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Timothy Howe ✦ Joseph Roisman ✦ John Vanderspoel
Pat Wheatley ✦ Sabine Müller



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Cicero, the Constitution and the Roman People*

Alexander Jakobson

1. Cicero's constitutionalism

Benjamin Straumann's main thesis, in his learned, original, ambitious and important book *Cicero and Constitutionalism: Roman Political Thought from the Fall of the Republic to the Age of Revolution* (Oxford, 2016), is that

the Roman concept of constitutionalism emerged out of the context of the crisis of the late Republic. The frequent recourse to emergency measures and the increasing importance of private individuals with extraordinary powers convinced Cicero and other protagonists of late Republican politics of the need for a higher-order set of rules, i.e., a constitutional order... (147).

In S.'s view, the 'dissolution of the Republic' started with Tiberius Gracchus deposing, by means of a popular vote, his colleague Octavius, in an unprecedented violation of some of the fundamental principles of Roman public law. This move, and the way Tiberius justified it, expressed an 'absolutist' concept of the People's right to legislate—one that could override, by a single vote of the assembly, any constitutional principle. According to S., Cicero—on whose views, overwhelmingly, the book is focused—regarded the crisis of the Republic as primarily a constitutional one. He therefore sought a constitutional solution to it: creating 'a hierarchy of the sources of law' that would prevent ordinary laws passed by popular assemblies from undermining the Republic's 'ius'—that is, those fundamental constitutional principles grounded in natural law. The supremacy of *ius* over *lex* is 'often gestured at in late Republican oratory' and developed in Cicero's mature philosophical works (147). It is entrenched, according to S., in Cicero's *De Legibus* which was meant to present a set of basic rules, applying in principle to any well-governed commonwealth but based on Rome's actual constitution at its prime. These rules reflected the precepts of reason and, hence, of natural law, and could not be set aside by ordinary legislation.

According to S, this 'political theory' of constitutionalism was an original Roman, late-Republican contribution, which 'differed markedly from anything Greek political theory had to offer' and was 'a radical departure from Greek thinking on the subject of politics' (147). He particularly stresses that the Roman tradition in question was interested in 'constitutionalism and constitutional design, not virtue' (19): a well-ordered commonwealth, and, specifically, the salvation of the Roman Republic depended on creating a proper institutional balance and entrenching it, rather than on fostering the appropriate civic virtues among the citizens. Part iii of the book is dedicated to a survey of the impact of Roman (principally, Ciceronian) constitutional ideas on later political thought (until the Federalist Papers). In what follows, I focus on S.'s main thesis—the late-Republican (mainly Ciceronian) concept of constitutionalism as 'a hierarchy of the sources of law' designed to prevent the fundamental constitutional principles from being subverted by popular legislation.

* This paper is a response to Benjamin Straumann, *Cicero and Constitutionalism: Roman Political Thought from the Fall of the Republic to the Age of Revolution*, Oxford University Press, Oxford 2016.

A thesis dealing with late-Republican ‘constitutionalism’ and the powers of the people has to be examined in the context of the ongoing debates on the character of the Republican political system and political culture. The controversy over the people’s role in the political system has been central to these debates in recent decades. Recent scholarship has largely moved from constitutional questions to wider political and social ones and, increasingly, to analyzing the Republican political culture.¹ However, the ‘increased unease about traditional constitutional history’² and its limitations, characteristic of contemporary scholarship, does not imply that it cannot sometimes be useful and important to examine constitutional issues as a significant element of the wider picture. In this case, the author’s treatment of constitutional matters is certainly not purely legalistic – the wider picture of Republican politics and systems of government is constantly held in view. The argument that Cicero sought to save the Republic by restricting the powers of the people, because he found those powers (ever since 133 BCE) dangerously excessive and potentially destructive, runs counter to more rigidly oligarchic interpretations of the Republican political system. Such interpretations hinge on regarding the people’s powers as minimal and largely specious—at times a nuisance to the ruling class, but no real threat to the fundamental stability of the aristocratic Republic. On the other hand, S.’s thesis has an oligarchic implication of its own: Cicero could only have hoped to save the Republic by means of a drastic reduction in the people’s legislative power (as suggested by the author) if he thought that such a project was, at least in principle, politically feasible. The question of the political feasibility of the postulated project of constitutional reform is not systematically addressed in the book. In my view, this feasibility (under normal conditions of Republican politics) cannot be assumed without attributing to the Roman governing class, powerful and influential though it undoubtedly was, a degree of control over the system that is unrealistic.

As for the content of S.’s thesis, there is no doubt that Cicero regarded certain features of Roman public law as fundamental, and any statute that violated them as morally wrong and subversive of the Republic, in addition to being contrary to ‘natural law’, as understood through the precepts of reason. In extreme cases, he was prepared to argue that an infringement of such fundamental principles violating the basic rights of Roman citizens was, even if sanctioned by a *lex*, legally void. To that extent, his thought on these issues may indeed be properly called ‘constitutional’ in the sense suggested by the author; and it is doubtless true that the turbulent politics of the late Republic ‘invited’ pondering on such questions, and provided occasions for expressing such views.

¹ See e.g. K-J Hölkeskamp, *Reconstructing the Roman Republic: An Ancient Political Culture and Modern Research*, Princeton University Press, Princeton and Oxford 2010 (with a survey of the scholarly debates in recent decades); E. Flaig, *Ritualisierte Politik. Zeichen, Gesten und Herrschaft im Alten Rom*, Vandenhoeck und Ruprecht, Göttingen 2003; M. Jehne, ‘Methods, Models and Historiography’ in N. Rosenstein and R. Morstein-Marx (eds.), *A Companion to the Roman Republic*, Wiley-Blackwell, Malden Mass. 2006, 22 – 23. H. Beck, ‘Die Rollen des Adligen. Prominenz und aristokratische Herrschaft in der römischen Republik’, in H. Beck, P. Scholz and U. Walter (eds), *Die Macht der Wenigen. Aristokratische Herrschaftspraxis, Kommunikation und edler Lebensstil in Antike und Früher Neuzeit*, Oldenbourg, München 2008, 101-123; A. Yakobson, ‘Traditional political culture and the people’s role in the Roman Republic’, *Historia* 30 (2010), 282-302; R. Morstein-Marx, ‘Cultural Hegemony and the Communicative Power of the Roman Elite’, in C. Steel and H. van der Blom (eds.), *Community & Communication: Oratory & Politics in Republican Rome*, Oxford University Press, Oxford 2013, 29 – 48.

² Hölkeskamp (n.1), 14.

However, I believe that S. exaggerates Cicero's 'constitutionalism' according to his own definition of this term³ (I also believe that he underestimates various examples of Greek 'constitutionalism', but this point cannot be argued here). Nowhere does Cicero suggest a mechanism for 'entrenching' fundamental laws, or for quashing 'unconstitutional' statutes—beyond his enthusiastic adoption of existing Roman devices for preventing undesirable legislation by veto or religious obstruction, with the late-Republican addition of senatorial invalidation of statutes on (ostensibly) procedural grounds. Nowhere does he draw a systematic distinction between 'constitutional' and ordinary legislation, or anything like a list of fundamental principles not to be abridged by legislation. Cicero's *De Legibus* sought to provide an exemplary code of law for an ideal (optimal) state—in practice, the Roman Republic of the good old days, no doubt to be used as a model as far as possible. As such, this code was naturally defined as reflecting 'natural law'. However, it cannot be regarded as an entrenched constitution—nor, indeed, as a practical political plan to set up a constitutional mechanism for saving the Republic. The text, though it contains a code of laws couched in precise legal language, is an educational treatise on constitutional matters rather than a concrete proposal for a constitutional reform, tailored to a specific political situation.⁴ Moreover, it does not fully share S.'s strong skepticism towards the political efficacy of 'virtue'. As we shall see, it includes provisions that are clearly an appeal to civic virtue (mainly of senators) rather than a suggested mechanism for imposing constitutional restraints.

Nor is it obvious that Cicero, however much he objected to what he regarded as 'pernicious' popular enactments, regarded the crisis of the late Republic as fundamentally constitutional in the sense suggested by S.—i.e. one that resulted from the unfettered legislative authority of the *comitia* and could be solved by imposing formal limits on this authority. At any rate, he nowhere says so. The enactments that were really deadly to the Republic—the ones that created the statutory basis for the dictatorship of Sulla and Caesar, and then for the 'second triumvirate'—could never have been countered by veto, religious obstruction, senatorial invalidation, or any new constitutional device that Cicero might have suggested (but never did). They were all imposed by sheer military force and victory in civil war; the assemblies that adopted them were powerless, not abusing their power. No constitutional device can save a free state from being overthrown by force of arms (if the ability and readiness to use this force exists), with the subsequent rubber-stamp ratification of its demise by the legislative authority.

It is true that the 'extraordinary commands' of the late Republic, which S. regards, very reasonably, as one of the main expressions of the constitutional crisis, can be said to have paved the way for civil war and dictatorship (even before they could serve as a

³ Other definitions are of course possible. Cf. C. Ando, "The Origins and Import of Republican Constitutionalism," *Cardozo Law Review* 34 (2013), 917 – 935. For Ando, 'constitutionalism' means systematic discussion and theory of public law, as well as attempts at its codification, like in Cicero's 'Laws'. He stresses Cicero's acceptance of the principle of popular sovereignty, principally in legislation, including the People's right to set aside precedents and rules established by previous laws, and his willingness to apply this principle to extraordinary commands (on this see below). The *Lex Titia* in 43, establishing the 'second triumvirate', as well as the later laws that created the legal basis for the powers of Augustus and his successors, 'rested ... on doctrines of popular sovereignty that we have seen at work in Cicero's advocacy of the Manilian law' (932).

⁴ Cicero claims to be proposing laws 'not just for the Roman people but for all good and sturdy peoples' (*bonis firmisque populis* – 2.35). See A. R. Dyck, *A Commentary on Cicero, De Legibus*, The University of Michigan Press, Ann Arbor 2004, 19 – 20 on whether Cicero was 'aiming at fairly immediate political effect' (doubted by Dyck).

precedent of sorts for the laws that gave legal sanction to autocracy). Specifically, in Caesar's case, these laws put him at the head of the army that he later used to overthrow the Republic. The strongest link that can be established between the legislative 'absolutism' (41) of the popular assemblies and the fall of the Republic is surely, *pace* S., not the deposition of Octavius in 133 but rather the late-Republican wide-ranging extraordinary commands conferred by the People. But Cicero's own stance on *imperia extraordinaria* was, as S. recognizes, highly inconsistent. By his support for the imperium of Pompey in the East in 66 he materially contributed to the final stages of this development, and in 56, in a 'shameful change of course', according to S. (128), he supported the extension of Caesar's imperium in Gaul. In his *Laws* Cicero makes no attempt at all to outlaw or limit this practice; in fact, as we shall see, the code contains a provision that seems to sanction it.

2. Political flexibility on constitutional issues

In analyzing Cicero's views, and especially in attributing to him a systematic and consistent 'constitutional design', it must always be borne in mind that Cicero was, above all, a (highly flexible) politician and a successful advocate who naturally tended to plead according to the exigencies of the particular case at hand.⁵ He said different, sometimes clearly contradictory, things on different occasions, and took divergent positions on questions that can be defined as constitutional. This does not mean that he was wholly cynical and lacked genuine 'constitutional' convictions. On the contrary—his core beliefs, on the most fundamental principles and values of the Republic, appear to have been very firm. The chief among these was his resolute opposition to any form of autocracy and dictatorship. In the end, he gave his life for this principle; he must surely have realized he was risking it when he took on Antony the way he did. Hence I find it strange that S. suggests (117) that Cicero would possibly have been willing to consider 'Augustus' new order ... [as] at least *aliqua forma rei publicae*'. The Manilian law supported by Cicero has its place in the legislative pre-history of the principate, and the legal basis of the new regime was created by statutes ostensibly following late-Republican precedents;⁶ this was bound to be the case if there was to be no open revolutionary breach of legal and cultural continuity. But there is no reason to assume that Cicero himself could have regarded as legitimately 'Republican' a (*de facto*) autocracy rubber-stamped by assembly votes.

On the other hand, the degree of flexibility that Cicero could display, when the need arose, on various important issues outside this core was truly great; and, in the nature of things, the very border-line between the two spheres might be blurred. He did, to be sure, have a general political-constitutional bent on these issues and it was, certainly since his consulship in 63 BCE, optimate. But apart from being a malleable and, at least on occasion, opportunistic politician, he was also a sophisticated political thinker. He held that the popular legitimacy and hence, the stability of the system could not be ensured without conceding to the people more than what might be considered as desirable in principle, from the optimate point of view; and certainly more than what some rigid optimates were

⁵ See Asc. 70C: referring to an example of minor importance (providing separate seats for senators in public shows, criticized by Cicero in a 'Popular' forensic speech, and later praised by him in the Senate) Asconius remarks that such contradictions were 'a right allowed to the orator's craftiness' (*oratoriae calliditatis ius*).

⁶ Cf. note 3 above.

willing to concede. This is an important theme in both *De Republica* and *De Legibus* (where the unadulterated optimate view is presented by his brother Quintus in the two famous debates on the tribunate and the ballot).

All in all, Cicero's political flexibility on various constitutional issues was so great that these views hardly amount to a systematic 'constitutional design' that he may be thought to have wished, even ideally, to put beyond the reach of ordinary politics; much less can he be shown to have actually proposed doing this. Would he, for example, have wished to create a system that would have made it legally impossible for the People to bestow on Pompey the kind of extraordinary imperium conferred on him in 66 by the *lex Manilia*, with Cicero's enthusiastic support?

According to S., the issue of extraordinary commands was of crucial importance in shaping Cicero's constitutionalism:

[he] and some of his contemporaries...were convinced of the need for a constitution by the increasing recourse to emergency powers and the relatively recent phenomenon of far-reaching extraordinary commands bestowed by the popular assembly.

He notes that Cicero's argument in *De Lege Manilia* entails

the implicit constitutional assumption that 'whatever the People order should be ratified', a position obviously at odds with his considered view as expressed in his late speeches and his philosophical work (108).⁷

Summing up Cicero's argument in a later speech *De Domo Sua*, S. notes that Cicero attempts to distinguish between illegitimate extraordinary commands conferred by Clodius' laws and legitimate ones (since they were imposed by pressing necessity) supported by himself—like Pompey's command in 66 or his *cura annonae* in 57. This argument 'amounts to the claim that if reason of state demanded it ... extraordinary commands were somehow constitutional; if not, not' (114). It is obvious that we are dealing with politics here, rather than constitutionalism in any proper sense—which is not to say that Cicero did not sincerely believe that 'his' extraordinary commands were more justified by public interest and real necessity, and thus more 'constitutionally' appropriate, than those of Clodius. We may even think that he was right in believing so.

In 43, in his *Eleventh Philippic*, Cicero is very probably presenting his considered view of the whole subject of extraordinary *imperia*—though at the same time he is also opposing a particular senatorial motion conferring such a command. 'For an extraordinary *imperium* is a fickle and *popularis* thing, one which does not at all become our gravity and this house' (*nam extraordinarium imperium popolare atque ventosum est, minime nostrae gravitatis, minime huius ordinis*) (17). A highly tendentious historical survey follows, in an attempt to show that the Senate and all good citizens have always tried to avoid this expedient as far as possible. Rather shamelessly, Cicero attributes the extraordinary commands given to Pompey to 'turbulent' tribunes of the plebs (18). However, a closer precedent of his own support for an extraordinary command could not be ignored:

But (for this is what I hear is said), I myself gave by my own vote an extraordinary imperium to the young Caius Caesar [Octavianus]. Yes, indeed, for he had given me

⁷ Cf. Ando (n.3), 925 on the doctrine of unfettered (by precedents or any prior legislation) popular sovereignty implicit in Cicero's arguments in this speech.

extraordinary protection; when I say me, I mean he had given it to the Senate and to the Roman people (20).

The whole discussion is preceded by a general statement on extraordinary commands: 'I always judge [this expedient] dangerous unless it is necessary (*semper, nisi cum est necesse, periculosam arbitror*) (16).

It seems clear that Cicero's 'dangerous unless necessary' does not mean 'unconstitutional'—i.e. impermissible—but rather 'suspect on grounds of constitutional propriety', but not to be given up as an option, when needed. In fact, he uses the argument of necessity in his very speech on favour of the Manilian Law in 66. To the arguments of the bill's opponents who were claiming that the grant of power to Pompey was contrary to '*exempla atque instituta maiorum*', Cicero gives the following answer:

I need not point out here that our ancestors obeyed custom in times of peace, but necessity [*utilitas*] in times of war, always developing new plans and policies to meet the new crises of the day (60).

The political context and purpose and hence, the rhetorical emphasis is very different from that of the *Eleventh Philippic*, but the principle is essentially the same: deviation from established practice has to be justified by necessity; *utilitas* in time of war surely qualifies as necessity. This certainly implies that such deviations are, ideally, undesirable; but whether they in fact should or should be introduced in a particular case is clearly a matter for political judgement.

Arguments based on precedent and ancestral custom carried great weight in Rome's traditional political culture; but there was considerable flexibility here too. When needed, it could always be argued that there were ample precedents for introducing useful and necessary innovations; or even that recent precedents were more weighty than old and half-forgotten ones.⁸ In Pompey's case, Cicero argues (*Leg. Man.* 60 – 63) that there is already a well-established tradition of creating precedents by conferring extraordinary powers on him. This, as Cicero stresses, had been done for the good of the republic—and, moreover, with the agreement of the *principes* who were opposing the Manilian law in 66 but had displayed great flexibility on the question of extraordinary commands at earlier stages of Pompey's career. All in all, the optimate hat that Cicero is wearing in the *Eleventh Philippic* clearly suited him and his basic attitudes better than the *popularis* one in the *De Lege Manilia*. The positions he took on the two occasions were indeed 'at odds' (as S. notes) politically, but there is no direct 'constitutional' incompatibility between them.

3. De Legibus

In his *Laws*, Cicero makes no attempt to outlaw or restrict the practice of extraordinary commands—for which, it should be borne in mind, not only controversial late-Republican precedents, but respectable middle-Republican ones were available. Instead, this practice seems to be covered by the following provision (probably meant to apply primarily not to extraordinary commands of the late-Republican type, but to more routine administrative assignments):

⁸ Cf. Ando (n.3), 925 – 926.

But if any acts [of administration] shall be necessary in addition to those done by [regular] magistrates, the people shall elect officials to perform them, and give them the authority to do so (*ast quid erit, quod extra magistratus coerari oesus sit, qui coeret populus creato eique ius coerandi dato*) (*Leg.* 3.10).

In N. R. Dyck's words, 'Here Cicero explicitly grants to the *populus* the right to create, when circumstance demand, extraordinary commissions and thus insures them a place within his constitution'.⁹

Cicero was certainly well aware of the danger that the people's power of legislation might be abused for purposes that he would regard as not just politically undesirable but clearly 'unconstitutional'. But his remedy for this, in the *Laws* as elsewhere, was not some new mechanism of 'judicial review'. Nor can his occasional statements that, in extreme cases, statutes undermining the basic principles of public law might be treated as a legal nullity, even without having been repealed or formally invalidated, be regarded as providing such a remedy in any systematic way. These statements are important and constitutionally (in the sense suggested by S.) significant—especially since Cicero sometimes suggests that 'unconstitutionality' of content, rather than irregularity in the mode of the law's adoption, may be used as a justification; but they do not represent a proposal for an institutional solution to the problem. Rather, Cicero's institutional solution was the traditional Roman one: undesirable laws would hopefully be vetoed, or their passage prevented by religious obstruction; or in some rare cases they might be invalidated after passage, on formal grounds. These arrangements for defending the *fundamenta rei publicae* were an integral part of ordinary politics and thus, fully subject to various political constraints, considerations and contingencies.

Moreover, the efficacy of these arrangements was heavily dependent on the factor that S. consistently disparages and sharply contrasts with constitutionalism—the civic virtue of the political players (e.g. 157: 'virtue does not help; the only real solution is a constitutional one'). Dyck comments on *Leg.* 3.11 ('he who has vetoed a harmful measure shall be considered a citizen of distinguished service'—*intercessor rei malae salutaris civis esto*) and on Cicero's remark in 3.43 that this provision would make people 'eager to come to the rescue of the republic' in the hope of earning the praise heralded by this law: 'Here Cicero acknowledges that he has provided not so much an enforceable law as a commendation for the statesman'.¹⁰ Of a similar character is the provision that the senatorial order 'shall be free from dishonour and serve as a model for the rest of citizens' (3.10). The first part is connected with the censors' powers, though probably is meant to convey a wider message. As for the Senate serving as an example, this is clearly a piece of wishful thinking and a matter for civic education (Atticus is understandably sceptical—3.29) rather than an enforceable constitutional norm. And indeed, Cicero (29) states that ensuring that the Senate should be free from *vitium* 'is difficult to accomplish except through education and training (*educatione et disciplina*)'.

The even more unenforceable provision for the Senate to serve as an example to citizens is described by Cicero as vital: 'if we secure this, we shall have secured everything'; the power of example from above—both positive and negative—is stressed (30). This

⁹ Dyck (n.4), 471. According to Dyck, 'this Ciceronian *lex*, no less than those on the tribunate and balloting, might have been challenged by optimates'.

¹⁰ Dyck (n.4), 543; cf. 440 on *Leg.* 3.6; similarly 3.9 (*populi sui gloriam augento, domum suum laude redeunto*).

remark shows that a high standard of civic virtue, on the part of members of the elite, was regarded by Cicero as more than merely a desirable addition to a fundamental stability that he hoped would be produced by the appropriately balanced institutional arrangements. In *De Officiis* 1.85-86, discussing the virtues required of those who take part in governing the commonwealth, Cicero enjoins them to be impartial in promoting the common good of the state as a whole, rather than being either *populares* or *studiosi optimi quisque* (1.85). The bar is set rather high, especially given Cicero's own avowed political identification; it certainly goes beyond anything that could be legally enforced. But it is not presented as merely a pious wish or a counsel of perfection: Cicero goes on to say that failure to respect this principle caused, in Rome, 'not only seditions but disastrous civil wars' (86). Cicero does set great store by the political balance produced by well-thought-out institutional arrangements, but he does not rely solely on this balance for preserving the constitution; a crucial role is allotted to the civic virtue of the political actors.

Of course, constitutional mechanisms and an acknowledged legal 'hierarchy of norms', all the way to a full-fledged 'judicial review' of the kind that has become normal in contemporary democracies, are also not self-enforcing. This means that in the final analysis they, too, inevitably depend on a certain kind of 'civic virtue'; much more so the essentially political arrangements for defending the constitution that Cicero relied on.

4. The veto and its ambiguities

The traditional mechanisms that sometimes (far from invariably) allowed the Roman elite to prevent, or even undo, 'dangerous' assembly decisions were certainly an aspect of the Roman political system dear to Cicero's heart. He regarded them as an important bulwark against abuses of popular power. But even there, as a politician, he could not afford to be wholly consistent. He was willing to justify, in a public speech, the threat by the tribune Gabinius in 67 to depose, by an assembly vote, his colleague Trebellius who had vetoed his bill conferring on Pompey his command against pirates. He argued that Gabinius was right 'not to allow the voice of a single colleague of his to outweigh that of the entire state' on a matter of vital public interest (Asc. 72C).¹¹ This line of argument, shocking from the 'constitutional' point of view, followed the precedent set by none other than Tiberius Gracchus, in deposing Octavius.

Of this precedent S. takes a very dim view:

The procedural rights of Roman citizens guaranteeing personal liberty depended thus no longer on the constitutional status of the tribunate, its inviolability, but on a majority decision of the People! ... It could be said with little exaggeration that at least in this respect the People under Gracchus' guidance did more to undermine the rights of citizens than even Sulla did (122).

I feel that there is perhaps more than a little exaggeration involved here. S. notes that '[e]ven Cicero himself, in that most *popularis* speech of his, *Pro Cornelio*, seems to have adopted Tiberius Gracchus' constitutional argument about the authority of the People'

¹¹ In *Vat.* 5 Cicero would claim, quite implausibly, that C. Cornelius, the *popularis* tribune of 66 BC who he had defended in the speech in question, did not actually intend to disobey his colleague's veto. But in the passage of *Pro Cornelio* quoted in Asc. 72C he explicitly justifies both the overriding of the veto, and the (threatened) deposition of a fellow-tribune who insisted on his intercession, in the case of Gabinius.

(126). But if so, can he really be regarded as a ‘constitutionalist’ worthy of the name? I would suggest that Cicero was, indeed, a consistent enough constitutionalist on matters that touched on the most fundamental principles of the Republic, as he saw them—more fundamental than even the undoubtedly important question of circumventing the veto by removing, or threatening to remove, a tribune of the plebs. But the positions he took on other questions of governance and public law, including highly important ones, usually reflected a mixture of normative predilection and political (or forensic) expediency. Out of this mixture one can often reconstruct what was constitutionally desirable, in Cicero’s view, but hardly a rigid system of constitutional rules that he would have wished to insulate from normal politics.

Moreover, Cicero’s adoption of the *popularis* line of argument on this question in *Pro Cornelio* could rely on a respectable precedent—the defence of C. Norbanus by M. Antonius around 95 BCE. Norbanus had carried a bill (setting up a *quaestio* to try Q. Servilius Caepio, blamed for a disastrous military defeat) overriding the veto of two tribunes, who were driven by the violence of Norbanus’ supporters away from assembly. In his defence speech, Antonius justified the proceedings, attributing the violence against tribunes to the people’s righteous indignation (rather than to any incitement on the part of the accused). He argued that so far from diminishing the *maiestas* of the Roman people, his client had actually augmented it:

if the magistracies ought to be under the control of the Roman people (*in potestate populi Romani*), why do you accuse Norbanus, whose tribunate obeyed the will of the community (*voluntati paruit civitatis*)?¹²

Moreover, Antonius justified not merely the principle of the People’s legislative sovereignty, but also its right to sedition for a just cause. And indeed, the former could only be effectively asserted, in the face of a persistent veto or religious obstruction, by resorting to the latter. For this popular right to a justifiable sedition Antonius found ample historical precedents, starting with the expulsion of the kings (Cic. *De or.* 2.199).

Thus, both Cicero and Antonius before him put forward, at important political trials, arguments that gravely undermined, in the name of the supremacy of the Roman people, one of the main bulwarks of senatorial authority—the veto of (pro-senatorial) tribunes that could be used against pernicious and unconstitutional (in the optimate view) popular legislation. In both cases, the accused were acquitted, vindicating the validity of this line of argument. Cicero was, in 66, at his younger, junior and (relatively) ‘Popular’ stage. But Antonius was a former consul and censor when he defended Norbanus. Within a few years of the dramatic date of Cicero’s *De Oratore*—where the story of this trial is recalled by him (and others) as one of Antonius’ major accomplishments (91 BCE)—Antonius would be murdered by Marius’ men. At the beginning of the dialogue, Cicero says that at that time, he was a close friend and political ally (*consiliorum in republica socius*—1.24) of Crassus, who had been his opponent several years previously at the trial of Norbanus. All the participants in the dialogue are described by Cicero as first taking part in a political consultation, clearly optimate in its tendency (1.26).

The case is discussed by people who had stood on two opposing sides at the trial with great appreciation for Antonius’ professional accomplishment in securing the acquittal,

¹² Cic. *De or.* 2.167; cf. 2.164; 2.197 – 203; Cic. *Part. or.* 105; see on this S. 125.

without any hint on either side that there was anything improper or even especially daring about his line of argument on that occasion. Indeed, Antonius recalls his claim, at the trial, that it had often been conceded that it might sometimes be legitimate to stir up the Roman people (*quodsi unquam populo Romano concessum esset, ut iure concitatus videretur, id quod docebam saepe esse concessim*—2. 199). While Antonius confesses that his very decision to take up Norbanus' defense was considered by some as not quite honourable (*non satis honeste*) in that he was defending a seditious citizen (2. 198), his arguments on the (occasional) legitimacy of popular sedition in defense of liberty (and, in this case, of 'national interest') are described as helping to secure for him the sympathy of his audience and of the judges.

All this indicates that it was not only Cicero who could display '*oratoria calliditas*', in Asconius' words (n. 5 above) by making different and contradictory arguments on political and constitutional matters on different occasions and before different audiences, according to his political and forensic needs. We know about Cicero incomparably more than we know about anybody else, but Antonius' speech and the way it is treated in *De Oratore* imply that this flexibility may well have been a characteristic feature of the Republican political culture (though it may still have characterized Cicero more than others). However, this flexibility was surely not unlimited; it had to stay within the bounds of what was considered fundamentally legitimate. Nobody could afford to toy, in public, with the idea of kingship, with or without the diadem. But public speakers could certainly toy, when it suited them, with the idea of an unlimited sovereignty of the Roman people—and not just by pledging allegiance to the general principle, but specifically by arguing that the People's will was paramount even when it had been asserted by sweeping aside important safeguards against its abuse. On other occasions, it was the crucial importance of these same safeguards, as part of the traditional constitutional order, that might be strongly asserted; and this is what Cicero does, with great emphasis and, no doubt, genuine conviction, in the *Laws*.

S. defines the two interpretations of Roman constitutions held by the late-Republican *populares* and *optimates* as 'mutually exclusive' (57).¹³ But it seems better to speak of two versions of the same broad commonly accepted constitutional narrative, with different emphases that might lead to radically different political conclusions, but making use of a common stock of slogans and themes.¹⁴ One of them—in fact, the chief among them—was the liberty and majesty of the Roman People—and hence, in Republican terms, its ultimate supremacy. People of all persuasions not only had to pay due homage, in general terms, to this principle in their public utterances,¹⁵ but might occasionally find it expedient to

¹³ Cf. T. P. Wiseman, *Remembering the Roman People: Essays on Late-Republican Politics and Literature*, Oxford University Press, Oxford/New York 2009, 9: 'two rival ideologies, two mutually incompatible understandings of what the republic was'.

¹⁴ Cf. N. Mackie, 'Popularis Ideology and Popular Politics at Rome in the First Century B.C.', *Rheinisches Museum für Philologie* 135 (1992), 49–73; A. Yakobson, 'Marius speaks to the people: "new man", Roman nobility and Roman political culture', *Scripta Classica Israelica* 33 (2014), 286 – 287. See also V. Arena, *Libertas and the practice of politics in the late Roman Republic*, Cambridge University Press, Cambridge 2012, 7 – 8: for 'traditions on *libertas*', *optimatus* and *popularis*, with competing interpretations but also with significant common ground. For a view that questions the political significance of the terms *populares* and *optimates*, as usually understood, see M. A. Robb, *Beyond Populares and Optimates: Political Language in the Late Republic*, Franz Steiner Verlag, Stuttgart 2010.

¹⁵ See on this R. Morstein-Marx, *R. Mass Oratory and Political Power in the Late Roman Republic*, Cambridge University Press, Cambridge 2004, 230 – 240. The posture of deference to the Roman *populus* and its liberty, regularly adopted by public speakers, co-existed with a strong emphasis on the elite speakers'

emphasize popular supremacy at the expense of other recognized elements of the ‘constitution’, including the power of magistrates and the authority of the Senate. This, as is shown by Antonius’ defense of Norbanus and the way it is treated by Cicero in his *De Oratore*, might also apply to late-Republican optimates (or at least to the more flexible among them)—though their true ‘constitutional’ preference was, of course, basically different.

Moreover, this was not just a matter of the need to be appropriately deferential to the people and their liberty in public discourse, or to placate them by occasional concessions just enough to make them the more prepared to be guided, in the main, by the *auctoritas* of the leading men. Cicero was, indeed, eager to make the latter point, especially in his friendly debates with his brother Quintus and with Atticus, who represent a more rigid optimate outlook.¹⁶ But this plea of necessity also includes an element of *oratoria calliditas*; playing the popular card might be positively useful—an opportunity to take advantage of, rather than a reluctant concession. The people had enough clout in the political system to create, sometimes, powerful incentives for members of the senatorial elite to use (rather than to frustrate, as they were wont to do in other cases) the popular mechanisms provided by the constitution in pursuit of their personal advancement, and sometimes of the common interests of the elite. Cicero presumably thought about his own popularity and career, and not just about public interest, when he was supporting the *Lex Manilia*; as a good politician, he probably tended to believe that it was clearly in the public interest for his career to be advanced. The tribunes’ veto was, of course, ‘popular’ in its origins. Its employment in the service of the Senate is well attested—but this was certainly not the only way it could be employed. Whether it suited the interests of the Senate (or of the most powerful clique within it) to uphold this power (naturally, in the name of protecting the tribunate of the plebs, this most popular of institutions) or, on the contrary, to insist on the unfettered power of a particular assembly to pass a certain law (in the name of the supremacy of the People)—these things surely depended on specific circumstances.

Cicero stresses the principle that a veto (by a tribune or by an equal or higher authority) should be obeyed: ‘nothing is more advantageous than this, for it is better that a good measure should be impeded than that a bad one should be allowed to pass’ (*Leg.* 3. 42). Generally this was, no doubt, a sound constitutional principle from the optimate point of view, since it naturally tended to favour the status quo.¹⁷ But was this principle to be inflexibly adhered to if a salutary measure urgently needed to be passed? Such a dilemma

position of hierarchical authority (legitimized by the popular election of magistrates) vis-à-vis the popular audience. See e.g. F. Pina Polo, *Contra Arma Verbis: Der Redner vor dem Volk in der späten römischen Republik*, Franz Steiner Verlag, Stuttgart 1996 (esp. 8 – 33); M. Jehne, ‘Jovialität und Freiheit. Zur Institutionalität der Beziehungen zwischen Ober- und Unterschichten in der römischen Republik’ in B. Linke and M. Stemmler (eds.) *Mos Maiorum. Untersuchungen zu den Formen der Identitätsstiftung und Stabilisierung in der römischen Republik*, Franz Steiner Verlag, Stuttgart 2000, 207-235; Yakobson (n. 13), 283 – 300; K-J Hölkeskamp, ‘Friends, Romans, Countrymen: Addressing the Roman People and the Rhetoric of Inclusion’ in C. Steel and H. van der Blom (eds.), *Community & Communication: Oratory & Politics in Republican Rome*, Oxford University Press, Oxford 2013, 11 – 28.

¹⁶ *Leg.* 3. 17 (tribunate) 24-25 (the tribunate); 26 (Pompey restoring the tribunes’ powers); 39 (the ballot); cf. *Rep.* 2.50; 2.53-55; 2.57-59.

¹⁷ Cf. *Leg.* 3.24 specifically on the tribunes of the plebs: no college of tribunes is so desperate as not to include at least one ‘sane’ tribune (i.e., one willing to help the republic by using his veto).

would usually arise in the Senate,¹⁸ where a tribune's veto might certainly be disruptive from the optimate point of view—for example, when a tribune of the plebs was outrageously obstructing Cicero's recall from exile (Cic. *Sest.* 74-75). If we could hear this tribune's voice, we would, no doubt, hear that he regarded himself an *intercessor rei malae*; so, no doubt, did the two tribunes whose veto on behalf of Caesar, and the Senate's disregard for it, provoked the civil war in 49. But this might also happen in a popular assembly. Cicero proudly records the resolution of the Senate adopted before the vote on his recall in the centuriate assembly:

that no one was to observe the heavens that no one was to cause any delay whatever, that if any one did so, he should be considered at once as a subverter of the republic (*eversorem reipublicae*), that the Senate would take a very grave view of this, and that a motion about this act should be immediately made to the Senate (*Sest.* 129).

In the end, the vote passed smoothly, without obstruction; but it seems not unlikely that Cicero would have been willing to take a stand in defense of the Roman People's unrestricted right to legislate had someone tried to block the passing of the bill. Apart from Cicero's personal considerations and political inconsistencies, any strict optimate adherence to the right of veto (or, indeed, the right of religious obstruction, as is clear from this example) as a matter of constitutional principle was not politically feasible. The people's clout in the system (including via *popularis* tribunes, and sometimes other magistrates) was such that the optimates were simply not powerful enough to monopolize the use of these tools. When these tools were used against them, it was their turn to appeal to the principle that the collective will of the community on a vital matter could not be legitimately thwarted by anybody.

5. Quashing unconstitutional laws?

Under such conditions, a constitutional design openly based on limiting the legislative power of the Roman People is not something that can easily be attributed to Cicero without explicit testimony to this effect. This is so despite the fact it was very much part of Cicero's political outlook to be aware of the danger that the power of the people might be abused. S. suggests (181 – 182) that such a testimony is indeed contained in the *Laws*; however, I am not convinced by his reading of the relevant passages. According to S.,

There are clear attempts to establish mechanisms to enforce the hierarchical distinction between the constitutional norms contained in books two and three of the *Laws* and mere legislation. The most crucial such attempt—at odds with Roman historical practice—is Cicero's reform of the censorship, which was now to be entrusted with the protection of the fidelity of the laws (*Leg.* 3.11).

¹⁸ Cicero's rule that '*intercessor rei malae salutaris civis esto*' is placed at the end of a passage dealing with popular assemblies, and has clear optimate connotations; the same applies to 3.42. But the right of veto is given to tribunes is, of course, not restricted to assemblies (*quodque i prohibessint quodque plebem rogassint, ratum esto*—3.9; cf. 3.19—the power of tribunes is sanctioned in its existing form). Cicero is aware of the fact that a harmful measure might also be proposed in the Senate, and might sometimes have to be resisted by a magistrate (*peccante senatu, quod fit ambitione saepissime, nullo magistratu adiuvante*—3.40).

Should '*fidem legum custodiunto*' be taken to mean that the censors are empowered by Cicero to quash 'unconstitutional' legislation? This certainly cannot be simply taken for granted without an explanation, and seems to me very unlikely. The phrase is followed by *privati ad eos acta referunto, nec eo magis lege liberi sunt*, refereeing to ex-magistrates who are to give account to the censors for their acts in office. These provisions are explained in 3.46: Cicero admits that they are (untypically for the *Laws*) an innovation, but one dictated by public interest (*[leges] rei publicae necessariae*). This indeed confirms that something new and important is being proposed here. However, it is very unlikely that a truly revolutionary change like empowering the censors to serve as a 'constitutional court' of sorts would be conveyed by mere implication, rather than being specifically spelled out, in the detailed explanation that follows (or in list of the censors' powers in 3.7). What Cicero does propose here, explicitly, to change about the censorship accounts quite sufficiently for his admission of innovation.¹⁹ The explanation starts with a reference to *custodia legum* that makes clear that the term is to be understood in a narrow technical sense: Cicero complains that official records are not properly kept; hence 'we'—Roman senators and magistrates—have to depend on clerks and copyists for the precise texts of the laws. He goes on:

The Greeks were more careful about this, for among them 'guardians of the law' were created, who kept watch not only over the text [of laws], as was done in the past at Rome too, but also over the acts of men, and recalled them to obedience to the laws. Let this duty be entrusted to the censors, for I decree that there will always be censors in the republic [cf. 3.7].

Cicero goes on to say that magistrates, after completing their terms, should report and explain their official acts to the censors. He compares and contrasts this arrangement with the Greek one of having public prosecutors attending the usual procedure of ex-officials submitting accounts. He prefers his own solution of allowing the censors to make a preliminary decision on the basis of the report (*censores praeiudicent*), leaving the actual sentence for the courts following a regular prosecution. Cicero's proposal is indeed a significant innovation, adding to the censors' powers (and making their office permanent, so they could continuously examine the ex-magistrates' reports). But nothing in the passage hints at a power to examine laws (as opposed to ex-magistrates' *acta*), and quash them on grounds of 'unconstitutionality'.²⁰

In a note on his suggestion quoted above, that Cicero meant to endow the censors with 'constitutional' powers, S. interprets *Leg. 2.21*, ('whatever the augur has declared to be *iniusta, nefasta vitiosa*, or ill-omened, let those things be void') as a significant 'reinforcing of the weight' of augurs: laws already passed could be voided by the augural pronouncement alone. Traditionally, the augurs would report their findings to the Senate, which was authorised to make the final decision (182, note 121).²¹ If this change is indeed implied in the passage, this does have a 'constitutional' significance—inexorably intertwined with the political one. Cicero had every reason to expect that augurs would use their powers,

¹⁹ Cf. *Leg. 3.12*: Cicero's laws 'are almost the same of those of our state, although you have proposed a few innovations (*paulatum ... novi*)'. This seems to cover, among other things, the changes regarding the censorship proposed by Cicero (see below), but hardly the much more dramatic change postulated by S.

²⁰ Cf. Dyck (n. 4), 550 - 551. Dyck leaves open the possibility that Cicero intended the censors 'to have the power to reject laws', possibly following the example of some Greek *nomophylaces*, but says that he 'provides too few details to clarify' his exact intentions in this respect.

²¹ Cf. *Leg. 2.21* – capital punishment for disobeying an augur's finding; Dyck (n.4) 309.

generally, with a conservative bent—i.e. in his view, for the benefit of the republic (cf. *Leg.* 3.43). But this provision, despite its significance, hardly ‘amounts to a kind of judicial review’, in S. words. The powers of augurs were employed under a religious pretext, and their political uses were not aimed, either explicitly or implicitly, at enforcing a ‘hierarchy of norms’, with a systematic distinction between constitutional provisions and ordinary legislation. In *Leg.* 3.27 Cicero speaks of auspices being used to put down ‘*populi impetum iniustum*’, which may well include, but is not necessarily confined to, threatened violations of what might be described as constitutional norms; but he also mentions the adjournment of assemblies that were merely ‘unprofitable’ (*inutiles comitiatus*).

Cicero’s code includes several provisions that might give rise to claims of substantive ‘unconstitutionality’ in legislation. These were the traditional rules of Roman public law, enshrined in existing statutes: the ban on laws of personal exception, the provision that only the centuriate assembly shall decide on capital cases; the prohibition of omnibus bills dealing with several issues at once (3.11); and the right of *provocatio* (3.6). *Provocatio* was protected by in a series of statutes; Cicero claims (whatever modern scholars might say) that it was part of Roman law already under the kings (*Rep.* 2.54). The ban on *privilegia* and a guarantee that only the centuriate assembly may decide *de capite civis* are both ascribed by Cicero to the Twelve Tables (3.44), and *leges saturae* were prohibited by *lex Caecilia Didia* in 98 BC. In case of a bill arguably infringing those provisions, Cicero apparently relied not on some new constitutional mechanism, but on the traditional Roman devices for preventing, and sometimes invalidating, undesirable legislation.

These devices, essentially political, might be employed in the service of defending basic constitutional principles (as seen by those employing them), and Cicero certainly expected that they would be so employed. But there was never any pretence that they could only be used on those grounds; Cicero’s *mala res* can surely be any measure which was in his view harmful to the state. It should be remembered that a senatorial decree invalidating a law was subject to a tribune’s veto (or that of an ‘equal or higher’ magistrate). No provision of the *Laws* specifically defends the sanctity of private property—though it is one of the main pillars of Cicero’s constitutionalism according to S., and despite the undoubtedly high importance attached to property rights in Roman legal and political culture. S. rightly stresses that Cicero regarded property rights as a fundamental aspect of justice and natural law, and thus, a crucial part of the Roman constitution; states, according to him, came into being largely in order to defend these rights (S. 184 – 187; *Cic. Off.* 2.73). But a provision against legislative interference with property rights could not be formulated in terms of existing Roman law. This does not mean that Cicero did not expect it to be defended with the help of the appropriate political mechanisms, should the need arise; indeed, this was probably one of the main things he had in mind when he spoke of an *intercessor rei malae*.

Provocatio, of course, was widely regarded as fundamental to Roman liberty and citizenship, and in Cicero’s terms—also to natural law. But Cicero blatantly violated this fundamental constitutional principle by executing the Catilinarian conspirators as consul in 63 BCE. Or did he? There was a disagreement between him and his opponents on this question; of course, his action as consul was in accordance with his consistently held, and consistently controversial, view on the ‘*senatus consultum ultimum*’ and what a consul, supported by the Senate, was justified in doing in the face of a grave emergency. For his actions in 63 BCE he would be driven into exile. He claimed that the law on his exile, apart from having been carried by force, was a *privilegium* and thus, legally void. His supporters shared this constitutional view (*Cic. Leg.* 3.45). But Clodius, presumably, did not accept the

labeling of his law against Cicero as a *privilegium*,²² any more than Cicero accepted that by executing the conspirators he had violated the right of *provocatio*; or any more than Sulla or the ‘triumvirs’ of 43 BCE would have admitted that the laws conferring their powers on them were not merely laws on *imperia extraordinaria* of a kind that could find support in legitimate precedents, but legislative subversions of the republican constitution. Nor would Tiberius Gracchus have admitted that his agrarian law violated private property rights in any way.

For solving any of those political-constitutional controversies, no new mechanism is provided by the *Laws*—only the traditional tools for struggling over them. Most of these tools could be employed against the optimates as well as by them—though Cicero, as we have seen, possibly proposes enhancing the augurs’ powers, the most reliably optimate one of these devices. Nor, in fact, does the treatise provide any clear guidance regarding Cicero’s own views on those controversies. Cicero’s text does not grapple with the dilemmas involved in any of the controversies on the major constitutional issues that, according to S., gave rise to Cicero’s attempt to limit the legislative supremacy of the popular assemblies in order to defend the constitution. While the voting by ballot and the tribunate of the plebs are discussed in an elaborate and nuanced way, with an attempt (on Marcus Cicero’s part) to find a proper balance between conflicting considerations, there is no attempt to distinguish, even in a general way, between legitimate extraordinary commands and de facto autocracy conferred by an assembly vote. The whole issue is absent from the treatise. When the downside of the tribunate is discussed at length by Quintus Cicero, and conceded partially by Marcus (3. 19 – 26), all the examples refer to irresponsible populist legislation (or other activities) undermining the authority of the *principes* and damaging to the community as a whole, rather than to laws conferring excessive and dangerous powers on individuals. This is perhaps unsurprising given Cicero’s record of support for the Manilian law. According to S., ‘the distinction between notions such as “constitutional”, “*extra ordinem* but perhaps still constitutional”, and “unconstitutional” constituted one of the key battleground of constitutional argument in the late Republic’ (102). But this battleground is wholly ceded in Cicero’s *Laws*.

According to S., Cicero’s *Laws* presented ‘a body of constitutional norms aiming to govern and constrain normal legislation’. Moreover, the validity of the code itself was grounded in natural law, of which the code was the optimal (even if not ideal) practical expression; therefore, it did not depend on the ‘assent ... of a popular assembly’ (181). Indeed, Cicero confirms the lofty standing of the laws he is about to propose. He says that natural law, based on reason, ‘can neither be repealed nor abrogated’, as opposed to ordinary laws that are sometimes unethical, and are thus, properly, no law at all, especially (*praesertim*) since several such laws were invalidated by a senatorial decree. As opposed to this, his own laws, that reflect the natural law (and, at the same time, the principles of Rome’s actual constitution when the republic was at its prime), ‘will never be repealed’ (2.14).

But the supremacy of Cicero’s proposed laws over ordinary legislation, implied in its immunity from repeal, could only be made constitutional and political reality if Cicero envisaged the actual adoption of such a code by the People, as well as its formal entrenchment.²³ Now, Cicero makes it clear that he does not expect ‘those who live today’

²² On the legal issue see Dyck (n.2), 17.

²³ Cf. Dyck (n.4), 14 note 59: the suggestion that Cicero’s laws were meant to be superior to other laws ‘is speculation without support in the text’. The immunity from repeal mentioned by Cicero could be taken as

to accept his laws, and does not sound very confident about the future (*si qui forte his legibus parere voluerint*—3.29).²⁴ This in no way diminishes their validity, supremacy and immutability in terms of natural law, reason and justice—as well as their value as an intellectual and educational exercise. But how could they, without being accepted by the People and turned into positive law, save the republic? S. regards Cicero's code of laws as an actual attempt to offer a practical solution to the constitutional crisis ('a constitutional solution to the fall of the Roman Republic'—150). Of course, a proposal can be put forward in the hope that what is impractical today may become practical in the future; or it can be an intellectual exercise on how the republic **could have been** saved. But it is hard to see how Cicero's code, even if adopted into law, and made legally immune from repeal and change (not an easy thing to assume), could have performed the function of 'governing and constraining normal legislation'. What happened in the actual political-constitutional controversies of the late Republic was that both sides would regularly claim to be acting within the bounds of the substantive provisions contained in Cicero's laws, while interpreting them in different ways. Unless there was to be a mechanism for adjudging, authoritatively, between those conflicting interpretations in each particular case, even a formal entrenchment of such a code would, in itself, be merely declaratory. It would be of little practical value in preventing 'unconstitutional' legislation. Rather than creating a systematic 'hierarchy of norms', with a mechanism for enforcing it, Cicero appears to have simply put forward a comprehensive description of the traditional rules for running the Roman state, as they obtained in the good old days, with some slight improvements.

6. Inherently unconstitutional statutes.

It is nevertheless true, and significant, that Cicero did have a notion of a statute that was, although adopted by the People and not invalidated by the Senate, nevertheless null and void because it infringed some fundamental principle of public law. In practical terms, this meant that a court in adjudging a case, or a magistrate in the exercise of his powers (cf. *Dom.* 84), might legitimately ignore this statute. Moreover, this was clearly a view shared by others. Cicero relates the opinion delivered by Lucius Cotta (a former consul and censor) in the Senate, according to which the Clodian law on Cicero's exile was a nullity, and thus could be ignored without having it repealed by the People (*nihil omnino actum esse de nobis*). His grounds for this were that in addition to the fact that violence had been used to pass it, it was an (illegal) *privilegium*; moreover, capital cases were confined to the jurisdiction of the centuriate assembly (*Leg.* 3.45; cf. *Cic. Dom.* 68; *Sest.* 73). However, notes Cicero, 'you [Quintus Cicero and Atticus] and other eminent men thought it best' that a law for his recall should be passed (by the centuriate assembly). Elsewhere (in *Dom.* 69; *Sest.* 74) Cicero states explicitly that it was decided to resort to legislative repeal—although, as he claims, it was widely accepted that the Clodian law was null and void—in order not to provoke popular *invidia* against Cicero if he was to be recalled without the People's sanction.

an indication of such a supremacy—but only assuming that Cicero expected his code to be actually adopted, and somehow guaranteed against future repeal.

²⁴ See on this Dyck (n.4), 520 – 521; G. Clemente, 'I censori e il senato. I mores e la legge', *Athenaeum* 104/2 (2016), 499 – 500. Cf. *Leg.* 3.37: 'not what can be obtained from the Roman people such as it is at present'.

As a matter of doctrine, the possibility of treating a statute as null and void on constitutional grounds (even in the absence of a senatorial decree on the matter—an option that might be impeded by the treat of veto) was, apparently, far from an exceptional or marginal point of view. But whether this doctrine would be acted upon depended on political realities, including constraints imposed by the popular aspects of the system. Such claims were repeatedly made by optimates in the 50s regarding the laws passed by Caesar in his first consulship. Not much came out of it, except for the scourging of the unfortunate local senator from Novum Comum (an easy victim) in 51 by the consul Marcus Marcellus, evidently as a way to demonstrate the nullity of the *Lex Vatinia* conferring citizenship on his colony.²⁵

Arguments against the validity of laws could, moreover, claim some support from the Roman statute law itself. The language of some Roman statutes forbade ‘asking’ (*rogare*—the technical term for a legislative proposal) certain things of the people—whether it was a ban on bills of exception ascribed to the Twelve Tables, later bans on creating magistracies without *provocatio*, or late-Republican bans on omnibus bills. Cicero claims, in *Caec.* 95, that all laws contained a saving clause stating that nothing is ‘asked’ in the present law which it would have been unlawful to ask (*si quid ius non esset rogarier, eius ea lege nihilum rogatum*). This is doubted by some, including S. (61 – 62), but the formula was surely not invented by Cicero, and must have appeared at least in some laws.²⁶ The specific law of Sulla mentioned, and disparaged, by Cicero (to which we shall attend presently), did presumably contain this clause—unless Cicero is directly misquoting the law to the judges; if so, there seems to be no reason to doubt that the clause was fairly routine. This created significant potential for attacking the validity of statutes, on various grounds that could be broadened into far-reaching ‘constitutionalism’. The passage in *Pro Caecina* exemplifies this potential—but it is clear that in the late Republic it was not realized, and no serious attempt to realize it was ever made. Cicero, in his *Laws*, makes no use of this formula in order to create a theory, if not a mechanism, of constitutional limits on legislation; at any rate, there is no mention of it in the extant parts of the treatise, which S. regards as an attempt to create this kind of constitutionalism.²⁷

The reason why this potential for attacking unconstitutional, or otherwise ‘pernicious’ laws, provided by the peculiar Roman practice of putting in statutes provisions restricting the content of future legislation (without any explicit ‘hierarchy of sources of law’) was not realized in the late Republic, was, apparently, the people’s clout in the system. Any politician resorting to such tactics risked popular *invidia* (just as was feared in the matter of Cicero’s recall) if it was felt that he was running roughshod, under some formal pretext, over what the Roman People had ‘willed and commanded’. This was not a risk that most Roman politicians took lightly. A senatorial decree of invalidation (a power apparently

²⁵ Cicero took strong exception to this action (*Att.* 5.11.2), though there is no full clarity as to the legal situation and the exact grounds for Cicero’s criticism.

²⁶ Lintott suggests that the clause would be inserted by a proposer ‘nervous about offending, wittingly or unwittingly, against the sanctions in previous laws’; A. Lintott, *The Constitution of the Roman Republic*, Clarendon Press, Oxford 1999, 63. He also mentions various late-Republican laws that penalized proposals to repeal them. This, as he notes, was ineffectual, for a successful repeal was considered as repealing this clause too (a view that vindicated the legislative sovereignty of the people), though an unsuccessful attempt might expose the proposer to a penalty.

²⁷ See Dyck (n. 4), 28 – 30 on what may have been covered by the other two books (at least) of the dialogue that Cicero wrote.

sanctioned by a statute, the above-mentioned *Lex Caecilia Didia*)²⁸ would provide greater legitimacy. This option depended on various political factors, including the state of public opinion that would be influenced by the content of the legislation in question and perhaps by the availability of a plausible pretext; as all senatorial decrees, it was subject to veto. Despite the potentially wide scope for political manipulation that it offered, this weapon was not used against the most pernicious, from the optimate point of view, of the popular laws of the late Republic.

Cicero's strongest and broadest statement of the theory that some statutes could be treated as a nullity because of their 'unconstitutional' content was made in a context where it could arouse little public resentment. It was his speech *Pro Caecina*, where he is defending the property rights of his client against a claim that, inter alia, he could not inherit the property in question because his community had been disfranchised by one of Sulla's laws. Surely, the Roman people would not be offended by an argument that a statute might be inherently unlawful, and thus inoperative, when the statute in question was one of Sulla's notorious punitive measures, and the substantive claim was that nobody could lawfully be deprived of their Roman citizenship. This does not mean that Cicero's view in this particular case did not reflect his broader and deeply-held beliefs²⁹; but the 'constitutional' significance and weight of such statements cannot be properly appreciated without fully taking into account their political and forensic context.

Neither side at the trial wished to make its case hinge on the validity of Sulla's law. The other side was urging various arguments against Caecina's claim to inherit the property; the bulk of Cicero's speech deals with those arguments. Then, in *Caec.* 95, he refers to the argument that Caecina could not in any case inherit, having lost his civic rights under the Sullan law. 'But [you say] Sulla carried a law. Without any reflection on those days and on the calamity of the republic, my answer to you is this': Sulla also put in the same law the usual saving clause that nothing is hereby 'asked' of the people that it would be unlawful to ask (*non ius esset rogarier*). So it was not a genuine expression of the Roman People's will that stood between Caecina and his inheritance, but a tyrannical enactment; what better than to find a formal pretext to remove the obstacle? It is true, and certainly significant, that Cicero then proceeds to argue his case on a higher plane. He argues at length that nobody can be lawfully (*iure*) deprived of Roman citizenship. This rule, it should be noted, is not ascribed to some specific statute, or statutes (as in the case of other bulwarks of Roman liberty, such as *provocatio*) but presented as a fundamental principle of Roman *ius* that cannot be legitimately overruled—even by the People itself. Whereas in his attacks on the Clodian law for his exile Cicero is very insistent that apart from being a legal nullity because of its content, this enactment was passed by 'armed slaves' rather than by the real Roman people (*Leg.* 3.25), here, in *Pro Caecina*, he is telling his audience that some things are

²⁸ On this see Lintott (n. 26) 62. The most frequent grounds were violation of the auspices (regulated by the *leges Aelia and Fufia*), with which, according to Lintott, the use of violence 'came to be associated' (rather than constituting a separate justification), as well as tackling disparate measures in a single bill (*per saturam*) and failure to the legal interval between the promulgation of the bill and the voting.

²⁹ On the other hand, as part of his flexibility on such matters, Cicero could also argue, when such a view favoured the case he was defending, that even obviously unfair laws have to be observed, as long as they have not been properly repealed, since the *leges* are the chief foundation of Roman liberty; 'we must all be slaves to the laws, so that we might be free' (*Cluent.* 146). The unfairness in question in that case was not on a par with disfranchisement or enslavement, but the attitude displayed here is in marked contrast with Cicero's more far-reaching statements, in the *De Legibus*, on the supremacy of natural law, embodying reason and justice, over civil law.

so inherently illegitimate even if the real *populus Romanus* has no right to do them. One wonders how many of his listeners would disagree with this in the case of the extreme examples that he mentions:

But I ask you—do you think that, if the People command me to be your slave, or you mine, this command would be valid (*ratum*)? You see and admit that this would be a nullity. And in doing so you first of all concede that not everything that the People commands should be valid; and secondly, you offer no reason why, if liberty cannot possibly be taken away, citizenship can. For we have the same tradition (*traditum nobis est*) with regard to both (96).

While the constitutional principle annunciated here is far-reaching indeed, the specific examples—deprivation of citizenship, and an even more extraordinary hypothetical case of legislative enslavement—are limited, extreme, and calculated to arouse wide popular sympathy. This does not look like an attack on the rights of the Roman People—quite to the contrary; especially since Cicero takes care to remind his listeners that if it were accepted that newly-created citizens could be lawfully deprived of their citizenship, no argument could protect any of the other citizens from the same fate (*Caec.* 101). Having made his point, Cicero goes on to argue that even if Sulla's law should be considered valid, his client should still get his property, since Sulla's law did not in fact fully deprive his community, Volaterrae, of civic rights—merely reduced it the same status as Arminium, whose citizens did retain their rights of inheritance (102).

7. Conclusions

What Cicero says in *Pro Caecina* certainly deserves a place in the history of constitutional thought. Moreover, this could not have been only his personal view, or anything his listeners would find new, untraditional and unsettling; Cicero never irked his listeners in this way. The notion that a statute might, even if passed without any formal irregularity, be considered legally void because its content violates certain basic norms of public law is, indeed, part of the heritage of the late Roman Republic. It is only natural to assume that it had considerable influence on European constitutional thought in later times, as S. argues.

It cannot, however, be shown that Cicero sought to use this idea on order to solve the crisis of the Roman Republic. He cannot be shown to have favoured creating a new mechanism for restricting the legislative powers of the assemblies on constitutional grounds; specifically, such a project cannot be attributed to his *Laws*. What can be shown is that he strongly supported the use (and, in the case of augurs, perhaps the enhancement) of the traditional political devices aimed at preventing the assemblies from causing harm. This included, but was by no means confined to, harm of a 'constitutional' nature. These devices were part of the traditional balance of Republican politics, but they could not always allow the Senate to have its way. Moreover, sometimes they were used against it; hence, the Senate and those defending its authority could not afford to adhere to them inflexibly, as to a constitutional norm in the full sense.

The idea of imposing essentially new and untraditional limits on the legislative competence of the assemblies with an avowed aim of restricting the power of the Roman People to 'will and command' as it pleases would apparently have been beyond the realm of

political feasibility.³⁰ The people were prepared to hear that their fundamental rights as Roman citizens and free men could not be taken away from any of them even by a decree of the People as a whole; but political realities did not allow the Roman elite to use this potentially promising notion in order to further limit the people's power of legislation. As long as the Republic lasted, the Roman people—with all the necessary qualifications that the use of this term requires, and without forgetting that we are not speaking about anything remotely resembling a modern democratic electorate³¹—were, for the Roman ruling class, a force to reckon with.

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³⁰ For the same reason, Cicero's provision on the validity of senatorial decrees (*Leg. 3.10: eius decreta rata sunt*) while meant, as it clear from the context, to fortify the Senate's authority, should not in my view be taken to mean that, as S. suggests (468), Cicero is endowing the Senate with 'unrestricted legislative power'. Lintott (n. 26), 230 suggests that the meaning is more restricted, though still significant: that senatorial decrees 'should be obeyed by magistrates without fail'.

³¹ See e.g. H. Mouritsen, *Plebs and Politics in the Late Roman Republic*, Cambridge University Press, Cambridge 2001, cf. Morstein-Marx's objections in Morstein-Marx, (n.5), 42; 122-123; M. Jehne, 'Who attended Roman Assemblies? Some remarks on political participation in the Roman Republic', in Francisco Marco Simón, Francisco Pina Polo, José Remesal Rodríguez (eds.), *Repúblicas y ciudadanos: modelos de participación cívica en el mundo antiguo*, Universitat de Barvelona, Barcelona 2006, 221 – 234; J. Tan, 'Contiones in the Age of Cicero', *Classical Antiquity* 27 N.1 (2008), esp. 172 – 180 ('The Audience').

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