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The *societas publicanorum* and corporate personality in Roman private law

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ABSTRACT

This article demonstrates the often-repeated modern claim that the *societas publicanorum* had the corporate personality of a joint-stock company with tradeable shares lacks grounding in commercial context and Roman private law. After reviewing the concept of corporate personality and the historical evolution of the Roman *societas*, the discussion traces the claim of joint-stock personality to unsupported interpretations of the sources, especially *In Vatinius* [29], by 19th century philologists. An alternative more plausible commercial and legal explanation for the corporate personality of the *societas publicanorum* is provided by an organisation of Roman tax farming that employed a *societas maior* connecting a network of *societates* and *familias*.

KEYWORDS

Publicani; *societas publicanorum*; Roman tax farming; partnership law

'If we would see with the eyes of Labeo, of Ulpian, or even of Tribonian, we must begin by clearing our minds of all preconceived notions, English, French, or German, of corporate Personality.'

P. Duff, *Personality in Roman Private Law* (1938, p.130)

1. Introduction

Over a century ago, Tenney Frank, the eminent Roman economic historian, observed: 'It is a commonplace ... that historians often reflect the spirit of their own epoch in the interpretation of past ages ... efforts at writing the history of Rome would itself furnish a picture of the changing *Zeitgeist* in the countries of the writers' (Frank, 1910, p. 99). This observation begs the central questions for this article: are modern interpretations of the *societas publicanorum* overly influenced by the *Zeitgeist* of 19th century philologists that claimed this *societas*, especially during the late Republic, had corporate personality comparable to a 'joint-stock' company with tradeable shares? How was the degree of corporate personality given to this *societas* sufficiently distinct from a 'classical' partnership? And, is the search for corporate personality in the few essential sources available the result of an effort to 'stir the musty history into fascinating activity' rather than providing an opaque interpretation more consistent with what is known of Roman private law? Unfortunately, due to strong social and, possibly, legal aversion to revealing details of such activities, the difficulties of

interpreting incomplete and 'often so one-sided' sources from Roman commercial history are compounded where the search for evidence of corporate personality is concerned.

Against this background, the few available sources relevant to the general organisation and operation of the *societas publicanorum* (*soc.pub.*) are identified and the influence that interpretations of these sources by 19th century philologists has had on modern contributors is traced. A variety of interpretations for the organisation, legal status and characteristics of shares (*partes*) for a *soc.pub.* can be identified. Examining the evidence provided for these diverse contributions reveals the difficulty of exploring the position of the *soc.pub.* in Roman private law, especially the possible evolution of 'corporate personality' for these partnerships empowered to conduct activities on behalf of the Roman state. This task is complicated by the absence of legal sources dealing directly with the late Republic period when the *soc.pub.* was most influential for collecting state revenues. With these difficulties in mind, the commonly stated claim that the *soc.pub.* had a corporate personality and organisation consistent with a joint-stock capital structure having tradeable shares is found to be legally and commercially implausible. Consistent with the organisation of tax farming most supportable in Roman private law sources, the key to essential legal context is identified in *Digest* [17.2.20] as: '*nam socii mei socius meus socius non est*' (For my partner's partner is not my partner).

2. Context from roman commercial history

Roman commercial history is both difficult and fascinating. Difficulties arise from: the substantive evolution of Roman commercial activities from kingdom to Empire; the relative absence of sources about these activities; and, the linguistic obscurity created by the original Latin and, to a lesser extent, Greek and subsequent modern contributions in English, French, Italian and, especially, German. Adding to these difficulties are the intricacies of Roman political, legal and social organisation.¹ Conquests that fuelled growth of the Roman state from the early to late Republic created dramatic changes in the demand for infrastructure and the availability of resources to fund military adventures, colonial administration and other state activities. Though the sources provide only fragmentary detail, the *soc.pub.* served an essential role in taking up the state contracts to provide the skills, manpower and capital needed to support Roman expansion. The emergence of the Emperor Augustus marks a fundamental change in method of state contracting from that employed during the Republic (Strong, 1968, p. 103–6); change that substantively reduced the role of the *soc.pub.* largely to tax farming.

One fascinating aspect of Roman commercial history is the construction of intricate narratives based on: scarce or absent sources detailing commercial activities; and, translations and interpretations of obscure Latin (or Greek) commercial terminology. For example, the fundamental legal concept of *societas* can be translated as 'partnership' or 'company' or 'association', depending on the context and interpretation. Similarly, *soc.pub.* can be 'partnership of public contractors' or, alternatively, 'company formed to carry out state contracts'. This leads to consideration about the method of public contracting and items involved in the contracts. Origins of the Roman state contract system are unknown, possibly dating as early as the founding of the Republic in 509, though more likely somewhat later. This inference follows because, during the Republic, state capacity for infrastructure construction, managing state assets and raising revenues was limited and the necessary

resources were in private control. Little is known about the state contract system until the second Punic war (218–201) when the sources start to provide some detail.² Significantly, state contracts for supplying the army during the war provide the first substantive account, by Livy (*Ab urbe condita*), of the organisation and resources of a *soc.pub.* Fleckner (2010) and Malmendier (2002) exhaustively detail relevant references to the *soc.pub.*, scattered in various sources.

The awarding of contracts – typically with a five-year term (*lustrum*) – was largely by public auction (*ensoria locatio*), conducted by the *censores*, subject to approval of funding and contract substance by the Senate. Exceptions were: care of the streets, upkeep of civil and religious buildings and occasional contracts for construction of commercial buildings that were the responsibility of the *aediles* (Strong, 1968); and, the building of provincial roads and fortifications that was under the purview of the military (Elliott, 2017, ch. 4–5). Precisely when and why the *censores* came to be responsible for the contract system is unknown, though the responsibility of the *censores* in supervising public morality and the inability of other magistrates to overrule a censorial decision likely were influential. Initially, as state assets were insignificant compared to later years, the contract system was largely concerned with infrastructure construction and supplying the military. Guided by references in the Cicero sources, as territories were conquered and Roman rule in the provinces solidified, contracts for tax-farming and managing state assets gradually assumed a central role in the contract system.

The relatively vague and sparse descriptions of the *soc.pub.* in the sources leave considerable room for competing interpretations ranging from being a large joint-stock corporation with many shareholders featuring tradeable shares with different denominations to being not much larger than a conventional *societas* with the same fundamental structure. The joint-stock interpretation has a pedigree traceable to the work in Latin of two philologists on the *In Vatinius* by Cicero – the Italian Swiss, Johann von Orelli, and the German, Karl Halm (Halm, 1845; Orelli, 1835). Following these contributions, variants of this interpretation were adopted and expanded in French (Deloume, 1890) and especially in German (Kniep, 1896; Rostovtzeff, 1902). The influential English work by Badian (1972) made the strong claim that the *soc.pub.* was a large joint-stock corporation with tradeable shares issued in different denominations, some of which were anonymously held by senators. Recent literature seeking a connection between the legal and political environment with financial development and the rise and structure of firms has inspired a revival of interest in the *soc.pub.* with an important contribution appearing in English by Malmendier (2009), summarising an impressive earlier effort in German (Malmendier, 2002) that, more or less, adopts the interpretation of Badian.

Doubts concerning the joint-stock interpretation were expressed as early as the English commentary on the *In Vatinius* by Long (1858) where the key reference to trading of shares in the *soc.pub.* identified by Orelli and Halm is described as ‘obscure’, possibly based on a source that was corrupted and ‘if it is the genuine text, we must be content not to understand it’. Though this cautious approach appears sporadically, eg Duff (1938) in English and Cimma (1980) in Italian, until recently the joint-stock interpretation of the *soc.pub.* was widespread. The authoritative contribution, in German, by Fleckner (2010) on Roman capital associations – the *societas*, *peculium* and *soc.pub.* – marks a turning point by explicitly denying the joint-stock interpretation advanced by Malmendier and, in addition, proposing that the *soc.pub.* had the same fundamental structure as a *societas*.³ A similar interpretation dealing

specifically with the *soc.pub.* is advanced, in French, by Dufour (2012). Denying the possibility that the *soc.pub.* lacked the corporate character necessary to support the trading in shares, Poitras and Geriano (2016) also provide a detailed refutation, in English, of the joint-stock interpretation. On balance, while the ‘negative argument’ against the joint-stock corporate character of the *soc.pub.* appears to be the more appropriate interpretation of the sources, the ‘positive argument’ concerning the likely legal structure of the *soc.pub.* still remains.

3. Essential features of corporate personality

Given the fundamental role of corporations in modern business activity, the seemingly arcane question of corporate personality is of strategic interest. As Iwai (1999, p. 388) observes, ‘for many centuries, philosophers, political scientists, sociologists, economists, and above all jurists and judges have debated heatedly as to what constitutes the “essence” of this soulless and bodiless person’. The debate over corporate personality has gone through several phases without a definitive resolution. Each phase has, to some extent, been conditioned on the evolution that the corporation reached at that point in time. The implications of the debate extend beyond purely legal implications to include the appropriate form of corporate governance and the socially optimal method of organising business activity. With this backdrop, exploring the corporate personality, if any, of the *soc.pub.* is more than an exercise in Roman commercial and legal history. In addition to enhancing understanding of the nexus between the organisation of economic activity, the legal system and the associated method of corporate governance, there is also the importance of demonstrating how perceptions of interpreters at one point in history can influence later interpretations.

As Dewey (1926, p. 655) recognises, the debate surrounding corporate personality is simplified considerably by recognising that ‘for the purposes of law the conception of “person” is a legal conception; put roughly, “person” signifies what law makes it signify’. This starting point avoids complications arising from the distinction between ‘natural’ and ‘artificial’ or ‘fictitious’ persons, eg if a fictitious ‘person’ cannot think or feel, can it have a ‘personality’? When Abatino, Dari-Mattiacci, and Perotti (2011) refer to the ‘depersonalisation of business’ enabling an enterprise to operate as a separate entity from its ‘owners and managers’, ‘person’ takes the non-legal meaning of ‘natural person’. Because a slave was a ‘non-person’, endowing a slave *in potestas* (in the power) with *peculium* to conduct business for a *pater familias* provided a form of limited liability, not available in the *societas*, if the *pater familias* was not directly involved in running the business. However, from a legal perspective, the asset partitioning provided by the *peculium* created a commercial entity – a legal person – run by a slave that was able to enter contracts and engage in commercial activities.

Directing attention to the rights and duties arising in commercial aspects of private law provides further clarification of ‘corporate personality’ (Radin 1932, p. 465):

A ‘person’ or a ‘personality’ ... is not a being nor anything given in nature, but a group of rights and capacities or at any rate a group of legal relations, and this group owes its existence entirely to the recognition of it by the legal and institutional organisation of the community.

Modern debate over legal personality contrasts a corporation engaged in commercial activity that is a fully-fledged owner of real assets, separate and distinct from those of the ‘owners of the corporation’, the shareholders, with an interpretation that maintains a corporation is only ‘a nexus for a set of contractual relationships among individual factors of

production'. Recognising that the real assets owned by a corporation are distinct from the assets owned by its shareholders, Hansmann, R. Kraakman, and R. Squire (2006) classify features of contract enforcement into entity shielding and owner shielding to legally determine how the liability associated with shareholder assets are separate and distinct from the liability for corporation assets. Of relevance to determining the legal personality of a *soc. pub.*, this involves assessing liability of two ownership relations: the joint or individual liability of *soc. pub.* shareholders, 'the owners'; and, in turn, the liability of the *soc. pub.* – 'the entity' – that owns corporate assets, if any, required to conduct commercial activity. A conventional Roman *societas* lacked entity shielding; obligations and assets of the *societas* were those of the *socii* with liability among *socii* for debts contracted by the *societas* being *pro rata* rather than 'joint and several'.

Duff (1938, p. 134) provides an ominous warning about the daunting task of sorting corporate personality in Roman legal history: 'in discussing early law, strict logic is to be avoided above all things'. The task of ferreting out 'new' insight is made even more difficult by in depth contributions on various aspects of Roman private law from some of the most important 19th and early 20th century Roman historians, including Mommsen *De Collegiis et Sodaliciis* (1843), Mitteis, *Römisches Privatrecht* (1908) and Buckland *Elementary Principles of Roman Private Law* (1912). Such contributions detail the corporate personality of public entities – the *municipa* and *populus Romanus* – and the array of entities with private character: *collegia*, *sodalicia*, *decuriae* and the *societates* – aiming to sort out the meaning of *corpus* and *persona* as it applies to a specific entity in the changing historical milieu of Roman religious, political, legal and commercial history. It is in this project that 'strict logic is to be avoided'. If only due to the paucity of sources, the *soc. pub.* receives comparatively little attention.

Deciphering the vast literature of scholarly books, monographs, legal opinions and journal articles on Roman corporate personality – *corpora* and *personae* – needs to avoid being distracted by the minutiae of detail not directly related to the *soc. pub.*, focusing on relevant distinctions between: public and private *corpora*; and, commercial and non-commercial activities. Neither of these distinctions can be made decisively precise. Though the issue of *persona* is obscure, it is conventional to identify a *soc. pub.* as a commercial private *corpus* of partners (*socii*) that achieved greatest importance during the post-Gracchan Roman Republic in the collection of state revenues and, to a lesser extent, the construction of public works and other public duties. As Duff (1938, p. 159) observes: 'Little is known about [the *soc. pub.*], and that little is more concerned with their position in commercial and administrative law than with their Personality'. Reference to *corpus* signifies no more than a group of men joined for a common purpose, as with any *societas* or *collegium*.⁴ In a landscape of unrevealing sources, is it possible to justify strong claims that the *soc. pub.* had enough corporate *persona* to operate as a large 'joint-stock' company with impersonal trading of shares by a multitude of shareholders?

Given that the concept of 'corporate personality' is intimately connected to the notion of 'legal person', precisely what powers being a legal person confer on a business corporation depends on the historical context. A modern listing of powers possessed by the 'legal person' of a business corporation is provided by the American Bar Association 'Model Business Corporation Act' (§3.02). Omitting several items that would not apply to corporations from a previous historical period,⁵ items that could arguably be required for corporate personality in the Roman era include: 'to sue and be sued, complain and defend in its corporate name; to purchase, receive, lease, and own property; to sell, pledge, lease and otherwise dispose

of all or any part of its property; to make contracts and guarantees, incur liabilities and borrow money; to lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment; to have directors and officers, employees, and agents; and, to transact any lawful business that will aid governmental policy'.

For the 'legal person' of a business corporation to have such powers, some method of creating this 'soulless and bodiless person' is required. Since the introduction of general registration in the 19th century, this has involved filing articles of incorporation with the appropriate authority. Prior to this time, there were several centuries where corporate status was conferred by the sovereign or, when applicable, the legislature by granting a corporate charter. Such practices have roots in the evolution of corporate personality in Roman legal history. If Plutarch [*Parallel Lives*, 17] is correct, this evolution starts in the kingdom of Numa with the initial rudiments of guild organisation:

the distribution of the people into groups according to their trades or arts ... into musicians, goldsmiths, carpenters, dyers, leather-workers, curriers, braziers, and potters. The remaining trades he grouped together and made one body out of all who belonged to them. He also appointed social gatherings and public assemblies and rites of worship befitting each body.

This situates the beginnings of *corpora* at a time when key Roman institutions of pagan religion and politics also emerged. Though often unrecognised, the association of a specific pagan god with the *persona* of a defined group had a substantive impact on subsequent evolution of entities involved in Roman society such as the *equites*, *plebians*, *patricians*, merchants and so on.

The next steps toward 'legal personality' appear in the expansion of the early Republic initially with the *Foedus Cassianum* (493 BC), which created alliance between the Latin League and the Romans, and the separate *foedera* (military alliance or peace treaty) with specific Latin cities and various non-Latin allies: referred to as the *socii*. Many such *foedera* precede the restructuring of relations between the Romans and the Latins in 338, eg Baranowski (1988), and subsequent emergence of cities with full or partial Roman citizenship, the *municipia*. These *foedera* conferred important rights on the *corpus* of the *populus* covered by a treaty, such as *commercium* and *connubium*. If reference to the non-Latin allies as *socii* is correct, this is evidence of *corpora* with *personae* being present in Roman public law since the early Republic. Recognising the opaque boundary between the private and public in a society that descended from tribal and familial alliances, attention shifts to those involved in commercial activities essential to the state: the *societates* formed by *publicani* to take up public contracts, ie the *societates publicanorum*.

Who were the *publicani*? Beyond the elementary observation that *publicani* were private contractors engaged in activities essential to the state, the sources provide scant and sometimes conflicting guidance.⁶ Contrary to the publican tax collector of Biblical usage, it is conventional to reference *publicani* as those involved, directly and indirectly, in the state contracts, not the employees, *familiares* and slaves involved in fulfilling the contracts. *Publicani* at the time of Cicero almost certainly satisfied the property qualification for *equites*, though this is less certain prior to the *lex Claudia* (218) that restricted the commercial activities of senators and their *familiae*. The Gracchan reforms (123/2) that greatly increased the importance and size of the *equites* as a political class included the privilege to collect taxes in the potentially lucrative province of Asia. By the time of Cicero, the connection of *equites* with the patricians of the early Roman cavalry was diluted to the point where: 'the

equites consisted of several different types of people, principally Italian landowners and the *publicani*, who need not necessarily have identified with each other all of the time and whose interests did not necessarily coincide' (Berry, 2003, p. 223).

4. The evolution of *societas*

Together with slaves and other *familiares* endowed *in potestas* with *peculium* by the *pater familias*, the *societas* was the most important legal form of Roman commercial association.⁷ In contrast to the immutable and distinct modern concept of partnership, 'no realistic assessment of the Roman *societas* can be made if the early history of this institution is ignored' (de Ligt, 2007, p. 16). The substantive evolution of *societas* from the overthrow of the kingdom at the end of the sixth century to the late Republic at the time of Justinian reflects the changing commercial and political environment. Precise dating when the consensual 'primitive' *consortium* formed by Roman *sui heredes* (co-heirs, literally 'his heirs'), also referred to as *societas ercto non cito* (partnership of undivided inheritance) (de Zulueta, 1935; Watson, 1984, p. 15–16), facilitated the creation in praetorian law of the 'primitive' *societas omnium bonorum* – partnership of all assets – is unclear, possibly as early as the fourth century BC. This evolution was accompanied by the emergence of the *consortium* formed by *legis actio* that did not involve inheritance but did involve some form of contract, between Roman citizens, for pooling property. Though the 'classical' *societas omnium bonorum* did involve partners bound by contract pooling all property, partners in this *societas* did not require Roman citizenship.

Substantive issues surrounding *persona* arise with these early forms of Roman *societas*. Under the *societas ercto non cito* the household continued with several persons having equal rights to independently perform acts of household administration previously reserved for the *pater familias*. In effect, each of the *sui heredes* was co-owner with control over the whole common property subject to *ius prohibendi* that provided a veto for any other co-owner over the actions of another co-owner. The obvious problems this could pose for sustainability of the *societas ercto non cito* could be addressed, with considerable difficulty, by an *actio familiae erciscundae* that would effectively end the *societas* by requiring a division of household property.⁸ That a consensual or contractual agreement by the *consortes* to continue the household was undertaken speaks to importance of the fellowship of *fratres* in the early *societas*. The classical *societas omnium bonorum* almost certainly inherited the basic legal structure of the *societas ercto non cito*, with the proviso that the common property did not originate with inheritance but was the result of contributions by the *socii*. Consequently, the assets were not held as a group but *pro indiviso* by individual partners, each having the right to dispose of their share (de Ligt, 2007, p. 17) and, consequently, end the *societas*.

Over time, the legal structure of the *societas* adapted to accommodate commercial needs and the primitive forms of *societas* became obsolete. The resulting changes leave a range of questions associated with the *persona* for different types of *societas*. Though the *persona* of the *societas ercto non cito* may appear almost schizophrenic, the intangible element of fellowship and the inclusion of all property gave a cohesion that allowed the *corpus* of this *societas* to adopt a *de facto persona* with some rudimentary features of 'corporate personality' even though the 'life' and activities of this *societas* were not legally separate from the individual *socii*. From this starting point, the Roman *societas* evolved toward contractual

legal forms that, while essential for commercial purposes, had *persona* that lacked elements of corporate personality (Broekaert, 2012; Daube, 1938). For example, the *societas unius rei*, a partnership formed for a single transaction, lacked the permanence needed for corporate personality. In general, *persona* resided with the *socii*, not the *societas*. With few exceptions, though property was held in common, the *societas* could not survive the death of a *socius* (*Institutes* III, 152) or the desire of a *socius* to end a *societas* by *actio pro socio* to obtain their share of the common property (*Institutes* III, 151).

Deciphering the *persona* of the *soc.pub.* requires the timing and rationale for the special legal features apparently granted to this *societas* to be identified and evaluated. This task is complicated by the difference in dating between the essential legal sources from the imperial period – the *Institutes* of Gaius and *Digest* of Justinian contained in the *Corpus Juris Civilis* – and the non-legal sources from the middle and late Republic when the *soc.pub.* was most influential in public affairs. Given the vague dating associated with the evolution of *societas*, it is not clear when all special legal features identified in the legal sources were applied to the *soc.pub.* These specific legal features included: removing the requirement that *actio pro socio* by a *socius* in a *societas* for tax collection will end the partnership (*Digest* 17.2.65.15); and, allowing the *societas* for tax collection to continue following the death of a *socius* (*Digest* 17.2.59). More important and controversial was the right for partners in tax farming, gold mines, silver mines and saltworks to have ‘a common treasury and a syndic or attorney to transact business in common’ (*Digest* 3.4.1). The Customs Law of Asia (*Monumentum Ephesenum*) indicates the *magister* likely fulfilled the role of ‘syndic or attorney’.

The relevance of comparing the dating given by non-legal sources from the Republic for activity of a *soc.pub.* with the time line for evolution of the *societas* is captured by the three ‘companies’ of 19 persons (*tres societates aderant hominum undeiginti*) that ‘came forward’ to enter into the contract to supply the army in Spain during the Hannibalic war, circa 215. According to Livy *Ab urbe condita* [23 48–9], due to pursuit of the war in Spain ‘the army was in want of money, clothing, and corn, and that their crews were in want of everything’. Supplies had to be sent from Rome ‘otherwise neither the army could be kept together nor the province preserved’. The depletion of the treasury in Rome led the *praetor* Fulvius to call an assembly of the people and ‘exhort those persons who had increased their patrimonies by farming the public revenues, to furnish temporary loans for the service of that state, from which they had derived their wealth, and contract to supply what was necessary for the army in Spain’. This indicates that the contract system for ‘farming of public revenues’ was well established at this time; Livy mentions taxes in Sicily and Sardina. In addition, there is reference to three *societates* of tax farmers taking up ‘the’ contract (not several contracts) and some method of identifying the specific number (19) of those involved.

Even though a *societas of publicani* is, by definition, a *soc.pub.*, unless more detail on the legal characteristics of such a *societas* is provided, it is not possible to accurately discern the extent of corporate personality. Were the *societates* described by Livy a classical or primitive *societas omnium bonorum* or, as Ligt (2007, p. 17) infers, *societas unius rei*? If available, details of the contracts taken up by the *publicani* would be helpful. Unfortunately, the only such contract that has survived is for a much later date. Badian (1972, p. 68) describes this small contract for construction of a wall at Puteoli in 105. There were five signatories on the contract but only details of the lead contractor are known. It is possible that this *societas* involved some partners contributing capital and some partners labour and supplies, which raises substantive legal issues of where personal liability was situated. Recognising that a *soc.pub.*

could have had different legal forms depending on the date and type of contract, to make further progress toward determining details of the *persona* for a specific *soc.pub.* close examination of essential sources on the possible and actual organisation and operations is needed.

5. Time line and essential sources

Identification of essential sources requires both a time line and specifics on the organisation and activities of a *soc.pub.* and the associated *publicani*. A possible time line might commence with the introduction of the *ensoria locatio* to collect state revenues, construct public works and manage state resources, but relevant Roman sources prior to the end of the third century BC are scarce. As noted, the precise date for granting of state contracts using *ensoria locatio* is unknown, perhaps appearing during the second half of the fifth century BC, shortly after the censorship was established, possibly adapted from Greek methods.⁹ It is evident that the need for capital and number of *socii* would increase as the scope and geographical reach of state activities increased over time. In addition to the exhaustive listings in Fleckner (2010) and Malmendier (2002), Badian (1972, p. 68–71) and Kay (2014, p. 193) also identify various sources indicating aspects to the activities and organisational elements of a *soc.pub.* These sources commence with Livy [23 48–9; 24 18] where, in addition to supplying the army in Spain, the role of *publicani* supporting the Roman state during the second Punic war included making loans to the state and continuing to work on building contracts without payment when state finances were crippled by war expenditures.

The expansion of Roman territory following the end of the second Punic war witnessed substantially increased demand by the state for services of the *publicani* that provided potential profit opportunities arising from management of mines in conquered areas and collection of *portoria* and *vectigalia*.¹⁰ Accompanying this expansion was increasing complexity in the methods used to raise varying types of revenue being collected, and exemptions granted, across locations. Careful consideration is required to connect commercial and administrative details of specific activities involving the *publicani*, the associated human and financial capital required to conduct these activities and the changing political and legal environment. The requirements and potential demand for participation in contracts involving state expenditures for buildings, temples, aqueducts, municipal roads, supplying the army and the like is substantively different from contracts for raising revenues. The commonplace, but imprecise, modern reference to *publicani* as tax-collectors implicitly recognises this distinction. Modern claims for corporate personality are primarily associated with the *soc. pub.* involved in revenue raising activities. Though there is no direct evidence in the sources, is it possible (likely?) that the organisation of a *soc.pub.* differed depending on the type of state activity involved and associated *ensoria locatio* contract issued?

Arguably, no sources of importance on the contract system and the *soc.pub.* appear prior to an oft examined section from Polybius *Histories* [vi 17] that establishes context, not later than 146 BC.¹¹ This dating is significant. Implications for activities of the *publicani* following destruction of Carthage and the conclusion of the Macedonian wars and the Achaean war appear after 146 BC. Together with other fundamental reforms of C. Gracchus in 123/2 that diminished the authority and power of the Senate, increased the power, influence, and wealth of the merchant and officer class – the *equites* (*equester ordo*) – and increased the economic independence of the lower classes (Rowland, 1965, p. 373),

the *lex Sempronia de provincia Asia* ceded much control for raising state revenues in the provinces to the *ensoria locatio* held in Rome.¹² From this point until the reforms of Augustus, about a century later, the influence of the *publicani* over state revenue collection reached a peak and, presumably, substantively impacted the demand for and supply of *partes* in a *soc.pub.* Key non-legal sources on the organisation and activities of the *soc.pub.* are orations and letters authored by Cicero, though there are also less significant sources that touch on the *soc.pub.* of the late Republic and earlier by authors that lived during the Principate including Valerius Maximus (Val. Max.), Pliny, Plutarch, Appian and Dio Cassius.¹³

The Cicero sources relevant to the activities of the *soc.pub.* during the late Republic include: a brief reference to the organisation of the *soc.pub.* in *Pro C. Rabirio Postumo* [2.4] (*Rab. Post.*), an oration for the adopted son of C. Rabirius that Cicero defended in 63 on a charge of treason (Long, 1858, p. 291); and, for the related issue of trading *partes*, *In Vatinius* [12.29] (*Vat.*), an oration that was part of the trial of P. Sestius, defended by an impressive team that included Cicero and Q. Hortensius Hortalus. Regarding the connection between the *soc.pub.* and tax farming in Sicily, *In Verrem* [ii 2.169–175; ii 3.166–168] (*Verr.*) is an essential source for varied reasons. Serving as *quaestor* in western Sicily in 75, Cicero was intimately familiar with tax farming practices in that area.¹⁴ Not only did the prosecution of Gaius Verres in 70 for plundering Sicily during a term as governor demonstrate the oratory skills of Cicero, Verres was defended by Hortensius, arguably the most renowned Roman orator at that time, eg Dyck (2008). Further clues on tax farming include: a reference to the ‘large staffs’ of the *publicani* in *Pro lege Manilia* [2.6] from 66; and, letters of Cicero such as *ad Atticum* [xi 10.i] (Balsdon, 1962) and *ad Familiares* [xiii 65] (Cotton, 1986).

There are also sources from contributions appearing after the late Republic that provide some context on the organisation of the *soc.pub.* or activities of the *publicani* prior to the Principate: Pliny [33.95] on the connection of the *publicani* with the mines at the end of the second century; Plutarch [21.6–21.7] *Cato Maior* on the possible participation of Cato the Elder in a *soc.pub.*; Appian *Mithradates* [11; 62–3] on the money lending activities of the *publicani* in Asia; a section from ‘Memorable Deeds and Sayings’ (Val. Max. [vi 9.7]) referencing *partes* denominated in small units (*particulae*); and, Dio [39.55.5] on the activities of Roman businessmen, including the *publicani* in Blythnia and Syria during the late Republic. The list is not complete. Added to such textual sources is the epigraphic ‘Customs Law of Asia’ (*lex portorii Asiae*) (Cottier, Crawford, & Crowther, 2008), 154 surviving lines of inscription discovered at Ephesus in 1976 dated from the reign of Nero in 62 AD containing references to the modifications of the *portoria*, possibly starting from the last third of the second century BC. Though some changes did occur over time, the ‘Customs Law’ demonstrates there was considerable stability over time in the method of collecting customs duties at this important port and, by implication, for goods entering ports or crossing the frontier of the provinces of Asia.

In addition to the Customs Law of Asia, the essential legal sources appear after the end of the Republic – Gaius, *Institutes* (Gordon & Robinson, 1988) and the *Digest* of Justinian (Watson, 1985). Despite potential lack of applicability, these sources are essential to the central legal issue at hand: the corporate personality of the *soc.pub.* in Roman private law. The most relevant sections are: *Institutes* [III, 148–52] and *Digest* [17.2] on the organisation of partnerships; *Digest* [3.4] on actions for and against corporate bodies; *Digest* [39.4] on actions against tax farmers; *Digest* [50.10] on public works; *Digest* [19.2] on lease and hire; *Digest* [6.3] on actions for vectigalian land; and, *Digest* [10.3] on actions dividing common

property. In addition to the manuscript tradition for these sources originating well after the end of the Republic, these sources also suffer, to varying degrees, from philological difficulties, including the risk of 'interpolation'. While legal sources are not always indicative of actual commercial activities, the 'Customs Law' demonstrates that legal sources surviving from the imperial period can capture continuity in key features of Roman commercial law.

6. *Zeitgeist* and translation

Based on scant detail for the *soc.pub.* available in the sources, influential modern interpretations arrive at the extraordinary conclusion that the *persona* of the *soc.pub.* corresponded to that of a 'joint-stock' company. This conclusion supports further claims that *partes* in the *soc.pub.* were traded. The manuscript tradition that leads to such claims can be found in the important English translation of *In Vatinium* provided in the Loeb Classical Library by Gardner (1958). This source reveals a heavy reliance on Pocock (1926), the source also referenced by Badian. In turn, the Halm (1845) edition of *In Vatinium* is referenced by Pocock as the source of the original Latin. Without referencing the specific source by Orelli, Pocock (1926, p. 116) claims: 'Orelli's view that *partes* = "*partes publicorum*", shares in the joint-stock of the *publicani*, is alone satisfactory, and is generally accepted (cf. Rab. Post. 2.4; Val. Max. 6.9.7)'. Gardner (1958, p. 279, n.h) adapts this position and expands:

Partes = shares in the capital of a tax-farming company. Vatinius secured a remission to the *publicani* of one-third of the original purchase price of the Asian tax-contract. His commission for this service was paid in gifts of shares in the favoured company, greatly appreciated in value, from Caesar and the company.

This translation for *partes* requires that: the contracts required significant amounts of 'capital' to pay 'the original purchase price', shares in the capital could be 'paid as gifts', and, shares could be appreciated in value.

To appreciate the translation and interpretation issues involved in *Vat.*, consider the key part of the English translation of *Vat.* by Gardiner:

Did you not at the same time filch shares when they were at their highest, in part from Caesar, in part from the tax-farmers themselves?[*] This being so, I ask you whether, after being so poor a man, you became rich in that same very year in which a most severe law was passed against extortion?

At [*], Gardiner provides the note given previously about the definition of *partes* adapted from Pocock. The key section from the original Latin is given as: '*eripuerisne partes illo tempore carissimas partim a Caesare, partim a publicanis*' (Did you not at the same time filch shares when they were at their highest, in part from Caesar, in part from the tax-farmers themselves?). In translating this key section as shares in the capital of a (joint-stock) company, Pocock (1926) does not follow the interpretation of the eminent 19th century philologist George Long (1858, p. 24) on this most essential part of the *Vat.* translation:

partes... carissimas] This is obscure; and if it is the genuine text, we must be content not to understand it. The only attempt at explanation worth notice is Orelli's, but we want historical evidence to support it. Halm concludes that Orelli is at least so far right in interpreting '*partes*' to be '*partes publicanorum*', '*partes*' of the '*vectigalia*', which the *Publicani* farmed; and he refers to *Pro Rabirio Post* c.2; and to Valerius Maximus vi.9.7 Orelli takes '*partes*' to be shares (the French,

'actions', the Italian 'azioni'), and these shares would be higher at some times than at others. The general meaning of Cicero's charge is that Vatinius cheated Caesar and the *Publicani*; and that is all that we can conclude.

Similar cautious conclusions can also be found in later contributions, eg Monro (1902), Buckland (1963).

Hints of early 19th century *Zeitgeist* influencing interpretation of *Vat.* originate in the essential Orelli (1835, p. 20–1) source that connects *partes* with the shares in joint-stock companies traded in Germany (*Aktien*) and Italy (*azioni*) at that time ('*Partes h. l. sunt, quas nos dicimus Akzien, Itali azioni*').¹⁵ Orelli also refers to purchasing shares of different denominations from tax farming companies ('*Scilicet a societatibus publicanorum emere poterat aliquis ... decimam, vicesimam, centesimam partem vecitgalium*'). Evidence that this *Zeitgeist* influenced other subsequent interpretations appears repeatedly in the English translation of *Verr.* in the Loeb Classical Library (Greenwood 1966). Consider, for example, '*ad socios litteras de istius*' translated as the letters 'written to the company' by Carpinatus complaining about Verres in *In Verrum* [ii 2.171, 2.172], as though 'the company' was a separate entity. A more literal translation has letters 'written to the partners'. Similarly, '*magister erat eius societatis*' is translated as 'chairman of that company' as though there was a corporate board of directors. Alternatively, this could be translated as 'operator of that partnership.' And it continues: '*decumanos*' [2.174] is translated as 'directors' instead of 'collectors of the tithe'; '*pro magistro*' [2.169] is 'working director'; '*eadem societas*' is 'the same company'. Yet, as Cottier et al. (2008, p. 148) observe: 'the whole internal structures of the *societates [publicanorum]* are too little known to allow a decisive judgment'.

Drawing on interpretation of the *soc.pub.* that originates with Orelli, modern claims of corporate personality, in some form, for the *soc.pub.* are commonplace and persistent. For example, referencing Badian (1972) and Kniep (1896), Richardson (1976, p. 146) claims: 'the distinctive legal feature of the *societates publicanorum* was that under Roman law they had a corporate *persona*, and thus the right to enter into contracts, to own property and so forth'. Many secondary contributions making substantive claims of corporate personality reference Badian as an authority, eg Hansmann et al. (2006); Love (1991). Recognising that *equites* were central to the organisation of the *soc.pub.*, interpretations from acknowledged modern experts on the *equities* – Brunt and Badian in English and the contributions in French by Nicolet (especially Nicolet, 1966, 1974) – are particularly relevant. Badian (1972, p. 7) explicitly acknowledges an intellectual debt to Brunt (1962), a 'short, but stimulating and scholarly paper' on the *equites* in the late Republic. This reference raises subtle and complicated issues surrounding differences among the *equites*, composed of the *publicani*, officers and merchants, relevant to the political and judicial aspects of the contract system during the late Republic. On the activities of the publicans (*publicani*), Brunt (1962, p. 123–4) observes:

The ... publicans ... performed functions that were vital to the State and from which senators were debarred by law. Senators had to take account of their interests but did not share them. The large profits naturally attracted the richest of the non-senators and the capital required was so great that the co-operation of many such men was indispensable. The publicans also formed joint-stock companies in which numerous investors could take shares and though these companies were not permanent in law but subsisted only to fulfil contracts let every five years, much the same group of *socii* may usually have obtained renewals of the right to farm taxes.

Though not explicitly stated, the reference to a *soc.pub.* being a joint-stock company makes a definitive claim about corporate personality.

As noted, important 19th and early 20th century philologists and Roman historians making contributions on the organisation of the *soc.pub.* the auctions of tax farming contracts by the censors and possible trading of shares in the *soc.pub.* include Orelli, Halm, Mommsen, Long, Kniep, Rostovtzeff and Deloume. These contributions are complemented by more recent efforts. In addition to Nicolet, Brunt and Badian on the *equites* are the English translations of Rostovtzeff (1957) and Andreau (1999). Despite such prestigious scholarly contributors, the recent efforts, in German, by Malmendier (2002) and Fleckner (2010) (with English summaries Malmendier 2009 and Fleckner 2017) reveal continuing and considerable disagreement. There is a spectrum of claims ranging from the most extreme adherents of corporate personality, reflected in contributions detailing the sources by Deloume (1890), Rostovtzeff (1902), Badian, and Malmendier, to the cautious interpretations, reflected by Mommsen (1901), Frank (1927), Nicolet (1971), and the recent contributions by Cottier et al. (2008) and Poitras and Geranio (2016) and to the extreme position of Fleckner that the *soc.pub.* was not fundamentally different in structure from a *societas*.

Recognising that necessary elements for legal structure of the modern limited liability corporation with autonomous shares emerged in the second half of the 19th century (Poitras, 2016, ch. 5-6), a 'joint-stock' company would be the most evolved form of 'capital association with corporate character' circa the contributions of Orelli and Halm. Economic historians venturing into this area of Roman history, such as Kessler and Temin (2007, p. 318), recognise that the 'joint-stock' company underwent centuries of evolution: 'There is evidence showing that at least some Roman companies functioned similarly to the joint-stock companies of the English and the Dutch in the 16th and 17th centuries'. However, this claim fails to distinguish between the appearance starting in 1602 of an impersonal market for trading in shares of the chartered VOC (Dutch East Indies Company) and an 'ad hoc' joint-stock company that could be formed without a charter by a sizeable number of investors pooling capital for a risky commercial venture.¹⁶ Being little more than large partnerships, shares in such 'ad hoc' joint-stock companies typically could not be traded and the capital stock lacked 'permanence'. The early English slaving voyages of John Hawkins, in which Queen Elizabeth participated as an investor, were of this form – with a separation of ownership and control, without the 'corporate' identity provided by a charter and liability determined in the fashion of limited partnerships.

The 16th and 17th centuries featured various forms of equity capital association. In addition to 'ad hoc' joint-stock ventures and regulated companies, there was also 'chartered' joint-stock companies – such as the Muscovy and Levant companies in England – that were chartered by the sovereign with a monopoly on trade to a specific region for a period of years with shares that were problematic to trade.¹⁷ Such companies were formed as a 'body politic', with corporate personality and detailed governance rules contained in the charter to define the separation of ownership and control. The capital stock for such companies was typically more permanent than 'ad hoc' joint-stock ventures that often involved return of capital at the end of a specific venture, such as a round-trip sea voyage. Due to the potential for additional calls on shareholders and other factors specified in the charter, liability was not limited in the same sense as unchartered joint-stock companies. The joint-stock company differed from a regulated company, such as the Merchant Adventurers, where there was a corporate personality associated with a grant of specific monopoly to a 'company' but capital

was not held jointly. Like a medieval guild, membership in the regulated company was restricted with each member carrying on trade individually under the charter. Does a regulated company have more similarity to a *soc.pub.* than a joint-stock company?

Another example of difficulty determining the relationship between a joint-stock company and corporate personality in Roman times is provided by Verboven (2002, p. 278): 'In some exceptional cases a *societas* was granted corporate capacity by a law, a senatorial decree or (later) an imperial *constitutio*. The most famous example is the large *societas vectigalium* formed to collect taxes on behalf of the state. Under the Republic, they were no doubt the only "incorporated" *societates*. The precise meaning of "incorporated" in the context of the *soc.pub.* is elusive. What 'law' granted corporate status? For the late Republic, presumably this is referencing *lex Hieronica*, *lex Sempronia de provincia Asia*, *leges censoriae* and the like, but these were laws about taxation not corporate status. How does obtaining a tax-farming contract through the *censoria locatio* create a corporate personality? *Persona* for a joint-stock company was 'corporate' but was this the case for *socii* in the *soc.pub.*? Comparing the organisational and legal character of the *soc.pub.* with later 'capital associations with corporate character' is complicated due to differences in commercial context between late Republic tax-farming and, say, long-distance seaborne trade of many 16th and 17th century joint-stock companies.

7. The '*societates*' in Roman private law

Verboven and others claim support for interpreting the *soc.pub.* having corporate *persona* by referencing the legal description of private 'corporate bodies' found in *Digest* [3.4.1]. However, there has been long-standing debate over translation and possibly corruption or interpolation of this fragment from Gaius, *Provincial Edict*.¹⁸ Watson (1985) provides the following:

Partnerships, *collegia* and bodies of this sort may not be formed by everybody at will; for this right is restricted by statute, *senatus consulta*, and imperial *constitutiones*. In a few cases only are bodies of this sort permitted. For example, partners in tax farming, gold mines, silver mines and saltworks are allowed to form corporations ... Those permitted to form a corporate body consisting of a *collegium* or partnership or specifically one or the other of these have the right on the pattern of the state to have common property, a common treasury, and an attorney or syndic through whom, as in a state, what should be transacted and done in common is transacted and done.

Despite difficulties with *Digest* [3.4.1] it is still apparent that the *soc.pub.* did have a form of corporate personality (*corpora habere*), albeit seemingly insufficient to sustain a claim for joint-stock organisation with trading of shares. Common property 'on the pattern of the state' indicates that a partner in a tax farming *societas* does not have the traditional right of *socii* to bring an *actio pro socio* to dissolve the partnership, just as a citizen of a *municipium* or member of a *collegium* does not have a right of dissolution. Restriction of *actio pro socio* was exceptional in the Roman law of *societas* and it is likely that infringements on this right would be avoided if possible.

The two other features for a 'corporate body' specified in *Digest* [3.4.1] as 'on the pattern of the state' are: the 'common treasury;' and, the role of attorney or syndic. For the *municipia* having a common treasury was essential for the provision of common services and

maintenance of public works. In the Greek and Roman eras, the 'treasury' was typically a building of importance, reflecting the independent corporate status of a *municipium* or city state. The Customs Law (II.67, II.71) recognises the importance of buildings associated with collection of *portoria* (and other taxes) providing rules for: the handover of these buildings if the *publicanus* (*manceps*) changes;¹⁹ and, for the construction of new common treasury buildings. The 'common treasury' would provide, from contract to contract, a fixed location for tax collection and revenue disbursement. If the *publicanus* or some *socii* employed municipal authorities in the Asian province to collect taxes within their scope of influence, then the 'common treasury' of the local authorities could be used to collect state revenues and disburse funds to the Roman administration for purposes such as provisioning the troops and compensating a variety of officials on the governor's staff. This feature speaks to the practical implementation of state revenue collection: the legal organisation of tax-farming activities had to recognise the need for stability in the physical infrastructure.

The final feature of a 'corporate body' specified is the role of an attorney or syndic. For the *soc.pub.*, this feature is captured by the *magister*. The need for stability of the *magister* is recognised in the Customs Law (II.105, II.110, II.133), providing explicit requirements for changing the *magister*, indicating this position did not necessarily change with the outcome of a *ensoria locatio* auction. The role of the 'syndic or attorney', ie *magister*, acting in the interest of the *publicanus* is almost certainly related to the expertise required to conduct tax-farming business. In addition to knowledge of assessment and collection methods, activities of the *soc.pub.* could span various locations, eg in Rome and the Asian province associated with the contract, and the need to disburse funds for Roman administration. The ability of a syndic or attorney to act in place of a *publicanus* who is in another location or is otherwise unavailable would be a practical necessity. Continuity in the *magister* from *lustrum* to *lustrum*, combined with the physical facilities of the common treasury, would facilitate an easier transition if there was a change in the *publicanus* that secured the tax farming contract at the *ensoria locatio*.

While explicit support in the sources for claims that *partes* in the *soc.pub.* were traded is questionable, at best, resolving questions surrounding the precise character of 'corporate personality' granted to the *soc.pub.* is decidedly more complex. Though reference to 'joint-stock' is too imprecise to be useful without further clarification, it is obvious the *soc.pub.*, either in the more general sense or restricted to *societas vectigalium*, had a legal structure that had some substantive differences from the classical Roman *societas*. Recognising that the essential Roman legal sources, the *Institutes* and the *Digest*, appear well after the Republican period when the *publicani* were most influential, if studies that have argued Roman law incorporated 'radical innovations' from the time of the Twelve Tables until the Principate are correct, eg de Ligt (2007), Watson (1984), then legal sources need to be supplemented by inferences about commercial context gleaned from other relevant sources to determine the *persona* of the *soc.pub.* in Roman private law. Fortunately, there are two sources to assist: Polybius *Histories* [vi 17] and the 'Customs Law of Asia' (II. 53, 57, 67, 74, 99, 101, 105, 110, 124, 126–127, 133).

As the Customs Law only covers a period starting with the *lex Sempronia de provincia Asia*, at the earliest (Cottier et al., 2008, p. 7–10), the dating of Polybius [vi 17] allows for an earlier connection between the *ensoria locatio* and the *soc.pub.* Nicolet (1971) demonstrates the importance of this Greek source for identifying the role of guarantors (*praedes*) for the

ensoria locatio contract. As ‘capital associations’, the amount of capital and security required for the *manceps* to acquire state contracts, allocation of funding and security requirements among the *socii* and whether liability was corporate or individual, is essential information for inferring organisation and corporate personality. Polybius establishes context for the contract system in the economy of the Roman Republic circa the end of the second Punic war when the *soc.pub.* was involved in public works construction as well as tax farming and, possibly, making public loans (Shuckburgh, 1889, trans.):

The people on its part is far from being independent of the Senate and is bound to take its wishes into account both collectively and individually. For contracts, too numerous to count, are given out by the censors in all parts of Italy for the repairs or construction of public buildings; there is also the collection of revenue from many rivers, harbours, gardens, mines, and land—everything, in a word, that comes under the control of the Roman government: and in all these the people at large are engaged; so that there is scarcely a man, so to speak, who is not interested either as a contractor or as being employed in the works.

This description of the widespread use of the *ensoria locatio* contract system corresponds to the more detailed account in Mommsen (1901, p. 84–6, 92–95).

The next part of the section from Polybius provides essential context:

some purchase the contracts from the censors for themselves; and others go partners with them; while others again give security for these contractors, or actually pledge their property to the treasury for them.

This general description of the contract system, reflected in secondary literature going back to Kniep (1896), claims the *manceps* takes up the *ensoria locatio* contract and is joined in a ‘company’ by other partners (*socii*) who hold ‘shares’ and, possibly, undertake to provide the labour and organisation needed to fulfil the contract. This interpretation of *soc.pub.* organisation is adopted without giving close attention to how such a ‘company’ would have been organised in Roman private law. The notion that the *manceps* and *socii* were involved in a single ‘joint-stock’ company organised as a special type of partnership with *partes* that Badian and others maintain could be traded requires legal and commercial grounding that is lacking. Closer inspection of available legal sources is required to determine an alternative organisational structure that is both more consistent with evidence in the sources and capable of explaining puzzling problems raised by Nicolet (1971).

Nicolet (1971) is explicitly concerned with the interpretation of Polybius [vi 17], concentrating on the philology and interpretation of the Greek text for the ‘rather obscure category of other *praedes*’ associated with ‘pledge their property to the treasury’. After an exhaustive examination of the available sources and secondary literature, Nicolet concludes Polybius is not referring to ‘details of the auctions’ but, rather, to the ‘public loans’ made through the ‘public contracts’ during and after the second Punic war when the contractors agreed to undertake various activities on behalf of the state without conventional payment thereby extending money, credit and materials to the state. Focused on ‘citizens committed to the *publica*’, Nicolet (1971, p. 168) dismisses the possibility of a connection between ‘*praedia*’, that applies to public contracts, and ‘*pignus*’ that is the associated concept for private contracts. Discovery of the Customs Law of Asia, after the appearance of Nicolet (1971), provides an additional source that suggests an alternative to joint-stock organisational structure for the *soc.pub.* that is consistent with Polybius [vi 17].

It is more than apparent that pledging of personal and real security was of central import to concluding a tax-farming contract. The Customs Law (Il.101) states the following:

the *publicanus* [who] has accepted the contract for the extraction of the *tele* is publicly to give security with *praedes* and *praedia* at the discretion of the consuls C. Furnius and C. Silaius, or the praetors [in charge of the] *aerarium*; the appointed day for the affair is the next Ides of January.

It follows that the tax-farming contract was with the *publicanus* (*manceps*), not with a *soc. pub.*²⁰ If the security required to secure the tax-farming contract of Customs Law (Il.101) exceeded the abilities of even the wealthiest Roman *eques*, then *praedia* would have to be obtained from *socii* (*praedes*) able and willing to provide the necessary security (*praedia*) to the state.²¹ This begs various questions: what method of organisation was employed to secure the '*praedes* and *praedia*'? Did the 'discretion of the consuls' permit the *praedia* to remain with the *praedes*? What initial payment (deposit at the *aerarium*) was required by the *publicanus* to secure the contract? What is the relationship between the *publicanus* and the *magister*? Were there other incentives for the *publicanus* to enter into a tax-farming contract than the possible profit margin gained from tax collection? What procedures were involved when the *ensoria locatio* resulted in a change of *publicanus*?

Despite little being available in the sources specifically about the *soc. pub.*, Roman private law provides some details to make informed, if speculative, inferences about corporate personality of the *soc. pub.* related: to the organisation of the *soc. pub.*; and, to the legal liability of *soc. pub.* shareholders and ownership of commercial assets. Regarding organisation, instead of using a joint-stock company, tax-farming could be legally and, arguably, more efficiently organised by the *publicanus* taking up the contract and forming a *societas maior* (the *soc. pub.*) composed of: active partners responsible for logistics, local lending and labour; and, other *socii* acting as sleeping partners willing to provide *praedia* and, possibly, *familiares* for tax collecting (see Figure 1). Accepting that the *soc. pub.* had the liability implications of a *societas* and not a joint-stock company, the *societas maior* would likely involve a small number of *socii*. As Hansmann et al. (2006, p. 1356) observe: 'consistent with the lack of entity shielding most commercial *societates* had no more than a few members'. Similarly, Fleckner (2017, p. 3) claims: 'Roman business associations were surprisingly small'.

The extent of *soc. pub.* activities associated with tax-farming in Asia is described by Cicero in *Pro lege Manilia* [6.u16] as: 'tax-farmers feel that there is the gravest risk in keeping large staffs which they maintain on the pastures and the corn lands, at the harbours and the coastguard stations'. If commercial activities involved in tax farming were so considerable, how could this be organised to mitigate the lack of entity shielding in a *societas*? Buckland (1963, p. 510) deals with the legalities of the situation, albeit based on legal sources dating from after the late Republic (*Digest* 17.2.19–20):

A *socius* could not, by taking a partner, add him to the *societas*. If he took such a partner, and allowed him to deal with firm's business, he was responsible for his acts, and could not get rid of liability by ceding his actions against him. As between its parties, the subpartnership was valid. An *actio pro socio* on it would not affect the main *societas*, but so far as the subpartnership was formed merely in respect of the concerns of the principal firm, it necessarily ended if that happened.

As such, a large '*societas*' without enough 'corporate personality' separate from the *socii* raises obvious entity shielding problems that are mitigated with the *societas maior* connected

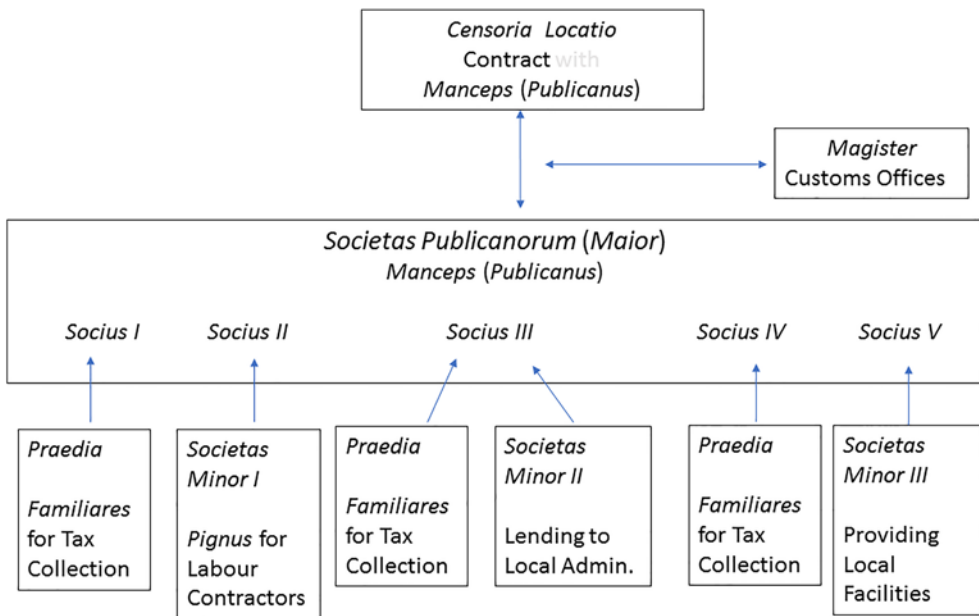


Figure 1. Example of possible organisational structure for *societas publicanorum* from customs law.

to a network of *societates* involving the active partners where the right of *actio pro socio* would be available to sub-partnerships not directly involving the *publicanus*. By reducing the number of *socii* in the *soc.pub.*, a network of sub-partnerships employed in the act of collecting taxes would provide greater flexibility to ensure the necessary resources required were not substantively disrupted by, say, the death or bankruptcy of a *socius*. As *Digest* [17.2.20] states: '*nam socii mei socius meus socius non est*' (For my partner's partner is not my partner).

This method of organisation would mitigate liability associated with the *persona* of the *soc.pub.*, ie *Digest* [39.4] demonstrates that *socii* involved in tax collection had individual liability. Other than the common treasury, resources such as slaves and other *familiares* responsible for the collection of taxes were owned or were otherwise in the power of individual *socii* involved in the *soc.pub.* Corporate personality that requires, at least, weak 'ownership shielding' from commercial liability – where the corporation, not shareholders, would be liable – was not present. Barring prior agreement to shared ownership of tax collection resources with other *socii* in the *soc.pub.*, legal actions involving, say, extortionate collection by a slave acting under the direction of a *socius*, would be taken against that *socius*, not other *socii* involved in the *soc.pub.* This liability structure gave each *socius* in the *soc.pub.* considerable latitude to form *societates minor* with *partes* that could be 'gifted' or 'extorted' without requiring the consent of other *socii* involved in the *soc.pub.* or other *societates* in the network. For example, a *familiaris* undertaking a commission from a *socius* in the *soc.pub.* to supervise the collection of taxes in Asia might be rewarded with a 'gift' of *partes* in a specific *societas minor*.²²

The sources indicate the *censoria locatio* contracts for tax-farming in Asia could exceed the wealth of the richest Romans, indicating there was, in addition to active partners, other *socii* responsible for providing the *praedia* required to take up the contract. Perhaps, some

(all?) *socii* that were active partners also were *praedes*. As Duff (1938, p. 150) observes: ‘We cannot be sure what the corporate group was ... The *societas* may be the actual group of partners who make a particular contract or the larger group of capitalists behind it.’ However, recognising that a large enough pledge of *praedia* was required to take up the contract, some insight can be gained from the Roman legal definition of *praedia* as ‘landed estates together with the buildings erected on them’ (Berger, 1953, p. 641). Recognising the key role in the agrarian based Roman economy of land-owning families headed by a *pater familias*, *socii* providing *praedia* could be *patres familias* pledging family estates as *praedia* and employing *familiares* in the active collection of taxes.

The upshot of having *societates minor* and *familiares* connected with the small number of *socii* involved in a *societas maior* with the *publicanus* – the *soc.pub.* – is that a tax-farming contract would be undertaken, not by a ‘joint-stock company’, but by a network of *societates* and *familias* devised to execute the contract between the state and the *publicanus*. In the case of a *soc.pub.* involved in public infrastructure construction, the secondary guarantors identified in Polybius [vi 17] that troubled Nicolet (1971), ie those ‘that give security for these contractors, or actually pledge their property to the treasury for them’ are more readily explained. Specifically, *socii* of the *manceps* forming *societates* to provide the labour and materials involved in public works construction could provide *pignus* to ensure workers are paid or to ensure payment for supplies and logistics. Similarly, *socii* that pledge *praedia* to the *manceps* could be *patres familias* with large estates able to provide *familiares* to support construction activity or, possibly, also be involved in sub-partnerships providing labour and materials. In contrast to the assumption that the *soc.pub.* was a joint-stock company, this type of *soc.pub.* organisation provides a plausible explanation for the obscurity perceived by Nicolet (1971) and others in Polybius [vi 17].

Notes

1. In addition to members of the Senate, relevant political positions were *aedile*, *tribune*, *quaestor*, *praetor*, *ensor* and *consul*. The highest but temporary political position of *dictator* was not filled during an important period of *soc.pub.* influence from the second Punic war until Sulla was elected *dictator* in 82/81.
2. Strong (1968, p. 97) identifies the first recorded *locatio* (contract of lease and hire) for building the walls of Rome in 377, though Astin (1990) and others mention a contract for feeding the sacred geese which would have been earlier. There were large contracts for building roads and aqueducts in 312.
3. Translating Fleckner (2010, p. 215): ‘The *societas publicanorum* was a special form of the ordinary *societas* which chiefly differed with respect to objectives (public contracts), structure (heterogenous with main- and sub-participants) and function (location-wise and time-wise far-reaching, but objective-wise limited). Otherwise, in their fundamental form, most *societas publicanorum* were essentially like the *societas*. Especially, it appears that they were subject to the same legal regime, and that often they were not much bigger.’
4. The exhaustive treatment by Duff (1938, p. 26-34) concludes about Roman law: ‘From all [the] evidence, it appears that *corpus* is never a technical term meaning “a corporate body”’. Berger (1953, p. 417) defines *corpus* as a general term that could, when referring to ‘a union of persons’, be synonymous with *collegium* or ‘corporate body’, but can take other meanings depending on context.
5. For example, a modern business corporation has the power to: ‘establish pension plans, profit sharing plans, share option plans, and benefit or incentive plans.’ Many such items would be inapplicable to corporations from a previous era where employee pensions or executive stock

options had not yet evolved. Similarly, there were powers that applied to the Romans and not the modern era, such as the right of manumission.

6. For example, *Digest* [39.4.1] states ‘all those who lease anything from the imperial treasury are correctly described as *publicani*’. The actions of paying *vectigal* to the treasury and collecting tribute are specifically identified. *Digest* [13.4.13] also observes: ‘people who have saltworks, chalk-pits and mines also count as *publicani*’. The role of *publicani* during the Republic supplying the army or constructing public works receive no mention in the legal sources.
7. Fleckner (2010) provides an authoritative and detailed examination of the three legal forms available to ‘Roman businessmen’: *societas*, *peculium* and *soc.pub*. Various authorities observe such arrangements did not dominate aggregate economic activity, eg Frank (1927). Much of the Roman Republic economy had an agrarian basis structured around ownership of productive resources in control of land-owning families, typically headed by a *pater familias*.
8. This would be problematic when the ‘household property’ was difficult to divide. As such, difference in the source of assets associated with the *societas* is a substantive point of demarcation between the *ercto non cito* and *omnium bonorum* form of *societas*. As Watson (1984, p. 15) observes about the early Roman *societas*: ‘the primary type of consensual partnership was not a commercial arrangement between merchants – they would want a much more restricted partnership – but between close relatives and friends, probably wishing to engage in a communal agricultural enterprise’.
9. As Cottier et al. (2008, p. 7) document, Roman public law traditionally assigned the establishment of terms for contracting and the sale or lease at auction of public revenues and properties to the *censores*. However, other magistrates such as the *praetor* did at times undertake these duties for differing reasons. The early example of a censorial contract for feeding the sacred geese that alerted defenders of the Citadel about invading Gauls in 390 BC appears in a story from Livy [5 47].
10. As illustrated in Brunt (1956), *vectigalia* can refer to differing sources of state revenue, depending on the context. Typically, *vectigalia* refers to ‘dues levied on *ager publicus*’; and, in other cases to: ‘all regular and ordinary sources of Roman revenue, as distinct from the extraordinary *tributum*’ (Smith, Wayte, & Marindin, 1890), though *Digest* [39.4.1] does mention the collection of tribute by the *publicani*. As such, *vectigalia* usually refers to the *decumae* (the tithe, a fixed percentage of crops) and the *scriptura* (grazing fees). Additional Roman state revenues that the *publicani* could collect were rents for houses on public land (*solarium*), sale of timber on public land (*vectigal picariarum*), revenue from salt works (*salinae*) and revenue from mines (*metalla*). Other than the *decumae* and *scriptura*, the most important revenue source collected by the *publicani* was customs duty (*portorium*).
11. Of Achaean Greek origin, there is only ‘scanty and ambiguous’ evidence (Epstein 1992) about the birth and death dates for Polybius (c. 208–c. 125).
12. The precise dating for the commencement of revenue collection by the *publicani* in Asia may, or may not, have preceded the reforms of C. Gracchus. Badian (1972, p. 63) claims 131 as the beginning, while Kay (2014, p. 61–4) follows Appian in recognising the *lex Sempronia* for Asia as the beginning. Mommsen (1901, p. 342–61) provides an insightful treatment of the connection between C. Gracchus and the rise of the *equites*.
13. As Kay (2014, p. 191) observes: ‘the source evidence for wealth creation in the Roman world during the Republican period comes from the years 70 to 40, thanks to the Ciceronian corpus, in particular his letters, and that no equivalent source is available’.
14. Scramuzza (1937) provides further background on the publican *societates* in Sicily. On Roman tax-farming and revenue raising practices in other areas see Hill (1946) and Richardson (1976). On the interesting relationship with previous tax-farming practices in Ptolemaic Egypt, Harper (1934) is still useful.
15. *Akzien* is an obscure German term in use at Orelli’s time to refer to traded shares. *Aktien* is more recent terminology.
16. As detailed by Gelderblom, de Jong, and Jonker (2011), historical accuracy requires a distinction to be made between the VOC and the English joint-stock and regulated companies. Unlike the English joint-stock companies, the VOC and Dutch West India Company were root-

ed in a different legal tradition than that associated with corporate personality for English companies. The 'ad hoc' variant of the English joint-stock company is detailed in Scott (1910), Harris (2000) and Freeman, Pearson, and Taylor (2012). See also the discussion in Duff (1938, esp. p. 149).

17. Grounds for granting a charter, as well as conditions detailed in the charter, differed. For many English companies, the charter was granted for a set time in exchange for a substantial consideration to the Crown, with stipulations in the charter requiring some additional services to the Crown. The charter for the VOC involved the amalgamation of existing companies to further the interests of the Dutch republic. The VOC required the capital stock to be 'permanent' for a period of 10 years by restricting the ability to pay dividends to shareholders during that period. To account for the difficulties this would pose for raising capital, the charter of the VOC contained explicit conditions for the transfer of shares that created the appropriate legal environment for the first exchange trading of company shares.
18. Observing that private partnerships, as consensual contracts, could be formed at will, difficulties with *Digest* [3.4.1] are apparent from the first sentence. Debate surrounding resolution of this important fragment during the 19th and early 20th century included: Cohn, *Zum römisches Vereinsrecht* (1873); Waltzing, *Corporations professionnelles* (1896); Kniep (1896); and, Mitteis *Römisches Privatrecht* (1908). Duff (1938, p. 141–53) reviews the debate and suggests the following translation for the first sentence: 'Neither a partnership nor a college nor any other body of the kind is freely allowed in all cases to have corporate capacity (or a corporation).' Fleckner (2010) provides a detailed account of *Digest* [3.4.1] and the early German contributions by Cohn and Mitteis reaching the conclusion: 'with a probability bordering on certainty ... the dominant opinion that the *societas publicanorum* could have a personality structure and independent assets is contradicted' (p. 410–11).
19. In translating the Customs Law to Latin, Cottier et al. refer to the individual securing the contract to farm the taxes as the *publicanus* while legal sources and modern discussion going back to Kniep (1896) use the alternative term *manceps* (entrepreneur).
20. The epigraph of the Customs Law of Asia is in Greek and Cottier et al. (2008, p. 67) uses the Greek *tele* (*telos*) for 'customs' or 'tariffs' (Latin *portorii*); alternatively *tele* can be translated as 'port duty' or 'dues extracted by the state', eg Fleckner (2010, p. 206). Duncan-Jones (2006) provides useful background on Roman customs practices. The *aerarium* was the public treasury. Related to the *aerarium* is the *fiscus*, a term that usually referred to the private wealth of an individual (Republic) or the Emperor (Empire) but could also refer to a 'chest' where the public monies were held. Because the private wealth of the Emperor was responsible for state activities during the Empire, *fiscus* could also refer to the imperial treasury, eg Brunt (1966).
21. Whether some or all *praedes* were *socii* is not a certainty. Fleckner (2010, p. 186) recognises: '*umfangreiche sachliche und persönliche Sicherheiten (praedia und praedes) geleistet werden mußten*' (extensive material and personal guarantees (*praedia* and *praedes*) had to be provided). Following a discussion on p. 206 Fleckner concludes it 'is a little more likely that *socii* and *praedes* are indeed the same persons' ('*ein wenig wahrscheinlicher, daß socii praedes tatsächlich dieselben Personen sind*').
22. Commercial organisation involving a network of inter-locking partnerships appears in one of the earliest, almost complete, set of business records surviving from the Renaissance for Francesco Datini, 'The Merchant of Prato' (Origo, 1957). This network of partnerships had no trading of shares. Earlier instances of a partnership network also appear in notarial records from the middle of the 12th century in Genoa, albeit in the context of seaborne trade (Poitras, 2016, ch.5).

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