

Law and Finance “at the Origin”

ULRIKE MALMENDIER*

*What are the key determinants of financial development and growth? A large literature debates the relative importance of countries' legal and political environment. In this paper, I present evidence from ancient Rome, where an early form of shareholder company, the *societas publicanorum*, developed. I show that the *societas publicanorum* flourished in a legally underdeveloped but politically supportive environment (Roman Republic) and disappeared when Roman law reached its height of legal sophistication but the political environment grew less supportive (Roman Empire). In the Roman case, legal development appears to have mattered little as long as the law as practiced was flexible and adapted to economic needs. The “law as practiced,” in turn, reflected prevalent political interests. After discussing parallels in more recent history, I provide a brief overview of the literature on law and finance and on politics and finance. The historical evidence suggests that legal systems may be less of a technological constraint for growth than previously thought—at least “at the origin.” (JEL D72, K10, N23, N43)*

1. Introduction

Understanding the causes of financial development and economic growth is central to research agendas in many fields of economics, ranging from macroeconomics and microeconomics to finance. The law and finance literature suggests a causal impact

of countries' legal systems.¹ Another strand of the literature emphasizes the role of the political environment and argues that the effectiveness of institutions varies considerably with the political support they receive.²

Definitive empirical evidence for either of those approaches is hard to come by. Given the scarcity of perfect natural experiments,

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¹ Rafael La Porta et al. (1997, 1998).

² Raghuram G. Rajan and Luigi Zingales (2003); Daron Acemoglu and Simon Johnson (2005); Marco Pagano and Paolo Volpin (2005).

TABLE 1. CHORONOLOGY OF ROME

	Political Events	Economic/Cultural Developments
M O N A R C H Y	BC	
	700–500	Expansion in the western Mediterranean. Growing urban settlements with temples, fortifications, and other communal facilities.
	c.625	Foundation of the city of Rome (fictional date: 753)
	600–575	Usage of Greek coinage
	500–470	Foundation of the Republic: monarchy replaced with time-limited magistracy.
	486	Earliest recorded agrarian laws, regulating the disposition of public land
	c.450	Codification of law in the Twelve Tables
	393	All Roman citizens are allotted 7 iugera (4.38 acres) of land north of the city, leading to the creation of a class of working landowners.
	367/366	<i>Lex Licinia Sextia</i> restores consulship and appointment of plebeians to consul positions.
	367–287	<i>Lex Licinia Sextia</i> limits the amount of land a citizen can own. Not enforced in practice.
E A R L Y	366	Class struggle between the two orders, plebeians and patricians; shapes the constitution of the classical Republic and forms a ruling class (<i>nobilitas</i>) consisting of both plebeians and patricians.
	366	First Roman coinage
	347	Century-long legal interest rate of 8 1/3 percent falls by half.
	342	Prohibition of interest (<i>lex Genucia</i>)
	340–290	Earliest centuriations (formal divisions of colonies into square blocks), indicating the appropriation and exploitation of conquered territories.
	300–200	Earliest <i>villas</i> , indicating large scale slave plantation agriculture.
	287	Resolutions of the plebeian assembly (<i>plebiscites</i>) are made binding by the <i>lex Hortensia</i> ; end of the conflict of the orders.
	269	Discontinuation of old coinage and implementation of denarial system. Opening of first mint.
	264/3–241	First Punic War against Carthage
	264–227	Beginning of tribute system. Annual tribute to Rome amounts to about one million bushels of wheat.
R E P U B L I C	264–227	Rome expands in the western Mediterranean; establishes first overseas provinces (Sicily and Sardinia) under military governors (praetors).
	218–201	Second Punic War
	202	Defeat of Hannibal at Zama in North Africa
	200–150	Slaves constitute a significant proportion of the population and an important input to production, especially in <i>villas</i> . Wine production and exports begin to flourish
	200	Development of Roman roads and increasing use of mules as pack saddle animals and to pull carts.
	197	Creation of two Roman provinces on the Iberian peninsula
	194	Revitalization of the harbor of Puteoli; becomes Rome's main sea harbor.
	193–174	Construction of giant warehouse <i>Porticus Aemilia</i> and new marketplaces in Rome.
	167	Direct taxation of Roman citizens abolished. Polybius (historian) arrives in Rome.
	154–133	Rome's domination in the central and western Mediterranean stimulates exchange and encourages mass production for export.
L A T E	146	Destruction of Carthage and Corinth. Carthaginian North Africa, Macedonia, and parts of Greece become Roman provinces
	143–71	Era of slave rebellions
	133–129	Creation of the Roman province of Asia
	131	Census records 318,823 adult males as Roman citizens.
	122	Introduction of subsidized monthly sales of grain in Rome
	91–88	Social War. All Italians are granted Roman citizenship.
	88	Sulla's first march on Rome. Militarization of internal conflicts.
	86	Legislation imposes debt forgiveness of 75 percent.
	82/81	Sulla's dictatorship leads to the reorganization of the state.
	70	Repeal of the main points of the Sullan system.
R E P U B L I C	63	Suppression of the Catilinarian conspiracy
	63	Wars cause civil and economic disturbances. Export ban of silver and gold from Italy.
	60	Abolishment of harbor custom dues in all the ports of Italy (but not the provinces) to support Italian industries and resolve dissatisfaction with collection practices. Later reintroduced by Caesar.
	60	First Triumvirate between Caesar, Crassus, and Pompey
BC 133. <i>Tribunate of Tiberius Gracchus</i>		
BC 123. <i>Tribunate of Gaius Gracchus</i>		
BC 70. <i>Consulship of Pompey and Crassus</i>		
BC 63. <i>Consulship of Cicero</i>		
BC 59. <i>Consulship of Caesar</i>		

TABLE 1. CHORONOLOGY OF ROME (Continued)

BC 19. Reign of Augustus	49	Caesar crosses the river Rubicon, against Roman law, marking the start of civil war (<i>alea iacta est</i> : “the die is cast” [acc. to Sueton]).	Legislation imposes debt forgiveness of 25 percent.
	46–44	Caesar’s dictatorship; reforms and monarchical reorganization.	
	15 March 44	Murder of Caesar	
	43	Second Triumvirate between Antony, Lepidus and Octavian	
	Oct./Nov. 42	Victory of the triumvirs over the Caesar’s murderers Cassius and Brutus at Philippi	
	33/32	Break between Antony and Octavian	
	28		Census records 4,063,000 adult males as Roman citizens.
	27 BC–AD 6	Creation of a professional army and provision for veterans	
	27 BC–AD 9	Consolidation of the boundaries of the Roman Empire	Beginning of period of Roman peace, <i>Pax Romana</i>
	AD 14–68. Julio-Claudian Dynasty	19/18	Reform legislation of Augustus
12		Augustus assumes highest religious position (<i>pontifex maximus</i>)	
43		Claudius conquers Britain.	
64		Fire in Rome for nine days. Persecution of Christians.	
79		Eruption of Vesuvius. Destruction of Pompeii and Herculaneum.	
AD 96–192. Age of the Antonines	100–110		Tacitus writes <i>Histories</i> and <i>Annals</i> .
	165		Estimated Population of Roman Empire between 60 and 70 million
	180		End of period of Roman peace, <i>Pax Romana</i>
	192–235	Militarization of the Empire, increasing barbarian pressure at the frontiers, decline of the Roman world.	
AD 192–235. Severan Dynasty	235–284	Military anarchy, sequence of nearly twenty emperors	
	250		Epidemic of plague
	284–306	Diocletian reestablishes central power and founds the Tetrarchy (Roman Empire ruled as four separate parts).	
	312	Constantine wins battle of Milvian Bridge under the sign of the Cross: Christianity declared official state religion.	
	395	Division of the Empire between the sons of Theodosius	
AD 378–395. Reign of Theodosius the Great	407–410	Increasing uprisings and external raids in Britain leads to gradual Roman withdrawal during Empire’s decline.	
	476	End of Roman Empire in the West	
	533		<i>Digest</i> of Roman Law is compiled.
AD 572–565. Reign of Justinian, Eastern Emperor	1453	Conquest of Constantinople by the Turks; end of the Eastern Roman Empire	

Sources: John Boardman, Jasper Griffin, and Oswyn Murray (1986), Klaus Bringmann (2007), Tenney Frank (1927), and Walter Scheidel, Ian Morris, and Richard P. Saller (2007).

Under the Principate, the emperors' decrees (*constitutiones*) started to be recognized as binding legislation. The emperors, however, imposed little constraint on the autonomous, case-driven legal development. The preexisting body of law continued to evolve in a similar fashion as before.

Systematic codification finally took place under the Byzantine emperor Justinian. Justinian aimed at documenting and codifying the full body of Roman law in the so-called *Corpus Iuris Civilis*. In AD 529 and 534, the main parts of the *Corpus* were issued: the *Institutes* (an introductory textbook), the *Digest* or *Pandects* (the core piece, which documents various legal debates), and the *Codex* (imperial constitutions from the Principate). Our knowledge of Roman law stems mostly from the *Corpus Iuris Civilis*.

The case-oriented evolution of Roman law helps us to understand how the creation of a quasi-corporation could occur without formal legislative changes and recognition of legal concepts often considered indispensable, such as limited liability, agency, and representation.⁷ For example, Roman law never recognized limited liability for private businesses—besides removing the right of a creditor to kill or sell into slavery a debtor if he failed to pay (*lex Poetelia Papiria de nexis*) in 326 BC. Instead, Rome accommodated the demand for limited liability by exploiting the *peculium* of slaves. Slaves were legally “things” and, as such, could not own other things. In practice, however, they were allowed to accumulate earnings and other property, denoted as their *peculium* (allowance). They became the legal owner after manumission, i.e., when granted freedom. To remedy the lack of a business format with limited liability, Romans employed “company slaves” (*exercitores servi communes non volentibus dominis* or *servi communes*

negotiatores) as managers and funded them with a *peculium* for business transactions. That way, they avoided liability for business conducted by the slaves beyond the funds with which they provided them.⁸

Similarly, Rome never instituted the law of agency. Instead, to meet the increasing demand for binding representation in business matters in Rome's growing economy, the Romans employed the *patria potestas*, i.e., the power of a Roman father over his (adult) children, and the ownership of slaves as a form of agency.⁹ The Roman *pater familias* and *dominus* could act through children and slaves, in which case he was liable for their offenses.¹⁰ Slaves managed estates and arranged trading and banking transactions on the master's behalf. Even top managers were typically selected from among slaves, which helps to explain the astonishingly common phenomenon of Romans “placing themselves into slavery.” Free men sold themselves into slavery in order to attain a high position in the enterprise of a senatorial house,¹¹ a striking example of how the Romans achieved modern organizational functions without formal legal reform by expanding the interpretation of existing legal institutions.

2.2 Who Were the Publicans?

The *societas publicanorum* owes its creation to Rome's Republican system of government. During its five centuries of existence, the Roman Republic never assembled any

⁸ Lujjo Brentano (1929), p. 143; András Földi (1996), especially the summary on p. 211. For a discussion of the exceptions in which the liability went beyond the *peculium*, see Heinrich Honsell, Theo Mayer-Maly, and Walter Selb (1987), pp. 378–81.

⁹ On the law of agency and its substitutes, see Peter Garnsey and Richard P. Saller (1982), p. 33, and John A. Crook (1967), p. 60. On the same topic in the context of the Roman labor market, see Temin (1994b), p. 536.

¹⁰ Rafael Taubenschlag (1944), pp. 307 ff., 505 ff.

¹¹ Ulpian (*Digesta* 28.3.6.5) denotes such slavery as *ad actum gerendum*, i.e., to secure the post of an *actor*, who runs the senatorial household.

⁷ For more details, see Ulrike Malmendier (2002), pp. 212–13.

sizable bureaucracy. Similar to the ancient democracy in Athens, Rome distrusted the continuity of power embedded in a bureaucratic state machine. Instead, public services were contracted out and public income sources were leased to private entrepreneurs. These private contractors were called “government leaseholders” or publicans (*publicani*). As Ulpian writes in the Digest (*Digesta* 39.4.1.1):

Publicani . . . sunt qui publico fruuntur, nam inde nomen habent.

Publicans . . . are those who deal with public property; that is where their name comes from.

And shortly thereafter (*Digesta* 39.4.12.3 [38 ad ed.]):

Publicani autem dicuntur, qui publica vectigalia habent conducta.

Those are called publicans who conduct the exaction of public taxes.

Since the Roman senators were not allowed to participate in the government leases, a separate class of entrepreneurs emerged, later often equated with the knights (*equites*).

The business activities of the publicans are described in Ernst Badian’s classic work, titled *Publicans and Sinners* (1983), and in Malmendier (2002).¹² The earliest reports refer to the fifth century BC. Ancient historians, such as Dionysius of Halicarnassus and Livy, provide accounts of religious and ceremonial services as well as construction jobs contracted out to private entrepreneurs. Another famous example is the feeding of the white geese on the Capitol. The geese received government-sponsored meals since, in 390 BC, their honking had warned the Romans of the attacking Gallic troops.¹³

According to Pliny,¹⁴ the “geese feeding program” was leased out to the publicans.

Over the course of the Republic, an increasing volume of public works were outsourced until the publicans were dealing in practically every state department’s business (Cunningham 1898, pp. 157 and 162). The three main areas were (1) provision of goods and services for the public, (2) utilization of public property, and (3) collection of public revenues.

The key element in the first group of contracts was the provision of supplies to the Roman army.¹⁵ This included the regular supply to fixed and stationary garrisons as well as the less predictable supply demands during wartime. We have evidence of the latter even for the imperial period when the publicans were otherwise in demise. The revenues from these contracts were astonishing; as Badian (1983, p. 29) shows, they were equivalent to the annual pay for 10,000 soldiers (about 1.2m *denarii*) in the case of a supply contract for togas, tunics, and horses in the second century BC (Livy, *Ab urbe condita* 44.16).

The construction, renovation, and maintenance of public facilities were likely the next-largest type of public provision contract. Public buildings included streets, city walls, temples, markets, *porticus*, basilicas, theatres, facilities for the circus games, aqueducts, and public sewers.¹⁶ Private

¹⁴ Pliny, *Naturalis historia* 10.26.51.

¹⁵ See, for example, Livy, *Ab urbe condita* 23.48.5–49.4; 25.3.10; and 34.6.13 for the year AD 215; 27.10.13 for AD 209; 44.16.4 for AD 169; Valerius Maximus, *Factorum et dictorum memorabilium* 5.6.8. See on the topic Herbert Hill (1952), pp. 88–89.

¹⁶ Examples can be found in Cicero, *Secunda in Verrem* 1.49.128 (maintenance of temples); Dionysius of Halicarnassus, *Roman Antiquities* 3.67 (maintenance of public sewers); Livy, *Ab urbe condita* 4.22.7 (construction of the *villa publica*); 5.23.7 (construction of the temple for the Mater Matuta at the Forum Boarium for Iuno Regina on the Aventine hill); 6.32.1 (maintenance of city walls); 24.18.10 (maintenance of temples); 29.37.2 (street repairs; also in 41.27.5); 40.51.3–5 (renovation of markets and theatres).

¹² The 1997 edition of Badian’s work (in German) incorporates some newer sources and offers modified interpretations. Older literature includes Ferdinand Kniep 1896, Antonin Deloume 1889, and Georg Ürdgi 1968.

¹³ Livy, *Ab urbe condita* 5.47.4.

entrepreneurs were also contracted to erect statues.¹⁷ Like the army supplies, building contracts required vast financial resources. Badian (1983, p. 67 f.) suggests that the building contract for the Marcian aqueduct in the middle of the second century BC amounted to 45m *denarii*, which was roughly the entire fortune of the (purportedly) richest millionaire in Rome in the first century, M. Crassus.

Another famous, though smaller task was coinage. The government entrusted private entrepreneurs even with the minting of Roman coins.

The second group of contracts, the utilization of public property, includes grazing on the public domain (*ager publicus*), mining, and fishing in public lakes.

The most (in-)famous contracts where those outsourcing tax collection, especially poll or land taxes from the provincials. Taxes and dues initially played a minor role in ancient Rome. Like the Greek *polis*, Rome had no concept of direct taxes. The peoples conquered outside of Italy paid tributes, but direct personal taxation, such as an income tax, was deemed unworthy of free men. The state's primary source of income was war booty. The only tax burden on the Roman citizen was the *tributum*, a tribute demanded irregularly to finance soldiers' pay.¹⁸ It was levied only when military ventures had exhausted the state treasury. Even then it was perceived as a loan of the citizens to the state to be repaid later out of war booty.¹⁹ With the expansion of Rome, the tribute disappeared

almost completely at the expense of the provinces.²⁰ A steadier stream of tax revenues was imposed only during the Principate. At that time, however, an official fiscal administration took over and excluded the publicans from the collection of the taxes.

Instead, the collection of indirect taxes and tributes on goods and services became a core activity of the publicans. These dues were imposed primarily on non-Romans and non-Roman goods, namely traders arriving at ports, city gates, and market places. Cicero mentions the three most important taxes that were contracted out in *De Imperio Cn. Pompei* 6.15: the port tax (*portorium*), the "tenth" of the harvest of agricultural products including grain (*decuma*), and the grazing fee (*scriptura*). The inheritance tax (*vicesima hereditarium*) was also contracted out but played a subsidiary role.²¹

All three types of contracts were awarded via auctions (*sub hasta*), similar to licenses or spectrum rights today. Livy, *Ab urbe condita* 39.44.5-8 mentions public procurement auctions taking place as early as 200 years BC. The auctions appear to have been conducted regularly, with a regular and large audience of entrepreneurs specializing in contracts with the state: Livy, *Ab urbe condita* 24.18.10-11, refers to businessmen in 214 BC who "frequently participated in such auctions" (*frequentes qui hastae huius generis adsueverant*). The Roman *ensor* (the registrar and "finance minister") awarded utilization or tax-collection rights to the highest bidder, procurement contracts to the lowest bidder. A *societas publicanorum* was represented in the auction by a *manceps*, normally the most illustrious partner (*manceps princeps intersuos*) as Cicero formulates in *Pro Plancio* 13.32

¹⁷ Cf. Francesco Milazzo, *Realizzazione delle opere pubbliche*, p. 147 ff.

¹⁸ Originally, the *tributum* probably replaced the self-provisioning during military service; Bernhard Laum (1926), p. 229.

¹⁹ Even voluntary contributions were repaid whenever possible. A famous example is the voluntary contributions of Roman citizens during the Second Punic War (in 210 BC). Livy reports (starting in *Ab urbe condita* 23.48.5) that, after the financial situation improved in 204 BC, the contributions were ex post recognized as loans and repaid in three installments. See John Briscoe (1989), p. 75.

²⁰ Cicero describes the *tributum* in *De officiis* 2.21.74 as an overcome means of public financing.

²¹ Cicero complains in his letters *Epistulae ad Atticum* 2.16.2 that the *vicesima* alone generates too little tax income.

and *Pseudo-Asconius, Divinatio in Caecilium* 33). The auctions took place on the central Roman market place, the *Forum Romanum*, with the exception of a few auctions in the provinces. In *De Lege Agraria contra Rullem* 1.3.7, Cicero writes that the censors can grant tax-collection contracts only in front of the Roman people (*ensoribus vectigalia locare nisi in conspectu populi Romani non licet*), preventing noncompetitive allocations to preferred entrepreneurs.

The customary contract term was five years, likely because the censors were originally in office for the period of five years (*lustrum*).²² The individual contract terms and conditions were laid down in so-called *leges locationum* (or *lex censoria*), a reservoir of fixed contract clauses that, for the most part, could be used for each new contract grant.²³ The contract specified payment schemes, warranties, and legal rights.

The scale of these three types of business activities expanded vastly with the expansion of Rome. While the types of contracts did not change much throughout the Republic, the economic opportunities grew with the addition of new territories. The decline of the Roman Republic and the onset of the Principate, however, brought an end to the success story of the publicans. As discussed in more detail in section 2.4, the knights (*equites*), and thus many of the publicans, were subject to proscriptions during the last century BC, resulting from power struggles with the senatorial aristocracy.²⁴ Legal reforms were passed that restricted the business activities of the publicans. First, they

were limited to collecting taxes and dues.²⁵ Then, Augustus transferred the tax collection contracts in Gaul, Asia, and finally in all imperial provinces to a *procurator Augusti*, who was part of his bureaucracy.²⁶ The Julio-Claudian emperors (AD 14–68) continued to gradually reduce the contracting with private entrepreneurs and, in the second century AD, Trajan (AD 98–117) finally limited it to a few specific taxes such as the inheritance tax. The large-scale operations of the publicans reverted to smaller-sized businesses of so-called *conductores* (contractors), similar to their origins in the early Republic.²⁷

Concurrent with the demise of the *societas publicanorum*, economic growth slowed down in several industries. One example is the mining industry, which had formerly seen an explosion in output, likely due to technological improvement and its use by the companies of the publicans. As Wilson (2002) reports, the use of the new water-powered mining techniques and the output from various mines shrank significantly in the first century AD, which is after the emperors took over the mines.

The correlation between output and activities of the publicans in other industries is harder to measure. Tax collection by state officials, for example, might have been easier to enforce, even if less efficiently organized. It was also affected by the drastic changes in tax laws mentioned above. The construction industry remained very active, which is not surprising in light of the territorial expansions and the emperors’ demand for villas, temples, and palaces. It would be interesting to know whether the cost of production,

²² Theodor Mommsen (1877, p. 342) speculates that, originally, the franchises were granted *quinto quoque anno*, i.e., every four years, and it was only later that this cycle was extended to five years.

²³ An example is the *Lex Portorii Asiae*, see footnote 29.

²⁴ According to Appian (*De bello civili* 4.5), 2000 *equestri* were killed; see also the detailed account of the brutality of the proscriptions in Cassius Dio (*Roman History* 47.14). More on this in Ürödjgi (1968), col. 1201.

²⁵ Maria Rosa Cimma (1981), pp. 99 ff.; Otto Hirschfeld (1963), pp. 69 ff.; Michail Rostovtzeff (1902), pp. 379 ff.

²⁶ Joachim Marquardt (1884), pp. 301–18; Ürödjgi (1968), col. 1200, 1202. A province was called imperial if the emperor appointed the governor, and senatorial if the senate appointed the governor.

²⁷ See Pliny, *Epistulae* 7.14; *Panegyricus Traiani* 3.7.7; 39.5.

e.g., for street repairs or army provisions, increased after the demise of the *societas publicanorum*. Unfortunately, such data is hard to procure.

The demise of the *societas publicanorum* also explains why this business format is not discussed much by economic and legal historians. As mentioned above, most of today's knowledge about Roman law stems from the compilation of Roman law under Justinian, the *Corpus Iuris Civilis*, in AD 533–34. The codex contains legal opinions from the classical and postclassical periods (first to sixth century AD), but not from the preclassical period. Since it was compiled after the leaseholding companies had disappeared, the jurists cited in the *Corpus Iuris Civilis* refer to the publicans only in the sense of smaller tax collectors. The lack of easily accessible evidence is likely the reason the *societas publicanorum* is relatively unknown in the history of the corporation.²⁸

2.3 *The Societas Publicanorum as a Business Corporation*

To what extent were the large associations of the publicans “corporations”? From the historical literature and inscriptions,²⁹ we know that Roman law recognized two types of associations, the *collegium* and the *societas*. The *collegium* was the only incorporated form of organization besides the public corporations (such as the *populus Romanus*, i.e., the state, or the *aerarium* and *fiscus*,

i.e., the state and imperial treasuries). It was, however, available only to organizations with “public purpose,” such as religious and political associations, not including government lease holding.³⁰ As a result, government leaseholders had to set up their companies as *societates*, the Roman version of partnerships.

The Roman partnership differs from the modern corporation in many ways: partners (*socii*) could not limit their liability; the partnership could not exist beyond the death or renunciation of a partner nor in case of legal disputes among the partners; and the firm could not assume rights or obligations separately from its members.³¹ Hence, the legal format of the *societas* was evidently unsatisfactory for the large-scale and long-term operations of government leaseholders. The Romans resolved this deficiency by reinterpreting and allowing exceptions to the prevailing legal rules, applicable only to lease-holding companies. Four features differentiate the *societas publicanorum* from the simple *societas*:

Representation: A single person could contractually bind the firm and assume rights in the name of the firm.³² The representative with whom the *ensor* interacted and who bid for contracts in the public auction was called *manceps*, as described above.

Continuity and Stability: The firm did not cease to exist if a partner died or left the firm. Moreover, legal disputes among the partners did not necessarily affect the existence of the *societas publicanorum*.³³ Even the departure of the key executive, the *manceps*, did not affect the contractual relationship between the company and the Roman government.³⁴

²⁸ See Malmendier (2002). In addition, most of the scarce evidence about economic activities in ancient Rome comes from the period of the early Empire; see Temin (2006).

²⁹ I use classical Roman and Greek literature and inscriptions, in particular the *Monumentum Ephesenum*, an inscription discovered in Ephesus in 1976 that turned out to be the translation of a Latin tax law—the *Lex Portorii Asiae*—from AD 62 (Helmut Engelmann and Dieter Knibbe 1989). The nucleus of this law, paragraphs 1–36, originates in the late Republic, 75 or 74 BC, and reveals numerous details about the functioning of the lease-holding companies.

³⁰ Duff (1938), pp. 95 ff.

³¹ See, for example, Kaser (1980), pp. 225–27.

³² *Digesta* 3.4.1.1.

³³ The special legal action was called *actio pro socio manente societate*, see *Digesta* 17.2.65.15.

³⁴ We can infer this from paragraphs 46 and 54 of the *Lex Portorii Asiae*.

External Financing: Investors could provide capital and acquire shares (*partes*) without becoming a partner and without being liable for the company’s obligations. Several ancient authors refer to the shareholders of the *societates publicanorum* as *participes* or *adfines*.³⁵ We also know that the shares were traded and had fluctuating prices. For instance, Cicero writes about “shares that had a very high price at that time.”³⁶ The statement also implies that the shares could be bought either from another shareholder or directly from the company, suggesting secondary offerings. Traders met on the *Forum Romanum*, supposedly near the Temple of Castor.³⁷

Rights and Obligations: According to *Digesta* 47.2.31.2, the company of tax collectors could file actions, e.g., against fraud or embezzlement. The company could also own property and inherit items.³⁸

The *societas publicanorum* had thus assumed the most important features of the modern corporation. In addition, other sources describe it almost directly as a separate legal entity. For example, Cicero reports about a *societas publicanorum* that “consists of other *societates* [*publicanorum*]”³⁹ and thus assumes the role of a natural *persona*. Gaius counts the *societas publicanorum* among the organizations with a *corpus* (*Digesta* 3.4.1.1). And *Digesta* 46.1.22 states

that the *societas publicanorum* can “act like a person,” which is exactly the modern characterization of corporations as legal *personae*.

The modified features of the *societas publicanorum* had a far-reaching effect on its access to capital. Cicero mentions that stock ownership in the *societates publicanorum* was widespread in the Roman population. According to Polybius, “almost every citizen” invested in government leases by the second century BC.⁴⁰ A famous statement by Cato indicates that investors aimed for diversified portfolios. Cato advises that, if people wished to obtain money for shipping business, they should form a large association and when the association had fifty members and as many ships, he would take one share in the company.⁴¹ These quotes from Cicero, Polybius, and Plutarch illustrate not only the flows and functioning of the Roman capital market but also that such transactions were a matter of course. Plutarch, for example, quotes Cato with the expectation that his readers in the early Roman Empire would understand his boasting. In other words, educated Romans knew about the possibility of buying shares in the *societates publicanorum*.

In summary, the *societates publicanorum* functioned much like modern corporations in terms of their recognition as legal entities and their access to capital markets. This being said, the *societas publicanorum* does not display every feature of a corporation, at least in the sense of a modern definition of legal *persona*. The concept of the legal *persona* was formed slowly over the centuries. Its modern conceptualization started in the sixteenth century and was the subject of extensive theoretical debates in the nineteenth century, most prominently between the “Romanist” legal scholar Friedrich Carl von Savigny and the “Germanist” Otto

³⁵ E.g., Cicero, *Pro lege Manilia* 2.6, *Pro C. Rabiro Postumo* 2.4; Plautus, *Trinummus* 330–31; Livy, *Ab urbe condita* 43.16.2. The meaning of *adfines* is vaguer; they are never mentioned in Cicero’s work.

³⁶ Cicero, *In P. Vatinius testem interrogatio* 12.29. Badian (1983), p. 102, points out that the high stock prices Cicero mentions are consistent with a price reduction for tax collection rights in the same year.

³⁷ See Plautus, *Curculio*, 78, and the references in Edward Chancellor (1999), p. 4.

³⁸ *Digesta* 3.4.1 (*habere res communes*) and *Digesta* 37.1.3.4 (*bonorum possessio*).

³⁹ Cicero, *Epistulae ad familiares* 13.9.2 (“constat ex ceteris societatibus”). Whether this quote truly indicates corporate pyramiding is debated, see J. P. V. D. Balsdon (1962) for a discussion, especially p. 136 (with fn. 22).

⁴⁰ Polybius, *Historiae* 6.17.3–4.

⁴¹ Plutarch, *Cato Maior* 21.5–6. I thank an anonymous referee for suggesting this quote.

Friedrich von Gierke.⁴² The modern concept imposes much more structure than existed at the time.⁴³ The Romans were not concerned with such conceptual debates. Dealing with the rapid transformation of their small closed agricultural economy into an open system that spanned the entire known world, they managed to accommodate the practical needs of their growing economy without revolutionizing the laws that regulated company formats. From a practical, economic perspective, the historical sources paint a compelling picture of the *societas publicanorum* as the first business corporation.

2.4 Why Did the Publicans Disappear?

Why did the development of the Roman business corporation come to a halt, ultimately being reversed under the Roman emperors? Why did the *societas publicanorum* disappear instead of becoming the direct predecessor of the modern corporation? These questions take us to the debate on the political economy of legal, financial, and economic development. I showed above that the rise of the publicans is closely related to the development and functioning of the Roman Republic and that its demise was triggered by the disappearance of the Republic and the rise of the emperors. But, while it seems clear that the rise and fall of the *societas publicanorum* reflects Rome's changing political environment and that their

rise was in the interest of political elite in an expanding Roman Republic, it is less clear what motivated the emperors to suppress the activities of the *publicani* and the related financial and economic developments.

Traditionally, historians have linked the demise of the publicans to their abuse of power. Already in the sixteenth century, the legal historian Jacques Cujaz described the publicans as “unsurpassed in fraud, avarice, immodesty and audacity.”⁴⁴ Over the last four centuries, this verdict has changed little. Deloume and Ürödgi portray the publicans as revenue-hungry exploiters.⁴⁵ Mommsen relates the rise of a class of profit-oriented entrepreneurs, i.e., of the publicans, to the emerging social tensions in the Roman Republic and, later, the disintegration of the Roman Empire.⁴⁶ Cunningham lists “avarice,” “extortions,” and “greed” as their main business motivation.⁴⁷ These historians interpret the elimination of the government leaseholding system and its replacement by public administration as an attempt of the emperors to remedy the shortcomings of contracting and outsourcing that relied on monetary incentives. Augustus is hailed for organizing an effective public administration that eliminated the abuses of the publicans.

There are, however, two problems with this traditional view. First, it is unclear how severe the abuses of the publicans were. As Badian (1983) points out, the negative image of the publicans is biased. At times when the system of public contracts was working well, there was little reason for ancient writers to report about it. The excesses and abuses of

⁴² Von Savigny (1840–49), vol. 2; von Gierke (1887).

⁴³ A more detailed discussion of appropriate classification criteria for the ancient corporation is in Malmendier (2002). See also Duff (1938), e.g., p. 48. A similar problem in the modern law and finance literature is implicit comparisons relative to the standards in one country. For example, some countries may (formally or informally) recognize firms as separate entities even if they are not registered—which is, instead, a legal prerequisite in most Western countries. As a result, data collected on firms and different types of firms in different countries may be biased. For instance, most Latin American countries have no concept of “partnerships” and only limited-liability companies are included in the “formal” sector (Leora F. Klapper and Juan Manuel Quesada Delgado 2007).

⁴⁴ Cujaz (1595) characterizes the *publicani* in his commentary on *De publicanis et vectigalibus et commissis* (*Digesta* 39,4) as: “*Hi quam fraude, avaritia, immodestia, audacia superent ceteros homines nemo est qui nesciat...*” (p. 54).

⁴⁵ Deloume (1889), pp. 475–76; Ürödgi (1968), cols. 1191–92.

⁴⁶ Mommsen (1916), pp. 379–80.

⁴⁷ Cunningham (1898), pp. 157 and 165.

the publicans, instead, stirred the interest of the ancient historians and led then to a partial treatment of the publicans in the historical literature centuries later.

Second, however grave the abuses were, it is unclear whether the governing political class had any interest in protecting the inhabitants of the provinces from the excesses of the publicans. Attempts to restrain the publicans, such as the legislation of Q. Mucius Scaevola as governor of province Asia in the early first century BC, were rare. Politicians had to overcome resistance among their fellow magistrates in order to enact any such legislation, as Cicero reports in his letters to Atticus (*Epistulae ad Atticum* 6.1). Quite to the contrary, the proconsuls displayed similarly abusive behavior in the provinces they were governing.⁴⁸ Thus, the traditional explanation for the demise of the publicans, which invokes the “benevolent paternalism” of the imperial Roman government, lacks plausibility.

It is right, however, that the political change from Republic to Empire fundamentally changed the political-economy framework in which the publicans conducted their business. First, the government became less dependent on the publicans for purely organizational reasons. During the Republic, the short tenure of the consuls and other magisterial offices precluded a stable bureaucracy that could have been in charge of public works. In other words, it was a necessary condition for the change from private lease-holding to public (“renationalized”) administration that the emperors established a permanent bureaucratic apparatus.⁴⁹ At the same time, creating a bureaucracy also allowed the emperors to divert public funds more easily. Under the Principate, as the emperors increasingly redirected public revenues into their (private)

pockets and Rome’s public treasury, the *aerarium*, lost its importance.⁵⁰ Such diversion was likely easier when the emperors’ own employees collected public revenues rather than when the task was publicly auctioned off and performed by private entrepreneurs. In fact, as Badian (1983) points out, earlier during the Republic, Gaius Gracchus started to outsource tax collection in the province of Asia to the publicans in order to *prevent* the governors from diverting public revenues. A reverse argument explains why the emperors wanted to discontinue outsourcing.

Second, the switch from private entrepreneurs to bureaucrats coincided with the gradual increase in taxes under the emperors. As discussed above, taxation was generally viewed as intruding on civil liberty and had caused violent resistance all over the empire.⁵¹ Hence, it is conceivable that enforcement was easier for government employees, i.e., representatives of public sovereignty with public enforcement rights, than for private entrepreneurs. Thus, even if the auction-based outsourcing system had revenue-enhancing features, e.g., identified the lowest bidder for the provisions of services and the highest bidder for revenue rights, these advantages might have been outweighed by the better yield from public collection when taxation increased.

A third reason relates to the tensions between the political and business elites in ancient Rome. The emperors may have had concerns about powerful and large business organizations since the power of the publicans posed a threat to their own imperial position, consistent with arguments in the modern

⁴⁸ See, for example, M. Cary and H. H. Scullard (1975), p. 174.

⁴⁹ Alfred Heuss (1960), p. 363; Rostovtzeff (1957), p. 382.

⁵⁰ During the Republic, all state finances went through the *aerarium*. It was the role of the two quaestors to manage the *aerarium*, following the decrees of the Senate. During the Principate, the emperors established an additional treasury, the *fuscus*, with whose usage they bypassed Senate. They also started to nominate the quaestors themselves or replaced them with dependent officials. See Cary and Scullard (1975), p. 379.

⁵¹ Laum (1926), p. 218; Jens Peter Meincke (1984), pp. 170–71.

political-economy debate (e. g., Rajan and Zingales 2003). During the Republic (particularly in times of war), the Roman government repeatedly came to realize its dependence on the services of the publicans. The emperors were in the position to avoid such dependence building up their own bureaucracy.

This latter argument is particularly compelling in light of the increasing political role of the publicans. Early during the Republic, the publicans had shown little interest in political involvement. Becoming a senator and running for political offices would have required them to give up their business, as senators were excluded from trade and commerce.⁵² The political involvement of the publicans, however, increased significantly with the Gracchan reform movement. After the murder of his elder brother Tiberius Sempronius Gracchus in AD 133, Gaius Sempronius Gracchus continued to strengthen the position of the *equites*, i.e., the knights, who also ran the *societates publicanorum*. He passed a law (*Lex Iudicaria*) granting them control over the courts that dealt with the senatorial extortions in the provinces. These reforms helped to create an *ordo equester*, i.e., a “class” of knights with a distinct identity. C. Gracchus also reinforced the economic power of the publicans by allowing them to collect the “tenth” (*decuma*) in Asia, Rome’s richest province. (Previously the publicans had only collected small taxes in Asia.) The *equites* and, most prominently among them, the publicans started exerting increasing influence on state politics—an influence that senators (like Drusus and L. Sulla) and, later, the emperors aimed to undermine.

Finally, another possible reason for the demise of the publicans is lack of credible

commitment on the side of the emperors. That is, it might have been impossible to sustain the *societas publicanorum* and the system of government leases even if the emperors had wanted the system to persist. How could the emperors convince entrepreneurs that they would respect property rights and honor obligations toward the publicans? The Roman Republic was a system of checks and balances. But the emperors centralized power and could, in principle, bend law and its enforcement in their favor. Eliminating the large companies was that much easier, given that their status was not enshrined in formal law. Similar accounts of kings and other powerful elites imprisoning or killing their bankers are common throughout history, especially if the elites were knee-deep in debt.

These factors point to the importance of politics, in addition to and sometimes in spite of legal development, for the establishment and longevity of corporations in Rome.

2.5 *Finance and Growth of Large Firms— With and Without Law*

I have shown that the Roman publicans were able to establish large-scale business operations when the governing class supported and, in fact, benefited from those businesses. Laws were reinterpreted to facilitate government lease holding without fundamental legal reforms. With the transition from a Republican to an imperial government, however, the Roman economic system gradually switched from contracting with private entrepreneurs to large-scale nationalization. Since such financial and economic regression occurred at a time when the legal system reached its height of development, the Roman case allows us to distinguish the influence of political changes from that of legal changes.

The historical case provides one example of corporations functioning without the legal environment we usually presume they need (including legal concepts such as limited

⁵² Partly, the apparent lack of political ambition might reflect hidden constraints. While *equites* were formally qualified to enter the Senate, being part of the land-owning aristocracy may have been an informal impediment embedded in social prejudice, as for example argued in Badian (1983).