

## ***A Painted Republic: the Constitutional Innovations of Cicero's De legibus***

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### **ABSTRACT**

This article proposes three arguments concerning the constitutional innovations offered by Cicero in the *De legibus*. First, these innovations are much broader and deeper than commonly appreciated, none more so than the very attempt at a prescriptive written constitution for Rome. Second, Cicero's amendments to traditional Roman practice follow a consistent set of four principles, principles encapsulated in his metaphor of the republic as a painting in need of fresh colors. Finally, the reframed institutions within the *De legibus* reveal Cicero to be neither the reflexive optimist his critics lament, nor the far-seeing political diagnostician he considered himself. The senate, for all its faults, remains the sole center of gravity in his constitutional system, and the legitimate grievances of Rome's citizen majority remain unrecognized and unaddressed. Though a failure on its own terms, the *De legibus* represents antiquity's last major attempt at original political thought, and an essential if unrecognized bridge to the modern idea of a constitution.

### **KEYWORDS**

Cicero, *De legibus*, constitutionalism, institutional rebalancing

“Suppose that some one had a mind to paint a figure in the most beautiful manner, in the hope that his work instead of losing would always improve as time went on—do you not see that being a mortal, unless he leaves some one to succeed him who will correct the flaws which time may introduce, and be able to add what is left imperfect through the defect of the artist, and who will further brighten up and improve the picture, all his great labour

will last but a short time?”<sup>1</sup> – Plato, *Laws* 769c.

“But though the republic, when it came to us, was like a beautiful painting whose colors, however, were already fading with age, our own time has not only neglected to freshen it by renewing the original colors, but has not even taken the trouble to preserve its configuration and, so to speak, its general outlines”<sup>2</sup> – Cicero, *De republica* 5.1.2.

In late republican Rome, to be *novus* was to be suspect. In political debate, *novi* was an epithet used to rebuke any departure, real or perceived, from the *mos maiorum*<sup>3</sup>. Likewise, the political ascendance of a *novus homo* – a man lacking ancestors of consular status – was an extremely rare event, Cicero being the first such *novus* to win the consulship in thirty years. Cicero was in fact a *novus* among *novi*, having risen not through military valor, as had his townsman Gaius Marius, but through his sharp legal mind and sharper tongue. In a political culture so centered upon famous bloodlines and martial glory, Cicero was arguably the most politically vulnerable Roman statesman of his generation, lacking either legions or a family network to buttress his position<sup>4</sup>. Whether from this vulnerability or from conviction, Cicero’s speeches show a consistent attention to

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<sup>1</sup> ‘εἴ ποτέ τις ἐπινοήσῃε γράψαι τε ὡς κάλλιστον ζῶον καὶ τοῦτ’ αὖ μηδέποτε ἐπὶ φαυλότερον ἄλλ’ ἐπὶ τὸ βέλτιον ἴσχειν τοῦ ἐπιόντος ἀεὶ χρόνου, συννοεῖς ὅτι θνητὸς ὢν, εἰ μὴ τινα καταλείψει διάδοχον τοῦ ἐπανορθοῦν τε, ἐάν τι σφάλῃται τὸ ζῶον ὑπὸ χρόνων, καὶ τὸ παραλειφθὲν ὑπὸ τῆς ἀσθενείας τῆς ἑαυτοῦ πρὸς τὴν τέχνην οἴός τε εἰς τὸ πρόσθεν ἔσται φαιδρῶν ποιεῖν ἐπιδιδόναι, σμικρὸν τινα χρόνον αὐτῷ πόνος παραμενεῖ πάμπολυς;’

<sup>2</sup> *Nostra vero aetas cum rem publicam sicut picturam accepisset egregiam, sed iam evanescentem vetustate, non modo eam coloribus eisdem, quibus fuerat, renovare neglexit, sed ne id quidem curavit, ut formam saltem eius et extrema tamquam liniamenta servaret.*

<sup>3</sup> See, e.g., *De Lege Manilia* 20.59 (“But I am told, ‘Let no innovation [*novi*] be made contrary to usage and the principles of our forefathers”). See H.G. Hodge (ed. By), *De Lege Manilia*, in *Cicero: Orations Vol. IX*, Loeb Classical Library, Cambridge, MA, Harvard University Press; cf. Sallust, *Conspiracy of Catiline* 37 (ed. By J.S. Watson, New York and London, Harper & Brothers, 1899).

See also E. Rawson, *Cicero: A Portrait*, London, Bristol Classical Press, 1975: 154.

<sup>4</sup> Cf. Sallust, *Conspiracy of Catiline* 23: “For before this period, most of the nobility were moved with jealousy, and thought the consulship in some degree sullied, if a man of no family, however meritorious, obtained it”. See also Rawson, *Cicero: A Portrait*, cit.: 58-59, on electoral attacks made against Cicero for his lack of nobility.

lambasting his adversaries for proposals or practices he deemed to be *nova*<sup>5</sup>. For Cicero, the remedy to any political problem was patent in the *mos maiorum*, the virtues and practices of the republic's glorious past. And yet, in his fragmentary and unpublished *De legibus*, what James Zetzel has called "one of the most neglected of Cicero's works"<sup>6</sup>, Cicero proposes a startling array of constitutional *nova*: a semi-secret ballot law, new powers for censors, a directly elected senate, and new sanctions against political violence, to name but a few. Could one of Rome's most renowned conservatives have also been its most constitutionally inventive?

This article proposes three arguments concerning Cicero's constitutional innovations. First, these innovations are much broader and deeper than commonly appreciated, none more so than the very attempt at a prescriptive written constitution for Rome. Second, Cicero's amendments to existing Roman practice follow a consistent set of four principles, principles encapsulated in his metaphor of the republic as a painting in need of fresh colors. Finally, the *De legibus* reveals Cicero to be neither the reflexive optimate his critics lament, nor the far-seeing political diagnostician he considered himself. The senate, for all its faults, remains the sole center of gravity in his constitutional system; even for a statesman as ingenious as Rome ever produced, the legitimate grievances of Rome's citizen majority, and the centrality of these grievances to Rome's constitutional crisis, were beyond Cicero's interest or understanding.

### 1. *Why Write a Constitution for Rome?*

In the second book of the *De legibus*, Cicero frames his purpose in the following manner:

M. Do not you think, then, since Scipio in my former work on the Republic offered a convincing proof that our early State was the best [*optumam*] in the world, that we must provide that ideal State [*optumae rei publicae*] with laws which are in harmony with its character?

Q. Certainly I think so.

M. Then you must expect such laws as will establish [*contineant*] that best type of State. And if I chance to propose any provisions to-day which do not exist now and never have existed in our State, they will nevertheless be

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<sup>5</sup> See, e.g., *De Lege Agraria* 2.10.26; *In Verres* 1.18.55; *In Verres* 2.3.61.142; *De Domo Sua* 44.115.

<sup>6</sup> J.E.G. Zetzel, "Review: A.R. Dyck's *A Commentary on Cicero, De legibus*", *The Classical Review* 55(2005), 111-113: 111.

found for the most part among the customs of our ancestors, which used to have the binding force of law<sup>7</sup> (*De legibus* 2.10.23).

From a literary point of view, the logic is straightforward enough: a work situating the *optimum status rei publicae* in Rome's past leads naturally to a consideration of its laws for the present and future. Cicero's intellectual inspiration for such a project is equally clear: in the first book, Atticus remarks,

[S]ince you have already written a treatise on the constitution of the ideal State [*de optimo rei publicae statu*], you should also write one on its laws. For I note that this was done by your beloved Plato, whom you admire [...] above all others (*De legibus* 1.5.15).

Putting aside for the moment the myriad differences between Plato's pair and Cicero's, the *De legibus* represents a project that, as far as we know, had never been attempted in Rome's history: a prescriptive written constitution for the republic. The Romans of Cicero's generation were, of course, no strangers to written law. From the adoption of the Twelve Tables in the mid-fifth century, written statutes had provided the basis for resolving a wide range of disputes between private citizens<sup>8</sup>. And from at least the early second century, written handbooks were produced to assist magistrates with the performance of their increasingly complex duties, usefully compiling precedents but having no formal power in themselves<sup>9</sup>. In more than four

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<sup>7</sup> Unless otherwise noted, all translations of *De republica* and *De legibus* are those of Clinton Keyes in the Loeb Classical Library edition (Cambridge, Harvard University Press, 1928).

<sup>8</sup> See A. Lintott, *The Constitution of the Roman Republic*, Oxford, Oxford University Press, 1999: 3-8. Lintott notes that "it is unlikely that the majority of the Roman people had the capacity to read, still less to understand legal texts. Nevertheless, men with skill in legal language could have understood them and told the others, and those in public office were obliged to read either the public copies on bronze or those in the treasury". Cf. J.A. Crook, *Law and Life of Rome, 90 BC – AD 212*, Ithaca, Cornell University Press, 1967: 19-30.

<sup>9</sup> See A.R. Dyck, *A Commentary on Cicero, De legibus*, Ann Arbor, University of Michigan Press, 2004: 4 concerning, e.g., the *magistratuuum libri* of C. Sempronius Tuditanus (cos. 129) and the *de Potestatibus* of M. Junius Gracchanus, cited by Cicero at *De legibus* 3.49. See also Lintott, *The Constitution of the Roman Republic*, cit.: 4 on written commentaries that recorded or explained constitutional practice. Lintott concludes that a wide variety of rules governing Rome's magistrates were "written down but did not derive their authority from the writing in which they were recorded".

centuries of the republic's history, however, at no point did an individual or group of Roman statesmen establish a comprehensive written framework for Rome's political institutions<sup>10</sup>.

Though educated Romans were no doubt aware of the prescriptive constitutions of Lycurgus or Solon that had been fundamental to the success of their states, the historical record down to 54 BCE reveals no Roman attempt to follow their lead. Roman politics operated on consensus, and more specifically on a common understanding among Rome's leaders of the rules and practices constituting the *mos maiorum*. These rules, in turn, were legitimized not through public referendum but by the monumental success of Rome's armies and its rapidly expanding empire. In these victories the wisdom of the ancestors was manifest; Cicero distinguished Rome from its Greek counterparts by declaring, "Our own commonwealth was based upon the genius, not of one man, but of many"<sup>11</sup> (*De republica* 2.1.2).

By the year 54, however, the republic's unwritten consensus lay in tatters. Through the second century, an astonishing inflow of wealth to Rome had created economic and social tensions that Rome's political institutions could no longer mediate, and their failure in the Gracchan crisis of 133-32 inaugurated eighty years of civil violence<sup>12</sup>. Competing interpretations of the *mos maiorum* were so deep and ongoing that they took on the aspect of rival clans – *optimata* and *popularis* – in fervent, often lethal, competition for the loyalty of Rome's leading men and their networks of *clientes*. Once complementary authorities in the republican system, the tribunate and senate locked themselves in a dysfunctional stalemate. Purges

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<sup>10</sup> See Lintott, *The Constitution of the Roman Republic*, cit.: 208-13 on successive attempts by the Gracchi, Saturninus, Sulla, and Clodius to readjust the balance of Rome's constitution. If any of these attempts at reform included a proposal for a single code or set of laws which would encompass all of Rome's major civic institutions, history has not preserved it.

<sup>11</sup> *Nostra autem res publica non unius esset ingenio, sed multorum*. See Rawson, *Cicero: A Portrait*, cit.: 150 on how Rome's mixed constitution differed, for both contemporary and subsequent observers, from its Greek counterparts.

<sup>12</sup> See J.E.G. Zetzel (ed. By), *Cicero: On the Commonwealth and On the Laws*, Cambridge, Cambridge University Press, 1999: xii. The beginning of Rome's civil wars were thus due in an important sense to conflicting interpretations of what the unwritten *mos* allowed: T. Gracchus' circumvention of the senate, the impeachment of a fellow tribune, and standing for a second term were all, to one group of Romans, totally in keeping with Roman values and precedents. To another group, they represented such an egregious violation of those precedents that the bloody massacre of Gracchus and his followers was both necessary and legally justified.

and proscriptions replaced elections as the determinants of Rome's political agenda. Such elections that remained were increasingly marred by bribery, and popular assemblies became arenas of gang warfare<sup>13</sup>. Rome's empire was secure, but its unwritten constitution had failed.

At this moment of constitutional emergency, Cicero decided to propose something Rome had never had before: a prescriptive written constitution. The originality and impact of this decision has, bewilderingly, received next to no attention from modern scholars. As early as 1921, describing the three tenets of modern constitutionalism, Clinton Keyes concluded that "the collection of 'laws' in *De legibus* III is the only ancient document which seem to correspond to the modern idea of a constitution [...] Whether he fully realized it or not, he actually seems to have written the first constitution of this kind in existence"<sup>14</sup>. Since this well-supported endorsement made by a prominent Ciceronian nearly a century ago, commentary on the *De legibus* has been either silent or dismissive on this point<sup>15</sup>.

Why has Cicero's daring innovation been so roundly overlooked? At least three reasons present themselves. The first is textual: as far as we are aware, the *De legibus* remained incomplete and unpublished at Cicero's death. Its extant form is fragmentary and occasionally obscure; unsurprisingly, scholarly attention to the *De legibus* has paled in comparison with Cicero's other works. The second is formal: the notion that a law code situated in a literary dialogue could have any serious political purpose is simply too strange for some modern observers to allow<sup>16</sup>. The final is lexical: in a

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<sup>13</sup> See, e.g., Crook, *Law and Life of Rome*, cit.: 265: "[B]y Cicero's day politics *was* a jungle; on one side the upper class had political pressure-groups for the purpose of 'managing' elections [...] and on the other side there arose the real 'mob,' bands of thugs, free and slave, operating to intimidate, to break up elections and so on".

<sup>14</sup> C.W. Keyes, "Original Elements in Cicero's Ideal Constitution", *American Journal of Philology* 42(1921), 309-323: 309, 312.

<sup>15</sup> Cf. Zetzel, "Review: A.R. Dyck's *A Commentary on Cicero, De legibus*", cit.: 111; Dyck, *A Commentary on Cicero, De legibus*, cit.: 1.

<sup>16</sup> See Rawson's (E. Rawson, "The Interpretation of Cicero's *De legibus*", *Aufstieg und Niedergang Der Römischen Welt* I.4(1973): 334-56, reprinted in E. Rawson (ed.), *Roman Culture and Society*, Oxford, Oxford University Press, 1991: 125-48) pat dismissal at 142: "Cicero's laws are too compressed (and too literary) to be compared with the codifications planned by Pompey [...] and Caesar." On why Cicero may have considered compression useful for Roman law given its state of pettifogging metastasis, see *De legibus* 1.4.12-1.6.18. (To borrow a modern example, "compressing" a constitution to six pages did not appear to have troubled America's founding fathers.) Cicero's use of the dialogue form to further his constitutional project is discussed in Sections A and B, *infra*. Even Rawson admits,

tradition dating at least as far as Clinton Keyes' 1928 Loeb edition, the term *optimus status rei publicae* has been translated as "ideal republic," a term to which modern English adds the connotations of "transcendent," "utopian," even "imaginary"<sup>17</sup>. Never mind that Cicero had already used the term *optimus* in the *De republica* to refer to the actual Rome of history, or that *optimus* is just the superlative form of *bonus*: if the *De legibus* was merely an unfinished sketch of an imaginary Rome, modern scholars could feel justified in overlooking it.

There are at least three reasons why the *De legibus* should be taken seriously as a political proposal, and thus as a watershed moment in the history of political thought. The first is found in the quote from Book III above:

If I chance to propose any provisions to-day which do not exist now and never have existed in our State, they will nevertheless be found for the most part among the customs of our ancestors, which used to have the binding force of law [*tum ut lex valebat*] (*De legibus* 2.10.23).

The imperfect tense of *valebat* is key; if the unwritten *mos maiores* once sufficed to make citizens obey common rules, they no longer do. By implication, some new approach is needed for the *mos maiorum* to exert the same binding force on Rome's current and future citizens; Cicero's written law code, inspired by Greek political thought and ancestral Roman tradition, is that new approach<sup>18</sup>.

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however, that *De legibus* represents "our best evidence for the reforms that he would have liked to see introduced at Rome" (Rawson, *Cicero: A Portrait*, cit: 154).

<sup>17</sup> As an example, consider the related but distinct meanings of the English terms "optimal solution" and "ideal solution". The English mistranslation of *optimus* as "ideal" has touched even the highest rungs of Ciceronian scholarship; see, e.g. Rawson, "The Interpretation of Cicero's *De legibus*", cit.: 143 and Zetzel (Zetzel [ed. By], *Cicero: On the Commonwealth and On the Laws*, cit.: xxiii). Powell (J.G.F. Powell, "Were Cicero's *Laws* the *Laws of Cicero's Republic*?", *Bulletin of the Institute of Classical Studies* 45(2001): 17-39) would seem to have put the matter definitively to rest. See also L. Strauss, *What is Political Philosophy?* Westport, CT, Greenwood Press, 1973: 84-85 on "the natural tendency" of antique political controversy "to express itself in universal terms".

<sup>18</sup> See Zetzel (ed. By), *Cicero: On the Commonwealth and On the Laws*, cit.: xi, characterizing Cicero's dialogues as "an attempt to transpose Greek ideas about public life into a Roman context and to provide a more rigorous philosophical model for Roman public behavior and institutions." An important parallel to the Twelve Tables is also worth noting: Prior to 451 BCE, legal disputes among private citizens were settled by

Secondly, Cicero displays a keen desire to repair what is broken in Rome's civil law tradition. Early in Book I, Atticus asks Marcus why he doesn't use his free time to compose a treatise on the civil law, Marcus answers as follows: "I believe that there have been most eminent men in our State whose customary function it was to interpret the law to the people and answer questions in regard to it, but that these men, though they have made great claims, have spent their time on unimportant details. What subject indeed is so vast as the law of the State [*ius civitatis*]? But what so trivial as the task of those who give legal advice?" (*De legibus* 1.4.14) As a Roman statesman, perhaps the first, whose ascendance in politics was due entirely to success in the courts, Cicero's opinion on the state of Roman law should be weighed heavier than most<sup>19</sup>. If we take him at his word<sup>20</sup>, Cicero saw a legal community bogged down in trifles, and believed he could clarify and harmonize the tradition which had formed him and thrust him to prominence.

A third reason to take the *De legibus* seriously relates to Cicero's political position in the late 50s. With the Conference of Luca renewing the effective hegemony of the First Triumvirate, Cicero found himself shut out of high-level politics at Rome. The internal evidence of the *De legibus* is that during this period of involuntary *otium*, the wounds of his recent political battles – most notably with Clodius – remained fresh. The provisions on capital punishment for disobeying augurs, holding presiding magistrates responsible for *vis*, outlawing *privilegia*, and punishing violations of "religious obligations," are all explicitly or implicitly responses to Clodius' *popularis* campaign (Even Cicero's sanction of capital punishment for incest at 2.9.22 could be seen as a slap at Clodius, whose rumored affair with his sister Clodia

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unwritten tradition or personal authority; Cf. Crook, *Law and Life of Rome*, cit.: 28. When the social tensions between patrician and plebeian broke the consensus necessary for these methods to continue, a new approach – the codification of unwritten legal customs into a written code – was adopted. There is no reason to think that, steeped in the Roman legal tradition as he was, that this precedent failed to attract Cicero's attention; cf. Zetzel (ed. By), *Cicero: On the Commonwealth and On the Laws*, cit.: xxiv.

<sup>19</sup> Among the great legal experts Cicero cites – M. Scaevola, L. Crassus, M. Junius Gracchanus – all were from well-established patrician families.

<sup>20</sup> I am aware of the risks in ascribing the opinions of the character "Marcus" to Cicero himself, just as the pronouncements of the literary "Atticus" and "Quintus" do not necessarily reflect those of their historical namesakes. Where evidence from external sources suggests a gap between those of the real Cicero and those of "Marcus," I will note a possible distinction; no such gap is evident concerning the real Cicero's opinion about civil law.



was a Ciceronian leitmotif). As tribune, Clodius had enacted a series of laws that shifted the balance of power away from *optimata*-controlled institutions; writing *De legibus* allowed Cicero an opportunity to advance in print the political goals he could not advance in person<sup>21</sup>. To assert that the law code in the *De legibus* was a serious proposal is not to imply, of course, that Cicero had a specific plan to see his law code adopted and implemented. But in a generation that had seen several attempts to “re-found” Roman institutions – beginning with Sulla, continuing through Clodius and Caesar and achieving fruition in Cicero’s would-be protégé Octavian – a project of the *De legibus*’s political boldness was not unique, even if its intellectual content was.

The decision to write a constitution for Rome led the ex-consul into uncharted and uncomfortable territory. As a longtime leader of *optimata* resistance to *popularis* reforms, he evidences discomfort with proposing *novi* on his own behalf<sup>22</sup>. At times, he claims to be faithfully and exclusively codifying the *mos maiorum*, with slight, almost bashful caveats<sup>23</sup>. At times, he proudly presents new laws, such as those relating to the censorship, “that have never been in use among us, but are necessary for the public interest” (*De legibus* 3.20.46). And at times, as with the death penalty for disobeying augurs, he hides his innovation entirely, claiming his law “already to be found in the customs and laws of our State” (*De legibus* 3.19.43). As a political conservative embarking on a legal and philosophical project with no precedent at Rome, Cicero faced daunting questions: How closely would he hew to existing Roman practice? What boundaries and principles would

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<sup>21</sup> Cf. J.-M. David, *La République romaine de la deuxième guerre punique à la bataille d’Actium* (218-31): *Crise d’une aristocratie*. Paris, Ed. du Seuil, 2000: 223: “[Cicéron] tentais alors de faire admettre dans l’opinion des principes qu’il ne pouvait plus transcrire lui-même dans l’action civique et de regagner par le magistère intellectuel la perte de prestige et d’autorité qu’entraînait sa subordination aux décisions des triumvirs.”

<sup>22</sup> For prior instances where Cicero parried accusations that he had endorsed *novi*, see *In Verres* 1.18.55, where he employs the novel tactic of grouping his witnesses together (but denies this is a break from precedent), and *De lege Manilia* 20.59, where he defends Pompey’s new powers by arguing, “[O]ur forefathers always bowed to precedent in peace but to expediency in war, always meeting fresh emergencies with fresh developments of policy [*ad novos casus temporum novorum consiliorum rationes*]”. Cicero would have had little difficulty employing a version of the latter argument to cover his constitutional innovations – the republic being, in a larger sense, at war with itself.

<sup>23</sup> See *De legibus* 2.10.23, “they will nevertheless be found for the most part [*fere*] among the customs of our ancestors”; *De legibus* 3.5.12, “I had no innovations, or at least only a few [*sane non multum*], which I thought ought to be introduced into the constitution”.

guide his departures? To what extent could he frame the task of constitutional innovation as one of preservation or restoration?

Though we will never know how Cicero answered these questions for himself, he offers a significant clue in the use of a vivid and curious political metaphor.

## 2. Cicero's *Painted Republic*

Contemporary interpretations of the *De legibus* have often centered upon its appropriations and departures from the *divinum illum virum*, Plato (*De legibus* 3.1.1). Though he likely misread the *Laws* as a continuation or completion of the *Republic*<sup>24</sup>, Cicero borrows from the former work on a number of significant points, including the setting (a bucolic walk on a summer day), the time (significantly later than the first of the two dialogues), the phasing out of a named protagonist from the first dialogue (Socrates, Scipio),<sup>25</sup> and the number of interlocutors (three).

One of the most revealing – and, to my knowledge, heretofore unexamined – correspondences between the two pairs of dialogues is the metaphor of the ideal constitution as a painting, found in Book VI of the *Laws* and Book V of the *De republica*. Plato's "Athenian", joking that the painters he knows "never cease touching up their works," argues that in a similar fashion a legislator, being mortal and imperfect, should leave "some one to succeed him who will correct the flaws which time may introduce, and be able to add what is left imperfect through the defect of the artist, and who will further brighten up and improve the picture" (769c). Observing that as he and his fellows in the dialogue are old men, and that the "guardians of the law" are young in comparison, the Athenian concludes that his trio must "endeavour to make them not only guardians of the law but legislators themselves, as far as this is possible" (770a).

Cicero adopts Plato's image of the optimal constitution as a painting in need of maintenance, but alters it in several illuminating points. Plato's painted constitution is explicitly the product of a single mind, and requires

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<sup>24</sup> Cf. Rawson, *Cicero: A Portrait*, cit: 153.

<sup>25</sup> Interpreters of the *Laws* from Aristotle to the present have identified "the Athenian" as embodying Socrates in some fashion; see, e.g., L. Strauss, *The Argument and the Action of Plato's Laws*. Chicago, University of Chicago Press, 1975: 1-2. Nevertheless, the shift in named characters remains a common point between Plato's and Cicero's dialogues.

improvement both because of the “defect of the artist” and of “the flaws which time may introduce”. Cicero gives Plato’s metaphor a half turn; the Roman painting is viewed not from the point of view of its imperfect and singular creator, but rather from that of the current generation “receiving” it as a bequest from generations past. This difference of perspective reveals how Cicero may have viewed himself differently from his philosophical hero: where Plato had sought to put an optimal state on its feet, Cicero seeks instead to keep his own running. As argued above, the constitution of the *De legibus* can thus be more usefully interpreted not an “ideal Rome” created for theoretical or literary ends, but as a practical (if ultimately unfinished) blueprint for restoring, with creative adjustments, the optimal Rome that its *maiores* had built.

In a second contrast with Plato, Cicero’s metaphor lacks any suggestion of a flaw or defect in Rome’s constitution which requires correction. Where a single Platonic artist may err, the collective product of Rome’s *maiores* is a constitution of *optimu statu* – that is, if not the “ideal” constitution in a transcendent or eternal sense, the best order that human beings could produce in our material world. Cicero’s painted constitution is thus not “corrected” (*epanorthoun*) but preserved (*servaret*) and renewed (*renovare*). The painting metaphor also suggests a far more nuanced view of Cicero’s political conservatism than his critics generally grant him. The preservation of Rome’s constitution is decidedly not achieved through passive admiration or merely protecting it from meddling *popularis* hands; rather, constitutional preservation is an active and ongoing process of renewal, demanding fresh ranks of enlightened and virtuous statesmen. Cicero laments that his generation has failed in its duty to “refresh the colours” of the Roman constitution, to “preserve its configuration” (*forma*) and “general outlines” (*extrema lineamenta*).

How does Cicero’s metaphor of the republic as painting help us understand the purpose and content of *De legibus*’s written Roman constitution? The metaphor suggests four linked principles that may have guided Cicero’s constitutionalism. First, in agreement with Plato’s *Laws* (though not with his *Republic*), an optimal constitution for Cicero is not a legal arrangement frozen in place. Because time will naturally cause the “fading” of a constitution, each generation of statesmen has a role to play in preserving it. Second, also as in Plato, the maintenance of a constitution is not a passive or prophylactic process but an active and creative one – a painting must be directly handled in order to “refresh” it. Third, this

handling requires a special expertise or *technē* earned by the painter, and embodied for Cicero in the rational reflection and seasoned prudence of statesmen. Finally, Cicero adds a fascinating detail to Plato’s metaphor in the distinction made between the “colours” of a constitution and its “configuration” and “outlines”. What could he have meant by this distinction? A few lines later he states directly that “the loss of our customs is due to our lack of men” and concludes that

it is through our own faults [...] that we retain only the form of the commonwealth, but have long since lost its substance<sup>26</sup> (*De republica* 5.1.2).

Relating this comment back to the image of the painting, I propose that by a failure to “refresh the colors” (*coloribus* [...] *renovare*) of the state, Cicero has in mind the personal failure of Rome’s leading men to follow the moral example of their ancestors, and that by “general outlines” (*extrema liniamenta*), he means the institutional arrangements that remain in words (*verbo*) long after their animating spirit has faded. The complementarity of institutional authority and individual virtue is not original to Cicero, but his treatment of the theme produces constitutional ideas of startling inventiveness.

### 3. *The Constitution of the De legibus*

In the second and third books of the *De legibus*, the character Marcus plays the role of lawgiver, pronouncing laws related to religious and political institutions, respectively<sup>27</sup>. Following the recitation of his code, Marcus leads a group discussion of some of the code’s more critical and controversial provisions. In both books, the discussion section begins with Quintus declaring approvingly that Marcus’s laws resemble, but are not identical to, past or existing Roman practice (*De legibus* 2.10.23; 3.5.12). Among the

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<sup>26</sup> *Nostris enim vitiis, non casu aliquo, rem publicam verbo retinemus, re ipsa vero iam pridem amisimus.*

<sup>27</sup> An intriguing consequence of Cicero’s choice of the dialogue form is that while the author Cicero is writing the constitution, the protagonist Marcus is of course speaking it. Having evidently read the *Phaedrus* (Atticus alludes to it by name at 2.3.6), Cicero implicitly engages Plato’s debate over the priority of the written or spoken word, ensuring that his new law code is both.

innovations Cicero offers in the realm of politics are a tribunate accountable for political violence, a semi-secret ballot, an altered *cursus honorum*, an expanded censorship, new rights of judicial appeal, and a directly elected senate with stronger legislative powers. The details of these constitutional innovations will now be taken up in turn.

### A. *The Tribunate*

From an *optimatus* perspective, Cicero's inclusion of the tribunate in its pre-Sullan form – or as he puts it, *quae est in re publica nostra* (“as it is in our state”) – would have been one of his constitution's most surprising features. For three generations the tribunate had been a notorious springboard of *popularis* politicians, suppressed by Sulla, partially reinstated by Pompey, and recently held by Cicero's bitter enemy Clodius. Furthermore, in Book I the character Marcus denigrates legal enactments in which the populace “decrees whatever it wishes” (*scripta sancit quod vult*), noting that these are only what “the crowd” calls law (*ut vulgus appellat*), and should not be confused with *summa lex*, the supreme law of Nature that will guide Cicero's own laws<sup>28</sup>. Nevertheless, these laws ultimately provide for ten tribunes “whose persons shall be inviolable” and whose resolutions, when ratified by the plebeian assembly, “shall be binding” (*ratum esto*). What is Cicero thinking here?

The painting metaphor helps us make sense of Cicero's tribunate in at least three ways. First, echoing the distinction between the painting's lines and its colors, in his defense of the tribunate Cicero draws a sharp line between his castigation of individual tribunes and his opinion of the office itself. The positive impact of the institution – which helps ensure “the senatorial order is not subject to envy, and the common people make no desperate struggles for their rights” (*De legibus* 3.10.25) – outweighs the negative impact of any individual tribune. Secondly, Quintus argues that the tribunate was “a mischievous thing [...] begotten in the midst of dissension” (*De legibus* 3.8.19). Remember that for Cicero, unlike Plato, there are no

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<sup>28</sup> Marcus goes as far as to accept Quintus' assertion that three *popularis* laws related to agrarian reform and grain distribution were not really laws at all (*leges nullas putas*), though he adds the caveat that they were quickly and decisively repealed. (*De legibus* 2.6.13-14) In this exchange and in the debate over the tribunate and ballot laws, Cicero allows Quintus to voice the “*optimatus* fundamentalist” position that the character Marcus engages sympathetically while trying to guide it toward more conciliatory ground.

defects to be corrected in the constitution of the *maiores*; its “general configurations” (*extrema liniamenta*) are to be preserved, and removing the tribunate would amount to a major alteration of these *liniamenta*. On the contrary, Cicero insists, the tribunate testifies to the *sapientia* of the *maiores*, who devised it as a compromise (*temperamentum*) that would mollify the people’s desire for liberty while keeping them under the guidance of their betters (*De legibus* 3.10.24-25). The tribunate is therefore not the enemy of the *boni*, but rather an instrument to keep an unruly *populus* under control<sup>29</sup>.

Finally, the debate between Quintus and Marcus over the tribunate gives Cicero his best chance to model the *technē* of statesmanship necessary to care for a painted republic. The ultimate test of a constitution is its ability to mediate political conflict without recourse to violence; the unwritten Roman constitution began failing this test with the murder of T. Gracchus in 132, and was failing it with greater frequency and blatancy by the late 50s. In the *De legibus*, Cicero’s veneration of reasoned discourse is matched only by his horror of political violence, and his section on the tribunate allows the expression of each. First, Cicero emphasizes that tribunes can be held responsible for violence in a way that mobs cannot, and that they can calm the violent impulses of the *populus* as well as inflame them (*De legibus* 3.10.23-24). In a more positive vein, Cicero uses the dialogue form to model how patriotic statesmen can disagree without being disagreeable. He lets “Quintus” present an impassioned and detailed argument against the tribunate, and when “Marcus” fails to convince Quintus and Atticus, he draws further attention to the dialogue form by joking that, by the rules of

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<sup>29</sup> Cicero may additionally be offering a counterpoint to Polybius’s portrayal of Rome’s institutional balance. Polybius observes, after treating the consulship, senate, and popular assemblies in turn, that “whenever one of the three elements swells in importance [...] the designs of anyone can be blocked or impeded by the rest, with the result that none will unduly dominate the others or treat them with contempt. Thus the whole situation remains in equilibrium since any aggressive impulse is checked, and each estate is apprehensive from the outset of censure from the others” (*Hist.* 6.18). In this passage, the ur-text for the modern theory of checks and balances, Polybius presents Rome’s constitution as a mechanism for extending and rationalizing the conflicts inherent in Roman society. For Cicero, by contrast, Rome’s constitutional bodies should not manage and channel conflict but reduce it; *concordia*, not equipoise, is Cicero’s objective. See also *De republica* 2.16.30, where Cicero responds forcefully to Polybius’s claim that the Roman constitution had evolved as a series of chance adaptations to adversity: “And you will learn that the Roman People has grown great, not by chance, but by good counsel and discipline, though to be sure fortune has favoured us also”.

the genre, the other characters in the dialogue are supposed to agree with him (*De legibus* 3.11.26).

The utility of the dialogue form is therefore not to show how *optimates* and *populares*, employing reason and dialogue, can come to a quick and easy agreement. Reasoned, collegial, non-violent discussion of sensitive political questions is for Cicero an end in itself, independent of the debate's outcome. He underscores this by finishing the debate with a kind of Socratic *aporia*, with both sides agreeing to disagree (*De legibus* 3.11.26). On a superficial level, the debate over the tribunate has failed, but Cicero may have used this device for two subtler purposes. First, the characters Marcus and Quintus are the spokesmen not only for two specific political positions, but also for the competing political imperatives to do what is necessary (*necessarium*) versus what is best (*optimum*). Despite the supposedly absolutist demands of the *ius natura*, Cicero via Marcus provides a passionate defense for the art of compromise, which he credits to the *maiores* themselves (*De legibus* 3.10.24). The tension between *optimum* and *necessarium*, essential and perhaps unresolvable, is modeled for future Roman statesmen in the polite but firm disagreement of the two brothers<sup>30</sup>. The second message reflects the more profound crisis of current Roman politics: simply agreeing to disagree, without drawing swords or calling up legions, is precisely what Roman politicians had failed to do in Cicero's lifetime<sup>31</sup>. The *technē* of peaceful political deliberation is one Rome has lost, and the tribunate debate offers Cicero the means to model this lost element of Roman statesmanship<sup>32</sup>.

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<sup>30</sup> Cf. Scipio's observation at *De republica* 2.33.57 that "the essential nature of the commonwealth often defeats reason" (*vincit ipsa rerum publicarum natura saepe rationem*). I am grateful to Professor David Fott for guiding me to this point.

<sup>31</sup> As Professor Carlos Lévy poses the question, "la question qui hante Cicéron n'est-elle pas aussi la difficulté d'actualiser une autre forme de transcendance, celle du *mos maiorum*, dans un monde en proie à la violence née précisément de l'affrontement des egoïsmes?" (C. Lévy, *Cicero Academicus: Recherches sur les Académiques et sur la Philosophie Cicéronienne*, Rome, Ecole Française de Rome, 1992: 503).

<sup>32</sup> Despite his innovative use of Platonic dialogue to illustrate the virtues of Roman statesmen, Cicero offers no explicit theory of political deliberation in the *De legibus*. One possible difficulty is that natural law and pluralist deliberation are not natural intellectual bedfellows; either one believes in a single "right" answer to a political question or one does not. Cicero's implication at 1.6.19 that "the crowd's" concept of law is at odds with the *summa lex* of nature diminish the likelihood that *popularis* perspectives on political questions, even when held by senatorial peers, could be granted equal respect under a Ciceronian scheme. Gentlemen may disagree, in other words, but only to a point.

## B. *The Ballot*

Of all the provisions in Cicero's constitution, perhaps none is more peculiar than his idea of how Romans should vote:

When elective, judicial, and legislative acts of the people are performed by vote, the voting shall not be concealed from citizens of high rank, and shall be free to the common people<sup>33</sup> (*De legibus* 3.4.10).

When the three interlocutors debate this provision later in Book III, all sides agree on the salient political facts: Rome's ballots had once been entirely open; after a series of reforms beginning in the 130s, they were now almost entirely secret, but riven with bribery. Our first clue that Cicero is attempting something new and unfamiliar lies in Atticus's first reaction to the proposal:

I could get no clear idea of the meaning of this law (*De legibus* 3.15.33).

Marcus frames the question simply – should the votes of Roman citizens be recorded openly or secretly? – then promptly gives the floor to his brother, thereby allowing the proposal to be extensively critiqued before it is even explained.

Quintus, defending a pure voice vote, opposes Marcus' proposal on both historical and principled grounds. As a matter of history, the secret ballot was not the people's creation but rather the creation of demagogues who sought to manipulate them<sup>34</sup>. The four laws that had been passed to extend closed balloting rights were the proposals of no-account or wayward aristocrats who later repented – or, in the case of the first law, with the support of Marcus' "beloved" Scipio, who deserves blame just as Marcus will deserve it for his own proposal (*De legibus* 3.16.37). As a matter of principle, Quintus laments that Rome's *boni* too often retreat from *optimum* policies

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<sup>33</sup> *Creatio magistratum, iudicia populi, iussa vetita quom suffragio cōsciscuntur, optumatis nota, plebi libera sunt.*

<sup>34</sup> "Such a law was never desired by the people when they were free, but was demanded only when they were tyrannized over by the powerful men in the State" (*De legibus* 3.15.34).



because they fear popular opposition<sup>35</sup>. This argument sounds his familiar note of *optimata* fundamentalism – the *populus* as a wholly negative counterweight to good leadership – but Cicero the author is also pointing his readers back to the tension, discussed above, between *optimum* and *necessarium*: does political compromise represent a weakening of the *optimus status rei publicae* or a core virtue which serves and sustains it?

Likewise, Marcus defends the proposal on both practical and principled grounds. As a matter of history, he argues that those balloting reforms which were “made to interfere with the buying of votes, as they usually are”, should be repealed not because they aimed at an unworthy target but because they failed to hit it.

[I]f [those] laws have never actually prevented bribery, then let the people have their ballots as a safeguard of their liberty, but with the provision that these ballots are to be shown and voluntarily exhibited to any of our best and most eminent citizens (*De legibus* 3.17.39).

As a question of principle, then, the people will retain the *libertas* they have become accustomed to, while the senate's *auctoritas* – the only sure protection against electoral corruption – will be restored.

In this openly avowed innovation, Cicero the author is once again applying the principles of his painted republic. First, against the complaints of Quintus, he has the character Marcus defend – or at least *non reprehendere* – a series of proactive measures against electoral bribery, though he insists that his own will succeed where they have failed. Here again a “conservative activism” is required to defend the institutions bequeathed by the *maiores*. Moreover, the dialogue form again allows Cicero the author to model his *technē* of discursive statesmanship: each side of the question is argued strenuously but politely, with the first word given graciously to his opponent and a defense that engages thoughtfully with its critique. But is the proposal itself anything more than a slapdash compromise, guaranteed to please neither side, or is there some deeper sense at work?

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<sup>35</sup> “[T]his is a view which, more than any other, both leads the inexperienced astray, and is very frequently a hindrance in public affairs; the belief, I mean, that certain measures are wise and good [*verum et rectum*], but are impracticable; that is, that the people cannot be opposed.” (*De legibus* 3.15.34)

Here the painting metaphor aids us in a different way, by drawing our attention to the text which contains its Platonic counterpart. Outlining Magnesia's magistracies in Book VI of the *Laws*, the Athenian insists that

those who are to elect should have been trained in habits of law, and be well educated, that they may have a right (ὀρθός) judgment, and may be able to select or reject men whom they approve or disapprove, as they are worthy of either (751d).

Initially, this judgment is to be guided by the "parent" colony of the Cnossians, who "should take a common interest in all these matters" (754c). The votes are to be registered on tablets, with the name and choice of the voter clearly marked, and then to be exhibited in the Agora for a period not less than 30 days (753c). The similarities to Cicero's proposal are striking: voting as a "correct" judgment, guided from above, and ready to be exhibited. But isn't the exhibition of votes to the general public different than the exhibition of votes at the request of one's social superiors – in short, isn't Plato's voting method far more egalitarian? Plato anticipates this kind of question:

There are two equalities which are called by the same name, but are in reality in many ways almost the opposite of one another.

The first of these is simple mathematical equality, and the second "the better and higher kind", is described thus:

It gives to the greater more, and to the inferior less and in proportion to the nature of each; and above all, greater honour always to the greater virtue, and to the less less; and to either in proportion to their respective measure of virtue and education (757c).

With this defense of proportional equality, the civic hierarchies which distinguished republican Rome from democratic Athens are justified by Athens' greatest philosopher<sup>36</sup>. As Cicero would crystallize it in the sixth book (a coincidence?) of the *De republica*,

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<sup>36</sup> Cf. Rawson, *Cicero: A Portrait*, cit: 151: "To [Cicero], as to Plato, justice is involved in the preservation of proper ranks and hierarchies, though there is a sympathetic insistence on the equality of all citizens before the law".

citizens ought to be weighed rather than counted (*De republica* 6.1.1).

Still, Cicero departs from Plato significantly on his characterization of the “guidance from above” which voters require. Unlike Plato, for whom such guidance was a temporary measure allowing citizens time to be educated in the ways of the new city, Cicero does not allow that ordinary citizens could ever become educated or virtuous without aristocratic guidance. One could even say that for Cicero, the only relevant indicator of virtue in a rank-and-file citizen is that they vote however the *boni* instruct them.

The problematic attitude of Cicero toward ordinary Roman voters is captured in his closing argument for the half-secret ballot:

our law grants the appearance of liberty (*libertatis species*), preserves the influence of the aristocracy, and removes the causes of dispute between the classes (*De legibus* 3.17.39).

In the discussion on the tribunate, the character Marcus insists that “real liberty, not a pretence of it, had to be given to the common people” (*De legibus* 3.10.25)<sup>37</sup>, yet with Cicero’s new ballot the *res* of *libertas* is scaled back to a *species*, a mere appearance.

Is the *libertas* offered to Rome’s voters under this constitution no more than a sham? Such is the position of Neil Wood, who argues that Cicero’s code is “above all else an ingenious mechanism to maintain the dominance of the large noble landholders in an age of mounting popular demand for more liberty and a greater role in government”<sup>38</sup>. While Cicero’s condescension toward the common Roman voter was undeniable, I am not as ready to convict him of simple hypocrisy on this point. The *De legibus* was intended for an educated, politically consequential audience, most Roman citizens not being disposed to read philosophical dialogues that engaged Stoic natural law. To convince his arch-conservative brother (a character with whom many of Cicero’s readers would identify), the character Marcus needed to reassure him in terms that an *optimatus* would accept: the *boni* will keep their *auctoritas*, while the *populus* is appeased just enough not to cause trouble. The framing is more reminiscent of a canny statesman closing a deal than the unwitting

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<sup>37</sup> ...*plebi re, non verbo danda libertas*.

<sup>38</sup> N. Wood, *Cicero's Social and Political Thought*, Berkeley and Los Angeles, University of California Press, 1988: 171.

confession of a *populus*-hating aristocrat. Nevertheless, the fact remains that the debate over Cicero's ballot is not the reconciliation of two political sides, but of one side with the middle. Here as elsewhere, the *popularis* position is simply absent, the point of view of Rome's citizen majority unworthy of serious engagement.

### C. *Assemblies and Augurs*

Under traditional Roman practice, the augurs' interpretations of divine will could have very direct political implications. With the words "*alio die*", these officials could prevent a popular assembly such as the *comitia tributa* from conducting its business, and since many augurs were selected from patrician families, this power often amounted to an aristocratic veto over popular assemblies<sup>39</sup>. The Aelian and Fufian laws required that such observations of adverse omens must be respected, but Cicero's enemy Clodius had effected strong limitations on these laws in the 50s<sup>40</sup>. He had also established a more direct form of control on assembly business in the form of armed gangs meant to intimidate any dissenters; unsurprisingly, violence at these assemblies had increased dramatically by that decade's end<sup>41</sup>.

At this moment of crisis, Cicero proposes two linked innovations to address the problem of violent and uncontrollable public assemblies. The first is to hold the presiding magistrate of an assembly (generally a tribune) personally responsible for any *vis* occurring during the course of business, and the second is to impose a penalty of death on any citizen who disobeys an augur's finding (*De legibus* 2.21.6). Marcus describes the former law as merely a codification of the policy chosen by his early mentor L. Crassus, the "supremely wise man" who recommended G. Carbo (tr. 96) be held personally responsible for disorder he had instigated. The provision concerning augurs he claims is "already to be found in the customs and laws of our State", despite the fact that no evidence exists for a penalty of capital punishment having been applied in such cases<sup>42</sup>. In any event, the principle linking these two proposals is clear:

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<sup>39</sup> See Polybius, *Hist.* 6.56.11; cf. Lintott, *The Constitution of the Roman Republic*, cit.: 187-190.

<sup>40</sup> See *Post Reditum in Senatu* 5.11; *De Haruspicum Responsis* 27.58.

<sup>41</sup> See Crook, *Law and Life of Rome*, cit.: 265.

<sup>42</sup> See Dyck, *A Commentary on Cicero, De legibus*, cit.:15.

Nothing is more destructive to governments, nothing is in such complete opposition to justice and law, nothing is less suitable for civilized men, than the use of violence in a State which has a fixed and definite constitution [*composita et constituta re publica*]” (*De legibus* 3.18.42).

Against the problem of political violence, Cicero's solution is reinforced control from above, though in this case from both “inside” (presiding tribunes) and “outside” (augurs) of the institution.

Here too the painted republic helps us understand how and why Cicero chooses the innovations he does. The first step in fixing the institution of popular assemblies is recognizing that they have “faded”, in the loss of aristocratic control via augural veto and the increase in political violence – problems he would have seen as both concurrent and mutually reinforcing. To restore the assemblies to their former stability, he creates new legal penalties that strengthen the sanctions associated with each problem. More importantly, he does not redress the problem of public assemblies by removing any of their formal powers – this would be tantamount to removing a key figure from the *maiores*' painting. Rather, he “preserves the outlines” of the institution by creating new legal incentives for the assemblies to function as the ancestors intended. Finally, the locus of these incentives are not the *populus* but the statesmen intended to control them; the presiding magistrate takes personal responsibility for the inherently unthinking crowd, and the augur who casts his veto is “shall be deemed a citizen of distinguished service”<sup>43</sup> (*De legibus* 3.19.43). This is the specific content of Cicero's “refreshed colors” and “general outlines” – clarified boundaries for institutional power, and new incentives for leaders to behave virtuously within them.

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<sup>43</sup> This is only one of several points in which Cicero strengthens the tools which Roman political actors could use to stop any legislative change from happening; see also his endorsement of a proto-filibuster in Roman senatorial procedure, “in which case it is a good thing to use up the whole day” (*De legibus* 3.18.40). While giving a philosophical statesman like himself free rein to propose constitutional changes, Cicero apparently wants to make further changes as difficult as possible. As he concludes, “It is better that a good measure should fail than that a bad one should be allowed to pass”.

#### D. *The Senate*

In its formal powers and informal example, the senate has no rival within Cicero's constitution. The changes he proposes to the institution are threefold. First, in what he calls "certainly a *popularis* measure", Marcus' laws ensure

that no one shall enter that exalted order except by popular election, the censors being deprived of the right of free choice (*De legibus* 3.12.27).

As a counterweight to this *popularis* concession, the laws provide that the senate's decrees shall now be binding (*eius decreta rata sunt*). This combination of authority and accountability, Marcus argues, will allow *concordia ordinum* to be restored:

[F]or the fact is that if the Senate is recognized as the leader of public policy, and all the other orders defend its decrees, and are willing to allow the highest order to conduct the government by its wisdom, then this compromise [*ex temperatione iuris*], by which supreme power is granted to the people and actual authority to the Senate [*cum potestas in populo, auctoritas in senatu sit*], will make possible the maintenance of that balanced and harmonious constitution which I have described (*De legibus* 3.12.28).

A contemporary reader would not fail to notice that under Cicero's "compromise", Rome's *boni* have gained far more, constitutionally speaking, than they have given up. Though the majority of Rome's senators had always come as a result of their election to the magistracies, this was even more the case given the deterioration in the role of censor by the late 50s<sup>44</sup>. By contrast, eliminating the requirement that assemblies ratify senate decrees and delegating the right to appoint dictators would together amount to a massive increase in the senate's legislative power. Where traditionally its *consulta* were directed only at specific magistrates and thus expired at the end of that magistrate's term, here a senate's decree would have the force of *lex*, that is, a law in perpetuity unless repealed<sup>45</sup>. While the *forma* and

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<sup>44</sup> See Lintott, *The Constitution of the Roman Republic*, cit.: 70, 116.

<sup>45</sup> See Dyck, *A Commentary on Cicero, De legibus*, cit.: 15; it is unclear whether under Cicero's constitution the popular assemblies would retain the right to veto a senatorial decree, even if an assembly was no longer needed to ratify it.

*lineamenta* of Roman institutions remain technically in place, under Cicero's constitution, quite clearly, the senate would rule.

Cicero's second innovation is a fixing in place of Rome's traditionally unwritten ladder of office, the *cursus honorum*. In a provision with potentially significant consequences for senate membership, Marcus relegates quaestors to the category of *minoris magistratus*, and sets the position of aedile as the "first step in the advancement to higher office" (*De legibus* 3.3.7). Though this new rule, uncommented upon in the dialogue, would arguably remove an area of dispute in the interpretation of Roman political custom, Rawson notes that Cicero's senate would be "less representative than ever, as many *novi homines* got to the quaestorship but no further"<sup>46</sup>. Citing testimony from Plutarch and Caesar, Rawson posits that this downgrading of the quaestorship can be viewed as a response to a rash of cases of financial mismanagement – which Cicero, as a former quaestor, would certainly have been privy to. If true, Rawson's observation further supports the notion that Cicero was treating his constitutional project seriously, and was molding his laws to meet contemporary political concerns.

A final provision, less an innovation than an aspiration, is that the senate

shall be free from dishonour, and shall be a model for the rest of the citizens (*De legibus* 3.3.10).

When Atticus jokes that the task of punishing all the current senate's misdeeds "would wear out all the judges as well as the censors", Marcus tells him not to worry,

for we are not talking about the present Senate or of the men of our own day [*qui nunc sunt*], but about those of the future [*de futuris*]; that is, in case any of them ever are willing to obey these laws of mine (*De legibus* 3.13.29).

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<sup>46</sup> Rawson, "The Interpretation of Cicero's *De legibus*": 143. See also Dyck, *A Commentary on Cicero, De legibus*, cit.: 15, the senate would be "a more elite body with the quaestors excluded." One wonders whether this provision is meant to complement the provisions on strict senatorial morality discussed at 3.13.30-31; conversely, tightening the *cursus honorum* may have served to inoculate Cicero from the suspicion that his ascendance would inspire too many other *novi* to follow suit. On whether a work of Theophrastus may also have inspired this provision, see Rawson, "The Interpretation of Cicero's *De legibus*", cit: 143.

This sentence, as rendered above by Clinton Keyes, has often been taken as further proof that Cicero intended *De legibus* to be the template for an “ideal” Rome, somewhere in the distant future, as opposed to a series of practical proposals to fix the problems of his own day. Such an interpretation involves two related misreadings of Cicero’s text: that *optimus* must mean “ideal” in the transcendent sense, as opposed to merely “optimal” or “best”, as discussed above; and that the *nunc* and *de futuris* in the sentence above suggest two different epochs of mankind, as opposed to merely “now” and “in the future”. Taken in this more straightforward sense, *nunc* and *de futuris* testify to the simple, and seemingly incontestable, insight that the goal of a moral senate would take more than a single generation to achieve. In this, he once again draws from Book VI of Plato’s *Laws*, where the Athenian declares that his new constitution will not truly take root until a generation of statesmen has been educated in them from childhood<sup>47</sup>.

Cicero’s proposals for a stronger and more virtuous senate are consistent, needless to say, with a lifetime’s worth of speeches and letters on the subject. Here too, however, the metaphor of the painted republic offers insight into the purpose Cicero wanted the senate to fulfill. Over the previous 80 years, the contest between *optimates* and *populares* had been waged as a proxy battle between the relative power of the institutions each side was seen to control. To achieve their political ends, the Gracchi were seen as stretching the tribunate’s constitutional authority at the senate’s expense; to achieve his own political ends, Sulla had enlarged the senate and hobbled the tribunes<sup>48</sup>.

Applying the painting metaphor to Cicero’s senate shows how adamantly he wanted to break from this zero-sum pattern. Strengthening a single institution at the direct expense of another would violate the “configuration” handed down by the *maiores*; Cicero’s laws are designed to be measured not by which sector of Roman society gains or loses, but in their level of interdependence on one another. The senate of the *De legibus* is thus designed as a microcosm of the whole republic, in which the people participate, power is rotated, and the best men rule. For Cicero, fixing the senate is the closest

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<sup>47</sup> “Now a man need not be very wise, Cleinias, in order to see that no one can easily receive laws at their first imposition. But if we could anyhow wait until those who have been imbued with them from childhood, and have been nurtured in them, and become habituated in them, take their part in the public elections of the state [...] then I think that there would be very little danger, at the end of the time, of a state thus trained not being permanent” (*Laws* 752c).

<sup>48</sup> See Lintott, *The Constitution of the Roman Republic*, cit.: 208-11.



thing to a constitutional panacea; if a new generation of virtuous men can “refresh its colors”, their virtues will resonate up and down the political ladder<sup>49</sup>. This, for Cicero, is the indispensable lesson of Rome's *maiores*:

For, if you will turn your thoughts back to our early history, you will see that the character of our most prominent men has been reproduced in the whole State; whatever change took place in the lives of the prominent men has also taken place in the whole people (*De legibus* 3.14.31).

By making the senate more accountable, more effective, and more virtuous, Cicero imagines that all sides to Rome's civil wars will consider themselves the victors.

### E. *The Censorship*

If Cicero had hesitated before in owning up to his constitutional innovations, his hesitation ends with the censorship:

The last of my laws have never been in use among us, but are necessary for the public interest (*Extremae leges sunt nobis non usitatae, rei publicae necessariae*) (*De legibus* 3.20.46).

His forthrightness may be explained by the fact that the first role assigned to the censors, the clarification and protection of Rome's laws in written form, is so similar to the one Cicero has assigned himself: “We have no guardianship of the laws”, Marcus declares,

and therefore they are whatever our clerks want them to be (*De legibus* 3.20.46).

For this reason, censors shall in the future “have charge of the official text of the laws” (*ensoris fidem legum custodiunto*) (*De legibus* 3.4.11). Marcus

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<sup>49</sup> Cf. Cicero's assertion that Rome's leading men “do more harm by their bad examples than by their sins.” (*De legibus* 3.14.32) The insight is a convincing one. One wonders, though, how convincingly Cicero could defend the example set by the *optimate* Scipio Nasica in 132 in leading a mob to murder the sacrosanct tribune Tiberius Gracchus, the inaugural bloodbath of Rome's civil war. Cicero revises history to blame Gaius Gracchus for setting this “example”, 3.9.20-21.

explains that here he is adopting the Greek institution of *nomophylakes*, in which censors shall not merely guard the physical text of the laws, “as was formerly done at Rome also”, but observe men’s actions as well and recall them to obedience to the laws<sup>50</sup>. To emphasize the critical importance of the office, he emphasizes that while all other magistracies will be elected for single-year terms, censors shall hold office for five years and their office “shall never be vacant”<sup>51</sup> (*De legibus* 3.20.47). To their traditional functions of purging the senate rolls, an additional supervisory function is added to the censorship:

[M]agistrates, after completing their terms, are to report and explain their official acts to these same censors, who are to render a preliminary decision in regard to them (*De legibus* 3.20.47).

After defending their tenure in this fashion, outgoing magistrates remain liable nevertheless to prosecution by a private accuser, because

it is unreasonable to expect real severity from accusers unless they act voluntarily (*De legibus* 3.20.47).

Why does Cicero place such importance on an institution that had fallen into near-total disuse? Returning again to the painting, the antiquity and desuetude of the censorship may have been sufficient qualities in themselves to warrant Cicero’s attention; a constitutional painter would naturally give special attention to figures that had faded the most. Rawson notes that this attention may have been of particular personal importance to Cicero, given

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<sup>50</sup> Rawson interprets the clerical “guardianship of the laws” as the compilation and preservation of hard copies, and not about introducing this practice, which already existed, but improving it: “What Cicero is worried about is the copies circulating among the staffs of magistrates (compare the books of *scc.* that apparently existed) [...] [This] might not only raise the standard of individual behaviour, but avoid some of the controversies as to what the law was – one thinks of Appius Claudius and the necessity or otherwise of his *lex curiata*” (Rawson, “The Interpretation of Cicero’s *De legibus*”, cit.: 147).

<sup>51</sup> The continuous occupancy requirement also finds an antecedent in Book VI of Plato’s *Laws*: “But as a ship sailing on the sea has to be watched night and day, in like manner a city also is sailing on a sea of politics, and is liable to all sorts of insidious assaults; and therefore from morning to night, and from night to morning, rulers must join hands with rulers, and watchers with watchers, receiving and giving up their trust in a perpetual succession” (758a).

that his personal heroes among the *maiores* – Cato the Elder, Scipio Aemilianus, Scaurus, and L. Crassus – had all served as censors<sup>52</sup>. More interestingly, we see how his attention to the censorship reveals both reciprocity and tension between the “lines” and “colors” of his constitution. On the one hand, the strengthened censorship shows the supreme importance Cicero places on moral correction via institutional control over a magistrate’s public and personal lives – through the yearly review of magistrates and the power to purge the senate rolls, respectively. The priority given to “refreshing the colors” over “preserving the configuration” in the painting metaphor may suggest that for Cicero, the loss of virtue was the paramount factor in the republic’s present crisis<sup>53</sup>. On the other hand, his emphasis on the censor’s power to control morality points to an ambivalence about what good laws can and cannot do to achieve this goal<sup>54</sup>. The new penalties for disobeying augurs or praise for prudent vetoes may orient citizens in the right general direction, but in the end only men, men with real power, can control other men.

#### *F. Judicial Rights & The Limits of Law*

The innovations Cicero offers in the area of judicial rights are largely consonant with his other institutional adjustments. His rule against *privilegia* expresses the principle that law be a force binding society together and not wielded against a particular individual; having recently been the target of Clodius’ *privilegium*, Cicero could have additionally considered this rule the

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<sup>52</sup> Rawson, “The Interpretation of Cicero’s *De legibus*”, cit.: 144, n. 59.

<sup>53</sup> Rawson observes a similar interdependence between these moral functions of the censors and their more clerical ones. Noting that the νομοφύλακες corrected both texts and the behavior of individuals, she concludes that for Cicero, “these two things are now properly comparable” (147).

<sup>54</sup> To Cicero’s credit, the insufficiency of written law to produce moral citizens is one which he confronts head-on: “Since, then, we must retain and preserve that constitution of the State which Scipio proved to be the best in the six books devoted to the subject, and all our laws must be fitted to that type of State, and since we must also inculcate good morals, and not prescribe everything in writing, I shall seek the root of Justice in Nature, under whose guidance our whole discussion must be conducted” (*De legibus* 1.6.20). Cicero thus brings a statesman’s hard-won skepticism to the Platonic debate over the relationship between positive law and moral action, a debate that has dominated the last century of legal theory. On other correspondences between *De legibus* and modern legal theory, see Section E, *infra*.

settling of a political score<sup>55</sup>. Cicero also proposes new penalties against electoral bribery, for which “the punishment shall fit the offense”<sup>56</sup> (*De legibus* 3.20.46). Lintott both highlights and criticizes Cicero’s originality on this point, concluding that this new provision is “at variance with normal practice in implying that magistrates should be general law-enforcers, when in fact they had neither the time nor the resources so to be”<sup>57</sup>.

This attention to both the power and limitations of written law shows a final innovation on Cicero’s part, namely that he prefigures in the *De republica* and *De legibus* several of the principal problems in contemporary legal theory: the insufficiency of written law as a spur to moral action (discussed in Section E above), the inherent incompleteness of law, and the relationship between morality and positive law. In each case, he engages the Stoic natural law tradition to explore what a written and prescriptive constitution could do to renew the Roman state.

The incompleteness problem of law stems from the natural, and more importantly the temporal, limitations of human reason: even at their most rational, human laws are created to be applied to future situations, but can only be written based on past experience<sup>58</sup>. Plato refers to this problem directly in the predicament of the constitutional painter, who needs

some one to succeed him who will correct the flaws which time may introduce, and be able to add what is left imperfect through the defect of the artist (*Laws*, VI.769c).

While recognizing this inescapable difficulty, Cicero inverts Plato’s argument in Rome’s favor: Rome’s constitution is *optimus* precisely because it did not have to rely on a single, all-seeing lawmaker. “There never has lived a man possessed of so great genius,” declares Scipio,

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<sup>55</sup> See Dyck, *A Commentary on Cicero, De legibus*, cit.: 17 for a discussion of whether Clodius’s law against Cicero really had been a *privilegium*, and if so, whether it was consonant with existing Roman practice. For a more extended treatment of *privilegia* by Cicero, see *De Domo Sua*, 17.43-44.

<sup>56</sup> *Noxiae poena par esto*.

<sup>57</sup> Lintott, *The Constitution of the Roman Republic*, cit.: 227.

<sup>58</sup> For a compelling recent application of this idea, see K. Pistor and C. Xu, “Incomplete Law: A Conceptual and Analytical Framework and its Application to the Evolution of Financial Market Regulation”, *Journal of International Law and Politics* 35(2003), 931-1013.

that nothing could escape him, nor could the combined powers of all the men living at one time possibly make all necessary provisions for the future without the aid of actual experience and the test of time (*De republica* 2.1.2).

Cicero's metaphysical trick is to merge the collective judgments of mortal, partially sighted individuals into an immortal, all-encompassing code: the *mos maiorum* and the law of nature as a single force guiding the lawmaker's hand. Thus, the descriptive aspect of Cicero's laws – the claim that he is merely transcribing the semi-divine *mos maiorum* – camouflages the risk of prescriptive innovations that (and one thinks of the ballot law here) could fizzle or flop in practice. This is a maneuver attempted by practically every republic in modern times – portraying its constitution as both the crystallization of time-honored values and the self-contained source of legitimacy for future decisions – but Cicero was the first in history to try it.

A third and final preoccupation of modern legal theory is whether laws are laws regardless of their underlying morality (the positivist position) or whether conformity with moral principles is part of the very definition of law (the natural law position)<sup>59</sup>. Cicero indicates his affiliation to the latter school in the early chapters of Book II, citing Cocles's bravery on the bridge and the wickedness of Tarquin's rape, actions that required no written law, he asserts, to make them good or evil. For even when no written law existed, the character Marcus explains,

reason did exist, derived from the Nature of the universe, urging men to right conduct and diverting them from wrongdoing, and this reason did not first become Law when it was written down, but [...] came into existence simultaneously with the divine mind (*De legibus* 2.4.10).

Having recognized the priority of *ius natura* over written law, Cicero decides not to curtail the role of man-made law in his *optimus* Rome, but rather to invent a novel and higher form of it. This new species of Roman law would function as a kind of *daimon*, a mediating force between divine reason and imperfect humanity. It would join certain sacred principles – that all public commands must be lawful, or that

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<sup>59</sup> For the classic general treatment of the positivist position, see H. L. A. Hart, *The Concept of Law*, Oxford, Oxford University Press, 1961; for a leading contemporary exponent of natural law theory, see J. Finnis, *Natural Law and Natural Rights*, Oxford, Oxford University Press, 1980.

he who rules should remember that in a short time he will have to obey (*De legibus* 3.2.5)

– to a reshaped institutional framework which will allow Romans a process to create legitimate, prudent, and virtuous laws in the future. The use of a single document as a “higher law,” a bridge between divine reason and the partisan, inconsistent legislation of real politicians, was something new in human history. And as Clinton Keyes so astutely observed, this invention of Cicero’s is precisely what the modern world has come to think of as a constitution<sup>60</sup>.

A final observation is due to the legal protections Cicero provides to individual Roman citizens against state power. One such provision is among the very first in the code: the *provocatio* or guaranteed right of judicial appeal of a magistrate’s decision “to an equal or higher authority, or the people”<sup>61</sup> (*De legibus* 3.3.6). A second rule guarantees the citizen’s right to be heard in assemblies, *privatis magistratibusve audiendis*<sup>62</sup> (*De legibus* 3.19.42). This latter provision, in turn, is brought into relation with two others: the requirement that cases involving the death penalty or the loss of citizenship be tried “before the greatest assembly”, and the rule against *privilegia*, the misuse of the legislative process to punish a single citizen. “Nothing could be more unjust than such a law”, declares Cicero,

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<sup>60</sup> See Keyes, “Original Elements in Cicero’s Ideal Constitution”, cit.: 309. As always, Cicero’s high-mindedness is served with a dose of hard-edged political gamesmanship. Natural law theory provides the means to undermine his *popularis* adversaries by creating a new standard for legal legitimacy: Cicero’s law code, which hews to divine reason, is “true law,” while the enactments of uneducated crowds “bear the title of laws rather by favour than because they are really such.” (*De legibus* 2.5.11) See also 2.5.13, discussed in Section A above, where Marcus sidesteps the problem of denying that certain *popularis* laws were really laws by noting that in any event, “the Senate repealed them in one sentence and in a single moment.”

<sup>61</sup> Cicero abridges the right of *provocatio* for Roman soldiers serving in the field. See *De legibus* 3.3.6.

<sup>62</sup> See Lintott, *The Constitution of the Roman Republic*, cit.: 40-41: “The word ‘heard’ should also be stressed: although other magistrates and private citizens were asked to speak by the president of an assembly [...] there was no general right to participate in the discussion, such as obtained in a Greek democracy like that of Athens”.

when the very word 'law' implies a decree or command which is binding upon all. (*De legibus* 3.19.44).

Cicero's attention to the rights of individual citizens lead us to a final and perhaps unexpected question. It is conventionally understood that the modern "bill of rights", a series of guarantees protecting individual citizens from undue state power, was a creation of the Enlightenment and would have been entirely alien to the statesmen of antiquity. In addition to the foregoing provisions of *De legibus*, two passages from Cicero's *De domo sua* (composed just prior to the *De legibus* in 57) suggests that it is time to reexamine this assumption. Ranting against his exile at the hands of Clodius, Cicero asserts

that it was impossible, according to public equity and the constitution enjoyed by the state [*iure publico, legibus iis*], for any citizen, without a trial [*sine iudicio*], to have such disaster inflicted upon him as that in question; that this right existed in this state even in the days of the kings, that it has been bequeathed to us by our ancestors, and is, finally, the peculiar mark of a free community (*De domo sua ad pontifices* 22.31).

Later in the same speech, he upbraids Clodius for having violated the rule that no Roman could have his citizenship rights stripped against his will [*invitus*]:

And is this the right which you, pillar of our democracy [*homo popularis*], think should be the bulwark of our citizenship and our freedom, the right of each one of us to lose our franchise, if, when the tribune of the plebs asks, 'Is it your will and command?', a hundred men of Fidulius' stamp say that it is their will and command? If this is so, then there was no true democratic spirit in our ancestors, who laid down laws of franchise and freedom with the intent that neither phases of lawlessness, nor ascendancy of magistrates, nor verdicts recorded, nor even the authority of the whole Roman people, paramount in all else, should avail to undermine them (*De domo sua ad pontifices* 30.80).

A guaranteed citizen right to trial and appeal. A guaranteed right to be heard in public debate. Inalienable rights to citizenship. A compilation of these guarantees in a written, prescriptive code of law, with the additional

guarantee that they could not be overridden by popular majorities. Was Cicero on the verge of drafting a Roman “bill of rights”? At the end of Book III, Atticus observes that Marcus has left some unfinished business, specifically an explanation of “the law of the Roman people” (*de iure populi Romani*). Atticus specifies that he intends to hear details from Marcus concerning the powers of individual magistrates as well as, presumably, the limits of those powers (*De legibus* 3.20.48-49). How far Cicero intended to develop the notion of individual rights and constitutional guarantees may remain one of the great unsolved mysteries of ancient political thought.

*Conclusion: Was the De legibus a Failure?*

The astonishing range of Cicero’s innovations should not obscure the fact that the *De legibus*, on its own terms, was a failure. Available evidence suggests it was neither finished nor published in Cicero’s lifetime<sup>63</sup>, and it certainly did not forestall the collapse of the republic Cicero held dear. Why did Cicero’s constitution get such scant attention, from his contemporaries, from modern scholarship, and apparently from the author himself<sup>64</sup>?

The circumstantial reasons for its incompleteness are easy to discern. Cicero was called back into public life in 51, to an apparently undesired governorship in Cilicia where he served the republic once again with distinction<sup>65</sup>. By the time of his next authorial *otium* in the mid-40s, political conditions had deteriorated a great deal further: Clodius was dead and buried, but Caesar’s consolidation of power had made a pro-republican project on the scope of *De legibus* both riskier and a great deal more futile. Cicero’s personal temperament may also have been at play: near the beginning of Book I he confesses the ease in which his written work can be derailed

nor do I find it so easy to resume an interrupted task as I do to complete at once whatever I have undertaken<sup>66</sup> (*De legibus* 1.3.9).

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<sup>63</sup> See Rawson, *Cicero: A Portrait*, cit.: 153.

<sup>64</sup> Zetzel observes, “[A]lone among Cicero’s major philosophical works, it is not mentioned a single time in Cicero’s correspondence” (Zetzel (ed. By), *Cicero: On the Commonwealth and On the Laws*, cit.: xxi).

<sup>65</sup> *Ibid.* at 153, 164-182.

<sup>66</sup> Cf. Zetzel’s view that *De legibus*’s incompleteness may be a function of its incoherence: “Cicero is quite successful in dealing separately with the philosophical underpinnings of



What remains to us is incomplete, but as a constitutional artist, Cicero has left much upon which to judge him. To his credit, he located the principal cause of Rome's crisis not in the follies of his *popularis* adversaries, but in the moral failings of his *optimate* allies. His laws aimed not just at correcting and educating Rome's senators, but in creating the institutional framework that would demand their best and punish their worst. In a lesson to political conservatives ancient and modern, Cicero recognized that preserving the best of Rome's past required creative action in Rome's present. Not only were *novi* ideas not antithetical to the *mos maiorum*, they were indispensable to the goal of sustaining what the ancestors had built.

But would Cicero's constitution have done any good? Though *De legibus* gives warranted attention to some of the glaring faults of late-republican politics – chiefly violence, bribery, and corruption – it fails to address some of the worst. Cicero's code provides no antidote to the rise of politician-generals whose legions were loyal to them rather than to the state – in fact, by suspending *provocatio* for soldiers and reaffirming the consuls' sole authority in the field, Cicero's laws might actually have made the problem worse. He ignores the proliferation and abuse of veto powers, which together had ground the legislative process to a halt – in fact, judging from his endorsement of a proto-filibuster at 3.18.40, Cicero was far more interested in stopping bad laws than allowing good ones to pass<sup>67</sup>. Maddeningly true to form, Cicero fails to recognize any legitimate grievances of Rome's citizen majority which lay behind the social reforms he so disdained. His constitutional innovations flow from a simplistic *optimate* reading of recent history: Rome's crisis began when the people forgot their place, and the senate its virtue. Perhaps most dismaying, besides the preambular principle *iusta imperia sunt*, he fails to engage the most noteworthy issue of his own political career, namely, the legal consequences of declaring a state of emergency. Given another Catilinarian conspiracy – or a tyrant savvy

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justice and the particularities of legislation but is unable to make the two cohere...There is every reason to believe that *On the Laws* was left incomplete not merely because of the turbulent circumstances of Cicero's life but because it is not nearly so satisfying a work at *On the Commonwealth*" (Zetzel (ed. By), Cicero: *On the Commonwealth and On the Laws*, cit.: xxiii).

<sup>67</sup> "A long speech should never be indulged in unless, in the first place, the Senate is taking some mischievous action—which most usually comes about through some illegitimate influence—and no magistrate is taking any steps to prevent it, in which case it is a good thing to use up the whole day".

enough to invent one – Cicero’s ingenious notion of a higher, unassailable code for Rome would inevitably have foundered on the rocks of the *senatus consultum ultimum*. The problems Cicero recognized receive inventive and elegant treatment in his code, with a keen awareness of both the utility and futility of written law. As for these latter problems: *cum tacent, clamant*.

Despite these shortcomings, *De legibus* remains an enormously important, and heretofore undervalued, landmark in constitutional thought. It is the valedictory text in an antique tradition dating back through Plato to Lycurgus and Solon: the artful arrangement of political power, grounded upon the rule of law, to create the good society. Once Cicero put down his pen, fifteen centuries would pass before this work began again in earnest. When sovereign citizens once more replaced semi-divine monarchs in the West, these citizens built their new republics on the idea Cicero had pioneered, that a written constitution could frame a new political order while preserving the wisdom of ages past. Cicero did not inaugurate this new age, but he did provide the *lineamenta* within which modern constitutionalism was born, and for which new republics continue to offer fresh colors. What is more, Cicero harnessed the power of metaphor and dialectic to create a constitutional poetics whose legacy the modern world has barely understood, and whose potential we have not begun to realize. Like the Marian oak Atticus recognizes in the work’s opening lines, Cicero’s laws, unfinished and unheeded in his own time, were “planted with the imagination”, and like those august boughs, “will live in men’s thoughts for a longer time than Nature could have kept them in existence”.