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CONSULAR LEGISLATION IN PRE-SULLAN ROME

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The consulship of republican Rome would surely merit a thorough treatment comparable to that which Corey Brennan has recently bestowed to the praetorship.[1] Since the publication more than twenty years ago of Adalberto Giovannini's work *Consulare imperium*, the latest substantial contribution to our understanding of this magistracy,[2] controversy has arisen as to the role of the consuls and the precise nature of the consulship. Above all Richard Mitchell, in his iconoclastic study *Patricians and Plebeians*,[3] has proposed bold new interpretations of the origin, evolution and, indeed, the whole character of this office. That the modern emphasis on the consulship as the **key** to Roman politics is not unproblematic has been recognized also by Fergus Millar, who pointed out the well-known yet much overlooked fact that it was only after Sulla – that is, in the very last decades of the Republic – that the consuls tended to spend their year of office at Rome.[4] I have myself, in my works on the legislation of the pre-Sullan Republic, found reason to question many current views of the consulship.[5] I have, above all,

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* I sincerely thank professor Olli Salomies (University of Helsinki) and professor emerita Eva Margareta Steinby (All Souls College, Oxford) who read the whole manuscript and gave me most valuable suggestions.

[1] T. C. Brennan, *The Praetorship in the Roman Republic* I–II, Oxford 2000.

[2] A. Giovannini, *Consulare imperium* (Schweizerische Beiträge zur Altertumswissenschaft 16), Basel 1983.

[3] R. E. Mitchell, *Patricians and Plebeians. The Origin of the Roman State*, Ithaca 1990.

[4] F. Millar, "The Last Century of the Republic. Whose History?", *JRS* 85 (1995) 239.

[5] K. Sandberg, "The *concilium plebis* as a Legislative Body during the Republic", U. Paananen et al., *Senatus populusque Romanus. Studies in Roman Republican Legislation* (Acta Instituti Romani Finlandiae 13), Helsinki 1993, 74–96; "Tribunician and Non-Tribunician Legislation in Mid-Republican Rome", C. Bruun (ed.), *The Roman Middle Republic. Politics, Religion and Historiography, c. 400–133 BC. Papers from a*

proposed a marginalization of the legislative role of the chief magistrates of Rome, which effectively confines their sphere of legislative activity during much of this period to extrapomerial matters, as I have called them (pertaining to the world outside the *pomerium*, i.e. matters of war and peace, foreign relations, and the like).[6]

In this paper I shall further advance my case, now with the focus on the consulship. This I will do with an array of fresh arguments, commenting upon some of the reactions to my earlier work. All the major issues that will be dealt with here constitute quite complex problems and have, accordingly, prompted a vast amount of scholarly literature. Therefore, in order not to adduce another monograph's worth of details and references, I have resolved to keep my footnotes short and to refrain as much as possible from repeating all of my earlier argumentation. This, along with a full documentation of all the problems involved and earlier research, can be found in my book *Magistrates and Assemblies*. While in the present study it is clearly inevitable that I must provide a minimum of background and orientation, the emphasis will be put on those very points where diverging opinions have been brought forth by other scholars.

It is convenient to begin this paper by providing a synopsis of my main theses, before expounding them in more detail and confronting them with some of the reactions they have prompted in the scholarly discussion.[7]

Conference at the Institutum Romanum Finlandiae, September 11–12, 1998 (Acta Instituti Romani Finlandia*e* 23), Rome 2000, 121–140 and, in particular, the monograph *Magistrates and Assemblies. A Study of Legislative Practice in Republican Rome* (Acta Instituti Romani Finlandiae 24), Rome 2001.

[6] For the significance of the *pomerium* (the sacred city boundary) and my distinction between intrapomerial and extrapomerial matters, see, above all, Sandberg 2001 (n. 5), 119 ff., esp. 122. Cf. Sandberg 1993 (n. 5), 82.

[7] No effort has been made here to take into account every single reaction known to me, as I will return to certain problems in forthcoming papers. Therefore a list of reviews of my earlier works might be helpful to anyone interested in the themes that I have covered. Reviews of *Magistrates and Assemblies* (Sandberg 2001 [n. 5]): R. S. Howarth, *BMCRev* 2002.05.28; K. Christ, *AAHG* 56 (2003) 21–23; L. de Libero, *HZ* 276 (2003) 428–430; V. Marotta, *RSI* 115 (2003) 780–787; M. H. Crawford, *CR* 54 (2004) 171–172 and B. Linke, *Klio* 86 (2004) 484–485. My earlier studies are discussed, sometimes at length, in reviews of the volumes in which they appear. *Senatus populusque Romanus* (n. 5): L. de Libero, *HZ* 261 (1995) 160–162; F. Reduzzi Merola, *Index* 24 (1996) 377–381 and P. Salmon, *RBPh* 74 (1996) 231. *The Roman Middle Republic* (n. 5): J.-C. Richard, *REL* 78 (2000) 328–330; U. Walter, *HZ* 271 (2000) 715–717; M. H. Crawford, *CR* 51 (2001)

1) Current perceptions of the political system of pre-Sullan Rome, including prevailing notions of the consulship, have been distorted by a failure to keep the actual evidence for this period at the centre of the attention. Already a cursory glance at the scholarly literature yields that there is a large number of altogether unfounded notions in circulation.

2) The record of consular activity in the mid-republican period – or rather, the way it has been documented by modern scholarship – is not firmly based on the testimony of the primary sources. This is particularly true of legislation. Many of the republican laws which are listed as consular statutes in modern scholarly works are in fact of uncertain attribution or even altogether conjectural. A careful analysis of the technical terminology present in the primary sources suggests that consuls normally did not legislate themselves on civil matters in the mid-republican period.

3) That consuls did not concern themselves with civil legislation in the Middle Republic is also suggested by an institutional situation that can be inferred by a close scrutiny of the evidence for the use of the popular assemblies. The centuriate assembly (*comitia centuriata*) was normally not employed for civil legislation, and the sole tribal assembly (the *concilium plebis*, which was identical with the *comitia tributa*), which after the decline of the *comitia curiata* was the only assembly that legislated on civil matters, was summoned by none but the tribunes of the *plebs* before the last century BC.

Methodological considerations

The first question at issue, concerning basic methodology, is of fundamental importance for my entire case. I have argued that many of the traditional approaches to politics in the Roman Republic are flawed, and that the entire scholarly discussion has admitted too many elements that are not firmly based on the testimony of the primary sources. Empirical facts have become

331–333; B. M. Levick, *G&R* 48 (2001) 101–103; E. Orlin, *BMCRev* 2001.01.15; M. Dondin-Payre, *AC* 71 (2002) 442–443 and J. M. Rainer, *ZRG* 119 (2002) 640–646.

more and more obscured by an accumulated body of scholarly doctrine.

Most current notions of the structure of the political system of republican Rome, of the composition, functions and competence of the various institutions, and of their formal interaction, are still based on Theodor Mommsen's monumental study *Römisches Staatsrecht*, which in practice is a codification of the Roman constitution as a unified system of positive law.[8] There is certainly a vast number of later descriptions of this system, but it can be observed that Mommsen's synthesis to a remarkably limited extent has been modified by later research. Comparatively little original work has been done on the republican institutions since the publication of Mommsen's *magnum opus*. This state of affairs no doubt reflects the fact that, since the pioneer work of the 19th-century scholars, the focus of the scholarly discussion of the politics of republican Rome has shifted away from the political institutions to the political agents (that is, to individuals, and, in particular, to groups of individuals), to political culture and the whole social and economic setting of political life.[9]

It is important to stress that the prevailing model of the political system of republican Rome is essentially a 19th-century construction, that for an extended period of time has attracted only incidental attention. In my opinion there can be little doubt that it calls for a thorough revision. At least the development during the whole period antedating the Late Republic has, I believe, been studied on erroneous premises. The standard interpretation is in my mind anachronistic, because it to a considerable extent is based on data that are attested for only in the sources for the last century BC. I have argued that due attention has not been paid to the fact that a number of novel features were introduced into political life in connection with the reforms of Sulla in the late 80s BC.[10] I have also argued that many current notions have been heavily coloured by a remarkably large amount of free conjecture and bold speculation admitted into the discussion by the 19th-century scholars.[11] Modern conjecture is not always recognized as such, but is often mistaken for well-established fact.

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[8] Th. Mommsen, *Römisches Staatsrecht* I^3–II^3, III, Leipzig 1887–1888.

[9] On the impact of Matthias Gelzer and his followers, see the discussion in K. Sandberg, "De-constructing and Re-constructing the Political System of Republican Rome" (forthcoming).

[10] See, in particular, Sandberg 2000 (n. 5), 131 f. and Sandberg 2001 (n. 5), 21 f.

[11] Sandberg 2000 (n. 5), 125 and Sandberg 2001 (n. 5), 12 f.

I believe I have demonstrated, in my studies of republican legislation, that many aspects of the legislative procedure appear in an entirely new light if studied by means of a strictly empirical method. My method consists of consistently keeping empirical data at the very centre of all analysis, something which hitherto – in the field of Roman constitutional history – has been far from a matter of course. This state of affairs reflects the nature of the surviving evidence. In comparison with the sources available for later periods of Roman history the evidence for the mid-republican period is scarce. Moreover, the sources in question, particularly those for the earlier part of the period, are gravely problematical. To cope with the difficulties presented by an inadequate and troublesome source material it has been customary to supplement the surviving information on mid-republican conditions with data attested for later periods, particularly the last century BC, which is a period about which we happen to know a great deal. This specific period, especially the last decades of the Republic, constitutes one of the best documented periods in all of Roman history. For this period there is a wealth of high quality sources, not only an extensive literature – including a large body of contemporary documentation –, but also a number of original documents such as laws and *senatus consulta*, which in some cases survive quite substantially.

As for constitutional matters, it has normally not been seriously questioned that data attested in the sources for the Ciceronian age are of relevance also for earlier periods. Therefore the last century BC has established itself as the main avenue to the Roman Republic, almost regardless of the specific era under study. In my opinion this is a flawed approach, because it provides us with highly disparate data. I have argued that due attention has not been paid to the fact that the entire constitutional setting changed with the reforms of Sulla in the late 80s BC. It is particularly important to observe that the consulship, as a result of these reforms, became essentially a civil office. Unlike their pre-Sullan predecessors, who spent most of their year in office leading military operations far from the capital, the consuls of the last century BC were based in Rome where they headed the civil administration. This means that the very structures of political life changed drastically in the beginning of the last century BC.[12]

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[12] Cf. T. Hantos, *Res publica constituta. Die Verfassung des Dictators* Sulla (Hermes Einzelschriften 50), Stuttgart 1988, 79 f.

The value of the testimony of Cicero and of other late republican material as sources for the pre-Sullan period is further diminished by the well-known fact that much of the last century BC was a period of severe crisis and, during certain particularly troubled years, political anarchy. The problem, to quote John North, is "that the period for which the information is of such high quality is short, amounting to little more than the years of Cicero's political maturity, and that this was itself a period of crisis, not one of normality".[13] The political conditions of the last century BC are, of course, well known to scholars, but the apparent implications have not been duly recognized. If political life in the last decades of the Republic featured radically new structures, it is obvious that the sources for this period have little bearing on pre-Sullan conditions. In my earlier studies I have stressed the importance of studying the political system of the Middle Republic exclusively on the basis of the sources for this specific period.

The validity of my method has been questioned by Michael H. Crawford, who rejects the idea that the Sullan constitutional settlement involved significant changes of the political system. He quite rightly observes that some of the changes that took place in the later Republic (some of which have been attributed to Sulla, that is) predate the ascendancy of Sulla,[14] but it remains an indisputable fact that the surviving sources depict Sulla as a major reformer of the political system. It is, above all, amply documented that he tampered with the *tribunicia potestas*, which for centuries had been a major factor in Roman politics.[15] Moreover, Appian tells us in explicit terms that the Sullan reforms involved voting in the popular assemblies.[16] Rejecting my contention that Sulla had introduced a major change in the nature of consular legislation, Crawford cites a passage of Cicero (*Flacc.* 15), which in his mind suggests that the whole pattern of voting in the popular assemblies in the mid-first century BC went back to

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[13] J. North, "Democratic Politics in Republican Rome", *P & P* 126 (1990) 4.

[14] Crawford 2004 (n. 7), 172.

[15] Caes. *civ.* 1,7,3 (cf. 1,5,1): *Sullam nudata omnibus rebus tribunicia potestate tamen intercessionem liberam reliquisse*; Liv. *per.* 89: *legibus novis rei publicae statum confirmavit, tribunorum plebis potestatem minuit et omne ius legum ferendarum ademit*; Vell. Pat. 2,30,4: *Pompeius tribuniciam potestatem restituit, cuius Sulla imaginem sine re reliquerat*; App. *civ.* 1,100: τὴν δε τῶν δημάρχων ἀρχὴν ἴσα καὶ ἀνεῖλεν; *Vir. ill.* 75,11: *tribuniciam potestatem minuit*.

[16] App. *civ*. 1,58.

time immemorial.[17] Even if this rather bold interpretation of the phrase he must be thinking of – *o morem praeclarum disciplinamque quam a maioribus accepimus, siquidem teneremus!* – were correct (one seriously doubts, however, if the *maiores* here necessarily are the distant founders of the Republic), the passage by no means warrants that procedural changes never took place in the legislative assemblies between the inception of the republican period and Cicero's lifetime.[18] Not only is the mere idea absurd, considering that we are dealing with a period spanning nearly five centuries, but we actually know for certain that one major change was introduced. The adoption of the written ballot, a reform to which Crawford himself refers to later,[19] was brought about in accordance with four tribunician *leges tabellariae* in the period 139–107 BC. The third of these, passed by the tribune C. Papirius Carbo in 131, extended this method of voting to the legislative assemblies.[20]

I should also stress that, whatever their nature and specific content, my methodological approach derives its justification not solely from the supposed impact of Sulla's reforms. As I have repeatedly underlined, my exclusion from consideration of political conditions attested for **only** in the post-Sullan period is justified also by the fact that much of the last century BC was a period of severe crisis, which in my mind automatically limits the value of data documented solely in this period.[21] That conditions attested for in the last decades of the Republic are not necessarily indicative of political practice in the pre-Sullan period is clear also from an observation made, incidentally, by Crawford himself:[22] "It is difficult to comprehend political life at Rome in the late Republic. Not only are its structures and institutions alien to us; they were also in a state of disruption and change." I could not agree more.

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[17] Crawford 2004 (n. 7), 172.

[18] In my mind the passage rather implies the opposite, that the meetings of the popular assemblies in Ciceros days were **not** conducted in accordance with ancestral custom.

[19] Crawford 2004 (n. 7), 172.

[20] For the four ballot laws, see Cic. *leg.* 3,35–36. Among the many modern discussions I would like to single out A. Yakobson, "The Secret Ballot and its Effects in the Late Roman Republic", *Hermes* 123 (1995) 426–442.

[21] Sandberg 2001 (n. 5), 21.

[22] M. Beard & M. H. Crawford, *Rome in the Late Republic. Problems and Interpretations*, London 1985, 40.

"Eliminating" consular legislation

In a thorough scrutiny of the primary sources I have sought to demonstrate that many of the republican laws which are usually held to be consular – included as such (mostly with invented names altogether) in the canon of Rotondi (which recently, for the period down to the Gracchi, has been replaced by the works of Flach and Elster) – are in fact of uncertain attribution or even altogether conjectural.[23] There has been a conspicuous tendency among modern scholars to ascribe laws of unknown authorship to consuls. A good example of this tendency is the law on bribery of 159 BC which Rotondi calls "*lex Cornelia Fulvia de ambitu*", ascribing it to the consuls Cn. Cornelius Dolabella and M. Fulvius Nobilior; this attribution is accepted also by Broughton.[24] A look at the actual evidence gives a much needed reminder of how vague our knowledge of republican legislation often is. The only source for this law is the epitomator of Livy, who merely states that, in the year in question, *lex de ambitu lata est*.[25]

A remarkably large share of the consular laws present in the list of Rotondi are neither mentioned nor alluded to in ancient sources, but their existence has been postulated by modern scholars in order to account for various innovations or reforms attested for in the historical record. For instance, Pliny the Elder's report in his account of monetary history that the coining of silver commenced at Rome in the consulship of Q. Ogulnius and

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[23] Sandberg 2001 (n. 5), esp. 41–44 and 85–93. All known fragments of republican laws are conveniently collected in *RS* = M. H. Crawford (ed.), *Roman Statutes* I–II (Bulletin of the Institute of Classical Studies, Supplement 64), London 1996. However, our knowledge of republican legislation is only rarely based on documentary evidence; it primarily rests on scattered reports in historiographical and other literary sources (of which few predate the last century BC). Lists of Roman statutes, with references to classical sources and modern scholarship, are therefore essential tools: *LPPR* = G. Rotondi, *Leges publicae populi Romani*, Milano 1912 (repr. Hildesheim 1990); *GFFR* = D. Flach, in Zusammenarbeit mit S. von der Lahr, *Die Gesetze der frühen römischen Republik. Text und Kommentar*, Darmstadt 1994 and M. Elster, *Die Gesetze der mittleren römischen Republik*, Darmstadt 2003. A new collection of the evidence for legislation, *Les lois du peuple romain*, is currently being prepared by an international team of scholars under the direction of J.-L. Ferrary and Ph. Moreau. An important aid is also *MRR* = T. R. S. Broughton, *The Magistrates of the Roman Republic* I–II, New York 1951–52 (with *Supplementum*, Atlanta 1986).

[24] Rotondi, *LPPR* (n. 23), 288; Broughton, *MRR* I (n. 23), 445.

[25] Liv. *per.* 47.

C. Fabius (*coss.* 269 BC) has called into existence an altogether hypothetical "*lex Fabia Ogulnia*", ascribed to the consuls of the year.[26] Pliny's reference to the consuls is, of course, nothing else than the normal Roman method of dating by eponyms; consular involvement is not implied. And there is certainly no need to postulate a consular law. It is interesting to note that the rest of Pliny's account actually includes several explicit references to monetary laws, all of which seem to be tribunician measures.[27]

Laws of uncertain attribution as well as hypothetical laws are almost invariably attributed to consuls.[28] This means that the consular share of republican civil legislation, which even by orthodox views is fairly limited, is actually much smaller than what is usually recognized. I think that there are cogent reasons to believe that it is all but non-existent before the last century BC. The strongest support for this view is found in the classical authors' use of Latin technical terminology, which never connects consuls or other curule magistrates with legislative procedure. It is an indisputable fact that no other words than *promulgare* and *rogare* bind historical agents to specific stages in the legislative procedure. The problem with other words, notably *ferre*, is that their exact implication with regard to the proceedings in the legislative assembly cannot be known.[29] By means of a thorough scrutiny of technical terminology present in the primary sources I have established that the consuls of the Middle Republic, in contexts of civil legislation, are never represented as performing *promulgatio* or *rogatio*.

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[26] Plin. *nat*. 33,44: *Argentum signatum anno urbis CCCCLXXXV, Q. Ogulnio C. Fabio cos., quinque annis ante primum Punicum bellum*. Rotondi, *LPPR* (n. 23), 243 f.; M. H. Crawford, *Roman Republican Coinage* II, Cambridge 1974, 615.

[27] Plin. *nat.* 33,46: *Mox lege Papiria semunciarii asses facti. Livius Drusus in tribunatu plebei octavam partem aeris argento miscuit. Is, qui nunc victoriatus appellatur, lege Clodia percussus est.*

[28] For more examples, see my discussion of non-tribunician statutes in Sandberg 2001 (n. 5), 85–93.

[29] The Greek literary sources for the republic are of very little value for terminological analysis, as the Greek authors usually do not provide adequate equivalents to the technical terms that they found in their Latin sources. It is only in the official inscriptions, particularly the translations of statutes, that it is possible to discern an effort to render the original terminology in a Greek form, but this material is very scanty. See, à propos, H. J. Mason, "The Roman Government in Greek Sources. The Effect of Literary Theory on the Translation of Official Titles", *Phoenix* 24 (1970) 150–159 and, in particular, Id., *Greek Terms for Roman Institutions. A Lexicon and Analysis* (American Studies in Papyrology 13), Toronto 1974.

Whereas tribunes of the *plebs* are frequently associated with these key stages in the legislative procedure, there are only four instances in the entire record for this period where curule magistrates are represented as performing these functions.[30] Interestingly enough none of these pertains to "normal laws", but to the passage of *leges de bello indicendo* (declarations of war). Another context in which curule magistrates are attested for is elections. One sole passage constitutes the only evidence we have for a consul performing a *promulgatio* or *rogatio* in this period, and this pertains to the passage of a *lex de bello indicendo* in 200 BC.[31] These observations, I think, corroborate my hypothesis that consuls and other curule magistrates, though no doubt formally competent to legislate on civil matters, in practice did not do that.

There are also, I believe, reasons to believe that the great majority of those relatively few statutes which are associated with consuls by classical authors were in fact passed by tribunes of the *plebs*.[32] There is evidence for tribunes legislating on the request of consuls, who usually are recorded as acting on the initiative of the Senate.[33] This, I have argued, was, during the better part of the pre-Sullan Republic, the normal way for consuls and other

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[30] Curule magistrates of the pre-Sullan period are represented as performing *promulgatio* or *rogatio* in the following passages: 1) Liv. 6,42,14 (the election of *duumviri aediles*, i.e. curule aediles, in 367 BC); 2) Liv. 27,5,16–17 (the appointment of Q. Fulvius Flaccus as *dictator* in 210 BC); 3) Liv. 31,6,1 f. (the passage of a *lex de bello indicendo* in 200 BC) and 4) Liv. 45,21,1–3 (the passage of another *lex de bello indicendo* in 167 BC). There is a possible fifth instance in the epigraphic record, in the so-called *Lex de provinciis praetoriis* (formerly known as *Lex de piratis persequendis*), a Greek translation of a Roman statute of c. 100 BC (*RS* 12). In this inscription (Cnidos copy, col. iii, lines 4 f.) there is a reference to an earlier law on the powers of provincial governors. This law, which is clearly an extrapomerial law, had been passed by a certain M. Porcius Cato in his capacity as praetor, perhaps the consul of 118 who held the praetorship in or before 121 BC (see *RS* I, 260): ἐν τῶι νόμωι ὃν Μάαρκος Πόρκιος Κάτων στ̣ρ̣α̣τ̣η̣γ̣ὸ̣ς̣ ἐ̣κ̣ύ̣ρ̣ω̣σε. As indicated by the dotted letters, the last words are not clearly legible. The current restoration of the verb is not unproblematic. Andrew W. Lintott, observing that the word κυροῦν is not normally used of a person obtaining the approval of a measure, and that ἐρωτᾶν is used for *rogare* elsewhere in the text of the inscription, concludes that the translator was faced with *tulit* in the Latin original, see "Notes on the Roman Law Inscribed at Delphi and Cnidos", *ZPE* 20 (1976) 81.

[31] Liv. 31,6,1 f.

[32] See, in particular, Sandberg 2001 (n. 5), 97 and passim.

[33] See e.g. Val. Max. 7,6,1 (215 BC); Liv. 30,27,3 (202 BC), 31,50,8 (200 BC), 39,19,4 (186 BC) and 45,35,4 (167 BC).

curule magistrates to legislate on civil matters. This kind of legislative practice would explain the fact that consuls, who are never connected to the actual passage of civil legislation (by the verbs *promulgare* or *rogare*), are sometimes recorded as law-makers by the word *ferre*, in constructions such as *consul legem*/*rogationem tulit*. It is not unreasonable to assume that laws, which had been conspicuously backed by a consul or another curule magistrate, would normally be associated with this magistrate in the historical tradition. That classical authors reporting details about legislation might ignore the actual proposer of a law, if this person acted on the initiative of others, is evident from an interesting passage of Pliny the Elder: *lex Metilia extet fullonibus dicta, quam C. Flaminius L. Aemilius censores dedere ad populum ferendam*.[34] Here we have a law, designated *lex Metilia*, which was associated with two censors of which neither was himself a Metilius. It seems clear that the law got its name from the person by whom it was promulgated and rogated in the legislating assembly. Both Rotondi (who finds Pliny's phraseology "infelice") and Broughton identify the legislator as M. Metilius, one of the tribunes of 217 BC.[35] True, my case would be considerably stronger had the passage referred to consuls instead of censors (who normally did not engage in comitial legislation), but it serves quite well to prove that there was a clear distinction between the *auctor legis* and the *lator legis*, and that these are not always the same person.

Crawford again, in his review of my contribution to the volume *The Roman Middle Republic*, though being sceptical, concedes that I have "identified an interesting phenomenon, namely that the sources for the middle Republic talk of curule magistrates generally as passing statutes, whereas tribunes go through the processes reasonably well known from the late Republic of promulgating and proposing".[36] Curiously oblivious of this observation, in his review of *Magistrates and Assemblies* he seems to fail to understand the essence of my terminological analysis.[37] As a result, Crawford not only distorts the results of my terminological analysis, but completely misrepresents them. Believing that I have tried to show that tribunes are described as legislating with the terms *promulgare* and *rogare*,

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[34] Plin. *nat.* 35,197.

[35] Rotondi, *LPPR* (n. 23), 252; Broughton, *MRR* I (n. 23), 236.

[36] Crawford 2001 (n. 7), 332. Sandberg 2001 (n. 5).

[37] Crawford 2004 (n. 7), 171–172.

and consuls with the term *ferre*, he goes on to cite instances where *ferre* is used of tribunes and *rogare* of consuls and praetors.[38] As he notes himself, I actually cite all the passages he refers to. It is therefore a bit strange that he did not seem to have had time to take a second look at what I actually say. The plain truth is that I nowhere claim that the terms in question were used in the way Crawford suggests. Indeed, I explicitly assert that "the frequently occurring word *ferre*, in constructions such as *consul/tribunus plebis legem* (or *rogationem*) *tulit*" was used for both consular and tribunician legislation.[39] I also make perfectly clear that my analysis focuses on the use of *promulgare* and *rogare*.

Crawford also suspects that I have not "really taken on board the extent of Livy's wanton insouciance about institutional terminology; or of the filtering of almost everything we know about the middle Republic through the experience of the late Republic".[40] First of all, I should stress that my observations about technical terminology are based on all extant sources. Livy is, of course, the single most important author, but my scrutiny of the sources did include the whole corpus of literary sources (including legal literature) as well as the entire epigraphic and papyrological record, even coins. I am also perfectly aware that the sources for pre-Sullan Rome are mostly post-Sullan. We would certainly wish to have more adequate sources, but it is simply an inescapable fact that Livy and other late republican and imperial sources constitute the bulk of the written evidence for the Middle Republic. This means that any interpretation of political and constitutional conditions in this period must be based on this material. That is, the standard model is based on the very same body of evidence that I have used in my inquiry. Why should this scholarly reconstruction be perceived *a priori* as more tenable than mine? If Crawford wants us to think that nothing can be inferred from the sources for the mid-republican period, then we should establish that the political, institutional and constitutional history of this period cannot be subject to scholarly study, and that all research on republican Rome should focus entirely on its last few decades. The most absurd consequence of such a stance would be that the large body of work done on pre-Sullan Rome cannot be critically reviewed.

The big question is, of course, whether or not it is possible to deduce

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[38] Crawford 2004 (n. 7), 171.

[39] Sandberg 2001 (n. 5), 45.

[40] Crawford 2001 (n. 7), 333.

from an argument *e silentio* that consuls and other curule magistrates did not themselves put law proposals before the legislative assemblies. Crawford is quite right to stress the fact that we for the Middle Republic do not have the contemporary documentation that we have for the Ciceronian age.[41] I am well aware of the possibility that qualitative differences in the documentation available to us may distort our perception of how things worked in the various periods of the Republic, and I also admit that I should have stressed this in more explicit terms. However, as I shall show below, there are reasons to believe that the terminology found in the sources does reflect actual conditions in the Middle Republic, at least the way they were perceived by the historians and antiquarians who took an interest in this period.

Crawford does not contest that consular legislation was rare before the late second century BC, but this, in his mind, only explains why "the complete apparatus of '*promulgare*' and '*rogare*' happens not to be attested for."[42] Here he misses something very important. As we have already seen, both words are actually attested for in connection with curule magistrates in the pre-Sullan period, but exclusively in contexts pertaining to elections or declaration of war. There is, in other words, a very clear pattern emerging from the sources, and this corroborates my hypothesis that these were the curule magistrates' normal spheres of comitial action (in the centuriate assembly). The possibility that the mere scarcity of consular legislation accounts for the complete absence of evidence linking curule magistrates to legislative procedure in civil contexts is diminished considerably by the fact that even rulers and magistrates of foreign communities are connected to such procedure: at Syracuse (in 214 BC), at Argos (in 197 BC) and at Carthage (in 195 BC).[43] Given the extreme rarity in Roman sources of references to legislation in foreign states, it is remarkable that the legislative procedure is described here with a technical terminology not attested for in connection with the chief magistrates of Rome. It is therefore most difficult, for me at any rate, to escape the impression that it is no accident that classical authors do not represent consuls and other curule magistrates as performing the *promulgatio* and *rogatio* of Roman statutes (as ever, with the

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[41] Crawford 2001 (n. 7), 333.

[42] Crawford 2004 (n. 7), 171.

[43] Liv. 24,25,10: *rogationem promulgarunt* (the local *praetores*); Liv. 32,38,92: *rogationes promulgavit* (king Nabis of Sparta) and Liv. 33,46,5–6: *legem ... promulgavit pertulitque* (Hannibal).

exception of *leges de bello indicendo*).

Crawford also supposes that curule magistrates are not normally recorded as having promulgated or proposed for the middle Republic, because it was tribunician legislation that the late Republic regarded as controversial and as requiring an account of the various stages.[44] He would not have come up with this kind of argument if he had bothered to check all of the relevant material, which he frankly admits not to have done.[45] This material is in numerous cases found in passages pertaining to routine legislation. Indeed, it can be found also in accounts of such tribunician legislation which was initiated by the Senate, usually with a consul as an intermediary. Moreover, the terminology in question also appears in other fairly non-controversial or "neutral" contexts – namely in the accounts of foreign legislation we considered in the preceding paragraph.

As for my discussion of individual laws, Crawford finds "simply breath-taking" my approach to the sources "in order to eliminate as much pre-Sullan legislation as possible". But he gives merely one example of an argument which in his eyes is weak. [46] So strong a judgement would, in my mind, have called for more examples. And better ones. As a matter of fact, in rejecting my interpretation of a passage of Livy,[47] Crawford brings forth an argument that is clearly flawed. I have argued that the popular vote authorizing Q. Fabius Maximus Verrucosus to dedicate, as a *duumvir*, the temple that he in the aftermath of the battle at Lake Trasimene had vowed to Venus Erycina was a tribunician measure, and not – as is usually thought – a consular law of Ti. Sempronius (*cos.* 215).[48] I suggested that the passage in question, though in this particular case an explicit reference to tribunician participation is wanting, implies the same kind of procedure attested for in other remarkably similar passages in Livy, where it is recounted that the Senate directs a curule magistrate to hand a matter to the tribunes.[49] Additional support I found in a passage of Cicero according to which there was a *lex vetus tribunicia* that prohibited *iniussu plebis aedis, terram, aram*

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[44] Crawford 2001 (n. 7), 333.

[45] Crawford 2001 (n. 7), 333.

[46] Crawford 2004 (n. 7), 171.

[47] Liv. 23,30,14.

[48] Sandberg 2001 (n. 5), 98 f.

[49] See, for instance, Liv. 30,27,3, 31,50,8, 39,19,4 and 45,35,4, which refer to legislation in the period 202–167 BC.

consecrari.[50] Now, Crawford rejects this argument on the ground that *consecrare* is not the same as *dedicare*. Here he seems to be simply wrong. A *dedicatio* of a temple or an altar to a deity is at the same time a *consecratio*. Although not strictly technically the same thing, these two acts are inseparable parts of the ritual by which an object was made a *res sacra*. It is therefore quite adequate, as indeed our sources frequently do, to refer to the whole ritual of *dedicatio*/*consecratio* by the term *dedicatio* which, to quote Nisbet, "is probably the better technical term. It would be supposed to carry the *consecratio* with it".[51] Therefore, provided that the *lex vetus* in question was enacted before 215 BC, the matter assigned to Ti. Sempronius clearly postulated a popular decree in the form of a *plebiscitum*.

In Crawford's mind my attempt "to write out of the story such consular legislation as is attested" reveals my "desperation".[52] Again he uses strong words with a minimum of documentation to substantiate his claim, and again he misses the mark. Crawford singles out two laws, the *Lex Licinia Mucia* of 95 BC, which deprived of their citizenship aliens who usurped the Roman citizenship (or had been illegally enfranchised), and the *Lex Iulia* of 90 BC, which granted Roman citizenship to those Italian communities which at the outbreak of the Social War were still willing to accept it. Here it must be stressed that I have not denied the historicity of these laws, nor have I raised doubts that they were consular laws, but Crawford finds it "bizarre" to describe them as 'pertaining to foreign relations'. Whether or not this particular characterization is accurate enough is of little importance as there can be little doubt what my point is, namely, that these two laws – which were concerned with *peregrini* and foreign states – belonged in the category of 'extrapomerial' statutes.[53] Moreover, if Crawford is right in assuming that the *Lex Pompeia* of Cn. Pompeius Strabo (*cos.* 89 BC) was no comitial statute this would only strengthen my case as I have argued that some of the consular laws of the pre-Sullan period were in

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[50] Cic. *dom*. 127.

[51] R. Nisbet, *M. Tulli Ciceronis De domo sua ad pontifices oratio*, Oxford 1939, 209–212 (Appendix VI). Cf. J. Linderski, *The Oxford Classical Dictionary*[3], Oxford 1996, 376–377 s.v. '*consecratio*'. I thank Dr. Jyri Vaahtera, an expert on Roman religion and augural matters, for the reference.

[52] Crawford 2004 (n. 7), 172.

[53] Sandberg 2001 (n. 5), 79 and 101 n. 16.

fact *leges datae*, or possibly *edicta*.[54]

The implications of the use of the legislative assemblies

The view that the consuls of the Middle Republic did not legislate on civil matters is perfectly compatible with a politico-institutional situation that, I daresay, has begun to emerge in the discussion of the political institutions of republican Rome. If a) the centuriate assembly was not used for civil legislation in this period and b) the *concilium plebis* was the only tribal assembly, it is quite obvious why there is no evidence for curule magistrates performing the *promulgatio* or the *rogatio* of civil laws. When the oldest assembly of Rome, the *comitia curiata*, had lost its legislative functions,[55] these magistrates simply had no legislating assembly at their disposal. Of course, it is seldom possible to prove anything conclusively in the study of ancient Roman history, particularly when we are dealing with periods antedating the Late Republic, but it can indeed be shown that the prevailing views of the use of the centuries and the tribes are based entirely on scholarly conjecture and not on a close reliance on actual evidence.

While it is well known that the centuriate assembly was not employed for civil legislation during the latter part of the pre-Sullan Republic, it is far from common knowledge that there is only scanty (and, as we will see, very problematic) evidence for earlier legislation in this assembly. Ernst Meyer notes that we do not know of one single law passed by the centuries in the period between the *lex Hortensia* (of 287 BC) and Sulla (of course, with the exception of decisions concerning war and peace), but he seems to believe that there is evidence for centuriate legislation in the period immediately preceding the Hortensian law.[56] Michael Rainer, objecting to my views, betrays a similar conviction: "Dass die *comitia centuriata* als eigentliche und

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[54] Sandberg 2001 (n. 5), 102 f.

[55] The last known curiate law, an enactment ordering the recall of M. Furius Camillus from his exile, dates to 390 BC (Liv. 5,46,10). That the curiate assembly was no deliberative popular assembly in the Late Republic is reflected in the fact that the participation of the citizenry (by the year 63 BC) was no longer needed; the 30 *curiae* were each represented by a *lictor* whenever it was necessary to obtain a curiate decision, see Cic. *leg. agr*. 2,31.

[56] E. Meyer, *Römischer Staat und Staatsgedanke*[2], Darmstadt 1961, 192.

ursprüngliche Versammlung des Gesamtvolkes galten und bis zum Ausgang der Republik als solche bestehen sollten, darüber gibt es für mich keinen Zweifel. Es ist ganz allgemein davon auszugehen, dass alle Gesetze, die vor 367/366 und wahrscheinlich vor der *lex Hortensia* 287 v.Chr. beschlossen wurden, entweder in den *comitia tributa* oder in den *comitia centuriata* beschlossen wurden. Als wesentliches Beispiel nenne ich hier die Zwölf Tafeln".[57]

It is symptomatic that Rainer has to go all the way to the decemviral period, c. 450–449 BC, in order to find the example that he so badly needs. As a matter of fact, all other known instances of legislation in the centuriate assembly pertain to even earlier legislation. Therefore, the case for a period when the centuriate assembly was used for legislation in the pre-Sullan Republic rests entirely on evidence of the poorest quality imaginable. As is well known, the attendibility of the annalistic tradition for the Early Republic is highly dubious. In addition to the Twelve Tables (the *lex duodecim tabularum*), the ratification of which was believed to have taken place in the centuriate assembly,[58] there are only four statutes before Sulla that classical authors connect with this assembly: 1) the *lex Valeria de provocatione* of 509,[59] 2) the *lex Icilia de Aventino* of 456,[60] 3) the so-called "lex Aternia Tarpeia de multa et sacramento" of 454,[61] and 4) the so-called "lex Valeria Horatia de plebiscitis" of 449.[62] As was observed already by Richard Mitchell, the small group of recorded centuriate laws includes some of the most dubious laws of the whole Republic.[63]

I have also pointed out that the centuriate laws known to us were usually passed in most exceptional circumstances. This is certainly true of the *lex Valeria de provocatione*. This statute, perceived as a cornerstone of the republican constitution in the Late Republic, was believed to have been passed in the immediate aftermath of the expulsion of the last king and the establishment of the new political system. As for the Twelve Tables, this

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[57] Rainer 2002 (n. 7), 643 f.

[58] Liv. 3,34,6; Dion. Hal. *ant*. 10,57,6.

[59] Cic. *rep*. 2,53; Val. Max. 4,1,1.

[60] Dion. Hal. *ant.* 10,32,4.

[61] Cic. *rep*. 2,60; Dion. Hal. *ant.* 10,50,1.

[62] Liv. 3,55,1; Dion. Hal. *ant.* 11,45,1.

[63] Mitchell 1990 (n. 3), 199. See also my discussion of these laws in Sandberg 2001 (n. 5), 127 ff.

codification of customary law was ratified in a period during which the regular constitution was suspended and the political power entrusted to *decemviri legibus scribundis*, which was not only a new magistracy, but also exempt from appeal (*provocatio*). Finally, the "lex Valeria Horatia de plebiscitis" was passed immediately after the fall of the second decemvirate and a plebeian *secessio*. That is, the involvement of the centuriate assembly in these instances, even if it be accepted as historical, cannot be cited to support the view that this assembly was employed for legislation under normal circumstances.[64]

For the period between 445 BC and Sulla the only attested functions of the centuriate assembly were to elect magistrates with *imperium*, to pass judgement in cases *de capite civis* and to decide on matters concerning war and peace. Not a single law on civil matters is reported. Given the nature of the evidence, we are not permitted to conclude with certainty that this assembly was not used regularly for civil legislation in this period, but – in view of the complete absence of documentation – why should we even begin to assume something like that? The indisputable fact that the centuriate assembly was not used for legislation in the Middle and Late Republic (that is, before Sulla) is usually explained in terms of a gradual development. According to this view, which has been accepted wholesale by most authorities on the Roman popular assemblies, the legislative functions of the *comitia centuriata* were gradually transferred to assemblies which met by tribes.[65] Crucial to this kind of interpretation is the notion that tribal voting, which was based on 35 *tribus*, was more expeditious than voting by 193 *centuriae*. Also Michael Rainer, rejecting my interpretation of the operation of the comitial system, cites this widespread belief as a well-established

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[64] Sandberg 2001 (n. 5), 128 f. For a more thorough discussion of the use of the centuriate assembly, and of all the problems involved, see ibid. 123–131. See also U. Paananen, "Legislation in the comitia centuriata", *Senatus populusque Romanus* (n. 5), 9–73.

[65] G. W. Botsford, *The Roman Assemblies. From their Origin to the End of the Republic*, New York 1909, 239; J. Bleicken, Das *Volkstribunat der klassischen Republik. Studien zu seiner Entwicklung zwischen 287 und 133 v.Chr.* (Zetemata 13), München 1955, 43; E. S. Staveley, "Tribal Legislation before the *lex Hortensia*", *Athenaeum* 33 (1955) 11; Meyer 1961 (n. 56), 192; L. R. Taylor, *Roman Voting Assemblies. From the Hannibalic War to the Dictatorship of Caesar*, Ann Arbor 1966, 7; R. Develin, "*Comitia tributa plebis*", *Athenaeum* 53 (1975) 317 and 322.

fact.[66] Which it is certainly not. I believe that I have established that voting in the centuriate assembly was actually much faster than in assemblies which voted by tribes.[67] Therefore, unless it can be shown that my demonstration contains errors, there is no reason – at least on account of any practical considerations – to postulate a transfer of the legislation from the *comitia centuriata* to the tribes.

Let us now turn to tribal legislation. Most laws in republican Rome were passed in assemblies which met by tribes, this much is universally acknowledged. But controversy abounds as to the implication of this observation. It is usually thought that, in terms of composition and presidency, there were already in the Middle Republic (if not earlier) two tribal assemblies. Whereas the *concilium plebis*, which was summoned by the tribunes of the plebs, was an exclusively plebeian affair, the *comitia tributa* is thought of as comprising the entire citizen body under the presidency of a consul or another curule magistrate. That the existence of the latter, which in modern scholarly literature is sometimes designated *comitia tributa populi* (a term lacking the authority of the primary sources), is not evident from the primary sources, but has been inferrred only by modern scholarship, is not widely known, even amongst scholars working with constitutional history. Rainer again, at odds with my contention that the *concilium plebis* was the sole tribal assembly before the Sullan reforms, clearly believes that the existence of a tribal assembly of the whole populus is a well-established fact (bold types are mine): "Zu diesen ausserordentlich anregenden Ausführungen doch einige kritische Bemerkungen. Diese betreffen zuerst die Existenz von *comitia tributa*. Es ist nicht einsichtig, warum diese durchaus nützliche Versammlung, die sehr wohl aus Patriziern und Plebeiern bestand, **a priori geleugnet werden soll**."[68]

It seems to me an altogether absurd situation that advocacy of the view that there was but one tribal assembly is generally regarded as iconoclasm, as it is in fact adherence to the prevailing view that entails admittance of notions that are not firmly based on the testimony of the primary sources. I believe that already Robert Develin has demonstrated that the whole notion of two tribal assemblies, which originated with the work of Mommsen, is nothing

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[66] Rainer 2002 (n. 7), 643.

[67] Sandberg 1993 (n. 5), 84 f. and Sandberg 2001 (n. 5), 124 f.

[68] Rainer 2002 (n. 7), 643.

but an assumption.[69] That Develin was right was all but confirmed by Joseph Farrell in an important, but much neglected, paper. The very existence of the terms *comitia* and *concilium*, interpreted in accordance with the well-known legal definition of the imperial jurist Laelius Felix,[70] has been the single most important piece of evidence in favour of two separate tribal assemblies – even if it was noted already in the beginning of last century that there is a clear discrepancy between the definition of these terms and their actual usage in classical writers.[71] Farrell, in a forceful demonstration, established how the two terms are actually used, effectively showing that they do not constitute evidence for postulating two distinct tribal assemblies.[72]

Unlike Develin, who in my mind goes too far in discrediting the evidence of the late Republic, I have no problem whatsoever with curule magistrates using the tribes for legislative purposes in this period. I have actually argued that the consuls possibly were given the formal right to convene the tribal assembly by Sulla, in connection with his well-documented endeavours to curtail the tribunician powers.[73] Therefore I see no point in opposing my views on the subject by citing evidence from the Late Republic and the Early Empire, especially as I have warned against using evidence from this period in studying pre-Sullan conditions. Martin Jehne counters my views of pre-Sullan conditions by citing data from the last decades of the Republic, arguing that the idea of one single tribal assembly is incompatible with the testimony of Cicero in one of his letters (*fam.* 7.30.1): *ille* (sc. *Caesar) autem, qui comitiis tributis esset auspicatus, centuriata habuit*. Oblivious of what I have said about the value of data attested for only in the post-Sullan Republic he continues: "Solange niemand eine ordentliche Erklärung dafür anbietet, wieso der Patricier und Dictator Caesar berechtigt gewesen sein soll, im *concilium plebis*

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[69] R. Develin, 1975 (above n. 65) 302–337 and Id., "*Comitia tributa* Again", *Athenaeum* 55 (1977), 425–426.

[70] Preserved in Gell. 15,27,4: *Is qui non universum populum, sed partem aliquam adesse iubet, non* '*comitia*', *sed* '*concilium*' *edicere debet*.

[71] G. W. Botsford, "On the Distinction between *comitia* and *concilium*", *TAPhA* 35 (1904) 21–32. Cf. Botsford 1909 (n. 65), 119–138.

[72] J. Farrell, "The Distinction between *comitia* and *concilium*", *Athenaeum* 74 (n.s. 64) (1986) 407–438.

[73] Sandberg 1993 (n. 5), 80 f.; Sandberg 2001 (n. 5), 108 ff.,147.

Quaestorenwahlen abzuhalten, scheint es mir weiterhin naheliegender zu sein, zwei Formen der Tributcomitien zu akzeptieren".[74]

Also Crawford rejects my views on pre-Sullan conditions by citing data from the post-Sullan period. He cites as a severe problem for my case the fact that the *Lex Antonia de Termessibus* (of c. 68 BC) has tribunes proposing a statute to the *plebs*, and that the *Lex Quinctia* (9 BC) has a consul proposing to the *populus* (both terms referring to a tribal assembly). According to Crawford this difference of practice was hardly a construction of the late Republic or Augustus, wherefore it **must** be traditional.[75] He does not explain why. I should point out that the evidence in question could as well be cited to corroborate my own views. If Sulla had given the consuls the right to use the tribes for legislation, it would make perfect sense that a distinction between *populus* and *plebs* was introduced at this point in references to tribal assemblies. That is, the tribal assembly under tribunician presidency was referred to as *plebs*, whereas it qualified as *populus* when it met under the presidency of a *magistratus populi Romani*. It remains a fact that the only evidence we have for a curule magistrate putting a bill before a tribal assembly in the pre-Sullan period is found in a passage of Livy pertaining to most irregular circumstances – at a military camp at Sutrium (!) in 357 BC.[76] Maybe the lack of additional evidence is yet another example of what Crawford styles "an unimportant accident",[77] but I believe that we should approach the whole problem strictly empirically, and so acknowledge that the notion of a regular tribal assembly at the disposal of curule magistrates before the last century BC is based entirely on scholarly conjecture.[78]

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[74] Cic. *fam.* 7,30,1. M. Jehne, "Integrazionsrituale in der römischen Republik. Zur einbindenden Wirkung der Volksversammlungen", G. Urso (a cura di), *Integrazione, mescolanza, rifiuto. Incontri di popoli, lingue e culture in Europa dall'antichità all'umanesimo: Atti del convegno internazionale, Cividale del Friuli, 21–23 settembre 2000*, Roma 2001, 91 n. 8.

[75] Crawford 2001 (n. 7), 333; cf. Crawford 2004 (n. 7), 172. *Lex Antonia de Termessibus* (*CIL* I^2 589 = *RS* 19); *Lex Quinctia* (Frontin. *aq.* 129 = *RS* 63).

[76] Liv. 7,16,7 f. Users of the *LPPR* (n. 23) will certainly find a number of additional examples, but a control of the primary sources cited by Rotondi reveals that these are based on unwarranted assumptions.

[77] Crawford 2004 (n. 7), 172.

[78] For a full-length discussion of the problem concerning the use of the tribes by curule magistrates, see Sandberg 2001 (n. 5), 105–110.

The testimony of Polybius

The most serious challenge to my views of pre-Sullan legislation is posed by Polybius of Megalopolis, in his survey of the Roman constitution. This was pointed out in her review of *Magistrates and Assemblies* by Loretana de Libero,[79] who, however, fails to mention that I dedicate in my book an entire chapter to a discussion of the value of Polybius' testimony for the problems I consider. It would have been interesting to know on what grounds she altogether neglects the considerations I have expounded on the subject.

Polybius' survey of the political system of Rome is most interesting, not only because it contains explicit information on the Roman constitution (which do not otherwise abound in the ancient sources), but also on account of its early date. Written in the middle of the second century BC, or shortly thereafter, Polybius' history constitutes the oldest surviving account of Roman history. Particularly important, from the point of view of my specific method, is the fact that Polybius witnessed the operation of the political system in the Middle Republic, that is, well before the innovations brought about by Sulla and, equally important, before the political turbulence that was heralded by the tribunate of Ti. Sempronius Gracchus in 133 BC.

As I stressed in my book, Polybius is far from being helpful as to the legislative procedure in his day. His account does not provide specific information about the interaction between magistrates and assemblies, or between the various categories of magistrates engaged in legislation. Very little specific can be inferred from Polybius' account about the operation of the various popular assemblies, or about their curious co-existence. He does not even distinguish various types of assemblies, but almost invariably speaks of the δῆμος. As for the various categories of magistrates, only the powers of the consuls are discussed in any detail.[80] This is, of course, quite in accordance with his theoretical conception of the Roman system. As the consuls were at the apex of the magisterial hierarchy that constituted the monarchic element in the mixed constitution, it is understandable that he did not find it worthwhile to consider the functions of the other magistrates which, after all, were subject to consular supervision. It is, however, regrettable that the tribunes of the *plebs* – who along with the rest of the plebeian political organization were altogether exempt from formal consular

[79] de Libero 2003 (n. 7), 429.

[80] Pol. 6,12.

control – are largely neglected in Polybius' survey. Only their obstructive powers are mentioned explicitly, even if much of what he says about the popular element in effect must pertain to the tribunes (for the simple reason that the people could not convene or make any decisions on its own initiative).

Dealing with the functions of the consuls Polybius does, however, make a statement that *prima facie* seems of immediate relevance for the concerns of this study. He states that it was the responsibility of the consuls that those state matters which were subject to popular discretion were put before the people. It was the consuls who summoned the assemblies, introduced the propositions, and executed the people's decisions: τούτοις καθήκει φροντίζειν καὶ συνάγειν τὰς ἐκκλησίας, τούτοις εἰσφέρειν τὰ δόγματα, τούτοις βραβεύειν τὰ δοκοῦντα τοῖς πλείοσι.[81]

Considered in isolation Polybius's account clearly implies that the consuls, also when it came to legislation, were the magistrates *par excellence* of the Roman state. There would be no reason whatsoever to take a second look at this statement were it not for the disturbing fact that there is a major discrepancy between the seemingly obvious interpretation of this passage and the actual record of republican legislation provided by other sources. As we have already seen, attested consular laws are very rare. No one contests this well known and easily observable fact.[82] Even if we would admit the whole group of poorly known laws attributed to consuls only by modern scholars and all the conjectural consular laws found in Rotondi's canon it can be observed that consular laws are heavily outnumbered by tribunician statutes. What does this mean? Are tribunician measures over-represented in the sources? This is the traditional explanation of the situation before 287 BC, i.e. the date for the Hortensian law. For instance, Jochen Bleicken rejects "mindestens 22 Plebiscite" from the period before the *lex Hortensia* (of 287 BC) as "Übertragungen später politischer Gedanken auf die Frühzeit".[83] The shortcomings of the historical tradition, it is thought, show in an over-representation of the tribunes of the *plebs* in the field of legislation. There is, at any rate, a curious predisposition among scholars to consider the traditions

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[81] Pol. 6,12,4. Discussion in F. Walbank, *A Historical Commentary on Polybius* I, Oxford 1957, 675–678.

[82] See, for instance, Crawford 2004 (n. 7), 171.

[83] J. Bleicken, *Lex publica. Gesetz und Recht in der römischen Republik*, Berlin 1975, 77 in the note.

of tribunician actions less reliable than those pertaining to consuls. It is always a convenient solution to cite the unreliability of the sources for the earlier periods of the Republic, but one is left to wonder why data concerning the tribunes would be more liable to distortion than those concerning consuls.[84] It has also been suggested that the predominance of tribunician legislation is due to certain archival-technical circumstances, that is, that *plebiscita* were more accessible for consultation than consular laws.[85] This is, of course, nothing but idle guess work that cannot be corroborated in any way. It is also based on the *a priori* assumption that consular legislation was considerably more important, in quantitative terms, than what the surviving evidence suggests.

The situation after 287 BC has been easier to reconcile with traditional views. As tribunician measures were now universally binding, and the consuls were spending more and more time leading armies and fleets against Rome's enemies, it was only natural that the tribunes – now fully integrated into the political system – would take an increasing responsibility for the legislation. But how does all this fit in with Polybius' statement? Not very well. It seems obvious to me that Polybius' testimony cannot be taken at face value. If he is interpreted as saying that the consuls were significantly engaged in legislation, this is clearly inconsistent not only with the testimony of other sources, but also with a political situation that can be inferred from all surviving sources, including the account of Polybius himself. Namely that the consuls set out for their military provinces early in the year, and spent most of their year in office away from Rome.

There are at least two solutions to this problem. First of all, we should not forget that Polybius' history is essentially an account of Roman military history. This means that he in his own research was using principally sources pertaining to military and diplomatic affairs. In these realms of public life the consuls were always conspicuously present, something which must have reflected in the documents he read. Popular decisions on war and peace, military matters, and foreign policy were usually taken by the centuriate assembly, which met in military array *extra pomerium* on the Campus

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[84] Richard Mitchell (1990 [n. 3], 191) has made a good point. In view of the fact that tribunician legislation is so well documented before the *lex Hortensia*, he finds it surprising that modern scholarship tends to discount, qualify or declare unreliable (or even illegal) early *plebiscita* rather than develop an alternative historical explanation.

[85] P. Culham, "Archives and alternatives in Republican Rome", *CPh* 84 (1989) 103.

Martius under the presidency of a consul or another *magistratus cum imperio*. The tribunes, who were not entitled to summon the centuries, were not as visible as the consuls in the material Polybius knew best. I have also suggested as a possibility that Polybius is not speaking of the consuls in absolute terms, but with regard to their position within the magisterial hierarchy. This hierarchy did not include the tribunes or other plebeian officials.[86]

What were the *leges consulares*?

That the consuls of the Middle Republic, at least in practice, first and foremost were military commanders cannot be seriously questioned. The record of their actions in surviving historical accounts is essentially a record of exploits in the theaters of war.[87] This state of affairs is certainly no mere reflection of the preferences of ancient historians, who had a special predilection for military *res gestae*. It is all clear that the supreme magistrates of this period, at any rate after the inception of the third century, spent most of their year in office campaigning. As for the tribunes of the same period, no matter how we read the sources, it can be observed that they were the principal law-makers. Almost all important legislation is associated with these plebeian officials. As a matter of fact, focusing on internal affairs we have to conclude that it was not the consuls, but the tribunes, who were the leading magistrates of the pre-Sullan Republic. It can be observed that there were, at least in practice, two spheres of public life during the better part of a typical political year in this period, each one with a separate administration: on the one hand a civil sphere under the tribunes and, on the other, a military sphere under consular control. According to Richard Mitchell, this situation reflects a dichotomy that was an original feature of the administration of the Roman state.[88] As far as the Middle Republic is concerned, this kind of model is not

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[86] Sandberg 2001 (n. 5), 32 f.

[87] See, for instance, Broughton, *MRR* (n. 23).

[88] Mitchell rejects the historicity of the Conflict of the Orders as well as the existence of a political distinction between patricians and plebeians; there was a distinction, but it was religious and legal in nature. According to Mitchell, the plebeian organization was no revolutionary movement, but the original civil administration of the Roman state, see Mitchell 1990 (n. 3), esp. 1–30. Cf. Id., "The Definition of *patres* and *plebs*. An End to the

at variance with the testimony of the sources, but I do not think that this kind of interpretation is tenable for the Early Republic.

As I have stressed elsewhere, it seems to me that the bifurcation of Roman public life, which was hardly a real dichotomy, evolved only gradually. That we do not find evidence linking curule magistrates to legislative procedure during the three centuries preceding Sulla does not, I think, indicate that they were not entitled to legislate, only that they usually did not. Or rather, that it was later believed that they did not themselves concern themselves with the technicalities of legislation.

There can be no doubt whatsoever that the consuls also had civil competence. True, the fact that the consuls – in accordance with a compromise between patricians and plebeians – during many years in the period 445–367 were substituted with military tribunes (*tribuni militum consulari potestate*) testifies to the predominantly military character of the consulship in the Early Republic, but the *imperium domi*, which together with the *imperium militiae* defined the competence of the consuls, must have included the power to put matters before the people.

It is also quite clear that some of the early republican laws were later considered to have been consular. We have already seen that there were a few consular laws of the first half of the fifth century BC that, according to tradition, were passed in the centuriate assembly (which could be convened only by magistrates with *imperium*). This serves to prove that were ancient laws that were believed to have been passed by curule magistrates. This must also be true of statutes passed before the institution of the tribunate, which according to tradition happened in 494. Rotondi distinguishes 10, and Flach 13 laws, – most of them ascribed to the consul P. Valerius Poplicola – in the period preceding the first *secessio* of the plebeians.[89] As for other early legislation, sometimes it is evident from the context in historical accounts that it was believed that consuls occasionally legislated themselves on civil matters. For instance, Livy recounts that the consuls of the year 430, L. Papirius Crassus and L. Iulius Iullus, resolve to propose a law concerning the valuation of fines, having learned that the tribunes were planning to put such a law before the people.[90] We should note as well that

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Struggle of the Orders", K. Raaflaub (ed.), *Social Struggles in Archaic Rome. New Perspectives on the Conflict of the Orders*, Berkeley and Los Angeles 1986, 130–174.

[89] Rotondi, *LPPR* (n. 23) 189–192; Flach, *GFRR* (n. 23), 45–73.

[90] Liv. 4,30,3: *Legem de multarum aestimatione pergratam populo cum ab tribunis parari*

there is also indirect, epigraphic evidence attesting that consuls did legislate in the Early Republic. A bronze pillar inscribed with the text of a consular law of 472, providing for an *intercalatio*, was seen by Varro in the last century BC.[91] Whether authentic or not, a question that is of course impossible to determine, it serves to prove that the most erudite of the Roman antiquarians did not hesitate to attribute early legislation to consuls. Finally, and most importantly, it should be pointed out that some of the early laws were referred to as *leges consulares*.[92]

I have argued that the consuls of the Early Republic legislated on all kinds of matters. For legislation pertaining to matters of war and foreign policy they used, as later in the Republic, the centuriate assembly. Laws on civil matters they passed originally, I believe, in the curiate assembly, which convened *intra pomerium*, in the *comitium*.[93] However, as soon as the tribunes' right to legislate was recognized, whether formally or *de facto*, it was only a question of time before the consuls would largely lose the initiative to these plebeian officials. Demands for change and reform normally originated in the plebeian community, and not among the patricians, who were intent on preserving *status quo*. Therefore the political organization headed by the tribunes at an early date emerges as the dynamic element in Roman society.[94] In the course of time the curiate assembly lost its legislative functions to the *concilium plebis*, and eventually became the institutional fossil we know from the Late Republic. After the completion of this process, I have argued, all civil legislation was concentrated in the hands of the tribunes

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consules unius ex collegio proditione excepissent, ipsi praeoccupaverunt ferre. Cf. Cic. *rep.* 2,60: *levis aestumatio pecudum in multa lege C. Iulii P. Papirii consulum constituta est*.

[91] Macr. *Sat.* 1,13,21: *Sed hoc arguit Varro scribendo antiquissimam legem fuisse incisam in columna aerea a L. Pinario et Furio consulibus, cui mensis intercalaris adscribitur.*

[92] The legislation of L. Valerius Poplicola Potitus and M. Horatius Barbatus in 449: Cic. *rep.* 2,54: *Luciique Valerii Potiti et M. Horatii Barbatii ... consularis lex sanxit, ne qui magistratus sine provocatione crearetur*; Liv. 3,55,4 f.: *Aliam deinde consularem legem de provocatione ... non restituunt modo, sed etiam in posterum muniunt sanciendo novam legem, ne quis ullum magistratum sine provocatione crearet*, Liv. 3,55,13: *Hae consulares leges fuere*.

[93] Sandberg 2001 (n. 5), 118, 135.

[94] Bleicken 1975 (n. 83), 82 ff., esp. 85 and 92. Cf. L. Amirante, "Plebiscito e legge. Primi appunti per una storia", *Sodalitas. Scritti in onore di Antonio Guarino* IV, Napoli 1984, esp. 2026.

of the *plebs*. In normal circumstances consuls would not themselves convene the tribal assembly or legislate on civil matters in the *centuriate assembly*, which lacked civil competence. Laws by curule magistrates on civil affairs were passed only when it was thougth necessary to formally sanction concessions made by the patricians to the plebeians during the Conflict of the Orders. Some of these were comitial laws passed in the the centuriate assembly, on the analogy of peace treaties which were normally ratified in this assembly. Some consular and dictatorial laws of the period were possibly *leges datae*.[95]

During most of the mid-republican period and down to at least the Gracchi, or even the reforms of Sulla, the Senate, which in effect constituted the government of the Roman state, normally depended on the tribunes in order to obtain popular decisions concerning civil matters. This kind of constitutional situation has been hard to accept for some scholars, who are reluctant to accept that the Roman aristocracy depended on the political organization of the plebeians. Loretana de Libero, criticizing my views, makes the following assertion: "Die Frage nach der praktischen Durchführbarkeit der vorgelegten Überlegungen, die den Patriziern keine Möglichkeit unabhängiger Gesetzesinitiativen vor dem Volk zugestehen und damit trotz *auctoritas patrum* eine gefährliche Abhängigkeit von den Volkstribunen kreieren, wird nicht gestellt".[96] There is, in my opinion, no justification for this kind of position. It is, after all, an undeniable fact that it was the plebeians who prevailed in the Conflict of the Orders, as the patricians were forced to accept all the demands of the tribunes. Effectively entrusting most of the legislation to the tribunes might well have been but a small concession compared with the recognition of the *ius intercessionis*. No scholar has ever cast into doubt that the obstructive powers of the tribunes from a very early date, at least *de facto*, were a key factor in Roman political life. By virtue of these powers any member of the tribunician college was able to make void any action or decision, by any political agent. If the patricians – and the *nobiles* who inherited their position – were able to tolerate such a dependence on the tribunes, they may as well have accepted the fact that legislation became a tribunician realm of public life.[97] This need not have been that hard to accept, after all, since the consuls could not in any case pass

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[95] Sandberg 2001 (n. 5), 102 f. and 129.

[96] de Libero 1995 (n. 7), 161 f.

[97] Sandberg 2001 (n. 5), 142.

laws against the will of the tribunes.

As for the dangers posed by too radical tribunes, it must be remembered that the aristocracy still had many efficient means at its disposal to check tribunician initiatives. The grant of legal force to the *plebiscita* – whenever that first happened – was made, we must remember, with the provision that they should be subject to the formal approval of the patricians (*patrum auctoritas*). It was only with the *lex Hortensia* of 287 that the decisions of the plebeian assembly became unconditionally binding.[98] The patricians could also easily prevent bills from being put before the *plebs* by turning to a co-operative tribune. It is amply attested that tribunes were often prevented by their own colleagues from bringing measures to the people, and that the patricians usually had no difficulty in finding collaborators in the tribunician college.[99]

The modern axiom that the consuls played an active role in the legislation before the Late Republic is supported by the testimony of the primary sources in a conspicuously poor way. It seems rather to be based on a predisposition among scholars to perceive the consulship as the ancient Roman counterpart to modern political leadership. However, it is evident that the Roman political system, in respect of its structure and modes of operation, cannot be compared with modern states. It is true that the consuls were at the apex of a well defined magisterial hierarchy, but this was, we must remember, parallelled by the plebeian political system. It is also true that the Senate, advising the magistrates, exercised an overwhelming and continuous control of the political process, but this control was never formal. Moreover, consular authority never included control of the political organization of the plebeians, which was always a completely independent entity retaining its full independence even after the end of the Conflict of the Orders. Thus the political process in the Roman Republic did not articulate itself within a unitary political system, but should rather be perceived as the expression of a clash between two competing systems. In this process the various elements had to find ways to co-operate in order to avoid anarchy. That there was a strong interdependence between the Senate, the magistrates and the leaders of the plebeian organization is nothing but the very essence of Polybius's

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[98] For the *lex Hortensia*, including full bibliography, see now Elster 2003 (n. 23), 121–125.

[99] See Liv. 2,44,2, 4,48,6 and 6,35,6.

analysis of the political system of the Romans.[100]

Conclusion

In this paper I have revisited some of the problems that I have dealt with in my earlier work on the legislation of republican Rome. This time the focus has been on the consulship, the one political institution the understanding of which is most fundamentally affected by the interpretations that I have offered in the past. The aim has been to adduce additional support for my views, insofar as they have been challenged; the focal points of the present discussion have therefore been those very issues brought up by other scholars. At this point I hope it will be recognized that there are still problems with many of the standard views of republican legislation in general and the role of the consuls in particular – and, above all, that the discussion continues.

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[100] Sandberg 2001 (n. 5), 143 f.