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The Oxford Handbook of Republicanism

(In Progress)

Frank Lovett (ed.), Mortimer Sellers (ed.)

https://doi.org/10.1093/oxfordhb/9780197754115.001.0001

Published: 2024 **Online ISBN:** 9780197754146 **Print ISBN:** 9780197754115

CHAPTER

Justice and Republicanism

Benjamin Straumann

https://doi.org/10.1093/oxfordhb/9780197754115.013.11

Published: 21 March 2024

Abstract

This chapter discusses the conception of justice put forward by the Roman thinker Marcus Tullius Cicero (106–43 BCE). Cicero wrote in the context of the collapse of the Roman republic, the largest and longest-lived republic hitherto in existence, and developed a political theory that put justice and legality front and center. Cicero's jural or constitutional republicanism differs interestingly from both his eudaemonist Greek predecessors and present-day republicans. His theory of justice formulated a principle of popular sovereignty, albeit one limited by natural law; it gave fundamental importance to a set of equal rights, some of which were seen as pre-political; and it sketched a view of the common good understood as what accrues to people living under a system of public law (*ius*). This yields a jural theory of the state (*res publica*), a view that accords justice priority even before liberty, but justice here is not understood as personal virtue, but as something that necessarily has to be expressed in legal form, as rules. These rules survive Cicero's scepticism: we can know them with a high degree of certainty, unlike conceptions of the highest good (*summum bonum*). The chapter closes by discussing how Cicero's Roman theory of justice differs from some of the views put forward by some of today's republicans.

Keywords: theory of justice, republican liberty, Cicero, natural law, Roman law, natural rights, legality, common good, popular sovereignty, scepticism

Subject: Legal System and Practice, Law

Series: Oxford Handbooks

Collection: Oxford Handbooks Online

Republicanism as a modern political theory has several distinct features. While loosely inspired by the self-governing *poleis* and *res publicae* of classical antiquity as well as the political thought these polities provoked, republican theories are not, as a rule, committed or firmly wedded to any one ancient model. Republicanism is therefore commonly understood to be at most a 'neo-roman' (Skinner, 1998: ix), not a Roman, theory.[1] Secondly, republicanism usually presents itself as a political theory that has liberty at its

center of gravity, where liberty is understood in a specifically republican sense as being free from arbitrary control by another will. Republican liberty, prominent republican theorists such as Philip Pettit are fond of saying, consists therefore in non-domination.

This republican conception of liberty has generated a large amount of literature and there have been very lively debates as to whether republicans can make good on their claim to have unearthed a conception of liberty meaningfully distinct from that formulated by liberal thinkers. Theories of liberalism, too, put liberty front and centre, and some liberal thinkers have criticized the republican conception of liberty either on the grounds that it really, albeit not admittedly, is positive liberty in another guise, or on the grounds that republican liberty is unstable and always on the verge of collapsing into negative, liberal liberty.[2]

What is far less clear, and has generated less debate, is the relationship between republicanism and justice. Does republicanism also feature a distinct theory of justice? Is such a theory implicit in its claims about liberty as non-domination? How about republicanism in the history of political thought—does the republican tradition present us with a distinctly republican view of justice? The centrality of liberty in recent republican political theory has perhaps prevented republicanism from developing a full-fledged theory of justice. Justice as conceived by modern republicans is for the most part conceived as the requirement to promote freedom as non-domination; justice is identified, that is, with what we get once we achieve republican liberty.

Philip Pettit, who in the second chapter of his *On the People's Terms* sketches a republican view of social justice, makes it clear that although freedom as non-domination is not the only value that matters, the promotion of freedom as non-domination is both necessary and sufficient for the justice of a state (Pettit, 2012: 127). This leaves no daylight between justice and the realization of republican liberty—it makes little sense to ask, on this view, whether or not the achievement of republican liberty is itself always just. 'If we look after freedom properly', Pettit 2014: 78) claims, 'then justice and democracy will look after themselves'.[3]

In what follows I will try to investigate the history of political thought in search of a republican theory of justice. But since the label 'classical republicanism' is far too wide and unspecific to be of much use, as I have argued elsewhere[4], I will try to look for an articulation of principles of justice in one particular place: the political thought of Marcus Tullius Cicero (106–43 BCE), which originated against the backdrop of a large, actually existing republic, the Roman *res publica*—which was, however, collapsing as Cicero was writing.

The justification for this narrow focus, apart from space constraints, lies in the fact that it is a particular conception of justice that seems to have had extraordinary influence in the history of political thought, and it is not a conception that has received widespread attention from historians or political theorists to date.[5] As Peter Stacey (2021: 46 ff.) put it, early Renaissance humanists had 'inherited from Cicero … a highly specific theory about the *res publica*', and '[t]hat theory is currently missing from our understanding of the classical apparatus that underpinned Renaissance political thought'. The second, deeper and perhaps more interesting, justification for my focus is that the republican conception of justice I will seek to recover is somewhat in tension with the prevailing views of today's republicans, especially in the priority it accords to justice. The republicanism I propose to focus on here could be called 'jural' or 'constitutional republicanism' and it is distinct both from a *polis*-centred eudaemonist concern with virtue and from an instrumental concern with virtue as exhibited by Machiavelli.[6]

1. A Jural Definition of *Res publica*

The best place to start an investigation into the relationship between justice and republicanism is certainly Cicero's definition of *res publica*. In his dialogue *On the Republic* (*De re publica*), written in the late 50s BCE, during a time of violent political tensions and decaying institutions and immediately before the outbreak of civil war in 49 BCE, Cicero has Scipio, the most important participant in his dialogue, attempt a definition of the subject matter of the work, which is of course the republic or state:

> The commonwealth (*res publica*) is the concern of the people (*res populi*), but a people is not every group of men assembled in any way, but an assemblage of some size associated (*sociatus*) with one another through agreement on law (*iuris consensu*) and community of interest (*utilitatis communione*).
>
> (*Rep*.: 1.39, trans. Zetzel, 2017: 18)

This definition is supposed to be applicable to the Roman republic of Scipio's day, of course, but it is also explicitly meant to capture *any* polity that lives up to a minimal threshold of legitimacy. As Cicero makes clear in the second book of the *Republic*, the definition applies to the Roman commonwealth from the time of the kings onwards to the dramatic date of the dialogue, which is set in 129 BCE, also a time of violence and crisis, characterized by the effects of the Gracchan attempts at reform and their aftermath. The state or republic is something that belongs by definition to the people, it is a *res populi*. Everything now hinges on the concept of the people: not just any multitude will do, but a group of individuals associated (*sociatus*) with each other, or partnership, that is glued together through agreement on *ius* (*iuris consensus*) and common advantage, or fellowship of interest or welfare (*utilitatis communio*).

This immediately raises three important questions.

1. Why does Cicero use the language of partnership (*societas*) to describe the *populus*?
2. What precisely is the role of agreement, or consent, in this definition of the republic?
3. What does the common interest consist in—is this a way of framing the common good?

2. Partnership and Rights

First, partnership. Jed Atkins has shown, with great sensitivity and perspicuity, that what is at the centre of Scipio's definition is the relationship between state and people.[7] He argues that we must pay attention to the technical legal terms at work: the associated group, the *populus*, is meant to be like a Roman *societas*, a partnership. This partnership, Atkins suggests (2013: 128–138), implies certain rights on the part of the citizens: the citizens are partners who collectively *own* the *res publica*. The property metaphor, which for Atkins hinges on the way Cicero uses *res* in the sense of a thing owned by the people, is put forward by Scipio to suggest that 'the fact that the people own the *res publica* implies the right to manage this property' (Atkins, 2013: 138).

The importance of viewing the people as a partnership in the technical legal sense is rightly stressed by Atkins. Other scholars, such as Elizabeth Asmis (2004) and James Zetzel (2013), have also interpreted Cicero along these lines, drawing attention to the weight of the term *societas* in Cicero's work as a whole. Zetzel in particular has pointed out an important aspect of the Roman law of partnerships, namely, the fact that these *societates* were rather precarious, fragile creatures. Unlike corporate entities such as the state or towns, partnerships relied on constant consent from all the partners involved and were therefore difficult to

maintain in the long run. If one partner pulled out or passed away, for example, the partnership was dissolved. In other words, the partnership 'lasted only so long as the participants did, and as long as they wanted it to', which shows that Cicero, with this metaphor, must have meant to emphasize the fragility of the partnership of the *populus* (Zetzel, 2013: 442).

But this also suggests, I think, that we should be careful in delineating the extent to which the partnership metaphor holds for Cicero. For example, he cannot have meant to describe Roman day-to-day government as involving control by a partnership—far too demanding would the requirements of consent to most if not all far-reaching decisions be.[8] Partners in a *societas* could delegate governance to managers, but to a far lesser extent than a corporation could (Fleckner, 2010: 245–292). Partnerships were not, after all, entities distinct from its members, but simply *were* those members, governed by their contractual relations amongst each other and the law of partnership (*ius societatis*) itself (Watson, 1965: ch. 6). This means that the *populus* needed for the *res publica* to exist is not a corporate entity but simply the sum total of its individual members, connected by a consensual contract. I agree with Jed Atkins that the people have rights qua partners (*socii*), but they have these rights individually, and not 'as a body' (Atkins, 2013: 141). The consensual contract, moreover, presupposes a set of rules (*ius*), the law of partnership, that it itself is governed by. Given this enormously demanding consensual framework, it is plausible to assume that what Cicero had in mind was a metaphor that extended precisely as far as he suggested, and not further: to the *consensus iuris* that is said by Scipio to create the *societas* in the first place.

We should note that when Cicero wrote, partnerships very likely did not dissolve upon the death of a partner, as they did later in the classical law of the *Digest* (Watson, 1965: 132; but cf. Harries, 2011: 129–132). Also, there is evidence that in Cicero's time, partnerships were not always contracted into voluntarily, as was the case later. It looks as if death in the late Republic did not necessarily terminate partnerships and partnerships could continue in heirs. If this is what Cicero had in mind—and he says in his speech *For Quinctius* that partners could be brought together by choice *or by chance* (*fortuna*)—if this was his model in the *Republic*, then the idea might have been as follows: the partners, that is to say citizens, of any given state (*res publica*) are born into their states without any choice or agreement, but once they are part of this hereditary partnership (*hereditaria societas*),[9] there are rights and corresponding obligations flowing from two sources: the (higher-order) *ius* governing partnerships in general (i.e. the *ius societatis*), and the particular partnership contract governing the particular state. From now on, agreement is indeed necessary —lack of agreement will dissolve the *populus*, and with it the state (the *res populi*).[10]

3. Agreement Concerning Justice

This brings us to the second question, the role of consent or agreement. Agreement to what exactly? The answer cannot be too demanding, since in Cicero's time, as well as later in the *Digest*, *societates* depended for their survival on continuing agreement between the partners. The agreement, Cicero tells us through Scipio, is agreement concerning the *ius*, and here what must be meant is the higher-order *ius* governing partnerships in general as well as the *ius* governing any particular people's particular partnership. For it to be possible to generate continuing agreement, this body of higher-order *ius* has to live up to certain demands of justice, and it has to be a very thin body of higher-order law, on pains of not generating the necessary agreement.

Agreement concerning justice or higher-order law—this is what Cicero's phrase *iuris consensus* apparently means. The *ius* in question, I said, is of a higher order than statutory law, but how does this fit into the partnership metaphor? Roman partnerships were constituted by so-called consensual contracts, which had been developed by the praetors, and found their ground of validity in good faith (i.e. ultimately in natural reason and natural law) (*Off.*: 3.70–72). The *ius* in question, I suggest, is the body of law that contains

amongst other things the rules on partnerships (*ius societatis*), namely, the law of nations and of nature (which are the same for Cicero). It is on this level of law that our search for jural justification bottoms out—the goal of the partnership is the law itself.[11]

Yet the fact that it bottoms out in this kind of natural jural order also means that *iuris consensus*, in Cicero's definition, is not a voluntaristic contractarian device.[12] As I said above, the partnership agreement is a contract that *presupposes* a set of rules (*ius*) that it itself is governed by. It is therefore the *ius* itself, and its being accessible by natural reason, that for Cicero *generates* the necessary consensus in the first place.[13] From this very lean basis of necessary constant agreement created by the most fundamental set of *ius*, everything else arises: the concrete rules of delegation and decision-making that form the basis of states.

Consensus iuris might fruitfully be conceptualized, then, along the lines suggested by Thomas Hobbes in his account of the way the laws of nature have an effect on the inhabitants of the state of nature. The laws of nature, Hobbes claimed, are the 'precepts by which men are guided' in order to avoid 'the condition of war' (1651: 235)—the laws of nature, that is, are 'articles of peace, *upon which men may be drawn to agreement*' (1651: 86 [emphasis added]), Hobbes argued. The laws of nature, one might say, are what make agreement possible for rational beings in that they are what we can agree upon and what we have epistemic access to. The laws of nature allow us therefore to arrive at *iuris consensus*. These laws are the lean basis of the necessary constant agreement Cicero had also envisaged: a natural law for sceptics, as it were.[14] For Cicero, the following holds: no *ius* and the subjective *iura* it provides, no consensus; no consensus, no partnership; no partnership, no people; no people, no state. This implies that there cannot be a popular sovereignty conceived as an extra-legal entity or constituent power (Straumann, 2019); the *populus*, not a corporate entity but a partnership, exists only by virtue of the underlying *ius societatis*.

This *ius*—a very basic, very lean jural order, lean enough to generate agreement amongst all the members of the *populus*—also provides for rights. Amongst the rights it creates are those, as Jed Atkins points out (2013: 141), that the partners (*socii*) have by virtue of the contract of partnership and which can be sued for if they 'are infringed by either another partner or the manager (*tutor*) of the partnership'. Note that the language of subjective rights-claims is prominent in classical Roman law: a partner whose rights to common ownership have been infringed is said to have a *ius prohibendi*, a right to veto or prohibit this infringement (*Dig.*: 10.3.28). This points us towards a rights-based conception of republican justice, where wrongdoing or injustice is tantamount to a violation of rights.[15] For the partnership of citizens to be held together, these rights need of necessity be equal, which does not for Cicero imply equality of wealth or natural capacity, only equality of some basic rights (*iura paria*).[16] If statutory law (*lex*) is to bind the citizens—if it is to be the bond of the partnership and thus create obligation—then the underlying higher-order law (*ius*) has to guarantee the equality of the law, Cicero claims (*Rep.*: 1.49).[17] This equality is built into the very concept of legality: otherwise, it would not be *ius* (*Off.*: 2.42). It is *ius*, Cicero claims, that creates equality and serves as a yardstick of equality (*Caec.*: 70) (see Schofield 2021: 38).

4. Common Advantage and Common Good

That wealth or capacity need not be equalized is not just a concession of the democratic point of view to the oligarchs and aristocrats, but also flows from the partnership analogy. In Roman law, by default, shares in losses and profits were equal, but partners were free to bargain for whatever terms for sharing profits and losses, so that some partners could share disproportionally in profits.[18] This brings us to the third question raised above: how are we to understand Cicero's claim that to have a people, there has to be a fellowship of interest or a common advantage (*utilitatis communio*)?

The partnership analogy suggests an interpretation of this claim along the following lines: the common advantage is not a hypostasized common good above and beyond the interests of the individual citizens (the

partners), but consists simply in adding up whatever share of the profits and losses the partners were due under the terms of the partnership. This view of the common good may include both what economists today call 'public goods' as well as what accrues to individuals in the marketplace. This might interestingly complicate the notion of the common good that seems crucial to present-day republicans (e.g., Sellers, 2003: ch. 2). What is not subject to bargaining under the terms of the partnership, however, are the basic rights associated with being a partner, and it is these rights that are held—by analogy—equally by all citizens and, to an attenuated extent, even by all human beings in the partnership that is the human species (Cicero, *Leg.*: 1.49). It is these rights, then, that are of primary value and are presupposed by any attempt to achieve the common advantage.

The Roman conception can be made clearer by drawing a contrast between Cicero's jural republicanism, on the one hand, and Aristotle's political theory, on the other. Cicero's conception of justice has its focus firmly on corrective justice; Aristotle's, on distributive. There is of course a background view of distributive justice at work in Cicero's writings as well; these background ideas are by no means devoid of normative pull and can be gleaned especially from his *On Duties*. To put it very briefly, they consist in the principles of Roman property law for the lawful original acquisition of things, supplemented by an interesting theory of Cicero's own making that concerns itself with the protection of justified expectations and the prohibition of harm.[19]

5. Natural or Civil Rights?

It is of crucial importance, however, that at least some of these background principles of distributive justice are rules of natural law and therefore conceived as operative in a pre-political state of nature, and that these natural legal rules give rise, in the state of nature, to natural rights, in a shockingly proto-Lockean way.[20] When Cicero says (*Off.*: 1.21) that private property rights are not natural, he means that they are not primordial, but that there was a kind of negative community in the state of nature. However, there certainly *are* Hohfeldian liberty rights to take and occupy property in the state of nature, and, once occupied, the occupation generates property rights that are pre-political (Straumann, 2016: ch. 4). Indeed, Cicero in a key passage of *On Duties* writes that it is the guarantee and protection of such property rights that constitutes the very purpose of the state:

> For political communities (*res publicae*) … were constituted especially so that men could hold on to what was theirs (*ut sua tenerentur*). It may be true that nature first guided men to gather in groups; but it was in the hope of safeguarding their possessions (*spe custodiae rerum suarum*) that they sought protection in cities.
>
> (*Off.*: 2.73, trans. Atkins, 1991)

Cicero, with his metaphor of the partnership and the underlying concept of subjective rights, claims that there must be at least some pre-political rights which are prior to the terms of the particular partnership entered into. There is an obvious tension between the notion of popular sovereignty as contained in the idea of the state as a *res populi*,[21] and Cicero's concept of a natural jural order that contains rights (Hawley, 2022). The way Cicero dissolves this tension is subtle, but it necessarily involves the idea of a hierarchy of legal sources where rights are justified, not by reference to the political framework, but to higher-order natural law, or *ius gentium* (the two for Cicero are equivalent), and where this higher-order *ius* is placed hierarchically above mere statute (*lex*).[22]

Unlike in Aristotle's political theory, higher-order *ius* and the rights flowing from it for Cicero cannot be overridden by considerations of virtue and the common good. Rights on this view are not, as in Aristotle, 'rendered according to merit', Jed Atkins explains; rather, Cicero's rights 'can enter into the calculation of how to distribute goods according to justice at a different point. Whereas for Aristotle 'rights' are the

product or result of distributive justice, for [Cicero] rights are factors that one must take into account as one performs the calculations' (Atkins, 2013: 147).[23]

Indeed, Cicero's 'common advantage' (*communis utilitas/utilitatis communio*) may simply consist in what accrues to people who live under a system of public law (*ius*)—government, laws (*leges*), and states are established for the enjoyment of justice (*iustitiae fruendae causa*: *Off.:* 2.41), and the state is said to be held together by laws, which are the 'mind' (*mens*) of the state (*Clu.*: 146). Magistrates are servants (*ministri*) to the laws, and the laws are (*Leg.*: 3.2) 'in charge of the magistrates', so that acts of magistrates that do not comply with the laws can hardly be recognized as acts of the state (Straumann, 2019). The state is (*Rep.*: 1.49) a partnership about law (*iuris societas*). This yields an essentially jural theory of the state, and it is certainly important to notice that when Scipio reiterates his definition of *res publica* in the third book of the *Republic*, *utilitatis communio* as a criterion of the state drops away and the focus of the definition now lies entirely with the criterion of law, the *iuris consensus*, which appears as both necessary and sufficient (*Rep.*: 3.43–45).

For Jed Atkins, in line with much recent republican theory, the rights contained in Scipio's account in the *Republic* are essentially political, civil rights, but I think it can be shown quite clearly that at least some of these rights are necessarily prior to civil society. Importantly, the *ius* that governs Cicero's partnership (*ius societatis*) was part of the *ius honorarium* and was thought to derive not from statute, nor from some Burkean tradition, but from humankind's natural reason. It's just that the state makes those rights stick, which is why we need it. We have states qua legal orders in order to be able to enjoy justice (*Off.*: 2.41). Incidentally, this need for the state and for positivized law is why Thomas Hobbes, otherwise not overly enthusiastic when it came to citing ancient authors, thought for once fit to enlist Cicero's *Pro Caecina* for his purposes in the *Leviathan* (Straumann, 2016: 186f.).

Even rights that are indeed essentially political, such as the Roman due process right of appeal (*provocatio ad populum*), or rights such as the *ius commercii*, which allowed certain non-citizens to engage in commercial transactions with Roman citizens, had their ground of validity ultimately not in statutory law (*lex*) but higher-order *ius*—the kind of jural order that qualified violations of due process rights (*provocatio*) as unjust wrongdoing (see e.g. Cicero, *Rep.*: 2.63).

6. Justice for Sceptics

There is an important epistemic aspect to republican justice as put forward by Cicero. Justice is not a virtue first and foremost, but must needs be expressed in legal form, as *rules*. Virtue stands in contrast to institutions and legal coercion (*Rep.*: 1.3). Similarly, the virtue of the ideal statesman is shrunk, as it were, and consists exclusively in *knowledge* of the higher-order law (*Rep.*: 5.5). Cicero, entirely moving away from his Greek predecessors, does not formulate a eudaemonist theory of justice, and the reason for this must be sought in his allegiance to academic scepticism; one cannot read his treatise on the Hellenistic schools and their competing conceptions of the highest good (*summum bonum*), the *On Ends*, without concluding that certainty about the highest good and the good life cannot be had and that, while the investigation may be ongoing, we simply do not have sufficient knowledge of the good to justify coercive institutions that are built around a eudaemonist theory of justice. A teleological virtue-based political theory cannot be sustained by this result. By contrast, Cicero's mature treatises of political philosophy—the *Republic*, the *Laws* and *On Duties*—can be read as putting forward quite dogmatic a theory of justice cast in jural terms of legality and rules.

These rules of justice are those we have epistemic access to, and here scepticism is left behind: Cicero's natural law is rationalist (and Cicero may well be an externalist with regard to moral motivation).[24] This epistemic accessibility gives these rules their clarity, and it is due to their higher *epistemic dignity* that the

state is entitled to coerce in their name, and is also itself bound by them. If this epistemic dignity is lacking because there is not—at least not as of yet, the possibility of progress is acknowledged—sufficient insight, rational access, and clarity, then we move into the realm of different rules, namely, statutes (*leges*). Here justice requires that legislation by the popular assemblies be politically alive and malleable, all the while such legislation may not infringe on the hard core of jurally formulated justice (i.e. the constitutional underpinning of the state) (*ius*).

But it remains crucially important that both the hard core of jural justice (*ius*) as well as other kinds of rules including statutes (*leges*) exhibit the formal features of legality—it is these formal features, Cicero reminds us, which are required by justice and guarantee a minimal threshold of legitimacy. Put simply, Cicero's constitutional republicanism or jural theory of justice is a theory of law. Law draws its authority, on this view, not simply from either its content or its pedigree, but is conditioned by its formal features: *leges* have to be established according to higher-order law (*iure*), even if their pedigree or content is otherwise unproblematic. Witness Cicero's argument in a speech, delivered in a forensic setting, where he denies that legislation could possibly be *iure* if it violated due process and was not sufficiently general:

> You may have been tribune as constitutionally (*iure*) and legally (*legeque*) as the present P. Servilius Rullus himself, a man most illustrious and honorable on every account—still, by what *ius*, or in accordance with what tradition (*quo more*) or what precedent (*quo exemplo*) did you pass a law (*lex*) explicitly aimed, by name, against the civil rights (*de capite*) of a citizen who had not been condemned?
>
> (*Dom.*: 43, trans. mine)

Similarly, the confiscation of private property has to live up to the same formal constraints of legality.[25] Cicero in his forensic speeches brings out very clearly how essential the right of appeal or right to a trial was to the constitutional order of the Roman republic, and how much it was seen to derive its validity, not from its various enactments in statutes, but from its belonging to the higher-order norms of *ius*:

> I hold that under our constitution (*iure publico*) and under the laws that are in force in our state no such injury (*calamitas*) may be inflicted on any citizen without trial (*sine iudicio*). I maintain that this had been constitutional (*iuris*) in this state even during the rule of the kings, that it was handed down to us by our ancestors, and lastly that this is the essential trait of a free state (*proprium liberae civitatis*): that nothing can be taken away from the status (*de capite*) or the property (*de bonis*) of a citizen without trial (*sine iudicio*) in the Senate, before the People, or before judges appointed for the issue at hand.
>
> (*Dom.*: 33, trans. mine)

Higher-order *ius* reaches thus in some ways into statutory law, as it were, in that formal requirements of legality, such as the prohibition of bills of attainder (*privilegia*) or requirements of due process, condition and constrain law-making in the assemblies (*Caec.*: 95f.).[26] Still, positive law-making continues to be necessary, and participation in that process is conceived of as a right (*Rep.*: 2.39).[27]

7. Conclusion

But where does all this, and especially the focus on justice, leave the more recent republican priority accorded to liberty as non-domination? On one view, liberty as non-domination might be achieved within a Ciceronian framework, while still leaving (too) much to be desired (Atkins, 2018). Viewed from a different angle, one might say that non-domination, understood as a consequentialist theory that positively *requires* interference of the right kind—the kind proposed by Philip Pettit that 'tracks interests' while disregarding mere preferences—may well prima facie be in line with Cicero's views. After all, Cicero does conceptualize a distinction between interest and mere wants (*utilitas* and *voluntas*), while giving the former more weight when it comes to what government should take into account (*Rep*: 5.8; *Sulla*: 25).[28]

But for Cicero, as opposed to some present-day republicans such as Philip Pettit, the tracking of interests may never outweigh the rules of justice that provide for rights of due process, property and political participation. The assumptions that would also have to hold for interests to outweigh the rules of justice are too uncertain. These interests would have to be known as well as the rules of justice, by the right people, and magistrates would have to reliably track them.[29] We would need a theory drawing the distinction between wants and true interest, and it seems that Cicero would ultimately be as sceptical with regard to such a theory as he demonstrably is when it comes to theories of the highest good. The maximization of non-domination as required by a republican theory such as Pettit's would, in other words, run up against constraints of justice, constraints that could *disable* Pettit's tracking of avowed interests in the name of Ciceronian justice, perhaps even on the grounds that some purportedly interest-tracking interferences are arbitrary, although procedurally flawless, due to flaws in their legal implementation—they might be enshrined in positive law (*lex*), that is, but still be lacking in legality (*ius*).[30]

Further, I would expect Cicero to be less convinced that non-domination, as Pettit claims, is a public good. Cicero would probably say that non-domination is far more of a zero-sum affair, so that reducing domination somewhere may well result in more domination elsewhere. The way out, for Cicero, is to define a baseline, as part of his theory of justice, of justified rights-claims that flow from law in a non-arbitrary way. Here it is legality, something normative inherent in the very form of law, that is the primary criterion for non-arbitrariness, not a republican form of government. Expressed differently, one might say that the difference between neo-Roman republicans such as Skinner or Pettit and Romans such as Cicero or Livy lies in their notion of control. While Pettit would consider non-arbitrary interference that supposedly tracks citizens' interests as *controlled* by those citizens, Cicero or Livy believe that control is first and foremost a matter of entrenched rights demanded by justice, such as, crucially, the right of appeal (*provocatio ad populum*). Having these rights as a matter of higher-order law, and having law (*lex*) that is itself conditioned by the formal requirements of legality demanded by higher-order law (*ius*), is for Cicero the necessary and sufficient requirement for having a state (*res publica*) and having control over that state.

It is arguable that many of the early modern republican thinkers such as John Milton and Algernon Sidney were rather more Ciceronian in this regard, and far more interested in entrenched rights, even natural rights, than we hitherto thought (Hamel, 2011, 2013). The same can be said about such paradigmatic republicans as Marchamont Nedham, Walter Moyle, Trenchard, and Gordon (Straumann, 2016: 308–316). James Harrington, too, although less interested in rights and more of a Machiavellian, betrays the influence of and an intimate familiarity with Cicero's constitutional and especially legal ideas (Straumann, 2016: 310–312). This influence can certainly also be found in John Locke (Marshall, 1994: 157–204, 292–326; Mitsis, 2003; Straumann, 2016: 316–319; Hawley, 2022: ch. 5), who has been claimed as a republican (Pettit, 2014: 56), but it is perhaps especially true of the American founder John Adams, who has served as a paradigmatic example of 'classical' republicanism (McDonald, 1985: 71 ff.) but on closer inspection turns out to be far more of a Ciceronian (Straumann, 2016: 333–338).

Where today's republicans claim that there cannot be any freedom as non-domination without a particular, republican form of self-government, Cicero and Livy see less tight a connection between constitutional form and freedom—or, to the extent that we can detect a conceptual relationship between the two, the implication may be said to run the other way around: for Cicero there cannot be a real state (*res publica*) without having law (*lex*) that is constrained by legality (*ius*) and without the rights, especially *provocatio* and property, that flow from it. The *res publica* in this view presupposes legality and rights and these rights Cicero argues for in the framework of an elaborated theory of natural law. Today's republicans, conversely, have a view of freedom of non-domination that presupposes a republican form of government (Edelstein and Straumann, 2023: 1039).

Nor would Cicero agree, I think, with the view that freedom, correctly understood, simply amounts to justice. For Cicero, justice and the rules we can know her by are prior to liberty and thus distinct; the two can certainly come apart (*Rep.*: 1.43). Non-domination on this view does not exhaust justice; justice may well require reducing some freedoms; and interests, although at times more weighty than mere desires or will, may not trump justice.[31] While this kind of justice does not usually require that our interests be tracked and sometimes will prohibit their being tracked, it may require liberty, of course, certainly liberty from an arbitrary will, but it will insist that this can only be achieved when rule happens in the form of law.

If this makes Cicero and the constitutional republicanism he formulated appear less republican than we have been led to expect, this may well be due to the fact that Cicero, writing under the impression of the crisis and collapse of the Roman republic, was pushed to formulate ideas of public law, legality, and institutional closure that were very much concerned with the instability and eventual loss of the largest and longest-lived republic the world had hitherto known.[32] But this also means that Cicero's very influential republicanism already contains answers to some of the flaws he perceived in the Roman republic of his own day, answers that might help us today to spot some weaknesses in the edifice of today's neo-Roman republicanism. Cicero, one might say, was driven into a somewhat Hobbesian direction due to his concern for the loss of the republic and the civil wars that ultimately proved his own undoing, and what he thought he was proposing was a juridical remedy to violent social disagreement—the state of nature—and the loss of republican government. His early modern readers, beginning with Bodin, understood him in that way, and we too might find interesting a thinker who thought that instability and injustice were causally linked.

Acknowledgements

This contribution received funding from the European Research Council (ERC) under the European Union's Horizon 2020 Research and Innovation Program (Grant Agreement no. 864309). Many thanks to Frank Lovett and Mortimer Sellers for feedback and suggestions.

References

Asmis, Elizabeth, 2004. 'The State as a Partnership: Cicero's Definition of Res Publica in His Work on the State'. *History of Political Thought* 25: 569–598.
Google Scholar WorldCat

Atkins, E. M. ed., 1991. *Cicero: On Duties*. Cambridge: Cambridge University Press.
Google Scholar Google Preview WorldCat COPAC

Atkins, Jed, 2013. *Cicero on Politics and the Limits of Reason: The Republic and Laws*. Cambridge Classical Studies. Cambridge; New York: Cambridge University Press.
Google Scholar Google Preview WorldCat COPAC

Atkins, Jed, 2018. 'Non-domination and the *libera res publica* in Cicero's Republicanism'. *History of European Ideas* 44: 756–773.

Besson, Samantha, and José Luis Martí, 2009. *Legal Republicanism: National and International Perspectives*. Oxford: Oxford University Press.
Google Scholar Google Preview WorldCat COPAC

Büchner, Karl, 1984. *M. Tullius Cicero, De re publica: Kommentar*. Heidelberg, Germany: Universitätsverlag Winter.
Google Scholar Google Preview WorldCat COPAC

Dyzenhaus, David, 2013. 'Critical notice of *On the People's Terms*, by Philip Pettit'. *Canadian Journal of Philosophy* 43: 494–513.

Dyzenhaus, David, 2014. 'The Public Conscience of the Law'. *Netherlands Journal of Legal Philosophy* 43: 115–126.
Google Scholar WorldCat

Edelstein, Dan, and Benjamin Straumann, 2022. 'Roman Rights Talk: Subjective Rights in Cicero and Livy'. *History of Political Thought* 43: 637–659.
Google Scholar WorldCat

Edelstein, Dan, and Benjamin Straumann, 2023. 'On the Liberties of the Ancients: Licentiousness, Equal Rights, and the Rule of Law'. *History of European Ideas* 49: 1037–1060.
Google Scholar WorldCat

Fleckner, Andreas, 2010. *Antike Kapitalvereinigungen: Ein Beitrag zu den konzeptionellen und historischen Grundlagen der Aktiengesellschaft.* Cologne, Germany: Böhlau Verlag.
Google Scholar Google Preview WorldCat COPAC

Hamel, Christopher, 2011. *L'esprit républicain: droits naturels et vertu civique chez Algernon Sidney*. Paris: Classiques Garnier Éditeurs.
Google Scholar Google Preview WorldCat COPAC

Hamel, Christopher, 2013. ' Republicanism of John Milton: Natural Rights, Civic Virtue and the Dignity of Man'. *History of Political Thought* 34: 35–65.
Google Scholar WorldCat

Hamel, Christopher, 2017. 'Are Rights Less Important for Republicans than for Liberals? Pettit versus Pettit'. *Contemporary Political Theory* 16: 478–500.
Google Scholar WorldCat

Harries, Jill, 2011. 'Violating the Principles of Partnership: Cicero on Quinctius and Naevius'. In: C. J. Smith and Ralph Covino,

eds., *Praise and Blame in Roman Republican Rhetoric*. Swansea: Classical Press of Wales. 127–143.
Google Scholar Google Preview WorldCat COPAC

Hawley, Michael, 2022. *Natural Law Republicanism: Cicero's Liberal Legacy*. Oxford: Oxford University Press.
Google Scholar Google Preview WorldCat COPAC

Hobbes, Thomas. [1651] 1996. *Leviathan*. Oxford: Oxford University Press.
Google Scholar Google Preview WorldCat COPAC

Klink, Maarten, 2024. 'Legal Analogies in Cicero's Political Thought'. *Journal of the History of Ideas* 85: 1–17.
Google Scholar WorldCat

Lovett, Frank, 200**4**. 'Can Justice Be Based on Consent?' *Journal of Political Philosophy* 12: 79–101.
WorldCat

Lovett, Frank, 2010. *A General Theory of Domination and Justice*. Oxford: Oxford University Press.
Google Scholar Google Preview WorldCat COPAC

Lovett, Frank, 2016. *A Republic of Law*. Cambridge: Cambridge University Press.
Google Scholar Google Preview WorldCat COPAC

Marshall, John, 1994. *John Locke: Resistance, Religion and Responsibility*. Cambridge: Cambridge University Press.
Google Scholar Google Preview WorldCat COPAC

McDonald, Forrest, 1985. *Novus Ordo Seclorum: The Intellectual Origins of the Constitution*. Lawrence: University Press of Kansas.
Google Scholar Google Preview WorldCat COPAC

Miller, Fred D., 1997. *Nature, Justice, and Rights in Aristotle's Politics*. Oxford: Oxford University Press.
Google Scholar Google Preview WorldCat COPAC

Mitsis, Phillip, 2003. 'Locke's Offices'. In: J. Miller and B. Inwood, eds., *Hellenistic and Early Modern Philosophy*. Cambridge: Cambridge University Press. 45–61.
Google Scholar Google Preview WorldCat COPAC

Monson, Andrew, 2023. 'Taxing Wealth in the Just City: Cicero and the Roman Census'. *Journal of Roman Studies* 113: 1–27.
Google Scholar WorldCat

Neumann, Kristina, 2015. 'Virtuous Taxation in Cicero's De Officiis'. *Syllecta Classica* 26: 21–49.
Google Scholar WorldCat

Pettit, Philip, 2012. *On the People's Terms: A Republican Theory and Model of Democracy*. Cambridge: Cambridge University Press.
Google Scholar Google Preview WorldCat COPAC

Pettit, Philip, 2014. *Just Freedom: A Moral Compass for a Complex World*. New York: W. W. Norton.
Google Scholar Google Preview WorldCat COPAC

Schofield, Malcolm, 2021. *Cicero: Political Philosophy*. Oxford: Oxford University Press.
Google Scholar Google Preview WorldCat COPAC

Sellers, Mortimer, 2003. *Republican Legal Theory: The History, Constitution and Purposes of Law in a Free State*. New York: Palgrave Macmillan.
Google Scholar Google Preview WorldCat COPAC

Skinner, Quentin, 1998. *Liberty before Liberalism*. Cambridge: Cambridge University Press.

Google Scholar Google Preview WorldCat COPAC

Stacey, Peter, 2021. 'Liberty and the Rule of Law: Freedom in Renaissance Republicanism'. In: Virginia Cox and Joanne Paul, eds., *A Cultural History of Democracy in the Renaissance*. London: Bloomsbury. 41–61.
Google Scholar Google Preview WorldCat COPAC

Straumann, Benjamin, 2011. 'Constitutional Thought in the Late Roman Republic'. *History of Political Thought* 32: 280–292.
Google Scholar WorldCat

Straumann, Benjamin, 2016. *Crisis and Constitutionalism: Roman Political Thought from the Fall of the Republic to the Age of Revolution*. Oxford: Oxford University Press.
Google Scholar Google Preview WorldCat COPAC

Straumann, Benjamin, 2019. 'The Laws Are in Charge of the Magistrates: Reply to Edelstein, Sullivan and Springborg'. *Global Intellectual History* 4: 271–288.
Google Scholar WorldCat

Vinx, Lars, 2010. 'Constitutional Indifferentism and Republican Freedom'. *Political Theory* 38: 809–837.
Google Scholar WorldCat

Watson, Alan, 1965. *The Law of Obligations in the Later Roman Republic*. Oxford: Oxford University Press.
Google Scholar Google Preview WorldCat COPAC

Zetzel, James E. G., 2013. 'A Contract on Ameria: Law and Legality in Cicero's *Pro Roscio Amerino*'. *American Journal of Philology* 134: 425–444.

Zetzel, James E. G., ed. and trans., 2017. *Cicero: On the Commonwealth and On the Laws*. 2nd ed. Cambridge: Cambridge University Press.
Google Scholar Google Preview WorldCat COPAC

Notes

1 This is Quentin Skinner's terminology, from the seminal Skinner (1998) onwards. One of his reasons for maintaining the term 'neo-Roman', rather than 'republican', is that he subsumes theorists under the term who did not think of themselves as republicans, such as Locke.

2 See Dyzenhaus (2013) for subtle criticism along these lines.

3 For another attempt at closely linking non-domination and social justice, see Lovett (2010).

4 Against the usefulness of the label, see Straumann (2016: 303–304).

5 For the important distinction between Cicero's jural project of republican constitutionalism, on the one hand, and a Sallustian concern with virtue and its corruption on the other, see Straumann (2016: esp. the 'Introduction' and the 'Epilogue').

6 For Machiavelli, interpreted as an exponent of a 'neo-Roman' but anti-jural tradition, see Straumann (2016: ch. 7).

7 This paragraph is from Edelstein and Straumann (2022).

8 Indeed, as Klink (2024) shows, the people were conceived as sovereign owners of the state, but at the same time they were governed by their magistrates the way free minors were directed by their guardians according to the Roman legal concept of guardianship (*tutela*).

9 A term Cicero actually deploys in a technical context: *For Quinctius*: 76.

10 Note that in the definition of *res publica*, Scipio also mentions 'co-ownership of advantage' (*communio utilitatis*), which is probably meant to convey the prudential nature of the association and betrays its commercial connotations; this co-ownership—which in Roman law gave every co-owner a kind of veto right when other partners tried to use it for themselves without consent of the others—drops out of the definition of the state altogether, however, when Scipio re-introduces it in the third book (*Rep.*: 3.43–45). *Ius* overtakes *utilitas* as the defining feature of state.

11 Cicero, *Rep.*: 1.49: *quid est enim civitas, nisi iuris societas*[?]

12 Cicero is aware of the problems with voluntarism identified by Lovett (2004). How Cicero's rationalist natural law could possibly coexist with a republicanism based on legal positivism, such as defended by Lovett (2016), is unclear to me. Cicero would defend it in terms of a hierarchy between *ius* and *lex*, where the latter is positive, albeit conditioned by the former, which is not merely positive.

13 This view is consistent with Malcolm Schofield's reading of *iuris consensus* as a subjective genitive (Schofield, 2021: ch. 3).

14 Thanks to Andreas Gyr for this phrase.

15 Namely, the rights contained in *societas*: cf. *On Duties*: 3.70 (*societas vitae*) and 3.72 (*iniuria*). On *vitae societas* and its connection with Q. Mucius Scaevola, see Zetzel (2013). For this republican tradition of rights, see also Hamel (2017).

16 Note that this might provide an independent argument for legal equality as a necessary component of the rule of law, one that need not run into the problems identified by Lovett (2016: 132–135), in that legal equality is necessary for all partners/citizens, but this is consistent with the circle of citizens being itself quite constricted.

17 I am following Büchner's interpretation of *ius autem legis aequale* (*Rep.*: 1.49); *aequale* 'muss heissen, dass das *ius* in Hinsicht auf das Gesetz in dessen spezifischer Eigenschaft, für alle gleichmässig zu gelten, die Gleichheit des Gesetzes ist.' He points out that *aequale* has this meaning rarely, but it does so at *Leg*. 1.49, too: *societas hominum et aequalitas et iustitia* per se *est expetenda*. Büchner (1984: 136 ff.).

18 Except that it was not permitted to have partners who shared in losses only, and not in profits—the other way around, however, was permitted.

19 See my ongoing European Research Council project on Cicero's theory of justice (theJustCity.org).

20 Locke, of course, knew his Cicero very well. See Hawley (2022: ch. 5).

21 Discussed in Section 1, and for Cicero's concept of popular sovereignty, see Schofield (2021: chs. 2, 3) and now Klink (2024).

22 On Cicero's *ius-lex* hierarchy, which went on to a distinguished career and appears prominently in Jean Bodin, see Straumann (2016: chs. 1–4).

23 Whether or not Aristotle can be said to have a concept of rights is irrelevant to our concerns, but even if he does (see Miller, 1997), such rights seem dependent on and secondary to Aristotle's notion of worth or merit (*axia*).

24 In the third book of Cicero's *Republic*, the motivational scepticism by Carneades receives a reply that does not really meet Carneades on the plane of moral psychology, but moves to an epistemic realm. That is, we may not be motivated to follow the rules of justice, but this is a contingent psychological matter—we can know these rules, which gives the state licence to enforce them.

25 Cicero has often thought to be hostile to taxation in a proto-libertarian way, as well, but this view cannot be sustained; it is arbitrary expropriation, by Sulla and Caesar, that he objects to due to the flaws mentioned above: flaws of legality to do with the insufficiently general scope of rules (*privilegia*) and lack of due process. Similarly, the agrarian reforms of the Gracchi appear as problematic because of their illegitimate imposition first and foremost (cf. *Leg.*: 3.2). Taxation that is brought about *iure* is unobjectionable (Neumann, 2015). For a more libertarian Cicero, see Monson (2023).

26 One might say that it is Lon Fuller's 'inner morality of law', but delineated by the epistemic criterion of what rules we can know with the highest certainty.

27 Everyone is to partake in the *ius suffragii*, even if the vote of the poor is heavily diluted.

28 The focus is on *utilitas*, not virtue. Cicero is no eudaemonist.

29 For scepticism regarding the ability to select those with the requisite knowledge, see *Rep.*: 1.51; for scepticism as to whether those selected could be reliably counted on to track our interests, see *Rep.*: 1.44, where worries about the reliability of virtue come to the fore in a way inspired by Polybius.

30 This possibility arises from the legal positivism most republicans adhere to, and the attending instrumental view of law, which Cicero does not share. See Dyzenhaus 2014: 123). For a defense of republican legal positivism, see Besson and Martí 2009: 32).

31 Witness the eclipse of *utilitatis communio* vis-à-vis *iuris consensus* at *Rep.*: 3.43–45, and the way justified interests are framed as claims of legality.

32 Cf. Vinx (2010) on the problem of institutional closure. See also Straumann (2011) for the emergence of constitutional thought in the context of the crisis of the Roman republic.