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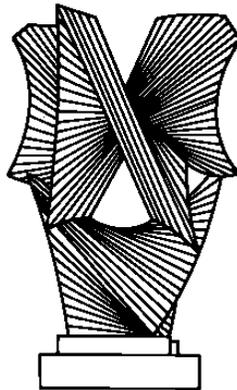
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## THE CONSTITUTION OF THE ROMAN REPUBLIC: A POLITICAL ECONOMY PERSPECTIVE

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The Constitution of the Roman Republic: A Political Economy Perspective  
Eric A. Posner<sup>1</sup>

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*Abstract.* The constitution of the Roman Republic featured a system of checks and balances that would eventually influence the American founders, yet it had very different characteristics from the system of separation of powers that the founders created. The Roman senate gave advice but did not legislate; the people voted directly on bills and appointments in popular assemblies; and a group of magistrates, led by a pair of consuls, proposed bills, brought prosecutions, served as judges, led military forces, and performed other governmental functions. This paper analyzes the Roman constitution from the perspective of agency theory, and argues that the extensive checks and balances, which were intended to prevent the recurrence of monarchy, may have gone too far. Suitable for an earlier period in which the population was small and the political class was homogenous, the constitution proved unworkable when Rome acquired a vast, diverse empire. The lessons of Roman constitutionalism for the American constitution are also discussed.

The Roman Republic, which is conventionally dated from 509 to 27 B.C.,<sup>2</sup> had an unwritten constitution that controlled its political system. The constitution established a series of institutions (such as the senate) and offices (such as the two consulships), and defined their powers; it determined the rights of citizens and eligibility for citizenship; it addressed the role of religion in public life; it specified proceedings for lawmaking and adjudication. There was no formal amendment procedure, so constitutional norms changed frequently and often imperceptibly (as in Britain), and the constitution evolved a great deal over almost five hundred years. But there was a fair degree of continuity, and ancient authors recognized the difference between constitutional norms and other legal and political norms, making modern identification of a Roman constitution possible.

The modern scholarship on the Roman constitution is mainly descriptive and historical, with some speculation about how particular norms may have contributed to the prosperity and stability of the Republic, and others may have contributed to its collapse. Historians generally observe that Roman constitutional norms mediated between an upper class and the masses, and distributed executive power among multiple offices in order to forestall a return to the monarchical system that existed in the sixth century B.C. No one has tried to analyze the Roman constitution within a modern political economy framework, however, and the purpose of this paper is to develop such an analysis.

The central idea of this framework is that of agency costs. Constitutions do many things but all constitutions manage agency costs. The people (the principal) assign government officials (the agents) the task of supplying public goods and redistributing wealth. The agents

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<sup>2</sup> Historians disagree about the precise date. Augustus became Emperor in 27 B.C., but the end of the Republic could be dated as early as the unconstitutional dictatorship of Sulla in 81, or the dictatorships of Caesar in the 40s.

have interests that are not fully aligned with those of the people; the purpose of a constitution is to give agents incentives to act in the interests of the people, that is, to minimize agency costs. A large literature discusses the way that elections, judicial review, separation of powers, and other modern political institutions may (or may not) minimize agency costs.<sup>3</sup> I address the Roman constitution from this perspective, examining ways that Roman institutions might have minimized agency costs that existed in the ancient world. I do not claim that the Roman constitutional system was optimal or efficient; my more modest goal is to describe ways in which the system may have addressed the problem of agency costs, albeit frequently in imperfect or questionable ways.

The most notable feature of the Roman system from a modern perspective was the elaborate set of precautions against the accumulation of executive power in a single person. The goal was to prevent the recurrence of monarchy but the risk of checks and balances is that they paralyze governance. I argue that gridlock did not occur during the Republic's first four centuries because the population was relatively small and homogenous, so political agents could bargain around the institutional checks and balances when necessary for the sake of public security. But as conquered foreign populations streamed into the city, the population became large and heterogeneous. Most of the fabulous wealth resulting from conquest enriched the elites, not ordinary people, resulting in divergence of interests between the upper and lower classes. Governance became subject to gridlock, setting the stage for extra-constitutional behavior in the last century and eventually dictatorship.

There are three reasons why such an analysis contributes to the literature. First, classicists have been cautious about speculating about the functions of the Roman constitution because of the paucity of sources. Nonetheless, they have tried to make inferences which reflect informal rational choice reasoning but without, as far as I can tell, any knowledge of the vast modern literature on political economy. One purpose of this paper is to bring to bear recent ideas from one discipline on the discussions of specialists in another.

Second, the Roman constitution has influenced modern political institutions. American revolutionaries (and, subsequently, French revolutionaries) were obsessed with ancient Rome.<sup>4</sup> References to the heroes and villains of ancient Rome are ubiquitous in founding-era pamphlets, letters, orations, and books. Publius wrote the Federalist Papers, the veterans of the Revolutionary War created the Society of Cincinnatus, etc., etc. A more fine-grained understanding of the Roman constitution will contribute to our understanding of the founders' constitutional thinking and to constitutional theory in general.

Third, modern constitutional legal theory has taken a comparative turn, and a new, rich literature has produced rigorous accounts of foreign constitutions, often from the perspective of rational choice.<sup>5</sup> One benefit of this approach is that it helps stimulate ideas for constitutional

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<sup>3</sup> See, e.g., DENNIS C. MUELLER, PUBLIC CHOICE III (2003).

<sup>4</sup> See CARL J. RICHARD, THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT 12-38 (1994).

<sup>5</sup> See, e.g., ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS (2009); CONSTITUTIONAL POLITICAL ECONOMY (STEFAN VOIGT ED. 2005); David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism* (unpub. m.s., 2010).

design and evolution in the United States. The Roman constitution provides a fresh example, which is notable because of its stark differences from modern constitutional systems.

Before I turn to the analysis, I need to offer more than the usual number of caveats. The secondary literature contains many internal disagreements about the meaning of sources, which are themselves extremely sparse and not always to be trusted. Only the final years of the Republic are well-documented, thanks in large part to Cicero's private letters to his friends, and the survival of speeches and other contemporary materials. For earlier periods, historians rely mainly on Polybius, who was a foreigner with a foreign perspective and a particular ideological and philosophical agenda; Livy, who relied on earlier historical sources that are now lost, and, writing in the Augustan age, needed to avoid making claims that would have displeased Augustus; and mostly ambiguous archeological evidence. Augustus, Rome's first emperor, and later republicans like Cicero idealized the old days and emphasized the decadence of the late republic period—Cicero to justify a return to an era supposedly dominated by the elites, Augustus to justify his abolition of late republican institutions.

In order to make progress with a political economy analysis, I will have to engage in extreme simplification. My claims about Roman constitutional norms should all be taken in this spirit; because I will not reproduce the controversies in the literature, interested readers will need to consult the sources.

On top of the problem of interpreting old sources that could be self-serving and that are rife with gaps, there is the problem of interpreting an unwritten constitution. Even with a modern system such as Britain's, it is never entirely clear when a norm is constitutional or merely legal. In such cases, claims about the meaning of the constitution are hard to separate from ideological or self-interested wishful thinking—as is, of course, even the case with written constitutions. However, that Rome did have a constitution, and that Romans themselves believed themselves to have a constitution, is not open to serious doubt<sup>6</sup>—at least, until the last century of its existence.<sup>7</sup>

In addition, it is impossible to identify a single Roman constitution over the five hundred year period of the Roman Republic.<sup>8</sup> There was significant change and disruption during this period. During its last century, the Republic was in a state of nearly continuous crisis and sometimes civil war. The secondary sources that describe the Roman constitution focus on the third and second centuries B.C., when the political order was relatively stable, while also identifying norms that persisted over time and some historical variation during other periods, especially the final fifty years. I follow them but deemphasize the historical variation, which is complex and elusive.<sup>9</sup>

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<sup>6</sup> See, e.g., T. Corey Brennan, *Power and Process Under the Republican "Constitution,"* in *THE CAMBRIDGE COMPANION TO THE ROMAN REPUBLIC* 31 (Harriet I. Flower ed. 2004).

<sup>7</sup> See Ronald Syme, *THE ROMAN REVOLUTION* 15 (1939) (calling the Roman constitution in its last century a "sham" behind which a group of powerful families exercised power).

<sup>8</sup> Cf. Harriet Flower, *ROMAN REPUBLICS* (2009).

<sup>9</sup> I rely mainly on Andrew Lintott, *THE CONSTITUTION OF THE ROMAN REPUBLIC* (1999), whose description of the Roman constitution is both comprehensive and modern, and Frank Frost Abbott, *A HISTORY AND DESCRIPTION OF ROMAN POLITICAL INSTITUTIONS* (1901).

## I. A Thumbnail Sketch of the Roman Constitution

The U.S. constitution embodies a system of separation of powers, with a presidency that executes the laws, a Congress that legislates, and a judiciary that interprets the laws. Federalist structures guarantee some autonomy for states. The source of authority is the people who can amend the constitution by following prescribed procedures. The Roman system is quite different. Most scholarly discussions divide it into three main elements: the senate, the magistrates, and the assemblies. The senate is politically important as the locus for political discussion but has mainly advisory powers in a formal sense. The magistrates have the major executive and administrative powers, but also serve as judges, and initiate legislation by summoning assemblies of the people and submitting bills to them for their approval. The people, acting in assemblies, pass bills, elect magistrates, and serve certain judicial functions. Roman provinces had no autonomy but were governed by representatives of the government. Table 1 provides an overview of the Roman Constitution as it existed in the mid- to late Republic. The information provided is approximate, and will be discussed in more detail in the text below.

Table 1: The Roman Constitution

<b>Institution</b>		<b>Eligibility</b>	<b>Term</b>	<b>Powers</b>
Senate		Former magistrate; good character	Lifetime	Advisory; finances
Magistrates (number by end of Republic)	Consul (2)	Former praetor	One year	Military command; head of state; power to convene assemblies and propose legislation
	Praetor (16)	Former quaestor	One year	Military command; judicial authority; power to convene assemblies and propose legislation
	Quaestor (40)	Citizen	One year	Public finances; assistants to other magistrates; power to convene assemblies and propose legislation; public prosecutors
	Tribune (10)	Plebeian	One year	Power to convene assemblies and propose legislation; intercessio
	Plebeian Aedile (2)	Plebeian	One year	Public infrastructure, games
	Curule Aedile (2)	Citizen	One year	Public infrastructure, games
	Censor (2)	Citizen	Five years	Maintaining census; enrolling senate; public contracts
	Dictator	Citizen	Six months	Maintaining order in emergencies; appointed on an ad hoc basis
Assemblies	Centuriate	Citizen	Ad hoc	General legislation; elected consuls, praetors, and censurs; capital trials
	Tribal	Citizen	Ad hoc	General legislation; elected other magistrates; trials
	Plebeian	Plebeian	Ad hoc	General legislation; trials

### A. The Senate

The senate was the central institution in Roman politics, but its formal powers were few. It did not pass legislation or appoint magistrates, for example. As a matter of formal constitutional law, the senate was mainly an advisory institution whose members received delegations, digested reports, debated, and issued decrees, which were not legally binding.<sup>10</sup> Nonetheless, in practice the senate had a considerable degree of authority during most of its existence. Over the last one hundred years of the Republic, the senate lost power to magistrates with popular followings.<sup>11</sup>

The senate's decrees did not have formal legal force, but they frequently guided subsequent legislation enacted by the plebeian assembly, which was the main legislative body.<sup>12</sup> Magistrates needed the support of the senate because the senate consisted of important, experienced men.<sup>13</sup> The senate also provided a forum in which the magistrates divided authority among each other so as to avoid jurisdictional conflicts.<sup>14</sup> The senate received delegations from foreign countries and negotiated treaties with them, and had a significant role in public finances.<sup>15</sup>

Magistrates summoned the senate for meetings and set the agenda.<sup>16</sup> A magistrate made a proposal and asked the senate's advice. Senators were supposed to debate the issue presented by the magistrate but could digress. Filibusters were possible because the meeting had to be ended at nightfall. Eventually, the presiding magistrate called for a vote on his proposal (for example, that a decree be issued), and the senators voted for or against. The motion could be vetoed by a tribune or a magistrate of equal or greater rank. If a decree survived the veto, it was recorded.

The membership of the senate varied over time, but it was always in the hundreds. Because senators were often absent, meetings could take place in the low hundreds.<sup>17</sup> Senators were not subject to a formal property qualification but probably had to have substantial property (or belong to a family that did) in order to hold office.<sup>18</sup> For one thing, they were not paid and were barred from commercial activities.<sup>19</sup> For another, they were drawn from the ranks of magistrates (also unpaid), who needed substantial resources to win electoral campaigns and

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<sup>10</sup> See, e.g., Lintott, *supra*, at 66 (describing the senate as an advisory, rather than administrative body, which primarily debated issues and advised the magistrates).

<sup>11</sup> MARY T. BOATWRIGHT, DANIEL J. GARGOLA, & RICHARD J.A. TALBERT, *THE ROMANS: FROM VILLAGE TO EMPIRE* 136 (2004).

<sup>12</sup> Brennan, *supra*, at 62; see also Lintott, *supra*, at 87-88.

<sup>13</sup> See Lintott, *supra*, at 86 (describing the senate as a "repository of accumulated experience of political office and military command").

<sup>14</sup> This was particularly important because different magistrates were not required to act in unison and colleagues frequently sought to obstruct the work of other magistrates. See Lintott, *supra*, at 100-101.

<sup>15</sup> See Abbott, *supra*, at 234-39.

<sup>16</sup> For an overview of the procedures governing debates, as well as the lawmaking process more generally, in the Republican era, see *id.* at 225-32; see also Lintott, *supra*, at 75-85.

<sup>17</sup> The number of senators who served at any particular time is unknown. Records of quorum calls and senate votes suggest that there were typically between 150 and 500 senators. See Lintott, *supra*, at 68-70

<sup>18</sup> See Lintott, *supra*, at 68-72.

<sup>19</sup> Senators were generally barred from pursuing occupations that placed a "moral stigma" on the individual, such as gladiatorial combat or acting. Senators were also generally barred from holding occupations that paid a salary or wage, or which required the constant personal attention of a senator. See Abbott, *supra*, at 223.

discharge some of their duties (for example, aediles were expected to finance the games).<sup>20</sup> Senators were appointed by consuls earlier in the Republic and by censors later in the Republic. As noted, they were typically ex-magistrates. Censors determined that an individual possessed good moral character before appointing him to the senate; censors could also remove senators who had engaged in gross moral turpitude, including serious crimes. Otherwise, senators served for life.<sup>21</sup>

## B. Offices

Day-to-day governance occurred through the magistrates. The major magistrates were the consuls, praetors, tribunes, aediles, and censors. Each office had more than one occupant, as discussed below. Each type of magistrate possessed authority over a different area of life; their authority included executive, legislative, and judicial powers, as we understand them today.<sup>22</sup> Madison, following Montesquieu, warned that breach of separation of powers was a recipe for tyranny.<sup>23</sup> But the Roman magistrates were subject to significant checks. Their terms were short; they were elected by the people (in most cases); they had to obtain the approval of the people for certain actions such as legislation; they could be tried and punished for abuse of their office after their term has expired; and they were constantly subject to public scrutiny because they had to act publicly in most cases.<sup>24</sup> They could act independently but some amount of cooperation was necessary so that they did not undermine each other's actions; in addition, magistrates could veto actions of other magistrates of equal or lesser rank as long as the vetoing magistrate was present.<sup>25</sup> All of the magistracies were open to plebeians as well as patricians by the mid-Republic.<sup>26</sup> Magistrates could and often did simultaneously serve as senators, akin to the parliamentary system and unlike the American system of separation of powers.<sup>27</sup>

### 1. The Magistracies: Powers

#### a. Consuls

The chief magistrate was the consul. In fact, two consuls were in office at the same time. The consul's term was one year. Until Sulla reformed the office in 81 B.C., the consul's major role was as military commander. Thus, the two consuls would leave the city in order to conduct military campaigns.<sup>28</sup> Before leaving the city and after returning to the city, the consul performed a number of civilian functions. He might conduct elections of other officials such as censors; he might discuss issues in the senate; he might propose legislation; he might preside

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<sup>20</sup> Abbott, *supra*, at 222.

<sup>21</sup> Lintott, *supra*, at 71-72.

<sup>22</sup> Indeed, some scholars argue that different government activities were spread across different magistrates in order to avoid conflicts between magistrates. See Lintott, *supra*, at 100.

<sup>23</sup> See THE FEDERALIST NO. 10 (James Madison).

<sup>24</sup> See, e.g., Abbott, *supra*, at 167-73 (discussing the electoral limits, qualifications, and other constraints on magistrates); see also Lintott, *supra*, at 99-102 (describing the province system as a means for controlling the powers of consuls).

<sup>25</sup> Boatwright, *supra*, at 137.

<sup>26</sup> Abbott, *supra*, at 167.

<sup>27</sup> See, e.g., Lintott, *supra*, at 68 (noting that senators frequently were drawn from the ranks of the higher magistrates and the aediles).

<sup>28</sup> Lintott, *supra*, at 104-05.

over certain trials as judge; he could appoint a dictator (although the senate appears to have had some role in this appointment as well<sup>29</sup>). After 81 B.C., consuls' military role was deemphasized. Others (often called proconsuls) were appointed to conduct military campaigns, and consuls stayed in Rome and discharged their civilian duties. Consuls could veto each other's actions but preferred to cooperate.<sup>30</sup> To avoid conflict, consuls took turns holding the power to set the agenda, alternating by month.<sup>31</sup>

#### b. Praetors

Praetors were junior to consuls but nonetheless very powerful magistrates as well. They also served single one-year terms.<sup>32</sup> Originally, there was only one praetor; the number was increased to two around 242 B.C.; in 81 B.C. the number appears to have been increased to eight by Sulla. By the end of the Republic, the number had been increased to sixteen.<sup>33</sup> Praetors had most of the functions of the consul but not all—for example, they could not appoint dictators. They were junior to consuls so they had to step aside when consuls rejected their policies or actions. Praetors served as governors of provinces, military adjuncts to consuls, or military commanders. By the mid- to late Republic, all praetors had judicial functions.<sup>34</sup> They presided over civil and criminal trials, which gave them the ability to influence the outcomes, though verdicts would be rendered by juries. Many such trials touched on questions of official misfeasance.<sup>35</sup>

#### c. Tribunes

Tribunes, unlike consuls and praetors, could only be plebeians, and were elected by plebeians.<sup>36</sup> By the late Republic, ten tribunes served one-year terms. Tribunes were understood to serve the plebeians' interests and to defend them against the patricians.<sup>37</sup> They presided over plebeian assemblies that could legislate and conduct certain political prosecutions, and had the important power to obstruct or veto proceedings in other bodies. Tribunes could prevent the senate from convening, veto senate decrees, and stop other magistrates from performing their duties ("*intercessio*") such as proposing legislation or taking actions against citizens such as arrests and prosecutions. Their right to intercede was not absolute, but its contours were uncertain.<sup>38</sup>

#### d. Aediles

There were two pairs of aediles, plebeian and curule, who were elected in different ways, as discussed below. However, the two types of aediles had similar functions. They had

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<sup>29</sup> Abbott, *supra* at 240.

<sup>30</sup> For an overview of the transformation of the consuls' military role over time, see Lintott, *supra*, at 114-15.

<sup>31</sup> Abbott, *supra* at 176.

<sup>32</sup> Abbott, *supra*, at 156.

<sup>33</sup> Lintott, *supra*, at 107-08.

<sup>34</sup> Abbott, *supra*, at 189-90.

<sup>35</sup> Lintott, *supra*, at 108-09.

<sup>36</sup> Abbott, *supra*, at 196.

<sup>37</sup> Abbott, *supra*, at 196.

<sup>38</sup> See Abbott, *supra*, at 198-99 (recognizing the lack of clarity over restrictions on *intercessio*).

responsibility for maintaining public buildings such as temples, streets and the water supply, and public order. They staged the public games. They also served as prosecutors in trials involving public law.<sup>39</sup>

e. Quaestors

Quaestors dealt with public finances. Urban quaestors managed the public treasury, making payments and pursuing tax and other obligations.<sup>40</sup> Consular quaestors managed army pay and finances.<sup>41</sup> The number of quaestors increased from four in 421 B.C. to 40 in 45 B.C.;<sup>42</sup> they served one-year terms. Quaestors were assigned to particular administrative posts, for example, for a province.<sup>43</sup> Some were assistants to other magistrates. Quaestors were assigned by the senate, presumably in consultation with the senior magistrates.<sup>44</sup>

f. Censors

Censors kept track of the Roman people and their property. The two censors had terms that varied over the history of the Republic, but lasted around five years in the last two centuries.<sup>45</sup> In addition to conducting the census—that is, counting up the people, ranking them by property holdings, and determining their tribal membership—censors passed judgment on them. People who had showed cowardice in battle, or did not cultivate their lands, or committed some serious crime or moral offense, might be condemned by the censors, in which case they could not serve in the Senate or occupy important offices. Censors also entered public contracts on behalf of Rome, both for public works and for taxation.<sup>46</sup>

g. Dictators

Unlike the other offices, the dictatorship was a temporary position (sometimes six months) that was created in emergencies. The dictator was appointed (technically, nominated) by the consul (and/or the senate); sometimes he was popularly elected.<sup>47</sup> The dictator was given military command for the purpose of addressing a military threat or suppressing a rebellion. The authority of the dictator may have been absolute, or it may have been subject to some limitations (including the tribune's veto). He also may have had to share some *de facto* authority with his second-in-command, the separately appointed Master of the Horse. But clearly he was the supreme leader while in office. The dictatorship was not used after the Second Punic War ended in 201 B.C., until Sulla in 81 B.C. and Caesar beginning in 48 B.C. During this period, the Senate used other devices to authorize consuls to take extraordinary action against threats.<sup>48</sup>

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<sup>39</sup> For an overview of aediles, *see* Lintott, *supra*, at 129-33.

<sup>40</sup> Abbott, *supra*, at 208.

<sup>41</sup> Lintott, *supra*, at 135.

<sup>42</sup> Abbott, *supra* at 207.

<sup>43</sup> Lintott, *supra*, at 135.

<sup>44</sup> Lintott, *supra*, at 136.

<sup>45</sup> Abbott, *supra*, at 115.

<sup>46</sup> Abbott, *supra*, at 117-20.

<sup>47</sup> Abbott, *supra*, at 110-11.

<sup>48</sup> Abbott, *supra*, at 111-13.

## h. Other Magistrates and Officials

There were numerous lower-ranked magistrates, most of them elected for one-year terms or approved on an *ad hoc* basis. They performed various functions, for example, distributing lands, serving as judges in trials, cleaning roads, and managing the mint.<sup>49</sup> Religious officials were also important. The pontifex maximus headed the College of Pontiffs, the most important religious body in ancient Rome. It had control over sacred spaces, public religious rituals, aspects of family law, and the calendar.<sup>50</sup> The pontifex maximus was often a politician who was not necessarily pious (Julius Caesar, for example), and the powers of that office could be used for political purposes—for example, to adjust the calendar so as to extend a consul's term of office.<sup>51</sup> Other religious officials had the power to delay assemblies and other state functions for religious purposes.

Unlike in most modern systems, political officials often had religious functions. Before calling assemblies, consuls were required to consult the augurs, who would examine the flights of birds, the entrails of sacrificed animals, and other signs of divine favor or displeasure. Augurs could delay or nullify political actions if the omens were not auspicious. Some evidence suggests that the political class manipulated these religious rites for political effect. Cicero, for example, says that magistrates might adjourn an assembly citing unfavorable portents if they detected a disordered mood among the crowd or believed that the assembly would be politically “useless.”<sup>52</sup>

Provincial governors should also be mentioned. These officials had extraordinary power, including military power. They were not subject to restrictions the way that magistrates in Rome were, except they could be relieved of their positions and prosecuted for serious misconduct. One of Cicero's earliest victories as a lawyer was over Gaius Verres, the former governor of Sicily, whom he prosecuted for corruption. The earliest provincial governors were praetors; later, provincial governorships were given for one year to consuls and praetors at the end of their term.

## 2. Eligibility and Elections

A law of 180 B.C. prescribed certain qualifications for obtaining the senior offices. One had to hold the quaestorship before becoming a praetor, and the praetorship before becoming a consul. (This was known as the *cursus honorum*.<sup>53</sup>) Offices could not be held consecutively but at two-year intervals. There were also age requirements: 30 before becoming a quaestor, 36 before becoming an aedile, 39 before becoming a praetor, and 42 before becoming a consul. The tribuneship did not play a role in the *cursus honorum* because it was open only to plebeians. The other offices were presumably deemed insufficiently important to serve as prerequisites to higher positions.

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<sup>49</sup> Lintott, *supra*, at 137-44.

<sup>50</sup> Lintott, *supra*, at 183-85, 189.

<sup>51</sup> See Leonhard Schmitz, *Pontifex*, in A DICTIONARY OF GREEK AND ROMAN ANTIQUITIES 939-42 (William Smith, ed., 1875).

<sup>52</sup> Cicero, *Of the Laws*, in TREATISE OF M.T. CICERO 473 (C.D. YOUNGE, ED. 1876) at 473.

<sup>53</sup> For an overview of the *cursus honorum*, see Abbott, *supra*, at 168-69.

All of the offices I have discussed were filled by election except for the dictatorship, which was normally filled by consular (or senatorial) appointment. Consuls, praetors, and censors were elected in the centuriate assembly. Quaestors were elected in the tribal assembly. The plebeian aediles were elected in plebeian assemblies presided over by the tribune, while the curule aediles were elected in tribal assemblies presided over by a consul or praetor.<sup>54</sup> The pontifex maximus was at some times elected by a popular assembly and at other times appointed by the college of pontiffs.<sup>55</sup> Most of the offices were open to plebeians as well as patricians. Earlier in the Republic many offices were barred to plebeians, but these prohibitions were eliminated over time.<sup>56</sup> Some of the offices (the tribune, at least one of the consuls, at least one of the censors) were open only to plebeians.<sup>57</sup> There were two plebeian aediles; the two curule aediles could be either plebeian or patrician.<sup>58</sup> However, consuls were proposed by the senate, and the senate normally (although not always) proposed consuls from the ranks of the patricians who dominated that body.

Recall that senators were not elected. However, because senators were drawn from the ranks of former elected officeholders, and because they were selected by elected officials such as consuls and censors (also by two dictators, Sulla and Caesar), popular elections indirectly influenced the composition of the senate as well.

There was no formal property requirement to be a magistrate,<sup>59</sup> but only wealthy people could have afforded to be a magistrate. Magistrates did not draw a salary and some of them were expected to finance their public tasks out of their own pocket. For example, aediles paid for the games.<sup>60</sup> Other magistrates with access to the public treasure were expected to post security using their own funds.<sup>61</sup> And election campaigns were expensive. Candidates could obtain contributions or loans from others, but spent a great deal of their own money as well in order to secure election.<sup>62</sup>

### C. Legislation (Herein, Assemblies)

Laws were enacted through the joint action of a magistrate and an assembly. Magistrates—consuls, praetors, aediles, tribunes, or dictators—summoned assemblies and proposed bills. Because assemblies did not follow a calendar, notices of meetings were posted in advance. The assemblies met in public spaces chosen by the magistrate or determined by tradition. Because so many different officials could call assemblies, there was a danger of

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<sup>54</sup> For a comprehensive discussion of the eligibility and electoral requirements of magistrates, see Abbott, *supra*, at 169-70, 171. Assemblies are discussed, *infra*.

<sup>55</sup> Lintott, *supra*, at 184.

<sup>56</sup> Abbott, *supra*, at 167.

<sup>57</sup> Abbott, *supra*, at 196, 202.

<sup>58</sup> Abbott, *supra*, at 203-04.

<sup>59</sup> *But see* Claude Nicolet, *THE WORLD OF THE CITIZEN IN REPUBLICAN ROME* 318 (1989), who says it was, while acknowledging that conventional wisdom is otherwise. It may be that he and other authors disagree about what was *de facto* and what was *de jure*.

<sup>60</sup> Abbott, *supra*, at 205-06.

<sup>61</sup> Nicolet, *supra*, at 4.

<sup>62</sup> See Abbott, *supra*, at 170 (noting that candidates for office often paid for public games and other public events in order to gain favor with the electorate and to gain notoriety).

conflict—that multiple assemblies would be called at the same time. However, there was a rule that once an assembly began, another assembly could not be summoned; further, consuls could take over the assembly summoned by another magistrate, as could praetors unless the assembly was summoned by a consul.<sup>63</sup> Magistrates asked members of the assembly for their opinions but the latter had no right to speak.<sup>64</sup>

Legislation required the summoning of two types of assemblies. In the *contio*, speeches were made and debate occurred, but there was no voting. These assemblies were relatively informal; nonvoters such as slaves and women attended.<sup>65</sup> After the *contio* was dissolved, voting took place in the *comitia*. This second type of assembly was regimented.<sup>66</sup> Voters collected in an area organized into voting units (tribes or centuries) and marched forward to cast votes orally or (later) by using ballots.<sup>67</sup>

In the middle and late Republic, there were two major types of *comitia*: *comitia centuriata* (centuriate assemblies) and *comitia tributa* (tribal assemblies).<sup>68</sup> Centuriate assemblies were organized into centuries, groups of men ranked by wealth.<sup>69</sup> The organization had its origin in military structure: wealthier men who could purchase horses and armor belonged to the century with the highest rank (*equites*); slightly less wealthy men who could afford only armor held the next highest rank; and so on, down to men who could afford only light weaponry like slings. The smaller number of wealthy people were dispersed among a larger number of centuries than poorer people were; thus, the *equites* (which were essentially officers) and the first class of *pedites* (the wealthiest of the five classes of enlisted men) composed a majority of the total number of centuries, and thus could determine voting outcomes if they were united, even though these people were less numerous than the membership in the other four classes of *pedites*.<sup>70</sup>

Tribal assemblies were based on tribal membership. Every Roman citizen belonged to a tribe, which was essentially an arbitrary division of the Roman public based on ancient and probably fictive kinship groupings.<sup>71</sup> People inherited their tribal status from their fathers, except for freedmen who were generally shunted into the overpopulated urban tribes.<sup>72</sup> Voting took place by tribe. If a majority of a tribe supported a bill or other measure, then that tribe was deemed a *yea* vote; the measure passed if a majority of tribes supported it. The centuriate and tribal assemblies included men of both classes—patricians and plebeians—but there was also a separate type of tribal assembly known as the plebeian assembly that included only plebeians and was presided over by the tribune.<sup>73</sup>

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<sup>63</sup> Lintott, *supra*, at 43-44.

<sup>64</sup> Lintott, *supra*, at 41.

<sup>65</sup> Abbott, *supra*, at 252.

<sup>66</sup> Lintott, *supra*, at 42-43.

<sup>67</sup> LILY ROSS TAYLOR, ROMAN VOTING ASSEMBLIES 3-8, 111 (1966).

<sup>68</sup> A third type of assembly, the *comitia curiata*, was no longer used by the later Republic. See Lintott, *supra*, at 49.

<sup>69</sup> Lintott, *supra*, at 55.

<sup>70</sup> Taylor, *supra* at 84-87.

<sup>71</sup> Abbott, *supra*, at 250, 260.

<sup>72</sup> Lintott, *supra*, at 50-51.

<sup>73</sup> See Taylor, *supra* at 3-8.

Both types of assembly had general legislative powers in principle, but in practice the plebeian assembly enacted the bulk of legislation. The centuriate assembly alone had the power to declare war and certain other powers related to military organization; it also elected consuls, praetors, and censors; and it conducted trials where the punishment was death.<sup>74</sup> The tribal assembly voted on general legislation and elected other magistrates. In some situations, the tribes voted simultaneously, but in legislative assemblies the tribes voted sequentially, with the results of each vote announced before the next. The order of voting was determined by lot.<sup>75</sup>

The account so far might give a misleading impression that the system for enacting legislation was highly democratic, even biased in favor of the lower class. As noted, most legislation was enacted by plebeian assembly, from which patricians were excluded; and the plebeian tribune, acting on behalf of the plebeians, could veto legislation in the centuriate and tribal assemblies where the patricians could vote.

However, several factors favored the patricians. First, the senate, which was dominated by patricians, and the chief magistrates, who were usually patricians, set the legislative agenda. Second, plebeians wealthy and successful enough to become tribunes surely found that their interests had become aligned with those of the patricians, who sought to conserve Roman traditions and maintain the existing distribution of property. Third, the assemblies were not entirely democratic in character. In the centuriate assembly, people were assigned to centuries on the basis of wealth, and the wealthier centuries had priority in voting.<sup>76</sup> In the tribal assembly, the urban tribes were overpopulated with the poor (including recently freed slaves).<sup>77</sup> Thus, the urban tribes could be outvoted by the less populated rural tribes which were dominated by landowners. On the other hand, members of the urban tribes were more likely to be present, and sheer numbers and the ever-present threat of mob violence, must have made a difference.<sup>78</sup> Many patricians, notably Clodius (who actually transformed himself into a plebeian by engineering his “adoption” by a plebeian), came to power by promising to redistribute wealth to the poor, and used the mob effectively.<sup>79</sup> Fourth, as a practical matter, only wealthy people could afford to be magistrates.<sup>80</sup> Some positions—for example, judicial offices after 123 B.C.—became the monopoly of the knightly class (*equites*).<sup>81</sup> Fifth, the *demos* excluded women and slaves, and slaves were a large majority of the population. It also excluded conquered peoples up until the Social War of 91-89 B.C., after which people living on the Italian peninsula (but by no means all conquered people) gradually were granted citizenship.<sup>82</sup>

#### D. Administration

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<sup>74</sup> Abbott, *supra*, at 257-58; Brennan, *supra* at 62.

<sup>75</sup> Taylor, *supra* at 70, 76.

<sup>76</sup> Taylor, *supra* at 59, 87 (quoting Livy: “Gradations were established so that no one would seem to be excluded from the vote and yet all the strength would rest with the leading men of the state.”).

<sup>77</sup> Taylor, *supra*, at 64-65.

<sup>78</sup> Taylor, *supra*, at 54.

<sup>79</sup> See Abbott, *supra*, at 113.

<sup>80</sup> See *supra*.

<sup>81</sup> Nicolet, *supra*, at 5.

<sup>82</sup> Nicolet, *supra*, at 23.

Administrative functions were fulfilled by the magistrates. The senate and the assemblies played no role. The magistrates had almost complete administrative discretion outside of Rome—in the case of military commands and civilian leadership positions in provinces.<sup>83</sup> Checks were political and judicial. Magistrates checked magistrates of equal and junior rank; tribunes could check all magistrates; and the senate exercised influence over magistrates as well.<sup>84</sup> Magistrates could also be sued for violating Roman law.

Inside Rome, the story was different. As we have seen, aediles, quaestors, and censors had responsibility for different aspects of municipal administration—aediles, for public works and games; quaestors for public finances; and censors for government contracts. Numerous minor magistrates had other responsibilities—conducting executions, watching for fires, and so forth.<sup>85</sup> They had to cooperate with each other, and with the tribunes, who could often obstruct their activities, and presumably with consuls and praetors as well.<sup>86</sup>

Although the magistrates were assisted by clerks, secretaries, and other personnel, the bureaucracy was tiny by modern standards. The city limits of Republican Rome had a population in the hundreds of thousands, but did not have a police force or a prison system.<sup>87</sup> The huge bureaucracy associated with ancient Rome was not developed until the later Empire.<sup>88</sup> In the Republic, the weakness of the administrative system resulted in corruption and periods of mob rule.<sup>89</sup> Cicero makes the interesting observation that tribuneships help diminish the volatility of mob rule by providing ordinary people with leaders who can discipline the mob and prevent it from acting irrationally. For Cicero, the reduction of the dangers of mob rule justified the modest loss of control by patricians over policy outcomes.<sup>90</sup>

## E. Criminal Judicial Process

For most of the history of the Republic, Romans did not have permanent courts; instead, tribunals were established on an ad hoc basis to investigate and try people suspected of particular crimes.<sup>91</sup> Starting in the third century, the murky details about Roman criminal procedure become clearer. Tribunes, aediles, and quaestors prosecuted defendants in assemblies; defendants mounted a defense; and the assembly voted to convict or acquit.<sup>92</sup> In the second century and later, permanent courts were established where prosecutions were conducted by private citizens while magistrates presided as judges, and juries composed of *equites* and/or senators rendered verdicts.<sup>93</sup>

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<sup>83</sup> Lintott, *supra*, at 94-95, 104-06.

<sup>84</sup> Lintott, *supra*, at 99-102.

<sup>85</sup> Lintott, *supra*, 137-44.

<sup>86</sup> Lintott, *supra*, at 100-101.

<sup>87</sup> Nicolet, *supra* at 325.

<sup>88</sup> Abbott, *supra*, at 359-72.

<sup>89</sup> See Lintott, *supra*, at 213 (emphasizing the “violence and corruption which characterized politics” in Rome in the last decades of the republic).

<sup>90</sup> Cicero, *Of the Republic*, in THE TREATISES OF M.T. CICERO, *supra*, at 471.

<sup>91</sup> Lintott, *supra*, at 73-74.

<sup>92</sup> Lintott, *supra* at 153.

<sup>93</sup> Lintott, *supra* at 159; Nicolet, *supra* at 335.

## F. Rights and Constitutional Change

Roman constitutional law did not contain judicially enforceable individual rights in a modern sense. Nonetheless, there were recognizable rights, which might be called constitutional or political rights.<sup>94</sup> One such right, which can be found in the Twelve Tables, was that a Roman citizen cannot be executed without a trial.<sup>95</sup> This right seems to have been taken very seriously. Roman citizens were rarely punished by execution at all. Cicero, as consul, did order the execution of several Roman citizens without a trial, citing emergency. But although his decision was supported at the time by the senate, he was later threatened with prosecution for this act and was driven into exile.<sup>96</sup>

Other rights included the right to participate in assemblies, or in general to political participation;<sup>97</sup> the right to occupy the various magistracies; and perhaps various rights to judicial process. Citizens threatened with coercion by magistrates had the right to appeal to popular assemblies or the tribunes (*provocatio*).<sup>98</sup> After permanent courts were established, the right to *provocatio* became a right to judicial process. This right is thought to be a precursor of habeas corpus.<sup>99</sup>

## II. Analysis

### A. The Literature on Roman Constitutionalism

In trying to explain the development of the Roman constitution, historians emphasize two themes: Romans' fear of executive power, and the conflict between the elites and the masses. The fear of executive power explains the multitude of checks and balances in the Roman constitution. The conflict between the elites and the masses explains why certain institutions were oriented toward one group or the other.

The Republic emerged from a rebellion against a monarchical system, and Romans sought to prevent a relapse. It was for this reason that the Roman constitution established such a weak executive. Two consuls shared power with each other, and with lesser magistrates who had independent sources of power. The consuls could not make laws without popular approval; they could not punish people without securing the consent of a jury. They could serve only one-year terms, which prevented them from consolidating power and establishing permanent dictatorships. They were subject to oversight by the senate, and interference from religious figures. These urgent constitutional efforts to check executive power lend poignancy to the collapse of republican institutions and their replacement with an absolute monarchy in the first century B.C.

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<sup>94</sup> See Lintott, *supra*, at 199, 244 (arguing that Roman citizenship primarily “implied personal liberty,” which ceased as soon as a citizen left the borders of the Republic).

<sup>95</sup> Lintott, *supra*, at 149.

<sup>96</sup> Abbott, *supra*, at 103.

<sup>97</sup> Lintott, *supra*, at 202-03.

<sup>98</sup> Lintott, *supra* at 33, 98-99.

<sup>99</sup> See Nicolet, *supra* at 320-21, who emphasizes the significance of these legal protections for Roman self-identity.

The other theme is the conflict between the elites and the masses—or to be more precise, the conflict between patricians and wealthy plebeians (often *equites*) who sought to maintain the status quo, and the ordinary plebeians and their occasional patrician leader who sought to redistribute wealth and power to the masses. The first group came to be known as the *optimates*, the second as the *populares*. In the early centuries of the Republic, the consuls and other magistrates were subject to the authority of the Senate, which was dominated by the elites. And most offices were open only to patricians. But the elites needed the support of ordinary people who supplied the bulk of manpower for military adventures and who were otherwise a potential source of instability. To secure their support, the patricians yielded more and more rights to the plebeians over the centuries. By the late Republic, certain offices were reserved for plebeians—such as the tribuneship—while most other offices were open to members of both classes. The plebeian assembly could even make law binding on the entire population.

That class conflict was central to Roman politics is the settled wisdom among historians.<sup>100</sup> The ancient sources suggest a long-term trend in favor of the people. However, how much power the patricians actually yielded to the lower class over time is the subject of considerable dispute. On the one hand, patron-client relationships persisted throughout the entire period: if ordinary people depended on the nobles for subsidies, contacts, advice, and other benefits, they might not have been able to exercise much political independence.<sup>101</sup> It took a vast amount of wealth to conduct election campaigns (which frequently involved bribery) and hold offices. It was not just that magistrates were unpaid; they also were expected to use their own funds for the public good. A small number of noble families dominated the governing class for centuries; families maintained their political power by entering alliances with each other, often ratified through the marriage of their children. These families also dominated the religious cults, which had a great deal of influence over political life.<sup>102</sup> Plebeians wealthy enough to win office often had the conservative outlook of the patricians.<sup>103</sup> Cicero frequently gives the impression that the tribuneship and other institutions that favor the plebeians were granted to them in response to popular pressure but did not actually matter. The public was happy with the constitutional forms of political power, which could cause annoyance but not affect political outcomes in a substantial way.<sup>104</sup>

On the other hand, the plebeians had the significant advantage of numbers. And, indeed, the poorest of the plebeians exercised disproportionate influence through the threat of street violence: only a fraction of Roman citizens actually lived in Rome and those citizens were among the very poorest.<sup>105</sup> Patricians needed the support of plebeians because they supplied the soldiers so important for Rome's defense and imperial glory. Many plebeians did attain high office—and both plebeian and patrician politicians rose to power by appealing to plebeian interests. Elections were meaningful; assemblies mattered. Aside from the changes in the Roman constitution that progressively favored the plebeians, significant substantive laws were

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<sup>100</sup> See G.E.M. DE STE. CROIX, *THE CLASS STRUGGLE IN THE ANCIENT GREEK WORLD: FROM THE ARCHAIC AGE TO THE ARAB CONQUESTS* (1998).

<sup>101</sup> See MARTIN GILBERT, *HISTORY OF ROME 70-71* (1978).

<sup>102</sup> Gilbert, *supra*, at 71.

<sup>103</sup> The claim that the Roman Republic was essentially oligarchic seems to be the standard view; see, e.g., S.E. FINER, *1 THE HISTORY OF GOVERNMENT* 387 (1997). For a more recent version, see Nicolet, *supra*.

<sup>104</sup> See, e.g., Cicero, *Of the Republic*, *supra*, at 341-42; Cicero, *Of the Laws*, *supra*, at 468-77.

<sup>105</sup> Finer, *supra*, at 426-27.

enacted that benefited plebeians—from land reform to the distribution of free food. Patron-client relationships, bribery, and private financing of public goods can also be reinterpreted as reflections of plebeian power. Why would patrician politicians risk bankruptcy to pay off plebeians if they had no political power?<sup>106</sup> The fact that plebeians secured substantive laws that benefited them, and that their efforts to secure these laws usually respected constitutional forms, suggests that the Roman political system was not a pure oligarchy. One might call it democratic republic that heavily favored an aristocracy or an oligarchy with significant democratic elements.

The two themes—fear of executive power and the conflict between the elites and the masses—are closely linked in Roman history. Roman elites feared popular demagogues from their own class—individuals who could amass power by promising to redistribute wealth from the nobles to the plebeians and hence securing their support in the assemblies. It seems clear that this fear lay behind many of the constitutional norms. If those norms were respected, it would be impossible even for a successful general or charismatic demagogue to establish a personal dictatorship. He could not be consul for more than one year; he would have to share power with others; as a member of the senate, he had just one vote; and so forth. The problem turned out to be that constitutional traditions were not powerful enough to prevent this from happening. People could obtain power through extra-constitutional means—for example, by relying on soldiers and other supporters to threaten violence. This is what eventually happened, starting with Sulla in 82 and culminating with Caesar. But only after more than 400 years of extraordinary political achievement.

## B. A Political Economy Perspective

### 1. The Agency Model

Agency models are extremely abstract, and can be applied to any case where one person (the agent) acts in a way that benefits another person (the principal). Typically, scholars study cases where the principal has some way to control the agent, so then the analysis focuses on methods the principal can use to control the agent at least cost, that is, minimize agency costs. In the simplest models, there is a single agent and a single principal; but the models have been extended to cases where there are multiple agents and multiple principals.

Political economy models typically simplify by treating the “government” as a single agent and the “people” as a single principle, but of course these are abstractions, and these assumptions are frequently relaxed. A government consists of multiple offices and institutions, and these can be treated as separate agents; the principal might sometimes be the people or a subset of the people or an institution like a political party or a branch of government.

In the case of Rome, the initial impulse is to treat the Roman “government” as the agent, and the Roman “people” as the principal. The people control the government through the constitution which is a set of self-enforcing norms that dictate what the government can do.<sup>107</sup> I

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<sup>106</sup> For a defense of the democratic element in the Roman constitution, see FERGUS MILLAR, *THE ROMAN REPUBLIC AND THE AUGUSTAN REVOLUTION* chs. 4-5 (2002).

<sup>107</sup> On self-enforcing constitutions, see Barry R. Weingast, *Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century* (unpub. m.s., 2003).

will generally rely on this simplification in my discussion of the Roman constitution, but I must start by noting the many ways in which it is inaccurate.

The question of who is the principal in the Roman Republic turns out to be more difficult than it first appears. The vast majority of people living in Rome and its territories were slaves, women, and conquered people who had not been given citizenship. It might be more accurate to say that the government was the agent of Roman citizens. But even this claim might not be sustainable. Most of the people were poorly educated, and impoverished; it might be doubted whether they could wield much control over the sophisticated and vastly wealthy elites, many of whom exerted power through patronage and private guards and gangs. On the other hand, Rome had a complex class structure. Patricians formed the highest class but, as so often happens with the upper classes, they were reluctant to engage in commercial activity, and so they lost influence to merchants and farmers who amassed wealth. These people entered the class of *equites*, who had certain political privileges. “New men” like Cicero could obtain semi-aristocratic status by becoming consuls. Slaves were at the very bottom, but many managed to buy themselves out of slavery or were granted freedom by their masters. Freedmen had lower status than the free born, but some became immensely wealthy and influential nonetheless. People from the provinces form yet another group; they had few rights at home, when ruled by provincial governors, but brought a different perspective and often acquired citizenship when they came to Rome. For a class system, ordinary notions of the principal’s “ideal point” might be inappropriate.

If, as is often claimed, Rome was an oligarchy,<sup>108</sup> the proper assumption is that the government served as an agent for the upper class or some segment of it—the patricians and wealthy *equites*, the *optimates*, or perhaps a few great families. That is the impression one gets, for example, from Cicero, who sometimes writes as though ordinary people are a hostile force that must be propitiated by the government for the sake of the nobility; at other times, however, he treats the people as the principal albeit one that does not, and should not, have any control over the agent, which is wiser than they are.<sup>109</sup> On the oligarchic view, the principal consists of the relevant oligarchy; the government maximizes the utility of its members but also must pay other members of society whatever the minimum is necessary to prevent them from engaging in civil war or causing a domestic disturbance.<sup>110</sup>

The Romans themselves appeared to have yet another view of the principal: the Senate and Populus of Rome—the Latin acronym is SPQR.<sup>111</sup> This name implies two principals—the Senate and the people. These two principals are separate yet share sovereignty; compare “we the people” in the United States and the Athenian demos, which imply a single principal. One suspects that “Senate” stands in for the upper class—the patrician and wealthy plebeian families that dominated Rome. Imagine, then, that two principals form a joint venture and expect the the

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<sup>108</sup> See *supra* note \_\_\_\_.

<sup>109</sup> See generally, Cicero, *Of the Republic*, *supra*.

<sup>110</sup> Compare, for example, ALBERTO ALESINA & ENRICO SPOLAORE, *THE SIZE OF NATIONS* (2003), who assume that a dictator maximizes the utility of a constituency while subject to an “insurrection constraint”—he must ensure that others are above some minimum level of welfare.

<sup>111</sup> “SPQR” can be seen on public infrastructure throughout the modern city of Rome.

governmental agents to serve their joint interests. This again suggests a state with a form of government that lies somewhere between oligarchy and democracy.

Similar complications arise when we turn our attention to the agent. It is at best a rough approximation to say that Rome had a “government.” It lacked the enormous, permanent, hierarchical bureaucracy that is the essential character of government in modern states. (It did, however, have a large army, albeit sometimes supplemented by forces paid out of the personal funds of individuals like Crassus during the slave revolt of 71 B.C., and toward the end of the Republic, mainly loyal to its commanders, who rewarded soldiers with booty.) As we have seen, the government comprised officials who were not required to cooperate with each other and were not subject to the control of a single person or institution. Magistrates could not rely on a police force to keep order, and often resorted to private guards, private gangs, and even private armies. Still, it seems fair to say that over time the Roman government acted in a largely consistent and coherent way, thanks in large part to the senate and perhaps the small size of the elite.

The Roman government, like governments at all times and places, did two things: it supplied public goods and it redistributed wealth. The public goods included security against external enemies; the rewards of conquest, including loot, tribute, and taxation; suppression of rebellion; the maintenance of public order; the construction and maintenance of roads, sewer systems, viaducts, and other infrastructure; adjudication of private disputes; and enforcement of property and contract rights. This type of public-good provision fits easily into the principal-agent model. The various cleavages among the population manifested themselves mainly in distributional conflict. Everyone agreed on the need for security; they disagreed about who should pay for it. Everyone welcomed conquest, but disagreed about how the spoils should be distributed. These distributional conflicts led to constitutional controversies because when ordinary people did not get what they regarded as their fair share, they sought more representation in government or stronger roles for their representatives. Nonetheless, everyone had an interest in a government that would maximize the social surplus.

My focus, however, will be agency costs. The political economy literature identifies a number of ways of reducing agency costs. I will focus on (1) methods for selecting government officials; (2) division of powers among offices and institutions; and (3) rewarding and sanctioning government officials.

## 2. Selection of Government Officials

Government agents such as magistrates may make decisions that are contrary to the public interest because they lack competence or because they have preferences that deviate from those of the principal. The Roman constitution addressed this problem in three ways: qualification rules for office; elections; and screening by the censors.

The major qualification rules were the age restrictions and the *cursus honorum*. These rules ensured that young, inexperienced people could not hold high office, and thus reduced the risk that an incompetent person might be elected. The *cursus honorum* ensured that people with mainstream preferences became consul, for people with idiosyncratic preferences were unlikely to win multiple elections.

Likewise, elections are a straightforward method for aggregating information and preferences. Suppose that the competence and political preferences of candidates are private information, but individuals can make inferences about this information on the basis of their prior behavior. Elections are efficient mechanisms for aggregating this information as long as people vote independently. One feature of Roman elections that may have worked against this function, however, was that voting was public and often sequential rather than simultaneous: one tribe or century votes first; its vote is publicly recorded as a yea or nay for a particular candidate; then another tribe or century votes. The later voters might rationally herd;<sup>112</sup> indeed, herding was encouraged by the perverse superstition in tribal assemblies that the first tribe, which was selected by lot, reflected the will of the gods, and so subsequent tribes should follow it.<sup>113</sup> In later years, the secret ballot was introduced, so that voters could not be intimidated by the powerful; this may also have dampened herd behavior.

Qualification rules and elections are in tension. If qualification rules restrict who can be elected, the people do not have unfettered choice. From time to time, voters suspended qualification rules so that exceptionally talented individuals could be appointed at an early age or without previously occupying an office in the *cursus honorum*. However, usually the qualification rules were respected. Senators were *indirectly* elected. Although appointed by consuls or censors, they were not eligible for appointment unless they had served as a magistrate in the past, which means that they had won an election. This is one way of reconciling the tension between popular sovereignty and the republican principle that only virtuous people should hold office. In the United States, this tension was resolved in another way: Americans could not vote directly for senators or the president—state legislatures and the electoral college served as mediating institutions.

Fears that elections would result in bad choices also may have accounted for the voting structure. Both the centuriate and tribal assemblies were biased in favor of the wealthy. One might believe that the wealthy, educated class selects magistrates more wisely than the illiterate masses do. On the other hand, the elites are not likely to choose magistrates who serve the interests of the masses, and they might not understand those interests in any event. And not all common people were illiterate; many (including slaves) were highly educated. The Roman voting system was a compromise, weighted in favor of the wealthy but permitting the masses to have influence when the wealthy were divided.

The American constitution has many fewer eligibility requirements—the most notable one is the rule that the president must be a natural born citizen and at least the age of 35. One could imagine a *cursus honorum*, one requiring, for example, that a person serve as governor (or senator) before becoming president, and member of the House (or mayor or alderman) before becoming governor or senator. Such a rule would reduce the risk that unqualified people reach high office, but it would also limit democratic choice in a way that surely would be considered unacceptable.

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<sup>112</sup> On herd behavior, see Abhijit V. Banerjee, *A Simple Model of Herd Behavior*, 108 Q.J. ECON. 797, 798 (1992).

<sup>113</sup> See Nicolet, *supra*.

The difference can be attributed to the more fluid political environment that existed in ancient times. Then, it was possible for a talented young man from a prominent family to achieve military success early in his career, and amass wealth and influence while still in his twenties (or even teens). Such a person might harbor dictatorial ambitions and possess the means to achieve them, while lacking the temperament and experience for republican politics. By contrast, wealth and military glory are not straightforward paths to the presidency in the United States. Unlike in ancient Rome, no one is wealthy enough to finance whole armies (as Crassus, Pompey, and Caesar could); and military glory is rare and usually comes only to elderly generals who have gradually moved up the ranks over the course of a long career. As a result, American politics are dominated by civilian career politicians who obtain prominence through compromise and consensus-building. Eligibility rules that emphasize age and experience are unnecessary.

### 3. Division and Limitation of Powers

Governance can be divided along two dimensions: policy domain (war, public order, games, and so forth) and type of power (legislative, executive, judicial). The U.S. founders divided the government by power—Congress has the legislative power, the president has executive power, and the judiciary has the judicial power—while also assigning some duplicative powers and imposing some restrictions on policy domain. The Roman constitution, by contrast, is divided (roughly) by policy domain. Consuls and praetors had authority over war and public security; quaestors over finances; censors over the census; aediles over public infrastructure and games; and so forth. Again, there was some overlap. But the Roman constitution did not make a fetish of separation of powers. Most of the magistrates had legislative, executive, and judicial powers: they made policy within broad legal constraints, executed it, and interpreted the law.

The Roman system had a number of advantages.<sup>114</sup> First, the structure of the magistracies limited the amount of mischief that a single officeholder could do. If an incompetent or preference-outlier is elected to an office, he can produce problems only within his jurisdiction. Having no authority over games, an incompetent praetor cannot put on bad games. If some fraction of elected magistrates are incompetent, then the effect of distributing power over multiple magistrates is to reduce the *variance* of policy outcomes. By contrast, a single executive office produces consistently good outcomes when a competent person holds the office and consistently bad outcomes when an incompetent person holds the office.

Second, the Roman system established relatively clear lines of authority, in this way easing the burden on the public to monitor and sanction officeholders. Because the aedile is responsible for games, the public can evaluate an aedile on the basis of the success of the games. As a result, the public learns about the abilities of the aedile, and can reward him with future offices, or sanction him by denying him future offices. A consul responsible for defense of the city will be judged on the basis of whether the defense fails or succeeds. By contrast, in the

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<sup>114</sup> All related to the “unbundling” of powers. See Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385 (2008); Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. (forthcoming 2010).

American system lines of responsibility are not always so clear.<sup>115</sup> When crime increases, it is hard to know whether to blame the executive for inadequate enforcement, the legislature for insufficiently tough laws, or the judiciary for excessive protection of procedural rights. Thus, in the Roman system, it was easier for the people to evaluate, and hence to reward and punish, officeholders on the basis of their public acts.<sup>116</sup>

Third, the Roman system nonetheless did provide for checks that ensured that projects went ahead only if they had sufficient political support. If a consul is tempted to enact a law that favors the elites, then a tribune or the other consul can veto it, and indeed a popular assembly can refuse to approve it. As a result, an implicit supermajoritarian rule holds: policies will be implemented only if officeholders representing a broad array of interests favors it. Supermajoritarian rules can be justified on the ground that they prevent redistributive politics while permitting government to produce public goods when decision costs are low.<sup>117</sup> It is impossible to know whether supermajoritarian rules served this purpose in Rome or merely entrenched the status quo—a question to which I will return. For now, the interesting comparison is between the Roman and American systems of checking. In the American system, a branch of government cannot check another branch when that branch acts solely within its domain. So, for example, the judiciary does not try to check prosecutorial discretion. In the Roman system, such checking is possible. If the purpose of checks and balances is to ensure that a supermajoritarian element exists in policymaking, then the American system is hard to justify. There is no particular reason to limit checking to cases where the three different types of powers must come into play in order for political outcomes to be achieved.

While Madison and Montesquieu complained that the failure to separate legislative, executive, and judicial power results in “tyranny,” the usual complaint about the Roman system is that the division of powers caused gridlock.<sup>118</sup> Again, let us compare the American and the Roman system. Simplifying greatly, the American president can respond to an emergency by either drawing on existing statutory authority or obtaining a single authorization from Congress, and then taking whatever actions seem necessary, subject only to a judicial check against arbitrary arrests and similar police actions. A Roman consul could respond to an emergency without senate authorization (though senate authorization would be prudent), and could, in principle, establish policy and use coercion in order to achieve it. Yet at all times, he would need to contend with objections from the other consul and the ten tribunes, and eventually he would be required to grant people trials. It seems that, on the whole, the American executive has more freedom of action than the Roman consul did. Rules restricting consuls to one-year terms, and limiting the frequency with which an individual could hold consulships and other offices, further weakened the executive in the Republic by preventing talented individuals from accumulating political power.

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<sup>115</sup> Ethan Bueno de Mesquita & Dimitra Landa, *An Equilibrium Theory of Clarity of Responsibility* (unpub. m.s., 2008), available at <http://home.uchicago.edu/~bdm/PDF/clarity.pdf>.

<sup>116</sup> However, the unbundling of powers was not pure; for example, magistrates usually had to rely on the senate for financing.

<sup>117</sup> JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962).

<sup>118</sup> See THE FEDERALIST NO. 10 (James Madison).

Brennan and Hamlin note that American-style separation of powers reproduces at the political level the dual monopoly problem analyzed in the industrial organization literature.<sup>119</sup> Suppose the government produces a public good but charges a “price” in the form of taxes. A single government official would set a monopoly price; but if two government officials must agree to the project, then the first (akin to a supplier) will charge a monopoly price to the second (akin to a distributor) who will then treat the first official’s consent as, in effect, a costly input, and pass the cost along to the taxpayer plus an additional markup reflecting the second official’s monopoly power. Because of the principle of collegiality in the Roman constitution, this problem might seem even more significant than in the American constitution. A consul who seeks to implement a project must bribe the other consul not to veto it. However, there are two competing factors. First, the consuls were individuals and could bargain very easily with each other—much more easily than the president can bargain with Congress, which consists of two houses, each with a multitude of members. Second, the consuls typically came from the same class, and often were bound by family and clan alliances. From the standpoint of the Brennan/Hamlin model, separation of powers in Rome appears less damaging than it is in the United States, at least until the last century of Rome’s existence. Gridlock and the other pathologies of separation of powers could be avoided through bargaining in a small, homogenous political class.

The Roman constitution also addressed the weakness of executive power in more direct ways. Magistrates such as consuls, proconsuls, and praetors enjoyed broadest powers when outside Rome, while on campaigns or when administering provinces. In these situations, there were relatively fewer concerns that the magistrates would abuse their powers because they had less authority over Romans (aside from soldiers, travelers, and administrators). For that reason, they could be subject to fewer limits.

In addition, magistrates could not be everywhere at once, and a magistrate could not veto the action of another magistrate unless in his presence. The constraints of time and space thus could facilitate governance, albeit only as a result of contingency. Magistrates in the same college also divided up responsibilities temporally (consuls took turns with authority on a monthly basis) and by domain, in this way avoiding direct conflict but possibly interfering with continuity of governance.

Further, the senate played an important role in coordinating the magistrates. However, the senate was not an elected body; as a result, senators, who surely reflected the interests of the wealthy, had an impact on policy outcomes through their influence on the assignment of roles to magistrates and their resolution of disputes between them.

Finally, the Roman constitution had a safety valve in the office of the dictator. The dictator did not have to coordinate with other magistrates; unlike the consul, the dictator did not

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<sup>119</sup> Geoffrey Brennan & Alan Hamlin, *A Revisionist View of the Separation of Powers*, 6 J. THEORETICAL POL. 345 (1994). For an alternative view, which points out that separation of powers may produce optimal outcomes as long as the legislature and executive trade agenda-setting power, see Torsten Persson, Gerard Roland, & Guido Tabellini, *Separation of Powers and Political Accountability*, 112 Q. J. ECON. 1163 (1997). For criticisms of this model, see ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (forthcoming, 2011).

have to contend with another person simultaneously holding the same office. Of course, such unbridled authority could be abused. The further solution to this problem was that dictators could hold office for only six months. Abuse was therefore time-limited. And because the dictator was selected by the consuls who were broadly responsible for the security of the Republic, the dictator would likely be a person who was experienced and enjoyed a fair amount of trust. However, even these protections may not have been enough. From the second century B.C. through Sulla, the political class avoided reliance on dictators and instead the senate authorized a consul to take extraordinary actions during times of emergency. As an elected official, the consul may have had more trust among the public.

#### 4. Term Limits

The magistrates suffered under severe term limits of, in most cases, one year. They could not run for reelection, and there seemed to have been a presumption, on occasion disregarded, that a Roman could hold an office he had held before only after a long interval. In the United States, most officeholders have longer terms—two or more years. In the national government, only the president faces a term limit.

Scholars are generally critical of term limits because they prevent competent officeholders from staying in office and reduce the incentive of individuals to run for office in the first place.<sup>120</sup> In Rome, term limits may have been attractive for several reasons. First, term limits prevented consuls from acquiring monarchical powers. They had to share power over time, which meant that dictatorial acts undertaken their term of office could be reversed. Second, term limits also prevented officeholders from accumulating political capital, which would enable them to acquire excessive power. A person who held office for only one year would be quickly forgotten.

The Roman system may have worked well enough for a period of time, but its chief flaw became apparent in the last century. Because no civilian politician could amass much power through office, and perhaps because none had strong incentives to discharge their official duties competently, none could stand up to the military leaders who earned glory at battle and could offer loot to soldiers and civilians who supported them. Military posts was not term-limited; and so successful generals could earn a popular following over a long period of time. These military leaders included Marius, Sulla, Pompey, and Caesar, and they were the dominant figures during the last century of the Republic's existence. By contrast, most of the consuls of that era—aside from these figures and Cicero—were undistinguished.

#### 5. Rewarding and Sanctioning Government Officials

Principals cannot reward and sanction agents unless they can observe either the agent's performance or the outcome (payoff) of the agent's performance. Roman constitutional norms provided plenty of opportunities for such observation. Senatorial debates, assembly meetings, and judicial proceedings were all public and seem to have been attended by a great many people. However, physical structure put limits on the extent of public monitoring. Rome had a

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<sup>120</sup> See Timothy Besley and Anne Case, *Does Electoral Accountability Affect Economic Policy Choices? Evidence from Gubernatorial Term Limits*, 110 Q.J. ECON. 769 (1995).

population in the hundreds of thousands but in certain public spaces, only tens of thousands of people could have been present.<sup>121</sup>

The division of powers by policy domain also lent itself to public monitoring. If the games were unsatisfactory, then everyone knew to blame the aedile with the responsibility for them. If a military campaign ended in failure, then the relevant consul or praetor could be held accountable. In addition, intense competition for political offices gave candidates with access to private information incentives to disclose such information when it harmed opponents. Finally, the requirement that citizens be out of office for two years between magistracies ensured that the medium-term consequences of their actions could be observed before they were elected to a new office.

But what were the rewards and sanctions, concretely? Roman politicians sought honor and wealth. Many politicians inherited a distinguished family name that imposed burdens and conferred opportunities. A family name is a form of human capital that one inherits rather than earns. Because Romans gave some deference to people from old families, a distinguished family name provided its bearer with political opportunities but also subjected him to a kind of bond. If he ended up a political failure, he disgraced his ancestors and deprived his descendants of the opportunities that he enjoyed. Maybe, these psychological factors gave Roman politicians longer time-horizons than those of American politicians.

To obtain honor, a Roman politician must contribute to the glory and prosperity of Rome. If he is an aedile, he must stage impressive games. If he is a consul, he must win military victories or keep the peace. Cicero won honor by suppressing the Catalina conspiracy. The highest honor was the triumph, a spectacular victory parade that enhanced the leader's prestige among the public, which one could earn only by being a military leader, and most (but not all) military leaders were consuls (or praetors). But one could become a consul or praetor only if one first was a quaestor. Thus, the Roman system harnessed the thirst for military victory to more mundane civic needs such as the management of public finances.

Money also played an important role in Roman politics. Officeholders were not paid, and were often expected to finance projects out of their own wealth. Many ambitious politicians resorted to borrowing; if they did not repay their debts, they could be ruined. At the same time, offices presented opportunities for gain. A consul who was given command of an army received a large share of the booty if he gained victory, and provincial governorships—the reward to consuls after their term of office expired—tendered semi-legal opportunities for their occupants to enrich themselves at the expense of the governed. In these ways, high offices offered pecuniary awards as well as honors, aligning politician's incentives to do well with the self-interest of the Roman people.

But only partially. A magistrate who borrowed in order to win an election, and could only repay those debts by winning a military victory, had strong incentives to win a military victory. But he might also plan and execute his military campaign in a way that yields the highest gain for himself rather than for Rome—for example, targeting a weak but wealthy enemy

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<sup>121</sup> Boatwright, *supra* at 138.

rather than a powerful enemy that posed more of a threat. Similarly, governors who milked the provinces for their own benefit set the stage for civil strife in the future.

The Romans were aware of these problems. Consuls sought triumphs—the highest political honor—by winning battles, and this might cause the distortion in incentives noted above,<sup>122</sup> but the senate had the authority to confer or deny them, and it could have used that authority to dissuade consuls from pursuing military victories of no value for the Roman Republic. Magistrates and governors who abused their office could be prosecuted after the term of office expired.<sup>123</sup> However, many prosecutions were thought to be politically motivated, the result of private feuds. Thus, whether the availability of prosecution reduced rather than increased agency costs depends on how impartial the judicial system was. If jurors could be persuaded to convict only when the magistrate abused the office, then prosecution would have improved magistrates' incentives. But if jurors could be easily bribed, or swayed by temporary political passions, then magistrates would have regarded the prospect of trial as a cost of doing business, but would have not have changed their behavior in response to it.

Censors could remove senators who committed crimes, became bankrupt, or violated serious moral norms. In the U.S. system, the Senate (and the House) have the responsibility for policing their members. Both institutions resolve one set of agency problems but create new ones. The prospect of removal might cause agents to act in the public interest, but the people with the power to remove do not necessarily want them to act in the public interest. Elections of censors helped mitigate the latter problem but would not have been sufficient. Perhaps for this reason, the Romans seem to have been nervous about the powers of the censors, and their terms, although nominally five years, were shortened from time to time.

The short term of office might also be a way of limiting the damage that an incompetent official could do. But it also limited the good that a competent official could do. In addition, office attracts talented people to the extent that they can obtain rents; the shorter the office, the fewer the rents, and thus the smaller the incentive for entering political life.

Compared to the American system, Roman politicians had a great deal more at stake in politics. A successful political career resulted in fame, riches, and respect. A failed political career could result in death (at the hands of mobs and even political competitors) or exile (after a politically motivated prosecution), and certainly bankruptcy and disgrace. The high stakes must have given Roman politicians very strong incentives to perform well. However, they also had perverse consequences. Because one could be prosecuted only after leaving office, magistrates had incentives to forestall such prosecutions by taking legal action against their enemies or (in the case of Caesar) refusing to leave office or (in the case of Catalina) fomenting rebellion. These perverse incentives were held in check for most of the Republic's history, but they contributed to its collapse.

In the United States, politics is not a life and death struggle. The low stakes ensure that power is given up voluntarily and transfers of power are peaceful. Elected officials have weaker incentives to rig the game in the incumbent's favor. If incentives to perform well are less strong,

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<sup>122</sup> See MARY BEARD, *THE ROMAN TRIUMPH* (2007).

<sup>123</sup> Boatwright, *supra*, at 139.

by the same token the incentives to challenge the constitutional system are weaker, and so political instability is rarer.

## 6. The Role of the Senate

The system of independent magistrates creates a problem of coordination. If there are multiple aediles, which aedile is responsible for the games? If there are two consuls, which one will take command in the east and which will take command in the west? These are problems of coordination which are characteristic of unbundled executives.<sup>124</sup> The senate helped coordinate magistrates. Sometimes, the senate presided while magistrates drew lots. At other times, the senate directly appointed magistrates to undertake particular tasks. By issuing decrees that reflected general policies, the senate also provided a means for magistrates to coordinate their actions.

The senate also played an important role in maintaining the continuity of government. Because most magistrates had one-year terms, they might have taken a short-term view toward Rome's interests.<sup>125</sup> The influence of the senate assured people that policies adopted by magistrates extended for greater than one year. For example, creditors want assurance that debts undertaken in one year will be repaid in a later year. By endorsing the actions of magistrates in one period, the senate led people to expect that those actions would not be repudiated by subsequent magistrates.

For the senate to serve these functions, it would need to be able to control the magistrates. It had several methods for doing this. First, the senate bestowed honors on magistrates. For example, the senate determined whether a military leader received a triumph. Second, the senate initiated criminal proceedings against magistrates who abused their office. Third, the senate had control over public finances, and could penalize magistrates by refusing to fund them. Fourth, senators were rich and influential, and magistrates would have wanted to maintain good relationships with them for personal as well as political reasons. Fifth, the senate had power to influence the allocation of tasks among magistrates, so magistrates who acted badly could be deprived of appealing (and often lucrative) posts and projects.<sup>126</sup> To be sure, it is possible that magistrates could ignore these assignments. But the magistrates faced a coordination game where they could end up with very low payoffs if they engaged in the same tasks as other magistrates. Tradition gave the senate the role of coordinator (focal point), and it would have been difficult for magistrates to break out of this equilibrium.

In performing these functions, the senate diluted the control of the people over the magistrate through elections and popular approval of legislation. We might imagine a model, then, in which the people are the principal, and the principal controls the agents (the magistrates) both directly and through the senate. Modern business corporations have a roughly analogous structure. Shareholders control corporate policy both directly (certain actions like mergers must be approved by shareholders) and through an independent institution, the board of directors. Both the Roman senate and the board of directors enjoy a certain level of independence from the

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<sup>124</sup> See Gersen, *supra*.

<sup>125</sup> But also recall that their concern for their family name might have enhanced their time horizons.

<sup>126</sup> Boatwright, *supra*, at 138.

ultimate stakeholders. Senators are selected by censors; directors are selected by CEOs subject to a rubber stamp by shareholders. These forms of indirect representation raise agency costs. Censors do not necessarily act in the interest of the people (though they are elected themselves), and directors do not necessarily act in the interest of shareholders. The de facto and de jure qualifications for the senate also ensured that it was not a representative body. On the other hand, because senators were drawn from ex-magistrates, they were politicians who had in the past proven that they were acceptable to the people in elections.

Another feature of the senate was that it was a large body—generally in the neighborhood of 300 people—and hence subject to all the problems of collective decisionmaking. Senators had an incentive to free-ride on information-gathering and deliberation, and were vulnerable to agenda-setting by the magistrates, who could introduce bills or proposals and make take-it-or-leave-it offers. These factors suggest a weak and passive body. However, some historians argue that the senate was controlled by a core group of old and powerful families.<sup>127</sup> If that was the case, then the senate served a more effective coordinating and disciplinary role, but was less representative of the interests of the people.

The U.S. Senate is often called a millionaire’s club, but it hardly resembles the Roman Senate at all. It does not serve the interests of the elites in any clear sense; it is certainly not understood to have that function, as the Senate in Rome was. The United States has a single principal (“we the people”) rather than a dual principal (SPQR). This is surely the result of the fact that the United States does not have clearly demarcated classes; as a result, it would make little sense to give different government institutions the responsibility of advancing the interests of one class or the other.

## 7. Judicial Process

From a modern perspective, it is strange that a magistrate, who has executive and legislative power, could also serve as a judge. As judge, the magistrate would have strong incentives to favor political allies and harm political adversaries rather than respect the rule of law.

Although the details of judicial procedure in public law cases are murky, there appear to have been a number of checks on this type of behavior. It appears that magistrates never or rarely initiated the cases in which they served as judges. Cases were initiated by the senate and the popular assemblies, or by different magistrates. The jury was an important check as well. Not only would acquittal protect the defendant; it would also give rise to an inference that the magistrate had wasted public resources pursuing a politically vindictive case. It also does not appear that Roman judges had as much power as modern judges do. The law was mostly customary and the jury had a great deal of discretion to decide cases as it saw fit. However, because jurors were selected from the upper class, the system as a whole worked in favor of the wealthier and better connected.

## 8. Popular Sovereignty

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<sup>127</sup> See, e.g., Gilbert, *supra*, at 146-49.

Rome had a mixed system of representative and direct democracy. People voted for magistrates, who conducted the government's business; but they also voted on bills proposed by the magistrates. The system is in many ways appealing. The people appoint agents to draft and propose bills but retain the right to veto bills that are contrary to their interests.

The U.S. founders rejected direct democracy in favor of a system of representative democracy, where people vote for representatives who both propose and vote on bills. Such a system would appear to increase agency costs; why then was it selected?

There are a number of problems with the Roman system. First, the direct democracy component of it did not really eliminate agency costs. Magistrates still had agenda setting power, enabling them to propose bills that the public preferred to the status quo but not to any number of possible alternative bills. A small and collegial body, by contrast, can set up rules to mitigate agenda-setting. Second, most Romans were illiterate, and the bills had to be read to them. It is hard to believe that the public was able to understand complex laws, which means that magistrates could not propose complex but important laws or (more likely) that people voted on laws they did not understand. Debate involving thousands of people was also impossible, so the political contribution of the people was limited. Third, people could not be, and were not, compelled to attend assemblies. This probably meant that only people with low opportunity costs or a special interest in proposed bills attended assemblies. These people were not necessarily representative of the population as a whole, which means that many laws were enacted that served special interests rather than the public interest.

Direct democracy today can be found in some states like California. Systems of direct democracy have a poor reputation for reasons related to the problems with direct democracy in Rome. People often do not understand the proposals they vote on, and may not think carefully about how they interact with existing legislation.

### C. The Fall of the Roman Republic

Republican institutions decayed over the last century B.C. A series of dictatorships interspersed with civil war and periods of renewed assertion by the senate finally ended in 27 B.C., when Octavian became consul and was granted title of Augustus. Although the senate continued to exist, as did many of the constitutional forms, Augustus had immense political power as a result of his wealth, his control of armies, and his popularity. Over time, he and his successors would receive *de jure* recognition of their imperial authority.

Many of the ancients blamed the collapse of the Roman republic on decadence and the corruption of public morals that resulted from the vast wealth that flowed into Rome its conquests.<sup>128</sup> Sallust and some modern historians point to changes in military organization. In the earlier Republic, soldiers were recruited from among propertied farmers; in the later Republic, commanders (beginning with Marius) recruited them from the proletariat.<sup>129</sup> Thanks to the immense rewards from a successful military campaign, soldiers transferred their loyalty

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<sup>128</sup> Modern historians note that this view served Augustus's interests and for that reason may not be trustworthy. One might also note that every age seems to think it is decadent.

<sup>129</sup> SALLUST, *CATILINE'S WAR, THE JUGURTHINE WAR, HISTORIES* (A.J. Woodman trans. 2008).

from the Republic to particular military commanders such as Marius, Sulla, Pompey, and Caesar. Polybius and Machiavelli believed that the Roman constitution had lost its “balance” between monarchical, aristocratic, and popular elements as a result of the expansion of the power of the plebeians.<sup>130</sup> In the same spirit, Montesquieu argued that Roman conquests resulted in an influx of defeated populations, who did not share the interests of the Romans.<sup>131</sup> Modern historians concur that Rome’s conquest of foreign countries enriched the wealthy while generating a larger class of poor people who were absorbed into the state; the tensions between these classes eventually could not be contained in a republican system.

The historical debate was dominated by the image of the balanced constitution introduced by Polybius, who himself drew on themes in Plato, Aristotle, and other philosophers. But there are two problems with the idea of the balanced constitution. First, it draws on an old notion that society is divided into classes that pursue their class interests rather than the modern notion that society simply consists of individuals who pursue their self-interest.<sup>132</sup> Polybius imagined an aristocracy (“the few”) and the common people (“the many”), and an inherent struggle between them over social resources. This is certainly not an accurate picture of society today; it is not a good starting point for political analysis even for the ancient world. People then as now had individual projects and ambitions. They lived in a class system but there is no evidence that the classes acted as unified agents. The classes were relatively fluid. Many plebeians joined the ruling class, becoming “nobles,” a more comprehensive group of wealthy and influential people than the “patricians.” Many patricians sought political power by offering leadership to the plebes.

Second, the idea of balance is ambiguous. Putting aside the extreme cases of absolute monarchy and mob rule, one cannot evaluate the “balance” of a constitution because the different elements do not have “weights” that can be compared along a common metric. When the U.S. senate became popularly elected, the many gained at the expense of the few, but did the constitution become unbalanced as a result or just more perfectly balanced? Such a question is impossible to answer. Polybius believed that the Roman constitution became “unbalanced,” as the senate lost power to popular assemblies, but one could just as easily argue that the constitution became more balanced as otherwise the senate was not adequately checked.

The better approach is to think about constitutions in terms of whether they generate good political outcomes—order, security, prosperity, and the like. The U.S. founders, although captivated by the ancient notion of balance, did make arguments along these lines. They rejected the Roman elements of direct democracy, which resulted in sometimes hysterical and inconsistent political outcomes, and favored the senate, which is portrayed as a sober deliberative body.<sup>133</sup> Hamilton criticized the division of the executive between two consuls because it led to

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<sup>130</sup> POLYBIUS, *THE COMPLETE HISTORIES* (W.R. Paton trans. 2009); NICCOLO MACHIAVELLI, *THE DISCOURSES* (Julia Conaway Bondanella & Peter Bondanella trans. 2009).

<sup>131</sup> MONTESQUIEU, *CONSIDERATIONS ON THE CAUSES OF THE GREATNESS OF THE ROMANS AND THEIR DECLINE* 91-95 (David Lowenthal trans. 1965).

<sup>132</sup> See John Ferejohn, *Two Views of the City: Republicanism and the Law* (unpub. m.s., 2009).

<sup>133</sup> See Mortimer N.S. Sellers, *The Roman Republic and the French and American Revolutions*, in *CAMBRIDGE HISTORY*, *supra* at 347, 350-52.

conflict.<sup>134</sup> Madison criticized the concentration of separate legislative, executive, and judicial powers in individual magistrates because it led to “tyranny.”<sup>135</sup>

The conventional wisdom beginning with Polybius is that the Roman constitution failed because the public obtained too much power. It foolishly marginalized the senate—the only continuous deliberative body—and put its faith in demagogues and tyrants. However, the opposite view seems more plausible. The senate refused to acknowledge that a de facto shift in political power had occurred as a result of the expansion of the population, and insisted on maintaining its de jure privileges rather than yielding constitutional power to the people, except in small grudging squibs. The elites became vastly wealthier during the time period as a result of conquest, which produced an influx of valuable goods including slaves that accrued mostly to the upper class. The increase in the number of slaves both increased the value of farmland, which was mostly held by the elites, and reduced the value of free labor, resulting in the reduction of wages and unemployment. Meanwhile, many Roman soldiers lost their farms as a result of war, political disruption, and their long tenure in the field. All this exacerbated the conflict between the lower and upper classes. To maintain power, the elites would have had to (for example) allow the senate to become a more representative body that reflected the interests and enjoyed the loyalty of the masses. The senate also kept the magistrates weak because it feared that powerful magistrates would redistribute wealth to the people; but in the process it also failed to give magistrates the power to keep order and prosecute wars in an efficient manner. All of this gave rise to a demand for powerful figures who would serve the interests of the masses and engage in efficient governance. A number of individuals saw the opportunity to obtain power by appealing to the masses and adopting redistributive programs. These included Tiberius and Gaius Gracchus from roughly 132-121 B.C.; Gaius Marius, who was consul seven times between 107 and 86 B.C.; Lucius Sergius Catilina and Publius Clodius Pulcher in succeeding years; and Julius Caesar, who was consul in 59 and then consul or dictator from 49 to his assassination in 44 B.C. It seems apparent that, backed by soldiers and plebes, these individuals had political power that greatly exceeded the constitutional authority that they could obtain. Because the senate and other vested interests blocked peaceful constitutional change, constitutional change occurred through violence.

The transition to absolute monarchy is treated as a tragic failure of self-government, but it should also be kept in mind that the monarchy ended the civil wars, kept the peace, and initiated a new era of conquest and prosperity for the Romans. It may well be the case that monarchy was the better constitutional form for the times—for a much larger and more diverse Rome than existed in the first few centuries of the Republic. After all, monarchy would be the dominant constitutional form for large states for the next two millennia, so it is likely that it had significant advantages over the republican form of government. It seems likely that as Rome became more populous and heterogeneous, the cumbersome republican system could not arrange transfers from policy winners to policy losers whenever the government created a new public good. Too many veto points blocked the way. A dictator can more easily arrange for transfers, and can stay

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<sup>134</sup> THE FEDERALIST NO. 63, at 321 (Garry Wills ed. 1982).

<sup>135</sup> THE FEDERALIST NO. 70, at 356-57 (Garry Wills ed. 1982). For numerous other examples, see Gilbert Chinard, *Polybius and the American Constitution*, in THE AMERICAN ENLIGHTENMENT 217 (FRANK SHUFFELTON ED. 1993).

in power as long as he makes sufficient transfers to the policy losers.<sup>136</sup> The major cost of dictatorship—that the dictator favors a clique of supporters—may have been tolerable when the alternative was either gridlock or anarchy and civil war. Maintaining order requires constant vigilance, and flexibility that allows one to redeploy resources whenever a new threat arises. The Republic did not have a powerful enough executive once it exceeded a certain size; by dividing executive power among multiple offices and institutions, it created a system that was too cumbersome to react to new threats as they arose.

### Conclusion: Lessons for the U.S. Constitution

The founders of the U.S. constitution were deeply knowledgeable about the constitution of the Roman Republic and heavily influenced by it.<sup>137</sup> They accepted Polybius's view that if a constitution is not balanced, the political system will degenerate into tyranny or mob rule,<sup>138</sup> but they rejected the particular checks and balances of the Roman constitution. Instead, they were persuaded by Montesquieu, and their own experiences with the state governments, that the better approach was to divide the government into legislative, executive, and judicial branches that had the power to check each other and the institutional motivation to maintain their authority.

With the benefit of centuries of research not available to the founders, one might worry that the founders took the checks and balances of the Roman constitution too literally. Many historians attribute the success of the Romans to the relatively coherent class of elites, who had a common worldview (emphasizing conquest and imperial expansion) and could buy off the masses through patron-client relationships and occasional redistributive laws and political institutions. The key to success, then, was a small, homogenous population—where everyone in the political class knew each other, and everyone could observe what everyone else was doing as they were doing it, at least within the confines of Rome. It was the expansion of the population after the Social Wars that finally destroyed Republican Rome, and required the replacement of Republican institutions with the dictatorship.

The upshot is that an elaborate system of checks and balances might not be easily transferable to the United States, which even during the founding was vastly larger, more populous, and more heterogeneous than Rome was—and today, is even more so. Of course, Madison, influenced by Montesquieu's skepticism about large republics, worried about this problem; federalism was supposed to be the solution. And indeed state constitutions did not fetishize the separation of powers as much as the national constitution did. Over time, the independence of the judiciary diminished in the states—judicial terms in nearly all states have been relatively short, and electoral systems in most states kept judges in check—and party politics overcame institutional checks and balances. So an institutionally weak national government sat atop institutionally powerful state governments. But federalism has eroded in the United States under the pressure of scale economies that favor a national market and national

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<sup>136</sup> For discussions of the political economy of dictatorship, *see, e.g.*, Alesina & Spolaore, *supra*; Daron Acemoglu & James A. Robinson, *Economic Origins of Dictatorship and Democracy* (2003); Ronald Wintrobe, *The Political Economy of Dictatorship* (1998).

<sup>137</sup> *See* Richard, *supra*.

<sup>138</sup> Richard M. Gummere, *The American Colonial Mind and the Classical Tradition* 176 (1963).

security. Today, separation of powers is a source of frustration for both left and right, who take turns blaming courts and Congress for impeding the policy agenda of the president, and a frequent target in the academic literature.<sup>139</sup> The development of Rome from a Coasean system where the checks and balances established political entitlements that could easily be traded among a small political elite, to one where they caused gridlock in a vast, heterogeneous population, provides a cautionary tale for the United States. Indeed, these features of the United States account for the erosion of separation of powers in the twentieth century.<sup>140</sup> Fortunately, we have advantages that the Romans lacked—notably, a free press, a wealthy, educated citizenry, a robust party system, and a widely respected norm of political equality that extends throughout the entire population. These hard-won cultural endowments have taken up the slack left by the relaxation of the archaic system of checks and balances we have inherited from the Romans.<sup>141</sup>

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<sup>139</sup> See, e.g., M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1128-29 (2000); Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006); Posner & Vermeule, *supra*; Aziz Z. Huq, *Second-Best Security* (unpub. m.s., 2010). Among political scientists, see, e.g., THE FAILURE OF PRESIDENTIAL DEMOCRACY (JUAN J. LINZ & ARTURO VALENZUELA EDS., 1994). See also WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS (1885).

<sup>140</sup> See, e.g., ARTHURS SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (2004).

<sup>141</sup> Cf. Posner & Vermeule, *supra*.

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