly in the hopes of earning a triumph.[441] Dictators obviously used *imperium* inside the city, since their very existence as a magistracy is tied to emergency circumstances that temporarily suspended certain laws. The ability of the dictator to wield *imperium* inside the *pomerium* and city can be seen from the fact that the *fasces* carried by his lictors contained the axes (*secures*). While consuls were in the city, their *fasces* did not have the *secures*, a symbol that their power of *imperium* was restricted. Only when consuls departed for a military campaign and were outside the *pomerium* could the *secures* be added to their *fasces*, showing that they were then able to wield *imperium.*[442] The inclusion of the *secures* to the *fasces* for the dictator was a sign that he was free from the legal and political restraints of regular magistrates, including immunity from tribunician *intercessio*, and had the authority to strike citizens and put them to death, and even (as an extreme example) the ability to lead troops into Rome.[443] The third common exception to the ban on *imperium* inside Rome came from the *senatus constultum ultimum*, the "final decree of the Senate." I have discussed the specifics of the *SCU* earlier in this chapter, so it will suffice to

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[440] For more on triumphs and *imperium*, see Drogula 2007: 419-420, 422, 442-445, 451, nn. 151-160; Straumann 2016: 71; Williamson 2019: 374. Caesar famously passed up his opportunity to triumph in 60, opting instead to stand for the consulship in Rome, which required him to enter the city (crossing the *pomerium*) and abdicate his *imperium* (Cic. *Att.* 2.3.3; Livy *Per.* 103.6; Suet. *Iul.* 18.2; Plut. *Caes.* 13.1-2; *Cat. Min.* 31.2-4).
[441] Cic. *Att.* 7.7.4: *de honore nostro nisi quid occulte Caesar per suos tribunos molitus erit*. On Cicero's request for a triumph, see Everitt 2003: 204; Lintott 2008: 277; Morrell 2017: 109-110, 114-116, 197-200.
[442] Dion. Hal. 5.19.3, 10.59.5-6.
[443] On the dictator's use of *imperium* in the city in general, see Cic. *Rep.* 2.56; Dion. Hal. 5.70-77; Livy 2.18.8; 3.20.8; 4.14.1-7; 6.58.2; 8.33.5; Festus 216L; Plut. *Fab.* 5.4, 8.1-10.1; Drogula 2007: 445, n. 164; de Wilde 2012: 555-577. On the immunity from the tribune, see the example of Fabius Cunctator in 217 (Plut. *Fab.* 5.4, 8.1-10.1); on the ability to use physical force and even threaten capital punishment, see the story of T. Lartius in 509 (Dion. Hal. 5.70-77; Livy 2.18.8) and L. Quinctius in 439 (Livy 4.14.3-7); on the ability even to lead troops into Rome see again the examples of L. Quinctius in 439 (Livy 4.14.1) and Papirius Cursor in 325 (Livy 8.33.5). Dictators may have been immune to *provocatio* initially, but this later changed (Livy 3.20.8; 6.58.2; Festus 216L; see especially the arguments of de Wilde 2012: 555-577, who argues definitely that the dictator was not immune to *provocatio*).

reiterate here that the *SCU* was an unofficial request by the Senate in times of emergencies to a Roman magistrate (usually the consul) to save the Republic by any means necessary. The Senate's "final decree" is often used as an example of *imperium* being used inside Rome due to Sallust's description of the *SCU* (Sall. *Cat.* 29.2-3), where he states that it granted magistrates the right to wield *imperium* "at home and on campaign" (*domi militiaeque*). Sallust is not referring to two different types of *imperium*, however, but rather the temporary removal on the restriction to use *imperium* in the city. As Drogula states, the *SCU* can be understood as a declaration of martial law, which authorized consuls to use military force (*imperium*) in the city, "where such power was normally forbidden."[444]

The *Cursus Honorum*

The very fact that all magistracies possessed *potestas* while only certain magistracies could wield *imperium* implies that a hierarchy existed among Rome's political offices. Indeed, a multitude of magistracies existed during the Roman Republic, and though all were important in some way, certain offices were more crucial to the day-to-day operations of the government, carried higher responsibilities, possessed greater jurisdiction and authority, and were thus viewed as more prestigious than others. Gellius, for instance, himself quoting from the augur Messala, states that the "greater magistrates" (*magistratus maiores*) were elected by the centuriate assembly and included the consuls, praetors, and censors, while the "lesser magistrates" (*magistratus minores*), consisting of the quaestors, aediles, and tribunes, were all elected by the tribal assembly (Gell. 13.15.4). Gellius points out that the greater magistrates possessed more

[444] Drogula 2007: 449. On the use of *imperium* under a *senatus consultum ultimum*, see Cic. *Rab. Per*. 20-21; *Cat.* 1.3-4; *Mil.* 3, 70; Caes. *BC* 1.7.2-6; Sall. *Cat.* 29.2-3; Vell. 2.34.4; Plut. *Cic.* 35.2-5; *Tib. Gracch. I18.1,* 19.5; *C. Gracch.* 14-17; Bonner 1922: 147; Lintott 1999: 89-93; Drogula 2007: 448-451, nn. 180-181, 184-191.

authority than their lesser counterparts, ranging from the ability to hold *imperium*, convene assemblies, address the people, arrest citizens, and more.[445] Despite their division into the categories of "greater" and "lesser," all six of the aforementioned magistracies (the censors, consuls, praetors, aediles, plebeian tribunes, and quaestors) were permanent positions in the Roman government that were filled annually by election.[446] This is significant because, in addition to these "greater" and "lesser magistracies," there were even more political offices, lower magistracies that comprised both individual posts and multi-person committees, many of which were temporary and/or created on an *ad hoc* basis to serve a specific function or assist higher magistrates. Common lower offices included the *tresviri monetalis* (supervisors of the mint), *decemviri stlitibus iudicandis* ("ten men for judging lawsuits"), *praefecti* (subordinates with delegated authority), *tresviri capitales* (overseers of criminal trials), committees of various sizes for distributing land (*agris dandis adsignandis*), military tribunes (*tribuni militum*) and many more.[447] Thus, for the purposes of clarity, we can designate those offices that Gellius calls "greater" and "lesser" as the higher magistracies, while the remaining junior offices can be regarded as lower magistracies.

Over time a system of informal rules developed alongside this hierarchy of magistracies, establishing the qualifications for holding each position and the sequential order in which

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[445] Gell. 13.12.5-6. Quoting from Varro's *Antiquitates rerum huminarum*, Gellius states, "'*In magistratu,' inquit, 'habent alii vocationem, alii prensionem, alii neutrum: vocationem, ut consules et ceteri, qui habent imperium; prensionem, tribuni plebis et alii, qui habent viatorem; neque vocationem neque prensionem, ut quaestores et ceteri, qui neque lictorem habent neque viatorem.*'"

[446] The office of the censor is an obvious exception to this rule, of course, given that they could be elected every five years (called a *lustrum*) and served terms of eighteen months. I elaborate further on the censors later in this chapter. Varro *LL* 6.11; Dion Hal. 4.22.1-2; Livy 1.44.1-2; Lintott 1999: 116-117; North 2007: 264.

[447] Lintott 1999: 137-144. According to Cicero (*Leg.* 3.9), the lower magistracies, which he does not even name specifically, could be charged with an assortment of duties, including overseeing the imprisonment of criminals, carrying out capital punishment, overseeing the mint, judging lawsuits, and generally performing any task decreed by the Senate.

political offices were held, known as the *cursus honorum* (or "ladder of offices").[448] The division between the lower and higher magistracies is attested in Roman texts, which refer to the aediles and quaestors as the first step into higher office.[449] A basic principle was that the experience gained in lower office and in the assistance of superior magistrates helped qualify men for the higher offices later in their careers.[450] Around the age of thirty (and after a decade or more of military service), most men could progress to the "lesser magistracies," the quaestors, plebeian tribunes, and aediles, before being inducted into the Senate. Thereafter, by the age of forty, established public servants could stand for election to the "greater magistracies," the praetorship and consulship (wielding *imperium*), as well as the censorate.

For centuries this "ladder of offices" (*cursus honorum*) in Roman government was upheld by tradition (*mos maiorum*) and reflected a consensus on office holding and procedure among Rome's political elite. The reliance on traditional norms to enforce adherence to the *cursus honorum* also allowed for flexibility and occasional exceptions to the requirements of holding specific magistracies in times of emergency.[451] As Rome's military demands and overseas obligations grew, however, competition for office (*ambitio*) intensified, leading to an increase in bribery and corruption in elections.[452] A central tenet of Roman political thought throughout the Republic is the importance of limitations placed on magisterial authority, which prevented individuals from aggrandizing too much authority in their political office to the point of

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[448] Mousourakis 2003: 77; Hölkeskamp 2010: 23.
[449] According to Appian, Sulla's *lex Annalis* in 80 established the quaestorship as the first magistracy required before standing for election for the praetorship (App. *BC* 1.100). Cicero (*Leg.* 3.7), on the other hand, referred to the aedileship as the "first stage toward higher office," while Tacitus (*Ann.* 13.29) stated that the quaestorship was the "first magistracy." See also Lintott 1999: 145.
[450] Lintott 1999: 144; Hölkeskamp 2010: 91.
[451] Mousourakis 2003: 77 n. 32; Hodgson 2017: 13.
[452] Carney 1959: 74; Taylor 1966: 69; Lintott 1999: 145; Drogula 2007: 436-437; Hammer 2008: 59, 106; Mouritsen 2011: 230-231; Arena 2014: 218; Steel 2014: 328-330; Straumann 2016: 28-30.

establishing tyrannies (Livy 2.1.1-10).[453] Eventually, *mos maiorum* proved to be inadequate as a "binding force" for the ladder of offices, as constant deviations and circumvention of procedure strained the flexibility of tradition. In response, legislation gradually codified various elements of the *cursus honorum* where tradition had failed, specifying the minimum age requirement of magistracies, prerequisite experience, and the frequency with which offices could be held.[454] While the *cursus honorum* had been upheld by tradition alone, the implications of any deviations from the norms of office-holding were judged alongside the circumstance surrounding the irregularity, thereby making it very possible to reconcile isolated anomalies in procedure with the traditional strictures.[455] On the other hand, the introduction of codified standards for the *cursus honorum* decreased this flexibility, making subsequent irregularities more controversial, since they were now judged as violations of more rigid statutes.[456] The gradual codification of the *cursus honorum* is another example of the dichotomies surrounding tradition and law. Tradition allowed for flexibility and exceptions in the name of pragmatism, but its reliance on continual and collective social agreement in place of any other method of enforcing adherence made it fragile and prone to eventual dissolution if consensus ever declined. Opposite these traditional norms, laws and codified rules offered stability, consistency, and objectivity by minimizing the chance for biased and subjective interpretations of procedure, but it left little room for innovation

[453] Mousourakis 2003: 78.
[454] Lintott 1999: 145-146; Mousourakis 2003: 78; Hölkeskamp 2010: 22-23 (on *mos maiorum* as a "binding force"); Arena 2014: 218.
[455] Consider, for example, the extraordinary allotment of a command against the Aequi given to the consul Q. Fabius Vibulanus in 465, due to his expertise in fighting them (Livy 3.3.2). Similarly, in 335, the procedure of sortition was skipped in the provincial assignment and the command against the Sidicini was granted to the consul M. Valerius Corvus because of his reputation as a competent commander. One of the most notable examples, of course, is that of P. Cornelius Scipio (later, Africanus) who received a proconsular command in 210 despite only being recently elected as an aedile (Livy 25.2.6-7; 26.18-19; Val. Max. 3.7.1; Sen. *Dial.* 10.17.6; Sil. *Pun.* 15.7-22, 16.545-656; App. *Ib.* 18; Dio 27 fr. 57.38-40), and was later elected consul in 205, even though he was only 31 (Livy 28.28.14, 38.6-11, 43.11-14; 29.20; Val. Max. 8.15.1; Sil. *Pun.* 16.545-700; Dio 27 fr. 57.56).
[456] Hodgson 2017: 13.

or compromise without potentially undermining the authority of the statute and making the rule irrelevant.[457]

A historical example of the dichotomy between tradition and law in the *cursus honorum* can be found in Cicero's defense of the *lex Manilia* in 66, which extended Pompey's extraordinary command in the East. Cicero was correct here when he stated, against the objections of Catulus and Hortensius, that innovation and adaptation in times of necessity did not conflict with *mos maiorum* (Cic. *Man.* 60). There was ample precedent in Roman history justifying deviations from tradition, namely the commands of Scipio Aemilianus and C. Marius.[458] But it is equally important to consider that Catulus' objection to the *lex Manilia* was not based only on the inflexibility of law or an aversion to innovation, but the danger of ignoring existing legislation. Why even bother having elected magistrates, Catulus asked, if the Senate was willing to disregard existing laws and incumbent magistrates in order to grant supreme power to a single person (Dio 36.32-33)?[459] As Arena puts it, Pompey's entire career was "signposted by exceptionality."[460] Since 83, Pompey had obtained all of his military commands and political positions through unorthodox measures, ranging from illegally raising an army, refusing to disband his troops, holding a consulship without having held previous office, and even threatening the Senate.[461] By 66, then, it made to no sense to many in the Senate for them to

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[457] Barber 2010: 72-73.
[458] Kloft 1977: 8; Lintott 1999: 5; Straumann 2016: 48-50, 107-108. For more on the passage of the *lex Manilia* in 66, see Cic. *Mur*. 34; *Dom*. 19; Livy *Per*. 100; Vell. 2.33.1; Ascon. 65; Quint. 2.44.40; Plut. *Luc.* 35.7; *Pomp.* 30.1-5; App. *Mith*. 81; Dio 36.42.4-43.3.
[459] For a similar argument, but ascribed to Q. Hortensius by Cicero, see Cic. *Man.* 52, and *Dom.* 19. Fabius Maximus similarly commented in 295 that there was no benefit in making laws if the Roman people then ignored them (Livy 10.13.11). On the disregard for laws, see the discussions in Kloft 1977: 14; Rodgers 2008: 309-310, 314; Coudry 2016: 33, 42-45; Straumann 2016: 49-50, 105-106, 110-111. Although Dio places Catulus' argument for 36.32-36 in his speech against the *lex Gabinia* of 67, Rodgers and Coudry persuasively argue that this is an error on the part of Dio and that Catulus' speech was in regard to the *lex Manilia* of 66, based on references in Cicero's speech in favor of the *lex Manilia* (Rodgers 2008: 296-299, 306; Coudry 2016: 37).
[460] Arena 2014: 221-222. Cicero summed up the anomalous course of Pompey's career in *Man.* 61.
[461] On Pompey illegally raising an army in 83, see Caes. *BAfr.* 22.2-4; Cic. *Man.* 61; *Phil.* 5.43; Diod. 38/39.9; Livy *Per*. 85; Vell. 2.29.1; Plut. *Mor*. 203B-C; *Pomp.* 6.3-4; App. *BC* 1.80; Dio 33.107.1. On Pompey refusing (if

object to Pompey's new command on the basis of law and tradition, when they had normalized a decade's worth of disregard for the *status quo* and the *cursus honorum* in their acquiescence to his ambition.[462] Much like socio-political customs and tradition, laws become irrelevant if they are continually ignored.[463]

The controversy surrounding Pompey's career is a testament to the importance of understanding the traditional and legal expectations in the *cursus honorum*. For most of the Republic, laws regarding magistracies (*leges annalis*) were passed on a case-by-case basis as the need arose, and many such laws are often mentioned only when they are broken or circumvented. One of the most well-known of these laws, the *lex Genucia* of 342, required a ten-year gap between holding the same office twice.[464] Legislation concerning higher magistracies was obviously of greater importance, given that they were able to wield significantly more authority than their lower counterparts. On the other hand, discussion of laws regulating the lower offices is rather scarce. The earliest comprehensive laws concerning the *cursus honorum* were the *lex annalis* sponsored by L. Villius in 180, which established the minimum age requirements for offices (Livy 40.44.1), and Sulla's *lex annalis* a century later, which further

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temporarily) to disband his troops, see Sall. *Hist.* 4.43; Livy *Per.* 91; Plut. *Pomp.* 17.3, 21.3; App. *BC* 1.121; Dio 56.39.1-4. On Pompey becoming consul without having held any other magistracy, see Cic. *Man.* 62; Livy *Per.* 97; Vell. 2.30.2; Val. Max. 8.15.8; Plut. *Crass.* 12.1; *Pomp.* 22.1, 44.4-5; Gell. 14.7.1-3; App. *BC* 1.121, 3.88; Dio 36.25.3; 77.5.5. On Pompey threatening the Senate, Sall. *Hist.* 2.82.6-10; Plut. *Luc.* 5.2; *Pomp.* 20.1; *Sert.* 21.5-6.

[462] On the normalization of Pompey's deviation from traditional norms and the legal requirements of the *cursus honorum*, see Seager 2006: 224; Rodgers 2008: 306; Vervaet 2009: 411, 427-428; Steel 2013: 239-240; Steel 2014: 333-334; Arena 2014: 221-333; Straumann 2016: 107, 115.

[463] Carney 1959: 74; Gordon 2007: 371; Burton 2014: 415; Straumann 2016: 81, 110-111.

[464] On the mandated ten-year gap between magistracies, see Livy 7.42.2; 10.13.9; Plut. *Mar.* 11.1, 12.1. As another example of laws on office-holding, in 213 the plebeian tribunes argued that P. Cornelius Scipio was had not yet reached the legal age to stand for election to the curule aedileship (Livy 25.2.6: *huic petenti aedilitatem … nondum ad petendum legitima aetas esset*) at the age of 21. See also *MRR* 1.263. A few years later in 210, Scipio again deviated from tradition by being elected as proconsul despite being only 24 years old, and thus legally too young (Livy 26.18.7-11; Val. Max. 3.7.1; App. *Ib.* 18; Dio 27 fr. 57.39-40; Zon. 9; *MRR* 1.280). Two other laws (or legal requirements) are mentioned in 184, when Q. Fulvius Flaccus, recently elected as curule aedile, tried to run for a recently vacated praetorship (due to the death of the incumbent, C. Decimus Flaccus), but was denied on the grounds that an elected magistrate could neither stand for another elected office nor even hold more than one office at a time (Livy 7.42.2; 39.39.2-4; *MRR* 1.375).

cemented the prescribed sequence for holding higher offices (App. *BC* 100).[465] Aside from the examples in the laws of Villius and Sulla, the course of development for the *cursus honorum* is confusing, due to the sporadic and circumstantial references to other *leges annalis* in Roman sources, as well as the fact that many such laws were changed, repealed, or even reiterated over time.[466] On the other hand, a precise analysis of the *cursus honorum* is much more easily accomplished when undertaken in conjunction with a detailed overview of the magistracies themselves. In what follows, then, I provide an overview of the various higher offices of the Roman Republic, the requirements for each office as laid out in the *cursus honorum*, their duties, powers, and the source of their election.

Lower Magistracies

In general terms, an aspiring politician could start his career around the age of 20 and serve in one of the various lower magistracies. There is a paucity of information regarding these lower offices, especially the qualification for holding them, but they do appear to have been recognized as the first steps for young aristocrats hoping to hold higher offices eventually.[467] The principal requirement before holding higher office, however, was ten years' service in the military (Plb. 6.19.3), and the only elected lower office within the legions was the high-ranking position of the military tribune (*tribunus militum*), making it a popular precursor to the first higher office, the quaestorship.[468] Though not a magistracy, the military tribunate was a

[465] Stewart 1998: 219; Mousourakis 2003: 77 n. 33.
[466] As an example of laws being reiterated, the required ten-year gap between magistracies in Sulla's *lex annalis* of 81 (App. *BC* 1.100) and the ban on holding multiple offices simultaneously are both mentioned in the controversy surrounding Q. Fulvius Flaccus in 184 (Livy 39.39.2-4) and in an earlier law proposed by the tribune L. Genucius in 342 (Livy 7.42.2).
[467] On the various duties of lower magistrates, see Cic. *Leg.* 3.6; also Dio 60.5.8; Tac. *Ann.* 3.29
[468] Ridley 1987: 132. This position is to be distinguished from the Tribunes of the Plebs (*tribunus plebis*) and the consular tribunes (*tribuni militum consulari potestate*), on which I elaborate in subsequent chapters (Heurgon 1973: 163, 175). According to Astin, the minimum age for compulsory military service began at seventeen, when young

prestigious position. Twenty-four tribunes were elected annually by the people in the tribal assembly to serve in the first four legions, while the consuls appointed any further tribunes needed in the subsequent legions.[469] The military tribunes were subordinates of the consuls in the legions, but they could shoulder significant responsibility and authority, such as commanding smaller contingents of troops, participating in recruitment, and receiving the oaths of new levies.[470]

Quaestorship

After service in the legions for ten years and starting between the ages of 27 and 30, a Roman citizen could stand for his first elected high office, the quaestorship.[471] The origin of the quaestorship is difficult to ascertain, as there are multiple contradictory accounts in Roman sources. An early form of the quaestorship supposedly reached back into the Roman monarchy, but the office was first created as an elected magistracy in 443 BCE.[472] In general, quaestors

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Roman men were required to attend the levy. The anomalous youth of some quaestors (24 to 25 years of age), which required ten years military service (discussed below), makes it possible that some men may have begun their military service at fourteen or fifteen, but no earlier (Astin 1958: 60-63). On the minimum requirement for attending the levy, see also Gell. 10.28; Livy 25.5.8; Plut. *C. Grac.* 5.1.

[469] Plb. 6.19-20; Livy 7.4.9; 9.30.3; 27.36.17; Festus 316-317L; Lintott 1999: 139-140.

[470] Plb. 6.21.1-6, 26.1; Cic. *Leg.* 3.6; *Verr.* 2.5.83.

[471] As Astin demonstrates, there is no evidence for a fixed minimum age for a quaestor, and the priority seems to have been placed on the requisite ten years of preceding military service. Nevertheless, despite a few cases of quaestors holding their offices at the ages of 24 or 25, the average minimum age for the quaestorship seem to have been around 27, based on the minimum age of compulsory military service being seventeen (Astin 1958: 60-63; see also Evans and Kleijwegt 1992: 182). By the time of Sulla, the average age for holding the quaestorship was 30 (App. *BC* 1.100; North 2007: 264). According to Tacitus (*Ann.* 13.29), the quaestorship was still the first magistracy by time of Claudius' reign (c. 41-54 CE).

[472] Tac. *Ann.* 11.22; Taylor 1966: 60; Mousourakis 2003: 94. Tacitus states that quaestors were originally appointed by the kings, and then by the consuls in the earliest days of the Republic before being turned over to the electoral process, but Gracchanus Junius, as cited by Ulpian in the *Digest* (1.13.pr.), claimed that quaestors were elected as early as the reigns of Romulus and Numa (c. 753-673). Livy, however, records a speech of the tribune C. Canuleius in 445, who stated that the quaestorship was not present during the monarchy, at least by the reign of Servius Tullius (c. 578-535) (Livy 4.4.3). Both Cicero and Livy refer to the story of a quaestor accusing Sp. Cassius of attempting to make himself king in 486 (Cic. *Rep.* 2.60; Livy 2.41.11), while Livy mentions a similar instance of quaestors accusing M. Volscius Fictor, a former plebeian tribune, of perjury (Livy 3.42.3). According to Lintott, these discrepant accounts may be due to a confusion between the treasury quaestors and a lower judicial office, the *quaestor* (or *quaesitor*) *parricidii*, which presided over criminal courts. Despite the similarity in their names (both

oversaw the Roman treasury (the *aerarium*), namely in dispensing money to other magistrates, but also managed property registration and public accounts.[473] The purview of the office continued to grow, however, and quaestors eventually served as aides to military commanders on campaign and governors in their provinces abroad.[474] As lesser magistrates (*magistratus minores*), quaestors were elected by the *comitia tributa*, presided over by a consul, and served for one year (Gell. 13.15.4).[475] Additionally, like all magistrates, quaestors exercised the authority of their office through *postestas* but their status as a lesser magistracy meant they did not normally hold *imperium*.[476] Furthermore, quaestors did not have the power to summon or arrest individuals, nor could they interfere in an assembly convened by a superior magistrate.[477] At first, only two quaestors existed, but their number increased over the course of the republic, growing to a total of four by 421, to six by 267, to eight between 241 and 221, ten by 197, twenty by 80, and finally forty under Caesar.[478] Since the quaestorship was usually the first

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stemming from *quaerere*), Lintott states that the two offices were not related to each other (Lintott 1999: 133-135). See Lydus (*Mag.* 1.25) on the above distinction between *quaestor* and *quaesitor*, compared to the conflation of both offices in Varro (*LL* 5.81). Pomponius, in the *Digest*, and Zonaras state that treasury quaestors were created first, while the *quaestores parricidii* were created afterward to preside over capital trials (*Dig.* 1.2.2.22-23; Zon. 7.13.3).

[473] Plb. 6.12.8, 13.2; Cic. *Fam.* 13.9.3; Livy 4.43.4; Tac. *Ann.* 13.28-29; Gell. 13.25.29-31. As Tacitus and Gellius state, quaestors retained their oversight of public accounts well into the Principate. See also Loader 1940: 136; North 2007: 263-264.

[474] Cic. *Verr.* 2.5.83 (assisting governors in provinces); Livy 4.43.4 (assisting consuls on campaign).

[475] Taylor 1966: 60; Stewart 1998: 60.

[476] Mousourakis 2003: 83, 93-94. Livy records that a quaestor, Sempronius Blaesus, died while commanding a fleet in 216 (Livy 22.31.5). There are some instances of quaestors commanding troops in the second century, such as L. Tremellius Scrofa, who, serving as quaestor in Macedonia under the praetor Licinius Nerva in 143, crushed a native revolt in Macedonia, though it is not specifically mentioned whether he possessed *imperium* (Varro *RR* 2.4.1-2; Livy *Per.* 53.2; Eutrop. 4.15; *MRR* 1.472). The first definite instance of a quaestor possessing any type of *imperium* appears in 112, when M. Antonius is attested on an inscription at Delos as *quaestor pro praetore* (*I. de Délos* 4.1.1603; *MRR* 1.539). By the first century, however, *quaestores pro praetore* became increasingly common, including the famous example of Cn. Calpurnius Piso, sent to Spain by the Senate as a quaestor with praetorian *imperium* in 65 (Sall. *Cat.* 19.1-5 and *CIL* 1.749, as *quaestor pro praetore*; Ascon. 92-93; Suet. *Iul.* 9.3, as *extra ordinem*; Dio 36.44.5; Hodgson 2017: 106). North 2007: 261, 264; Steel 2014: 327. For examples of other quaestors *pro praetore*, see Caes. *BAlex.* 42; Livy *Per.* 104.6; Vell. 2.45.4.

[477] Varr. *LL* 6.91; Gell. 13.12.6, 13.4; Stewart 1998: 123.

[478] Lintott 1999: 134-136; North 2007: 264; Steel 2014: 327.On the quaestorship increased to four, see Livy 4.43.4-5, 12; on the increase to six, eight, and ten, see Livy *Per.* 15.8; Tac. *Ann.* 11.22; Lyd. *Mag.* 1.27; especially the arguments of Harris 1976: 92-106; Bandy 2013: 101; Prag 2015: 193-210; on Sulla's increase to twenty, see the *lex Corn. XX quaest.* (*CIL* I^2.587); Tac. *Ann.* 11.22; on Caesar's increase to forty quaestors, see Dio 43.47.2.

magistracy for aspiring politicians, holding the office did not allow for admission into the Senate. Only under Sulla in 81 are quaestors automatically granted membership into the Senate.[479]

Plebeian Tribunate

After serving as a quaestor and at the age of 27 a plebeian could be elected as one of the ten tribunes of the plebs, advocates for the Roman people in the Senate. The office was created as a result of civil discord between the patricians and plebeians in the first years of the Republic. As Livy tells it, the plebeians, despite their service to the state in Rome's incessant wars, were plagued by crushing debt that had caused many to lose their family land or even to fall into slavery. In 494, after several unsuccessful attempts to convince the Senate to propose reformative legislation that would protect the Roman people, the plebeians finally resolved to abandon Rome entirely and withdrew to the *Mons Sacer* outside the city, an event known as the First Plebeian Secession. The Senate, in order to secure a reconciliation, agreed in 493 to create a new magistracy in the form of two tribunes, held exclusively by plebeians, and designed to defend the plebeians against abuse from other magistrates (Livy 2.23-32.3; 3.52.9).[480]

Plebeian tribunes had neither *imperium* nor even the standard *potestas* of other magistracies, but had their own special legal power, the *tribunicia potestas*, which centered on the tribune's ability to intercede in the Roman government on behalf of the Roman people.[481] Because the plebeian tribunate was created for the express purpose of providing aid (*auxilium*) to the Roman people when necessary against political abuse of any kind, tribunes were required to be available to citizens at all times and therefore could not spend more than a night away from

[479] Tac. *Ann.* 11.22; Lintott 1999: 68-69; North 2007: 266.
[480] Asc. 76-77 (for Cicero's brief comments on the original creation of the first two plebeian tribunes); Heurgon 1973: 167-168; Lintott 1999: 121, 133; Mousourakis 2003: 62; North 2007: 264.
[481] App. *BC* 1.33; Heurgon 1973: 168; Lintott 1999: 133; Mousourakis 2003: 94, 96.

Rome.[482] Most notable was the tribune's power of *intercessio*, the ability to veto the motions of the Senate, another magistrate, or to bring any public action to a halt.[483] A tribune could also use his power of *intercessio* in many different ways, ranging from protecting a Roman citizen from corporal punishment or execution at the hands of magistrates, blocking proposed legislation, obstructing the Senate from convening, and (in extreme cases) shutting down all public business as a whole.[484] Other powers accorded to the plebeian tribunate included the recall and prosecution of magistrates, the rejection of an unqualified candidate standing for election to a magistracy, as well as the ability to convene the Senate.[485] Although the tribunes could not convene other *comitia*, they could convene and preside over *contiones* (gatherings for public announcements and debate with no ability to effect law) and, most importantly, the *concilium plebis* ("assembly of the plebs"), where they were also able to propose certain legislation directly to the people (*plebiscita*), such as the abrogation or prorogation of various magistracies, which

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[482] Lintott 1999: 124. Lintott does note that tribunes were occasionally away from Rome due to religious festivals or if dispatched abroad on official government business.

[483] Cic. *Agr*. 2.30; Caes. *BC* 1.7; Heurgon 1973: 1968; Lintott 1999: 84, 116, 121-128; Mousourakis 2003: 75; Drogula 2007: 421; North 2007: 264.

[484] On the capacity of tribunes to act in the defense of individual citizens, see Livy 2.55.4-5; 8.32-35.5; 38.60.4-6; Val. Max. 2.7.8; Gell. 6.19.1-7; on vetoing attempted legislation, see Cic. *Ad Herenn.* 1.21; Asc. 58; Plut. *Cat. Min.* 26.2-29.2; *Cic*. 23.4-5; Dio 37.43.1-2; *Schol. Bob.* 134; on blocking the Senate from convening, see Plb. 6.16.4; on shutting down all public business, see Plut. *Tib. Gracc.* 10.5; App *BC* 1.10; Dio 24.83.6. See also the discussions in Taylor 1966: 75; Bauman 1973: 36, 40-41; Lintott 1999: 61-62, 84, 121-126; Drogula 2007: 446; de Wilde 2012: 567.

[485] Heurgon 1973: 168; Lintott 1999: 123; Mousourakis 2003: 75; North 2007: 264-265; Straumann 2011: 285-286; Straumann 2016: 58. In 402, a plebeian tribune threatened to imprison the consular tribunes of that year if they persisted in opposing the Senate's desire to hold elections for new consular tribunes three months earlier than was accustomed. One of the incumbent consular tribunes, C. Servilius Ahala, rebuffed the plebeian tribune's threat as having no legal authority, but nevertheless promised that all the consular tribunes would honor the Senate's wishes (Livy 5.9). In 173, a tribune threatened M. Popilius Laenas (cos. 173) with prosecution if he did not return to Rome to answer the Senate's charges of unlawfully attacking the Ligurian Statellati (Livy 42.8-9, 21.4; North 2007: 271). The tribune P. Decius led the prosecution against the consul, L. Opimius, for his action in the killing of C. Gracchus in 121 (Cic. *de Or*. 2.132; Livy *Per*. 61.9; Straumann 2016: 58). As for rejecting unqualified candidates, the tribunes opposed the candidacy of Scipio (the later Africanus) for the office of aedile in 213, on the grounds of his youth, though the people overrode this objection (Livy 26.2.6-7) and two years later for a proconsular command in Spain (26.18.7-11; Straumann 2011: 285-286; Straumann 2016: 38).

bypassed the Senate completely.[486] Plebeian tribunes were elected by the *concilium plebis* and, like most of the regular magistracies, served for a term of one year.[487] Originally, the number of tribunes in office ranged from two to five, but, according to Lintott, this number was permanently raised to ten around 457.[488] One of the most significant qualities of the plebeian tribunate was its sacrosanctity, a quality based on religious decree that protected the tribunes from challenge or interference. At the creation of the office itself, Livy specifically states that tribunes of the plebs were *sacrosancti* and refers to the possibility that a *lex sacrata* was passed, which bound everyone to respect the inviolability of the tribunes (Livy 2.33.1-3).[489] Heurgon speculates that, due to the tribunes' lack of *imperium* or *potestas*, the sacrosanctity enforced by the *lex sacrata* gave legal and social force to the actions of the tribunes, since defiance of their authority was met with the implicit threat of a curse.[490] Indeed, it was the physical element of sacrosanctity that especially empowered tribunician *intercessio*, since no one could physically harm or even touch a plebeian tribune, even if he used his own body to obstruct an adjournment of the senate, conduct arrests, or silence someone from speaking at an assembly.[491] By virtue of

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[486] North 2007: 264. On tribunes and abrogation, see Cic. *Leg.* 3.24 (on Gracchus' abrogation of Octavius); Dio 36.30.1-2; Ehrenberg 1953: 119; Bauman 1968: 38, 40-41, 49; North 2007: 271; Straumann 2016: 16; Williamson 2019: 25; for prorogation, see Ridley 1981: 286; for *plebiscita* proposed by tribunes, see Cic. *Leg.* 3.16; Livy *Per.* 105.3; Plut. *T. Grac.* 11.1; App. *BC* 1.9-12; Dio 39.33.2; Boak 1918: 18; Lintott 1999: 54, 63; Mousourakis 2003: 21; North 2007: 261.

[487] Heurgon 1973: 167; Mousourakis 2003: 62, 112; North 2007: 264.

[488] Lintott 1999: 121. Cicero (through Asconius) records that two plebeian tribunes were first elected in 493 (Asc. 76-77). Livy confirms this number, though he states that there is some confusion on whether the number of plebeian tribunes was increased to five that same year in 493 or later in 471 (Livy 2.33.2-3, 58.1). Dionysius of Halicarnassus may have conflated the stories of the initial creation of the plebeian tribunate with the election of the five tribunes in 471, particularly confusing C. Sicinius Bellutus, tribune in 471 with his relative and predecessor in 493, L. Sicinius Bellutus (Dion. Hal. 6.89.1; Livy 2.61.2). Diodorus Siculus preserves a different tradition altogether, however, and claimed that the plebeian tribunate increased to four in 471 (Diod. 11.68.8). According to Livy, the plebeian tribunate increased to ten in number in 457 (Livy 3.30.7), though Dionysius pushed this date to 449 (Dion Hal. 10.30.2).

[489] Heurgon 1973: 172; Mousourakis 2003: 62; Straumann 2016: 16. On the sacrosanctity of the plebeian tribunes, see also Cic. *Leg.* 3.24; Dion. Hal. 6.89.3-4.

[490] Heurgon 1973: 167.

[491] Cic. *Tull.* 46; *Sest.* 79; Livy 4.26.9-11; Dion. Hal. 6.89.2-4; Plut. *C. Gracc.* 3.3; *Cat. Min.* 26.2-29.2; *Cic*. 23.4-5; Dio 37.43.1-2. Plutarch has Gaius Gracchus, in particular, recall that the consul C. Veturius was condemned to death for not giving way when a tribune was passing through the forum. Very likely, Gracchus (through Plutarch) was

their sacrosanctity and power of *intercessio*, with which they could bring nearly any facet of the Roman government to a halt, plebeian tribunes were a potent force in Roman politics, and a potential danger to the agenda of any Roman magistrate. It is no surprise then, that there were occasional attempts to curtail the power of the plebeian tribunate. Most notably, Sulla sponsored several measures in 81 (though later repealed by Pompey in 70) that restricted tribunician influence in Roman politics, such as limiting the power of *intercessio* only to the protection of individuals (and not the obstruction of the Senate or other magistrates), banning tribunes from proposing legislation, and prohibiting former tribunes from ever holding higher political office.[492]

Aedileship

At the age of 36, and after holding the office of quaestor, one could be elected as one of several aediles, municipal magistrates who oversaw public works, such as games, festivals, and markets, as well as the maintenance of roads, grain supplies, and temples (Cic. *Leg.* 3.7).[493] The place of aediles in the *cursus honorum* is obscure. Cicero describes the aedileship as the first step

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referring to C. Veturius Cicurinus, consul of 455 with T. Romilius Rocus Vaticanus (Livy 3.31.2-9; Dion. Hal. 10.33-49). According to Dionysius, who recounts the event in greater detail, after Veturius and Romilius ignored the tribunician *intercessio,* which was imposed after several citizens cried out for *auxilium* during the conduct of a levy, the tribunes did indeed consider condemning the consuls to death but were eventually dissuaded (Dion. Hal. 10.35.2). At no point does Dionysius state that the consuls blocked the paths of the tribunes in the Forum. He does, however, say that many "young patricians," who were supporters of the consuls, disrupted an assembly called by the tribunes by stealing voting urns and beating the attendants. When the tribunes tried to intervene, the young patricians did not hinder the movements of the tribunes themselves but did not allow anyone else in the forum to rally around the tribunes (Dion. Hal. 10.41.4-5).

[492] On the dissolution of the plebeian tribunate under the decemvirate, see Cic. *Rep.* 2.61; Livy 3.55.4-8; Heurgon 1973: 169; Straumann 2016: 77. On Sulla's diminishment of tribunician authority, see Cic. *Verr.* 2.1.155; *Leg.* 3.22; Caes. *BC* 1.5.1, 7.3; Livy *Per*. 89; Suet. *Iul.* 5.1; App. *BC* 1.100; *Vir. Ill.* 75.11; Vervaet 2009: 423; Burton 2014: 412; Steel 2014: 323-324. Sulla's legislation weakening the Senate was later repealed in 70 by Pompey (Cic. *Verr.* 1.44; *Leg.* 3.26; Sall. *Cat.* 38.1; Caes. *BC* 1.7.2-4; Livy *Per.* 97; Vell. 2.30.4; Tac. *Ann.* 3.27; Plut. *Pomp.* 22.4; App. *BC* 2.29.

[493] Heurgon 1973: 166-168; Lintott 1999: 129-132; Mousourakis 2003: 77; North 2007: 261-264. On the minimum age for the aedileship, see Astin (1958: 6, 32, 37-39), who argues that the fixed minimum age would have existed at least by 180 with the passage of the *lex Villia annalis*.

toward higher office (Cic. *Leg.* 3.7), though by 81 Sulla had established the quaestorship as the first of the high magistracies, and the aedileship does not even seem to have been a compulsory post for later office.[494] As for their origin, Roman tradition states that aediles were first created in 494 alongside the plebeian tribunes as their assistants and were likewise originally held exclusively by two plebeians (Dion. Hal. 6.90.2-3).[495] Over time, the responsibilities of aediles grew to such a degree that they became a distinct office, not merely assistants to the tribunes, but a broad catch-all administrative magistracy charged with managing the myriad aspects of daily life for the *populus Romani* that other magistracies could not address.[496] One similarity that persisted between aediles and plebeian tribunes, however, was that the aediles had some jurisdiction over public order with the authority to conduct arrests, act as prosecutors during trials, and exact fines.[497] Aediles did have legal power (*potestas*) to publish and enforce edicts in fulfilling the responsibilities of their office, but, as they were considered lesser magistrates, they did not possess *imperium*.[498] By 366 two more aedileships were created to allow for the participation of patricians, likely as a way to balance out the admission of the plebeians to the consulate, which also occurred that same year. These new patrician aediles did hold the same amount of authority as their plebeian colleagues, but their office was accorded the higher status as a curule magistracy, initially one of the necessary prerequisites for admission into the Senate.

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[494] App. *BC* 1.100; Tac. *Ann.* 13.29; Lintott 1999: 145. See the discussion of the praetorship below.
[495] Aediles also possessed the same sacrosanctity as the tribunes of the plebs, but this faded over time, since, as Lintott states, laws passed to protect supposedly inviolable magistrates implicitly demonstrated that they no longer possessed sacrosanctity. See Livy 3.55.6-10; Heurgon 1973: 168, 172; Lintott 1999: 123, 129.
[496] Lintott 1999: 130, 133. For example, Frontinus states that aediles had authority over aqueducts in Rome if there were no censors available (Front. *Aq.* 95).
[497] Lintott 1999: 131-132. According to Lintott, when the aediles engaged in the maintenance of public order, they mainly did so in conjunction with lower magistracies, such as the *triumviri capitales* and others. On fines, see Livy 10.31.8, 47.4; 34.53.4; 35.10.11-12; 38.35.5; 39.14.8-9; Tac. *Ann.* 13.28.2; Front. *Aq.* 97; Gell. 10.6.3 (on this case, see also Livy *Per.* 19.8-9; Val. Max. 8.1 *damn.* 4; Suet. *Tib.* 2.3). On prosecutions, see Cic. *QF* 2.3.1-2; *Sest.* 95; *Mil.* 40; Livy 7.28.9; 8.22.4; 10.13.14, 23.10-14; 25.2.9; 33.42.9-10; 34.53.4; 35.41.9; 38.35.6; Ovid *Fasti* 5.275-289; Val. Max. 6.1.7; 8.1 *abs.* 7; Plin. *HN* 18.41-43; Plut. *Marcell.* 2.3; Dio 39.18.
[498] Mousourakis 2003: 93-94.

Nevertheless, most of the unique aspects of the curule aedileship faded over time. In the same year as their creation, for instance, plebeians were granted partial access to the curule aedileship, while aediles who had not even held curule office gained entry into the Senate by the Second Punic War (218-201).[499] A distinction between the two offices persisted in the manner of their election, however, since the curule aediles were elected by the entire Roman people in the Tribal Assembly presided over by a consul, while the plebeian aediles were elected in the Plebeian Assembly under the presidency of a tribune. Like most other magistrates, aediles served terms of one year.[500] The number of aediles remained at four for the vast majority of the Republic until Caesar added two more plebeian positions in 44, the *aediles cereales,* who oversaw the *Ludi Cereales* in honor of the goddess Ceres.[501]

Praetorship

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[499] Ridley 1987: 131; Lintott 1999: 68-69, 129-130; Livy 23.23.4-6; *lex rep.* 13, 16, and 22 (CIL I^2, n. 583); Lintott 1999: 68-69. According to Livy (6.42.14-7.1.6), the patrician aediles were originally created exclusively for plebeians, but in the first year that the new aediles were elected, the Senate felt "ashamed" (*verecundia*) for creating the curule aedileship exclusively for patricians, and therefore decided that in alternate years to elect curule aediles from among the plebeians only and in the following years to open the election to both orders (7.1.6). Lintott (129-130), however, states that that this practice "seems to have been obsolete by the late Republic," apparently based on Polybius' comment (10.4.20) that, by 211 at least, it was customary "to elect two patricians" (ἔθους δ᾽ ὄντος δύο πατρικίους καθίστασθαι) for the aedileship. As for admission into the Senate, in 216, M. Fabius Buteo (cos. 245; see Flor. 1.18.30) was appointed dictator with the task of replenishing the Senate's numbers after Roman losses at the recent battle of Cannae. Livy (23.23.4-6) states that Fabius selected new senators according to rank, which included first "those who had held a curule magistracy but were not yet in the Senate" (*qui … curulem magistratum cepissent necdum in senatum lecti essent*), before moving on to former non-curule magistrates (aediles, plebeian tribunes, and quaestors), and finally to those who had held no office. As Lintott correctly points out (68-69), although Livy does not differentiate explicitly between curule or plebeian aediles, he clearly refers (through Fabius) to curule magistracies as being of higher rank, since they are among the first group to be admitted into the Senate. This sentiment is also seen in the *lex Acilia repetundarum* (123-122), which, in barring certain officeholders from serving on juries, specifically lists lesser ranking offices (such as plebeian tribunes and quaestors) as separate from higher magistracies that allowed for membership in the Senate (*queive in senatu siet fueri[tv]e*), which implicitly included aediles. Furthermore, the *lex repetundarum* makes no distinction between curule and plebeian aediles, implying that admission of both variations of the aedileship had become normal by at least the late second century.

[500] North 2007: 261, 264.

[501] Dio 43.51.3 states that the *aediles cereales* were still present in his day, well into the empire. See also Ryan 2000: 245. According to Ryan, Caesar created the "cereal" aediles in 44, but they assumed office in 43.

Three years later, around the age of 39, a candidate who had at least held the quaestorship could run for the office of the praetor, a magistrate bearing military authority (*imperium*) that served at different times in Roman history as a military commander, judge, or provincial governor.[502] While the aedileship was indeed commonly held before the praetorship, it was not a legal requirement, and there are instances of praetorian candidates who never served as aediles.[503] To the contrary, multiple sources state explicitly that the only prerequisite office for aspiring praetors was the quaestorship.[504] Praetors were elected by the *comitia centuriata,* presided over by a consul, and served for one year.[505] Contrary to quaestors, plebeian tribunes, and aediles, the office of praetor was a higher magistracy, and therefore was accorded curule status, attended by six lictors, and possessed both *potestas* and military *imperium*, though his *imperium* was subordinate to that of the consul.[506] As noted, the praetorship served multiple roles throughout Roman history, though different traditions exist for its origin. Some sources assert that the praetor originated as a military position and that an early version of the office may have even preceded the consulship in the form of senior magistrate known as the *praetor maximus*.[507]

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[502] As with most offices, scholars disagree on the exact age requirement for the office. Mousourakis (2003: 77) put the required age at 40, while North (2007: 264) states that the minimum age for plebeians was 39, but 37 for patricians. Originally only one praetor existed, though this number increased to two by 242, four by 228, six in 197, eight under Sulla, and finally to a total of sixteen under Julius Caesar (Jashemski 1966: 15, 40-41; Kloft 1977: 28, 37; Stewart 1998: 183; Lintott 1999: 107; Brennan 2000: 94, 392; Beck 2011: 82-85). See also Hölkeskamp 2010: 91.

[503] Livy (22.26.3) states, for example that C. Terentius Varro (cos. 216) held the quaestorship, both aedileships, and the praetorship before attempting to run as consul. Most importantly, Livy does not merely list the offices Varro held, but emphasizes the sequence in which he held them (*deinde ... pervenit ... postremo ... iam*) in a matter resembling a formal or expected procedure. On the other hand, Cicero (*Planc.* 51-52) cites multiple examples of individuals who neglected or failed to be elected as aediles, but still went on to hold higher offices.

[504] Cic. *Phil.* 5.46-47; Livy 26.18.7-11; App. *BC* 1.100; Mousourakis 2003: 77.

[505] Gell. 13.15.4; Lintott 1999: 55; Mousourakis 2003: 87; North 2007: 261, 264.

[506] Festus 152L; Gell. 13.12.6, 15.4-5; Last 1947: 158; Ehrenberg 1953: 115; Lintott 1993: 55; Stewart 1998: 97, 111, 115, 182; Gargola 2007: 155; North 2007: 265; Steel 2013: 5, 48, 240; Steel 2014: 333; Straumann 2016: 55, 86.

[507] Livy, for instance, mentions an ancient inscription in Rome that refers to a *praetor maximus* who was equal in authority to a dictator (Livy 7.3.5). According to Heurgon, early Roman *praetores* reflect Etruscan influence and correspond to a similar Etruscan magistrate called the *zilath*. Heurgon 1973: 161-164; Ridley 1987: 69; Stewart 1998: 40, 113-114; Lintott 1999: 104; Mousourakis 2003: 69 n. 3.

Livy, for instance, refers to praetors in command of the Latin League in 340 (8.3.9) and of the Samnites for 326 (8.26.1).[508] Other sources, however, attest to both a military and judicial function for the praetors. According to Varro's etymological explanation, "The praetor was so named as the one who should go before (*praeiret*) the law and the army."[509]

If an early incarnation of the praetorship did exist around the time of the Republic's inception, it fell into disuse over the course of the subsequent 150 years, because Livy states the office was officially created as one of the new magistracies via the Licinian-Sextian laws of 367. Only one praetor was created at first, ostensibly to aid in administering justice (*ius*) in Rome, known as the *praetor urbanus*.[510] As part of their *potestas,* praetors issued legally binding edicts, legal interpretations, and rulings on disputes that carried the force of law called the *ius praetorium* or *ius honorarium*.[511] The civic functions of the praetors included convening and consulting the Senate, issuing summons, introducing legislation, and presiding over assemblies.[512] Despite its judicial function, however, the newly created praetorship still served a military role, seen as early as 350, when the consul M. Popilius Laenas placed a contingent of troops under the command of that year's praetor, P. Valerius Publicola (Livy 7.23.4), and praetors

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[508] See also Festus 276L.
[509] Varro *LL* 5.80: *Praetor dictus qui praeiret iure et exercitu*. For the translation of Varro quoted above, see Kent 1938: 78-79. Cicero (*Leg.* 3.8), on the other hand, places more emphasis on the legal responsibilities of the praetors, but likewise identifies the etymology of the word as denoting military command: "Let there be two with the authority of the king, and let them be called praetors, judges, and consuls, on account of going before (i.e. leading), judging, and giving counsel. Let them have the highest authority over the military" (*Regio imperio duo sunto, iique praeeundo iudicando consulendo praetores iudices consules appellamino. Militiae summum ius habento*).
[510] Livy 6.42.11 (*de praetore uno, qui ius in urbe diceret, ex patribus creando*); 7.1.1 (*novis duobus magistratibus, praetura et curuli aedilitate*); 7.1.6 (*praetorem quidem etiam iura reddentem et collegam consulibus atque iisdem auspiciis creatum*). We should also note that 7.1.1 is the first instance where Livy refers to the praetorship as a magistracy (*praetura*) as opposed to speaking of the praetor as a title or the magistrate himself. One of the earliest literary references to both the praetor and the praetorship is found in Plautus' *Epidicus* (25-27). See also Stewart 1998: 95-97, 130; Lintott 1999: 107; Mousourakis 2003: 64, 83 n. 52, 86; North 2007: 264; Anderson 2018: 13.
[511] Cic. *Leg.* 1.17 (*a praetoris edicto*); *Dig.* 1.1.7.1 (*Ius praetorium est, quod praetores introduxerunt … quod et honorarium dicitur ad honorem praetorum sic nominatum*); Mousourakis 2003: 88; Anderson 2018: 13, 18-19.
[512] Cic. *Leg.* 3.10; Livy 8.2.1-2; 10.45.3-4; 22.55.1; 23.24.1; 33.21.9, 24.4; 35.21.1; 39.3.5, 54.4; 40.26.7; Gell. 13.12.4-9; Taylor 1966: 63; Stewart 1998: 115, 196, 203, 219; Lintott 1999: 108-109; North 2007: 264.

continued to serve as military commanders regularly throughout the Republic both as subordinates to consuls and under their own auspices.[513] According to Brennan the praetor was created not only to assist the consuls in their civic and military duties, but also as a way to balance out the recent admission of the plebeians to the consulate.[514] As a consequence, the praetorship was only open to patricians at its inception, with plebeians gaining access to the office by 337.[515] By around 246, a second praetor, the *praetor peregrinus*, was added to aid in military operations during the First Punic War and serve as provincial administrator, or governor, for Rome's first overseas territorial possession, Sicily.[516] Over the course of the Republic's history, the number of praetors increased as Rome began to expand throughout the Mediterranean. By 227, two more praetors were added, four more under Sulla, and rising to a total of sixteen under Caesar.[517] Although the praetorship was a higher magistracy with authority superior to that of lower offices, praetors were nevertheless the junior colleagues of consuls and therefore subordinate to their authority.[518]

Consulship

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[513] Stewart 1998: 117-118, 213-215; Drogula 2007: 428. L. Anicius, for instance, was the sole commander in the Third Illyrian War against Genthius in 168 (Livy 44.30-32.5; 45.26.10-13, 43.1-8; Strabo 6.4.2; Plut. *Aem.* 13.3; Flor. 1.29.2; App. *Ill.* 9; Fest. *Brev.* 7.5; Eutrop. 4.6.4; Zon. 9.24).
[514] Brennan 2000: 63-64.
[515] Mousourakis 2003: 64.
[516] Jashemski 1966: 39; Stewart 1998: 183, 195, 197, 203-208; North 2007: 270. According to Stewart, the jurisdiction of the *praetor peregrinus* was initially intended to include only Italian territory outside of Rome, but was expanded in 227 to include land outside of Italy as Rome gained provinces abroad. Later responsibilities of the *praetores peregrini* include managing the list and categorization of Roman allies, as well as announcing formal senatorial positions on foreign policy to the Roman public, communities abroad, and to foreign states (Livy 43.4.11, 6.10; 44.16.7).
[517] Livy *Per.* 20; 23.24.4; 33.42.8; Solin. 5.1; *Dig.* 1.2.2.32; Zon. 8.19; Carney 1959: 73; Jashemski 1966: 39; Lintott 1999: 107; Brennan 2000: 91-93; North 2007: 264; Mouritsen 2011: 230; Steel 2014: 327.
[518] Cic. *Att.* 9.9.3; *Verr.* 2.5.83; Lucan *Phars.* 3.105-108; Gell. 13.15.4 (*imperium minus praetor, maius habet consul*); Last 1947: 158; Ehrenberg 1953: 115; Stewart 1998: 211-212; Drogula 2007: 425; North 2007: 265; Straumann 2016: 55, 86.

After holding the praetorship, and around the age of 42, Roman statesmen could stand for election to the consulship, which, although not the end of the *cursus honorum*, was arguably the most prestigious office in the Roman government.[519] Two consuls were elected each year by the *comitita centuriata* and served annual terms.[520] Since the consulship was the highest-ranking political office, consuls were essentially the heads of the Roman state and wielded significant *potestas* and *imperium.* The consulship was a curule office, accompanied by 12 lictors, and (like the praetorship) was initially restricted to the patrician class until the plebeians gained access in 366 via the Licinian-Sextian legislation.[521] In his account of the Roman constitution, Polybius gives a detailed overview of the powers and responsibilities of the consul, who he says "exercise authority in Rome over all public affairs."[522] This is not to say that the consuls wielded supreme authority in every aspect of the Roman government, but rather that the consuls' powers and responsibilities touched on nearly every aspect of Roman politics and society.[523] In regards to the

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[519] Cic. *Phil.* 5.48; App. *BC* 1.100; Mousourakis 2003: 77, n. 33; North 2007: 264. Technically, the remaining elected office along the *cursus honorum* was the censorate, who maintained the Roman census and oversaw issues of public morality and sanctity. Although a very important elected office, the censor had no military function whatsoever (nor were there any irregular exceptions, as in the case of some quaestors with propraetorian *imperium*). Thus, I have excluded an in-depth discussion of the censorate for this chapter. For further reading on the censorate, see Varro *LL* 6.11; Dion Hal. 4.22.1-2; Livy 1.44.1-2; Cram 1940: 71-110; Suolahti 1963: 73-79, 200-201; McDonald 1965: 89; Lintott 1999: 71; Mousourakis 2003: 64, 91, 93-94; Brennan 2004: 29, 53; Mousourakis 2007: 14; North 2007: 261, 264; Hammer 2008: 72; Arena 2014: 230-234; Steel 2014: 333.

[520] Cic. *Rep.* 2.56; *Leg.* 3.8; Heurgon 1973: 161-165; Mousourakis 2003: 83; North 2007: 261, 264.

[521] North 2007: 264; de Wilde 2012: 561; Straumann 2016: 64. According to Heurgon (1973: 165-173), nothing found in the *Fasti* legally prevented plebeians from becoming consuls in the early Republic, and indeed there are several instances of plebeians serving as consuls, though they were a minority. Over the first 143 years of the Republic (509-367), for instance, only 23 plebeian consuls are recorded. So, although there was no legal prohibition on plebeian consuls, Heurgon states that a *de facto* ban was "inscribed" in the *mos maiorum* and stronger than written law (Heurgon 1973: 164). After the passage of the *leges Liciniae Sextiae*, one consul was required to be from the plebeian class every year (Lintott 1999: 104-105).

[522] Plb. 6.12.1: οἱ μὲν γὰρ ὕπατοι πρὸ τοῦ μὲν ἐξάγειν τὰ στρατόπεδα παρόντες ἐν Ῥώμῃ πασῶν εἰσι κύριοι τῶν δημοσίων πράξεων.

[523] Thus, Cicero states that the two highest magistracies in Rome are distinguished by their comprehensive responsibilities of military leadership, legal adjudication, and guidance in politics (Cic. *Leg.* 3.8: *Regio imperio duo sunto, iique a praeeundo iudicando consulendo praetores iudices consules appellamino*). Although Cicero refers this supreme magistracy by three names, the praetor, consul, and judge, he is in fact speaking of the consulship. In the earliest years of the Republic, different names were used for the highest magistracies. As noted above, for example, the highest magistracy in Rome was originally the *praetor maximus*, called so for his ability to lead (*prae-*) the Roman people into battle, which was subsumed under the auspices of consuls and later also the subordinate office of the praetorship after 366. On the other hand, according to Cicero (*Agr.* 1.9), all magistrates possessed

Senate, consuls presided over senatorial meetings, proposed legislation, introduced foreign ambassadors, oversaw elections, and possessed the power to veto any legislation.[524] As for the concerns of the Roman people, consuls similarly presided over most of the assemblies (namely, the *curiata*, *centuriata*, and *tributa*) and enforced the implementation of popular decrees and legislation.[525]

Of course, the consuls are best known for the supremacy of their *imperium*.[526] As the chief magistrate, and possessing *maius* ("greater") *imperium*, all other magistracies (except for the plebeian tribunes) were subordinate to the consul, who also had the right to intercede on the actions of all lesser offices (Plb. 6.1.1).[527] Thus, Polybius states that the consul's power was almost uncontrolled (σχεδὸν αὐτοκράτορα) in both preparing for war and for conducting campaigns in the field (Plb. 6.12.5). Indeed, the incessant warfare in the first centuries of the Republic meant that the Roman consulship was looked at almost primarily as a military office (Front. *Strat.* 2.8.1-14). Upon election, both Roman consuls were each allotted a *provincia* (initially a "sphere of operation" or objective, and only later being a territorial reference) either through mutual agreement, random sortition, or less often by popular vote or senatorial decree.[528] Accordingly, the consuls decided what demands were made to the allies, appointed their military tribunes, and oversaw the levy of recruitments, choosing among them those who were "fittest for service" (Plb. 6.12.6). The consul's *imperium* granted him the authority to punish anyone under

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political power (*potestas*) and the capacity to act as judges (*iudicium*). Therefore, Cicero's mention of *praetores, consules,* and *iudices* is likely a comment on the ambiguity of the chief magistrate's appellation (*appellamino*) in the early Republic before the title of "consul" was chosen. See Lintott 1999: 109; Drogula 2007: 432-433, n. 95.

[524] Plb. 6.12.2-3. Cic. *Leg.* 3.10; Gell. 14.7.7; Last 1947: 158; Heurgon 1973: 164; Ehrenberg 1953: 115; Ridley 1987: 69; Lintott 1999: 101, 105; Mousourakis 2003: 75, 82; Drogula 2007: 421; Seager 2013: 249.

[525] Plb. 6.12.4; Ehrenberg 1953: 127; North 2007: 261, 264.

[526] North 2007: 264.

[527] Cic. *Leg.* 3.16; Last 1947: 158; Ehrenberg 1953: 115, 132-3; Henderson 1957: 83-4; Mousourakis 2003: 82; Straumann 2016: 55.

[528] Mousourakis 2003: 82, n. 49; North 2007: 267. See esp. Stewart 1998: 17, 29, n. 47, 38-39, 147.

his command, though Polybius emphasized that this applied "when on active service" (6.12.7), implying a limitation on the use of *imperium* within the city of Rome itself.[529] The consul was also free to spend anything from the "public funds" after it was authorized by the Senate, and a quaestor thereafter fulfilled the consuls' instructions regarding how to spend the funds (Plb. 6.12.8).

Given the wide-ranging power and responsibilities of the consuls within Roman politics and society, we can see why Polybius stated that, if one looked solely at the consulship, the Roman government would appear to be led by a monarchy (Plb. 6.12.10). It is important to point out, however, that, like all magistrates, the consul's powers were limited. As mentioned, consuls outranked all other magistracies except the plebeian tribunes, while consular veto could only prevent legislation temporarily, since the vetoed issue could reemerge in later sessions of the Senate (Cic. *Fam.* 10.12.3). Moreover, the principle of parity in the consulship meant that the actions of one consul could be checked if necessary by his colleague in office (Livy 2.18.8).[530] Although a consul was immune to prosecution while in office, he could be removed from his magistracy by a vote of the people, at which point he was a *privatus* and vulnerable to prosecution.[531] Thus, consuls had to remain vigilant of the potential consequences of their actions in office when their term eventually expired. Furthermore, and as with most offices, consuls had to wait ten years after their term as consul before standing for election to the same office again, though this rule was broken on several occasions.[532] Lastly, as in all aspects of the Roman

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[529] Drogula 2007: 419-452; Straumann 2016: 71.
[530] Livy 3.70.1; Kloft 1977: 9; Ridley 1987: 69; Stewart 1998: 6-7, 97, 111; Mousourakis 2003: 81; Drogula 2007: 425; Steel 2013: 5.
[531] Bauman 1968: 38.
[532] Livy 7.42.2; App. *BC* 1.100; Ehrenberg 1953: 127; North 2007: 263. The problem of holding annual offices in succession, known as *continuatio* or *iteratio*, was a common occurrence even in the fourth and third centuries. Although the ten-year gap mandate was frequently circumvented during the Roman Republic, this did not mean it was disregarded as irrelevant. To the contrary, Roman sources consistently regard such instances as exceptional deviations from the law justified only by circumstance. According to Livy, for instance, in 295, Fabius Maximus

government, the civic power of the consuls was subject to the will of the Roman people.[533] So, as Seagar states, if Polybius thought the consuls resembled monarchs, they were more accurately closer to constitutionally restrained monarchs.[534]

Conclusions

In this chapter, I have provided a detailed overview of the structural framework of the Roman constitution, the Senate, the popular assemblies, and the Roman magistracies, as well as how each branch interacted with and influenced the development of extraordinary commands in the Roman Republic. The Senate, despite possessing minimal legal authority, wielded considerable socio-political influence, with which it could often direct the conduct of Roman magistrates. When we considering the fact that all higher magistrates were also senators, magistrates were therefore very likely to follow the counsel of the Senate. Furthermore, the most powerful potential magistrate in the Roman government, the dictator, originated from within the Senate's ranks during times of emergency following the nomination by a consul. Arguably the most powerful act of the Senate, stemming again from their informal but potent *auctoritas*, was the *Senatus consultum ultimum* (*SCU*), the "final decree of the Senate," which called upon a Roman magistrate (usually a consul or praetor) to take whatever measures were necessary to save the Republic from an impending crisis. Although the *SCU* did not confer any additional powers upon a magistrate, it was interpreted as a "blank check" of sorts, an implicit endorsement

attempted to dissuade the people reelecting him as consul on the grounds that the requisite ten years had not passed between his previous term as consul, ultimately relenting to popular pressure (Livy 10.13.5-14; Straumann 2016: 42). In 217, due to the exigency brought on in the Second Punic War, the Romans temporarily repealed the plebiscite of 324 that prohibited *continuatio* and *iteratio* (Williamson 2019: 24). The successive consulships of C. Marius are a primary example of a more egregious disregard for the ten-year gap in the late Republic. Furthermore, as Burton points out, Sulla himself violated his own *lex Cornelia annalis*, since he held his consulships were held in 88 and then 80 (Burton 2014: 415).

[533] Cic. *de Or*. 2.199: *plebiscitis totiens consularem potestatem minui*.

[534] Seager 2013: 249.

by the Senate for a magistrate in their service to disregard legal restrictions on their authority, including the use of *imperium* within the city of Rome itself, something only the dictator could legally do.

The sovereign authority in Rome, however, was always the Roman people, whose assemblies approved or rejected all proposed legislation and elected nearly every magistrate. Whatever the Roman assemblies voted was considered law, even if it contradicted existing law. As Lintott puts it, the political power of the Roman people was so absolute that "they were in theory permitted to abolish the Republic by legislation or by the conferral of extraordinary powers on a magistrate."[535] Thus, when we consider the egregious breach of law and tradition in the appointment of certain extraordinary magistracies, such Scipio Africanus, Marius, and Pompey, we must remember that the people voted to permit these otherwise illegal deviations.[536]

Lastly, I provided an overview of the regular Roman magistracies themselves, focusing on their nature, origin, hierarchy, function, as well as the limitations placed on their powers. According to Livy, the *libertas* of the Roman people was maintained at least in part by the annual term limits of Roman magistracies (Livy 2.1.1, 7, 10). Indeed, a consistent theme in Roman political thought in regard to its magistracies are the limitations placed on executive power. The Romans were very much aware of the danger of concentrating too much power into the hands of one individual. Thus, the plurality of Roman magistrates at each level ensured that any magistrate could be checked by his colleague. Lastly, possession of *imperium*, the most powerful

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[535] Lintott 1999: 40.

[536] On the role of the people in allowing for the creation of extraordinary commands in direct violation of Roman law, see the examples of Scipio Africanus in the election to the aedileship for 213 (Livy 25.2.7), proconsulship for 211 (26.18.7-10; App. *Hisp.* 18; Zon. 9.7), and consul of 205 (Livy 28.38.6-11; 29.20.2; Sil. *Pun.* 16.645-700), as well as the example of Marius' successive consulships from 104 to 100 (*CIL* 6.41024; Cic. *Prov. Cons.* 19; Sall. *Iug.* 114.3; Livy *Per*. 67.5-6, 68.4; Diod. 36.10.1; Vell. 2.12; Plut. *Mar.* 11.1-2, 12.1-2, 14.6-8, 22.3, 28.1-6; Dio 27 fr. 94.1; Exsuper 14), and Pompey's commands via the *leges Gabinia* and *Manilia* (Cic. *Man.*; *Mur.* 34; *Dom.* 19; Livy *Per*. 99.3, 100.1; Vell. 2.31.2-32.2, 33.1; Val. Max. 8.15.9; Ascon. 65, 72; Plut. *Pomp.* 25.1-26.1, 30.1-5; App. *Mith.* 94. 97; Dio 36.23.3-37.2, 42.4-43.4).

authority available to senior magistrates, was regulated through elaborate confirmatory rituals and forbidden inside the *pomerium* in order to minimize the possibility of its abuse.

Polybius stated the Roman constitution was not conceived by planning and design, but by the experience and perseverance gained from overcoming various obstacles and navigating crises to the best of their ability.[537] Around a century later, Cicero similarly argued that the true essence of *mos maiorum* in Roman politics was not rigid adherence to procedure, but rather the ability to adapt to circumstances when necessary (Cic. *Man.* 60). As Lintott states, "politics in the Republic were a game played by complex rules. Without knowledge of these it is hard to grasp the behavior of the contestants."[538] Having provided a detailed overview of the rules making up the structural framework of the Roman constitution, we can now turn in the following chapters to an analysis of the Romans breaking these rules, especially regarding their magistracies. But such an analysis is not all criticism necessarily. The complexity of the Roman government is a testament to its innovative judgement. Although Romans were willing to change or alter their political institutions when necessary, the emphasis placed on limiting the authority of magistracies also indicates their awareness of the inherent dangers of allowing for too much innovation. Thus, in the following chapters, I focus exclusively on the dynamic of extraordinary commands themselves, their various forms, and the criteria for identifying them, beginning with a survey of the definitions of extraordinary commands proposed by modern scholars.

[537] Plb. 6.9.10-14, 10.12-14.
[538] Lintott 1999: 2.

Chapter 4: Modern Definitions of Extraordinary Commands

The purpose of this chapter is to survey the various criteria and definitions of extraordinary commands that have been proposed in modern scholarship. The significance of this examination is that discussions of extraordinary commands in one form or another are ubiquitous in studies of the Roman Republic, but, as Ronald Ridley points out, "When, however, we come to ask what exactly constitutes such a command, the answers are found to be vague and conflicting."[539] Mommsen correctly identified that the essence of extraordinary commands fundamentally centered on the conferment of *imperium* in a manner that was contrary to Roman constitutional norms or was outright illegal.[540] Over time various historians have offered different and often contradictory definitions for extraordinary commands and the criteria for their identification, largely centering on debates over the flexibility of the Roman constitution, the importance of legal statute, and Roman political norms (*mos maiorum*). Thus, a proper understanding of extraordinary commands requires an analysis of the various norms and laws regulating Roman magistrates, such as breaches of annuity, collegiality, election, as well as the different methods and political implications of contravening these norms and laws.

In the first section of this chapter, I will provide a historiographical survey on the development of the modern definition of extraordinary commands, with emphasis on the different criteria proposed by various historians. The second section of this chapter will establish an outline of how to identify and scrutinize the various criteria of extraordinary commands.

Modern Conceptions of Extraordinary Commands: Historiography

[539] Ridley 1981: 280. See also Gruen 1995: 534.
[540] Mommsen 1887: 2.1.627-628.

As stated above, Theodor Mommsen's definition of extraordinary commands focused heavily on the issue of *imperium*. Mommsen saw a distinction between commands that were "exceptional" (exceptionelle) and those that were truly "extraordinary" (ausserordentliche). To Mommsen, exceptional commands were simply those which originated as modifications of "ordinary offices" (ordentlichen Amtes), such as prorogation, the legal extension of a magistrate's *imperium* at the end of their elected term. Extraordinary commands, on the other hand, were those where *imperium* was bestowed on an office or individual in a manner that deviated from constitutional norms and/or legislation. This is a rather ambiguous set of criteria, which Mommsen grouped into two basic categories, *imperium* attached to a lower or civil magistracy to which it did not legally belong (such as conferring proconsular *imperium* on praetors, propraetors, quaestors, etc.) and *imperium* assigned to a *privatus,* an individual not holding an elected magistracy.[541] An instance of Mommsen's first category can be found in the extraordinary command of Cn. Calpurnius Piso in 65, who received *imperium pro praetore* for a command in Spain, though only a quaestor at the time.[542] As for Mommsen's second category, the conferment of *imperium* upon *privati*, the anomalous career of Pompey is an indisputable example. In 83, for example, Pompey, being an equestrian and having never held political office, illegally raised a private army in support of L. Cornelius Sulla and was even granted formal *imperium pro praetore* a year later for a campaign against Marian holdouts in Africa.[543]

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[541] Mommsen 1887: 2.1.627-628. Mommsen actually cited five specific categories of extraordinary commands, however, which included: 1) consular *imperium* granted to a praetor or propraetor; 2) consular *imperium* granted to a quaestor; 3) *imperium* granted to an individual without a magistracy for a governorship or military command; 4) *imperium* granted to an individual without a proper magistracy and in which the commander's *imperium* was either equal or superior to that of other generals; and 5) *imperium* granted to commanders without magistracies in cases of emergencies. See also Ridley 1981: 280-281, who condensed Mommsen's multiple categories of extraordinary commands to the first two cited above but did not note the distinctions between different ranking *imperia*.
[542] *CIL* 1.749: *Cn(aeus) Calpurnius / Cn(aei) f(ilius) Piso / quaestor pro pr(raetore) ex s(enatus) c(onsulto) / provinciam Hispaniam / citeriorem obtinuit*; Sall. *Cat.* 19.1-5; Ascon. 92-93; Suet. *Iul.* 9.3; Dio 34.44.5.
[543] Cic. *Man.* 61; Caes. *BAfr*. 22.3; Livy *Per*. 89; Plin. *HN* 7.96, 8.4; Plut. *Pomp.* 14.1-6; *Crass.* 12.4; *Mor*. 203E-F, 803F; App. *BC* 1.80; esp. Gran. Lic. 36.2 (*pro praetore ex Africa triu[mph]avit*); *Vir. Ill.* 77.2; Eutrop. 5.9.1.

Mommsen is correct in emphasizing the importance of improperly conferring *imperium* in the creation of extraordinary commands, which also included irregularities in the hierarchical nature of *imperium*, specifically the relationship between "greater" (*maius*) and "lesser" (*minus*) *imperia*. As discussed in the previous chapter, there were specific legal stipulations under which *imperium* could be conferred on a magistrate, the foremost of which was that only dictators, consuls, and praetors were able to wield *imperium*, and only that which corresponded to the rank of the specific office itself.[544] Although the act of *prorogatio* formally extended only *imperium*, as opposed to the actual office, the type of *imperium* extended was limited in rank to the highest office held by the magistrate in question. In other words, according to the Roman constitution, only a consul (or a person who had formerly been a consul) could wield the *imperium* of a consul (*imperium consularis*), though a former consul could also wield the lesser *imperium* of a praetor (*imperium praetorii*), since the office of praetor was a prerequisite to the consulship. On the other hand, an individual who had only risen to the rank of a praetor could wield the *imperium* of the praetorship, but not the *maius imperium* of a consul. Accordingly, all four of the propraetors for 295 had previously been consuls.[545] In contrast, in the two prorogations for 241, only C. Lutatius Catulus, one of the previous year's consuls acted *pro consule*, while his subordinate commander, C. Valerius Falto, served *pro praetore*, since he had only risen to the praetorship at that point.[546]

On the other hand, Mommsen does not consider commands stemming from any "Modification des ordentlichen Amtes" as extraordinary, which excludes prorogation altogether.

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[544] Sumi 2005: 35; Drogula 2007: 436.
[545] Livy 10.25.11, 26.8-15, 27.5-6, 29.3-5, 30.1-2; Front. *Str.* 2.5.9; see also the discussion in *MRR* 1.178.
[546] Plb. 1.60.6-61.8; Diod. 24.11.1-3; Livy *Per.* 19; Val. Max. 2.8.2; Flor. 1.18.33-37; *Vir. Ill.* 41.1; Eutrop. 2.27.1-3; Oros. 4.10.6-78; Zon. 8.17. See also the triumphs recorded in *Fast. Tr.*, p. 100-101, as well as further discussion and sources listed in *MRR* 1.219-221.

In this way, for instance, Mommsen argues that Caesar's ten-year command in Gaul (58-49) qualifies as "legally an extended proconsulate" (rechtlich ein erweitertes Proconsulat) and not an extraordinary command, because the expansive irregularities of Caesar's magistracy (such as its geographical scope and tenure) were achieved through legal dispensation.[547] That is, to Mommsen there was nothing illegal about modified magistracies, as opposed to extraordinary commands which manifested as blatant contradictions to Roman law. The problem, however, is that Mommsen's criteria for what qualifies a command as extraordinary is based too strictly on legality. Specifically, Mommsen does not take into account that, for the most part, the Romans strove to reconcile intentional deviations from the Roman constitution through preemptive or retroactive legislation, so that any errant magistracies conformed (or appeared to conform) to Roman law. For instance, when, in 214, P. Cornelius Scipio (later, Africanus) announced his candidacy for the next year's curule aedileship the tribunes protested on the basis that he was below the legal age to hold office. Scipio responded, however, that he was indeed old enough to hold the office if the people approved, and thereby circumvented this legal requirement by popular acclaim (Livy 25.2.6-8). More serious was Scipio's later election to the proconsular command in Spain in 210, where again he was legally disqualified by his youth and now also his lack of progress through the *cursus honorum*, but again bypassed these hindrances through a popular vote.[548] According to Mommsen's logic, Scipio's proconsular *imperium* was illegal in 210, considering that he had only held a curule aedileship by that time, but this conferment was legitimized by the vote of the people.[549] We must remember that a fundamental principle of the Roman constitution was that whatever the people voted had the force of law (Livy 7.17.12), so

[547] Mommsen 1887: 2.1.627.
[548] Livy 26.18.2-19.9; Val. Max. 3.7.1; Sen. *Dial.* 10.17.6; Sil. *Pun.* 16.645-646; App. *Hisp.* 18; Dio 16 fr. 57.38-40; *Vir. Ill.* 49.7 (describing Scipio incorrectly as a praetor); Oros. 4.17.3; Zon. 9.7.
[549] On the age requirements and the *cursus honorum*, see Astin 1958: 1-7, 19-46.

Scipio's elections may have been contrary to Roman law but were still considered legal in accordance with the will of the people.[550]

Even more flagrant violations of Roman magisterial law were often met with accommodations retroactively, such as the case of Pompey's first triumph. In 81, after serving under Sulla for over a year and leading multiple campaigns, Pompey demanded a triumph to commemorate his victories in Africa but was told that he was unqualified on several grounds: he was too young (being twenty-four at the time), had not held the required consulship or praetorship (nor any public office, for that matter), and was not even a member of the Senate but only an *eques*. Pompey protested these restrictions, however, and successfully convinced Sulla to grant him a propraetorian triumph.[551] Although Sulla had previously hailed Pompey as *imperator*, which was controversial enough in the eyes of many, this had little legal implication. Granting Pompey a triumph, however, which required possession of *imperium*, implicitly legitimized Pompey's *imperium* up to that time as *pro praetore*, despite its illegal origin.[552] The examples of Scipio and Pompey demonstrate that Mommsen's differentiation between exceptional commands (ordinary magistracies modified by legal dispensation) and extraordinary commands (overt departures from the Roman constitution) is untenable. Both scenarios equally depict the Roman constitution adapting itself to accommodate irregular magistracies via legal exemption. The nature of extraordinary commands did not center solely on their legality, since the Romans made sure that every magistracy had the stamp of lawful legitimacy. Fundamentally,

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[550] Straumann 2011: 284-286; Straumann 2016: 36.
[551] Cic. *Man.* 61; Caes. *BAfr*. 22.3; Livy *Per*. 89; Vell. 2.40.4; Plin. *NH* 7.96; Plut. *Sert.* 18.3; *Pomp.* 14.1-11; *Crass*. 7.1, 12.4; *Mor*. 203E-F, 803F; App. *BC* 1.80; esp. Gran. Lic. 36.2 (*pro praetore ex Africa triu[mph]avit*); *Vir. Ill.* 77.2; Eutrop. 5.9.1. On placing the date of Pompey's triumph in 81, see Badian 1955: 107-118. On the controversial nature of Pompey's triumph, see also Boak 1918: 4; Kloft 1977: 70; Beard 2009: 16-17.
[552] On Sulla controversially lauding Pompey and hailing him as *Imperator*, see Sull. *Hist.* 5.16; Diod. 38.10.1; Val. Max. 5.2.9; Plut. *Pomp.* 8.1-4; *Crass.* 6.4-5; *Mor.* 803E; App. *BC* 1.80. On the requirement of *imperium* for a triumph, see Kloft 1977: 69-70; Stewart 1998: 125; Mousourakis 2003: 79; Drogula 2007: 434, 442-444; Vervaet 2009b: 415, 425, 429; Hölkeskamp 2010: 64; Steel 2013: 239-240; Williamson 2019: 374.

extraordinary commands were deviations from the constitution, but even seemingly minor modifications to ordinary magistracies technically had the same legality as outright illicit commands confirmed (either preemptively or retroactively) by legislation or popular acclaim.

Arthur Boak expanded on Mommsen's discussion by more closely examining the relationship between different types of *imperium* in extraordinary and ordinary commands, as well as the manner in which these commands were created (namely the alternation between senatorial and popular appointment of extraordinary commands), with a chronological focus spanning from Sulla's reforms to Caesar's victory at Pharsalus (c. 80-48). Boak's definition of extraordinary commands is much more encompassing than Mommsen and included all commands that "exceeded in some way the *imperia* of the regularly constituted officials and required to be created or defined by a special enactment of the Senate or *Comitia*."[553] One of Boak's central arguments is that control over the creation and conferral of extraordinary *imperium* in the late Republic shifted gradually from the Senate to the popular assemblies, and that the *comitia*'s "usurpation" cleared a path for ambitious aristocrats to obtain larger extraordinary commands. Like Mommsen, Boak also believed that the extraordinary commands held by Pompey were a precursor to the Augustan principate.[554] On the other hand, contrary to Mommsen, Boak argued that prorogations played a large role in the development of extraordinary commands by binding the loyalty of the soldiers to generals in "prolonged military command" and allowing commanders to engage in demagoguery in Rome through the support of their soldiers.[555] Boak's study also highlights the rise of Pompey, and the role that *imperium maius* played in his extraordinary commands, especially how the *imperium* of extraordinary

[553] Boak 1918: 1.
[554] Boak 1918: 1-2.
[555] Boak 1918: 3.

commands measured against that of proper, elected magistrates. Although Boak is right to note that prorogued commands can be counted as extraordinary commands, since prorogations were implicit violations of annuity, his overall criteria for identifying extraordinary commands are nevertheless too broad and all encompassing. The problem with Boak's perspective, as Ronald Ridley argues, is that "almost every command of the late Republic was seen as extraordinary."[556] Nevertheless, Boak's study successfully draws attention to the importance of distinguishing between different types of *imperium,* as well as the need to consider prorogation as a potential criteria of extraordinary commands, topics which later scholars would continue to examine.

We can better understand the nature of extraordinary commands by examining the type of *imperium* they possessed, especially in comparison to *imperium* attached to other ordinary magistracies. As mentioned above, a basic hierarchy existed for the *imperium* possessed by magistrates, which came down to two distinctions, namely "greater *imperium*" (*imperium maius*) and "lesser *imperium*" (*imperium minus*). At first glance, the distinction of the *imperia* for various magistracies appears simple. The *imperium* of higher-ranking magistrates, such as the consul, was superior, or "greater" (*maius*), than the *imperium* of lower ranking magistrates, such as praetors. As Hugh Last pointed out, however, the rise of extraordinary commands with innovative types of *imperium* complicated the distinctions between different types of *imperia*, requiring clarification in order to avoid conflicts of authority between ordinary and extraordinary magistrates.[557] Last distinguished between two types of *imperium maius*, "Type A," which was latent superiority, and "Type B," which was more directly preeminent over lesser forms of *imperia*. In "Type A," the holder of *imperium maius* did have "the right to impose his will on the holder of the latter," but generally did not intervene in the exercise of a lesser magistrate's

[556] Ridley 1981: 282.
[557] Last 1947: 160.

imperium unless the two *imperia* came into conflict.[558] As an example, instead of receiving a prorogation after his consulship in 102, Marius held supreme command again the following year (101) as consul (thus, an instance of *continuatio*) in the final battles against the Teutones and Cimbri alongside his now prorogued consular colleague from 102, Q. Lutatius Catulus, in order to prevent a conflict of authority among equally ranked commanders, which indeed happened in the disaster at Aurasio in 105.[559] The second kind of *imperium maius*, "Type B," was a more direct imposition of superior authority by one magistrate over a junior office and the subordination of those holding lesser *imperium*, whose official duties were now the "ultimate responsibility" of the magistrate with greater *imperium,* such as with the dictator's "unquestioned authority over all the other magistrates."[560] Last's goal was to show that *imperium maius* was not an "unequivocal expression," but could have different implications depending on the situation.[561]

Victor Ehrenberg also agreed on the need to distinguish between different expressions of *imperium maius*, but felt that Last's dual categorization was limited in its application and did not adequately address the complex nature of *imperium*.[562] According to Ehrenberg, "*imperium maius* is, above all, simply and purely *imperium*, though seen in its relations to other *imperia*."[563] As Ehrenberg goes on to say, the implications of *imperium maius* went beyond a simple dichotomy between active or latent imposition of hierarchical authority, as Last argued, but also considerations of ordinary and extraordinary commands, as well as the question of the

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[558] Last 1947: 158-159.
[559] Vell. 2.12.5; Plut. *Mar*. 27.4-8; Gruen 1970: 538; Kloft 1977: 72-74; Ridley 1981: 295; Ridley 1987: 357.
[560] Last 1947: 159. Last goes on to point out that, although Polybius and other writers seemed to exaggerate in saying that all other magistracies are dissolved (διαλύεσθαι) when a dictator was appointed (Plb. 3.87.8), the spirit of the statement is accurate in the sense that all other magistracies "had their independence impaired" when they were "required to work under the general instructions" of a dictator. For other writers using language similar to Polybius, see Dion. Hal. 5.70.1, 72.3, 77.1; Plut. *Ant.* 8.5; *Mor.* 283B; and App. *Hann.* 12.
[561] Last 1974: 163.
[562] Ehrenberg 1953: 114.
[563] Ehrenberg 1953: 115.

constitutionality of such appointments. In particular, Ehrenberg does well to point out that the Roman conception of *imperium* was not limited simply to a *maius-minus* bifurcation, but instead encompassed multiple variations of *imperium*, such as "equal" *imperium* (*par* or *aequum*) or even *imperium infinitum*, depending on the situation at hand.[564]

Wilhelmina Jashemski dramatically increased our understanding of extraordinary commands through her comprehensive examination of the history of the promagistracy in the Roman Republic. While Jashemski's study centers ultimately on the development of proconsular and propraetorian *imperium*, her work primarily focuses on the extension of *imperium* through prorogation and the conferral of *imperium* upon *privati*. The use of promagistracies, according to Jashemski, reflected Rome's acknowledgement of the limitations of its constitution, especially regarding annual magistracies, but also demonstrated Rome's willingness to adapt its institutions in order to meet "changing needs and circumstances."[565] Like Mommsen, Jashemski acknowledges the influential role that promagistracies played in the foundation of the Principate, particularly that the extraordinary commands held by Pompey served as a precursor and model for those later held by Augustus.[566] Jashemski's study of Roman promagistracies also expands on the work of previous scholars regarding extraordinary commands. Whereas Boak, for instance focused exclusively on extraordinary commands of the late Republic, Jashemski's scope covers most of the Republic's history, beginning with the first recorded prorogation in 326 (that of Q. Publilius Philo) to the outbreak of the Second Punic War in 218, followed by the Second Punic War itself and the first few years of the second century (218-198), and finally from the rest of the

[564] Ehrenberg 1953: 115-117. For examples of *par imperium* see Q. Fulvius in 211 (Livy 26.9.10) and Tib. Claudius in 202 (Livy 30.27.5); for *imperium aequum* see the famous example of Pompey's command in the *lex Gabinia* of 67 (Vell. 2.31.2); for *imperium infinitum* see M. Antonius in 74 (Cic. *Verr.* 2.2.8, 3.213). I will elaborate on the specific aspects of these different *imperia* later in this chapter.
[565] Jashemski 1966: vii, 1.
[566] Jashemski 1966: vii, 95.

second century to the foundation of the Principate (198-27).[567] Furthermore, Mommsen and Boak's analyses were heavily legalistic, characterizing extraordinary commands based on their legality or focusing solely on the method of conferring *imperium* (i.e., senatorial decree or popular vote), but Jashemski correctly recognizes that promagistracies were an indication of the renowned flexibility of Rome's constitution and its ability to adapt and innovate in times of emergency.[568] One of Jashemski's most significant contributions to the study of extraordinary commands is her increased focus on the grant of *imperium* to *privati* and *legati*, men who did not hold elected office at the time of their conferral. According to Jashemski, commanders who were *privati* could take three forms, those who had previously been elected to an office with *imperium*, those who had previously held an elected office but not one with *imperium*, and those who had never held elected office.[569] Jashemski also demonstrates that the delegation of *imperium* by commanders to *legati*, subordinate officers (who were also technically *privati*), is not exclusively a phenomenon of late Republican commands like those of Pompey, but originated in the appointment of the first four propraetors in 295, who may have served as legates to the consuls.[570] Nevertheless, despite the established precedent of prorogation and granting *imperium* to both *privati* and *legati* throughout the Republic, Jashemski also recognizes that promagistracies introduced the danger of "strong men" into Rome's government, citing the example of the Roman people desiring to make Scipio Africanus a perpetual consul and dictator.[571] And yet, Jashemski disagrees with the characterization of prorogations and appointment of *privati* in the late Republic as irregular or extraordinary, because of the

[567] On Philo, see Livy 8.23.10-12.
[568] Jashemski 1966: 1-2.
[569] Jashemski 1966: 20-21, 36-40, 66, 88-97. See also Ridley (1981: 287) on Jashemski's ambiguity and confusion regarding the careers of some *privati*.
[570] Jashemski 1966: 6-7, 23, 37-39, 66-67, 89-91, 98. For sources on the four propraetors of 295, see *MRR* 1.178.
[571] Livy 38.56.12; Jashemski 1966: 96-97.

continuity in the use of promagistracies throughout the entire Roman Republic. Thus, the Principate was not only born out of the late Republic, according to Jashemski, but was "rather the expression of a long and natural process of development."[572]

Despite the many strengths of Jashemski's work, there are some limitations. First, although Jashemski focuses on the develop of promagistracies overall, she does not directly engage the question of extraordinary commands; indeed, the term only appears once in the book. Although prorogations, the appointment of *privati*, and delegation to *legati* all occur frequently throughout the middle and late Republic, this did not make such procedures any less "irregular."[573] To the contrary, the fact that the use of *privati* declined sharply after the Second Punic War demonstrates that the Romans were wary at first of divorcing *imperium* too far from elected curule magistracies, while the stark increase in *privati* in the first century indicates a change in this senatorial policy that needs to be qualified. As another example, although the delegation of *imperium* may have had precedents in the third century, such uses pale in comparison to the widespread use of *legati pro praetore* in extraordinary commands of the first century, namely those held by Pompey, Caesar, and Augustus. Jashemski also glosses over other extraordinary measures, such as *continuatio*, *iteratio*, provincial assignment outside of sortition, the conferral of proconsular *imperium* upon praetors, praetorian *imperium* upon quaestors, and violations of the *cursus honorum*.

While most scholars to this point all agreed that extraordinary commands contributed to the dissolution of the late Republic, Erich Gruen represented a change in this interpretation. Gruen devoted a section of his appendices in *The Last Generation of the Roman Republic* to

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[572] Jashemski 1966: 98-99.
[573] Jashemski 1966: 99. According to Jashemski, "There has, however, been a tendency to regard these late Republican usages as irregular procedures, as is evidenced by the very term 'extraordinary,' which describes the commands granted to *privati* during this period."

"Imperia Extra Ordinem," which offered a new perspective on the concept of extraordinary commands. Gruen agrees with Jashemski that the promagistracies and "great *imperia*" of the late Republic should not truly be considered "extraordinary" because of the established precedent for using promagistracies throughout the Republic. Gruen recognizes a wider variety of criteria for so-called extraordinary commands, however, including instances of prorogation and the grant of *imperium* to *privati*, but also expanded powers (such as *imperium maius* or *infinitum*), and provinces assigned outside of sortition. As with many previous scholars, Gruen sees *imperia extra ordinem* not as contrary to *mos maiorum* or a circumvention of Rome's constitution. Instead, Rome's constitutional flexibility and the ability to innovate and adapt its political institutions in times of need, according to Gruen, were in fact central to the notion of *mos maiorum*.[574] In other words, the adoption of extraordinary *imperia* was not a contradiction of Roman socio-political tradition but was rather a component of that tradition. In contrast to previous scholars, however, Gruen argues that *imperia extraordinaria* did not erode the institutional stability of the Roman Republic but actually were indications that the government was thriving at the time, citing the fact that special commands were legally passed by appeals to the people and often included the establishment of safeguards against abuses of power, such as time limits and geographic scopes of authority.[575]

Gruen misses the forest for the trees, however, and does not take into account the broader political implications of extraordinary commands, despite his recognition of their use throughout much of the Republic's history. On the one hand, for instance, Gruen sees the widespread use of

[574] Gruen 1995: 534-535.
[575] Gruen 1995: 543. For an earlier view similar to Gruen, see Smith (1955: 108-109), who argued that the conferment of *imperium* upon *privati* were necessary and practical measures in response to necessity that represented an "evolution of government at Rome, which while not breaking with the spirit of the past, ensured efficiency of the present." For more discussion on the views of Smith and Gruen, see also Ridley 1981: 280n. 1.

extraordinary commands in the Second Punic War (218-201) as a precedent for those used during the first century.[576] On the other hand, the period of crisis and instability that precipitated extraordinary commands during the Second Punic War only lasted for around twenty years, after which time military commands returned largely to the purview of annually elected magistrates, who usually received only short prorogations. In contrast, during the last century of the Roman Republic extraordinary commands of various forms (multi-year commands, *privati cum imperio*, *maius imperium*, *iteratio*, violations of the *cursus honorum*, etc.) proliferated until the dissolution of the Republic itself and the foundation of the Principate. Lastly, Gruen acknowledges begrudgingly that this increase in extraordinary commands was "potentially troublesome" but states that the Roman government was "cognizant of the problem."[577] He does not, however, address the full political implications of the continuous corrective legislation that was enacted in response to these repeated magisterial irregularities. For instance, the three-year term limits specified in the *lex Gabinia* of 67, as well as the five-year terms of both Pompey's grain commission (57) and those of the First Triumvirate (59-50), suggest an attempt to prevent these large commands from repeating the precedents set by Marius, Sulla, and Lucullus earlier in the first century. Furthermore, although Gruen thinks that the *lex Pompeia de provinciis* of 52, which required former consuls and praetors to wait five years before assuming governorships, indicates continual self-regulation within Rome's government, it more so suggests the same anxiety apparent in Sulla's reforms a generation earlier.[578] Like Sulla before him, Pompey's proposal of legislation to standardize the assumption of promagisterial commands in the provinces reflects a desire to prevent other commanders from imitating the precedent set in the extraordinary

[576] Gruen 1995: 537.
[577] Gruen 1995: 542.
[578] Gruen 1995: 541-542.

commands that characterized his own early career, which also implies an acknowledgment by Pompey himself and those in the Roman government of the dangerous potential inherent to the large extraordinary commands that had become so frequent in the late Republic. The fact that laws were continually passed alongside the creation of extraordinary commands to establish limitations on their power does not necessarily imply that the situation was well under control, but rather that the drastic spike and expansion of extraordinary commands constituted a very real threat to the institutional stability of Rome's government and that both *mos maiorum* and socio-political consensus among the Roman nobility were no longer sufficient safeguards to keep promagistracies from spinning out of control. In other words, as Tacitus stated, the Republic was most corrupt when the laws were the most numerous (Tac. *Ann.* 3.27).

The next extensive study of promagistracies and extraordinary commands was completed by Hans Kloft in his *Prorogation und ausserordentliche Imperien*.[579] Whereas Jashemski focused on the development of the Roman proconsular and propraetorian *imperium*, Kloft's discussion centers on the mechanism of prorogation and the conferral of *imperium* upon *privati.* Both topics are quite similar, of course, but Jashemski was loath to characterize promagistracies as irregular or extraordinary, while Kloft's study explicitly considers prorogations alongside *privati* as types of extraordinary commands (ausserordentliche Imperien).[580] Like previous scholars, Kloft states that the use of prorogation and conferring *imperium* upon *privati* were innovative responses to the various crises facing the Roman Republic and are a testament to the pragmatic flexibility inherent to Rome's constitution. Building on Jashemski's work, Kloft analyzes not only the historical development of prorogations and *privati* as *ad hoc* responses to military necessity, but

[579] Kloft 1977.
[580] Prorogued commanders and *privati cum imperio* by implication possessed either proconsular or propraetorian *imperium*.

also examines the legal and socio-political implications of their use as extraordinary commands.[581] For instance, Kloft recognizes that prorogations and the conferral of *imperium* upon *privati*, notwithstanding the justification of military necessity, nevertheless represented the violation of "regulatory mechanisms" that provided limitations on a magistrate's power and accountability for their actions, specifically the political principles of annuity and collegiality.[582]

While Kloft focuses primarily on prorogation like Jashemski, he also examines the different aspects of extraordinary commands discussed by previous scholars, such as *privati*, commanders wielding augmented *imperium* (e.g., praetors with proconsular *imperium*, quaestors with propraetorian *imperium*, etc.), circumvention of sortition, as well as the question of granting or extending *imperium* via senatorial conferral, popular vote, or delegation. On the other hand, as Ridley correctly points out, Kloft "uses the term 'extraordinary' too widely, applying it to all prorogued *imperia*."[583] To be sure, Kloft is correct that prorogation by definition is a circumvention of the constitutional principle of annuity and therefore extraordinary, but the fact that prorogation became a normal and regulated expedient for provincial governance during the second century also demonstrates that not every prorogation should be considered an extraordinary command.[584] Indeed, Kloft himself recognizes that the mere use of prorogation, however frequent, did not cause the fatal decline of the Roman Republic. Instead, prorogued *imperium* only became dangerous once it was "expressly extended beyond the one-year period," referring to the lengthy commands held by men such as Sulla, Lucullus, Pompey, Caesar, and more.[585] Although multi-year commands had an established precedent as early as the Second

[581] Kloft 1977: 6-9.
[582] Kloft 1977: 87.
[583] Ridley 1981: 287.
[584] Kloft 1977: 5, 9-11, 18 n. 1, 20, 23, 32, 39, 86-89.
[585] Kloft 1977: 93.

Punic War, Kloft argues that the gradual increase in the length of commands and their distance from Rome, along with the competitive nature of the Roman aristocracy, eroded the socio-political consensus between the Senate and its generals. Once *extraordinaria imperia* progressively began to be appointed by plebiscites, as Cicero alleged in 44 (Cic. *Phil.* 11.18), the Senate's control over extraordinary commands began to wane. In such an environment, Kloft states, the extraordinary commands held by men like Pompey and Crassus became "explosive devices."[586]

Next, Ronald Ridley's article provided a valuable and comprehensive analysis of the major scholarship on extraordinary commands up to the point of its publication in 1981. In agreement with Gruen, Ridley recognizes that the lack of consensus on the criteria of extraordinary commands undermines the usual debate over their role in the supposed decline of the late Republic.[587] Thus, much of Ridley's article synthesizes the arguments of leading scholars on promagistracies, such as Mommsen, Boak, Jashemski, and Kloft, whose views he uses to formulate his own definition of extraordinary commands. On the one hand, contrary to Gruen, Ridley maintains that extraordinary commands did play a significant role in the decline of the late Republic and that the Augustan Principate was built on foundations laid by commands held by men like Pompey, Caesar, and Crassus.[588] On the other hand, Ridley also argues (against Boak) that extraordinary commands have a long legacy in the Roman Republic and cannot be seen solely as a late republican phenomenon.[589] The key issue in extraordinary commands, according to Ridley, was that the Roman government was able to augment the powers of existing

[586] Kloft 1977: 94.
[587] Ridley 1981: 280.
[588] Ridley 1981: 296. According to Ridley, "to claim that the Republic did not fall mainly because of the power of the competing commanders is obviously impossible."
[589] Ridley 1981: 282, 293.

magistrates or to supplement the number of magistrates with *imperium* whenever the circumstance required. Like previous scholars, Ridley states that the earliest method to empower magistrates in the field was to extend their *imperium* through *prorogatio*.[590] And yet, like Mommsen and Jashemski, Ridley does not truly consider prorogation to be extraordinary due to the frequency of its use throughout the second and first century.[591] More extraordinary to Ridley, however, was the use of *privati*, due to the complete circumvention of reserving *imperium* for elected officials.[592] Ridley also argues that extraordinary commands often had larger provincial assignments, such as Scipio Africanus' command in Spain and Africa (210-206), L. Licinius Lucullus in the east (77-67), M. Antonius against pirates (74-71), as well as Pompey's commands against piracy, the Mithridatic War (67-62), and his grain commission (57).[593] Ridley argues that the delegation of *imperium* to *legati* was not truly extraordinary, given the practice of subordinate commanders wielding *imperium* after a governor departed from his province and/or while the successor was in route, as well as the appointment of the first four propraetors by consuls in 295. Thus, true extraordinary use of *legati* was not *in absentia*, according to Ridley, but when the consular (or proconsular) commander actually remained in the same provinces as his *legati cum imperio.*[594] Ridley also believes that one of the most notable aspects of extraordinary commands was the innovative designations of *imperium*, those equal (*aequum*) or greater (*maius*) than that of consular colleagues. The hierarchy of *imperium* for elected magistrates was determined by their auspices. The *imperium* of consuls outranked that of praetors, while both were subordinate to dictators. Thus, the fact that proconsular commands

[590] Ridley 1981: 292-295.
[591] Ridley 1981: 289-290.
[592] Ridley 1981: 286-287, 293.
[593] Ridley 1981: 293-294.
[594] Ridley 1981: 294.

needed to be specified as equal (*aequum*) or greater (*maius*) than that of consular colleagues demonstrates an inversion of the otherwise normative hierarchy.[595]

Arguably, the most significant contribution of Ridley's article is his emphasis on the use of *extra ordinem* and *extraordinarium* in Roman sources, which many scholars often neglect.[596] Cicero, as Ridley notes, is our most prolific republican source for references to *extra ordinem* and *extraordinarium* but is egregiously inconsistent. In Cicero's defense of the *lex Manilia* of 66, for instance, although he described Pompey's commands as anomalous in nearly every way (a *novus homo*, appointed to high office as a *privatus* in contravention of the *lex annalis* and *cursus honorum*), he never used the words *extraordinarium* or *extra ordinem*. Cicero's argument here, as Ridley points out, was "to make a distinction between Roman conservatism in peace and pragmatism in war."[597] In contrast to the reasonable pragmatism of Pompey's appointment, describing the command as extraordinary would carry a negative connotation that Cicero wanted to avoid. On the other hand, when Cicero vehemently opposed granting an *extraordinarium imperium* to the P. Servilius (cos. 48) in 43 on the grounds that he was a *privatus* at the time, Cicero did in fact refer to many of Pompey's commands as extraordinary.[598] Unfortunately, the merits of Ridley's philological analysis are undermined by its brevity. For instance, while Ridley does give a brief mention of other uses of *extra ordinem* and *extraordinarium* in Cicero's works, he omits nearly all uses of the term in *De domo sua* and skips over all non-Ciceronian references aside from the sole mention of Caesar. Nevertheless, Ridley is unique among previous scholars for recognizing that the "first step" in establishing a definition of extraordinary commands is to

[595] Ridley 1981: 295.
[596] Ridley 1981: 290-292.
[597] Ridley 1981: 291.
[598] See also Dawes 2014: 249. I elaborate further on Cicero's specific use of *extraordinarium* and *extra ordinem* in the following chapter.

ask what types of commands the Romans themselves considered to be extraordinary. According to Ridley, what Cicero's speeches show, despite their apparent hypocrisy and inconsistency, is that extraordinary commands cannot be judged by a strict set of legalistic criteria alone, but also that the "motives, and the context and circumstances must always be taken into account." Otherwise, according to Ridley, historians risk the danger of being too rigid and characterizing the most minor irregularity as extraordinary, such as considering every prorogation extraordinary, as he alleges of Kloft.[599]

And yet, to the opposite extreme, Ridley himself is too lenient in seeing every deviation from law as yet another indication of Rome's constitutional flexibility or being permissible due to circumstance. For instance, Ridley rejects Boak's criteria that extraordinary commands were based on the violation of annuity, arguing instead merely on the grounds that extensions of *imperium* were not "unusual."[600] As further examples, Ridley excuses the five consecutive consulships (which were thus also examples of *reficere*, a type of *continuatio*) held by Marius due to his "military indispensability," while the long-term provincial commands assigned to Lucullus and Pompey against Mithridates were similarly necessary because "there was no other sensible way of trying to wage the war." Even the command of multiple provinces held by Lucullus and Pompey found precedent in Scipio Africanus' unrestricted command in Spain during the Second Punic War.[601] This is a poor argument, as neither the justification for resorting to extraordinary commands nor the consistency or precedent of their usage make them any less extraordinary. To the contrary, the circumstantial necessity justifying the use of extraordinary commands are inherent to their nature as a form of emergency powers. Furthermore, as de Wilde

[599] Ridley 1981: 290-292.
[600] Ridley 1981: 285.
[601] Ridley 1981: 285 (on Lucullus and Pompey against Mithridates), 290 (on Marius), and 293 (on the precedent set by Scipio Africanus in Spain).

points out, the danger of emergency powers is that they can be "transformed into regular means of governance."[602] Indeed, the act of *prorogatio*, a regular form of provincial administration in the second century, began as just such an emergency power.

Contrary to Ridley, one of the many aspects of an extraordinary command is not necessarily whether it was unprecedented or unjustified, but rather if it was a deviation from a constitutional norm or law. While *extra ordinem* and *extraordinarium* can certainly be interpreted as "irregular," "unusual," or "special," as most scholars translate them, these are not their fundamental meanings. The root of both terms, of course, is the word *ordo*, which (among its many uses) can be taken to refer to a designated order, sequence, place, position, arrangement, or standard procedure.[603] In this way, anything *extra ordinem* is contrary to a designated order, out of sequence, not in the correct place or position, outside the established arrangement, or deviating from standard procedure. Thus, commands and magistracies described as *extra ordinem* or *extraordinarium* are by definition created in a manner that is contrary to constitutional law regulating magistracies, even when justified by necessity or legitimized by statute. As Kloft argues, there is a significant political difference between "normality" (the frequency of an occurrence) and "normativity" (the constitutional legality of an occurrence).[604] Extraordinary magistracies and commands were always intended to be temporary expedients, and, although they may have recurred to such an extent they became a *de facto* norm, they were always *de iure* non-normative emergency powers.[605]

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[602] De Wilde 2015: 111.
[603] *OLD* 1968: 1266-1267. For the different definitions of *extraordinarius*, 661. On the use of *ordo* in reference to magistracies, see Cic. *Agr*. 2.24 (*magistratibus quorum certus ordo est*); Astin 1958: 19; Mousourakis 2003: 77.
[604] Kloft 1977: 84.
[605] De Wilde 2012: 560. As de Wilde points out, emergency powers were defined by their temporary nature.

Following Ridley's treatment, plenty of historians have included considerations of extraordinary commands in studies of Roman law, constitutional thought, the history of the late Republic, and more, but there has been no further comprehensive study of extraordinary commands themselves. Furthermore, subsequent historians have remained inconsistent in their characterization of extraordinary commands. Roberta Stewart, for instance, devotes considerable discussion to the introduction of prorogation, the use of *continuatio* and *iteratio,* the augmentation of a *imperium* (i.e., prorogued praetors with *imperium pro consule*) as well as the delegation of *imperium* to *privati*, but never mentions the unconstitutional nature of such extraordinary measures, merely attributing it to the willingness of the Romans "to work within institutions deemed acceptable" in times of crisis.[606] Lintott, in his study of the Roman constitution, provides a brief, but more thorough examination of extraordinary commands and their relationship with laws regulating Rome's magistracies. According to Lintott, the emergence of extraordinary commands is rooted in the need for more commanders in the field due to the limitations of Rome's annually elected, *imperium*-bearing magistracies. Early on, the need for extra commanders could be met by the use of dictators or more extreme measures, such as the institution of consular tribunes, but prorogation proved to be a more flexible and less disruptive innovation.[607] Further military exigencies, namely the Second Punic War, led to even more reliance on commanders receiving multi-year commands, as well as the conferment of *imperium* upon *privati*. However, Lintott acknowledges the changing trends in irregular magistracies after the Hannibalic War, particularly Rome's desire to pull back on their use of long-term prorogations and the appointment of *privati*, seen in the increase of praetorships and stricter

[606] Stewart 1998: 177-178. See also 91-92, 118, 166, 176-177, 207-208.
[607] Lintott 1999: 113.

regulation of prorogation in the second century.[608] In turn, Lintott also recognizes the resurgence of extraordinary commands in the first century, as well as the frequent use of *legati* wielding *imperium* delegated by senior commanders holding command over multiple provinces at once.[609] In contrast to Gruen, Lintott places the rise and expansion of extraordinary commands in the context of various constitutional issues plaguing the late Republic.[610] In a more legalistic perspective, Mousourakis defines extraordinary magistrates as those "appointed only under special circumstances or for specific purposes," including in their number dictators, the *interrex*, the *decemviri legibus scribundis,* and the consular tribunes.[611] Although Mousourakis is correct that extraordinary commands were appointed for special purposes, most often emergencies, he does not consider the issue of constitutional innovations into his definition. The dictatorship and the *interrex*, for instance, were official components of Rome's constitution with established procedures regulating their appointment and the extent of their authority. The *decemviri* and consular tribunes are better examples (which I discuss further in chapter 7), as they represent systemwide revisions or even suspensions of elements of the Roman constitution. On the other hand, although Mousourakis does discuss magisterial innovations of prorogation, *continuatio*, and *iteratio*, he does not include these in his definition of extraordinary commands, nor does he even acknowledge the issue of *privati cum imperio*.[612]

Frederik Vervaet must also be mentioned, as he has devoted significant attention to the various aspects and criteria that are commonly associated with extraordinary commands, such as violations of annuity, the legality of *imperium* conferred outside elected magistracies, provincial

[608] Lintott 1999: 105, 113-114.
[609] Lintott 1999: 115.
[610] Lintott 1999: 221-213.
[611] Mousourakis 2003: 84.
[612] Mousourakis 2003: 80-81.

allotment among extraordinary commands, the evolution of dictatorial powers, and more.[613] As only one notable example, Vervaet directly addresses the issue of praetors receiving proconsular *imperium* throughout the middle and late Republic, a topic that scholars commonly overlook or give only cursory attention. Specifically, Vervaet argues that the Metilian law of 217, which briefly upgraded the *imperium* of M. Minucius, the *magister equitum* at the time, to that of a dictator, served as a constitutional precedent for the Senate and people to augment the *imperium* of praetors to the consular level when deemed necessary.[614] In addition to providing thorough legal analyses, Vervaet also assesses the effect of extraordinary commands on the Roman constitution. Contrary to Gruen and Ridley, Vervaet shows that military emergency and the flexibility of Rome's constitution did not mitigate the dangers introduced by extraordinary commands. For instance, despite the necessity induced by the vicissitudes of Rome's losses in the Hannibalic War, the use of extraordinary commands in Spain were seen as a temporary and dangerous expedient that the Roman Senate sought to limit as soon the military emergency abated.[615] Nearly 150 years later, however, during the Sertorian and Mithridatic wars, many of Pompey's early extraordinary commands were created by implicit threats and "multiple breaches of the law."[616] Thus, as Vervaet shows, the potential and theoretical concerns generated by the extraordinary commands in Spain during the Hannibalic War manifested as genuine threats to the Roman state over the course of Pompey's career. Indeed, beyond even Pompey, Vervaet argues

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[613] On the allotment of provinces, Vervaet 2006: 625-654; on issues of annuity, such as *continuatio*, *iteratio*, and prorogation, Vervaet 2009a: 49-71 and 2010: 79-152; on the evolution of Sulla's dictatorship, Vervaet 2004: 37-84 and 2018: 31-82; on the *lex curiata* and the conferral of *imperium*, Vervaet 2015: 201-224.
[614] Vervaet 2012: 46-47. See also Vervaet 2007: 197-232. On the passage of the *lex Metilia*, see Plb. 3.103.1-8; Nepos 23.5.3; Livy 22.25-27; Sil. 7.508-522; Plut. *Fab.* 9.3-10.5; *Mor.* 195C; App. *Hann.* 12-13; Dio fr. 57.16-20; *Vir. Ill.* 43.3; Zon. 8.26.
[615] Vervaet 2007: 36; Vervaet 2009b: 413.
[616] Vervaet 2009b: 414-415, 425-433. Pressed for supplies and money to pay his troops while in Spain, Pompey sent a letter to the Senate in 74 threatening to march on Rome if he did not receive the provisions he requested (Sall. *Hist.* 2.82.10; Plut. *Luc.* 5.2; *Pomp.* 1).

that violations of annuity and collegiality, the accumulation of multi-provincial commands, the delegation and conferral of *imperium* upon *privati* and *legati*, and the assumption of *maius imperium* were continual features of extraordinary commands throughout the remaining years of the Republic, providing a perfect model for Augustus' monopolization of the *summum imperium auspiciumque* that formed the foundation of the Principate.[617]

As a final mention, Benjamin Straumann also recognizes that, "despite their crucial role in the crises of the late Republic there has not been a recent monographic treatment of *imperia extraordinaria*," nor is there consensus on the criteria of their identification.[618] Straumann analyzes extraordinary commands, along with the dictatorship and the *Senatus consultum ultimum*, in the context of constitutionality and the suspension of laws and political norms in the face of emergencies.[619] Similar to Mommsen's earlier differentiation between exceptional and extraordinary commands, Straumann stresses the importance of distinguishing between commands that were constitutional, commands that were "*extra ordinem* but perhaps still constitutional," and commands that were outright unconstitutional.[620] Like Mommsen and Jashemski, Straumann does not think that prorogations should be considered extraordinary, since legal extensions of *imperium* were preferable to *continuatio*, *iteratio*, and *reficere*, which were constitutionally controversial as they directly violated the principle of annuity. Along with the breach of annuity, extraordinary commands included the conferral or delegation of *imperium* to *privati*, breaches of the *cursus honorum*, sortition, and multi-provincial assignments.[621] Fundamentally, according to Straumann, extraordinary commands represented the removal of

[617] Vervaet 2014: 14, 64n. 35, 79, 85, 103-104, 105n. 106, 120, 124-125, 126n. 175, 143-144, 151, 165-166, 174, 186, 203-208, 213-224, 227, 230-232, 240, 243, 249-250, 256, 262-265, 269, 276, 284-285, 299, 346n. 139.
[618] Straumann 2016: 101.
[619] Straumann 2016: 64.
[620] Straumann 2016: 102.
[621] Straumann 2016: 101-104.

constitutional safeguards that were designed to prevent magisterial abuse of power. On the other hand, the constitutional supremacy of the people's vote meant that these safeguards, despite being defined by "higher-order norms" and "enshrined in legislation," could be overridden by the popular assemblies.[622]

Like Ridley, Straumann emphasized the importance of looking at what the Romans themselves characterized as *extra ordinem*. Despite the inconsistencies and contradictions in Roman sources, especially those of Cicero, the central issue inherent to extraordinary commands were constitutionality and national security. Roman critics of extraordinary commands argued that the circumvention of statutes (*lex*) and constitutional norms (*ius*) undermined the stability of Rome's government.[623] For instance, why even bother having laws that regulated magistrates, asked Catulus in 67, if the Romans were willing to bypass legal protocol by popular decree whenever expedient (Dio 36.33.2)? On the other hand, proponents of extraordinary commands based their arguments not only on the flexibility of Rome's constitution or the principle that the people's will was sovereign, but also that anything advantageous or in defense of the Republic was constitutional.[624] But, as Straumann points out, this argument is not airtight, since the gradual accumulation of unchecked powers in extraordinary commands created conditions where despotism and tyranny could grow, both of which were antithetical to the highest principle in the Roman constitution, the *libertas* and prosperity of the Roman people.[625]

The historians discussed above do not constitute the totality of discussions surrounding extraordinary commands, but they do represent the major arguments among modern scholars.

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[622] Straumann 2016: 108.
[623] Straumann 2016: 105-111.
[624] Cic. *Phil.* 11.28: *omnia quae rei publicae salutaria essent legitima et iusta haberentur*. See also Straumann 2016: 116.
[625] Straumann 2016: 111-116. On despotism and tyranny, Cic. *Brut.* 1.17.6: *hoc est cum regno et imperiis extraordinariis et dominatione et potentia quae supra leges se esse velit*. On the prosperity of the Roman people, see Cic. *Leg.* 3.8: *Ollis salus populi suprema lex esto*. On the *libertas* of the Roman people, see Livy 2.1.1-9.

The preceding historiographical survey demonstrates that, as mentioned at the beginning of this chapter, although discussions of extraordinary commands feature prominently in studies of the late Roman Republic, there is little consensus on the criteria for their definition. All scholars are at least in agreement on three major points: that extraordinary commands were fundamentally instances in which *imperium* was conferred upon an individual in a manner contrary to established Roman law (namely to *privati*), were indicative of the Roman Republic's flexibility and adaptability, and were not a phenomenon unique to the late Republic but had precedent as early as 326 with the first prorogation granted to Q. Publilius Philo.[626] Beyond these three points, there is little unified consensus among modern scholars regarding the definition and political significance of extraordinary commands. As we have seen, for instance, some scholars regard every legal anomaly for military commands as unconstitutional, while others argue that no innovative measure was outside the purview of senatorial and popular decree. And while most scholars recognize the established precedent of extraordinary commands throughout the Roman Republic, there is disagreement over the degree to which, if any, such commands played in the ultimate dissolution of the late Republic.

Towards a Comprehensive Definition of Extraordinary Commands

Having surveyed the lack of consensus among modern historians, we can now attempt to synthesize many of these various positions in order to form an overarching, comprehensive understanding of extraordinary commands. I argue that extraordinary commands should be understood as instances where *imperium* was conferred or wielded in a manner that represented a constitutional deviation in Roman politics. In order to demonstrate this definition, it is necessary

[626] See Livy 8.23.10-12 on Philo's prorogation.

to break down the fundamental issues surrounding the identification of extraordinary commands. Thus, we can condense the various modern arguments over the definition of extraordinary commands into three analytical perspectives: legal criteria, magnitude, and the broader constitutional relationship with Rome's political institutions.

Legal Criteria

The question of legal criteria is concerned with the specific qualities of extraordinary commands, how they were formed, and what they looked like in practice. From a purely legal perspective, extraordinary commands were instances in which *imperium* was divorced in some way from the magisterial restraint inherent in Roman constitutional procedure, manifesting potentially from the circumvention of the *cursus honorum* and election, elimination of collegiality, disregard of annuity, expanded scope of *imperium*, and more.[627] As such, extraordinary commands could exhibit any of the following seven legal criteria:

1. *Continuatio*, *reficere*, and *iteratio*

One potential violation of annuity was known as *continuatio*, in which magistrates remained in the same office after their prescribed terms had expired.[628] In general, *continuatio* could take three forms, the refusal to abdicate and vacate one's office, a formal and legal extension of the term of office, or immediate reelection to the same magistracy (*reficere*). Of the three, the refusal to abdicate was by far the most egregious and rare in occurrence, since it was a blatant violation of magisterial law and suggested monarchic and tyrannical ambition.[629] The best

[627] Boak 1918: 1.
[628] Kloft 1977: 12.
[629] Kloft 1977: 9-10; Vervaet 2009a: 58, 62, 69; 2010: 141-142; Straumann 2016: 104, 110.

example of this type of *continuatio* is the dictatorship of L. Manlius Capitolinus Imperiosus in 363, who remained in office past the conclusion of his designated religious function in an attempt to gain the command against the Latin Hernici tribe but was finally convinced to abdicate at the insistence of the plebeian tribunes. The following year, however, another plebeian tribune, M. Pomponius, actually did prosecute Manlius for his *continuatio*, who narrowly avoided conviction due to the intercession of his son.[630] The second type of *continuatio* was the legal and formal extension of a term for an elected magistracy (or appointed office, in the case of dictatorships), which was quite rare initially but became more common towards the end of the Republic. And while invariably effected through popular legislation, this type of legal *continuatio* more explicitly highlighted the danger of tyranny and *dominatio* on the part of ambitious elites than any brazen defiance of law, because it represented conscious efforts to circumvent constitutional procedure and safeguards. An example of this type of *continuatio* includes Caesar's appointment to an annually recurring dictatorship (first for a period of ten years in 46, then in perpetuity in 44), as well as the quinquennial renewals of the Second Triumvirate.[631]

The third form that *continuatio* could take was *reficere*, the immediate reelection to the same office at the end of an annual term. *Reficere* can be understood as a type or subset of *continuatio*, since both terms are at times used interchangeably, but there are also occasions

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[630] Cic. *Off.* 3.112; Livy 7.3.4, 9-4.7; Val. 5.43.3; 6.9.1; Sen. *Ben.* 3.37.4; App. *Sam.* 2; *Vir Ill.* 28.1-2; Zon. 7.24. See also Vervaet 2009a: 69-70; 2010: 142; de Wilde 2012: 574.

[631] On *continuatio* for Caesar's dictatorships, see *Fast. Cap.*, p. 78 (*C. Iulius C. f. C. n. Caesar in perpetuum*); Caes. *BH* 2.1 (*C. Caesar dictator tertio, designatus dictator quarto*); Livy *Per.* 116; Joseph. *AI* 14.211; Plut. *Caes.* 51.1, 57.1-2; Suet. *Iul.* 76.1; Flor. 2.13.91; App. *BC* 2.106; Gell. 19.8.3; Dio 42.20.3, 21.1-2; 43.14.4-5 (ἔτη καὶ δικτάτορα ἐς δέκα); 44.8.4; 46.17.5; *Vir. Ill.* 78.10 (*dictator in perpetuum factum a senatu*); Zon. 7.13. On the quinquennial *continuationes* of the Second Triumvirate, see Aug. *RG* 7; Livy *Per.* 120, 132; Tac. *Ann.* 1.10; Plut. *Ant.* 35.2-8; App. *BC* 5.95; Dio 46.55.3; 48.54.6. See also Bonner 1922: 149; Ehrenberg 1953: 128-132, 134; Lintott 1999: 40, 113; Mousourakis 2003: 100; Vervaet 2009a: 57, 59-71; 2010: 147; Hurlet 2010: 109, 124-129; Vervaet 2014: 224; Yakobson 2015: 159; Straumann 2016: 86, 88; Hodgson 2017: 184.

where *reficere* is used only (and instead of *continuatio*) to mean "reelection." In other words, references to *continuatio* may include reelection in addition other forms of remaining in office, but mention of *reficere* exclusively denotes "reelection."[632] *Reficere* was a much more common form of *continuatio* and, while not as much of a constitutional violation as the refusal to abdicate or the extension of an annual office, was still politically problematic as it allowed influential leaders to wield *imperium* and *potestas* for multiple years on end and potentially dominate elections. As such, *reficere* was also controversial, but frequently used in times of emergency as seen in the cases of M.' Curius Denatus (cos. II 275, III 274) during the Pyrrhic War (280-275), as well as M. Claudius Marcellus (cos. II 215, III 214), Q. Fabius Maximus Verrucosus (cos. III 215, IV 214), and even for a praetor in the case of Q. Fulvius Flaccus (pr. 215, II 214) at the height of the Second Punic War (218-201).[633] A better known, and more extreme example of *reficere* is obviously found in the five consecutive consulships awarded to C. Marius (104-100) during the Cimbric Wars (113-101), but also the four successive consulships of L. Cornelius Cinna (87-84).[634]

Whereas *continuatio* meant that a magistrate remained in office after their term ended and *reficere* indicated immediate reelection to the same office, *iteratio* referred to a magistrate who had at least ceased to hold office for some period of time after the end of their term but was

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[632] Brennan 2000: 651. For references to *continuatio* and *reficere* together, see Livy 3.21.2-4, 7 (*magistratus continuari et tribunos refici… consulibus refecti …consulem reficiebant … continuandis magistratibus … ex continuato*); 24.9.1, 4, 9 (*continuare consulatum … praetor unus refectus … consulatus continuatus*). For references to *reficere* alone, see Cic. *Amic.* 96 (*legem de tribunis plebis reficiendis*); Livy 2.56.5 (*tribunum reficit*); 6.36.7 (*octavum tribunos plebis refectos*); 10.13.8 (*consulem refici non liceret*); Sen. *Ep.* 104.9 (*ille consul factus, ille etiuam refectus*).

[633] For discussion of the examples mentioned above, see esp. Brennan 2000: 648, 651-652. On the controversial nature of *reficere*, see also Vervaet 2009a: 57; Straumann 2016: 103-104.

[634] For Marius' consulships from 104-101, see *CIL* 6.410.24; Cic. *Prov.* 19 (*extra ordinem*); Sall. *Iug.* 114.3; Diod. 36.10.1; Livy *Per.* 67-68; Vell. 2.12.1-2, 6; Plut. *Mar.* 11.1, 12.1-2, 14.6-8, 22.1-3, 28.1-6; Dio fr. 94; Exsuper. 14. For Cinna's consulships from 87-84, see *CIL* 6.41024; Livy *Per.* 80, 83; Plut. *Sull.* 10.3-4; App. *BC* 1.75, 77; Dio fr. 102.2-3; Ampel 42.2; *Vir. Ill.* 69.3; Exsuper. 22.

nevertheless reelected to the same office without allowing for the requisite time to pass, usually a period of ten years.[635] The significance of *iteratio* was directly tied to the concerns generated over the violations of annuity that *continuatio* and *reficere* represented. The purpose of annual term limits and the general prohibition of *continuatio* was to prevent magistrates from wielding unrestricted political power and fomenting a tyranny. As discussed above, the dynamic of *reficere* was another method of potentially circumventing this constraint on term limits by allowing a magistrate to occupy the same office for years in succession, thus carrying the similar connotations of *dominatio*. Even when magistrates avoided holding the same office for consecutive years, however, it was still possible for a small group of elite families to dominate consular elections by holding office in alternating years.[636] As only a few examples, C. Sulpicius Peticus held the consulship five times between 364 and 351, M. Popilius Laenas on four occasions from 359 to 348, and C. Marcius Rutilius on four occasions from 357 to 342.[637] It was for this reason that, according to Livy, legislation was passed in 342 mandating a ten-year gap between holding the same office, proposed by the tribune, L. Genucius.[638] As Brennan points out, the chronology and enforcement of a prohibition on *iteratio* is unclear, since iterated consulships and praetorships proliferate after 330 and spike during military crises, such as the Third Samnite (298-290) and Second Punic Wars (218-201).[639]

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[635] Kloft 1977: 10-11; Vervaet 2010: 133, 141-142.
[636] Brennan 2000: 66.
[637] For the sources on these consulships, see those listed in *MRR* 1.143-160.
[638] Livy 7.42.2. See also Astin 1958: 19; Kloft 1977: 9-10; Lintott 1999: 145; Brennan 2000: 68-69, 647, 651.
[639] Brennan 2000: 66-67, 76. In fact, Brennan argues that the *lex Genucia* may have actually only ever been intended as a "temporary moratorium on iteration" in order to help combat "excessive exclusivity in the top magistracies" among elites (68-69, 647). This is complicated, however, by the fact that Livy refers to the provisions of the *lex Genucia* as a standing law in 298 and 296 (Livy 10.13.8, 15.9). Brennan, however, regards this is as a dramatic fabrication on the part of Livy (648). As Brennan goes on to say, from 330 to 218 there were between 64 and 66 instances of *iteratio*, constituting 53-63% of elections, too many "exceptions" to allow for the enforcement of the *Lex Genucia* (649). But again, according to Livy (27.6.7), in 210 Q. Fulvius Flaccus (cos. 237, 224, 212, 209, pr. 215-214) cited a law of 217 that allowed the reelection of any individual who had previously been consul as one of the precedents for his own argument to allow his candidacy for the consulship. It is true that Flaccus specifically refers to *reficere* in this passage and not *iteratio*, but his use of the pluperfect (*ex iis qui consules fuissent*) indicates

It is apparent that the Romans did recognize the dangerous potential of *iteratio* after 200, however, as ten-year intervals between holding the same office became the norm for magistrates, while iterations in turn were rare, controversial, and reserved for emergencies.[640] Brennan argues that a special dispensation from the Senate was required for exceptions to the ban on *iteratio*, citing the examples of the initial consuls for 162, P. Cornelius Scipio Nasica and C. Marcius Figulus, who abdicated due to irregularities in the election, but were allowed to stand for election to the consulate in 156 and 155, respectively.[641] In fact, Brennan speculates that the third, iterated consulship of M. Claudius Marcellus (cos. 166, II 155) in 152 may have induced stronger legislation that banned holding the same office twice altogether, regardless of a ten year interval.[642] There is no mention of when such a law was created, but Livy (Per. 56) references it as an initial obstacle to the reelection of Scipio Aemilianus (cos. 147) for the consulship in 134,

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that the law of 217 also allowed the Romans to elect consuls from the pool of consulars from years past, not merely after their current term of office, thereby including *iteratio*.

[640] Brennan 2000: 650-651 (Brennan suggests the specific date of 196). See the examples of P. Sulpicius Galba Maximus (cos. 211, II 200), P. Cornelius Scipio Africanus (cos. 205, II 194), M. Aemilius Lepidus (cos. 187, II 175), L. Aemilius Paullus (cos. 182, II 168), and Tib. Sempronius Gracchus (cos. 177, II 163). For the sources on these consulships, see *MRR* 1.272, 301, 323, 342-343, 367-368, 381, 397-398, 401-402, 427, and 440.

[641] On the *vitio creati* for Scipio Nasica and Figulus in 162, see *MRR* 1.441-442. Valerius Maximus (9.3.2) records Marcius' anger at being disqualified in his initial election to the consulship. On Marcius' second consulship in 156, see Plb. 32.14.2; Cic. *Brut.* 70, Livy *Per.* 47; Flor. 2.25.11; App. *Ill.* 11; Obseq. 16; and see the sources mentioned in *MRR* 1.447. On the consulship of Scipio Nasica in 155, see *Fast. Tr.*, p. 105; Cic. *Acad.* 2.137; *Brut.* 79; Livy *Per.* 47; Strab. 7.5.5; Front. *Str.* 3.6.2; Ampel. 19.11; *Vir. Ill.* 44.4; Zon. 9.25; *MRR* 1.448.

[642] For the sources on Marcellus' consulship in 166, see *MRR* 1.437; for Marcellus' consulship in 155, *MRR* 1.448; for Marcellus' third consulship in 152, see the sources in *MRR* 1.453. On the passage of a law in 151 proposed by Cato that completely prohibited the repetition of office (*lex de consulato non iterando*) and the connection to Marcellus, see Festus 242.53-54L, *s. v. Pavimenta Poenica* ([*Cato*] *ne quis consul bis fieret*); Meyer 1832: 55; Rotondi 1912: 290-291; Guarino 1975: 210; Billows 1989: 121n. 18; del Castillo Álvarez 1994: 126; Brennan 2000: 179, 650; Churchill 2000: 166. On the one hand, it must be acknowledged that there is no reference to any legislation banning repeated elections to the same office as a response to Marcellus holding a third consulship. On the other hand, Marcellus' three consulships do appear to have been seen as exceptional, given that Cicero makes repeated reference to this hallmark in his mention of Marcellus (Cic. *Pis.* 44; *Div.* 2.14; *Fat.* 33). Furthermore, both Polybius and Appian state that Marcellus had incurred the distrust of many in the Senate, who suspected Marcellus of trying to bring the war in Spain to a premature conclusion either out of fear or the hasty desire to take credit for the victory. In any case, the Senate was immediately induced to send a replacement for Marcellus (Plb. 35.2-4; App. *Ib.* 48-49). Thus, even if there is no direct evidence supporting Brennan's claim of Marcellus being the catalyst for a total ban on repeated consulships, it is true that Marcellus had garnered a reputation of glory seeking in Rome and this will undoubtedly have been connected to his three consulships, a repetition of office that had not been surpassed since 208 by his grandfather of the same name (*MRR* 1.291-290).

requiring a plebiscite of the people to bypass this restriction.[643] Even this restriction eventually fell into disuse by the turn of the first century, however, prompting Sulla's reinstatement of the required ten-year interval in his *lex Annalis* of 81, though the problem of *iteratio* returned again in the 50s.[644]

2. Prorogation

Continuatio, *reficere*, and *iteratio* were all efforts to address the limitations of annual magistracies during periods of military exigency, but each had troublesome implications on the Roman principle of annuity for Roman magistrates. *Continuatio* described the literal extension of a magistrate's tenure of office, *reficere* indicated immediate reelection to the same office, while *iteratio* denoted reelection to the same office before a mandated ten-year gap. Each of these potential instances allowed for the possibility for a small group of individuals to dominate political office, especially the select few with access to *imperium*, which is the reason that they were heavily regulated by legislation or banned outright. An alternative to *continuatio*, *reficere*, and *iteratio*, which developed in the late fourth century, was the practice of prorogation (*prorogatio*), where a consul or praetor received a formal extension of their *imperium* at the conclusion of their year in office.[645] The first instance of prorogation was for Q. Publilius Philo (cos. 327) in 326. Philo was nearing the end of his consular term while he was in the process of besieging the city of Naples during the Second Samnite War (326-304). According to Livy,

[643] Brennan 2000: 179, 650. On the election of P. Cornelius Scipio Aemilianus in 134, see *MRR* 1.490-491, n. 1.
[644] On Sulla's ban on *iteratio* in his *lex Annalis*, see App. *BC* 1.100: καὶ τὴν ἀρχὴν τὴν αὐτὴν αὖθις ἄρχειν ἐκώλυσε, πρὶν ἔτη δέκα διαγενέσθαι. Sulla's *lex Annalis* was likely a response especially to the rampant use of *continuatio* and *iteratio*, among other magisterial irregularities, that took place in the seven consulships of C. Marius (107, 104-100), L. Cornelius Cinna (87-84), and Cn. Papirius Carbo (85-84, 82). Of course, Sulla himself contradicted his own law, since he was consul in 80, despite holding his first consulship in 88. See also Brennan 2000: 392, 394, 425.
[645] Carney 1959: 72; Jashemski 1966: 1; Kloft 1977: 1-2, 11-16; Mousourakis 2003: 80-81; Vervaet 2009a: 56; Beck 2011: 88; Steel 2013: 5, 48; Straumann 2016: 101-103. As an alternative to *continuatio*, see Kloft 1977: 24; Ridley 1981: 288; to *reficere*, see Straumann 2016: 103-104; to *iteratio*, see Kloft 1977: 24; Brennan 2000: 76, 170.

seeing that it would not be expedient to remove a commander from his post when he was so close to victory (8.23.11), the Roman Senate successfully proposed to the people that Philo be allowed "to carry out the war on behalf/in place of the consul," or *pro consule* (8.23.12).[646] In the case of Philo, according to Livy, two things had happened for the first time, an extension (*prorogatio*) of *imperium* and triumph after a magistracy had terminated (Livy 8.26.17).[647] This latter detail by Livy reveals an important distinction regarding prorogation as opposed to *continuatio* and *reficere*, specifically that only the prorogued commander's *imperium* received an extension and not the office he held, which instead terminated as normal at the conclusion of its annual term.[648] While prorogations were initially a rare expedient after their inception in 326 and throughout most of the third century, their use spiked drastically during the Second Punic War (218-201), with a total twenty-three of thirty-six consuls receiving prorogations, and an average

[646] See also Jashemski 1966: 1-2; Bauman 1973: 41; Develin 1975: 716; Kloft 1977: 20-22, 62, 47, 85, 92; Ridley 1981: 286; Lintott 1999: 113; Brennan 2000: 73-76, 602-603; Beck 2011: 82. The measure may have been a plebiscite, since Livy states that the proposal was made to the people by a plebeian tribune (*cum tribunis est*).
[647] Interestingly, although Livy does not explicitly state it (nor does any other author mention it), it seems to be implied that Philo's consular colleague for 327, L. Cornelius Lentulus, also received a prorogation (or some form of *continuatio*), since he states that Cornelius was also allowed to remain at his post in Samnium and nominate a dictator to oversee the consular elections for 326 (Livy 8.23.13: *L. Cornelio, quia ne eum quidem in Samnium iam ingressum revocari ab impetus belli placebat, litterae missae, dictatorem comitiorum causa diceret*). According to Livy and Dionysius of Halicarnassus, Cornelius was originally operating among the Volsci (15.10.2), close to the neighboring regions of Samnium and Campania, while Philo proceeded around 60-70 miles farther south against Naples (Dion. Hal. 15.10.2; Livy 8.22.9-10, 23.10-13), thus making it less likely that Cornelius would have acted as a *legatus* under his previous colleague, Philo, in 326, but rather will have continued to command under his own auspices. Furthermore, we also know from Livy that Cornelius remained in his camp (*in castris*) outside of Rome, since the augurs (who rejected Cornelius' nomination for the dictatorship as being *vitio creatus*) instituted an *interregnum* for 70 days to oversee the election of the consuls for 326, C. Poetelius Libo and L. Papirius Cursor (Livy 8.23.16-17). Thus, because an *interregnum* could only take place when the consuls had either "died or abdicated" (Mousourakis 2003: 84 n. 51), and because the people had decreed that Cornelius was to remain in his command, the only way he could have continued to wield *imperium* was through a prorogation. On the *interregnum*, especially when there were no consuls in office, see also Cic. *Rep.* 2.23; *Leg.* 3.9; Dion Hal. 4.75.1-2, 76.1, 84.4-5; Livy 1.17.4-6; 22.34.1; Bauman 1973: 41-42; Ridley 1987: 81; Lintott 1999: 67, 110; Mousourakis 2003: 55-57; North 2007: 261, 263, 265; Straumann 2016: 80.
[648] Jashemski 1966: 1; Kloft 1977: 11, 15-16, 62, 90; Brennan 2000: 74; Vervaet 2009a: 56; Beck 2011: 88; Steel 2013: 48. On the other hand, as Kloft (11) also points out, non-*imperium* bearing magistracies, such as the quaestorship and censorship could receive prorogations. For an example of a prorogued quaestorship, see the case of C. Sempronius Gracchus in 124 (Plut. *C. Gracc.* 2.3-5; Kloft 1977: 79).

of eight commands being prorogued each year.[649] On the other hand, although the number of prorogations does drop considerably for much of the second century, its use became a standard component of provincial governance, and it soon became the case that a consul or praetor could expect at least one year's prorogation.[650]

In theory, only the Roman people could grant a prorogation, likely because the conferral of *imperium*, especially for elected consuls and praetors, required the passage of a *lex curiata de imperio*, although in practice it was often the case that the Senate took the lead in proroguing commanders. Kloft argues that we should not see the Senate's dominance over prorogation as an intentional circumvention of the *comitia*'s role, but rather a sign of consensus, in that the people were often willing to trust the Senate's decisions without being consulted on every individual issue (which could be cumbersome and impractical in times of crisis). At any point and for any reason, however, especially if the consensus between the Senate and the assemblies were at odds, the people could reassert their authority over the grant of prorogation.[651] The parameters of prorogation could be within a designated timeframe but were more often limited to the completion of a specific military operation. Thus, in 204, P. Cornelius Scipio Africanus (cos. 205) had his imperium prorogued for a single year, but in the following year of 203, he received an open-ended prorogation until the war against Carthage ended.[652]

3. Augmented *imperium*

[649] Develin 1975: 718, 721; Kloft 1977: 28-31; Ridley 1981: 288; North 2007: 270; Williamson 2019: 25. As Ridley and Kloft point out, between 326 and 218 there were between twenty and twenty-two prorogations (Kloft 1877: 23; Ridley 1981: 288).
[650] Astin 1958: 12; Carney 1959: 72; Kloft 1977: 32, 38-41, 45-47, 75; Ridley 1981: 289; Lintott 1999: 105, 114; North 2007: 270; Steel 2013: 48; Straumann 2016: 103-104.
[651] Kloft 1977: 54-56; see also Brennan 2000: 75, 94, 625-626.
[652] For the prorogation in 204, see Livy 29.13.3: *P. Scipioni … prorogatum in annum imperium est*; for the prorogation in 203, see Livy 30.1.10-11: *P. Scipioni non temporis, sed rei gerendae fine, donec debellatum in Africa foret, prorogatum imperium est.*

Another potential quality of extraordinary commands was the augmentation of a magistrate (or prorogued commander's) *imperium*. As stated above, only dictators, consuls, and praetors could wield *imperium*, but the *imperium* of a dictator was considered greater (*maius*) than that of a consul, which itself was higher than the *imperium* of a praetor. In times of emergency, however, junior magistrates might receive a grant of imperium that belonged to a higher-ranking office. Most commonly, this took the form of prorogued praetors wielding a grade of imperium accorded to consuls (*imperium proconsularis*), such as M. Helvius (pr. 197) for 196-195.[653] In the late Republic, it also became possible for *imperium* to be granted to offices that were legally not permitted to wield it, such as quaestors, with Cn. Calpurnius Piso being a notable example, who was appointed to an extraordinary quaestorship *pro praetore* in 65.[654] There was no constitutional mechanism to allow for the augmentation of *imperium*, making it a highly irregular act, since the hierarchical relationship between the *imperia* of the consulship and praetorship were inherent to the offices themselves, in that a praetor was subordinate to the consuls.[655] As Vervaet shows, the earliest example for the augmentation of *imperium*, which also likely served as the precedent for all future acts, occurred in 217 via the controversial passage of the *lex Metilia*, a plebiscite which enhanced the *imperium* of the *magister equitum* for that year, M. Minucius Rufus (cos. 221), to that of the dictator, Q. Fabius Maximus Verrucosus (cos. 223, II 228).[656]

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[653] *Fast. Tr.*, p. 102; Livy 34.10.1-5.
[654] *CIL* I^2.749 (*Cn. Calpurnius / Cn. F. Piso / quaestor pro pr. ex s. c.*); Sall. *Cat.* 19.1-2; Ascon. 92-93; Suet. *Iul.* 9.3; Dio 36.44.5. *Privati* and *legati*, of course, were not allowed to wield any form of *imperium*, but, because by definition they did not hold an elected office, their possession of *imperium* constitutes a different criterion of extraordinary commands, which I cover later in this chapter.
[655] See, for instance, Cic. *Att.* 9.9.3 (*praetores qutem quo dita rogentur ut conlegae consulibus sint, quorum est maius imperium*) and Gell. 13.15.4 (*quia imperium minus praetor, maius habet consul*). On dictatorial, consular, and praetorian *genera imperii*, see the sources mentioned in Vervaet 2007: 202 n. 17 and 2012: 46 n. 2; esp. Cic. *Pis.* 38; *Verr.* 2.5.40; *Div.* 1.68; *Rep.* 2.56; Livy 22.34.2.
[656] Vervaet 2007: 197-232, esp. 201-204; Vervaet 2012: 46-47. For the passage of the *lex Metilia*, see Plb. 3.104.3-8, 106.1-2; Nepos *Hann.* 5.3; Livy 22.25-27; Silius 7.508-522; Plut. *Fab.* 9.3-10.5; *Mor.* 195C; App. *Hann.* 12-13; Dio

4. Violations of the *cursus honorum*

An often overlooked, but rather common form of extraordinary commands was the election to office in a manner that contravened the *cursus honorum* (the "ladder of offices"), which stipulated a sequential order of holding offices and minimum age requirements for each magistracy.[657] Admittedly, the legal history of the *cursus honorum* is difficult to untangle due to ambiguity in the source material. I discuss the evolution of the *cursus honorum* in greater detail in chapter 3, but it will suffice here to state that prerequisite qualifications for higher office were gradually developed over the course of the early and middle Republic, during which time *mos maiorum* served as the binding force regulating the cursus but was gradually supplemented by legislation on a case-by-case basis.[658] The first reference to a formal, codified *cursus honorum* was the *lex Villia annalis* of 180, which was revised and strengthened a century later by Sulla.[659] Nearly twenty years later, in 63, Cicero also discussed the importance of a *certus ordo* of

fr. 57.16-20; *Vir. Ill.* 43.3; Zon. 8.26. Fabius went on to hold consulship on three further occasions in 215, 214, and 209.

[657] Traditionally, magistracies were held in a sequential order with corresponding minimum age requirements, beginning with the quaestorship at around 30, then the aedileship at 36 (and optionally the plebeian tribunate), after which time they could be elected to the praetorship at the age of 39, and finally run for election as consul at 42. For a thorough overview of the *cursus honorum*, including the sequence of offices and minimum age limits, see Astin 1958: 5-47.

[658] On *mos maiorum* being the original binding force of the earliest *cursus honorum*, see Astin 1958: 19-22. It is evident, for instance, that some notion of minimum age requirements existed before 180, seen in the controversy surrounding the various elections and appointments of P. Cornelius Scipio Africanus, namely being too young, at the age of 21, for his election to the aedileship of 213 (Plb. 10.4.1-5.8; Livy 25.2.6-8; Vell. 2.8.2), his first proconsular appointment in 210 at the age of 24 (Livy 26.18-19; 28.43.11-14; 29.20.2; Val. Max. 3.7.1; Sen. *Dial.* 10.17.6; Sil. *Pun.* 15.7-22, 16.545-656; App. *Ib.* 18; Dio 17 fr. 57.38-40; *Vir. Ill.* 49.7; Eutrop. 3.15.1; Oros. 4.17.13), and his subsequent consular election in 205 at the age of 31 (Livy 28.38.6-11; 29.20; Val. Max. 2.8.5; 8.15.1; Plut. *Mar.* 12.1; *Pomp.* 14.1; Dio 17 fr. 57.56; *Vir. Ill.* 49.12; Amm. Marc. 25.9.10; Oros. 4.18.17). According to Brennan, the increase of praetors over the course of the third century led to the praetorship becoming an implicit prerequisite to the consulship (Brennan 2000: 94, 625-627; Beck 2011: 83-85).

[659] On the *lex Villia annalis* of 180, see Livy 40.44.1: *quot annos nati quemque magistratum peterent caperentque*. On Sulla's *lex Annalis* of 81, see Cic. *Acad.* 2.1, and esp. App. *BC* 100: καὶ στρατηγεῖν ἀπεῖπε, πρὶν ταμιεῦσαι, καὶ ὑπατεύειν, πρὶν στρατηγῆσαι, καὶ τὴν ἀρχὴν τὴν αὐτὴν αὖθις ἄρχειν ἐκώλυσε, πρὶν ἔτη δέκα διαγενέσθαι. See also Stewart 1998: 219; Brennan 2000: 384, 392Mousourakis 2003: 77 n. 33.

regulating the requirements and qualifications for election to office (Cic. *Agr*. 2.24).[660] While violations of the *cursus honorum* could include instances of augmented *imperium* (such as proconsular praetors), it more commonly comprised individuals being elected to offices they were not qualified to hold due to age or experience in subordinate magistracies. One of the most famous instances for a violation of the *cursus honorum* is the election of P. Cornelius Scipio Aemilianus to the consulship for 147, despite being too young (thirty-six at the time) and having held none of the elected prerequisite offices.[661] Similarly, when Pompey obtained his consulship in 70, several sources not only emphasized his youth, but specifically the fact that he had not yet held a single elected office at that point in his career.[662] Lastly, in January of 44, Cicero proposed that a series of *extra ordinem* dispensations were to be granted to the young Octavian Caesar (who was nineteen years old at the time), which included, among others, waiving any requirements of age and prerequisite magistracies for election to the praetorship.[663]

5. *Privati cum imperio*

Perhaps the most common form of an extraordinary command was the grant of *imperium* to *privati*, an individual who did not hold an elected magistracy at the time of their conferment. *Imperium* was an absolute legal necessity in order to hold an independent military command but was exclusively conferred upon consuls and praetors (as well as dictators in emergencies), and

[660] See also Astin 1958: 19-22.
[661] Cic. *Amic*. 11; *Phil*. 17; Livy *Per*. 50; Vell. 1.12.3; Val. Max. 8.15.4; Plut. *Mor*. 200A, 804F-805A; App. *Pun*. 112; Dio fr. 70.2-3; *Vir*. *Ill*. 58.5; Eutrop. 4.12; Zon. 9.29. Aemilianus was elected to the consulship while he was actually seeking the aedileship. It is not known whether or not he had held the quaestorship by this time (on this issue see the discussion in Astin 1958: 22).
[662] Cic. *Man*. 61-62; Livy *Per*. 97; Vell. 2.30.2-4; Val. Max. 8.15.8; Plut. *Crass*. 1.21; *Pomp*. 22.1; 44.1-4; Gell. 14.7.1-3; App. *BC* 121, 3.88; Dio 36.25.3; 77.5.5.
[663] Cic. *Phil*. 5.46-48; 11.20; *Oct*. 4; Aug. *RG* 1; Livy *Per*. 118; Vell. 2.62.1; Plut. *Cic*. 45.4; Tac. *Ann*. 1.10; Suet. *Aug*. 10.3; App. *BC* 3.51; Dio 46.29.2-6.

only then after the passage of a *lex curiata de imperio*.[664] Thus, there was no regular constitutional mechanism by which a person could possess *imperium* outside of a magistracy. Nevertheless, as with all forms of extraordinary commands, a vote of the popular assemblies could override such constitutional strictures.[665] Once granted, the *imperium* of a *privatus* carried the same force as any elected magistrate and could even receive prorogations.

Instances of *privati cum imperio* could take three distinct forms: The first was an individual who had previously held an elected magistracy with *imperium* in the past (such as a praetor or consul); the second was someone who had held an elected office, but not one with *imperium* (such as quaestors and aediles); finally, the third type of *privatus* was one in which imperium was granted to a person who had never held any elected office. An instance of the first type of *imperium*, and the earliest instance of *privati cum imperio* overall is found in the appointment of the first propraetors in 295, each of whom had already been elected as consuls over the course of the previous decade.[666] A prime example of the second type of *privatus* is found in the conferment of proconsular *imperium* upon P. Cornelius Scipio Africanus in 211, who had only been an aedile to that point (in 213).[667] An example of the third type of *privati*, and

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[664] Cic. *Pis.* 38; *Verr.* 2.5.40; *Div.* 1.58; *Rep.* 2.56; *Agr.* 2.30; *Phil.* 11.25-27; Caes. *BC* 1.6.6; Livy 22.34.2; Gellius 13.12.6, 15.3; Heurgon 1973: 113; Develin 1977b; Muir 1981: 5; Richardson 1991: 2-4; Lintott 1993: 55; Stewart 1998: 6, 116, 182; Lintott 1999: 49, 96, 130; Drogula 2007: 430, n. 85, 451-452; Gargola 2007: 155; Vervaet 2007: 202 n. 17; North 2007: 263-265; Hölkeskamp 2010: 55-56; Humm 2012: 65-75; Vervaet 2012: 46 n. 2; Steel 2013: 5, 48; Hodgson 2017: 242-243, 253, nn. 112-114.

[665] This is based on the overarching constitutional principle that "whatever the people last ordered is the law" (Livy 7.17.2: *ut quodcumque postremum populus iussisset id ius ratumque esset*). On the people asserting their ability to override Roman law, specifically in regard to magistracies, see the examples Fabius Rullianus protesting the people's circumvention of the legal ban of *iteratio* in 295 (Livy 10.13.5-12), Scipio Africanus's election to the aedileship in 213 (Livy 25.2.7) and that of Scipio Aemilianus to the consulship for 147 (App. *Pun.* 112). See also Boak 1918: 2; Bonner 1922: 145; Harrer 1922: 53; Bauman 1968: 38-41; Gruen 1995: 540; Lintott 1999: 40, 66; Mousourakis 2003: 57; Straumann 2011: 284-286, 291-292; Steel 2013: 48, 92, n. 50; Arena 2014: 217-219, 224-225; Yakobson 2015: 157-158, 165, 176; Straumann 2016: 25, 36-40, 83-84, 104; Hodgson 2017: 7, 11, 23.

[666] The four propraetors were L. Cornelius Scipio Barbatus (cos. 298), Cn. Fulvius Maximus Centumalus (cos. 298), M. Livius Denter (cos. 302), and L. Postumius Megellus (cos. 305). For sources, see those listed in *MRR* 1.178.

[667] Livy 26.18.2-19.9; 28.28.14, 43.11-14; 29.20.2; Val. Max. 3.7.1; Sen. *Dial* 10.176; Silius 15.1-151, 16.645-656; App. *Ib.* 17-18; Dio fr. 57.38-40; *Vir. Ill.* 49.7; Eutrop. 3.15.1; Oros. 4.17.13; Zon. 9.7.

arguably the most well-known case overall, is that of Pompey, who raised a private army in support of L. Cornelius Sulla in 83, despite being only an *eques* and having never held any public office.[668] Of course, Pompey's assumption of his private command had absolutely no legal standing, since the formal conferment of *imperium* was required to command a Roman army.[669] Ultimately, it was Sulla's recognition of Pompey as *imperator*, followed by Pompey's subsequent triumph in 81 that legitimized his otherwise illegal command as a *privatus cum imperio*.[670]

6. Provincial assignment

Another lesser-known potential aspect of extraordinary commands involved anomalous provincial commands, either by receiving a provincial assignment improperly (usually outside of sortition) or a commander operating outside their province. Upon election to office, each magistrate, especially those with *imperium*, received their own *provincia*, which represented

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[668] Cic. *Man.* 61; *Phil.* 5.43-44; Caes. *BAfr.* 22.2-4; Diod. 38.9-10; Livy *Per.* 85; Vell. 2.29.1; Plut. *Pomp.* 6.3-4; *Mor.* 203B-C; App. *BC* 1.80; Dio fr. 107.1.

[669] See my discussion of *potestas* and *imperium* in the previous chapter on Roman political institutions.

[670] The title of *imperator* was reserved solely for commanders possessing *imperium*, and not an empty honorific or flattery granted to Pompey by Sulla. This is further demonstrated Sulla's other acts in deference to Pompey, such as rising from his seat, uncovering his head, and dismounting his horse in Pompey's presence, all of which were gestures of respect accorded to commanders with *imperium*. On Sulla's use of the term, *imperator*, and other actions honoring Pompey, see Sall. *Hist.* 5.16; Diod. 38.10; Val. Max. 5.2.9; Plut. *Pomp.* 8.1-4; *Crass.* 6.4; *Mor.* 806E; App. *BC* 1.80. On the legal of significance of the term, *imperator*, see Livy 30.27.5; Ehrenberg 1953: 115-116, 127; Develin 1977a: 110-113; Lintott 1993: 22; Gruen 1995: 542-543; Sumi 2005: 167-168; Hölkeskamp 2010: 113; Steel 2013: 240 (who credits Sulla with "'creating' Pompeius' *imperium* during the civil war of the 80s by hailing him as *imperator*"). Pompey's triumph in 81 was a further factor in legitimizing his possession of *imperium*, since only commanders with *imperium* were allowed to triumph. Of course, a triumph also required the *imperator* to hold an elected magistracy, which Pompey did not, but this requirement was waived. This dispensation notwithstanding, the grant of a triumph retroactively legitimized Pompey's possession of *imperium pro praetore*, especially since it was confirmed by a plebsicite. On Pompey's triumph and the relationship between *imperium* and election to a magistracy in regard to triumphs overall, see Cic. *Man.* 61 (*quid vero tam inauditum quam equitem Romanum triumphare*?); Caes. *BAfr.* 22.3; Livy *Per.* 89 (*adhuc eques Romanus, quod nulli contigerat, ex Africa triumphavit*); Vell. 2.40.4 (*tribuni plebis legem tulerant, ... omni cultu triumphantium uteretur*); Plin. *HN* 7.96; Plut. *Pomp.* 14.1-6; *Crass.* 12.4; *Mor.* 203E-F, 804F; App. *BC* 1.80; Gran. 36.2.1-2 (*Pompeius ... pro praetore ex Africa triu*[*mph*]*avit*); Eutrop. 5.9.1; Boak 1918: 4; Jash. 1966: 30; Develin 1975: 716; Kloft 1977: 69-70; Stewart 1998: 117-119; Lintott 1999: 96; Mousourakis 2003: 79; Drogula 2007: 434; Vervaet 2009b: 415, 429; Vervaet 2014: 103-105, 120; Coudry 2016: 47-48.

their specific assignment, task, administrative jurisdiction, or sphere of military operation.[671] Legally, provinces were assigned through sortition, a sacred ritual that allotted provinces to commanders randomly, thereby eliminating bias.[672] In periods of crisis, however, provinces could be assigned *extra sortem*, either by agreement between the magistrates themselves (*comparatio*), senatorial decision, or popular vote, but was at all times controversial and considered problematic, as it potentially compromised the fairness and objectivity of provincial commands. After the consular provinces of 190 were initially assigned by lot, for example, there was a fleeting motion to override the sortition and leave provincial allocation to the Senate, a measure that Livy says was not supported by any precedent in living memory at the time.[673] Cicero explicitly referred to this proposal as a potential *extraordinarium imperium*, which was only avoided by the intercession of Scipio Africanus, who encouraged the Senate to uphold the original sortition.[674] In a more extreme example, Cicero, condemned the provincial commands assigned to the consuls of 58, L. Calpurnius Piso Caesoninus and A. Gabinius, on the grounds that they "given in an extraordinary fashion, directly nominated (for each consul) and without sortition" via a tribunician bill proposed by P. Clodius.[675]

Provincial assignments also served as a restriction or limitation to the exercise of *imperium*, since it delineated where a commander could operate and where their purview ended. In general, commanders were prohibited from exercising *imperium* or leading troops outside of their assigned province (*aliena provincia*), without the express direction from the Senate or people in order to prevent conflicts over disagreements of authority among multiple

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[671] Hodgson 2017: 217.
[672] Stewart 1998: 126-127.
[673] Livy 37.1.9: *cum res aut nova aut vetustate exemplorum memoriae iam exoletae*.
[674] Cic. *Phil.* 11.17. See also Cic. *Mur.* 32; Val. Max. 5.5.1; Just. 31.7.2; Porph. *Fr.* 47; Hist. Aug. *Gord.* 9.6; Eutrop. 4.4.1.
[675] Cic. *Dom.* 24: *tu provincias … extra ordinem sine sorte nominatim dedisti non consulibus, sed rei publicae pestibus*. See also Arena 2014: 221; Hodgson 2017: 252-254.

commanders.[676] Thus, in 200, the praetor L. Furius Purpurio caused quite a stir in Rome after he capitalized on the opportunity to score an unexpected but crucial victory over the Gauls at Cremona before the arrival of the consul, C. Aurelius Cotta, then in route. When Cotta, upon his arrival, sent Furius to a new provincial command in Etruria, the praetor instead went to Rome to demand a triumph. Although Furius ultimately succeeded in gaining his triumph, many in the Senate objected to his request not only on the grounds that he had achieved his victory with another commander's army (*alieno exercitu*) but especially because he had "quickly abandoned his province out of his desire for a triumph," for which, according to Livy, "there was no precedent."[677]

At times, however, a commander's *provincia* could take the form of a task encompassing a vast or ill-defined area, or even include multiple geographic provinces.[678] As is often the case, the best example for commands grouping several *provinciae* under a single commission is in the career of Pompey. In the *lex Gabinia* of 67, among the many other powers granted to him, the scope of Pompey's proconsular *imperium* spanned the entire Mediterranean and the coastlines of "all provinces" (*omnibus provinciis*) within fifty miles inland.[679] The following year, the *lex Manilia* transferred command of the Mithridatic War from Lucullus to Pompey, which placed the

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[676] See the examples in the piracy law from the inscription at Cnidos (*FD* 3.4.37), as discussed by Hassal, Crawford, and Reynolds 1974: 195-220, esp. 207-214.
[677] Livy 31.48.2: *maiores natu negabant triumphum, et quod alieno exercitu1 rem gessisset et quod provinciam reliquisset cupiditate rapiendi per occasionem triumphi; id vero eum nullo exemplo fecisse*. On this issue, see also Brennan 2000: 197-200.
[678] Ridley 1981: 285.
[679] Vell. 2.31.2: *imperium aequum in omnibus provinciis cum proconsulibus usque ad quinquagesimum miliarium a mari*; Plut. *Pomp.* 25.2: ἐδίδου γὰρ ἄρχειν ὁ νόμος αὐτῷ τῆς ἐντὸς Ἡρακλείων στηλῶν θαλάσσης, ἠπείρου δὲ πάσης ἐπὶ σταδίους τετρακοσίους ἀπὸ θαλάσσης; Flor. 1.41.8: *praefectis utraque Ponti et Oceani ora conplexus est*; App. *Mith.* 94: αὐτοκράτορα εἶναι θαλάσσης τε ἁπάσης ἢ στηλῶν Ἡρακλείων ἐντός ἐστι, καὶ γῆς ἀπὸ θαλάσσης ἐπὶ σταδίους τετρακοσίους ἄνω; Dio 36.36a: καὶ οὕτω Πομπήιος τὴν ἡγεμονίαν τῆς θαλάσσης τῶν τε νήσων καὶ τῆς ἠπείρου ἐς τετρακοσίους σταδίους ἀπὸ τῆς θαλάσσης ἄνω εἰλήφει.

provinces of Phrygia, Lycaonia, Galatia, Cappadocia, Cilicia, Upper Colchis, and Armenia all under Pompey's control.[680]

7. *Impar imperium*

Similar to the augmentation of *imperium* and the command of multiple provinces, extraordinary commanders might also receive a degree of imperium that was greater (*maius*) than that of other elected offices, even among colleagues of equal rank. Usually this was done to forestall conflicts over jurisdiction when one commander's *provincia* was adjacent to that of another colleague, and especially if a commander's *provincia* was not limited to a single region (as in the previous example) and could potentially encroach upon the colleague's province. As mentioned above, the hierarchy among the top magistracies (dictators, consuls, and praetors) was reflected in the gradations of their *imperium*, in that the *imperium* of the higher magistracies was greater (*maius*), while the *imperium* of lower magistracies was lesser (*minus*) in comparison.[681] Instances of augmented *imperium* involved a lower office being granted a class of *imperium* usually belonging to a superior office, such as a quaestor with praetorian *imperium* or a praetor with that of a consul. In the late Republic, however, it also became possible for a commander to receive a modification of their *imperium* that went beyond the auspices of the magistracy itself. For instance, M. Antonius, praetor in 74, was granted *imperium infinitum* to eradicate piracy in the Mediterranean, which allowed him to recruit troops, procure supplies, and operate freely in

[680] On the specific list of provinces transferred to Pompey's control, see Plut. *Pomp.* 30.2. See also Cic. *Mur.* 34; *Dom.* 19; Livy *Per.* 100; Vell. 2.33.1; Ascon. 65; Plut. *Luc.* 35.7; App. *Mith.* 97; Dio 36.42.4 (τόν τε γὰρ τοῦ Τιγράνου καὶ τὸν τοῦ Μιθριδάτου πόλεμον, τήν τε Βιθυνίαν καὶ τὴν Κιλικίαν ἅμα); Eutrop. 6.12.2.
[681] Cic. *Att.* 9.9.3 (*praetores qutem quo dita rogentur ut conlegae consulibus sint, quorum est maius imperium*) and Gell. 13.15.4 (*quia imperium minus praetor, maius habet consul*). On dictatorial *imperium*, see Cic. *Rep.* 2.56; Livy 22.34.2.

any province necessary to complete his task.[682] Similarly, as we have just seen, Pompey's own pirate command via the *lex Gabinia* of 67 granted him *imperium* that was equal (*aequum*) to proconsuls in all provinces within fifty miles from the shore.[683] In both cases, *imperium* was freed from limitations to a single province or theater of combat, but was applicable wherever the commander operated. Ten years later, in 57, when legislation was passed assigning Pompey the commission to oversee Rome's grain supply, Cicero claimed that one of the plebeian tribunes, C. Messius, unsuccessfully proposed a rider to the bill that would have granted Pompey *maius imperium* over all provinces, as well as their governors, which Cicero felt was "unbearable" (*non ferenda*).[684] And yet, in 44, Cicero himself proposed a bill to grant a proconsular command to C. Cassius Longinus, which included *imperium* in provinces greater (*maius*) than that of their governors.[685] Pompey did, of course, possess *maius imperium* in relation to his propraetorian *legati* in 67, as well as in 55 and 52, when he governed the Spanish provinces *in absentia* through his legates.[686] Similarly, in the provincial settlement of 27, Augustus (formerly Octavianus) officially exercised *imperium maius* over governors and commanders in all provinces, even those designated as being under senatorial control.[687] In 23, Augustus' *imperium*

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[682] Cic. *Verr.* 2.2.8; Lact. *Inst.* 1.11.4. For the scope of Antonius' authority included in his *imperium*, see *IG* 4.1.66, 5.1.1146; Cic. *Verr.* 2.3.213-218; Vell. 2.31.3; Tac. *Ann.* 12.62. Cicero also states that C. Calpurnius Piso and A. Gabinius possessed *imperium infinitum* in 58 (Cic. *Dom.* 23-24).

[683] Vell. 2.31.2; Plut. *Pomp.* 25.2; App. *Mith.* 94; Dio 36.36a. As Boak (1918: 13) points out, the initial "refusals" of Metellus and Piso to follow Pompey's directives are evidence that Pompey's *aequum imperium* should not be considered *maius*. See also Loader 1940: 134-136.

[684] Cic. *Att.* 4.1.7: *alteram Messius qui omnis pecuniae dat potestatem et adiungit classem et exercitum et maius imperium in provinciis quam sit eorum qui eas obtineant. Illa nostra lex consularis nunc modesta videtur, haec Messi non ferenda.* See also Boak 1918: 20; Ehrenberg 1953: 121; Vervaet 2014: 186, 220.

[685] Cic. *Phil.* 11.30: *ibi maius imperium C. Cassi pro consule sit quam erit qui eam provinciam tum obtinebit.* See also Vervaet 2014: 262.

[686] For 67, Vell. 2.32.4; Plut. *Pomp.* 25.3, 26.4-5; Flor. 1.41.8-10; App. *Mith.* 94-95; Dio 36.23.4, 37.1-4. For 55, Caes. *BC* 1.85.8; Vell. 2.48.1; Plut. *Pomp.* 53.1; App. *BC* 2.18. For 52, Plut. *Caes.* 28.8. See also Boak 1918: 20-23; Ehrenberg 1953: 121; Jashemski 1966: 98; Kloft 1977: 56; Beck 2011: 95; Steel 2013: 241; Vervaet 2014: 222.

[687] Dio 53.12-16.2, 17.1. On Augustus' *imperium maius*, see Vervaet 2014: 254-263. For one thing, as Vervaet explains, the governors of imperial provinces served as *legati pro praetore* under the *princeps'* auspices, thereby allowing Augustus to "take exclusive credit for any future victories won by these commanders." As for Augustus' *imperium maius* even in senatorial provinces, Vervaet points to Dio 53.15.4, which stated that Augustus gave instructions (ἐντολάς … ῥητοῖς) to the procurators, propraetors, and even proconsuls (who were supposedly reserved

maius was confirmed again in explicit terms by a vote the senate, who decreed that the *princeps* was to be proconsul for life, permitted to wield *imperium* inside the *pomerium* (something only ever allowed for dictators), and whose *imperium* was to be superior to that of governors in every subject territory.[688]

Magnitude

Under the issue of conceptual scale are the questions regarding the accumulative gauge of the criteria discussed above, specifically when and at what point the conflation of various magisterial irregularities qualified a command as extraordinary. A central issue here, as Ridley points out, is that not every abnormal command or magistracy constituted an extraordinary command.[689] Thus, even in rare cases of agreement among historians over certain features of extraordinary commands, such as *privati* or prorogation, there is no unanimity regarding either the necessary simultaneous amount of these criteria (i.e., how many of them appear together) or magnitude of their occurrence (such as a single year's worth of prorogation compared to a decade, for instance) required for a command to be considered extraordinary. And yet, we should also not reduce the historical disagreements over the categorization of extraordinary commands to a matter of semantics or legalism.

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for senatorial provinces) before they proceeded to their provincial commanders and/or governorships. Thus, as Dio (53.16.1) argued, Augustus masterfully projected an image of restoring the sovereignty of the Senate and people in the Republic but had in reality secured complete power over all things (τῷ γὰρ ἔργῳ καὶ πάντων καὶ διὰ παντὸς αὐτὸς ὁ Καῖσαρ). See also Boak 1918: 1, 22-24; Last 1947: 157-164; Ehrenberg 1953: 113-136; Henderson 1957: 83; Lintott 1993: 115-116; Drogula 2007: 435, n. 115; In contrast, according to Vervaet, there is no evidence that the triumvirs in 43 received *imperium maius* via the *lex Titia* (Vervaet 2014: 240 n. 93, 242, 252, n. 128).

[688] Dio 53.32.5: καὶ διὰ ταῦθ᾽ ἡ γερουσία … ἔδωκε, τήν τε ἀρχὴν τὴν ἀνθύπατον ἐσαεὶ καθάπαξ ἔχειν ὥστε μήτε ἐν τῇ ἐσόδῳ τῇ εἴσω τοῦ πωμηρίου κατατίθεσθαι αὐτὴν μήτ᾽ αὖθις ἀνανεοῦσθαι, καὶ ἐν τῷ ὑπηκόῳ τὸ πλεῖον τῶν ἑκασταχόθι ἀρχόντων ἰσχύειν ἐπέτρεψεν.

[689] Ridley 1981: 287-288.

The massive commands of Pompey, for instance, are often regarded as the epitome of extraordinary commands, due to the unorthodox way that Pompey obtained and held *imperium* throughout his anomalous career (83-48). Mommsen, of course, famously remarked that Pompey's extraordinary commands were the forerunner for the structure of the Augustan Principate.[690] Indeed, over the course of Pompey's career we can see examples of nearly every possible aspect of extraordinary commands: granting *imperium* to commanders outside of elected office (*privati*), receiving extensions of *imperium* past annual terms (*prorogatio*), possessing greater (*maius*) *imperium* than befitted a commander's legal status, delegating *imperium* to lower offices (especially to those not legally permitted to hold *imperium*, such as *legati*), holding command over multiple provinces at once, receiving triumphs before holding a magistracy, and later even being elected to office outside the bounds of the *cursus honorum*.[691] Thus, Pompey's career provides textbook examples of the various aspects of extraordinary commands, but he was not the only commander in Roman to wield *imperium* in such an irregular fashion, nor was he even the first. Although numerous commanders throughout Roman history wielded extraordinary *imperium* in many of the same ways as Pompey, there were none who mirrored his career exactly. The act of granting imperium to *privati* goes back to the four consular propraetors of

[690] "Denn nichts anderes ist seinem Wesen nach der Principat als ein solches ausserordentliches Imperium" (Mommsen 1887: 2.643).

[691] I elaborate further on Pompey's unorthodox career throughout this chapter. To briefly summarize, however, Pompey first gained propraetorian *imperium* illegally in 83 as a *privatus*, having never held an elected magistracy, and continued to wield uninterrupted *imperium* for over a decade. His first elected office was to the consulship in 70, which was itself a circumvention of all the prerequisite magistracies as stipulated in the *cursus honorum*. From 67 to 61, Pompey held proconsular *imperium*, which was superior (*maius*) to that of most other nearby proconsuls and covered a vast stretch of territory, especially in the eastern Mediterranean, and had the ability to appoint his own legates with propraetorian *imperium*. Thereafter, although Pompey was only elected consul again in 55 and 52 (where he was briefly *sine collegia*), he continued to hold proconsular *imperium*, even in the capacity of a grain commission, from 58 until his death at Pharsalus in 48. On the sources for Pompey's career, see *MRR* 2.63-64, 68-70, 77, 80-81, 83-84, 86-87, 89-91, 93-94, 98-99, 103-108, 111-112, 117-119, 123-124, 128-129, 145-150, 154-156, 159-160, 163, 168-170, 175-177, 180-181, 184-185, 190-191, 197-198, 202-204, 210-212, 217-219, 224-225, 229-230, 237-238, 242-244, 250-251, 259-264, and 275-278.

295, but their commands only lasted a year.[692] Scipio Africanus circumvented the *cursus honorum* on multiple occasions, such as his premature election to the aedileship (213) and consulship (205), was accorded proconsular *imperium* as a *privatus* in 210, delegated *imperium* to a subordinate at least once, and received multiple prorogations for both his proconsular (210-205) and consular (204-201) commands.[693] And yet, despite the extraordinary nature of his career throughout the Second Punic War (218-201), Scipio's commands also had limitations. Unlike Pompey, Scipio does not seem to have wielded any form of enhanced *imperium* beyond his proconsular status, and his provincial commands were designated to specific theaters of actions, namely Spain (210-206), and later Sicily and Africa (205-200).[694] Finally, despite all the

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[692] On the sources for their appointments, see *MRR* 1.178. See also Jashemski 1966: 4-7 (it is not clear, according to Jashemski, whether L. Cornelius Scipio Barbatus (cos. 298) acted as a *legatus pro praetore* under the consul of 295, Q. Fabius Maximus Rullianus), 89; Kloft 1977: 97-99, nn. 13-17; Ridley 1981: 286, 294; Gruen 1995: 536; Stewart 1998: 117-118, 177-178; Lintott 1999: 114; Beck 2011: 83; Vervaet 2014: 124-125.

[693] On Scipio's election to the aedileship for 213, see Plb. 10.4.1-5.10; Livy 25.2.6-8; Vell. 2.8.2. On Scipio's proconsular appointment in 210, see Livy 26.18.2-19.9; 28.28.14, 43.11-18; 29.20.2; Val. Max. 3.7.1; Sen. *Dial.* 10.17.6; Sil. *Pun.* 15.129-149, 16.645-663; App. *Ib.* 17-18; Dio fr. 57.28-40; *Vir. Ill.* 49.7 (who alone lists Scipio as a praetor, not proconsul); Eutrop. 3.15.1; Oros. 4.17.13; Zon. 9.7. On Scipio's election to the consulship for 205, see Livy 28.38.6-11; 29.20.2; 30.30.14; Sil. 13.511 (*maius ad imperium posthac capiere*), 16.595-602; Plut. *Pomp.* 14.1; Dio fr. 57.56; *Vir. Ill.* 49.11; Oros. 4.18.17. On Scipio appointing Q. Pleminius as a propraetorian legate, see Livy 29.6.9, 8.5. On Scipio's open-ended prorogation in 209, see Livy 27.7.17 (*non in annum Scipioni Silanoque, sed donec revocati ab senatu forent, prorogatum imperium est*), though Livy also mentions another extension in 208 (27.22.7). Multiple sources show that Scipio retained his command throughout 207 and 206 (see the sources listed in *MRR* 1.296, 299), while Zonaras also mentions the open-ended nature of Scipio's command of Spain in 206 (Zon. 9.10: Ὁ δὲ Σκιπίων μέχρις ἂν πάντα τὰ ἐν τῇ Ἰβηρίᾳ καταστήσῃ ἄρχειν τῶν ἐκεῖ προσετάχθη). On Scipio's prorogation for 204, see Livy 29.13.3. In 203, Scipio received another open-ended prorogation of his *imperium* until the war with Carthage should end (Livy 30.1.10; see also 30.27.3).

[694] M. Iunius Silanus does appear to have acted as a subordinate to Scipio in Spain (Livy 26.19.10: *et M. Iunius Silanus propraetor adiutor ad res gerendas datus est*; Zon. 9.7), but his propraetorian rank stemmed from a series of prorogations that followed his term as an elected praetor in 212, not from any delegation on the part of Scipio. On Silanus' election to the praetorship, see Livy 25.2.5; for his prorogation in 211, see 26.1.5 (*M. Iunio … prorogatum est imperium*); for his similarly open-ended prorogation in 209 alongside Scipio in Spain, see also Livy 27.7.17. Curiously, though explicitly referring to Silanus as a propraetor initially (26.19.10), Livy later has Scipio claim in 207 that he and Silanus were both sent with the same level of legal power and *imperium*, thus implying that Silanus, though a propraetor, may have wielded proconsular *imperium* alongside Scipio (Livy 28.28.14: *M. Silanus eodem iure eodem imperio mecum in provinciam missus*). As Broughton correctly points out, Polybius does refer to Silanus as an equal colleague of Scipio's (Plb. 10.6.7: συνάρχοντα; *MRR* 1.280, 284 n. 4). See also Jashemski 1966: 25-26. At the time of his proconsular appointment, Scipio's provincial assignment was specifically designated as the war in Spain (see the sources on Scipio's initial command in 210 cited in the preceding note), though he did make a brief excursion into Africa in 206 (Plb. 11.24a.1-4; Livy 28.17.2-18.20; 29.23.3-10; 30.13.3-6; Val. Max. 6.9.ex. 7; 9.8.1; Sil. *Pun.* 16.170-183; App. *Ib.* 29-30; *Pun.* 10; Zon. 9.10-11). In 205, Scipio initially received Sicily as his province (Livy 28.38.12) but was soon also allowed to command the invasion of Africa (Diod. 27.2a; Livy 28.40-45; Quint. 3.8.17, 37; Sil. *Pun.* 16.600-603, 698-700; Plut. *Fab.* 25.1-26.2; App. *Hann.* 55; *Pun.* 6-8; Dio fr. 57.52; Zon. 9.11).

legal exceptions accorded to Scipio, the Senate stood its ground in refusing to grant him the right to triumph in 206, since, though a proconsul, Scipio had never been elected to a magistracy *cum imperio*. Now, although the Senate did waive the requirements of the *cursus honorum* and allow Scipio to stand for election for the consulate of 205 as a compromise, it is important to note that Scipio himself did not challenge the Senate's decision, which is in stark contrast to Pompey's repeated insistence for his own triumph.[695] Even Sulla and Caesar, contemporaries of Pompey, despite holding their own extraordinary commands, nevertheless proceeded through the *cursus honorum* in the course of their careers, which Pompey never did.[696] So, if we were to measure extraordinary commands purely by the standard set by Pompey, we would have a very short list. Instead, we are left with multiple criteria to consider for identifying an extraordinary command, which could occur in different combinations at different times.

The cause of the disagreement among historians over the definition of extraordinary commands is that some criteria seem more indicative than others depending on circumstance. As the previous chapters have shown, a hallmark of the Roman government was its flexibility, which means that minor irregularities ought not always be regarded as extraordinary. Thus, a prorogation for one year or less when deemed necessary is not an egregious breach of constitutional norms. And yet, major deviations have their start in minor alterations. So, the six-month prorogations for P. Decius Mus and Q. Fabius Rullianus in 296 may not be alarming, but

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[695] Livy 28.32.6, 38.4; Val. Max. 2.8.5; Sil. *Pun.* 16.594; Plut. *Pomp.* 14.1; Dio fr. 57.56; Amm. Marc. 25.9.10. Polybius (11.33.7) and Appian (*Ib.* 38) do say that Scipio did receive his triumph, but it is possible that they are erroneously referring to an *ovatio* (cf. Livy 31.20.3 for the case of Cornelius Lentulus; see also *MRR* 1.299).
[696] On Sulla's quaestorship in 107, see the sources listed in *MRR* 1.551; on his praetorship in 93, *MRR* 2.13; on his consulship in 88, *MRR* 2.38. Sulla's omission of the aedileship may not have been considered a violation of the *cursus honorum*. Cicero states that the aedileship was "the first stage towards higher office" (Cic. *Leg.* 3.7), and it does seem to be the expected course of a political career (see Livy 22.26.3 for the example of C. Terentius Varro), but multiple sources (including Cicero himself) state that only the quaestorship was required to proceed to the praetorship (see Cic. *Planc.* 51-52; *Phil.* 5.46-47; Livy 26.18.7-11; Tac. *Ann.* 13.29; App. *BC* 1.100; Lintott 1999: 145; Mousourakis 2003: 77). On Caesar's quaestorship in 69, see the sources listed in *MRR* 2.131; on his aedileship in 65, *MRR* 2.157; on his praetorship in 62, *MRR* 2.172; on his consulship, *MRR* 2.186.

the eleven years of consecutive prorogations for L. Licinius Lucullus (73-63) certainly looks anomalous.[697] Similarly, it is also necessary to consider historical context when scrutinizing the criteria of potential extraordinary commands. The first prorogation, granted to Q. Publilius Philo in 326, for instance, was no doubt considered extraordinary due to its novelty, despite lasting less than a year.[698] Two centuries later, however, it was expected for a commander to receive a prorogation at the end of their term, and indeed would be more strange if he did not.[699] The occurrences of magisterial irregularities (e.g. *prorogatio*, *privati*, *maius imperium*, etc.) changed in frequency, duration, and magnitude over the course of the Republic, and the reasons for these changes must be taken into account when determining which criteria marks an irregular command as extraordinary.

Constitutional Implications

The final question in identifying extraordinary commands, then, is constitutional. As stated above, all scholars generally agree that a hallmark of Rome's government was the inherent flexibility of its constitution, through which legal statute and legislation made it possible for Rome to adapt its political institutions and provide innovative solutions to whatever circumstances it faced. And yet, even the most flexible institutions have a breaking point. For all its malleability, all political action had to be rooted in procedural norms and legal rules if Rome's constitution was to remain a legitimizing political force. In other words, there was a difference in Roman politics between "bending the rules" and "breaking the rules," even in the name of

[697] On Mus and Rullianus, see Livy 10.16.1, 17, 18.8-9, and 20.2. On the initial prorogation for Lucullus in 73, see Livy *Per*. 95; Plut. *Luc*. 7.1. For sources on the totality of Lucullus' prorogued command in Asia, see *MRR* 2.106-108, 111-112, 117-119, 123-124, 128-129, 133, 139, 145-150, 154-156, 159-160, 163, 168-170.
[698] *Fast. Tr.*, p. 95; Livy 8.23.12, 25.5-26.7.
[699] For example, between 136 and 116, there were only five years in which one of the year's consuls failed to receive a prorogation (132, 131, 127, 126, 119).

expediency. This, in turn, follows Straumann's distinction between commands that were constitutional, *extra ordinem* (that is, unusual) but still constitutional, and those that were outright unconstitutional.[700] Indeed, all of the above discussion takes us back to Mommsen's differentiation between commands that were exceptional, which were legal modifications of regular magistracies, and those that were truly extraordinary (ausserordentliche), in that they were deviations from the constitutional order.[701] Taking these distinctions in mind, the Roman government was flexible enough to allow for a number of legal innovations in the use and modification of magistracies and military commands to meet the changing crises facing the Republic over time. Thus, alongside the various potential criteria of extraordinary commands and the qualifying scale of their magnitude, the final identification of extraordinary commands comes down to considerations of constitutional innovation as opposed to constitutional deviation. In what follows, I will explain the differences between constitutional innovation and deviation in Roman politics in more detail.

As already stated, a well-known feature and strength of the Roman constitution was its flexibility, and the propensity for innovation in Roman politics is a testament to this flexibility. Principally, political innovation represented working within existing institutions through statute and legislation in order to find new solutions to new problems. A prime example of this is the institution of prorogation in 326, during the Second Samnite War (326-304). As we have seen, around the time of the consular elections, one of the consuls for 327, Q. Publilius Philo, was still in the process of besieging the city of Neapolis in Campania. Recognizing that it would be imprudent to recall Philo to Rome when he was so close to capturing the city, the Senate induced the tribunes to propose a measure to the people that would extend, or prorogue his *imperium*,

[700] Straumann 2016: 102.
[701] Mommsen 1887: 2.1.627.

thereby allowing him to retain his military command after the expiration of his magistracy until the capture of Neapolis.[702] As Jashemski points out, the practical effect of proroguing Philo's *imperium* was that the Romans "avoided interrupting an important military command" by allowing Philo to act "as consul," even after he ceased to hold the office.[703] More importantly, here, in the context of a political innovation, we should take note that a constitutional limitation was acknowledged (i.e., the annuity of the consulship), and, rather than ignoring the restrictive statute and allowing Philo to remain in office past his term (which would be an instance of *continuatio*, an illegal act), the Senate instead proposed a statute that modified magisterial procedure as a temporary expedient, which was then ratified by the Roman people. We can see this distinction in Livy's account where he states that Philo was empowered to wield *imperium* and continue the war *pro consule*, that is, "on behalf" or "in place of the consul," but explicitly not *consule*, or "as consul." In this way, the agency and legitimacy of Rome's constitution as the ultimate legal authority, especially regarding the limitations and restraint placed on magistracies, was intact. Through legal innovation, irregularities and modifications of magistracies and military commands acted in concert with the protocols and strictures outlined in the Roman constitution.

For all its flexibility, however, Rome's constitution was still a system of procedural norms and rules. Whereas an innovation worked within the procedural framework of constitutions, a deviation represented conscious departure, separation, circumvention, or disregard for constitutional norms and rules. The best (though not only) example of a constitutional deviation is, yet again, Pompey's illegal command in 83. That year, though having never held an elected office, and indeed being too young even to begin his political career,

[702] Livy 8.232.10-12.
[703] Jashemski 1966: 1-2. See also Kloft 1977: 20.

Pompey illegally raised an army comprising veterans who had served under his father, Cn. Pompeius Strabo (cos. 89), in support of L. Cornelius Sulla, then marching on Rome for a second time.[704] There was no constitutional mechanism that could have allowed Pompey to assume this position with any legitimacy. Being a *privatus*, he was not elected to a curule office, nor was he even qualified for one, and therefore could not receive his *imperium* via the passage of *lex curiata*, as was legally required. In other words, Pompey's command was blatantly illegal and indisputably unconstitutional.[705] Nevertheless, although no component of the Roman government could or did make an official grant of *imperium* to Pompey at any point for 83, both Sulla's acts of deference, especially in hailing Pompey as *imperator*, as well as the Senate's order sending Pompey to Sicily and Africa can certainly be interpreted as an implicit acquiescence to Pompey's illegal action on behalf of the government.[706]

Two years later, Sulla and the Roman Senate again acceded to Pompey, this time deviating from Rome's constitutional law regarding the right of commanders to triumph. In 81, Sulla at first balked at Pompey's initial request for a triumph, pointing out that only former consuls and praetors were allowed, holding up the example of Scipio Africanus, who also held his first command as a *privatus* and did not seek a triumph for that very reason. Nevertheless, when Pompey persisted in his desire for a triumph, Sulla again acquiesced, after which two tribunes successfully proposed a bill to the assemblies that permitted Pompey's otherwise illicit

[704] Cic. *Man.* 61; *Phil.* 5.43; Caes. *BAfr.* 22.2-4; Diod. 38.9.1; *Per.* 85; Vell. 2.29.1-2; Plut. *Pomp.* 6.1-6; *Mor.* 203B-C; App. *BC* 1.80; Dio fr. 107.1. On the minimum age requirements for Roman elected offices, see Astin 1958: 46.
[705] On the qualifications to wield *imperium*, see Lintott 1999: 96; Beck 2011: 78.
[706] For Sulla' hailing Pompey with the unofficial title of *imperator* and giving him public gestures of honors reserved for high-ranking officials (such as dismounting from one's horse, uncovering one's head, and rising from one's seat in the presence of the individual in question), see Sall. *Hist.* 5.16; Diod. 38.10.1; Val. Max. 5.2.9; Plut. *Pomp.* 8.1-4; *Crass.* 6.4; *Mor.* 806.E; App. *BC* 1.80. For Pompey being sent to Sicily and Africa by the Senate, see Cic. *Man.* 61; Livy *Per.* 89; Plut. *Pomp.* 10.2. Indeed, even a year later in 82, when Pompey executed Cn. Papirius Carbo, Valerius Maximus states Pompey was still a private citizen (Val. Max. 6.2.8: *te equite*).

triumph.[707] Granting Pompey the right to a triumph had a double effect, however, beyond merely exempting him from a legal requirement. Only a commander possessing *imperium* was able to celebrate a triumph.[708] Thus, the concession to grant Pompey a triumph also constituted a retroactive but official and legal endorsement by the government of his possession of *imperium pro praetore* for the previous two years of his illegal command.[709] In this one example, then, every aspect of the Roman constitutional procedure governing the conferment of *imperium* was deliberately circumvented or disregarded altogether in favor of Pompey.

It is true that, in contrast to the assumption of his command in 83, the tribunician law that granted Pompey his triumph (and thus retroactively legitimized his *imperium*) was quite legal, as it was passed by the popular assembly. It is important to recognize, however, that constitutional deviations are not necessarily illegal, and indeed (as is also the case with most extraordinary commands) they rarely are.[710] The function of law in a society is not predicated on the existence of a constitution. Instead, as Straumann points out, constitutions actually are collections of hierarchically entrenched laws and political conventions that provide the guiding principles of a government's structural framework.[711] In other words, it is possible for laws to deviate or

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[707] Vell. 2.40.4 (*Absente Cn. Pompeio T. Ampius et T. Labienus tribuni plebis legem tulerant, ut is ludis circensibus corona aurea et omni cultu triumphantium uteretur, scaenicis autem praetexta coronaque aurea*); Plut. *Pomp.* 11.1-2. On the necessity of a plebiscite for a triumph, see Kloft 1977: 69.

[708] Boak 1918: 4; Jashemski 1966: 30 (on Scipio Africanus being refused a triumph for the same reasons in 205, from which Pompey was exempted in 81); Kloft 1977: 69-70; Stewart 1998: 95-96, 117-119, 125; Lintott 1999: 96; Drogula 2007: 420, 442-444; Vervaet 2009b: 415; Hölkeskamp 2010: 64; Steel 2013: 239-240; Vervaet 2014: 103-104, 120 ("the elemental rule that all potential triumphators had to hold independent *imperium* and *auspicium* of their own was upheld continuously"), 126n. 175; Beck 2011: 91; Straumann 2016: 71; Williamson 2019: 374.

[709] On Pompey's triumph, see Cic. *Man.* 61; Caes. *BAfr.* 22.3; Livy *Per.* 89; Vell. 2.40.4; Plin. *HN* 7.96, 8.4; Plut. *Sert.* 18.2; *Pomp.* 14.1, 45.7; *Crass.* 12.4; *Mor.* 203E-F, 804F; App. *BC* 1.80; Gran. Lic. 36.2; *Vir. Ill.* 77.2; Eutrop. 5.9. On specific references to Pompey acting in the capacity of a praetor (στρατηγός), see Plut. *Sull.* 28.8; *Mor.* 203C; and Granius Licinianus, who explicitly states that Pompey triumphed *pro praetore* (Gran. Lic. 36.2). On the date of Pompey's triumph being 81, see Badian 1955: 107-118.

[710] See also Ehrenberg who states, in reference to Pompey's commands, that "Constitutional forms had been used to confer unconstitutional power" (Ehrenberg 1953: 122).

[711] Straumann 2011: 282, 284. In particular, Straumann bases this particular aspect of constitutions on the definition espoused by Henry Bolingbroke in 1733: "By constitution we mean, … that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that

circumvent from a constitution, since a constitution is itself partially composed of laws. Thus, although Pompey received his triumph legally, it still represented an egregious constitutional deviation.[712]

The significance of the distinction between constitutional innovations and deviations is their implication on the integrity of a constitution. In many ways, constitutions act as a blueprint for a government's structural framework, guiding the direction of its various institutions and actions of political agents. The binding force of a constitution, however, depends on the collective agreement among the community of the constitution's validity, or its legitimacy. Innovations, despite often resulting in temporary exceptions to constitutional law, act within and in concert with the constitution, thereby affirming its political primacy. Deviations, on the other hand, due to their conscious circumvention of constitutional procedure, especially when given legal affirmation, indicate the irrelevancy of the constitution as a binding political force, thus gradually chipping away at its legitimacy.[713] Consider again the examples of Philo's prorogation in 326 as well as Pompey's first command as a *privatus* in 83 and his triumph two years later. In 326, when the Roman Senate induced a tribune to propose the extension (*prorogatio*) of Philo's *imperium* to the people, they were not disregarding the magisterial principle of annuity, but only allowing a momentary exception to it.[714] In effect, Philo's prorogation is representative of a case where the "exception proves the rule."[715] In this momentary exception, the Romans availed themselves of an innovative solution, while simultaneously upholding, and even affirming the

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compose the general system according to which the community hath agreed to be governed" (Bolingbroke 1754: 130).

[712] See also Kloft (1977: 70), who says that the concession to grant Pompey a triumph as a *privatus* was a "weakening of (the) traditional rule" that triumphs were reserved for former magistrates.

[713] On this point, see also the discussion in Beck 2011: 77-96, esp. 96.

[714] Livy 8.23.11-12.

[715] On the relationship between exceptions to law and legal validity, see Cic. *Balb.* 34: *quod se exceptio facit ne liceat, ubi non sit exceptum, ibi necesse est licere*. For a broader discussion of the legal principle of rules and exceptions, see Holton 2010: 369-388. See also Brunt 1982: 146; Fitzpatrick and Joyce 2007: 65-76.

overarching principle of annuity. On the other hand, by raising his own private army in 83, Pompey had acted in direct contradiction to the Roman constitution. Soon afterward, Sulla himself stood at a political crossroad when he met Pompey at the head of his illegal army. If Sulla upheld the constitutional norms and laws regulating magistracies and the legal possession of *imperium*, then he could not accept Pompey's command as legitimate. Instead, Sulla hailed Pompey as *imperator*, thereby endorsing Pompey's deviation from constitutional law and subordinating the Roman constitution to private initiative.

Conclusions

The first half of this chapter concentrated on an analysis and survey of the modern conception of extraordinary commands, in particular the development of extraordinary commands as a concept, the potential criteria for their identification, and the various definitions of extraordinary commands proposed by various historians. The importance of this examination is that the true significance of extraordinary commands cannot be accurately understood without establishing a precise definition. As we have seen, there is unfortunately little consensus among modern historians. At the very least, all scholars do recognize that extraordinary commands fundamentally center on the removal of magisterial restraint, such as annuity, or the illegal conferral of *imperium*, especially to *privati*, men who did not hold elected office. There is also common agreement among historians that extraordinary commands are a consequence of military necessity, a response to the limitations of Rome's annually elected magistrates. At the same time, the emergence of extraordinary commands is widely recognized as a testament to the flexibility of Rome's government and the ability of the Romans to adapt to changing military

circumstances. Beyond these basic points, however, there is very little consensus in modern scholarship regarding the definition and criteria of extraordinary commands.

The strongest points of contention among historians are the specific qualities and features of extraordinary commands, what they looked like on the ground, especially from a legalistic perspective. For instance, while most scholars agree that *imperia* held by *privati* qualified as extraordinary commands because of their indisputably illegal nature, many do not consider prorogued commands to be extraordinary, even those lasting a decade or more, on the grounds that prorogations were granted through valid legislation. And yet, these same historians forget that *privati* were commonly appointed to command via the same channels as *prorogatio*, votes in the popular assembly. Furthermore, the actual importance on legal distinctions is a matter of dispute that relates to larger discussions of constitutionalism in Roman politics. Many historians argue that too much emphasis on legalities can be a red herring in studies of Roman politics that ignores broader socio-cultural issues in government, such as tradition and non-legal norms.[716] In response, others have maintained that, notwithstanding the importance of "social and political questions," we should not forget just how "legally-minded the Romans really were," especially in matters regarding constitutional legitimacy.[717] Both sides of the debate over legalities and constitutional norms have also unfortunately led to sweeping generalizations on the part of many historians. On one end of the spectrum, some are so rigid in their interpretations of Roman constitutional law that nearly any irregularity in a military command was deemed extraordinary.

[716] As Ridley states, "The key to the fall of the Republic and the great commands is not in legal distinctions. Little in Roman politics and society can be explained that way. It is, so to speak, a matter of psychology. After the murder of the Gracchi and Sulla's march on Rome, nothing could ever be the same" (Ridley 1981: 297). See also the discussions in Gruen 1995: 534-543; Hölkeskamp 2010: 12, 17; Arena 2014: 217; Straumann 2016: 12-15; Hodgson 2017: 2-5, 13-15, 23.

[717] Ehrenberg 1953: 113-114. See also Boak 1918: 1; Jones 1951: 112; Heurgon 1973: 170; Kloft 1977: 2, 5-6, 28-40, 56, 60, 76, 82; Mousourakis 2003: 17, 51; North 2007: 256-257; Hurlet 2010: 109-111, 127; Straumann 2011: 290; Straumann 2016: 11, 14-18, 23-23, 30-32, 47-48, 54-55, 61, 86-87, 103, 111; Anderson 2018: 13.

On the opposite end, others seem to view Rome's political institutions as being so flexible that almost no magisterial innovation should be considered extraordinary. Neither position is tenable, necessitating a balanced perspective of constitutional law and socio-political norms in Roman government.[718]

In order to proceed toward a comprehensive definition of extraordinary commands, we need to sift through the conflicting arguments of previous scholars and synthesize the debate, as well as its various conclusions. Mommsen correctly pointed out that there is a difference between exceptional commands, those that were modifications of ordinary office, and true extraordinary commands, which were constitutional deviations.[719] On the one hand, the flexibility of Rome's constitution to adapt its institutions and magistracies to fit changing circumstance cannot be denied. As Cicero famously argued, innovation in the face of emergency was a fundamental component of Roman custom and political tradition that was built on ample historical precedent.[720] Thus, designating every irregular command as extraordinary would require scholars to ignore the political versatility inherent to the resilience of the Roman state. But at the same time, it is also the case that constitutions consist of legal rules and political norms, which, however flexible they may be, cannot be ignored. In this way, dismissing every anomalous magistracy as yet another testament to Rome's constitutional plasticity contradicts other hallmarks of Roman success, such as orderliness and structure in government (including conduct during wartime).[721] According to Livy, as early as the inception of the Republic, among the secrets to the success and liberty of the Roman people, alongside their conduct in war and peace

[718] Kloft 1977: 1-9.
[719] Mommsen 1887: 2.1.627.
[720] Cic. *Man.* 60: *At enim ne quid novi fiat contra exempla atque instituta maiorum. Non dicam hoc loco maiores nostros semper in pace consuetudini, in bello utilitati parvisse, semper ad novos casus temporum novorum consiliorum rationes accommodasse*.
[721] Eckstein 2006: 13-14, 202-205, 219-220, 225-228, 250, 257.

and their use of annual magistracies, was the supremacy of laws over men.[722] Indeed, in the histories of both Livy and Cassius Dio we find the sentiment expressed that there was no point to bother even making laws if the people were willing to circumvent them at a moment's notice in the name of expediency.[723] Thus, the crux of the debate over the definition of extraordinary commands comes down to a need for a multifaceted analysis that balances legal, socio-cultural, and political considerations.

As I have argued in the second half of this chapter, then, we can condense the identification of extraordinary commands to three categories: legal criteria, magnitude, and constitutionality. Under the category of "legal criteria" are the various potential irregularities and qualities that extraordinary commands could manifest in relation to Roman law; that is, what they specifically looked like on the ground and what differentiated them from regular, elected magistracies. This includes violations of annuity (e.g., *continuatio*, *reficere*, *iteratio*, and prorogation), breaches or circumventions of the *cursus honorum* (such as *privati cum imperio*, or augmented *imperium*), and disregard for the principle of collegiality (seen in the possession of *imperium maius* or massive provincial commands), among others. Under the category of "magnitude" are considerations of the combination, frequency, and duration of the potential legal criteria. The significance here is that not all the criteria mentioned above need to be present for a command to deemed extraordinary, and indeed different combinations could be present. The four propraetors of 295 were all *privati* but did not receive prorogations, for instance, whereas Scipio Africanus began his proconsular command as a *privatus* in 210 and received multiple years of

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[722] Livy 2.1.1: *Liberi iam hinc populi Romani res pace belloque gestas, annuos magistratus, imperiaque legum potentiora quam hominum peragam.*

[723] See the speech attributed to Q. Fabius Maximus Rullianus in 295 in Livy 10.13.10 (*quid ergo attineret leges ferri, quibus per eosdem qui tulissent fraus fieret*?) and that attributed to Q. Lutatius Catulus in 67 in Dio 36.33.2 (τίνος μὲν γὰρ ἕνεκα καὶ τοὺς ἐνιαυσίους ἄρχοντας χειροτονεῖτε, εἴγε μηδὲν αὐτοῖς πρὸς τὰ τοιαῦτα χρήσεσθε;). See also Cicero's emphasis on the importance of law in place of the rule of violence in human affairs (Cic. *Sest.* 92; *Leg.* 3.42).

prorogations, while Marius was neither a *privatus* nor had his *imperium* prorogued but nevertheless held the consulship for five years (104-100) through *continuatio*/*reficere*. Furthermore, the frequency and duration of irregular commands and magisterial anomalies must be taken into account. Recourses that began as *ad hoc* emergency measures and were used in moderation, such as prorogation or enhanced *imperium* became so commonplace in the second century that they are often overlooked by both ancient writers and modern historians. Yet, as Kloft argues, normality is not the same as normativity; simply because something illegal or unconstitutional is allowed or permitted to happen does not make it legal or constitutional.[724] Furthermore, the potential criteria of extraordinary commands must be analyzed in their proper historical context and in consideration of the circumstances under which they appear. According to Mommsen, one of the distinct qualities of extraordinary commands in the post-Sullan era, as opposed to those earlier in the Republic, was that they were not created to address any particular emergency but rather to serve the ambitions of individual commanders.[725] This is a sweeping, subjective, and inaccurate generalization on the part of Mommsen, but it does point to the importance of examining each potential extraordinary command on an individual basis, since the political connotations and reasons for the creation of extraordinary commands differed throughout the course of the Republic's history. The final, and most definitive consideration for identifying an extraordinary command is its constitutionality, whether it is a constitutional innovation or deviation. As discussed, innovations are accurate reflections of the Roman constitution's well-known flexibility since they work within in the overall context of a state's constitution and thereby also affirm its validity. Deviations, on the other hand, completely

[724] Kloft 1977: 84 and n. 34. See also Biagini 1994: 338; Posner 2000: 4; Hölkeskamp 2010: 15; Yakobson 2015: 165; Straumann 2016: 14-15, 18, 21-22, 31, 48-49, 87.
[725] Mommsen 1887: 2.1.635. See also Ridley 1981: 282.

circumvent and even disregard the legal rules and norms stipulated in constitutions, chipping away at their legitimacy and, in turn, suggesting their irrelevancy. In other words, with innovations the constitution was still supreme, while deviations subordinated the constitution.

Thus, we come full circle to Mommsen's original classification of extraordinary commands as being "deviations from the constitutional order" (Abweichungen von der verfassungsmässigen Ordnung).[726] But alongside the consideration of legal criteria and magnitude, the accurate determination of the constitutionality for an irregular (and potentially extraordinary) command also requires a philological examination, an often-overlooked subject matter. Because the actual word "extraordinary" is derived from the Latin terms *extraordinarium* and *extra ordinem*, we need to understand exactly how Roman and Greek writers themselves qualified a military command as extraordinary, which therefore is the subject of the next chapter. Following a philological examination, I will then turn to demonstrate what ancient Greek and Roman writers thought of extraordinary commands, beyond their definition, but their implications on the institutional stability and legitimacy of Rome's republican constitution. In the final chapters, having surveyed modern, philological, and ancient perspectives, I will provide a survey of various extraordinary commands throughout the Roman Republic, their potential identification according to the legal criteria discussed above, as well as the development and changes in their magnitude and their constitutionality over the course of the Republic.

[726] Mommsen 1887: 2.1.627.

Chapter 5: Roman and Greek Conceptions of Extraordinary Commands

The previous chapter began with a survey of how modern historians have perceived extraordinary commands, as well as the criteria for their identification. Although all scholars recognize the existence and importance of extraordinary commands in the history of the Roman Republic, there is little modern consensus as to their actual definition, beyond their most fundamental and characteristics; namely, that they involved the removal of legal restraints on Roman magistrates, were the consequence of military emergencies, and reflected the flexibility of Rome's constitution. An accurate understanding of extraordinary commands and their socio-political significance requires establishing a precise definition and criteria for their identification. Thus, in the second half of the chapter, I discussed three important categories of extraordinary commands, their legal criteria, magnitude, and constitutionality. Ultimately, through a consideration of these three categories, I argued that extraordinary commands are best understood as deviation from Rome's constitution. Whereas constitutional innovations reflected the flexibility of Rome's government to modify its magistracies in order to respond to various crises, deviations indicated the subordination of constitutional law and tradition to accommodate ambitious military commanders.

But discussions over the definition of extraordinary commands cannot be limited to the ideas of modern scholars. Thus, an important step in establishing whether an irregular command is extraordinary requires an examination on how Roman and Greeks writers themselves understood and described extraordinary commands from both a philological and conceptual perspective. The first section of this chapter, therefore, centers on the description of extraordinary commands in Roman sources, particularly through the use of the terms, *extraordinarium* and *extra ordinem*. The next section examines the corresponding depictions of

extraordinary commands in Greek sources. There are no direct equivalents of *extraordinarium* and *extra ordinem* in Greek, but we do find similar depictions of the legal and political irregularities inherent to extraordinary commands. Following this, I then analyze the relationship between extraordinary commands and the rise of promagistracies in both Latin and Greek texts.

Roman conceptions of extraordinary commands

The Latin terms *extraordinarium* and *extra ordinem* are the derivations for the modern term, extraordinary. Although both terms are often used to refer to irregular magistracies and unconstitutional conferment of *imperium*, it is not always the case. In fact, neither term is prominent in Latin literature, and both are used in a number of different ways. Both terms appear 216 times in Roman texts, but the prepositional phrase *extra ordinem* occurs most commonly by far, in around 146 instances, while *extraordinarium* is used on 70 occasions. The usage of the terms also varied considerably, though at their most basic level both were used to describe an event or action that was unusual or contrary to standard practice in some way. *Extra ordinem* and *extraordinarium* could refer to the most minor and mundane of irregularities, such as receiving a bad haircut or a breach of social protocol, but the most common usage was to denote various types of anomalies in legal procedure, accounting for 150 of the total 216 instances of the terms.[727] The different legal issues described in one way or another as extraordinary ranged from

[727] On the use of *extraordinarium/extra ordinem* in reference to a bad haircut, see Sen. *Dial.* 10.12.3; parental authority, Sen. *Ben.* 3.11.1; receiving visitors, Cic. *Verr.* 2.3.8-9; Suet. *Tib.* 32.3; personal esteem of a friend, Cic. *Fam.* 6.5.3; information not recorded in a book, Mart. 9.pr; special exhibits of exotic animals, Suet. *Aug.* 43.4; special concern or care given to a decision, Livy 26.18.3; large sums of money (*pecunia*), Cic. *QRosc.* 4.4; *Verr.* 2.1.100, 102, 2.170; desire (*cupiditatibus*), Cic. *Verr.* 2.5.35; *Ep.* 21.11; an interesting speech, Cic. *Brut.* 226; sources of revenue, Varro *Rust.* 2.1.28, 11.1 (*fructum*); sacrifices, Livy 22.57.6; taking notes, Quint. *Inst.* 10.3.33; passing hasty judgement on something, Sen. *Ep.* 106.2.4; danger (*periculo*), Curt. 4.16.25; a special task, Plin. *Ep.* 10.28; special privileges or favors, Suet. *Tib.* 25.2; *Ves.* 8.2; Just. *Dig.* 29.5.7.pr.; 36.4.12.pr.; special locations for events, Suet. *Cl.* 21.4; special games Suet. *Ves.* 2.3; grammar, Serv. *Don.* 447.37; legates and envoys, SHA *Tyr. Trig.* 33.1.

the improper passage of laws and decrees (such as Cicero's exile at the hands of Clodius in March of 58), to taxes, special investigations conducted by the Senate or consuls, court procedure, jurisdiction, legal guardianships, and more.[728] It was very common, for instance, for arbitrary or severe punishments to be described as *extra ordinem* if special circumstances called for different penalties than those prescribed in standard legal protocol.[729] Criminal activity and political corruption could also be described as extraordinary, such as embezzlement, bribery, misuse of public money, and the improper collection of debts.[730]

Alongside legal terms, *extraordinarium* and *extra ordinem* are also commonly used in regard to military affairs, describing hierarchical interactions among soldiers based on rank, battle protocol, tactics, emergency levies, and irregular or auxiliary troops. In fact, the earliest recorded use of *extra ordinem*, attributed to Cato the Elder (234-149) in his *Origines* (though preserved by Gellius), refers to the problem of soldiers breaking formation and charging into battle either before the order was given or against orders entirely.[731] Aside from Cato, however, the description of soldiers disobeying orders is one of the least common uses of *extra ordinem* in Latin texts.[732] On the other hand, Livy does frequently use *extra ordinem* to describe any

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[728] On general legal issues described as *extra ordinem* and/or *extraordinarium*, see Cic. *Dom.* 26; *Mil.* 14; *Inv.* 2.58-9; *Fam.* 8.8.1; Ascon. *Mil.* 43-44, 88; Livy 27.12.14; 39.14.6, 16.12; 41.5.4; Quint. *Inst.* 4.3.14; 10.3.33; *Declam.* 312.1.2; Sen. *Ep.* 97.7, 106.2; Gell. 4.10.3-5; 12.13.1; 14.7.5; Pliny *Ep.* 9.13.7; Suet. *Cl.* 23.2; *Ves.* 10.1; *Dom.* 8.1; Tac. *Ann.* 13.51; SHA *Marc.* 17.4; Just. *Dig.* 1.16.6.;pr.; 3.5.46.1; 4.4.4.3.pr., 4.16.pr.; 6.2.pr.; 6.1.43.pr.; 9.3.1.8; 11.7.8.2, 7.12.pr, 14.2; 13.7.36.pr.; 14.1.1.19; 17.1.7.pr., 56.3; 19.1.52.2; 21.2.50.pr.; 23.2.66.pr.; 25.3.1.4, 4.1.1; 26.1.9.pr., 7.1.pr., 7.49.pr.; 29.5.7.pr.; 35.1.92; 36.1.12, 4.12.pr.; 39.4.9.5; 42.6.1.5; 43.1.t, 4.3.pr., 4.3.1, 32.1.2; 47.1.3.pr., 10.45.pr., 19.3.pr.; 48.10.7.pr., 16.15.1, 19.1.3, 19.13.pr.; 50.4.12.pr., 5.6.pr., 13.t.; 1.1, 13.1.7, 16.10.pr., 178.2, 239.3.

[729] On specific legal punishments described as *extra ordinem* and/or *extraordinarium*, see the examples in Justinian's *Digesta*, such as 3.1.1.7; 17.1.7.pr.; 23.2.66.pr.; 25.3.1.4; 26.1.9.pr., 7.49.pr.; 47.2.93.pr, 10.43.pr., 11.1.pr., 11.10.pr. 15.1.1, 2.pr., .6.pr., 17.1.pr., 19.1.pr., 3.pr., 20.2.3.pr., 3.2; 48.1.8.pr., 2.12.4, 3.4.pr., 7.1.2, 10.7.pr., 11.7.3, 13.4.2, 16.3.pr., 19.1.3, 37.pr., 50.7.1.pr.

[730] On the misuse of public money, see Cic. *Font.* 4; on a judge taking a bribe from a defendant, Cic. *Clu.* 85; on the improper repayment or collection of debts, Sen. *Ep.* 81.18 and Just. *Dig.* 4.2.23.3.

[731] Gell. 11.1.6: *Nam in quarto Originum verba haec sunt: "Imperator noster, si quis extra ordinem depugnatum ivit, ei multam facit."* On the date of Cato's birth, see Cic. *Sen.* 50; on his death, Plin. *HN* 29.8.

[732] Livy 7.10.2; 8.6.16, 7.15; 34.15.6; *Per.* 57; Flor. 1.6.2; SHA *M. Ant.* 6.6

unorthodox military practice and tactic, such as using reserve lines of infantry, soldiers volunteering for service, or individuals requesting permission to engage an enemy in single combat.[733] Occasionally *extra ordinem* could also refer to individuals or soldiers receiving special privileges and dispensations beyond what was legally allowed.[734]

Another legal use of *extra ordinem* and *extraordinarium* was in reference to senatorial decrees, especially regarding various irregularities in the appointment and management of magistracies. The earliest use of *extraordinarium* in reference to a magistracy is found in Cicero's speech in opposition to the agrarian bill proposed in January of 63 by the plebeian tribune, P. Servilius Rullus, for the purpose of settling Pompey's veterans in colonies throughout Italy. The bill entailed the formation of a ten-man commission, with five-year terms, invested with full powers to buy and sell land, found colonies, act as judges, access the public treasury, appoint legates, recruit soldiers, and wield *imperium.*[735] To Cicero, the power concentrated into the hands of this decemvirate constituted a new type of despotism, akin to a tyranny, which went beyond the extraordinary (*extraordinaria*) *imperia* of a Roman general and was more suited to that of a king.[736]

Cicero's use of *extra ordinem* and *extraordinarium* in reference to magistracies is most frequent in his *De domo Sua*, written in 57 after his return from exile.[737] In much of the speech, Cicero focuses on what he sees as hypocrisy and inconsistency (*inconstantia*) on the part of P. Clodius, who opposed granting extraordinary powers and commands to Pompey, but was perfectly willing to appoint to multiple commands *extra ordinem* to M. Porcius Cato, L.

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[733] Livy 3.62.7; 5.7.7, 12; 7.7.6, 9; 10.36.4; 23.47.1; 25.18.12; 27.12.14; 34.47.3-4; 35.5.1, 4, 6; 40.27.3, 31.3; 41.5.4;42.58.13; Flor. 1.6.2; SHA *M. Ant.* 6.6.
[734] Cic. *Phil.* 3.23; Livy 3.58.8; Suet. *Tib*. 25.2; *Ves.* 8.2; SHA. *Aur*. 9.7.
[735] Cic. *Agr*. 2.32-34, 75.
[736] Cic. *Agr*. 2.8: *novae dominationes, extraordinaria non imperia, sed regna quaeri putabantur*. See also the discussions in Boak 1918: 14-16; Straumann 2016: 111-112.
[737] MacKendrick 1995: 147.

Calpurnius Piso, and A. Gabininus in 58.[738] The speech reveals a great deal as to what actions precisely Cicero viewed as *extra ordinem* and their significance in regard to the Roman constitution.[739] The various magistracies and commands themselves mentioned in the speech are most often described adverbially as being granted in a manner that is "out of order" (*extra ordinem*), while there are only two instances of a command and political power being referred to outright as extraordinary (*extraordinarium*). Cicero did not shy away from the fact that many of Pompey's commands throughout his career had been created contrary to constitutional procedure; that is, *extra ordinem*.[740] Echoing his debate with Catulus over the command granted to Pompey via the *lex Manilia* in 66, Cicero reminded his audience that the common political opinion among Roman statesmen a decade earlier was that no individual should be entrusted with so much power *extra ordinem*, but, if forced to do so, that Pompey was the most capable and deserving.[741] Indeed, the extraordinary nature of Pompey's appointment, which Cicero himself had supported, was only justified by the magnitude of the benefits brought to the state and the Roman people as a consequence of his commands.[742] We should pause here and take note of the manner in which the extraordinary commands mentioned by Cicero were created. Cicero does not mention any of the specific peculiarities regarding Pompey's commands, such as his status as a *privatus*, his age, his circumvention of the *cursus honorum*, or even his possession of *imperium*. Instead, Cicero seems to focus on the fact that specific commands were directly entrusted (*commissa*) and appointed (*deferre*) to Pompey. Cicero makes no mention of any role

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[738] According to the Bobbio Scholiast, Clodius himself had sought an extraordinary command in Syria after his quaestorship in Sicily, c. 61-60. Cic. *In Clod. Et Cur. fr.* 14.8; *Schol. Bob.* 86-87: *Syriam sibi nos extra ordinem polliceri*.
[739] See also the summary and discussion of this speech in MacKendrick 1995: 148-149.
[740] Cic. *Dom.* 18: *Cn. Pompeio plurima, periculosissima, maxima mari terraque bella extra ordinem esse commissa.*
[741] Cic. *Dom.* 19: *si qua res ad unum deferenda sit, ad Cn. Pompeium delaturos potissimum; sed se extra ordinem nihil cuiquam dare.*
[742] Cic. *Dom.* 19: *cum esset extra ordinem ad patriam defendendam vocatus, auxit nomen populi Romani imperiumque honestavit.*

played by the popular assemblies for these appointments, which we indeed know to be the case for many of Pompey's extraordinary commands (such as in the *leges Gabinia* and *Manilia*), but instead focuses on the motions put forward by senators and magistrates themselves. Cicero, for instance, identifies himself as an instigator (*auctor*) behind the portion of the *lex Manilia* that gave Pompey his command against Mithridates VI and Tigranes.[743] Similarly, no mention is made of the popular assemblies approving a motion that appointed Cato to his extraordinary command, but Cicero does state that the appointment was created by a corrupt law (*lege nefaria*) pushed through by Clodius as tribune.

Ironically, here, in 57, Cicero did not shy away from the fact that Pompey's command in 66 was *extra ordinem*, though he never used those words to describe the command a decade earlier in his speech defending the *lex Manilia.* And yet, Pompey's command in 66 absolutely was extraordinary. Pompey already possessed unprecedented power and authority via the *lex Gabinia* in 67 to combat the problem of piracy in the Mediterranean. A *privatus* at the time of his appointment, Pompey had been granted proconsular *imperium* for a period of three to five years throughout the entire Mediterranean sea and within fifty miles inland of any shore, with the ability to appoint his own legates, who themselves would have propraetorian *imperium*.[744] The *lex Manilia* expanded on this already extraordinary command by transferring the command of the war against Mithridates VI and Tigranes of Armenia from Lucullus (who had held command there for seven years) to Pompey, along with nearly all Roman provinces in the east.[745]

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[743] Cic. *Dom.* 19: *quo ille auctore extra ordinem bellum cum Mithridate Tigraneque gessit.*
[744] On Pompey's appointment through the *lex Gabinia* in 67, see Cic. *Man.* 44, 52, 56, 59, 67; *Agr.* 2.46; *Red. Sen.* 29; *Phil.* 11.18; *CIL* 1^2.2500; Livy *Per.* 99; Vell. 2.31.2-32.2; Val. Max. 8.15.9; Tac. *Ann.* 15.25; Asc. *Corn.* 72; Plut. *Luc.* 27.4; *Pomp.* 25.1-26.2; Flor. 1.41.7-15; App. *Mith.* 94; Dio 36.23.3-37.3; Schol. Bob. 98.
[745] On Pompey's appointment through the *lex Manilia* in 66, see Q. Cic. *Comment. pet.* 51; Cic. *Man. passim*; *Mur.* 34; *Dom.* 18; Fam. 1.9.11; *Orat.* 102; *Phil.* 11.18; Livy *Per.* 100; Vell. 2.33.1; Asc. *Corn.* 65; Quint. *Inst.* 2.4.40; Plut. *Luc.* 36.1; *Pomp.* 30.1; App. *Mith.* 91, 97; Dio 36.42.4; Eutrop. 6.12; Schol. Bob. 119. See also Boak 1918: 13, 23; Ehrenberg 1953: 120; Jashemski 1966: 69, 77; Kloft 1977; Lintott 1999: 5; Rodgers 2008: 295-318; Vervaet 2009b: 409-410; Steel 2013: 239-240; Coudry 2016: 33-50; Straumann 2016: 49-50; 105-112.

Clodius' appointment of Cato to an extraordinary command (*extra ordinem praefici*) in 58 was hypocritical, according to Cicero, since Clodius himself had previously opposed the appointment of Pompey to his grain commission on the grounds that it too would be *extra ordinem*.[746] Cato, however, had been such a vociferous opponent of "extraordinary commissions" (*extraordinarias potestates*) that Clodius sought to remove him from Rome, ironically by imposing such a command upon Cato himself.[747] Specifically, Clodius proposed a motion to the people that would assign Cato the task of overseeing the annexation of Cyprus and the restoration of exiles in Byzantium (Plut. *Cat. Min.* 34.3-4), also conferring upon Cato the office of a quaestor but with praetorian *imperium*.[748] Cato was a *privatus* at the time and had not held an elected office since his term as plebeian tribune in 62.[749] Consequently, Cicero does not refer to Cato's posting as a quaestorship or even a magistracy, but rather ambiguously as an office (*honorem*), and that Cato had been appointed (*detulisti*) through Clodius' proposal (*tua rogatione*) and not elected.[750]

Cicero also referred to the improper allotment of provinces as *extra ordinem*. In the same year as Cato's appointment, Clodius also distributed the provinces of Cilicia and Syria to A. Gabinius and Macedonia to L. Calpurnius Piso, abrogating the Senate's privilege to assign provinces (according to the *Lex Sempronia*) and without casting lots (*sine sorte*).[751] By focusing so heavily on Clodius' agency in both the appointment of Cato and the allotment of provinces

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[746] Cic. *Dom.* 20: *audeas dicere extra ordinem dari nihil cuiquam oportere*; *Dom.* 21: *qui negas esse verum quemquam ulli rei publicae extra ordinem praefici*. See also *Dom.* 3 and MacKendrick 1995: 148.
[747] Cic. *Sest.* 60: *non illi ornandum M. Catonem sed relegandum, nec illi committendum illud negotium sed imponendum putaverunt, qui in contione palam dixerint linguam se evellisse M. Catoni, quae semper contra extraordinarias potestates libera fuisset.* See also MacKendrick 1995: 200.
[748] Cicero explicitly states that Cato's post included an allotment of *imperium* but does not specify the office Cato would hold (Cic. *Dom.* 21: *honorem et imperium … detulisti*). Velleius, on the other hand, does state that Cato would act as quaestor but with praetorian authority (Vell. 2.45.4: *ut is quaestor cum iure praetorio*).
[749] Plut. *Cat. Min.* 21.2.
[750] Cic. *Dom.* 21-22.
[751] Cic. *Dom.* 23-24. For sources on the provincial assignments for Gabinius and Piso, see *MRR* 2.192.

here, Cicero was emphasizing the danger in individual politicians having the power to arrange extraordinary commands directly (*nominatim*). We see this sentiment, for instance, when Cicero stated that, if Clodius had been able to pass all of his desired proposals, there would be no place in the world "free from extraordinary magistracies and Clodian *imperium*."[752] It is important to note here that Cicero referred explicitly to "Clodian *imperium*," sardonically pointing out the inevitable consequence of extraordinary *imperium* being derived from the influence and authority of a single individual, and not through the protocols outlined in the Roman constitution.

And yet, although Cicero criticized Clodius for his hypocrisy in opposing Pompey's command, Cicero himself was hardly consistent in his own logic. As Straumann points out, Cicero only thought that extraordinary commands were unconstitutional when unnecessary.[753] For example, Cicero anticipated that Clodius' rebuttal to the objections over Cato's extraordinary command would be to extol Cato's many virtues as a statesman, his wisdom, piety, and bravery, all of which supposedly made him uniquely qualified to receive an extraordinary command. Cicero preemptively asked why Cato's laudable qualities mattered when Clodius himself had previously stated that no one should ever receive an extraordinary appointment.[754] Thus, Cicero is claiming that an individual's merits ought to have no bearing on the decision to appoint them to an extraordinary command. And yet, Cicero had no qualms with using the same reasoning a decade earlier in 66 in his defense of the *lex Manilia* that granted Pompey command of the war against Mithridates VI. Just as Clodius exalted Cato's character in 58/7, Cicero had similarly praised Pompey for possessing the "the virtues of a general," namely diligence, bravery, energy,

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[752] Cic. *Dom.* 24: *ecqui locus orbi terrarum vacuus extraordinariis fascibus atque imperio Clodiano fuisset*?
[753] Straumann 2016: 105-116, esp. 114.
[754] Cic. *Dom.* 21: *dices,* "*quem virum! sanctissimum, prudentissimum, fortissimum, amicissimum rei publicae, virtute, consilio, ratione vitae mirabili ad laudem et prope singulari!*" *sed quid ad te, qui negas esse verum quemquam ulli rei publicae extra ordinem praefici?*

rapidity in action, and wisdom, all of which made Pompey deserving to receive the command against Mithridates in 66.[755] Later in the same speech, Cicero proudly listed all of the aspects of Pompey's career to that point which were extraordinary, such as raising and commanding an army as a *privatus*, being granted *imperium* and a triumph before ever holding an elected office, receiving proconsular commands over sitting consuls themselves, being released from the laws by senatorial decree, and even obtaining the consulate in complete circumvention of the *cursus honorum* (Cic. *Man.* 61-62). But, according to Cicero, none of these irregularities mattered in the case of Pompey, since he was uniquely qualified to carry out the tasks of the command proposed for him (Cic. *Man.* 63-64).[756] Ultimately, Cicero protested Clodius' provincial revisions only because he felt that Piso and Gabinius were reprehensible characters, not necessarily because he objected to provinces assigned outside of sortition. This is evident, for instance, a year later in 56, when Cicero argued in favor of Caesar retaining his Gallic command to better ensure that the consuls for that year would be sent to replace Piso and Gabinius in their provinces. According to Cicero in this case, just as Marius received a provincial command in Gaul *extra ordinem*, so too should Caesar remain in Gaul in order to conclude the war there.[757]

Thus, Cicero's feelings on extraordinary commands had apparently changed between his defense of the *lex Manilia* in 66 and his *De domo sua* of 57, while his usage of *extra ordinem* and *extraordinarium* in reference to magistracies continued to evolve as well. In 51, for instance, Cicero described his own proconsular command in Cilicia as an extraordinary office (*munus*

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[755] Cic. *Man.* 29: *neque enim solae sunt virtutes imperatoriae quae volgo existimantur, labor in negotiis, fortitudo in periculis, industria in agendo, celeritas in conficiendo, consilium in providendo*; 42: *et quisquam dubitabit quin huic hoc tantum bellum permittendum sit, qui ad omnia nostrae memoriae bella conficienda divino quodam consiolio natus esse videatur*? For all of Cicero's comments on Pompey's personal qualifications for the command, see Cic. *Man.* 27-42.

[756] See esp. Cic. *Man.* 64: *atque in hoc bello Asiatico et regio, Quirites, non solum militaris illa virtus quae est in Cn. Pompeio singularis sed aliae quoque animi virtutes magnae et multae requiruntur.*

[757] Cic. *Prov.* 17-19, esp. 19: *at ii non modo illum inimicum ex Gallia sententiis suis non detrahebant, sed ei propter rationem Gallici belli provinciam extra ordinem decernebant*.

extraordinarium; Cic. *Att.* 5.9.1). The eastern front was still reeling from the disastrous defeat of M. Licinius Crassus (cos. 55) at the hands of the Parthians in 53, and its provinces were languishing under previous mismanagement of avaricious governors.[758] In attempt to forestall corruption in provincial administration and curb the ambition of former office holders, the *lex Pompeia de provinciis* of 52 stipulated that magistrates had to wait five years after their term of office before holding the governorship of a province, which was only then assigned by the Senate.[759] Consequently, competent former consuls and praetors were needed, and Cicero was selected and sent to govern Cilicia as proconsul, much to his chagrin, alongside M. Calpurnius Bibulus (cos. 59) in Syria, while around eight other eastern provinces were assigned to former praetors.[760] The extraordinary nature of Cicero's Cilician command was that he was a *privatus* at the time, having held no office since his consulship in 63, and was therefore appointed, not elected, to his governorship via the *lex Pompeia*.

Furthermore, there is also the question of how the governors under the *lex Pompeia* were even selected. Although Cicero does state that the provincial assignments for 51 were decided by sortition, there is evidence that the *lex Pompeia* had changed the process so that the names of the prospective governors themselves were drawn out at random from the ceremonial urn and

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[758] Cic. *Att.* 6.6.3; *Fam.* 8.10.1-3; 15.1.5; Sherwin-White 1984: 292; Everitt 2003: 188; Morrell 2017: 5, 187-192, 227, 229, 232-233, 235-237, 242. Ironically, however, despite the trepidation over a potential Parthian invasion, Sherwin-White notes that there was a degree of indifference to the Parthian situation among many in Rome, seen in the fact, as one example, that Crassus' former quaestor, C. Cassius Longinus, was left in charge of Syria for two years after scrambling to stabilize Rome's position in Syria following the disaster at Carrhae. Indeed, a senatorial proposal to hold a levy in Italy and reinforce the eastern legions under Cicero and Bibulus was actually blocked by Ser. Sulpicius Rufus, one of the consuls for 51 (Cic. *Fam.* 3.3.1). Apparently, both Cicero and Bibulus were granted leave to raise local levies, though Cicero argued that these were insufficient to bolster the derelict defenses of either province (Cic. *Fam.* 15.1.4-6). See also Cic. *Att.* 5.18.1-2; Dio 40.28.2-4.

[759] Cic. *Att.* 6.6.33; *Fam.* 2.15.4; Dio 40.30.1; Steel 2013: 221; Morrell 2017: 5.

[760] Indeed, Cicero stated that he was virtually forced to accept his provincial command in Cilicia (Cic. *Fam.* 3.2.1: *Cum et contra voluntatem meam et praeter opinionem accidisset, ut mihi cum imperio in provinciam proficisci necesse esset*). See also Cic. *Fam.* 2.8; 8.8.5, 8; *Phil.* 11.34; *Div.* 1.2; Plut. *Cic.* 36.1. On Bibulus in Syria, see Cic. *Att.* 5.21.2; *Fam.* 15.1.1 (on Bibulus as proconsul); App. *BC* 5.10; Dio 40.30.1; Everitt 2003: 188; Lintott 2008: 253; Morrell 2017: 234-237, 242-243.

assigned to predetermined provinces, in contrast to the traditional method of drawing out the names of provinces for magistrates entering their term of office.[761] Nevertheless, Caesar alleged that magistrates under the *lex Pompeia* were selected and dispatched to their provinces in a manner that broke with political tradition, in that their *imperia* and *provinciae* came not from popular acclaim, but a small (*paucos*) faction within the Senate.[762] Morrell argues that Caesar's complaint was ultimately over partisan influence in the selection of governors and not an accusation of illegality, especially since he recognized that the laws for magistracies had changed (*iura magistratuum commutari*).[763] First of all, Caesar does state that praetors were being sent out to their provinces without having their *imperium* confirmed by the people, presumably referring to the *lex curiata*, without which a prospective commander remained a *privatus* and could not legally wield *imperium*, and that *privati* were attended by lictors. *Privati* who received *imperium* and lictors without a *lex curiata* were such breaches of tradition that they "produced a status of illegality," according to Grillo.[764] While it is true that Caesar did not challenge the

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[761] Cic. *Fam.* 8.8.8: *Eos sortitio in provincias mitti placere… ita sorte in provincias proficiscerentur… in sortem coicerentur*; *Lig.* 21: *Turberonis sors coniecta est ex senatus consulto, cum ipse non adesset*. See also Schol. Clun. 272St; Schol. Gron. 291St; Stewart 1998: 12-51, esp. 29-30; Brennan 2000: 182-185. See especially the discussion in Morrell (2017: 229-234), in particular her examination of the scholiasts. For an example of this practice before the *lex Pompeia*, in 60 as an emergency measure, see Gruen 1995: 541, n. 31.

[762] Caes. *BC* 1.6.5: *de reliquis rebus senatus consulta perscribuntur. provinciae privatis decernuntur, duae consulares, reliquae praetoriae. … Philippus et Cotta privato consilio praetereuntur, neque eorum sortes deiciuntur*; 1.85.9: *In se iura magistratuum commutari, ne ex praetura et consulatu, ut semper, sed per paucos probati et electi in provincias mittantur*.

[763] Morrell 2017: 226-227.

[764] Caes. *BC* 1.6.6-7: *Neque exspectant, quod superioribus annis acciderat, ut de eorum imperio ad populum feratur paludatique votis nuncupatis exeant. consules, … quod ante id tempus accidit nunquam, ex urbe proficiscuntur, lictoresque habent in urbe et Capitolio privati contra omnia vetustatis exempla*; Grillo 2015: 38. On the legal importance of the rituals of *paludamentum* and *vota nuncupata*, see also Livy 42.49.1-7; Henderson 1957: 83; Stewart 1997: 178; 1998: 34-37 (esp. n. 70), 125; Sumi 2005: 35, 90, 167-168; Pomeroy 2006: 176-177; Drogula 2007: 436-438, n. 120-122; Zollschan 2011: 53-54; Driediger-Murphy 2014: 198; Konrad 2015: 162-164; Vervaet 2015: 220-221; Hodgson 2017: 169; Koortbojian 2020: 19n. 18, 40. Stewart compellingly translates the passage to imply that the praetors mentioned by Caesar not only failed to have their *imperium* confirmed before the people, but also did not ritually put on the military cloak (*paludatus*) or make their vows (*vota nuncupata*), which she supports with Cicero's reference to a similar incident regarding Verres in 73 (Cic. *Verr.* 2.5.32, 34). Similarly, Vervaet points out that Cicero also recognized the necessity of completing the *lex curiata* in order to wield *imperium* legally (Cic. *Att.* 4.18.4; *Fam.* 1.9.25; 3.6.3, 6.6, 10.6; *QFr.* 3.2.3). Against the notion of illegality, see Wilson (2021: 164), particularly for his criticism of Drogula's (2007) argument about the legal prohibition of *imperium* inside the

legality of the new sortition method via the *lex Pompeia*, the fact that he connects the biased appointment of governors to breaches of political tradition demonstrates that his concerns are fundamentally rooted in issues of constitutionality. As stated in the previous chapter, legality and constitutionality are not synonymous, since it possible for individual laws to undermine the integrity of a constitution, which is itself a body of laws that guide the state's institutional framework. In other words, we need to focus not only on the letter, but also the spirit of the law regarding sortition. Sortition, or the use of lottery, was not merely matter of procedure, nor was it reserved for assigning provincial commands, but was a sacred process that ensured impartiality in both the election of magistrates and the allotment of *provinciae*. As Mouritsen points out, elections are inherently divisive in a state as they implicitly put both candidates and voters into conflict with one another. Competition among elites over socio-political status and influence was particularly dangerous, according to Mouritsen, as it could easily lead to factionalism, "instability, infighting and the eventual collapse of the system."[765] Sortition prevented both candidates and voters from alleging unfairness, since the act of drawing lots at random eliminated (or reduced) the chance of bias influencing elections or the allotment of provincial assignments, some of which were more prestigious than others.[766] Therefore, Caesar's comments on the influence of the *factio paucorum* over provincial assignments in Rome has definite constitutional implications.

Lastly, Morrell states that the purpose of the *lex Pompeia* placing provincial sortition further under the purview of the Senate was "to select individuals on the basis of their ability or

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pomerium. For more on the legalities of the *profectus*, including the *paludamentum* and *vota nuncupata*, see chapter 3 of this dissertation on Roman political institutions.

[765] Mouritsen 2011: 221-223. The importance of assigning offices by lot was not even unique to Roman political thought, but is also found in Aristotle, according to Lintott (1992: 120-122, 125).

[766] Taylor 1966: 70-74, 77-79; Kloft 1977: 48, 60-61, 71, 81-82; Stewart 1998: 91, 126-127, 143-144, 182-183; Lintott 1999: 55, 101, 136; Brennan 2000: 626, 758-763; Mousourakis 2003: 82 n. 49; Gargola 2007: 155; Beck 2011: 91; Mouritsen 2011: 228-232.

exclude them on moral grounds," which, she emphasizes, had always been "the principle behind the well-established phenomenon of 'extraordinary commands.'" After all, as Morrell notes, we can see "the idea of selecting the best man for the job" as the central argument in Cicero's endorsement of Pompey's command in the *lex Manilia*, as well as Clodius' nomination of Cato for his command in Cyprus.[767] All of this is true, but it does not diminish the importance of Caesar's criticism, nor the extraordinary nature of the commands granted in the *lex Pompeia*. For one, although Cicero absolutely advocated for Pompey's assumption of command in the Mithridatic war on the basis of his talent as a general and his personal morality, not once in his speech defending the *lex Manilia* in 66 did Cicero refer to Pompey's proposed command as extraordinary.[768] To the contrary, as we have seen, not only did Cicero frequently refer to Cato's Cyprian command as *extra ordinem* and *extraordinarium* in his *De domo sua* of 57, as well as the direct appointment of commanders (*nominatim*) outside of sortition (*sine sorte*), but he also reminds his listeners that an individual's merit ought to have no influence on whether they receive an extraordinary command (Cic. *Dom.* 21).[769] Furthermore, it is likely that Cicero will have agreed with Caesar's objections to the *lex Pompeia*, since we will recall that Cicero himself referred to his own governorship in Cilicia as a *munus extraordinarium* and did not want the posting (Cic. *Att.* 5.9.1). Thus, Cicero was correct to label his Cilician command as extraordinary, not only because of his status as a *privatus*, but also the irregular nature of his selection for the post.

[767] Morrell 2017: 226-227. See Cic. *Man.* 27-50, 59-68; Plut. *Cat. Min.* 34.2-3. See also MacKendrick 1995: 4-6.
[768] In contrast, however, Asconius' does refer to Pompey's command via the *lex Manilia* as *extra ordinem* in his commentary on Cicero's *Pro Cornelio* (Asc. *Corn.* 65).
[769] For the use of *extra ordinem*, see Cic. *Dom.* 18-26; for *extraordinariis*, see 22 and 24; for references to the direct appointment of commanders outside of sortition, see 21, 23-24, 43, 51, 136.

Cicero's view of extraordinary commands continued to evolve by the time of his eleventh *Philippic*, written in late February of 43.[770] Here, Cicero unsuccessfully argued against the creation of an extraordinary command for P. Servilius (cos. 48) in Syria, proposed by L. Iulius Caesar (a cousin of the dictator) to oppose the recently condemned P. Cornelius Dolabella, and suggested instead (unsuccessfully at first) to transfer Syria to C. Cassius Longinus instead.[771] Cicero's basic argument was that granting the command to Servilius would require the conferral of *imperium* upon a *privatus*, which was to be avoided whenever possible, especially since, as Cicero claimed, Cassius already possessed legal *imperium*.[772] The irony, however, was that Cassius' existing command was anything but ordinary. In early August of 44, Cassius and M. Iunius Brutus were appointed at the end of their praetorships to oversee grain collection for 43 in Cyrene and Crete, respectively. Instead, both men rejected their provincial assignments and assumed their preferred commands by force, with Brutus going to Macedonia and Cassius to Syria, and then proceeded to gather allies and neutralize other Caesarian loyalists. In this way, both Brutus and Cassius held illegal commands, a far cry from the *imperium legitimum* alleged by Cicero (Cic. *Phil.* 11.26).[773]

Cicero is remarkably flexible and inconsistent in his characterization of extraordinary commands throughout the rest of the eleventh *Philippic*. To begin, Cicero states that an

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[770] On the date, see Lintott 2008: 396.

[771] Cic. *Phil.* 11.17. Cicero was not successful in obtaining the Syrian command for Cassius until late April, by which time Cassius had already entered Syria with troops (*MRR* 2.343). Dolabella was declared a *hostis* after murdering C. Trebonius, who refused to turn over Syria to Dolabella. See Cic. *Phil.* 11.1, 5, 7-9; 13.22-23; 14.8; *Fam.* 12.12.1; Livy *Per.* 119; Strabo 14.646; Vell. 2.69.1; App. *BC* 3.26, 61; 4.58; Dio 47.29.1-4; Oros. 6.18.6. For more on the eleventh *Philippic*, see Lintott 2008: 396-398.

[772] Cic. *Phil.* 11.19, 25 and esp. 26: *expedito nobis homine et parato, patres conscripti, opus est et eo qui imperium legitimum habeat, qui praeterea auctoritatem, nomen, exercitum, perspectum animum in re publica liberanda.*

[773] On the grain commands assigned to Brutus and Cassius, see Cic. *Att.* 12.1; 15.9.1, 10.1, 11.1-4; App. *BC* 3.6, 35; 4.57. On the controversy surrounding their provincial assignments, see Cic. *Att.* 15.5.2, 9.1, 11.1-4; *Fam.* 12.2, 14.4-6; *ad Brut.* 2.3.3; *Phil.* 2.31; 11.30-32; Nic. Dam. 112, 135; Vell. 2.62.2, 69.2; Joseph. *AI* 14.271-272, 320; *BI* 1.219; Plut. *Brut.* 19.5, 28.6; App. *BC* 3.7-8, 16, 36, 63, 78; 4.57, 59; Dio 46.40.3; 47.21.1-2; 26.1-2; 28.3-5. On the legitimization of Cassius' Syrian command, see App. *BC* 3.63; Dio 47.28.5.

extraordinarium imperium is fickle and better suited to the mob, not fit for the dignity of the Senate (Cic. *Phil.* 11.17). He then related the example of the provincial allotment to the consuls of 190, beginning with L. Cornelius Scipio (later granted the agnomen, Asiaticus). After the consular elections for 190, many in the Senate were concerned that L. Scipio, younger brother of the famous Africanus, was too inexperienced or even incompetent to be entrusted with the command against the Seleucid king, Antiochus III, during the Syrian War (192-188). Consequently, many were hesitant to submit the provincial allotment to sortition, instead hoping that the consuls themselves would agree upon their respective provinces (*comparare*) or simply allow the Senate to choose, with the hope in either case that Scipio's more experienced consular colleague, C. Laelius, would take the command against Antiochus. Only after Scipio Africanus himself offered to serve as a legate under his younger brother did the Senate accede to L. Scipio carrying out the war against the Seleucid king.[774] Thus, we can see again that Cicero views one of the criteria for extraordinary commands to be the violation of the tradition of provincial sortition by lot.[775] On the other hand, although the consular sortition was upheld for 190, Cicero curiously makes no mention of the fact that the balloted provinces for two of the praetors in 192, M. Baebius Tamphilus and A. Atilius Serranus, were overturned (*permutatae provinciae*) by a senatorial decree ratified by a plebiscite (Livy 35.20.9). And while Cicero might argue that the transfer of provinces was legally permissible, according to the constitutional principle that the popular assemblies had the final say in any legal matter (Livy 7.17.12), it was nevertheless contrary to procedural norms regarding provincial assignment. So, at the very least, Cicero is being very selective and inconsistent in labelling the transfer of provinces as *extraordinarium*.

[774] Cic. *Mur.* 32; *Phil.* 11.17; Livy 37.1.7-10; Val. Max. 5.5.1; Just. 31.7.1-2; Porph. *Frg.* 47.
[775] See also Cic. *Dom.* 22-24; *Prov. cons.* 19.

Following his discussion of Scipio Asiaticus' provincial assignment, Cicero then states that there was no more of a desire for extraordinary commands during the Syrian War (192-188) than in the Pyrrhic War (280-275), all three Punic Wars (264-241, 218-201, 149-146), the Second Macedonian War (200-197), or the Achaean War (146).[776] This is a very bold assertion on Cicero's part, which reveals a great deal about his definition of magistracies that were *extraordinarium*, and warrants a full examination, since many of his previous descriptions of extraordinary commands contradict this present claim. To begin with the Syrian War itself, aside from the breach of sortition for two of the praetors in 192 (Livy 35.20.8), there were multiple prorogations, including one for Scipio Asiaticus himself in 189, though this was admittedly done to facilitate his triumph.[777] Additionally, both C. Flaminius and Q. Minucius Thermus had their *imperium* prorogued for three years consecutively (192-190), with two years of prorogated command being granted each to M. Fulvius Nobilior (192-191), L. Oppius Salinator (190-189), L. Aemilius Paullus (190-189), M. Tuccius (189-188), and P. Iunius Brutus (189-188), while M. Fulvius Nobilior had two years of prorogated commands on two separate occasions (192-191, 188-187), and many others also received a single year's prorogation.[778] Moreover, three commanders received *imperium* higher than legally befit their rank at the time. In their first year of prorogued *imperia*, for instance, Nobilior (pr. 193) and Paulus (pr. 191) each held proconsular *imperium* despite having served as praetors in the previous year.[779] Similarly, L. Oppius Salinator

[776] Cic. *Phil.* 11.17.
[777] *Fast. Tr.*, p. 103; Plb. 21.24.16-17; Cic. *Prov. cons.* 18; Livy 37.58.5-59.6; 38.59.3; Val. Max. 3.5.1; 4.1.8; Plin. *NH* 33.148-149; Gell. 6.19.3, 7; Eutrop. 4.4.3; Malal. 8.211.
[778] On Q. Minucius Thermus (192-190), see Nepos *Hann.* 8.1; Livy 34.54.1; 35.20.6; 36.38.1; 37.2.5; Front. *Str.* 1.5.16; on C. Flaminius (192-190) and M. Fulvius Nobilior (192-191), Livy 34.54.2; 35.20.11; 36.2.8-9; 37.2.11; *Vir. Ill.* 52.1 (on Nobilior's second round of prorogations in 188-187, see Cic. *Mur.* 31; Livy 38.35.3, 42.9-44.5; 39.4-5; 40.45.6; Eutrop. 4.5); on L. Aemilius Paullus, Livy 37.46.7, 57.5, 58.5; Plut. *Aem.* 4.1; Oros. 4.20.23; on L. Oppius Salinator, Livy 37.2.11, 50.10, 51.3-6; on P. Iunius Brutus, Livy 37.50.13; on M. Tuccius, Livy 37.50.13; 38.36.1.
[779] On Nobilior, see Livy 35.22.6 (*proconsul*); Oros. 4.20.16, 19 (praetor).

received a propraetorian command in 192, despite having served as an aedile for 193, which also meant that he was *privatus* at the time of his appointment.[780]

Cicero was correct in his comments on extraordinary commands during the Pyrrhic War, for which there were minimal irregularities, with only one prorogation being granted to L. Aemilius Barbula in 280.[781] As for the First and Second Punic Wars, Cicero states that they in particular were carried on and concluded by consul and dictators alone, implying a lack of recourse to extraordinary commands, but this is simply not true.[782] In the First Punic War (264-241), six consuls received prorogations as did one praetor (242).[783] During the Second Punic War (218-201), however, nearly every conceivable irregularity in Roman magistracies occurred. Fifteen commanders were granted *imperium* while being *privati*, fifty-five separate prorogations were granted, several commanders held *imperium* for multiple years consecutively, proconsular *imperium* was given to former praetors, and the *cursus honorum* was ignored on several occasions, as were many other laws governing the appointment and conduct of Roman magistracies.[784] Granted, it may very well be the case that Hannibal's invasion constituted such an unprecedented crisis that these emergency measures were warranted, but for Cicero to say that the Romans did not resort to extraordinary commands and only availed themselves of consuls and dictators during the Second Punic War is outright false.

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[780] Livy 35.23.6-7, 24.6.
[781] *Fast. Tr.*, p. 98. There are no references to Aemilius' prorogation beyond the reference on the *Fasti*, nor is there any mention of his activity against the Tarentines, Samnites, and Sallentini beyond that which was mentioned during his consular year of 281 (Dion. Hal. 19.6; App. *Sam.* 17; Dio 9.39.5; Oros. 4.1.3-4; Zon. 8.2). Nevertheless, because the *Fasti* show him triumphing in early to mid-July, it seems likely that his prorogation was also of military necessity; that is, not solely for the purpose of triumphing.
[782] Cic. *Phil.* 11.17: *duobus antea maximis Punicis bellis quae a consulibus aut a dictatoribus gesta et confecta sunt.*
[783] The six proconsuls were C. Aquilius Florus (cos. 259), M. Aemilius Paullus and Ser. Fulvius Paetinus Nobilior (coss. 255), Cn. Cornelius Scipio (cos. 254), L. Caecilius Metellus (cos. 251), and C. Lutatius Catulus (cos. 242), with the first prorogued praetor being Q. Valerius Falto (pr. 242). For further discussion and sources, see Jashemski 1966: 9-12.
[784] Astin 1958: 26, 42-43; Jashemski 1966: 17-19, 40; Gruen 1970: 537-538, 540; Develin 1975: 716; Kloft 1977: 18, 20-24, 27-35, 48, 50, 75, 90; Ridley 1981: 288, 290; Lintott 1999: 105, 113-114; Vervaet 2014: 207-208; Straumann 2016: 104-105; Williamson 2016: 25-28.

As for the Third Punic War (149-146), Cicero does acknowledge the controversy surrounding the election of P. Cornelius Scipio Aemilianus to the consulship for 147, who at the time was too young to be consul and had only served as an aedile.[785] At the same time, however, Cicero still attempted to demonstrate that Aemilianus' election, which was contrary to Roman electoral law, was not extraordinary. According to Cicero, the Roman people sought a capable commander (*delegit idoneum ducem*), as Rome had recently been facing setbacks in the war with Carthage, and, although they saw such an able commander in the person of Scipio Aemilianus, they did "at least" (*tamen*) want him to carry out the war as consul.[786] By explaining the matter in this way, Cicero seems to be saying that the Roman people chose to make Aemilianus consul as opposed to granting him *imperium* as a *privatus*, which would be *extra ordinem*. While this may be true, it does not change the fact that Aemilianus' election to the consulate was a violation of the *cursus honorum* and minimum age requirements stipulated in the *leges annales*, both of which Cicero considered potential aspects of extraordinary commands a decade earlier in his description of Pompey's career.[787] Cicero also fails to mention the fact that Aemilianus received the province of Africa *extra sortem*, a practice that Cicero had moments before described as *extraordinarium*, as well as the fact that Aemilianus received a prorogation for 146, while overseeing the annexation of Africa as a province, before returning to Rome for a triumph later that year.[788] Furthermore, Aemilianus was not the only commander whose *imperium* was

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[785] *Fast. Cap.*, p. 70; Cic. *Amic.* 11; Livy *Per.* 50-51; Vell. 1.12.3; Val. Max. 8.15.4; Plut. *Mor.* 200A, 804F-805A; App. *Pun.* 112; Dio fr. 70.2-3; *Vir. Ill.* 58.5; Eutrop. 4.12; Zon. 9.29.
[786] Cic. *Phil.* 11.17: *ut eum tamen bellum gerere consulem vellet*.
[787] Cic. *Man.* 62: *quid tam singulare quam ut ex senatus consulto legibus solutus consul ante fieret quam ullum alium magistratum per leges capere licuisset?* On the *cursus honorum* and age requirements, see Astin 1958: 46.
[788] On the lack of sortition, see Livy *Per.* 51 (*extra sortem*); Val. Max. 8.15.4 (*sine sorte*); App. *Pun.* 112 (διακληροῦσθαι). On Scipio's activities in 146 and his subsequent triumph, see Plb. 18.35.9-12; Cic. *Verr.* 2.2.85-87; 4.73-84, 97-9; 5.124, 185-187; *Rep.* 6.11; *Agr.* 2.58; Diod. 13.90.5; 32.25; Livy *Per.* 51-52; *Ep. Ox.* 51.142-143; Vell. 2.4.5, 38.2; Val. Max. 2.7.13; 4.3.13; 5.1.6; Plut. *Mor.* 97D, 200B; App. *Pun.* 135; Plin. *NH* 33.141; App. *Pun.* 133-135; Gell. 3.4.1; Eutrop. 4.12, 14.

expanded during this time, contrary to Cicero's claim. During the brief Achaean War of 146, the first Roman commander in the field, Q. Caecilius Metellus Macedonicus, who had just captured the Macedonian rebel Andriscus, had held *imperium* continuously since 148, while his successor, L. Mummius (cos. 146), also received a prorogation for 145 to conclude the war in Greece.[789]

Cicero's next usage of *extraordinarium* continued to focus on granting *imperium* to *privati*, but also prorogation. In this case, Cicero began with the example of P. Licinius Crassus Dives Mucianus, who was pontifex maximus and one of the consuls in 131 (Cic. *Phil.* 11.18). Mucianus forbade his consular colleague, L. Valerius Flaccus, to assume his command in Pergamum against the rebel Aristonicus on the grounds that Flaccus could not leave Rome in his concurrent capacity as a priest of Mars (*flamen Martialis*). According to Cicero, although the renowned Scipio Aemilianus had recently returned from Spain and triumphed for his victory over the Numantines, the people nevertheless decided not to confer *imperium* upon a *privatus* (that is, Scipio) but entrusted the command against Aristonicus to the other elected consul, Mucianus.[790] When we consider the fact that Mucianus was quickly defeated and killed by Aristonicus' forces, Cicero may be emphasizing here that, even though a supremely qualified general was available in the person of Scipio Aemilianus, the Roman people instead privileged

[789] On Metellus' praetorian command (148) and subsequent prorogations (147-146), see *MRR* 1.461, 464, 467; on Mummius' consular command (146) and prorogation (145), see *MRR* 1.465-466, 470. It is also possible that Metellus held proconsular *imperium* in 147-146, despite being praetor in 148, though this theory relies on the sole reference to Metellus as a consul in Florus (1.32.3). There is greater evidence, however, that Metellus entered Greece and engaged the Achaeans illegally, that is, *in aliena provincia*. Pausanias explicitly states that Metellus rushed into Greece as soon as he heard that Mummius had been sent against the Achaeans, desiring to end the war before Mummius arrived (Paus. 7.15.1). The author of *de Viris Illustribus* (60.1) similarly states that Mummius was assigned the command against the Achaeans and describes Metellus' attempt to claim victory as an improper action (*alieno labore*). As Stewart explains, the act of magistrates fighting outside the "proper tenure of the command that had been allotted" was referred to as *aliena provincia* or *alieno auspicio* (Stewart 1988: 91).

[790] On Mucianus receiving the command against Aristonicus, see Cic. *Phil.* 11.18; Livy *Per.* 59; Val. Max. 8.7.6; Oros. 5.10.1. On Scipio Aemilianus' triumph in 132, see Cic. *Rep.* 6.11; *Phil.* 11.18; Livy *Per.* 59; Val. Max. 2.7.1; Plin. *NH* 33.141; Plut. *Mor.* 201E; Flor. 1.34.17; Eutrop. 4.19.1; Oros. 5.7.

law over merit and entrusted the command to a less capable commander.[791] Yet, although Cicero is correct that the people adhered to law in the case of Mucianus, there were other magisterial irregularities that occurred during this time. For one, although Scipio Aemilianus did not gain the command against Aristonicus, there was a motion among at least two of the tribunes to suggest just such a proposal, which even Cicero acknowledges.[792] Scipio Aemilianus had also already held *imperium* for three years at this time (134-132), two of which were prorogations.[793] Furthermore, Mucianus himself received a prorogation for 130, as did his successor M. Perperna (cos. 130) in 129 until his own death that year, while M'. Aquillius (cos. 129) in turn held command in Asia until 126.[794] Thus, Cicero's silence regarding these examples demonstrates that he did not consider prorogation to be a criteria of an *imperium extraordinarium*.

Cicero was aware, however, of the contradiction in his opposition to granting *imperium* to a *privatus*, especially since he had supported so many of Pompey's appointments as a *privatus* in the past, prompting him to explain his apparent inconsistency (Cic. *Phil.* 11.18). Cicero attributed most of Pompey's commands to "turbulent tribunes" (*tribuni plebis turbulenti*), which certainly included the tribunician proposals of A. Gabinius in 67 and C. Manilius in 66 that granted Pompey (a *privatus* at the time) his sweeping commands throughout the Mediterranean against the pirates and in the East against Mithridates.[795] As for the Sertorian War in Spain (80-

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[791] Cicero states that Scipio Aemilianus was superior by far to all in bravery and renown in war "*longe omnis belli gloria et virtute superaret*" (Cic. *Phil.* 11.18). On Mucianus' defeat and death after battle with Aristonicus, see Livy *Per.* 59; Strabo 14.646; Vell. 2.4.1; Val. Max. 3.2.12; Front. *Str.* 4.5.16; Flor. 1.35.4-5; Gell. 1.13.9-13; Just. 36.4.7-8; Obseq. 28; Eutrop. 4.20; Orso. 5.10.2-3.
[792] Cic. *Phil.* 11.18: *duas tamen tribus solas tulit.*
[793] On Scipio's consulship in 134 and his subsequent prorogations, see Cic. *Rep.* 6.11; *Phil.* 11.18; Livy *Per.* 56-57, 59; Val. Max. 2.7.1; 3.7.2; 7.6 ex.2; 8.15.7; Vell. 2.4.2-5; Sen. *Ira* 1.11.7; Plin. *HN* 33.141; Front. *Str.* 2.8.7; 4.1.1; Plut. *Mar.* 3.2, 13.2-3; App. *Ib.* 84-86, 92-93; Flor. 1.34.8-17; Eutrop. 4.17, 19; *Vir. Ill.* 58.6; Veget. 3.21; Polyaen. 8.14.1-2; Ampel. 18.11; 24; Oros. 5.7.
[794] On Mucianus' proconsular appointment for 130, see Vell. 2.4.1 (*Crassum Mucianum ... proconsulem*); on that of Perperna for 129, see Strabo 14.1.38; Just 36.4.11; on Aquillius holding command in Asia via prorogation for 128-126, see *Fast. Tr.*, p. 105; Cic. *de Or.* 2.195; Vell. 2.4.1; Flor. 1.35.7; App. *BC* 1.22.
[795] On Gabinius' legistlation, the *lex Gabinia* see the sources listed in Broughton, *MRR* 1.144, 146; on that of Manilius, the *lex Manilia*, see *MRR* 1.153, 155.

72), Cicero stated that Pompey was granted *imperium* as a *privatus* in 77 by the Senate, but only because both sitting consuls had refused the call.[796] In making this point, Cicero was reiterating that lawful, elected magistrates should always take precedent over *privati* in the conferment of *imperium*. Again, in his example of 131, the people gave command against Aristonicus to the consul Mucianus, even though a superior general, Scipio Aemilianus, was available as a *privatus*. Thus, in the case of 77, Cicero is also implying that the Senate may not have assigned Pompey his extraordinary command in Spain if either of that year's consuls had accepted the appointment. Once more, however, Cicero omits a great deal of information, this time regarding Pompey's other commands as a *privatus*. Neither the Senate nor any turbulent tribunes granted Pompey *imperium* in 83 when he raised his own private army in support of Sulla, a flagrantly illegal act about which Cicero seemed to boast in 66.[797] Nearly three decades later, in 57, Cicero himself supported a law that granted Pompey, once more a *privatus*, extraordinary powers for regulating Rome's grain supply to Rome, which included access to the treasury, command of a fleet and army, and proconsular *imperium* abroad in the provinces, all for a period of five years.[798]

Cicero was forced to reconcile an even larger contradiction in his logic, however, after conceding that he himself, in January of 43, had actually supported the conferment of *imperium* upon another young *privatus*, C. Iulius Caesar Octavianus, the nephew and adopted son of the

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[796] Cic. *Man.* 30, 62; *Phil.* 11.18; Sall. *Hist.* 2.16-20, 82.4; Livy *Per.* 91; Vell. 2.29.5, 30.2; Val. Max. 8.15.8; Plin. *NH* 7.96; Plut. *Pomp.* 13.9, 17.1-4; *Sert.* 18.1-2; App. *Ib.* 101; *BC* 1.80, 108; Dio 36.25.3, 27.4; *Vir. Ill.* 77.4; Exsup. 38; Eutrop. 6.1; Oros. 5.23.8-9. See also Leach 1978: 44; Seager 1979: 17; Spann 1987: 85.
[797] Cic. *Man.* 61: *quid tam novum quam adulescentulum privatum exercitum difficili rei publicae tempore conficere? confecit. huic praeesse? Praefuit.* See also Cic. *Phil.* 5.43-44; Caes. *BAfr.* 22.2-4; Diod. 38.98.1; Livy *Per.* 85; Vell. 2.29.1-2; Plut. *Pomp.* 5.4-6.6; *Mor.* 203B-C; App. *BC* 1.80; Dio fr. 107.1.
[798] Cic. *Att.* 4.1.6; *Dom.* 16-30; Livy *Per.* 104; Plut. *Pomp.* 49.5; App. *BC* 2.18; Dio 39.9.2-3; 54.1.3. For an overview of the different periods in which Pompey held *imperium*, see Steel 2013: 240.

recently assassinated dictator.[799] In late 44, M. Antonius, still consul for the year, had departed Rome to take up his provinces of Cisalpine and Transalpine Gaul and laid siege to the city of Mutina, which was held by Decimus Brutus, who refused to relinquish the Gallic provinces to Antonius.[800] Around the same time, Octavian, though only nineteen and having never held an elected office, gathered an army comprising many of Caesar's veterans (including two legions who defected from Antonius) on his own initiative, marched to Rome, and compelled Cicero to legitimize his command in the hopes of joining the newly elected consuls for 43 (C. Vibius Pansa and A. Hirtius) in their campaign against Antonius, who was by now declared a public enemy.[801] Cicero's rationalization in the eleventh *Philippic* for agreeing to confer propraetorian *imperium* upon Octavian (Cic. *Phil.* 5.45-46) is also a rebuttal against the accusations of hypocrisy he had apparently heard directed toward him. How could Cicero, asked his detractors, dare to oppose L. Caesar's own proposal to grant *imperium* to Servilius, another *privatus*, when Cicero himself had done the same very same thing mere months ago for Octavian, notwithstanding even his previous support of Pompey commands as a *privatus* in the past? In response to this, Cicero stated he had only supported conferring *imperium extraordinarium* upon Octavian because the nascent commander was himself rendering "extraordinary protection" (*praesidium extraordinarium*) to the Senate and people, without which the Republic would not have been safe.[802] Furthermore, Cicero argued that the dilemma was not so simple as whether to confer *imperium* upon Octavian.

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[799] Cic. *Phil.* 11.20 (*C. Caesari adulescentulo*); Cic. *ad Oct.* 4; Aug. *Res. Gest.* 1; Livy *Per.* 118; Vell. 2.62.1; Plut. *Cic.* 45.4; Tac. *Ann.* 1.10; Suet. *Aug.* 10.3; App. *BC* 3.51; Dio 46.29.2-5; Ehrenberg and Jones 1976: 44; Straumann 2016: 297-298.

[800] Cic. *Phil.* 2.109; 5.7; Livy *Per.* 117; Nic. Dam. 130.120-122; Vell. 2.60.5; App. *BC* 3.27-30; Dio 45.9.2-3, 22.3, 25.1-2; 46.23.4-5. On Brutus refusing to turn over Gaul to Antonius, see Cic. *Fam.* 11.6.2; *Phil.* 3.3-12, 37; 4.4-7; 5.3, 22-25; 6.8-9; 7.24; 13.20; Flor. 2.15.3; App. *BC* 3.49; Oros. 6.18.3.

[801] Cic. *Att.* 16.8.1-2, 11.6; *Fam.* 11.7.2; *Phil.* 3.3; 4.3-4; 5.23, 42-46, 52; 11.20; 13.18; Livy 117; Nic. Dam. 130.129-139; Aug. *Res. Gest.* 1.1 (*Annos undeviginti natus exercitum privato consilio … comparavi*); Vell. 2.6.1-2; Tac. *Ann.* 1.10; App. *BC* 3.43-45, 52, 56, 67; Dio 45.13.1-4, 38.5. See also Osgood 2018: 188.

[802] Cic. *Phil.* 11.20: *ille enim mihi praesidium extraordinarium dederat: cum dico mihi, senatui dico populoque Romano. A quo praesidium res publica, ne cogitatum quidem, tantum haberet ut sine eo salva esse non posset.*

Instead, because Octavian had already raised an army on his own private initiative, and because no one could command an army legally without possession of *imperium,* Cicero claimed that the only actual options were either to take the army away from Octavian or to grant him the *imperium* necessary to legitimize his command (*aut exercitus adimendus aut imperium dandum fuit*). Furthermore, to Cicero, it was the necessity of war that gave Octavian his *imperium*; the Senate could only give him the *fasces* (*Imperium C. Caesari belli necessitas, fascis senatus dedit*).[803] Nevertheless, despite his justifications, Cicero does at least acknowledge that Octavian's propraetorian command as a *privatus* was indeed an extraordinary command.

Cicero continued to discuss Octavian's extraordinary commands in an exchange of letters with M. Iunius Brutus in mid-43. Writing in May, several months after Octavian first received his propraetorian *imperium*, Brutus warned Cicero of the danger of Octavian's consular aspirations. Specifically, Brutus was concerned that Octavian would not remain content with the extraordinary honors (*honoribus … extraordinariis*) that he had already received from the Senate (that is, *imperium propraetore*), implying that the young Caesar sought even further extraordinary honors, which could only be a reference to the desired consulship.[804] As for the source of these appointments, although Brutus does attribute Octavian's elevation to Cicero's bestowment of honors and decrees, he also speaks of the potential consulship coming from a senatorial appointment.[805] A subsequent letter written to Atticus also in May, and dubiously attributed to Brutus, further describes Octavian's consulship as one among many of the

[803] Cic. *Phil.* 11.20. On the necessity of *imperium* to command an army, see also Cic. *Phil.* 5.45.
[804] Cic. *Brut.* 1.4a.2-3: *cum exploratum habere coepero Caesarem honoribus quos acceperit extraordinariis fore contentum.*
[805] Cic. *Brut.* 1.4a.2: *tribuendis honoribus … decretis tuis*; 3: *auctore … ipso senatu.*

despotisms, extraordinary commands (*imperiis extraordinariis*), tyrannies, and other attempts to be above the law that Brutus swore to oppose.[806]

In June, Cicero responded to Brutus with news of the victory over Antony at Mutina, but also confirmed that certain agents and malcontents had indeed induced Octavian to hope for the consulship, while further acknowledging that such an appointment would in fact constitute an extraordinary office (*honore extraordinario*).[807] Despite Cicero's reassurance to Brutus, it came to pass that Octavian got his wish in August of 43 after marching to Rome and compelling the Senate to acquiesce to his demands. Octavian was neither appointed to the consulship by the Senate nor by the endorsement of Cicero, as Brutus feared, but by popular acclaim in the suffect elections to replace the deceased consuls C. Vibius Pansa and A. Hirtius, who had not survived the battle of Mutina.[808] Octavian was, of course, legally unqualified to be consul (or even to stand as a candidate in elections), as he was only nineteen at the time and had not even begun to progress through the *cursus honorum*, thereby making any potential consular appointment extraordinary in every way, save for the fact that he was elected and not appointed directly.[809]

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[806] Cic. *Brut.* 1.17.4: *ego certe quin cum ipsa re bellum geram, hoc est cum regno et imperiis extraordinariis et dominatione et potentia quae supra leges se esse velit*. For arguments disputing the authorship of Brutus for this letter, see Shackleton Bailey 1980: 10-14 and Lintott 2008: 419n. 37.

[807] Cic. *Brut.* 1.10.3: *sed Caesarem meis consiliis adhuc gubernatum, praeclara ipsum indole admirabilique constantia, improbissimis litteris quidam fallacibusque interpretibus ac nuntiis impulerunt in spem certissimam consulatus*.

[808] Aug. *Res. Gest.* 1.1-8; *Fast. Cap.*, p. 80; *EJ*: Fast. Ann. Iun. Aug. 19; Livy *Per.* 119; Vell. 2.65.2; Plut. *Brut.* 27.1-3; *Cic.* 45.4-46.2; Tac. *Ann.* 1.10; *Dial.* 17.2; Suet. *Aug.* 26.1; App. *BC* 3.88-94; Dio 46.42.2-46.3; 56.30.5; Obseq. 69; Eutrop. 7.2; Macrob. *Sat.* 1.12.35.

[809] Some sources state that Octavian was only nineteen at the time of his election (Aug. *Res. Gest.* 1.1-8; Livy *Per.* 119), but most put his age at 20 (Vell. 2.65.2; Plut. *Brut.* 3; Suet. *Aug.* 26.1; Eutrop. 7.2). Appian (*BC* 3.85-88) and Dio (46.43.1-5) state that Octavian sent centurions to the Senate as envoys in order to argue for their support in his bid for the consulship. According to Appian (*BC* 88), when confronted by objections from many in the Senate to Octavian's consular candidacy due to his youth, the centurions cited the precedents set by the election of M. Valerius Corvus (cos. 348) at the age of twenty-three, Scipio Africanus (cos. 205) at thirty-one, Scipio Aemilianus (cos. 147) at thirty-eight. On Valerius, see Livy 7.26.12; on Scipio Africanus, Livy 28.38.6-11; 29.20.2; 30.30.14; Val. Max. 8.15.1; Sil. *Pun.* 13.511; 16.595-599; Plut. *Mar.* 12.2; Dio fr. 57.56; *Vir. Ill.* 49.11; Oros. 4.18.17; on Scipio Aemilianus, Cic. *Amic.* 11; Livy *Per.* 50; *Ep. Ox.* 50.123-124; Vell. 1.12.3; Val. Max. 8.15.4; Plut. *Mor.* 200A, 804F-805A; App. *Pun.* 112; Dio fr. 70.2-3; *Vir. Ill.* 58.5; Eutrop. 4.12; Zon. 9.29. The centurions then pointed to recent exemptions from electoral law granted to Pompey (cos. 70), Caesar (cos. 59), and also "Dolabella," which is most likely a reference to P. Cornelius Dolabella (cos. suff. 44). For sources on the first consulships of Pompey,

According to Dio, however, the most alarming aspect of Octavian's election to the consulship, and something that had never happened before, was that the Senate's compliance was gained under direct threat, when one of Octavian's centurions pointed to his sword and said, "If you do not grant the grant the consulship to Caesar, this will."[810] With this act, the Senate had been coerced into accepting a commander's demand for an *extraordinarium imperium.*[811]

After Cicero, Livy uses the terms *extra ordinem* and *extraordinarium* on thirty-five occasions. Either term was used to describe unorthodox battle tactics, including the unconventional deployment of troops in sixteen instances, soldiers disobeying orders five times, deviation from battle protocol and procedure twice, as well as singular references to decoration in recognition of bravery in combat (3.58.8) as *extra ordinem* and "special care" (*extraordinaria cura*) taken by the people in choosing a commander (26.18.3).[812] As I show below, however, on nine occasions either *extra ordinem* or *extraordinarium* are directly used in reference to Roman

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Caesar, and Dolabella, see *MRR* 2.125, 186, 316. The reference to Caesar is erroneous, since he seems to have followed the *cursus honorum* with minimal irregularity, but plenty of controversy (see Billows 2008: 78-111). The rest of the examples were disqualified not only for their youth, but also for their own lack of progress through the *cursus honorum*. Valerius had likely only served as a military tribune before holding the consulship (Livy 7.26.2; Dion. Hal. 15.1), Scipio Africanus had only been an aedile, the very office that Scipio Aemilianus sought when he was instead elected consul. Pompey, as is well known, had held no elected office, whereas Dolabella had at least secured election to the plebeian tribunate in 47 (*MRR* 2.286).

[810] Dio 46.43.4: "ἂν ὑμεῖς τὴν ὑπατείαν μὴ δῶτε τῷ Καίσαρι, τοῦτο δώσει." Dio (46.45.3-4) mentions a further irregularity in Octavian's election to the consulship, namely that, even though both consuls were killed, an *interrex* was not chosen to oversee the suffect elections, which was according to precedent (κατὰ τὰ πάτρια), but instead two unnamed individuals were appointed by the urban praetor (στρατηγοῦ τοῦ ἀστυνόμου) "in place of the consuls" (δύο τινῶν ἀντὶ ὑπάτων πρὸς τὰς ἀρχαιρεσίας αἱρεθέντων) for the purpose of facilitating elections.

[811] On Octavian's election and the exchange between Brutus and Cicero, see also Syme 1987: 177-186; Goldsworthy 2014: 122-123.

[812] In reference to battle tactics, deployment, and the use of troops, see Livy 3.62.7 (*extra ordinem*) on infantry held in reserve; 5.7.7 and 12 (*extra ordinem*) on plebeians volunteering to serve in the army; 7.7.6 (*extra ordinem*) on the positioning of troops, 9 (*extraordinariae*) referring to special, allied cohorts; 10.36.4 (*extra ordinem*) on tactical deployment; 27.12.14 (*extraordinarii*) on special levies; 34.47.3-4 (*extraordinaria/iis*) on special, allied cohorts; 35.5.1, 4, 6 (*extraordinarii/os*) on special troops; 40.27.3 (*extraordinariis cohortibus*) on special, allied cohorts, 31.3 (*extraordinariis equitibus*) on special, allied cavalry; 41.5.4 (*extra ordinem*) on a special levy issued throughout Italy; 42.58.13 (*extraordinariis equitibus*) on special, allied cavalry. See also the commentaries in Olgivie 1965: 642-643; Briscoe 1981: 123; Briscoe 2008: 475. On soldiers disobeying orders referred to as *extra ordinem*, see Livy 7.10.2; 8.6.16, 7.15; 34.15.4; *Per*. 57. On soldiers deviating from protocol (in this case, requesting to engage in single combat) described as *extra ordinem*, see Livy 23.47.1 and 25.18.12.

magistracies by Livy, six of which describe irregularities in provincial assignments, while three concern special powers exercised by a magistrate.

In 466, Livy stated that one of the year's consuls, Q. Fabius Vibulanus, received his province *extra ordinem,* presumably through a senatorial decree and circumvention of sortition.[813] Next, an *extra ordinem* provincial assignment against the Volscians for M. Furius Camillus, one of the consular tribunes of 381, is directly ascribed to a senatorial decree.[814] In the provincial allotment of 379, the Senate (*patres*) again assigned two consular tribunes, Publius and Caius Manlius, the command against the Volscians, which Livy explicitly stated was extraordinary because it disregarded both sortition and *comparatio* (decision by the commanders themselves).[815] M. Popilius Laenas, consul for 350, received command against the Gauls *extra ordinem* due to the illness of his colleague, though Livy did not specify whether this appointment came from the Senate or popular vote (Livy 7.23.2). Regardless, Livy indicated that either method (senatorial or popular appointment) was considered *extra ordinem*, as it was a deviation from the procedural norm of sortition.[816] Livy also related, for instance, a possible controversy that arose in the allotment of the consular provinces for 295, where the patrician senators wanted to confer the province of Etruria directly upon one of the consuls, Q. Fabius Maximus Rullianus, which would be *extra ordinem*. Against this, the plebeian senators encouraged his colleague, P. Decius Mus, to insist that the matter be decided through sortition. When neither side of the dispute could come to an agreement, the matter was deferred to the people. Although Decius

[813] Livy 3.2.2: *Fabio extra ordinem … Aequis … ea provincia data*. The only other mention of the provinces assigned to the consuls of 466 is in Dionysius of Halicarnassus (9.61.1-2), who does say that "the Senate sent" (ἡ βουλὴ … ἐξέπεμψε) them to their provinces and "ordered them to ravage the lands of the Aequi" (ἐτάχθη … Φάβιος δὲ τὴν Αἰκανῶν δῃοῦν), which does agree with Livy's account.
[814] Livy 6.22.5: *Volscum bellum M. Furio extra ordinem decretum*. Plutarch, however, states that it was "the people" (ὁ δῆμος) who "forced" (ἠνάγκασεν) Camillus "to take command" (ὑποστῆναι τὴν στρατηγίαν) against the Praenestines and Volscians alongside his colleague, L. Furius Medullinus (Plut. *Cam.* 37.2).
[815] Livy 6.30.2-3: *Manliis … Volsci provincia sine sorte, sine comparatione, extra ordinem data*.
[816] On the circumvention of sortition in cases of emergency, see Ogilvie 1965: 395.

argued passionately on the importance and established precedent (*exemplo*) of consuls casting lots for their provinces, the people nevertheless decided to bypass sortition and grant the province of Etruria to Fabius.[817] Livy's final use of *extra ordinem* to describe a provincial allotment takes place in 214 in reference to Q. Fulvius Flaccus, one of that year's praetors. The Senate passed a decree (*senatus consultum*) that Flaccus, who had also been urban praetor the year before (thus also constituting a *continuatio*), would again receive the city as his province and would even hold overall command after the consuls departed for their provinces, acting as a reserve commander in case Rome was attacked.[818]

In contrast to his description of *extra ordinem* provincial allotments, Livy only directly refers to a magistracy itself as being extraordinary on one occasion. In 390, leading up to the Battle of the Allia River (which was followed by the sack of Rome), Livy noted with the benefit of hindsight that, despite being faced with an overwhelming Gallic force, the Romans refused to avail themselves of any form of "extraordinary command or aid."[819] Of course, Livy does not elaborate on what form such an extraordinary command would take, but he does indicate that such an appointment would be considered more irregular than even the appointment of a dictator, which the Romans had employed frequently in previous emergencies (*multis tempestatibus*).[820] Thus, at the very least, we can see here that Livy's Augustan-era perception of extraordinary commands did not include the dictatorship.

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[817] On the debate between Fabius and Decius, see Livy 10.24.5-17, and on the people's decision in agreement with the Senate, see 10.24.18 (*nec minore populi consensus quam senatus provincia Etruria extra sortem Fabio decreta est*). Livy himself seems to have had some doubt regarding the veracity of this controversy, stating that some historians do not record a dispute between the consuls, while others claim that the dispute went even further than that which Livy recounted (Livy 10.26.5-7). See also *MRR* 1.177, 179 n. 1.
[818] Livy 24.9.5: *comitiis praetorum perfectis senatus consultum factum, ut Q. Fulvio extra ordinem urbana provincia esset isque potissimum consulibus ad bellum profectis urbi praeesset.* On Fulvius' praetorship in 215, see Livy 23.32.4, 15, 18 (*praetori urbano*), 34.11-17, 41.7, and 48.10-12.
[819] Livy 5.37.2: *nihil extraordinarii imperii aut auxilia quaesivit.*
[820] Livy 5.37.1.

The only other reference to magistrates acting with any form of extraordinary powers in Livy takes place in 186, during the attempted suppression of the Bacchanalia, which were popular in Italy at the time. There was a growing belief among many Roman statesmen that the debaucheries inherent to the Bacchic rituals not only included many illegal acts but also contributed to the moral degradation of the Roman citizenry. Consequently, the Senate issued a decree banning participation in any Bacchanalia and instructed the consuls to launch an investigation armed with extraordinary powers.[821] The authority accorded *extra ordinem* to the consuls may have included a suspension of *provocatio*, since suspected participants in Bacchic rites could be apprehended and held until their trial, in which a conviction was considered a capital offense.[822] Additionally, as Mousourakis points out, *quaestiones extraordinariae* were special tribunals in which the presiding magistrates conducted trials without consulting any of the *comitia*, and there was no ability to appeal the court's decision.[823] While the unorthodox power of *quaestiones extraordinariae* may not appear to be on par with the authority wielded in irregular military commands, the right of appeal (*provocatio ad populum*) was one of the fundamental restraints inherent to Roman magistracies (especially those bearing *imperium*) as stipulated in the Roman constitution.[824] Only in the acts of certain dictators and the declaration of the *Senatus consultum ultimum* do we see similar instances where the right of appeal was intentionally violated.[825] The circumvention of *provocatio* represented not only an infringement

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[821] See Livy 39.14.6 (*quaestionem … extra ordinem consulibus mandant*) and 16.12 (*senatus quaestionem extra ordinem … mandavit*). See also Val. Max. 6.3.7; Tert. *Apol.* 6.7. For the full text of the decree itself, see *CIL* 1.581.
[822] Livy 39.14.8-10.
[823] Mousourakis 2003: 144-149.
[824] Bauman 1968: 40; Bauman 1973: 34-35; Ridley 1987: 69; Mousourakis 2003: 55, 58, 80; Drogula 2007: 421, 428-430, 438 (on the restriction of *provocatio* to within the *pomerium*), 439-440 (Drogula argues also that *provocatio* was more intended to restrict the *potestas* of a magistrate, rather than its *imperium*, which could not be wielded inside the *pomerium*).
[825] Lintott 1999: 89, 97 (on the *Senatus consultum ultimum*); Drogula 2007: 440; Straumann 2016: 57-60, 65-72, 92-95. Indeed, Dionysius of Halicarnassus argued that the institution of the dictatorship was an attempt by the Senate to circumvent the *ius provocationis* (Dion. Hal. 5.70.1-5; see also Heurgon 1973: 172). There is disagreement,

of "civil rights," but also called into question the extent and constitutionality of emergency powers in Rome's government, which is among the central concerns in the creation of extraordinary military commands.[826]

After Cicero and Livy, the use of *extra ordinem* and *extraordinarium* to describe irregular military commands becomes sporadic. Velleius Paterculus (19 BCE - 31 CE) twice mentioned *extraordinaria imperia* held by Pompey. The first case follows Velleius' account of Pompey triumphing for his victories over Sertorius in Spain and then being elected consul, despite having never held a magistracy. Velleius was surprised that Pompey, who only achieved his high position (*summum fastigium*) because he held "so many extraordinary commands" (*per tot extraordinaria imperia*), would actually feel that it was unjust for Caesar to possess the *ratio absentis* for his own consular election for 49.[827] Velleius is referring here to the multitude of the extraordinary commands enjoyed by Pompey throughout his entire career, which included raising his own illegal army and fighting under Sulla as a *privatus*, his commands against Lepidus and Sertorius, his aforementioned violations of the triumphal law and the *cursus honorum*, as well as the sweeping authority throughout the Mediterranean granted to Pompey through the *leges Gabinia et Manilia*, his time on the grain commission, his governance of Spain *in absentia* through legates, his prorogations, and more. Furthermore, Velleius also implied here

however, among both ancient and modern writers regarding the dictator's ability to ignore the right of *provocatio*. Livy, for instance, relates contradictory accounts of dictators either bypassing or being forced to respect *provocatio* (Livy 2.29.11-30.5; 8.33.7-9). The consensus seems to be that dictators were legally immune to *provocatio* early on, but later legislation placed the right of appeal above the power of the dictator (Bonner 1922: 145-148; Ehrenberg 1953: 123; Baumann 1973: 34-36, 40-47; Lintott 1993: 97; 1999: 111, 125; Drogula 2007: 446; de Wilde 2012: 559n. 15, 560; de Wilde 2015: 115), although Straumann points out that both Sulla and Caesar suspended *provocatio* during their dictatorships (Ehrenberg 1953: 126; Straumann 2016: 72, 82, 87).

[826] On this point, see also Straumann 2016: 6

[827] Vell. 2.30.2-3. For more on the *ratio absentis*, see Morstein-Marx 2007: 159-178.

that the privilege which granted Caesar the right to run for consul *in absentia* was itself an extraordinary measure on par with those that Pompey enjoyed.[828]

Following Pompey's extraordinary triumph (71) and consulship (70), Velleius then described the commands against piracy in the Mediterranean, first held by M. Antonius in 74 and then Pompey in 67 through the *lex Gabinia*, as *extraordinaria*.[829] Velleius began here by recounting how the tribune A. Gabinius proposed to assign Pompey the task of eradicating the piracy epidemic in the Mediterranean, for which purpose Pompey, no longer consul and a *privatus* once more, would have proconsular *imperium* throughout the Mediterranean Sea and within 50 miles of every shore. Through this act, according to Velleius, "the command of almost the entire world was entrusted to one man," that is, Pompey.[830] Velleius then stated very succinctly that the same powers were granted by senatorial decree seven years before to the praetor, M. Antonius.[831] Further details regarding Antonius' command are unfortunately sparse, but it does appear that he was granted *imperium infinitum*, likely proconsular, was able to exact funds and supplies from the provinces, and recruit his own troops.[832] After an initial campaign against pirates near and around Liguria and Spain, Antonius attacked the Cretans, whom he accused of aiding the pirates, but was defeated and soon after died.[833]

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[828] Vell. 2.30.4. Specifically, Velleius states that it is commonly the case that people will "forgive themselves of all things, but nothing for others" (*omnia sibi ignoscere, nihil aliis remittere*). The *omnia* mentioned by Velleius refers to all of Pompey's various *extraordinaria imperia*, which is placed in comparison to the *nihil* ascribed to Caesar. In this case, we can also infer Velleius' meaning to be that Pompey was willing to pardon his own extraordinary measures but none of Caesar's own extraordinary measures.
[829] Vell. 2.31.4.
[830] Vell. 2.31.3: *Quo scito paene totius terrarium orbis imperium uni viro deferebatur*.
[831] Vell. 2.31.3: *sed tamen idem hoc ante septennium in M. Antonii praetura decretum est*. Lactantius (*Inst.* 1.11.4) similarly states that Antonius received this command through senatorial decree.
[832] On the explicit reference to Antonius possessing *imperium infinitum*, see Cic. *Verr.* 2.2.8 and Lact. *Inst.* 1.11.4. On the various powers and authority accorded to his command, see *IG* 4.1.66, 5.1.1146; Cic. *Verr.* 2.3.213-218; Vell. 2.31.3; Tac. *Ann.* 12.62.
[833] For general accounts of his campaign against various pirates and his eventual defeat at the hands of the Cretans, see *IG* 4.1.66; Diod. 40.1.1; Sall. *Hist.* 3.2-8; Livy *Per.* 97; Plut. *Ant.* 1.1; App. *Sic.* 6.2; Schol. Bob. 96.

Valerius Maximus (fl. 13-37 CE) only referred to a magistracy being created *extra ordinem* on a single occasion, specifically one that Cato the Younger declined in 56. As we have seen, Cato had been appointed as a *privatus* in 57 to act as a quaestor with propraetorian *imperium*, which Cicero vociferously opposed as being *extra ordinem*. Nevertheless, Cato carried out his duties so admirably that, upon his return to Rome, the Senate decreed that he should be allowed to run for the office of praetor *extra ordinem* (Val. Max. 4.1.14).[834] Despite his extraordinary quaestorship the year before, Cato had only ever been elected to the plebeian tribunate in 63, which meant that his candidacy to the praetorship would be both a circumvention of the *cursus honorum*, since he would be skipping election to the offices of quaestor and aedile, as well as the principle of *biennium*, which stipulated a two year gap between holding office.[835] According to Valerius Maximus, Cato refused the offer for his unorthodox candidacy.[836]

Around thirty-three years after Valerius Maximus, Seneca the Younger (c. 4 BCE - 65 CE) twice referred to *extraordinaria imperia* in his *de Beneficiis*, first in regard to P. Cornelius Scipio (cos. 218), father of the famous Scipio Africanus, and then Pompey's commands.[837] As for Scipio, Seneca stated that the younger Africanus advocated for his father while in Rome and saw to it that the elder Scipio received three terms as consul and that his provincial assignments and extraordinary commands were extended.[838] On the one hand, Seneca is incorrect in ascribing three consular terms to Scipio, since he only served as consul for 218. On the other hand, Seneca stated that Scipio's extraordinary commands were extended (*continuet*), which was likely a confusion in terms with prorogation, as Scipio did indeed receive prorogations for seven years in

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[834] See also Plut. *Cat. Min.* 39.3, who says that the Senate in fact wanted to award an "extraordinary praetorship to Cato" (τῷ Κάτωνι, στρατηγίαν ἐξαίρετον δοθῆναι).
[835] On Cato's tribunate, see Plut. *Cat. Min.* 21.2. On the *biennium*, see Astin 1958: 5-47.
[836] Livy (*Per.* 105), however, claims that Cato did run but was defeated.
[837] Sen. *Ben.* 3.33.3 (on Scipio) and 5.16.4 (on Pompey).
[838] Sen. *Ben.* 3.33.2-3: *ut alterum illi consulatum ac tertium aliosque honores etiam consularibus concupiscendos congerat. … Si adhuc parum est, adice, ut provincias et extraordinaria imperia continuet.*

succession (217-211).[839] Later in *de Beneficiis*, in his discussion of ingratitude, Seneca spoke briefly of the various *extraordinaria imperia* that Pompey held throughout his career. First, according to Seneca, out of Pompey's three consulships and three triumphs, as well as his many other offices, he had seized most of them before the legal age.[840] Next, in order to mitigate any potential jealousy over his accumulation of power, Pompey elevated others to their own high commands, a clear reference to his alliance with Caesar and Crassus in the formation of the First Triumvirate. According to Seneca, by encouraging Caesar and Crassus to follow his own example, Pompey had allowed multiple men to do what not even one man should be allowed to do.[841] In conclusion, Seneca stated that Pompey's desire for *extraordinaria imperia*, his distribution of provinces, and his actual division of the *res publica* into thirds (another reference to the First Triumvirate) had reduced the Roman people to a such state that they could only obtain safety through the acceptance of servitude.[842] In effect, according to Seneca, Pompey's ambition and pursuit of extraordinary commands had enslaved the Roman people.

Nearly a century after Seneca, Suetonius (c. 69-122 CE) described magistracies as both *extra ordinem* and *extraordinarium* on several occasions in his *De Vita Caesarum*. In his biography of Julius Caesar, for instance, Suetonius mentioned that Cn. Calpurnius Piso, who was suspected of taking part in the Catilinarian conspiracy, had been granted the province of Farther

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[839] On the elder Scipio's first prorogation in 217, see Plb. 3.97.1-5; Livy 22.22.1 (*prorogato imperio … senatu missus*); App. *Ib.* 15; *Hann.* 8; Oros. 4.14.9; Zon. 9.1. On his second prorogation in 216, see Livy 23.26.1-2. On his third prorogation in 215, see Livy 23.48.4; Oros. 4.16.13; Zon. 9.3. On his fourth prorogation for 214, see Livy 24.41.1-2. On his fifth prorogation in 213, see Livy 24.48.1; App. *Ib.* 16. On his sixth prorogation for 212, see Livy 25.3.5-6 (*imperium provinciaeque … prorogatae, idem … Hispaniae P. et Cn. Corneliis*); Zon. 9.5. On his seventh and final prorogation for 211, see Livy 25.34.11; Val. Max. 2.7.15; 3.7.1; Eutrop. 3.14.2; Oros. 4.17.12-13.
[840] Sen. *Ben.* 5.16.4: *Ingratus Cn. Pompeius, qui pro tribus consulatibus, pro triumphis tribus, pro tot honoribus, quos ex maxima parte immaturus invaserat.*
[841] Sen. *Ben.* 5.16.4: *Hanc gratiam rei publicae reddidit, ut in possessionem eius alios quoque induceret quasi potentiae suae detracturus invidiam, si, quod nulli licere debebat, pluribus licuisset.*
[842] Sen. *Ben.* 5.16.4: *dum extraordinaria concupiscit imperia, dum provincias, ut eligat, distribuit, dum ita cum tertio rem publicam dividit, ut tamen in sua domo duae partes essent, eo redegit populum Romanum, ut salvus esse non posset nisi beneficio servitutis.*

Spain *extra ordinem* in 65.[843] Suetonius did not go into further detail regarding the nature and source of Piso's command, but we fortunately possess an inscription from Rome stating that Piso was indeed granted command of a Spanish province, as well as a propraetorian quaestorship, both of which he received by senatorial decree.[844] Sallust, in his account of the Catilinarian conspiracy, similarly stated that Piso was sent to Spain as a quaestor *pro praetore* by the Senate, but also through the insistence of M. Licinius Crassus (the future triumvir), who knew that Piso was an enemy of Pompey.[845] And while Sallust did claim that the Senate wanted to have Piso, a contemptible individual (*foedum hominem*), far away from Rome, it was also the case that many leading senators viewed Piso as a possible counterbalance against Pompey, who was at the height of his career through the extraordinary command granted via the *lex Manilia* of 67, in which case a Spanish command could give Piso an opportunity to build up his own power.[846] Whatever the motivation, it is clear that Piso received his quaestorship *extra ordinem*, in that he was appointed and not elected to his position, was assigned his province in Spain *extra sortem*, and was granted

[843] Suet. *Iul.* 9.3: *cui ob suspicionem urbanae coniurationis prouincia Hispania ultro extra ordinem data sit*. According to Cicero and Asconius, Piso had plotted with Catiline to murder the Senate, but the conspiracy dissipated when Catiline gave the signal to the conspirators before they were prepared to act (Cic. *Mur.* 81; *Sull.* 66-67; Asc. 66, 83, 92C; Dio 36.44.4-5). In fact, Suetonius goes on to say that some in Rome accused Caesar of actually plotting with Piso, which Asconius and Plutarch also suggest, along with Crassus (Asc. 83C; Plut. *Crass.* 13.2). For further discussion of Piso, see Hodgson 2017: 106.

[844] *CIL* 1^2.749: *Cn(aeus) Calpurnius Cn(aei) f(ilius) Piso quaestor pro pr(aetore) ex s(enatus) c(onsulto) provinciam Hispaniam citeriorem optinuit*. In contrast with Suetonius' account, who states that Piso was given command of Farther Spain, the inscription from Rome indicates that Piso in fact received command of Nearer Spain (Hispania Citerior).

[845] Sall. *Cat.* 19.1-2: *Postea Piso in citeriorem Hispaniam quaestor pro praetore missus est adnitente Crasso, quod eum infestum inimicum Cn. Pompeio cognoverat. Neque tamen senatus provinciam invitus dederat.* See also Sall. *Cat.* 21.3; Asc. 92C; Dio 36.44.5.

[846] Sall. *Cat.* 19.2: *quippe foedum hominem a republica procul esse volebat; simul quia boni complures praesidium in eo putabant et iam tum potentia Pompei formidulosa erat.*

propraetorian *imperium* despite holding a non-curule office.[847] In Piso, then, we see a precedent for the extraordinary quaestorship also held by Cato the Younger eight years later.[848]

In the same year as Piso's command, Suetonius also recorded that Julius Caesar himself attempted to obtain an extraordinary command in Egypt by means of a plebiscite, though the Senate rejected this proposal.[849] In 87, the king of Egypt, Ptolemy X Alexander, bequeathed the kingdom to Rome in his will, although the Senate had declined to act upon it.[850] Over twenty years later, in 65, Crassus, who was censor at this time, proposed a bill that would uphold Ptolemy X's will and annex Egypt, but this was also struck down in the Senate.[851] We have no further details on the nature of the extraordinary command that Caesar sought, though it seems likely that he would have been facilitating the annexation of Egypt as proposed by Crassus' bill.[852] Judging from Suetonius' claim that Caesar sought to induce plebeian tribunes to achieve his appointment by means of a plebiscite, we can infer that the command would not be an elected position. Furthermore, although Caesar's command would have included a grant of *imperium*, he was already serving as a curule aedile for 65, making him legally ineligible to hold the praetorship for two years according to the principle of *biennium*.[853] Thus, Caesar could only have held his extraordinary command as an unelected *privatus cum imperio*.[854]

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[847] On curule vs. non-curule magistracies and the nature of *imperium*, especially regarding quaestors, see Jashemski 1966: 58, 81; Taylor 1966: 60, 63; Stewart 1998: 57-58, 60, 123; Lintott 1999: 54, 67-69, 95-96, 111, 116-117, 133-137, 182-183; Mousourakis 2003: 83, 93-94; Drogula 2007: 426 n. 53; North 2007: 261; Hölkeskamp 2010: 91.
[848] On Cato the Younger's extraordinary quaestorship, see the discussion in Cicero's *De domo sua* 21-27 above (see also *MRR* 2.197). For further instances of quaestors possessing *imperium*, see also Jashemski 1966: 48, 58-59, 70, 78, 82-86, 89, 98; Kloft 1977: 7, 79; Drogula 2007: 426 nn. 53, 55; Vervaet 2015: 220-221 n. 53.
[849] Suet. *Iul.* 11: *Temptavit per partem tribunorum, ut sibi Aegyptus provincia plebiscito daretur, nanctus extraordinarii imperii occasionem, quod Alexandrini regem suum socium atque amicum a senatu appellatum expulerant resque vulgo improbabatur. Nec obtinuit adversante optimatium factione*.
[850] Cic. *Agr.* 1.11, 2.41.
[851] Cic. *Agr.* 1.1, 2.44; Plut. *Crass.* 13.1; Schol. Bob. 92-93.
[852] Boak 1918: 14; Crawford 1994: 45-46.
[853] After 180, a two-year interval (*biennium*) was legally required between the curule aedileship and elected on to the praetorship. See Astin 1958: 5-19, 25, 45.
[854] Although Caesar's position was created through a plebiscite, this did not constitute an election, since magistrates with *imperium* could only be elected by the *comitia centuriata*, not the *concilium plebis*. See Gell. 13.15.4; Taylor

In his biography of Augustus, Suetonius then recounted that the emperor's father, C. Octavius, was assigned a command *extra ordinem* by the Senate in 60.[855] Octavius had been elected praetor for 61 but was immediately granted a prorogation for the following year, since he only received his province of Macedonia at the end of his praetorship.[856] Also, although Octavius was only elected to the praetorship for 61, his *imperium* was enhanced to that of a proconsul for the duration of his Macedonian command (60-59).[857] The significance of Octavius' command is that even a simple prorogation could be considered *extra ordinem* (Suetonius did not mention Octavius holding proconsular *imperium*). Moreover, the fact that Octavius was assigned his province by lot (*sortitus*) indicates that sortition was still considered a part of standard procedure even in instances of prorogation during the late Republic.

Tacitus (c. 56-120 CE) and Suetonius also show how the legacy of extraordinary commands remained present in the political mindset of the early Principate.[858] In his *Life of*

1966: 5; Stewart 1998: 60, 95-96, 182, 210-211; Lintott 1999: 55; Mousourakis 2003: 83, 87, 107; North 2007: 261. As Boak states, even Scipio Africanus' extraordinary proconsular command in 211 was granted "by a special law of the *comitia centuriata*" (Boak 1918: 2 n. 6; see also Livy 26.18; 28.43.11). Although Lintott (1999: 122) does point out that the *lex Hortensia* made plebiscites the legal equivalent to laws based in the centuriate and tribal assemblies, this does not supersede the requirements and procedures governing elections, which were grounded in religious auspices. For further discussion of Caesar's potential extraordinary command for 65, see Gelzer 1968: 40-41; Gruen 1995: 75n. 117, 138, 429n. 107 (who doubts the veracity of Suetonius' account); Canfora 2007: 20; Tatum 2007: 194; Billows 2009: 85; Osgood 2018: 128.

[855] Suet. *Aug.* 3.1: *Ex praetura Macedoniam sortitus fugitivos, residuam Spartaci et Catilinae manum, Thurinum agrum tenentis in itinere delevit, negotio sibi in senatu extra ordinem dato.*

[856] Cic. *QF* 1.21; *Phil.* 3.15; Vell. 2.59.2; Suet. *Aug.* 4.1, 7.1, 94.5.

[857] *CIL* 6.1311: *C(aius) Octavius C(ai) f(ilius) C(ai) n(epos) C(ai) pr[on(epos)] / pater Augusti / tr(ibunus) mil(itum) bis q(uaestor) aed(ilis) pl(ebis) cum / C(aio) Toranio iudex quaestionum / pr(aetor) proco(n)s(ul) imperator appellatus / ex provincia Macedonia*. See also Jashemski 1966: 55.

[858] It is true that magistracies described as extraordinary during the imperial period differed from those in the republican period, mainly because the emperor possessed ultimate authority over all other offices, wielded *maius imperium* superior to that of other military commanders, and could even override elections and appoint magistrates directly. Nevertheless, because imperial sources like Suetonius, Tacitus, and others discussed extraordinary commands during the republican period, it is important also to mention their similar descriptions of commands occurring during the principate to demonstrate the full conceptual breadth of their use of the terms, *extra ordinem* and *extraordinarium*. Furthermore, as Dio (53.1-19) points out, although the form of the government during principate was in effect a monarchy, an effort was made to retain the appearances of a republican system, especially in the function of the magistracies. Thus, commands during the principate described as extraordinary, despite existing under imperial aegis, were cloaked in republican rhetoric. See also Hodgson 2017: 269-270.

Tiberius, for instance, Suetonius briefly stated that Tiberius (r. 14-37 CE) placed the extension (*prorogari*) of *imperium* and the assignment of extraordinary military commands (*extraordinaria bella*) under the purview of the Senate.[859] Suetonius also mentioned that L. Salvius Otho, father of the ephemeral emperor (69 CE), held multiple extraordinary commands (*extraordinaria imperia*) during Tiberius' reign.[860] Even Caligula (r. 37-41 CE) is said to have granted the praetorship *extra ordinem* to an eager senator as a gift.[861] In neither case, unfortunately, did Suetonius elaborate on the nature of these extraordinary commands.

Tacitus, on the other hand, twice mentioned magistracies created *extra ordinem* in his accounts of the reigns of Tiberius and Claudius (r. 41-54 CE). In 16 CE, M. Scribonius Drusus Libo (pr. 15 CE), was accused of plotting a revolution against the emperor Tiberius and committed suicide once his conviction seemed eminent.[862] Tacitus stated that Tiberius distributed Libo's property amongst the prosecution (*accusatores*) in the case, presumably as a reward for their service to the state, while those of senatorial rank were given praetorships *extra ordinem*.[863] Regarding the praetorships, Pettinger suggests that Tacitus likely meant "that Tiberius personally sponsored their candidacy."[864] Although this is certainly possible, Tacitus explicitly stated that Libo's accusers "were given praetorships" (*praeturae … datae … erant*), not that they were

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[859] Suet. *Tib.* 30.1: *Quin etiam speciem libertatis quandam induxit conseruatis senatui ac magistratibus et maiestate pristina et potestate. Neque tam parvum quicquam neque tam magnum publici privatique negotii fuit, … denique quibus imperium prorogari aut extraordinaria bella mandari*.
[860] Suet. *Otho* 1.2: *Pater L. Otho … urbanos honores, proconsulatum Africae et extraordinaria imperia seuerissime administrauit.*
[861] Suet. *Cal.* 18.2: *qua epulatione equiti R. contra se hilarius avidiusque vescenti partes suas misit, sed et senatori ob eandem causam codicillos, quibus praetorem eum extra ordinem designabat.*
[862] Tac. *Ann.* 2.27-32. See also *Fast. Amit.* (in Ehrenberg and Jones 1955: 52); Vell. 2.130.3; Sen. *Ep. Mor.* 70.10; Suet. *Tib.* 25; Dio 57.15.1, 4-6. For more on Libo's trial, suicide, and conviction, see Pettinger 2012: 5-8. On Libo's nomenclature, see Weinrib 1968: 263-264; Sumner 1970: 275 n. 113; Pettinger 2012: 219-220.
[863] Tac. *Ann.* 2.32: *Bona inter accusatores dividuntur, et praeturae extra ordinem datae iis qui senatorii ordinis erant*. On the division of Libo's property, see also Dio 57.15.5. The four *delatores* were C. Fulcinius Trio, Firmius Catus, Fonteius Agrippa, and C. Vibius Serenus (Tac. *Ann.* 2.27-30).
[864] Pettinger 2012: 8 and n. 16.

sponsored, endorsed, or recommended to the office.[865] Furthermore, Tacitus claimed that Tiberius had in fact previously conferred the praetorship upon Libo himself, making it possible that the later *extra ordinem* praetorships given to Libo's accusers were also directly granted by Tiberius.[866]

Much later in the *Annales*, Tacitus provided a brief overview of the evolution of magistracies governing Rome's treasury. Traditionally the responsibility of the quaestors, Augustus transferred the supervision of the treasury to two former praetors, initially appointed by the Senate but later selected by lot. Claudius reversed this decision and placed the treasury back under the purview of the quaestors, whom he allowed to advance to higher offices *extra ordinem*, implying a circumvention of the *cursus honorum*.[867] Some translations of this passage depict Claudius merely as reinstating the quaestorship, but the use of the verb *imposuit* suggests that Claudius directly appointed these quaestors to their office, bypassing their election altogether.[868] Furthermore, Dio recorded that these new quaestors under Claudius were not annual magistrates, but served for three years at a time, with many assuming the praetorship immediately after leaving office.[869] Thus, these quaestors were indeed *extra ordinem* in that they were not limited to annual terms, did not adhere to the principles of *biennium* or the *cursus honorum*, and may not have even been elected.

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[865] If this was the case, Tacitus had the terminology at his disposal to indicate an endorsement or recommendation to the praetorship by Tiberius on behalf of the accusers, namely *approbare*, *prodere*, or *subrogare*.
[866] Tac. *Ann.* 2.28: *Caesar … Libonem ornat praetura*.
[867] Tac. *Ann.* 13.29: *tunc Claudius quaestores rursum imposuit iisque, … extra ordinem honores promisit*. On Augustus' shift to praetors and ex-praetors, see Suet. *Aug.* 36; Dio 53.32.2. On Claudius returning quaestors to the supervision of the treasury, see also Suet. *Claud.* 24.2; Dio 60.24.1-2.
[868] See, for example the Loeb translation in Jackson (1937: 48-49), who uses the term "reinstated," and Grant (1977: 297), "returned the post" (to the questors), as opposed to that of Church and Brodribb (1942: 301), who state that Claudius "appointed quaestors."
[869] Dio 60.24.1-2: καὶ τοὺς στρατηγοὺς τοὺς ἐπὶ τῆς διοικήσεως καταλύσας ταμίαις αὐτὴν κατὰ τὸ ἀρχαῖον ἐπέτρεψεν, οὐχ ὥστε καὶ ἐτησίους σφᾶς, ὅπερ ἐπί τε ἐκείνων πρότερον καὶ ἐπὶ τῶν στρατηγῶν μετὰ ταῦτα ἐγίγνετο, ἄρχειν, ἀλλ᾽ οἱ δύο οἱ αὐτοὶ τρία ὅλα ἔτη αὐτὴν διῴκουν, καὶ οἱ μὲν στρατηγίας εὐθὺς ἐλάμβανον.

Greek conceptions of extraordinary commands

An analysis of the description and characterization of extraordinary commands cannot be limited to Latin texts but must also include an examination of Greek sources. Unfortunately, Greek descriptions of extraordinary commands are replete with inconsistencies and ambiguities due to Greek unfamiliarity or incompatibility with Roman politics. Whereas Roman writers commonly described irregular commands or magistracies as *extra ordinem* and *extraordinarium*, ancient Greek had no direct counterpart for either term. Instead, Greek writers referred to extraordinary commands as distinct promagistracies (that is, proconsuls and propraetors) or by highlighting their specific legal and political irregularities.

In lieu of a direct counterpart to the Latin *extraordinarium* or *extra ordinem*, the closest Greek parallels are found in words that denote the legal abnormalities or unorthodox nature of extraordinary commands. One such example is ἐξαιρετός, referring to a special honor, privilege, or decree, which Plutarch used to describe an "extraordinary praetorship" (στρατηγίαν ἐξαίρετον) that was offered to Cato the Younger in 56, who declined the offer.[870] Dio uses the word, ὑπέρογκος ("excessive" or "swollen"), in his account of the debate surrounding the *lex Gabinia* of 67, where Catulus argued that the proposed command would grant Pompey "excessive powers" (ὑπέρογκοι ἐξουσίαι).[871] Another possible synonym to *extraordinarium* is ἀτοπώτερα, meaning "out of place" or "abnormal." Although no direct connection is made to the possession of *imperium*, Octavian (according to Dio) used ἀτοπώτερα to describe the delegation of irregular tasks to subordinates, and we do know that Octavian made good use of *legati pro*

[870] Plut. *Cat. Min.* 39.3.
[871] Dio 36.35.1. Coudry states that Dio's coverage of the debates between Gabinius, Catulus, and Pompey may be reconstructions of Cicero's own references from his speech defending Pompey's command in the *lex Manilia* of 66 (Coudry 2016: 37-40).

praetore.[872] Two other analogous terms are πρόσκαιρος, meaning "strange" or "temporary," and παράνομος, which referred to something as "unlawful." In the first case, πρόσκαιρος has no political connotation and is only used to describe a magistracy once, specifically by Appian, in a speech attributed to L. Antonius that referred both to the temporary (πρόσκαιρον) and unlawful (παράνομον) nature of the Second Triumvirate, formed in late 43.[873] Appian also records that both C. Flavius Fimbria and L. Cornelius Sulla accused each other of possessing "unlawful commands" (παρανόμως/ἐννόμως ἄρχοι) when their two armies met in 85.[874] Sulla was declared a public enemy by Marius and Cinna in 87, which implicitly invalidated his proconsular command against Mithridates VI.[875] Fimbria, on the other hand, while a *privatus*, led a mutiny against and murdered L. Valerius Flaccus, one of the duly elected consuls for 86, illegally seizing command of Flaccus' army in the process.[876] Finally, Dio refers to certain commands that were created "contrary to precedent" (ἔξω τῶν πατρίων) on two occasions, specifically all of Pompey's commands as of late 61 and Octavian's propraetorian appointment in 43.[877]

Other references to extraordinary appointments focused on the size and magnitude of the command in question. Pompey's command via the *lex Gabinia* of 67, for instance, is described by Appian as "so great a command" (τοσήνδε ἀρχὴν). Dio described the same position as "a

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[872] Dio 49.4.2; Jashemski 1966: 96-97. For similar examples in Dio of other legal measures and privileges described as "extraordinary" but do not specifically connected to the possession of *imperium*, see Octavian's claim in 27 that he never accepted any excessive powers (ὑπέρογκον) offered to him by the Senate (Dio 53.6.1-2), the extraordinary measures (ἔξω τοῦ νενομισμένου) proposed for Livia after Tiberius' ascension in 14 CE (Dio 57.12.4), and the excessive honors (τιμὰς ἐξαισίους) granted to Caligula in 40 CE (Dio 59.25.4).
[873] App. BC 5.43: καὶ γὰρ ὅτε συνίστασθε αὐτήν, ὁμολογοῦντες εἶναι παράνομον, ὡς ἀναγκαίαν καὶ πρόσκαιρον ἐτίθεσθε (For when you formed it [the Triumvirate], acknowledging that it was contrary to the law, you considered it necessary and temporary). For some examples of non-political uses of πρόσκαιρος, see Joseph. *AI* 2.51; *BI* 5.66, 6.32; Heb. 11:25; 2 Cor. 4:17; Matt. 13:21; Strab. 7.3.11; Plut. *Pel.* 15.5; Dion. Hal. *Dem.* 50.
[874] App. *Mith.* 59.
[875] Plut. *Sull.* 22.1-2; App. *Mith.* 51; *BC* 1.73; Eutrop. 5.7.3. On the declaration of someone as a public enemy (*hostis*) in Rome, see Bonner 1922: 148; Lintott 1999: 91-92; Steel 2014: 325; Straumann 2016: 33, 92-100.
[876] Livy *Per.* 82; Vell. 2.24.1; Memn. 24.3, 28.2; Plut. *Luc.* 7.2, 34.2; *Sull.* 23.6; App. *Mith.* 52; Dio 30-35 fr. 104.1-6; *Vir. Ill.* 70.1; Oros. 6.2.9.
[877] Dio 37.23.4: τὰς γάρ τοι ἀρχὰς καὶ τὰς ἡγεμονίας ἔξω τῶν πατρίων ὀλίγου πάσας λαβών; 46.39.2: πάνθ᾽ ὅσα ἐν τῷ πρὶν δυναστείας τισὶν ἔξω τῶν πατρίων δοθέντα παρεσκευάκει προκατέλυσαν.

single general with full power" (στρατηγὸν ἕνα αὐτοκράτορα) selected from among the ex-consuls, but also, like Appian, as "so great a command" (τοσαύτην ἡγεμονίαν).[878] Many descriptions refer to extraordinary or irregular commands in a vague manner. Dio, for instance, obliquely described the appointment of Cn. Calpurnius Piso in 65, as well as many of those granted by Julius Caesar from 49-44, as "some command" (ἀρχήν τινα).[879] Plutarch, on the other hand, calls a potential appointment for Pompey in Egypt for 57 a "new command" (στρατηγίας καινῆς).[880] Catulus, through Dio, similarly characterizes the accumulation of Pompey's powers in the *leges Gabinia et Manilia* not only as "some new command" (καινήν τινα ἀρχὴν), but also as distinct from regularly elected consuls and praetors (ὑπάτων καὶ στρατηγῶν), as well as promagistracies (τῶν ἀντὶ τούτων ἀρχόντων).[881]

Extraordinary Commands and promagistracies

Having surveyed the Latin uses of *extra ordinem* and *extraordinarium* and the Greek equivalents used to describe extraordinary commands, it is necessary to examine the connection between extraordinary commands and promagistracies. The above discussion demonstrates that commands described as extraordinary are also often referred to as promagistracies, namely proconsuls and propraetors. While it is true that not all extraordinary commands were promagistrates, the use or possession of *imperium* outside elected office does mean that all promagistrates had their root in extraordinary commands. Fundamentally, promagistracies originate from the separation of *imperium* from elected magistracies, beginning with the first prorogation granted to Q. Publilius Philo (cos. 327) in 326, who had besieged Naples at the onset

[878] App. *Mith.* 94; Dio 36.23.4, 24.1.
[879] On Piso in 65, see Dio 36.44.5: ἀρχήν τινα; on those granted by Caesar, see 43.44.2: ἄλλην τινὰ ἐξουσίαν.
[880] Plut. *Pomp.* 49.7.
[881] Dio 36.33.1. I elaborate further on Dio's description of magistracies later in this section.

of the Second Samnite War (326-304).[882] As discussed in the previous chapter, when Philo's consular term of office ended in 326, the Roman Senate and people voted to allow him to retain his military command (*imperium*) and carry out his command *pro consule*, or "on behalf/in place of the consul."[883] Thus, as Kloft states, the first references to *pro consule* (as well as *pro praetore*) were functional designations, not titles or offices in their own right.[884] In this way, any commander acting *pro consule* wielded the *imperium* of a consul (that is, proconsular *imperium*), just as those operating *pro praetore* held the *imperium* of a praetor (or propraetorian *imperium*), but did not occupy the corresponding offices. Proconsular and propraetorian *imperium* could refer to any instance where *imperium* was separated from its corresponding office, however, not only in cases of prorogation. We also see commanders acting *pro consule* and *pro praetore* in cases of those who possessed augmented *imperium* (such as praetors with proconsular *imperium*), did not hold an elected office (*privati*), held multi-provincial commands, or held *maius imperium* over lower ranking commanders.

As already stated, references to commanders acting in the capacity of proconsuls, propraetors, as well as promagistrates began as functional designations and only gradually became titular in nature over the course of the second and first centuries.[885] The *Senatus Consultum de Bacchanalibus* of 186, for instance, which prohibited participation in Bacchic rites, distinguishes between a magistrate and someone acting on behalf of a magistrate, that is, as a promagistrate (*neve magistratum neve pro magistratu*).[886] Mentions of *pro consule* on

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[882] Livy 8.23.10-12.
[883] Livy 8.23.11-12: *actum cum tribunis est, ad populum ferrent ut, cum Q. Publilius Philo consulatu abisset, pro consule rem gereret quoad debellatum cum Graecis esset*; 8.26.7: *duo singularia haec ei viro primum contigere, prorogatio imperii, non ante in ullo facta, et acto honore triumphus.*
[884] Kloft 1977: 21, 62.
[885] Kloft 1977: 64.
[886] *ILS* 18. See also Kloft 1977: 186. This formula continued to be used for inscriptions throughout the second and first centuries such as the *lex Acilia* of c. 123-122 (*CIL* 1^2 587), the *lex Cornelia de XX quaestoribus* in 81 (*CIL* 1^2 587), and the *lex Antonia* in c. 72/68 (*CIL* 1^2 589 [= *ILS* 388]).

inscriptions do not become common until around 135, such as with Sex. Atilius Serranus (cos. 136) and L. Caecilius (cos. 142/117), both of whom received prorogations after their consular terms.[887] In 110 we actually see inscriptions referring to proconsuls in the contracted form (*procos*.), specifically for Manius Sergius and Q. Fabius Labeo, who may have been *privati* or praetors with proconsular *imperium*, since neither individual held the consulship.[888] Nevertheless, *pro consule* reappears as a full prepositional phrase in an inscription from 102 in regard to the praetor, M. Antonius, who received an extraordinary command with proconsular *imperium* against Cilician pirates, as well as his legate, Lucilius Hirrus, who held *imperium pro praetore*.[889] Thereafter, references to proconsuls, propraetors, and promagistrates in prepositional form remains the standard in subsequent inscriptions throughout the first century.[890] The paucity of literary sources for the second century makes it difficult to analyze textual trends in the rendering of *pro consule*, but the titular form, *proconsul*, clearly became common by the late Republic, judging by its prevalence in the writings of Q. Claudius Quadrigarius, Cicero, Sallust, and Caesar.[891] Beyond the actual rendering of the terms, inconsistencies in the functional differentiation between magistrates and promagistrates remained common in Latin sources. In an

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[887] On Serranus, see *CIL* 1^2 636 (= *ILS* 5945): *Sex.Atilius M. f. Saranus pro cos*; see also *Fast. Cap.*, p. 70. On Caecilius, see *CIL* 1^2 633-634 (= *ILS* 5944-5944a; *ILLRP* 467). This Caecilius is either L. Caecilius Metellus Calvus, consul of 142, or L. Caecilius Metellus Diadematus, the consul of 117 (see *MRR* 1.474, 478, 528, 530).
[888] For Q. Fabius Labeo, see *CIL* 1^2 840 (*ILS* 5813; *ILLRP* 461). Sergius is featured on two inscriptions, on one as *pro cos* and another as *procos*. See *CIL* 1^2 823 for *pro cos* and 824 for *proc.* (= *ILS* 5812; *ILLRP* 462). Broughton (*MRR* 1.543-544) dates both governors to 110, but also suggests that "the two governors, should be dated in different years," between the middle and end of the second century, but does not specify any alternate dates. The only scholarly agreement on dates is that the Q. Fabius Labeo in this inscription is not the consul of 183 (and proconsul of 182), whose province was Liguria (Livy 39.45.1-3; 40.1.3, 8; *MRR* 1.378, 382).
[889] *CIL* 1^2 2662 (= *ILLRP* 342); Cic. *De Or.* 1.82, 2.2-3, *Brut.* 168; Livy *Per.* 68; Obseq. 44; *MRR* 1.568, 569, 572, 573, 576.
[890] See examples of C. Iulius Caesar (father of the dictator), *pro cos.*, c. 98-90 (*CIL* 1^2 705 [= *ILS* 7272; *ILLRP* 344] and *CIL* 1^2 706 [= *ILLRP* 345]); L. Cornelius Sulla, *pro cos.* in 87 (*CIL* 1^2 711 [= *ILLRP* 349] and *CIL* 1^2 712 [= *ILLRP* 350]); M. Terentius Varro Lucullus, *pro pr.*, c. 82-74 (*CIL* 1^2 719 [= *ILLRP* 474]); C. Salvius, *pro. pr.*, c. 71-51 (*CIL* 1^2 743 [= *ILLRP* 372]); Cn. Calpurnius Piso, *pro pr.* in 65 (*CIL* 1^2 7749 [= *ILLRP* 378]).
[891] For Quadrigarius, see the quote in Gell. 2.2.13; for Cicero, see *Att.* 8.11A-D, 12A-1D; *Fam.* 13.30-39; *Brut.* 2.5; *Div.* 2.76; Sall. *Iug.* 44; *Hist.* 1.111; Caes. *BAfr.* 86.3, 93.3; *BAlex.* 59.2; 64.2; *BG* 3.18, 6.1.

inscription from Spain in 189, L. Aemilius Paullus (pr. 191) simply refers to himself as *imperator*, although he was a prorogued praetor with proconsular *imperium*.[892] Kloft also points to the examples of L. Caecilius Metellus (cos. 251), M. Claudius Marcellus (cos. 214), and Tib. Sempronius Gracchus (cos. 176), all of whom are referred to as consuls in the year after their offices terminated, during which time their activities were certainly proconsular.[893]

Such inconsistencies are even more common in Greek sources, whose writers often confused the identity of ordinary, elected magistrates, at times referring to both consuls and praetors as στρατηγός, likely because of their ability to wield *imperium* and act as military commanders. Consuls gradually became further specified by the term ὕπατος (both with and without στρατηγός), while praetors retained the designation of στρατηγοί to denote their military function but also their subordinate relationship to consuls.[894] On the other hand, Greek writers initially saw little need for a distinction between ordinary and extraordinary Roman offices.[895] Thus, in Polybius, T. Quinctius Flamininus (cos. 198) refers to himself as consul (στρατηγὸς ὕπατος) in the declaration of Greek freedom of 196, when he was undeniably a prorogued proconsul.[896] In the mid-2nd century, we begin to see more precise Greek renderings of proconsuls, at first as ἀντιστράτηγοι but much more commonly as ἀνθύπατοι.[897] Confusingly,

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[892] *CIL* 1^2 614 (= *ILLRP* 514): *L. Aimilius L. F. inpeirator*. See also Livy 37.46.7, 57.5-6, 58.5; Vell. 1.9.3; Plut. *Aem.* 4.1; Oros. 4.20.23; *MRR* 1.353, 357, 362.

[893] Kloft 1977: 63-66. On L. Caecilius Metellus, see *Fast. Tr.*, p. 100 (*pro cos.*); Diod. 23.21 (τοῦ ὑπάτου); Front. *Str.* 2.5.4 (*consul*); Plin. *HN* 7.139 (*bis consulis*); Flor. 1.18.27 (*consule*); *Eutrop.* 2.24 (*consulibus*); Oros. 4.9.14 (*consulibus*). On M. Claudius Marcellus, see Livy 24.35.7 (*consulem*), 25.7.4 (*proconsuli*). On Tib. Sempronius Gracchus, see Livy 43.28.8 (*consulis*); *Fast. Tr.*, p. 103 (*pro co*[*s.*]).

[894] Jashemski 1966: 49-50. See, for example, Dion. Hal. 2.6.1-2: ἐν ὑπάτων καὶ στρατηγῶν καὶ τῶν ἄλλων τῶν κατὰ νόμους ἀρχόντων.

[895] Jashemski 1966: 43; Kloft 1977: 63.

[896] Plb. 18.46.5; cf. 18.12.1: ἡ δὲ σύγκλητος … τὸν δὲ πρὸς τὸν Φίλιππον πόλεμον ἐψηφίσατο κατάμονον εἶναι δοῦσα τῷ Τίτῳ τὴν ἐπιτροπὴν ὑπὲρ τῶν Ἑλληνικῶν; Livy 32.28.9: *T. Quinctio prorogarunt imperium, donec successor ex senatus consulto venisset*; Plut. *Flam.* 7.1: ὁ Τίτος παρ᾽ αὑτοῦ τοὺς πράξοντας ὅπως ἐπιψηφίσηται ἡ σύγκλητος χρόνον αὐτῷ τοῦ πολέμου μένοντος. See also Livy 32.27.1-6; 33.25.11, 43.6; App. Mac. 8.2-3; Just. 30.45.5; Zon. 9.16; Kloft 1977: 18, 32, 50-51, 62-63, 78-82.

[897] For ἀντιστράτηγος, Plb. 3.106.2; 28.3.1; Dion. Hal. 9.11.2, 12.4; for ἀνθύπατος, Plb. 21.10.11; 28.5.6; Dion. Hal. 9.16.3-4, 17.5; 11.62.1. See Kloft (1977: 63) on the use of ἀνθύπατος in Polybius, in contrast to Jashemski (1966:

στρατηγὸς continued to be used in reference to proconsuls at times, while ἀντιστράτηγος came to describe propraetors.[898] Nevertheless, Jashemski states that ἀνθύπατος, as well as στρατηγὸς ἀνθύπατος, could refer both to proconsuls and even praetors augmented with proconsular *imperium*.[899] Despite the apparent inconsistency in terms, Jashemski goes on to argue that Greek writers eventually did come to recognize the distinction between the military and civil functions in their description of promagistrates, with στρατηγὸς referring to military commanders and ἀνθύπατος emphasizing civic functions of proconsuls, especially as governors.[900] By the end of the second century Greek inscriptions also began describing promagistrates generically as an ἀντάρχων, usually when opposite an elected magistrate, who was likewise mentioned in general terms as an ἄρχων. For instance, in the *lex de provinciis praetoriis* of 101/100, which regulated the powers and function of provincial governors, there are several passages specifically differentiating between "a magistrate or promagistrate" (ἄρχων ἢ ἀντάρχων).[901] Similar references to "a magistrate or a promagistrate" appear again in inscriptions pertaining to a *senatus consultum* regarding Aphrodisias (c. 39-38), the *lex Fonteia* (c. 33), and fragments of a treaty between Rome and Mytilene (c. 25).[902] Nevertheless, as we see in inscriptions throughout

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50) who erroneously states that Polybius never uses the term. The closest Greek parallel to the Latin *pro consule* is ἀντὶ ὑπάτου, which appears very rarely. See Dio 8.36.1 and the discussion of Fabius Gurges below.

[898] For both ἀνθύπατος and στρατηγὸς being used interchangeably in reference to the proconsul for 188, Cn. Manlius Vulso (cos. 189), see Plb. 21.45 (Μάλιος ὁ ἀνθύπατος) and 46.1 (Γνάιος ὁ στρατηγὸς). For an example of ἀντιστράτηγος to describe propraetors, see *IK Knidos I* 31, Kn., Dlph. B/IV.27; *FD* III 4.37[2].B.1.27 (στρ[ατηγὸς ἀντιστράτηγος ἢ ἀνθύ]πατος); Dio 41.43.3 (ἀνθυπάτους τοὺς δὲ ἀντιστρατήγους τοὺς δὲ ἀντιταμίας). See also Vervaet 2009b: 408-409.

[899] Jashemski 1966: 53, (and Jashemski's appendix of στρατηγοί ἀνθύπατοι) 159-160.

[900] Jashemski 1966: 53.

[901] See B. 6 and also C.7, 24-55 (μήτε τις ἄρχων [μήτε τις ἀντάρχων) in *FD* III 4.37 (also listed under *SEG* 1.161; 3.378; *BCH* 28.1924.58ff; *IK* Knidos I 31, Kn., Dlph.; McC. Knidos 18). See also the discussions and analyses of the inscriptions in Hassall, Crawford, and Reynolds 1974: 195-220; Crawford 1996: 230-271; Geelhaar 2002: 109-118; Drogula 2011: 91-124.

[902] For the *SC* to Aphrodisias, see Reynolds (1982: 87), who proposes the provision of "ἄρχων, ἀντάρχων" (l. 67) based on similar formula used in a letter between Octavian and Seleukos of Rhosos, dated between 42 and 30, "ἄρχ[ον ἀντάρχοντέ]ς" (*RDGE* 58, ll. 70-72). On the *lex Fonteia*, "see Crawford 1996: 497-506, 36 (*IG* XII 4.1.266 [fr. F. 44]; *SEG* 46.1088 [fr. 9 fg. 10]; 51.1066). On the treaty between Rome and Mytilene of 25, "πα[ρὰ — — — ἄρχων ἢ ἀν]τάρχων," see *IG* XII 2.35 (col. E.3.12-13).

the Principate, ἀντάρχων continued to be used broadly to refer to promagistrates or subordinate officials.[903]

And yet, over time, Greek writers were able to distinguish extraordinary commands not only from regularly elected magistracies, but even promagistracies. As we have already seen, in Dio's account of the debate surrounding Pompey's proposed command in *lex Gabinia* of 67, Catulus warns the Roman people against instituting "some new command" (καινήν τινα ἀρχὴν) in place of the consuls and praetors (ὑπάτων καὶ στρατηγῶν) but also the promagistrates (τῶν ἀντὶ τούτων ἀρχόντων), who had received their commands in conformity with the law.[904] Looking ahead nearly twenty years later to January of 48, the Roman government had splintered into factions either adhering to Caesar in Rome or rallying in exile under Pompey in Greece.[905] Here, in a political environment of fractured loyalties and contested legitimacy, Dio even further emphasizes the subtle, yet important distinctions between elected officials, promagistrates, and illegal commands, which needs to be quoted in full:

> [1] The ensuing year the Romans had two sets of magistrates (ἄρχοντες), contrary to custom (παρὰ τὸ καθεστηκὸς), and a mighty battle was fought. The people of the city had chosen as consuls (ὑπάτους) Caesar and Publius Servius, along with praetors (στρατηγοὺς) and all the other officers (τέλη) required by law (ἐκ τῶν νόμων). [2] Those in Thessalonica had made no such appointments, although they had by some accounts about two hundred of the Senate and also the consuls with them and had appropriated a small piece of land for the auguries, in order that these might seem to take place under some form of law (ἐν νόμῳ δή τινι), so that they regarded the people and the whole city as present there. [3] They had not appointed new magistrates for the reason that the consuls had not proposed the *lex curiata* (τὸν φρατριατικὸν οὐκ ἐσενηνόχεσαν); but instead they employed the

[903] See, for instance, an inscription from Sardis, c. 5-1 BCE, in *IG* 4.1756, ll. 133 (= *SEG* 39.1291; see also Buckler and Robinson 1914: 321-362): τὸ δεύτερον καὶ ἀντάρχων τῶν στρατηγῶν; one from Akraipia in Boiotia, c. 37 CE, in *IG* 7.2711, ll. 43: ὁ ἀν[τ]άρχων Ἀ[ρ]ισ[τ]ομάχου τοῦ Ἐρασίππου (see also Oliver 1971: 221-237; Oliver 1978: 185-191; Stravrianopoulou 2007: 159-183); two from Neapolis, c. 71-80, in *I.Napoli* 1.84, col. 1.8 (= *SEG* 44.814.84): Ἰούλιος Λειουιανὸς ὁ ἀντάρχων; *I.Napoli* 1.85, ll. 6, 16 (= *IG* 14.760; *I. Napoli* II, p. 142): Τρανκουίλλιος Ῥοῦφος ὁ ἀντάρχων … Ἰούλιος Λειουεια[ν]ὸ[ς ὁ ἀντάρχων; one from Pelagonia in Macedonia, c. 119-120 CE, in *IG* 10.2.2.294 (= *SEG* 38.663): Στυβερραῖος ὁ ἀντάρχων; and one from Side in Pamphylia, dated around the mid-second century CE, in *IK Side* 70, ll. 13: ἀντάρχων Ροιζας Ἑρμογένους.
[904] Dio 36.33.1.
[905] Dio 41.44.1: δίχα τῆς ἀρχῆς μεμερισμένης ("with the government split into two").

> same officials as before, merely changing their names and calling some proconsuls, others propraetors, and others proquaestors (ἀνθυπάτους τοὺς δὲ ἀντιστρατήγους τοὺς δὲ ἀντιταμίας). [4] For they were very careful about precedents (πατρίων), even though they had taken up arms against their country and abandoned it, and they were anxious that the acts rendered necessary by the exigencies of the situation should not all be in violation of the strict requirement of the ordinances (μὴ πάντα τὰ ἀναγκαῖα πρὸς τὴν τῶν παρόντων ἀπαίτησιν καὶ παρὰ τὴν τῶν τεταγμένων ἀκρίβειαν). [5] Nevertheless, these men mentioned were the magistrates (ἦρχον) of the two parties in name only (ὀνόματι), while in reality (ἔργῳ) it was Pompey and Caesar who were supreme; for the sake of good repute they bore the legal titles (ἐννόμους ἐπικλήσεις) of proconsul and consul (τοῦ ὑπάτου ὁ δὲ τὴν τοῦ ἀνθυπάτου), yet their acts were not those which these offices permitted (ἐπέτρεπον), but whatever they themselves pleased (ἤθελον).[906]

The above passage reveals several aspects regarding Dio's perception of extraordinary commands. First, we should take note that Dio on several occasions in this chapter differentiates not only between magistracies and promagistracies, but also states that not all promagistracies were considered extraordinary.[907] Second, only some of the promagistracies outlined above fit the notion of being extraordinary, in that they were contrary to custom (καθεστηκὸς) and precedent (πατρίων), were outside an established order (παρὰ τὴν τῶν τεταγμένων ἀκρίβειαν), but were seen as justified due to emergency (ἀναγκαῖα πρὸς τὴν τῶν παρόντων ἀπαίτησιν).[908] Finally, Dio alludes to a dichotomy between actual adherence to law and the mere appearance of legality in extraordinary commands. On the one hand, for the importance of actual legality, Dio mentions near the start of the chapter (41.43.1) that the people in Rome had elected their consuls, praetors, and other magistrates "as required by law" (ἐκ τῶν νόμων). In contrast, those in Pompey's camp at Thessalonica were not able to elect new magistrates, especially those capable of military command, because they could not propose a *lex curiata* (τὸν φρατριατικὸν οὐκ ἐσενηνόχεσαν), which was legally required in order for a magistrate to wield *imperium*. Instead,

[906] Dio 41.43.1-5. See also Driediger-Murphy 2014: 99-120, esp. 109-111.
[907] Dio 41.43.1, 3, 5.
[908] Dio 41.43.1, 4-5.

the government under Pompey prorogued the magistrates with them who had been elected the previous year.[909] The reasoning here, according to Dio, was that the Pompeians wanted to be sure that their emergency measures (πάντα τὰ ἀναγκαῖα πρὸς τὴν τῶν παρόντων ἀπαίτησιν), however justified by necessity, were not contrary to required procedure (μὴ … παρὰ τὴν τῶν τεταγμένων ἀκρίβειαν), that is, extraordinary. Indeed, Dio reiterates at the end of this chapter (41.43.5) that the powers of both elected magistrates and promagistrates were limited (ἐπέτρεπον) by law.

On the other hand, Dio also highlights the efforts by those on either side of Rome's splintered government at least to appear in conformity with the law whenever actual adherence was impossible or inexpedient. Dio states, for instance, that those in Pompey's camp (i.e., the previous year's consuls and about 200 of the Senate) set aside a piece of land in Thessalonica for the auguries, "in order that these might seem to take place under some form of law."[910] Augural ritual determined the legitimacy of public acts in Rome, not only through acts of divination, but also by mandating that specific acts of government had to take place inside Rome's sacred urban boundary, the *pomerium*.[911] Thus, Dio's mention of seeming to be under "some form of law" (ἐν νόμῳ δή τινι αὐτὰ δοκεῖν) likely refers to an implicit acknowledgment among the Pompeian government that, because they were acting in exile at Thessalonica and not physically in Rome, none of their actions carried any actual legitimacy, merely the appearance of it. In fact, we can see evidence of this feigned legitimacy again in the decision of the rump Roman government in Greece to prorogue the *imperium* of the previous year's magistrates with them in lieu of elections. As we have seen, Dio stated that the government in Pompey's camp could not enact the

[909] Dio 41.43.3.
[910] Dio 41.43.2: καί τι καὶ χωρίον ἐς τὰ οἰωνίσματα, τοῦ δὴ καὶ ἐν νόμῳ δή τινι αὐτὰ δοκεῖν γίγνεσθαι.
[911] Heurgon 1973: 113; Stewart 1998: 111-112, 124-125, 183; Lintott 1999: 62, 103-104; Mousourakis 2003: 55; North 2007: 267-269; Vervaet 2014: 284-285n. 214, 350; Straumann 2016: 55. On spatial component of augural ritual, especially in the determination of *auspicia urbana*, see the discussion in Stewart 1998: 124, as well as Varro *LL* 5.143 and Gell. 13.14.1.

lex curiata, presumably due to the inability to convene the assemblies, and instead "employed the same officials as before, merely (μόνας) changing their names and calling some proconsuls (ἀνθυπάτους), others propraetors (ἀντιστρατήγους), and others proquaestors (ἀντιταμίας)."[912] Dio's use of the word μόνας is important when considering this statement, as it emphasizes that these prorogations were likely not even legally valid, since prorogation itself also required a vote of the assemblies for legal validity, the very same hinderance that prevented the Pompeians from holding elections in the first place. Although it is the case that many prorogations in the past had been granted without recourse to the assemblies, Kloft points out that such a practice was never normative but merely an oversight permitted by the silent consent of the people, whose prerogative could also withdraw that consent at any time.[913] Therefore, as Dio says, the Pompeian government in Greece had not actually prorogued anyone but had merely changed the names of consuls to proconsuls, praetors to propraetors, and so forth. Nevertheless, this minor irregularity looked much less problematic than the egregious act of holding elections without the assemblies. Also, by emphasizing the mere changing of names from magistrate to promagistrate, Dio is pointing to the importance of titles in the projection of legitimacy, as well as the realities of power. For all the effort to appear in conformity with legal procedure, Dio states in the chapter's final passage (41.43.5) that the magistrates and promagistrates in both camps, both in Rome and those in exile in Greece, held their posts (ἦρχον) in name only (ὀνόματι), since it was Caesar and Pompey who held true power. In fact, Dio says that both men too only held their respective titles of consul and proconsul as a pretense of legitimacy, acting not in accordance with the legal limitations of their offices (ἐπέτρεπον) but in reality in order to do whatever they

[912] Dio 41.43.3: τοῖς δὲ δὴ αὐτοῖς ἐκείνοις οἷσπερ καὶ πρόσθεν ἐχρήσαντο, τὰς ἐπωνυμίας σφῶν μόνας μεταβαλόντες καὶ τοὺς μὲν ἀνθυπάτους τοὺς δὲ ἀντιστρατήγους τοὺς δὲ ἀντιταμίας ὀνομάσαντες.
[913] Kloft 1977: 54-55. See also Brennan 2000: 94.

wished (ὅσα αὐτοὶ ἤθελον).[914] Thus, as Dio shows at length in this chapter, in the case of extraordinary commands, actual adherence to the law was substituted for the appearance of legality in the attempt to create or maintain the perception of legitimacy.

Conclusions

Up to now, this chapter has surveyed the Latin use of the terms *extraordinarium* and *extra ordinem*, their closest Greek counterparts, and conceptions of promagistracies, all in the context of extraordinary commands. The purpose of the above discussion was not to include every possible extraordinary command occurring during the Roman Republic, but to survey the different ways and terminologies in which commanders were described as holding extraordinary commands. The importance of this overview is that we can see specific examples of commands that Roman and Greek writers themselves identified as extraordinary, not merely the designations imposed by modern scholars. More importantly, studying Greek and Roman conceptions allows us to discern the precise qualities and attributes that ancient writers considered to be the actual criteria of an extraordinary command.

The first half of this chapter surveyed Roman conceptions of extraordinary commands. As we have seen, the Latin derivations for extraordinary, *extra ordinem* and *extraordinarium*, could have a variety of meanings, referring to something as banal as a bad haircut, to legal anomalies, or military tactics. No matter the context, *extra ordinem* and *extraordinarium* always described something as being contrary to what was perceived as normal or expected, a rule that persisted in the description of irregular magistracies. Roman writers, though not always consistent in their depictions, thought that multiple criteria could qualify a command or

[914] Coudry 2016: 44.

magistracy as extraordinary, but all fundamentally centered on the conferral of *imperium* in a manner contrary to Roman constitutional norms and law. At the broadest level, extraordinary commands were those in which a commander wielded excessive power, though what constituted this excess was often ambiguous and circumstantial. Cicero, of course, identified many of Pompey's various commands throughout his career as *extraordinaria*, though he was selective when doing so, and seldom gave any details for why he felt this way.[915] Only in his speech in opposition to Servius Rullus' agrarian bill of 63 did Cicero go into detail as to what excesses made a command *extraordinarium*, specifically mentioning extended terms of office, unchecked legal authority, access to Rome's treasury, the ability to appoint legates, and recruit soldiers, all of which was accompanied by the conferral of *imperium*, even when it circumvented the *lex curiata*.[916] Such powers, Cicero stated, were fit not for Roman generals, but kings (*regna*).[917] Velleius Paterculus gave a similar appraisal of the excessive nature inherent to Pompey's extraordinary command via the *lex Gabinia* in 67. After noting that Pompey had authority equal to proconsular governors within fifty miles of every shore, Velleius remarked that the control of almost the entire world had been handed to one man, Pompey (Vell. 2.31.4).

Other extraordinary commands are attributed to more specific types of excess, such as the removal of formal limitations to a magistrate's authority. Seneca the Younger, Suetonius, and Tacitus all connected prorogation to *extraordinaria imperia*, though Cicero apparently did not.[918] On the other hand, Cicero, Velleius, and Suetonius, all took note of extraordinary commands in

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[915] For more on this, see the earlier discussion in this chapter on Cicero's arguments in *De domo sua* and the *Eleventh Philippic*. Where Cicero does describe Pompey's commands as extraordinary, he usually does not go into detail as to the reasons why, save for a single reference in the *Eleventh Philippic* (11.18), where he concedes that Pompey was given command in the Sertorian War as *privatus* at the instigation of "turbulent tribunes." On the other hand, Cicero goes into great detail in regard to the anomalous nature of Pompey's commands in his defense of the *lex Manilia* of 66, though here Cicero never refers to Pompey's appointments explicitly as extraordinary.
[916] Cic. *Agr*. 2.31-34, 75.
[917] Cic. *Agr*. 2.8.
[918] Sen. *Ben.* 3.33.3; Suet. *Aug.* 3.1; *Tib.* 30.1; Tac. *Ann.* 13.29; Dio 60.24.1-2.

which a commander wielded *imperium* augmented beyond what they were legally entitled, such as the propraetorian quaestorships for Piso in 65 and Cato in 58, C. Octavius' proconsular propraetorship in 60, and more.[919] Livy even described the suspension of *provocatio* to be a component of extraordinary commands.[920] Beyond excesses in authority and the removal of formal limitations, extraordinary commands could also stem from circumventions of magisterial procedure. Cicero, Livy, Seneca the Younger, and Suetonius identified the violation of sortition as a potential component of extraordinary commands.[921] Commands that bypassed the *cursus honorum* were also considered extraordinary by Velleius, Valerius Maximus, Seneca the Younger, and Tacitus.[922] Our Roman sources are not unanimous on the criteria for extraordinary commands, nor are they always consistent. Cicero, for example, did not consider prorogations to be extraordinary and vacillated on whether violations of sortition were extraordinary, while Livy is the only writer to describe the suspension of *provocatio* as *extra ordinem*. The one quality that was consistently identified with extraordinary commands whenever it appeared was the appointment of *privati cum imperio*, as this circumvented the electoral process altogether.[923]

The second section of this chapter in turn examined Greek conceptions of extraordinary commands. Greek sources had no direct counterparts to the Latin *extraordinarium* or *extra ordinem* but used practical equivalents to identify commands that were deemed unusual, contrary to tradition, novel, and unlawful; that is, extraordinary. The criteria for these commands in Greek sources corresponded to those of Roman writers, such as the appointment of *privati*, procedural irregularities, and commands that were excessive in the scope of their authority. Dio described

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[919] Cic. *Dom.* 21; Vell. 2.31.3, 45.4; Suetonius *Iul.* 9.3, 11.1 (see also *CIL I*^{2} 749 and Sall. *Cat.* 19.1-2).
[920] Livy 39.14.6, 16.12.
[921] Cic. *Dom.* 23-24; *Phil.* 11.17; Livy 3.2.2; 6.22.5, 30.2-3; 7.23.2; 10.24.5-18; 24.9.5; Sen. *Ben.* 5.16.4; Suet. *Aug.* 3.1.
[922] Vell. 2.30.2-4; Val. Max. 4.1.14; Sen. *Ben.* 5.16.4; Suet. *Cal.* 18.2; Tac. *Ann.* 13.29.
[923] Cic. *Dom.* 21; *Phil.* 11.18-20.

Pompey's commands as excessive or swollen in size, or ὑπέρογκος (Dio 36.35.1), and referred to Pompey himself as a general with full or complete power, στρατηγὸν ἕνα αὐτοκράτορα (Dio 36.23.1), while both Appian and Dio called Pompey's positions as "great" or "large."[924] Potential violations of procedure, such as the *cursus honorum*, were described as a "special privilege" (ἐξαιρετός), according to Plutarch, referring to the Senate's offer to allow Cato the Younger the dispensation to stand for election to the praetorship, despite having never held the aedileship (Plut. *Cat. Min.* 39.3). Some Greek descriptions commented on the anomalous nature of commands, such as Dio describing Octavian's delegation to *legati* as "abnormal" (ἀτοπώτερα) or Appian calling the Second Triumvirate "strange" or "temporary" (πρόσκαιρος), as well as "illegal" (παράνομος).[925] Others were vague, such as Dio describing extraordinary appointments for Piso and Caesar in 65 as simply "some command" (ἀρχήν τινα), and when both Dio and Plutarch labelled Pompey's command in the *lex Gabinia* ambiguously as a "new command."[926]

Finally, the third section of this chapter discussed the relationship between the conception of extraordinary commands and promagistracies in both Roman and Greek sources. The importance here is that, while nearly all extraordinary commands were promagistracies in some fashion, not all promagistracies were extraordinary commands. At first, references to *pro consule* and *pro praetore* were functional designations that indicated when *imperium* was exercised outside an elected magistracy, usually by means of prorogation or *privati cum imperio*. Only very gradually over the course of the second century did promagistracies begin to be differentiated as separate from regular elected magistracies, though some inconsistencies remained. Greek writers at first struggled to distinguish between magistracies and promagistracies, possibly due to a lack

[924] App. *Mith* 94: τοσήνδε ἀρχὴν; Dio 36.24.1: τοσαύτην ἡγεμονίαν.
[925] Dio 49.4.2; App. *BC* 5.43.
[926] On Piso and Caesar, see Dio 36.44.5; 43.44.2. On Pompey, see Plut. *Pomp.* 49.7 (στρατηγίας καινῆς); Dio 36.33.1 (καινήν τινα ἀρχὴν).

of familiarity with Roman political institutions but seemed to refer to proconsuls (ἀνθύπατοι) and propraetors (ἀντιστράτηγοι) in a titular fashion before their Roman counterparts. Lastly, it is in our Greek sources where we see not only a distinction between magistracies and promagistracies, but also between promagistracies and extraordinary commands, which centered on the appearance of legality as opposed to actual adherence to the law.

In the previous chapter, I identified seven potential characteristics in the manifestation of extraordinary commands: *continuatio*/*iteratio*, prorogation, augmented *imperium*, violations of the *cursus honorum*, *imperium* given to *privati*, expanded provincial assignments, and unlimited *imperium*. Again, the examples discussed in the present chapter do not represent the totality of extraordinary commands in the history of the Roman Republic, only those that Roman and Greek sources themselves clearly identified as such. In the following chapter, I will build on the examples provided here and show that all extraordinary commands exhibit at least one of the seven criteria mentioned above. Furthermore, I will show not only how Roman and Greek writers conceived and identified extraordinary commands, but also how they perceived and understood their significance in Roman politics. As we have seen with the discussions of extraordinary commands and promagistracies in Greek and Roman sources in this chapter, Rome's constitution was sufficiently flexible to allow for occasional and temporary irregularities and innovations regarding magistracies in the face of emergencies. On the other hand, blatant disregard for law and magisterial procedure represented a deviation from Roman constitutional norms. In a similar manner, although promagistracies could originate from necessary innovations, they could eventually become extraordinary deviations.

Chapter 6: Roman and Greek Views and Perceptions of Extraordinary Commands

The previous chapter surveyed the ways that Roman and Greek writers identified extraordinary commands. I began by looking at the meaning and use of the Latin derivations for "extraordinary" itself, *extraordinarium* and *extra ordinem*, particularly when used in descriptions of irregular magistracies and military commands. Magistracies and commands depicted as *extraordinarium* and *extra ordinem* were those that either broke with socio-political tradition, circumvented established protocol, or outright broke Roman laws regulating magistrates and military command. I then turned to discuss how Greek writers described extraordinary commands. Although the ancient Greek language had no direct counterpart to *extraordinarium* or *extra ordinem*, Greek writers to were able to able to provide equivalent descriptions that conveyed the same anomalous and unorthodox nature of commands similarly identified as extraordinary in Latin sources. Finally, I analyzed the conceptual development of the promagistracy in both Roman and Greek sources, as well as its relationship to extraordinary commands. Promagistrates either continued to function as or wielded the legal power of an elected magistracy outside its term of office. In regard to the exercise of *imperium*, although not all promagistracies were extraordinary commands, they were at leasted rooted in extraordinary commands. While promagistracies originated as legal innovations that reflected the flexibility of Rome's constitution, extraordinary commands were deviations from Roman constitutional law. In effect, promagistracies may have had their origin in "bending the rules," but extraordinary commands went further by "breaking the rules."

The previous chapter's conclusions resulted in even further questions, however, providing a segue to the present chapter. On the one hand, Roman and Greek depictions of extraordinary commands were as inconsistent as those in modern scholarship. One ancient author may have

labelled a certain command as extraordinary, while others did not. For instance, only Suetonius explicitly refers to the propraetorian quaestorship given to the *privatus* Cn. Calpurnius Piso in 65 as *extra ordinem*.[927] This does not negate Suetonius' characterization of Piso's command, however, since nearly all ancient sources who mention *privati cum imperio* describe them as extraordinary. Furthermore, many ancient authors were inconsistent in their own description of extraordinary commands, not merely in comparison to others. As another example, if we were to read only Cicero's speech defending the *lex Manilia* in 66, which allotted command of the Third Mithridatic War (75-63) to Pompey, we might conclude that Cicero did not believe that Pompey's career to that point was extraordinary, since he never used the terms *extraordinarium* or *extra ordinem*. But, to the contrary, Cicero did refer to several of Pompey's commands as *extra ordinem* and *extraordinarium* in both the *De domo sua* and the *Eleventh Philippic*.[928] On the other hand, despite the disagreement and inconsistency among ancient sources regarding the identification of extraordinary commands, there was also a significant amount of shared and reoccurring characteristics. As shown in the previous chapter, extraordinary commands could be depicted as varying degrees of excessive power, the removal of formal limitations on magisterial authority (especially in the possession of *imperium*), and the circumvention of electoral procedures. Thus, while the study of Roman and Greek conceptions of extraordinary commands is an important and necessary step, it cannot be the only step. We must also examine the precise criteria of extraordinary commands.

In this chapter, I will demonstrate that all commands identified as extraordinary in ancient sources exhibited at least one of seven characteristics: violations of annuity (specifically *continuatio*, *reficere*, or *iteratio*), extension of *imperium* through prorogation, *imperium*

[927] Suet. *Iul.* 9.3.
[928] Cic. *Dom.* 18-19; *Phil.* 11.17-19.

augmented to that of a higher office (for example, commanders of praetorian rank wielding proconsular *imperium*), election to office in a manner that circumvented the *cursus honorum*, individuals granted *imperium* outside of elected office (*privati*), irregularities in provincial assignments (including sortition and multi-provincial commands), and imparities of *imperium* (such as *imperium maius* or *infinitum*). The importance here is that, although we have surveyed the variety of ways that Greek and Roman writers described extraordinary commands, not every command was identified as such by our sources. For example, in the prorogation for Q. Fabius Maximus Gurges in 292, neither Dionysius of Halicarnassus nor Cassius Dio use the term prorogation or an equivalent, but instead say that Fabius Gurges was ordered by the Senate and people to remain in command with proconsular *imperium* (ἀνθύπατον ἀρχὴν), which is the legal definition of prorogation and a quality that both Seneca and Suetonius attributed to extraordinary commands.[929] Indeed, some sources do not acknowledge certain commands as extraordinary, despite ample evidence to the contrary. L. Aemilius Paullus, as we have seen, referred to himself only as *imperator*, although he was in fact a propraetor with proconsular *imperium*, a trait that Cicero and Plutarch considered extraordinary.[930]

And so, outlining the common characteristics of commands described as extraordinary by Greek and Roman writers gives modern scholars the necessary criteria to identify other extraordinary commands that are not explicitly labelled as such. But, as a word of caution, it is

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[929] Dion. Hal. 17-18.4.4: Φάβιον τῆς βουλῆς ψηφισαμένης μένειν ἐπὶ τοῦ στρατοπέδου, καὶ τὴν ἀνθύπατον ἀρχὴν ἔχοντα πρὸς ταύτην τὴν μερίδα τῶν Σαυνιτῶν πολεμεῖν; Dio 8.36.31 (and Zon. 8.1): οἱ δὲ Ῥωμαῖοι διὰ τοῦτο ἐκεῖνόν τε ἐμεγάλυνον καὶ τὸν υἱὸν αὐτοῦ καὶ ἐς τὸ ἔπειτα ἀντὶ ὑπάτου ἄρξαι ἐκέλευσαν; cf. Livy *Per.* 11; Val. Max. 2.2.4; 5.7.1; Eutrop. 2.9.2; Oros. 3.22.6-7. See also Polyaenus (8.15.1), who states that Fabius Gurges was appointed to the position of a commander (αἱρεθῆναι στρατηγὸν), not a consul (ὕπατος), further suggesting that the appointment was proconsular in nature. For further discussion of Fabius Gurges, especially on the extraordinary nature of his prorogation at the time, see Jashemski 1966: 8-9; Develin 1975: 717-718. On Seneca and Suetonius, see Sen. *Ben.* 3.33.2-3; Suet. *Aug.* 3.1.

[930] *CIL* 1^2 614 (= *ILLRP* 514): *L. Aimilius L. F. inpeirator*. See discussion and note, with further sources, above. On Cicero and Plutarch's views on augmented *imperium* and in extraordinary commands, see their comments above in regard to Cato's appointment as quaestor *pro praetore* in 58 (Cic. *Dom.* 3, 20-22; *Sest.* 60; Plut. *Cat. Min.* 34.3-4).

important to establish parameters in the application of the aforementioned criteria in our definitions of extraordinary commands. It is not the case that all extraordinary commands must exhibit each of the above criteria simultaneously, nor is it the case that any command featuring one such criterion must necessarily be considered extraordinary. Prorogations, for instance, while always a potential quality of extraordinary commands, are not by themselves a singular determinant factor. In fact, the passage of the *lex Baebia* in 181 made single-year prorogations a routine measure for praetors sent to Spain.[931] Instead, different combinations of these characteristics were present in extraordinary commands. In any case, however, every command definitively identified as extraordinary will assuredly contain at least one of the criteria listed above. The importance of examining these criteria goes beyond what Roman and Greek writers thought extraordinary commands looked like but highlights their socio-political significance in Roman society.

1. <u>*Continuatio/reficere/iteratio*</u>

As discussed in chapter 4, *continuatio* could take three forms: refusing to leave office or attempting to remain in office past a set term, obtaining a legal extension or reappointment to the same magistracy, or immediate reelection to the same post (*reficere*).[932] We have very few direct references of the first type in either Greek or Latin texts, as it was the most controversial. Livy states that Appius Claudius Crassus, along with other members of the decemvirate of 451-450, refused to step down from his position in 449, attempting "to prolong his office" (*continuandum magistratum*), and committed suicide out of fear of prosecution after the office was disbanded by

[931] See Astin 1958: 27 and Brennan 2000: 169-170, 392, 625-626.
[932] Kloft 1977: 12; Brennan 2000: 651; Vervaet 2009a: 57; Straumann 2016: 103-104.

decree.[933] Another example is that of L. Manlius Capitolinus Imperiosus in 363, who attempted to extend his appointment to the dictatorship past its religious and ceremonial function in order to obtain a command against the Hernici tribe.[934] According to Appian, a plebeian tribune, M. Pomponius, briefly attempted to prosecute Manlius "for many crimes" in 362, before being forced to recant his accusations when threatened by Manlius' son.[935] Chief among these "many crimes," especially according to Cicero and Valerius Maximus, was Manlius' attempt to retain his dictatorship for the purposes of gaining a military command.[936]

In contrast, we find a great deal of discussion surrounding the second type of *continuatio*, the legal extension of a magistrate's office. Seneca stated that P. Cornelius Scipio the Elder (cos. 218) received several continuations (*continuet*) of his extraordinary commands.[937] And although Seneca is actually mistaking prorogations of Scipio's *imperium* for extensions of office, it nevertheless shows that *continuatio* was viewed as extraordinary. The irregularity of *continuatio* is noted explicitly by Livy, who states that, when Q. Fabius Maximus (cos. 215) received a continuation of his consulship in 214 (*consulatus continuatus*), "The critical state of affairs, the exigencies of the war, and the danger which threatened the state prevented anyone from looking narrowly into the precedent, or suspecting that the consul was actuated by an excessive love of

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[933] Livy 3.35.6; 9.34.1-2 (*continuando*). Livy describes the decemvirate, especially the role of Appius, as a monarchy and a tyranny (Livy 3.37.4-38.1, 39.8). See also Heurgon 1973: 169; Mousourakis 2003: 83; Hammer 2008: 111.

[934] Cic. *Off.* 3.112; Livy 7.3.4, 9-4.7; Val. 5.43.3; 6.9.1; Sen. *Ben.* 3.37.4; *Vir Ill.* 28.1-2; See also Vervaet 2009a: 69-70; 2010: 142; de Wilde 2012: 574.

[935] App. *Sam.* 2: γραψαμένου δὲ αὐτὸν ἐπὶ πολλοῖς ἀδικήμασι Πομπωνίου δημάρχου. Our only other Greek source regarding Manlius in 363-362 is Zonaras (7.24), who however only mentions Manlius' own quarrel with his son, but not the attempted *continuatio*.

[936] Cic. *Off.* 3.112: *L. Manlio A. f., cum dictator fuisset, M. Pomponius tr. pl. diem dixit, quod is paucos sibi dies ad dictaturam gerendam addidisset; criminabatur* etiam; Val. Max. 5.4.3: *L. Manlio Torquato diem ad populum Pomponius tribunus pl. dixerat, quod occasione bene conficiendi belli inductus legitimum optinendi imperii tempus excessisset.*

[937] Sen. *Ben.* 3.33.3: *ut provincias et extraordinaria imperia continuet*. See Kloft 1977: 33; Gruen 1995: 537; Vervaet 2014: 204-205.

command."[938] Similarly, *continuatio* could also apply to a commander attempting to retain unbroken possession of *imperium*. According to Livy again, two tribunes accused Q. Fulvius Flaccus, dictator in 210, of attempting "to have his office prolonged" (*magistratum continuari*) by standing in the consular elections for the following year, which they claimed was against the welfare of the state and set a bad precedent.[939] To be fair, Flaccus' career will have made him a prime target for accusations of *continuatio*. He had been *praetor urbanus* for 215, was reappointed to the same office the following year, *magister equitum* in 213, consul for 212, had his *imperium* prorogued for two years in succession (211-210), was appointed dictator in late 210 (in the same year that he was proconsul), reelected as consul for 209, and received two further prorogations into 207, meaning that he had held *imperium* for eight years in succession.[940] Thus, although the use of prorogation itself was in no way synonymous with the actual extension of office, successive prorogations were considered a potential component of *continuatio*, wherein a magistrate sought continual access to *imperium*. In the same way, though nearly 140 years later, the Roman people accused L. Licinius Lucullus of trying to prolong the war against Mithridates in order to hold continual command (ὑπὲρ τοῦ στρατηγῶν) after he allowed Tigranes to escape following a defeat in 68.[941]

The constitutional danger of *continuatio* in extraordinary commands was not only that a magistrate would refuse to vacate his office or seek repeated office, but also that the people might voluntarily give such prolonged commands on a charismatic leader that it was tantamount

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[938] Livy 24.9.1 (*continuare consulta*), 9 (*consulatus continuatus*), 10 (*tempus ac necessitas belli ac discrimen summae rerum faciebant, ne quis aut in eam rem exemplum exquireret aut suspectum cupiditatis imperii consulem haberet; quin laudabant potius magnitudinem animi*).
[939] Livy 27.6.4: *qui neque magistratum continuari satis civile esse aiebant, et multo foedioris exempli eum ipsum creari qui comitia haberet.* See also Livy 27.6.8; Brennan 2000: 648, 651-652; Beck 2011: 87.
[940] *MRR* 1.254, 259, 263, 267, 274, 280, 285, 292, 296; Brennan 2000: 101; Vervaet 2014: 165-166.
[941] Plut. *Luc.* 24.3. See also Dio 36.2.1: ἀπ᾽ αὐτοῦ καὶ αἰτίαν ὡς οὐκ ἐθελήσας τὸν πόλεμον, ὅπως ἐπὶ πλεῖον ἄρχῃ. See also Boak 1918: 7-8, 22; Ehrenberg 1953: 118; Jashemski 1966: 76-77; Kloft 1977: 44; Sherwin-White 1984: 186-188; Steel 2013: 219-220, 242.

to a monarchy. Livy and Valerius Maximus, for instance, stated that the people wanted to bestow continuous consulships and a perpetual dictatorship upon Scipio Africanus, which he declined.[942] Such problems became more frequent in the massive, extraordinary commands in the first century, especially those held by Marius, Sulla, Pompey, and Caesar. Livy's *Periochae* (67) states that Marius held "continued consulships over the course of many years" (*continuatus per conplures annos est consulatus*). Plutarch's discussion of Marius' extraordinary career provides us with examples of Greek references to both *iteratio*, reelection to the same magistracy without waiting for the requisite interval (usually ten years), as well as *reficere*, immediate reelection to the same magistracy with no interruption of office. The crisis brought on by the invading Cimbri and Teutones compelled the Roman people to reelect Marius as consul for 104, who had been elected to his first term for 107.[943] According to Plutarch, however, although it was illegal for someone to be reelected to the same office without waiting the appropriate amount of time, the people persisted in reelecting Marius since the present emergency justified the laws yielding to expedience.[944] Thereafter, Marius was reelected to the consulship successively for the next four years. Plutarch goes on to say that only one other person had been reelected to the consulship as often as Marius, namely, M. Valerius Maximus Corvus, who had been consul six times.[945] In the case of Corvus, however, his consulships were spread out over the course of forty-nine years,

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[942] Livy 38.56.12: *castigatum enim quondam ab eo populum ait, quod eum perpetuum consulem et dictatorem vellet facere*; Val. Max. 4.1.6: *voluerunt ei continuum per omnes vitae annos consulatum perpetuamque dictaturam tribuere*. See Dio 17.57.55-56 on the apparent fear back in Rome that Africanus would in fact return as a tyrant. See also Jashemski 1966: 97; Coudry 2016: 45.
[943] See the sources listed in *MRR* 1.550.
[944] Plut. *Mar*. 12.1: καὶ τὸ δεύτερον ὕπατος ἀπεδείχθη, τοῦ μὲν νόμου κωλύοντος ἀπόντα καὶ μὴ διαλιπόντα χρόνον ὡρισμένον αὖθις αἱρεῖσθαι, τοῦ δὲ δήμου τοὺς ἀντιλέγοντας ἐκβαλόντος. ἡγοῦντο γὰρ οὔτε νῦν πρῶτον εἴξειν τῷ συμφέροντι τὸν νόμον.
[945] Corvus was consul in 348, 346, 343, 335, 300, and suffect consul for 299. For the sources on these dates, see *MRR* 1.129, 131-132, 140, 172, and 173.

and only his final two terms were consecutive, while Marius held five of his consulships in "a single sequence."[946]

In his opposition to Pompey's commands in the *lex Gabinia*, Catulus (according to Dio) spoke disparagingly of those holding "so many commands continuously" (τοσαύτας κατὰ τὸ ἑξῆς ἀρχὰς), giving the examples of Marius receiving multiple commands and six consulships "in the shortest period of time" (ἐν βραχυτάτῳ), as well as Sulla "wielding *imperium* for so many years in succession" (τοσούτοις ἐφεξῆς ἔτεσι τὴν ἀρχὴν τῶν στρατοπέδων), before then becoming dictator and even consul again![947] Multiple sources go into great detail about the honors granted to Julius Caesar (even if they do not always agree on the specific details) and highlight the extraordinary nature of Caesar's consecutive consulships and the extensions of his dictatorship, which was eventually granted indefinitely. Plutarch states that Caesar was granted his second dictatorship in late 48 but also that his appointment was to last for an entire year, something which "had never happened before."[948] Cassius Dio further says that Caesar was granted the right to remain consul for five years "continuously" (ἐφεξῆς) and to wield tribunician power for life, which was "permitted for no one" (ὃ μηδενὶ ἐξῆν).[949] As for Caesar remaining in the dictatorship for a year instead of the customary six months, Dio states that this was "contrary to all precedent."[950] Over a year later, in 46, Dio mentions very briefly that Caesar was appointed

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[946] Plut. *Mar*. 28.6: οὐδενὶ μέντοι τῶν πρὸ αὐτοῦ πλὴν μόνῳ Κορβίνῳ Οὐαλλερίῳ τοσαύτας ὑπατείαςἔδωκεν ὁ δῆμος. … Μάριος δὲ μετὰ τὴν πρώτην τὰς πέντε ῥύμῃ μιᾷ τύχης διέδραμε. Plutarch mistakes Corvus' name, however, with that of his son, M. Valerius Maximus Corvinus (cos. 312, II. 289, III. 286). See *Fast. Tr.*, p. 95, 97; *MRR* 1.171-170n. 2.

[947] Dio 36.31.3-4: φημι δεῖν μηδενὶ ἑνὶ ἀνδρὶ τοσαύτας κατὰ τὸ ἑξῆς ἀρχὰς ἐπιτρέπειν. … οὔτε γὰρ τὸν Μάριον ἄλλο τι ὡς εἰπεῖν τοιοῦτον ἐποίησεν ἢ ὅτι τοσούτους τε ἐν ὀλιγίστῳ χρόνῳ πολέμους ἐνεχειρίσθη καὶ ὕπατος ἑξάκις ἐν βραχυτάτῳ ἐγένετο, οὔτε τὸν Σύλλαν ἢ ὅτι τοσούτοις ἐφεξῆς ἔτεσι τὴν ἀρχὴν τῶν στρατοπέδων ἔσχε καὶ μετὰ τοῦτο δικτάτωρ, εἶθ᾽ ὕπατος ἀπεδείχθη.

[948] Plut. *Caes*. 51.1: οὐδέποτε τῆς ἀρχῆς ἐκείνης πρότερον ἐνιαυσίου γενομένης.

[949] Dio 42.20.3-4: ὕπατός τε γὰρ ἔτη πέντε ἐφεξῆς γενέσθαι καὶ δικτάτωρ οὐκ ἐς ἕκμηνον ἀλλ᾽ ἐς ἐνιαυτὸν ὅλον λεχθῆναι ἔλαβεν, τήν τε ἐξουσίαν τῶν δημάρχων διὰ βίου ὡς εἰπεῖν προσέθετο … ὃ μηδενὶ ἐξῆν.

[950] Dio 42.21.1-2: αὐτὸν μὲν τὸν δικτάτορα ἐς ἐνιαυτὸν παρὰ πάντα τὰ πάτρια λεχθῆναι γνόντες.

to the dictatorship for ten years in advance, then going on to list a slew of other honors accorded to him.[951] If a year-long dictatorship was contrary to all precedent, then it seems odd for Dio to make such passing reference to a tenfold increase in Caesar's tenure as dictator. According to Wilson, however, this may in fact be a rhetorical strategy on the part of Dio, who was attempting to illustrate that the Senate had showered Caesar with so many excessive honors that even a measure as extraordinary as a ten-year dictatorship seemed to be "thrown onto the heap" and buried under sycophantic gifts.[952] Indeed, Dio goes on to say that even Caesar himself came to realize that the honors bestowed on him were excessive and granted to him for the purpose of flattery, not for his merits.[953] Eventually, Caesar wielded not only continued consulships (*continuum consulatum*) but also a perpetual dictatorship, which Plutarch and Cassius Dio compared to a monarchy (μοναρχίαν) and a tyranny (τυραννίς), since it was now beyond accountability (ἀνυπευθύνῳ) and devoid of term limits (ἀκατάπαυστον).[954] The legacy of *continuatio* culminated in Augustus himself, who, like Pompey, began his career in extraordinary commands and held nearly unbroken chains of *imperium* for the vast majority of his political career, not only during the Second Triumvirate, but also nine years of continued consulships (31-23).[955]

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[951] Dio 43.14.4: ἔτη καὶ δικτάτορα.
[952] Wilson 2021: 312-313.
[953] Dio 43.15.1-2: καὶ διὰ τοῦτο καὶ ὑπερόγκους οἱ τιμὰς κολακείᾳ ἀλλ᾽ οὐκ εὐνοίᾳ ἐψηφισμένους.
[954] Livy *Per.* 116: *dictator in perpetuum*; Suet. *Iul.* 76.1: *continuum consulatum, perpetuam dictaturam*; Plut. *Caes.* 51.7: καὶ τῶν ἐμφυλίων πολέμων καὶ κακῶν ἀναπνοὴν ἡγούμενοι τὴν μοναρχίαν, δικτάτορα μὲν αὐτόν ἀπέδειξαν διὰ βίου τοῦτο δ᾽ ἦν ὁμολογουμένη τυραννίς, τῷ ἀνυπευθύνῳ τῆς μοναρχίας τὸ ἀκατάπαυστον προσλαβούσης; Dio 44.8.4: ὅτι καὶ δικτάτωρ διὰ βίου μετὰ ταῦτα ἀποδειχθεὶς ἠνέσχετο; 46.17.5: τῆς βουλῆς εἴκειν, οὕτως ὥστε τά τε ἄλλα καὶ δικτάτορα αὐτὸν διὰ βίου εἶναι τῇ τε σκευῇ τῇ τῶν βασιλέων χρῆσθαι ψηφίσασθαι. See also Joseph. *AJ* 14.211; App. *BC* 2.106.
[955] Vell. 2.89.5: *continuaret Caesar*; Suet. *Aug.* 26.2: *continuavit*. See also *MRR* 2.336, 357, 370, 378, 385, 390, 395, 398, 406, 410, 414, 416, 420.

2. Prorogation

As stated in chapter 4, the first instance of prorogation occurred in 326, at the expiration of the term of office for one of the previous year's consuls, Q. Publilius Philo, who was besieging Neapolis. Not wishing to remove a commander from his theater of operations, especially when he was so close to victory, the Senate induced one of the tribunes to propose to the people, who agreed, that Philo's *imperium* be extended (*prorogatum*) until the siege of Neapolis was complete.[956] According to Livy, then, prorogation of *imperium* was first achieved through popular vote. Polybius, on the other hand, outright states that the Senate had the absolute authority (κυρίαν) either to replace a consul or praetor (στρατηγὸν) at the end of his annual term of office or to retain the existing commander (ὑπάρχοντα) in his post; that is, to prorogue his *imperium*.[957] From here it seems that there is a discrepancy between Livy and Polybius regarding whether prorogations originated from the popular assemblies or senatorial decree. According to Kloft, however, this apparent discrepancy may actually be an indication of consensus between the assemblies and the Senate, wherein certain leaders originally had so much support that it made "popular resolutions for the prorogation appear superfluous," while over time senatorial resolution gradually became rooted in *consuetudo*. And yet, should the consensus ever be broken, the purview of assigning prorogations ultimately reverted to the people.[958]

Polybius' use of ὑπάρχοντα can also be taken to refer to a "subordinate colleague," especially in contrast to the preceding mention of the στρατηγὸν, thus not only alluding to the hierarchical relationship between elected magistrates and promagistrates, but also connecting the

[956] Livy 8.23.11-12 (*pro consule*), 26.7 (*prorogatio imperii*).
[957] Plb. 6.15.6: τοῦ γὰρ ἐπαποστεῖλαι στρατηγὸν ἕτερον, ἐπειδὰν ἐνιαύσιος διέλθῃ χρόνος, ἢ τὸν ὑπάρχοντα ποιεῖν ἐπίμονον, ἔχει τὴν κυρίαν αὕτη.
[958] Kloft 1977: 54-56.

use of prorogation to promagistracies.[959] Thus, Q. Fabius Maximus Gurges is specifically described as wielding proconsular *imperium* (ἀντὶ ὑπάτου ἄρξαι) after receiving his prorogation for 291.[960] Similarly, Plutarch states that M. Claudius Marcellus (cos. 222) received a proconsular command (ἀνθύπατος ἀναγορευθεὶς) in 215 following his abdication from the consulship in the same year after his election was determined to be *vitio creatus*.[961]

As discussed above, Seneca (*Ben.* 3.23.2-3) stated that the *extraordinaria imperia* of Publius Cornelius Scipio (father of Scipio Africanus) were "continued" (*continuet*), though this is actually a reference to the prorogations that Scipio received from 217 to his death in 211.[962] Although our Greek sources do not use any term equivalent to *extraordinaria* for Scipio's commands, they do describe the irregularity of his prorogation. During his consular term of 218, Scipio split his forces into two, sending one half to Spain under the command of his legate and younger brother, Gnaeus, while Publius himself took the other half to confront Hannibal in northern Italy.[963] Although Hannibal defeated both consular armies at Ticinus and Trebia, the Roman forces under Gnaeus Scipio were more successful in Spain.[964] Consequently, the Romans decided "not to neglect" the Iberian theater, but rather to capitalize on the momentum of Gnaeus' success and send Publius to rejoin his brother "as they originally planned."[965] Polybius's account

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[959] For other uses of the verb ὑπάρχω and the noun ὕπαρχος to describe subordinate commands or promagistrates, see *Epig. Gr.* 906; App. *BC* 5.26 (ὕπαρχος Ἀντωνίου); Dio 36.36.1 (καὶ ναυάρχους καὶ ὑπάρχους), 3 (ἄρχοντας αὐτοὺς ἢ ὑπάρχοντας, καὶ στρατηγοὺς ἢ ὑποστρατήγους); 72.34.5 (Ἀντωνίνῳ … ὑπάρξας).
[960] Dio 8.36.31; Zon. 8.1.
[961] Plut. *Marc.* 12.2. See also Livy 23.31.13: *vitio creatum*.
[962] For 217, Pl. 3.97.1-5; Livy 22.22.1 (*prorogato imperio … senatu missus*); App. *Ib.* 15; *Hann.* 8; Oros. 4.14.49; Zon. 9.1. For 216, Livy 23.26.1-2. For 215, Livy 23.48.4; Oros. 4.16.13; Zon. 9.3. For 214, Livy 24.41.1-2. For 213, Livy 24.48.1; App. *Ib.* 16. For 212, Livy 25.3.5-6 (*imperium provinciaeque … prorogatae*); Zon. 9.5. For 211, Livy 25.34.11; Val. Max. 2.7.15; 3.7.1; Eutrop. 3.14.2; Oros. 4.17.12-13.
[963] Plb. 3.49.1-4, 56.5; Livy 21.32.1-5, 60.1-2; 28.42.20; App. *Ib.* 14; *Hann.* 5; Amm. Marc. 15.10.10-11.
[964] On the battle at Ticinus, see Plb. 3.62.1-65.11; 10.3.3-7; Nepos 23.4.1; Livy 21.45.4-47.1; Sen. *Ben.* 3.33.1; Flor. 1.22.10; App. *Hann.* 5; Ampel. 46.5; Dio 14 fr. 57.4-6a; *Vir. Ill.* 49.4; Eutrop. 3.9.1; Oros. 4.14.6; Macrob. 1.11.26; Zon. 8.23; on the battle at Trebia, see Plb. 3.70-75.3, 108; Nepos 23.4.2; Livy 21.53.-57.3; Front. *Str.* 2.5.3; Plut. *Fab.* 3.4; Flor. 1.22.12; App. *Hann.* 6-7; Ampel. 46.5; Eutrop. 3.9.1; Oros. 4.14.7; Zon. 8.24.
[965] Plb. 3.97.1-2: οἱ δ᾽ ἐκ τῆς συγκλήτου πυθόμενοι τὸ γεγονὸς προτέρημα διὰ τοῦ Γναΐου περὶ τὴν ναυμαχίαν καὶ νομίσαντες χρήσιμον εἶναι, μᾶλλον δ᾽ ἀναγκαῖον τὸ μὴ προΐεσθαι τὰ κατὰ τὴν Ἰβηρίαν … καὶ στρατηγὸν

is significant because it emphasizes that the second dispatch of Publius Scipio to Spain was an *ad hoc* decision due to unexpected developments. The implication here is that ordinary procedure would not have resulted in Publius rejoining his brother in Spain at the end of his consular term. Whereas Polybius is not specific in regard to the nature of Scipio's command, Appian gives a more precise description of the legal irregularities of the prorogation (App. *Ib.* 3.15), stating that, after Scipio's office had expired (ληγούσης τῆς ἀρχῆς τῷ Ποπλίῳ) and new consuls were sent out, the people sent Scipio back to Spain as a proconsul (αὐτὸν δὲ ἀνθύπατον ἀποφήναντες ἐς Ἰβηρίαν αὖθις ἔστειλαν).[966] Here, then, in Appian we have direct mention to the process of prorogation: the termination of regular office and the extension of *imperium* in promagisterial form (i.e., proconsular instead of consular *imperium*).

Other references to prorogations by Greek and Roman writers followed the example laid out above in Polybius and Appian's description of P. Cornelius Scipio's proconsular command in Spain, specifically the acknowledgment of the end of a consular term and the bestowal of proconsular *imperium*. The consuls of 217, for instance, Cn. Servilius Geminus and M. Atilius Regulus, both received proconsular appointments (ἀντιστράτηγοι) after their office ended for 216, according to Polybius, but also operated independently (κατὰ τὴν ἑαυτῶν γνώμην) in their commands, that is, under their own auspices and not under the command of the consuls.[967] According to Livy (32.1.6), T. Quinctius Flamininus (cos. 197) received a prorogation (*prorogarunt imperium*) at the end of his consular term in 198. Plutarch, on the other hand, states

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ἐπιστήσαντες Πόπλιον Σκιπίωνα κατὰ τὴν ἐξ ἀρχῆς πρόθεσιν, ἐξαπέστελλον μετὰ σπουδῆς πρὸς τὸν ἀδελφὸν Γνάιον. See also Plb. 10.4.5: Here, Polybius states that Scipio was "appointed as general" and sent to Spain: γὰρ πατέρα τότε πλεῖν συνέβαινεν εἰς Ἰβηρίαν στρατηγὸν καθεσταμένον.

[966] See also App. *Hann.* 8, where Appian similarly, yet more succinctly mentions Scipio's proconsular appointment: ὁ δὲ Σκιπίων ἀνθύπατος αἱρεθεὶς ἐς Ἰβηρίαν διέπλευσέ.

[967] Plb. 3.106.2: οἱ δὲ προϋπάρχοντες ὕπατοι, Γνάιος Σερουίλιος καὶ Μάρκος Ῥήγουλος ὁ μετὰ τὴν Φλαμινίου τελευτὴν ἐπικατασταθείς, τότε προχειρισθέντες ὑπὸ τῶν περὶ τὸν Αἰμίλιον ἀντιστράτηγοι καὶ παραλαβόντες τὴν ἐν τοῖς ὑπαίθροις ἐξουσίαν ἐχείριζον κατὰ τὴν ἑαυτῶν γνώμην τὰ κατὰ τὰς δυνάμεις. Regulus was actually elected as a suffect consul, following the death of C. Flaminius at Lake Trasimene in 217 (see *MRR* 1.242).

that Flamininus sent friends to induce the Senate to "extend" and "maintain" his command in the war against Macedon.[968] But, as we see with other aspects of extraordinary commands, Greek writers are at times inconsistent in their depiction of prorogation. Appian, for instance, states outright in his discussion of the proconsular commands of Q. Caeclilius Metellus Pius (pr. 89) and L. Cornelius Sulla (cos. 88) in 83 that prorogued magistracies retained their commands until they returned to Rome (ἀνθύπατος ἔτι ὤν: ἔστι γὰρ εἶναι τοῖς αἱρεθεῖσιν, ἔστε ἐπανέλθοιεν ἐς Ῥώμην).[969] On the one hand, Appian seems to be claiming erroneously that prorogations were open-ended or automatically renewed, but he may instead be confusing the strictures of prorogation with the legal termination of *imperium* when a commander crossed the *pomerium* into Rome.[970]

According to Suetonius, C. Octavius, father of Augustus, received an *extra ordinem* assignment from the Senate when he was prorogued for two years (59-58) to govern Macedonia after his praetorship in 60 (Suet. *Aug.* 3.1). At the conclusion of their consular terms in 58, L. Calpurnius Piso and A. Gabinius received *extra ordinem* commands, which included successive prorogations until 55.[971] Because prorogations could continue as long as deemed necessary, many extraordinary commands were established with set terms of office in order to provide some vestige of limitations to irregular magistracies. As one example, the famous *lex Gabinia*, which granted Pompey his command against the pirates in 67, specified a term of three years.[972] The

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[968] Plut. *Flam.* 7.1-2: ἐπιψηφίσηται ἡ σύγκλητος χρόνον … τοῦ πολέμου τὴν ἡγεμονίαν ἐκείνῳ φυλαχθῆναι. See also Plb. 18.11.2, 12.1; Zon. 9.16.

[969] This example also demonstrates that any command could be prorogued, such as those granted to *privati* or, in the case of Metellus, augmented *imperium* (that is, proconsular *imperium* granted to a former praetor), as Kloft (1977: 15) argues.

[970] On Metellus, see App. *BC* 1.80; on Sulla, 1.81: ἐδόκει γὰρ δὴ καὶ ὁ Σύλλας, ἀνθύπατος ἐπὶ Μιθριδάτῃ γενόμενος, οὐκ ἀποθέσθαι πω τὴν ἀρχήν, εἰ καὶ πολέμιον αὐτὸν ἐψηφίσατο Κίννας.

[971] Cic. *Dom.* 23-24 (these commands were also granted *sine sorte* and included *imperium infinitum*), 55; *Piso* 88; Ascon. 1-2; App. *BC* 5.10; *Syr.* 51.

[972] On the three-year term in the *lex Gabinia*, see App. *Mith.* 94; Dio 36.23.3, 37.1.

agrarian law unsuccessfully proposed by P. Servilius Rullus in 63 stipulated that its decemvirate would serve for a term of five years.[973] Seven years later, in 57, Pompey's grain commission was similarly limited to five years.[974] Dio records, for instance, that M. Antony, in a speech at the funeral of Caesar in 43, reminded the people that they had granted Caesar "the right to hold office for a very long time" (ἐπὶ πλεῖστον ἄρξαι), something which had been forbidden since the foundation of the Republic, then specifying that Caesar had held *imperium* for eight years in succession prior to his dictatorship in 49, which corresponded to his time spent as a proconsul in Gaul.[975] In any case, in the late Republic, prorogations were usually granted in finite amounts (three to five years) and required the Senate's approval for renewal or further extension, but we even find reference to extraordinary commands and prorogations in the early Principate.[976] During the reign of Tiberius, according to Suetonius, prorogations and other *extraordinaria bella* were under the purview of Senate (Suet. *Tib.* 30), while Tacitus points out that Claudius established quaestorships *extra ordinem* that served for terms of three years.[977]

3. Augmented *imperium*

Many commands that were *extra ordinem* and *extraordinarium* involved the conferment of *imperium* beyond what the commander was legally entitled to wield, based either on his current progress through the *cursus honorum* or the hierarchy of auspices among magistrates (e.g., the *maius imperium* of consuls compared to the lesser, or *minus imperium* of praetors). One

[973] Cic. *Agr*. 2.32: *definit in quinquennium*.
[974] Cic. *Att.* 4.1.6-7; *Dom.* 18-20, 25 (describing the grain commission as *extra ordinem*); Livy *Per*. 104; Dio 39.9.3.
[975] Dio 43.44.2: ἐπὶ πλεῖστον ἄρξαι αὐτῷ προσετάξατε: ὅπερ, ἀφ᾽ οὗ ἐδημοκρατήθημεν, οὐδενὶ ἄλλῳ ὑπῆρξε, λέγω δὲ τὸ ὀκτὼ ἔτεσιν ὅλοις ἐφεξῆς ἡγεμονεῦσαι.
[976] See Plut. *Caes.* 21.3, 29.5; *Cat. Min.* 41.1; *Comp. Ages. et Pomp.* 3.5; *Pomp.* 56.1; App. *BC* 2.24-25; Dio 39.33.3-4, 38.5-6.
[977] Tac. *Ann.* 13.29. On the reference to three-year terms, see Dio 60.24.1-2.

of the earliest examples where the elevation of a magistrate's *imperium* is described as extraordinary in some way is that of M. Minucius Rufus (cos. 221), the *magister equitum* under the dictator, Q. Fabius Maximus Verrucosus, in 217. The Roman people, impatient with Fabius' cautious tactics, elevated Minucius' *imperium* to be equal to that of the dictator, an action that both Polybius and Plutarch emphasize had never happened before, while Dio states that Minucius had "received his prize through insubordination."[978] According to Vervaet, the plebiscite elevating Minucius' authority, the *lex Metilia*, served as the precedent for future augmentations of *imperium*, especially in the frequent use of proconsular praetors during the Second Punic War and afterward.[979] In 191, for example, Plutarch states that, because the "experienced commanders" (ἡγεμονικωτάτων ἀνδρῶν) were engaged in the Syrian War or repelling the Boii in the north, the Romans needed a competent commander to fight a new war in Spain. Accordingly, the Romans dispatched the praetor, L. Aemilius Paullus, to Spain, but with twelve lictors, specifically "so that his office would have the rank of a consul."[980] Indeed, this privilege does not seem to have been honorary, since Livy confirms that Paullus received a prorogation and served as proconsul for 190 and 189.[981]

For more extreme examples of augmented *imperium*, among Pompey's many powers in the *lex Gabinia* of 67 was the authority to designate *legati* with *imperium pro praetore*, many of whom were also *privati*.[982] Quaestors also were legally not allowed to wield *imperium*, being

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[978] Plb. 3.103.3-4: ὥστε τότε γενέσθαι τὸ μηδέποτε γεγονός: αὐτοκράτορα γὰρ κἀκεῖνον κατέστησαν … καὶ δὴ δύο δικτάτορες ἐγεγόνεισαν … ὃ πρότερον οὐδέποτε συνεβεβήκει παρὰ Ῥωμαίοις; Plut. *Fab.* 9.3: ἀπὸ τῆς αὐτῆς ἐξουσίας τῷ δικτάτορι, πρᾶγμα μὴ πρότερον ἐν Ῥώμῃ γεγονός; Dio 14 fr. 57.17: ἅτε καὶ τῆς ἀπειθαρχίας ἆθλον τὴν πρὸς τὸν δικτάτορα ἰσομοιρίαν προσλαβών.
[979] Vervaet 2007: 197-232; 2012: 46-47.
[980] Plut. *Aem.* 4.1: ὥστε τῆς ἀρχῆς ὑπατικὸν γενέσθαι τὸ ἀξίωμα.
[981] Livy 37.2.11: *duas Hispanias Sardiniamque obtinentibus prorogatum in annum imperium est et idem exercitus decreti*; 46.7: *ductu L. Aemilii proconsulis*. See also Oros. 4.20.23; *MRR* 1.357. For the sources and discussion of Aemilius' proconsular command into 189, see *MRR* 1.362, 363n. 5.
[982] Plut. *Pomp.* 25.3, 26.2-5; Flor. 1.41.7-10; App. *Mith.* 94-95; Dio 36.23.4, 37.1.

non-curule magistrates, but Cn. Calpurnius Piso and M. Porcius Cato received propraetorian *imperium* when granted their quaestorships *extra ordinem* in 65 and 58, respectively.[983] Similarly, had Caesar received his extraordinary command in Egypt in 65, he would have wielded propraetorian *imperium*, despite only having held the aedileship that same year and having never been a praetor.[984] Even the father of the future *princeps*, C. Octavius was granted proconsular *imperium extra ordinem* at the conclusion of his praetorship in 60.[985] In July of 47, Julius Caesar appointed a cousin, Sextus Julius, as governor of Syria with propraetorian *imperium*, despite only being a quaestor (ταμίᾳ). Josephus describes Sextus in more generic terms as a governor, but both Appian and Dio explicitly refer to him as leading troops.[986] A mere four years later, in 43, both C. Cassius Longinus and M. Iunius Brutus were given proconsular commands that far exceeded their station as elected praetors the previous year.[987]

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[983] On Piso, *CIL* 1^2.749 (*quaestor pro pr(aetore)*); Sall. *Cat.* 19.1 (*quaestor pro praetore missus*); Suet. *Iul.* 9.3 (*extra ordinem data sit*). On Cato, Cic. *Dom.* 20 (*bello gerendo M. Catonem praefecisti*), 21-23 (*extra ordinem*); Strab. 14.684 (Strabo states that Cyprus became a "praetorian province" after Cato's annexation: ἐπαρχία ἡ νῆσος καθάπερ καὶ νῦν ἐστι στρατηγική); Vell. 2.45.4 (*quaestor cum iure praetorio*).
[984] Suet. *Iul.* 11: *extraordinarii imperii.*
[985] *CIL* 6.1311: *pr(aetor) proco(n)s(ul) imperator appellatus / ex provincia Macedonia*; Vell. 2.59.2; Suet. *Aug.* 3.1: *extra ordinem*.
[986] Joseph. *AI* 14.160 (διέποντι τὴν Συρίαν), 170 (Σέξστος … ὁ τῆς Συρίας ἡγεμὼν); *BI* 1.205 (διοικοῦντι τὴν Συρίαν); App. *BC* 3.77, 4.58 (τὸ δὲ ἀξίωμα εἶχε … Σέξστος Ἰούλιος … τὸ τέλος ἐς τρυφὴν ἐπήγετο ἀσχημόνως); Dio 47.26.3 (ἦρχε δὲ τῶν Σύρων Σέξτος: τούτῳ γὰρ καὶ ταμίᾳ καὶ συγγενεῖ αὐτοῦ ὄντι ὁ Καῖσαρ πάντα τὰ τῇδε), 7 (τὰ τοῦ Σέξτου στρατόπεδα). Cf. Caes. *BAlex.* 66: *Sextum Caesarem … legionibus Syriaeque praeficit*.
[987] Plut. *Brut.* 19.3: Βρούτῳ μὲν γὰρ ἐψηφίσαντο Κρήτην, Κασσίῳ δὲ Λιβύην. App. *BC* 3.8, 12, 16, 35, App. 3.63: τούς τε ἄλλους, ὅσοι τινὸς ἔθνους ἢ στρατοῦ Ῥωμαίων ἄρχουσιν ἀπὸ τῆς Ἰονίου θαλάσσης ἐπὶ τὴν ἕω, πάντας ὑπακούειν ἐς ὅ τι προστάσσοι Κάσσιος ἢ Βροῦτος; 3.64; 4.57, 58: ὅσοι Ῥωμαίοις ἡγεμονεύουσιν ἐθνῶν ἢ στρατοπέδων ἀπὸ τοῦ Ἰονίου μέχρι Συρίας, ὑπακούειν, ἐς ὅ τι κελεύοι Κάσσιος ἢ Βροῦτος; 4.94: ἡ βουλὴ καὶ ἀρχὰς ἐθνῶν τῶν μεγίστων καὶ ἡγεμονίας ἔδοσαν ἡμῖν καὶ γῆς ἀπέφηναν ἡγεῖσθαι πάσης ἀπὸ τοῦ Ἰονίου μέχρι Συρίας; Dio 46.40.3; 47.21.1-2, 28.5: (for Cassius) ἡ βουλὴ τήν τε ἀρχὴν τῆς Συρίας ἐβεβαίωσε. On the nature of Brutus and Cassius' *maius imperium*, see Last 1947: 162; Ehrenberg 1957: 134. See also Boak 1918: 24-25; Straumann 2016: 116; Hodgson 2017: 255.

4. Violations of the *cursus honorum*

Greek and Roman sources also take note of the irregularities in cases where individuals were elected to magistracies in various ways that circumvented the legal requirements for office, the *cursus honorum*. In 148, Scipio Aemilianus was elected consul for the following year, despite the fact that he only sought the aedileship at the time and was too young for high office, which both Plutarch and Appian remark was "contrary to law."[988] When the consuls for that year protested that Aemilianus could not legally hold the consulship, the tribunes retorted that the people were the final authority in elections and that "they could set aside or uphold whichever law they wished."[989] Then, after relating how the Senate and consuls ultimately acquiesced to the demands of the tribunes, Appian states that it was as if the Roman government had said, "Let the laws sleep today."[990] In this way, Aemilianus' consulship may have been "contrary to law" but, according to the Roman people, it was not illegal.

In a more egregious circumvention of the *cursus honorum*, Pompey secured election to the consulate for 70, regardless of the fact that he was too young for high office and, as Dio says, had never even held an elected office.[991] Appian underscores the illegality in Pompey's lack of previous office by pointing out that his colleague in office, M. Licinius Crassus, had at least been praetor in accordance with the Sullan law (κατὰ τὸν νόμον Σύλλα), whereas Pompey had been neither a praetor nor even quaestor and was only thirty-four years old.[992] All of Pompey's other

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[988] Plut. *Mor*. 200A, 804F-805A: ὕπατον ἀπέδειξε παρὰ τὸν νόμον; *Mar*. 12.1: παρὰ τοὺς νόμους ὕπατον; App. *Pun.* 112: παρανόμου δ᾽ ὄντος.
[989] App. *Pun.* 112: καὶ ἐκεκράγεσαν ἐκ τῶν Τυλλίου καὶ Ῥωμύλου νόμων τὸν δῆμον εἶναι κύριον τῶν ἀρχαιρεσιῶν, καὶ τῶν περὶ αὐτῶν νόμων ἀκυροῦν ἢ κυροῦν ὃν ἐθέλοιεν. Dio (fr. 70.2-3) and Zonaras (9.29) also acknowledge that Aemilianus' youth disqualified him for office but only Zonaras mentions the legal requirement (καίτοι τῆς ἡλικίας μὴ ἐφιείσης αὐτῷ τὴν ἀρχήν). See also Boak 1918: 2; Astin 1958: 22, 36; Carney 1959: 74; Straumann 2016: 39.
[990] App. *Pun.* 112: κοιμάσθων οἱ νόμοι τήμερον.
[991] Plut. *Pomp.* 22.1; App. *BC* 1.121; 3.88; Dio 77.5.5-6: καὶ ὑπάτευσε μηδεμίαν ἄλλην ἀρχὴν προάρξας, ὥσπερ ὁ Πομπήιος.
[992] App. *BC* 1.121: ὁ δὲ Πομπήιος οὔτε στρατηγήσας οὔτε ταμιεύσας ἔτος τε ἔχων τέταρτον ἐπὶ τοῖς τριάκοντα.

commands, offices, and magistracies were also violations of the *cursus honorum*, as he had held none of the prerequisite offices before his first consulship in 70, nor did he reach the required age until 64, at which point he had held proconsular *imperium* for sixteen years.[993] To the contrary, Cato refused an *extra ordinem* candidacy to the praetorship after his extraordinary quaestorship in 56. Despite the fact that Cato's quaestorship in 58 was already *extra ordinem* (Cic. *Dom.* 21, 23), the Senate's offer in 56 would still be a breach of the *cursus honorum*, since it would require Cato to skip the aedileship.[994] Octavian, the future Augustus, followed Pompey's example in receiving his first grant of propraetorian *imperium* at the age of nineteen in 43, after he too raised a private army under his own initiative, which, as we have seen, Cicero described as *extraordinarium* (Cic. *Phil.* 11.20). In the same year, however, Octavian also obtained the consulship, despite being even farther below the legal age and without holding any previous public offices.[995] As with Aemilianus, our sources all mention that Octavian was too young for the consulship, being only twenty at the time, though Plutarch alone explicitly states that this would be "contrary to law."[996] At first, when Octavian was only granted propraetorian *imperium* as a *privatus*, the Senate additionally assured him that he would be granted the right to stand for the consulship ten years before the legal age.[997] Even with this dispensation, which itself was irregular, it still meant that Octavian would need to wait another decade before standing for the consulship. Unwilling to tolerate this delay, Octavian insisted on seeking the consulship

[993] On Pompey's violations of the *cursus honorum*, see Cic. *Man.* 61-62; Sall. *Hist.* 2.82.1; Livy *Per.* 91; Vell. 2.30.2-3; Val. Max. 8.15.8; Sen. *Ben.* 5.16.4; Plut. *Pomp.* 14.1-2; App. *BC* 1.80; Dio 36.25.2-3, 27.4, 28.3; Eutrop. 6.1; Oros. 5.23.8.
[994] Val. Max. 4.1.14; Plut. *Cat. Min.* 39.3. See Astin 1958: 30-41.
[995] Cic. *ad Oct.* 4; Aug. *Res Gest.* 1.1; Livy *Per.* 118; Vell. 2.62.1; Plut. *Cic.* 45.1-5; Tac. *Ann.* 1.10; Suet. *Aug.* 10.3; App. *BC* 3.51; Dio 46.29.2, 5.
[996] Plut. *Brut.* 27.1: ὑπατείαν τε μνώμενος παρὰ νόμον; *Cic.* 45.1. See also App. *BC* 3.82; Dio 46.41.5.
[997] App. *BC* 3.51: τὴν ὑπατείαν αὐτὴν μετιέναι τοῦ νόμου θᾶσσον ἔτεσι δέκα; Dio 46.29.2: ἄλλας ἀρχὰς δέκα ἔτεσι θᾶσσον παρὰ τὸ νενομισμένον. Dio refers to the minimum age requirement for consuls as a matter of custom (νενομισμένον), not law.

immediately after the Battle of Mutina in March of 43. Appian states that the Senate at first resisted Octavian's request to stand for the consulship, but Octavian in turn sent a number of his centurions to persuade it, who cited several examples where individuals had been allowed to stand for the consulship before the legal age, then threatened to supersede the Senate and confer the consulship upon Octavian through "an extraordinary election" (ἐξαιρέτῳ χειροτονίᾳ).[998] According to Suetonius and Dio, however, one of the centurions actually gestured toward his sword, saying "If you do not elect him, this will."[999] The Senate eventually acceded, and Octavian was thereafter elected as consul though he had never held a previous elected office and was, as Plutarch puts it, a "mere youth," being more than twenty years below the required age of the office.[1000] Yet, whereas Aemilianus gained his special dispensation for the consulate by popular acclaim, Octavian secured his exemption for the *cursus* through blatant threats.

5. *Privati*

One of the most commonly identified aspects of extraordinary commands was the appointment of *imperium* to commanders who did not hold elected office (*privati cum imperio*). An early example of the use of *privati* in Greek sources is P. Cornelius Scipio Africanus, who in 211 volunteered himself for the vacant proconsular command in Spain after the deaths of his father and uncle there the previous year. The Roman people enthusiastically voted to confer

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[998] App. *BC* 3.87, and esp. 88: ὑποκριναμένης δὲ τῆς βουλῆς τὴν ἡλικίαν … καὶ ὁ στρατὸς πυθόμενος ἔτι μᾶλλον ὠργίζοντο καὶ ἄγειν σφᾶς εὐθὺς ἐκέλευον ἐς τὴν πόλιν, ὡς αὐτοὶ χειροτονήσοντες αὐτὸν ἐξαιρέτῳ χειροτονίᾳ. In particular, the centurions cited the examples of examples M. Valerius Maximus Corvinus (cos. 348), Scipio Africanus (cos. 205), Scipio Aemilianus (cos. 147); Pompey (cos. 70), and P. Cornelius Dolabella (cos. 44). There is no conclusive evidence that Dolabella was under the legal age at the time of his consulship in 44. On the sources for each examples, see *MRR* 1.129-130, 301, 463; 2.125, 314-316. See also McGing 2020: 167n. 45.

[999] Suet. *Aug.* 26.1: *cum quidem cunctante senatu Cornelius centurio, princeps legationis, reiecto sagulo ostendens gladii capulum non dubitasset in curia dicere: "Hic faciet, si vos non feceritis*;" Dio 46.41.3-43.6, esp. 43.4: καὶ τὸ ξίφος λαβών … ἥψατό τε αὐτοῦ καὶ εἶπεν ὅτι, 'ἂν ὑμεῖς τὴν ὑπατείαν μὴ δῶτε τῷ Καίσαρι, τοῦτο δώσει.'

[1000] Plut. *Brut.* 27.2: ὑπατείαν ἔλαβεν, οὔπω πάνυ μειράκιον ὤν, ἀλλ᾽ εἰκοστὸν ἄγων ἔτος, ὡς αὐτὸς ἐν τοῖς ὑπομνήμασιν εἴρηκεν; App. *BC* 3.89-94; Dio 46.44.2.

proconsular *imperium* upon Scipio. At this point, Scipio was a *privatus*, had only been elected to the aedileship for 213, and, as Appian remarks, was only twenty-four years old.[1001] Dio specifically states on two occasions that Scipio did not hold the "legal title of a commander" but conducted his Spanish campaign as a "private individual."[1002] Perhaps the most famous *privatus cum imperio* is, of course, Pompey, who held several commands outside of elected magistracies throughout his career, all of which Cicero described as *extra ordinem* (Cic. *Dom.* 18). Beginning in 83, Pompey, though only twenty-three and having not even began his political *cursus*, levied a private army of his own initiative in support of Sulla.[1003] Plutarch remarks specifically that no one had appointed Pompey as a commander or formally granted him *imperium*, but that he had conferred the command upon himself.[1004] Plutarch went on to describe Pompey's activity at this initial stage of his career as "extraordinary" (ὑπερφυεῖς), even in comparison with his later deeds (Plut. *Pomp.* 8.6), which is a comment both on Pompey's accomplishments and the unorthodox nature in which he achieved them.

But Pompey's command was not only unconventional; it was also illegal. Although Sulla greeted him as *imperator* (αὐτοκράτωρ) upon their first meeting, along with other gestures of respect accorded only to commanders wielding *imperium*, Sulla himself had been declared a public enemy in late 87 by the pro-Marian government in Rome.[1005] Thus, Pompey's command

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[1001] App. *Ib.* 18.
[1002] Dio 16 fr. 57.40: μὴ ἐννόμου ἡγεμονίας λαβὼν ὄνομα; 17 fr. 57.56: ὅτι ἰδιώτης τε ὢν ἐστράτευτο καὶ ἐπ᾽ οὐδεμιᾶς ἐννόμου ἡγεμονίας ἐξήταστο. See also Zon. 9.7, 11.
[1003] Cic. *Man.* 61: *privatus*; *Phil.* 5.43-44; Caes. *BAfr.* 22.2: *privatus*; Diod. 38.9; Livy *Per.* 85; Vell. 2.29.1-2; Plut. *Mor.* 203B: μήτε ἄρχων μήτε βουλεύων; App. *BC* 1.80; Dio fr. 107.1.
[1004] Plut. *Pomp.* 6.3: ἐκ τούτου Πομπήϊος ἔτη μὲν τρία καὶ εἴκοσι γεγονώς, ὑπ᾽ οὐδενὸς δὲ ἀνθρώπων ἀποδεδειγμένος στρατηγός, αὐτὸς ἑαυτῷ δοὺς τὸ ἄρχειν. Plutarch seems to imply retrospectively that Pompey's command, though illegal and unofficial at this time, was later considered praetorian in nature, considering his use of the term στρατηγός.
[1005] On Sulla greeting Pompey as *imperator*, as well as rising from his seat, uncovering his head, and dismounting from his horse in Pompey's presence, see Sall. *Hist.* 5.16; Diod. 38.10; Val. Max. 5.2.9; Plut. *Pomp.* 8.1-4; *Crass.* 6.4; *Mor.* 806E; App. *BC* 1.80. On Sulla being declared a public enemy, see Plut. Sull. 22.1; App. *Mith.* 51; *BC* 1.73; Eutrop. 5.7.3. On the use of *imperator* to refer to commanders with *imperium*, see Livy 30.27.5; Ehrenberg

as a *privatus* did not gain any semblance of legality until the following year, 82, when he was dispatched to Sicily by Sulla, who had by then been appointed dictator and had his previous acts as both consul and proconsul retroactively ratified.[1006] Despite this, Pompey's legitimacy as a *privatus cum imperio* was still contested. After seizing Sicily, a group of Mamertines challenged Pompey's jurisdiction over them, citing "an ancient law of the Romans," to which Pompey reportedly replied, "Stop quoting laws to those of us wearing swords!"[1007] The significance of this interaction with the Mamertines shows that the legitimacy of *privati* could be subject to challenge, especially in periods of civil strife, and that the legality of those appointed by the Senate or consular decree was questionable. Pompey continued to receive appointments as a *privatus cum imperio* throughout his career, including his commands against Lepidus and Sertorius in 77, the *leges Gabinia et Manilia* in 67 and 66, as well as his appointment as grain commissioner in 57.[1008]

In 52, M. Tullius Cicero and M. Calpurnius Bibulus were sent as proconsuls to govern Cilicia and Syria respectively. Both men were *privati* at the time of their appointment, as Cicero had been consul in 63 and Bibulus in 59.[1009] Accordingly, Cicero himself described his

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1953: 115-116, 127; Develin 1977a: 110-113; Lintott 1993: 22; Gruen 1995: 542-543; Sumi 2005: 167-168; Hölkeskamp 2010: 113; Steel 2013: 240.

[1006] On Sulla sending Pompey to Sicily, see Plut. *Pomp.* 10.1. On the ratification of Sulla's previous acts as consul and proconsul see Cic. *Agr.* 3.5-6; Plut. *Sull.* 33.1. For more sources on Sulla's dictatorship, see *MRR* 2.65.

[1007] Plut. *Pomp.* 10.2: καὶ Περπέννας μὲν εὐθὺς αὐτῷ Σικελίας ἐξέστη, τὰς δὲ πόλεις ἀνελάμβανε τετρυχωμένας καὶ φιλανθρώπως πάσαις ἐχρῆτο πλὴν Μαμερτίνων τῶν ἐν Μεσσήνῃ, παραιτουμένων γὰρ αὐτοῦ τὸ βῆμα καὶ τὴν δικαιοδοσίαν ὡς νόμῳ παλαιῷ Ῥωμαίων ἀπειρημένα, 'οὐ παύσεσθε,' εἶπεν, ' ἡμῖν ὑπεζωσμένοις ξίφη νόμους ἀναγινώσκοντες.' According to Plutarch (*Pomp.* 11.1), while in Sicily, Pompey received a further command, this time in Africa, from both a senatorial decree and instruction from Sulla (δόγμα συγκλήτου καὶ γράμματα Σύλλα).

[1008] On the command against Lepidus in 77, see Plut. *Sull.* 34.5; *Pomp.* 16.3. On the command against Sertorius in 77, see Cic. *Man.* 62: *privatum pro consule*; *Phil.* 11.18: *privato*; Sall. *Hist.* 2.16-20, 82.3; Livy *Per.* 91; Val. Max. 8.15.8; Plut. *Pomp.* 13.5; 17.4; App. *Ib.* 101; *BC* 1.80, 108; Dio 36.25.3, 27.4; *Vir. Ill.* 77.4; Eutrop. 6.1.2; Oros. 5.23.8. On the commands granted by the *leges Gabinia et Manilia* in 67-66, see the description and sources cited earlier in this chapter, as well as *MRR* 2.143-145, 152, 154; Coudry 2016: 33. On the grain commission in 57, see Cic. *Att.* 4.1.6-7; *Dom.* 3-31, esp. 18-19, and 25: *extra ordinem*; Livy *Per.* 104; Plut. *Pomp.* 49.4-5; App. *BC* 2.18; Dio 39.9.2-3; 54.1.3.

[1009] For sources on Cicero's consulship in 63, see *MRR* 2.164-165; for Bibulus' in 59, *MRR* 2.186.

proconsular command as *extraordinarium* in a letter to Atticus in 51 (Cic. *Att.* 5.9.1). As for Bibulus, his status as a *privatus* was noted explicitly by Dio, who mentions his selection as governor in the context of the *lex Pompeia provinciis*, which forbade former consuls and praetors from taking up provinces within five years of their term of office, thus underscoring the fact that neither Bibulus nor Cicero held an elected or prorogued office in 52.[1010]

As discussed above regarding violations of the *cursus honorum*, in early 43, Octavian gained his first command in a manner reminiscent of Pompey. In November of 44, at the age of nineteen, Octavian raised a private army of his own initiative and marched to Rome where, by January of the following year, the Senate conferred propraetorian *imperium* upon the young *privatus*, a command that Cicero could not deny was *extraordinarium* (Cic. *Phil.* 11.20).[1011] Our sources note not only the irregularity of Octavian's appointment, but also the predicament facing the Roman government. Like Pompey before him, Octavian's army was quite illegal, but the Republic was in the midst of another civil war, in which no advantage could be disregarded.[1012] Furthermore, failing to legitimize Octavian's command of an army he had already raised would risk alienating or even antagonizing the young commander, which would only endanger the Republic further. Thus, Plutarch states that Cicero "persuaded the Senate to vote Caesar the

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[1010] Dio 40.30.1: καὶ ὁ Βίβουλος ἄρξων τῆς Συρίας ἀφίκετο, καίπερ ἐψηφισμένου μηδένα μήτε στρατηγὸν μήθ' ὕπατον μήτε εὐθὺς μήτε πρὸ πέμπτου ἔτους ἐς τὰς ἔξω ἡγεμονίας ἐξιέναι, ἵνα μὴ διὰ τοῦτο σπουδαρχοῦντες στασιάζωσι. It is worth noting, however, that Dio actually characterizes Bibulus arrival to govern Syria as a violation (καίπερ ἐψηφισμένου) of the *lex Pompeia de provinciis*. This seems to be a mistake on Dio's part, since Bibulus was consul in 59, eight years before his governorship of Syria in 51, and did not receive a prorogation or any other form of a promagistracy, thereby allowing more than enough time to be in compliance with the *lex Pompeia*. It is true, as Steel points out, that the *lex Pompeia* in 52 was the legislative confirmation of a consular decree from the previous year (Dio 40.46.2), but even if Bibulus' governorship was formally proposed in 53, this would still account for the required five-year gap following the end of his consulship in December of 59 (Steel 2012: 84-85). On consular dating, see also Ogilvie 1965: 404-405.

[1011] For Octavian raising his army and marching on Rome, see Cic. *Att.* 16.8.2, 11.6; *Fam.* 11.7.2; *Phil.* 3.3; 4.3-4; 5.23, 43-46; *ad Oct.* 4; Nic. Dam. Fr. 130.130-138; Aug. *RG* 1.1; Livy *Per.* 117-118; Vell. 2.61.1-2, 62.1; Tac. *Ann.* 1.10; Suet. *Aug.* 10.3; App. *BC* 3.40-42, 58; Dio 45.12.1-6, 38.3; 49.29.2-6; 55.24.8; Goldsworthy 2014; 103; Hodgson 2017: 224-225.

[1012] Huzar 1978: 106.

lictors and insignia of a praetor on the ground that he was fighting in defense of the country."[1013] Much like the example of L. Aemilius Paullus in 191, by referring specifically to the bestowal of lictors and the "insignia of a praetor" (στρατηγικὸν κόσμον), Plutarch is emphasizing that the Senate did not confer the praetorship itself upon Octavian, but rather the authority and rank equal to a praetor. Appian records that Octavian's soldiers offered him lictors and *fasces*, urging him to assume the title of propraetor (ἀντιστράτηγος), though Octavian preferred to wait for a vote of the Senate.[1014] Dio states that the Senate gave Octavian the authority and *imperium* of a praetor, which he distinguishes from the elected praetorship that was briefly offered to Octavian before the Senate capitulated to his demands to stand for the consulship.[1015] Thus, in Plutarch, Appian, and Dio we see discussions of praetorian rank, insignia, and military authority, all of which are explicitly differentiated from an elected praetorship, and therefore the legal substance of a *privatus* granted *imperium pro praetore*.

6. Provincial commands

Irregularities involving provincial commands could take the form of provinces assigned either outside of sortition (*extra sortem*) or without mutual agreement of the magistrates themselves (*comparatio*), or even multiple provinces placed under the control of a single commander. The practice of deciding provinces by lot was not a mere formality but a sacred tool

[1013] Plut. *Cic.* 45.3: Καίσαρι δὲ ῥαβδούχους καὶ στρατηγικὸν κόσμον, ὡς δὴ προπολεμοῦντι τῆς πατρίδος, ἔπεισε ψηφίσασθαι τὴν σύγκλητον; *Ant.* 17.1: Καίσαρι δὲ ῥαβδουχίαν πέμψαι καὶ στρατηγικὰ κόσμια. See also Jansen 2022: 194, 249; Brennan 2023: 93, 237n. 3. Plutarch uses similar wording to describe the augmentation of the praetor L. Aemilius Paullus' *imperium* to that of a consul in 191 (see the above discussion under "Augmented *Imperium*" and Plut. *Aem.* 4.1).
[1014] App. *BC* 3.48: ἠξίουν ἑαυτὸν ἀντιστράτηγον ἀποφῆναι … τὸ δὲ ἔργον ἐς τὴν βουλὴν ἀνετίθετο. See also App. *BC* 3.64.
[1015] Dio 46.29.5-6 (στρατηγοῦ τινα ἀρχὴν δόντες), 35.4 (ὅτε τὸν κόσμον καὶ τὴν ἐξουσίαν τοῦ στρατηγοῦ ἀνέλαβε), 38.1-2 (αὐτοκράτορες … ὅ τε Καῖσαρ, … καὶ ὑπὸ τῶν στρατιωτῶν), 41.3 (στρατηγόν τε αὐτὸν ἐν τοῖς πρῶτον αἱρεθῆναι … ἐψηφίσαντο).

to mitigate competition between magistrates desiring illustrious commands.[1016] In contrast, bypassing sortition invited jealousy and rivalry among commanders, as seen in 295, when the Senate and people determined to grant the command in Etruria *extra sortem* to Q. Fabius Maximus Rullianus. In response, according to Livy, Fabius' consular colleague, P. Decius Mus, argued that sidestepping the lot was an attempt by the Senate to retain political dominance over assigning commands and was an affront to the gods themselves.[1017] Livy refers to the lack of both sortition and *comparatio* as *extra ordinem* on five more occasions, in which the provinces were determined by popular vote or senatorial decree.[1018] In 169, Plutarch reports that the people were so eager for the newly elected consul, L. Aemilius Paullus, to take up the command against Perseus in Macedon that they "did not permit a lot to be cast for the provinces, as was the custom," but voted to assign Macedon to Paullus directly.[1019] When Scipio Aemilianus was elected to his extraordinary consulship for 147, Appian states that his consular colleague, C. Livius Drusus, proposed deciding the provinces by lot (διακληροῦσθαι), but was overruled by the people, who voted to give Scipio the command against Carthage in Africa.[1020]

Deviations from sortition were also regarded as extraordinary in the late Republic. Seneca stated that Pompey distributed provinces "as he chose" throughout all of his extraordinary commands, likely a reference to the legates appointed by Pompey via the *leges*

[1016] Kloft 1977: 60-61; Stewart 1998: 143-144. Sortition was also a sacred ritual for voting in the assemblies, see Ross 1966: 73; Mouritsen 2011: 228.

[1017] Livy 10.24.3-18, esp. 16: *Iouem optimum maximum deosque immortales se precari, ut ita sortem aequam sibi cum collega dent si eandem uirtutem felicitatemque in bello administrando daturi sint.* See also Stewart 1998: 176-178.

[1018] Livy states that *extra ordinem* allotment of provinces were determined by the Senate on three occasions, to M. Furius Camillus in 381 (6.22.5), C. and P. Manlius in 379 (6.30.2-3), and Q. Fulvius Flaccus in 214 (24.9.5). Only once does Livy note an *extra ordinem* provincial allotment by popular vote, for Q. Fabius Maximus Rullianus in 295 (10.24.3-18). Livy does not state the method of allotment for two instances, specifically Q. Fabius Vibulanus in 465 (3.2.2) and M. Popillius Laenas in 350 (7.23.2), merely stating the provinces were assigned *extra ordinem*.

[1019] Plut. *Aem.* 10.3: οὐκ ἐάσαντες κλῆρον γενέσθαι, καθάπερ εἰώθει, περὶ τῶν ἐπαρχιῶν, ἀλλ᾽ εὐθὺς ἐκείνῳ ψηφισάμενοι τοῦ Μακεδονικοῦ πολέμου τὴν ἡγεμονίαν.

[1020] App. *Pun.* 112.

Gabinia et Manilia and those through whom he governed his provinces *in absentia*.[1021] In 65, the Senate assigned the province of Hither Spain to Piso for his extraordinary quaestorship, while Caesar unsuccessfully sought an extraordinary command in Egypt the year through a tribunician bill.[1022] Indeed, Cicero described the commands granted to L. Calpurnius Piso and A. Gabinius in 58 as *extra ordinem* because they had been assigned outside of sortition (*sine sorte*) and instead granted directly by name (*nominatim dedisti*) to Piso and Gabinius by their benefactor, Clodius.[1023] According to Dio, the Roman people granted Caesar the right to assign the *provinciae* for the praetors of 48 himself "without casting the lot" (ἀκληρωτὶ).[1024] Indeed, one such praetor, M. Caelius Rufus was angry that his colleague, C. Trebonius, was appointed *praetor urbanus* by Caesar and "not by lot, as was customary" (οὐ κληρωτός, ὥσπερ εἴθιστο).[1025] In a speech attributed to Cicero against Antony in early 43, Dio further underscores the problem of direct provincial appointments, saying that among the many terrible acts (πολλὰ … δεινὰ) committed by Antony were the distribution of commands to friends, his brother, and even himself.[1026]

As for extraordinary commands that exercised authority over multiple provinces, we do not find many specific instances until the late Republic. An early case can be found in the case of

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[1021] Sen. *Ben.* 5.16.4: *dum extraordinaria concupiscit imperia, dum provincias, ut eligat, distribuit*. On Pompey's governance of provinces *in absentia* through his legates, see Boak 1918: 21-23; Jashemski 1966: 98;Ehrenberg 1963: 121; Kloft 1977: 56; Beck 2011: 95; Steel 2013: 241; Vervaet 2014: 222.
[1022] On Piso's command being assigned by the Senate, see *CIL* 1^2.749; Sall. *Cat.* 1-5; Suet. *Iul.* 9.3; Dio 36.44.5. On Caesar's failed attempt to gain the province of Egypt through a tribunician bill, see Suet. *Iul.* 11.
[1023] Cic. *Dom.* 23-24.
[1024] Dio 42.20.4.
[1025] Dio 42.22.2: ὀργισθεὶς δὲ ὅτι τε μὴ ἠστυνόμησεν καὶ ὅτι καὶ ὁ Τρεβώνιος ὁ συνάρχων αὐτοῦ οὐ κληρωτός, ὥσπερ εἴθιστο, ἀλλ᾽ αἱρετὸς ὑπὸ τοῦ Καίσαρος ἐς τὴν ἀστυνομίαν προεκρίθη. For more sources on Caelius' praetorship, see *MRR* 2.272. Morrell 2017: 233.
[1026] Dio 46.22.2-3: ὅτι πολλὰ καὶ δεινὰ προελόμενος δρᾶσαι … ποῦ γὰρ ἂν ἑκόντες ὑμεῖς τὰς μὲν παρὰ τοῦ Καίσαρος ἢ καὶ τοῦ κλήρου δοθείσας ἑκάστοις ἡγεμονίας, κατελύσατε, τούτῳ δὲ ἐπετρέψατε τά τε ἄλλα πολλὰ τοῖς φίλοις καὶ τοῖς ἑταίροις διαδοῦναι, καὶ ἐς μὲν τὴν Μακεδονίαν τὸν ἀδελφὸν τὸν Γάϊον πέμψαι, τὴν δὲ δὴ Γαλατίαν ἑαυτῷ μετὰ τῶν στρατευμάτων. According to Millar (1961: 18), the speech presented by Dio is an amalgamation of elements from Cicero's *Philippics*.

C. Valerius Flaccus (cos. 93), who held command in Hispania Citerior and Transalpine Gaul from around 85 to 81, which, according to Badian, "recalls some of the later 'special *imperia*'" of the late Republic.[1027] Of course, the best example of multi-provincial commands returns us to Pompey's massive assignment to combat piracy in the Mediterranean through the *lex Gabinia* of 67. All sources are in general agreement over the vast scope of geographic authority granted to Pompey in these commands. Velleius states that the Gabinian law gave Pompey authority equal to proconsuls within fifty miles of any shore (*ei imperium aequum in omnibus provinciis cum proconsulibus usque ad quinquagesimum miliarium a mari*) and emphasized that, in this one series of extraordinary powers (*extraordinaria*), "almost the entire world was being entrusted to one man."[1028] Plutarch similarly describes the creation of the *lex Gabinia*, in dramatic terms, stating not only that it gave Pompey authority (ἄρχειν) over the entire Mediterranean sea and fifty miles inland of any shore, but also an outright monarchy (ἄντικρυς … μοναρχίαν) and unrestrained power (δύναμιν … ἀνυπεύθυνον) over all men.[1029] Appian also states that Pompey was given "absolute power" (αὐτοκράτορα) over the entire Mediterranean Sea and its coastlines.[1030] In a speech attributed to Q. Lutatius Catulus (cos. 78) against the *lex Gabinia*, Dio notes the same geographic parameters of Pompey's command as Plutarch and Appian and further claims also that Pompey held proconsular authority (ἀντὶ ὑπάτου) in Italy.[1031] Additionally, Dio goes into much more detail about the extraordinary nature of Pompey's command from legal, traditional, and even practical viewpoints. In Dio's rendering of the speech (36.31-36a), Catulus

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[1027] Badian 1958: 11-12.
[1028] Vell. 2.31.3-4: *Quo scito paene totius terrarum orbis imperium uni viro deferebatur*.
[1029] Plut. *Pomp.* 25.2: ἄντικρυς δὲ μοναρχίαν αὐτῷ διδόντα καὶ δύναμιν ἐπὶ πάντας ἀνθρώπους ἀνυπεύθυνον. ἐδίδου γὰρ ἄρχειν ὁ νόμος αὐτῷ τῆς ἐντὸς Ἡρακλείων στηλῶν θαλάσσης, ἠπείρου δὲ πάσης ἐπὶ σταδίους τετρακοσίους ἀπὸ θαλάσσης.
[1030] App. *Mith.* 94: Γναῖον Πομπήιον αἱροῦνται νόμῳ στρατηγὸν ἐπὶ τριετὲς αὐτοκράτορα εἶναι θαλάσσης τε ἁπάσης ἢ στηλῶν Ἡρακλείων ἐντός ἐστι, καὶ γῆς ἀπὸ θαλάσσης ἐπὶ σταδίους τετρακοσίους ἄνω.
[1031] Dio 36.36a: οὕτω Πομπήιος τὴν ἡγεμονίαν τῆς θαλάσσης τῶν τε νήσων καὶ τῆς ἠπείρου ἐς τετρακοσίους σταδίους ἀπὸ τῆς θαλάσσης ἄνω εἰλήφει; 36.37.1: τῆς δὲ Ἰταλίας ἀντὶ ὑπάτου ἐπὶ τρία ἔτη.

referred to the extraordinary nature of Pompey's proposed command on five separate occasions, calling it "some new office" (καινήν τινα ἀρχὴν), "some strange and never-before-seen command" (ξένην δέ τινα καὶ μηπώποτε γεγενημένην ἡγεμονίαν), "another command in addition to the annual offices" (παρὰ τὰς ἐπετησίους ἀρχὰς … ἑτέραν), "a new command" (καινὴν ἡγεμονίαν), and a position with "great honors and excessive powers" (μεγάλαι τιμαὶ καὶ αἱ ὑπέρογκοι ἐξουσίαι).[1032] Such commands, according to Catulus, were "not permitted by laws" (32.1), "contrary to legal appointments and proven experience" (32.3), abandoned "traditional offices and entrust nothing to those elected by law" (33.3), did not follow "ancient precedent" (34.1), and were "not in accordance with law" (36.4).[1033] But Dio also has Catulus point out the practical implications of supra-provincial commands, such as those proposed in the *lex Gabinia*, specifically complications that the allotment and division of provincial assignments had intended to avoid. Catulus states, for instance, that all worthy men should seek to obtain honorable commands and share in their labors, not only one man.[1034] Furthermore, distributing provincial assignments allowed for multiple commanders to gain experience, according to Catulus, whereas the concentration of provinces under a single commander resulted in a paucity of seasoned generals at home.[1035] Catulus then goes on to say that it was also not advantageous to entrust one man to oversee all of Rome's "possessions" (ἀγαθῶν) because it was not possible for one man to manage the entire Mediterranean Sea or be everywhere at one time.[1036] Instead, such a broad

[1032] Dio 36.31.1: ("some new commands"), 3 ("strange and never-before-seen"), 34.1 ("another command in addition to annual offices"), 3 ("new position of command"), 35.1 ("great honors and excessive powers").
[1033] Dio 36.32.1: μήτε ἐκ τῶν νόμων ἐπιτέτραπται, 32.3: παρά τε τὰ διατεταγμένα ἐν τοῖς νόμοις καὶ παρὰ τὰ διεληλεγμένα ἐν τοῖς ἔργοις, 33.3: ἂν τὰς μὲν πατρίους ἀρχὰς καταλύητε καὶ τοῖς ἐκ τῶν νόμων χειροτονουμένοις μηδὲν ἐπιτρέπητε, 34.1: παράδειγμα ἀρχαῖον, 36.4: οὐκοῦν … νομιμώτερον.
[1034] Dio 36.32.1: οἷς γε ἐπιβάλλει, προσήκει τυγχάνειν ˙τοῦτο γάρ ἐστιν ἡ δημοκρατίά, εἴτε κάματον, καὶ τούτου πρὸς τὸ μέρος πάντας μεταλαμβάνειν δεῖ ˙τοῦτο γάρ ἐστιν ἡ ἰσομοιρίά.
[1035] Dio 36.32.2-3: ἔτι τοίνυν ἐν μὲν τῷ τοιούτῳ πολλούς τε ἐν ταῖς πράξεσιν ἐγγυμνάζεσθαι, καὶ ῥᾳδίαν ὑμῖν τὴν αἵρεσιν τῶν πιστευθῆναι δυναμένων πρὸς πάντα τὰ πρακτέα ἀπὸ τῆς πείρας ὑπάρχειν συμβαίνει, ἐκείνως δὲ δὴ πολλὴν τὴν σπάνιν καὶ τῶν ἀσκησόντων τὰ προσήκοντα καὶ τῶν ἐπιτραπησομένων ἀνάγκη πᾶσα γίγνεσθαι.
[1036] Dio 36.35.1-3.

command would require numerous generals (στρατηγοὺς), admirals (ναυάρχους), and lieutenants (ὑπάρχους), where multiple individuals shouldered independent authority, responsibility, and accountability.[1037] Pompey's grain commission in 57 granted him powers similar to what he held via the *lex Gabinia,* again conferring access to the treasury, the power to recruit troops, and authority over ports, markets, and grain shipments in every Mediterranean area under Roman control.[1038]

7. <u>*Impar imperium*</u>

While consuls wielded *maius imperium* over the *minus imperium* of praetors, a parity of authority existed among magistrates of equal rank, especially those governing provinces.[1039] A common implication or consequence of extraordinary commands, especially those with multi-provincial assignments, however, were disruptions in the hierarchy of commanders wielding *imperium*, where individual commanders were granted higher authority than their supposed colleagues of equal rank. Other grants of *imperium* encompassed instances where commanders were given far more *imperium* than was ever intended for a magistrate or commander to wield, regardless of the auspices of his office. Very often this was done when a commander's task encompassed provinces already governed by other commanders. After Marius and Catulus defeated the Cimbri in July of 101, for instance, Plutarch states that ultimate credit for the victory was given to Marius, because his *imperium* was greater as consul than that of Catulus, who was

[1037] Dio 36.35.1-36.2. For further discussion of the *lex Gabinia*, see Boak 1918: 11-16, 19, 23; Loader 1940: 134-136; Last 1947: 161; Ehrenberg 1953: 118-121, 133; Jashemski 1966: 77; Sherwin-White 1984: 187-190, 209-210; Hurlet 2010: 114-115; Beck 2011: 94; Rodgers 2008: 296-299, 305-306; Vervaet 2009b: 416-417; Steel 2013: 240, 243; Vervaet 2014: 213-215. 218, 349; Coudry 2016: 33-50; Straumann 2016: 105-106.
[1038] Cic. *Att.* 4.1.7; *QF* 2.5.1; Plut. *Pomp*. 49.4; App. *BC* 21.8; Dio 39.9.3.
[1039] Cic. *Att.* 9.9.3; Fest. 152L; Gell. 13.15.4; Boak 1918: 1-2, 22-23; Henderson 1957: 83; Stewart 1998: 98-99, 110-114, 215; Steel 2013: 188; Straumann 2016: 55. See also the debate over the nature of *imperium maius* in Last 1947: 157-161 and Ehrenberg 1953: 113-136.

only a proconsul.[1040] As Henderson points out, however, the hierarchy between consuls and proconsuls was not written in stone, since Q. Fulvius Flaccus, proconsul of 211, was actually granted *par imperium* to the consuls.[1041] It was also the case, however, that *maius imperium* could grant sweeping, unfettered authority to a commander in order to carry out special commissions not confined to provincial borders, such as the *imperium infinitum* granted to M. Antonius against Mediterranean piracy in 74, as well as similar authority given to C. Calpurnius Piso and A. Gabinius in 58 in their eastern commands.[1042] Often the amount of power granted to a single commander was shocking. As we have seen, when the *lex Gabinia* was put before the people in 67, Plutarch states that the leading men in the Senate were afraid of the "absolute and unlimited power" proposed for Pompey.[1043] Appian (*Mith.* 94) explicitly describes the *maius imperium* that Pompey held over his legates through the *lex Gabinia*, saying that the twenty-five legates (ὑπάρχοι) assigned to Pompey each held their own praetorian *imperium* (στρατηγίας σημεῖα … αὐτοκράτωρ ἐντελὴς), while Pompey himself held authority over them in the manner of a "king of kings" (βασιλεὺς βασιλέων).[1044] Lastly in regard to the *lex Gabinia*, Dio relates that one of the consuls for that year, Piso, initially refused to allow Pompey's legates to recruit troops in Gallia Narbonensis, Piso's allotted consular province. And while Piso ultimately relented after the people threatened to remove him from office, it does show that, much like Plutarch's depiction of the legal relationship between Marius and Catulus, Pompey's proconsular *imperium* was not implicitly considered greater than an elected consul by default.[1045] When Cicero, in 63, described the extraordinary powers proposed for the *decemviri* in Rullus' agrarian law as being

[1040] Plut. *Mar*. 27.5: τὸ πρόσχημα τῆς ἀρχῆς. See also Ridley 1981: 295; 1987: 357.
[1041] Livy 26.9.10; Henderson 1957: 83.
[1042] On M. Antonius, see Cic. *Ver*. 2.2.8, 3.213 and Lact. *Inst.* 1.11.4; on Piso and Gabinius, see Cic. *Dom.* 23, 55.
[1043] Plut. *Pomp.* 25.3: τῆς ἐξουσίας ἀπερίληπτον καὶ ἀόριστον.
[1044] See also Plut. *Pomp.* 26.2; Loader 1940: 134-136; Jashemski 1966: 95-96; Ridley 1981: 285, 295.
[1045] Dio 36.37.2. See also Boak 1918: 13; Kloft 1977: 72-73; Vervaet 2009b: 409.

fit for kings, he was purposefully invoking the fear of tyranny that was a fundamental component of Roman political thought.[1046] Five years later, Pompey again gained supreme power in the Mediterranean when he was granted the authority to regulate the grain supply to Rome and had "greater *imperium* in the provinces than those governing them."[1047] Finally, Dio states that the emperor Augustus (formerly Octavianus) was granted *maius imperium* in 27 over all provincial appointments, "giving instructions to the procurators, proconsuls, and propraetors, so that they were sent out under precise orders" in their provinces, and wielding "complete power over all things and for all time."[1048] Dio uses more explicit terms to describe Augustus' *maius imperium* for 23, when the Senate voted to grant the *princeps* "proconsular authority for life" (ἀρχὴν τὴν ἀνθύπατον ἐσαεὶ), with *imperium* greater (τὸ πλεῖον… ἰσχύειν) than that of any governor in all Roman provinces.[1049]

Concluding Remarks

The purpose of this chapter has been twofold: first, to review the various criteria of extraordinary commands and how they manifested in practice; second, to highlight their socio-political significance in the eyes of Roman and Greek writers. As we have seen, commands described by Greek and Roman writers as extraordinary generally exhibited at least one of seven potential criteria: violation of annuity (*continuatio*, *reficere*, and *iteratio*), prorogation,

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[1046] Cic. *Agr*. 2.8 (*extraordinaria non imperia, sed regna*), 32 (*praeterea potestatem verbo praetoriam, re vera regiam*). According to Livy (2.1.9), for instance, immediately after the expulsion of Tarquinius Superbus in 509, M. Iunius Brutus made the people swear an oath never to allow any individual to reign as a monarch in Rome (*iure iurando adegit neminem Romae passuros regnare*).
[1047] Cic. *Att.* 4.1.7: *maius imperium in provinciis quam sit eorum qui eas obtineant*; App. *BC* 2.18; Dio 39.9.3; 54.1.3; Boak 1918: 20; Vervaet 2014: 186.
[1048] On Augustus giving instructions to governors, see Dio 53.15.4 (ἐντολάς τέ τινας καὶ τοῖς ἐπιτρόποις καὶ τοῖς ἀνθυπάτοις τοῖς τε ἀντιστρατήγοις δίδωσιν, ὅπως ἐπὶ ῥητοῖς ἐξίωσιν); for his possession of "complete power," see Dio 53.16.1 (τῷ γὰρ ἔργῳ καὶ πάντων καὶ διὰ παντὸς αὐτὸς ὁ Καῖσαρ, ἅτε καὶ τῶν χρημάτων κυριεύων).
[1049] Dio 53.32.5-6: ἐν τῷ ὑπηκόῳ τὸ πλεῖον τῶν ἑκασταχόθι ἀρχόντων ἰσχύειν ἐπέτρεψεν. See also Boak 1918: 23-24; Last 1947: 163; Lintott 1993: 115-116; Drogula 2007: 435; Vervaet 2014: 262-263.

augmentation of *imperium*, circumvention of the *cursus honorum*, *privati cum imperio*, irregular provincial appointments, and the imparity of *imperium*. And yet, in establishing a comprehensive understanding of extraordinary commands, it is not enough simply to identify their constituent criteria. It is equally important to understand how ancient writers perceived extraordinary commands and their political significance in Roman society. To that end, this chapter has also shown what the criteria of extraordinary commands represented in the minds of our Greek and Roman sources.

One of the more dangerous potential aspects of extraordinary commands was the violation of annuity, which took the form of extensions or refusal to leave office (*continuatio*), immediate reelection to the same office with no interruption (*reficere*), or reelection outside the appropriate interim (*iteratio*). The central fear in violations of annuity was that of magistrates refusing to vacate their office or attempting to prolong their tenure for personal ambition, which conjured images of tyranny and despotism in Roman political thought.[1050] Even when continual commands and repeated reelections to the same office were justified by necessity or supported by popular legislation, there was always the danger that the people might voluntarily enslave themselves to a monarch, which was suggested in the cases of Scipio Africanus, Pompey, and Caesar.[1051] As with many extraordinary commands, the constitutional issue at play was a contest between the sanctity of laws aimed at preventing abuse of power and the supposed supremacy of

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[1050] See the examples of the Appius Claudius Crassus, decemvir in 450 (Livy 3.36.9.34.1-2), and L. Manlius Capitolinus Imperiosus, dictator in 363 (Cic. *Off.* 3.112; Livy 7.3.4, 9-4.7; Val. 5.43.3; 6.9.1; Sen. *Ben.* 3.37.4; *Vir Ill.* 28.1-2), who were both threatened with prosecution for attempting to prolong their office. Badian 1962: 58n. 12; Kloft 1977: 9-11; Ridley 1981: 288, 290; Raschke 1987: 315; Brennan 2000: 384 647, 651-652; Vervaet 2009a: 57-61, 66-71; 2010: 133, 141-142, 147; Straumann 2013: 175; 2016: 104, 110.

[1051] Scipio Africanus was supposedly offered a continual consulship and perpetual dictatorship by the people but refused (Livy 38.56.12; Val. Max. 4.1.6). As for Pompey, Seneca stated that he reduced the Roman people such a state that they only felt safe through voluntary reduction to a state of servitude to him (Sen. *Ben.* 5.16.4: *eo redegit populum Romanum, ut salvus esse non posset nisi beneficio servitutis*). Caesar's continual consulships and perpetual dictatorship was such that Plutarch and Dio referred to them outright as a monarchy and even a tyranny (Plut. *Caes.* 51.7; Dio 44.84; 47.17.5).

the popular will. As Lintott states, the people's supreme authority was such that they could do anything they wanted, even abolish the Republic itself, which eventually happened with the passage of the *lex Titia* in 43 that established the Second Triumvirate and the *continuationes* that preceded Augustus' creation of the Principate.[1052]

Prorogations were a good alternative to *continuatio*, *reficere*, and *iteratio*, in that they allowed for *ad hoc* extensions of *imperium* in response to military exigencies but preserved the annual terms of magistracies. As extraordinary commands, long term prorogations still bore resemblance to *continuationes* and were liable to abuse by generals seeking to extend the tenure of their commands, as was suggested in the cases of Flamininus (197-194) and Lucullus (75-66).[1053] Thus, the increasing duration of prorogations in the late Republic is likely the reason that long-term commands, such as those granted to Pompey, Caesar, and others were given fixed term-limits. Cases of augmented *imperium* did not garner a great deal of negative attention by Roman and Greek sources but were still rooted in extraordinary commands, with several being explicitly labelled as such.[1054] Much like prorogations, the augmentation of *imperium* could serve as an *ad hoc* measure in response to military necessity, as we see in the example of the praetor, L. Aemilius Paullus (pr. 191), who was assigned a proconsular command in Spain (190-189).[1055] In contrast, circumventions of the *cursus honorum*, despite also being necessary in times of crisis and necessity, were always considered dangerous. One of the problems with making exceptions to electoral procedure was that they eventually threatened to become normalized, gradually

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[1052] Lintott 1999: 40. On the *continatuiones* in the Second Triumvirate, see Vell. 2.89.5: *continuaret Caesar*; Suet. *Aug.* 26.2: *continuavit*. See also *MRR* 2.336, 357, 370, 378, 385, 390, 395, 398, 406, 410, 414, 416, 420; Rowell 1962: 56.
[1053] On Flamininus, see Plb. 18.11.2, 12.1; Plut. *Flam*. 7.1-2; Zon. 9.16; On Lucullus, Plut. *Luc*. 24.3; Dio 36.2.1.
[1054] See the examples of Cn. Calpurnius Piso, quaestor *pro praetore* in 65 (Suet. *Iul.* 9.3; *CIL* 1^2.749); the *imperium pro praetore* proposed for the curule aedile, Caesar, in 65 (Suet. *Iul.* 11); C. Octavius, the propraetorian proconsul for 59-58 (*CIL* 6.1311; Suet. *Aug.* 3.1); M. Porcius Cato, quaestor *pro praetore* in 58 (Cic. *Dom.* 21; Vell. 2.45.4).
[1055] Plut. *Aem.* 4.1.

undermining the validity of Roman law. Thus, whereas Cato the Younger may have refused an *extra ordinem* dispensation to stand for the praetorship before he was legally allowed in 56, Octavian forced the Senate at sword-point to grant him the right to stand for an extraordinary election (ἐξαιρέτῳ χειροτονίᾳ) to the consulship in 43 when he was only nineteen years old.[1056]

Violations of the *cursus honorum* may have violated electoral protocol, but the conferral of *imperium* onto *privati* circumvented election altogether. And while the use of *privati* was undeniably a valuable and necessary recourse at times in the Roman government, it was always extraordinary, because *imperium* was divorced from the confines of elected magistracy. The extraordinary nature of *privati* can also be seen in the initial rarity of its use, occurring in a total of twenty-five occasions from the Second Punic War to the end of the second century (218-100), before rising dramatically to fifty instances between 99 and 50.[1057] As *privati* became more commonly used later in the Republic, there was an increasing possibility that their use could be exploited by ambitious commanders. Consequently, when Pompey illegally raised his army as a

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[1056] On Cato, see Val. Max. 4.1.14; on Octavian, see Suet. *Aug*. 26.1; Plut. *Brut*. 27.2; App. *BC* 3.87-88; Dio 46.41.3-43.6.

[1057] For 217, C. Centenius and Cn. Cornelius Scipio Calvus; for 215, T. Manlius Torquatus; for 210, P. Cornelius Scipio Africanus; for 208, C. Terentius Varro; for 207, L. Manlius Acidinus; for 206, L. Cornelius Lentulus; for 205, Q. Pleminius, T. Quinctius Flamininus, P. Sempronius Tuditanus, and M. Valerius Laevinus; for 203, L. Baebius Dives; for 201, C. Cornelius Cethegus and M. Valerius Laevinus. For 199, L. Stertinius; for 192, L. Oppius Salinator; for 173, Cn. Sicinius; for 169, Appius Claudius Centho; for 101, Licilius Hirrus. On the preference for other forms of extraordinary commands instead of *privati*, see the examples of Scipio Aemilianus in 147 and P. Licinius Crassus Dives Mucianus in 131. According to Cicero, although the people desired to place Aemilianus in command during the Third Punic War (149-146), they "at least" (*tamen*) chose to elect him consul, despite his disqualification due to age and standing only for the aedileship (Cic. *Phil.* 11.17; see also Cic. *Amic.* 11; Livy *Per*. 50; *Ep. Ox.* 50.123-124; Vell. 1.12.3; Val. Max. 8.15.4; Plut. *Mor*. 200A, 804F-805A; App. *Pun.* 112; Dio 21 fr. 70.2-3; *Vir. Ill.* 58.5; Eutrop. 4.12.1; Zon. 9.29). Cicero also states that Aemilianus was widely seen as the superior commander during the revolt of Aristonicus in 131 but was a *privatus* at the time, for which reason the command was given to Mucianus, one of that year's consuls (Cic. *Phil.* 11.18; see also Livy *Per*. 59; Val. Max. 8.7.6; Oros. 5.10.1). For 90, C. Marius and L. Porcius Cato; for 89, L. Cornelius Sulla; for 88, C. Marius; 87, C. Cassius Longinus and Appius Claudius Pulcher; for 85, C. Valerius Flaccus; for 84, L. Licinius Murena; for 83, Cn. Pompeius; for 82, Cn. Domitius Ahenobarbus and M. Terentius Varro Lucullus; for 81, C. Annius and Q. Sertorius; for 78, C. Cosconius and L. Hirtuleius; for 77, Cn. Pompeius; for 67, Cn. Pompeius and over twenty *legati pro praetore*; for 65, Cn. Calpurnius Piso; for 58, M. Porcius Cato; for 57, Cn. Pompeius; for 51, M. Calpurnius Bibulus and M. Tullius Cicero; for 50, M. Aurelius Cotta.

privatus in 83, Plutarch emphasized that he "conferred the command on himself" (αὐτὸς ἑαυτῷ δοὺς τὸ ἄρχειν) and that his legitimacy had to be retroactively confirmed by Sulla.[1058]

We have also seen in this chapter that the assignment of provinces outside of sortition or multi-provincial commands were considered extraordinary. Distributing provincial commands by lot was a sacred measure, rooted in both religion and tradition to ensure fairness and prevent corruption in provincial assignments. From a constitutional perspective, sortition was an exercise in procedural objectivity, the integrity of which upheld the collective agreement among magistrates and commanders regarding the validity of Roman institutions. Excessive assignment of provinces directly to individuals by name (*nominatim*) was dangerous, then, as it incurred jealousy among commanders and undermined faith in the system.[1059] Massive multi-provincial assignments were less common than violations of sortition, but they were much more extraordinary and were considered to be blatant constitutional deviations, as they removed institutional restraint on military commanders. This is because provincial assignments were not only officially sanctioned opportunities for military prestige, but also provided limitations to the scope of a commander's *imperium*. Removing these limitations led to another similar, but not wholly synonymous dynamic of extraordinary commands, the imparity of *imperium* among different magistrates. Some commanders operated without provincial boundaries (*imperium infinitum*) and could even transgress into provinces assigned to other commanders, leading to disruptions in the hierarchy of *imperia*.[1060] Consuls possessed *maius imperium* over that of subordinate offices, such as praetors, as well as proconsuls, who wielded *minus imperium*, but

[1058] Cic. *Agr*. 3.5-6; Plut. *Pomp.* 6.3, 10.1-2; *Sull.* 33.1.
[1059] On commands granted directly to individuals (*nominatim*) outside of sortition (*sine sorte*), see Cic. *Dom.* 21. On the danger of jealousy in violations of sortition, see Dio 36.33.3 and 42.22.1-4. On the fierce competition for provincial commands, see Stewart 1998: 143-144.
[1060] For examples of *imperium infinitum*, see M. Antonius in 74 (Cic. *Verr.* 2.2.8, 3.213; Sall. *Hist.* 3.2-4; Vell. 2.31.3-4; Lact. *Inst.* 1.11.4), as well as A. Gabinius and L. Calpurnius Piso Caesoninus in 57; Cic. *Dom.* 23, 55. See also Boak 1918: 8, 22-23; Loader 1940: 135; Ehrenberg 1953: 117-118; Sherwin-White 1984: 187-188.

some extraordinary commands altered the nature of *maius imperium* to become less of a latent indication of precedence and jurisdiction, and more of a direct preeminence and control over lower offices akin to the function of a dictator.[1061] In this case, the *imperium maius* that Pompey wielded over his propraetorian *legati* through the *leges Gabinia et Manilia*, as well as his outranking of provincial governors in the grain commission of 57, were both direct precursors to Augustus' authority over others governors and generals in the formation of the Principate.[1062]

Many of these criteria are related to one another and can be grouped into larger categories that reflected Roman and Greek conceptions of extraordinary commands, such as concentrating excessive authority in the hands of a single person, the circumvention of formal procedures regulating magistracies, and the removal of legal restraints and limitations to a commander's function. Fundamentally, however, each of these criteria share one quality; they represented instances where *imperium* was wielded or conferred upon a person in a manner that contradicted or deviated from constitutional law. Furthermore, it is important to remember that there was no set number or combination of the criteria outlined in this chapter that was necessary to qualify a command as extraordinary. Some extraordinary commands exhibited only one of these criteria. Scipio the Elder, for instance, received nothing more than a series of prorogations (217-211), but Seneca still described his command as *extraordinarium* (Sen. *Ben.* 3.33.3). Other extraordinary commands exhibited different combinations of various criteria. Marius' repeated reelections to the consulship (104-100) constituted *reficere* and *iteratio*, but he also received multiple

[1061] On the two different types of *imperium maius*, see Cic. *Att.* 9.9.3; *Fest.* 152L; Gell. 13.15.4; Last 1947: 157-164; Ehrenberg 1953: 113-136; Henderson 1957: 83; Kloft 1977: 72-74; Ridley 1981: 285, 295; Stewart 1998: 98-99, 111-112; Straumann 2016: 49-50.
[1062] On Pompey's *imperium* in the *lex Gabinia*, see Loader 1940: 134-136; Jashemski 1966: 95-96; Vervaet 2014: 186, 218; on that of Augustus, Boak 1918: 1, 23-24; Carney 1959: 76-77; Lintott 1993: 115-116; Drogula 2007: 435; Vervaet 2014: 262-263.

prorogations and had his province in Gaul assigned *extra ordinem*.[1063] Of course, Pompey's commands granted in the *leges Gabinia et Manilia* of 67-66 encompassed nearly all the potential criteria of extraordinary commands, since Pompey was a *privatus* granted proconsular *imperium* for multiple years and across multiple provinces, which he also received without sortition, and appointed his own legates with propraetorian *imperium*, all of whom commanded under Pompey's auspices. In the end, although not all the criteria discussed above were necessary for a command to be considered extraordinary, all extraordinary commands did at least exhibit one of these criteria.

But merely identifying the potential legal criteria is not sufficient in establishing a comprehensive definition of extraordinary commands. We must remember that a hallmark of the Roman Republic's strength was the flexibility of its institutions, meaning that not all innovative commands were extraordinary, nor were all extraordinary commands detrimental to the Republic. Instead, it is necessary to examine historical context in the use or appearance of magisterial irregularities, as well as their frequency and duration. This is because, although each of the criteria identified in this chapter could potentially make a command extraordinary, not all of them did so necessarily in every situation. For instance, not every prorogued command should be considered extraordinary. Were this the case, then hundreds of commands would be considered extraordinary, vastly outnumbering those otherwise regarded as ordinary.[1064] So, while consuls receiving very brief prorogations in order to facilitate their triumphs may not be extraordinary, the eleven years of prorogued *imperium* held by L. Licinius Lucullus was certainly

[1063] *CIL* 6.41024; Cic. *Prov. Con.* 19 (*extra ordinem*); Sall. *Iug.* 114.3; Diod. 36.10.1; Livy *Per.* 67-68; Vell. 2.12.2-6; Plut. *Mar.* 11.1, 12.1-2, 14.6-8, 28.1-6. 22.3; Dio 27 fr. 94.1; Exsuper. 14.
[1064] Kloft 1977: 9-10; Ridley 1981: 287-288.

considered extraordinary.[1065] Lastly, extraordinary commands must be evaluated alongside the circumstances and the constitutionality of their creation. The conditions surrounding the use of the four propraetorian *privati* as *legati* in 295 differ greatly from those precipitating Scipio Africanus' first appointment as a *privatus cum imperio* through a plebiscite in 210, while both examples stand in stark contrast to the illegal army raised by Pompey in 83.[1066] Only through a full consideration of the frequency, duration, and constitutionality of magisterial irregularities are we truly able to identify and understand extraordinary commands, which is the subject of the next and final chapter.

[1065] On prorogations being given to facilitate triumphs, see Develin 1975: 717; Kloft 1977: 97; Lintott 1999: 113; Drogula 2007: 443-444; On Lucullus, see Plut. *Luc.* 24.3; Dio 36.2.1; Boak 1918: 7-8, 22; Ehrenberg 1953: 118; Jashemski 1966: 76-77; Kloft 1977: 44; Sherwin-White 1984: 186-188; Steel 2013: 219-220, 242.
[1066] For the propraetors of 295, see *MRR* 1.178; for the appointment of Scipio Africanus in 210, see *MRR* 1.280; for Pompey levying a private army in 83, see *MRR* 2.63.

Chapter 7: Final Determinations of Extraordinary Commands: Magnitude and Constitutionality

The purpose of this dissertation has been to establish a comprehensive definition of extraordinary commands in the Roman Republic. Doing so has been no small task, requiring an understanding of general constitutional thought, the Roman constitution itself, and the function of Rome's various political institutions, especially the function of its magistracies. Throughout this dissertation I have argued that extraordinary commands are best understood as constitutional deviations, wherein socio-political norms, constitutional law, and statutes, especially those regulating Roman magistracies are subordinated in order to accommodate the creation of an irregular military command. The current chapter will begin by briefly summarizing the subject matter of the previous chapter, specifically the potential legal criteria of extraordinary commands. Then, I discuss the final two components and considerations in defining extraordinary commands as constitutional deviations, the questions of magnitude (the frequency, duration, and combination of various legal criteria) and constitutionality (the relationship between irregular commands and Roman law). Then, I put theory into practice and provide a brief survey of various extraordinary commands throughout the entire Roman Republic with statistical analysis. Finally, I conclude by discussing the significance of establishing a definition of extraordinary commands in the greater context of the Roman Republic. Ultimately, extraordinary commands are a fundamental topic in Roman history, particularly in the debates over the decline or collapse of the Roman Republic. Before Roman historians can accurately assess the effect of extraordinary commands on the political institutions of the Roman Republic, it is necessary to understand exactly how to define and identify extraordinary commands.

The previous chapter surveyed the legal criteria of extraordinary commands, highlighting the specific ways such commands could manifest and the qualities they might exhibit in the

context of Roman laws and the constitutional regulation of magistracies. To review, these seven criteria were violations of annuity (*continuatio*, *reficere*, or *iteratio*), prorogation, circumvention of the *cursus honorum*, augmented *imperium, privati cum imperio*, irregular provincial assignments or violations of sortition, and *impar imperium*.[1067] While identifying these criteria are a necessary step in establishing a comprehensive definition of extraordinary commands, they are not the only step. Ultimately the legal criteria of extraordinary commands only indicate the potential ways that such commands could manifest but are not determinant factors on their own. It is necessary to establish whether the appearance of any of these criteria at any given time represented a constitutional innovation or deviation, or even a blatantly unconstitutional act. The reason for this is that extraordinary commands should fundamentally be understood as the conferral of *imperium* upon an individual in a manner that deviated from Roman law and constitutional norms.

A fundamental, guiding principle of Rome's constitution was its flexibility and ability to adapt in the face of emergencies. As we have seen, this flexibility is famously attested by Cicero in his defense of the *lex Manilia*, which conferred command of the Third Mithridatic War (73-63) upon Pompey in 66. According to Cicero,

> But let no innovation be made contrary to the precedents and principles of our ancestors. I will not say here that our ancestors always obeyed custom in peace

[1067] I elaborate in detail on the nature of these criteria in the previous chapter, but, as a summary, they can be understood in the following ways: *continuatio* was the extension of an actual term of office or the refusal of a magistrate to vacate office; *reficere* was the immediate reelection to the same office with no gap in between; *iteratio* was reelection to the same office before the mandated ten-year gap; prorogation was the extension of a commander's *imperium* past the termination of his elected office; violations of the *curus honorum* involved election to office without fulfilling the required prerequisites of minimum age requirements and previous office experience; augmentations of *imperium* took place when a lower ranking commander wielded *imperium* above the legal station of his office; *privati cum imperio* were commanders who had not been elected to office; provincial irregularities could refer to circumvention of sortition or multi-provincial commands; *impar imperium* was similar to augmented *imperium* but referred to imbalances in the parity of *imperium* between colleagues (*maius* and *minus*) and even *imperium* without limitations (*infinitum*).

> but expediency in war, that they always adapted the formation of new plans to the new emergencies of the times.[1068]

Cicero's rhetorical use of *praeteritio* aside, his words here are a reminder that the Roman government was sufficiently flexible to allow for a multitude of innovations in times of need, meaning that not every magisterial irregularity should be considered extraordinary.[1069] Thus, each of the seven legal criteria listed above represent the potential qualities of extraordinary commands or ways that such commands may manifest, but they are not determinant factors on their own. And yet, Cicero's reference to expediency (*utiliati*) also implies that innovations were guided only by what was necessary to address a present emergency and always grounded by default in custom (*consuetudo*) and *mos maiorum*. Thus, however flexible the Roman government may have been, Cicero is also reminding us that this flexibility had its limits, and that innovation could be taken too far.

Constitutional Innovations and Deviations

The limitations to the flexibility of Rome's political institutions is the root of Mommsen's differentiation between commands that were innovative or exceptional (exceptionelle), in that they were adaptations from "ordinary offices" (ordentlichen Amtes), and those that were truly extraordinary (ausserordentliche) because they deviated from constitutional norms.[1070] The problem with Mommsen's proposal, however, was that he did not provide a clear outline for the distinction between commands that were innovations and deviations. If constitutional

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[1068] Cic. *Man.* 60: *At enim ne quid novi fiat contra exempla atque instituta maiorum. non dicam hoc loco maiores nostros semper in pace consuetudini, in bello utilitati paruisse, semper ad novos casus temporum novorum consiliorum rationes accommodasse.* See also Yakobson 2015: 160; Straumann 2016: 50.
[1069] On Cicero's use of *praeteritio* in his *De lege Manilia*, see MacKendrick 1995: 22-23; Lintott 1999: 5n. 11. See also Mousorakis 2003: 22; Straumann 2016: 107.
[1070] Mommsen 1887: 2.1.627-628.

innovations reflected the flexibility of Rome's constitution, then constitutional deviations represented abuse and overstraining of this flexibility to its breaking point.[1071]

It is first necessary to establish the clear distinction between exceptional commands that represent constitutional innovations as opposed to constitutional deviations, which characterize extraordinary commands, but also appointments that are blatantly unconstitutional acts. I elaborate on the difference between these categories in the discussion that follows, but, in simple terms, the distinction between constitutional innovations and deviations lies in the relationship between a particular irregularity and Roman law.[1072] With a constitutional innovation the command is created in a way that conforms to the law, whereas a constitutional deviation signifies the subordination of law to accommodate the creation of the command.

Constitutional innovations centered on the notion of exceptions to the law. The purpose of Roman constitutional law, especially in the regulation of magistracies, was to act as a safeguard for the people against political abuse of power and corruption in government. Cicero voices this very sentiment in his *De legibus*, where he states that the welfare and safety of the people is the highest law, specifically referring to the function of Rome's magistrates and commanders.[1073] Thus, for as much prescriptive law sanctioning the powers of various elected offices in Rome, we find much more proscriptive statute limiting the scope of their authority, both civic (*potestas*) and military (*imperium*). The principle of restraint in magistracies was one of the foundational principles in the Roman Republic, according to Livy, with the explicit purpose of ensuring that the Roman people would never again suffer under a tyrannical monarch, stating that a free Rome was one of annual limitations on magistracies and the exercise of

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[1071] On this point, see Marsh 1922: 57; Kloft 1977: 8, 89; Sherwin-White 1984: 210; Hölkeskamp 2010: 21-22; Hurlet 2010: 128; Beck 2011: 93; Arena 2014: 217; Steel 2014: 333; Yakobson 2015: 161.
[1072] Kloft 1977: 29-30, 56, 76, 82: Ridley 1981: 297; Morrell 2017: 226.
[1073] Cic. *Leg.* 3.8: *Ollis salus populi suprema lex esto*. See also Straumann 2016: 43.

imperium.[1074] In fact, Livy also states that, immediately after the expulsion of the kings and the establishment of the Republic, the first consul, L. Iunius Brutus, compelled the people to swear an oath never to allow a monarch to rule in Rome again.[1075] But alongside Livy's attribution of Rome's liberty to annual magistracies is the supposed supremacy of Roman civic law, even over that of its citizens. This is an important point, as it appears at first glance to contradict another well-known constitutional principle also attested by Livy, that the ultimate authority to implement, abolish, or change any law is held exclusively by the Roman people.[1076] Modern scholars commonly interpret Livy's meaning here solely to mean that the voice of the Roman people was not constrained or limited by law and that no legal statute was capable of subverting popular will.[1077] There is nothing wrong with this interpretation of the Roman people's ultimate sovereignty in politics, but it is simply not the entire picture. Because the voice of the people had the final determination in the legitimacy of law, the people's voice itself was the law.[1078] The significance here is the implication that every irregular magistracy had to navigate its relationship between existing statute and popular will in order to keep or attain legitimacy. The constitutionality of an irregular command, exceptional or extraordinary, came down to a question of whether it conformed to existing statute or received legal endorsement through the popular assemblies.

[1074] Livy 2.1.1: *annuos magistratus, imperiaque legum potentiora quam hominum peragam,* 7 *libertatis autem originem inde magis quia annuum imperium consulare factum*. See also Mousourakis 2003: 78.
[1075] Livy 2.1.9: *omnium primum auidum nouae libertatis populum, ne postmodum flecti precibus aut donis regiis posset, iure iurando adegit neminem Romae passuros regnare*.
[1076] Livy 7.17.12: *ut quodcumque postremum populus iussisset, id ius ratumque esset*. For similar examples of this principle, see the *lex Valeria Horatia* in 449 (Livy 3.55.3), the election of Scipio Africanus to the aedileship for 213 (Livy 25.2.6-7), and Scipio Aemilianus' election to the consulship for 148 (App. *Pun.* 112). See also Harrer 1922: 53; Straumann 2011: 285; Straumann 2016: 36-39, 83.
[1077] Gruen 1995: 539; Lintott 1999: 40; North 2007: 260-261; Beck 2011: 87; Yakobson 2015: 160-161, 165-168, 176; Williamson 2019: 66.
[1078] Hodgson 2017: 83.

To build off of Mommsen's original (yet incomplete) distinction, exceptional commands were the result of constitutional innovations, in which legal modifications upheld and worked in tandem with existing law and statute. The flexibility of Rome's constitution was not due to any weakness of its legal institutions, but rather due to its relationship with custom (*consuetudo*) and tradition (*mos maiorum*), as well as the ability to modify existing statute through supplementary legislation. An example of the balance between traditional norms and law in regulating magistracies is found in the office of the dictatorship. Although Roman sources uniformly state that the office of the dictatorship was legally restricted to a term of six months, de Wilde persuasively argues that informal restraints on the dictator, as an "exceptional institution," were more important than formal restraints.[1079] In fact, according to de Wilde, it was *fides*, or trust in a dictator's "fidelity to republican institutions," that allowed for occasional exceptions to be made in the legal six-month restrictions of a dictator's term of office.[1080] Despite these rare exceptions, however, the six-month limit to a dictatorship was never lifted, nor consciously disregarded until the tenures of Sulla and Julius Caesar.

The purpose of Roman law was to protect the people against abuses of power, never to limit their ability to protect themselves. Thus, in periods of crisis and when existing statutes were insufficient for the welfare of the Republic, Roman political culture allowed not only for momentary exceptions to established legal procedure, but also for the modification of existing law by means of legislation. A prime example of constitutional and legal innovations leading to exceptional commands is found in the origin of prorogation in 326. As we have seen, the

[1079] De Wilde 2015: 558, 560.
[1080] De Wilde 2015: 562-566, 571-577. According to de Wilde (571n. 67), as many as six dictators are recorded to have remained in officer for at least a year, M. Furius Camillus (390-389), P. Cornelius Rufinus (334-333), L. Papirius Cursor (325-324, 310-309), L. Aemilius Mamercinus Privernas (316-315), Q. Fabius Maximus Rullianus (315-314), and M. Valerius Maximus Corvus (302-301). For sources on their terms as dictator, see *MRR* 1.95, 97, 141, 148, 156, 163, and 171.

enforcement of annuity (strengthened by the formal prohibition of *continuatio* and *iteratio* around 342 via the *lex Genucia*) ensured that no one remained in office past his allotted year, but significantly limited the ability of commanders in the field before being forced to return to Rome and lay down their *imperium*.[1081] Rather than disregard or transgress annual term limits, the Roman Senate and assemblies passed a decreed passed in 326 that legally allowed Q. Publius Philo (cos. 327), one of the previous year's consuls, to retain his *imperium* after the expiration of his office and act *pro consule* (that is, "in place of a consul") until his siege of Neapolis was completed.[1082] Such an act, while unprecedented, was merely a legal innovation, since it acknowledged the validity of term limits as standard procedure (*consulatu abisset*), allowed for an expedient solution (*pro consule rem gereret*), but also provided justification for the authorization of this temporary measure (*quoad debellatum … esset*) as a response to military exigency. In this way, Roman law governing annual magistracies was upheld while a former consul was able to wield *imperium* outside his term of office.[1083]

The above examples of extended dictatorships and prorogation were instances in which a temporary exception to Roman law was granted due to extenuating circumstance but was done so in a way that nevertheless upheld existing statute. In effect, they were "exceptions that proved the rule," a legal principle we see expressed in Cicero's *Pro Balbo* in 56. Originally a citizen of Gades in Hispania, L. Cornelius Balbus was enfranchised by Pompey via the *lex Gellia Cornelia*, a law passed in 72 that gave Pompey the right to grant citizenship to individuals directly. In 56, however, Balbus was brought to trial on the grounds that his enfranchisement violated the terms

[1081] Livy 7.42.2; Brennan 2000: 66-67; Eckstein 2008: 225;
[1082] Livy 8.23.10-12: *cum Q. Publilius Philo consulatu abisset, pro consule rem gereret quoad debellatum cum Graecis esset.*
[1083] On the importance of Philo's prorogation as an exceptional command, see Jashemski 1966: 1-2; Develin 1975: 716; Kloft 1977: 20; Ridley 1981: 286-288; Lintott 1999: 113; Brennan 2000: 74

of the *lex Papia de peregrinis* of 65, which stipulated that a person could only receive Roman citizenship with the consent of their native state.[1084] This logic was contradictory, according to Brunt, who states that it would be "an entrenchment on Roman sovereignty" for grants of Roman citizenship to be subject to the approval of a foreign government.[1085] In other words, any law restricting the enfranchisement of an alien would have to be a Roman law, since the Romans would not subject themselves to foreign law. Indeed, Cicero points out that there were Roman treaties with allies which included exceptions stipulating that no one from these communities could receive Roman citizenship. Thus, Cicero states that "because an exception makes something illegal, the lack of an exception makes it legal."[1086] Cicero's broader meaning here is somewhat difficult to understand, since he is specifically referring to an exception that prohibited certain behavior. He is essentially stating, however, that exceptions, by outlining the conditions under which the precepts of a rule or law are circumvented, highlighted the otherwise standard strictures for the observance of that same law. In other words, the exception to a rule implicitly proves the existence of that rule.[1087] Another example of legal exception is found in the *formulae* of praetorian edicts, which always consisted at least of an *intentio* (plaintiff's claim) and *condemnatio* (judgement or assessment of a penalty), but could also include a plea of exception made by the defendant (*exceptio pacti*) that could modify, counter, or change the plaintiff's *intentio* and alter or even fully waive a judge's *condemnatio*.[1088] In any case, as Mousourakis states, the principle of *exceptio* allowed for the modification of statute "to deliver appropriate relief in individual cases without questioning the validity of the relevant legal rule."[1089]

[1084] Cic. *Balb.* 19: *accusator fatetur, sed negat ex foederato populo quemquam potuisse, nisi is populus fundus factus esset, in hanc civitatem venire.*
[1085] Brunt 1982: 143.
[1086] Cic. *Balb.* 32: *quod si exceptio facit ne liceat, ubi non sit exceptum, ibi necesse est licere.*
[1087] Brunt 1982: 141.
[1088] Mousourakis 2003: 202-203. See also Just. *Dig.* 4.39-44.
[1089] Mousourakis 2007: 54.

Legal exceptions, then, especially regarding magisterial irregularities, are inherent to the notion of constitutional innovation because they acknowledge the validity and primacy of existing laws while allowing for statutory modification in response to special circumstances. As we have seen, for example, the innovation of *prorogatio* in 326 was a better legal alternative to *continuatio* and *iteratio*, because it allowed a consul to retain his *imperium* at the end of his term of office while the annual limitation of the office itself was upheld.[1090] But a key factor in qualifying an irregular magistracy as exceptional was the subordination of the command to Roman law; even if it was law modified through constitutional innovation, the law itself was still supreme. To return to the example of prorogation, Livy's account explicitly states that it was the Senate and people who initiated the motion to prorogue Philo's *imperium*. Furthermore, the motive for this extension was not because Philo was refusing to vacate his office or lay down his command, but because it was deemed not expedient to the Republic (*haud e re publica esse*) for Philo to be recalled when he was so close to victory.[1091] The innovation of *prorogatio*, then, was a legal exception because it worked in tandem with existing law, not against it, and was implemented in order to accommodate an extenuating circumstance, not at the instigation of a commander.

In contrast to exceptional commands, which were constitutional innovations, extraordinary commands were constitutional deviations because the law was subordinated to the command. This does not mean that extraordinary commands were illegal; indeed, they rarely were, if ever. Rather, extraordinary commands were constitutional deviations precisely because they circumvented or overrode established law, especially in response to emergencies.

[1090] See Kloft 1977: 24.
[1091] Livy 8.23.11: *et Publilium inminentem hostium muris avocari ab spe capiendae in dies urbis haud e re publica esset*.

Scrutinizing the exceptionality and extraordinariness of commands on the basis of legalistic innovations only forms part of the picture. To understand the ramifications of exceptional commands and when they become extraordinary, it is also necessary to ascertain the circumstances for their creation and the magnitude of their appearance. The reason for this takes us back to one of the fundamental elements of Rome's constitution, its flexibility in times of need. As we have seen, Cicero stated that the Romans followed tradition (*consuetudini*) in times of peace but were prepared to adapt their institutions to suit new crises and emergencies when they arose (Cic. *Man.* 60). This passage is usually read in a one-sided manner, focusing only on Cicero's apparent endorsement of extraordinary measures, specifically Pompey's command in the Third Mithridatic War (73-63) in 66. The crux of Cicero's argument, however, is the principle of Roman adherence to the precedents and institutions established by their ancestors (*ne quid novi fiat contra exempla atque instituta maiorum*). Admittedly, the implication here is indeed that innovative practices (*novi*) are inherent to the precedent and tradition in Roman politics. What is often overlooked is that Cicero advocates for adaptation only in the face of unprecedented crises (*ad novos casus temporum novorum consiliorum rationes accommodasse*). Thus, while Rome's ancestors (*maiores nostros*) adopted expediency in war (*in bello utilitati parvisse*), they defaulted to tradition in times of peace (*in pace consuetudini*). This means that innovative measures were only allowed when justified by extenuating circumstances, otherwise they conflicted with *mos maiorum*. This corresponds to the distinctions between exceptional and extraordinary commands proposed here: exceptional commands were the result of constitutional innovation that worked alongside and upheld the validity of established law and practice, whereas extraordinary commands were the consequence of constitutional deviations that subordinated and overrode established law. For an example of this, we can look to the election of Q. Fabius Maximus

Rullianus in 295. The height of the Third Samnite War (298-290) was a period of military crisis where the Romans required proven commanders of talent in the field. Subsequently, according to Livy, in the consular elections of 295, the people enthusiastically voted for Rullianus, a famous general who had scored numerous victories over the Samnites in the past. Rullianus, however, protested his candidacy on the grounds that he had been consul two years before in 297, thereby making his reelection an *iteratio* in violation of the *lex Genucia*. When the plebeian tribunes assured him that the assemblies could repeal this law, Rullianus scolded the people, asking why they even bothered passing laws if they were only going to break them, describing the situation as one in which "the laws are not in control, they are being controlled."[1092] Nevertheless, the assemblies persisted and Rullianus was elected to his fifth and final consulship. Rullianus' *iteratio* in 295 is a perfect example of a constitutional deviation, as it highlights the subordination of law and statute, here the *lex Genucia*, in order to accommodate Rullianus' reelection in accordance with the will of the popular assemblies.

A further example can be found in the career of yet P. Cornelius Scipio Aemilanus in 148. Frustrated by their lack of progress in the Third Punic War (149-146), the Roman people elected Aemilianus to the consulship for 147, despite the fact that he was too young (being around thirty-eight) and was only seeking the aedileship at that time. Indeed it was for both of these reasons that Plutarch and Appian actually state that Aemilianus' candidacy for the consulship was outright illegal.[1093] Appian further states that, when the consuls of 148, Sp. Postumius Albinus and L. Calpurnius Piso, objected to Aemilianus' candidacy, the people stated that they had the

[1092] Livy 10.13.9-10: *quid ergo attineret leges ferri, quibus per eosdem qui tulissent fraus fieret? iam regi leges, non regere.*
[1093] Cic. *Amic.* 11; Livy *Per.* 50; *Ep. Ox.* 50.122-123; Vell. 1.12.3; Val. Max. 8.15.4; Plut. *Mor.* 200A, 804F-805A (παρὰ τὸν νόμον); App. *Pun.* 112 (παρανόμου); Dio 21 fr. 70.2-3; *Vir. Ill.* 58.5; Eutrop. 4.12.1; Zon. 9.29. On Aemilianus' age at the time of his election, see Etcheto 2012: 176.

final word regarding elections, a right given to them by the kings, Romulus and Tullus Hostilius, and that they could disregard or uphold whatever law they pleased.[1094] Ultimately, the consuls only yielded to the people after the tribunes threatened to remove the authority for consuls to oversee elections at all. Then, rather than modifying the law with a temporary exception, the Senate was instead persuaded by the tribunes (more likely threatened) to "repeal the law" blocking Aemilianus from the consulship, only to reenact it a year later, in order to make way for a single extraordinary command. In this way, according to Appian, it was as if the Romans had decreed to "let the laws sleep today."[1095]

And yet, despite the primacy of the assemblies in Roman constitutional thought, the issue of the people overriding established law nevertheless appears contradictory. After all, if laws can be disregarded at a whim, when did they have any validity? The key to resolving this issue lies in understanding the relationship between *ius* and *lex*. As discussed in chapter 2, although *ius* and *lex* often overlapped in use, they were not equivalent or synonymous concepts but rather distinct from one another. We can see a succinct example of this distinction, for instance, when Cicero states in *De legibus* that "nothing is more contrary to justice and law" (*iuri ac legibus*) than public violence.[1096] In Roman political thought, *ius* represented notions of justice (*iustitia*), fairness (*aequitas*), and rightness in law. Thus, as Mousourakis states, *lex* "drew upon *ius* but was not identified with it."[1097] In other words, *lex* was grounded in the overarching notion of *ius* and therefore subordinate to it, which meant that any law conflicting with *ius* was implicitly unjust (*iniuria*) and carried no legitimacy.[1098]

[1094] App. *Pun.* 112: καὶ ἐκεκράγεσαν ἐκ τῶν Τυλλίου καὶ Ῥωμύλου νόμων τὸν δῆμον εἶναι κύριον τῶν ἀρχαιρεσιῶν, καὶ τῶν περὶ αὐτῶν νόμων ἀκυροῦν ἢ κυροῦν ὃν ἐθέλοιεν.
[1095] App. *Pun.* 112: "κοιμάσθων οἱ νόμοι τήμερον."
[1096] Cic. *Leg.* 3.42: "*Vis abesto*" *... nihil tam contrarium, iuri ac legibus*. Straumann 2016: 32.
[1097] Mousourakis 2003: 19.
[1098] Cic. *Caec.* 95: *Ascripisse eundem Sullam in eadem lege,* "*Si quid ius non esset rogarier, eius ea lege nihilum rogatum*." Mousourakis 2003: 17-19; Straumann 2016: 60-61.

But because *ius* represented the fundamental principle of justice and rightness, it also served as the foundation of natural law (*ius naturale*) in Rome. Although the concept of natural law is difficult to define, Mousourakis states that it was essentially understood in Rome as the guiding principle for interpreting and applying law, and through which the circumstantial validity of law can be tested.[1099] Specifically, according to Cicero in his *Partitiones Oratoriae* of 54, it was natural law that directed Romans to uphold legal statute and ancestral tradition, but also laid out the strictures by which statute could be lawfully ignored.[1100] Cicero states that when a person admits to breaking the law but swears to have done so "lawfully" (*iure*), they must prove that their actions were driven by necessity and a sense of justice (*aequitatis*).[1101] Indeed, Cicero put this theory into practice two years later in his defense of T. Annius Milo. In early 52, Milo, who was a candidate for the consulship that same year, was convicted of murdering his political rival, the notorious P. Clodius, after a round violence broke out between the two men and their respective supporters near Bovillae along the *Via Appia*.[1102] Though unsuccessful in his legal defense, Cicero argued that Milo had acted lawfully (*iure factum*) because he had killed Clodius only in self-defense.[1103] It was an unwritten law born out of nature itself, according to Cicero, that any measure of ensuring one's safety was permissible when their life was threatened.[1104]

[1099] Mousourakis 2003: 24-28.
[1100] Cic. *Part. Or.* 130: *Ut nostros mores legesque tueamur quodammodo naturali iure praescriptum est.*
[1101] Cic. *Part. Or.* 129: *se id fecisse ipsum in quo reprehenduntur; sed quoniam iure se fecisse dicunt*; 131: *Si imprudenter aut necessitate aut casu quippiam fecerit, quod non concederetur eis qui sua sponte et voluntate fecissent, ad eius facti deprecationem ignoscendi petenda venia est, quae sumetur ex plerisque locis aequitatis.*
[1102] On Clodius' murder and Milo's subsequent conviction, see Cic. *Mil. passim*; *Att.* 5.13.1; *Phil.* 2.21; Caes. *BG* 7.1.1; Livy *Per.* 107; Asc. 30-35, 40-42, 49, 53-54; Plin. *NH* 2.147; Quint. 7.1.34-37; Plut. *Cic.* 35.1-4; Suet. *Iul.* 30.3; App. *BC* 2.20-24; Dio 40.48.1-3, 54.1, 55.1; Schol. Bob. 111-125.
[1103] Cic. *Mil.* 8-9. Milo's trial was interrupted by further political violence, which actually resulted in frightening and unnerving Cicero to the detriment of his usual eloquence. The copy of the speech which is preserved, then, is not the one given at Milo's actual trial, but a more polished version later sent to Milo in exile by Cicero himself. See Asc. 41-42; Plut. *Cic.* 35.3-5; Dio 40.54.3-4; Schol. Bob. 112.
[1104] Cic. *Mil.* 10: *est igitur haec, iudices, non scripta, sed nata lex, quam non didicimus, accepimus, legimus, verum ex natura ipsa adripuimus, hausimus, expressimus, ad quam non docti sed facti, non instituti sed imbuti sumus, ut, si vita nostra in aliquas insidias, si in vim et in tela aut latronum aut inimicorum incidisset, omnis honesta ratio esset expediendae salutis.* See also MacKendrick 1995: 367, 363-365, 370-371; Straumann 2016: 166.

Having argued for the justification of self-defense, Cicero then makes a crucial argument regarding the relationship between law and extraordinary measures: *Silent enim leges inter arma*.[1105] Granted, Cicero is still referring here to an individual act of self-defense, but his logic addresses the broader concept of the justifications for taking actions outside the bounds of legal precept. Furthermore, Cicero makes applies this concept to the broader legal and constitutional issue of public safety throughout the *pro Milone*. A few lines before, for instance, Cicero compares Milo's actions to the killings of multiple men who had been designated public enemies, such as Sp. Maelius in 439, Tib. Gracchus in 133, C. Gracchus is 121, L. Saturninus and C. Glaucia in 100, and even L. Catilina at Cicero's own order in 63.[1106] In all but one case (that of Maelius), each example cited by Cicero involved the invocation of the *Senatus consultum ultimum* (*SCU*), wherein the Senate decreed that a current or former consul could take whatever measures were necessary in order to protect the state.[1107] As discussed in chapter 4, the *SCU* in no way granted additional legal authority a magistrate, but was rather an informal endorsement and encouragement from the Senate for an individual to ignore formal limitations on the exercise of *imperium*, especially inside the *pomerium* and against individuals. In the case of Sp. Maelius in 439, he was killed by the *magister equitum*, Servilius Ahala, for refusing to answer the summons of the dictator, Cincinnatus.[1108]

Thus, despite originating in the defense of an individual, Cicero's *pro Milone* explicated one of the fundamental elements of extraordinary commands, the suspension of legal restrictions on the powers, functions, and/or appointments of magistrates, justified by the declaration of an

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[1105] Cic. *Mil.* 11.
[1106] For sources on Spurius, see *MRR* 1.56; on Tib. Gracchus, *MRR* 1.493-494; on C. Gracchus, *MRR* 1.520-522; on Saturninus and Glaucia, *MRR* 1.574-576; on Catiline, *MRR* 2.164-165; Cic. *Cat.* 1.4-7; Sall. *Cat.* 29.1-3; Plut. *Cic.* 15.3-5; Dio 37.31.1-2. See also MacKendrick 1995: 357; Straumann 2016: 167.
[1107] See Drogula 2007: 446-447; Straumann 2016: 66-67.
[1108] Livy 4.13.1-16.7; Cic. *Sen.* 56; *Amic.* 28; *Rep.* 2.49; Flor. 1.17 (1.26.7); Dion Hal. 12.1-4. See also the sources in *MRR* 1.56. For further discussion of Maelius, see Drogula 2007: 446-447; Straumann 2016: 66-67.

emergency.[1109] Neumann states that Cicero's examples of the *SCU* demonstrated how constitutional institutions such as magistracies could be used in times of crisis in ways that were outside the bounds of constitutional order.[1110] From another perspective, according to Forschner, Cicero was not claiming that laws lost legitimacy in times of emergency, but rather that the law tacitly empowered a person with the right to defend themselves by whatever means necessary.[1111] Forschner further states that Cicero's logic here was not limited solely to matters of private law, but also extended into the defense of the state, arguing that "in cases where state institutions fail to effectively use their legal power, the stability of the legal order depends on the commitment of ordinary citizens."[1112] Indeed, Cicero even argued in favor of magistrates disobeying unjust laws, such as when Brutus and Cassius illegally seized provinces outside of sortition in 43, so long as their interests were aligned with those Senate, since, according to Cicero himself, "all things advantageous to the state are lawful (*legitima*) and just (*iusta*)."[1113]

To summarize, this section addressed one particular question: If extraordinary commands were constitutional deviations because they subordinated existing law, how were they legal? How could it be legal to override established law in Rome? As we have seen, the answer came down to the relationship between *ius* and *lex*. *Ius* represented the overarching principle of constitutional legality and justice, while *lex* referred to individual legal statute derived from the institutional authority of *ius*. And while natural law (*ius naturale*) mandated humans to uphold tradition and legal statute, Cicero reminds us that the highest law in any state is the welfare and prosperity of the people, the *salus populi*.[1114] The *res publica* is the *res populi*, according to

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[1109] Straumann 2016: 6.
[1110] Neumann 2010: 137.
[1111] Cic. *Mil.* 11: *Etsi perspienter et quodam modo tacite dat ipsa lex potestatem defendendi*; Forschner 2016: 60.
[1112] Cic. *Mi.* 89: *numquam illum res publica suo iure esset ulta*; Forschner 2016: 61.
[1113] Cic. *Phil.* 11.27-28: *omnia quae rei publicae salutaria essent legitima et iusta haberentur*.
[1114] Cic. *Leg.* 3.8: *Salus populi suprema lex esto*. See also Cic. *Rep.* 3.33; *Leg.* 1.33; Straumann 2011: 282-283, 287; Straumann 2016: 35-36, 43.

Cicero, and the people are not merely an assembly of individuals gathered without purpose, but one born out of agreement over laws and mutual benefit within the community.[1115] The common agreement to live under the rule of law is the reason that Livy described a "free Roman people" and one where laws were superior to its citizens.[1116] But again, the purpose of law in the Roman world was not simply to impose arbitrary and despotic mandates upon the people, but fundamentally to ensure the *salus populi*. Indeed, Cicero argued that the written law and statute tacitly endorsed extralegal recourse in times of emergency, so long as such action was in the defense of the Roman state. Furthermore, it was the people who had the ultimate say in determining the law through their vote in the assemblies.[1117] Thus, it was not incompatible in the Roman constitution for the people to raise an individual to a command outside the bounds of Roman law, since a popular decree had the force of law, even in contradiction of existing statute. In fact, Cicero outright states in *De legibus* that, if there was anything necessary that was outside the scope of current magistrate, the people ought to elect someone and give them the "legal right" (*ius*) to do so.[1118]

Magnitude: Frequency, Duration, and the Combination of Criteria of Extraordinary Commands

Alongside constitutionality, we can also identify extraordinary commands by analyzing the magnitude of the potential legal criteria, that is the frequency of their occurrence, their duration, and the combination of multiple criteria in one command. Furthermore, even an exceptional command can become extraordinary over time if minor constitutional innovations

[1115] Cic. *Rep.* 1.39: *res publica res populi, populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis iuris consensu et utilitatis communione sociatus.*
[1116] Livy 2.1.1: *Liberi iam hinc populi Romani res pace belloque gestas … imperiaque legum potentiora quam hominum peragam.* See also Cic. *Leg.* 1.41-44.
[1117] Livy 7.17.12.
[1118] Cic. *Leg.* 3.10: *Ast quid erit quod extra magistratus coerari oesus sit, qui coeret, populus creato eique ius coerandi dato.*

were allowed to erode magisterial regulations even further to the point that the law was disregarded entirely. For an example of this, we can return yet again to the original example of prorogation. Philo's brief prorogation was not considered extraordinary for several reasons, such as the manner of its implementation through senatorial proposal and popular vote, the proximity of Philo's command at Neapolis, and the limited tenure of the extension granted to his *imperium*.[1119] In contrast, Seneca referred to the prorogations granted to the elder P. Cornelius Scipio (cos. 218) during the Second Punic War (218-201) as *extraordinaria imperia*.[1120] Whereas none of the nineteen prorogations since 326 had lasted more than a year, Scipio received repeated prorogations each year and held proconsular *imperium* successively from 217 to 211.[1121] Indeed, Seneca explicitly states that it was the continual (*continuet*) commands bestowed on Scipio, his prorogations, that made his commands *extraordinaria*. Furthermore, Seneca states that the honors bestowed on Scipio during his commands were highly coveted among those of consular rank (*consularibus concupiscendos*) and that Scipio did in fact have many enemies.[1122] The importance here is that the incitement of jealousy and envy over prestigious political and military opportunities among aristocratic commanders was a central concern and consequence of extraordinary commands in Rome.[1123]

[1119] Livy 8.23.10-12.
[1120] Sen. *Ben.* 3.33.3: *provincias et extraordinaria imperia continuet*.
[1121] Livy 22.22.1: *prorogato post consulatum imperio*; 25.3.5-6: *prorogatae*. On Scipio's activities from 218 to 211, see the sources listed in *MRR* 1.237-238, 245, 250, 253n. 4, 256, 260, 264, 269, 274. The two prorogations listed by Livy for Scipio following his consulship in 218 may correspond to Seneca's mistaken reference to the second and third consulships held by Scipio (Sen. *Ben.* 3.33.2: *alterum illi consulatum ac tertium aliosque honores*); App. *Ib.* 15: Ῥωμαῖοι γάρ, ληγούσης τῆς ἀρχῆς τῷ Ποπλίῳ, … αὐτὸν δὲ ἀνθύπατον ἀποφήναντες ἐς Ἰβηρίαν αὖθις ἔστειλαν. καὶ ἀπὸ τοῦδε οἱ δύο Σκιπίωνες τὸν ἐν Ἰβηρίᾳ πόλεμον διέφερον. See also App. *Hann.* 8: ΄ὁ δὲ Σκιπίων ἀνθύπατος αἱρεθεὶς ἐς Ἰβηρίαν διέπλευσέ.
[1122] Sen. *Ben.* 3.33.2: *ut idem patrem reum defendat et conspirationi inimicorum potentium eripiat, ut alterum illi consulatum ac tertium aliosque honores etiam consularibus concupiscendos congerat.*
[1123] See, for example, Dio's account of the discussion over Pompey's command in the *lex Gabinia* of 67 (Dio 36.26.1-2, 31.1, 33.2-3). On jealous and extraordinary commands in general, see also Ridley 1981: 289; Lintott 1999: 7; Steel 2013: 241; Coudry 2016: 39.

Alongside their duration, it is also necessary to analyze the frequency of magisterial irregularities, the question of how often they occur. The importance here is the consideration of normality and normativity in the relationship between constitutional innovations and deviations. According to Hermann Heller, normality represents both an acknowledgment among citizens of a behavior toward a rule or law as standard practice, as well as an expectation for continued regard toward that rule in the future. Over time, the populace begins to obey a rule or law reflexively and habitually, which engenders continual observance in the future. In contrast, according to Heller, normativity represents obligatory conduct, or "the exemplariness or bindingness of conduct that accords with particular positive standards."[1124] In other words, for the populace of a state, normality is what has always been done, while normativity is what ought to be done. We see these notions manifest in Roman politics, with normality represented by the concepts of customary practice (*consuetudo*) and ancestral tradition (*mos maiorum*), while normativity is embodied by ideas of legality (*ius*) and statute or legislation (*lex*). A socio-political norm can develop normative force in a state, especially when it is so deeply rooted in the social consciousness that it is a perceived as a constitutional rule, to which adherence is non-negotiable in a community. This is the essential concept of *mos maiorum*, of course, which was inextricably part of Roman identity and often carried the same normative force as legal statue.[1125] But although a normality could develop normative force, it did not need to do so through formal legislation. In fact, as Arena demonstrates, an increase in recourse to written law could also indicate the failure of traditional *mores* to regulate public and political behavior. That is, law is

[1124] Heller 1996: 1185-1187.
[1125] Arena 2014: 217-220.

implemented where tradition failed.[1126] Indeed, Tacitus states that "the Republic was most corrupt when the laws were the most numerous."[1127]

This is not to say that *mos* and *lex* were inherently contradictory or in conflict with each other, though this was certainly possible. Steel argues, for instance, that Sulla's reforms "attempted to replace custom (*mos*) with law (*lex*)," resulting in an unstable system that largely did not long survive the dictator's abdication and death.[1128] On the other hand, in the earlier history of the Republic, particularly through the end of the third century, there was not a great deal of conflict between *mos* and *lex*; indeed, the two concepts had a complementary relationship, according to Lintott.[1129] *Mos* and *consuetudo* provided the basis for constitutional thought in early Rome, while *lex* filled in the specific gaps where *mos* could not reach, such as in ambiguous circumstances or to implement a set procedure.[1130] On the other hand, new measures, even when based on past precedent, themselves become precedent for future generations.[1131] As the emperor Tiberius stated, as recorded by Tacitus, "Tradition adapts to necessity, and this also will soon become customary."[1132] A conceptual problem is evident, then, when customary practice evolves to a degree that it appears to contradict established law.

As has been discussed, an inherent aspect of exceptional commands as constitutional innovations was their ultimate conformity to legal statute. Again, Cicero pointed out in *pro Balbo* that an exception can serve to strengthen established law, since the necessity of seeking a legal exemption underscored the normal strictures of that law.[1133] Maintaining the exceptionality of

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[1126] Hölkeskamp 2010: 22; Arena 2014: 218.
[1127] Tac. *Ann.* 3.27: *corruptissima re publica plurimae leges.* See Lintott 1999: 7.
[1128] Steel 2013: 324; Arena 2014: 217-218. For more on Sulla's reforms, see Flower 2010: 119-132, esp. 124 ("now everything was to be a matter of law rather than of custom").
[1129] Lintott 1999: 5-6.
[1130] Arena 2014: 221.
[1131] Tac. *Ann.* 11.24: *inveterascet hoc quoque, et quod hodie exemplis tuemur, inter exempla erit.*
[1132] Tac. *Ann.* 12.6: *Morem accommodari prout conducat, et fore hoc quoque in iis quae mox usurpentur.*
[1133] Cic. *Balb.* 32: *quod si exceptio facit ne liceat, ubi non sit exceptum, ibi necesse est licere.*

legal innovations, then, required the rarity of their occurrence, which ensured that established law, statute, or legal procedure remained the norm and reflected the common consent of law (*iuris consensu*).[1134] A normality can exist without normative force in a constitutional state, according to Heller, but a law cannot have any normative force if it is not based in a normality; that is, a "valid law is a 'regular reality.'"[1135] Thus, constant and repeated divergence from legal procedure gradually erodes the validity of law, because it normalizes deviations from the established legal order. In other words, if an exception to a law becomes normalized, adherence to the law ceases to be normal, and the law loses its normative force. In this way, the normalization of *ad hoc* legal innovations in response to circumstances represent the complete subordination of law in the name of expediency, which is a principal aspect of constitutional deviations.

It is in this dynamic of normalized innovations that we can see how even minor exceptional commands can become extraordinary over time. One of the main points of contention over the identification of extraordinary commands in modern scholarship is the application of excessive legal interpretations to magisterial irregularities, especially those based on established precedent. An example of this disagreement can be found again in the debate over the extraordinary or exceptional nature of prorogation. Several scholars have maintained that prorogation was not an extraordinary measure because it was achieved through legitimate legal channels and became a commonality over the course of the Republic. But, as we have seen, the six-month extensions of *imperium* granted in the first prorogations pale in comparison to the eight years of prorogation granted to the elder Scipio (217-211), and certainly to the eleven

[1134] Cic. *Rep.* 1.39.
[1135] Heller 1996: 1188.

consecutive prorogations given to L. Licinius Lucullus (73-63).[1136] Similarly, the increase in the frequency of prorogued commands over the course of the second and first centuries did not make the practice any less exceptional. From 299 to 200, around seventy-two commanders received at least a single year's worth of prorogation, but from 199 to 100 no less than 153 commanders received a minimum of one year of prorogation. Clearly, prorogations had become normalized over the course of the second century, but normality is not necessarily normativity.[1137] To the contrary, it was only after the passage of the *lex Baebia* in 181 that prorogations became a routine or automatic prospect for praetors serving in Spain.[1138]

The final aspect of identifying extraordinary commands on the basis of magnitude is in the combination of the various potential legal criteria of irregular commands. I have already discussed this notion in chapters 5 and 6, but a brief summary will suffice here. As we have seen in the consideration of frequency and duration, the occurrence of a certain potential legal criteria individually is not sufficient in determining the existence of an extraordinary command. For example, a single prorogation is not necessarily extraordinary, nor is a minor circumvention of the *cursus honorum* or a violation of sortition. The Roman constitution was sufficiently flexible to allow for such minor irregularities. On the other hand, the coalescence of multiple criteria at one time compounded individual irregularities making the command less exceptional and more extraordinary. As a prime example again, Pompey's command in the *lex Gabinia* in 67 was that of a proconsular *privatus*, with *imperium* equal (*aequum*) to that of all governors within 50 miles from the shore, for a term of three years, and with the right to appoint his own *legati pro*

[1136] On Scipio, see *MRR* 1.237-238, 245, 250, 253n. 4, 256, 260, 264, 269, 274. On Lucullus, see *MRR* 2.106-108, 111-112, 117-119, 123-124, 128-129, 133, 139, 145-150, 154-156, 159-160, 163, 168-170.
[1137] For an opposite view, see Jashemski 1966: 98-99; Ridley 1981: 287; Gruen 1995: 534-535
[1138] Livy 40.44.2.

praetore.[1139] But, if we were to define all extraordinary commands by the standard set by Pompey, then we would have a very short list indeed. Thus, there are multiple other combinations of potential criteria in extraordinary commands, such as the consulship of P. Cornelius Scipio Aemilianus in 147. Due to his youth and inexperience alone, having not even held the aedileship, Scipio's election was a violation of the *cursus honorum*. Beyond this, he also received his province outside of sortition, and even had his *imperium* prorogued into 146.[1140] Thus, in order to ascertain the different possible combinations, it is necessary to example the occurrence of all potential criteria over the course of the entire Roman Republic.

Survey of Extraordinary Commands: 509-31 BCE

So far in this chapter I have outlined how issues of constitutionality and magnitude help determine the difference between exceptional commands, as constitutional innovations, extraordinary commands, which were constitutional deviations. To review, exceptional commands were constitutional innovations because they modified but ultimately upheld laws and statues regulating magistracies. On the other hand, extraordinary commands were constitutional deviations because they subordinated laws and norms regulating magistracies in order to facilitate the creation of the irregular command. In order to determine whether a command was a constitutional innovation or deviation required the consideration of three distinct categories: legal criteria, constitutionality, and magnitude (especially question of duration, frequency, and the combination of criteria). The seven potential criteria of extraordinary commands, which were the possible legal irregularities that such commands could exhibit included violations of annuity (*continuatio*, *reficere*, and *iteratio*), prorogation, the augmentation of *imperium*, circumvention of

[1139] *MRR* 2.155.
[1140] *MRR* 1.463, 467.

the *cursus honorum*, violations of sortition and/or large provincial assignments, and *impar imperium*. The issues of constitutionality regarded the relationship between the irregular command and Roman law, whether the command in question was facilitated through existing statute or required special legal authorization (through the assemblies or the Senate, which was unorthodox). Finally, considerations of magnitude involved the frequency (how often certain irregular commands occurred), duration (how long various irregular commands lasted), and combination (how many different criteria manifested in a single irregular command). There is no set rule scrutinizing the magnitude of irregular commands, but it was typically the case that extraordinary commands tended to occur more frequently, were longer in duration, and featured multiple criteria subsumed under a single commander.

In what follows, I provide a brief survey of all irregular commands over the course of the entire Roman Republic by century, which I analyze through the lens of the three categories mentioned above (criteria, constitutionality, and magnitude), highlighting different trends in irregular commands, and pointing out notable extraordinary commands for each period. Beyond identifying potential extraordinary commands, examining trends and patterns in irregular commands also shows the overall evolution of Rome's regular elected magistracies. It is important to emphasize that the purpose of this survey is not to show every single extraordinary command that ever occurred in this history of the Republic, but rather to show how the necessary scope when identifying possible extraordinary commands and how they changed over time.

Extraordinary and Exceptional Commands: 509-400

It is difficult to determine the presence of extraordinary commands in the first hundred years following the foundation of the Republic for a variety of reasons. For one, we suffer from a

paucity of evidence for much of the fifth century, and what information we do have is of doubtful provenance and veracity. Much of the Republic's early history was rooted in legend or tradition and preserved in the biased works of historians writing hundreds of years later.[1141] Lastly, many of the laws regulating magistracies, such as the *cursus honorum* or the ban on *iteratio*, only emerged in the mid-fourth century, since Rome relied more on *mos maiorum* for much of the earlier Republic than codified legislation, which developed later.[1142] Nevertheless, when surveying extraordinary commands over the course of the entire Republic, it is still necessary to take note of those magistracies and commands considered *extra ordinem* by later generations of historians.

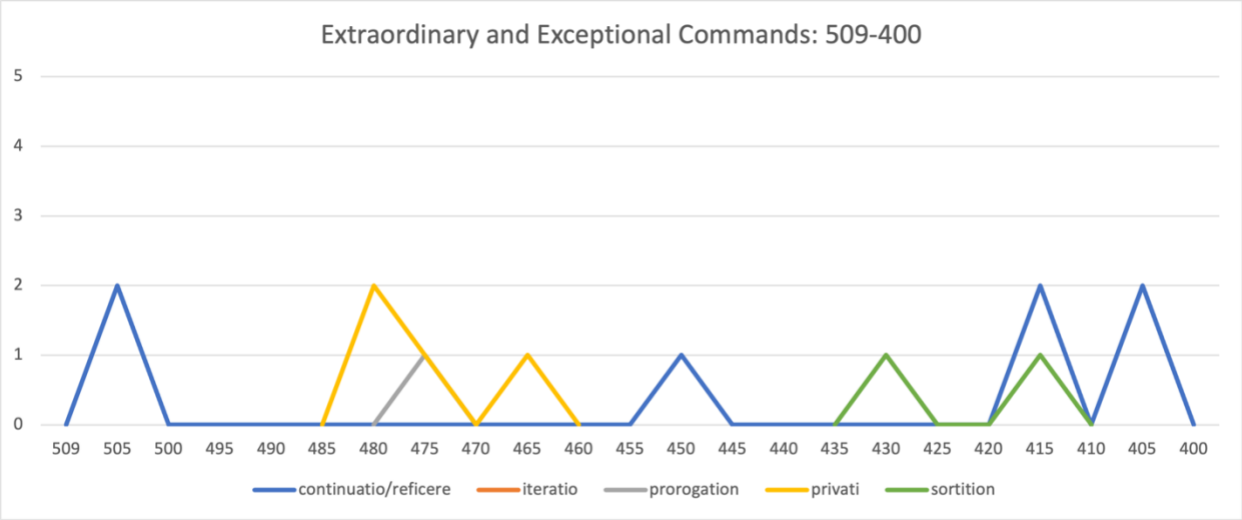

Figure 1

To begin with an overview of legal criteria, the main magisterial irregularity we find in the fifth century is the intermittent occurrence of *continuatio*, as shown on Figure 1. The first instances of *reficere* occurred merely a year after the founding of the Republic when one of the suffect consuls of 509, P. Valerius Publicola, was elected to the consulship consecutively for the

[1141] Mousourakis 2003: 37.
[1142] Lintott 1999: 6-7; Mousourakis 2003: 77, nn. 30-32; Straumann 2016: 48.

years 508 and 507. Although we do not possess any records of the *Fasti* for this period, multiple literary sources attest to the multiple consulships held by Publicola.[1143] None of our sources remark with any alarm at Publicola securing two consecutive consulships specifically, but he was apparently accused of aspiring to the kingship and only avoided prosecution by placating the people through a series of popular reforms, many of which regarded the regulation of magistracies.[1144]

Livy and Dionysius of Halicarnassus also attest to the existence of five commanders wielding proconsular *imperium* between 480 and 460, which would include four *privati cum imperio* and one apparent prorogation. These stories are likely apocryphal, however, since the legal distinctions surrounding promagistracies and holding *imperium* outside elected office (that is, *pro consule*) does not appear historically until the first prorogation in 326.[1145] Like much of early republican history, it is likely that Livy and Dionysius were trying to reconcile stories of legendary Roman commanders with gaps in official political history and were forced to explain

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[1143] On Publicola's first election in 509, see Livy 2.2.11; Dion. Hal. 5.12.3, 14.3, 15.4; Val. Max. 2.4.5 (*primus consul*); 4.4.1; Plin. *NH* 36.112 (*primo consule*); Plut *Pop.* 7.; Eutrop. 1.9.4; Zon. 12. On his second election to the consulship in 508, see Livy 2.8.9 (*P. Valerus iterum T. Lucretius consules facti*); Dion. Hal. 5.20.1 (τὸ δεύτερον ὕπατος); Plut. *Pop.* 16.2 (ὕπατος τὸ δεύτερον). On his third election to the consulship, see Dion. Hal. 5.21.1 (τὸ τρίτον ἐπὶ τὴν αὐτὴν ἀποδειχθέντος ἀρχὴν); Plut. *Pop.* 17.1 (τὸ τρίτον ὑπατεύων). Valerus Maximus (4.4.1) states that Publicola held the consulship three times after his first term but does not specify the order of these offices. Eutropius (1.11.4) does not mention Publicola's second or third consulships after his first in 509 but does state that Publicola died in 504 after his fourth consulship.

[1144] Plut. *Pop.* 10.1-3; Dio 3 fr. 13.3. For example, Publicola supposedly instituted the right of *provocatio* and made it illegal for anyone to assume a magistracy without a vote of the people (Plut. *Pop.* 11.2-3).

[1145] On Q. Fabius Vibulanus and T. Siccius in 480, see Dion. Hal. 9.11.2 (πρεσβευτὴς καὶ ἀντιστράτηγος), 12.4, 14.3. See also *MRR* 1.19-2-25. Dionysius' use of ἀντιστράτηγος referred not to a propraetor, but a proconsul since the praetorship did not exist in 480. See Livy 6.42.11; 7.1.1, 6. See also See also Kloft 1977: 63; Stewart 1998: 95-97, 130; Lintott 1999: 107; Mousourakis 2003: 64, 83 n. 52, 86; North 2007: 264; Vervaet 2009b: 408-409; Anderson 2018: 13. On Kaeso Fabus Vibulanus and Ser. Furius Fusus in 478, see Dion. Hal. 9.16.3-4 (ἀνθύπατος); Livy 2.48.5-10, 49.3. On the importance of Livy's reference to Kaeso's *profectio* denoting legal *imperium*, see see Henderson 1957: 83; Kloft 1977: 68; Stewart 1998: 126n. 105; Sumi 2005: 35, 90, 167; Pomeroy 2006: 176-177; Beck 2011: 91; Zollschan 2011: 53-54; Driediger-Murphy 2014: 108; Konrad 2015: 162-164; Vervaet 2015: 220-221; Koortbojian 2020: 19n. 18; 40. On T. Qunctius Capitolinus in 464, see Livy 3.4.10-11 (*pro consule*), 5.8-13; Don. Hal. 9.63.2-4.

these magisterial aberrations in the legal language at their disposal, that is, as extraordinary commands.

In 451, ten former consuls were elected to serve on a board known as the *Decemviri Consulari Imperio Legibus Scribundis*.[1146] As the name of the commission implied, the board of the ten, or decemvirate, was established for the purpose of codifying Roman law, shifting the emphasis from *mos* to be based more on *lex*.[1147] The decemvirate was certainly extraordinary in nature from the start, given that its creation entailed the suspension of numerous constitutional norms regulating magistrates and was seen as a temporary expedient, while its members possessed consul *imperium* and *potestas sine provocatione*. Indeed, Dionysius of Halicarnassus explicitly referred to the decemvirate as "strange" (ξένην) and a "new office" (νέαν ἀρχὴν), while Gellius outright said that it was empowered with "extraordinary law" (*extraordinario iure*).[1148] While the decemvirate was successful initially, it quickly gave way to potential tyranny. For one thing, by the end of the year, instead of disbanding and allowing elections for regular offices to resume, the decemvirate sought to extend or renew their tenure for another year into 450. One *decemvir*, Appius Claudius Crassus Inregillensis, was especially ambitious and did not want to cede his position on the board, but instead succeeded in "having his magistracy continued" (*continuandum magistratum*) by popular vote, something that was seen at the time as a very dangerous precedent in Rome.[1149]

[1146] Cic. *Rep.* 2.61, 63; Livy 3.33.1-2; Dion Hal. 59.2; Diod. 12.23.1; Tac. Ann 3.27; for Gell. 11.18.6; 17.21.15; 20.1.3, 20, 34; Zon. 7.18.

[1147] Thus, as Cicero says (*Rep.* 2.61), the *decemviri* in their first year of office drafted legislation based on highest fairness and practicality (*Qui cum X tabulas summa legum aequitate prudentiaque conscripsissent*)

[1148] Dion. Hal. 10.54.7, 55.2; Gell. 14.7.4-5. See the translation of Gellius below in the discussion of the consular tribunes.

[1149] According to Livy 3.35.3-8, Appius was anxious at the prospect of losing his decemviral office (*demissa iam in discremin dignitas*), so much so that he seemed more concerned with seeking office rather than holding it (*petendo quam gerendo magistratui*) and in finding a way to prolong his office (*non tam properantis abire magistratu quam viam ad continuandum magistratum quaerentis esse*), which was seen as a terrible precedent (*id ipsum pessimo exemplo*). See also Dion. Hal. 10.58.3 (ἐπὶ τῆς ἀρχῆς ἠξίου κατέχειν).

Several years later in 444, according to tradition, the Roman government again suspended normal political offices and instituted the election of military tribunes with consular powers (*tribuni militares consulari potestate*).[1150] Just as with the decemvirate, Gellius also described the consular tribunes as possessing *extraordinarium ius*, since they held *imperium* outside elected office. Furthermore, Livy, Dionysius of Halicarnassus, and Gellius all specify that the consular tribunes functioned "in place of the consuls," that is, *pro consulibus*.[1151] Just as in the brief experiment of the *decemviri*, the consular tribunate resulted in at least two separate examples of *continuatio*/*reficere*, namely C. Servilius Axilla (cos. trib. 419-417), as well as C. Servilius Ahala (cos. trib. 408-407), whom Livy states received a "continuance in office" (*continuato honore*).[1152]

Extraordinary and Exceptional Commands: 399-300

The fourth century was a period of continued experimentation and political refinement in the history of the Roman Republic. The experiment of the *tribuni militum consulari potestate*, for insteance, persisted for much of the first half of the 300s, during which time we see a spike in the occurrence of *continuatio* and *reficere*. Nevertheless, the institution of the consular tribunes was

[1150] On the historicity of the consular tribunate, see Versnel 1970: 188-189; Heurgon 1973: 173-175; Stewart 1998: 57-61; Mousourakis 2003: 83, 101. Against this see Holloway 2008: 122. On the problems of early Roman chronology, see Cornell 1995: 399-402; Forsythe 2005: 369-370; Holloway 2008: 114-125, esp. 115. Citing Cicero (*Brut.* 16.62) and Plutarch (*Num.* 1.1), Holloway states that "The Romans were perfectly aware that their early history was a reconstruction, although they employed a less generous term, 'forgery.'"

[1151] Livy 4.7.1 (*tribuni militum pro consulibus magistratum*); Dion. Hal. 11.62.1 (τὴν ἀνθύπατον ἀρχὴν); Gell. 14.7.4-5 (*extraordinario iure tribunos quoque militares, qui pro consulibus fuissent, item decemviros, quibus imperium consulare tum esset*); see also 13.12.6. Furthermore, as Stewart (1998: 61) points out, some consular tribunes later served as *interreges*, "suggesting political recognition of the full authority (*auspicium* and *imperium*) of their office." For other arguments in favor of the consular tribunes possessing *imperium*, see Versnel 1970: 188-189; Heurgon 1973: 173. Against this, see Badian 1990: 469.

[1152] On Servilius Axilla in Diodorus, see 13.2.1 (M. Servilius), 7.1 (C. Servilius); in Dionysius' listing, see (12.6.6); in Livy, see 4.44.13, 45.4; 46.10 (possibly referred to as the son of the dictator, Q. Servilius Priscus); 47.7 (possibly referred to as L. Servilius Structus). On Servilius Ahala, see *Fast. Cap.*, p. 34; Diod. 13.104.1; 14.3.1; Livy 4.56.2; 57.6, 12 (*continuato honore*).

finally terminated in 367 by the *leges Liciniae Sextiae*, which introduced sweeping regulatory reforms of Roman magistracies. For one, the *lex Genucia* of 342 officially required a gap of ten years between holding the same office, thereby allowing us to view the occurrence of *iteratio* as a possible extraordinary command for the first time. Finally, the practice of *prorogatio* was officially introduced for the first time in 326 with Q. Publilius Philo, which profoundly changed the dynamic of extraordinary commands throughout the rest of the Roman Republic.

The adoption of the consular tribunate began as an experiment in the fifth century, but its usage increased to the point that it had become the dominant high magistracy in the Roman

Figure 2

Republic by the turn of the fourth century, continuing nearly unbated from 408 to 367.[1153] While originating as a response to the need for multiple military commanders beyond what the dual consulship could provide, the consular tribunate introduced the danger of abuse of power in Roman politics, as a select group of aristocrats began to dominate high office.[1154] The principle

[1153] As stated above, after their inception in 444 and until their dissolution in 367, the only years without consular tribunes were 443-439, 437-435, 431-427, 423, 421, 413-409, 393-392, and 371-371.
[1154] From 408 to 367, for instance, twenty-five men served as either consul or consular tribune for at least three terms. Of these, L. Valerius Potitus, Q. Servilius Fidenas, M. Furius Camillus, and P. Valerius Potitus Poplicola

of annuity, specifically the prohibitions of *continuatio* and *reficere*, were rooted in the foundation of the Republic and were "key constitutional safeguards" against the concentration of political authority into the hands of individual leaders, according to Straumann, which could result in the rise of tyrannies or the return of monarchic rule in Rome.

Whereas only six instances of *continuatio*/*reficere* occurred during the fifth century, this number nearly doubled for the fourth century, rising to a total of ten, eight of which took place in the terms of consular tribunes. First, L. Furius Medullinus was reelected to the consular tribunate on two separate occasions, 398-397 and again in 395-394.[1155] The 380s saw a number of *continuationes* in quick succession that all went without comment in the source material, such as L. Quinctius Capitolinus (386-385), his brother T. Quinctius Capitolinus (385-384), Ser. Sulpicius Rufus Praetextatus (384-383, 377-376), and L. Aemilius Mamercinus (383-382).[1156] L. Veturius Crassus Cicurinus also served consecutive terms in 368 and 367.[1157]

Perhaps the most egregious example of *continuatio*/*reficere* during this period, however, was not with the consular tribunes but instead with the plebeian tribunes. Specifically, C. Licinius Stolo and L. Sextius Lateranus both held the plebeian tribunate for a period of ten years continuously from 376 to 367.[1158] While not a military command, the extraordinary nature of this

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served at least six terms in office, while L. Furius Medullinus and Ser. Cornelius Muluginensis held the consular tribunate on at least seven occasions. For sources, see *MRR* 1.78-114.

[1155] On 398-397, see Livy 5.14.5, 16.1, 17.2-3; on 395-394, see Livy 5.24.1, 26.2; Diod. 14.94.1. Another *continuatio* for 394 possibly belonged to P. Cornelius, whose cognomen is missing, and could refer to either Cossus or Scipio, both of whom were consular tribunes for 395, but could also refer to Maluginensis, consular tribune for 397. It is additionally possible that a "Cornelius" was briefly elected (though abdicated as *vitio creatus*) as consul for 393, but the evidence in *Fasti Capitolini* (p. 38) is too fragmentary to be certain. See *MRR* 1.87, 89-92, as well as 90-91n. 1 and 92n. 1. A further possible *continuatio* could belong to Cornelius' brief consular colleague in 393, L. Valerius Potitus, who also abdicated, but was reelected the following year. The problem, however, is that the only reference to Valerius for 393 is in the Chronograph of 354 (Divjak and Wischmeyer 2014: 377), which lists him along with Cornelius Maluginensis (*Potito et Malluginense*). On Valerius' consulship in 392, see Livy 5.31.2; Diod. 14.103.1; 15.14.1; Dion. Hal. 1.74.5-6. See also 91-92, 92n. 1.

[1156] Livy 6.6.3, 11.1, 18.1, 21.1, 22.1, 32.3; Diod. 15.25.1, 28.1, 36.1, 61.1, 71.1; Dio 7 fr. 29; Zon. 7.24. On the dating problems for the consular tribunes of 376, see *MRR* 1.107-109, 109n. 1.

[1157] Livy 6.38.2, 42.3.

[1158] Livy 6.35.4-10, 36.7, 39.6-12; Dion. Hal. 14.12; Plut. *Cam.* 39.1; Dio 7 fr. 29; Zon. 7.24.

ten-year tribunate is self-evident, especially as it coincided with a supposed five-year cessation of curule magistracies, representing the complete subordination of constitutional law over elections and the regulation of magistracies. Indeed, Licinius and Sextius' extended tenure of office was seen as excessive by many, with Appius Claudius, grandson of the decemvir who also received a *continuatio*, even accusing both men of trying to make themselves "perpetual tribunes" and whose tenure was akin to the reign of kings.[1159] After 367, there were only two more possible instances of *continuatio*/*reficere* for the remainder of the fourth century, both of whom were consuls, namely C. Plautus Decianus (329-328) and L. Papirius Cursor (320-319).[1160]

The passage of the *lex Genucia* of 342 was the first legal attempt to restrict *iteratio*, the repeated but not consecutive election to the same office, by stipulating that an individual could not hold the same magistracy within the space of ten years.[1161] The significance here is that, until 342, we have not been able to regard instances of *iteratio* as extraordinary, because there was no law prohibiting it. The problem, however, was that merely allowing at least one year to pass between holding the same office prevented magistrates from accusations of *continuatio* and *reficere*, but still allowed for the concentration of *imperium* into the hands of a select few repeated office holders, especially among patrician families.[1162] For instance, there were around seventy-one iterated consular tribunes and sixteen iterated consulships between 399 and 350.[1163] After the passage of the *lex Genucia* in 342, however, we see a significant drop in the number of

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[1159] Livy 6.40.7: *perpetuos … tribunos*, 41.3: *quorum annos in perpetua potestate tamquam regum in Capitolio numerates*, 8-12. See also Livy 6.38.6, 41.8-12.
[1160] For Decianus, on the Chr. 354, see Divjak and Wischmeyer 2014: 382. For Proculus, see Livy 8.22.1. On the full debate over the consuls of 328, see the discussion in *MRR* 1.145n. 1. On Papirius, see Livy 9.15.11 (*continuato magistratu*); Diod. 18.58.1.
[1161] Livy 7.42.2: *ne quis eundem magistratum intra decem annos caperet*.
[1162] Brennan 2000: 66.
[1163] *MRR* 1.85-128.

iterationes, with only a total of eighteen occurring after 342 until the end of the fourth century. While *iteratio* was still possible and certainly did occur after 342, as Hölkeskamp points out, these were "exceptions to the rule" that now required justification as a potential answer to various emergencies.[1164] In other words, from 342 onward we are now able to speak of *iteratio* as a potential exceptional or extraordinary command. There were only isolated iterations in the 330s, which appear as temporary exceptions that uphold the *lex Genucia* more than detract from it, especially since no iterated commands are held for a decade after 330.[1165] In contrast, the outbreak of the Second Samnite War (326-304) was a period of crisis that prioritized expediency and survival over "constitutional niceties," as Eckstein states.[1166] Consequently, we see a rise in iterated consulships starting in 320, such as L. Papirius Cursor (cos. 326, II 320, III 319, IV 315, and V 313), Q. Publilius Philo (cos. 339, II 327, III 320, and IV 315), C. Sulpicius Longus (337, II 323, and III 314), C. Iunius Brutus (317, II 313, and III 311), and Q. Fabius Maximus Rullianus (322, II 310, III 308, IV 297, V 295), each of whom had held the consulship on at least three occasions by the end of the fourth century.[1167]

The above examples of *iteratio* demonstrate the military and political conundrum in which the Romans found themselves during periods of crisis. The exigencies of war demanded men of proven military talent beyond the limits of their annual terms of office, but the Romans were simultaneously loath to disregard annuity overall, as it was a sacrosanct safeguard against tyranny. Thus, as a potential answer to this problem, one of the most significant developments in

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[1164] Hölkeskamp 1993: 24. Against this, see Brennan 2000: 66-67.
[1165] See M. Valerius Corvus, cos. 335 (Livy 8.16.5; Diod. 17.40.1); L. Papirius Crassus, pr. 332 and cos. 330 (Livy 8.17.12, 19.1; Diod. 17.82.1; cf. Vell. 1.14.4).
[1166] Eckstein 2008: 226.
[1167] L. Papirius Cursor had also been consul for 319, which was a *continuatio* from the previous year; for sources on his consulships, see *MRR* 1.146, 152, 154, 156, 158). On Q. Publilius Philo, see *MRR* 1.137, 147, 152, 156. C. Sulpicius Longus is a perfect example of attempts to uphold the *lex Genucia* in consular elections, as his terms are spaced ten years apart; see *MRR* 1.138, 149, 157. C. Iunius Brutus was consul in (*MRR* 1.155, 158, 161). On Q. Fabius Maximus Rullianus see, *MRR* 1.149-150, 161-162, 164, 175, 177.

the history of extraordinary commands also took place during the Second Samnite War, the introduction of prorogation in 326 for Q. Publilius Philo (cos. 327).[1168] The development of prorogation has already been discussed in significant detail in previous chapters, but it will suffice here to reiterate here that it allowed a commander, by a vote of the assemblies, to retain his *imperium* temporarily after his term of office ended. Thus, the act of *prorogatio* alone should not be considered an extraordinary command, because it was a temporary modification of existing statute that preserved the annuity of office. Nevertheless, the Romans do seem to have recognized the extraordinary potential of prorogations, in that, although consular limits were preserved, magistrates were now able to wield *imperium* outside of elected office. The fact that only one further prorogation occurred in the fourth century, specifically for Q. Fabius Maximus Rullianus in 307, demonstrates that the Romans originally considered *prorogatio* to be a recourse only taken in rare circumstances.[1169] And so long as it remained a rare and ephemeral practice, prorogation was merely an innovative exception to the principle of annuity.[1170] If, on the other hand, prorogations became more frequent and of longer duration, it would signal the subordination of annuity to an extraordinary measure, thus representing a deviation from constitutional laws regulating Roman magistracies, a dynamic that would indeed take place over the course of the third century.[1171]

Extraordinary and Exceptional Commands: 299-200

The third century was a period of further development in exceptional and extraordinary commands, including attempts at regulations and experimental measures in response to crises.

[1168] Livy 8.23.11-12; 23.26.7.
[1169] *MRR* 1.165. As Develin (1975: 722) states, "Prorogation was not to be used unless really necessary."
[1170] Kloft 1977: 15.
[1171] Develin 1975: 716-722.; Kloft 1977: 9, 22-26; Beck 2011: 88.

Commands that violated or strained the principle of annuity, namely *continuatio, reficere*, and *iteratio*, became increasingly rare but still occurred during periods of emergency. The device of prorogation, on the other hand, steadily increased over the first half of the century, before exploding in use during the Second Punic War (218-201). Lastly, more radical measures, such as the conferral of *imperium* onto *privati* and violations of the *cursus honorum* become more prominent throughout the third century. In the end, the use and discussion of extraordinary commands in this period resulted in a recognition among the Romans that the flexibility of their constitution, a hallmark of their success, had its limits, which led to further attempts at the regulation of extraordinary measures in the second century.

Instances of *continuatio* and *reficere* remained at modest levels throughout the third century, occurring only on five occasions and confined to the crises of the Third Samnite War (298-290) and Second Punic War (218-201).[1172] *Iteratio*, on the other hand, occurred on thirty-

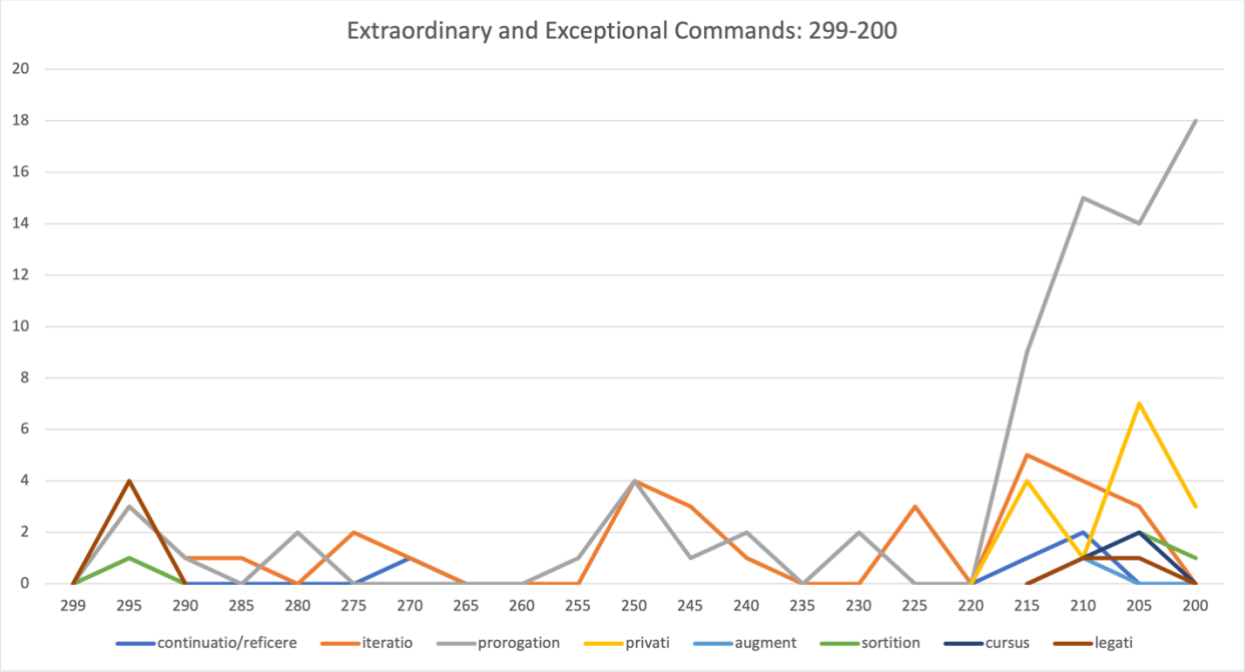

Figure 3

[1172] See M. Valerius Maximus, cos. 299 (Livy 10.11.4-6; Cic. *Sen.* 60); Man. Curius Denatus, cos. 274 (*Fast. Cap.*, p. 53); M. Pomponius Matho, pr. 216 (Livy 22.55.1); Q. Fabius Maximus Verrucosus (Nep. *Cat.* 1; Livy 24.7-9; Plut. *Marc.* 9.13); Q. Fulvius Flaccus (Livy 24.9.4-5).

one occasions during the third century, most of which were confined to the Samnite and Punic Wars. Prorogations followed patterns similar to *iteratio* for most of the third century but skyrocketed throughout the Second Punic War. Overall, seventy-two commanders had their *imperia* prorogued at least once in the third century, but during the Hannibalic War it became increasingly common for commanders to wield *imperium* for multiple years in succession, a distinct departure from the practice of six-month prorogations that were common since 326.

Several new irregularities were also introduced during the third century, such as granting *imperium* to individuals who did not hold elected office, *privati*, as well as the augmentation of an elected magistrate's *imperium*. The first four *privati* were appointed as legates to the consuls in 295, a measure that was not used again until the Second Punic War, where it occurs on fifteen occasions.[1173] There were also several instances where both the *cursus honorum* and sortition were circumvented entirely. The proliferation of magisterial irregularities means that multiple examples of extraordinary commands can be found during the third century, especially in the combination of various legal criteria. For instance, the appointment of *privati cum imperio* throughout the third century all qualify as extraordinary commands, because there was simply no constitutional mechanism to wield *imperium* outside of an elected magistracy (aside from the position of the dictatorship). Another extraordinary command was the iterated election of Q. Fabius Maximus Rullianus in 295. Having already held the consulship, Fabius protested the people's desire to elect him as consul on the basis of the prohibition of *iteratio* as stipulated in the *lex Genucia*, appealing to the people to have "respect for the laws" (*verecundia legum*).[1174] When the tribunes replied that the people's vote could dissolve the *lex Genucia*, Fabius asked in

[1173] For the *privati* of 295, see Livy 10.25.11, 26.12-15, 29.3-4, 30.1-2.
[1174] Livy 10.13.8: *Quae verecundia legum restinguenda ratus, legem recitari iussit, qua intra decem annos eundem consulem refici non liceret.*

reply why the people would even bother passing laws if they were so quick to circumvent them. In such a state of affairs, Fabius concluded, the law was not ruling the people, rather the people were ruling the law (*iam regi leges, non regere*).[1175]

Extraordinary commands were also present at the onset of the Second Punic War. In 217, for example, we find the first case of augmented *imperium*, when the Roman people, impatient with the cautious tactics of the dictator for that year, Q. Fabius Maximus Verrucosus, voted to elevate the *imperium* of his *magister equitum*, M. Minucius Rufus, to that of a co-dictator via the *lex Metilia*. Such a measure had never been taken before, and Vervaet points out that the passage of the Metilian law in 217 set the precedent for all future augmentations of *imperium*, particularly for proconsular authority granted to former praetors, which was widely practiced in the second century.[1176]

Another extraordinary command that shocked the Roman people was the *continuatio* in 214 obtained by the consul, Q. Fabius Maximus Verrucosus. In 215, Fabius actually interrupted the consular elections for 214 when he disagreed with the people's initial selection and in order to compel the assemblies to vote for him instead, even using the threat of violence to silence one of his political opponents and rivals, T. Otacilius Crassus, who accused Fabius of attempting to have his consulship continued (*continuare consulatum*). Crassus was correct, in the end, as Livy reports that Fabius indeed succeeded in having his "consulship continued" (*consulatus continuatus*).[1177] Livy also states that the people were shocked by Fabius' behavior, but the crises

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[1175] Livy 10.13.10: *Se ad populum laturos, uti legibus solveretur. Et ille quidem in recusando perstabat, quid ergo attineret leges ferri rogitans, quibus per eosdem, qui tulissent, fraus fieret. Iam regi leges, non regere.* See Broughton (*MRR* 1.175n. 1), who persuasively argues that the Rullianus' iterated consulship indeed took place in 295, not in 297, as Livy's chronology would suggest.
[1176] Plb. 3.103 (ὃ πρότερον οὐδέποτε συνεβεβήκει παρὰ Ῥωμαίοις); Plut. *Fab.* 9.3 (πρᾶγμα μὴ πρότερον ἐν Ῥώμῃ γεγονός); Vervaet 2007: 197-232; 2012: 46-47. See also Dio 14 fr. 57.17.
[1177] Livy 24.9.9.

brought on by the Hannibalic War were such that no one was worried about issues of precedent or even suspected Fabius of coveting high office.[1178]

One of the most notable extraordinary magistracies during the third century was the election of P. Cornelius Scipio (the future Africanus and son of the proconsul in Spain of the same name) to the curule aedileship in 213. When the tribunes objected to Scipio's candidacy on the grounds that he was below the legal age, he responded that "If the people want to make me aedile, then I am old enough!"[1179] After the people voted accordingly in Scipio's favor, the tribunes laid down their objections. Though a minor office and with no military capacity, Scipio's premature election to the aedileship is a textbook example of an extraordinary magistracy, because there was no constitutional innovation for modifying an existing office or law to allow for Scipio's candidacy, nor was there any emphasis placed on the importance of standard electoral protocol. Instead, the law governing age requirements in the *cursus honorum* was subordinated entirely to accommodate the people's desire to elect the young Scipio. As we will see, this was not an isolated incident and similar instances would occur repeatedly throughout the next two centuries of the Republic.

Also during the Second Punic War, we find the case of L. Marcius Septimius, the only recorded instance of a commander being refused an extraordinary command, which provides valuable insight on both the legal implications and Roman perceptions of extraordinary commands. In early 211, after serving for eight years in Spain (Livy 25.36.14), the proconsuls P. and Cn. Cornelius Scipio were both killed at the Battle of Upper Baetis in southern Spain, being

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[1178] Livy 24.9.7, 10-11: *Consulatum ineuntes plus solito convererant in se civitatis animos; … Tempus ac necessitas belli ac discrimen summae rerum faciebant ne quis aut in eam rem exemploum exquireret aut suspectum cupiditatis imperii consulem haberet.*
[1179] Livy 25.6.6-7: *"Si me" inquit "omnes Quirites aedilem facere uolunt, satis annorum habeo."*

defeated by Hasdrubal Barca, brother of Hannibal.[1180] In the ensuing chaos, L. Marcius Septimius, a young junior office, rallied the survivors of the Scipionic armies and salvaged the Roman position, even managing to gain some minor victories over the Carthaginians. Livy states that the remaining soldiers in Spain voted to appoint Marcius as their *dux tumultuarius*, or irregular general, with the implication that he possessed *imperium*.[1181] This attempted battlefield promotion seems to have been genuine, since Marcius soon sent a dispatch to the Senate announcing the defeat of the Scipio brothers as well as the recent victories under his own leadership, requesting supplies for the army, and referring to himself specifically as a propraetor.[1182] According to Livy, although the Senate was impressed and grateful for Marcius' actions, the *patres* rejected his claim to the title of propraetor, calling it an empty title or honorific (*titulus honoris*), since he had not received *imperium* from either a popular vote or a senatorial decree.[1183]

The most notable extraordinary command during the Second Punic War, of course, and arguably one of the most famous and important in Roman history overall, was the proconsular command granted to the young *privatus*, P. Cornelius Scipio, who was the son of the slain commander in Spain of the same name and would later gain the *agnomen* Africanus. The memory and shock from the loss of two previous commanders, P. and Cn. Cornelius Scipio, meant that their successor had to be selected with "extraordinary care" (*extraordinaria cura*).

[1180] Plb. 8.38.1; 9.22.3; Livy 25.32-36; 27.44.6; 28.43.10; Val. Max. 3.7.1; Sil. 13.650-704; Flor. 1.33.6; App. *Ib.* 16-17; Eutrop. 3.14.2; Amm. Marc. 31.13.17; Oros. 4.17.12; Zon. 9.5.
[1181] Livy 25.37.6: *ad L. Marcium cuncti summam imperii detulerint*; 26.37.8: *tumultuaria duce*; 28.28.13: *ducem … delegistis*; 28.42.4: *L. Marcius et militari suffragio ad tempus lectus, … si nobilitas ac iusti honores adornarent*; Val. Max. 1.6.2: *ducis duorum exercituum*; 2.7.15: *suffragiis dux esset creatus*; 8.15.11; *inusitati decoris … ducem legerunt*; Front. *Str*. 2.6.2: *T. Marcius, eques Romanus, cui duobus Scipionibus occisis exercitus imperium detulit*. Note that Frontinus confuses L. Marcius' praenomen for "Titus."
[1182] Livy 26.2.1: *L. Marcii … "propraetor senatui" scripserat*; Val. Max. 2.7.15: *senatui de rebus actis a se scribens in hunc modum orsus est: "L. Marcius pro praetore."*
[1183] Livy 26.2.1: *quod imperio non populi iussu, non ex auctoritate patrum dato.*

Livy states that it was decided, presumably by the Senate, to leave the matter to the people, who themselves chose to elect a new proconsul (*proconsuli creando*), implying the new commander would not be a regular magistrate but instead a promagistrate of some type. Ultimately, after none of Rome's current or former commanders stepped forward, only the young P. Cornelius Scipio offered to undertake the command in Spain, despite being only twenty-four years old, and having only held the office of curule aedile. Due to both his age and lack of prerequisite offices, then, Scipio was unqualified for a proconsular command according to the *cursus honorum*. Nevertheless, he received an unanimous vote according to Livy, though the people began to experience trepidation at their new commander's youth and inexperience, obliging Scipio to bolster the voters' confidence at their decision.[1184] Lastly, Dio underscores the extraordinary nature of Scipio's appointment as a *privatus cum imperio* when he emphasizes that Scipio did not have "the legal title of a commander after being elected."[1185] The young Scipio went on to command for several years in Spain, winning a score of victories for the Romans, before returning home in 206.

Two *privati* with propraetorian *imperium,* L. Manlius Acidinus and L. Cornelius Lentulus were sent to Spain in 206 to relieve Scipio, who was returning to Rome with the intention of standing for the consulship.[1186] Furthermore, while commanding in Spain, one of the *privati*, Lentulus, was actually elected as curule aedile for the following year (205) in Rome, though Livy states that he was able to carry out the duties of his office despite being far away from the city in Spain. Thus, aside from the irregularity of being elected *in absentia*, we should more

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[1184] Livy 26.18.2-19.9; 28.28.14, 43.11-14; 29.20.2; Val. Max. 3.7.1; Sen. *Dial.* 10.17.6; Sil. 15.1-151; 16.645-656; App. *Ib.* 18; Dio 16 fr. 57.38-40; *Vir. Ill.* 49.7; Eutop. 3.15.1; Oros. 4.17.13; Zon. 9.7.
[1185] Dio 16 fr. 57.40: ὁ Σκιπίων καὶ μὴ ἐννόμου ἡγεμονίας λαβὼν ὄνομα ἐξ ὧν ἐχειροτονήθη.
[1186] Livy first refers to both Acidinus and Lentulus as propraetors for 206 (Livy 28.38.1), though he calls them proconsuls the following year (Livy 29.13.7). Polybius (11.33.8) makes no mention of either, though both Dio and Zonaras refer to both commands as praetors (Dio 17 fr. 57.56; Zon. 9.11). In any case, no source mentions the source of their appointment for 206.

importantly take note that Lentulus was technically an aedile with propraetorian *imperium*, which was certainly an extraordinary command.[1187] As for Scipio, the extraordinary nature of his command as a *privatus* was highlighted once again when he arrived back in Rome later that year (206). According to Livy, Scipio had wanted a triumph but was denied one, since, despite holding command in Spain for several years in succession, he had done so without holding a magistracy, which was a legal requirement for a triumph.[1188]

Scipio's inability to receive a triumph paled in comparison to a greater prize, however, his successful election to the consulship for 205.[1189] The extraordinary nature of Scipio's consulship can be seen in several ways. First, despite being around 30 years old by 205, Scipio was still far too young for the consulship. Second, although the sequence of the elected magistracies in the *cursus honorum* had not been codified by the time of the Second Punic War, Scipio's advancement to the consulship despite only having been elected as aedile was still considered extraordinary, and indeed may be the reason that legislation was passed in 197 requiring the praetorship as a prerequisite to candidacy to the consulship.[1190] Furthermore, Scipio stirred up controversy over the distribution of provinces for 205, when he demanded that the Senate allot him the command in Africa *extra sortem*, threatening to take the question to the popular assemblies if necessary.[1191] A long debate ensued in the Senate, and when Scipio was challenged to repeat his threat openly in the Senate, he stated that "he would act as he thought was best for the state."[1192] The significance of this assertion is that it reveals one of the principal

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[1187] Livy 29.11.12: *Curules erant aediles Cn. et L. Cornelii Lentuli; Lucius Hispaniam provinciam habebat; absens creatus absens eum honorem gessit.*
[1188] Livy 28.38.4: *sine magistratu*. See also Val. Max. 2.8.5; Plut. *Pomp.* 14.1; Dio 17 fr. 57.56; Amm. Marc. 25.9.10.
[1189] Livy 28.38.6; 29.20.2; 30.30.14; Val. Max. 8.15.1; Sil. 13.511; 16.595-599; Plut. *Mar*. 12.2; Dio 17 fr. 57.56; *Vir. Ill.* 49.12; Oros. 4.18.17.
[1190] On this, see Astin 1958: 19-30.
[1191] Livy 28.40.1-2.
[1192] Livy 28.45.3: *Scipio respondisset se quod e re publica esset facturum.*

dangers about extraordinary commands, that public emergencies and service to the state could be used as justification for the circumvention of law and legal procedure, regardless of whether or not such an emergency even existed. Scipio finally relented in his demands when opposed by the plebeian tribunes, though he ultimately did receive Africa as his province.[1193]

The Second Punic War was truly a period of innovation and experimentation for the Roman state, especially in the employment of magistrates and military commanders. Prorogation, which had been used sparingly since its inception in 326 skyrocketed during the Hannibalic War, becoming an indispensable expedient in Rome's arsenal. Compared to the twenty prorogations that occurred between 326 and 219, over forty commanders had their *imperia* prorogued during the Second Punic War, at an average 7.2 prorogations per year over the course of seventeen years. Furthermore, multiple commanders held *imperium* through prorogations for several years in succession, such as M. Valerius Laevinus, who wielded prorogued *imperium* for nine years over the course of the Hannibalic War. Similarly, eight years of prorogation were granted in total to M. Claudius Marcellus, Q. Fulvius Flaccus, and to P. Cornelius Scipio Africanus. No matter how often the people chose to prorogue their magistrates' *imperia*, the extensions remained exceptional so long as the prorogation was finite and lasted no more than a year. But, as Kloft points out, when prorogations became "expressly extended beyond the one-year period," they then became extraordinary as they directly contradicted the principle of annuity.[1194]

Extraordinary and Exceptional Commands: 199-100

[1193] Livy 28.45.9-11; Quint. 3.8.17, 37; Sil. 16.600-700; Plut. *Fab.* 25.2-26.2; App. *Hann.* 55; *Pun.* 6-7; Polyaen. 8.14.2; Dio 17 fr. 57.52; Zon. 9.11.
[1194] Kloft 1977: 93.

After the emergency of the Second Punic War, the use and function of Roman magistracies were forever changed. Exceptional measures that had been used with caution previously, such as prorogation, were now regularly used expedients. Meanwhile, extraordinary commands that were relatively unheard of in the past, like *privati cum imperio* and augmentations of *imperia*, became very practical options in times of necessity. While the victory over Carthage was followed by a decrease in exceptional and extraordinary commands, they declined only gradually and did not disappear entirely. The fact that irregular commands and magistracies continued to be used, even if in a reduced fashion, demonstrates that the Romans were unable to depart from many of the extraordinary measures adopted over the last two decades. In other words, as Kloft states, the Romans recognized that "one could not go back the way taken in the Second Punic War."[1195]

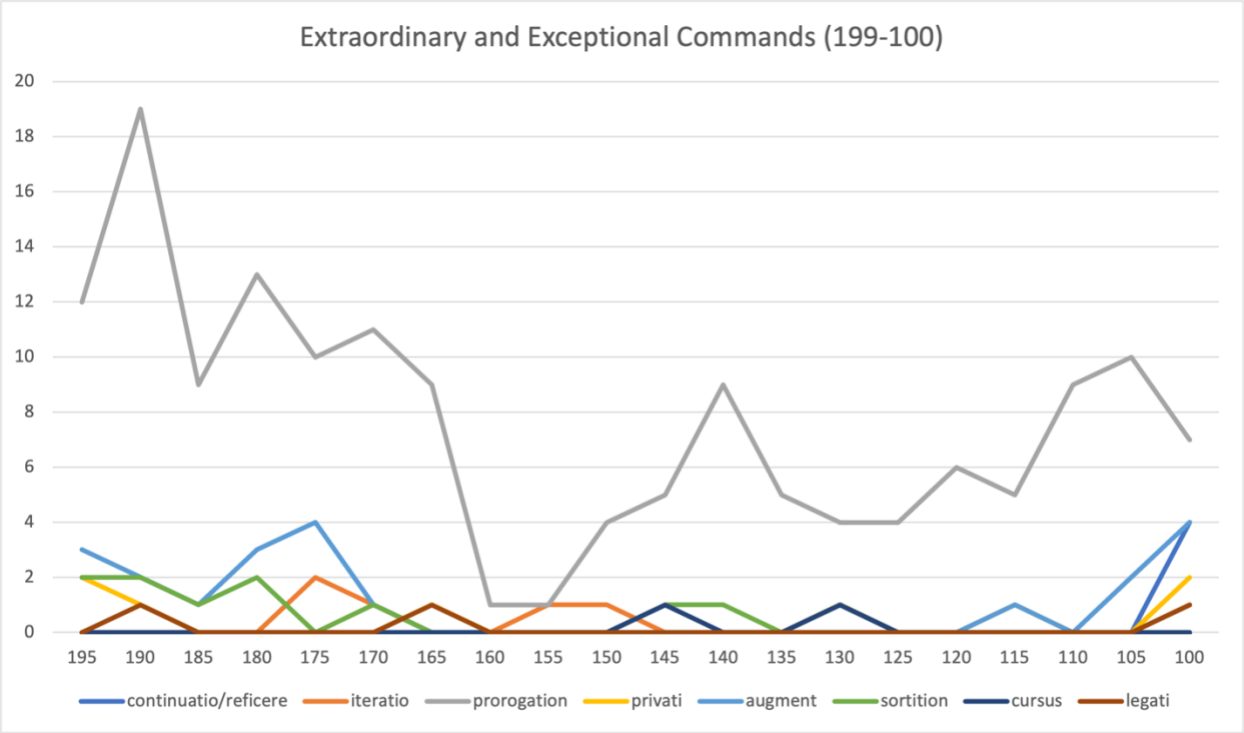

Figure 4

[1195] Kloft 1977: 32.

The general avoidance of *continuatio*/*reficere*, an extraordinary and extremely controversial measure, does seem to have held fast for the vast majority of the second century. After the last instance of *reficere* in 214, there were no further cases for 110 years, only reappearing with the five successive consulships held by C. Marius (104-100).[1196] Iterated elections also remained rare throughout the second century occurring at least seven times, on average around twice every twenty years.[1197] Prorogations remained at levels similar to that of the Second Punic War for the early second century, no doubt due to the continuous warfare in Spain, Greece, and Macedon, but do begin to decline around 165, only to rise again around the time of the Third Punic War (149-146), as well as during the Cimbric and Jugurthine Wars (113-101). Despite the drastic rise in prorogations during the Second Punic War, prorogued commands remained low for most of the third century, resulting in a total of seventy-two commanders receiving at least one year's prorogation. In contrast, although the duration of prorogations remained at modest or low levels for much of the second century, the frequency of their use was much more consistent than the previous century. Consequently, from 199-100, no less than 153 commanders had their *imperium* prorogued for one year at minimum.

If the third century was a period experimentation regarding extraordinary commands, then the second century should be regarded as a period of regulation. As stated above, the Roman government could not depart from many of the expedient measures used during the Hannibalic War, but there were attempts at standardizing previously exceptional measures, namely prorogation, and regulating them under normative law. The creation of two new praetorships in 197 for the Spanish provinces does indicate that the Roman government recognized the

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[1196] *MRR* 1.558, 562, 567, 570, 574.
[1197] See Cn. Cornelius Scipio in 177, C. Valerius Laevinus in 177, C. Cluvius Saxulua in 178 and 173, C. Marius Figulus in 161, M. Claudius Marcellus in 152, and P. Scipio Aemilianus in 134; C. Marius in 104. *MRR* 1.392, 395, 397n. 4, 398, 408, 410n. 1, 441-442, 447-448, 453, 558.

insufficiency or danger of relying solely on prorogations. Nevertheless, the passage of the *lex Baebia* in 181 made a single year's prorogation automatic for governors in Spain by stipulating the election of four and six praetors in alternating years.[1198] And since the Spanish provinces were only included in the sortition in the years when six praetors were elected, any praetor dispatched there could implicitly expect at least one year's automatic prorogation. Thus, the significance of the *lex Baebia,* according to Brennan, is that "it marks the first institutional acceptance of routine prorogation."[1199] Henceforth, single-year prorogations could no longer be considered exceptional magistracies, since they had become a normalized and normative component of Roman provincial administration. Thereafter, the extraordinary nature of prorogations could only be assessed in terms of magnitude; that is, how often they were granted, for how long, and their combination with other irregularities, such as *continuatio*/*reficere*, as in the case of Marius, or *privati cum imperio*.

Further extraordinary measures were used less frequently after the conclusion of the Second Punic War and for most of the second century overall. The use of *privati cum imperio*, for instance, which had proliferated in the war against Carthage, decreased considerably over the course of the second century, occurring on only seven occasions.[1200]

[1198] Livy 40.44.2: *Praetores quattuor post multos annos lege Baebia creati, quae alternis quaternos iubebat creari*.
[1199] Brennan 2000: 626 (for the quotation), as well as 170, 392, 625-626; see also Astin 1958: 27.
[1200] See Cn. Cornelius Blasio, in 199 (Livy 31.50.11: *plebes Cn. Cornelio Lentulo et L. Stertinio pro consulibus imperium esse in Hispania iussit*; *MRR* 1.329n. 3); L. Stertiinius, in 199 (Livy 31.50.11); L. Oppius Salinator, in 192 (Livy 35.23.4-7: *itaque Senatus, ... decrevit, ... ut M. Fulvius praetor classem navium viginti mitteret ad tuendam Siciliae oram, et ut cum imperio esset, qui classem eam duceret, duxit L. Oppius Salinator, qui priore anno aedilis plebei fuerat*; 24.6); Ap. Claudius Centho, in 169 (Livy 43.9.6: *et consul Hostilius Ap. Claudium in Illyricum cum quattuor milibus peditum misit*. For more discussion on Claudius in 169, see *MRR* 1.425, 427n. 5); L. Valerius Flaccus, in 117 (Cic. *Div. Caec.* 61-63; *MRR* 1.529); C. Cluvius, in 104 (*ID* 1679: Γάιον Κλούιον Λευκίου υἱὸν στρατηγὸν ἀνθύπατον Ῥωμαίων); C. Lucilius Hirrus in 102 (*CIL* 1^2 2.2662: *auspicio [Antoni Marc]i pro consule classis/Isthmum traductast missaque per pelagus/ipse iter eire profectus Sidam classem Hirrus Atheneis/pro praetore anni e tempore constituit*).

Similar to the occurrence of *privati cum imperio*, there appeared to be only six definite instances where the practices of sortition or *comparatio* were blatantly circumvented, though our sources do not always specify the details of provincial assignment.[1201] The final two cases where sortition was bypassed entirely occurred simultaneously with the only two violations of the *cursus honorum* in the second century, the extraordinary consular elections of P. Cornelius Scipio Aemilianus for 147 and 134. In the first case, when standing for the aedileship in 148, Scipio was instead elected enthusiastically to the consulship by the popular assemblies, despite the fact that he was too young for the office and had held none of the prerequisite magistracies.[1202] When the consuls presiding over the elections protested Scipio's candidacy, the people responded that it was they who held the authority over electing their magistracies, which was a law passed down to them from the kings, Romulus and Tullus Hostilius. The consuls initially persisted in their resistance but acceded after the plebeian tribunes threatened to take away from the consuls their right to oversee elections at all. The *lex annalis* was then repealed to legitimize Aemilianus' candidacy and was thereafter reinstated, thereby allowing Aemilianus to circumvent the *cursus honorum* altogether. Even after securing the election, when Aemilanus' consular colleague, C. Livius Drusus, proposed that they decide their provincial assignments by lot, the tribunes instead put the question before the assemblies, who immediately chose Aemilianus for the campaign in Africa. Thus, in the case of Scipio Aemilianus in 147, we see the complete subordination of electoral and regulatory law for magistracies in order to accommodate the creation of an

[1201] Cn. Cornelius Blasio and L. Stertinius in 199 (Livy 31.50.11); L. Oppius Salinator in 192 (Livy 35.23.4-7); for the provincial assignments of 190 (Livy 37.1.7-10, esp. 8-9: *Scipio responso ad hoc dato cogitaturum, quid sibi faciendum esset, cum fratre uno locutus iussusque ab eo permittere audacter senatui, renuntiat collegae facturum se, quod is censeret. cum res aut nova aut vetustate exemplorum memoriae iam exoletae relata expectatione certaminis senatum erexisset*).

[1202] Although Scipio Aemlianus was 38 at the time of his election, and therefore not as young as when his namesake and adoptive father, Scipio Africanus, had held the consulship in 205 (being around 30), the consulship was reserved for men who were at least 42. For Aemilianus' birth in 184, see Cic. *Rep.* 6.12; Plut. *Mor.* 199F. On the age requirements of magistracies, see Astin 1958.

individual extraordinary command.[1203] It is little surprise that Appian remarked on the occasion that it was as if someone in Rome had said "Let the laws sleep today."[1204] Twelve years later, the people again decided to elect Aemilianus to the consulship, this time to command at Numantia in Spain. As we have already seen, Aemilianus' consular candidacy was now illegal due to a law passed around 151 that prohibited any person from being elected to a magistracy twice, the *lex de consulato non iterando*, but this too was repealed by the assembly to facilitate Aemilianus' candidacy.[1205] Furthermore, Valerius Maximus states that Aemilianus received his provincial assignment directly after a senatorial decree, just as in the Third Punic War.[1206]

Lastly, cases of augmented *imperia* proliferated during the first half of the second century, surpassing levels even seen during the Second Punic War, rising to twenty-one instances in total. Fourteen commanders had enhanced *imperia* between 199 to 175, and all were prorogued praetors who served in Spain.[1207] Seven remaining instances of commanders with augmented *imperia* are scattered throughout the remainder of the latter second century and mainly concentrated in Greece, Macedonia, and Asia Minor.[1208] For most, no explanation in our sources is given for the manner in which these praetors received proconsular *imperium*. Instead, the course of events is usually that an elected praetor departs from Rome to his assigned

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[1203] Cic. *Amic.* 11; Livy *Per.* 50; *Ep. Ox.* 50.123-124; Vell. 1.12.3; Val. Max. 8.15.4; Sen. *Contr.* 1.8.12; Plut. *Mor.* 199F, 200A, 804F-805A; App. *Pun.* 112; Dio 21 fr. 70.2-3; *Vir. Ill.* 58.5; Eutrop. 4.12.1; Zon. 29.9.
[1204] App. *Pun.* 112.
[1205] Cic. *Rep.* 6.11; Livy *Per.* 56; Vell. 2.4.2; App. *Hisp.* 84; Eutrop. 4.17.2; Oros. 5.7.1; Cassiod. *Chr.* 619.
[1206] Val. Max. 8.15.4: *Eidem senatus bis sine sorte provinciam, prius Africam, deinde Hispaniam dedit.*
[1207] See the examples M. Helvius, 196-195; C. Sempronius Tuditanus, 196; Q. Minucius Thermus, 195; M. Fulvius Nobilior, 193-191; L. Aemilius Paullus, 191-189; A. Terentius Varro, 183-182; P. Sempronius Longus, 183-182; Q. Fulvius Flaccus, 181-180; L. Postumius Albinus and Tib. Sempronius Gracchus, 180-178; M. Titinius Curvus, 178-175; T. Fonteius Capito, 177-176; Ap. Claudius Centho, 174. For sources on these individuals, see *MRR* 1.336-337, 341, 344, 348, 351, 353-354, 357, 362-363, 366-367, 369, 371, 373, 382-385, 388-389, 398-399, 401.
[1208] For Caepio, see Val. 6.9.13: *praeturae splendore*; *Fast. Tr.*, p. 107: *proconsul*; for Antonius, see *CIL* $1^2$2662: *pro consule*; Cic. *de Or.* 1.80-82: *Antonius … pro consule*; Livy *Per.* 68: *praetor*; Cn. Cornelius Sisenna (118), Q. Servilius Caepio (108-107), C. Billlienus (106), C. Cluvius (104), C. Memmius (103), M. Antonius (101-100), and T. Didius (100-99). See the discussions in *MRR* 1.526, 528, 546, 551, 552n. 3, 553, 559-560, 564, 568-570n. 2, 571-572, 576-577.

province, receives a prorogation for a second year of *imperium*, at which point they are referred to as wielding proconsular *imperium*. Only in the case of one proconsular praetor, L. Aemilius Paullus (pr. 191), do we have an actual explanation of the potential reason and means of augmenting praetorian *imperium*. According to Plutarch, the Roman government, already embroiled in the Syrian War (192-188), required the service of another talented commander when a new war broke out in Spain in 191. Consequently, the Romans dispatched the praetor L. Aemilius Paullus to Spain, "not with six lictors which the praetors usually carried, but with twelve so that his office would have consular rank."[1209] Livy seems to support this interpretation, saying that Paullus, as praetor, was sent to take over the army formerly commanded by another praetorian proconsul, M. Fulvius, in Hispania Ulterior.[1210]

The general trend in exceptional and extraordinary commands was one of a gradual decline from 199 to 160, a precipitous drop from 160 to 150 (mostly likely due to the dearth of evidence for the period in question), followed by only a moderate increase and steady use of prorogations until a spike in various extraordinary measures at the end of the century. We are, however, able to draw some correlations to the trends in irregular commands during the second century. The first half of the century, where we see prevalent use of various extraordinary measures, occurred during periods of intense warfare in Spain, as well as intermittent conflict in Greece, Macedon, and Asia Minor, while the temporary increases around 150 to 130 are likely due to the Numantine and Third Punic Wars, as well as the Cimbric and Jugurthine Wars beginning around 115. Most notably, aside from the 150s, decreases in the rate of prorogations are followed by increases in other extraordinary measures, especially cases of augmented

[1209] Plut. *Aem.* 4.1: ἐπὶ τοῦτον ὁ Αἰμίλιος ἐξεπέμφθη στρατηγός, οὐχ ἓξ ἔχων πελέκεις, ὅσους ἔχουσιν οἱ στρατηγοῦντες, ἀλλὰ προσλαβὼν ἑτέρους τοσούτους, ὥστε τῆς ἀρχῆς ὑπατικὸν γενέσθαι τὸ ἀξίωμα.
[1210] Livy 35.24.6 (*praetores creati L. Aemilius Paulus*); 36.2.6 (*L. Aemilio Paulo Hispania ulterior*), 8 (*L. Aemilio Paulo in ulteriorem Hispaniam, praeter eum exercitum quem a M. Fulvio proconsule accepturus esset*).

imperia. Overall, the image that emerges for the second century is one of the Roman government attempting to assert control over exceptional measures in order to prevent a resurgence of the rampant extraordinary commands seen in the late third century. Unfortunately, the concurrent spike in *continuatio*/*reficere*, *privati cum imperio* (including the appointment of *legati*), and violations of the *cursus honorum* at the end of the second century signaled a potential rise in extraordinary commands for the final century of the Republic.

Extraordinary and Exceptional Commands: 99-31

The Roman Republic did not survive the first century. After enduring the Social War, multiple internecine conflicts, a separatist movement in Spain, rampant piracy throughout the Mediterranean, and the protracted wars against Mithridates, the Republic ultimately succumbed to renewed civil war in the 40s and 30s. Throughout this entire period, extraordinary commands of all types rose to unprecedented levels, making it no surprise that so many of the most well-known examples of extraordinary commands are found during this period.

The nearly incessant civil war characterizing much of the first century resulted in almost constant states of emergency, wherein extraordinary measures were frequently employed, leading to crises of legitimacy, in which opposing sides each believed that their opponents were not being led by extraordinary promagistrates, but rather rebels with no legal standing for their commands. Consequently, there are so many potential extraordinary commands that occurred during this period that is almost overwhelming, leading to the temptation to strike many such commands from the list that were held by those who were eventually defeated in the civil wars. And yet, when Caesar crossed the Rubicon in 49, for instance, he and Pompey both legally held proconsular *imperium*, despite the fact that each viewed the other as an enemy of the state.

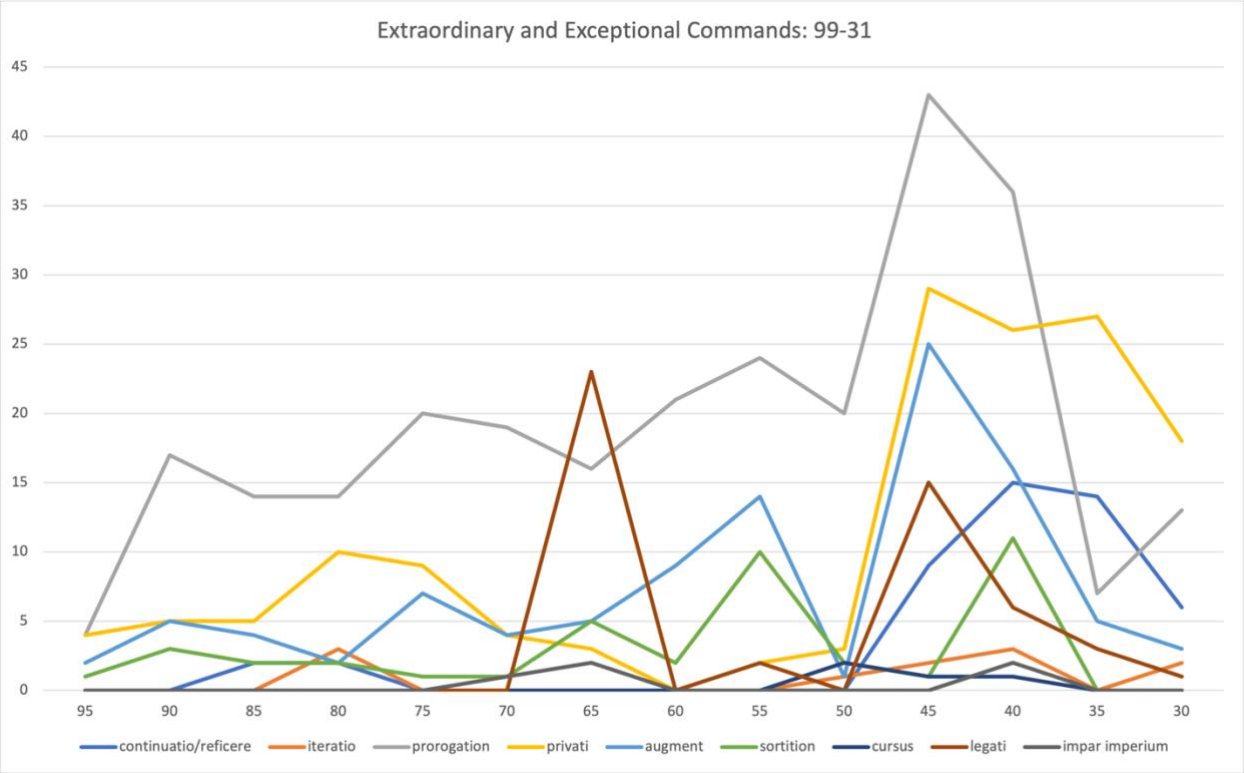

Figure 5

Therefore, when examining extraordinary commands of the first century, we must consider those held by members of all factions, even those in rebellion, so long as they were created through valid legal channels originating from the government at Rome, namely popular acclaim. After all, following his departure to Spain in 83 and until he was assassinated by Perperna in 72, Q. Sertorius could have justifiably argued that he held a prorogued praetorship as the legitimate governor of Spain, since that was indeed the last assignment he received from the Marian government in Rome.[1211]

The variety and constant fluctuation of different types and criteria of extraordinary commands from 99 to 31 is a good reflection of the general chaos of the period. On the other hand, due to the sheer volume of potential extraordinary commands during this time, a detailed year-by-year analysis of all the commands occurring during the first century would require its

[1211] App. *BC* 1.86, 108.

own dedicated chapter, if not more. Thus, as with the preceding periods examined in this chapter, the following discussion will focus on general developments in the first century and point out some notable extraordinary commands along the way. As Figure 5 shows above, even a cursory examination of the commands during this period reveals several notable trends that are worthy of discussion.

The first overall observation to make is that the potential criteria of extraordinary commands across all categories occurred in higher rates in the first century than any previous period in the Republic. The most moderate levels for prorogations, *privati cum imperio*, augmented *imperia*, and even violations of sortition occurring during the first century surpass the highest relative occurrences for the entire third and second centuries. The number of commanders receiving new prorogations, for instance, never drops below at least three per year after 80 until around 35, but then immediately begins to trend upward once again. Cases of augmented *imperia*, which only occurred at modest levels in the first thirty years of the second century, now occurred in increasing numbers over the course of the first century, rising from around one per year to six annually in the span of fifty years. Even the controversial use of *continuatio*/*reficere*, which had only reappeared at the end of the second century with Marius' repeated consulships, occurred at a rate of two to three per year after 50, largely as a consequence of Caesar's continued dictatorships and the institution of the Second Triumvirate, occurring a total of forty-four times between 49 and 31.

Next, in contrast to previous periods, the first century is the only time where the criterion of *impar imperium* truly appears, and then only in very low numbers. To be clear, the hierarchy of *imperia* between different offices had always existed in Roman politics, but only in the first century do we find specific ranks of *imperium* beyond what was inherent to each specific office,

such as the so-called *imperium infinitum* granted to M. Antonius in 74, as well as L. Calpurnius Piso and A. Gabinius in 58, and the proconsular *aequum imperium* held by Pompey in 67. Additionally, the *maius imperium* granted to both Pompey in 57 is often seen as a precursor to that eventually wielded by the first emperor, Augustus.[1212] Thus, the paucity of their occurrence in the first century, especially in comparison to the quantity of other criteria, does not diminish its significance. To the contrary, the novelty and rarity of granting specially defined *imperia* only further emphasizes the extraordinary nature of separating the regulation of *imperium* from elected magistracies, a process that arguably began with the first prorogation in 326.

Second, the prorogations shown in Figure 5 only show the first year that commanders had their *imperium* prorogued in order to highlight commanders receiving new commands each year. In contrast, Figure 6 shows the total number of all prorogations, including commanders receiving

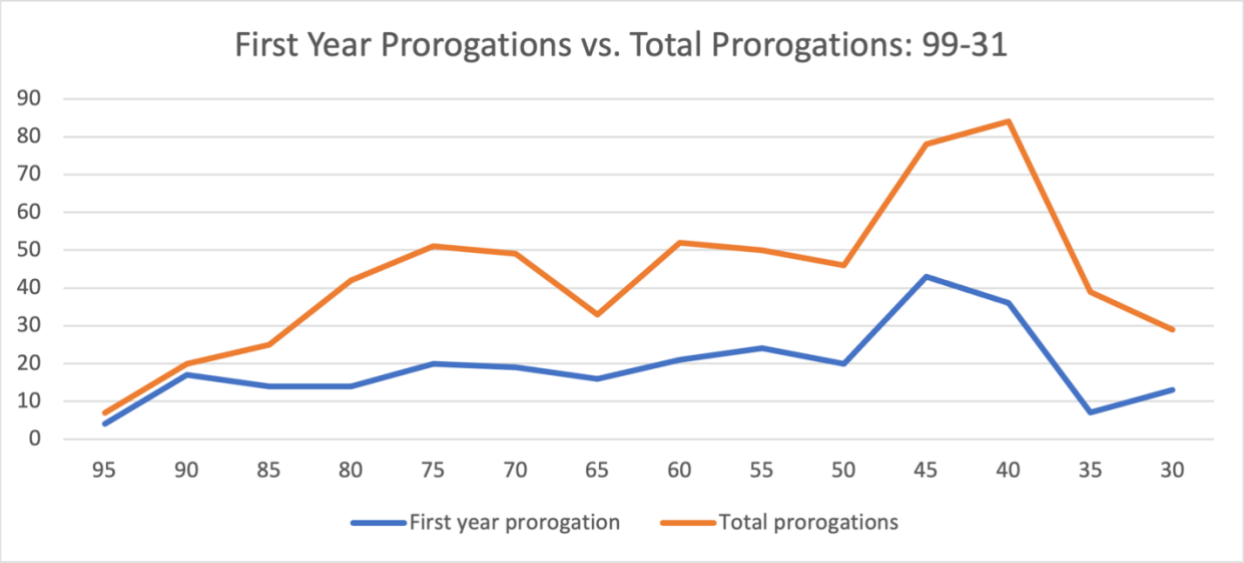

Figure 6

[1212] For M. Antonius in 74, see Cic. *Verr.* 2.2.8, 3.213; Sall. *Hist.* 3.2-4; Vell. 2.31.3-4; Lact. *Inst.* 1.11.4; for Piso and Gabinius in 58, see Cic. *Dom.* 23, 55; *Piso* 88; App. *BC* 5.10; *Syr.* 51; on Pompey's *imperium* in the *leges Gabinia et Manilia* of 67-66, see Plut. *Pomp.* 25.3; 26.2; on Pompey's *maius imperium* in 57, see Cic. *Att.* 4.1.7; App. *BC* 2.18; Dio 39.9.3; 54.1.3; on Augustus' *maius imperium*, see Dio 53.15.4, 16.1, 32.5-6. For more discussion on *imperium infinitum* and *maius imperium*, see also Cic. *Att.* 9.9.3; *Fest.* 152L; Gell. 13.15.4; Boak 1918: 8, 20-24; Loader 1940: 134-136; Last 1947: 157-164; Ehrenberg 1953: 113-136; Henderson 1957: 83; Jashemski 1966: 95-96; Kloft 1977: 72-74; Ridley 1981: 285, 295; Sherwin-White 1984: 187-188; Lintott 1993: 115-116; Stewart 1998: 98-99, 111-112; Drogula 2007: 435; Vervaet 2014: 186, 262-263; Straumann 2016: 49-50.

their first year of prorogued *imperium*, as well as subsequent renewals and extensions. From 99 to 31, 268 commanders received at least one year's prorogation, with 605 commands being prorogued in total. The significance here is that, even where the Romans seemed to show restraint in extending the *imperia* of new commanders (such as the declines in prorogation in 90-85, 75-65, 55-50, and 45-35), there were a plethora of commanders continually wielding *imperium* year after year. It is this distinction that allows historians to discern the true extraordinary nature of prorogations. As we have seen since its inception of *prorogatio* in 326, temporary extensions of *imperium* are not extraordinary commands but only exceptional measures, since the annuity of office is upheld. But, as Kloft has noted, constant and excessive prolonging of *imperium* undermined the exceptionality of *prorogatio*, making it an extraordinary deviation from the principle of annuity. Thus, like the prolonged commands held by Scipio Africanus during the Second Punic War, the massive tenures of command held in the first century, such as the twelve-year command held by L. Licinius Lucullus (74-63) are in stark contrast to the six-month extension of *imperium* granted to Q. Publilius Philo in 326.

There is also a clear correlation between the rise and fall of different criteria and historical events of the first century. In many periods during the first century, prorogations, *privati*, augmentations, and provinces assigned *extra sortem* were nearly parallel in their occurrence. For example, between 85 and 75, prorogations, *privati cum imperio*, *iteratio*, augmented *imperia* all begin to increase, whereas between 75-70, all four criteria were in decline. Interestingly, these trends broadly correspond to the outbreak of the Sullan-Marian civil wars and the relative resolution of these conflicts, such as Pompey's conclusion of the Sertorian War in 72. A better example can be found in 50-49, the eve of the civil war between Caesar and Pompey. According to Figure 5, Caesar's crossing of the Rubicon preceded a flurry of nearly all

potential criteria of extraordinary commands, with prorogations, augmentations of *imperia*, the appointment of *privati* and *legati cum imperio*, and others skyrocketing dramatically to the highest numbers in the history of the Republic. Furthermore, the trends of potential criteria during the first century all gradually increase in frequency and number over time, resulting in a continual growth in the overall magnitude of extraordinary commands as the century progressed. Of course, the trends in potential extraordinary commands indicated above do not correspond exactly to the various wars and events in Rome at the time, nor do they need to. What they show, rather, is an echo of how the Romans were acting, or reacting, in response to various events affecting the Republic in the first century. The image that emerges is not optimistic but depicts an incremental escalation of extraordinary commands over the course of the first century with a compounding momentum that spirals out of control by the middle of the century.

As mentioned at the start of this section, the first century provides the most famous and commonly cited examples of extraordinary commands, many of which have been mentioned throughout this dissertation. And yet, as a consequence of the wide variety of irregularities occurring during the first century, we are able to identify several unique but lesser-known extraordinary commands for this period. T. Didius, for instance, spent most of the first decade of the first century in possession of *imperium*, beginning with his praetorship in 101, followed by two years of prorogations (100-99), during which time his *imperium* was augmented to the rank of proconsul. Didius was then elected consul for 98 and received five consecutive years of prorogations in Spain, before triumphing as proconsul in 93.[1213] Another development in the first century was the rise of the proquaestorship. Proquaestors were mentioned occasionally in the second century, namely C. Sempronius Gracchus (125-124) and C. Marcellus (114-113).[1214]

[1213] *Fast. Tr.*, p. 107; Cic. *Pis.* 61; Livy *Per*. 70. See also *MRR* 1.571, 573n. 1, 577; 2.3-4, 7, 10-11, 13, 15.
[1214] On C. Sempronius Gracchus, see *MRR* 1.511-512; on C. Marcellus, see *MRR* 1. 534, 536.

More notable were the propraetorian quaestors and proquaestors, namely M. Antonius in 112 and L. Cornelius Sulla in 105.[1215] In contrast to these four individuals, over fifty proquaestors are recorded in the first century, many of whom held extended tenure, while several others wielded propraetorian *imperium*. These propraetorian quaestors absolutely are extraordinary commands, because the quaestorship was neither a curule office nor was it ever intended to wield *imperium*, making such appointments examples of augmented *imperia*. In total, fifteen quaestors appear to have received grants of *imperium* during the first century, many receiving their *imperium* through senatorial decree or by acting as legates under a consul or proconsul.[1216] Of these, at least two (Piso in 65 and Cato in 58) were appointed to the quaestorship directly, as opposed to being a *privatus pro quaestore*, thereby bypassing election altogether. Other notable cases of augmented *imperia* include the three *praefecti pro praetore* in 36 and one report of a quaestor *pro consule* in 34.[1217] Perhaps the most interesting example of an extraordinary command with augmented *imperium* belongs to none other than the future triumvir, M. Antonius, who, after being elected to the plebeian tribunate in 49, was given *imperium pro praetore* by Caesar.[1218]

The significance of the correlations and trends discussed above is that they underscore how extraordinary commands are often identified not through one particular set of criteria, but through different combinations. In this dissertation, I have argued that extraordinary commands are best understood as constitutional deviations, wherein the socio-political laws and norms

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[1215] On M. Antonius, see *MRR* 1.539; on Sulla, see *MRR* 1.556.
[1216] P. Cornelius Lentillus Marcellinus, 74 (*MRR* 2.103); Cn. Calpurnius Piso, 65 (*MRR* 2.159); M. Aemilius Scaurus, 63 (*MRR* 2.168); L. Marcius Philippus, 61 (*MRR* 2.180); M. Porcius Cato, 58 (*MRR* 2.198); T. Furfanius Rufus, 49 (*MRR* 2.262); L. Antonius, 49 (*MRR* 2.260); Faustus Cornelius Sulla, 49 (*MRR* 2.250); Sex. Iulius Caesar, 47 (*MRR* 2.289); Q. Cornificius, 47 (*MRR* 2.288); C. Antistius Vetus, 45 (*MRR* 2.308); M. Barbatius Philippus, 41 (*MRR* 2.372); L. Gellius Publicola, 41 (*MRR* 2.372); M. Cocceius Nerva, 41 (*MRR* 2.373); M. Iunius Silanus, 34 (*MRR* 2.412).
[1217] On the *praefecti pro praetore*, see M. Oppius Capito, L. Sempronius Atratinus, and M. Valerius Messalla Corvinus (*MRR* 2.402-403). On M. Iunius Silanus as quaestor *pro consule* in 34, see *MRR* 2.412.
[1218] Cic. *Att.* 10.8A prescript: *Antonius Trib. Pl. Pro. Pr.*; Caes. *BC* 1.11.4, 18.2; see also *MRR* 2.260.

regulating Roman magistracies were subordinated in order to accommodate the creation of an irregular command. It is difficult to ascertain the extraordinary nature of a particular command based on the prevalence of one set of criteria. Even in cases where such a determination might be possible, such as the extended prorogations held by commanders like Lucullus, it is only achieved though considerations of magnitude and constitutionality, which highlight the excessive or anomalous nature of irregular commands, not mere legal statute. On the other hand, determinations of magnitude and constitutionality are much more apparent when multiple criteria appear in an irregular command simultaneously. The reason that many of Pompey's appointments are prime examples of extraordinary commands is because of the combination of multiple extraordinary criteria. The *lex Gabinia* in 67, as we have already seen, granted Pompey, as a *privatus*, proconsular *imperium* over the entire Mediterranean equal to other governors within 50 miles of the shore for a period of three years, and with the authority to appoint his own *legati* with propraetorian *imperium*. In this single appointment, then, we see evidence of *privati cum imperio*, violations of sortition, circumvention of the *cursus honorum*, prorogation, and *impar imperium*. Identifying similar combinations of these criteria in other irregular military appointments can allow us to find further extraordinary commands in the first century.

Conclusions

Veterem ferendo iniuriam invites novam – Pub. Syr. *Sent.* 715

By permitting an earlier injustice, you invite a new one.

The purpose of this dissertation has been to establish a comprehensive definition of extraordinary commands in the Roman Republic. As has been stated, although discussions of extraordinary commands are a fundamental component of any examination of the late Roman Republic, there is no consensus among historians regarding the definition of extraordinary commands or the necessary criteria for their identification.[1219] As a result, the term has come to be used rather arbitrarily by historians whenever it is necessary to describe a problematic general with a large army.[1220] Indeed, as Gruen states, the term is "often bandied about, rarely defined."[1221] The consequence of this ambiguity is that it is impossible to ascertain the true significance and importance of extraordinary commands in the history of the Roman Republic.

Thus, I have argued throughout this dissertation that extraordinary commands are best understood as constitutional deviations, wherein socio-political norms and laws regulating Roman magistracies are subordinated, either by popular acclaim or senatorial decree, in order to facilitate bestowing *imperium* on an individual in a manner that would otherwise be illegal. The importance of this argument is that, by establishing a comprehensive definition of extraordinary commands and the criteria for their identification, historians will be better able to determine the true significance of such commands occurring throughout the Republic. As we have seen, a well-

[1219] Ridley 1918: 280.
[1220] See the examples discussed in chapter 1.
[1221] Gruen 1995: 534.

known component of Rome's political institutions was its flexibility, which allowed for *ad hoc* constitutional innovations that modified existing statute and provided exceptional measures and expedients in response to various crises facing the Roman state. The notion of extraordinary commands does not contest this flexibility of Rome's political institutions, but instead highlights the limits of that flexibility, the breaking-point where constitutional innovations become constitutional deviations. The importance in this distinction is that innovative exceptions ultimately upheld statute and law, while extraordinary deviations undermined the validity of the legal protocols regulating Roman magistracies. In what follows I briefly review the various arguments explored in previous chapters and then break down the constituent elements necessary to define and identify extraordinary commands as constitutional deviations.

Before even we address the question of extraordinary commands themselves, the distinction between innovations and deviations from the Roman constitution requires establishing whether we can even speak of a constitution in the Roman Republic, which itself necessitates an examination of constitutional theory. Answering these two questions formed the basis of chapter 2. Constitutions can take many forms, but ultimately consist of a higher order of socio-political norms and rules that comprise the fundamental guiding principles and structural framework of a state. In this way, Rome did in fact possess a constitution, which was built on divine moral mandates (*fas*) and the concept of justice (*ius*), was organized on the basis of ancestral tradition (*mos*) and legal statute (*lex*), and was dedicated to the principle of upholding the welfare of the people (*salus populi*). In chapter 3, I surveyed the operation of Rome's political institutions in detail, including the function of the Senate and popular assemblies, but with special emphasis Roman magistracies. The importance here is to illustrate the ordinary function of Roman elected offices and military commands in order to highlight the appearance of

extraordinary commands and irregular magistracies in subsequent chapters. Although the Roman constitution and government was indeed flexible, the amount of laws and procedural statutes regulating the function of elected offices demonstrates that the Romans were well aware of the danger in unrestrained political and military authority being concentrated into the hands of individuals. After all, as we have seen according to Livy, as soon as the Romans had expelled the kings and established the Republic, the first elected consul, L. Iunius Brutus, compelled the Roman people to swear an oath never to allow a king to reign in Rome again (Livy 2.1.9-10).

Building on the debate over flexibility and legality, chapter 4 analyzed the possible definitions of extraordinary commands proposed by modern historians and the lack of consensus between them. All modern scholars rightly recognize that issues surrounding extraordinary commands centered on the juxtaposition between the flexibility of Roman institutions and the conferral of *imperium* in a way that contravened Roman law. There was little agreement, however, on when magisterial irregularities ought to be described as extraordinary. Many scholars focused on the flexibility of the Roman constitution, seeing so-called extraordinary commands and promagistracies as evidence of Rome's penchant for adaptability.[1222] Other scholars, on the other hand, favored more legalistic approaches.[1223] More recent scholarship has tended to examine extraordinary commands within the broader context of the controversial emergency measures employed by Rome during the late Republic.[1224]

For the latter half of chapter 4, I returned to my central argument that extraordinary commands are best understood as constitutional deviations that subordinated regulatory law to accommodate the irregular command. Here, I proposed three analytical perspectives for

[1222] Jashemski 1966; Gruen 1995.
[1223] Boak 1918; Kloft 1977.
[1224] Lintott 1999; Vervaet 2007: 197-232; Vervaet 2009a: 49-71; Vervaet 2014; Straumann 2016: 64, 101-111.

determining when an irregular command or magistracy qualified as a constitutional deviation and could therefore be identified as an extraordinary command. These perspectives included legal criteria, constitutionality, and magnitude. Legal criteria pertained to the specific way that extraordinary commands could manifest, whether in ways that violated annuity, the *cursus honorum*, provincial sortition, or parity of *imperium* among colleagues. First, I identified the seven legal criteria which could potentially manifest in any extraordinary command in detail.

1. Violations of annuity: This could take the form of *continuatio* (extension of office), *reficere* (immediate reelection to the same office with no interval in between), and *iteratio* (reelection to the same office with an interval of less than ten years).
2. Prorogation: The legal extension of a commander's *imperium* at the conclusion of their term of office.
3. Augmented *imperium*: Occurred when a commander wielded *imperium* that was of a higher rank than that fitting their last elected magistracy. The most common example here is the conferral of proconsular *imperium* on current or former praetors, though quaestors with propraetorian *imperia* also become common by the first century.
4. Violations of the *cursus honorum*: Election to a regular office without reaching minimum age requirements or before holding prerequisite offices.
5. *Privati cum imperio*: Commanders wielding *imperium* who had not been elected to a magistracy.
6. Irregular provincial commands and violations of sortition: Commanders who received their provincial assignments in a manner beyond sortition or *comparatio*, usually through senatorial decree or popular acclaim. This criterion could also include commanders who

received multiple or enlarged provincial commands beyond what a single commander should be allotted.

7. *Impar imperium*: Similar to augmented *imperium* in that a commander wielded *imperium* at a grade higher than the rank of their current magistracy or in massive provincial assignments, but specifically entails possession of *imperium* without a colleague or in a way that overrules colleagues of equal rank. Usually this takes the form of *maius imperium*, *aequum imperium*, or *imperium infinitum*.

It is important to reiterate that it is not necessary for any combination of these criteria to manifest (though they often did), but it is the case that every confirmed extraordinary command will invariably feature at least one of these criteria.

Next, building on how the differences between constitutional innovations and deviations centered on the relationship with regulatory law are questions of constitutionality. In determining constitutionality, a command featuring any one of the criteria listed above is scrutinized as to whether it was compatible with Roman law or if the command required a special dispensation through senatorial decree or popular acclaim. The significance here is that compatibility with law signaled an exceptional or innovative command, while the recourse to a senatorial decree or popular vote entailed the subordination of constitutional law and statute.

Last are questions of magnitude, which refers to three specific categories: frequency, duration, and combination. The significance of questions regarding magnitude is that historians are thereby better able to ascertain whether the appearance of various criteria are minor isolated incidents or indicative of larger more substantial trends. In the category of frequency, we are clearly looking at how often certain irregular criteria occurred. Likewise, questions of duration pertain in particular to criteria involving violations of annuity or prorogation and are concerned

with how long the criteria in question lasted, such as whether a commander received a single six-month prorogation, as in the case Q. Publilius Philo in 326, or for years on end, as with L. Licinius Lucullus (74-63).[1225] The third category in the perspective of magnitude simply measures how many different legal criteria occurred simultaneously in individual irregular commands. As stated above, it is not necessary for multiple criteria to occur simultaneously for a command to be considered extraordinary. P. Cornelius Scipio (father of Africanus), for instance, only received continuous prorogations (217-211) and was still described wielding *extraordinaria imperia* by Seneca the Younger.[1226] It is often the case, however, that the irregular commands do tend to feature combinations of criteria. Indeed, this very often does strengthen a case when determining the extraordinary nature of a command, particularly for the occurrence of criteria considered to be more minor legal infractions (for example, violations of sortition or minor breaches of the *cursus honorum*) as opposed to massive provincial commands or *imperium infinitum*.

Meanwhile, having evaluated how modern historians have attempted to define extraordinary commands and after explaining in detail the three analytical perspectives for identifying extraordinary commands, chapter 5 adopted a philological analysis and looked at the ways that Greek and Roman writers themselves described extraordinary commands, beginning with the Latin use of the terms, *extraordinarium* and *extra ordinem*, then turning to the equivalents of either term in Greek, and ending with an examination of the evolution of promagistracies. The conclusion here, surprisingly, is that our Greek and Roman sources tended at times to be as inconsistent in their portrayals of extraordinary commands as modern scholars.

[1225] Livy 8.23.11. On Lucullus, see *MRR* 2.106-108, 111-112, 117-119, 123-124, 128-129, 133, 139, 145-150, 154-156, 159-160, 163, 168-170.
[1226] Sen. *Ben.* 3.33.2-3.

Nevertheless, despite some ambiguity and contradiction, thereafter I successfully demonstrated in chapter 6 that every command which Greek and Roman sources described as extraordinary corresponded to at least one of the seven potential legal criteria proposed in chapter 4.

Finally, in chapter 7, I demonstrated the intersection of all three analytical perspectives in identifying extraordinary commands by providing a brief survey of all potential extraordinary commands over the course of the Roman Republic, beginning with the expulsion of the kings in 509 and ending with Octavian's victory at the battle of Actium in 31. Thereafter, I recorded the occurrences of all potential legal criteria over the course of the Republic, as well as the frequency of their occurrence, their duration when applicable, and the combinations of criteria occurring simultaneously. I then examined the concurrent trends of each criterion broken down by century, while also assessing the constitutionality of notable examples that deviated from Roman regulatory law. The goal was not to highlight every possible extraordinary command, but to demonstrate how these three analytical perspectives (legal criteria, constitutionality, and magnitude) were necessary to determine definitively when an irregular command or magistracy qualified as a constitutional deviation and was therefore indicative of an extraordinary command.

By establishing a comprehensive definition of extraordinary commands as constitutional deviations, and by devising a method their identification, scholars are better equipped to discern the true significance of extraordinary commands and their effect on the institutional stability of the Roman Republic. As has been well argued, Rome's republican institutions were flexible by design so that the Romans could survive any threat facing the Republic. Indeed, Cicero claims that this was inherent to Roman tradition when he points out that "our ancestors always adhered to tradition in times of peace but adapted their plans to accommodate new strategies in the face

of new crises."[1227] But, flexibility had its limits, and constant deviation from legal protocol undermined the legitimacy of law itself. Thus, as Fabius Rullianus lectured the people in 295 for insisting on repealing the ban on *iteratio*, "Why both even making laws, if you are going to repeal them? The laws are no longer in control but are being controlled."[1228] To that end, the ability to assess potential extraordinary commands at a macro-level provides historians a unique analytical vantage point. Rather than merely scrutinizing irregular commands on a case-by-case basis, scholars can ascertain how the practice and use of exceptional and extraordinary commands evolved over time in the Roman Republic and more clearly discern the balance between flexibility and legality in the Roman constitution. As a final example, Figure 7 below shows the overall trend and development of every possible criterion of extraordinary commands

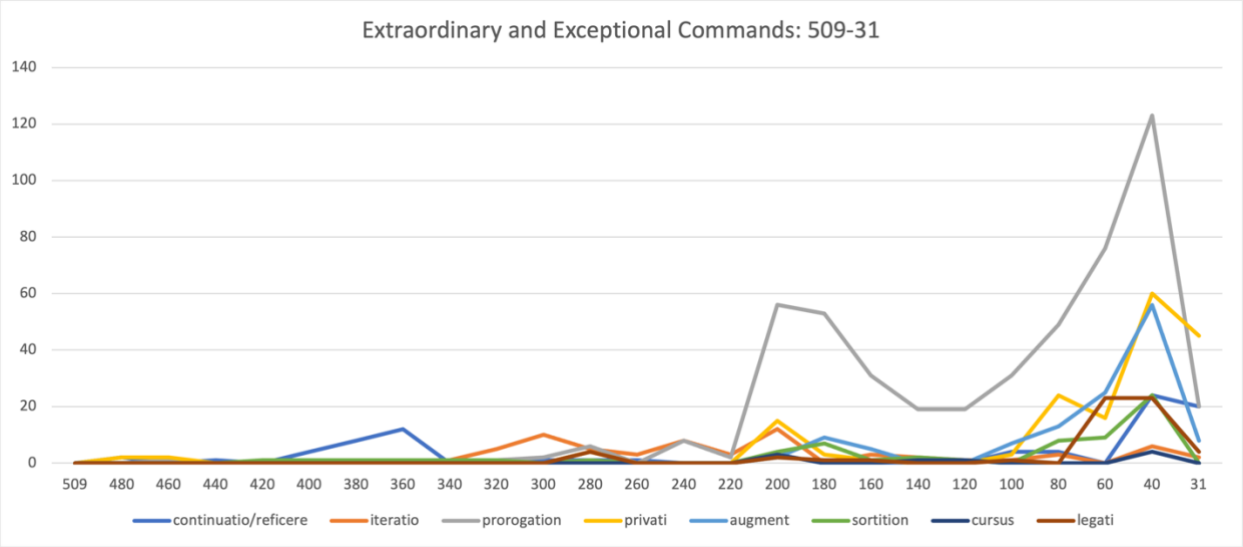

Figure 7

over the course of the Roman Republic. From here we are able to see that, although the Romans certainly availed themselves of expedient commands throughout their early history, there was an

[1227] Cic. *Man.* 60: *Maiores nostros semper in pace consuetudini, in bello utilitati paruisse, semper ad novos casus temporum novorum consiliorum rationes accommodasse.*
[1228] Livy 10.13.10: *Se ad populum laturos, uti legibus solveretur. Et ille quidem in recusando perstabat, quid ergo attineret leges ferri rogitans, quibus per eosdem, qui tulissent, fraus fieret. Iam regi leges, non regere.*

apparent desire to keep such measures to a minimum. And indeed, the Romans seem to have been successful in this as well for a long time. From the outbreak of the Second Punic War, however, the use of extraordinary commands escalated to unprecedented levels. Yet, even here, we see an attempt by the Romans to return to a degree of normalcy. Unfortunately, exceptional and extraordinary commands proved too valuable an expedient to do away with entirely. As Kloft says, "one could not go back the way taken in the 2nd Punic War."[1229] And thus, around 130 we see a gradual, incremental escalation in the occurrence of extraordinary commands of all kinds, to the point that by the first century the Romans appear to have lost control of their promagistracies. In establishing a comprehensive definition of extraordinary commands and the criteria for identifying them, scholars are better able to see the danger and long-term consequences of constitutional deviations and the subordination of law in the name of expediency.

[1229] Kloft 1977: 32.

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Abbreviations

CIL -	*Corpus Inscriptionum Latinarum*.
EJ -	Ehrenberg, Victor, A. H. M Jones, D. L Stockton, Augustus, and Tiberius. 1976. *Documents Illustrating the Reigns of Augustus & Tiberius*, 2nd ed. Oxford: Clarendon Press.
ILLRP -	Degrassi, Attilio. 1975. *Inscriptiones Latinae Liberae Rei Publicae*. Firenze.
MRR -	Broughton, T. S. 1954. *Magistrates of the Roman Republic* V. 1-2. New York: American Philological Association.
RDGE -	Sherk, R. K. 1969. *Roman Documents from the Greek East*. Baltimore.
Syll.^{3} -	Dittenberger, W. 1915-1924. *Sylloge Inscriptionum Graecarum*. 3rd ed. Leipzig.

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