THE CICERONIAN AND CATONIAN METHODS OF UPHOLDING CONSTITUTIONAL LEGITIMACY

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ABSTRACT

This article considers two ways in which politicians may uphold the legitimacy of the constitution when faced with political opponents who wish to act unconstitutionally. One of these ways is the Ciceronian method, which involves using actions which are either legally ambiguous or clearly extralegal to ensure the long-term defense of the constitution's ability to restrain leaders. The other way is the Catonian method, which involved using strictly legal means to ensure the constitution's legitimacy. As the historical examples of Cato the Younger and Marcus Tullius Cicero demonstrate, both of these methods are capable of damaging the legitimacy of the constitution if used improperly. Given that both methods are employed in modern politics, modern politicians ought to be aware of the consequences of using each method.

Republics collapse when their constitutions fail to restrain their leaders. We do not need to appeal to examples to show the truth of that fact, as established definitions within American legal scholarship are sufficient for making the point clear. Many scholars accept the idea that "a republican government is one in which the people control their rulers".[1] If that is the case, then rules which require rulers to adhere to the will of the people are a defining feature of republics. The moment those rules fail to restrain rulers is the moment that the government over which those rulers preside ceases to be a republic. If it is the case that "republic" is defined by the presence of rule of law, as other scholars say,[2] then the point is even clearer.

Arguments of this kind provide sufficient evidence that governments only count as republics when their constitutions restrain their leaders. However, that sort of proof is unlikely to show why we care about upholding republics in the first place. Citing historical examples solves

[1] Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 23 (1988).
[2] Robert G. Natelson, *A Republic, Not a Democracy—Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 Tex. L. Rev. 807, 814–15 (2002).

this problem, as such examples allow us to see the importance of keeping leaders constitutionally restrained. Benito Mussolini's ascent into the role of dictator over Italy serves as an example of this kind.[3] In 1924, Mussolini was attempting to concentrate political power into the National Fascist Party. He oversaw an election that gave his coalition the majority of seats in Parliament, partly due to a set of dubious electoral reforms passed a year earlier.[4] Soon afterwards, Giacomo Matteotti, secretary of the Italian Socialist Party, publicly produced evidence of illegal activity on the part of the Fascist Party during the election.[5] He was kidnapped ten days after this and found dead several weeks later.[6] Evidence suggested that Mussolini was personally involved in the murder,[7] leading many of his former political allies to distance themselves from him.[8] In response, Mussolini sought to firmly reestablish his position. On

[3] To be clear, Mussolini's rise to power is not an example of how republics fall, since Italy was a monarchy prior to Mussolini's rise, not a republic. It is, however, a case that demonstrates how a system of law can lose its ability to restrict a political figure.
[4] R.J.B Bosworth, *Mussolini's Italy: Life Under the Fascist Dictatorship, 1915-1945* 191 (2005).
[5] Robert O. Paxton, *The Anatomy of Fascism* 109 (2004).
[6] Id. at 109.
[7] Id. at 110.
[8] Michael R. Ebner, *Ordinary Violence in Mussolini's Italy* 40 (2011).

January 3, 1925, Mussolini delivered a speech to the Chamber of Deputies in which he took responsibility for the violence, and challenged his opponents to penalize him. His opponents remained silent.[9] Scholars often suggest that this speech marks the beginning of Mussolini's dictatorship.[10]

Mussolini had used violence to enforce his political agenda prior to the death of Matteotti, but those uses of force had not successfully put him above the law. He was still forced to work within the bounds of a parliamentary system to ensure the legitimacy of his regime. He still needed to work alongside politicians from outside of the Fascist Party, and he still needed to participate in ostensibly competitive and fair elections. His word was not law yet. Even the murder of Matteotti failed to change that. His dictatorship did not begin until that speech in January of 1925, when Mussolini publicly displayed that nobody was able or willing to hold him accountable to the law. As such, dictatorship can only occur when laws fail to bind leaders.

My goal in this essay is not to analyze dictatorships

[9] Id. at 41.
[10] R.J.B Bosworth, *Mussolini's Italy: Life Under the Fascist Dictatorship, 1915-1945* 214 (2005).

or to describe how and why they arise. Instead, I intend to discern the nature of constitutional legitimacy. In discussing that, the rise of one particular dictator serves as a demonstration of how laws restricting the power of politicians can be overturned. Two thousand years before Mussolini marched on Rome, Julius Caesar crossed the Rubicon river and led his troops toward the same city. This would mark the beginning of a civil war which would culminate in Caesar being declared dictator for life.[11]

What is interesting is not the exact methods by which Caesar obtained power, but rather the ways in which Caesar's opponents attempted to preserve the Republic, revealing two competing methods by which one may attempt to uphold constitutional legitimacy when faced with perceived attempts to undermine it. Marcus Tullius Cicero's response to Caesar embodies a practically-minded approach in which precedent and even the direct prescriptions of law may be put aside for the sake of the long-term defense of the Republic. By contrast, the methods of Marcus Porcius

[11] Plutarch, *Lives, Volume VII: Demosthenes and Cicero. Alexander and Caesar*. 575 (Bernadotte Perrin trans, 1919).

Cato (otherwise known as Cato the Younger) involve attempting to uphold constitutional legitimacy via strictly constitutional means. The contrast between politicians who rigidly adhere to principle and politicians who engage in realpolitik is well known, but the cases of Cicero and Cato raise considerable questions about the nature of constitutional legitimacy. Prima facie, both methods seem capable of defending the legitimacy of the constitution, but both also seem capable of undermining it. It is not clear which method, if either, should be employed by those who wish to uphold the rule of law. The remainder of this essay will examine these two methods and the ways in which they affect political legitimacy. It will be shown that the Catonian method is most effective at upholding the legitimacy of the law in all cases in which the law is unambiguous. In cases of ambiguity, one will be more successful using the Ciceronian method, but only insofar as they do not overtly violate any legal precedents or statutes.

Cicero, Cato, and Caesar

To understand these two competing methods, we must first understand the people who chose to use them.

Both Cicero and Cato the Younger are generally remembered as steadfast defenders of classical republican principles and gifted statesmen, largely as a product of their clashes with Caesar. However, the differences in their political strategies became clear long before the civil war.

Early in his career, Cato made a name for himself as a strict defender of the rules. After being elected to the role of quaestor, the official who oversaw the Roman treasury, Cato cracked

down on fraudulent documentation within the treasury, ensured that the city paid outstanding debts, and prosecuted politically well-connected individuals who had obtained city funds by unjust means.[12] His opposition to Caesar's attempts to sidestep the law was apparent well before the general crossed the Rubicon. In 60 BCE, Caesar returned to Rome from a successful military campaign in Spain in order to run for consul, the highest office in the Roman Republic. However, the law demanded that generals renounce their military command before entering the city for any purpose.

[12] Plutarch, *Lives, Volume VIII: Sertorius and Eumenes. Phocion and Cato the Younger* 273-275 (Bernadotte Perrin trans, 1919).

Caesar wished to receive a triumph[13] for his victory in Spain, but he needed to retain his command to receive these honors. The triumph was "the highest mark of honor that could be conferred" upon a Roman citizen, and very few generals had ever obtained it over the course of Rome's history.[14] Since the law forbade anyone from running for office from outside the city, Caesar was forced to choose between the triumph and the consulship. He asked the Senate for a "one-time exemption from the law" to run *in absentia*,[15] but Cato refused to allow it, filibustering in the Senate until the time in which the exemption could be discussed had passed.[16] Caesar ultimately chose the consulship, but he continued to face opposition from Cato while in office. In one infamous incident, Caesar had Cato dragged out of the Senate to be imprisoned while Cato was mid-filibuster.[17] Cato complied with the arrest, but he

[13] In Rome, a triumph was a prestigious celebration in a general's honor.
[14] Hendrik S. Versnel, *Triumphus: An Inquiry Into the Origin, Development and Meaning of the Roman Triumph* 1-2, 56 (1970).
[15] Running for an election in absentia entailed running for office without being present in Rome during the election.
[16] Fred K. Drogula, *Cato the Younger: Life and Death at the End of the Roman Republic* 119-120 (2019).
[17] Plutarch, Lives, Volume VIII: Sertorius and Eumenes. Phocion and Cato the Younger 315-317 (Bernadotte Perrin trans, 1919).

continued speaking against Caesar's policies while being led out of the room. He used the incident to convince much of the Senate that Caesar was not to be trusted with power. After much of the Senate left the room in solidarity with Cato, Caesar realized that he had politically isolated himself, and so he had Cato freed.[18] The animosity between Cato and Caesar would not end until Cato's death at the end of the civil war.

Cicero's political career was defined by the Catilinarian Conspiracy. During Cicero's consulship in 63 BCE, the politician Catilina attempted to lead a violent revolt against the Roman government.[19] The plot was revealed before any violent action could take place, and Cicero was faced with a choice over what he should do with the captured conspirators. Any ensuing trial was likely to be swayed by bribery, and many co-conspirators (including Catilina himself) remained free and armed. Cicero wanted to dismantle the rebellion before any further action took place,

[18] Fred K. Drogula, *Cato the Younger: Life and Death at the End of the Roman Republic* 131 (2019).
[19] Anthony Everitt, *Cicero: The Life and Times of Rome's Greatest Politician* 101-104 (2001).

and so chose to have the conspirators killed without a trial.[20] It was normally illegal to have Romans killed without trial. The Senate's declaration of support for Cicero's actions (a declaration known as a *senatus consultum ultimum*[21] or s.c.u) momentarily legitimized the event, but this alone did not legalize Cicero's choice.[22] Scholars continue to debate the issue, and it appears that the Romans themselves were unsure about the matter as well. Cicero's choice did lead to the dissolution of the conspiracy, and the public praised him for restoring order.[23] However, once some of his opponents gained power five years later, Cicero would be forced into exile as punishment for violating the existing laws against execution without trial, only returning to Italy once his allies had regained support within the Senate a year afterwards.[24]

The competing methods of Cicero and Cato would become clear during the trial of Lucius Licinius Murena. During his consulship, Cicero oversaw the elections of the

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[20] Id. at 107-108.
[21] The exact legal power of the *senatus consultum ultimum* will be discussed later in this paper. For now, the reader only needs to know that it signalled the Senate's approval of Cicero's actions.
[22] D. H. Berry, *Cicero's Catilinarians* 50 (2020).
[23] Id. at 50-52.
[24] Anthony Everitt, *Cicero: The Life and Times of Rome's Greatest Politician* 142-145, 151 (2001).

next year's consuls. The election was beset by extensive bribery by all candidates, so Cato publicly vowed to prosecute whoever won in response. Catilina lost this election (prompting him to organize the aforementioned conspiracy), and Murena was one of the winners (prompting Cato to prosecute him).[25] Since Catilina was raising an army, Cicero did not wish to deprive Rome of a consul during the coming year. Murena had considerable military experience and could be trusted to hold back Catilina if he marched against Rome.[26] As such, Cicero acted as a part of Murena's defense team. While Cato accused Cicero of inconsistency for being harsh in response to Catilina's wrongdoings and lenient towards those of Murena, Cicero replied that he was simply adapting his response to the needs of each situation. He argued that Cato's misguided Stoic principles had led him to be overly rigid in his assessment of the present case, when he should be willing to accommodate for the abnormal circumstances.[27] The jurors ultimately acquitted

[25] Michael Leff, *Cicero's "Pro Murena" and the Strong Case for Rhetoric*, 1 Rhetoric and Public Affairs 61, 70 (1998).
[26] D.H. Berry, *Cicero's Catilinarians* 51 (2020).
[27] Michael Leff, *Cicero's "Pro Murena" and the Strong Case for Rhetoric*, 1 Rhetoric and Public Affairs 61, 75 (1998).

Murena despite his obvious guilt.[28] Cicero would later sponsor a bill that increased the punishments for bribery, but he made sure that the bill was less stringent than the anti-bribery policy Cato supported at the time as a method of placating the opponents of Cato's policy.[29]

The civil war would present the most prominent cases in which Cato and Cicero's methods diverged, but the causes of the war must be understood before these cases can be examined. In 59 BCE, Caesar formed an informal political alliance with Gnaeus Pompeius (better known as Pompey) and Marcus Licinius Crassus, thereby allowing them to use their combined wealth and political resources to fulfill aims that the Senate stood against.[30] After Crassus died in a campaign against the Parthian empire, Pompey began to search for new allies. By 50 BCE, these allies had successfully pressured Pompey into defending policies that were contrary to Caesar's aims.[31] One of these policies involved

[28] Christopher P. Craig, *Cato's Stoicism and the Understanding of Cicero's Speech for Murena*, 116 Transactions of the American Philological Association (1974-2014) 229, 229-230 (1986).
[29] Erich S. Gruen, *The Last Generation of the Roman Republic* 221-223 (1974).
[30] Anthony Everitt, *Cicero: The Life and Times of Rome's Greatest Politician* 132-135 (2001)
[31] Erich S. Gruen, *The Last Generation of the Roman Republic* 465-483 (1974).

Caesar's ability to run for consul *in absentia* (again) while on campaign in Gaul. A 52 BCE decree had granted Caesar the exemption from the aforementioned law against running *in absentia*, in spite of Cato's attempts to block the proposal as he had done in 60 BCE.[32] It is believed that the decree did not explicitly state when Caesar would be allowed to run *in absentia*, but that the politicians that passed the decree intended for the decree to apply to the election of 50 BCE.[33] Instead, Caesar chose to run in 49 BCE. Pompey and his allies recognized that Caesar's choice to run in 49 went beyond the intent of the decree, thereby making the action unconstitutional.[34] Caesar later "exploited [the] ambiguity [of the decree] in self-justification" when explaining why he ultimately marched on Rome, arguing that the Senate had deprived the people of their right to elect him as consul.[35] Pompey began to call for an end to Caesar's command in Gaul, asking that Caesar return the troops that Pompey had previously lent him.[36] Proposals were made for Caesar to

[32] Id. at 455.
[33] Id. at 475-476.
[34] Id. at 478.
[35] Id. at 476.
[36] Plutarch, *Lives, Volume VII: Demosthenes and Cicero. Alexander and Caesar*. 513-517 (Bernadotte Perrin trans, 1919).

give up his command over his soldiers in Gaul and for Pompey to give up his command over his soldiers in Iberia, but these compromises failed. November 13 of 50 BCE, the date that the Senators had originally set as the official end of Caesar's governorship and campaign in Gaul, came and went without Caesar giving up his control over the legions in Gaul.[37]

Scholars debate why this dispute culminated in Caesar marching against Rome. Why was he willing to go to war over his ability to run in this particular election? One theory holds that Caesar's motivation was to avoid prosecution. In Rome, consuls and governors could not be tried while in office, so Caesar's governorship in Gaul and a consulship immediately afterward (to be secured by the election of 49 BCE) would maintain Caesar's legal immunity continuously.[38] Cato and other opponents of Caesar had been calling for him to be put on trial for years at this point, creating a real possibility that Caesar would be sent into an exile that he would not be able to

[37] Fred K. Drogula, *Cato the Younger: Life and Death at the End of the Roman Republic* 241-243, 255 (2019).
[38] G.R Stanton, *Why Did Caesar Cross the Rubicon?*, 52 Historia: Zeitschrift für Alte Geschichte 67, 69 (2003).

escape due to his limited political and financial resources.[39] Others argue that the attempts to prosecute Caesar were not taken seriously by the Roman elite or Caesar himself,[40] and that Caesar's goals of securing a second consulship alongside a triumph for his success in Gaul serve as sufficient explanation for his actions.[41] Under this view, Cato's successful obstruction of Caesar's triumph in 60 BCE likely served as a motivation for Caesar to secure this triumph regardless of the Senate's approval.[42] In either case, Cato's continued stance against Caesar seems to have contributed to the tensions between Caesar and the Senate. Cato would lead a vocal anti-Caesarian faction to support Pompey over Caesar without compromise.[43] Eventually, the Senate declared that Caesar would be considered an enemy of the state if he refused to leave his post in Gaul, and issued a *senatus consultum ultimum* granting support to all magistrates who protected the

[39] Id. at 67, 86-89.
[40] Robert Morstein-Marx, *Caesar's Alleged Fear of Prosecution and His "Ratio Absentis" in the Approach to the Civil War*, 56 Historia: Zeitschrift für Alte Geschichte 159, 161 (2007).
[41] Id. at 159, 167.
[42] Id. at 159, 169.
[43] Fred K. Drogula, *Cato the Younger: Life and Death at the End of the Roman Republic* 260 (2019).

Republic by any means necessary.[44] Cicero tried to get Caesar and Pompey to agree to compromises throughout this era,[45] ensuring the passage of decrees that benefitted both men.[46] Caesar had proposed an arrangement that would give himself the governorship of Illyricum, protected by a fraction of the troops he now oversaw in Gaul. Cicero was nearly successful in getting Pompey to accept this compromise, but the proposal died after Cato spoke out against it.[47] It should not be assumed that Cato did all of this to instigate further conflict with Caesar. When Caesar crossed the Rubicon, Cato immediately expressed his opposition to armed retaliation.[48] His goal had been to unite the Senate against the seemingly unrestrainable Caesar, not start a civil war.[49]

Regardless of Cato's intentions, war with Caesar had begun, and it did not go well for the anti-Caesarians. After Pompey's defeat at the Battle of Pharsalus, the remaining

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[44] Erich S. Gruen, *The Last Generation of the Roman Republic* 489-490 (1974).
[45] Plutarch, *Lives, Volume VII: Demosthenes and Cicero. Alexander and Caesar*. 175-177 (Bernadotte Perrin trans, 1919).
[46] Erich S. Gruen, *The Last Generation of the Roman Republic* 455 (1974).
[47] Anthony Everitt, *Cicero: The Life and Times of Rome's Greatest Politician* 205-206 (2001).
[48] Fred K. Drogula, *Cato the Younger: Life and Death at the End of the Roman Republic* 277 (2019).
[49] Id. at 259-260.

anti-Caesarians deliberated about how to proceed. Cato asked Cicero to lead the faction in Pompey's place, but Cicero declined, choosing to return to a Caesar-dominated Rome.[50] Cato would lead the faction to North Africa, where they would once again be defeated by Caesarian forces in the Battle of Thapsus.[51] Cato would oversee Utica, the faction's last North African stronghold, using his position to assure the safety of those fleeing the impending Caesarian armies and of those looking to appeal to Caesar's mercy.[52] Caesar had a long history of granting clemency to his former enemies, which was the reason that Cicero was able to return to Rome safely. Cato knew that Caesar intended to pardon him if he got the chance.[53] However, he also recognized that allowing Caesar to pardon him would legitimize Caesar's illegal seizure of power over Rome.[54] After all, securing the compliance of his staunchest

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[50] Plutarch, *Lives, Volume VII: Demosthenes and Cicero. Alexander and Caesar*. 181 (Bernadotte Perrin trans, 1919).
[51] Fred K. Drogula, *Cato the Younger: Life and Death at the End of the Roman Republic* 288-289, 291 (2019).
[52] Plutarch, *Lives, Volume VIII: Sertorius and Eumenes. Phocion and Cato the Younger* 375-397 (Bernadotte Perrin trans, 1919).
[53] Fred K. Drogula, *Cato the Younger: Life and Death at the End of the Roman Republic* 293 (2019).
[54] "[H]e acts illegally in saving, as if their master, those over whom he has no right at all to be the lord." Plutarch, *Lives, Volume VIII: Sertorius and Eumenes. Phocion and Cato the Younger* 375-397 (Bernadotte Perrin trans, 1919).

opponent would indubitably cement Caesar's position as the leader of Rome. As such, Cato chose to take his own life rather than legitimize a government which he saw as tyrannical, much to the chagrin of Caesar.[55]

My purpose in citing these cases is not to praise the character of Cato or Cicero. For all that has been said, one could still reasonably argue that neither of them were right to do the things that they did. These cases only demonstrate a difference in their styles of defending the precedents and rules within Roman law. Cicero's handling of these cases demonstrate that he was willing to ignore or contradict precedents and laws for the sake of maintaining the institutions underlying the Roman Republic. In the case of Caesar, he chose to *avoid enforcing* the law for the sake of maintaining peace. In the case of Murena, he chose to assist in the *active defiance* of bribery statutes for the same reason. Cato worked to uphold the same institutions, but generally chose to use strictly legal means to uphold them. Sometimes this involved using obstructionist tactics allowed by the Roman legal system, such as the veto or the filibuster, against

[55] Id. at 315-317.

perceived violators of Roman law, and sometimes this involved *enforcing* the law against these violators.

Lessons From Rome

When reading the story of the Roman Republic's collapse, certain factors that allowed the collapse to occur immediately become apparent. For instance, it is difficult to ignore the role of factionalism. The *optimates* faction of Cato and Cicero was continuously at odds with the *populares* faction of Caesar. It would be rather difficult to imagine a civil war occurring without the presence of two sides with political, financial, and martial resources at their disposal. The financial resources were already pooled in service of expensive bribe-supported electoral campaigns, and the martial resources were consolidated into the hands of the same men by virtue of Roman expectations that politicians would oversee military ventures. In fact, it had been common practice to grant individual figures long-standing military commands throughout the course of the Republic.[56] In this respect, Caesar's command over an army large enough to overthrow the Republic while in Gaul was not

[56] Erich S. Gruen, *The Last Generation of the Roman Republic* 534-538 (1974).

unprecedented. During this period, we also see an increase in the acceptability of violence as a method of securing one's political goals. Aside from the Catilinarian Conspiracy and Caesar's civil war, cases like Publius Clodius Pulcher's use of mob violence to stop unfavorable law court proceedings and Titus Annius Milo's attempts to stop Clodius using his own violent gang come to mind.[57] Not only do they serve as further demonstrations of factionalism within Rome (given that Clodius fought for the *populares* and that Milo fought for the *optimates*), but they also show the extent to which high-status politicians would go to fulfill their political aims.

While these factors were relevant, they were not individually capable of bringing down the Republic. The central component of the Republic's collapse was the inability of the law to constrain extralegal political ventures. Even if it were not the case that bribery regularly played a role in elections and trials, laws designed to maintain stability continuously failed to do so. Political crises during the late republic consistently arose due to "dispute about and

[57] Fred K. Drogula, *Cato the Younger: Life and Death at the End of the Roman Republic* 154-155, 211 (2019).

divergence from traditional procedures", not unprompted "revolutionary action".[58] This is demonstrated by the fact that Caesar and his armies presented themselves as serving and defending the Republic when they marched on Rome. In spite of the rhetoric of his opponents, Caesar was able to convince his soldiers and allies that he was operating on behalf of the constitution, as they would not have followed him otherwise.[59] As previously discussed, the law concerning Caesar's ability to run for consul *in absentia*, as written, did not specify whether Caesar was only allowed to run *in absentia* during 50 BCE or if he was also allowed to run *in absentia* in 49 BCE. He would claim that the law did grant him that right when justifying his crossing of the Rubicon,[60] and that would prove to be good enough for his purposes. By exploiting the law's ambiguity,[61] he was able to ensure that he was not held accountable to it. The case of Caesar demonstrates that laws constraining the actions of politicians

[58] Erich S. Gruen, *The Last Generation of the Roman Republic* 507 (1974).
[59] Erich S. Gruen, *The Last Generation of the Roman Republic* 501-502 (1974).
[60] Julius Caesar, *Civil War* 49-51 (Cynthia Damon trans, 2016).
[61] A law may become ambiguous when people come to disagree about its contents, even if the law was originally well-written and easily understood. As such, the term "ambiguous law" should not be taken to refer exclusively to poorly-written laws.

must have a commonly-accepted meaning if they are to restrain any politician in practice.

This is why Cato's method of responding to Caesar failed to secure the legitimacy of the Roman constitution. Cato was trying to respond to Caesar by enforcing the law. He tried to mobilize the resources of the state against Caesar by appealing to the illegality of his activities. Because the law did not have a commonly-accepted meaning, this appeal was only partly successful. Cato was able to mobilize *some* of the state's resources against Caesar, but Caesar was just as able to mobilize *some* of the state's resources against Cato and the Senate. Under normal circumstances, his method would have been successful, as shown by his success in prosecuting malpractice in the Roman treasury early in his career. In those cases, the implications of the law were clear. Bureaucratic malpractice was something that occurred because the figures with the ability to fix the issue looked the other way. Even though there were no disagreements about what the law said, the law was simply not applied. In prosecuting those bureaucrats, Cato upheld the legitimacy of the law by demonstrating that the law could still restrain

those that violate it. When Cato applied this method to Caesar, he unwittingly demonstrated that the law could not restrain Caesar, thereby damaging the legitimacy of Roman law. In cases of widespread, irresolvable disagreement about the implications of the law, Cicero's method of pursuing compromise while ignoring the legal implications of the disputed law is more effective at ensuring that rule of law is ultimately maintained. If the Senate had adopted Cicero's method, concessions would need to be given to Caesar, but the Senate would retain its status as a legitimate authority in Roman governance.

Of course, Ciceronian compromise is not the only way that legal disputes of this kind can be handled. If both sides of this political dispute appealed to an independent third party to discern the implication of the law, and both sides accepted the ruling of this third party, then there would be no need for compromise. This is the justification for the United States' use of the Supreme Court. However, courts and compromises can fail[62] since the legitimacy of a court ruling or a compromise

[62] This was famously demonstrated during the prelude to the American Civil War, when legislative compromises, such as the Missouri Compromise and

can also be called into question. No method can unequivocally ensure the legitimacy of the law. Compromises and court rulings are just methods that typically resolve these constitutional issues, and it is easy to see why. If laws only bind by virtue of them being accepted as common ground between disputing parties,[63] then the same applies to other mutually accepted decisions, whether they be decisions delivered by a legitimate authority or decisions reached through negotiation. While court systems are designed to operate continuously as the accepted method of resolving disputes, compromises are ad hoc solutions tailored to the interests of the particular parties involved. If the interests or bargaining power of the disputants change, the compromise may be called into question. It is therefore unlikely that Cicero's compromise would have resolved tensions between Caesar and the Senate for long. Nevertheless, it had the potential to avert the civil war that brought the Republic to its knees.

It is tempting to conclude that the Ciceronian method

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the Compromise of 1850, failed to prevent the war.

[63] *Cf.* David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 Yale L.J. 1717, 1719, 1732 (2003).

is always the best way to handle challenges to constitutional legitimacy. Caesar's challenge would seem to demonstrate that the best way to handle these situations often involves sacrificing rigid constitutionalist principles to allow for compromise and a smooth resolution to the problem. Cicero himself seems to have expressed this view on a number of occasions. Even though he regarded Cato as "the one man who cares for the Republic" and an exemplar of "constancy and integrity", Cicero also saw him as lacking "sense [and] talent", as his inability to compromise disrupted the "union of the orders [which] contributes to the safety of the Republic".[64] On another occasion, Cicero remarked that, in spite of his "warm regard" for the senator, "with all his patriotism and integrity [Cato] is sometimes a political liability. He speaks in the Senate as though he were living in Plato's Republic instead of Romulus' cesspool".[65]

It is safe to agree with Cicero's claim that Cato's repeated refusal to compromise ultimately endangered the

[64] Fred K. Drogula, *Cato the Younger: Life and Death at the End of the Roman Republic* 115-116 (2019).
[65] Marcus Tullius Cicero, *Letters to Atticus, Volume I* 133 (D. R. Shackleton Bailey trans., 1999).

Republic he sought to uphold. There are times and places in which trying to enforce the law against those who violate it is simply counterproductive and infeasible. From this, we should not accept Cicero's apparent conclusion that Cato's methods are idealistic or practically inapplicable in most cases. We have only shown so far that Cato's methods are inapplicable when the nature of the law is ambiguous. Ambiguity of this kind is not an everyday phenomenon, especially in systems like that of the United States. The hallmark of legal systems based on written statutes and judicial precedents is the fact that disagreements concerning the proper application of any law can be reviewed and settled, with the resulting conclusion serving as a guide for future cases. These systems of common law, such as the United States, are only able to impose laws on their citizens because these systems are built to foster clarity and cohesiveness within the law. Even strong disagreements about how governments ought to act, the kind which is found in ancient and modern partisan politics, do not normally call the nature of pre-existing laws into question. When constitutional crises within a given government come to be more frequent and

expected by the population than the straightforward application of the law, the government is no longer capable of being a system of common law or a republic. It is not a system of common law because *stare decisis* does not apply, and it is not a republic because the law no longer binds the actions of politicians. As such, under normal circumstances, politicians within republics should not operate as though the law is fragile and subject to common disagreement. On the occasion in which the law does become ambiguous, political actors are likely to do less damage to the legitimacy of the law if they use the Ciceronian method of pursuing compromise rather than attempting to enforce their version of the law.

Unless disputes concerning the meaning of the law are entirely irresolvable, the Catonian method of utilizing tools provided by the law to resolve the situation is generally better at upholding the legitimacy of the law. The successful defiance of legal statutes or judicial precedent necessarily undermines the statutes and precedents being violated. It demonstrates that the law can be violated with impunity. Of course, this alone does not mean that we always have a moral obligation to follow the prescriptions of statutes and

precedents. We can certainly imagine circumstances in which the legitimacy of some statute ought to be undermined. It simply means that we ought to abide by a statute if we ought to uphold it. Perhaps this served as part of the moral justification for Cicero's handling of Murena's case. Based on the bribery law that Cicero sponsored after the trial, it seems that he disapproved of the pre-existing laws against bribery that led to Murena being tried. The ambiguity of the old laws allowed political rivals to file frivolous suits against each other, and the few unambiguous statutes were unenforceable. Cicero's law, by contrast, clearly defined which actions constitute bribery, and enumerated practical punishments for each kind of offense.[66] He did not want to grant the old laws legitimacy, so he had no problem defending a man who was understood to be guilty of violating those laws.

Cicero's response to the Catilinarian Conspiracy presents a far more complex case. The trial of Lucius Opimius, a former consul who had executed Roman citizens after the senate had passed a *senatus consultum ultimum* (s.c.u.),

[66] Erich S. Gruen, *The Last Generation of the Roman Republic* 222-223 (1974).

might provide some indication about the legal justification for Cicero's actions. In 121 BCE, Opimius was acquitted on the grounds that the s.c.u. gave him the authority to execute citizens that endangered the Republic,[67] so it may seem as though Cicero's actions are exonerated by straightforward legal precedent. However, the Roman Republic was not a system of common law. In the Roman Republic, past court cases did not strictly determine the meaning of the law when applied to future cases, and no written statute gave court cases any constitutional weight. Court cases would inform the application of laws in the future, and the norm of *mos maiorum*[68] encouraged political figures to abide by unwritten legal traditions, but no part of Roman law required adherence to legal precedent.[69] Instead, statements concerning the constitutional authority of figures in the Roman government were based firmly in the consensus of

[67] Andrew Lintott et al., *The Cambridge Ancient History, Volume 9* 83-85 (2nd ed. 1994).
[68] *Mos maiorum* can be broadly defined as "tradition" or "custom". Adherence to *mos maiorum* was expected in Rome, but there was no written law demanding such adherence.
[69] Andrew Drummond, *Law, Politics and Power: Sallust and the Execution of the Catilinarian Conspirators*
82-86 (1995).

citizens at the time,[70] In spite of the court's decision in 121 BCE, the power of the s.c.u. was not the subject of consensus. In 63 BCE, before the Senate discussed the fate of the conspirators, Gaius Rabirius, another former official who had executed a citizen after the Senate passed an s.c.u., was tried for murder. The trial, which occurred three decades after Rabirius took part in the killing, was a political act on the part of the *populares*. The citizen Rabirius had killed was a *popularis* official,[71] and the *populares* had not accepted the view that the s.c.u. leglized the event.[72] Rabirius was initially found guilty, but the *optimates* (including Cicero himself) appealed the case. The vote on the appeal would never occur, since a praetor used a legal loophole to call an end to public business that day. Having called the s.c.u. into question, the *populares* had fulfilled their aim, and felt no need to call the court to reconvene.[73] If the constitutionality of an official's actions depended on the existence of an

[70] Andrew Drummond, *Law, Politics and Power: Sallust and the Execution of the Catilinarian Conspirators*
87 (1995).
[71] Erich S. Gruen, *The Last Generation of the Roman Republic* 78-79 (1974).
[72] Anthony Everitt, *Cicero: The Life and Times of Rome's Greatest Politician* 97-98 (2001).
[73] Id. at 99.

established consensus that the actions were constitutional, then Cicero's actions were not constitutional. Contrary to Cicero's claims otherwise, executing citizens without due process, even with the consent of the Senate, was illegal.[74] The fact that the executions delegitimized the Roman constitution is demonstrated by the events which followed. Seeing that Cicero was willing to use extralegal methods to fulfill his political aims, his opponents began to do the same. Caesar, Pompey, and Crassus would form their extralegal alliance in response to Cicero's actions, and used their pooled resources to influence elections.[75] The former supporters of Catilina, dissatisfied with how their leaders were treated, flocked to Clodius, supporting him in his protracted campaign of street violence.[76] In refusing to handle the situation lawfully, Cicero signalled his lack of confidence in the ability of Roman legal institutions to handle political cases of this kind.[77] In doing this, he

[74] Andrew Drummond, *Law, Politics and Power: Sallust and the Execution of the Catilinarian Conspirators*
88-89 (1995).
[75] Harriet I. Flower, *Roman Republics* 147-148 (2010).
[76] Anthony Everitt, *Cicero: The Life and Times of Rome's Greatest Politician* 141 (2001).
[77] Harriet I. Flower, *Roman Republics* 146-147 (2010).

promoted the use of extralegal procedures of securing one's political aims. While he was not an obstructionist like Cato when engaged in active negotiation, Cicero had implicitly discouraged the culture of consensus-seeking which had previously defined political disputes. It is difficult to understate the role that such a culture would have played in preventing the events of 49 BCE.

In spite of his unsubtle rigidity while engaged in political activity, Cato was not subject to the same kind of error. The reported motivations behind his suicide show that he was aware of how important it was to avoid legitimizing unconstitutional activities. His methods embody that recognition. This certainly is not to say that these methods were infallible. In attempting to enforce a controversial interpretation of the law, Cato weakened the system he sought to save. A Ciceronian compromise would have been a more successful policy in that situation. However, under normal circumstances, resolving disputes within the confines of the law is the best way to ensure the continued legitimacy of the law.

Modern Politics

Having seen the practical effects of these two methods, we may now examine how they have been employed in recent cases of purportedly unconstitutional activity. The opponents of the Trump Administration serve as good examples of how modern political actors utilize the Ciceronian and Catonian methods. Furthermore, they demonstrate how both methods affect constitutional legitimacy.

In considering the Ciceronian and Catonian responses to Trump's actions while in office, I do not mean to call Trump a dictator or a second Caesar. He certainly has some Caesar-like qualities, as shown by the many commentators who like to point out similarities between the two men.[78, 79] Due to the fact that they drew their comparisons prior to 2021, their accounts miss the most striking similarity between the two. Each man tried to get his country's legislative branch

[78] Tim Elliott, *America Is Eerily Retracing Rome's Steps to a Fall. Will It Turn Around Before It's Too Late?*, Politico (Nov. 3, 2020), https://www.politico.com/news/magazine/2020/11/03/donald-trump-julius-caesar-433956.
[79] Lois Beckett, *Trump as Julius Caesar: anger over play misses Shakespeare's point, says scholar*, The Guardian (June 12, 2017), https://www.theguardian.com/culture/2017/jun/12/donald-trump-shakespeare-play-julius-caesar-new-york.

to allow him to serve for another term in office, in spite of the law disallowing him from serving that prospective term. When it became clear that the legislative branch wouldn't give him what he wanted, each man's political supporters invaded the capitol, declaring that *he* was the real defender of the constitution all the while. Nevertheless, Trump never wielded unchecked political authority, and there is little reason to think that he would start a civil war to gain such authority. In fact, for our purposes, all that matters is that he was *seen* by his opponents as flouting constitutional norms, since our area of inquiry is the question of how politicians respond to *perceived* violations of those rules.

The most apparently Catonian method by which Trump's opponents attempted to uphold the legitimacy of the law was the use of impeachment. It is quite clearly a method of enforcing the law against politicians who appear to violate it, much like Cato's attempt to hold Caesar legally responsible after his governorship ended. Furthermore, it is a method of enforcing the law provided by the law itself. Unlike Cicero's response to the Catilinarian conspirators, impeachment is both precedented and legal. However, the Catonian method is

only effective when the laws being applied are generally understood and uncontroversial. While impeachment is itself a legally accepted practice, there are ambiguities concerning when impeachment may be applied. Article II of the Constitution states that a president may be impeached "for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors".[80] The unclear meaning of "high Crimes and Misdemeanors" proved to be a source of disagreement. In 2019, Trump was impeached for abuse of power and obstruction of Congress on the grounds that both were high crimes and misdemeanors.[81] Members of the House of Representatives argued that the high crimes and misdemeanors for which a president may be impeached "need not be indictable criminal offenses," citing the stances of the Framers as evidence.[82] Trump's defense responded that the abuse of power and obstruction of Congress charges levied against Trump were not high crimes or misdemeanors on the basis that neither charge alleged "any crime or

[80] U.S. Const. art. II, § 4.
[81] Proceedings of the United States Senate in the Impeachment Trial of President Donald John Trump, Vol. I: Preliminary Proceedings, 116th Cong., S. Doc. No. 116-18, at 50-51(2020).
[82] Id. at 416.

violation of law whatsoever".[83] This disagreement concerning what constitutes an impeachable offense could have substantially damaged the law's ability to hold leaders accountable. Fortunately, this impeachment did not lead to a constitutional crisis. The Senate's vote to acquit Trump was accepted as legally binding by all of the participants involved, so the ability of the law to bind a president was never called into question. Furthermore, while Trump's defense objected to the particular articles of impeachment levied against the president, they were still willing to take part in the trial, demonstrating the trial's importance in determining whether an impeached official has defied the constitution. Even though neither impeachment resulted in a conviction, they both established that the law binds the president. In that way, they reasserted the legitimacy of the law in the face of challenges to constitutional practice.

The Mueller Report presents a more complicated case. By investigating the possibility that Trump and his administration acted illegally, Mueller seemed to be holding the Trump Administration accountable to the law, thereby

[83] Id. at 410-411.

acting in a straightforwardly Catonian manner. However, Mueller refused to pass any judgment that would "initiate or decline a prosecution" of the president, as the Office of Legal Counsel had issued an opinion stating that a sitting president could not be prosecuted.[84] This OLC opinion is merely a policy in the Department of Justice and has no force of law. Mueller abided by the policy as an official within the DOJ, but he could have sidestepped it by asking the DOJ to change the policy.[85] As such, if he believed that the president had obstructed justice, Mueller could have chosen to prosecute Trump. Instead, Mueller chose to refrain from prosecuting Trump, but indicated that Congress could choose to hold the president accountable via impeachment or prosecution after the end of the president's term in office.[86] This complicates the question of whether Mueller's actions were Catonian or Ciceronian. If his choice
to refrain from prosecuting the president was based on the worry that Trump would challenge the decision and escape

[84] 2 Robert S. Mueller III, *Report On The Investigation Into Russian Interference In The 2016 Presidential Election* 1 (2019).
[85] Kimberly L. Wehle, *"Law and" the OLC's Article II Immunity Memos*, 32 Stan. L. & Pol'y Rev. 1, 4-9 (2021)
[86] 2 Robert S. Mueller III, *Report On The Investigation Into Russian Interference In The 2016 Presidential Election* 1,173,178 (2019).

legal consequences on the grounds that the DOJ could not prosecute a sitting president, his choice was Ciceronian. Given Trump's explicit display of distaste towards Mueller's investigation,[87] Mueller had good reason to believe that Trump would try to stop any prosecution that arose as a result of it. Furthermore, Trump's legal team had previously asserted that none of Trump's actions could "legally constitute obstruction because that would amount to him obstructing himself." [88] They further alleged that the president had the constitutional authority to terminate the investigation and the ability to pardon himself should anyone attempt to convict him.[89] This gave Mueller good reason to believe that a prosecution would lead the legitimacy and independence of the DOJ to be called into question. Trump had signaled that he was willing to initiate a constitutional crisis if Mueller attempted to charge him with anything. He never used this nuclear option to stop the investigation, possibly because starting a constitutional crisis over an investigation which had not even found him guilty yet was not worth the trouble.

[87] Id. at 77-79, 89-90, 157.
[88] Stephen Skowronek et al., *Phantoms of a Beleaguered Republic : The Deep State and The Unitary Executive* 85 (2021).
[89] Id. at 85-86.

Regardless, the words of his legal team made it clear that a trial would result in the utilization of that option. As such, one could argue that Mueller used the Ciceronian method. Just as Cicero refrained from enforcing the law against Caesar to avoid civil war, Mueller refrained from enforcing the law against Trump to avoid a constitutional crisis. Alternatively, it is possible that Mueller genuinely agreed with the OLC's opinion that a sitting president could not be prosecuted, and believed that such a prosecution would "impermissibly undermine the capacity of the executive branch to perform its constitutionally assigned functions".[90] If that were true, then Mueller's actions would be Catonian. In accordance with the powers he believed the law gave him, he simply identified various cases which provided "[s]ubstantial evidence" that the president had acted illegally,[91] and indicated the various means by which Congress may constitutionally hold Trump accountable to the law.[92] In either case, Mueller's actions were careful and judicious attempts to ensure that the president was held accountable to the law while also ensuring that the

[90] 2 Robert S. Mueller III, *Report On The Investigation Into Russian Interference In The 2016 Presidential Election* 1 (2019).
[91] Id. at 89, 97.
[92] Id. at 1,173,178.

legitimacy of the DOJ and the Constitution were not undermined. If he had acted in a Ciceronian fashion, he did so without defying statutes or precedents, thereby avoiding the mistakes Cicero made in handling the Catilinarian conspirators. If he had acted in a Catonian fashion, he did so without enforcing the law against an opponent who could potentially sidestep such enforcement, thereby avoiding the mistakes Cato made in attempting to enforce the law against Caesar. His report is a rare display of commitment to the legitimacy of the Constitution combined with competence in ensuring that legitimacy.

I call Mueller's display rare because it does not seem like an obviously partisan use of constitutional language for the sake of some short-term political aim. It is far more common to see politicians claiming that some political opponent is triggering a constitutional crisis after that opponent secures some partisan victory. For instance, consider the fact that Democratic politicians only began raising concerns about partisanship delegitimizing the Supreme Court after a number of conservative justices were

appointed.[93, 94] Regardless of whether or not their proposals to reorganize the Supreme Court would initiate a constitutional crisis in order to prevent one, it is clear that the only reason their proposals ever reached national attention was the fact that Democratic politicians realized that such proposals appealed to Democratic voters unenthused by the prospect of a conservative Court. Many politicians seek to uphold constitutional legitimacy, but only as a means to some thinly-veiled end. The Ciceronian and Catonian methods remain in use, but few of the people who use them would be mistaken for Ciceros or Catos. While both men were flawed in various ways, they were both genuinely committed to upholding the rules which supported their republic. People of that kind seem to be rare in all ages. Regardless, their example should still inform the actions of politicians with no interest in constitutional legitimacy. If the constitution is to be used as a tool for localized political ends, it should be used with care. Undermining the constitution to achieve some short-term

[93] Josh Lederman, *Inside Pete Buttigieg's plan to overhaul the Supreme Court*, (June 3, 2019), https://www.nbcnews.com/politics/2020-election/inside-pete-buttigieg-s-plan-overhaul-supreme-court-n1012491.
[94] Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 Yale L.J. 148 148,150

aim gives legal ammunition to one's opponent. If politicians have any interest in fulfilling their aims, they ought to be aware of that fact.