Chapter 8

*Servius, Cicero and the Res Publica of Justinian*

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1. INTRODUCTION

In 45 BC, Servius Sulpicius Rufus and Cicero exchanged letters containing reflections on the recent death of Cicero’s daughter Tullia. This tragic event was assimilated by both to what they saw as the ‘death’ of the *res publica*, defined loosely by both as the constitutional order that had underpinned their own success and prestige, and that now, thanks to the victory of Caesar, was no more. However, both also resorted to survival strategies: a continued involvement, somehow, in the affairs of the *res publica*; and the fulfilment of obligations to the interests of clients and friends.¹

Although the emotions that prompted the exchange were heart-felt (at least on Cicero’s side), the pair of letters was also a jointly created literary artefact. Both writers were masters of rhetoric (despite Cicero’s allegations to the contrary with regard to Servius in the *Pro Murena*) and their arguments add up to a joint exercise in self-representation as the chief mourners for a defunct *res publica*. As an analysis of what was meant by *res publica*, the letters leave much to be desired in that they may reflect Servius’ more limited political and philosophical outlook; Cicero, even when profoundly afflicted by grief, could do better, as is evidenced in the *Tusculan Disputations*, also a response to Tullia’s death.² In other words, Cicero, as so often, adapted himself to his correspondent.

Cicero’s and Servius’ concern with helping friends would provide a means to enable the elite under the Empire to survive and prosper as manipulators of networks of power. Among them, Servius’ intellectual successors, the Roman jurists, also prospered; his career, and the subsequent perspectives on it, illustrated here through brief analyses of the presence of Servius in Celsus and Pomponius, illustrate how easily the *iuris periti* could adapt to a new constitutional order, by representing it as a continuation of the old. The ‘procuratorial’ attitude to the role of the *populus* in the *res publica* in

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¹ For Cicero’s overall definition of *res publica*, see Schofield 1995.
² *Tusc.* 4.1.1 for laws as directors of *res publica*; for death of Tullia; *Att.* 12.28.2; full discussion and other references at Hammer 2014: 79–87. On the *Tusculan Disputations* as a response to Caesar’s victory, with an emphasis on history and education, see Gildenhard 2007.
their exchange is more problematic. The ‘fall of the Republic’ can be read in many ways; certainly, the ability of the *populus Romanus* to act as an effective element in constitutional governance was an early casualty of Augustus’ new system. Cicero and Servius, it will be argued, justify cultural attitudes towards the *populus* that distanced the elite from the *populus* as ‘partners’ in the *res publica*, thus also subverting Cicero’s own philosophical stance on *res publica* as *societas*. This downgrading of the significance of popular participation and consent paved the way for the Augustan regime; parallels between Ciceronian and modern Russian attitudes to ‘the people’ suggest that these attitudes had (and have) constitutional, as well as social, implications.

2. SERVIUS AND CICERO 45 BC

In their exchange of letters in 45, Cicero and Servius allow the meaning of *res publica* to shift in line with their argument. Servius’ letter of condolence mourns the passing of the *res publica* (which Tullia, fortunately for herself, did not live to see), comparing that catastrophe to the obliteration of once great Greek cities. However, Servius then shifts his ground and the *res publica* is resurrected. While the *res publica* as ‘constitutional’ government was no more, the *res publica*, defined as the Roman civic community, still needed Cicero. Servius thus urged his friend not to seem indifferent to the current situation (*tempora rei publicae*) – or to give the impression of resenting the triumph of the opposing faction. Instead Cicero must continue to supply wise advice to the *patria* (fatherland) and life must go on.

For his part, Cicero, while appreciative of his friend’s concern, had more still to say of the *res publica*, now redefined as a source of the activities and status that made life worth living for a leading politician and senator. Famous exemplary men in Roman history who had lost children, Cicero wrote, nonetheless could derive consolation from their possession of the *dignitas*, honourable status, which they could enjoy under a functional *res publica*: the benefits included help for friends, the care (*procuratio*) of the *res publica*, and activities in the law courts and the senate.

Under stress, Cicero reveals a concept of *res publica*, which emphasises the duties of friendship and services to clients over service to ‘the people’. While his use of *procuratio* is consistent with his concept of the *res publica* as property owned by the *populus* Cicero, as *procurator*, sees himself as the legal agent for a *populus*, which, by implication, cannot be trusted – and indeed is

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4 Fam. 4.4. Cicero’s reply is idem: 4.5.
5 Rep. 1.25.39: ‘est igitur . . . res publica res populi, populus autem non omnis hominum coetus quoque modo congregatus, sed coetus multitudinis iuris consensus et utilitatis communione sociatus.’ Note the lack of independent agency implied by the passive *sociatus.*
not even legally competent – to look after its own affairs. Moreover, his list of activities proper for a man of dignitas was headed, not by his obligation to act as procurator, but by his duty to supply ‘help for friends’, which would have included acting as their advocate (patronus) in law courts. Cicero’s attitude to the populus was not shaped by any sense of obligation to constituents or electors. Nor did he see himself as a ‘servant’ of the populus, with any obligation to take account of the superior wisdom of the Roman people. In this discourse of power, amicitia and the exchange of favours between equals took precedence over the rights of the populus as a political, or even legal, independent agent. The populus, therefore (when not the audience to Cicero’s comparatively rare speeches ad populum) are treated as passive, because incapable of operating as independent agents, and thus in need of the ‘care’ of his superior wisdom.

Cicero’s vision of the populus is paradoxical and perhaps self-contradictory, in ways that cannot be explained as deriving from the contexts or genres in which they were expressed. I shall suggest below that modern constitutional theory, when applied to Cicero’s analysis of Rome’s early constitutional history in Rep. 2, accords the populus a crucial, albeit limited, role in early Roman state formation, which accords with the functions ascribed to a ‘constituent power’. This did indeed die with the Republic, both institutionally and conceptually. But this concession was undermined by the negative attitude implied by the emphasis on procuratio. It will also be argued, using a modern parallel, that such cultural attitudes on the part of an elite towards a populus were, and are, incompatible with modern, Western ideals of democracy. Despite the well-attested liveliness of the Roman people in public contexts and the importance attached by Cicero and others to the appearance of public support, the late Republican elite, Cicero included, did not view the populus as a responsible agent; it was unable to handle freedom (libertas) responsibly and required enlightened procuratorship on the part of the elite to perform its functions effectively.

3. **LEGUM AUCTORITAS AND THE CONTINUITY OF LAW**

Both res publica and the rule of law survived the end of Republican government. Emperors would pay lip service to the res publica down to the time of Justinian. Justinian’s sponsorship of the Corpus Iuris Civilis project between 529 and 534 made a direct connection between the res publica and the law and was a positive statement on the part of the autocrat that the rule of law was important. Nothing, he claimed, was more deserving of close attention (studiosum) than the ‘authority of the laws’ (legum auctoritas), supported by centuries

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6 See also Scipio’s comment at idem: 1.22.35, that the procuratio and administratio of the res publica are duties inherited by himself (and by implication other eminent public men), and not dependent on popular consent.
of tradition going back to the foundation of the Roman state by Romulus. Nor was this an isolated nod in the direction of ancient history. Elsewhere Justinian justified his reinvention of the praetor in Republican terms; the praetor, he reminded his Byzantine Roman readers, was among the senior magistrates sent out to the provinces, to handle both arms and the laws. Justinian’s contemporaries also used the Republic as a reference point for the rise (and fall) of the Roman Empire, and not always favourably. As Marion Kruse put it, apropos Justinian’s discontinuation of the consulship after 541, ‘Jordanes (the historian) heightens the tension inherent in the term respublica because the consulship was, for any late antique authors, including Justinian, the defining office of the Republic and its most important survival’.

Jordanes would have agreed with modern late Roman historians, who have assumed that, by the time of the promulgation of Justinian’s Digest in 533 AD, the term res publica was no more than an empty signifier. The turning point, moderns argue, came in the third century AD, as emperors scrapped the use of Republican magistracies and titles on inscriptions, and the senate was increasingly ignored both as a source of provincial administrators and as a body that had hitherto conveyed both advice, authority and legitimacy. By the early fourth century, this notional Republic had finally given way to a divinely sponsored and unaccountable autocracy. On this view, Justinian’s focus on the authority and continuity of law (which echoes the language of a novella of Anthemius more than half a century earlier) and the importance of Rome’s rise under the Republic is mere antiquarian rhetoric.

The same could also apply to assertions on the part of emperors that they were subject to the rule of law. Claudian, the panegyricist of the emperor Honorius early in the fifth century, provides a representative sample, which could have been guaranteed some impact as it was delivered in public:

> if you ordain or decree any measure to be enacted for the common good, be the first to submit yourself to your own orders; for thus the people are more observant of justice nor do they refuse submission when they see the lawmaker himself obedient to his own law.

Obedience to law, Claudian insisted, was reinforced by respect for the Roman senate, ancient custom and enlightened legal reform. While the rhetoric would have targeted a Roman audience, which could claim more continuity than most with the Republican past, this was a sustained use of loaded terms – ‘the people’, justice, the obedience of the lawmaker to the laws, respect for the senate and custom, appropriate change – which Cicero himself would have been proud to own.

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7 Novella 24 pr. For an alternative view, see Kaldellis 2005.
10 Claud. IV cons Hon. 296–9, 504–7.
Such rhetoric, however conditioned by official conventions, had a prominence in imperial pronouncements and ceremonial that could not be lightly discounted. Sustaining a visible connection between the late antique present and the Republican past was part of a complex strategy of asserting imperial legitimacy by accepting constitutional constraints, which were themselves validated by reference to tradition and history. This process, however, originated not with Constantine but with Augustus, whose adoption of the *tribunicia potestas* in 23 BC gave him permanent curatorship of the interests of the *populus*, relieving them of all constitutional responsibility for their affairs. Under the Principate, all emperors were content to appear ‘Republican’, through their continued use of Republican magisterial titles and powers, because such symbols provided a convenient mask for an evolving autocracy and a reassuring connection with a remote and idealised past; the rhetoric of continuity was designed both to reassure and to mask change.

The treatment of Servius by later, second-century lawyers demonstrates how continuity between ‘Republic’ and ‘Empire’, specifically in the legal tradition, was constructed and maintained through the simple device of failing to acknowledge that there had been a break at all. Successions of jurists through families or descent from teacher to pupil provided the illusion of continuity. So too did patronage. Like many jurists under the Empire, Servius did better with help from his friends; his adherence first to Pompey, who was probably responsible for Servius’ consulship in 51, and later Caesar, who appointed Servius to the governorship of Achaea in 46, foreshadowed the elevation of other jurists to high office by emperors. This was not a matter of chance. Servius’ lack of clout under the Republican system made him a prime target for the military dynasts in search of useful clients, to provide expert assistance in the creation of what was, already, a set of alternative administrative regimes. By contrast with his belated political success, Servius was a relative failure in his cultivation of eminent people as future jurists (perhaps Cicero’s pejorative view of the profession was shared by others); his pupils, as listed by Pomponius, lacked independent distinction or power bases of their own.11

4. SERVIUS AND CELSUS

Servius, of course, cannot be held responsible for the absolutism of sixth-century Byzantium, but he would have fitted in well there. As a *iuris peritus*, Servius asked questions of law that required answers, regardless of who was in charge of the government. The adherence of successive emperors in the first and second centuries to what they claimed to be the traditional values

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11 D. 1.2.2.44, C. Alfenus Varus (cos. suf. 39), Aulus Ofilius, T. Caesius, Aufidius Tucca, Aufidius Namusa, Pacuvius Labeo, the father of Antistius Labeo.
of government, which included the rule of law, gave to jurisprudence significant protection from the vagaries of autocratic rule; emperors could hardly jettison traditions of which law was an integral part. But the increased assertion of imperial control over the lawmaking process by both Hadrian, in the codification of the Praetorian Edict (c. 130 AD), and Justinian, through the Corpus Iuris Civilis (529–34 AD), were important stages in the consolidation of power in the person of the emperor. Had Servius lived in the sixth century, he could have been, perhaps, another Tribonian.

The legal tradition itself drew strength from continuity. Servius’ work could easily be connected to the thinking of those second-century AD politicians who prospered under Trajan and Hadrian. The Servius of the senatorial aristocrat and jurist, P. Iuventius Celsus (consul II, 129) was useful because he was someone who could advise on what was meant by the word, ‘furniture’ (supellectilis), when used by a testator in a will.12 For a discussion of his options, he turned to three authorities, all more than a century old, Antistius Labeo, praetor under Augustus, who had supplied an etymological definition of supellectilis, Servius and Aelius Tubero. Eminent though he was, Celsus went out of his way to show his respect for his predecessors: Tubero’s auctoritas (authority, prestige, standing) and ratio (legal reasoning) were to be honoured, although Celsus nonetheless declared his preference for Servius’ view.

Cicero’s exchange with Servius had mourned the deaths of both Tullia and the res publica; theirs was a rhetoric of discontinuity and the collapse of the old political and legal order. In the narrative of the imperial jurists, there is no mention of, still less concern about, the death of Republican libertas (a ‘freedom’ that could be read as applying more to the senate than the population at large). Celsus’ deference to Servius, along with Tubero and other lawyers contemporary with Cicero, such as Aulus Cascellius,13 asserts continuity with a legal tradition that was first shaped by the lawyers who rose to prominence under Cicero’s res publica. The intellectual pedigree, constructed by jurists’ citations of each other, bridged the gap (as we see it) between Republic and Empire, by simply – and from their standpoint rightly – failing to acknowledge it in the first place.

But the world had changed, in some respects. Celsus, like all senators, owed his status and his high offices to the patronage of the emperor. As a member of the emperor’s consilium, Celsus would collude in strengthening the emperor’s control of law, when he supervised the young lawyer from Africa, Salvius Julianus, in his redacting of the Praetorian Edict into a fixed form. Moreover, on at least one occasion, Celsus the lawyer strayed into the world of patronage and amicitia that Cicero’s exchange with Servius

12 Celsus, Digest XIX at D. 33.10.7 = Lenel vol. 1 Celsus, 168, col. 153.
13 Celsus, Digest XXV at D. 50.16.158 = Lenel vol 1, Celsus, 215, col. 160; Cascellius is otherwise cited only by Labeo and Iavolenus Priscus, with two indirect references in Ulpian.
had placed, for their own purposes, at the heart of what the res publica meant to them. With reference to Pompey’s Eastern settlement in 63 BC, Celsus described the lex Pompeia, the constitution for Bithynia-Pontus, as a beneficium.\footnote{D. 50.1.1.2, cited by Ulpian, Ad Edictum 2, referring to the lex Pompeia of 63 BC.} The terms of the discussion suggest that Celsus’ copy was incomplete, and that the lawyer, who was also the emperor’s man, had no scruples in categorising Pompey’s charter as primarily an act of patronage rather than of law.

This provision – which is not typical of the contents of the Digest as a whole – elided the all-important distinction between the making of law as an activity based on rules and legal principles, and the discretionary (and potentially corrupt) culture of doing things for others as acts of (selective) kindness (beneficium). As is well known, patronage, amicitia and the various forms of assistance afforded by the elite to clients and friends were fundamental to how Roman society worked. Yet the omnipresence of amicitia, as an honourable and useful relationship between members of the elite, was also constantly subversive of the rule of law and the ‘constitutionality’ that both Cicero and Servius claimed to champion, not only because of the discretionary element but also because focus on obligations to individual clients obscured the need to serve the requirements of the populus as a whole.

Cicero will be presented below as a champion of the role of the populus in the res publica, which was essential, but restricted. First however, we should look at Servius’ story as Pomponius narrated it, a story in which questions of documentary composition and survival, personal relationships (sometimes dysfunctional) and teacher–pupil succession for the most part trumped those of public service and the status rei publicae.

5. SERVIUS AND POMPONIUS

Justinian was far from being the first to ignore the distinction between Republic and Empire. Pomponius’ Enchiridion, extracts from two versions of which were included in the Digest, is an attempt to preserve and promote a canon of juristic authorities. This is embedded in an account designed to establish the central importance of jurists from the very foundation of Rome (when the leges regiae were allegedly codified by C. Papirius) – and to create a narrative without an obvious break. To this end Pomponius, where he could, tried to establish family trees of teachers and auditors, pupils who went on to be famous jurists themselves. But he knew that, with the Republic, he faced problems of transmission and survival, not on constitutional grounds but because his heroes had lived a long time ago. Servius, on his first appearance, provided valuable evidence for predecessors:\footnote{D. 1.2.2.42.}
The auditors of Mucius (Q. Mucius Scaevola Pontifex) were numerous, but of outstanding auctoritas were Aquilius Gallus, Balbus Lucilius, Sextus Papirius and Gaius Iuventius; of these Servius declared that Gallus had the greatest auctoritas among the people.

Here is Servius, not yet in his own right but as a source of an earlier stage in the evolution of a juristic dynasty constructed through teachers with authority and their pupils. What was awkward for Pomponius was that he was obliged to rely on Servius as the gatekeeper who preserved through his own writings some record of the learning of his predecessors:

Omnes tamen hi a Servio Sulpicio nominantur: alioquin per se eorum scripta non talia extant, ut ea omnes appetant: denique nec versantur omnino scripta eorum inter manus hominum, sed Servius libros suos complevit, pro cuius scriptura ipsorum quoque memoria habetur.

All these, however, are listed by name by Servius. For their writings do not survive in such a condition on their own account that everyone can have access to them. And so their writings do not circulate at all through people’s hands but Servius has incorporated them in his own books and, on account of his writings the memory of these men is also preserved.

This, then, was Servius’ first claim to fame, that he had placed on record material from earlier jurists that would otherwise be either completely lost or restricted in circulation to a very few. Underlying this is a concern that is apparent elsewhere in Pomponius with the survival of texts and the accessibility of rare books, which extends also to their readability: Aelius Tubero, for example, affected an archaic style, which made his ‘many books’ on public and private law unattractive to the reader. This Servius is an author who wrote books for other people who liked books, a type Aulus Gellius would also have appreciated.

In Pomponius’ account, Servius the orator, known to and appreciated by Cicero, was subverted and then destroyed by an encounter with Q. Mucius Scaevola Pontifex. Servius begins his public career as a forensic orator second only to Cicero himself (an anachronism, as Cicero’s rise to fame postdates Mucius’ death in 82 BC). Having enquired about a legal point on behalf of a friend, Servius is twice told the answer and fails to understand it. Q. Mucius loses his temper and declares that ‘it was shameful for one who was a patrician and a nobleman and one who pleaded cases to be ignorant

16 D. 1.2.2.46, ‘parum libri eius grati habentur.’
17 See Howley 2013.
of the law he was subjecting to discussion’. Pomponius thus obliterates the narrative of Servius’ consulship, while personalising his disagreements with the opinions of Q. Mucius. Servius’ choice of a legal career is prompted by his feelings of shame – at the contempt shown by Mucius – and affront to his honour, which can only be dealt with by a change of direction.

This refashioning of Servius is anomalous. Resentment about an insult is an unusual launch pad for a legal career. Moreover, having begun with Servius as the guardian of the memory of earlier jurists, Pomponius offers a Servius who, far from being the dutiful successor to a great man, as was usually the case, in fact breaks with him. Brought up in a Rome divided between two principal dynasties (or schools) of lawyers, whose intellectual pedigree he traced back to Ateius Capito and Antistius Labeo, Pomponius venerated the role of praeceptores and their auditors as providing continuity through the generations. This should have been the case with Servius as well. One pupil of Mucius, Balbus Lucilius, taught Servius the basics of law, before Servius moved to advanced study with another Mucian auditor, C. Aquilius Gallus, already in the 80s an established iudex and arbiter. An explanation of this legal–dynastic malfunction was therefore required. Pomponius knew that Servius had disagreed with Q. Mucius on a wide range of matters, including in works provocatively entitled the Reprehensa Scaevolae Capita,19 and the De Sacris Detestandis (The Swearing Away of the Sacra).20 However, he did not appear to know why and made no direct reference to the offending texts (although their citation by Gellius shows that they were still available to Romans in the second century). Thus the anecdote did not merely substitute for admitting the intellectual divergence between the two; it also served as a cover-up.

Upon Servius’ death ‘on embassy’ (in legatione), Pomponius returns him to the world of Cicero – or nearly. In Philippic 9, Cicero had commemorated Servius’ service to the res publica and his death on embassy to Antonius encamped in northern Italy in February 43, an embassy Cicero had in fact opposed. Pomponius, however, had nothing to say on the involvement of Cicero, the objective of the embassy, or its fraught political context. What mattered was the statue voted on by the populus (not the senate, who had voted on Cicero’s motion to that effect). It had been placed before the Rostra, ‘and today it survives still before the Rostra of Augustus’.21 The shifts in emphasis may be accidental but they are significant. Servius receives his statue from ‘the people’, not the senate, Cicero is not mentioned at all, and the location is defined in relation to an imperial monument.

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18 D. 1.2.2.43, ‘namque eum dixisse turpe esse patricio et nobii et causas oranti ius in quo versaretur ignorantem.’
19 D. 17.2.30; 33.9.3.6; 50.16.25.1; Gaius, Inst. 3.149; Gell. NA 4.1.17–20.
20 Gell. NA 7.12.1.
21 D. 1.2.2.43, ‘hic cum in legatione perisset, statuam ei populus Romanus pro rostris posuit, et Hodieque exstat pro rostris Augusti.’
Pomponius’ narrative about Servius concludes with an account of the 180 books ascribed to him. However, he makes one more appearance in a context that illustrates Pomponius’ deliberate downgrading of political, in favour of juristic, family identity and status. C. Cassius Longinus, namesake and relative to Caesar’s assassin, was consul suffectus in 30, and the patron of Masurius Sabinus; for Pliny, he was the mainstay of the Cassian school, which was based in his Roman residence, where, as Tacitus observed, the funeral masks of Brutus and Cassius the tyrannicide were also to be found. None of this family history mattered to the historian of jurisprudence:

Huic (Sabino) successit Gaius Cassius Longinus natus ex filia Tuberonis, quae fuit neptis Servii Sulpicii: et ideo proavum Servium Sulpicium appellat.

To him succeeded C. Cassius Longinus, the son of Tubero’s daughter, who was also the granddaughter of Servius Sulpicius; and so he called Servius Sulpicius his great-grandfather.

Not only, then, was this Cassius a member of a juristic dynasty, relating him to Servius and Tubero, with no connection to the assassin Cassius – he was also prepared to boast about it.

Pomponius’ Servius is a product of the second century AD. Servius’ intellectual pedigree, the information he provides on earlier jurists and specifically his contradictions of Q. Mucius, are laid out, and Servius’ alleged change of direction, from orator to jurist is accounted for by his contretemps with Mucius, the teacher of his teachers. In due course, he becomes the author of numerous books, the teacher of several famous jurists, the diligent state servant, who dies on embassy, and the recipient of a statue. His more obviously ‘Republican’ aspects are airbrushed from the portrait, including his offices; his relationships with Caesar, Pompey and, crucially, Cicero; and the context of the legatio, the senate’s abortive negotiation with Antony. Even the location of the statue is defined by its relationship to the Rostra of Augustus, making it in effect an adjunct to the new imperial order. The exclusion of material reminiscent of the old Republic is not fortuitous. For Pomponius, there was no ‘old’ Republic – only lawyers and their pedigrees, familial or educational, who transcended both the centuries and the vagaries of constitutional change.

6. RES PUBLICA AND MODERN CONSTITUTIONALISM

While we cannot know if Pomponius’ reworking of history is his own or that of his now lost sources, the effect of his account was to construct a legal continuum that existed independently of political, social or constitutional
context. This allowed the authority of law, as defined by juristic interpretatio, to be asserted as an entity that could not be influenced or affected by external factors, such as changes in systems of government from monarchy to collective rule and back again to the imperial autocracy. This fed, in due course, into Justinian’s affirmation of law’s continuity over the 1,400 years of the Roman res publica down to his own day, and into the repeated insistence by panegyric and other sources on the importance of the rule of law, and the emperor’s subjection to it.

Although the ius civile as codified by Justinian cannot be described as a constitution in any modern sense, the legitimation both of law and of power rested on related foundations. Rome, of course, had no written constitution, and in that respect differed from the societies usually studied by modern constitutionalists, where ‘modern constitutions invariably come into existence as the consequence of some founding act’. However, the issue of how a constitutional order is created and subsequently sustained bears directly on both the Roman res publica and later states.

The ‘paradox’ of constitutionalism has been defined by Loughlin and Walker as a tension between two imperatives: one that governmental power must ultimately be generated by the consent of ‘the people’, and a second, that ‘such power must be divided, constrained and exercised through distinctive institutional forms’. The paradox is that ‘people’ and ‘constitution’ can be constructed and shaped by each other, thus rendering the relationship unstable:

The formal constitution that establishes unconditional authority, therefore, must always remain conditional. The legal norm remains subject to the political exception, which is the expression of the constituent power of the people to make, and therefore also to break, the constituent power of a state.

For moderns, the ‘constituent power’ must be ‘the people’ for a constitution to be legitimate, although some flexibility is accorded to what ‘the people’ might consist of in any given situation. Moreover, although (on the American model) it is possible to identify the moment when a constitution comes into being, the creation of a constitutional order can also be a process of unspecified duration. When these theories are applied to Cicero’s thinking on the res publica, for which he claimed the status of procurator, it appears that he did indeed construct ‘the people’ as the constituent power, albeit with limits as to its role, and that he had a clear idea of who, in philosophical terms, ‘the people’ were. Moreover, he saw the formation of the Roman constitution as a process, extending over centuries.

The res publica, Cicero’s Scipio Africanus argued, was owned by the populus, and the populus was defined, not as a haphazard collection of

24 Loughlin and Walker 2007: 3.
individuals but as an assemblage of a large population (coetus multitudinis) ‘brought together in a partnership’ (sociatus) by legal consent and mutual self-interest (iuris consensu et utilitatis communione). Although Cicero appears to ascribe agency to ‘the people’, for whom it is part of the law of nature that they wish to live in communities, the use of the passive sociatus is ambiguous; there is no space to acknowledge that those who constitute the coetus must choose to make the partnership contract with each other as individuals. Instead a partnership is created for the coetus as a collective ‘brought together’ by two further abstracts, legal consent and common interest. This use of language may not be fortuitous; reducing ‘the people’ to a philosophical abstract endowed with a collective identity, constructed by a legal concept, societas, downgrades the importance of individual agency in state formation.

Next, Scipio’s coetus constructs its dwellings on a fortified site, calls it a town or city and builds shrines and meeting places. Only then does a ‘constitution’ take shape:25

Omnis ergo populus, qui est talis coetus multitudinis, qualem exposui, omnis civitas, quae est constitutio populi, omnis res publica, quae, ut dixi, populi res est, consilio quodam regenda est, ut diuturna sit. Id autem consilium primum semper ad eam causam referendum est quae causa genuit civitatem.

Every people, therefore, which is the assemblage of a large population, as I have described, every citizen community, which is the constituted state of the people, and every res publica, which, as I said, is the entity owned by the people must be governed by some kind of guiding power, so that it may endure. And this guiding power must always first be attributed to the same root cause that generated the citizen community.

Although Cicero uses no single word for ‘constitution’, the formation of the consilium, involving the coetus, the civitas and the populus marks the moment at which a constitution, notionally, comes into being. At this point, the choice is made (we are not told how) between the three primary types of government: monarchy, aristocracy or democracy. Any of these, Scipio says, is viable, provided that the ties (vinculum), which first bound men together in the partnership of the res publica, hold firm.26 All three forms of government, therefore, still depend on the continuation of the partnership formed for (but not so clearly by) ‘the people’; this, in its turn, is based on legal consent and the common good.

As ‘owners’, on the strength of the partnership established among themselves, Cicero’s populus was the prime source of legitimacy for all forms of government and constitutions. However, the power to act, in practice

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26 Idem: 1.26.42, ‘si teneat illud vinculum, quod primum homines inter se rei publicae societate devinxit.’
ascribed to the *populus*, is left undefined. The result is a paradox. In line with modern constitutional theory, Cicero concedes to the *populus* its status as the constituent power with an ongoing watching brief on its governance (including, in theory, the option of majoritarian democracy). At the same time, Cicero is either vague or restrictive on how in practice that power was or should be exercised.

His narrative of the founding of a real constitution, that of the Roman res *publica*, also ascribed to Scipio, further clarifies the rights of the *populus* as beneficial ‘owner’ of the res *publica*. It also suggests that what we now see as ‘constituent power’ may be ascribed to more than one authority, requiring a differentiation between the role of ‘constituent power’ or ‘powers’ in the creation and legitimisation of the constitution, and the ability of the ‘constituent power’ to break the power of the state as ‘constituted’, by withdrawing consent or by disrupting or changing the institutions it has initially authorised.

In his preliminary remarks, Scipio invokes the authority of Cato the Elder in explicitly rejecting the creation of the Roman constitution as the work of a moment or of one individual.27 Unlike Greek lawgivers, he said, such as Minos in Crete, Lykourgos in Sparta and, in Athens, Theseus, Draco, Solon and Cleisthenes, the Roman res *publica* was not the creation of one mind but of many. The res *publica* had a founder, Romulus, responsible for the choice of site (much space is devoted to the advisability of not being by the sea), the union with the Sabines, and the creation of the advisory senate. He also instituted the taking of the auspices, a practice conducive to the security (salus) of the res *publica*, and the founding of the College of the Augurs, ‘which was the foundation (principium) of our res *publica*’.28

Because so much of Rome’s early history was the stuff of legend, Cicero had some leeway in handling the tradition. The choice, therefore, to foreground, as he did, the importance of popular consent and ratification, is significant. From the death of Romulus onwards, the *populus* asked and were granted by the senate a decisive voice, both in the continuation of the monarchy and the appointment of successive kings.29 In response to the people’s insistence on a new king, the senate appointed an interrex, and, after a search, ‘the people’, on the advice of the senate, chose Numa Pompilius, credited with the establishment of Rome’s religious institutions.30 On Numa’s death, the Comitia Curiata, presided over by the interrex, chose Tullus Hostilius, whose prompt response was a request to the Comitia directly for ratification of his position:31

27 Idem: 2.1.2 although later (2.11.21) he credits Romulus with the formation of a fully-grown *populus*.
28 Idem: 2.9.16.
31 Idem: 2.17.32.
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Et ut advertatis animum, quam sapienter hoc reges nostri viderint, tribuenda quaedam esse populo . . . ne insignibus quidem regis Tullus nisi iussu populi est ausus uti.

His successor, Ancus Martius, maternal grandson of Numa, was chosen by ‘the people’, and the choice was confirmed by a curiate law. When he too died, the fifth king, Lucius Tarquinius Priscus, was elected unanimously and he too passed a law de suo imperio. Thus the pattern was established of a double popular vote, first making the choice and then, once the nominee had consented, confirming it with a lex de imperio.

Despite Cicero’s insistence on popular consent, however, his treatment of the populus falls short of crediting them with creating the institutions of the res publica. The populus therefore were the ‘constituent power’, in the sense that they chose, and by their choice gave delegated authority to, those who would proceed to create over time the institutions of the res publica using their own judgement. The architects of the reforms that ‘constituted’ the res publica were the kings, and the populus, having chosen the king, had no further direct say. Instead, Romulus was responsible for the city, the senate and the auspices; Numa, the various priesthoods, including the Salii and Vestal Virgins and the necessary rituals, making them onerous but not expensive; and Tullus Hostilius the meeting places for senate and people, and the ius fetiale, the binding rules, governing the declaration of war. Ancus Martius made no reforms but expanded the city and Tarquinius Priscus expanded the senate, and reformed the cavalry.

Could the populus be credited with the ability to act as the constituent power, given their largely passive role? With the accession of the sixth king, Servius Tullius, the tension between the populus as the ‘owner’ of the res publica and thus of the ruler, and the role of the ruler himself as the author of constitutional reform, became more apparent. ‘Laelius’ observed that Servius Tullius ‘had the best insight of all into what the public interest required’. Yet his legitimacy was open to challenge. As Scipio confirmed, Tullius was traditionally believed to be the first to have reigned ‘without the order from the people’ (iniussu populi). Indeed, as the monarchy entered its phase of degeneration Tullius engaged in a cover-up, by taking over following Tarquinius’ murder and ruling in his name, concealing his predecessor’s death until his own position was secure. He did not consult the senate either, but, after Tarquinius’ funeral, took his request for power to the people and, after receiving their endorsement, authorised the usual curiate law. His main reform, so admired by ‘Laelius’, would have gone down less well with the majority of the populus; the creation ascribed to him of the Comitia

32 Idem: 2.18.33, ‘a populo est Ancus Martius constitutus.’
33 Idem: 2.20.35, ‘cunctis populi suffragis rex est creatus L. Tarquinius.’
34 Idem: 2.21.37, ‘qui mihi videtur in re publica vidisse plurimum.’
Centuriata concentrated voting power in the hands of the elite. The pretext of universal suffrage was maintained, while ‘the greatest voting power lay with those in whose interest it most was that the welfare of the civitas was maintained’.\textsuperscript{35}

Cicero’s view of the role of the populus was conditioned by the Roman understanding of the nature of different kinds of power. Potestas, also used of the power of fathers over households, lay with the magistrates; auctoritas lay with the senate; and libertas with the populus;\textsuperscript{36} and unless they were properly distributed, the status rei publicae would be destabilised. But although they had the ‘freedom’ to own, their role in the state in Cicero’s day was limited to that of responding to prompts from the elite concerning legislation, voting in elections; in those held by the Comitia Centuriata, the upper classes were privileged, a state of affairs justified by ‘Scipio’, on the grounds that a principle in constitutional governance (\textit{in re publica}), which should always be upheld was that ‘the greatest number should never hold the greatest power’.\textsuperscript{37} This passive or reactive role is echoed in Cicero’s terminology with reference to the behaviour of the populus in the early centuries of the Republic, when, although the people were ‘free’, the government lay with the auctoritas of the senate;\textsuperscript{38} reforms were brought about by the senate, while the people acquiesced, populo cedente or populo patiente atque parente.\textsuperscript{39}

Thus far, this line of thought, which favoured aristocratic governance but gave a protected, albeit passive constitutional role to the populus, along with such legal rights as that of provocatio (appeal), is what we would expect of Cicero, even as mediated through the figure of Scipio Aemilianus. But in consigning the populus to a passive constitutional role, both in the evolution and the preservation of the res publica, while also, in the letter to Servius, assigning to himself and to fellow members of the elite the powers of acting as procurator, on behalf of the populus as owner of the res publica, Cicero effectively nullified the ability of the populus to take action on its own initiative to protect its interests.

7. CULTURES OF POWER: MODERN RUSSIA

Cicero’s representation of ‘the people’ as being occasionally active and assertive, not always in their own best interests, but otherwise passive recipients

\textsuperscript{35} Idem: 2.22.40, ‘et is valebat in suffragio plurimum, cuius plurimum intererat esse in optimo statu civitatem.’

\textsuperscript{36} Idem: 2.33.58, ‘ut et potestatis satis in magistratibus, et auctoritatis in principum consilio, et libertatis in populo sit; on libertas, as, among other things the freedom to ‘own’ in Cicero’s public sense of owning the res publica, see Hammer 2014: 52–8.

\textsuperscript{37} Rep. 2.22.39, ‘ne plurimum valeant plurimi.’

\textsuperscript{38} Idem: 2.32.56; cf. 2.31.55, ‘modica libertate populo data’, so that the auctoritas of the principes could be strengthened.

\textsuperscript{39} See Idem: 2.32.56; 35.60; 36.61.
of enlightened leadership by the elite was a cultural, as much as a consti-
tutional, phenomenon. As Michael Urban’s study of elite political discourse in
post-communist Russia maintains, ‘Cultures of power express themselves as
discursive strategies, rooted in group habitus, by means of which actors on
the field of politics stake out positions yielding access to desired things’.40
Cicero (and Servius) would doubtless have been appalled to be accused of
framing arguments about clientelae, public service or constitutional theory
with a view to enhancing their own status. Nonetheless, Cicero’s (and
Scipio’s) philosophical position both explains and validates Cicero’s politi-
cal preference for the exercise of auctoritas by an enlightened elite. Nor was
this a deliberate or conscious tailoring of theory to practice. As Urban puts
it, ‘Rather than a collection of beliefs and values held by individuals, that are
thought to cause some effect in behaviour, culture appears here as meaning
integral to, or coextensive with, that behaviour itself’.41

While the parallels with modern Russia should not be pushed too far,
the overlaps with Ciceronian attitudes towards ‘the people’ are striking.
The power of the Russian elite, though different in composition from that
of Rome, was based, as it was in Rome, on networks of power and personal
relationships, designated favourably as ‘teams’ or, unfavourably, as ‘clans’,
a linguistic distinction reminiscent of the Romans’ designation of oppos-
ing groups as ‘factions’. Urban’s interviews with a selection of men and
women involved in government from the late 1980s to the present identified
four distinctive perceptions of the Russian people; ‘as inert; as in need; as
degraded; and as easily manipulated’.42 The first perception, partly grounded
in tradition, was of the people as either ‘vegetables’ or ‘god-bearers’ or
both, who were liable to act on the basis of irrational impulses. The second
was expressed, as a minority view, positively in terms of ability to provide
practical help to constituents; more often respondents expressed an abstract
dedication to popular welfare, which did not, at least in the speakers’ view,
entail helping individuals, reminiscent of Cicero’s often generalised rhetoric
on public service, as contrasted with his active efforts on behalf of clients.
The third element, degradation, blamed the ‘vegetable’ state of the people
on wider corrupt practices on the part of the elite, not least the introduction
of mass capitalism; Roman moralists, such as Sallust, might have spotted
parallels with the corrosive effect of the riches of empire on social mores.
The fourth, which criticised the people as too easily fooled by populist
rhetoric, resulting in their preferring the ‘bad’ leader Yeltsin to the ‘good’
leader Gorbachev, has a long classical pedigree in the denigration of orators
as deceivers (and Cicero’s own boasts, as over his defence of Cluentius in 66,
of how he pulled the wool over the eyes of credulous judges).

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41 At 5.
Of these, the first two are the most significant to Cicero’s cultural perspective. As we have seen, Cicero’s ‘people’, having asserted itself positively with its choice of the first five kings, gradually slipped into more passive mode. While retaining the constitutional power to ‘concede’ or ‘allow’, the People of the early Republic wisely submitted itself for the most part to the auctoritas of the senate. However, as Hammer pointed out, the partnership (societas) that constituted the res publica was also a matter for negotiation, and if the balance of powers was uneven, or the people acquired a taste for too much ‘freedom’, such negotiations could undermine the stability of the entire res publica:

grant a measure of freedom to the People, as did Lycurgus and Romulus, you will not grant them a sufficiency of liberty but will whet their appetites for more, when you give them no more than a mere taste of it.43

Indeed, ‘Scipio’ argued, as history had shown, a people with too much freedom had no idea how to use it, indulged in all kinds of excesses and ended up under the rule of a tyrant.

Cicero’s ‘people’, therefore, although entitled to be ‘granted’ legal rights and freedom, was best off, when it acquiesced in the auctoritas of the enlightened elite. But obligations were reciprocal. On Urban’s second category, the people as in need, Cicero agreed that, as individuals, they were entitled to protection and the elite were expected to provide it: under the early Republic, before inequalities of wealth had taken hold, ‘the virtuous conduct of each in public life was the more welcome, because in their private dealings, they made every effort to assist individual citizens with practical assistance, advice and material support’.44 However, as a constitutional entity, a member of the populus as a voter in elections or on legislation was not susceptible to ‘assistance’. However, he could be, and was, manipulated (Urban category 4) by (alleged) bribery, rhetoric in the contio,45 and as a member of a jury in public trials. Cicero praised ‘the people’ to their faces, as in his speech for Pompey’s command in 66, or his rejection of the agrarian bill in 63, by posing as a true popularis; it was a tribute to his skill as a speaker that he could also, as he did Rullus in 63, persuade them to vote against their own interests. Here, unlike in the Russian example, which ascribed the deceit to others, it was the manipulator himself who boasted of his power to hoodwink the unwary.

43 Rep. 2.28, 50.
44 Idem: 2.34.59.
8. CONCLUSION

The formulation, study and interpretation of Roman law was an elite prerogative; its practitioners required the leisure that came with wealth, and access to power networks, which could both use and disseminate their work. Lawyers, therefore, had employment and status, whatever Rome’s system of government, provided the preserves and privileges of their sector of the elite were safeguarded. It followed that, along with the jurists, the continued survival of a res publica, which originated with iuris consensus, was also guaranteed, not as a specific constitutional entity, but as a civic community governed by law. Pomponius’ and Celsus’ assertion of continuity, therefore, may not have been as tendentious as appears at first sight. They asserted the continuity of law (and Servius’ place within that continuum), because that was genuinely the case. Justinian, several centuries later, would do the same.

Nor was jurisprudence the only elite occupation to be relatively unaffected by constitutional change. Cicero’s focus in his letter to Servius on helping his friends as a bereavement strategy would also be continued by the elites under the Empire; patronage, friendship, the cultivation of clients were the bedrock of aristocratic power down to the Fall of Rome in the fifth century. All this rendered the populus dispensable. Cicero’s notion (as expressed by ‘Scipio’) of the enlightened aristocrat, empowered to act as a procurator for a populus bound into the contractual partnership of the res publica, denied to the populus the right or indeed the legal capacity to act for itself. Whatever may be thought of Roman ‘democracy’, the cultural assumptions of Cicero, the self-proclaimed procurator of the people, show that he was no democrat; for him the populus must always be legally dependent on those who knew better.

Cicero’s historical construction of the role of the populus in the evolution of the Roman constitution therefore contained a paradox. On the one hand, the people had ultimate authority, especially under the early kings, as the ‘constituent power’ that chose the kings, who then, under power effectively delegated by the people, established the institutions of the res publica. On the other, as their role became more passive, the populus was ‘granted’ freedom and rights, or ceded reforms, through a process of largely passive consent. This version of history was not intended as the tendentious self-justification of elite values, but reflected the interaction, or confluence, of Cicero’s elite culture with the actions and behaviour that had characterised his entire political career.

Such attitudes had constitutional consequences in that it rendered more acceptable a res publica without the populus. Perceptions on the part of members of the modern Russian political elite of their populus as inert and irresponsible, requiring assistance but vulnerable to manipulation, provide an instructive echo of Cicero’s perspectives. Without seeking to make judge-
ments on the present state of Russian ‘democracy’, an elite, be it Roman or any other, which, as a collective, has access to power and wealth, without the requirement to seek endorsement from the wider population, and which also expresses cultural attitudes that are dismissive or contemptuous of the ability of the populus to make rational decisions for itself, is unlikely to go out of its way to safeguard the people’s constitutional prerogatives. In 45 Cicero and Servius condemned Caesar’s autocracy, yet both, in their different ways, would contribute to its perpetuation.

BIBLIOGRAPHY


46 Presidents of Russia require to be elected every six years; their consilia principis, selected, as were those of Roman emperors, on the basis of amicitia, do not.