

OBSTRUCTION AND EMERGENCY IN LATE REPUBLICAN ROME

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Abstract: Over the past decade, Roman institutions of emergency government have attracted the attention of a growing number of scholars. But this outpouring of new scholarship has obscured an equally critical aspect of the late republican constitution: the simultaneous introduction of new forms of executive and legislative obstruction, founded in significant part on the strategic manipulation of Roman religious rituals. Thus this article seeks to establish that constitutional checks were not deteriorating but *proliferating* in the late republic. Even as old constitutional barriers to action were swept aside in the increasingly violent contest between *optimates* and *populares*, new configurations of checks and balances were being improvised to take their place, often with no clear legal warrant, occasionally drawing on the same idiom of state necessity and *salus populi*. Far from the antithesis of Roman emergency government, then, the tactics of obstruction and delay that became so prominent in the late republic can be thought of as its second face, and this may carry implications for how we understand the problem of ‘emergency powers’ in our own time.

Keywords: Rome, emergency, obstruction, Cicero, constitution, executive power, late republic.

Introduction

In the modern era, few aspects of the late Roman republic have attracted as much attention as the deluge of ‘extraordinary’ magistracies and ‘emergency’ decrees that swept across the SPQR between 133 and 43 BC.³ Classicists have long understood the constitutional innovations of the late republic — Sulla’s proscriptions, Pompey’s *lex Gabinia*, and the infamous ‘last decree’ of the Senate — as having set the stage for the Caesarean dictatorship and the

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² The idea for this paper came out of a series of illuminating conversations with Adrian Vermeule on the Roman constitution. Drafts were presented at the Harvard Political Theory Workshop (2012) and the Midwest Political Science Association conference (2013), and I owe a debt of gratitude to the participants at both venues for their criticisms and suggestions. Particular thanks are due to Daniela Cammack, Emma Dench, Matt Landauer, Eric Nelson, Sabeel Rahman, Gary Remer, Richard Tuck and the editors and reviewers at *HPT*, for their detailed written comments. This essay is far better for their participation in it. Unless otherwise noted, all translations of Greek and Latin are taken from the Loeb editions; all translations of passages from secondary literature are my own.

³ See Chaim Wirszubski, *Libertas as a Political Idea at Rome* (Cambridge, 1960), p. 61: ‘The controversy over extraordinary executive powers was perhaps the most important feature of domestic politics in the Late Republican period.’

Augustan Principate.⁴ More recently, political theorists have charted what they see as the parallels between the Republic's prolonged state of emergency and the 'lawless' manoeuvres of the national security state after 9/11, hinting at a similarly precarious future for republican liberty in the West.⁵ In the composite portrait that emerges from this literature, the collapse of *libertas* at Rome can be attributed largely to its reckless overextension of extraordinary executive powers, and its abandonment of an ordered system of checks and balances.

But this familiar narrative is radically incomplete. In precisely the same period that Rome was experimenting with extraordinary magistracies and novel forms of state-sanctioned violence, it was also evolving new constitutional procedures for obstructing, delaying and nullifying official action. That is to say, the response of the late republic to the rising climate of exigency was just as often to *multiply* checks and balances as to dissolve them. This curious double movement — the amplification of executive power alongside the multiplication of veto points — is the point of departure for this essay.⁶

⁴ The major works in English summarizing Rome's emergency institutions are: Gregory K. Golden, *Crisis Management During the Roman Republic* (Cambridge, 2013); Andrew Lintott, *Violence in Republican Rome* (Oxford, 1968), esp. pp. 149–76; Wilfried Nippel, *Public Order in Ancient Rome* (Cambridge, 1995), esp. pp. 60–9.

⁵ See, e.g., Nomi Clare Lazar, 'Making Emergencies Safe for Democracy', *Constellations*, 13 (2006), pp. 506–21; Andreas Kalyvas, 'The Tyranny of Dictatorship', *Political Theory*, 35 (2007), pp. 412–42; Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago, 2005), pp. 65–88.

⁶ Since Mommsen, scholars have debated the extent to which the Roman political system can be productively described as a 'constitution', in something like the modern sense. Among modern scholars, Fergus Millar speaks most freely of the republic's 'constitutional machinery', its 'rules and procedures', and the 'formal, structural features of the Roman constitution'. Others have criticized this stance as a 'dogmatic' back-projection of modern political ideas onto ancient political forms. Benjamin Straumann rightly observes that typically neither side in this debate 'bother[s] to justify [its] position', instead relying on intuitions that Rome either closely resembles or is utterly alien to today's 'paradigmatic constitutional orders'. Like Millar and Straumann, I agree that the modern concept of a 'constitutional order' can be usefully applied to the Roman *res publica*, though in Part III I will question whether an *entrenched* constitution that could override decisions taken in the *comitia* was ever anything but an optimative projection. The first step in bridging the distance between these two poles is acknowledging that our modern constitutions, written and unwritten, depend more than we often acknowledge on informal background norms and elaboration through political argument. It is a mistake to think that their provisions have a clear, unchanging meaning that remains insulated from day-to-day political struggles. The second step is underlining the debt that modern constitutional ideas owe to Polybian and Livian accounts of 'checks and balances' in the Roman constitution; modern constitutional thought, from Machiavelli forward, was assembled in the shadow of these ancient models. See Fergus Millar, *The Crowd in Rome in the Late Republic* (Ann Arbor, 1998), pp. 15, 144, 210 and *passim*; Karl-J. Hölkeskamp, *Reconstructing the Roman Republic*, trans. Henry Heitmann-

Leading classicists have long recognized that the final days of the *res publica* were marked by a disastrous ‘alternation of violence and paralysis’, but have rarely thought to tie these phenomena into a common conceptual history.⁷ This is true even of the works that have done the most to document the explosion of obstructive tactics in the late republic.⁸ In her formidable monograph *Obstruktion* Loretana de Libero takes a sanguine view of these ‘highly imaginative’ modes of interference.⁹ She contends, first, that the legitimacy of obstructive techniques was widely accepted by the major factions in Rome’s internal political struggles, and second, that the persistence of these tactics testifies to the health and institutional stability of the republic, even in its terminal phase.¹⁰ But as her critics have noted, this overstates the consensus that surrounded these manoeuvres, leading her to find ‘acceptance’ in hostile acquiescence, and to downplay the many incidents in which attempts at obstruction precipitated constitutional argument and public acts of violence.¹¹ L.A. Burckhardt, on the other hand, rightly presents the proliferation of these tactics as the symptom of a worsening constitutional crisis, as the senate employed every means at its disposal to preserve its traditional preeminence.¹² The senate, he continues, had a myriad of techniques to repel challenges to its authority, ranging from auspicial intervention to extra-judicial killing, depending on the severity of the situation. Burckhardt is closely attuned to

Gordon (Princeton, 2010), pp. 12–14; Andrew Drummond, *Law, Politics and Power* (Stuttgart, 1995), pp. 81–95; Benjamin Straumann, ‘Constitutional Thought in the Late Roman Republic’, *History of Political Thought*, 32 (2011), pp. 280–92, p. 281; Wilfried Nippel, ‘Ancient and Modern Republicanism: “Mixed Constitution” and “Ephors”’, in *The Invention of the Modern Republic*, ed. Biancamaria Fontana (Cambridge, 1994), pp. 6–26.

⁷ Lintott, *Violence*, p. 207.

⁸ Leonhard Alexander Burckhardt, *Politische Strategien der Optimaten in der Späten Römischen Republik* (Stuttgart, 1988), esp. pp. 159–237; Loretana de Libero, *Obstruktion: Politische Praktiken im Senat und in der Volksversammlung* (Stuttgart, 1992).

⁹ Libero, *Obstruktion*, pp. 13, 105.

¹⁰ *Ibid.*, p. 106: ‘The acceptance of obstructive tactics in everyday political disputes was quite robust, proving that obstruction had lost none of its importance or power in the late republic. Constitutional institutions still functioned normally and without fail, and free competition was rarely constrained, and manifested itself in deliberate, often imaginative forms of obstruction.’

¹¹ For critical responses to Libero making many of the same points, see Erich S. Gruen, ‘Review of *Obstruktion*’, *Gnomon*, 67 (1995), p. 172: ‘L.’s claim that the persistence of obstructive behavior demonstrates the health of the system rather than its disintegration is a striking one. It demands attention and scrutiny. The book does not, however, establish its thesis.’ Also, Andrew Drummond, ‘Obstructive Tactics in Roman Politics’, *The Classical Review*, 44 (1994), pp. 123–4.

¹² Burckhardt, *Strategien*, pp. 19–20, 200–1.

many complexities of the Roman constitutional order,¹³ and he correctly posits a relationship between obstruction and executive action that is too often overlooked. But he is wrong to suggest that these extraordinary modes of government were monopolized by the *nobiles*. Indeed, it is crucial that they were not, since it was precisely the competition between active and obstructive emergency powers that gave the crisis of the late republic its unique character.

The argument proceeds as follows. Part I offers a comprehensive survey of political obstruction in the Roman republic, focusing in particular on the numerous religious formulas that permitted the dissolution of popular assemblies and the annulment of legislation. It demonstrates in particular that (1) these practices became increasingly common in the late republic, as Rome lurched towards its ultimate crisis and (2) the religious character of these tactics gradually receded, as ostensibly sacred procedures like *servatio* and *obnuntiatio* came to be incorporated into the ordinary political practice of the senate and *comitia*. Part II argues that this profusion of obstructive tactics was inextricable from Rome's wider crisis of emergency government. Unprecedented forms of obstruction elicited equally unprecedented modes of executive rule, and vice-versa, a vicious circle that sped the republic to its doom. Finally, Part III examines this history of delay and obstruction in light of recent scholarly claims that Rome possessed a higher law constitution. Drawing in particular on the political theory of Cicero's *De legibus*, it proposes that (1) these constitutional norms could only be 'enforced' through the rather strange mechanism of the augural college and (2) the higher law constitution that Cicero envisioned for Rome was not the antithesis of discretionary emergency government, but something like its mirror image: equally unprecedented, but focused on constricting rather than expanding the power of the state. That is to say, the border between 'constitutional' and 'emergency' government in the late republic was far more porous than we often assume. Not only consuls, but also tribunes and priests could serve as the bearers of unlimited discretion and crisis authority, and this historical fact may carry wider implications for our understanding of the structure and nature of emergency powers.

¹³ See, for instance, his intriguing but underdeveloped suggestion of 'a dialectic between norm and exception in the political structure of the late Roman republic'. *Ibid.*, pp. 15 ff., 24.

I

The Architecture of Obstruction

1.1 *The Classical Republic*

The constitutions of the early and middle republics made ample provision for interference with ordinary legislative and executive procedures.¹⁴ With the exception of a small number of emergency offices (the dictator, *interrex* and *praefectus urbi*), Roman magistracies operated under the principle of collegiality, ‘each colleague being empowered both to act alone and to oppose any action undertaken by his equals or juniors’.¹⁵ The tribunes of the plebs were vested with a special authority to veto not only the executive acts of other magistrates (including consuls), but also legislation pending in the *comitia* and decrees of the senate; this far-reaching privilege, known as *intercessio*, carried the latent potential to paralyse the government;¹⁶ and Polybius reports

¹⁴ What we know about the constitutional workings of the early and middle republics is of course limited by the scarcity of reliable information: we depend heavily on Titus Livius (and, to a lesser extent, Dionysius of Halicarnassus and Diodorus Siculus), whose account was in turn based on a series of now-lost histories that date to the second century BC, and were (at best) heavily embroidered. The debate over sources and methodology continues to rage today; compare Kurt A. Raaflaub, ‘The Conflict of the Orders in Archaic Rome: A Comprehensive and Comparative Rome’, in *Social Struggles in Archaic Rome: New Perspectives* (second revised edition, New York, 2006), pp. 1–46 and Timothy J. Cornell, ‘The Value of the Literary Tradition’, in *ibid.*, pp. 47–74. On Livy’s reliability see also S.P. Oakley, *Commentary on Livy, Books V–X, Vol. I* (New York, 1997), pp. 3–110; and Gary Forsythe, *Livy and Early Rome* (Stuttgart, 1999). Speaking generally, I am persuaded by Cornell’s view that historians of the classical republic ought to be ‘conservative’, accepting surviving accounts where there is no affirmative reason to reject them. But it is also worth adding that the arguments I present in Parts II and III of this article do not depend on the reader accepting any particular detail in Livy as *true*, so long as she accepts that obstruction seems to have been a real but limited phenomenon in the classical Roman constitution, becoming pathological only in the late republic.

¹⁵ Wirszubski, *Libertas*, p. 22.

¹⁶ Andrew Lintott, *The Constitution of the Roman Republic* (Oxford, 1999), pp. 61–2 (veto over legislation in the *comitia*); pp. 123–6 (*intercessio* against the acts of magistrates and decrees of the senate). See in particular Poly. 6.16.4: ‘And what is most important is that if a single one of the tribunes interposes, the senate is unable to decide finally about any matter, and cannot even meet and hold sittings.’ The tribunician veto hinged on the ‘sacrosanct’ status of tribunes (Liv. 3.55; Diony. *Antiquities* 6.89); religious tradition made it impermissible to lay hands on them during their term of office. Thus they could protect citizens from arrest simply by interposing themselves between magistrate and citizen, and could bring legislative meetings to a halt by standing in the exit of a building where public business was being conducted. That being said, the tribunician veto over *senatus consulta* may have been limited by ingrained deference to senatorial elites; in 191 the senate successfully ‘prevailed on the tribune to desist’ from his veto of a triumph for Scipio Nasica (Liv. 36.40).

that the senate could be ‘deliberately negligent and obstructive’ of consuls it disagreed with by refusing to vote supplies for their military campaigns.¹⁷

But, perhaps surprisingly, the primary vehicle for obstruction in Rome’s classical constitution was its highly articulated complex of religious rites and rituals. Although a comprehensive survey of ritual law and its operational infrastructure is beyond the scope of this article, it is worth highlighting the major avenues through which an otherwise valid public action might be blocked in the early and middle republics for the failure to comply with religious norms.

Any electoral or legislative assembly of the people might be dissolved — or its outcome subsequently nullified — by the discovery of unfavourable auspices, ranging from a sudden flash of lightning to a flock of birds flying in an unexpected formation.¹⁸ Although there is a great deal of ambiguity in the sources, an emerging scholarly consensus holds that public proceedings would have been subject to a veto at four points. First, the presiding magistrate might decline to call the public meeting to order. Veit Rosenberger describes how this worked in practice:

Auspices from the flight of birds require the magistrate to go to the place of observation before sunrise, to define his *templum*, the religious delimitation of a specific area, and to wait for the sign. As soon as the magistrate had received the sign he had been waiting for, the session was over and the business could be started.

If the magistrate failed to discern an auspicious array, he might postpone the proceedings by reciting the formula *alio die*, another day.¹⁹ Second, an ongoing public assembly might be dissolved by any magistrate with *imperium*,²⁰ or any member of the augural college,²¹ upon catching sight of a *signa*

¹⁷ Poly. 6.15.2–4.

¹⁸ Pompeius Festus lists five categories of auspices, also including the refusal of sacred chickens to feed on grain, unusual behaviour by four-legged animals, and any other noteworthy prodigy. See Matthew Dillon and Lynda Garland, *Ancient Rome: From the Early Republic to the Assassination of Julius Caesar* (New York, 2005), p. 145. On the centrality of the auspices to the Roman political imagination, see Liv. 6.41.

¹⁹ Veit Rosenberger, ‘Republican Nobles: Controlling the *Res Publica*’, in *A Companion to Roman Religion*, ed. Jörg Rüpke (New York, 2007), p. 299. Cf. Jerzy Linderski, ‘Founding the City: Ennius and Romulus on the Site of Rome’, in *Roman Questions: Selected Papers, Vol. II* (Stuttgart, 2007), pp. 3–20.

²⁰ On the exclusion of *magistratus minores* from taking the auspices, see Jerzy Linderski, ‘Watching the Birds: Cicero the Augur and the Augural *Templa*’, *Classical Philology*, 81 (1986), pp. 330–40, p. 333; J.H.W.G. Liebeschuetz, *Continuity and Change in Roman Religion* (Oxford, 1979), p. 10.

²¹ The college of augurs (consisting of three members prior to 300, and nine members from 300 until the Sullan reforms of 82, with the membership increased to fifteen under Sulla and sixteen under Caesar) appointed its members by cooption; membership drew on the ranks of the state’s most distinguished citizens, and its oligarchical principle

oblativa.²² Speaking technically, it was open to anyone (including private citizens) to announce a *signa oblativa*, but presiding magistrates were unlikely to take notice of reports from *privati*.²³ Third, if there was a dispute about the sighting of omens or their proper interpretation, the question could be referred to the senate and the college of augurs for a final disposition; on the recommendation of the *collegium* the senate might nullify the proceedings and demand that any election or legislative session tainted by error [*vitium*] be restaged.²⁴ Livy records numerous instances, of which the following example describing a ritual flaw in the elections of 397 is representative: ‘there was only one possible mode of expiation, and that was that the consular tribunes should resign office, the auspices to be taken entirely afresh, and an interrex appointed. All these measures were carried out by a decree of the senate’.²⁵ Finally, if a portent manifested itself while the public assemblies were in recess, it was left to the senate to decide whether or not it constituted a prodigy demanding some form of official expiation; if it recognized the event as a public prodigy, it would typically refer it to a specialized priesthood for interpretation, either the Etruscan *haruspices* (who cast entrails) or the XV *viri sacris faciundis* (guardians of the *libri Sibyllini*, a collection of oracular utterances in Greek hexameter).²⁶ Although these rites of expiation rarely required the resignation of magistrates, or the striking of legislation, it was not at all unusual for religious officials to declare several days of *supplicatio* as penance for the state, a period during which political assemblies were forbidden.²⁷

The aristocratic composition of the college of augurs and the significant role reserved for the senate in determining when a sign had materialized gave the *nobiles* wide latitude to abrogate legislation, suspend elections, and depose magistrates with whom they disagreed. Although Livy is rarely explicit on

of selection ensured that the college remained sympathetic to elite interests. See Liebeschuetz, *Continuity and Change*, p. 19.

²² The sources distinguish between *auspicia impetrativa* (signs solicited by the formal request of a presiding magistrate) and *auspicia oblativa* (signs that present themselves suddenly and unexpectedly). Cic. *Phil.* 2.81.

²³ Lintott, *Constitution*, p. 102.

²⁴ Linderski, ‘Watching the Birds’, p. 333: ‘It is not difficult to observe that the intervention of the college always took place *post actionem*, whereas the single augurs intervened *inter actionem*. Thus it lay within the prerogatives of the college [or more exactly within the prerogatives of the senate, although it normally acted after consultation with the college] *comitiatus et concilia habita rescindere*, that is, to annul the effects of the voting in the assemblies, whether legislative or electoral.’

²⁵ Liv. 5.17. Cf. 4.7, 6.27, 8.15, 8.17, 8.23, 9.7, 10.47, 21.63, 23.31, 30.39, 65.12.

²⁶ Susanne William Rasmussen, *Public Portents in Republican Rome* (Rome, 2003), pp. 46–9.

²⁷ See, e.g., Liv. 39.46; 22.1; 38.44.

this point,²⁸ several episodes in the *History of Rome* imply a readiness to bend the state religion to maintain the primacy of the senate, and it is a striking fact that nearly all of the magistrates recalled from office for ‘defects in the auspices’ fell into one of two categories: active supporters of plebeian interests or emergency magistrates not subject to the ordinary strictures of the Roman constitution.

It is not difficult to find examples in Livy of Roman religious traditions being appropriated to contain the political ambitions of the multitude.²⁹ When the conflict over military conscription reached boiling point in 461, a number of bizarre *prodigia* were reported: raw flesh fell from the sky, the earth trembled, and ‘[t]hat a cow had spoken — a thing which had found no credence the year before’. When the senate instructed the *duumviri* to consult the Sibylline books their interpretation of the portents was suspiciously timely: ‘The two commissioners for sacred rites consulted the Sibylline Books, where it was predicted that there was danger to come from a concourse of foreigners . . . amongst other things was a warning to avoid factions. The tribunes charged them with trying to hinder their law, and a violent struggle was pending’.³⁰ But the standoff is broken by the sudden onset of war, and Livy registers no further efforts to retaliate against the senate’s brazen obfuscations.

Similarly, in 377, with a growing chorus of plebeians clamouring for debt relief legislation, the tribunes secured the appointment of two censors to undertake a comprehensive census of property holdings in the commonwealth. When one of the censors died in office his colleague resigned in accordance with tradition, with the expectation that a new pair of censors would be appointed in his place. But owing to an unspecified error in the ritual the next set of censors was also barred from office; the senate then announced that it was the will of the gods that the censorship remain vacant for that year. The tribunes accused the senate of falsifying the auspices to forestall a census that would ‘show half of the state had been ruined by the other half’. The popular party, in other words, was unimpressed with the senate’s invocation of divine will [*dis non accipientibus*] as an alibi for its opportunistic dissolu-

²⁸ The technical terms *auspicia ementiri* and *auspicia ementita* appear only once in Livy (Liv. 21.63). By comparison, the phrase recurs three times in Cicero’s *Philippics* (Cic., *Phil.* 2.83, 2.88, 3.9). Gell. *NA* 4.5.1 reports an incident in 270 in which the *haruspices* deliberately prescribed the wrong expiation in response to a lightning strike; when their plot was discovered they were tried in the *comitia populi* and put to death.

²⁹ The definitive work is Jerzy Linderski, ‘The Auspices and the Struggle of the Orders’, in *Staat und Staatlichkeit*, ed. Walter Eder (Berlin, 1990), pp. 34–48.

³⁰ Liv. 3.9–10. See also Dionys. *Antiquities* 10.1–2. Ogilvie notes that the ‘bald and unliterary style’ indicates that the report of *prodigia* comes from the *Annales*, though the frame of class conflict is probably his own invention. See R.M. Ogilvie, *A Commentary on Livy, Books 1–5* (New York, 2nd edn., 1998), pp. 415–16.

tion of the censorship.³¹ Yet the decision of the senate was effectively without appeal; the tribunes lacked a constitutional mechanism to make the appointment themselves.

But perhaps the most noteworthy instance arose in 217 at a point of maximum tension in the Second Punic War, when the newly elected consul Gaius Flaminius attempted to circumvent the traditional requirement that consuls report to the senate to take military auspices before departing for their consular province. Flaminius had reason for concern; in 223 the senate had unsuccessfully attempted to evict him from his consulship, based on a report of unfavourable auguries. Livy breaks with his predecessors³² in foregrounding the implicit class tension of this episode; in so doing, he also gives voice to the plebeian suspicion that Rome's intricate machinery of ritual and ceremony was simply an appendage of senatorial power.

[Flaminius] was also hated by the senators on account of an unprecedented law [respecting limits on shipping] . . . but had procured for him the favour of the plebs and afterwards a second consulship. Believing, therefore, that his enemies would falsify the auspices and make use of the Latin Festival and other means of hindering a consul, to detain him in the City, he pretended that he had to take a journey, and departing, as a private citizen, slipped away secretly to his province.³³

The Latin Festival was an annual commemoration of Rome's military alliances, but one without a fixed date, making it the prerogative of the senate to schedule it each year; the fear expressed by C. Flaminius was that in this case the celebration had been hastily scheduled to generate a pretext for relieving him of his command. The precise language that Livy employs when voicing the suspicions of Flaminius³⁴ — and the fact that Flaminius sets his plan in motion immediately after his election — seems to imply that these obstructive tactics were commonly invoked against magistrates disfavoured by the Senate. It may also be worth highlighting the *denouement*: in a detail that often goes unmentioned by commentators, Flaminius successfully defied the senate when it attempted to recall him to Rome. ‘On this embassy went Quintus

³¹ Liv. 6.27.

³² For instance, Polybius reports the death of Flaminius at 3.83–84 without mentioning his neglect of the auspices; Cicero notes that he imprudently disregarded ill omens before his fateful battle with Hannibal, but leaves out any discussion of class conflict or disagreement with the senate (Cic. *Div.* 1.77). The fact that these earlier sources omit these details suggests that Livy may be projecting the sharp class divisions of the late republic back onto this earlier period.

³³ Liv. 21.63. The sumptuary law in question regulated the size of ships that senators were permitted to keep, in order (it claimed) to preserve their dignity. The senate responded to this manoeuvre with strong invective, demanding that Flaminius return to Rome to execute the proper sacrifices in the temple of Jupiter.

³⁴ *consularibus allis impedimentis*, ‘by other impediments belonging to the consuls . . .’.

Terentius and Marcus Antistius, whose arguments had no more weight with him than had the letter sent to him by the senate in his former consulate.³⁵ This failed mission is a reminder that the senate relied on *auctoritas*, not *imperium*, to execute its religious decrees, and could not always enforce its rulings on recalcitrant elites.³⁶

Tellingly, the religious veto seems to have been deployed most aggressively in periods of dictatorship; Livy records six dictators forced to resign because of defective auspices (versus four consuls, one censor and one pair of military tribunes).³⁷ On the rare occasion that the dictatorship was occupied by a plebeian, this generalized mistrust of the office could tilt into barely suppressed panic. In a particularly egregious incident from 324, the consul Lucius Cornelius, asked to name a dictator to conduct elections in the city while he and his colleague waged military campaigns, appointed the plebeian Marcus Claudius Marcellus. Without further explanation, this choice was rejected on religious grounds [*quia vitione creatus esset*] by the college of augurs. As the tribunes observed, this strained credulity to its breaking point:

This sentence the tribunes by their accusations made suspect and infamous; for the flaw, as they pointed out, could not easily have been discovered, since the consul rose in the night and appointed the dictator in silence . . . nor was there a single mortal living who could say that he had seen or heard a thing that would bring to naught the auspices; nor yet could the augurs have divined, as they sat in Rome, what obstacle the consul had met with in the camp. Was there anyone, they would like to know, who could not see that the plebeian standing of the dictator was the thing which had seemed irregular to the augurs?³⁸

An almost identical complaint was lodged in 216 by the tribune Quintus Herrenius, who accused the augurs of overruling the appointment of a dictator

³⁵ Liv. 21.63.

³⁶ It seems likely that Livy meant the catastrophic defeat of Flaminius at the hands of a Carthaginian army shortly thereafter to impart a moral and prudential lesson about disregarding the auspices and the *auctoritas* of the senate.

³⁷ Liv. 6.38, 8.15, 8.17, 8.23, 9.7, 22.34. Cf. Liebeschuetz, *Continuity*, p. 14: ‘Like the sighting of prodigies, the “vitiation” of elections occurred most frequently in times of stress, when political conflict was intense . . . It is probably significant that the office vitiated most often was the dictatorship . . . [The dictator] held exceptional powers for an exceptional task, to deal with a military emergency or, more frequently, to hold an election. There was bound to be controversy about such an appointment.’

³⁸ Liv. 8.23. The experience appears to have been traumatic for Marcellus; Cicero reports that the next year, as the elected consul, he travelled in a closed litter to avoid seeing the sky. Cic. *Div.* 2.77. Cf. the assessment of S.P. Oakley, *Commentary on Livy, Books VI–X, Vol. II* (New York, 1998), pp. 661–2: ‘Much of L.’s reporting of these events seems wholly credible.’

so that impending elections would instead be administered by an interrex.³⁹ The consuls, he complained bitterly, ‘succeeded in having the augurs declare that there had been a flaw in his appointment’, with an eye towards installing their preferred candidates through a corrupted vote.⁴⁰ Like many of his predecessors in office, however, Herrenius chose to fulminate against the *patres* without taking any concrete steps to defy them. The following year the augurs nullified the election of the consuls after hearing thunder just before their formal accession; the patricians insisted that the election of two plebeian consuls had displeased the gods.⁴¹

The summary above traces a path through the wilderness of Livy’s histories. In times of upheaval — class strife, military invasion — senatorial elites reacted by aggressively policing the election of magistrates and the interpretation of omens. The creative reading of the Sibylline books in 459 suggested a horror of redistribution; the preoccupation with plebeians occupying the highest magistracies suggested a concern for a balance between the orders; and the special attention paid to the dictatorship implied a worry that unchecked *imperium* might challenge the constitutional preeminence of the senate. But these isolated incidents were not necessarily representative of the nature and character of Roman religion in this period; certainly they should not be taken as confirmation of the cynical Polybian thesis that Roman *religio* was primarily a technology of social control.⁴² Most of Livy’s references to *auspicia* and *prodigia* are free of partisan motivations, and he depicts the elite as punctilious to the point of mania regarding the proper performance of religious ritual.⁴³ It would seem, then, that while the norms of the classical

³⁹ Unlike a dictator appointed by the (elected) consuls, an interrex was selected by a private meeting of patrician families. Once appointed, an interrex served for five days. For basics see Lintott, *Constitution*, p. 164.

⁴⁰ Liv. 22.34. Although this story is typically dismissed for its anachronistic portrayal of a struggle between the orders, Erich Gruen points out that the episode makes perfect sense if we read *patres* as ‘senators’ rather than ‘patricians’. The senate and the mass of citizens were then at loggerheads over the proper strategy to pursue in the field against Hannibal; finding itself outvoted in the consular election, the senate resorted to extreme measures to keep its preferred candidates in office. Erich S. Gruen, ‘The Consular Elections for 216 BC and the Veracity of Livy’, *California Studies in Classical Antiquity*, 11 (1978), pp. 61–74, p. 67.

⁴¹ Liv. 23.31. Since the *lex Ogulnia* of 300 plebeians had been eligible for the College of Pontiffs and the College of Augurs, so the motive could not have been excluding plebeians entirely; rather, the object was to ensure that patricians maintained a foothold in the state’s critical institutions. For commentary on this episode, which is generally taken as authentic, see Rasmussen, *Public Portents*, pp. 157–8.

⁴² Poly. 6.56: ‘the multitude must be held in by invisible terrors and suchlike pageantry’.

⁴³ Liv. 8.30 (Papirius as dictator returns to Rome from the battlefield to retake the auspices); 9.14 (auspices are favourable for war with the Samnites); 27.16 (Fabius is refused favourable signs from the birds before engaging Hannibal in battle); 35.48

republic allowed for certain forms of electoral nullification, they were limited in scope, relatively infrequent, and ad hoc. It is an exaggeration, but only a slight one, to say with Veit Rosenberger that '[o]bstruction as a means of political struggle was used only in the late republic'.⁴⁴

1.2 *The Late Republic*

Although the final century of the republic is often presented as a period in which Rome's ordered system of constitutional checks and civic rights gave way to military despotism and extra-constitutional dictatorship, the remarkable fact is that checks and balances multiplied furiously even as the fog of emergency gradually descended over the republic. The dramatic cascade of vetoes, filibusters and religious overrides came to define the late republic at least as much as the rising acceptance of an imperial executive.

As we might expect, the auspices continued to serve as the fulcrum of elite control, but their status in the late republic departed in significant ways from the practices recorded in Livy. First, the passage of the *leges Aelia et Fufia* (c.153 BC) generated a statutory basis for *obnuntiatio*, bolstering its legitimacy. A practice that had relied exclusively on tradition now carried the official imprimatur of the SPQR.⁴⁵ Second, the *Lex Aelia* extended the ambit of religious nullification from electoral assemblies to legislative assemblies, while the *Lex Fufia* appears to have expanded the number of *dies nefasti* on which comitial assemblies were forbidden.⁴⁶ Finally, the aura of ritual magic surrounding *obnuntiatio* appears to have diminished in the republic's final century; the pretence of having actually heard thunder or witnessed a flash of lightning was jettisoned, and the annunciation of omens took on the aspect of a formal parliamentary manoeuvre.⁴⁷ As a result of these innovations, political figures who found themselves at odds with majorities in the *comitia* now

(Quintius takes auspices during a battle so diligently that he is placed at a strategic disadvantage); 45.12 (Popilius is removed as consul after receiving negative omens, with no clear sociopolitical motive on the part of the college of augurs). Cf. Cic. *De Nat. Deor.* 2.10–11, where it is difficult to attribute a political motive to the dismissal of Publius Scipio and Gaius Figulus from the consulship in 162.

⁴⁴ Rosenberger, 'Republican *Nobiles*', p. 294.

⁴⁵ The date and the speculation about its precise content come from William F. McDonald, 'Clodius and the *Lex Aelia Fufia*', *Journal of Roman Studies*, 19 (1929), pp. 164–79. McDonald conjectures (with some plausibility) that the *lex Clodia* of 58 withdrew the right of *obnuntiatio* in legislative assemblies from consuls, but not from tribunes. For further thoughts see W. Jeffrey Tatum, *The Patrician Tribune* (Chapel Hill, 1999), pp. 126–9.

⁴⁶ One probable effect was to prevent sub-urban voters who might have come to Rome for the annual elections from taking part in legislative sessions. See Henrik Mouritsen, *Plebs and Politics in the Late Roman Republic* (Cambridge, 2004), p. 34.

⁴⁷ See Burckhardt, *Strategien*, pp. 181, 189.

had access to a panoply of new techniques for frustrating, delaying and dissolving legislative action.

The *pro forma* character of *obnuntiatio* in the late republic is obvious from even a cursory glance at the sources. In 101 a phalanx of nobles assembled in the *comitia* to arrest the progress of an agrarian bill introduced by the tribune Apuleius Saturninus; on being violently driven from the forum, the *nobiles* suddenly exclaimed that they heard thunder and demanded that the meeting be adjourned. Saturninus ignored the warning and passed the law, but the recitation of ill omens furnished the senate and the college of augurs with sufficient pretext to strike it after Saturninus was arrested and then executed by a mob in 99 pursuant to a ‘last decree’.⁴⁸ Milo, seeking to block the ascension of Clodius to the curule aedileship in 57, managed to postpone the scheduled elections indefinitely by travelling in person to the forum each day before sunrise and declaring contrary auspices [*in campo obnuntiasset*]; Cicero exulted in a letter to Atticus that ‘for two days there has been no assembly’.⁴⁹ In 56 Pompey and Crassus, hoping to deny Cato the praetorship, nominated two of their placemen for the office and flooded the forum with bribes to ensure their election; when the people nevertheless seemed inclined towards Cato, Pompey dissolved the assembly, citing an inauspicious omen.⁵⁰ Cato soon returned the favour. After being forcibly expelled from the *comitia* by C. Trebonius for his voluble opposition to the provincial bill, Cato slipped into the forum under cover of darkness, stood on the shoulders of his allies, ‘and being lifted up by them, declared an omen with the purpose of breaking up the meeting’.⁵¹ While the Greek historians do not always underline the falsity of these claims, the surrounding context makes it clear in each case that these recitations were meant as interventions at critical moments in the life of the republic, not impromptu weather reports. Occasionally the histories are explicit; Plutarch writes of Pompey in 56 that he ‘lyingly declared that he heard thunder, and most shamefully dissolved the assembly’.⁵² We might think more carefully, though, about the nature of this ‘lie’. Given the century-long tradition of invoking auspices as a political manoeuvre of last resort, it seems unlikely that Pompey expected to be believed — that he was deluding the assembled crowd. It is much more plausible to think that he was exercising the prerogative of presiding magistrates to discharge assemblies of the people at their discretion, and that the recitation of thunder was an empty formality and a legal fiction.

⁴⁸ App. *BC* 1.30. That the report of thunder was falsified can be inferred from Saturninus’s ironical reply, recorded in *Vir. Ill.* 73.7: *Huic legi nobiles abrogantes, cum tonuisse, clamarunt: ‘Iam’, inquit, ‘nisi quiescitis, grandinabit’*.

⁴⁹ Cic. *Att.* 4.3. Cf. Cic. *Quint.* 3.3 (approving of the *de facto* cancellation of elections in October 54 because all four candidates for the consulship were suspected of bribery).

⁵⁰ Plut. *Pompey* 52.

⁵¹ Dio 39.35. Cf. Plut. *Cat.* 43.5.

⁵² Plut. *Cat.* 42.3.

However dubious, this practice accelerated markedly as the republic sped to its end, undergoing several significant transformations along the way. The most prominent of these was *spectio*, the practice of forestalling public assemblies, not by claiming to have seen inauspicious omens, but merely by announcing an intent to watch the skies [*servare de caelo*] in expectation.⁵³ This tactic was pioneered by Bibulus, an ardent optimate who shared the consulship with Caesar in 59 BC.⁵⁴ When Caesar attempted to carry an agrarian law Bibulus resorted to the full arsenal of obstructive techniques, first recruiting three tribunes to veto the legislation, then (when this was disregarded by Caesar) proclaiming a ‘sacred period’ lasting through the end of the year (the length of his appointment), effectively dissolving all public meetings for the duration of Caesar’s term. When Caesar brushed aside even this extraordinary measure and exiled his colleague from the assembly, Bibulus retreated to his house, ‘and whenever Caesar proposed any innovation, he sent formal notice to him through his attendants that it was a sacred period and that by the laws he could rightfully take no action’.⁵⁵ On Bibulus’s highly unorthodox construction of sacred law, there was no necessity to appear in person — or actually to descry an adverse omen — in order to break up the *comitia*, so long as the proclamation of *servare de caelo* was renewed each day. There is no question that this manipulation of the auspices pressed the boundary of the law; the classicist Susan Rasmussen justifies his actions by citing conditions of ‘religio-political emergency’, noting sympathetically that once Bibulus had been driven from the forum, Caesar (as sole consul) exercised nearly unlimited *imperium*.⁵⁶ Extraordinary power, in other words, had to find its echo in extraordinary obstruction. Cicero adverted to this idea in a sarcastic letter to his brother Atticus, scoffing at the fame that Bibulus had won among the *nobiles*. They talk of Bibulus, he marvelled, as the poet Ennius once talked of Q. Fabius Maximus, ‘who by delays alone restored our state’.⁵⁷ Although Cicero is being ironic, his comparison of Bibulus to

⁵³ Dio 38.13: ‘Accordingly, many persons who wished to obstruct either the proposal of laws or the appointment of magistrates that came before the popular assembly were in the habit of announcing that they would look for omens from the sky that day, so that during it the people would have no power to pass any measure.’

⁵⁴ As a derivative of *obnuntiatio*, *spectio* was only available to presiding magistrates, and notice had to be given before each assembly day. In the *Second Philippic* Cicero makes light of Marcus Antonius’s clumsy efforts to invoke *spectio* at an electoral assembly after it had already commenced, pointing out that once the election had begun Antony might still have claimed to see an *auspicia oblativa*, but could no longer dissolve the meeting on the pretext of searching the skies. Cic. *Phil.* 2.80–3.

⁵⁵ Dio. 38.4–6; Suet. *Div. Jul.* 20.1; Plut. *Caes.* 14.6.

⁵⁶ Rasmussen, *Public Portents*, p. 165.

⁵⁷ Cic. *Ad Att.* 2.19. Fabius, appointed dictator in 221 and 217, earned the cognomen ‘Delay’ [Cunctator] for his successful strategy of attrition during the Second Punic War.

Maximus, general and dictator during the Second Punic War, is a telling index of how his actions were perceived by the *boni*. As with any emergency measure, the legality of *servatio* was bitterly contested. Publius Vatinius, then serving as tribune, insisted that Bibulus be prosecuted for his unprecedented attempt at legislative sabotage, though his colleagues collectively blocked him from taking any action.⁵⁸ On the other hand, when Publius Clodius broke with Caesar in 57, he denounced the Julian laws as having been passed illegally [*contra auspicium*], a charge that Cicero, despite his private mockery of Bibulus, enthusiastically endorsed.⁵⁹

Although manipulation of the auspices was certainly the most common means of halting unfavourable legislation or unwelcome elections, it was hardly the only one. Also of critical importance was mastery of the political calendar, which could be constricted or expanded at the command of the pontifical college through the insertion of intercalary months and the declaration of festival days on which public assemblies were forbidden.⁶⁰ It was a system subject to increasing abuse; from the vantage of the first century AD Suetonius wrote that the calendar had been ‘disordered’ [*turbatos*] by the opportunism of the pontiffs, while in the third century Censorinus complained that ‘a magistrate was often deprived of his functions, or held them a long time, as the *pontifices* willed’.⁶¹ Although members of the pontifical college were occasionally elected by popular assembly,⁶² its elite composition made it a useful weapon in the struggle between *optimates* and *populares*. A letter Cicero

⁵⁸ Dio 38.6. In the judgment of Lintott, Vatinius seems to have had the better of the argument. See Lintott, *Violence*, p. 145.

⁵⁹ Cic. *Har.* 48. Cicero’s enthusiasm for *spectio* and the politics of obstruction had its limits, of course. The same year that he denounced the Julian laws for having been passed *contra auspicium*, he exalted the senate for resolving that while the bill recalling him from exile was under debate ‘no one was to observe the heavens or cause any delay whatsoever’, and that anyone making the attempt would be considered an enemy of the state [*eum plane eversorem rei publicae*]; Cic. *Sest.* 129. See also the somewhat puzzling letter of July 50 to G. Sallustius, advising him to observe the Julian laws over the objection of Bibulus that they were passed illegally; Cic. *Ad Fam.* 2.17. Here it is not clear whether Cicero believes that the law should be respected *qua* law, or merely as a prudential matter, and of course we should hold open the possibility that Cicero was not perfectly consistent on this point.

⁶⁰ See, generally, the treatment in Lily Ross Taylor, *Party Politics in the Age of Caesar* (Berkeley, 1962), pp. 78–80.

⁶¹ Suet. *Div. Jul.* 40; Censor. *De Die Nat.* xx.29.

⁶² A law was passed in 104 at the instigation of G. Domitius Ahenobarbus designating a special convocation of 17 of the 35 comitial tribes to elect the priests of the four major colleges. It was overturned as part of Sulla’s constitutional reforms, and was reinstated by a law urged by the tribune Labienus in 63, enduring until the republic’s end. Mary Beard, John North and Simon Price, *Religions of Rome, Vol. I* (Cambridge, 1998), pp. 136–7.

wrote to his brother Quintus in 56 underscores how effective these machinations could be in frustrating political opponents:

Lentulus Marcellinus is splendid as consul, and his colleague does not put any difficulty in his way . . . he has deprived [the tribunes] of all the comitial days, for even the Latin festival is being repeated, nor were thanksgiving days wanting. In this way the passing of most mischievous laws is prevented.⁶³

Similarly, Cicero's dispatches from 50 relate the complaint of the tribune Curio, a leading *popularis*, that he is 'being robbed of his comitial days by every sort of device', that is, his legislative calendar was being artificially foreshortened by the declaration of spurious holidays and *supplicationes*.⁶⁴ The habitual distortion of time itself to serve the optimate cause helps to explain why the rationalization of the calendar was one of Caesar's first acts on assuming the dictatorship, and why Cicero, the indefatigable mouthpiece of the senatorial elite, greeted this reform with such bitterness.⁶⁵

Not every tactic of delay and obstruction had roots in Rome's civil religion. As 'extraordinary' executive measures loomed ever larger on the horizon of republican politics, elites increasingly sought protection behind new forms of legislative obstruction. Even the vaunted senate succumbed to deadlock and tactical gamesmanship. Under the senate's rules, each member had a right to issue a 'recommendation' on every subject under debate. There was no limit to the length of these perorations; '[s]ince each meeting had to be completed by nightfall', Lintott observes, 'this created the possibility of a filibuster (*diem consumere*)'.⁶⁶ Cato was a past master in this tactic, once blocking senatorial affairs (including the reception of foreign embassies) for three months in pursuit of an obscure vendetta against the tax collectors.⁶⁷ The father of Verres managed to delay the prosecution of his son for extortion in the colonies by persuading a small number of senators to 'spin out the proceedings with long speeches' [*dicendo tempus consumerent*].⁶⁸ Clodius waged a similar delaying action against the senatorial decree of 57 restoring Cicero's house, holding

⁶³ Cic. *Ad Quint.* 2.4. This blunt letter is a reminder that while Roman religion was more than an instrument of social control, Roman political elites could also be strikingly cynical about the political motivations undergirding religious actions and interpretations.

⁶⁴ Cael. *Ad Fam.* 8.11.1.

⁶⁵ Plut. *Caes.* 59.3. It seems likely that the *lex Clodia* of 58 made it legal to hold assemblies of the people on *dies fasti* (Cic. *Sest.* 33), though it is unclear whether this provision ever entered into effect.

⁶⁶ Lintott, *Constitution*, p. 78.

⁶⁷ Cic. *Att.* 1.18.

⁶⁸ Cic. *Verr.* 2.2.96.

the floor for three hours in a vain effort to postpone the ruling into oblivion; Cicero reported his eventual failure with immense satisfaction.⁶⁹ Nevertheless, Cicero approved of such stoppages *in extremis*: ‘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.’⁷⁰

Temporizing speeches and dilatory tactics were not confined to the Capitol. According to an archaic rule dating to the earliest days of the republic, centuriate assemblies could be adjourned by pulling down the red military banner that flew at all times atop the Janiculum Hill; the augur Metellus Celer took this course of action in 63 to dissolve the *comitia centuriata* just before it returned a guilty verdict in the politically-fraught trial of Rabirius.⁷¹ Cato became notorious for carrying out similar measures in the *comitia plebis* to thwart legislation he saw as dangerous to the republic, so that an exasperated Caesar could exclaim in the *Bellum Civile* that ‘Cato . . . in his usual manner, consumed the day by a tedious harangue’ when the bill allowing candidates to stand for the consulship *in absentia* came up for debate.⁷² Similarly, when C. Trebonius proposed dividing up the provinces between Caesar, Pompey and Crassus, a *de facto* recognition of the triumvirate, Cato launched a tireless two-hour diatribe, finally goading Trebonius

⁶⁹ Cic. *Att.* 4.2: ‘[W]hen it came to Clodius’s turn he wished to talk out the day and went on endlessly; however, after he had spoken for nearly three hours, he was forced by a loud expression of the senate’s disgust to finish his speech at last.’ Cf. Cic. *Quint.* 2.1: ‘Clodius, being called on, began trying to talk out the sitting’; Cic. *Att.* 4.3: ‘Marcellinus [proposed to indict Clodius], but Metellus talked out the time with a filibuster.’

⁷⁰ Cic. *De Leg.* 3.41.

⁷¹ Dio 37.28. Rabirius had been arraigned by the Caesarean party for his participation in the killing of the tribune Saturninus in 99, pursuant to a so-called ‘last decree’. The decree, otherwise known as a *senatus consultum ultimum*, was a resolution of the senate, calling upon the consuls to take all necessary action to defend the republic in times of emergency. Its frequent invocation to authorize the killing of Roman citizens made it highly controversial, and the trial of Rabirius was widely understood as a critical test of its legality. His conviction would have set the precedent that the *sciu* had no formal legal validity, stripping the senate of one of its most important prerogatives (see Wirszubski, *Libertas*, p. 59). Although the *comitia* adjourned when the flag was pulled from the Janiculum, tradition suggests that this interference may have been instigated by Caesar and his allies, who felt that they had refuted the idea of senatorial impunity by bringing Rabirius to trial, and had nothing to gain by seeing the elderly defendant crucified. There is evidence for this proposition in the total disinterest of the *populares* in re-initiating the case following its dismissal.

⁷² Caes. *BC* 1.32. Cf. App. *BC* 2.8; Plut. *Caes.* 13.2. Caesar was serving as praetor in Spain and had been awarded a triumph by the senate that he was eager to claim; but the triumph was scheduled for after the election, and it was illegal to receive a triumph if one had already returned to the city from the battlefield.

into ordering his arrest and removal. By this time it was nightfall, and the *comitia* was forced to adjourn. ‘In this manner’, writes Plutarch, ‘Cato consumed that day.’⁷³ These passages demonstrate the continuing vitality of the filibuster at Rome, but also hint at its fragility. In the senate, we see that filibusters could be sustained over large tracts of time (Cato’s procedural battle with the *publicani* continued for three months), but more often required physical exertion on the part of the speaker, who had to be prepared to hold the floor indefinitely, and *ex tempore*; and the ignominious retreat of Clodius testifies to the difficulty of maintaining a lonely opposition in the face of an inflamed majority. In the *comitia* filibusters were rarely sustained for more than a day; the object was not indefinite delay but compelling political theatre, and there is reason to think that in many cases it was successful. ‘By maintaining a consciously moral posture, driving the triumvirs to extreme measures, and parading their own martyrdom’, Erich Gruen concludes, ‘Cato and his associates ruined triumviral credit with the people and assembled aristocratic collaboration in resistance.’⁷⁴ This is accurate but optimistic; Robert Morstein-Marx concludes more ominously that the object of Cato and his allies was to ‘push their adversaries into repressive measures apparently contrary to Republican traditions’.⁷⁵ It would prove to be a clever gambit but a dangerous game, and the multiplication of these incidents underscores the extremes to which opposition figures were increasingly willing to resort as constitutional norms of bounded *imperium* and private property deteriorated under the pressures of empire.

But perhaps the most fascinating example of late republican innovation is the changing nature of the *iustitium*, one of the traditional pillars of Roman emergency government. A declaration of *iustitium* traditionally accompanied a *tumultus*, and carried a set of precise legal consequences: the cessation of all public and private business, a suspension of meetings of the senate, a general levy, and the assumption of military powers by magistrates with *imperium*.⁷⁶

⁷³ Plut. *Cat.* 43.3–4. Cassius Dio indicates that the object of this filibuster was not to dispose of the legislation (39.34) but to build sympathy for the optimiate cause by dramatizing their ill treatment at the hands of the popular party.

⁷⁴ Erich S. Gruen, *Last Generation of the Roman Republic* (Berkeley, 1974), p. 95.

⁷⁵ Robert Morstein-Marx, *Mass Oratory and Political Power in the Late Roman Republic* (Cambridge, 2004), p. 185.

⁷⁶ Golden, *Crisis Management*, pp. 87–8. Although longstanding tradition linked the *iustitium* to the apparatus of martial law, it is important to remember that this was not true in the earliest days of the republic; Gellius *NA* 20.43 traces the origins of the *iustitium* to the law of the Twelve Tables addressing the temporary relief of debtors; and after the fall of the republic the *iustitium* became a public holiday of mourning with no connection to military emergency. See John O. Lenaghan, *A Commentary on Cicero’s Oration De haruspicium responso* (Amsterdam, 1970), p. 185 (with accompanying cites to Tacitus). See also the fifth chapter of Agamben’s *State of Exception*, which attempts to assimilate this later tradition of public mourning to the republican emergency paradigm.

The *iustitium*, then, was a vital piece of legal machinery for waging war abroad, its manifest purpose being to turn the attention of Roman citizens from private to public affairs, and by ceasing all public business to free magistrates for military command.⁷⁷ This background brings the curious events of 88 into sharp relief. Sulla, serving as consul that year, was chosen by lot to wage war in Asia; his rival Marius desired the command for himself and induced the tribune Sulpicius to introduce legislation in the *comitia* transferring the commission. Sulla, rightly seeing this bill as a challenge to his authority and an affront to the traditional preeminence of the senate in foreign affairs, responded with an unprecedented invocation of the *iustitium*: ‘as the day for voting on the law drew near, [the consuls] proclaimed a vacation [*αργιας*] of several days, such as was customary on festal occasions, in order to postpone the voting and the danger’.⁷⁸ The stratagem ultimately failed; Sulla cancelled the *iustitium* a few days later amidst a whirlwind of popular outrage and the spectre of mob violence. But the reinvention of the *iustitium* as a tool of domestic order, and its incorporation into the senate’s arsenal of obstructive techniques, speaks to a growing recognition that extra-constitutional defences against ordinary legislation would henceforth be as important as extra-legal modes of coercion and repression. As a result, the border separating emergency and obstruction would become increasingly hazy. Deciding on the exception had always been the prerogative of the senatorial elite; but as the relative harmony of the classical republic gave way to raucous civil discord, the elite began to see more clearly the power inherent in deciding not to decide.

II A Vicious Circle

Modern histories of the decline and fall of the Roman republic, written in the long shadow of the twentieth century, tend to fixate on Rome’s reliance on emergency government to stem the rising tide of class animosity and imperial overstretch. Civil libertarians are fond of quoting Caesar’s urgent query from Sallust as a warning against the deadly narcotic of emergency measures: ‘when, with our example as a precedent, the consul shall have drawn the

⁷⁷ Episodes of *iustitium* punctuate Livy’s history at regular intervals: in response to a Gallic invasion in 393 the dictator T. Quinctius Pennus ‘proclaimed a suspension of all business and made every eligible man take the military oath’, while an incursion of the Samnites into Campania in 295 prompted the senate to ‘order all legal and other business to be suspended, and men of all ages and every class to be enrolled for service’. See Liv. 3.3, 10.21. Cf. T. Corey Brennan, *The Praetorship in the Roman Republic*, Vol. II (Oxford, 2000), p. 374 (remarking on the Social War of 90–89).

⁷⁸ App. BC 1.55. See Golden, *Crisis Management*, pp. 89 ff., 228, for the argument that *αργιας* is Appian’s effort to translate *iustitium* into Greek. Cf. Plut. *Sull.* 8.2: ‘To prevent voting on these, the consuls decreed suspension of public business.’

sword on the authority of the senate, who shall stay its progress, or moderate its fury?'.⁷⁹ Yet if we critically examine the most notorious episodes of emergency rule in the late republic — from the assassination of the Gracchi to the Caesarean dictatorship — we find a curious dynamic at work. Often, the novel forms of executive authority wielded by consuls, senators and private citizens evolved as responses to equally unprecedented forms of delay, filibuster and obstruction, and far from tamping down class tensions and restoring calm to the republic, the plethora of new techniques for suppressing and nullifying official action acted as an accelerant on the republic's smoldering antagonisms. The civil libertarian narrative of an extra-constitutional executive triumphing over the traditional checks and balances of the Roman constitution is too constricted; it would be more accurate to say that the republic was trapped in a vicious circle of action and obstruction that ultimately tore it asunder.

We see this poisonous dynamic at work in the assassination of the Gracchi, certainly the most notorious instances in which 'extraordinary' powers were invoked to justify the killing of Roman citizens. In both episodes the same basic pattern asserts itself: extra-constitutional executive action called forth unprecedented forms of delay and interference, generating a political paralysis that could be broken only by illegal executive measures or popular violence.

The killing of Tiberius by the *pontifex maximus* Scipio Nasica was precipitated by a violent constitutional standoff over the proper limits of the tribunician veto. Tiberius's controversial agrarian bill was opposed by one of his fellow tribunes, Marcus Octavius, who asserted his right to block the legislation on the point of passage. Although it had long been assumed that Octavius's absolute veto of the Sempronian law was fully consistent with Roman constitutional norms,⁸⁰ scholarship from the past half century has called this into question. Thus the classicist Ernst Badian concludes from a survey of Roman constitutional mores that by 133 a convention had solidified granting the people a right of final decision in the *comitia*, and allowing dissenting tribunes only an opportunity to delay the vote by a few days. 'The presentation of Tiberius' law straight to the People was . . . no breach of any convention we can recognise. What broke constitutional convention' was M. Octavius's brazen attempt at nullification.⁸¹ Tiberius responded with an even more drastic measure:

⁷⁹ Sall. *Cat.* 50.

⁸⁰ Plut. *T. Gracch.* 10.3: 'Now, the decisive power is in the hands of any tribune who interposes his veto; for the wishes of the majority avail nothing if one tribune is in opposition.'; App. *BC* 1.12: 'for among the Romans the negative veto always defeats an affirmative proposal'; Cic. *Mil.* 72.

⁸¹ Ernst Badian, 'Tiberius Gracchus and the Beginning of the Roman Revolution', *Aufstieg und Niedergang der römischen Welt*, 1.1, ed. H. Temporini (1972), pp. 668–731, p. 701. Cf. Lintott, *Constitution*, p. 125.

Tiberius issued an edict forbidding all the other magistrates to transact any public business until such time as the vote should be cast either for or against his law. He also put his private seal upon the temple of Saturn, in order that the quaestors might not take any money from its treasury or pay any into it, and he made proclamation that a penalty would be imposed upon such praetors as disobeyed, so that all magistrates grew fearful and ceased performing their several functions. Thereupon the men of property put on the garb of mourning and went about the forum in a pitiful and lowly guise; but in secret they plotted against the life of Tiberius and tried to raise a band of assassins to take him off.⁸²

We have already seen how the declaration of *iustitium* blurred the line between emergency rule and legislative obstruction in the late republic; Tiberius's command, though not technically an invocation of the *iustitium*, shared many of its most salient characteristics,⁸³ and demonstrates how closely extreme forms of obstruction could mirror the classical techniques of emergency rule. Tiberius's plenary veto on the activity of magistrates may have been illegal; precedents for it were scarce, and the unhinged reaction of the senatorial elite certainly suggests a belief that this pseudo-*iustitium* violated the rules of the game.⁸⁴ Whatever the legality of the manoeuvre, there is no mistaking the dynamic of escalation that it set in motion. After a referral to the senate failed to quell the controversy, Tiberius initiated proceedings to remove Marcus Octavius from office by popular vote in the *comitia*, stripping him of his sacrosanctity and thus his right of *intercessio*. Plutarch, generally sympathetic to Tiberius, opines that the deposition of Octavius was 'illegal and unseemly', though it seems more accurate to say, with the classicist C.F. Konrad, that 'Tiberius's move was without precedent — in response to Octavius's unprecedented use of the veto'.⁸⁵ One constitutional innovation spurred another, prompting cross-charges of illegality and usurpation, and

⁸² Plut. *T. Gracch.* 10.5–6.

⁸³ In particular, a *iustitium* typically involved the suspension of private as well as public business, and the halting of all deliberations in the senate; Tiberius's order affected only elected magistrates. It is worth noting that historians have tended to follow Mommsen's conjecture that Tiberius was invoking the *iustitium*, and that scholarship as recent as Lintott (1999) leaves this possibility open (see A.E. Astin, *Scipio Aemilianus* (Oxford, 1967), p. 347; Lintott, *Constitution*, p. 125). As a technical matter this is not probable (see Golden, *Crisis Management*, pp. 88–9), but for the purposes of the present conceptual exercise the distinction hardly matters; the fact remains that Tiberius responded to an act of obstruction in the *comitia* by replicating the major features of an official state of emergency.

⁸⁴ A similar tactic was threatened in 184 BC in a dispute between tribunes over the withdrawal of troops from Spain, but it never entered into effect; see Liv. 39.38.

⁸⁵ Plut. *T. Gracch.* 11.2; Cic. *Mil.* 72: *Ti. Gracchum, qui conlegae magistratum per seditionem abrogavit.* C.F. Konrad, 'From the Gracchi to the First Civil War', in *A Companion to the Roman Republic*, ed. Nathan Rosenstein and Robert Morstein-Marx (New York, 2007), pp. 167–89, p. 168.

setting in motion the famously lethal climax. Nothing better encapsulates the chaos of the late republic than the image of Scipio Nasica, his head wrapped in the purple fringe of his toga, descending on the Gracchans massed in the Capitol like an avenging angel of death. Yet Nasica's lawless vigilantism was only possible in a context where extraordinary acts of obstruction had already started to destabilize ordinary constitutional understandings.

In this respect, as in so many others, the career of Gaius Gracchus followed that of his brother. After his second tribunate ended in 122 Gaius sailed to North Africa to found a colony on the ruins of Carthage. Although Roman law strictly limited the number of citizens who could inhabit overseas territories — and although upon razing Carthage Scipio had consecrated it as sheep-pasturage — Gracchus and his colleague boldly invited six thousand citizens to populate the new settlement. Appian reports the ripple effects:

The functionaries who were still in Africa laying out the city wrote home that wolves had pulled up and scattered the boundary marks made by Gracchus and Fulvius, and the soothsayers considered this an ill omen for the colony. So the Senate summoned the comitia, in which it was proposed to repeal the law concerning the colony. When Gracchus and Fulvius saw their failure in this matter they were furious, and declared that the Senate had lied about the wolves. The boldest of the plebeians joined them, carrying daggers and proceeded to the Capitol, where the assembly was to be held in reference to the colony.⁸⁶

Gracchus's charges of falsification seem inarguable given the political stakes. But note the structure of this episode: the senate's cancellation of the colony via the politicized interpretation of a portent was provoked by Gracchus's own extra-legal circumvention of colonial law. Both sides swept aside inconvenient rules and distorted religious and civic norms in the service of their political programmes, with each illegal act calling forth a corresponding form of extra-legal obstruction. This vicious circle would ultimately engulf the republic; the extract of Appian quoted above ends just before a minor act of violence by one of Gracchus's armed followers prompted the senate to (for the first time) issue a 'last decree', authorizing the public killing of Gaius by the consul L. Opimius and the mass detention and execution of his partisans.⁸⁷ Gaius was not targeted by the reactionary elites of the senate *because* he dismissed their traditional prerogative to interpret omens. He earned their hatred with his egalitarian legislative agenda and his democratic manners. But it is a matter of historical record that the intensifying constitutional conflict over the

⁸⁶ App. *BC* 1.24. Plut. *C. Gracch.* 11 details other ill omens that accompanied the foundation: 'For the leading standard was caught by a gust of wind . . . the sacrificial victims lying on the altars were scattered by a hurricane and dispersed beyond the boundary-marks in the plan of the city, and the boundary-marks themselves were set upon by wolves.' Certain of these details seem rather improbable.

⁸⁷ Plut. *C. Gracch.* 35; App. *BC* 1.26.

senate's religious veto was the point from which Rome's unbounded executive first took flight.

At every critical juncture in the life of the republic extraordinary forms of *imperium* emerged in tandem with, and often in response to, novel modes of obfuscation and delay. A fragment from Dio's *Roman History* makes the complex interrelation of these powers fully legible. It opens in 62 BC with the populist tribune Metellus Nepos proposing that Pompey be recalled from Asia to suppress the remnants of the Catilinarian conspiracy:

Nepos had moved that Pompey, who was still in Asia, be summoned with his army, ostensibly for the purpose of bringing order out of the existing confusion, but really in the hope that he himself might through him gain power amid the disturbances he was causing, because Pompey favoured the multitude; but the senators prevented this motion from being adopted. In the first place, Cato and Quintus Minucius, the tribunes, vetoed the proposition and stopped the clerk who was reading the motion. Then when Nepos took the document to read it himself, they took it away, and when even then he undertook to speak extempore, they stopped his mouth. The result was that a battle waged with clubs and stones and even swords took place between them, in which some others joined, assisting one side or the other. Therefore the senators met in the senate-house that very day, changed their raiment and gave the consuls charge of the city, that it might suffer no harm. Then Nepos once more became afraid . . . After this occurrence not even Caesar, who was now praetor, ventured any further innovation.⁸⁸

The logic of escalation is on full display here. The senate, wary of what seemed to be a conspiracy to emasculate the optimates and unbalance the Roman constitution,⁸⁹ reacted by setting in motion a policy of total resistance, first through ordinary legal means (*intercessio*), and then through acts of legislative sabotage untethered from the *mos maiorum*. When these attempts to silence the *comitia* kindled an outburst of popular violence, the senate responded by issuing a 'last decree', temporarily intimidating the tribunes into compliance. In other words, (1) obstructive measures, often backed by the senate as a means of defusing crisis, actually tended to intensify them, and (2) for the Roman oligarchy, gridlock and unbounded consular *imperium* were not opposites but different means to the same end.

This pattern held, *mutatis mutandis*, at every significant moment of constitutional crisis. The 'vacation' from public meetings decreed by Sulla in 88, which as we have already seen was anchored in the juridical state of exception, was immediately denounced by the tribune Sulpicius as illegal; in the

⁸⁸ Dio 37.43. Cf. Suet. *Div. Jul.* 15–16 and Plut. *Cat.* 29.2, which unlike Dio are ambiguous as to whether the senate passed an *scu* or merely threatened to do so.

⁸⁹ Pompey then travelled in the *populares* orbit, and this act was intended to draw him further within it through flattery and alliance. Under Nepos's proposal Pompey would have retained his proconsular *imperium* within Rome's city limits, which was anathema to senate hardliners like M. Cato. Cf. Brennan, *Praetorship*, Vol. II, p. 473.

face of an armed mutiny of the people Sulla hastily rescinded the order and fled to Capua to organize a *coup d'état*, occupying the forum with his battalions and reforming the constitution by *diktat*.⁹⁰ When Bibulus was expelled from the forum by Caesar in 59 for his relentless obstruction, his first recourse was to appear in the senate and ask for a ‘last decree’; only when he was rebuffed by a divided chamber did he barricade himself in his house and declare the rest of the year a ‘sacred period’ during which no public assemblies could be held.⁹¹ The killing of Clodius by Milo on the Appian Way, depicted by Cicero as an act of state in defence of the optimiate republic,⁹² occurred against a background of filibuster and delay; as we have already seen, Milo attempted to bar Clodius from the aedileship in 56, and allies of Clodius retaliated in 53 by postponing the appointment of the interrex needed to administer consular elections, where Milo was standing as a candidate. The resulting tumult led to the appointment of Pompey as sole consul in 52, amidst whispers that he ought to be named dictator instead.⁹³

Its brief resurrection in 44–43 notwithstanding, the Ciceronian republic was effectively interred at the Battle of Pharsalus in 48, and given the arc of the republic’s final half-century, we should not be surprised that its cataclysmic end was propelled by a dispute over the proper boundaries of the constitutional veto. Caesar’s *casus belli* was the passage of a *senatus consultum* ordering him to disband his army in Gaul, registered over the objections of the tribunes Marcus Antonius and Quintus Cassius Longinus. The senatorial party had been signalling for some time that it did not consider tribunician *intercessio* valid in times of emergency, and Pompey had equated a veto under such circumstances to treason: ‘It made no difference whether Caesar was going to refuse to obey the senate, or whether he would put up someone to obstruct its decrees.’⁹⁴ Indeed, when Cassius and Antonius attempted to nullify the act in January 49, the senate declared them enemies of the state:

⁹⁰ App. *BC* 1.56–9; Plut. *Sull.* 1.9–10.

⁹¹ Suet. *Div. Jul.* 20.1 suggests that Bibulus engaged in ordinary *obnuntiatio* as soon as Caesar attempted to pass his agrarian law, only resorting to *spectio* when the senate refused to sanction a reprisal. The Latin — *qualia multa saepe in levioribus turbis decreta erant* — implies that Bibulus sought a declaration of emergency from the senate, which it seems reasonable to assume was a variant on the ‘last decree’. The accounts in Dio 38.6 and App. *BC* 2.11 are much more equivocal on whether Bibulus petitioned the senate for a *senatus consultum*.

⁹² Cic. *Mil.* 89 and *passim*.

⁹³ Asc. *Mil.* 95.2, 95.6. Cf. Dio 40.50. Consider also the episode recorded in Cic. *Sest.* 79, in which Sestius is violently attacked in the forum by the partisans of Clodius for attempting to dissolve a public meeting on auspicial grounds [*obnuntiavit consuli*].

⁹⁴ Cael. *Ad Fam.* 8.8.9; cf. 8.8.6 (a *senatus consultum* declared that ‘in the opinion of the senate, the man who so obstructs or forbids the debate, has acted against the interests of the Republic’).

This, then, was the decision reached [that Caesar must give up his commission in Gaul]; but Antony and Longinus did not allow any part of it to be ratified either on that day or the next. The rest, indignant at this, voted to change their apparel, but this measure, also, through the opposition of the same men, failed to be ratified. The senate's decision, however, was recorded and put into effect; for all straightway left the senate-house, and changed their dress, then came in again and proceeded to deliberate about punishing the tribunes . . . This, then, was the decision reached at that time; and the care of the city was committed to the consuls and to the other magistrates, as was the custom. Afterward the senators went outside the pomerium to Pompey himself, declared that there was a state of disorder, and delivered to him both the funds and the troops.⁹⁵

Caesar upbraided the senate for its unprecedented construction of the *scu* and accused it of executing a stealth coup on a flimsy pretence of danger. ‘There had been no instance’ of the *scu*, he insisted, ‘except in the case of pernicious laws, tribunicial violence, a popular secession, or the seizure of temples’. A veto by the tribunes of a bill concerning the distribution of provinces hardly warranted an internal state of emergency.⁹⁶ But for the party of order, the slow motion of the veto was a luxury that a martial republic could no longer afford. Cicero, addressing Marcus Antonius five years later in his venomous *Second Philippic*, recalled this ‘deadly veto’ of 49, painting Antonius’s determined obstruction as an act of treason.

What passionate or rash action was being taken by the senate when you — a single youth — forbade the whole order passing a decree concerning the safety of the State, and that not once, but several times, and refused all negotiations with you about the authority of the senate? Yet what was their aim except to prevent you from seeking the utter destruction and overthrow of the State?⁹⁷

⁹⁵ Dio 41.3. The mourning garb that the senators showily adopt is the exterior sign of a *tumultus*.

⁹⁶ Caes. *BC* 1.7. Cf. Lintott, *Violence*, p. 152 on the unsettled legal status of a tribunician veto of a ‘last decree’.

⁹⁷ Cic. *Phil.* 2.52. Cf. Dio. 45.27: ‘Well, then, when he was tribune, he first of all prevented you from accomplishing satisfactorily the business you then had in hand, by shouting and bawling and alone of all the people opposing the public peace of the state, until you became vexed and because of his conduct passed the vote that you did.’ Cic. *Phil.* 1.25, directly addressing the crisis of 44, takes a very different line on the tribunician veto: ‘But I ask why should I or any of you, Conscription Fathers, fear bad laws while we have good tribunes of the people? We have men ready to interpose their veto; men ready to defend the State by the sanctity of their office: we ought to be free from fear. “What vetoes”, he [Antonius] says, “what sanctities are you telling me of?” Those of course in which the safety of the State is involved. “We disregard all that, and think it quite out of date and foolish; the Forum will be fenced in: all approaches will be closed: armed men will be stationed on guard at many points”. What then? What is transacted in this manner will be law . . . ?’ As we will see in Part

It is true that a state of emergency had never been invoked to dissolve an ordinary veto of the tribunes, Cicero conceded, but when determined opposition threatens to immobilize and deadlock the *res publica*, its defences must spring to life.

III Cicero's Constitution

In a recent essay, the intellectual historian Benjamin Straumann fastens on a critical point about Roman emergency politics:

[I]t is obvious that when discussing dictatorship and emergency powers these terms gain their significance from staying in a tension with some sort of normal constitutional order. If there were no such thing, it would seem difficult to understand in what sense phenomena such as dictatorship, emergency powers or *imperia extraordinaria* should be described as extraordinary or exceptional.⁹⁸

The question, then, is whether the republic possessed a framework of higher-order principles by which the rectitude of legislation and political actions could be judged. Straumann contends that it did, and that we can locate its lineaments in Cicero's *De legibus*, where the orator posits certain natural rights (to property, to freedom) as beyond the reach of any ordinary legislature, and intimates that legislation could be struck for failing to comport with these rights. Cicero's repeated appeals to 'fundamental' rights are, for Straumann, a confirmation that Rome had a 'normal constitutional order' in the conventional sense, and that it fell apart only when it began to be challenged by charismatic leaders wielding discretionary executive authority. Straumann is right to question whether the late republic is really a good fit for the modern idea of 'emergency' government. But he is rather too quick to answer yes; as I argue below, the relationship between Rome's emergency institutions and Cicero's 'higher law' constitution is a good deal stranger than Straumann lets on. First, because Cicero's vision of higher law constitutionalism — which would have conferred unprecedented powers on the college of augurs — was itself a sharp break with existing norms and practices. To say that this higher law constitution was repeatedly abrogated in Rome's final crisis misses the fact that it was also first articulated in response to that crisis; and second, because Cicero did not expect the higher law constitution of the *De legibus* to be enforced at all times, but only at certain critical

III, far from rejecting the veto power, Cicero made it the nucleus of his ideal constitution in the *De legibus*. The contradiction is not mere forensic opportunism; for Cicero and many of his interlocutors, Rome's carefully calibrated network of checks and balances shared many of the characteristics of its extraordinary executive institutions. To be legitimate they had to be exercised at the right moment, with an eye towards the salvation of the state.

⁹⁸ Straumann, 'Constitutional Thought', p. 281.

moments, when the timely obstruction of legislative or executive action might be necessary to rescue the state. Ciceronian constitutionalism was not an *alternative* to emergency politics, as Straumann presumes, but a continuation by other means.

To begin with, while Straumann concentrates on a series of relatively familiar proto-liberal rights as the basis of Roman constitutionalism, it seems clear that no legislation was ever struck for abridging the rights of freemen. It is telling that when the senate ignored or annulled redistributive measures, it did so not for violating a vaporous ‘right to property’, but on the strictly procedural ground that the law had been passed *per vim et contra auspicia*.⁹⁹ Cicero makes the centrality of religious-procedural rules to Roman constitutionalism readily apparent in his *Pro Sestio*, lamenting the passage of the *lex Clodia de obnuntiatione*:

In the presence and sight of these same consuls, a law was passed that the *auspices* were to have no validity; that no one was to interrupt any proceeding by declaring that he was taking them; that no one was to have the power of arresting a law by his veto; that it should be lawful to pass a law on all days of festival; that the Aelian and Fufian laws should have no validity. And who is there who can fail to see that by that one motion, the entire constitution [*universam rem publicam*] was destroyed?¹⁰⁰

This is tendentious in the extreme; indeed it is possible that the *lex Clodia* emerged stillborn and never entered into effect.¹⁰¹ Nevertheless, it is noteworthy that Cicero identifies the *universam rem publicam* with the senatorial veto, and the senatorial veto with the enforcement of religious ritual;¹⁰² and — not for the last time, as we will see — Cicero ties the constitutional project to class politics, declaring in his triumphant speech to the senate after being recalled from exile that the Aelian law was ‘designed by our ancestors to be a sure shield for the constitution against tribunician assaults’.¹⁰³

This does not necessarily mean that we should understand his view of procedure as plated armour protecting some deeper core of constitutional rights — at times it seems that in Cicero’s constitutional imagination there is *only* procedure. This comes across most clearly in another extract from the *Pro Sestio*,

⁹⁹ The major text here is Lintott, *Violence*, pp. 132–48. Though the legal formula is *per vim . . .* Lintott notes that ‘violence . . . in itself was not a technical ground for annulment’ (p. 145). Of course the belief in a moral right to property was the rudder driving the ship, but it is critical that the senate never claimed the right to nullify legislation on the basis of property rights alone.

¹⁰⁰ Cic. *Sest.* 33. Cf. Cic. *Dom.* 2: ‘the crushing of constitutional government’.

¹⁰¹ See Jörg Rüpke, *Religion in Republican Rome* (Philadelphia, 2011), p. 123.

¹⁰² Cf. Cic. *In Vat.* 23: ‘the republic, which was originally founded in obedience to *auspices* . . .’.

¹⁰³ Cic. *Red.* 11.

in which Cicero describes the attempted obstruction of the law recalling him from exile.

For if the praetor, who said that he had watched for signs from the sky, had announced an evil omen to Fabricius, the State would have received a blow, but one which it could survive; if a colleague had put a veto on Fabricius, he would have injured the State, but would have done so by a constitutional procedure [*rei publicae iure*].¹⁰⁴

The veto of a law, even a manifestly good law, must be respected if it follows proper procedures. Similarly, it seems in the *Fifth Philippic* that Cicero is willing to countenance even laws with which he disagrees violently, provided they are promulgated through proper channels.

For these reasons it is my judgment that the laws which Marcus Antonius is said to have carried were all carried by violence and in contravention of the auspices, and that the people are not bound by those laws. If Marcus Antonius is said to have carried a law confirming Caesar's acts or abolishing the dictatorship in perpetuity or founding colonies on lands, I think it proper that the same laws be carried afresh with due observance of the auspices so that they may bind the people.¹⁰⁵

Yet Cicero questions whether it is possible to obtain favourable auspices for substantively unjust laws. Just a few paragraphs earlier in the *Fifth Philippic*, as Cicero sarcastically rails against Caesar's *lex agraria*, which would have 'given all of Italy to that moderate man Lucius Antonius to distribute', he pointedly asks not only whether the Roman people will accept such a wicked statute, but whether it is even possible to pass a law of that nature in conformity with the auspices [*per auspicia ferri potuit?*].¹⁰⁶ The startling implication is that nature may refuse to cooperate with populist programmes of redistribution; in Cicero's arch formulation, 'the immortal gods have often put down unjust assertions of the people's will by means of the auspices'.¹⁰⁷ The pretext of a thunderstorm or a flock of birds might be prerequisite, though we have already seen how easily such 'disturbances' could be improvised. Indeed,

¹⁰⁴ Cic. *Sest.* 78. For a summary of the controversy surrounding the MSS text of this paragraph, resolving it in favour of the conventional interpretation, see Robert A. Kaster, *Cicero: Speech on Behalf of Publius Sestius* (Oxford, 2006), pp. 290–1.

¹⁰⁵ Cic. *Phil.* 5.10. Cf. Cic. *De Prov.* 45; Cic. *De Dom.* 42.

¹⁰⁶ Cic. *Phil.* 5.7.

¹⁰⁷ Cic. *De Leg.* 3.27. Although this may seem to point towards a bad faith manipulation of the auspices on Cicero's part, in Cicero's Stoic cosmology the universe itself is governed by the *logos* of natural law, so that there is nothing very unusual about nature 'cooperating' with natural law ideals of private property. Thus these statements are not necessarily evidence that Cicero thought the Roman constitution was substantive as well as procedural. I owe this insight to a conversation with Eric Nelson; see also Cic. *De Nat. Deor.* 2.23 and the commentary of Marcia L. Colish, *The Stoic Tradition from Antiquity to the Early Middle Ages, Vol. I* (Leiden, 1990), pp. 109–25.

Cicero affirms in the *Philippics* that even blatantly falsified auspices, while regrettable, must be obeyed.¹⁰⁸

More importantly, Straumann's exclusive reliance on the writings of Cicero to warrant the claim of a Roman 'higher law' constitution overlooks the extent to which this constitutional commentary was intended (and understood) as polemical.¹⁰⁹ His special devotion to the augural college was the annex of his optimate politics. To bring his vision more sharply into focus we should turn to the blueprint traced in the *De legibus*, where the priesthood is granted a startling prominence in constitutional affairs.

But the highest and most important authority in the State is that of the *augurs*, to whom is accorded great influence . . . For if we consider their legal rights, what power is greater than that of adjourning assemblies and meetings convened by the highest officials, with or without *imperium*, or that of declaring null and void the acts of assemblies presided over by such officials. What is of graver import than the abandonment of any business already begun, if a single augur says, 'On another day'? What power is more impressive than that of forcing the consuls to resign their offices? What right is more sacred than that of giving or refusing permission to hold an assembly of the people or of the plebeians, or that of abrogating laws illegally passed? Thus the Titian Law was annulled by a decree of the college of augurs, and the Livian Laws by the wise direction of Philippus, a consul and augur. Indeed, no act of any magistrate at home or in the field can have any validity for any person without their authority.¹¹⁰

Because of his conspicuous role in establishing the legal basis for the *scu* and the *hostis* declaration, Cicero is often viewed as one of the intellectual architects of late republican emergency government. So it is striking to observe how little attention he gives to extraordinary executive measures in his utopian writings,¹¹¹ and how much emphasis he instead places on extraordinary forms of obstruction, veto and delay. Lily Ross Taylor compares the college to a supreme court,¹¹² but judicial metaphors seem far too weak to capture the extensive prerogatives he assigns its members, combining a court's power to review and repeal legislation, the executive power to dismiss magistrates or to nullify their actions, and the traditional right of the crown to prorogue parliament. With the unfettered discretionary power to bring the operations of government to a standstill, Cicero's college of augurs is a kind of photographic negative of the dictatorship, sitting in permanent session as

¹⁰⁸ Cic. *Phil.* 2.88.

¹⁰⁹ On the difficulties inherent in relying on Ciceronian 'evidence' more generally, see Andrew Lintott, 'The Crisis of the Republic: Sources and Source-Problems', in *Cambridge Ancient History, Vol. IX*, ed. J.A. Crook *et al.* (Cambridge, 1994), pp. 2–3.

¹¹⁰ Cic. *De leg.* 2.31.

¹¹¹ The *De legibus* provides for a dictatorship in time of war, but makes no mention of the *scu*.

¹¹² Taylor, *Party Politics*, p. 84.

an emergency brake on the machinery of state. But, as we have seen, efforts at religious obstruction were often contested and overturned in the political arena; it was at best an imperfect instrument for taming popular sovereignty. The *De legibus* perfects it: ‘Whatever an augur shall declare to be unjust, unholy, pernicious, or ill-omened, shall be null and void; and whosoever yields not obedience shall be put to death’.¹¹³ Remarkably, Cicero’s reaction to the intensifying atmosphere of crisis in the late republic was not to facilitate executive dispatch or to streamline the channels of lawmaking, but to multiply veto points and to strengthen the institutions of attrition, delay and constitutional review. He was especially keen to ensure that, like the commands of the dictator and the resolutions of the senate, these obstructive orders could be enforced at the point of a sword.

Cicero was rewriting the Roman constitution with brio, and it is striking how many of his edits were designed both to make Rome a more ‘constitutional’ state, in precisely the sense that Straumann understands, and to advance the political project of the optimates. There was no precedent in the Roman constitution for his proposition that the ‘right of taking the auspices’ be granted to ‘all magistrates’; the predictable effect of this reform would have been to trap controversial legislation in an endless maze of veto points.¹¹⁴ Similarly, to insist with Cicero that certain statutes lack the binding force of law — and that they can be overturned by the college of augurs — is to place a political authority above the nominally sovereign *comitia*, and thus to upend a constitutional understanding that had prevailed since the *lex Hortensia*.¹¹⁵ It is no accident that Cicero fixates on the college of augurs; it was at the time of the *De legibus* the only major institution in Rome that appointed members by cooptation rather than election, making it a reliable instrument for curbing popular excess.¹¹⁶ Of course it goes without saying that in the actual Roman republic, as opposed to Cicero’s vellum fantasy, augurs could not act independent of elected magistrates, their decrees had no force without ratification by the senate, and disobeying their commands was not a capital offence. It is

¹¹³ Cic. *De leg.* 2.21. Cf. Elizabeth Rawson, *Roman Culture and Society* (Oxford, 1991), p. 140, who reads this passage as a suggestion that Caesar ought to have been put to death for disregarding the *spectio* of Bibulus in 59.

¹¹⁴ Cic. *De leg.* 2.27. Cf. Andrew R. Dyck, *A Commentary on Cicero, De Legibus* (Ann Arbor, 2004), pp. 516–17.

¹¹⁵ The strongest argument that Cicero is envisioning a dramatic expansion of the power of the augurate is in David D. Mehl, *Comprehending Cicero’s De Legibus* (unpublished PhD dissertation, University of Virginia, 1999), pp. 209–11. The conclusions in Dyck, *De Legibus*, pp. 342–4 are more measured, but Dyck ultimately agrees that Cicero is rewriting the Roman constitution to place the college of augurs at its centre.

¹¹⁶ It is no accident that Cicero uses the example of ‘rules a band of robbers might pass in their assembly’ to illustrate his claim that certain statutes do not ‘deserve to be called laws’. Cic. *De leg.* 3.12.

not difficult to map Cicero's enthusiasm for higher-law constitutionalism onto his suspicion of the *comitia* and his desire to turn back the rising tide of redistributive demands.

Cicero's interest in fortifying the architecture of obstruction is tied to his aphorism that 'it is better that a good measure should fail than that a bad one should be allowed to pass'.¹¹⁷ But there is more to it than this. Hence his insistence that the college of augurs will police magistrates as well as popular assemblies, retaining authority over consuls even in time of war [*nihil domi, nihil militae*]. Note also his careful reminder that dictators are to be 'appointed under favourable auspices',¹¹⁸ and the insistence in his *Eleventh Philippic* that 'an extraordinary command smacks of "popular" politics' [*extraordinarium imperium populare atque ventosum est*].¹¹⁹ Radiating through these passages is a desire to subject newly-emerging 'extraordinary' powers to newly-elaborated 'constitutional' controls. It may be, then, that historians have misunderstood the physics of Rome's ultimate crisis: not an exogenous shock to the system that fractured its foundations, but an escalating dynamic in which every new form of *imperium* elicited an equally unprecedented form of *obnuntiatio*; and the line between them often blurred into indistinction, as in Cicero's statement in *De senectute* that 'whatever was done for the safety of the Republic [*pro rei publicae salute*] was done under the best auspices, and whatever was inimical to the Republic was against the auspices'.¹²⁰ Or, in the more direct rendering of the *De legibus*: 'it is the duty of a good augur to remember that he should come to the rescue of the State in great emergencies' [*maximis rei publicae temporibus*], nullifying pernicious legislation, dismissing populist magistrates and suspending the sovereign assemblies of the people when they prove irresponsible.¹²¹ Cicero's ardent desire is to channel the potentially destabilizing rhetoric of *salus populi* away from the unpredictable offices that formed the spine of Rome's emergency state, and towards a higher law constitution that might be invoked *in extremis* against those he considered a shiftless and untrustworthy rabble. Straumann presents the constitutional project and the emergency project as opposites — understandably, given the terms of our contemporary debates. But it must be acknowledged that for Cicero the continuities were just as important as the departures.

Conclusion: A Dialectic of Emergency

The proliferation of emergency powers — and the corresponding deterioration of the middle republic's intricate system of checks and balances — is

¹¹⁷ *Ibid.*, 3.42.

¹¹⁸ *Ibid.*, 3.8.

¹¹⁹ Cic. *Phil.* 11.17. Cf. the essential commentary at Wirszubski, *Libertas*, pp. 61–5.

¹²⁰ Cic. *De Senec.* 11 (approvingly quoting Q. Fabius).

¹²¹ Cic. *De leg.* 3.43. Cf. *ibid.*, 2.33 (importance of taking the auspices *ad rei publica tempus*).

widely believed to have contributed to the eclipse of the republic and the rise of the Principate.¹²² There is no denying the force of this assessment; in the ninety years between the tribunate of Tiberius Gracchus and the formation of the Second Triumvirate Rome became the staging ground for a number of experiments in extraordinary government, and it seems obvious that these mutations were eventually incorporated into the DNA of the evolving imperial constitution. But this familiar history overlooks a critical element of late republican politics: the simultaneous introduction of new forms of legislative and executive obstruction. Even as old constitutional barriers to action were swept aside in the increasingly violent contest between *optimates* and *populares*, new configurations of checks and balances were being improvised to take their place, often with no clear legal warrant, occasionally drawing on the same idiom of state necessity and *salus populi*. To disregard this intricate dialectic of obstruction and emergency, to fixate obsessively on the *scu* and military dictatorship without asking how these extra-constitutional apparitions came to haunt the Roman forum, is to overlook the tension that gave Rome's constitution its specific structure and shape.

One reason that theorists have focused so narrowly on Rome's emergency institutions may be that they offer such an irresistible analogue for our own times. The dictatorship, the last decree, Pompey's unbounded commission to eliminate piracy: one needn't strain to see the modern equivalents in our permanent national security state, or to confirm the comforting liberal nostrum that unchecked executive authority inevitably corrodes republican liberty. It is less flattering of our prejudices, but more useful for thinking through our present political predicament, to consider the other lessons that these episodes bring to the fore: that the appeal to the safety of the state can sometimes be misused to justify radical forms of *inaction*, that engineered paralysis can pose as great a threat to collective self-government as extra-constitutional usurpation, and that the executive *coup d'état* that we fear may be invited by the deliberative, highly articulated constitution that we favour. One writer who perceived this point clearly was the German jurist Carl Schmitt, who laid the groundwork for his programme of plebiscitary executive leadership by decrying 'the destructive methods of parliamentary obstruction' and 'the misuse of parliamentary immunities and privileges by a radical opposition'.¹²³ One might recall in this formulation Caesar's insistence that his civil war against Pompey was waged not against the Roman people but against 'the factious dominance of a few men', an intractable minority of twenty-two who

¹²² See in particular Wirszubski, *Libertas*, pp. 62 and 96; Mortimer N.S. Sellers, 'The Roman Republic and the French and American Revolutions', in *Cambridge Companion to the Roman Republic*, ed. Harriet I. Flower (Cambridge, 2004), pp. 347–64, p. 356. For a sceptical view, see Gruen, *Last Generation*, pp. 534–43 (Appendix III).

¹²³ Carl Schmitt, *Crisis of Parliamentary Democracy* (1923), trans. Ellen Kennedy (Cambridge, 1985), p. 19.

OBSTRUCTION & EMERGENCY IN REPUBLICAN ROME 451

had hijacked the levers of power in the senate, bringing Rome's class tensions to their bloody meridian.¹²⁴

It has become commonplace in the modern West to observe that we inhabit a 'state of exception'. The etiology is murky, but the symptoms are clear enough: a predominance of executive over legislative government, internal 'security' measures over individual rights, and unilateral self-defence over the collective security envisioned in the UN Charter. We might ask, prompted by the experience of Rome, whether the modern tendency towards speed of execution and concentrated power has been shadowed by a rising tolerance of minority vetoes, legislative obstruction, and extensive post-hoc judicial oversight, as well as a tendency on the part of our intellectual class to pretend that these features form an intrinsic part of a legitimate democracy. It is not difficult to interpret the most far-reaching innovations of the American executive in the twenty-first century — the circumvention of confirmation in appointments, the evasion of due process at the Guantanamo military base, and the whispered threat to raise the debt ceiling unilaterally, on grounds of 'necessity' — as strategic responses to equally novel and unprecedented forms of obstruction and interference by the Senate and the Supreme Court. One must at least pose the question of whether, like Rome in the twilight of its republic, we are locked into a disastrous competition between the active and obstructive branches of government that leaves us permanently on the precipice of constitutional crisis, and threatens to transform the orderly minuet of checks and balances into a wheeling *danse macabre*.

Adam Lebovitz

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¹²⁴ Caes. BC 1.22. Cf. T.P. Wiseman, 'The Ethics of Murder', in *Remembering the Roman Republic* (Oxford, 2009), p. 192.