

Cicero After Exile: Constitutional Arguments under the Triumvirate

What is a ‘constitution’? And did the Roman Republic possess one? This important question has begun to garner increased interest from scholars of ancient history and political science alike. Most previous work, however, has focused on the Roman Constitution as a factual legal regime, i.e. scholars hope to rediscover the rules and procedures that the people of the Roman Republic followed. This positivistic tendency is perhaps best exemplified in the fantastic work of Andrew Lintott in The Constitution of the Roman Republic.¹ There he sets out to explain the rules by which the Republic operated, as he says, “Politics in the Republic were a game played according to complex rules. Without knowledge of these it is hard to grasp the behavior of the contestants.”² The Roman Republic clearly possessed a constitution in this positivistic and descriptive sense. I think, however, that we can all agree that a real constitution, in our modern sense, is more than simply a set of rules or procedures to be followed.

Some scholars have begun to question this method of defining and studying the Roman Constitution. Perhaps the most interesting alternative model offered so far is that of Benjamin Straumann.³ He proposes a working definition of a constitution, which he terms a “hierarchy of norms.”⁴ A constitution exists, he argues, when some legal norms are more ‘entrenched’ than others. These entrenched norms are thus regarded to be of higher importance than other legal norms. From this it follows that, in cases of conflict, a higher order norm takes precedence over any lower order norm. To give a familiar American example, our own written constitution contains the legal norm that “Congress shall make no law... abridging the freedom of speech.” And should any such law be passed, by Straumann’s theory, it would not be as ‘entrenched’ as

¹ Lintott 1999.

² *Ibid.* pg. 2.

³ Straumann 2011.

⁴ *Ibid* pg. 284

the First Amendment. Thus in the case of a conflict, he argues, the First Amendment's prescription would triumph and, presumably, the offending law would be deemed invalid.

Straumann then identifies what he conceives to be the fundamental Constitutional rule of the Roman Republic, which triumphs over every other actual or potential rule. This is a rule from Rome's 12 Tables cited by Livy "that the most recent decree of the people is lawful and binding."⁵ It should be noted before moving on that this notion of "the people" had a specific meaning in the Roman Republic – the people, as represented in their legislative assemblies. But this legal norm becomes, for Straumann, the unalterable and fundamental law of the Republic – the idea that there is no rule in the republic which the sovereign *populus* (in their Assemblies) cannot alter. This rule is then taken to prove Straumann's model. Since this rule was clearly 'entrenched' to a greater extent than ordinary legislation, it proves the existence of a hierarchy of norms at Rome and thus the existence, at least in Roman political thought, of a real Roman Constitution in our modern sense.⁶

These two definitions of a constitution at Rome, however, leave something to be desired. And thus I want to approach this question of the existence of a Roman Constitution in a new way. After all, when a particular modern law or proposal is described as unconstitutional, we are not usually arguing solely about its consistency with a neutral set of rules. Instead, we are also making an argument about its legitimacy. When a legal norm such as "Congress shall make no law... abridging the freedom of speech" is drafted, it is, I argue, an attempt to prescribe certain potential activities. In this case, the First Amendment serves to delegitimize (and thus prevent) in advance any attempt to abridge the freedom of speech. Thus a written constitution is an

⁵ This is based on Livy 7.17.12: "ut quodcumque postremum populus iussisset id ius ratumque esset." The translation offered is my own, although Straumann translates this line a bit differently as "that whatever was the last order that the people made should have the force of law."

⁶ Straumann pg. 284

attempt to prescribe in writing what sorts of actions and laws will be (and will not be) legitimate for future political actors.

For the purposes of this paper, then, I want to propose a different working definition of a constitution. For my purposes, a constitutional argument is an assertion that set of legal norms exist which attempt

1. to prohibit certain actions, policies, or proposals on the grounds that they are illegitimate and incompatible with the current government and
2. to render such illegitimate actions invalid and thereby legally null and void, thus preserving or returning the government to its previous, and presumably legitimate, state.

Thus the assertion that a constitution exists and applies (by forbidding or allowing) a given policy is actually an argument. It is an argument that some claimed unconstitutional action is so out of line, so unprecedented, and so illegitimate, that it is actually incompatible with the current system of government in a fundamental and absolute way. This helps explain, perhaps, why claims of unconstitutionality and unconstitutional behavior are so frequently (and often passionately) linked to charges of corruption, arbitrary abuse of power, and tyranny. A state which is declared constitutional in this sense gains legitimacy in the eyes of its people when it is generally seen to follow its constitution. It likewise loses legitimacy when it is perceived to be violating its constitution.

What I want to focus on, then, is not the notion of a constitution as a set of rules, even a hierarchical one, but rather on the notion of a constitution as an argumentative criterion of legitimacy. A constitution, after all, does not exist simply as blots on a piece of paper. Even a written constitution does not usually garner anything like perfect obedience. Instead, a

constitution is reified by continual argument. It only truly exists when a political actor claims that it must be obeyed and the claim is accepted, and the offending law/policy voided or unconstitutional proposal dropped. This, then, is the question I want to ask: can a normative Roman constitution in this sense be said to exist under the Roman *res publica*? If it did, what sorts of rules was this constitution said (argued) to contain? To restate the point slightly, which rules and procedures were considered essential to a real *res publica*? And finally, were the appeals that orators made to this constitution ever or generally successful in limiting the sorts of behaviors or proposals that it prescribed?

The Larger Project: Discovering a Higher Law

This paper is a part of a larger project that examines how the Roman politician Cicero constructs political legitimacy within his forensic and philosophical works. Thus it examines how he defends both the legitimacy of his own actions and likewise attacks the legitimacy of his opponents' proposals. This doctrine of legitimacy can, it argues, be seen as a conscious part of his political program and political self-definition. His concern with legitimacy is a consistent feature of his public political presentation from the very beginnings of his career, in his cautious attack on Sulla's proscriptions in the *Pro Roscio Amerino*, to the very end, when he viciously undermines the claims of the consul Marcus Antonius in the *Philippics*. Throughout his career, Cicero promotes a generally (though not always) consistent set of doctrines that he considers to be essential to a legitimate *res publica*. Defending these 'republican' ideals, things like free and honest courts, the ability to speak one's mind in public, the proper role of the Senate, the punishment of corruption, obedience to the 'real' Roman people, among others, allows Cicero to claim to be defending the Roman *res publica* from assault and destruction.

In this paper, I wish to focus on one particular period of Cicero's career, and indeed, one in which we might least expect to find him making constitutional arguments – the period after his return from his 'exile.'⁷ Specifically, I wish to examine how Cicero constructs political, legal, and moral legitimacy in two specific speeches of this period: the *De Domo Sua* and the *Pro Sestio*. These two speeches were delivered in close proximity to each other, the *De Domo* in September of 57 BCE and the *Pro Sestio* in March of 56. Both cases respond to very unique legal situations which colors their presentation of legitimacy. Nevertheless, these two speeches form, I argue, the core of Cicero's attempted public rehabilitation after exile. Taken together, they illustrate Cicero's attempt to create a consistent political program and public persona in response to the complicated and uncertain political, legal, and constitutional environment that existed under the 1st Triumvirate. It is at this point necessary to set the stage, as it were, and briefly review the unique legal and political situation which Cicero faced after his return.

Cicero's Exile: The Legal and Political Background

Cicero became Consul (the highest office of the Roman republic) in 63 BCE. His greatest achievement was the discovery and suppression of an insurrection against the state led by his former political rival, Lucius Catilina, the famous Catilinarian Conspiracy. In order to defeat this revolt, it was necessary for Cicero to cajole the Senate into a kind of declaration of martial law at Rome. The particular decree employed, the so-called *Senatus Consultum Ultimum*, only dated back about 50-60 years before this time period and had been a contentious issue in Roman politics for some time.⁸ This was especially so as the martial law decree had

⁷ I will term this an exile in this paper, because it is the most frequently employed word to describe this period. The word 'exile' *exsul* had certain political and legal ramifications in Roman law, including the loss of citizenship, status, and property, as outlined in Riggsby 2002 pg 168-170. As he points out, Cicero went to great lengths in these speeches to prove that this term could not be properly applied to his situation.

⁸ For a brief discussion of the legal position of this decree, see especially Lintott 1999, pg. 89-93. For Cicero's perspective, the most sustained discussion of the decree's legality is to be found in the *Pro Rabirio Perduellionis* of 63 BCE.

only ever been used by one ‘faction’ at Rome (The *optimates* – ‘best men’ – a generally aristocratic grouping) in order to suppress by armed force ‘sedition’ by the other faction (The *populares* - the ‘peoples’ men’).⁹ While Cicero saw its use as completely legitimate, those who considered themselves *populares* were vocal critics of this *Senatus Consultum* and its use to crush political dissent. The decree had a somewhat tenuous legal basis, as it was not a *lex* (statute) passed by the people in their assemblies, who were, technically speaking, the sovereign body in the Roman Republic. It was instead a ‘decree of the Senate’ (*Senatus Consultum*) that which announced “Let the Consules take care that no harm come to the republic.”¹⁰ This decree, the *optimata* legal theory ran, allowed the Republic’s magistrates to take virtually any action seen as necessary to defend the Republic in a time of emergency without fear of prosecution or later retribution.

In his consulship, Cicero turned to this constitutionally dubious decree to give him the legal powers he felt necessary to suppress the revolt led by L. Sergius Catilina. For Catilina had not only a private army gathered in secret, but also left a number of his key followers in Rome in order to (as Cicero and others inform us) 1. Legally obstruct the consul from taking action 2. Attempt to murder the consul if possible and 3. On a given night, to attempt to kill a large part of Rome’s senators and set fire to large sections of the city of Rome. The plan, then, was to throw the entire Roman republic into a state of absolute confusion, during which Catilina’s army would

⁹ I acknowledge that I am here vastly oversimplifying the political situation by characterizing these as “aristocrats” and “populists.” It has long been noted that the political groupings, and the use of these labels *optimates* and *populares*, are not to be confused with modern political parties in liberal democracies. For the standard view, see Taylor 1949 pg. 1-25, and for this period, pg.140-148. In general, the orthodox opinion that these represented political strategies, rather than beliefs, ideologies, or parties still holds sway. For a brief discussion of Cicero’s view of these groups, see, for instance, Seager 1972. Some recent, and very good, scholarship has begun to push back against this orthodox opinion and assert that there was clearly some ideological content behind these labels. For a good example criticizing this “ideological vacuum” which most scholarship has assumed, see Wiseman 2009, pgs. 5-32.

¹⁰ One of the most famous restatements of this is in Cicero’s 1st *Catilinarian*, 4: “*consul videret, ne quid res publica detrimenti caperet.*” Cf. Sallust’s *Catilinarian Conspiracy*, 29 and Caesar’s *Bellum Civile* 1.5 for other versions.

advance on Rome and install his own government. Cicero's main achievement of his consulship, which he outlines at length in his Catilinarian orations, was uncovering and exposing the conspirators who were still present in Rome through an elaborate ruse. What happened next was to have an enormous effect on Cicero's future career and fortunes. Having captured the conspirators at Rome, he consulted the Senate (though not the Assemblies or the traditional law courts) on what was to be done with the conspirators who were captured in Rome. And the nearly unanimous opinion of the Senate (with some subtle pushing by Cicero)¹¹ was that the conspirators must be put to death immediately even without a proper trial.¹² It should be noted that the sole legal justification for this rested on the emergency powers given to Cicero through the *Senatus Consultum Ultimum*. The Senate voted nearly unanimously for death, but this vote, it must be noted, was advisory.¹³ It was Cicero who would be responsible, morally and legally, for carrying out the actual executions. Using such methods, the conspiracy was soon suppressed within the city, and within a few months the remaining rebels and Catiline himself were defeated and killed in a minor battle in northern Italy. Cicero was widely praised for his actions in suppressing the conspiracy, even being granted the unprecedented titles of "father of his country" and "2nd founder of the city."

¹¹ This is the content of the 4th Catilinarian Oration.

¹² This debate in the Senate is staged most dramatically in Sallust's *The Catilinarian Conspiracy*, 50-55. There the historian, interestingly, minimizes Cicero's role and makes the debate center upon the opinions of Julius Caesar and Marcus Cato the Younger

¹³ I say nearly unanimous because there is one quite famous exception – Julius Caesar bitterly opposed the death penalty, and advocated instead incarceration for life. His motivations are unclear and also hotly debated. He was certainly a leading popularis politician, and one of the prime motivators of the case against Rabirius earlier in the year (see the *Pro Rabirio Perduellionis*). In the historian Sallust's version, cited above, his primary objection rests primarily in the 'constitutional' precedent that such an action would set – that the martial law decree would then allow a consul not only to suppress active insurrection, but also to act as both judge and jury of anyone that he deemed guilty, without any possibility of appeal. But his opposition was very strident, as Suetonius' *Life of the Divine Julius* makes clear (14): "Yet not even then did he cease to delay the proceedings, but only when an armed troop of Roman knights that stood on guard about the place threatened him with death as he persisted in his headstrong opposition. They even drew their swords and made such passes at him that his friends who sat next him forsook him, while a few had much ado to shield him in their embrace or with their robes. Then, in evident fear, he not only yielded the point, but for the rest of the year kept aloof from the House." (This translation is taken from the that of Rolfe in the Loeb Classical Library)

But, as they say, no good deed goes unpunished. A few years later (59 BCE), Julius Caesar, the general Pompey, and Marcus Crassus combined their political forces together into an unlikely alliance which has gone down in history as the First Triumvirate. These three men, between them, were largely able to control the political affairs of Rome on and off (though mostly on) for a period of 10 years, although they certainly did not always act in concert or with perfect harmony. It was to Cicero's later misfortune that he chose to oppose this 'Triumvirate' publicly, rather than join it.¹⁴ The triumvirate responded to his criticism by empowering one of his greatest personal and political foes, a patrician named Publius Clodius Pulcher. Pompey and Caesar, acting in their separate authorities as religious officials, allowed Clodius to transfer himself (by a fictive adoption) to the plebeian order and thereby allow him to run for the powerful office of Tribune of the People. Clodius immediately performed as expected, harassing Cicero in a number of ways. It was not long before he latched onto his most powerful criticism of the ex-consul – he began grandstanding on the *popularis* line that Cicero had executed Roman citizens without an appropriate trial. He was able to promulgate and pass two bills dealing with Cicero. The first (March 59 BCE), obviously aimed at Cicero, did not name him, but instead made him liable to a criminal charge, the *Lex Clodia de capite civis*, which read, in part: "That anyone who had put a Roman citizen to death without trial should be banished from the community."¹⁵ Cicero briefly considered fighting it out, either by submitting to trial or by gathering his supporters to fight Clodius' gangs in the streets of the City. Clodius, however, claimed to be supported in his efforts by the Triumvirs, and the three powerful men refused to aid Cicero. Faced with the option of facing a kangaroo court or a private war within the city of Rome, Cicero chose to leave the city rather than face a trial.

¹⁴ He claims to have been offered the chance to join in a private letter to his friend Atticus, *ad Att.* 2.3.3.

¹⁵ The relevant portion of the law's text is cited by the later historian Velleius Paterculus 2.45.1 "qui civem Romanum indemnatum interemisset, ei aqua et igni interdiceretur."

It was then that Clodius passed his second measure, the *Lex Clodia de exsilio Ciceronis*. Anticipating the objection that Cicero had not been convicted in a Roman court of law, Clodius promulgated another bill before the People's Assembly which declared, simply, "That Marcus Tullius Cicero has been banished from the community"¹⁶ and further providing that all of his property be confiscated by the state. Particularly affected were Cicero's estates near Rome, which were given as 'gifts' to the Consuls of that year, while his prominent residence within the city of Rome (and abutting the Roman Forum) was leveled to the ground.¹⁷ This act of destroying his house had a special meaning in Roman political discourse, since according to tradition it marked the former owner as a 'tyrant' or aspiring king who had been driven off by the Roman people.¹⁸ As a final spiteful act, Clodius made certain that this very public monument to Cicero's defeat would be permanent, by turning to Roman religion. He enlisted the aid of a Pontiff (a Roman priest) and had the entire former site of Cicero's home consecrated as a shrine to the goddess *Libertas* (Freedom). Clodius' thought process seems to have been that, even if Cicero manages to return from his exile, he will never be able to legally undo the religious consecration of this new 'monument' to Cicero's tyranny. Thus Clodius hoped the site of Cicero's house would forever remain barren in sight of the Forum, a permanent reminder of his exile and 'tyranny' during his year as consul.

Cicero would spend a period of approximately 18 months (March of 58 to September of 57 BC) in a period of self-imposed exile. During that time period, Clodius gained greater and greater power over the state through his monopoly on the People's Assembly, as well as his

¹⁶ The text of the law is cited, and then mocked, by Cicero in the *De Domo Sua* 47: "Velitis ivbeatis vt M. Tvllio aqva et igni interdictum sit?"

¹⁷ This forms, of course, the backdrop to the dispute over Cicero's house, the *De Domo Sua*.

¹⁸ On the practice of leveling a so-called tyrant's house in Roman political discourse, see Roller 2010.

criticism of Pompey the Great.¹⁹ He also appears to have overreached himself. Clodius took on a much greater level of independence from the Triumvirs, which resulted, after about a year, in an open break with Pompey the Great. By that time, however, the Tribune actually had enough popular support to effectively confine the general to his house, by employing the threat of mob violence and potential assassination. Pompey in response began to enlist support for Cicero's recall, along with a pair of favorable consuls (Lentulus and Metellus). After a great number of conflicts, in the courts and in the streets as well, the Senate voted in favor of recalling Cicero by a vote of 416 to 1 (Clodius).²⁰ This matter was then referred to the Centuriate Assembly (notably not the Popular Assembly), which still possessed a long disused ability to legislate. This body as well voted with almost complete unanimity that Cicero ought to return to Rome. After his triumphant return, Cicero set out to restore his former place in society, by re-asserting his status as 'father of his country' and opposing Clodius in virtually every way that he could. He did this on a number of very public occasions, and attempted to tell the potentially disgraceful story of his flight and exile in as flattering a light as possible in virtually all of his speeches after exile.

Now, both the two speeches that I propose to deal with, the *De Domo Sua* and the *Pro Sestio*, necessarily respond to the legal and political situation following Cicero's exile. But they are also criticized frequently in the relevant scholarship because they supposedly deal very little with the core issues involved in the case.²¹ In the *De Domo*, of 147 paragraphs (62 pages in the Oxford critical edition), he deals with the actual consecration, the telling legal issue, in a mere 10

¹⁹ Rundell 1979 does a good job illustrating how Clodius exploited Senatorial resentment of Pompey the Great in order to gain their support for a number of his laws and policies. See in particular pages 319-323.

²⁰ Cicero trumpets the almost total unanimity of this vote in both the *Post Reditum in Senatu* (25-27) and the *Pro Sestio* (129).

²¹ See, e.g. Stroh 2004, who takes this as the central "problem" of the *De Domo Sua*, or the well-known views of Shackleton-Bailey expressed in his recent translation (1991) that the speech is Cicero "at his most discursive" pg 137. Robert Kaster (2006) notes the problem as well in his recent commentary: "Had Cicero's speech not survived, we would scarcely know less off what Sestius actually did as tribune in 57, because Cicero by design, says almost nothing on that subject, pg. 14.

paragraphs (127-137). Indeed, he devotes a far greater amount of space (28 paragraphs, 3-31) discussing his proposal to allow Pompey to fix Rome's grain supply and even more (37 paragraphs, 34-71) dealing with the legal validity of Clodius' laws 'exiling' him. Similarly, in the speech in defense of Sestius (another 147 paragraphs, but totaling 72 pages), he also deals with the substantive legal issue very quickly – discussing the charge of public violence in 22 paragraphs (71-93), while offering, for comparison, 39 paragraphs (15-54) on his exile and 31 on his famous excursus and often ridiculed 'proof' that all good men in Rome are necessarily *optimates*.

For these reasons, the two speeches are sometimes criticized for being both pompous and self-aggrandizing, or, on the other hand, simply irrelevant attempts to cloud the legal issues involved. I, however, think that legal issues *of the particular trials*, while a great concern for Cicero, are not actually his main concern in delivering and publishing these speeches. Instead, I propose to read these two speeches in the following way: *Cicero is concerned primarily with re-establishing the legitimacy of himself and of his actions as consul and as 'exile.'* His elaborate defenses of his actions as consul and of his departure from Rome are not simply self-aggrandizing or pompous attempts to praise himself, but are instead meant to publicly legitimize his position in the state and also de-legitimize the actions and person of Publius Clodius. That is not to say that Cicero does not wish to win the trials at hand. Clearly he wishes, for instance, to have his house restored to him in the *De Domo Sua*, and to have Sestius acquitted of the charge of public violence in the *Pro Sestio*. But he chooses to go about this not by pursuing the strict legal issue, but by making both cases a public referendum, in a sense, on *the overall legitimacy of his actions compared to those of Publius Clodius*. Furthermore, within these speeches, Cicero attempts to establish his legitimacy as a political actor on three broad fronts: by proving he is

morally sound, that his actions have a basis in law and previous legal precedent, and, finally, that it is his own actions that are truly ‘popular.’ Thus upon his return from exile, as I hope to show, Cicero chose three broad fronts of re-establishing his position in the state, emphasizing all of his actions as moral, legal, and popular. I hope, then, to examine both Cicero’s defenses and his attacks against Clodius on these three fronts, proceeding first from the moral and religious threat that Clodius represents, then covering the legal threat that his laws represent to the commonwealth, and finally attacking Clodius’ greatest claim to legitimacy: his popularity with the urban plebs and the popular assemblies.

The Depraved Tribune: Assaults on Clodius’ Moral Legitimacy

Moral attacks form a significant part of Cicero’s assault on Clodius’ place within the Roman Republic. Clodius represents a distinct moral threat to the Republic within Cicero’s speeches after exile, for several reasons. First, Clodius’ own moral character is a threat to the Republic. He is, in Cicero’s presentation, not even a man, but an immense beast who overcomes any potential restraints: “This guilty, hideous monster was tied by auspices, bound by custom, fettered by the chains of inviolable laws. Suddenly, a Consul released him.”²² And yet, paradoxically, Cicero refuses at to acknowledge that this ‘beast’ (*belvam*) has any great strength, but instead dwells upon how Clodius’ sexual past has completely destroyed him: “what strength can there be in a life of his sort, with its brotherly outrage, the debauchery of his sisters, his strength entirely dried up in fulfilling every outrageous desire? No, it must have been chance that brought death to the republic.”²³

²² *Sestio 16. Hanc taetram immanemque belvam, vinctam auspiciis, adligatam more maiorum, constrictam legum sacratarum catenis, solvit subito lege curiata consul... The Consul in question is Julius Caesar during the year 59. The Latin is taken from the Oxford text of Peterson (1911), M. Tulli Ciceronis Orationes, vol. 5.*

²³ *Sestio 16, qui enim in eius modi vita nervi esse potuerunt hominis fraternis flagitiis, sororiis stupris, omni inaudita libidine exsanguis? Sed fuit profecto quaedam illa rei publicae fortuna fatalis.*

Clodius stands, in Cicero's telling, as a man who should never have been allowed to achieve any importance on his own. This is perhaps strange, given Clodius' aristocratic heritage and clear popularity with the Popular Assembly, but nevertheless Cicero insists repeatedly throughout the *Pro Sestio* that Clodius' evil was only given opportunity by the negligent and corrupt actions of the two Consuls of that year, Gabinius and Piso. Only with the unfortunate collaboration of these two 'consuls' was Clodius enabled to destroy the Roman state:

Armed men occupied the Forum and public meetings (*contiones*) there were killings and stonings. The Senate was no more, the other magistracies for naught. One individual usurped the powers of all by arms and banditry, not by any strength of his own; but after withdrawing the two Consuls from the Commonwealth by a bargain on provinces, he established an insolent dominance, holding many by threats and fear, even more by hopes and promises. (*Sestio* 34)²⁴

So this moral failing of Clodius, and the inability of the consuls to keep it in check, allows Clodius not just to become prominent, but in fact to *dominate* (*dominabatur*) the state during his year as Tribune. He becomes the embodiment of the tyrant or king, seizing power as the hated figure of the *rex* that always (rhetorically at least) threatens the Roman Republic. This characterization is, of course, consistent across Cicero's speeches and finds perhaps its most strident expression after Clodius' death in the *Pro Milone*.²⁵ Nevertheless, the charge is perhaps more potent here, when made against an opponent who had the ability to refute or contest these charges of 'tyranny.'

This bad character, however, does not stop with Clodius himself, but also extends down to his followers and supporters. Cicero's characterizations of Clodius' lesser followers, specific men like Sextus Cloelius or the Tribune Vatinius, is absolutely replete with condemnations of

²⁴ "Armati homines forum et contiones tenebant, caedes lapidationesque fiebant; nullus erat senatus, nihil reliqui magistratus: unus omnem omnium potestatem armis et latrocinii possidebat, non aliqua vi sua, sed, cum duo consules a re publica provinciarum foedere retraxisset, insultabat, dominabatur, aliis pollicebatur, terrore ac metu multos, pluris etiam spe et promissis tenebat."

²⁵ Dunkle (1967), see pg. 163-64 on Clodius, shows how Cicero employs this same trope, the tyrant, against many of his political enemies, including Gaius Verres and, later, Marc Antony.

their moral character. Cicero attacks Clodius' legal draftsmen, Sextus Cloelius, not just for being ignorant of proper legal draftsmanship, but also for his reputed sexual proclivities, which were seen as highly disgraceful and allowed Cicero another opportunity to 'cleverly' repeat the charge of incest against Clodius.²⁶ The most distinctive and punishing invective, however, is reserved for the traitorous Consuls of that year, Piso and Gabinius. He goes so far, in the *Pro Sestio*, as to lingeringly describe how their very appearances undermine their authority, not just as consuls, but, in Gabinius' case, as Roman men as well. "[Gabinius] reeking with perfume, his hair fresh from the curling tongs, scorning his accomplices in vice and the ancient troublers of his youthful bloom [...] and the flocks of moneylenders." But effeminacy and profligacy are far from the only charges, since Gabinius "used to curry favor with the gangs, who, as he freely acknowledged, had snatched him from a trial for electoral bribery, and used to say that he expected a province at their hands, whether the Senate liked it or no."²⁷

Piso suffers a different treatment. For Cicero claims his *only* good characteristic is his looks, in that he resembles a stolid Roman aristocrat of old: "Gracious heavens, what a forbidding air, how grim and terrible of aspect! You might think you were looking at one of our bearded forefathers, a typical ancient empire-builder, a portrait of antiquity, a pillar of the commonwealth."²⁸ The reality of the man, however, is far different. Piso's appearance serves, in the end, only to disguise his true villainy and point up his false nobility in the eyes of the Roman people. Piso is characterised as possessing audacity (*audacia*), cruelty (*crudelitas*),

²⁶ *De Domo* 47-50 on his 'confused and unprecedented' laws. *De Domo* 25 on Sextus' character as a whole: "that beggarly miscreant, the foretaster of your lusts, a partner in your blood, whose tongue even cost you the affections of your dear sister." *Homini egentissimo et facinerosissimo, Sex. Cloelio, socio tui sanguinis, qui sua lingua etiam sororem tuam a te abalienavit*

²⁷ *Pro Sestio* 18: *Alter unguentis adfluens, calamistrata coma, despiciens conscios stuprorum ac veteres vexatores aetatulae suae [...] faeneratorum gregibus inflatus. Later in the same section: contemnabat equites Romanos, minitabatur Senatui, venditabat se operis atque ab iis se ereptum ne de ambitu causam diceret praedicabat, ab isdemque se etiam invito Senatu provinciam sperare dicebat.*

²⁸ *Pro Sestio* 19: *Alter, o di boni, quam taeter incedebat, quam truculentus, quam terribilis aspectu! Unum aliquem te ex barbatis illis, exemplum imperi veteris, imaginem antiquitatis, columen rei publicae diceret intueri.*

worthless (*nequam*) and irresponsible (*levis*), but manages to hide this under his noble brow and supposed love of philosophy.²⁹ But worst of all, for Cicero, is the fact that these two men, the consuls and supposed protectors of the Roman state, saw nothing wrong with cooperating with Clodius. It was their consular powers, gone wrong, that enabled Clodius to truly wreak havoc upon the Roman state:

This they were to do by providing you with an armed band, their own tried and trusty centurions, money, and troops of slave; by abetting you with their villainous public speeches; by mocking the authority of the Senate, by threatening the Roman knights with death and proscription, by terrorizing me with menaces, telling me to expect slaughter and battle, by using their friends to fill my house, crowded as it was with honest men, with the dread of proscription. (*De Domo* 55)³⁰

But the threat that Clodius' bad character represents is greater than the threat of one-man-rule or even exploitation of immoral followers and enablers. So Cicero reserves some of his most powerful invective for Clodius' violations of Roman religion and his hypocrisy in exploiting its tenets.

As mentioned above, Clodius was able, in his year as tribune, to persuade a Roman pontifex, Lucius Pinarius Natta, to dedicate Cicero's house to the Gods. In this way, through the exploitation of the Pontifical law of dedications, he hoped to keep Cicero from ever recovering the property.³¹ Cicero even mocks Clodius' position "A dedication, he says, has great religious force. Does it not seem to you, gentlemen, that you are listening to Numa Pompilius? Learn, Pontiffs, and you, Flamens. You too, King, learn from your fellow clansmen, though he has left your clan – learn all the same, from the votary the comprehensive principles governing all

²⁹ *Pro Sestio* 22-25.

³⁰ *Ut tibi omnia permitterent, te adiuvarent, tibi manum, copias, tibi suos spectatos centuriones, tibi pecuniam, tibi familias compararent, te suis sceleratis contionibus sublevarent, senatus auctoritatem inriderent, equitibus Romanis mortem proscriptionemque minitarentur, me terrerent minis, mihi caedem et dimicationem denuntiarent, meam domum refertam viris bonis per amicos suos complerent proscriptionis metu.*

³¹ Both Wilfried Stroh (2004) and Jeffrey Tatum (1993), separately, conclude that Clodius was most likely right on the legal point. There simply was no good precedent of a building like Cicero's house being deconsecrated and returned to private use.

religious observances.”³² But Cicero’s response to this legal assertion focuses as much on the legal argument (to be dealt with later) as it does on criticism of Clodius’ character. Who is Clodius, Cicero asks, to be standing on the principles of Roman religion? This is, as May correctly points out, one of the recurring themes of Cicero’s oratory of this period – the assertion that his enemies are attempting to overthrow all things, both human and divine.³³ In the case of the *De Domo Sua*, however, the charge is far more than a recurring trope. Cicero frames the speech, from the beginning, as an appeal to the Pontiffs to protect Roman religious beliefs. He addresses the jurors:

It falls to you to decide this day whether you wish for the future to deprive unscrupulous magistrates of the support of rascals and criminals, or whether you prefer to arm them with the additional weapon of religion. If that curse of the Commonwealth, that destroying flame, shall bring divine religion to defend his ruinous, disastrous tribunate, which he cannot protect by any appeal to human justice, we shall have to look for other rites and priests and religious guides [i.e. than yourselves]. (*De Domo Sua* 2)³⁴

Thus Clodius threatens with his actions the very legitimacy of Roman religious practice and belief. For a ruling in his favor would lead all citizens, or so Cicero says, to despair not only of constitutional government, but also of their religion as well.

The Fraudulent Tribune: Attacking Clodius’ Legal Legitimacy

Though the *De Domo Sua* and *Pro Sestio* present almost exactly the same arguments on Clodius’ moral character, they differ significantly in how they assault the Tribune’s legal legitimacy. The reason behind this difference lies primarily in the particulars of the legal cases

³² *De Domo* 127: ‘Dedicatio magnam,’ inquit, ‘habet religionem.’ Nonne vobis Numa Pompilius videtur loqui? Discite orationem, pontifices, et vos, flamines; etiam tu, rex, disce a gentili tuo, quamquam ille gentem istam reliquit, sed tamen disce ab homine religionibus dedito ius totum omnium religionum.

³³ May 1988 pg 90, citing the first paragraph of the *Pro Sestio*.

³⁴ *Vobis hodierno die constituendum est utrum posthac amentis ac perditos magistratus improborum ac sceleratorum civium praesidio nudare, an etiam deorum immortalium religione armare malitis. Nam si illa labes ac flamma rei publicae suum illum pestiferum et funestum tribunatum, quem aequitate humana tueri non potest, divina religione defenderit, aliae caerimoniae nobis erunt, alii antistites deorum immortalium, alii interpretes religionum requirendi. Cf also De Domo 108-09, where Cicero again attacks Clodius’ supposedly hypocritical stance of using religion to defend an ‘irreligious’ act.*

themselves. In the *De Domo Sua*, Cicero's primary concern is to regain the ownership and possession of his house on the Palatine. To this end, he focuses his efforts on proving that Clodius' adoption, tribunate, laws on exile, and authorization to dedicate the house were all unprecedented actions in conflict with essential Republican tradition and therefore invalid and null. In the *Pro Sestio*, by contrast, Cicero's primary concern is to defend his political ally Publius Cestius against a charge of "Violence against the Republic" (*vis contra rem publicam*). In response, Cicero chooses to make his stand on Republic itself. While skirting the charge of violence itself, he asserts that whatever violence Sestius is guilty of was done not *contra rem publicam*, but rather *pro re publica* (For the Republic) at a time when it was crushed, defeated, or non-existent due to Clodius' violent domination. I propose to examine the two strategies in turn, examining both legal validity in the *De Domo Sua* first, and then turn to how Cicero defines the *Res Publica* as a defense strategy in the *Pro Sestio*.

When Cicero delivered the *De Domo Sua*, he delivered it before a very unusual court – the College of Pontiffs. Upon his return, the Senate had voted to grant Cicero the restitution of his property, including his famous house on the Palatine Hill. Clodius, as we have seen above, attempted to prevent its restitution by claiming that it was impossible to annul or repeal the dedication of the property to the gods. So the legal point at issue centered, theoretically, upon the validity of Clodius' dedication. And yet, Cicero's speech deals with the issue in an almost summary fashion (10 paragraphs out of 147, less than 10% of the speech). In fact, when the College issued its verdict, they issued a narrow judgment centered upon this very issue, largely ignoring the rest of the speech.³⁵ But it is certainly unfair to regard the rest of the speech as "a

³⁵ As Cicero reports their judgment in his letter to Atticus, Att. 4.2.3: *si neque populi iussu neque plebis scitu is qui se dedicasse diceret nominatim ei rei praefectus esset, neque populi iussu aut plebis scitu id facere iussus esset, videri posse sine religione eam partem areae mihi restitui*. "[that] if he [i.e. Clodius] who claimed that he had dedicated it had not been placed in charge of the affair by name in either a law or a plebiscite, and had not been

luxuriant mass of exposition which is as self-satisfied as it is off the point, and – a still more serious criticism – was at the time uncalled for,” as Stroh characterizes it.³⁶ Although I wish to acknowledge that these precise legal grounds are still relevant, the case is a carefully constructed discussion of legal legitimacy and validity, rather than the clever exploitation of a technicality. It is not Cicero’s emotional appeals and *doloris magnitudo* which win him the case,³⁷ but rather the way he is able to bring virtually one of Clodius’ actions, laws, and even his status in society into question. For, as Cicero presents the choice, if any single one (and not necessarily every one!) of Clodius’ laws, actions, or tribunate is invalid, then his dedication of the house must be ruled invalid as well.

Cicero constructs Clodius’ public career and the legitimacy of his actions as Tribune as something as fragile as a house of cards. But the removal of any card will cause the entire structure to collapse and, conveniently for Cicero, lead the jury to restore his Palatine home. He speaks first about Clodius’ adoption.³⁸ As a patrician born into a very noble and ancient Roman clan, Clodius would have been ineligible to run for the office of Tribune of the Plebs. And if he was never Tribune, of course, he could not have passed the laws that effectively exiled Cicero. Consequently, Cicero challenges the validity of his adoption into the Plebeian order on three broad fronts: as a violation of Pontifical law, Augural law, and finally Public Law (*ius publicum*). The Pontiffs, he charges, have the duty of investigating into the appropriateness of

ordered to do so by a law or plebiscite, then it seemed appropriate that that part of the property could be restored to me without religious objection.” Stroh 2004, pg. 324 emphasizes that this was the crucial point from a purely legal perspective, and that this would seem to indicate that the rest of the speech “[was] not supposed to be, and did not have to be, decisive for the Pontiffes.”

³⁶ Stroh 2004, pg. 314-15. Jeffrey Tatum 1993 also agrees that the validity of the consecration was Cicero’s chief technical objection to the dedication, but points out that even Cicero’s employment of the *Lex Papiria De Dedicacionibus* was far from straightforward. Instead, Cicero’s argument allowed the Pontiffs simply an “opportunity, not an obligation, to invalidate the consecration” pg. 321. Thus the need, in my view, for the greater defenses Cicero offers, in case this single technical objection did not suffice.

³⁷ As Stroh 2004 pg. 368-70 asserts

³⁸ *De Domo Sua* 32-42

Roman adoptions and ensuring for the continuation of every families' religious rites. In the case at hand, however, they have apparently abandoned their duties to investigate his motives or purpose.³⁹ He then outlines the various reasons that Clodius' adoption, if it had been investigated properly, would clearly have been ruled out of order: the 'father' Fonteius was actually younger than his new 'son' and was still capable of fathering natural children, Clodius has refused to take on his father's name, he further retains the right to inherit from his own family, and even had himself legally emancipated from his adopted family (*De Domo* 34-37). Cicero makes this into a preposterous act of legal trickery that fooled no one:

“Here comes a beardless youth, married and in good health, and says he wants to adopt a senator of the Roman People as his son, while all the world knows and perceives that the purpose of the proceeding is not that the latter become the son of the former, that that he cease to be a patrician and become eligible for the tribune” (*De Domo* 37)⁴⁰

The invalidity of the adoption is further substantiated by reference to Augural and Public law. The augurs were responsible for determining the will of the gods through portents and bird-signs. Cicero points out that at the time of Clodius' adoption, the Consul Bibulus was conducting an *obnuntiatio*, i.e. a ritual searching of the skies for omens. The fact that an *obnuntiatio* was going on was supposed to bar all public business, but the other Consul, Julius Caesar, famously chose to ignore it and continue conducting public business.⁴¹ Cicero, then, offers the legal theory that this fact too vitiated Clodius' adoption and, once again, that he should

³⁹ *De Domo* 34-35: “The whole notion of such an adoption as yours ought to have been in the power of the Pontiffs. Or was he perhaps merely asked whether he wished to throw the Commonwealth into seditious turmoil, and whether he desired adoption, not in order to be that person's son, but to become Tribune and overturn the community from its foundations?” *quae omnis notio pontificum, cum adoptarere, esse debuit: nisi forte ex te ita quaesitum est, num perturbare rem publicam seditionibus velles et ob eam causam adoptari, non ut eius filius esses, sed ut tribunus plebis fieres et funditus everteres civitatem.*

⁴⁰ *De Domo* 37: *Quae maior calumnia est quam venire imberbum adolescentulum, bene valentem ac maritum, dicere filium senatorem populi Romani sibi velle adoptare; id autem scire et videre omnis, non ut ille filius instituitur, sed ut e patriciis exeat et tribunus plebis fieri possit, idcirco adoptari?*

⁴¹ *On the Roman debate concerning Bibulus' obnuntiatio and its effects on the validity of Caesar's laws, see Beard, North, and Price (1998), pages 126-29.*

never have been able to become Tribune of the Plebs.⁴² The third ground upon which he challenges the adoption is a procedural objection. Clodius' adoption, is on the basis of public law. Cicero alleges that the adoption was formally promulgated and performed within a period of three hours. If true, this would violate the *lex Caecilia Didia*, which required all public business to be announced 24 days (three *nundinae* – market days) before they could be voted on. And Clodius' adoption, a piece of public business conducted by the *Comitia Curiata*, most definitely fell into this category.

Laws that Cannot Be: The Decrees on Cicero's 'Exile'

Having thus challenged his tribunate on three different grounds, Cicero graciously agrees to pass over these numerous objections.⁴³ For the purpose of his own argument, he asserts, he does not need to invalidate Clodius' entire tribunate. And yet the prospect hangs over the entirety of the speech that follows. If one is willing to accept this objection, Cicero has already in effect won his case, but he refuses to stop so soon. He instead feels it necessary to declare the laws of exile themselves to be invalid. These laws, Cicero asserts, fail for a number of reasons: they were passed through violence, had distinct procedural irregularities, were invalid types of laws (that is, they are both a *privilegium* or 'bill of attainder' as well as a *lex per saturam*, a law covering an illegal variety of topics), and that this judgment has been sustained frequently and in public by the Roman Senate as well as the Centuriate Assembly.

⁴² Cicero further substantiates this objection by citing Clodius' own words, delivered in a *contio* meeting in which he attempted to challenge the validity of Julius Caesar's laws. *De Domo Sua* 40-41. Interestingly, while Cicero offers this plausible objection to both Caesar's laws and Clodius' adoption, he illogically insists that only the adoption is invalid: "I shall be asked 'Are you calling into question the official proceedings of that gallant gentleman Gaius Caesar.' Not at all. They are no longer any concern of mine, apart from the weapons that were discharged against my person as a result of his proceedings." *'Infirmas igitur tu acta C. Caesaris, viri fortissimi? Minime; neque enim mea iam quicquam interest, exceptis iis telis quae ex illius actionibus in meum corpus inmissa sunt.'*"

⁴³ *De Domo Sua* 42-

Cicero's objection to the second of Clodius' laws of exile is stronger than the first, for here he has greater procedural grounds for objection. For the second exile decree had determined a punishment against Cicero *by name*.⁴⁴ Thus unlike the first decree, which had attempted to punish those who executed Romans without trial, this one simply declared Cicero to be punished (and not simply indictable). It is interesting to note that paradoxically Cicero relies on the same 'constitutional principle' as Clodius had in exiling him, i.e. that no Roman may be punished without a trial, in order to defend, in essence, the execution of the Catilinarian conspirators. But he attempts always to obscure this connection. Instead, his argument suggests that Clodius is the 'real' violator of this particular right:

by what right or custom or precedent did you propose a law concerning a citizen who had been guilty of no offense, by name, depriving him of his civic rights? *Leges Sacratae* (Sacred Laws) prohibit legislation against individuals, as do the Twelve Tables. For that is a *privilegium*. No one has ever proposed such a law; and in fact, nothing is more cruel, more pernicious, nor is there anything which this citizen body is less capable of enduring. When we think of the lamentable word 'proscription' and the whole tragedy of the Sullan period, one feature, above all others, I imagine, stamps those savageries in our memory: punishment decreed against named Roman citizens without trial. (De Domo Sua 43)⁴⁵

Thus Cicero connects Clodius, and not himself, with the charge of condemning a citizen without trial, while at the same time drawing attention to the real difference between the two men: Cicero executed the Catilinarians as a consul under the protection of the martial law decree, while Clodius decreed Cicero's banishment through the passage of a law. Thus he associates Clodius, the *popularis* in chief, with perhaps the most regressive of the *optimata* faction, Cornelius Sulla, the Dictator, who had put to death approximately 2,000 members of the Senatorial and Equestrian classes in 81 BCE.

⁴⁴ As mentioned above, n. 16, De Domo 47: "Velitis iubeatis ut M. Tullio aqua et igni interdictum sit?"

⁴⁵ *quo iure, quo more, quo exemplo legem nominatim de capite civis indemnati tulisti? Vetant leges sacratae, vetant xii tabulae leges privatis hominibus inrogari; id est enim privilegium. Nemo umquam tulit; nihil est crudelius, nihil perniciosius, nihil quod minus haec civitas ferre possit. Proscriptionis miserrimum nomen illud et omnis acerbitas Sullani temporis quid habet quod maxime sit insigne ad memoriam crudelitatis? opinor, poenam in civis Romanos nominatim sine iudicio constitutam.*

The second law of exile is also criticized as a *lex per saturam*, a law dealing with too many topics, as well as being self-contradictory and therefore self-defeating. Thus Cicero asserts that the second law of exile relies upon a premise, it states: “Because Marcus Tullius reported a false *Senatus Consultum...*” (i.e. that on the execution of the Catilinarians).⁴⁶ But if the premise is false, as Cicero purports to show, then the entire bill must fail as self-contradictory or unjustified. He then connects this attack with the charge of a *lex per saturam*, cleverly as if his variety of attacks were also a kind of *per saturam* – that they are so various and numerous that they could not stand together: “How many methods must I use to show you that that law, as you call it, is invalid?”⁴⁷ Thus he attacks the law logically for stating that Cicero should not return, rather than banishing him, that no one should harbor him, but not that he should be thrown out, before finally pointing out that the law both exiled Cicero and at the same time appointed Clodius to dedicate Cicero’s house. These two topics, the confused ‘expulsion’ of Cicero and the dedication of his house, constitute topics two distinct to make up one bill: “Now take your present argument before the Pontiffs. You say you consecrated my house, erected a monument in the precincts, dedicated a statue, all of which you did under one little bill. Does that appear one and the same as what you proposed against me by name?”⁴⁸ Having thus characterized the bill as an law embracing an unconstitutional number of topics, he has disproven at once two of Clodius’ most critical points – that the law made Cicero into an ‘exile’ and that it allowed the consul’s house to be dedicated to the gods. Once again, if the jury buys this argument, they must

⁴⁶ *De Domo* 50: *Quid si iis verbis scripta est ista proscriptio ut se ipsa dissolvat? est enim: Quod M. Tullius falsum senatus consultum rettulerit. Si igitur rettulit falsum senatus consultum, tum est rogatio: si non rettulit, nulla est.*

⁴⁷ *De Domo* 50: *Quot modis doceo legem istam, quam vocas, non esse legem?*

⁴⁸ *De Domo* 51: *Quid? hoc ipsum quod nunc apud pontifices agis, te meam domum consecraste, te monumentum fecisse in meis aedibus, te signum dedicaste, eaque te ex una rogatiuncula fecisse, unum et idem videtur esse atque id quod de me ipso nominatim tulisti?*

give the judgment to Cicero – since his house cannot possibly have been dedicated legally if the second bill of exile is invalid.

Cicero's rhetorical attack on the first bill of exile⁴⁹ put him in a tougher spot. For this bill, unlike the second, was clearly not either a *privilegium* or a *lex per saturam*, but instead appointed a punishment for a specific crime – executing Roman citizens without a trial. On this front Clodius had Cicero quite outmaneuvered, for if Cicero departed Rome as he did, then he would appear to be admitting his guilt. On the other hand, if Cicero stayed in Rome, he was liable to be killed, 'legally' by any of Clodius' men who saw him in public.⁵⁰ But Cicero did not challenge the law as unconstitutional of its nature. After all, inflicting punishment without trial was one of his own charges against Clodius. Instead, he relied largely on the argument that it was passed by means of violence (*de vi*). As a law passed under coercion, it could not represent the freely-given opinion of the Roman people, the sovereign body of the Republic.⁵¹ There was only one problem with this argument: there had been no violence at the actual vote for the first bill, as Cicero himself acknowledges. Consequently, Cicero builds his objection upon the *threat of violence*, instead of actual violent action:

What then? Is it a law if you passed it through violence (*per vim*)? Can anything appear done legally if all agree that it was done by force? Granted that in the actual voting, there was no stone-throwing or fighting: does that mean that you could manage to ruin the community, wash it down the drain, without employing extreme violence? (*De Domo* 53)⁵²

He pins this objection on Clodius' alleged preparations for violence, which had the effect of cowering the populace (and Cicero) into acquiescing to his law. Slaves were enrolled, shops were close, weapons were stockpiled, Cicero's supporters, harassed, and the Tribune's actions were

⁴⁹ Velleius Paterculus 2.45.1: "Who ever had executed a Roman citizen without trial is to be banished from the community." *qui civem Romanum indemnatum interemisset, ei aqua et igni interdiceretur.*

⁵⁰ Lintott 2008, pg. 177.

⁵¹ On violence as a grounds for annulment, see Lintott 1968, pgs. 132-148.

⁵² *Quid? si per vim tulisti, tamenne lex est? aut quicquam iure gestum videri potest quod per vim gestum esse constat? An, si in ipsa latrone tua capta iam urbe lapides iacti, si manus conlata non est, idcirco tu ad illam labem atque eluviem civitatis sine summa vi pervenire potuisti?*

aided and abetted by virtually all the legal magistrates of the year, including the consuls Piso and Gabinius.⁵³ As Cicero sums up, ironically addressing Clodius “clearly you showed [in these preparations] how very much you ‘despise’ violence.”⁵⁴ Clodius’ laws on exile, then, are shown to be invalid on a variety of grounds. Yet each of these numerous charges is individually sufficient to nullify Cicero’s supposed ‘exile.’ And if one accepts any one of the charges, that Clodius was not adopted correctly, that he could not be Tribune, that the laws were *privilegia*, *leges per saturam*, self-contradictory, or passed by violence, then one must necessarily give Cicero the verdict he requests and return his house on the Palatine.

Religion and the Public Sphere: The Invalid Consecration

Having thus proven that his ‘exile’ was not so, legally speaking, Cicero finally turns to the grounds that the College of Pontiffs found to be decisive – that, even if Clodius was a Tribune, passed valid laws, and did so without violence, the actual law dedicating Cicero’s house to the goddess *Libertas* was invalid and should be nullified. He bases this argument partly on Clodius’ own degraded moral character – what right should this sinner have to dedicate my house? - but also upon the legal doctrine that certain proposals are, of their very nature, unallowable in Roman Law. Therefore he cites the ‘savings clause’ of Clodius’ legislation dedicating the house:

What was the basis of your ‘consecration’? He [Clodius] replies: “I passed a bill permitting me.” What? Did that bill not contain the proviso that if anything was proposed that was unlawful (*non ius*), then it was invalid?” Will you then, gentlemen, determine it lawful that the dwelling, altar, hearth and household Gods of each and every person is subject to a Tribune’s desire? (*De Domo* 106)⁵⁵

⁵³ *De Domo* 54-56.

⁵⁴ *De Domo* 54: “*tum profecto ostendisti vim tibi maxime displicere.*” It should be noted that the charge of *vis* in Rome carried some of the same connotations as the modern charge of assault. *Vis*, like assault, consists in the threat of and ability to cause bodily harm, as opposed to battery. Thus the allegations Cicero makes that Clodius was preparing for violence would qualify as illegal *vis* in Roman law.

⁵⁵ *Quae tua fuit consecratio? 'Tuleram,' inquit, 'ut mihi liceret.' Quid? non exceperas ut, si quid ius non esset rogari, ne esset rogatum? Ius igitur statuetis esse unius cuiusque vestrum sedis, aras, focos, deos penatis subiectos esse libidini tribuniciae?*

Cicero proceeds to mock every aspect of the dedication and to ensure that, while the Pontiffs may wish to uphold the validity of dedications in general, this particular dedication is so completely hypocritical, threatening, and wholly *irreligious* that it cannot be allowed to stand. He asserts, first., that no moral person wished to take over the property and that the gods, being moral, would not have wanted it either (*De Domo* 108-09). Secondly, he claims that the cult statue of this goddess *libertas* is actually a Greek funeral statue of a prostitute (though strangely appropriate for Clodius' notion of liberty, he asserts, *De Domo* 111-113). Next, that Clodius wanted the property solely to add an addition onto his own house (*De Domo* 115-116), and finally, that the Pontiff performing the dedication ceremony was both the newest member of the college and Clodius' brother-in-law (*De Domo* 117-118). Finally, he holds over the Pontiffs a slippery slope argument, that permitting one such dedication will lead to more hypocritical and purely punitive consecrations of an opponent's property. Thus Cicero regales the jury with the memory of the retaliatory consecrations that broke out between Clodius and the Consul Gabinius late in the year. Clodius, in a pique, had consecrated the Consuls' home to the Gods, only to witness his own property dedicated to Ceres a short while later.⁵⁶ The two magistrates had apparently desisted and allowed each other to regain their property, but Cicero portrays this as a potentially fearful 'right' to establish one that will erode property rights and threatens the stability of the Republic itself.

In addition to characterizing the action itself as necessarily unlawful, Cicero points out that Clodius' law, as it stands, actually neglects to appoint him by name to consecrate the house.

⁵⁶ *De Domo* 124-26: "Did not a very gallant and excellent gentleman, Lucius Ninnius, follow in your footsteps and consecrate your possessions? Do you say that his act should not be valid because it concerns yourself? Then the rules you laid down in that splendid tribunate of yourse were for you to use for the ruin of others, and to reject when turned against you." *quid? exemplo tuo bona tua nonne L. Ninnius, vir omnium fortissimus atque optimus, consecravit? Quod si, quia ad te pertinet, ratum esse negas oportere, ea iura constituisti in praeclaro tribunatu tuo quibus in te conversis recusares, alios everteres;*

This legal oversight deprives the dedication of the sanction of the *Lex Papiria*, a law otherwise unknown, which laid down the principle that all dedications must be voted on and approved by the Plebeian Assembly.⁵⁷ Thus he avers that the bill contained not even one word on the subject of consecration: “The Papirian law forbids the consecration of buildings except by order of the Plebs (i.e. the Assembly). Let us grant, if you will, that this relates to our homes and not to public temples: show me one word about consecration in that bill of yours, if it is a bill and not just the voice of your crime and cruelty.”⁵⁸ So, in the final analysis, Clodius’ adoption is invalid, his Tribunate is null, his laws are of unconstitutional types, passed by violence, and, in the final analysis, do not even prescribe the very consecration which forms the crucial issue of the *De Domo*. It is not just the consecration of the house which Cicero seeks to delegitimize, but rather his entire career and current standing within the Roman citizen community.

Uniting the Senate and the ‘real’ Roman People: Legitimacy through Consent

These, then, are the grounds on which Cicero believes the two laws of exile and the consecration of the house should be considered invalid and null. He then looks to show that this view is popular and widespread in Roman society as a way of legitimating it. Both the Roman Senate and the Centuriate Assembly have completely rejected the view, he asserts, that the laws of exile are binding in any way. He turns to the view of his friend and Senator, Lucius Cotta, to reinforce this view:

When [Cotta] addressed the Senate on the first of January, he gave it as his view that no legislation should be passed concerning my return. I had been careful for the sake of the

⁵⁷ Shackleton-Bailey 1991 pg 38 (quoting Shaum’s *de consecratione domus Ciceroniana* of 1889) points out that this assertion that the bill lacked any language about consecration conflicts with Cicero’s statements at 51 (where he uses it to prove the charge it was a *lex per saturam*) and again at 106. He attributes this discrepancy to the fact that Cicero composed the latter sections before returning, and when he had a chance to read the law after his return added this section. Since this is the grounds that the Pontiffs ruled on (see note 35) we can assume the bill did not contain any language authorizing Clodius’ consecration.

⁵⁸ *De Domo* 128-29: *Lex Papiria vetat aedis iniussu plebis consecrari. Sit sane hoc de nostris aedibus ac non de publicis templis: unum ostende verbum consecrationis in ipsa tua lege, si illa lex est ac non vox sceleris et crudelitatis tuae.*

Republic, he said, had bowed to the storm, had proved a better friend to you and the rest of the community than to myself. I had been driven out by armed violence, men organized for massacre, and a revolutionary despotism. No legislation affecting my rights as a citizen could have been passed [i.e. by Clodius], nothing had been put legally into writing, nothing had any claim to validity; all had been accomplished in defiance of law and tradition, recklessly, tumultuously, by force and fury. If that document [Clodius' law] were a law, the Consuls were not entitled to put the matter before the Senate, nor he himself to address the House. But they had so done, and he was so doing. Therefore the House should not decree that legislation on my case be proposed; that would mean accepting as a law what was not a law at all. No speech could have been truer, graver, better, or more to the advantage of the Republic. (*De Domo* 68)⁵⁹

He is attempting, here and elsewhere, not just to discuss the validity of a particular law (though that is, admittedly, one of his goals), but rather to discuss the entire period of Clodius' tribunate and 'revolutionary despotism' (*novus dominatus*) over the Roman state. And this forceful and violent domination was not only undesirable, but also incompatible with the notion of the *res publica*. Cicero then recites the numerous Senators who signed on to this interpretation of events, Pompey the Great, Bibulus, the Consul-Elect Lentulus (*De Domo* 68-70). In each case these individuals, and the Senate as a whole judge Clodius' laws to be completely invalid. Indeed, Cicero grants the Senate, rather than any other body, the highest authority to declare laws invalid: "As for the Senate, whose judgment weighs heaviest when it comes to the validity of laws, it declared that [law] null and void every time my case was submitted to it."⁶⁰

But, although Cicero wishes to characterize the laws of exile as invalid, he is forced to reckon with the fact that a law *was* passed on his return. If he had admitted that a second *lex* was *required* to repeal the first, this would be an admission that all of Clodius' laws were actually

⁵⁹ *L. Cotta, qui legem de meo reditu ferendam non censuit; qui me consuluisse rei publicae, cessisse tempestati, amicrorem vobis ceterisque civibus quam mihi exstitisse, vi, armis, dissensione hominum et caede instituta novoque dominatu pulsum esse dixit; nihil de meo capite potuisse ferri, nihil esse iure scriptum aut posse valere, omnia contra leges moremque maiorum temere, turbulente, per vim, per furorem esse gesta. Quod si illa lex esset, nec referre ad senatum consulibus nec sententiam dicere sibi licere; quorum utrumque cum fieret, non oportere ut de me lex ferretur decerni, ne illa quae nulla esset esse lex iudicaretur. Sententia verior, gravior, melior, utilior rei publicae nulla esse potuit*

⁶⁰ *De Domo* 71: *Senatus quidem, cuius est gravissimum iudicium de iure legum, quotienscumque de me consultus est, totiens eam nullam esse iudicavit.*

valid. He deals with this in two major ways: first, by emphasizing that such a law was passed for purely political, rather than legal reasons, and second, by showing that the law which was passed did not contain language hinting at repeal. When he reports the Senate's judgment, they are wise enough that "You [the Senate] were concerned lest a wave of popular resentment might break upon me at some later date if it should appear that my restoration had taken place without the people's sanction."⁶¹ They are presented as a body that is not at all afraid of being legally incorrect, but simply concerned with how the matter might appear. Otherwise, Cicero works hard to bury this detail.⁶² But secondly, even the law that was passed did not grant Cicero permission to return, as if permission were necessary, but rather directed him to return: "It provided, not that it should be allowed for me to come to Rome, but simply that I should come. You [Lentulus the Consul] did not wish to propose that I be allowed to do what was already within my rights."⁶³ Cicero plants himself, and his cause, firmly within the orbit of the Roman Senate – a body which always agreed that the decrees of exile were invalid and illegitimate.

Cicero's presentation joins the authority of the Senate, shown in its numerous decrees and attempts to bring his case up for consideration, to the authority of the Roman People in their assemblies. Here he must reckon with the fact that Clodius was extremely popular with some segments of the Roman populace. This was perhaps most true when he passed the first exile decree (*Lex Clodia de capite civis*), though we can also see it in Cicero's choice of legislative

⁶¹ *De Domo* 69: *sed prospexitis ne quae popularis in nos aliquando invidia redundaret, si sine populi iudicio restituti videremur*

⁶² Interestingly, Plutarch, in his *Life of Cicero* (34), points out that Cato the Younger, at least, was quite opposed to this doctrine of invalidity: (The translation is from Bernadotte Perrin's translation in the Loeb Classical Library Series) "Cicero argued that it was illegal for Clodius to pass from the ranks of the patricians into the tribunate, and that therefore none of his acts was valid, Cato was indignant and spoke against Cicero; not that he approved of Clodius, nay, he was actually displeased at his political course, but he set forth that it was a strange and violent measure for the senate to vote the abrogation of so many acts and decrees, among which were those for his own administration in Cyprus and Byzantium."

⁶³ *De Domo* 71: *Nam non est ita latum ut mihi Romam venire liceret, sed ut venirem; non enim voluisti id quod licebat ferre ut liceret*

assembly. The Plebeian Assembly (*Concilium Plebis*) was perhaps the easiest of the Roman legislative assemblies to operate. Nevertheless, Cicero's allies chose to avoid this assembly, and instead turn to the Centuriate Assembly (*Comitia Centuriata*) to promulgate the law on Cicero's return.⁶⁴ The meeting was clearly a triumphant success for Cicero, and he describes it throughout the speeches of this period as a way of shoring up his popular credentials. In his telling, the success of this meeting makes him not only 'popular' but perhaps *the arch-popularis* of the Roman state:

I have always been championed, advanced, and decorated by the Roman People. How, then, can any man set himself ahead of me, even when it comes to *popularis* politics? Perhaps you think the Roman People is that people, made up of hirelings and persons who are instigated to do violence to magistrates and beleaguer the Senate, that people which prays every day for massacre, arson, and looting [...] No, the true beauty, the real shape of the Roman People was the shape you [Clodius] saw in the Field [the Campus Martius] on that occasion when even you were at liberty to speak in opposition to the authority and zeal of the Senate and all Italy. That is the people, the lord of kings, victor and ruler over all nations, which you saw, you villain, on that glorious day when all the leaders of our community, and all men of all classes and ages, were casting their votes not (so they believed) for the welfare of a citizen, but of the whole citizen body. (*De Domo* 89-91)⁶⁵

It is not, then, simply the Senate or a body of aristocrats which supposedly brought Cicero back to the city, but rather the entirety of the sovereign people with a kind of unanimous consent. The men who voted for Cicero time and time again at his election to various posts turn out, yet again, to show their support for him and for the Republic. They are not the hirelings and thugs of Clodius, but become in his treatment "men of all classes and ages" joined together to protect the

⁶⁴ Lintott 2008, pg. 181-82. This assembly gave certain advantages to his side. First, it was held in a larger area (the broad plain of the *Campus Martius* rather than the narrow Forum) thus permitting a greater number of voters. Second, the voting procedure was tilted quite heavily towards the wealthier centuries, rather than sorted geographically as the Plebeian Assembly was. Finally, it allowed the legislative meeting to be run by the Consuls, Cicero ally Lentulus and Metellus, rather than the potentially radical Tribunes.

⁶⁵ *contraque a populo Romano semper sim defensus, amplificatus, ornatus, quid est qua re quisquam mihi se ipsa populari ratione anteponat? An tu populum Romanum esse illum putas qui constat ex iis qui mercede conducuntur, qui impelluntur ut vim adferant magistratibus, ut obsideant senatum, optent cotidie caedem, incendia, rapinas? [...] Illa fuit pulchritudo populi Romani, illa forma quam in campo vidisti tum cum etiam tibi contra senatus totiusque Italiae auctoritatem et studium dicendi potestas fuit. Ille populus est dominus regum, victor atque imperator omnium gentium, quem illo clarissimo die, scelerate, vidisti tum cum omnes principes civitatis, omnes <homines> ordinum atque aetatum omnium suffragium se non de civis sed de civitatis salute ferre censebant*

citizen body against a despotic tyranny. In this way he is able to undermine Clodius' greatest claim to legitimacy, the support of the Roman People.

Conclusion: The *De Domo Sua* and Roman Political Thought

What we see reflected in Cicero's *De Domo Sua* is a reflection of two political conceptions of the Roman Republic: Cicero's and, dimly reflected, Clodius'. First and foremost, we see Cicero's own brand of political self-fashioning (and perhaps posturing?) as he attempts to re-legitimize himself after his deeply disgraceful and legally disastrous flight from Rome. We see him attempt to accomplish this difficult task on three fronts: Moral, Legal, and Popular. Where the *De Domo Sua* distinguishes itself from both his other speeches, and even from his other speeches after his exile, is in its emphasis on the absolute and total illegitimacy and consequent invalidity of Clodius' laws and actions as Tribune. To do so, he attempts to promote certain laws (such as the *lex Papiria* or the *lex Caecilia Didia*), institutions (the Senate, the courts), and procedures (*obnuntiatio*, adoption) to a kind of unalterable status in the Roman Republic. The precedence of these practices, he asserts, cannot be changed without damaging the very core and essence of the *res publica*. They are presented as *ipso facto* legitimate, and any attempt to repeal or do away with them as invalid at best, and tyranny at worst.

Furthermore, Cicero holds to this doctrine as the key both to his successful return and to obtaining his supposed object: the de-consecration and return of his house on the Palatine Hill. In this he faces, noticeably, a very difficult task; for Clodius in this case was able to make his stand on two very critical sources of legitimacy at Rome – popular support and the unchangeable nature of Roman religious belief. These Cicero must undermine with all his rhetorical skill, deriding Clodius' popularity as a kind of 'astroturf' and his view of Roman religion as purely partisan, self-contradictory, and destructive to religious belief itself. Thus we see in the *De*

Domo Sua a contest between Clodius and Cicero to set forth the best *vision* for the Roman Republic. Was it to be a state with limits and controlled by the interplay of a variety of political institutions and traditions, as Cicero presented it? Or was it to be a state which represented the people's vision and a form of popular sovereignty and mass appeal, as Clodius presented it? On this day, before the college of the Pontiffs, Cicero's vision triumphed. His house was promptly deconsecrated and returned to him, and his place in the state restored. Nevertheless, Clodius' vision persisted: both his influence and popularity would continue until his death in 52 BCE. His supporters, fittingly, chose the perfect funeral pyre for their populist leader – The Senate House, a representation of his mortal enemy Cicero and of the aristocrats he opposed.

Future Directions:

This presentation is very much a work in progress. I had initially hoped to include in this paper a discussion of the *Pro Sestio*, but issues of time and length have prevented me. There, I will focus attention on Cicero's efforts to acquit Sestius of violence *contra rem publicam*. It would thus focus on Cicero's efforts to rhetorically define the Roman state and particularly his attempt to combat the *popularis* propaganda with his unexpected political 'manifesto' that "all good men are *optimates*." In that speech, he offers a more convincing and full description of the cooperation and competition between the various institutions of the Roman state, as well as arguing more fully that Clodius' *popularis* politics are not actually popular, but instead misrepresent the real Roman People. They, the sovereign body of the Republic, are not to be found at Clodius' disorderly political rallies (*contiones*), he argues, but rather at the elections (*comitia*), and at the Roman games and festivals. So there, too, he depends not as much upon the

texts of statutes to acquire legitimacy, but rather upon his own definition of the 'Republic' and its 'inviolable laws' along with the sanction of the 'real' Roman People.

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