Roman Political Economy and Legal Change: The Effects of Empire on Property in Roman Law

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Roman Political Economy and Legal Change:
The Effects of Empire on Property in Roman Law

A dissertation presented
by

Charles Frederick Bartlett

to the
Department of the Classics

in partial fulfillment of the requirements
for the degree of

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Abstract

This dissertation presents a series of four cases studies in order to argue that the administration of empire rather than self-referential juristic thought or practice determined the broad outlines of res in Roman law. “Res” in this context signifies all substantive private law, and the term thereby encompasses and extends beyond property. The period of primary interest to this dissertation is the second century BCE to the first century CE. The particular case studies have been selected to demonstrate how empire impacted the development of various aspects of the Roman law of res; the case studies are illustrative rather than exhaustive, and other complementary examples could be added to those presented here. Each of the case studies addresses administrative change at Rome and in the wider empire, and thereby shows the close interrelation of the two. In addition to their focus on legal change at Rome, the case studies included discuss events in Sicily during the second century BCE, in Asia Minor during the first century BCE and first century CE, and in Italy during the first century CE. Throughout this dissertation, use is made of literary and epigraphic evidence, and the writings of the Roman jurists feature prominently. This dissertation engages debates in imperial history, legal history, economic history, comparative law, and political theory. Where appropriate, this dissertation also touches upon the afterlives of these ideas in theories of political representation and international relations.
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For my parents
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Roman Political Economy and Legal Change

The Effects of Empire on Property in Roman Law

Introduction

This dissertation presents a series of four case studies in order to argue that the administration of empire rather than juristic thought or practice determined the broad outlines of res in Roman law. “Res” in this context signifies all substantive private law, and the term thereby encompasses and extends beyond property; Gaius calls the relevant body of law the ius rerum.¹ The case studies in this project concern above all the ownership and use of res, as well as the means of adjudicating disputes, many of which would have been over these same issues. The assertion that imperial governance was the prime driver of development, however, also applies to other aspects of res in Roman law. The period of chief interest to this study is the second century BCE to the first century CE. This choice stems partially from the evidence available to us, but is also meant to highlight these centuries as a time of particularly consequential political and imperial change that prompted later juristic thought. This subsequent juristic systematization and theorization took place during the most productive period of legal thought at Rome, in what is known as the classical period of Roman law; this is usually conceived as extending from the principate of Augustus to the death of Severus Alexander. As is no doubt evident, this project stretches across several historical phases, whether we use political or legal periodization. Cases are drawn from the mid to late Republic and the early Empire, although reference is often made to the early Republic and to decades after the first century CE, or from before and during the

¹ Gai. 2.1.
classical period of Roman law. This selection is meant to show the different rates at which various aspects that coalesced into the Roman law of *res* developed.

Before we proceed any further, we should provide a description of each of the two phenomena that we are juxtaposing. By empire, I have in mind the acquisition of territory and the implementation of rules and institutions of administration, as well as the broader economic and intellectual integration of the resultant space. We examine institutions both at Rome and in the provinces, as will become clear. Of course, not all of these rules, institutions, or measures of integration were the result of Roman imposition. Gruen and others have shown conclusively that local institutions that predated Rome’s arrival not only remained powerful after the space was incorporated into the Roman empire, but that such institutions managed to have an effect upon political, social, and cultural forms at Rome.² We are more interested in how institutions, especially in Rome’s engagement with them and their evolution after Rome’s arrival, shaped Roman *res* than we are in either the mindset and political environment of those who acquired the empire, or the terminological debates over, for instance, how to characterize the international environment from which Rome grew, or how to specify Rome’s increasingly dominant position.³


³ The mindset and political landscape that led to Rome’s acquisition of its empire has been the object of much study, and perhaps three main schools of thought have emerged. For discussions of these schools of thought, cf. Erskine (2010). The first of these insists that Rome expanded to meet threats from abroad, and in what is usually termed defensive imperialism; cf. Frank (1914) and Holleaux (1921), and for an attempt to situate this tradition in the period out of which it emerged, cf. Adler (2008). The notion of defensive imperialism can be traced back to a passage in Mommsen (1854) I.781-2. Here he contrasts Rome’s expansion throughout Italy, of which he approves because Rome grew to fill out the natural bounds of the territory, as he sees it, with its costly acquisitions overseas. Badian (1959) still emphasizes that Rome sought consistently to avoid the necessary commitment of resources that came with annexation. The connection of especially the original assertion of these positions with contemporary politics is inescapable. The second school of thought holds that Rome acquired its empire chiefly for economic benefit than for any other reason; this theme runs through Rostovtzeff (1926), and for a discussion of its origin, cf. Capogrossi Colognesi (2000). Lastly, there is the school of thought following Harris (1979) that debates whether waging war was culturally central to Rome and the Roman ethical perception. Rich (1993) argues that militarism was less a consequence of the Roman demeanor than a result of the institutional setting that forced aristocrats to compete with one another, chiefly in martial terms.
By juristic thought and practice, we have in mind the activities of jurists of the republican and classical periods, as well as of their predecessors during earlier periods of the Republic. We should conceive of the earliest of their predecessors as pontiffs first and foremost, but there developed an increasingly self-conscious and professionalized group of jurists from the second century BCE forward; more on this will follow shortly. Their work has been understood as constituting a self-conscious and self-referential legal tradition at Rome. This understanding is in no small part due to the efforts of Justinian’s compilers who produced the *Corpus Iuris Civilis* in the sixth century CE and thereby created a more authoritative canon of Roman legal sources, but their efforts were by no means the first to systematize the output of the jurists and to imbue their practice with a history. For our purposes, we conceive of the thought and practice of the jurists as the series of cases, judgments, and principles that was and is authoritative and generative of legal rules and sensibilities.

Of course, I do not wish to present these two phenomena as opposites of one another: each reinforces the other in crucial ways, and, depending upon the context, there are aspects of each phenomenon that may at times seem more properly of the other. I do want to emphasize, however, that the seminal developments within *res* were the result of administrative decisions by political and economic agents and forces more so than of the reasoning and systematization by the jurists, whether largely professionalized or not. This specification of political and economic actors allows us to distinguish such conduct from those aspects of administration that were by and large legal. I also do not wish to say that jurists took no part in the administration of empire;

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For the international environment in which Rome expanded, cf. Eckstein (2006) and (2008), which stresses the conditions of “international anarchy” out of which Rome emerged. For an entry in the debate as to how to classify Roman dominance, cf. Scheidel (2006). The debt of such studies to the terminology of political science is obvious.

4 Two seminal contributions to this work are Frier (1985) and Schiavone (2012). Watson has also written extensively on topics within this history; cf., inter alia, Watson (1985) and (1991).
we know of many who held an array of political posts and others who advised magistrates.\textsuperscript{5} Instead, I argue that the intellectual work of the jurists was secondary in determining the rules governing \textit{res} in Roman law.

The chief institution in which the two phenomena of imperial administration and legal development came together was the \textit{ius honorarium}. To quite Berger, this was “the law introduced by magistrates who had the right to promulgate edicts in order to support, supplement or correct the existing law in the interest of the community.”\textsuperscript{6} Chief among these magistrates were the praetors, especially the urban praetor. The \textit{ius honorarium} was of course a legal institution and an indispensable means of legal change at Rome, but in so far as many of the developments that sprang from this context were the result of economic forces and commercial interactions, we need to conceive of the \textit{ius honorarium} as a mechanism responsive to larger societal forces than just the internal development of law. Several of our cases make clear that foreign peoples, who likely often came to Rome for commercial reasons, were crucial actors within the context of the \textit{ius honorarium}. In addition to many of the parties at the praetor’s court being economically minded, this was also the forum in which many economic questions were decided. It was also the presence of the praetor, who was in his capacity a politician and administrator, even if there are several famous instances of legally minded praetors, which made this as much a political as a legal forum.

By framing the problem as how jurists responded to and eventually shaped administrative circumstances throughout the empire, we can nuance the existing history of the jurists at Rome. There have been several fascinating treatments of the rise of the juristic class at Rome, told either

\begin{flushleft}
\textsuperscript{5} Cf. Bauman (1983).
\textsuperscript{6} Berger (1953) ad loc. He draws our attention to \textit{Dig.} 1.1.7.1.
\end{flushleft}
from the point of view of their internal development or their relation to larger forces in Roman society; two that are particularly noteworthy are those by Frier and Schiavone.\textsuperscript{7} Honoré has also contributed to this literature, often by focusing on the importance of one jurist within his legal environment.\textsuperscript{8} There is a certain teleology to these studies, however, which tend toward an inflation of the jurists’ importance, that leads to talk of a legal tradition that preceded them. In both of these studies and in others, such as the numerous treatments of juristic activity by Watson, of interest is tracing the origins of a group that clearly comes to exist.\textsuperscript{9} That a self-consciously constructed group of jurists would come to exist was not clear in the mid second century BCE, however, and this knowledge on the part of scholars has at times led to mischaracterizations of periods before the rise of the jurists, often through the retrojection of later juristic tendencies or reasoning. Our approach is intended to minimize the likelihood of such misrepresentation by first reconstructing the political and economic circumstances of a particular case study, and then evaluating the elements of legal thought in the resultant picture. As is likely clear, this is in contrast to those studies that take their cue from the juristic writings themselves. The output of the jurists that concerns the history of their profession often makes coherent what was unruly at the time. We will try to recover some of that imperial unruliness, and in the process provide more information about the broader imperial context out of which the jurists developed.

Similar work has been done for other periods of Roman history, with fascinating results. Humfress has shown how notions of state-sanctioned legality and attempts to seek it on the part

\textsuperscript{7} Frier (1985) and Schiavone (2012). A foundational study in the relation between society and law is Crook (1967).

\textsuperscript{8} Honoré (1978) and (1982).

of individuals in the provinces of the later Roman Empire were dependent upon the political organization of the relevant space. Yiftach-Firanko and others have demonstrated the effect of administration and imperial change upon the development of law in the province of Egypt during the Empire. The focus of this study is somewhat different, in that it examines the phenomena behind the development of the rules that later influenced behavior in these places and elsewhere in the Roman world; it rather looks at the growth of what would become the Roman law of res in institutional and intellectual historical terms. We also extol the centrality of macroeconomic developments in spurring longue durée political, social, and legal change.

CASE STUDIES

In selecting our case studies, we are to some degree bound by the categories and subcategories that later jurists created or formalized, such as obligatons ex contractu or acquisition per universitatem. These categories are of course extremely useful, but their precision at times obscures a degree of past fluidity. We try to describe the shortcomings of their categories when necessary, but we refer to them throughout. The first of our case studies is drawn from Sicily of the second century BCE and concerns procedure in private litigation. A system of private litigation was instituted in Sicily following the First Servile War of 135 to 132 BCE. The first Servile War stemmed form a slave revolt beginning in Enna. The leader of the revolt, a Syrian slave named Eunus who styled himself after the Seleucid monarchs, joined forces with Cleon, a slave whose own revolt at about the same time had led to the fall of

10 Humfress (2013).
Agrigentum. The combined forces managed to take control of much of the eastern portion of the island, and were able to defeat several Roman armies before finally being beaten by the consul P. Rupilius in 132. The law that was passed in the wake of the conflict, and which addressed the system of private litigation in place in the province, was the *lex Rupilia* of 132/1 BCE.

This law was passed upon the recommendations of a decemviral commission sent to the province at the end or close to the end of the conflict. Several passages from Cicero’s *Verrines* are our window onto all aspects of this legislation, including its origin. We read in Cicero that the organizing logic of the *lex Rupilia* was the citizenship of the parties involved. Cicero first specifies that cases between two citizens of the same city were allowed to proceed according to that city’s laws. In other cases, the provisions of the *lex Rupilia* are, first, that in cases between the *populus* of one city and an individual from another city, the council from a third is selected as judge, with each party being able to reject one such proposal; second, that in cases of a Roman suing a Sicilian, the judge is to be a Sicilian; and third, that in cases of a Sicilian suing a Roman, the judge is to be a Roman. Cicero adds that for all other matters, the praetor typically draws judges from the Roman citizens assembled in a district.

It is not immediately obvious why the legislative response to a large slave uprising was the institution of a new system of private procedure. With the benefit of hindsight, including the knowledge that this was not the last of Rome’s servile wars, we might judge that reforming the nature of agriculture and slave-owning was the more pressing concern. Reform on this scale, however, was likely beyond both the capabilities and the interests of the Roman state at this time. If we consider as well that the revolt must have seriously disrupted the use and organization of *res*, it becomes clearer why the *lex Rupilia* addressed what it did.
There was another factor in this legislative response, which is connected to the development of private procedure at Rome and its relation to the rest of the empire. This development was the gradual decline of the *legis actiones* and the growth of the formulary system. This process had as its focal point the passage of the *lex Aebutia*, although we do not know exactly when this law was passed. The *lex Aebutia* strengthened the formulary system at the expense of the *legis actiones*. The newer formulary system was more capacious in terms of the number of disputes and circumstances it could accommodate, and was not as exacting in its procedural requirements. It also likely required more action on the part of the magistrate than did the *legis actiones*, and probably allowed for a broader group of advisors than just the pontifical class that had been crucial in the administration of law, especially when private litigation was conducted by means of the *legis actiones*. This newer system was a result of Rome’s increasing economic prominence and imperial centrality.

This flexibility does much to explain why this system was, at its core, implemented in Sicily. There were certain variations in the system when it moved to a Sicilian context, but the characteristic bifurcation of the proceedings was preserved, as was a heightened role for the praetor and the allowance for a wide array of actionable claims. The extension of the formulary system to a provincial context encourages us to conclude that the *lex Aebutia* was passed before 132/1 BCE. Extending the *legis actiones* to cover foreigners in certain cases had been tried in 149 BCE with the *lex Calpurnia de repetundis*, and indeed scholars have thought the chances of extending a feature of the *legis actio* procedure to foreigners, if another option had existed, to be so minuscule that 149 has often been judged the terminus post quem for the *lex Aebutia*. My argument is that the fallout from the *lex Calpurnia* further underscored the shortcomings of the *legis actio* procedure and led to the passage of the *lex Aebutia*, which is indicated by the
provisions of the *lex Rupilia*. We therefore have a powerful example of how the necessities of imperial administration drove legal change, in this case as regards the means by which *res* was transferred.

Our second case study centers around the Roman *publicani*, the individuals who constituted the *societates publicanorum* that performed numerous administrative functions throughout the Republic and early Empire, including the collection of various taxes. The *societates* have proved to be of interest to students of various fields of history, and this chapter addresses some of the ways in which interpretations have differed along disciplinary lines. We begin by reviewing the outlines of their collective history, and I offer two corrections to the usual narrative regarding the vacillations of their fortunes. The first concerns the complexity of their operations during the late Republic, and engages with a strain of literature produced by scholars of business history. I argue that the evidence for their structure and funding does not support modern assertions that they were funded much like early modern joint-stock companies, and that there was a formalized exchange on which their shares were traded. The second corrective addresses their standing during the first century CE. I demonstrate that the *societates* were not reduced to near irrelevance by the civil wars of the late first century BCE, which capped a period of great difficulty for them, as has at times been contended.

Their continued relevance is shown by the role allotted to them in the *Customs law of Asia*. This is a complex document that dates to 62 CE and contains provisions from several previous years going back to the founding of the Roman province of Asia, which specifies how customs duties are to be collected in the province. This text indicates that the *societates* had many resources under their control, and were able to carve out very favorable terms in their contracting with the state. Taken together, these two correctives suggest that we understand the
fortunes of the *publicani* as changing more gradually: neither were their operations so complex at their height, nor was their situation so dire until just before their functions were subsumed by the state in the early second century CE.

This revised chronology has ramifications for the development of the Roman law of contract, and for our judgment of the extent to which Roman law came to possess a notion of corporate personhood. The implication for the Roman law of contract is that the *publicani* were still prominent actors during the first century of the classical period of Roman law, which, as mentioned above, is usually understood as extending from the principate of Augustus until the death of Severus Alexander. Many of the classical jurists therefore worked in an environment in which the *publicani* were responsible for crucial element of imperial administration and were powerful commercial agents. We can see their impact upon the categories of contract as developed and theorized by the jurists. More than any other, it was the category of *societas* that bore their imprint, as we would expect.

The continued prominence of the *publicani* has bearing upon the question of corporate personhood in Roman law as well. This connection derives from the fact that the *societates* contracted with the state during the imperial period, which is to say during the time when the state was increasingly anthropomorphized in the person of the emperor. To the extent that there developed a theoretical and stylistic preference that the anthropomorphized state contract with entities that displayed a certain conceptual parity, similar imagery had to apply to the *societas* at Rome as well. We see this in the individuals, chief among them the *magister* and the *syndicus*, who were given an enhanced Role in the operations of the *societas*, specifically the responsibility of representing the *societas* during the registration of the contract and, it seems likely, in subsequent meetings with agents of the state. In this way, the *societas* came to be seen in terms
of individuals who were charged with these duties by their partners. We also observe the likening of societates to states in their structure and representation, most notably by Gaius atDig. 3.4.1.1. Therefore, while we are not able to counter Maitland’s claim that Roman law nowhere discusses the societas as a persona, much less a persona ficta, this relation to an increasingly anthropomorphized state nuances our picture of Roman law’s inclusion of a notion of personhood.\(^{12}\) Our investigation of the publicani expands our interest in how the acquisition and above all the administration of empire determined the outlines of the Roman law of res by delving into the organization of res for joint ventures, and the conduct and conceptualization of the resultant structures.

Our third case study is the crisis of 33 CE. We investigate this case in order to demonstrate that the legislative decisions that most fundamentally drive the use and regulation of res are not those made by jurists, but rather those of politicians who have concerns beyond a coherent organization of provisions of private law. The crisis of 33 was a credit crisis that followed from a series of policy decisions, against the backdrop of repeated disregard of legislation designed to limit usury. At Annales 6.16, Tacitus, our main source for the crisis, tells us that creditors, during the entirety of the Republic, had ignored laws limiting the amount of interest they could charge on their loans, and that the situation in the early 30s CE was not different, except for the fact that the law on usury that the creditors were now disregarding varied somewhat from previous legislation. The law on the books was passed by Julius Caesar, and required that creditors keep a certain portion of their resources invested in Italy. This seems to be the first law of its kind, and we have no more information about it than what Tacitus relates.

\(^{12}\) Maitland (1902) xviii.
We do not know exactly when or at what prompting, but at some point a number of *delatores* started to bring cases against creditors in violation of this law. So many suits were brought that the praetor decided to refer the case to the senate, lest his court be choked with high-profile cases that implicated powerful men. A resolution on this matter, however, did not follow upon its referral to the senate. According to Tacitus, there were too many senators, all, if we follow his words, who were guilty of violating this law for the body to act with resolution. The senators instead looked to Tiberius for help in sorting out this situation, and the emperor’s solution was to create an eighteen-month grace period during which anyone running afoul of this law was to bring his affairs into line.

What followed was a credit crisis, as loans were called in so that the funds could be invested in Italian land and loaned out again at rates in accordance with law; we do not have any information on whether the Caesarian law regulated the rate of interest, but there were maximum rates nominally in force, and it seems reasonable to suggest that creditors would now have fretted over loans at rates in excess of these maximums, given the more general concern for financial propriety that had arisen. There was also a growing store of idle resources in the treasury, as many had been convicted under this law and their confiscated property had been sold at auction. In order to meet this challenge, the senate set the policy that two-thirds of creditors’ funds be invested in Italy, and that debtors pay back the same portion of their debts.

This potential senatorial solution did not run its course, however, as creditors called back the entirety of the loans they had made. This led debtors to sell their holdings in land, causing a general decline in prices. The creditors who did recoup their loans did not buy land, but rather awaited future price declines. At this point, Tiberius stepped in and made available one hundred million sesterces for three-year, interest-free loans from the state, accepting double the value of
the loan in landed property as collateral. Tacitus tells us that this restored liquidity and encouraged private lenders to begin lending again. Tacitus does not conclude his description of this affair without mentioning that creditors did not abide by the senatorial decree as regards investment in Italian land after Tiberius eased the situation.

As mentioned, our principal source for this crisis is Tacitus *Annales* 6.16, but mention of it is found at Suetonius *Tiberius* 48 and Cassius Dio 53.21.4-5. A consistent focus in our ancient sources, especially Tacitus, is the morally compromised state, as they see it, of the senators and creditors at Rome; we can see this in his insistence that every one of the senators was personally in violation of the Caesarian law. In the modern treatments of this crisis, this theme has barely received acknowledgement. Most scholars have instead focused on economic and financial questions associated with the crisis, including the policies that led to inflation before the crisis, and the means by which Tiberius would have dispersed the money that he made available after loans were difficult to obtain. Our analysis brings to the fore the moral concern expressed by Tacitus, Suetonius, and Dio, while still acknowledging the contributions of other scholars to our understanding of the economic and financial components of the crisis.

We include mention also of a strain of literature that has been produced by business historians whose interest in the crisis of 33 seems to stem from the financial crisis of 2007/8. These treatments at times look for policy lessons, speaking in very broad terms, from what was done at Rome. More important for our purposes is that such treatments see general similarities between the Roman situation and that which emerged in the developed world as the crisis of 2007/8 unfolded. They stress above all the ad-hoc nature of the responses in both cases to the

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13 The only scholar to have remarked on the fact of Tacitus’ condemnation of the senators is Rodewald (1976) 14; Elliott (2015) is the only other treatment to stress that we care better informed regarding social issues than economic realities in what we know of this crisis.
different stages of the crises, and the ultimate provision of liquidity by the state as the decisive move that ended the panic. Crucially, as the focus on the action of the state might suggest, no attention is paid to lawyers and legal theorists who discuss the finer points of the law of res. Lawyers were doubtless involved in the mechanics of crisis resolution in both cases, but in neither did a larger jurisprudence or the internal professional tendencies and concerns of jurists drive the responses of policy-makers.

In fact, none of the legal action that led to or resolved the crisis of 33 was the result of long-term juristic projects, including that which interests us most, the systematization of the law of res. The law passed by Caesar, which was given new force by the actions, to which Tiberius at least consented, of the delatores, was a law meant to emphasize the ideological primacy of Italy. The jurists had acknowledged a difference in terms of conveyance between land in Italy and that outside its bounds, but this was an acknowledgement of variation in development of legal practice, not an attempt at ideological promotion. Rather, such a law as this is indicative of an imperial political project, and one intending to present the Republic as a paragon of proper civic conduct by the state and by citizens, although of course it never was. This republicanism was a nostalgic tendency of imperial Rome.

We see a related concern at work here as well, namely Tiberius’ attempt to empower and embolden the senate to act more purposefully on its own. Tiberius doubtless did not want the senate to oppose his decisions, but he seems to have tried to induce the senate to administer more of the state’s business without his direct oversight. This required also bringing the affairs of senators into conformity with the laws, at least to a degree, as the council’s authority rested in no small part upon the conduct and standing of its members. The senate did undertake some action during the crisis, notably in its decree that creditors invest two-thirds of their capital in Italy to
make funds more widely available. This policy, however, only exacerbated the crisis, and in all other regards the senate failed to meet this opportunity.

As is hopefully clear, the salient action and ideologies of this crisis were not those of the jurists. They doubtless took part in revising the contracts that were affected by larger policy decisions, but they entirely reacted to these policies. The policies and laws of this crisis addressed how Romans could use their assets, and placed limits on its free deployment. These limits were designed to improve social welfare, to stabilize credit sources, and to realize certain ideological projects. Such goals were not at odds with those of the jurists, but the means by which they were pursued were wholly different. The jurists reacted to these broad, first-order policies governing Roman res.

Our last case study concerns the Roman gens, the extended family or clan structure that was an important means of social identification at Rome. We are particularly interested in the role of the gens in situations of intestate inheritance. This role changed dramatically from the early Republic to the second century CE. We read in the XII Tables at 5.4-5 that in cases of intestacy in which a suus heres and a proximus agnatus could not be found, the estate was to go to the deceased’s gentiles with, we must infer, the rules of gens regarding the distribution of res determining the division of the estate. This was in marked contrast to what we read in Gaius at 3.17, namely that the whole of gentilicial law had fallen into disuse by the time of his writing in the mid second century CE. In this chapter, we attempt to characterize this progression more precisely, in terms of the varying rate of change away from gentilicial control, the means by which this occurred, and the institutions that came to govern cases of intestate inheritance.

We identify the first century BCE as a crucial period in the change away from gentilicial prominence in these matters. We establish this by looking at several cases from these decades,
and show that while the idea of gentilicial control in cases of intestate inheritance had some legal
purchase in the first years of the first century, it did not by the period of the civil wars between
Caesar and Pompey. The indispensable witnesses to this change are a case described by Cicero at
de Oratore 1.176 between the Claudii Pulchri and the Claudii Marcelli, and the so-called
laudatio "Turiae." In the former case, the notion of gentilicial control of the estate of someone
who has died intestate receives consideration at the very least, whereas in the latter it is purposed
in an imprecise way and dismissed out of hand. Although the change seen between these two
cases is of great significance, we cannot be certain as to whether the shift away from gentilicial
determination had occurred entirely by the first century BCE, because the structure and operation
of the various gentes likely differed largely. Nevertheless, we maintain that this was a period of
important developments in these matters.

We posit that this change occurred as a result of a growing state apparatus. This
expanding state had replaced the gens in other areas as well. Most prominent and immediate of
these other areas was warfare, but the political organs of the state as well came increasingly to be
those that determined how citizens lived at Rome. The state expanded its purview in connection
with a growing empire. The means of acquisition of this empire are not our focus here, but
integral to the process were both military success and the political will to sustain it, and
economic innovation, exploitation, and growth. These two phenomena led to Rome’s eventual
prominence in the wider Mediterranean world. It was during the middle and late Republic
especially that Rome emerged as a commercial center.

This commercial importance led many to transact business at Rome and to move to the
city. The means by which the divergent legal expectations of these different actors could be
accommodated was the ius honorarium. The law as developed by different magistrates also
expanded the apparatus of the state for solving legal problems. Eventually statutory law built upon developments in the *ius honorarium*, particularly during the principate of Augustus. It was at this time that the movement away from gentilicial organization and control was codified in statute. These laws underscored the heightened consideration that had come to be paid through the *ius honorarium* to the interests both of cognatic relations who had largely been left out of gentilicial law so far as we can tell, and of those whom we would call members of the immediate or nuclear family.

This identification with the nuclear family and this partial balancing of agnatic with cognatic interests came as social logics other than that of the *gens* took primacy at Rome. These changes were not the result of any juristic decision, but rather followed gradual societal change, itself the result of the growth of empire. The jurists responded to this change and to some degree systematized the resultant situation, but the broad outlines and first-order principles of inheritance were developments resulting from the administration of empire, and not from juristic calculation.

These case studies have been selected in order to demonstrate the range of areas in which empire determined the broad outlines of *res* in Roman law; there are other complementary examples of such legal change at Rome, and indeed throughout imperial history. Our case studies concern primarily the ownership, use, and transfer of *res*, and demonstrate the ways in which imperial circumstance governed the development of the relevant rules. Each case study implicates action at Rome and relations to the broader empire, and taken together they show the varying rates at which different aspects of the law relating to *res* developed: there is in all cases an interplay between legal decision-making at the political center, usually prompted by acute political consideration, and more gradual development in practice. Finally, these cases
demonstrate as well the political interest that often attended private conduct, not least because of its implications for imperial governance.
Chapter 1

Sicily, the *lex Rupilia*, and the development of private procedure

INTRODUCTION

Our first study of how the effects of empire, rather than concerted and self-conscious juristic thought, generated changes in the organization and administration of Roman *res* is drawn from Sicily, and revolves around the law that reorganized the procedure of private litigation in the second century BCE, known as the *lex Rupilia*. This chapter will proceed by first describing the developments that culminated in the First Servile War of 135-132 BCE, the event that prompted the passage of this legislation. This war was a consequence of Roman agricultural practices, particularly the ownership of large numbers of slaves, and any recounting of it must focus not only on the questions of political economy that attend the intensive presence of Romans in Sicily, especially following the Second Punic War and its turning point of 210 BCE, but also the broader Hellenistic context of the slave uprising. Next I will reproduce the law’s provisions as far as possible given the surviving evidence; our window onto this legislation is quite narrow. I will then discuss possible reasons why the law passed took this particular form: while we might expect a law concerning an aspect of provisional administration to follow a major uprising such as the First Servile War, we might not anticipate a law addressing exactly what is of interest to the *lex Rupilia*, namely the reorganization of private procedure. We will then move to the resultant political and above all legal situation, our analysis of which will address considerations of political economy once again, along with legal development and legal pluralism, and the theorization of provincial governance. Within this last, quite capacious aspect
of our analysis, we will focus particularly on implications of this event for our understanding of how Romans conceived both of the development of legal institutions and the rule of law, and of the relation between governance at Rome and in one of the most important provinces at the time. In addition to the attention paid to the economic interconnection of this province and the Roman center, the main question within this section of our analysis will be what the *lex Rupilia* can tell us about the development of private procedure at Rome, specifically what its connection may be to the *lex Aebutia* of uncertain date.

This chapter will argue that, although reforming the agrarian economic conditions that precipitated the First Servile War was not, for social as well as economic reasons, the target of the legislation resulting from the uprising, the procedural changes ushered in by the *lex Rupilia* were both deeply connected to the needs of the province of Sicily, and closely related to concurrent legal change at Rome, and was recognized as such by those crafting the law. We should therefore condition ourselves to see an intimate link between the two legal situations, namely the province of Sicily and Rome, in regard to private litigation, even while other considerations point to two very different legal landscapes. There has to my knowledge been no attempt to link the *lex Rupilia* to the development of private procedure at Rome. We will also see that in both cases, economic and commercial relationships produced changing circumstances only later acknowledged in law.

This chapter will demonstrate how the administrative concerns of the empire were central to the development of private procedure at Rome. In an attempt to address provincial concerns in 149 BCE, Roman authorities had underlined the rigidity and shortcomings of the *legis actio* system, not only when extended to foreigners, but, to a large degree, when applied at Rome as well. These problems had likely come to light during the third century, and were of a kind with
the motivations to create the peregrine praetorship in 242. The creation of this office was again an outcome of imperial activity. We imagine that jurists and pontiffs advised in this process, but the legal tradition was not the chief impetus behind this change. The willingness to relate the administrative necessities of a province to changes in procedure at Rome blurs the line to some extent between province and imperial center, at least as far as political and legal administrators’ thoughts about the development of law are concerned, as legal situations in the provinces were thought to have bearing at Rome, and vice versa.

THE FIRST SERVILE WAR: ROMAN GOVERNANCE AND HELLENISTIC TIES

Any analysis of the events or consequences of the First Servile War of 135-132 BCE must begin by examining the changes brought to the island by increased Roman occupation and administration following the Second Punic War. The majority of Sicily had passed to Roman control in 241 BCE after the First Punic War, but it was not until after the Second that Rome gained possession of Syracuse, which was in most regards the chief city of the island. It would become the administrative center once all of Sicily was incorporated as a Roman province.14 Although this transition to Roman rule centered at Syracuse brought a number of changes to the island, including some that were meant to increase the integration of the areas of the province,

14 There is some evidence to suggest that only with Roman rule did the notion of Sicily as an integral space emerge, at least for the purposes of political administration. Cf. Prag (2013) esp. 57-9 and 62-5. This must be set against much older references in literature and art to the island as Trinacria, which name aims to express the characteristic shape of the island; although this name is predicated upon the totality of the island, it is topographic rather than political in nature. Although the territory administered by the Romans from Syracuse was for the first time the totality of the island, Syracuse had long been a seat of political power. The empire inherited by Hieron II, Rome’s ally during the third century and grandfather of the final Syracusan king prior to its short period of Carthaginian control, was centuries old. Although they did expand westward from the eastern coast of the island at various times, the Syracusan kings devoted considerable energy toward establishing control or influence in southern Italy and around the Ionian Sea as well. This is to say that the Syracusan imperial project cannot be said to have focused completely on the integration of Sicily, which was only achieved under Rome.
we must still understand a great deal of variation among the different cities and hinterlands of the province. This variation came in many forms, and encompassed political history, details of a polity’s founding, including its ethnic origins and language, and the history of its interaction with Rome. With the caveat that they did not all appear to the same degree nor at the same time, there do seem to be some observable changes in land ownership attendant upon increased Roman presence, and likely in the number of slaves present on the island and engaged in agricultural work; these changes are particularly visible in the northern areas of the island from the third century BCE. We will treat each in turn.

Our imprecise description of how landowning practices in Sicily changed from the middle of the third century falls along the lines of the proliferation of *latifundia*. The history of *latifundia* has long been a topic of interest to Roman historians and is quite contested. Our few literary references do not allow us to determine whether this was a generic word or a technical term referring to methods of land management. As such, the notion of the concerted creation and spread of *latifundia* is hardly on solid ground. It seems clear that the characteristics of large estates, which phrase we will use in place of “*latifundia,*” likely varied a great deal depending on when they were created and where. There did exist large agricultural estates often producing crops for export, and worked by many slaves engaged at various stages of the production of the crop or crops, and in many cases overseen by other slaves. Owners of such large estates as there were in the middle to late Republic were usually private individuals, but, especially during the high and late Empire, the state, the emperor, or members of the imperial family also owned considerable numbers of these estates.\(^\text{15}\)

\(^{15}\) Maiuro (2012).
The term “latifundia” is at times the focal point of Roman moral lament, such as Pliny the Elder’s famous remark that latifundia had destroyed Italy and were degrading the provinces in turn; he goes on to say that six individuals had owned all of the province of Africa before Nero confiscated their holdings.\(^\text{16}\) Although Pliny’s language is hyperbolic, it continues to loom over debates about the agricultural change attendant upon Roman expansion. Pliny seems to elide the conditions of his day with those of earlier centuries, a charge of which modern scholars are guilty as well. Indeed Durliat has shown how later agricultural conditions in particular regions have influenced scholars’ conceptions of these large estates.\(^\text{17}\) Given these uncertainties, we should not consider all large estates identical by any means. We do observe, however, a growth in large estates, albeit with different characteristics to be explored below, in Sicily upon Rome’s arrival.

This is an important lens for our analysis because, in addition to being a marker of Roman presence, such estates signify a more intensive slave presence than do small farms, which themselves very often housed several slaves: imagining an area constituted in one case by ten small farms and in another by a large estate, we can be certain that more slaves are to be found in the latter situation in the middle to late Republic.\(^\text{18}\) Similarly, if the actions of wealthy landowners in Italy during the third and second centuries is any indication, it is possible that those who owned large tracts in Sicily also made use of land that had been designated *ager publicus* upon its being wrested from a conquered enemy. If such was the case, the impact of these large estates on production in the province may have been even more substantial. This

\(^\text{16}\) *HN* 18.35.

\(^\text{17}\) Durliat (1995).

greater concentration also made it easier for slaves to coordinate in their dissatisfaction. We will see the importance of this for the uprising in Sicily shortly, but we must note here that their greater numbers, greater relative both to the prior system of small farms and likely to the number of free persons in a given household, that came with the spread of large estates also resulted in more frequent contact among slaves. The frequency of contact among different types of slaves would have depended upon the area of the estate to which they were assigned, be that an agricultural, pastoral, or domestic setting, but at least within the different subdivisions there were many slaves who were in near constant contact.

Before we examine the evidence for the spread of large estates in the Sicilian context, it is important to keep in mind that there were still many small farms on the island. Diodorus, Livy, and others do focus on the growth of large estates to a degree that can lead us to overlook the continued presence of small farms, but evidence from the first century BCE remedies this picture. In his treatment of the archaeology of Ciceronian Sicily, Wilson explains that the few surveys that have been published indicate that there was some consolidation of small farms, but that this was by no means the overwhelming situation on the island. There was as well ownership by one individual of properties that were not contiguous but used in the same system of production; this Sicilian practice may obscure to some degree the intense concentration of agriculture on the island. It is more difficult of course to determine how many of these small farms were owned by Romans as opposed to Sicilians, and thereby to try to characterize the percentage of Roman landholdings of each category, but judging from the fact that we have a relatively few instances of Romans being given allotments in Sicily, we seem secure in judging

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19 Manganaro (1980) 428-37 describes the state of small holdings in the province.

that mostly these small farms were not held by Romans or Italians.\footnote{For evidence of Romans and Italians moving to Sicily, cf. Fraschetti (1981) 53-61. Of course we would not expect small landowners moving from Italy to have left such an impact in our sources as their wealthier counterparts.} The picture of an appreciable number of large estates is not what one might glean from the *Verrines*, but here too Wilson offers a helpful and convincing explanation, namely that Verres was not interested in attacking the powerful and influential on the island, but rather preferred to go after the more vulnerable in his predations.\footnote{Wilson (2000) 159.}

The Roman presence seems to have changed the agricultural landscape from what it was in the fourth and early third century BCE beginning in northern and western Sicily, in those areas that were first brought under more permanent Roman control. The survey at Monreale in the hills outside of Palermo indicate that fewer sites were occupied following an increased Roman presence in comparison to previous centuries.\footnote{Johns (1992).} Excavations in the vicinity of Alcamo in the same region show a later increase in the rural population density during the Empire, but our evidence does not allow us to characterize any change attendant upon the emergence of Roman control in this area. Nevertheless, Wilson and others are comfortable positing that this may have been a site of early Roman transformation of landholding on some scale.\footnote{Wilson (2000) 160.} This was a change primarily in the size of farms and the intensity of their cultivation. There were also sites in the western part of the island that developed for the first time in late fourth or early third century,
including Campanaio, where the land was first intensively cultivated about fifty years after this initial development.\textsuperscript{25}

Changes came to the eastern part of the province somewhat later, though we should not imagine a sweeping development such that all of Sicily came to look similar; as was the case on the Italian mainland, significant variation among the different areas of the island persisted, and there were doubtless still many small holdings here too. Our evidence seems to indicate that some small holdings in the eastern region gave way to bigger estates in the early Empire. Although we find evidence of a number of farms of about 150 \textit{iugera} in the area outside of Heraclean Minoa and Himera in the middle to late Republic, these holdings were increasingly closed out during the early Empire.\textsuperscript{26} Although these changes may have come on a larger scale in the centuries that followed, the fact of a large-scale slave revolt on the island in the second half of the second century with the characteristics that we will see is only explained by the presence of a substantial number of large estates.\textsuperscript{27}

Turning to the related question of how slaves were employed in Sicily, we are able to describe the range of activities more securely, although it remains impossible to relate the proportion of slaves engaged in one activity relative to others with much certainly. We have just described the growth of agricultural estates, where the range of the duties of any one slave would have depended upon the size and nature of the farm on which he found himself; there is nothing in our meager evidence to suggest that agricultural slavery on Sicily differed substantially from

\textsuperscript{25} Wilson (2000b).

\textsuperscript{26} Wilson (1990) 221-3 and figures 178-9; Belvedere (1995).

\textsuperscript{27} We have the name of Damophilus of course, but frustratingly few other names have come down to us. Onomastic evidence would allow us a better understanding of just who owned these large estates, or were otherwise influential in the area. Bradley (1989) 49-50 lists prominent Romans in Sicily in the first half of the second century, but we lack an understanding of the role played by wealthy Italians, Greeks, and other peoples in the provincial landscape.
other areas that primarily produced the grains coming from Sicily, at least in terms of the tasks required. On the larger estates such as that of Damophilus, there was doubtless a division of labor according to the stages of production of the particular crop or crops. On these larger estates there were also domestic slaves as we would expect.

Important in the subsequent revolt, and indeed integral to several ancient conceptions of slavery especially in Sicily and southern Italy, was pastoral slavery. Mazza states confidently that agriculture in the province was of a mixed character, involving both landed estates and herding, which accords with our picture of agricultural activity in much of southern Italy. Although we cannot guess whether those engaged in this work were predominantly slaves or predominantly free men, there seems, on the basis of Diodorus’ description, to have been many slaves who tended to the herds of their masters, likely moving at times quite far from the property while grazing the animals in their charge. These men would carry weapons in order to protect their herds and would have required dogs to do their work. Diodorus characterizes these men as brigands following their inclination to supplement their meager allowances of food and clothing by turning these tools toward robbery.

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28 For Diodorus’ general description, cf. 34/35.27-31.

29 Bradley (1984) 52-3 discusses some of the likely conditions of slaves in general in antiquity, and finds little reason to think that conditions in Sicily during these years would have varied drastically.


Bradley presents slaves of this occupation in Lucania and Apulia as easily mobilized toward certain political activities, notably when they supported Catiline in 63 BCE or when Pompey employed them as cavalry during his time at Brundisium.\textsuperscript{34} They were important in the early stages of the slave revolt in Sicily with which we concern ourselves as well. Their more nefarious activities before the revolt were obviously distressing to many in the province, especially travelers, and Diodorus contends that they spread their murder and theft across almost all of Sicily.\textsuperscript{35} Roman governors could not have turned a blind eye to this problem if they had wished, but Diodorus tells us that they dared not punish the slaves, as their owners were rich, powerful, and, because they did not have to spend as much on the feeding and clothing of their slaves as they otherwise would have had to spend, the beneficiaries of this system. Indeed, one notoriously harsh slave-owner, Damophilus, is reported by Diodorus to have asked, upon being approached by his naked slaves seeking clothing, whether travelers on the road were similarly naked, and therefore unable to be robbed of their clothing.\textsuperscript{36} On my reading, this is not the last time that wealthy landowners would block reform to an arrangement that enriched them.

Having examined the situation of many of the enslaved in Sicily through the lens of the agricultural tasks in which they may have been engaged, let us turn to the events of the First Servile War. This review will prompt us to see the Hellenistic elements of the conflict. The First Servile War began in the city of Enna, located in Sicily’s mountainous interior. We do not know exactly when the revolt began, with scholars examining every date from 141 to 135 BCE.\textsuperscript{37} We


\textsuperscript{35} Diod. Sic. 34/35.2.2-3. We might wonder whether the potential threat posed by these slaves was clearer to Diodorus and others with the benefit of hindsight.

\textsuperscript{36} Diod. Sic. 34/35.37.

\textsuperscript{37} Bradley (1989) 59. Cf. also Bradley’s Appendix 2 for his helpful chronology of the war.
have seen that the slaves were by and large miserably treated, and on the large estate of the same Damophilus and his wife Megallis, plans to revolt circulated and gained support.\(^{38}\)

The question of leadership in this revolt seems to have been solved in a rather straightforward manner. Early on in the movement a Syrian from Apamea-on-the-Orontes named Eunus emerged and took charge. He was a domestic slave of Antigenes of Enna, and was a devotee of Astarte.\(^{39}\) Most important to his initial leadership and subsequent legend was his reputation as a mystic or performer of wonders; of particular note was his apparent ability to breathe fire. Diodorus’ reasoning as to how this was possible, that Eunus put an ember and some amount of fuel inside a walnut into which he had bored holes at both ends, thereby being able to exhale flames from his mouth, is convincing enough at least to this reader, but is not likely to have been puzzled over by those in attendance at the event.\(^{40}\) This trick had its desired effect, and Eunus’ renown among the other slaves was such that he was consulted to ordain, plan, and eventually lead the revolt.

We must keep in mind that the First Servile War indeed began as a revolt, and was hardly the first of its kind; there had been similar uprisings in Italy in the second century: at Setia in 198, in Etruria in 196, in Apulia in 185. We have no indication that the slaves at this early stage set their sights on obtaining such a large swath of eastern Sicily, let alone the entirety of the island. Eunus’ first piece of advice to the slaves of Damophilus and Megallis at this early stage was that they should also release those held in the *ergastula*, and rally as many slaves from other

\(^{38}\) For his clear and concise account of the war, cf. Bradley (1989) 55-65, which derives chiefly from Diod. Sic. 34/35.

\(^{39}\) Bradley (1989) 57 highlights the similarities between Astarte and Enna’s chief deity Demeter, specifying that both were expressions of the great mother goddess, and that commonalities would have been observed, even if we may not wish to see full syncretism; more on this below.

\(^{40}\) Diod. Sic. 34/35.2.5-7.
households to their cause as they could; there seems not to have followed at this point a complex plan to export their revolt. On a particular night some four-hundred slaves gathered outside of the city, bound themselves to each other by swearing oaths, and broke into the city intent on murdering the slave-owners.

Once the rebels entered the city, other slaves joined the revolt by first attacking their own masters. Absent from the initial violence, however, were Damophilus and Megallis, who Diodorus tells us were on an orchard, likely on an estate they owned outside of the city. A small force was dispatched to find them, and once they were located and brought into the city, the spectacle moved to the theater, where Damophilus attempted to defend himself as if on trial. Before he could carry on for too long, however, he was cut down. We cannot know how much license Diodorus takes in what seems a somewhat contrived depiction of a grotesque kangaroo court, but the image is undeniably intense.

While they were still in the theater, the rebel slaves declared Eunus their king, and he immediately called for an intensification of the violence. He killed a number of citizens, although he kept the craftsmen who could be of use to the rebels in chains, and set free those who had been kind to him while they were guests of his master Antigenes. He did not spare his former owner, however, and allowed Megallis’ slaves to kill her in gruesome fashion. Eunus’ next actions are fascinating. He assumed a diadem and royal garb, titled himself “Antiochus,” and called his female companion his queen. He also named his followers “Syrians,” and formed a royal council, though excruciatingly the details of its organization do not survive. We will return below to the aspects and symbols of this revolt that take on added meaning against a broader Hellenistic backdrop.
Three days after they took Enna, the slave force had grown to perhaps six thousand or, if we believe Diodorus, ten thousand. The force was large enough to prevail in several early encounters with Roman authorities. We do not know when these early encounters took place; as mentioned above, the details of the initial events in Enna and indeed all of the early stages of what would become the First Servile War are difficult to date with much accuracy. It does seem that within a month of the events in Enna, a second revolt led by a slave named Cleon broke out in the south of the island. Cleon was a brigand and a breeder of horses from an area of Cilicia close to the Taurus Mountains, and had come to Sicily perhaps with his brother Comanus. He had heard about Eunus’ exploits and convinced other slaves to join him in an uprising through which they gained control of Agrigentum.\footnote{Green (1961) 16 argues that Cleon and Eunus were in contact before the latter took Enna, and that it was according to a pre-determined plan that Cleon moved against Agrigentum; there is no evidence for this as far as I can see.} Their force is reported to have been about five thousand.\footnote{The Livian tradition amazingly says seventy thousand (Per. 56); one wonders if the stages of the war have become confused in this account.} Diodorus expresses the hope of many Sicilians that Eunus and Cleon would destroy each other, as two heads of two unruly slave armies, but this did not come to pass, as Cleon subordinated himself to Eunus’ leadership.\footnote{Diod. Sic. 34/35.2.17.;43.}

The slaves were able to take various cities and there was general panic throughout Sicily. Diodorus states that there were fears that all of the island might be overwhelmed, and Florus asserts that the initial effects of the uprising suggested that it would be worse than the Punic Wars.\footnote{Diod. Sic. 34/35.2.25 and Flor. 2.7.2.} Again, we should not think that this was now or at any point the goal of the rebels. The only bases of their operations mentioned in the sources were Enna, Catania, Morgantina, and
Tauromenium; it is unclear whether Syracuse was affected by their activities. The rebels therefore came to control much of the southeastern portion of the island, along the line that runs northward from Agrigentum through Enna to Tauromenium. This would have been about one half of the island at most.

The consul C. Fulvius Flaccus was sent to the province in 134 to confront the rebels who had bested praetorian governors likely for several years. Florus relates some of the Roman defeats, and we know of several cases when rebels captured camps and drove Romans from the field. A certain Manlius is said to have been disgraced upon his encounter with the rebels, and he can likely be identified as A. Manlius Torquatus. L. Plautius Hypsaeus was also dispatched to the province, and he lost eight thousand men shortly after arriving; this was in the wake of Cleon’s linking up with Eunus. Diodorus indicates that there were other victories as well, although he does not give details as to these engagements, and states that the rebel force at this point had grown to two hundred thousand.

L. Calpurnius Piso Frugi was sent to Sicily in 133 at the head of a consular army. Soon after arriving, his cavalry commander C. Titius was surrounded and forced to surrender his arms. This was to be the last major defeat that the Romans would suffer at the hands of the rebels. Piso proceeded to take Morgantina, in the process of which he killed about eight thousand slaves. He besieged Enna, where archaeologists have recovered slingshots that bear his name and office.

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45 Cf. Diod. Sic. 34/35.2.20 and Flor. 2.7.8 for Tauromenium; Stra. 6.2.6 for Enna, Catania, Tauromenium, and additional unspecified areas; and Oros. 5.9.6-7 for Morgantina, Enna, and Tauromenium.

46 Flor. 2.7.2.


48 Diod. Sic. 34/35.2.18.

49 _ILLRP_ 1088.
is safe to say that the Roman effort was in a better position following his year in office, but the situation was not yet fully resolved.

In 132, the Romans sent another consul, this time by the name of P. Rupilius. Rupilius moved first against Tauromenium, one of the two strongholds of the rebels. As many as twenty thousand slaves may have been killed in the fighting, and at Tauromenium, the consul elected to starve out the inhabitants, leading to noted instances of cannibalism. There are additional signs that this was by no means an easy victory. Indeed, Rupilius sent home his son-in-law Q. Fabius when the latter lost the citadel at Tauromenium, and the city was taken only after it was betrayed by one of the rebels, the Syrian Sarapion. Rupilius then moved to Enna, their other stronghold, and perhaps continued the siege that Piso had begun. Florus says that a Perperna, likely M. Perperna, consul in 130, was responsible for the final siege at Enna, and that he ended the war with another victory. This other victory was perhaps against Cleon, who had left Enna during the siege with a few men but did not make it far. Enna also only fell upon its betrayal from within. It was in these engagements that Cleon’s brother Comanus was killed when he tried to escape but was captured. It is possible, as Valerius Maximus suggests, that this occurred after Enna had fallen and at a final encounter somewhere outside the city.

Eunus supposedly escaped from Enna with one thousand bodyguards, but upon evaluating their situation outside the walls, the bodyguards decided that death was preferable to capture, and took their own lives. Eunus, however, did not make the same decision. He was later found taking refuge in a cave with his cook, baker, masseuse, and entertainer. We will examine

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50 Flor. 2.7.8. Bradley (1989) 62 thinks that Perperna may well have been fighting at Enna before Rupilius arrived from Tauromenium.

51 Val. Max. 9.12 ext. 1. Valerius Maximus calls this figure Coma; I follow Bradley (1989) 61 and others in identifying the two as the same person.
the nature of this fascinating entourage in more detail shortly. He did not survive for very long after his capture, but it is unclear whether he died at Morgantina or at Rome.\footnote{Diodorus (34/35.2.22-23) says Morgantina, but Plutarch (Sull. 36.6) places his death at Rome.}

As this outline will no doubt communicate, uncertainties proliferate in any account of the First Servile War. It is unclear how it developed from the initial attack at Enna, and if, let alone when, the rebels developed anything like broader goals or a long-term strategy. Eunus did mark his elevation formally, and he imposed discipline upon the movement, but before the slaves were secure in Enna, it seems that they did not even foresee that they would come to control the city. Their position at Enna was obviously desirable, however, and to the extent that we can discern a general practice, the rebels seem to have aimed at taking fortifiable cities and launching raids from them. They chose strategic cities, namely Enna, Tauromenium, Morgantina, and Catania, and thereby acquired access to the plain of Leontini, which was a crucial source of grain for the sustenance of their forces, which must have been sizeable. Diodorus’ figure of two hundred thousand certainly seems high, but our other sources place their numbers at perhaps between sixty and seventy thousand.\footnote{For a discussion of this evidence, cf. Bradley (1989) 64.}

Of a servile population in the range of ninety to three hundred and fifty thousand, this would clearly have been a sizeable proportion, but our sources state with certainty that this was a slave uprising on a new scale. I follow Bradley in thinking it very likely that tens of thousands of slaves were involved.\footnote{To arrive at this figure, Bradley (1989) 64 takes Finley’s (1979) 133 estimate that there were between six hundred thousand and one million people in Sicily during the middle of the first century BCE, assumes that the overall population in the second century was about the same, and uses as his lower bound Hopkins’ (1978) 101 estimate of the percentage of the population enslaved in 225 BCE (15%) and as his upper bound Hopkins’ estimate for 31 BCE (35%).}

One final consideration is in the size of the Roman armies sent to meet the rebels. Praetorian armies would have contained about ten thousand troops at the time, comprised of equal numbers of Romans and auxiliaries, and consular...
armies would have been twice as large.\textsuperscript{55} We can imagine some local Sicilians to have joined on the side of the Romans, although the total number of native inhabitants who so participated is anyone’s guess. In so far as the slaves were able to defeat contingents of Romans arrayed against them, they must have been quite numerous.

Turning to the question of the international aspects of the revolt, I wish to highlight several, which we will consider alongside the basic cultural similarities such as that which allowed for the syncretism between Demeter and Astarte noted above. The first is the interconnectedness of the various spaces within the Roman Empire. This revolt turned especially around the conduct of two slaves from areas in the eastern Mediterranean, where Rome had focused considerable military resources over the previous decades, and which had been changed by Roman action; both Apamea-on-the-Orontes and Cilicia, whence, respectively, Eunus and Cleon had come, and other areas of the eastern Mediterranean had produced thousands of slaves as a result of Roman wars in the region during the first decades of the second century.\textsuperscript{56} Any examination of territorial empires of the Hellenistic period reveals the interconnectedness of the various regions of these entities. In the Roman case, the influx of slaves from foreign wars was a powerful force in the intensification of the system of large estates in the Italian peninsula, and indeed in Sicily, albeit with several differentiations in the Sicilian case.\textsuperscript{57} Other empires were certainly subject to similar phenomena. To name but two recurring phenomena, trouble on the eastern frontier of the Seleucid Empire routinely required the diversion of resources away from the Mediterranean, often with the repercussions being felt in the form of territorial losses to the Ptolemies, who themselves had to balance affairs in Alexandria and the Levant against a

\textsuperscript{55} Bradley (1989) 64-5.

\textsuperscript{56} For a discussion of the number of slaves generated by these conflicts and others, cf. Scheidel (2007).

\textsuperscript{57} For a recent treatment of these developments, cf. Harris (2011).
perennially restless Upper Egypt. As in our case, the wars and initiatives in the eastern Mediterranean had profound ideological and costly political ramifications, as is demonstrated by the resources invested by Seleucid kings in attempts to regain a Mediterranean stronghold, or Ptolemaic attempts to appeal to Egyptian and Greek languages of legitimacy. We see in both empires also the repeated migrations of different peoples upon military conquest and expanded administration, and thereby the movement of political forms and sensibilities as well.

The second phenomenon to be considered in light of other Hellenistic royal practices is Eunus’ remarkable kingship, and Diodorus’ presentation of it. His adherence to the trappings of his position is fascinating, as he crowned himself with a diadem and appointed a royal council. He also unmistakably took cues from the Seleucid Empire, calling himself Antiochus and his followers Syrians. And he does not seem to have abandoned this initial self-fashioning, seeing that, although he had retreated to a cave after escaping a siege by a consular army, he was captured in the company of a cook, a baker, a masseuse, and an entertainer. In describing his kingship we must also include what attracted the rebellious slaves to him in the first place, his wonder-working and specifically his supposed fire-breathing. Given his place of origin and status as a devotee of Astarte, alongside his preference for Seleucid monarchical expressions, it seems possible that he employed such mysticisms as a means of fulfilling what he imagined other slaves would have expected or marveled at from an easterner such as himself. Would that we knew more about how calculated his self-presentation was: did he choose his Seleucid model solely because of his familiarity with it and his place of origin, or was this a deeper political commentary? By possibly playing upon these expectations, and fostering and creating rumors

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58 Kosmin (2014) has shown that the Seleucids could also use this territorial expanse to their benefit, not least ideologically and rhetorically. Cf. Manning (2009) for a persuasive treatment of the difficulties of administering Egypt in the Hellenistic world.
about his power, he undoubtedly elevated his position among the slaves and consolidated his place at the head of the rebellion.

It is also crucial to consider Diodorus’ descriptions of Eunus in the light of other Hellenistic portrayals of kings. Diodorus’ project is a Hellenistic project, and we must keep this wider world in mind when reading his treatment of the First Servile War. Morton has convincingly argued that Diodorus’ presentation of Eunus is intended to make his readers hostile to the slave king, exactly because he fails to live up to the Hellenistic ideals of kingship and indeed proper leadership more broadly. Chief among those traits necessary for kingly success and lacking in Eunus are courage and good generalship. Also, Eunus’ acclamation as king should have been tied to true kingly behavior, rather than his stealthy, nocturnal attack and the subsequent executions. To the extent that Diodorus is successful in his intent, it is because he presents Eunus in comparison to established norms of kingly behavior. We must realize, however, that a slave revolt is anything but an established means of creating a state, if indeed Eunus and the rebels ever intended to do as much, an idea which Diodorus’ underlying comparison suggests. We might also say that Diodorus presents Eunus as only attempting a military campaign, without having worked out a system of governance, but here too Diodorus relies upon aristocratic, kingly sensibilities to castigate Eunus. Diodorus flattens the complexity of Hellenistic political forms, both by requiring that the slaves and Eunus act according to established norms, and in suggesting the near universality of those forms in other polities, but Diodorus’ larger political theory is not our focus here.

We see also in this revolt an attempted renegotiation of legal and social identity, and of political geography. The slaves at the very least sought to escape bondage, and in that they

60 Morton (2013) esp. 239-41.
desired to reform their legal standing. Relatedly, we do not have much indication as to its stability, but there was a system of social and military order that emerged in this short-lived slave society. Moreover, this was an enterprise that ebbed and flowed over stretches of this territory. To the extent that the Hellenistic world was marked by such acts of legal, social, political, and territorial redefinition, we might wish to call this a Hellenistic event. Of course, such redefinition characterized other periods of Mediterranean history as well, but this event’s dependence upon individuals and imagery from distant lands that at times anchored peer polities, and the fact that it unfolded in the shadow of an expanding Rome, impart to it a Hellenistic nature.

THE END OF THE FIRST SERVILE WAR AND THE LEX RUPILIA

In the aftermath of the war, the consul saw to the passage of the *lex Rupilia*, which was meant to return stability to the province. The means by which this was to be done was the clarification of the procedures, based on the citizenship of the parties involved, of private litigation or dispute resolution. Our evidence for this law comes from Cicero’s *Second Verrine* 2.32.61 Although one must always be cautious when using a speech of Cicero’s as evidence of an actual event or situation, especially a speech as inflammatory as this one is at times, this particular passage describes in general terms and matter-of-fact style the system that had functioned before Verres undermined it, and is an entirely plausible reconstruction. Lintott characterizes this as amid the “background” that Cicero provides for his audience, and while

61 Cursory mention of the law is also found at Val. Max. 6.9.
such presentation is not completely neutral, our passage does not seem to sacrifice accuracy for rhetorical flourish, or for anything else.\(^{62}\)

According to Cicero, the system of private litigation was structured, as noted above, by the citizenship of the two parties involved. Reproduced below is the most systematic reference in *Second Verrines* to the *lex*:

Siculi hoc iure sunt ut, quod civis cum cive agat, domi certet suis legibus, quod Siculus cum Siculo non eiusdem civitatis, ut de eo praetor iudices ex P. Rupili decreto, quod is de decem legatorum sententia statuit, quam illi legem Rupiliam vocant, sortiatur ; quod privatus a populo petit aut populus a privato, senatus ex aliqua civitate qui iudicet datur, cum alternae civitates reiectae sunt; quod civis Romanus a Siculo petit, Siculus iudex, quod Siculus a civi Romano, civis Romanus datur; ceterarum rerum selecti iudices ex civium Romanorum convent proponi solent.

The Sicilians live under this law, that cases between two citizens of the same city should be tried in that city’s courts and by that city’s laws; that in cases between two Sicilians of different cities, the praetor should appoint judges by lot according to the decree of P. Rupilius, which was derived from the recommendation of the ten legates, which they call the *lex Rupilia*; that in cases between a *populus* and a private citizen, the senate from another city is selected to judge, with each party able to reject a senate thus proposed; that when a Roman sues a Sicilian, a Sicilian judge is chosen, and that when a Sicilian sues a Roman citizen, a Roman citizen is chosen; the judges selected for other cases are typically offered from the assemblage of Roman citizens.\(^{63}\)

If two Sicilians with the same citizenship had a dispute, it would be handled according to the mechanisms in place in their community. This situation must have been an administrative necessity from the point of view of the Romans, considering that the provincial agents of Rome certainly could not have collected and overseen all of the private disputes that arose in the


\(^{63}\) 2.32. Text Klotz (1923).
province. Next follow the three distinctions that comprise the *lex Rupilia*, and which determine how the praetor is to appoint *iudices* by lot in cases where the two parties are from different cities. First, in cases between a *populus* and a private citizen, the council from another city is proposed to judge, with each party being entitled to challenge one such proposal. This is possibly the only type of case in which we should imagine multiple judges presiding over one dispute, a question that we will address below. Second, when a Roman sues a Sicilian, a Sicilian *iudex* is chosen, whereas when a Sicilian sues a Roman, a Roman *iudex* is appointed. Lastly, in other cases the *iudices* are typically taken from the assemblage of Roman citizens in a district.

Cicero’s explanation of the origin of the *lex Rupilia* is fascinating. We read *Siculi hoc iure sunt ut, ... quod Siculus cum Siculo non eiusdem civitatis, ut de eo praetor iudices ex P. Rupili decreto, quod is de decem legatorum sententia statuit, quam illi legem Rupiliam vocant, sortiatur*. This decree, which the Sicilians and elsewhere in the speech Cicero himself call the *lex Rupilia*, was promulgated based on the recommendations of ten *legati* appointed to assess the situation of the province; although Cicero does not say as much, we conclude from better-documented cases that the commission would have been dispatched at the end of the First Servile War or perhaps soon before its conclusion. This report of course fits with our understanding of one of the means to introduce law in the middle and late Republic: the consul could propose legislation to one of the assemblies, and their approval would lead to a *lex*. We might posit that the issues fell to the *comitia curiata*, although as far as I know we do not have any specific
evidence. The detail here that the law came upon the advice of the decemviral commission need not make us think the procedure in this instance unusual.

So we have a board of ten recommending to the consul a system that will be upheld by later governors of the province. These boards of ten are familiar from accounts of the conclusions of earlier conflicts in Rome’s history, and their usual function was indeed to advise the magistrate in charge on how best to settle the situation. Indeed, one had gone to Sicily in 241 BCE at the conclusion of the First Punic War.⁶⁶ We do not know this first commission’s task exactly, but it was concerned with the territory that fell under Roman administration during the First Punic War, namely the western three-quarters or so of the island that was not under Syracusan control.⁶⁷ As the last quarter of the island came under Roman control during the Second Punic War, the later delegation was overseeing the entirety of Sicily.

Whereas other boards focused on territorial boundaries or terms of indemnities, the legati of this second commission to Sicily were presiding over a space that had been a Roman province for over seventy years by the time of the revolt. For this reason, the drawing of borders between various imperial jurisdictions was simply unnecessary, and there seems to have been no appetite to reconfigure municipal lines. The decemviral commission apparently felt that this situation required a quite legalistic solution, and one imagines that several of these commissioners must have been especially well versed in the law. These legati were crucial actors in the transition from warfare to administration, and here in the creation of a legally pluralistic environment.

What we know of the activities of the commission, which is to say the provisions of the lex Rupilia, does not suggest that it addressed the causes of the slave uprising. Indeed, these

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⁶⁶ Decemviral commissions had recently been dispatched in 196, 188, and 168 BCE. For the commission to Sicily in 241 BCE, cf. Polyb. 1.63.1-3.

⁶⁷ Prag (2013) 61 posits that their intention was “perhaps to organise Sicilian communities, as in later settlements,” but he does not go into further detail on what that might have meant.
causes of the First Servile War seem to be the same problems of land allocation and slave labor that plagued Italy and Sicily through to the end of the Republic, most destructively in the later Servile Wars. After a slave uprising, we might have expected legislation that addressed the ownership of slaves, either in terms of accumulation or treatment, in so far as this was understood as the cause. Although such a phenomenon would not necessarily explain the provisions of the resultant legislation entirely, it is possible that there may have been a degree of capture of the members of the commission. This is to say that the landowners whose operations the potential legislation may have targeted were able to influence toward their own ends those crafting the legislation. We have already seen how powerful Roman and Italian landowners were able to block changes in legal initiatives that would have required them to rein in their slaves acting as brigands by providing more food and clothing to them. It was also in their interest that the *lex Rupilia* take the form that it did, as it specified the means by which they could acquire more land, and it likely increased the chances that they would be able to resolve disputes before a sympathetic judge when a case was brought against them. Of course, wealthy Sicilians too would have liked this when they were the defendants, or were suing a member of their community. The details of this law, especially in regard to the identity of the judge, seem to facilitate the acquisition of more land by the wealthy, and indeed this may help explain the growth of large estates in eastern Sicily following the First Servile War, on the understanding that often Romans, Italians, and powerful Sicilians from elsewhere moved in to possess the land whose title was complicated by the slaves’ activities, and could be relatively secure in expecting a like-minded judge if disputes were taken to court.

The notion of capture, which asserts that the proper legislation was blocked by the political connections of adversarial landowners, relies upon the judgment that land reform could
have been passed. It was not possible to completely overhaul the agricultural situation in Sicily. It would have been unfeasible to prohibit the existence and operation of large estates, or to limit the number of slaves at an estate so that conspiracies would never arise. Indeed, attempts at such change are absent from the Roman legislative record, and are at odds with Roman ideas about the accumulation of res. If the drastic change that would have ensured the end of slave revolts was too disruptive to contemplate, we must think of what legislative options were available. With this focus, the content of the lex Rupilia becomes somewhat more intuitive. The initiative to address a procedural problem that seems to have existed for some time, and one that encompassed the transfer of res and used citizenship as its basis, had wide-ranging applicability and must have spoken to a number of long-standing administrative shortcomings. And as we will see below, this legislation was also connected to legal developments elsewhere in the empire.

LEGAL PLURALISM, EXPRESSIVE LAW, AND THE RULE OF LAW

The legal environment in Sicily after 132/1 should be viewed through the lens of legal pluralism because of the lack of specificity required by the broad categories of the lex Rupilia, and because of the nature of the interaction with pre-existing legal structures. While the law did place certain restraints on the iudex, it is clear that these were in regard to his citizenship, and not his conduct, and so we expect that the proceedings before the iudex could have taken a multiplicity of possible forms. To take the first distinction mentioned by Cicero in his presentation of the provisions of the lex Rupilia, namely a case between a populus and a private citizen, one imagines that there would be some variation depending on which city’s council was tapped to oversee the case; indeed, Cicero says nothing about restrictions on this city’s freedom.
in determining procedural or substantive requirements. Additionally, it seems unlikely that the entire *senatus* of a city would necessarily have been willing or able to hear a dispute concerning *res*, although we would like to know the degree to which Roman administrators envisaged or ensured a large jury. Further, aside from personal animus, there would have been no reason to allow for the rejection of one council by each party unless each potential council might institute a different legal or normative framework. One party would have no reason to reject a particular council unless he thought his prospects would be lessened under the expected framework. The differentiations in legal practices among closely neighboring communities was probably not extreme in many cases, but to the extent that the different populations of Sicily had different legal norms, this clause of the *lex Rupilia* suggests huge variation in procedure and substance. Cicero’s term “*Siculi*” obscures this to a large degree, but we cannot think that the dichotomy between Roman and Sicilian in his text meant that only two legal systems were in operation at this time. It may be, as Kantor would have it, that the allowance of local jurisdictional variation led in time to its replacement, but we imagine a diverse landscape in the second century BCE.68

The second distinction, where the *iudex* in a case between a Sicilian and a Roman is to be on the same side of this divide as the defendant, must have allowed for substantial variation as well. We cannot be sure of the course of action taken by the typical Roman *iudex*, who was acting in the capacity only of a private citizen, in this setting, and perhaps thinking in terms of a typical *iudex* credits the Romans with too much consistency. Nevertheless, it seems reasonable to conclude from this specification that there was at least perceived to be a difference in how a Roman and any particular Sicilian would act in such a context. Even less certain is the potential conduct of the Sicilian *iudex*. “*Siculi*” in this context is frustratingly inadequate, as mentioned,

68 Kantor (2010).
and Cicero’s explanation of the procedure to resolve disputes between two citizens of different communities makes this clear: different Sicilians were not, for the purposes of a role such as this, interchangeable, coming as they did from different cities and being familiar with and equipped to act upon varying legal understandings. Perhaps Cicero is oversimplifying and a Sicilian *iudex* would in fact be drawn from the same region as the accused when the plaintiff was a Roman. Here too the *iudex* could take probably several approaches to the problem before him. The consistency of the law that governed particular cases was dependent upon the directions of the praetor to the *iudex*, as was always true, but the uncertainty here stems from the capacities of various Sicilians, which were likely different from that of the traditional *iudex* at Rome.

Lastly, we have that *iudices* selected from the assemblage of Roman citizens in an area are to decide the other cases. We should note that there is no specification of the number of *iudices* meant to decide any particular case. This last category is clearly intended to be capacious, and gestures toward an important facet of the situation described by Cicero. It may have been the case that a number of Romans sufficiently expert in any potential matter could be convened to hear a case, but in more technical cases that seems improbable.\(^69\) Far more likely is that these citizens, and indeed all of the *iudices* described in this passage, were not tasked primarily with applying a perfectly defined substantive law, but rather with resolving disputes through something we would liken to arbitration or mediation.\(^70\) Our impression of an extremely regular system is due in large part to the fact that in these speeches, Cicero attempts to blacken Verres as much as possible, and that crucial to doing so is his presentation of the laws of Sicily as to-the-

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\(^69\) It would be fascinating to know if there were maritime courts in Syracuse, even with a small case load, at this time, but no evidence of their existence survives to my knowledge.

\(^70\) Lanni (2016) 150-169 has examined many of the ways in which norms were adjudicated and expressed in court setting in Athens, many of which may also have applied in cases before *iudices* in settings such as these; more on this to follow. Cf. also Bablitz (2016) for a treatment of private arbitration in Roman law.
letter, harmonious, and efficacious until Verres’ corruption of them. Although we have trusted in
the categories that Cicero uses, we need not infer the perfect consistency that he seeks to suggest
in his depiction.

Indeed, it is hard to see how a decision rendered by a second city in a case between a
*populus* and a *privatus* would be enforced, if the judgment required punishment under the law of
the second city. And from the perspective of the Roman authorities, clearly the resolution of the
dispute is the goal, not the potential animosity from one city’s almost extraterritorial extension of
its legal reach under the cover of a Roman provincial statute. This would not have been such a
fear in cases where the relevant laws of the two cities in question were relatively similar, but we
cannot know how often such was the case. Additionally, we should consider the possibility that
certain cities could have risen in regional prominence having gained a reputation for responsible,
or favorable, depending on the point of view of a particular party, resolution. Unfortunately, our
limited sources as so often do not allow us to examine the territorial repercussions that may have
developed in the wake of this law.

When considering issues of legal pluralism or multi-normativity, an over-insistence upon
the distinction between law and custom is misguided. Indeed one of the benefits of the term
“multi-normativity” is that it recognizes that custom has normative force even when it does not
produce law, though of course it can.71 Our situation can demonstrate the shortcomings of this
terminological distinction. It is uncertain how the praetor would have moderated the legal
expectations before him in cases falling within the classification scheme of the *lex Rupilia*, but it
would be untenable to claim that Roman administrators sought to block all “custom” from
judgments. Roman authorities and institutions may have reified the resultant judgments, but the

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various cities will necessarily have had a different understanding of the distinction, such as it existed, between law and custom. To the extent that this law enabled various legal sensibilities, we can view it through the lens of multi-normativity.

There may be at least one element of expressive force in this law as well. I do not want to press this point too forcefully, and my hesitation derives mainly from the context of our evidence, but this use of *Siculi* throughout does produce a sense that the Romans were at the first level thinking in binary, us-and-them terms. Additionally, the Sicilian side of this binary is quite unsatisfactory, as *Siculi* is made to encompass the smattering of Greek and Phoenician norms and customs that still survived. I hesitate somewhat because it would not have been surprising, given the uncertainties outlined above, for there to have been additional clauses of the legislation that specified further characteristics than just the Roman or Sicilian citizenship of the *iudices* empowered by the *lex*. It would not be entirely surprising for Cicero to have elided some of the finer details of the law, especially as he argued the case on behalf of the province as a whole. The best explanation for the nature of his description is again the main purpose of the *Verrines*: in Cicero’s attempts to tar Verres, nuanced specifications of citizenship would likely have been a distraction. Nevertheless, using the clauses that come down to us, one cannot help but notice the binary language that sharply divides between Romans and Sicilians.

The implications of this expression are that Roman law, as intended for at least some provinces, conceptualized the legal geography in terms of Romans and non-Romans, as defined by citizenship. This may have been somewhat more appropriate in the praetor’s court in Syracuse, but the binary is read out onto the province more broadly. Roman authorities acknowledged differences among Sicilians of course, but we should not overestimate the degree of specificity involved in legal confrontations when only one party was a Roman. The socio-
legal distinctions in other documents detailing provincial administration give a similar impression. We see an attribution of a common legal sensibility to groups defined in at times quite broad ethnic terms in the Edict of Cyrene, as well as in the Gnomon of the Idios logos. While such distinctions were doubtless helpful short-hands for Roman administrators, we should not think that all *Siculi* had the same understanding of law anymore than did all Greeks enveloped by the term in the Edict of Cyrene.\(^72\)

It remains for us to consider the *lex Rupilia* from the point of view of the rule of law. Central to many modern theoretical treatments of this topic is an insistence upon clarity and reproducibility in the resultant situation; there is also broad consensus that laws should not be retroactive.\(^73\) The provisions that Cicero describes are clear enough, and there is no mention of retroactive application, but as we have analyzed above, their enforcement likely differed across cases. This flexibility may have depended upon the specific individuals involved, the location of the proceedings, and the degree of scrutiny by the Roman administration, among other considerations.

Many of these potential red flags apply in a number of ancient settings, and indeed in much of the world at any particular time. In attempting to tackle these questions, I make use of the extremely helpful framework that Lanni has developed for analyzing the window onto the rule of law provided by legal institutions, both formal and informal. She stresses the importance of courts in forming and imposing norms, even without complex procedural and evidentiary

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\(^72\) The discussion of the unity of Greek law is informative here. Finley was prominent for several decades in this debate, arguing forcefully against seeing unity in Greek law; cf., e.g., Finley (1975) 132-154. Finley argued against many who had written decades earlier of the coherence and consistency of this concept, including Pringsheim, who had asserted emphatically that “[t]he similarity of Doric and Ionian institutions allows us to speak of ‘Greek law’ as a unity” (1950) 5. For a more recent treatment of the topic through a different lens, cf. Phillips (2013).

\(^73\) For one prominent recent essay, cf. Raz (1979) 210-29.
rules.\textsuperscript{74} With the understanding that of course the Athenian courts she studies are in many ways quite different from ours in Sicily, I believe many of her insights are applicable to our analysis, and can help alleviate especially our potential discomfort with the flexibility of judgment rendered. Lanni explains that this flexibility, which in the Athenian case takes the form of jurors’ relative freedom from procedural strictures when rendering decisions, allows judgments to accord with changing norms more dynamically than if jurors or judges were constrained by elaborate rules that may prevent amicable or at least satisfactory resolutions on technical grounds.\textsuperscript{75} This focus on normativity within proceedings, especially at the stage of judgment, leads nicely to considerations of the expressive power of procedural arrangements and judgments. I do not wish to press this point too far, as we do not have enough information about the judgments and their impact on thought and conduct in the relevant communities to make the case that \textit{iudices} utilized these cases of disputed transfer of \textit{res} to communicate norms of, for instance, tenancy or contracting. Nevertheless, the practice of delegation and local resolution that Cicero describes does signify preference for a system of local adjudication based upon considerations of citizenship and invoking local practices.\textsuperscript{76}

Although the manner in which these cases affected local communities and their frequency are questions that remain to a large extent, I believe that this delegation to local institutions and at times individuals encourages that we see, as Lanni does for Athens, that norms were not just dictated from the political or bureaucratic center, but could arise more locally, or from below, as

\textsuperscript{74} Lanni (2016) esp. 20-25 and 29-33.

\textsuperscript{75} Lanni (2016) 150-63 and 193-97.

\textsuperscript{76} Cf. Lanni (2016) 79-85.
well.77 From this the understanding that both formal and informal institutions connect and interrelate in providing a rule of law follows naturally. We should be weary of specifying too narrowly how any set of institutions may relate and reinforce one another, and this interrelation on a more general or conceptual level does not yield reproducibility or predictability in terms of individual cases. Indeed, Lanni notes that the threat of legal action always hung over the powerful and politically active at Athens, or anyone with contentious rivals, and that the outcome was far from secure even if one could point to quite favorable statutes.78 Although the Sicilian trials that concern us are admittedly rather different in certain regards, the importance of the identity of one’s potential adversary and its institutional implications are similarly characteristic, as is the uncertainty of how disputes would be resolved.

A CHANGE IN PRIVATE PROCEDURE AT ROME

Let us move to the last question of this chapter, namely how the lex Rupilia may inform upon the development of litigation at Rome. We will begin with a brief description of the two procedures of civil litigation employed at Rome in the latter part of the second century BCE, namely the legis actiones, the oldest system of private litigation that required precise recitation of legal formulae in its first stage in order for a case to proceed to its second, and the formulary system, a similarly bifurcated system with the crucial difference that the first stage was less exacting and was open to a wider range of cases. We will then examine the development of the newer formulary system. Here we will pay particular attention to the passage of a lex Aebutia of uncertain date, which promoted the formulary system at the expense of the legis actiones. This

77 Lanni (2016) 29-33.

attention to the issues associated with the *lex Aebutia*, especially those issues that provide information as to the date at which it was passed, will put us in good stead to consider how legal practices at Rome may have been influenced by legal administration in the provinces. In order to do this, we will compare what was likely the procedure of the *lex Rupilia* to that of the *legis actiones* and that of the formulary system.

I will argue that the system created by the *lex Rupilia* resembles rather more closely the formulary system than that of the *legis actiones*, and will suggest that the Sicilian system is in fact based on the formulary system. Combined with consideration of the mechanism by which the window for the date of the *lex Aebutia* has been established, this similarity will allow me to argue two things: first, that the results of exporting the *legis actiones* from Rome, which was attempted in 149 BCE, were unsatisfactory and a decisive consideration leading to the passage of the *lex Aebutia*; and second, that the difference between what was tried in 149 BCE and 132/1 BCE with the *lex Rupilia*, both years in which legislation aimed at provincial issues and taking cue from the situation at Rome was passed, shows an intervening elevation of the formulary system at Rome in the form of the passage of the *lex Aebutia*. We cannot be certain of course, but I will argue that we can fix the window within which a law addressing domestic procedure was passed using two pieces of legislation directed at provincial settings, the first of which was crucial in the reconfiguration of the domestic regime.

We will start with the formulary system, and then move to the older *legis actiones*.79 When the formulary procedure, or *ordo iudiciorum*, is used at Rome, the two parties in the case appear before the urban praetor, who reviews the suit, and either approves a *iudex* whom the two

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79 The best introduction to these questions is Metzger (2013), on which I draw here. For a more exhaustive treatment of these distinctions and questions related to litigation more broadly, cf. Metzger (2005).
parties have chosen, or selects one from the album of acceptable citizens. This constitutes part of the stage in iure. The praetor then passes the case off to the iudex, who acts in the capacity of a private citizen throughout the proceedings, and prescribes his actions by specifying a formula explaining how he is to find if certain conditions are met. Determining the formula is the praetor’s most important task. The proceedings then move to the second phase, known as apud iudicem, where the iudex decides the outcome of the case.

Over time, the formulary system replaced, albeit not completely, the legis actio procedure for civil litigation. This older remedy remained in modest use until either two or three leges Iuliae of 17 BCE all but did away with the leges actiones. It should be said here that rather than enshrining the formulary system, these leges Iuliae promoted the newest of the civil procedures, the cognitio extraordinaria. Prosecution involving most of the leges actiones also comprised two stages, in iure and apud iudicem. The primary difference between the two procedures was the rigidity of the stage in iure. In this older system of the leges actiones, the parties were required to recite a prescribed formulation with extreme precision, which indicated the type of suit brought. Including the extrajudicial legis actio per pignoris capionem, five leges actiones were eventually available, and the selection of one for a particular trial was made according to specific grievance and the stage to which it had progressed. The number of possible forms increased over time,

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80 In place of a iudex, the praetor could also appoint an arbiter, or a group of at least three recuperatores. Because of their history, the use of recuperatores is particularly interesting. These figures originally assisted in the conclusion of international treaties, came then to be involved in cases between a Roman and a foreigner, and finally to consider cases between two Romans. This progression adds to our judgment that private cases between two Romans were influenced by developments in “international” cases. We will return to this and related questions in the final section of this chapter.

81 Gaius (4.31) tells us that the legis actio sacramento was used before the centumviral court, and in cases such as in iure cession and manumissio vindicta where rights were created or transferred.

82 In the legis actio per pignoris capionem, a creditor exacted a surety from the debtor’s property. The issue of self-reliance or extrajudicial action in Roman law has garnered a lot of attention. Cf. Metzger (2007) 194-95 for a discussion of the central example of vadimonium. For self-help in the Roman world more broadly, cf. Lintott (1968).
but we have no indication that the standards of acceptable recitation declined. Watson has called the veracity of this report into question, but Gaius famously states that one party’s use of “vites” where he should have said “arbores,” as required in the XII Tables, resulted in his losing the case.\textsuperscript{83} Such constraints were absent from the \textit{in iure} stage of the formulary procedure.

The \textit{legis actiones} originate in the period before the rise of the jurists, when the pontiffs controlled litigation and jurisprudence at Rome. There is some indication of an enduring link between the pontiffs and the \textit{legis actiones}. The name of the most broadly applicable and likely oldest of the five \textit{actiones}, the \textit{legis actio sacramento}, referred to the procedure’s origins: the two parties would swear an oath, and would wager some property, the \textit{sacramentum}, as security.\textsuperscript{84} Ihering saw the \textit{sacramentum} as inherently the domain of the pontiffs, and we read that even in Varro’s time the loser’s \textit{sacramentum} arrived in the \textit{aerarium} only through the pontiffs, and not through the jurists, the latter of whom very certainly did exist in 45 BCE.\textsuperscript{85}

Varro states at \textit{De lingua Latina} 5.180:

\begin{verbatim}
Si est ea pecunia quae in iudicium venit in litibus, sacramentum a sacro; qui petebat et qui instiabatur, de aliis rebus uterque quingenos aeris ad pontificem
\end{verbatim}

\textsuperscript{83} Watson (1995) 8. We read at Gai. 4.11: \textit{actiones quas in usu veterni legis actiones appellabuntur, vel ideo quod legibus proditae erant (quippe tunc edicta praetoris, quibus complures actiones introductae sunt, nondum in usu habebantur), vel ideo quia ipsarum legum verbis accommodatae erant, et ideo immutabiles proinde atque leges observabuntur. unde eum, qui de vitibus succisis ita egisset, ut in actione vites nominaret, responsum est rem perdidisse, quia debuisset arbores nominare, eo quod lex XII tabularum, ex qua de vitibus succisis actio competeteret, generaliter de arboribus succisis loqueretur. “The actions of the practice of older times were called \textit{legis actiones}, either because they were the creation of statutes (of course in those days the praetorian edicts, whereby a large number of actions have been introduced, were not yet in use), or because they were framed in the very words of statutes and were consequently treated as no less immutable than statutes. Hence it was held that a man who, when suing for the cutting down of his vines, had used the word ‘vines’, had lost his claim, because he ought to have said ‘trees’, seeing that the law of the Twelve Tables, on which his action for the cutting down of vines lay, spoke of cutting down trees in general.” Text and translation de Zulueta (1946). The case recalled by Gaius is not such an example, but perhaps we should consider changes within the Latin language as imposing additional difficulties upon proper recitation.

\textsuperscript{84} Watson (1995) 53.

\textsuperscript{85} Ihering (1887) I.297 ff.; cf. also Conqueret (1895) 85.
deponebant, de aliis rebus item certo alio legitimo numero actum; qui iudicio vicerat, suum sacramentum a sacro auferebat, victi ad aerarium redibat.

If it is that money which comes into court in lawsuits, it is called *sacramentum* ‘sacred deposit,’ from *sacrum* ‘sacred’: the plaintiff and the defendant each deposited with the pontifex five hundred copper *asses* for some kinds of cases, and for other kinds the trial was conducted likewise under a deposit of some other fixed amount specified by law; he who won the decision got back his deposit from the temple, but the loser’s deposit passed into the *aerarium*.86

We see here that the pontiffs continued to provide the logistics to support this particular action. Although the original religious nature of the oath seems not to have been an overriding concern in later processes of civil procedure that made use of the *sacramentum*, the conveyance of anything that was pledged as *sacramentum* was still within the purview of the pontiffs. We should therefore understand legal mechanisms that required or may have required the *sacramentum* to have incorporated a role for the pontiffs, through a perpetuation of the religious symbolism of the public treasury.87

Additionally, from Tixier’s debatable statement that the introduction and promotion of the formulary system signaled the pontiff’s retreat from public life, we might conclude that even while a juristic class was forming, the *legis actiones* had remained the purview of the pontiffs.88

Of course this can be no more than a suggestion, as the juristic control of the formulary system does not mean that they did not work within the system of the *legis actiones* as well, but the centuries-old expertise of the pontiffs in the realm of the *legis actiones* may have dissuaded the jurists from attempting to work within this procedure. I hasten to say that this may very well

86 Text and translation Kent (1938).

87 Cf. Noailles (1950) 275 for the oath in civil trials more broadly, and Lévy-Bruhl (1952) for the *sacramentum* in the *legis actiones*.

88 Tixier (1897) 61.
draw too strong a distinction between the jurists and the pontiffs for the late third to mid second century to bear. Nevertheless, we can posit a situation of coexistence of the two systems at least for a time, with the formulary system and the jurists along with it gaining in prominence as time went on.

The rigidity of the *legis actiones*, the importance of the pontiffs, and the fact that usually only Roman citizens could make use of the procedure, explain its diminution. This decline was a result of Rome’s expansion in the Mediterranean, and much consequent economic and social change within Roman society. For centuries Rome had had a presence within several Mediterranean systems beyond Latium, but Rome’s importance in the wider western Mediterranean, and in other regions, grew tremendously from the middle of the third century BCE. This was founded upon Rome’s rise to hegemonic position in central Italy in the later fourth century at the expense of Etruria and Magna Graecia. Alongside Rome’s introduction of coinage at this time, we see a wave of colonization with large effects on trade and agriculture, including Ostia in the mid fourth century, Antium in 338, Paestum in 273, and Cremonia in 219. The second treaty between Rome and Carthage dates to 352 or 348, and the commercial considerations of this treaty are unmistakable. Further, commercial connections with Naples and Magna Graecia more broadly are demonstrated by the *foedus* with Naples dated to 326. We should see the treaties with Tarentum and Rhodes in this light, and indeed the creation of the

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89 Two treatments of the work of repulican jurists, those of Frier (1985) and Schiavone (2012) are interested in the relation between pontiffs and the jurists, but address legal developments in later periods, as we have seen.

90 Cf. Astin (1990) for a sound description of Rome’s relative standing at the end of the First Punic War.

91 The build up at Ostia demonstrates the interest in overseas trade, and similarly the settlement at Antium may have been to target a haven for pirates. Cf. Morel (2007) 497.

posts of *duoviri navales* in 311/310 as well.\textsuperscript{93} Relatedly, professional bankers first appear in the Forum in the late fourth century, likely between 318 and 310.\textsuperscript{94} Important developments in infrastructure date to this period as well, including roads such as the Via Appia, which was constructed in 312; these roads radiated from Rome and bypassed many ancient and previously consequential cities for reasons of reordering the economy.\textsuperscript{95}

The access to agricultural land was crucial, as of course the Italian peninsula was and would remain an agrarian economy. The first instances of centuriation appear to the south and east of Rome from 340 to 290, indicating the economic importance attributed to conquered lands.\textsuperscript{96} This Roman system existed alongside and eventually replaced other systems of partition and cadastration in Magna Graecia and Etruria.\textsuperscript{97} A powerful indicator of the influence of the state, the *ager romanus* grew considerably during and after this period, from 5,525 square kilometers in 338 to 26,805 square kilometers in 264.\textsuperscript{98} Wars against the Gauls especially in the Po Valley from 236 to 218 opened new agricultural areas and trade routes. Morel and others also favor a backdating of many of the estates found in central Italy to the third century at least.\textsuperscript{99} Relatedly, this seems to be the period in which the model of what has been called “colonial” exploitation expanded, in which small local populations would produce, in addition to wheat,


\textsuperscript{94} Andreau (2001) 65.

\textsuperscript{95} Morel (2007) 499.

\textsuperscript{96} Morel (1997) 200.

\textsuperscript{97} For the system in Magna Graecia, Morel (2007) 499 adduces the bronze tablets of Heraclea in Lucania of our same period that mention the system in use (cf. also Greco (1996) 242), and for that in Etruria, Morel highlights the case of Volsinii (cf. Cristofani (1986) 119 and 136, and Scardigli (1991) 97).

\textsuperscript{98} Morel (2007) 498.

\textsuperscript{99} Morel (1997) 221.
raw materials that would be shipped to local centers of production. It is important to emphasize that although Romans were able to influence behavior in much of the Italian peninsula, this was not an entirely integrated space that looked solely or even primarily to Rome. Much of the Adriatic coast was still part of a regional network oriented toward the Balkan peninsula and much of southern Italy and Sicily did not concern themselves entirely with Rome, to name just two regions. Similarly, this was not an uninterrupted spread of Roman hegemony, as Rome’s seeming withdrawal into itself in the wake of the First Punic War indicates. Nevertheless, Rome’s reach and economic dominance of the Italian peninsula should be recognized. Morel and others have emphasized that Rome built upon and worked with previous institutions, especially in the Greek cities of southern Italy and Sicily, in its ascendency, but Rome became increasingly economically dominant in these areas and in Sardinia over time.

While new cities entered into the Roman sphere, and there exist several cases of a prominent or stalwart enemy being designated a *civitas sine suffragio* upon annexation, such as happened to the Sabines, the city of Rome itself was central in this world, and Roman citizenship remained concentrated in its vicinity. As we might expect, and as stated, Rome became a

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102 Cf. Morel (2007) 500-02 for the further evidence supplied by changes in amphorae and coinage.
104 For an account of the spread of citizenship from Rome and related questions, the canonical treatment remains Sherwin-White (1939) esp. Part I. Cf. also the helpful discussion by Humbert (1978). Such questions are not our primary focus here.
much more important administrative and economic center over this period. This uptick in trade also brought more people, that is, more non-Romans, to Rome, and the higher number of interactions surely translated into more disputes. Without doubt there developed mechanisms for resolving disputes at the early stages of this period of interest, but a seminal event was the creation of the peregrine praetor in 242 BCE. This magistrate was responsible for overseeing cases between foreigners, or between Romans and foreigners. Although no evidence as to the exact procedure before the peregrine praetor’s court during the Republic exists, we should think that if one of the two was employed, the formulary system was used rather than the legis actio procedure, seeing that at least one party always did not have Roman citizenship. In fact, Metzger and others have posited that the formulary system’s origins are perhaps to be found in the peregrine praetor’s court.


106 Cf. Brennan (2000) 85-89 for his discussion of the evidence for this date. Brennan does not find the textual sources sufficient on their own, but adduces the administrative circumstances that arose in the five or so years before 242, and the changes seen afterward, to argue in favor of this date. His analysis centers around defensive obligations in these years and the needs of provincial administration, which he thinks best explains the designation praetor inter peregrinos. The province of interest is Sicily.

107 This is because none of the peregrine praetor’s edict survives, nor do any commentaries on the edict. Nicholas (1962) 23 must be correct in surmising that the granting of universal Roman citizenship by the Constitutio Antoniniana of 212 CE made this body of knowledge obsolete, and ensured that it would not survive, given how Justinian’s compilers worked. For a discussion of the guiding principles of the compilers, cf. Pugsley (1995), and Honoré (2006) and (2010). Any such opinions must take account of the constitutio haec quae necessario, especially clause 2, of 13 February 528, which lays out the rationale for Justinian’s Codex. Central within these studies is the issue of interpolation. This has been a focus since the late 15th century, and from that time until the middle of the 20th century textual critics and other scholars saw and increasing amount of editorial interference; this trend culminated in the work of Fritz Schulz, whose Classical Roman Law (1951) clearly communicates this desire to resurrect the original texts of the jurists and some means of doing so (cf. the useful reviews of Schulz by Kaser (1952) and Pharr (1953)). Since the middle of the twentieth century the pendulum has swung back in the other direction (cf. Honoré (1981)).

Gai. 4.31 provides a window onto the peregrine praetor’s court during his time, but any characteristic features it might have previously had seem to have been lost.

Whether or not the peregrine praetor’s court gave rise to the formulary system, the creation of this magistracy was a crucial step in the development of a legal administration beyond the realm of the pontiffs. The pontiffs were not required here because the forms used were not those that created a religious oath, or generated a *sacramentum* that, when involving Roman citizens, required pontifical oversight and administration. Rather, the foreigners litigating their disputes in the peregrine praetor’s court would not have been in the cultural position to produce such a requirement within the conservative and highly localized world of ancient religion. This is to say, simply, that foreigners were not Romans, and would not have been able to act as Romans, religiously speaking. Conversely, when we find a two-stage process in Sicily, such as that resulting from the *lex Rupilia*, if one of the two domestic systems has been exported it must be the formulary system, as the pontiffs who were indispensable within the *legis actio* procedure were not to be found in Sicily and would have had no standing there if brought from Rome.

This step in the growing marginalization of the pontiffs should also be considered in the context of several prior events within the law.\(^\text{109}\) The first of these events is the supposed publication of the *ius Flavianum* around 300 BCE. This was a likely apocryphal collection of the *legis actiones*, which was reportedly published by Gnaeus Flavius, the freedman and secretary of Ap. Claudius Caecus.\(^\text{110}\) One does not have to believe that this is the single event that finally ended the pontiffs’ exclusive control of the forms and of the calendar specifying when legal

\(^{109}\) The XII Tables could be included as the first of these events that eroded the pontiffs’ control of legal knowledge, but the fact that the interpretation of this code was rather quickly monopolized by the pontifical colleges prevented the changes that interest us here. Cf. Schiavone (2012) 105-107.

\(^{110}\) Cf. Wolff (1951) 94 and Watson (1991) 155. These treatments rely upon *Dig*. 1.2.2.7; Livy 10.46.5; *Cic*. *Att*. 6.1.8 and *De or*. 1.41.186.
action was permissible, which situation once existed according to Cicero.\footnote{Cic. Mur. 11-12, cf. also Plin. HN 33.6.17. The calendar was also supposedly published by Flavius.} This publication, however, or the more long-term, gradual dissemination of the \textit{legis actiones} for which it is a shorthand, threatened the pontiffs’ control of civil procedure. We should consider in the same vein Ti. Coruncanius, the first plebeian elected \textit{pontifex maximus} in 254 BCE, who, according to Pomponius, initiated the practice at Rome of professing the law publicly.\footnote{Dig. 1.2.2.35.} How exactly this practice changed the legal landscape of his time is unclear, but Schiavone in particular has been quick to note the connection between this action and Coruncanius’ election as the first plebeian pontifex maximus: Schiavone’s emphasis is the discrepancy between this practice and archaic ideas about the control of \textit{ius}.\footnote{Schiavone (2012) 118-119.} By the middle of the third century BCE plebeians had held magistracies within the more familiar \textit{cursus honorum}, whenever one imagines it was consolidated, for some time, but as Cornell, Flower, and others have judged, this period seems to have been that when religious offices ceased to be the purview of the patriciate almost exclusively.\footnote{Cornell (1995) 342. Flower (2011) 51 argues persuasively that the Struggle of the Orders moved to the priesthoods following the \textit{lex Genucia} of 342 BCE, which stipulated that one consul every year be plebeian; we should therefore understand Coruncanius’ election as the result of a long process.} We must consider these developments, namely the growing challenge by forces within Roman society to the arcane nature of the administration of law, and a trend toward increasing professionalization within the Hellenistic Mediterranean more broadly, in our analysis of the period during which the formulary system developed.\footnote{This trend can be seen in government bureaucracies, medicine, and military science, to name but three other areas. There were certainly professionals before the Hellenistic period, but the phenomenon intensified during this time.}
This brings us to the question of the connection between the *lex Rupilia* and the history of the formulary system. Here a chief concern of ours will be a piece of legislation, a *lex Aebutia* of uncertain date, which was central within this system’s development at the expense of the *legis actiones*, as mentioned above. We will look first to Girard, and then to those who responded to him. The *lex Rupilia* has not yet been brought to bear upon this debate, and we will consider how it might help us to date the *lex Aebutia*.\(^{116}\) In doing so we will display how legal circumstances in the provinces may be interrelated with legal change at Rome.

The formulary procedure existed before the passage of the *lex Aebutia*, as we have seen, but this law either fully legitimated within the *ius civile* agreements reached between citizens through the formulary system, or strengthened this system vis-à-vis the *legis actiones* by adding to the number of formulae that were efficacious in this newer procedure. Both of these possibilities deserve explanation. To take the latter first, a potential increase in the number of formulae did not mean that there were more exact phrases that would prompt the praetor to grant an action, but rather that there were more situations in which the praetor would so act; his discretion in deciding how to allow the case to proceed was enhanced. Turning to the former, Gaius tells us that traditionally three criteria had to be satisfied for a decision to qualify as a *iudicium legitimum*.\(^{117}\) These criteria were that the judgment take place within the first mile-marker outside the city, that the two parties be Roman citizens, and that a single *iudex* preside over the case. The first and second of these concerns were rendered obsolete eventually, and the third was dealt a blow by the rise of boards of *recuperatores* and the centumviral court in the late Republic, both of which concerned themselves with issues that would receive fully legitimate

\(^{116}\) On my understanding, the *lex Aebutia* would represent the establishment of an approximate consistency between two sources of law, the *ius honorarium* and statutory law. Legislation often lags behind changes in legal practice, but this could be overcome in Roman law in some regards through the *ius honorarium*, as we have discussed.

\(^{117}\) Gai. 4.107-109.
judgments. My preference would be to see the *lex Aebutia* as increasing the number of types of efficacious formulae, which already produced results that were fully legitimate within the *ius civile*, or perhaps to see the *lex Aebutia* as doing this and legitimizing them within the *ius civile*.

The *lex Rupilia* does not inform on just what the *lex Aebutia* did, but it can aid in dating this statute. Much ink has been spilt over the date of the *lex Aebutia*. Girard thought it was passed between 149 and 126 BCE. His *terminus post quem* derives from the *lex Calpurnia de repetundis* of 149. This law made it possible for provincials who claimed to have been extorted by Roman governors to bring an action by the *legis actio sacramento* to recover their property. It is Girard’s position that the statute would not have made use of this mechanism if another had been available. His *terminus ante quem* comes from his judgment that only with the passage of the *lex Aebutia* did the praetor gain many of the powers at his disposal when overseeing a civil case, powers such as the *denegatio actionis*, and that the record of a case dating to 126 indicates the exercise of this prerogative, and therefore the intervening passage of the *lex Aebutia*.

Many have taken issue with Girard’s methods of dating, but most do not find fault with his window. Mitteis is willing to say only that the *lex Aebutia* dates to after the very beginning of the second century, when Sextus Aelius, consul in 198, published his *Tripertita*, as this treatise is the product of an environment in which the *legis actiones* were the only system that produced *iudicia legitima*. Indeed he thinks that the *lex Aebutia* must have been passed at least several decades after the early second century, as he sees at work a larger “*formalistiche

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118 Cf. Girard (1929) 1055-1061 for his full argument.

119 Mitteis (1908) 52 n. 30. Clearly Mitteis is of the opinion that the *lex Aebutia* legitimated decisions reached through the formulary procedure within the *ius civile*. He (1908) 48 also judges that the description of contract proceedings in Cato’s *De agricultura* indicates that the formulary procedure was not available at the time of composition, which would require that the *lex Aebutia* date to after about 160 BCE. We are of course arguing from silence here, and Cato may have been conservative in his choice of legal remedy, as he was in so much else.
“Rechtsanschauung” during the late Republic and early Empire that he thinks would not have been present if the *legis actiones* had been abandoned at or before the beginning of the second century.\textsuperscript{120} If we have here something of a consensus on Girard’s *post quem*, Jolowicz and Nicholas provide additional arguments in favor of his *ante quem*.\textsuperscript{121} They posit that the *lex Aebutia* was passed significantly earlier than the two or three *leges Iuliae* of perhaps 17 BCE, which further strengthened the formulary system to the detriment of the *legis actiones*.\textsuperscript{122} They reason that if these three or four laws had been passed in rapid succession, later sources would have mentioned them together, and if the *lex Aebutia* dated to some point during Cicero’s lifetime, he would have referred to its passage. We are arguing from two silences here, but both deserve consideration, especially the former. Additionally, several passages from elsewhere in Cicero’s rhetorical output make clear that the formulary procedure was used widely in his day, including his statement in the *pro Roscio Comoedo*, *sunt formulae de omnibus rebus constitutae*.\textsuperscript{123} Indeed Greenidge characterizes the formulary system as predominant during Cicero’s time without hesitation, and the facts of the *pro Rosco Comoedo* indicate that the system was certainly open to a case involving two citizens as well.\textsuperscript{124} We should set alongside

\textsuperscript{120} Mitteis (1908) 52 n. 30. To give a specific example, he thinks that the two forms of procedure under interdict, *per sponsonem* and *per formulam arbitrariam*, would not have been as they are described by Gaius at 4.161-170 had the formulary system come to dominate in the first years of the second century; cf. Mitteis (1908) 48-49. Two other scholars who deserve mention are Kaser (1952) 1.46ff., who favors the first half of the second century as the window for the *lex Aebutia*, and Pugliese (1962) 2.1.58, who thinks it was passed in the last decades of the second century.

\textsuperscript{121} Jolowicz and Nicholas (1972) 219.

\textsuperscript{122} Cf. Jolowicz (1952) 266 n. 4 for his discussion of the number of *leges Iuliae* concerned with this issue passed at that time.

\textsuperscript{123} 8.24.

\textsuperscript{124} Greenidge (1901) 166. Wlassak (1907) 28.110 n. 2, also working from Cicero’s orations, thinks that the window for the passage of the *lex Aebutia* extends from Sextus Aelius to sometime before the *pro Flacco* of 59 BCE, in which (21.50) Cicero says that language pertaining to the selling of slaves in Asia was present within the formula used in the case; this could not have been present in the language of a *legis actio*.  

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this consideration one final piece of evidence, the *lex Latina Tabulae Bantinae*, a bronze tablet from a small Lucanian town preserving two legal texts.\(^{125}\) The legal text in Latin, as opposed to the one in Oscan, dates probably at the latest to 118 BCE, and shows that the stages and many of the characteristics of the formulary procedure as we come to know it were certainly in use by that time.\(^{126}\)

So both of Girard’s *termini*, often independently of each other, have generally been endorsed by other scholars. Let us look closely at the two dates, 149 and 126 BCE, and Girard’s reasons for them, with the goal of narrowing the window a bit more. As mentioned, Girard takes 149 as his *post quem* because the *lex Calpurnia de repetundis* of that year clearly employs the *legis actio sacramento*, the use of which it allows to provincials suing to recover property seized from them, and Girard thinks that this procedure would not have been that extended if another means existed in 149.\(^{127}\) Richardson and Lintott agree with Girard on this point.\(^{128}\) They must be right, as we see from the *lex Acilia de repetundis* of 123 BCE that another system that incorporated *nominis delatio*, a mechanism foreign to the *legis actio* procedure, was in this later instance preferred.\(^{129}\) Girard’s *ante quem* is less convincing. This derives from his conception that the praetor could not shape the proceedings at all before the passage of the *lex Aebutia*, and as Girard sees for the first time such influence in a case dating to 126, he takes this as his cut-

\(^{125}\) For a discussion of the *Tabula Bantina*, cf. Carlos Sánchez-Moreno Ellart (2012); the window of between 133 and 118 was Mommsen’s.

\(^{126}\) Cf. esp. ll. 9-13. The text can be found at Bruns (1909) 1.54.

\(^{127}\) Girard (1929) 1.116-117. There are several famous examples of legal workarounds or fictions in Roman law. One is the granting of an *actio utilis* against a person who had undergone *capitis diminutio* through the fraudulent use of *coemptio* or *adrogatio* to escape debts, where the remedy treated this person as not having undergone *capitis diminutio*. For the structure of the relevant formula, cf. Gai. 4.34.


\(^{129}\) Cf. ll. 23 and 73-75 of the *lex Acilia*.
As Jolowicz convincingly argues, the idea that the praetor had so little control in the cases before him prior to the passage of the law cannot be correct, as the change in the praetor’s position from relatively powerless under the *legis actiones* to having almost complete discretion as to the rules of law under the formulary procedure would be rather odd. Almost certainly the *lex Aebutia* legitimized a condoned or accepted practice of the praetor, and it may have afforded him greater control and freedom than he had under the *legis actio* procedure. Indeed 123, when the *lex Acilia* was passed, is a better *terminus ante quem*.

But perhaps the *lex Rupilia* can help us to be more precise as to the date of the *lex Aebutia*. This was not a law designed specifically for *repetundae* cases, but the *lex Rupilia* is a mechanism by which non-Romans could bring actions against Romans through the two stages *in iure* and *apud iudicem*. Several aspects of the law make clear that the formulary procedure and not the *legis actio* procedure is the point of departure for the *lex Rupilia*. First, there would not have been competent pontiffs present for the stage *in iure*, as Sicilian priests would not have had the same legal standing as Roman pontiffs, whose relation to *ius* had developed over centuries. Their position as something akin to guarantors of the *legis actiones* would have been fabricated and superficial. We must flag that the situation in 132/1 as different from that of 149 because the former takes place in the provinces. Second, the praetor may very well have had to be more active in reviewing a Sicilian case in order to make a proposed course of action agreeable to a Roman and a Sicilian, who may have had very different legal expectations. The activity here

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130 Girard (1929) 1.141. In this case, which Cicero recounts at *De or.* 1.36.166, *denegare actionem* is open to the praetor.

131 Jolowicz (1952) 229-230.

132 It is hard to imagine a situation of praetorial initiative such as that which Cicero describes in the *pro Quinctio* (9), a text that dates to 81 BCE, except perhaps with much artistic license taken, as permissible under the *legis actiones*, especially his requiring the defendant to speak first; but on the other hand, by virtue of his having *imperium*, the praetor cannot have been a powerless figure when the *legis actiones* were employed.
described is more akin to the formulary system than to the *legis actiones*. Finally, if a Roman sued a Sicilian, the praetor would give the case to a Sicilian *iudex*, which would not have been possible under the *legis actio* procedure.

What we can therefore posit is a development from the *lex Calpurnia de repetundis* of 149 through the passage of the *lex Aebutia* to the *lex Rupilia* of 132/1. In 149 the *lex Calpurnia* first exposed the shortcomings of extending the *legis actio* procedure to include provincials, and in 132/1 a more flexible system was exported to a provincial context. An important change took place in the interim. We should not think that the formulary procedure in Sicily looked exactly as it did in Rome. Of course, in a case arising between two citizens at Rome there would be no need to consider the ramifications of parties differing in citizenship, and the history of the law in Sicily was certainly sufficiently different from that at Rome to counsel against our imagining the promotion of the formulary system in the province to have effected the same change in the legal landscape. The conclusion should be that testing the *legis actiones* though the incorporation of foreigners demonstrated the shortcomings of the system, such as the forcing of claims into the language of particular *legis actiones*, the use of what must have occasionally been troublesome archaic Latin phrases, and the oversight of pontiffs who were in many respects limited jurisprudentially as well as geographically; perhaps these shortcomings had been visible or just below the surface at Rome for some time. The attempt to expand the *legis actiones* in response to a necessity arising in the provinces must have been an important factor in the passing of the *lex Aebutia*, as the expansion highlighted some of these crucial shortcomings. The new procedure ushered in by the *lex Aebutia* was more successful not least because it could be fitted into a foreign context.
CONCLUSION

The particulars of the *lex Rupilia* strongly suggest an intervening law governing procedure at Rome, and this case shows that the history of provincial administration is an indispensable component of legal change at the Roman center. Here a new system of private procedure was deemed the appropriate administrative response to a tumultuous slave uprising in the province. It is likely that addressing the underlying problems inherent in the system of agriculture in place was not feasible from a political economy standpoint, as such a reorganization would have been highly disruptive of the upper echelons of Roman society. We saw how the conditions that precipitated this revolt arose out of an interconnected Hellenistic world, and indeed how the political forms of other Hellenistic polities made themselves known during the First Servile War; our impression of the broader Hellenistic nature of this conflict is dependent in no small part upon Diodorus, our main source for the war. Eunus’ did not meet Diodorus’ standards of kingly conduct, but his use of Seleucid royal models was meant to consolidate political authority among his followers. There is nothing to suggest that such posturing led Roman authorities to conceive of this as a foreign war. To this point, we might posit that Romans may not have granted the conflict sufficient normative force to consider changing the underlying system of agricultural production and indeed political economy: we should not think that the Romans saw the servile wars, and certainly not the first of such conflicts,
as an indictment of the socio-economic system in place by anyone other than the slaves who rebelled.

Developments in provincial legal landscapes are an important window onto changing conceptions of law, and demonstrate that the competency of various Roman administrative actors and systems was thought to apply to the provinces as readily as to the center. In this instance, we see that the extension of a legal remedy to the provinces, in the form of the *lex Calpurnia de repetundis* of 149 BCE, underscored the geographical and cultural limitations of the broader system of private procedure known as the *legis actiones*. These limitations had likely begun to emerge as more economic activity had taken place at Rome from the fourth century onwards. This activity too had been an outgrowth of Rome’s imperial activity, and led to the extension of the purview of the *recuperatores*, as we have seen, and indeed to the creation of the office of the peregrine praetor. It was perhaps, and we will never know for certain, in the court of the peregrine praetor that the formulary system first took form. This form was used increasingly by Romans as well as foreigners, and when the shortcomings of the *legis actiones* were finally addressed legislatively, the *lex Aebutia* drew upon the other system of private procedure in use. Again, we understand the extension of the *legis actiones* to the provinces as a crucial step toward the passage of the *lex Aebutia*.

In the decision to enhance one of the systems of private procedure in use at Rome without closing off the other, we have a window onto the development of law at Rome. The existence of several procedures within the same administrative structure is entirely consistent with Roman practice elsewhere in the empire. Rather than legislating the end of the *legis actiones*, or of various procedures in Sicily, the *lex Aebutia* allowed for their continuation, but promoted the more adaptable formulary system. The *legis actiones* faded gradually over the course of centuries,
as indeed other procedural mechanisms in Sicily seem to have done. For this reason, an appreciation of desuetude is necessary for any account of change in a legal system that relied upon statute as much as did Rome’s. The Roman jurists were hardly oblivious to socio-political change, and the classical jurists recognize desuetude as a powerful force. One imagines that the Roman pontiffs similarly took note of changes in social behavior and legal preferences. The legal tradition was of course able to react to political, social, and economic circumstance. To the extent, however, that change of this sort, as opposed to juristic theorization detached from such phenomena, prompted change in the law, we must see empire as the prime force behind legal development. This investigation into the means by which res was transferred, and by which other legal disputes were adjudicated in Sicily, puts us in good stead to consider how other aspects of the Roman law of res were determined by the experience of acquiring and governing an empire.
Chapter 2

Casualties of Empire?

The Roman publicani during the early Principate and the development of contract law

INTRODUCTION

Crucial to the functioning of any state is the collection of taxes. Indeed, as Brélaz states: “[I]aw and order are, together with taxation, the main attributes of sovereignty and the most visible demonstrations of the power of an authority.” Even more fundamental than any projection of authority, governmental revenue underpins and makes possible all state operations. Throughout much of Roman history, the collection of taxes was performed by the societates publicanorum, the private organizations whose individual members were called publicani. In addition to the collection of taxes, the societates carried out several other tasks indispensable to the functioning of the Roman state, including the transportation of men and materiel, the construction of temples and roads, and the operations of mines and other extractive industries. The prominence of the societates in public affairs, and the fact that the corporate structures of individual societates proved quite ephemeral, ensured that their collective fortunes vacillated dramatically over the centuries of their operation. The importance of the duties that the societates carried out counsels strongly that they enter into the economic, legal, and political history of any period in which they were active. Indeed this chapter will show that the activities of the societates publicanorum were crucial to the development of the Roman law of contract. This

chapter provides, therefore, another indication of legal change driven by the administration of empire, rather than primarily by juristic thought.

In order to demonstrate this, we will examine their collective history. The prevailing narrative of their collective fortunes during our period, however, has mischaracterized both the nature of their operations, and the time at which they ceased to be of prime importance to the Roman state. This period is of course the late Republic and the beginning of the Principate, and the two mistaken claims that are of interest to us are, first, that the publicani were funded much as were the joint-stock companies of early modern Europe, with there even possibly being a designated place in the Roman Forum where their shares were traded, and, second, that the tumult of the civil wars of the first century BCE dealt the publicani a fatal blow, such that their operations were severely limited and they were barely relevant by the first years of the Principate. To put it another way, these mischaracterizations present the publicani both as having developed at their height a complexity that the evidence will not support, and as having been depressed by civil war to a depth also at odds with later information.

This chapter seeks initially to correct these mischaracterizations by reviewing the ancient evidence for the former assertion about the nature of the operations of the publicani at the height of their power in the late Republican period, and then by introducing a new piece of evidence that addresses the latter claim by proving the power of the publicani at least a century after the civil wars that were supposed to have crippled them. This evidence is the inscription called by modern scholars the Customs law of Asia, and it has not been considered from the point of view of the history of these companies. This analysis is predicated upon an understanding of the scale and nature of the operations of the publicani, including their role in political events, during earlier periods of the Republic. We will therefore review the predominant account of the
publicani during these earlier years, which is trustworthy in most aspects of its analysis and conclusions. We will see that the publicani were very powerful when their operations first emerged in detail in the literary record during the Second Punic War, and that they likely had been consequential already for centuries by that point. We will see how their power grew during much of the middle Republic, and we will discuss several examples illustrative of their reach; these examples will also make clear that they could drive policy in unexpected and profound ways. At the end of the second century BCE their power was still considerable and likely growing, but they did suffer setbacks during the period of Sulla’s domination. This leads us to the perennial question of the collective identity of the publicani, and we will examine how their membership corresponds to familiar social descriptors at Rome.

When our analysis enters the last decades of the Republic, we will come to the former of our mischaracterizations. We will weigh the small amount of evidence for the claims that the societates were funded like joint-stock companies, meaning that their funds were supplied by shareholders who would buy and sell their stakes in the societas; that shares were readily transferred among much of the population; and, amazingly, that there was an institutionalized exchange on which these shares were bought and sold. This part of our analysis will reduce, in our understanding, the heights of the influence and complexity of their operations during the late Republic. The other aspect of our correction will be to prove that they remained powerful in much of their endeavors later than the prevailing narrative has allowed. Although the civil wars of the first century BCE, as well as the changes to Roman society brought by Augustus’ rise and consolidation of power, were indeed damaging to their fortunes, the publicani retained influence deep into the Julio-Claudian period and likely beyond. This is confirmed by the Customs law of Asia, an inscription dating to 62 CE that specifies the conditions under which certain taxes were
to be collected in the province, and which has not been considered from the point of view of the long-term history of the publicani. This fascinating text is a collection of regulations, some of which date to the founding of the Roman province of Asia, when Roman administrators on occasion decided to preserve practices even older. It is therefore a complex document that gestures toward the different legislative and administrative situations that existed over the period. This text also sheds light on the power of the publicani at the time of its production; its clauses grant them the use of state resources and the sole authorization to collect customs dues, and indicate quite clearly the large sums of money under their control. Such privileges and financial resources indicate the political clout these individuals and their organizations possessed. The details of the text’s composition and its provisions allow us also to examine the regulatory regime and the contracting environment within which the societates operated, which was inherently international and subject to popular as well as imperial demands in interesting ways. We do not have evidence for their continued operation much beyond this period, and we will describe their eventual demise. The subsequent provision of their services by organs of the state speaks fascinatingly to changing conceptions of the proper place of the line dividing the public and the private in large-scale societal enterprises.

Taken together, these two correctives make the history of the publicani somewhat more consistent, and they allow us to stress that the highs of the late Republic were not so stratospheric nor the lows following the civil wars at the end of that period so abysmal. The implication of the second vertical adjustment, so to speak, was that the publicani continued on into later years as we have just said. The consequences of this sustained importance are numerous, but we will focus on the two that pertain most immediately to the major themes of this dissertation. The first is that for much of the first century at least of the classical period of Roman law, roughly from
the principate of Augustus to the death of Severus Alexander, the publicani were an important force within commerce, and many of the developments in legal thought concerning contracting arose in a context of their success; there were developments in what we come to call Roman contract law before the classical period of Roman law as well, but as in most areas of the law, the early Empire was a time of sustained innovation. We will examine important cases from this period that were considered by the jurists and that may indicate the power of the publicani. These cases are in addition to Dig. 39.4, which takes as its heading de publicanis et vectigalibus et commissis. This chapter thereby contributes to our investigation into the importance of empire for the development of the rules governing res by demonstrating the centrality of the publicani, who were imperial agents, to the Roman law of contract. The facts that the actions of the publicani spurred juristic writing and that they were indispensable to the background against which the jurists worked have not been adequately acknowledged. This chapter also nuances our understanding of the history of the jurists by providing further detail as to the commercial and political contexts in which much of their work was performed. We therefore argue against the idea that the work of a self-referential juristic class was the primary driver of the development of the rules governing Roman res.

The second consequence concerns political and corporate theory. It is commonly said that Roman law did not develop a notion of corporate personhood such as have other legal systems.\textsuperscript{134} While we cannot adduce any texts that would demonstrate explicitly that such a conception existed, I believe that the terms of this denial have to some extent obscured important aspects of Roman political thought, especially during the Principate. These aspects stem from the increasingly prevalent tendency to characterize the Roman state in anthropomorphized terms.

\textsuperscript{134} For one example, cf. Maitland (1902) xviii, where he remarks that “there is no text which directly calls the universitas a persona, and still less any that calls it persona ficta.” For interesting discussions, cf. Dewey (1926) and Duff (1938).
Such characterization derives from notions that the emperor embodied the state, which notions were influenced by, inter alia, the trumpeting of tribuniciant power by the emperors, and which increased in potency over the course of the Principate. We will see that this tendency implied the extension of a similar anthropomorphism to the parties contracting with the state. In regard to the publicani, this resulted in a heightening of the importance of the magister and the employment of a cognitor: by this means, the societas could similarly be represented by one individual, and could be conceived in something approaching human terms. The correction of this timeline and the conclusions that result allow us to re-evaluate a crucial aspect of exchange and administration at Rome, not only from the point of view of the impact of the publicani upon imperial operations or policy, but also from the standpoint of their role within legal development and political thought. The importance of this last focus of ours cannot be overstated considering the centrality of such relations in later international thought, especially in the areas of interstate interaction and the relations between states and corporations.

THE PUBLICANI DURING THE MIDDLE AND LATE REPUBLIC

We can infer the presence of the publicani, engaged in much more modest endeavors than those of later periods, as far back as the regal period, if we are inclined to believe tradition. The contracts with which we are concerned can be divided into two types. The first are those for the collection of revenues, and the second those for the provision of military supplies or religious services, called ultro tributa.\textsuperscript{135} The histories of the two types of contracts are related but not identical, and we begin with second type. Badian states that if we believe, following Varro, that

\footnotesize{\textsuperscript{135} One might object that the classification ultro tributa is strange if in fact this type of contract is the older. I will expand on this below, but my contention is that this classification came later, likely with the prohibition on senatorial participation in those contracts for the collection of revenue.}
king Servius Tullius instituted the centuriate assembly, then the contract for the summoning of the assembly similarly dates to his reign. Even if we do not wish to push the date back quite as far, the institution can likely be located at least in the early Republic. Dionysius of Halicarnassus discusses public works also in the context of the early Republic, stating that the contracts for temples to Ceres, Liber, and Libera were let in 493 BCE by A. Postumius Albus Regillensis. Livy similarly mentions the letting of contracts for the construction of temples, including one to Juno Regina in 396 BCE, and one to Salus, vowed in 307/6 and resuscitated in 303/2 BCE. His descriptions are short, but indicate that this practice of letting contracts for temple building was somewhat routinized. Livy also mentions other contracts for more secular public construction, including for a public building, a villa publica, on the Campus Martius in 436/5, and in 377 for the rebuilding of a section of the city wall damaged during the Gallic invasion. In each of these sections the fact of the contract is not Livy’s focus, and so we cannot gain much of a picture as to the regularity of the practice, except to say that the matter-of-fact manner in which he discusses them suggests their regularity.

Filling out the picture of the public works, again of a sacred nature, which were likely performed by the publicani, Badian discusses the contract for the feeding of the sacred geese on the Capitoline hill, which the censors of the late Republic were required to let. These geese had

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136 Varro Ling. 6.92. Badian (1972) 16. As will become clear, Badian remains the authoritative source on the history of the publicani during the Republic, and his account is trustworthy.

137 Staveley (1956) 75f. prefers a regal date. Sumner (1970) 77f. does not think that the form of the institution known during the middle Republic dates to the regal or early republican period, but thinks that there existed an earlier form.

138 Ant. Rom. 6.17.2

139 For the temple to Juno Regina, cf. 5.23.7. For the vow to build the temple to Salus, cf. 9.43.25, and for its resuscitation cf 10.1.9.

140 For the villa publica, cf. 4.22.7, and for the section of the city wall, cf. 6.32.1.
sounded the alarm during the Gallic invasion of Rome in 390 or 387 BCE, specifically when Brennus’ men attempted to scale the Capitoline to attack the Romans barricaded on its height. These geese, which were sacred to Juno, were of course in place at the time, and had been for some years, so the contract for their feeding goes back at least to the date of the invasion, if we believe the story. Although there are very few references in later authors to contracts for public service, especially for the construction of temples and the performance of specific civic and religious tasks, we can plausibly infer that they went to groups of private individuals at least by the fourth century.141 The question of their organization, however, is far more elusive.

When we move to the earliest event in which the conduct of the publicani is given extensive treatment, we see that the societates had amassed power and were quite well organized by the middle Republic. The event dates to 215 BCE, when Rome had suffered a series of defeats during the Second Punic War. In this year, with the Roman war effort dangerously imperiled, Q. Fulvius Flaccus, the praetor, was authorized to call upon private citizens for loans and the provision of crucial military supplies.142 Livy relates this episode at 23.48.10–49.3. The praetor asked explicitly that those who had become wealthy by collecting taxes come forward to help the state that had allowed them to prosper. They were requested to extend loans to the state and to provide what was needed by the army in Spain on the condition of being paid as soon as there was money in the treasury, and the praetor announced the day on which he would let the contract for the supply of grain and clothing for the army. On the appointed day, three companies of

141 I follow Badian (1972) 16 in thinking as much because evidence for any other mechanism, including that the work was carried out by prominent families, is completely lacking.

142 As stated above, such provisioning had likely been carried out by the publicani for some time by the late third century, but we do not have testimony of specific instances. Before the Marian reforms of 107 BCE, Roman soldiers were required to provide their own arms and armor, so the contracts would not have been for weapons; it is difficult to gain a picture of what services would have been regularly contracted, especially considering that the censors let the other public contracts.
nineteen men came forward and agreed to provide what was requested on two conditions: first, that they be exempted from military service while collecting revenue for the state; and second, that the state bear the cost of any losses during shipment, which might occur as a result of attacks or of storms. The Roman authorities were hardly in a strong negotiating position, and acquiesced to the demands of the publicani. Although we certainly should not infer from this case that the publicani were able to elicit what they desired in all negotiations, we should recognize that they had considerable resources at their disposal, as suggested by the fact that they were able to supply such provisions presumably on short notice, and that they were organized already into groups that could expand their operations as opportunities such as this one presented themselves.\textsuperscript{143} Livy suggests that perhaps the societates even held back from driving the hardest bargain possible, noting the commitment to the state that these men showed: \textit{ii mores eaque caritas patriae pro omnes ordines velut tenore uno}.\textsuperscript{144}

This was not the end of the affair, however, and Badian posits that Livy was not aware of what was to follow when he lauded the actions of the societates in these terms.\textsuperscript{145} It came to light two years after these contracts were awarded that two of the men, M. Postumius Pyrgensis and T. Pomponius Veientanus, had defrauded the state by loading worthless goods onto unseaworthy ships, and then lodging claims for the insurance money when the ships sank. Livy relates the events of 213/2 BCE at 25.3.9-4.11. At first they managed to escape any punishment that the senate might have meted out, because the senators realized that the societates were indispensable

\textsuperscript{143} The means by which they supplied the grain is also unclear. Presumably they both owned farms and had connections to other farmers and grain traders.

\textsuperscript{144} 23.49.3.

\textsuperscript{145} Badian (1972) 17. Badian thinks Livy wrote as he processed his sources and did not read far ahead of the point in his narrative with which he was concerned. Badian draws our attention to Walsh (1961) 141ff., where Livy’s inconsistencies are addressed. The curiously positive review at 23.49.3 is not the focus of our study.
to the war effort. The people were less willing to overlook the offense, a fact noticed by two tribunes, S. and L. Carvilius, who proposed a fine of two hundred thousand *asses* for Postumius and fixed a day on which to vote on the matter. On the appointed day, so many citizens gathered around that the Capitol to participate in the *comitia tributa* that they could scarcely be accommodated. The pressure to find against Postumius was so intense that it became clear that he would only avoid losing the case if another tribune, C. Servilius Casca, an associate and relation, whom Livy presents as *propinquus cognatusque*, of Postumius, disbanded the gathering.

After the witnesses came forward, the tribunes prosecuting the case told the people to withdraw from the center of the assembly, and the *sitella* was produced so that the tribes could draw lots in order to determine which would vote first. The *publicani* pressured Servilius to stop the proceedings, but as he was sitting on the edge of the platform close to the people, and was wracked with both fear and shame, he did nothing. The *publicani* therefore formed a wedge and rushed into the area from which the people had just moved in order to disturb the proceedings; they tangled with the people and with the tribunes. Seeing this, the consul Q. Fulvius Flaccus told the tribunes that this was an insult to their position, and that the situation would become seditious if they did not disband the assembly.

The matter then came before the senate for a second time. When the consuls proposed that the issue of the disruption of the assembly be considered, they noted that M. Furius Camillus, the decemvirs, and many other men of the highest regard had allowed themselves to be judged by the people. Postumius, on the other hand, had not allowed the people to vote, but rather had broken up an assembly and thereby had rendered ineffectual the authority of the tribunes. To top it off, he had done so by arraying his supporters in military formation and dividing the tribunes from the people at the moment the voting procedure was to begin. The consuls were careful to
state that it was only the considered decision to disband the assembly that prevented violence, and that the magistrates did this not because Postumius’ agents had taken control of the situation, but because, from a position of strength and foresight as the consuls would have it, they recognized that the avoidance of violence was the primary concern, seeing that Postumius and his supporters could be held to account later. These statements found support, and the senate passed a decree that Postumius’ conduct was harmful to the state and might indeed prefigure similar action in the future. At this point the two Carvilii decided not to pursue the fine but rather to bring an action for capital punishment against Postumius, and they set a day for his trial and ordered that if he did not give bail he should be brought to prison. Postumius gave bail but did not appear, and he is not heard of again. On the proposal of the tribunes, the people resolved that if he did not appear before the kalends of May, and if he did not respond when cited on that day, he would be declared an exile, his estate would be sold, and he would be interdicted from fire and water. Attention was then turned to those who participated in the disturbance. They were indicted on capital charges and ordered to give bail; at first only those who could not give it were put in prison, but later even those who could pay were imprisoned. At this point the majority of these men went into exile.

I relate the entirety of this episode to form the backdrop against which to detail several crucial elements of it that suggest the power of the publicani in the late third century. We will come to this power after discussing the conduct of the different officials and bodies mentioned in Livy’s account. The first aspect of note is the conduct of the tribunes in the concilium plebis. Livy is clear that the voting by tribe that he describes took place in such an assembly: he says as much at 25.3.14, 25.3.19, and 25.4.1. Only tribunes of the plebs could call such assemblies, and this meeting was called by the two Carvilii who seem also to have conducted it, at least until
agents of the publicani disrupted the proceedings. At this point, the consul Q. Fulvius Flaccus told the tribunes to disband the meeting or face a seditious situation. This particular consul was a plebeian, so his presence at the meeting is not troubling, but the decisiveness of his intervention is worth noting.\textsuperscript{146} Of course, it would still have been the tribunes who disbanded the meeting, as the fact of his request makes clear.

In his capacity as consul, Flaccus could of course have called a meeting of the tribes in the form of the comitia tributa, and presumably either a plebeian or a curule aedile would have prosecuted the case, as we know happened with other cases leading to a fine.\textsuperscript{147} The notion that Flaccus could not risk angering the publicani at this precarious time seems to explain his unwillingness. Livy tells us that the tribunes called this concilium plebis because of popular pressure; such forces certainly impacted curule politics and conduct as well. One is tempted to say, however that to the extent that the pressure in this case was based less on political calculation than on moral insult to the less powerful in society, perhaps the tribunes were the

\textsuperscript{146} Lintott (1999) 54 discusses the question of whether patricians were admitted to the concilium plebis after the lex Hortensia of 287 BCE gave plebiscites the force of law. He thinks it would have been cumbersome to bar patricians from informal discussions, and he points to a speech given by a former military tribune of patrician status in an assembly that a tribune convened to discuss the senate’s refusal to grant L. Aemilius Paulus’ request for a triumph in 167. As regards formal meetings such as ours in which voting took place, and where decisions were rendered as “X … plebem rogavit plebesque iure scivit” (following his formulation), Lintott is confident that patricians were not allowed access.

\textsuperscript{147} Cf. Lintott (1999) 53 for a discussion of the terminological issues regarding the concilium plebis and the comitia tributa: the latter at times encompasses the former because voting in the concilium plebis was conducted by tribe (for the use of comitia tributa in relation to a plebeian assembly, cf. Livy 2.56.2). Cf. Farrell (1986) 407ff. for additional discussion of terminological considerations. Since Mommsen, most scholars have preferred to use comitia tributa only for meetings by tribe of the entire populus. Some have challenged this practice on the grounds that these are modern terminological distinctions, or, more alarmingly, that there were no meetings of the tribes outside of concilia plebis presided over by tribunes; cf. Develin (1975) 335 and Sandberg (1993) 89. Lintott (1999) 53-4 convincingly refutes this, adducing the lex Gabinia Calpurnia de Delo of 58 BCE and the lex Quinctia of 9 BCE as examples of legislation carried through by consuls, and recalling that lines 4 and following of the Cnidos III inscription of the lex de provinciis praetoris of 101/100 BCE detail the legislating of the praetor M. Porcius Cato. For prosecutions conducted by aediles before the tribal assembly, cf. Mommsen (1887) 2.1.491ff.
natural choice given their mandate and history.\textsuperscript{148} Flaccus’ presence and active participation in the event, however, underscore his interest in the affair. He had been the praetor in 215 who let the contract, and it seems reasonable to suggest that he felt an ownership of the issue, although the entire affair was not his doing alone, as he was part of a group that decided in favor of letting these contracts. There were clearly multiple interested parties, and the \textit{concilium plebis} is one forum that could take on a judicial function, which does much to explain this choice of venue.\textsuperscript{149}

It was the conduct of Postumius and his agents during the \textit{concilium plebis} that, ostensibly, spurred the senate to subsequent action. Livy is clear that a great number of people were present at the \textit{concilium}, and so one imagines a large group of Postumius’ supporters would have been needed to divide the tribunes from the people and so disrupt the proceedings. In addition to constituting what must have been a sizeable group, Postumius’ supporters were rather organized in forming a wedge to exploit whatever space had just opened. The martial connotations of this action are clear, and likely what prompted the consul Flaccus to tell the tribunes that they needed to control what was a seditious situation. The consul’s interpretation of the situation seems to derive primarily from the symbolism of the particular action of Postumius’ agents; although he clearly had enough supporters to seriously disrupt the proceedings, he and his men seem not to have been in the position to completely overwhelm this assembly and to prolong seditious activity in the city of Rome. Their numbers may not have threatened overthrow of the government, but this single \textit{publicanus} was certainly able to amass a well-organized group, and one wishes that our sources allowed for a prosopography yielding information on the individuals present at the \textit{concilium plebis} and involved in the wedge, and any assistance

\textsuperscript{148} The notion that the plebeian aediles would have been the most logical choice of all, given their charge to police the market, relies upon a more modern understanding of the term, although plebeian aediles would increasingly convene assemblies for judicial reasons in the late Republic.

\textsuperscript{149} On this topic, cf. Staveley (1972) 171ff.
rendered to Postumius by other publicani. Indeed, one imagines that there was a great deal of
general coordination among the publicani, given the senate’s initial unwillingness to prosecute
even two men who were exposed to have defrauded the state.

The form of the senate’s action following this disruption in the concilium plebis further
supports this notion. The consuls presented the matter as in need of consideration by the senate
because of the threat to Roman political institutions posed by Postumius and his supporters. The
fact that the consuls insisted that the proceedings remained under control perhaps suggests just
how shaken the magistrates were by what had transpired. By phrasing the matter as a challenge
to the Roman ideal of judgment by the people, an ideal to which august Romans had previously
submitted but that Postumius rejected, the senate was able to side-step the issue of contractual
fraud that it had previously addressed unsatisfactorily and which had led to the convening of the
concilium plebis. The senate’s outrage at Postumius’ conduct in the concilium was certainly
genuine, but it was also convenient in allowing the body to avoid passing judgment on the issue
that would affect working relations with other publicani, who remained indispensable to the war
effort.

It was not only during times of extreme peril to the Roman state that the publicani were
able to expand their influence. Likely during the early second century BCE, the publicani
acquired control of the lucrative mining operations in Spain, and so became involved for the first
time in extractive industry. We will analyze what evidence we have of the relevant contracts in
search of how they may have influenced later contracts of various types. We are hampered by the
fact that we do not have Livy’s account of any censorship after 169 BCE, a situation that Badian
rightly bemoans; this shortcoming does not allow us to gain a picture of any subsequent change,
potentially resultant from political development at Rome or in the Spanish territory, in how these
contracts were let.\textsuperscript{150} We can, however, form an understanding of these contracts in the early second century, and of how the mines first entered Roman public control. There is no indication of mines owned by the Roman state in Spain before the end of the Second Punic War; indeed it seems that the mines were captured from the Carthaginians during this conflict. Badian and Barceló think that under the Barcids these were mines owned by the Carthaginian state, and Badian asserts that Rome generally continued the sort of administration it encountered in conquered territory.\textsuperscript{151} The evidence available to us does not allow us to judge how the Carthaginians administered the mines in Spain, and there are too many counter-examples to Badian’s assertion that the Romans generally perpetuated the type of management they encountered for us to simply read the Roman practice back onto the Carthaginians. Be that as it may, the mines were clearly treated as a state resource.\textsuperscript{152}

There is some disagreement over when these mines began to be leased to the \textit{societates}, as opposed to being operated by the provincial governor. Badian thinks that the mines may have only been leased to the \textit{publicani} after they were reorganized by Cato, who went to the province in 194 BCE.\textsuperscript{153} Badian bases this judgment on the fact that Cato mentions the silver and iron mines in a manner similar to that in which he discusses the salt mines, which had long been administered by the \textit{publicani}.\textsuperscript{154} Frank and Van Nostrand had thought that the governor exploited the mines until 179 BCE, and they base their conclusion on Livy’s tendency to list the

\textsuperscript{150} Badian (1972) 31.  
\textsuperscript{151} Badian (1972) 31 and Barceló (2011) 362.  
\textsuperscript{152} As to the issue of how these mines may have been worked, there were of course public slaves, but these did not exist in the numbers that would have been required to work the mines in Spain, for instance. On this topic, cf. Kay (2014) 43-57. That local populations contributed much of the labor force at this time is highly likely.  
\textsuperscript{153} Badian (1972) 32-33.  
\textsuperscript{154} Cato \textit{Orig.} fr. 93.
precious metals brought from Spain to Rome by various commanders, a tendency which he abandons in 179.\textsuperscript{155} Badian points out that Livy resumes this tendency in 174, and so it is not a reliable means of judging how the mines were operated.

This discussion is important because the \textit{publicani} are likely to have been able to extract more favorable terms from the censors in the years immediately following the end of the Second Punic War than in later years, because the state’s strength and therefore bargaining power grew as the years passed from the end of that conflict. Although contracts were let by subsequent censors who, as we discuss below, were able to exert appreciable influence over the process, the terms of public contracts can in fact be quite sticky, with the terms of earlier contracts providing the outline for later agreements. As we saw in the case of the contracts let during the Second Punic War in 215 BCE, these companies were not averse to driving a hard bargain when the state was in a position of weakness. And from the point of view of the state, even if an ideal agreement could not be reached, it very well might still have been worthwhile to pursue such a contract in order to employ private capital in the development of infrastructure in the new province, as Roman officials cannot have been unaware of the benefits conferred by mining operations upon the Carthaginian state.\textsuperscript{156} We should therefore allow that these contracts may have originated in the very first years of the second century BCE, and that the \textit{publicani} may have been able to carve out quite favorable terms if such contracts for the mines were initially negotiated in the immediate aftermath of the Second Punic War.

Although there is some disagreement over when exactly the mines passed into the control of the \textit{publicani}, that they were lucrative finds consensus. Polybius claims that in his time they

\textsuperscript{155} Frank (1914) 154 ff. and Van Nostrand (1933) 127ff.

\textsuperscript{156} Indeed, Barceló (2011) 362 reports that the mine at Baebelo produced three hundred pounds of silver daily.
generated 25,000 denarii per day, and employed 40,000 laborers.\footnote{Polyb. 3.59.7. A workforce of this size indicates another crucial point regarding the operations of the publicani. The societates jockeyed with one another to fill the highest positions within a given operation, not to provide the entire workforce.} If Polybius is to be trusted, the mines therefore generated over 9 million denarii in revenue every year.\footnote{Arriving at secure figures for such large operations in antiquity is always tricky, but it seems that this must be the amount of revenue, rather than of profit for the state or societas, considering that army supply contracts awarded in this period amounted to about one million denarii of revenue for the state; cf. Badian (1972) 34.} We do not know how much profit the entity operating the mine would have made, but this would of course have depended upon the price of the contract. The amount of surety and security required would have been similarly dependent.

The censors were of course the magistrates who let the contracts for the mines, and the prices of these contracts were crucially important for determining the profits seen by the societates. As mentioned, the surviving evidence for the conduct of the censors is limited, but Cato’s actions in 184 BCE do give us a window onto the ability that they had to impact the profits of the societates through their control of the auctions of the contracts. Plutarch tells us that Cato and his colleague L. Valerius Flaccus generally refused to let contracts for the collection of revenue that they thought were too low, and refused the sign off on contracts ulтро tribута that they thought were too high.\footnote{Vit. Cat. Mai. 19. He lists this action along with several others taken in order to safeguard public resources and public property.} Livy has a somewhat more sustained discussion of the details of the letting of contracts for these years.\footnote{39.44.8-9.} He relates that the necessary contracts were let, and that the publicani who had won the contracts then complained to the senate because the terms were such that they could not make any profit. Moved by their preces et lacrimae, the senate ordered that the contracts be cancelled. The censors let the same contracts at a lower price, which indicates that these were contracts for the collection of taxes, but not before they issued an edict.
baring those who had won the contracts and reneged from participating in the new auction. This generated a considerable amount of animosity as one might guess, and Livy concludes this section by telling us that the hostilities Cato engendered followed him throughout his political career.

Attention to the actions of the publicani, however, shows that they were able to influence senators to a surprising degree. There is no indication that the societates who won the first round of contracts were compelled to bid on them. The resultant situation is therefore that societates, who entered into contracts with the state of their own free will, were able to use their connections and clout to convince senators that the contracts they had agreed to were unfair. They prompted the senators to cancel the contracts, and to instruct the censors to conduct the auctions again. Neither the other magistrates nor of course the publicani could dictate the terms of the subsequent auctions, which saw those publicani who had previously won contracts barred, but the fact that there was a second round of auctions is remarkable.

It is unfortunate that Livy does not give us a sense of the time that passed between the first and second rounds of auctions, as such information would allow us to know whether the publicani tried to revamp their operations to squeeze out what profits they could, and only later appealed to their senatorial connections, or whether they simply began their lobbying efforts immediately after the first auction was concluded. At stake in the distinction is whether the publicani entered into the contracts in good faith, and how efficacious they judged their political connections. If they began lobbying immediately after the conclusion of the auction, it seems clear that their assumption was that winning the contract would allow them to renegotiate, and that having their names entered as the contracting party was the prime consideration. It is perhaps less likely that they would have tried to revamp their operations to squeeze out what
profits they could, and only then to complain to their senatorial connections. They would have known what profits could be expected from the mines and other tax-coll ecting operations, and such delay and the additional round of negotiations after maybe several months at least would have been quite disruptive. Also, Livy may have given an indication if some time had passed. It seems likely that the *publicani* trusted that their political connections would be able to exert enough pressure and allow for a renegotiation of terms, even though they had not attempted to perform the relevant tasks. What prevented their plan from working in its entirety, as their ability to force subsequent auctions was a partial victory, was the censors’ refusal to allow those who had reneged to take part in the second round of auctions. Cato’s actions, rather than those of the *publicani*, were those that were unexpected in 184.

SOCIAL QUESTIONS DURING THE LATE REPUBLIC

Let us turn to another extraordinary period in the history of the *publicani*, that extending from Ti. Gracchus’ tribunate in 133 BCE to that of his brother ten years later. Our examination here will focus on social and political questions that must attend any treatment of the *publicani*, and we will see that many of the social fractures that were ultimately so harmful to the Republic are to be traced back to these years. We will follow the consequences of the developments of these years through to the period of Sulla’s domination. What emerges from this treatment is an appreciation that Tiberius and later Caius so antagonized the senatorial class, and intended to so empower the officer class, as Badian calls it, including the *publicani*, that they set the two on a collision course.\(^{161}\) This is important to our understanding of the details of the *publicani*’s

\(^{161}\) Badian (1972) 56-58.
performance of crucial tasks of imperial administration and influence on the development of the Roman law of contract, because, at their core, these questions concern who the *publicani* were, the hierarchies of Roman society, and how those groups could organize once partially excluded from politics. Furthermore, to the degree that the *publicani* suffered during the civil wars of the first century BCE that were an outgrowth of the developments of this period, we have a window onto change in the means by which certain groups could participate in imperial governance: if the *publicani* could be socially described and were eventually dismantled, those constituting them could not continue to act in such ways, and participation in the imperial project will have been altered.

The two “classes” here are extremely difficult to disentangle. The essence of Badian’s argument is that the Gracchi, and Caius especially, created this division by giving voice and a principle of organization to the apolitical component of the *equites*, primarily through laws forbidding senators from engaging in certain activities, and through the promotion of this apolitical group to serve as jurors on *repetundae* cases. In the paragraphs immediately following, we will mention two cases of taxes restricted to non-senators, as well as the details of C. Gracchus’ *lex repetundarum*. It is possible that only upon the prohibition of senators from collecting taxes at this time that the classificatory term *ultro tributum* emerged or entirely crystalized. The regulations on seating in the theater and the return of the public horse are likewise intended to divide this group, on Badian’s view. Sherwin-White has detailed how this emergent class was specified with greater precision in these years, and has demonstrated that such perfect distinction between senators and an officer class was not achievable.\textsuperscript{162} He has also made the fascinating argument that much of this impulse came from an importation into Rome of

\textsuperscript{162} Sherwin-White (1982).
democratic notions from fifth-century Athens, but in the translation only certain members of society came to experience the social consequences of these ideas.\textsuperscript{163}

An important document from the early years of this period is an inscription detailing tax collecting in Asia Minor and dating to between 131 and 129.\textsuperscript{164} The document records a territorial dispute involving the publicani and other local actors, and judgment is rendered against the publicani. Gruen discusses the speed with which the publicani moved into the area, as well as the resources at the disposal of the societates. Of course, we should not overlook that this case was overseen by consuls as well. The publicani were certainly able to claim the attention of the most powerful figures in the state at the time, and the details of just what they are collecting indicates the complexity of the operation.\textsuperscript{165} Badian sees this case as priming the publicani to accept the social division that interests him, again that between the senatorial class and an equestrian officer class, not only because many of the publicani were themselves equites, but also because the publicani could more easily control such an equestrian class that appeared less organized. We might doubt, however, that the publicani themselves were at all times so well organized.\textsuperscript{166}

This was also a time at which the publicani were greatly strengthened through the decision that they would collect the decuma of Asia.\textsuperscript{167} This does not give us further indication of the organization of the province, but it is clearly central to the publicani. The importance of


\textsuperscript{165} For the details of the collection, cf. Badian (1972) 132 n. 42.

\textsuperscript{166} Badian (1972) 59-60.

\textsuperscript{167} There is a distinction to be made between, on the one hand, contracts for tax-collection that only covered portions of a province, as is the case with the portoria in Sicily, and, on the other hand, contracts for tax-collection that implicated an entire province, such as we have here.
this is hard to overstate: during Pompey’s reorganization of the East, tax revenue amounted to about 50 million *denarii*, with Asia contributing the most, and sixty years prior the relative importance of Asia would only have been higher.¹⁶⁸

A final case to be considered for what it can tell us about the formation of the equestrian class is C. Gracchus’ *lex repetundarum*.¹⁶⁹ Many aspects of this law have received a great deal of attention from scholars, but we are interested in the definition of those who are not subject to prosecution under it. Those against whom suit could be brought were all senators, ex-magistrates, and their close relatives, as indicated in lines 1 to 3. *Equites* who fell outside of these bounds were not subject to prosecution. Moreover, it was these *equites* from whom the judges were to be selected, as lines 12 to 26 specify. By defining the *equites* as the part of the wealthy in society that had not held office, certain other distinctions among them, such as the source of their wealth, were flattened, at least as far as this law and much subsequent political action was concerned. This binary differentiation was to have deleterious effects for the equestrian class, in which the *publicani* were included, following Sulla’s consolidation of power.¹⁷⁰

THE COMPLEXITY AND LONGEVITY OF THE *SOCIETATES VECTIGALIUM*

Continuing with our discussion of the fortunes of the *publicani* during the Republic and early Empire, we now move to the first of the two mischaracterizations that are often repeated in treatments of the *publicani*, namely that they were funded much as were joint-stock companies of the early modern period in Europe, which is to say by shareholders whose stakes in the


¹⁶⁹ The text, along with translation and commentary, is presented in Lintott (1992).

¹⁷⁰ For a number of such effects, cf. Keaveney (1982) 110ff.
company could be bought and sold. We delve into this mischaracterization in order to show that
the complexity of the *societates* at their height was not as great as is at times asserted. This claim
is encountered most commonly in studies of the history of the corporation or the history of
exchanges, many of which harken back to Rostovtzeff’s characterization of the Forum as the
place where, in addition to engaging in many other economic activities, “crowds of men bought
and sold shares and bonds of tax-farming companies.”\(^{171}\) A similar assertion is found in the most
prominent of recent treatments of the topic, that by Malmendier.\(^{172}\) The beginning of her
characterization of the “external financing” of the *societates* is reproduced below:

> 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*. 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.” The
> statement also implies that the shares could be bought either from another share-
> holder or directly from the company, suggesting secondary offerings. Traders met
> on [sic] the *Forum Romanum*, supposedly near the Temple of Castor.\(^{173}\)

This passage includes all of the complexities usually attributed by such studies to the
*societates* and the institutions that grew around them, for which there is, if we are generous, very
little evidence. The three claims that we will examine in order to discredit the resultant picture of
the *societates* are, first, that trading shares in the *societates* was not uncommon; second, that the
prices of these shares fluctuated; and third, that the trading of shares was regularized through an

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\(^{171}\) Rostovtzeff (1926) 31. One such later work is Chancellor (1999); cf. 4 for his quotation of Rostovtzeff, as well
as his reduction of the quaestorship to the position of “[t]he financial speculator in ancient Rome.” Such
simplifications are not uncommon in financial journalists’ treatments of these topics.

\(^{172}\) Malmendier (2002) and (2005) also address the topic of the development of the *societates*, but do not differ in
their analysis or conclusions from her (2009) piece.

\(^{173}\) Malmendier (2009) 1089.
exchange in the Forum. As we will see, only the second of these claims may be able to stand, and only with qualification.

In analyzing these claims, we will draw on the work of Poitras and Geranio.\textsuperscript{174} These economic historians have shown that assertions that shares in the \textit{societates} described in this chapter traded in ways similar to those of modern corporations cannot be sustained by the ancient evidence referenced. They have also done much to refute the claim that in their structure and financing, the \textit{societates} matched many early modern joint-stock companies. Although their careful examination is quite informative, we can add several layers to their analysis of the ancient sources through an appreciation of the broader legal, economic, and political context of the Roman material. Such contextualization will allow us to strengthen our refutation of these misguided claims.

In examining the assertion that participation in the \textit{societates} was denominated in shares that were traded, we can look to Malmendier’s four citations. These are Cicero’s \textit{pro lege Manilia} 2.6, his \textit{pro Rabirio} 2.4, Plautus’ \textit{Trinummus} 330-31, and Livy 43.16.2. The first and third say nothing about the trading or movement of shares, but rather that certain individuals may have participated in bidding on contracts for public works or tax collection; nothing about a transfer of the rights and privileges of such a position is mentioned. The assumption that participation in a venture was indicated by something akin to stock certificates that could be traded is repeated many times in treatments of this question. Although there would certainly have been documentation of participation in a \textit{societas}, there is no evidence that these certificates or bonds were traded as early modern or modern stocks were, or even that they took related

\textsuperscript{174} Poitras and Geranio (2016).
documentary form. Similarly, the passage from Livy speaks only of the formation of partnerships, but not of the trading of shares or their alienability.

Malmendier’s second citation, from Cicero’s *pro Rabirio*, does mention the extension of participation in a joint financial venture, but here too she asks too much of the evidence. The sentence in question speaks not of the trading of shares, but rather of the inclusion of Rabirius’ associates in a business undertaking, perhaps the performance of a public contract, which action Cicero mentions to demonstrate his client’s generosity amid his extensive dealings. We read at 2.4:

multa gessit, multa contraxit, magnas partis habuit publicorum; credidit populis; in pluribus provinciis eius versata res est; dedit se etiam regibus; huic ipsi Alexandrinio grandem iam antea pecuniam credidit. nec interea locupletare amicos unquam suos destitit, mittere in negotium, dare partis, augere <re>, fide sustentare.

He did much business, he was a party to many contracts, he had many shares in *societates publicanorum*; he trusted different nations; his affairs extended into many provinces; he gave himself also to kings; earlier he lent a large sum of money to the king of Alexandria himself; all the while he never ceased to enrich his friends, by sending them on business, giving them shares, increasing their estates, supporting them with credit.175

It is not certain exactly what the phrase *dare partis* signifies, and it must be said immediately that we cannot be absolutely sure that the ventures of which the *partis* are mentioned are the collection of taxes or the execution of other public contracts; while *partis* occurs only one other time in this sentence, and in relation to the execution of such contracts, this second occurrence is presented as of a kind with generic *negotium* and the growth of fortunes. Having stated that uncertainty, the most likely meaning of *dare partis* is that Rabirius gave his shares, or some of

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175 Text Olechowska (1981).
them, in a venture over to his associate or associates, and, rather less likely given the choice of verb, that he sold them to these individuals. Malmendier chooses the second of these options, although we would certainly have expected Cicero to use *vendere* if such were his meaning. Undercutting the urgency of deciding between these two options, however, is the very thrust of this passage. Cicero asserts that Rabirius *numquam destitit dare partis* when extolling his client’s generosity. In order for this action on the part of Rabirius to come across as generous to Cicero’s audience, it cannot have been very common, either because he gave his associates favorable terms, or because this transfer was unusual. Cicero’s inclusion of this item in his list of Rabirius’ generous actions argues against the conclusion that such a transfer of shares was a common practice.  

We certainly should not think that shares were never traded, but such transactions likely were not as common as has been asserted. Investigating Malmendier’s evidence for the fluctuations of share prices similarly detracts from the complexity of our picture of the financing of the *societates*. She adduces the beginning of section 12.29 of Cicero’s *In Vatinium*, in which Cicero charges Vatinius with abusing his position as tribune. We read:

> et quoniam pecunias aliorum despicis, de tuis divitiis intolerantissime gloriaris, volo uti mihi respondeas, fecerisne foedera tribunus plebis cum civitatibus, cum regibus, cum tetrarchis; erogarisne pecunias ex aerario tuis legibus; eripuerisne partis illo tempore carissimas partim a Caesare, partim a publicanis?

> And because you despise the resources of others, and glory in your own riches in a most intolerable manner, I want you to answer me, whether as tribune of the *plebs* you made treaties with other cities, with kings, with tetrarchs; whether you appropriated money from the treasury by your laws; whether you seized shares, most valuable at that particular time, in part from Caesar, in part from the

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176 We might also infer from the general freedom allowed to contracting parties in Roman law, in conjunction with the scarcity of instances of the transfer of shares, that there was little in the way of standardization of any such contracts that were entered into.
The value of shares, which again indicate one’s participation in a venture, was determined by the expected profit of the *societas*. The phrase *partis illo tempore carissimas* does certainly suggest that these shares were more valuable than others, but it does not clearly signify that one particular issue of shares changed in value over the course of its existence. Just as likely is that the shares of one five-year period were considered very valuable relative to those of the previous period or periods, or, keeping in mind that Cicero is speaking of a situation in the past, relative to the present five-year period of contracts. We do not need to think that these were consistently shares in the same *societas*, as there is no guarantee that *societates* did not disband and reform frequently.

It was easy enough to find the prices at which the contracts were sold, and at least in the case of tax-collecting, it seems likely that a well-informed individual would have some notion of the revenue to be collected. He would therefore be able to determine quite quickly whether the winning *societas* would have a profitable five years, and, of course, a *publicanus* would only know with more certainty. Consequently, demand for those shares tied to what seemed a promising contracting period would drive up the price. We could posit some subsequent fluctuation over the life of the contract, if, for instance, the company faced unforeseen infrastructural or transport difficulties. But given that information of this type was undoubtedly harder to access, and that we have very little evidence for the trading of shares, as we have seen, it seems more likely that most would have bought shares to hold them to maturity, so to speak, which in this case meant for the life of the contract.

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177 Text Maslowski (1995), with modifications.
We now move to the third and final mistaken claim contributing to the impression of astoundingly modern complexity, namely that there existed a designated exchange in the Forum Romanum, supposedly behind the Temple of Castor, on which the shares of the *societates* were traded. Malmendier adduces a passage from Plautus’ *Curculio* centering around line 481, although she inexplicably directs us to line 78, as well as a reference ultimately to the section of Rostovtzeff mentioned above. We will first examine the passage from the *Curculio*, in which the Choregus delivers a monologue detailing the landscape of the city in terms of social hierarchies, and in a way that is clearly meant to ridicule all mentioned and to suggest that vice permeates all society. We read:

In foro infimo boni homines atque dites ambulant; 475
in medio propter canalem ibi ostentatores meri.
Confidentes garrulique et malevoli supra lacum,
qui alteri de nihilo audacter dicunt contumeliam
et qui ipsi sat habent quod in se possit vere dicier.
Sub veteribus ibi sunt qui dant quique accipiunt fenore. 480
Pone aedem Castoris ibi sunt subito quibus credas male.

At the lower end of the Forum decent and wealthy people stroll around; in the middle part next to the open drain are the mere show-offs. Arrogant, overtalkative, and malevolent people are above the Lake, ones who boldly insult their neighbor for no good reason and who have enough that could in all truth be said about them. Below the old shops there are those who give and receive at interest. Behind the temple of Castor there are those whom you should not trust quickly.\(^\text{178}\)

There is no mention of the *societates* in this section of the text, and no indication of any trading of shares of any sort of company. All that is said in relation to the Temple of Castor is that there are people asking for loans behind the building, and they are not a good credit risk. Some have

concluded from lines 477 to 479 that Plautus had in mind some sort of an exchange, inferring that those who extol their own ventures and speak ill of those of others are in fact “the originals of the bulls and bears” in, again, an impressive display of anachronism. Although this suggestion need not delay us for long, as the lines in question suggest individual rivalries much more than the judgments about an entire sector or the broader economy that we would need to retroject the terms, this is the only hint of buying or selling that we get in this passage, and it is quite clear that Plautus concerns himself more with moral censure than with unassailable financial veracity.

We have now seen that the operations of the publicani were not as complex and widespread during the first century BCE as they are often portrayed to be. To recall our language above, the heights of their operations were not in fact so stratospheric. We now turn to their operations during the early Empire to show that, again contrary to some portrayals, they were still quite powerful after the civil wars of the first century BCE. This second correction builds upon our first in that it elevates in our estimation the fortunes of the companies during the early years of the Principate. Taken together, these two revisions correct the trajectory of the power and prestige of the societates, resulting in a more gradual decline from their heights in the first century BCE until increasingly their functions were taken over by groups of conductores, culminating in the demise of the publicani in the second century CE. This revision means that the publicani were in operation throughout much of the classical period of Roman law, and, as we will see, they influenced the development of Roman contracting during these last decades of their existence.

The evidence for this second revision is the *Customs law of Asia*. This document is a collection of statutes that was promulgated in 62 CE in order to fix and make known the rules regulating the collection of import and export taxes in the province of Asia.\(^{180}\) The assemblage of statutes dates to 62 CE, but the individual statutes themselves date to 75 BCE and to many intervening years as well. Fascinatingly, the regulations from 75 BCE seem to reflect Attalid practice to some degree.\(^{181}\) We therefore have a window both onto the changes, at least as regards customs dues, in the administration of this province, and onto the fortunes of the *publicani* in the realm of customs collection thanks to the attention they receive in this document.

Indeed, there is evidence that the *Customs law* was promulgated because of recent abuses by the *publicani*. Tacitus *Annales* 13.50-51, which records the events of 58 CE, says as much in its depiction of the characteristics of Nero’s approach to governing:

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[50] Eodem anno crebris populi flagitationibus, immodestiam publicanorum arguentis, dubitavit Nero, an cuncta vectigalia omitti iuberet idque pulcherrimum donum generi mortalium dare. sed impetum eius, multum prius laudata magnitudine animi, attinuere seniores dissolutionem imperii docendo, si fructus, quibus res publica sustineretur, deminuerentur: quippe sublatis portoriis sequens, ut triburum abolitio expostularetur. perrasque vectigalium societates a consulibus et tribunis plebis constitutas acri etiam populi Romani tum libertate; reliqua mox ita provisa, ut ratio quaestuum et necessitas erogationum inter se congruerent. temperandas plane publicanorum cupidines, ne per tot annos sine querela tolerata novis acerbitationibus ad invidiam vererent.

[51] ergo edixit princeps, ut leges cuiusque publici, occultae ad id tempus, proscriberentur; omissas petitiones non ultra annum resumerent; Romae praetor, per provincias qui pro praetore aut consule essent iura adversus publicanos extra ordinem redderent; militibus immunitas servaretur, nisi in iis, quae veno exercerent; alienque admodum aqua, quae brevi servata, dein frustra habita sunt. manet tamen abolitio quadragesimae quinquagesimaeque et quae alia exactionibus inlicitis nomina publicani invenerant. temperata apud transmarinas provincias frumenti subvectio, et, ne censibus negotiatorum

\(^{180}\) Cf. *Customs law* lines 1 to 7.

naves adscriberentur tributumque pro illis penderent, constitutum.

[50] In this year there were persistent public complaints against the societates farming taxes from the government. Nero contemplated a noble gift to the human race: he would abolish every regular tax. But the advisors whom he consulted, after loudly praising his noble generosity, restrained his impulse. They indicated that the empire could not survive without its revenues, and that the abolition of the indirect customs dues would be followed by demands to abolish direct taxation also. Many societates for collecting taxes, they recalled, had been established by consuls and tribunes in the freest times of the Republic; since then such taxation had formed part of the efforts to balance income and expenditure. But Nero’s advisers agreed that acquisitiveness of the publicani must be restrained, to prevent novel grievances from discrediting taxes long endured without complaint.

[51] So the emperor’s orders were these. Regulations governing each tax, hitherto confidential, were to be published. Claims for arrears were to lapse after one year. Praetors at Rome, governors in the provinces, must give special priority to cases against publicani. Soldiers were to remain tax-free except on what they sold. There were other excellent provisions too. But they were soon evaded – though the abolition of certain illegal exactions invented by the publicani, including as the two and a half percent and the two percent duties, is still valid. Overseas transportation of grain was facilitated, and it was decided to exempt merchant ships from assessment and property-tax.¹⁸²

Before turning to the law to which this passage is usually taken as referring, we should mention several aspects of this description of Nero’s deliberations of 58 CE.¹⁸³ First, there is the straightforward fact that his advisors understand that the empire depends upon revenue, which is by this point taxation, and that revenue must not be less than expenditure; such understanding has not always been allowed to ancient economic actors.¹⁸⁴ We must remember that certainly not all of the funds collected by the publicani went toward the maintenance of the state, seeing that

¹⁸² Text Wellesley (1986), with modifications. Translation Grant (1956), with modifications. The specification that claims that were older than a year could not be brought is contrary to Ulpian’s report of the praetor’s edict at Dig. 39.4.1.pr., where he states that there is a clause in the edict that he will grant an action for double the amount of any property seized by force by a publicanus, or for the amount if the claim is older than a year.


¹⁸⁴ This understanding is at the core of the primitivist / modernist debate about the ancient economy and ancient economic actors, on which cf. the useful discussion by Bang (2007) esp. 5ff.
anything collected over the amount pledged in the initial contract was retained by the *societas* as profit. There is also the curious assertion that the *societates* were established by consuls and plebeian tribunes during the Republic. It is unclear exactly what Tacitus has in mind here. We have seen that these companies were private associations constituted to execute public contracts, and that they involved many well placed individuals. It is possible that Tacitus, or more properly Nero’s advisers, mean to say that during the height of the Republic powerful men including consuls and plebeian tribunes had a hand in these companies. The Republic is likely invoked also because in the first century CE it could stand in as a short-hand for proper governance; we will explore this idea more fully in the next chapter.

Perhaps more consequential are the questions of who exactly constitute the *populus* calling for the abolition of the *vectigalia*, and whether the segments of the population that supposedly would call for an end to the *tributum* are the same. These questions are important because they specify who would have been opposed to the actions of the *publicani*, and indeed how widespread such dissatisfaction might have been. If the *publicani* were able truly to alienate all of the population, we have a sense of the extent of their operations. Nero’s advisors seem to present the second potential demand, namely the abolition of the *tributum*, as an escalation based on the first: if the people taste relief from a relatively less burdensome tax, they will demand that their real encumbrance be removed. If the inference that these are the same people is correct, then those under discussion are almost certainly located in the provinces. The inhabitants of Rome and Roman Italy famously did not have to pay the *tributum* after the conquest of Macedonia in 167 BCE, with the exception of a few extraordinary years in the late 40s BCE, and
this exemption continued under the emperors. Roman citizens living in a provincial city, however, which was neither a *colonia* nor specially excepted did have to pay the *tributum*.

Roman citizens in Italy were subject to the *vectigal*, which in its strict sense meant taxes on the *ager publicus*, such as the *decuma* and the cost to rent houses or public buildings on the *ager publicus*. In its wider sense the term encompassed all regular sources of revenue, in contrast to the extraordinary sources that constituted the *tributum*. The *portorium* is only one of the additional categories included in the broader understanding of the *vectigal*. Opposition to the *vectigal* could therefore have arisen in any part of the empire, but worry that its abolition would lead to calls for the eradication of *tributum* requires that we pay particular attention to the provinces. Indeed the clause *Romae praetor, per provincias qui pro praetore aut consule essent iura adversus publicanos extra ordinem redderent* is particularly significant, and specifies that the operations of the *publicani* indeed extended throughout the empire.

The *Customs law of Asia* allows us to gain a sense of their power overseas through the role given them in the administration of this province. A number of the clauses of this document detail their influence, and in proving that they remained quite powerful after the civil wars of the first century BCE, we will pay particular attention to three allowances carved out for them in the *Customs law*. These are that the *publicani* are allowed to use state personnel and resources in their collection of customs duties, that they are exempt from the law, and that they alone are authorized to collect duties in the approved areas. We will also look to the scale of the sums

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185 Cic. *Off.* 2.22; Plin. *HN* 33.17; for the re-imposition during the consulship of Hirtius and Pansa in the attempt to replenish the *aerarium*, cf. Plut. *Vit. Aem.* 38. For a discussion of the types of dues that were levied on Roman citizens as *tributum*, cf. Rathbone (2008).

186 Torelli (1999) 8 judges the requirement to pay *vectigalia* to have contributed to the decline of small farming in Italy. On the issue of *vectigalia* on *ager publicus*, cf. Roselaar (2010) esp. 232ff.

involved to bolster our claim that the *societates* were still immensely powerful and in control of impressive resources and a degree of influence that cannot be ignored. These points can be demonstrated relatively easily, and we will adduce one passage from the *Customs law* to illustrate each of these four considerations. After we have detailed these four demonstrations of their power, we will conclude our discussion of the *Customs law* by briefly examining a shift, observable across clauses dating to different years, in the imperial geography of the law. This shift demonstrates the centrality of imperial experience, specifically as relates to economic integration in this case, in determining the physical boundaries of legal spaces, and in the administration of their borders.

We begin with the use of state personnel and resources by the *publicani*. This allowance is communicated in lines 40 to 42, and 67 to 68 of the *Customs law*, and both clauses date to 62 CE. We read:

40. έαν μήτε τελώνης μήτε ἐπίτροπος κατὰ τοῦτον τὸν νόμον ἦν αὐτόθι, ὃι τις προσφονήσῃ /
[καὶ ἀπογράψῃ τις πρὸ τοῦ εἰσάγειν, ὅταν τῇ ὑπάρχῃ, ἥτις ἀν πόλις ἔγινη ἔκεινος τῷ τόπῳ, παρὰ τῷ ἐν αὐτῇ τῇ μεγίστῃ ἄρχῃ ἔχοντι ἀπογραφέσθωσαν /
[ὡς κατὰ τὸν νόμον δεῖ].

67. ἐποίκια /

40. If there is neither a collector nor a procurator there according to this *lex*, to whom someone may declare [and with whom one may register before importing, whenever] this is the case, whatever city is nearest to that place, they are to register with the person holding the highest office in it [as is appropriate according to the *lex*].

67. With respect to the buildings and royal [staging posts] which King Attalus the son of Eumenes had for the purposes of exaction of *telos*, [the *publicanus*] is to use (them) [as he (the king) did]; and he is to hand over *viri boni arbitratus* to [the incoming] *publicanus* whatever of these he may take over.188

188 Text and translation for all passages of the *Customs law* are those of Cottier et al. (2008).
Lines 40 to 42 clearly specify that in cases in which a publicanus is not present, one intending to import into the province of Asia is required to find the nearest magistrate and register his goods with that official. This specification is of prime importance because it extends greatly the effectiveness of the publicani: they are not required to keep men at every road into and out of the province, but need only go to the office of the chief magistrate in each town periodically to collect the dues paid on imported goods. Thus the publicani are authorized by the Customs law to deputize officials in the province, and thereby to deepen the effectiveness of their operations considerably.

Lines 67 to 68 demonstrate that in addition to the ability to deputize just described, the publicani could also make use of buildings that belonged to the state. We can be sure in thinking these state buildings because they were used by Attalus for the purpose of tax-collection, and would therefore have been included in his grant of his kingdom to the Roman state in 133 BCE. This clause also accounts for the rotation of the publicani, and envisions a continuity of structure and repeated use of resources when particular agents or societates change.

We turn now to the clause specifying that the publicani are exempt from the provisions of this law. We read in lines 74 to 78, which date to 75 BCE, that the publicani are not required to pay tax on the goods and equipment used in their operations, goods whose movement into or within Asia would otherwise be taxed:

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oùς /
[ἀν καὶ ἀπερ ἂν δῆμοσιόνης ἐξ Ἀσίας εἰς Ἁσίαν εἰσαγάγη; ἢ ἐξαγάγη, οὗ τέλος
Λούκιος Ὀκτάουιος. Γάιος Αὐρήλιος ὑπάτοι εξεμίσθωσαν, ὑπὲρ τούτων τέλος μή /
[διδόσθω, καί] ὑπὲρ πλοίου καὶ τῶν τοῦ πλοίου σκευῶν καὶ ὑπὲρ δούλων καὶ ὁν
ἀπάντων, οὗς ἂν ἢς ἢς ἂν οἰκοθέν ἄγωσιν ἢ παραπέμψοις, ὑπὲρ βυβλίων, /
[δέλτων τε πάντων, οἷς ἂν γράμματα γεγραμμένα ἦν, καὶ ὑρ ὃ αὐτὶ ἀν διατρέφονται,
ὑπὲρ τε κτηνῶν ἀπερ ἂν τις οἰκοθέν ἄγη ταύτης χάριν τῆς πορείας, ὑπὲρ τούτων ὑπὲρ /
[τῶν πραγμάτων τέλος μή διδόσθω.
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Whatever persons [or whatever things] a publicanus from Asia into Asia imports or exports (i.e., within Asia), in relation to anything on which the consuls L. Octavius
and C. Aurelius leased out the *telos* (tax), on this [he is] not [to pay] *telos* (*portorium*), on a ship and the equipment of a ship and on slaves and on everyone male or female, whom they bring from home or send for, on books, [tablets and everything] on which there is writing, and on anything by which they are maintained, and on animals which anyone brings from home for the sake of this journey, on these [things] he is not to pay *telos* (*portorium*).

This clause is one of those dating to the earliest year represented in the *Customs law*, and there is no indication that the provision was ever revoked. Indeed, given that the law was inscribed for the purpose of informing the inhabitants of the province of the regulations governing the collection of customs dues, we can be sure of its validity. This exemption must have been the result of lobbying on the part of the *publicani*, and it calls to mind the demand made by the companies during the first specific contract preserved in our sources, that dating to 215 BCE and described above. Although the exemption in this case is not from military service during the life of the contract, it is still from something imposed upon other citizens. Further, a glance at the list, which is certainly partial, of explicitly exemptions demonstrates the comfort in which the *publicani* were accustomed to operate. Indeed, one imagines that it would have been quite difficult to bring a successful action against a *publicanus* thought to have evaded the *portorium*, given the generous nature of the exemptions here described.

We now turn to the last explicit allowance granted by the law, namely that the *publicani* alone are authorized to collect taxes in the designated areas. The relevant text is lines 56 to 58, which again date to 62 CE:
In whatever places there is a customs-office of a publicanus according to this lex, in those places the [publicanus or] procurator is to collect the telos or fee. Whoever may collect anything in contravention of these provisions, or act so that someone else may collect, whatever may be the value of what is done in contravention of these provisions, there is to be judgment in relation to [those] goods [and merchandise] and there is to be the right to seizure of a pledge in this case.

The text makes clear that the publicani are to collect the tax only in certain areas, those in which a customs office is located, and presumably this is the prime location for observing traffic and transport into and out of a specific location. What follows after the first sentence in the lines reproduced above is quite interesting, and seems to do much to confirm Tacitus’ statement that Nero aimed to stamp out abuses by the publicani by granting an action against them in cases of illegal collection, which in this case is defined as that occurring outside the specified location. Crucially, however, we see also that this clause prohibits anyone else from collecting the tax, and therefore ensures the exclusive right of the publicani, either themselves or the magistrates whom they are empowered to deputize.\textsuperscript{189} The specifications of this clause must have been of interest not only to the publicani and the inhabitants of the province, but also to the magistrates who could be enveloped in the operations of the publicani. In an environment of recurrent conflict between the publicani and provincial magistrates, it does not seem unreasonable to suggest that such a clause as this one would also have been welcome to the former: this clause prohibited provincial officials from interfering in the business of the publicani in any way, and given that the focus of this clause is the location of collection, one wonders if provincial magistrates were in the habit of running their own additional collection operation. It is the inhabitants of the province and those importing and exporting who are best served by this clause, although we must balance these specifications against lines 40 to 42 and 45 to 47, which both require that a person

\textsuperscript{189} A provision of Julius Caesar’s gave the lessees of a contract to excavate quarries in Crete similar protection (\textit{Dig.} 39.4.15).
entering the province in an area without a publicanus or a procurator go to the nearest city to register his goods with the highest ranking official, and state that failure to register truthfully results in forfeiture of the goods in question.  

Before turning to the question of how the conduct of the publicani influenced the development of Roman contracts and res implicated in Roman commercial practice, a conclusion that when juxtaposed with the other studies in this dissertation shows the centrality of imperial administration in the development of the Roman law of res, we must touch upon the scale of the sums involved in the operations of concern to the Customs law. We are particularly interested in the law’s requirement that praedes et praedia be pledged by whoever accepts the contract. These sums are quite large, as is made clear in several clauses in the text. There are several amendments to the amount required that were made over the life of the law and which we will examine below, but the culmination of these amendments, and that which is in force when the Customs law was promulgated, can be found in lines 144 to 147, which date to 62 CE:


190 See above for text and translation of lines 40 to 42.  
45 [α μὲν ἃν τις βουλήσῃ ἐξελέσθαι ἢ εἰσαγαγεῖν κατὰ θάλασσαν, ἢ τε ἃν κατὰ γῆν εἰσάγῃ ἢ εἰσελαύνῃ ἢ εἰσκομίζῃ, ἢ ἔξαγεν ἢ ἐξελάυνη, / [τὸν πραγμάτων τούτων τὴν τείμησιν τειμάσθω[τ]] vac [ὅ] μὲν ἂν ἱστασθαι δέη, τούτων τὸν σταθμὸν, ὥδὲ ἃν ἀριθμήσηται δέη, τούτων τὸν ἀριθμὸν ὀρθῶς λέγετο. ἐὰν / [δ ὑπεναντίον τι τούτως γένηται, τὸ πράγμα ἐκεῖνο καὶ τὸ ὄνομα τοῦ τελώνου ἐστο. “[Whatever anyone may wish] to take out or import or export by sea, and whatever he may import or drive in or convey in or export or drive out by land, he is to estimate [the value of those goods:] whatever it may be necessary to weigh, he is correctly to state its weight, whatever to count, its quantity; [and if] anything happens in contravention of these provisions], those [goods] and merchandise are to belong to the collector.”]
[L. Calpurnius Piso, A. Ducinius Geminus, A.] Pompeius Paulinus, *curatores* of the public revenues, added: the person who has accepted the contract from [the people for this *vectigal*] is to be obliged to exploit [- - -] from the eleventh [day before the Kalends (?)] of January, as on his behalf the *magister* or those to whom [this] affair [has been entrusted decide (?)]; and he is to be obliged to give security for [up to five times] the sum for which he has accepted the contract for any one year, at the [discretion] of Nero Augustus Germanicus [and of the *curatores*] of the public [revenues.]

We see here that the company that wins the contract is required to give as security five times the yearly value of the contract; although in this particular clause we have to supply the amount of security required due to damage to the stone, there are as mentioned several other clauses detailing the same requirement, and those provide secure footing for the restoration here.

An attempt to provide a measure of specification as to the relative size of the sums involved is warranted. Arriving at anything like exact figures for activities within the ancient economy is notoriously difficult, and we will not try to produce one here. Instead, we can look to the language of certain clauses, and specifically their indication of a larger corporate structure, to demonstrate that the resources required to secure the contract for a period of five years were beyond what any one individual possessed. These clauses concern primarily the provision of security by the *societas* that has won the contract; that this provision occurs against the background of a larger corporate structure is entirely consistent with the picture painted by van Gessel and others.\textsuperscript{191} There are many clauses specifying the presence of a *magister* (προένγυος) or of a *cognitor* (αὐθέντης) in the execution of these contracts, which indicate a certain complexity in the operation.\textsuperscript{192} Indeed these clauses take for granted the participation of such individuals, and are interested in regulating when the person occupying these positions can be

\textsuperscript{191} van Gessel (2003).

\textsuperscript{192} For a discussion on the somewhat curious choice of Greek terms, as they see it, as translations for these positions within a Roman *societas*, cf. Cottier et al. (2008) 146-148. They reason that προένγυος is used to translate *magister* likely in order to capture the “secondary responsibility” of the position.
changed. The *magister* is mentioned in the clauses that span line 105 to 109, 133 to 135, 140 to 143, and 144 to 147, and the *cognitor* is mentioned in those clauses covering lines 105 to 109, 109 to 110, and 123 to 124. As a general rule, the *magister* in a Roman business venture was the individual with the highest rank in the organization below the *manceps* who purchased the contract. Aubert clearly described the *magister* as he who managed the internal workings of the *societas*, and who typically remained in Rome. The *cognitor* was the individual who acted as guarantor.

The presence of either of these figures indicates a complexity to the organization and a base of funds almost certainly in excess of what one individual would possess. As the clauses listed above reveal, both the *magister* and the *cognitor* appear in the clause found in lines 105 to 109, dating to 12 BCE. We read:

 philippines

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193 Interestingly, the focus on the proper period of time is found in clauses dating to later years. This may be a manifestation of an increasing instability within the *societates* as they adjusted to the situation created by Augustus’ administrative reforms.

194 Cf. Cottier et al. (2008) 146 for citations of references to these positions, including the helpful discussion in Brunt (1990) 366ff. Brunt (1990) 373f. reasons that the *manceps* was the agent of the *socii*, who in fact controlled the company through the provision of capital, as otherwise the death of the *manceps* would require that a new contract be written.

195 Aubert (1994) 327. For his helpful discussion of *promagistri*, cf. 343-346.
consuls P. Sulpicius Quirinüs and C. Valgius Rufus, or of [the praetors] in charge of [the aerarium]; and the person who has accepted the contract is to exploit for five years in succession from the next Ides of January; the rest (is to be) according to the same lex [in each year.]

We must infer the presence of the cognitor in line 107 of the text because of damage to the stone, but it is clear from context that this figure’s involvement is to be supposed, and he is to be subordinated to the magister.

Finally, lest we think the societates did not exhibit such complexity after the reforms of Augustus, we can look back to the clause spanning lines 144 to 147, reproduced again for the sake of convenience, and dating to 62 CE:

[L. Calpurnius Piso, A. Ducinius Geminus, A.] Pompeius Paulinus, curatores of the public revenues, added: the person who has accepted the contract from [the people for this vectigal] is to be obliged to exploit [---] from the eleventh [day before the Kalends (?)] of January, as on his behalf the magister or those to whom [this] affair [has been entrusted decide (?)]; and he is to be obliged to give security for [up to five times] the sum for which he has accepted the contract for any one year, at the [discretion] of Nero Augustus Germanicus [and of the curatores] of the public [revenues.]

We have here sure indication that such complexity did indeed survive the reforms of Augustus and of the earliest decades of the Principate, provided not only through specification of both the magister and the cognitor, but also through explicit acknowledgement that there may be several individuals administering this aspect of the affairs of the societas. This allowance for flexibility does not unequivocally communicate whether the fortunes of the publicani were improving or
worsening, but we might posit that the loosening of regulations, seen here in a relaxing of the requirement that an official *magister* be registered, resulted from pressure exerted on the *curatores* by well-connected *publicani*.

There is, as mentioned, a shift to be observed in the specification of jurisdiction in the *Customs law*. This is a shift away from listing the main cities in the province, to detailing those points that lie on the coast. This can be observed by comparing the cities mentioned in lines 88-96, which clause dates to 17 BCE, and lines 22 to 26, which date to 62 CE. In the former, the cities listed do form something of a boundary, which at its southern extent turns inland along the terrestrial limit of the province. Additionally, several locations mentioned, including Sardis, are not on the coast. The emergent impression is therefore one that incorporates a notion of radiation of influence from important centers, and the accentuation of a provincial boundary. This is in contrast to the territorial organization in lines 22-26. Here we see a maritime boundary that extends beyond the province of Asia, properly speaking, into Pamphylia, with the inclusion of the cities of, inter alia, Phaselis, Magydus, and Side. This is a larger imperial boundary that reflects the expansion of the empire. The focus here too is on where goods would have entered the empire, but as the regions of the eastern provinces had been more integrated by 62 CE, the expression of this focus was less tied to the extent of the province proper, at least as regards the operations of the *publicani*. This fascinating overlapping of geographies suggests that different imperial agents may have operated with varying but not contradictory spatial understandings or mandates.
We now come to the topic of how the operations of the publicani and of those engaging in related areas of state and imperial administration affected the development of Roman contract law. This discussion will demonstrate the seminal role of the societates and individuals both in the delineation of different types of contracts, and in the development of various norms in contracting. Our discussion will not be exhaustive, but will convey the supreme importance of these actors. Juxtaposed with our other case studies, this discussion allows us to see the centrality of imperial administration in the development of regulations in Roman law of res.

We will first present the timeline along which the four types of consensual contract developed at Rome, against the backdrop of an important economic innovation. Of these four types, we will examine two, emptio venditio and locatio conductio, for what traces they bear of the impact of imperial administration as opposed to juristic thought on their creation; we will not consider mandatum or pignus at length, although we will touch upon them in passing. We will then turn to another category of contract not included in this list, the societas, in our search for evidence of the effects of the actions of the publicani and imperial administrators more broadly on the development of this legal instrument.

As mentioned, there are four consensual contracts in Roman law, namely emptio venditio (sale), locatio conductio (hire), mandatum (contract for gratuitous service), and pignus (a pledge for a debt). Watson has done extensive work on the relative age of these types of contracts, and he sees increasing specification in this area of law beginning around 200 BCE.\textsuperscript{196} This is when he

\textsuperscript{196} Watson (1984) 3ff. Watson begins his discussion with a treatment of stipulatio, and underscores especially the versatility of this instrument.
sees the emergence of the contract of sale.\textsuperscript{197} This contract was quite versatile. Watson hesitates to give a date as to when \textit{locatio conductio} coalesced as a type of contract, to the extent that it ever did, and he emphasizes that it is something of a catch-all category for bi-lateral arrangements that are not sale and that require the prestation in money by one of the parties.\textsuperscript{198} He is more comfortable giving a date for the contract of \textit{mandatum}, saying that it was in existence by 123 BCE; the \textit{Rhetorica ad Herennium} specifies that the urban praetor of this year, M. Drusus, granted an action for breach of contract of \textit{mandatum}.\textsuperscript{199} As regards \textit{pignus}, Watson, after stating his position that the origins of the contract are not so easily discerned, asserts that as a security transaction \textit{pignus} might be quite old, but that we cannot be sure that there existed an action in law before the first century BCE, when such an action appears in the praetor’s edict.\textsuperscript{200}

Stating that these contracts could not have existed earlier because they all require a prestation in money, Watson situates this development after the introduction of coinage at Rome in about 275 BCE.\textsuperscript{201} Watson thinks that before 275 BCE, barter would have been the only means by which to conduct a commercial transaction, and he discusses the interesting fact that the legal institution of barter, \textit{permutatio}, did not come into existence until later in the Empire.\textsuperscript{202} The late development of barter as a legal institution, however, may not be quite so unexpected if we consider comparative evidence. In an expansive study, the anthropologist David Graeber has

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\textsuperscript{197} Cf. also Watson (1965) 40ff. on this topic.

\textsuperscript{198} Watson (1984) 11.


\textsuperscript{200} Watson (1984) 12. Cf. also Lenel (1927) 254ff. and Kaser (1971) 537. Lenel thought that an action existed before the first century, whereas Kaser seems not to have thought so.


\textsuperscript{202} Watson (1984) 17; cf. esp. n. 66, where Watson states that it was really only with Justinian that barter comes into focus. He also insists that this type “was never fully accepted into the Roman system of contracts.”
concluded that barter seldom predates the use of money, and that in fact, widespread engagement in barter is usually only encountered after a community’s access to money disappears.\(^{203}\) In far more cases, extensive credit networks enable and uphold commercial transactions before and indeed after the introduction of money. To name just two detailed studies of particular periods that underline this fact, Muldrew has demonstrated the centrality of such networks to economic activity in early modern England, and Smail has done the same for fourteen- and fifteen-century Europe.\(^{204}\)

The difference between an extensive credit network and a situation in which barter predominates is that the former does more to encourage future interactions and exchange, whereas the latter strives primarily to preserve money’s accounting function for individual transactions. It is only the latter that suggests a difficulty in carrying on a large number of transactions. This might do much to explain why we observe the emergence of barter as a legal instrument only later in the Empire, potentially after the crisis of the third century. If barter’s expansion and subsequent legal theorization is to be found at this time, we have another case of imperial circumstances driving legal thought and action, and here even when the juristic class has fully developed.

Public contracts can perhaps help us to understand the nature of transactions before the existence of coinage at Rome. We have seen that various public contracts were let before 275 BCE, which begs the question of how the contracts would have been paid for. It seems simplest to imagine a situation in which contractors certainly received material benefit, but instead of there being perfect valuation, notions of patronage or noblesse oblige, mixed with the promise of receiving future contracts, entered the accounting as well. In other words, we could posit the

\(^{203}\) Graeber (2013) esp. 21-41.

\(^{204}\) Muldrew (1998) and Smail (2016).
existence of something of an economy of credit also in these contracts. In this context, before the emergence of consensual contracts, we imagine the use of *stipulatio* in contracts with the state. These contracts would have been let at Rome to Roman citizens, so the requirements of the *stipulatio* would easily have been fulfilled. The pool of potential *publicani* would likely have been far smaller at this time, and as we have seen, could have included senators. These components would indicate a more closed and familiar contracting environment, and it seems reasonable to suggest that some credit arrangement existed between the state and the contractors.

The situation may have changed in the third century BCE, because of events such as those of 215. Livy is quite insistent that the conduct of state business by private funds was a novel situation at this time. Furthermore, and the details of the affair suggest a heightened amount of documentation on the part of the *publicani*. We might posit that their demand for indemnification against loss must have been over and above a certain amount, and their fraudulent claim must have been for a certain sum, both of which will have to have been substantiated. Such a case strongly suggests that an increased importance was placed on specific valuation within a contractual setting.

We cannot prove that the actions of the *publicani* led to the emergence of *emptio venditio* around 200 BCE, but the continued expansion of economic activity in the western Mediterranean, where Rome was now clearly the most powerful state, cannot be ignored. This activity was of course performed by merchants and imperial agents alike. This expansion also relied upon the participation of merchants who were not Romans, of course. This dynamic is central to the emergence of the contracts of *emptio venditio* and *locatio conductio*. *Stipulatio* required that the two parties be face-to-face and that each swear an oath to fulfill his side of the bargain. Such was not necessary in either *emptio venditio* or *locatio conductio*, and this extended the relevance of
these instruments. *Stipulatio* could be taken if merchants wanted additional guarantees beyond just transfer of ownership, but an action came to be granted on *emptio venditio* where *stipulatio* was not taken. In the long period before this, no remedy was available in case of defect or eviction if the seller had acted in good faith.\(^{205}\)

Watson’s description of *locatio conductio* shows his determination to see “the force of legal tradition in legal development.”\(^{206}\) His insistence arises from the conclusion that the contractual situations contained within *locatio conductio* are replaced by three different types of contract when there is no prestation in money: the temporary use of a thing in exchange for money is replaced by mandate; providing labor in exchange for money is replaced by deposit; and the allocation of a specific task in exchange for money is replaced by loan for use. The fact that *locatio conductio* nevertheless persisted is Watson’s evidence for his claim. I am inclined to think that the emergence and persistence of *locatio conductio* as a catch-all category does more to confirm the notion that the classical jurists or their forerunners who were determined to distinguish and systematize similar arrangements, as indicated by their division into mandate, deposit, and loan for use, did not determine the contractual form of *locatio conductio*. Its expansive nature more likely results from its being a repository of other sorts of arrangements after merchants drove hard at the contract for sale in the form of *emptio venditio*. The agentive character of the legal tradition is better indicated by the further specification that interests Watson than by the persistence of a somewhat unwieldy type of contract such as *locatio conductio*. Finally, indication that these forms emerged and developed not primarily through the work of a concerted and professionalized juristic class is present in the confused manner in which the jurists discussed such contracts. Gaius tells us most clearly at *Dig.* 19.1.19-20: *veteres*


in emptione venditioneque appellationibus promiscue utebantur and idem est et in locatione et conductione (“republican jurists used terminology indiscriminately in sale and purchase. Likewise, in lease and hire”).

Let us turn to the last contract that we will examine, namely societas. Societas must have existed before the consensual contracts we have discussed here, even if it may not have had all the trappings it would come to exhibit in the classical period. We know this from the letting of contracts from the earliest years of the Republic and perhaps during the regal period. We will analyze the variety of operations encompassed by the societas for their importance in two regards. First, because the structures of association among the members cannot but have come from actual practice, rather than from juristic contemplation; and second, because their activities, along with those of other administrators and merchants, seem to have driven the development of the contracts discussed above.

Inspection of the relevant section of Gaius, 3.148-154b, strongly suggests an attempt on the part of the jurist to systematize a series of arrangements that developed from practice without the utmost regard being for the resultant legal or logical coherence of the institution of the societas. This is not to say that a certain rationale could not be found in the actions of those forming such agreements, but reading through the different aspects and forms that Gaius discusses conveys that the jurist is trying to rein in, in terms of their conceptual organization, practices that resist straight-forward delineation. Time and again, Gaius tries to impose a sense of parity and logical balance on the arrangements he describes, but his acknowledgement of common practices within societates undercuts this inclination.

He discusses sub-shares of a partnership that produce different profits from those of full shares, but implies that these sub-shares add up to a full stake. He also takes pains to explain that

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207 Translation Watson et al. (1985).
labor may be just as valuable as capital in a partnership, and so we should not be surprised to see that *societates* would not require all partners to contribute in the same way in order to be treated equally. This equation, however, seems incomplete given Romans’ insistence upon distinguishing among means of acquiring wealth and concern with the propriety of charging for services rendered; Gaius has in mind legal equality, but one should not necessarily imagine social parity. We then come to see that there can in fact be different agreements for profit and loss, so that shares do not require equal division, and, in the case of sub-shares, equal further division. *Dig.* 17.19-21 makes clear that sub-partnerships are only made from the share of one individual, but that original share need not be equal to all other original shares. We read at *Dig.* 17.30, however, that no one individual can contract for a certain portion of the profits and a different portion of the losses of a venture. *Dig.* 17.31 records that one could share goods or assets and not be considered a partner, and indeed this accords closely with the preference that I believe we can observe for a match between potential profits and potential losses. Such flexibility again suggests that we not see the *societas* as a product of careful juristic consideration, but rather of the vicissitudes of imperial development.

**CONCLUSION: THE SOCIETAS AND CORPORATE PERSONHOOD**

By way of conclusion, let us consider how the *societas* may have contributed to a notion similar to corporate personhood in Roman political and legal thought. As mentioned, this question arises from, first, the increasingly prevalent tendency to characterize the Roman state in anthropomorphized terms, and to collapse its functions onto the person of the *princeps* following the end of the Republic; and, second, the fact that the *societates* contracted with the state and
may thereby have been conceived of in similar anthropomorphic forms. In this concluding section, we will first examine what evidence there is for this anthropomorphism of the state. This focus is different from the claim repeated many times in antiquity that the emperor was above the law. Our focus is rather on depictions of the emperor standing in for, leading, or subsuming the functions of the state.

After this tendency is established, we will analyze the evidence that Roman societates that contracted with the state underwent a similar anthropomorphism in their structure. Here we will return to the Customs law of Asia, and we will see that their representation was made more complex and dependent ultimately upon one head of the company. We will also examine a crucial juristic discussion of this topic by Gaius at Dig. 3.4.1. Finally, we will say a word about the eventual demise of the publicani, and what the particulars of the subsequent performance of their duties can tell us about changing conceptions of the proper division between public and private agency in imperial administration.

Millar has collected examples of documentary sources portraying the princeps as the manifestation or prime motivator of the Roman state or Roman people. We also have few examples from literature. One famous instance is to be found at Aeneid 8.678-81. We read:

hinc Augustus agens Italos in proelia Caesar
cum patribus populoque, penatibus et magnis dis,
stans celsa in puppi, geminas cui tempora flammes
laeta vomunt patriumque aperitur vertice sidus.

From here Caesar Augustus driving the Italians into battle
with the senators and people, with the household gods and the great gods,
he stands high on the stern, whose propitious temples send forth

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208 Cf., inter alia, Sen. Clem. 1.1.2; Plin. Pan. 4.4; and Ulpian at Dig. 1.3.31. Cf. Noreña (2009) 266-67 for a discussion of this trope.

twin flames and the star of his fathers appears on his head.\textsuperscript{210} 

We see here Augustus driving Italy forward into battle, and enveloping in his action the senators and people of Rome. There is, literally, in this case, a ship of state for him to stand on as well, and a means to nationalistic immortality presents itself too.\textsuperscript{211}

More fruitful for our purposes, however, are discussions of the ability of the emperor to subsume the administrative and legislative capacities of the state. The instantiation of this ability that interests us is the granting of the force of law to the \textit{constitutio principis}; because this imperial pronouncement had the force of law, the emperor could by decree pass resolutions as binding and efficacious as any other. Gaius tells us that indeed this instrument had the force of law, and, what is more, its potency had never been questioned.\textsuperscript{212} The relevant section of the \textit{Digest}, which quotes Ulpian, says the same.\textsuperscript{213} This universal acceptance is in contrast to \textit{senatus consulta}, the force of law of which has, we read, been questioned.\textsuperscript{214} The jurists are quick to ground this potency in the fact that such power was given to the \textit{princeps} by a law, namely the \textit{lex de imperio}; it is possible therefore that this justification is used from Vespasian onwards, but earlier emperors had similarly presented their position as ultimately endowed by the people.\textsuperscript{215} 

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\textsuperscript{210} Text Gransden (1976). \\
\textsuperscript{211} For a treatment of the political and cosmological language in this passage, cf. Hardie (1986) 347-8. \\
\textsuperscript{212} Gai. 1.5 \textit{Constitutio principis est quod imperator decreto vel edicto vel epistula constituit; nec umquam dubitatum est quin id legis vicem optineat, cum ipse imperator per legem imperium accipiat. "An imperial constitution is what the emperor by decree, edict, or letter ordains; it has never been doubted that this has the force of \textit{lex}, seeing that the emperor himself receives his \textit{imperium} (sovereign power) through a \textit{lex.}" Text and translation de Zulueta (1946). \\
\textsuperscript{213} Cf. esp. \textit{Dig.} 1.4.1.pr. \\
\textsuperscript{214} Cf. Gai. 1.4 and \textit{Dig.} 1.3. \\
\textsuperscript{215} Cf. de Zulueta (1946) \textit{ad loc.} 
\end{flushright}
this manner, therefore, the people have through their prerogative empowered the *princeps*, who cites their ultimate authority but acts in their stead.\(^{216}\)

Having considered the force of law of the *constitutio principis*, and its constitutional basis, as indicative of a functional anthropomorphism of the state in the person of the emperor, we will look for a similar concentration of the operations of the *societas* in one person. I cannot prove that this focalization is the direct result of their contracting with the state now encapsulated by the emperor, but it is noteworthy that such representation in the companies is not to be found before the imperial period. Such a change can be seen in the allowances for representation of *societates* in the *Customs law*. Mention of the agents of the *societas* is first found in lines 105 to 109, which date to 12 BCE. Here we see a *magister* (προένγυος), who is employed by the person who wins the contract in order to exploit it, and a *cognitor* (αὐθέντης) whose responsibility is to guarantee the *praedia* required of the company. In lines 133 to 135, which date to 19 CE, the period of time in which the *magister* can be changed by the company is extended from three to ten days, and lines 140 to 143, likely dating to 42 or 47 CE, increase the window to thirty days. The concentration of this agency in one *magister*, combined with the persistent use of the singular when describing the recipient of the contract who employs the *magister*, creates the impression that the activities of the *societates* were increasingly conceived of in terms of one individual.

We now turn to Gaius’ description of the organization of *societates* at *Dig.* 3.4.1. He first (*Dig.* 3.4.1.pr.) mentions that the ability to form *societates* or *collegia* is restricted so that only

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\(^{216}\) There is an interesting connection here to Thomas Hobbes, whose *Leviathan* features a frontispiece with perhaps the most recognizable image of an anthropomorphized state, and who locates the power of the king ultimately in the people as well; cf. Tuck (2016). We can also call to mind Hobbes’ assertion in *De Cive* 12.8 that “the king is the people.”
those engaged in certain activities or with certain permissions can join together in this way. Then at *Dig.* 3.4.1.1, Gaius makes the comparison that most interests us:

Quibus autem permissum est corpus habere collegii societatis sive cuiusque alterius eorum nominum, proprium est ad exemplum rei publicae habere res communes, arcam communem et actorem sive syndicum, per quem tamquam in re publica, quod communiter agi fierique oporteat, agatur fiat.

Those permitted to form a corporate body consisting of a *collegium* or partnership [*societas*] 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.\(^{217}\)

Gaius explicitly relates the organization, resources, and activities of the *societas* to a state. The activities specifically of the *societas* can be carried out by a particular individual who acts on behalf of the others in the partnership. This depiction of a state-like enterprise as represented by an individual speaks forcefully to a notional equivalence between such an enterprise and a state, the duties of which can be similarly focalized in one person, in situations of contract.

In closing, we will say a word about the demise of the *publicani*. This seems to have come in the early second century CE, at which time their final prerogative, namely tax-collection, was taken over by the state. This was carried out often through the employment of individual *conductores*, who at first collected taxes on imperial estates.\(^ {218}\) As the purview of the *conductores* grew, that of the *publicani* shrunk, and government agents also encroached upon the activities of the latter. We see then an instance of the imperial bureaucracy swelling to incorporate pre-existing structures of governance and administration, and redrawing the line between public and private ownership in imperial organization.

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Chapter 3

*Res* and territorial ideology
The crisis of 33 CE

INTRODUCTION

Our next case study is the crisis of 33 CE. We will begin with a presentation of the details of the crisis, including the motivation for the passage of the relevant legislation, the economic difficulties that resulted, and the steps taken by Tiberius in response. We will see that the crisis followed from an attempt to implement a law that had been passed by Julius Caesar. Frustratingly, this is all that we know about Caesar’s law, and so we cannot specify the year in which it was passed or any of its provisions. We will then characterize the interests of the ancient sources that treat the crisis, chief among them Tacitus *Annales* 6.16-17; the crisis is also mentioned in passing by Suetonius at *Tiberius* 48, and by Cassius Dio at 53.21.4-5. This characterization will make clear that the ancient sources were more interested in the moral components and consequences of this episode than the underlying economic questions. The latter, as we might expect, have received much attention from scholars, but our review of this literature will show that insufficient attention has been paid to the moral considerations of the crisis present in ancient accounts. Emphasizing these moral and societal dimensions will prime us to consider some of the reasons why Tiberius and those governing the state chose to pass what legislation they did.

We will then move to the question of how the crisis of 33 informs upon our interest in how the administration of empire, rather than concerted juristic thought, was the prime determinant of the rules governing Roman *res*. This episode shows how different the motivations
to formulate and enact rules governing res can be when those acting are magistrates and imperial agents as opposed to jurists, who were certainly a self-conscious professional group at this point. This case study underscores the political and ideological considerations of imperial administrators, which were completely different from those of the jurists. The motivation for the revival of the Caesarian legislation that led to the crisis of 33 was rooted in the notion that Romans of a certain position should keep a substantial portion, if not a majority or all, of their wealth in Italy; this notion depended upon a sensibility that Italy was a unique space within the empire. Roman law could acknowledge this as well, as demonstrated by the distinction in the procedure of conveyance between Italic and non-Italic land, with the former considered res mancipi and the latter res necmancipi.

This distinction in Roman law, however, was an acknowledgement of different traditional procedures across different areas of the jurisdiction of Roman law, a jurisdiction larger than that out of which Roman law first grew. What we have in the case of the legislation that led to the crisis of 33 is rather a promotion of Italy to a privileged position within the ideological geography of the empire, and this decision therefore incorporated an expressive component far more programmatic than the distinction between Italic and non-Italic land which was just mentioned and which may have been far older. Although Italy was considered to be a different sort of space administratively speaking from overseas provinces throughout much of the Republic, as can be seen in, for instance, the abolition of tributum after 167 BCE as mentioned above, or the extension of Roman citizenship after 88 BCE throughout the peninsula, the ideological promotion that concerns us in this chapter does seem to have a political philosophical interest that postdates the Roman Republic.
As we will see, the impulse of this legislation is best understood as arising from a politics of republicanism that sought to elevate Italy more for rhetorical and ideological reasons than for economic growth. The vehicle for this was the authority of the senate, an issue that had come up repeatedly in the earlier years of Tiberius’ principate, and which had coalesced around the figure of Cn. Calpurnius Piso; we will discuss two such instances and what they meant for senatorial dignity. Our examination of this republicanism will show that such concerns are part of the political, social, and economic interests of the empire, and that these decisions, which could find implementation by a growing number of sources of law during the Empire, superseded and delineated subsequent juristic theorization and rule-making. Such decisions would not have been proposed or counseled by the jurists; they rather reacted to such policies. We will conclude this chapter with a discussion of several of the treatments of the crisis of 33 written after the financial crisis of 2007/8. In addition to an impulse to showcase the supposed relevance of events from antiquity even by those covering finance, the interest of many such observers seems to stem from the ad hoc nature of the crisis response in antiquity, and indeed following the economic downturn in 2007/8. These ad-hoc responses were again the product of politics, not of juristic rumination. I believe that this putative connection sheds further light on our insistence on the centrality of empire in determining the rules of the administration of res: not only was the broader rationale behind the legislation that led to the crisis grounded in political and social, as opposed to juristic, projects, the successive responses to the crisis also did not bear the mark of juristic contemplation but rather betrayed political consideration.
As mentioned, the most comprehensive treatment of the crisis is that in Tacitus, sections of which we will examine throughout the chapter and which we quote in full below:

[16] Interea magna vis accusatorum in eos inrupit qui pecunias fenore auctitabant adversum legem dictatoris Caesaris, qua de modo credendi possidendique intra Italianam cavetur, omissam olim, quia privato usui bonum publicum postponitur. sane vetus urbi fenebre malum et seditionum discordiarumque creberrima causa eoque cohiebatur antiquis quoque et minus corruptis moribus. nam primo duodecim tabulis sanctum, ne quis unciario fenore amplius exerceret, cum antea ex libidine locupletium agitaretur; dein rogatione tribunicia ad semuncias redacta, postremo vetita versura. multisque plebi scitis obviam itum fraudibus quae toties repressae miras per artes rursurn oriebantur. sed tum Gracchus praetor, cui ea quaestio evenerat, multitudine periclitantium rettulit ad senatum, trepidique patres (neque enim quisquam tali culpa vacuus) veniam a principe petivere; et concedente annus in posterum sexque menses dati, quis secundum iussa legis rationes familiaris quisque componerent.

[17] Hinc inopia rei nummariae, commoto simul omnium aere alieno, et quia tot damnatis bonisque eorum divenditis signatum argentum fisco vel aerario attinebatur. ad hoc senatus praescripsenat, duas quisque fenoris parte in agris per Italianam conlocaret. sed creditores in solidum appellabant, nec decorum appellatis minuere fidem. ita primo concursatio et preces, dein strepere praetoris tribunal, eaque remedio quaesita, venditio et emptio, in contrarium mutari, quia feneratores omnem pecuniam mercandis agris considerant. copiam vendendi secuta vilitate, quanto quis obaeratior, aegrius distrahebant, multique fortunis provolvebant; eversio rei familiaris dignitatem ac famam praecepit, donet tuit opem Caesar disposto per mensas milies sestertio factaque mutuandi copia sine usuris per triennium, si debitor populo in duplum praedii cavisset. sic refecta fides, et paulatim privati quoque creditores reperti, neque emptio agrorum exercita ad formam senatus consulti, acribus, ut ferme talia, initis, incurioso fine.

[16] Accusers were now intensely active. Their present targets were men who enriched themselves by usury, infringing the law by which the dictator Julius Caesar had controlled loans and land ownership in Italy. Since patriotism come second to private profits, this law had long been ignored. Money-lending is an ancient problem in Rome, and a frequent cause of disharmony and disorder. Even in an earlier, less corrupt society steps had been taken against it. At first, interest had been determined arbitrarily by the rich, but then the Twelve Tables had fixed the maximum at 10 per cent. Next, a tribune’s law had halved the rate. Finally loans on compound interest were
forbidden completely. Fraudulence, attacked by repeated legislation, was ingeniously revived after each successive counter-measure. Now, however, the praetor Sempronius Gracchus (II), responsible for the investigation, was compelled by the numbers of potential defendants to refer the matter to the senate. That body – being implicated to a man – nervously entreated the emperor’s indulgence. It was granted. Eighteen months were allowed in which all private finances had to be brought into line with the law.

[17] The result was a shortage of money. For all debts were called in simultaneously; besides, the many convictions and sales of confiscated property had concentrated currency in the treasury and its imperially controlled branches. To meet this situation the senate had instructed that creditors should invest two-thirds of their capital in Italy, and debtors immediately should pay the same proportion of their debts. However, creditors demanded payment in full, and debtors were morally bound to respond. The first results were importunate appeals to money-lenders. Next, the praetor’s court resounded with activity. The decree requiring land purchases and sales, envisaged as relief, had the opposite effect since when the capitalists received payment they hoarded it, to but land at their convenience. These extensive transactions reduced prices. But large-scale debtors found it difficult to sell; so many of them were ejected from their properties, and lost not only their estates but their rank and reputation. Then Tiberius came to the rescue. He distributed a hundred million sesterces among specially established banks, for interest-free three-year state loans, against security double the value in landed property. Credit was thus restored; and gradually private lenders, too, reappeared. However, land transactions failed to adhere to the provisions of the senatorial decree. As usual, the beginning was strict, the sequel slack. 219

The events that have come to be known as the crisis of 33 were set in motion most of all by Tiberius’ revival of a law passed by Julius Caesar, although the ancient sources differ in the emphasis they place on the events that prompted Tiberius to revive the relevant law. In this account, I follow Tchernia’s description, although we will question some of his interpretations of the events. 220 According to Tacitus, delatores began in 33 to accuse people of breaking Caesar’s law de modo credendi possidendique intra Italianam. Tchernia states that this law created “in the matter of arbitrage, a legal correlation between landowning and moneylending for [sic] interest,” by which he presumably means that lending at interest provided greater returns than did landowning, but that one had to hold a certain amount of land to be involved in moneylending at

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a given volume.\textsuperscript{221} This seems more convoluted than what Tacitus says, namely that there was lending at illegally high rates. Tchernia thinks that this is the name of the law, but it reads more as a description of the law’s purpose by an historian than as a title, which would express the law’s type of concern; the relevant sentence in Tacitus seems not to reproduce the title exactly. As regards our other sources, Dio says that Tiberius revived the Caesarian law, whereas Suetonius does not mention anything regarding the origin of the crisis.\textsuperscript{222}

The actions of the \textit{delatores} implicated such a large number of people, or at least a sufficient number of well connected people, that the urban praetor who presided over the cases, referred the entire matter to the senate. Tacitus is insistent that the entirety of the senate was implicated in this scandal of lending at interest, and the body asked Tiberius to grant them some reprieve. The emperor declared that a period of eighteen months was to be established, during which time the senators were to bring their affairs into conformity with the law. There seems therefore to be some discrepancy between the accounts of Tacitus and Dio, because Tacitus sees the \textit{delatores} as those who set the whole affair in motion, whereas Dio has them taking their cue from Tiberius’ actions. In the interest of balancing these somewhat different accounts, we should remember Tacitus’ tendency to apportion blame to \textit{delatores} for a downturn in political decorum, which we observe in several of his works and perhaps mostconcertedly in the \textit{Dialogus de oratoribus}.\textsuperscript{223} It is impossible to know which action put these events in motion, but it seems likely that Tiberius would have played a critical part, as otherwise we have no explanation for why the \textit{delatores} moved so aggressively at this time. His desire to enforce the provisions of the law, albeit after a stay of eighteen months, demonstrates his approval of its being brought into

\textsuperscript{221} Tchernia (2016) 174.


effect by the actions of the delatores. Tiberius’ motivations, if it was in fact he who revived the law, are difficult to discern, but in this chapter we will adduce his actions before and during the crisis to argue in support of previous scholarship that has concluded that Tiberius sought to empower the senate in imperial administration.

What followed the granting of the eighteen-month grace period was a credit crisis, as loans that could be called in were. Tacitus says that an additional problem was created by the amassing in the treasury and other state repositories of funds from the many political convictions and sales of confiscated property. In first attempting to meet this problem, there came a senatus consultum that creditors should invest two-thirds of their capital within Italy, and debtors should pay the same proportion of their outstanding debts immediately. Tacitus’ phrase ad hoc at 6.17 seems to suggest that the entirety of loans had to be paid, with at least two-thirds of the balance paid earlier than it would otherwise have been due. This was not loan forgiveness, in other words. Following on this reading, we take the next of Tacitus’ remarks, sed creditores in solidum appellabant, also to apply to immediate repayment. Perhaps they feared that this new payment schedule would destabilize the original contract, and that they had better recoup the entirely of the loan as soon as possible.

Neither Dio nor Suetonius gives us enough information to resolve this question. Suetonius’ account differs somewhat from Tacitus’, with the former specifying that Tiberius initiated the senatus consultum, and required that two-thirds of the funds lent out be invested in land. The significance of the distinction as to who prompted the passage of the senatus consultum concerns the alacrity with which the senators moved to put their affairs in order; if Tacitus is to be believed, these senators seem to have taken the initiative on this matter. There is a further discrepancy between the accounts in Tacitus and in Suetonius to which Tchernia draws
our attention, namely Tacitus’ specification that the *senatus consultum* was issued after the crisis began and through its provision exacerbated the problem, and Suetonius’ assertion that the *senatus consultum* actually caused the crisis. However we choose to come down on these questions, the broad outlines of the resultant situation are clear enough in Tacitus’ account. After creditors called in loans that debtors could not pay, debtors’ property was then sold off, leading to a fall in land prices, and financial disaster for the debtors.

All three of our sources are in accord as to Tiberius’ solution: he made available one hundred million sesterces for interest-free loans with three-year terms, which required collateral in the form of land valued at twice the principle of the loan. According to Dio, Tiberius also had the most aggressive of the delatores killed. Further, Tacitus tells us that there followed no attempts to enforce the measures of the *senatus consultum*. It is difficult to imagine how exactly the *senatus consultum* would have been enforced, or how the remainder of debts beyond the two-thirds required by the *senatus consultum* would have been collected, if we consider Tacitus’ description of the resultant economic devastation to be, in its broad outlines, correct. He must be exaggerating to some extent, perhaps most of all in his insistence on the total ruin of debtors, some of whom may very well have been senators, but the situation was certainly dire if we accept his report of a precipitous decline in the price of land in Italy. (The problem of how to value the land that would have been required as collateral to receive a loan out of the money made available by Tiberius is not addressed in our sources.) There seems also not to have been another revival of Caesar’s law after the eighteen-month stay. Tiberius’ solution seems to have been effective in bringing about the end of the crisis.

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224 Tchernia (2016) 175. Lo Cascio (1978) 245 and others whom he cites have noted that the phrase *ad hoc* at the opening of the passage, and which we touched upon above, can mean either “besides this” or “to address this situation.”
We now turn to the issue of what aspects of the crisis our sources choose to emphasize in addition to their relating the political and economic details. Such interrogation of our sources, particularly the lengthier account in Tacitus, is warranted given that judgments of the factual components of the crisis, such as the extent to which senators engaged in money-lending or the degree to which debtors were wiped out, depend upon our perception of the extent to which Tacitus, Suetonius, and Dio take license in order to convey a moral point. Again we will look mostly at Tacitus’ lengthier description. By and large, this question of license has not been addressed by scholars interested in the economic or financial aspects of the crisis, who take what is said by Tacitus more or less at face value. Indeed, one struggles to find a treatment of the crisis of 33 that does not take as its focus a question such as the mechanisms by which Tiberius might have infused cash in to the ailing financial system, or his comprehension of the economic forces as work.225

One scholar who has emphasized a different aspect of the action taken by Tiberius is Elliott, who argues that the chief impulse behind Tiberius’ provision of credit for interest-free loans was to maintain the social standing of the senators implicated in the crisis, and that financial stabilization, if Tiberius even understood this as an objective, was decidedly of secondary importance.226 Elliott’s theme is not quite ours, but he does examine issues beyond purely the economy, and he may indeed be largely correct. The only scholar who seems to have addressed our interest in the purpose and effect of Tacitus’ decision to portray the senators and


Tiberius as he does is Rodewald. Rodewald mentions, in passing only, that Tacitus has in mind to use the episode as a means to illuminate the character and conduct of the senators and of Tiberius, and to pass judgment as to the nature of the relation between Tiberius and the senate.

Although it is certainly refreshing to encounter Rodewald’s recognition that Tacitus’ discussion may concern more than simply economics, I believe that we should carry this impulse somewhat further. This question has bearing upon our picture of the pervasiveness of the contravention of this law by the senatorial class, and therefore the size of the crisis itself. In other words, it is not enough simply to say that Tacitus intends to call the morality of the actors he portrays into question. Although we can see the relationship between any artistic license taken and the implied size of the crisis, arriving at an accurate picture is hardly easy. The idea that Tacitus over-emphasizes the degree of involvement of senators in this practice would lead naturally to the suspicion that the crisis was not so severe, but we cannot narrow our analysis any further.

Raising this concern will allow us to properly examine several past treatments of the crisis other than that of Rodewald to which we have just alluded. Elliott provides a useful description of the state of the literature, not least for his inclusion of several pieces produced after the financial crisis of 2007/8, which were written by non-specialists. The most prominent strain in the literature, and that which we have just attempted to nuance, is that interested in the economics of the crisis. Frank’s short study is still prominent and continues to fuel debate because it was the first attempt to situate the crisis within the longer-term macroeconomic forces

227 Rodewald (1976) 14.

228 Elliott (2015) 267-276. Some noteworthy titles include Gannon’s “Panic of 33: Roman Credit Crisis – Tiberius the Central Banker” (2010), and Taylor’s “Tiberius used Quantitative Easing to Solve the Financial Crisis of 33 AD” (2013). It should be stressed of course that this impulse to revisit the crisis with a twentieth- or twenty-first-century vocabulary and theoretical sensibility predates 2007/8; cf., inter alia, Thornton and Thornton “The Financial Crisis of A.D. 33: a Keynesian Depression?” (1990). As mentioned, we will return to these treatments below.
at work in the empire.\(^\text{229}\) Frank saw the origins of the crisis in the early years of Augustus’ principate, specifically as a result of the infusion of wealth from Egypt into the Roman economy, as recorded by Suetonius and by Dio.\(^\text{230}\) Suetonius and Dio each record a drop in interest rates and inflation; Dio concentrates on the city of Rome whereas Suetonius seems to expand his description to the countryside as well. Frank posited that this wealth entered the Roman economy primarily through imperial expenditure in the form of Augustus’ building program.

Frank then located a change in policy toward the end of Augustus’ life, either because the available funds were consumed or because Augustus no longer deemed such expenditure advisable.\(^\text{231}\) Tiberius’ reluctance to revive spending further decreased the money supply. This led to an increase in interest rates and a drop in land prices, with the drop in land prices decreasing the attractiveness of this asset as a potential investment. Frank also asserted that stability in the provinces led Romans to invest outside of Italy. This would also have been true, however, of the early years of Augustus’ principate, so we should not necessarily think that capital flowed out of Italy only after Caesar’s law was revived or after prices dropped in Italy, at least as far as we are keen to emphasize stability as the cause.\(^\text{232}\) Additionally, imperial expenditure in the provinces would likely have been required to raise land prices substantially across a broad region, unless Romans with cash on hand concentrated their attentions on only a

\(^{229}\) Frank (1935) 336-341.


\(^{231}\) Frank (1935) 338-339 draws heaving on the number of coin issues to make his argument.

\(^{232}\) Frank (1935) 339. Elliott (2015) 272 imagines capital flight after the revival of the Caesarian law, but gives no picture of this untethered capital during Augustus’ principate. Elliott and Frank also repeatedly use the plural “laws” to describe the Caesarian legislation, despite what we read in Tacitus. For a more nuanced treatment of Roman land ownership in the provinces, albeit one interested in earlier periods, cf. Eberle (2016), which makes clear the often overlooked fact that there were many institutional constraints preventing the straightforward purchase of land by Romans in the provinces.
few small areas. Indeed the impression that the sources give is one of general reduction in spending in Augustus’ last and Tiberius’ first years, rather than a comprehensive redirection of resources to the provinces that would substantially inflate land prices in areas outside of Italy.

Frank sees it as inevitable that a credit shortage would result from such policies, and locates the precise origins of the crisis in the prosecution of those charging higher rates of interest, and the resultant revival of the Caesarian law. Frank’s analysis undeniably emphasizes a crucial element leading to the crisis of 33, but requires that we see Italy as one entirely integrated economy in which no part remained unaffected by imperial expenditure, whereas the provinces remained wholly untouched by imperial largesse. This would be to conflate actual economic conditions with the ideological promotion of Italy in which we are interested. We will have more to say on this ideological project below.

INTEREST RATES IN THE LONGUE DURÉE AND POLITICAL MECHANISMS

Before we examine the aspect of the law requiring investment in Italian land, let us touch briefly on the provision governing interest rates. This discussion will prime us to consider the development over the *longue durée* of the programmatic aspect of the provision of the law governing landowning, since we will follow Tacitus in situating our understanding of the part of the law governing interest rates within the context of prior legal initiatives going back over centuries. Tacitus makes no attempt to hide his judgment of usury as a *vetus malum* that leads to the promotion of private interests ahead of public benefit. He gives a genealogy of usury

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233 One hesitates to argue from silence, but perhaps the satirists of the late Republic and early Empire would have enshrined the names of such regions outside of Italy alongside that of Baiae as bywords for aristocratic excess.

234 Suetonius (*Gai. 37.3*) asserts as proof of Tiberius’ parsimonious tendencies that he had amassed 2.7 billion sesterces that remained unspent at the time of his death.
legislation at Rome, beginning with a provision in the XII Tables that limited interest rates to 1/12 or 8 1/3%; he suggests mockingly that there was no prior check on rates except for the inclination of the wealthy. This provision does not come down to us. Livy locates the law that fixed interest rates at 8 1/3% in 357 BCE. If, however, the case from Tiberius’ principate is indication of anything, the enforcement of a law in the XII Tables may have lapsed after a period of time and may have been revived subsequently.

Tacitus then states that a later tribunician rogation reduced this rate by one half; Livy locates this in 347 BCE. The last piece of legislation that Tacitus mentions is a ban on versura, which Livy seems to place in 342 BCE. Of course one cannot help but note that these measures occurred during a period in which other legislation promoting plebeian causes was also passed. In the case of the ban on versura, we should note that properly the term means something akin to borrowing from a new creditor to pay an existing debt; hence the sense of “turn” inherent in the word. Before picking up again the situation during Tiberius’ principate, Tacitus includes that unending attempts to evade the prohibitions required a series of plebiscites directed at enforcing them.

We can construct a plausible narrative as to how the later plebiscites gestured to by Tacitus may have been initiated and enacted, although Tacitus’ vagueness ensures that the years of their passage remain anyone’s guess. These plebiscites presumably would have passed in

235 In the Roman system of specifying interest rates, unciarium faenus means 1/12% per month or 1% per year. Niebuhr (1853) thought this was far too low and judged that the meaning was 1/12 of the principle per month or 8 1/3% per year. He raised this to 10% by reasoning that this practice would have begun during the ten-month year. Mommsen (1854) agreed with him.

236 7.16.

237 We might perhaps have expected Tacitus to mention that previous laws had fallen into disuse as well.

238 7.27.

239 7.42.
years in which there was a prominent tribune or powerful public pressure to address usury. Crucial to the moralizing message that Tacitus attempts to communicate in his discussion of past legislation, which extends also to the entire presentation of the events of 33 CE, is the fact that legislation targeting interest rates had to be passed numerous times. That the vehicle chosen for such legislation was the plebiscite is intriguing, because several attempts were required before plebiscites came to apply to the entire population of Roman citizens. The authors of the *lex Publilia Philonis* of 339 BCE felt it necessary to restate the crux of the *lex Valeria Horatia* of 441 BCE, which had specified that legislated enactments of the *concilium plebis* were binding on all Roman citizens. The history that Tacitus outlines after 342 BCE, with its emphasis on the plebiscite, begs the question of whether the plebiscite certainly applied to all Romans in practice after the *lex Publilia Philonis*, or whether more time and further legislative repetition was required for it to become universally binding.

Tacitus’ discussion of the history of interest rate regulation is intriguing for another reason. As far as we can tell from the information that Tacitus himself provides, Caesar’s law was not primarily meant to address rates of interest. The law rather concerned the sums lent out, and it tied a particular sum to the amount of Italian land in an individual creditor’s possession. Such regulation limiting the amount of money that could be lent would of course drive up interest rates, as the supply of capital to be lent was reduced while demand likely remained constant. And so while Tacitus’ historical discussion of interest rate regulation is thematically related, the effect of the Caesarian law was contrary to the long-term trend that Tacitus highlights. We will examine why the focus may have shifted from regulating rates to regulating sums in the next section.

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In our case, what triggers the legislative activity designed to assert anew the provisions of the law is not the creative use of new financial instruments by those seeking to evade the law, but the simple unwillingness to abide by its provisions. The fact that the Caesarian law technically remained in force meant that an action on it was available to the delatores who were inclined to challenge the creditors. Tacitus’ phrase *omissam olim* refers to considerations of the law in practice, not to a repeal of any type. We cannot know the exact identities or motivations of the delatores given Tacitus’ quick characterization of them. We do see, however, that they were sufficiently active in bringing suits that the praetor felt compelled to hand the matter over to the senate.

**TIBERIUS AND THE SENATE – NEW PREROGATIVES?**

The conduct of the senate and their interaction with Tiberius are an indispensable part of our analysis of early imperial governance. There seems to be an attempt on the part of Tiberius to encourage the senate to act in a self-assured manner as regards its self-regulation and curbing of excesses. Further, we can perhaps attribute to Tiberius the intention of forming the senate into a body more capable of handling administrative necessities, and not focused chiefly on deliberation or admonition. The senate was at this time and would remain a body constantly re-evaluating its strength and independence vis-à-vis the emperor, and responding to the wishes of the princeps. I believe we see in this episode an opportunity created by Tiberius for the senate to claim for itself greater authority and a larger administrative purview, not least in the area of its own self-management. In this instance the senate did not avail itself of the opportunity. This question of how the senate might come together in order to find a solution to this financial
problem is different from Talbert’s interest in financial administration by the senate; he is concerned with specific, more routine administrative issues. He does, however, discuss indications of Tiberius’ desire that the senate act on its own accord at times.

In support of this position, let us recall several aspects of this series of events. We can likely conclude from the magnitude of the problem, even if Tacitus exaggerates somewhat, that Tiberius was aware of the senatorial contravention of the Caesarian law before the number of cases grew to such a total that the praetor had to refer the matter to the senate. As these suits implicated the most powerful men at Rome, it seems unlikely that they would have gained ground in the courts without Tiberius’ knowledge and consent, whether or not the evidence allows us to assert with confidence his approval. We can posit that perhaps the first cases were not brought against senators, and that the senators’ worry stemmed from the fear that they too were so exposed even if they had not yet faced suits. We must think both that any who were the targets of such designs on the part of the delatores were extremely wealthy, even if they did not all possess senatorial levels of wealth, and that similar actions would be brought in due course against senators absent some change in the law. The consequence of the initiation of these actions therefore seems clear, such that it is not crucial that we determine with absolute certainty whether or not senators were the first targets of these suits.

The reprieve of eighteen months granted by Tiberius was meant to allow creditors to bring their accounts into conformity with the law. As we have discussed, what resulted was hardly an orderly, coordinated adjustment, but one way to read the reprieve is that it indicated Tiberius’ desire that the senate act as a uniform body to address the problems that had come to light; they did not live up to that his expectations if such was his design, but that cannot disprove

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that he had such coordination in mind. Tacitus is certainly keen to highlight their collective interest in this event’s resolution, and of course to the degree that there were “senatorial interests” during the early Principate, as indeed during all other periods of Roman history, we might expect to see some coordination of action. This case was perhaps an ideal opportunity for the senate to assert its administrative capacity, given the senators’ collective implication, even if we imagine that not quite all were guilty.\textsuperscript{243} This case presented the added benefit of ensuring that the senate would get its own affairs in order, at least as regards this law that its members flouted.

Other events from Tiberius’ principate evidence an intention on his part to alter the character and conduct of the senate, among them the events surrounding Cn. Calpurnius Piso. Years before his trial in 20 CE, Piso clashed with at least one of his colleagues over the question of the senate’s administrative capacity. At the adjournment of the senate in 16 CE, there arose a dispute between C. Asinius Gallus and Piso over whether the senate should postpone its operations until after a period during which Tiberius had planned to be away from the city. This is related by Tacitus at \textit{Annales} 2.35, which we reproduce here:

\begin{quote}
Res eo anno prolatas haud referrem, ni pretium foret Cn. Pisonis et Asinii Galli super eo negotio diversas sententias noscere. Piso, quamquam afferaturum se dixerat Caesar, ob id magis agendas censebat, ut absente principe senatum et equites posse sua munia sustinere decorum rei publicae foret. Gallus, quia speciem libertatis Piso praecipitat, nihil satis inlustre aut ex dignitate populi Romani, nisi coram et sub oculis Caesaris, eoque conventum Italiae et adfluentis provinciarum praesentiae eius servanda dicebat. audiente haec Tiberio ac silente magnis utrimque contentionibus acta, sed res dilatae.
\end{quote}

The senate’s adjournment this year is only noteworthy because of the dispute regarding it between Gaius Asinius Gallus and Cnaeus Calpurnius Piso. Tiberius had said he would be away. But Cnaeus Piso considered this an additional reason for business to continue, it being in the interest of the \textit{res publica} that senate and \textit{equites} should be able to undertake \textit{sua munia} in the emperor’s absence. Gallus, forestalled by Piso in the display of

\textsuperscript{243} We might posit that some senators, particularly of plebeian standing, may have later taken it upon themselves to speak for the interests of the debtors, but that subsequent stage of the crisis did not arrive, and we should be skeptical that the debtors in this situation were by any means solely those of humbler social standing.
independence, protested that to conduct business without the emperor’s presence and supervision was incompatible with the *dignitas* of the *populus Romanus*; so the numerous Italian and provincial visitors ought to await his presence. Tiberius listened in silence as the argument raged. Finally, the adjournment was carried.\textsuperscript{244}

Piso argued that the emperor’s absence made continuing the senate’s operations the more important, as the public had an interest in some of the business of the state being carried on while the emperor was away. In Tacitus’ telling, Piso’s words equate the senate’s performance of its duties with the proper conduct of the *res publica*. Gallus took the contrary position, only, according to Tacitus, because Piso had pre-empted him in arguing for greater senatorial independence. Tacitus thereby condemns Gallus as one given to rivalry and discord more than political principles. Gallus contends that deliberations conducted with the *princeps* absent did not comport with the dignity of the Roman people, as shown by the fact that Italian and provincial cities awaited the emperor’s arrival before convening; it would, following Gallus’ argument, be ignoble to conduct the proceedings without this sign of the emperor’s approval. We read *Gallus...nihil satis inlustre aut ex dignitate populi Romani nisi coram et sub oculis Caesaris*. Tacitus stresses Tiberius’ aural reception of the fierce debate, which as mentioned ended with the senate’s adjournment.

The terms employed in these remarks are quite interesting. The juxtaposition is between, on the one hand, *decorum*, which is equated with the senate’s performing *sua munia*, and, on the other, what is in keeping with the *dignitas* of the Roman people. Further, Piso concerns himself with the *res publica*, while Gallus invokes the *populus Romanus*, into which distinction we might read a higher regard for the senate on the part of Piso. We must keep in mind that one aspect of Tacitus’ project is doubtless to show the contortions and strains put on language in a political context.

\textsuperscript{244} Text Borzsák (1992). Translation Grant (1956), with modifications.
environment such as we find in the early Principate, but such realization should not prompt us to treat all distortions equally.\textsuperscript{245} What follows upon Gallus’ invocation of the \textit{dignitas} of the Roman people is the equation between the Roman senate and all other assemblies in Italy and indeed throughout the provinces, all of which we are told wait for the \textit{princeps} to be present before assembling. This line of reasoning is fascinating: Gallus in effect denies the ideological and administrative centrality of Rome and attempt to clearly subjugate the senate symbolically as well to the \textit{princeps}. Gallus does in his phrasing mention Italy as distinct from the provinces, but the sentence in question seems rather to capture a rhetorical fossilization more than an intended administrative or conceptual differentiation. Tacitus very skillfully has Tiberius preside over the proceedings when Gallus is given the last word before the senate adjourns, thereby insinuating that the \textit{princeps} approved of this ideological assertion. Additionally, that this is the last word on the matter ensnares the motives of all of the other senators: the complexity of opinions arising from the likelihood that there would have been senators who wanted to adjourn for other reasons is overwhelmed by Gallus’ programmatic display.

What follows in Tacitus’ text is also quite interesting.\textsuperscript{246} Gallus made another proposal concerning the senate, but here he focused on the election of magistrates. He proposed that magistrates be elected five years in advance, and that praetorships be reserved for prominent commanders who had not yet held the post, with Tiberius nominating twelve such men every year. In making this proposal, Gallus was almost certainly acting consistently with the position he took during the debate with Piso, in that he likely again championed control by the \textit{princeps}

\textsuperscript{245} On the topic of Tacitus’ discussions of oratory, cf. Dominik (2007); for a treatment of oratory and politics during the imperial period, cf. Rutledge (2007).

\textsuperscript{246} Specifically at 2.36-37.
over the senate. This would make us question Tacitus’ charge that he only took that earlier stance because his preferred argument was claimed prior to his speaking.

The other reading that is possible, and is in keeping with Tiberius’ reaction to the proposal, is that it may in effect have increased the number of magistrates by a factor of five: announcing the names of men who would be magistrates in up to five years would give added consideration to the conduct and opinions of those men, and, Tiberius worried, lead them to overstep, probably vis-à-vis other senators. Tacitus reports that this last remark was couched in terms meant to be broadly appealing, but in reality it had the effect of further concentrating power in the hands of this one man, as the proposal was defeated. It is not clear, however, that Tiberius disliked the idea of, as he saw it, in effect creating more magistrates at any one time, because such an action would increase the power of the senate. Clauses such as *vix per singulos annos offensiones vitari, quamvis repulsam propinqua spes soletur: quantum odii fore ab iis, qui ultra quinquennium prociuntur* (“even the annual system easily caused offence, but its rebuffs were mitigated by hopes of an early reversal: rejection for five years would indeed cause ill will”), and *superbire homines etiam annua designatione: quid si honorem per quinquennium agitent?* (“even when nomination is on eyear before office, men become haughty in the interval – what if they assumed the honor and acted accordingly for five years?”) could fruitfully be read to show a regard for the body, in their emphasis on the will of individual members to participate and collaborate.247 I do not wish to push this point too far, but it seems unreasonable to conclude that Tiberius took this opportunity to depress the authority of the senate as a body.

The more famous episode in Piso’s life was of course his trial in connection to the death of Germanicus, related intermittently by Tacitus at *Annales* 2.55-82 and 3.1-15. The events over

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the course of the roughly three years from the allotting of commands in the east to Piso and to Germanicus to the trial are fascinating, but our focus here is on the actions of Tiberius toward the senate, which we interrogate with an eye toward any indication that the princeps attempted to use the trial to effect change in the senate’s administrative conduct. The two accounts of the trial and Piso’s death that we will use are Tacitus’ presentation, specifically at Annales 3.8-15, and the Senatus Consultum de Pisonem Patrem.\footnote{CIL 2\textsuperscript{2}.5.900. These two accounts are often read together; cf. Damon (1999).} Crucial to our estimation of Tiberius’ role in the trial is the procedure by which the emperor and then the senate heard the case. In cases deemed sufficiently important, the emperor first reviewed the case before it was brought to the senate.\footnote{For Tiberius’ role in the proceedings, cf. Tuori (2016) 143ff.} This practice of clearing cases before they proceeded to trial gave the emperor control over those heard in the senate, a power that was subject to the political pressures that characterized affairs that piqued public interest.

We imagine of course an informal and highly discretionary review of the case by the princeps. This process would not have been very similar to the praetor’s review of the facts of a case during the stage in iure in the legis actio or the formulary procedure: although the praetor likely had much discretion, his position was subject to more checks than was the emperor’s, and the cases over which the praetor presided, while still with implications for normativity and the rule of law, were not cases in public law that became causes célèbres. It seems reasonable to imagine some emperors as quite active in shaping the “facts of the case” before it was heard in the senate. The process of imperial review was a mechanism for the princeps to set the senate’s judicial purview, and thereby to influence the development not only of what legal issues were deemed of senatorial or political interest, but of the bounds of different areas of law so much as the venue in which cases were heard mattered to these questions. We should judge it
inconceivable, for instance, that the law on *maiestas* or *repetundae* would have developed as it did if it had been confined to the praetor’s court.

There was initially some negotiation regarding who would handle Piso’s prosecution. Tiberius was eventually asked to take over the mater once L. Fulcinius Trio secured permission to bring charges based on earlier events in Piso’s career. For his part Piso was pleased with this development, as he thought Tiberius less likely to be swayed by the gossip attached to the case, and because he reasoned that one man could better judge truth than a multitude. Tiberius, however, after hearing basic arguments from both sides, referred the case to the senate, charging them with determining whether Piso merely rejoiced at Germanicus’ death, or actually murdered him. There were several other charges that the senate was asked to consider, including bribing the troops, fomenting discord in the province, and insulting his superior, as Germanicus had been given *maius imperium*. After disparaging the actions of those he thought too quick to accuse, Tiberius called for a fair inquiry.

The prosecution was given two days to make its case and the defense, after a six-day recess, was given three days to rebut the charges. The defense was not able to refute the charges listed just above, but the accusation that Piso had poisoned Germanicus did not stick. Both judges, as Tacitus has it, were unsatisfied at this conclusion, Tiberius because Piso had made war to recover the province, and the senators because they remained convinced that Germanicus had not died of natural causes. Tacitus reports that both Piso and Tiberius refused to hand over their personal correspondence after a senatorial request, and records the assembled crowd’s hostility toward Piso. In his conclusion to the trial, Tacitus highlights Plancia’s distancing herself from her husband, and above all Tiberius’ withdrawal of any hint of support as contributing to Piso’s decision to take his own life.
The end of the trial did not mark the end of the affair, however. The senate subsequently issued the *Senatus Consultum de Pisone Patre*, a decree that differed substantially from its generic predecessors in its attempt to provide a narrative of the events surrounding Piso with an eye toward imperial unity and in admiration of the *princeps*. The inscription was found in Spain in 1988 or 1989 and published with extensive commentary for the first time in Eck et al.\(^\text{250}\) The complete text of about 175 lines presents the event of Piso’s trial from the regime’s point of view as expressed through the senate.\(^\text{251}\) This document provides another window onto our question of Tiberius’ interest in changing the nature of the senate, as we cannot imagine of course that the text would have seen the light of day without Tiberius’ approval. The particulars of this text are not what concern us here, although they have been the subject of much analysis.\(^\text{252}\) We are rather concerned with what such a use of a *senatus consultum* can tell us about changing attitudes regarding the proper role of the senate. This *senatus consultum* also follows on the heels of a decree of the previous year concerning honors thought due to Germanicus.\(^\text{253}\) Taken together, these two texts inform upon both the revised usage envisioned for the *senatus consultum* as a means of political communication, and the changing nature of the senate in its relation to the *princeps* and the imperial household.

To take the question of the *senatus consultum* first, we are struck by a departure during the early Principate from the conventions of the *senatus consultum* of the late Republic. These

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\(^{250}\) Eck et al. (1996). There was great excitement following this discovery, and in addition to translations and analyses in the major languages, the *American Journal of Philology* devoted a special issue to the document in 1999 (volume 120, number 1), under the direction of Damon, Takacs, and Potter.

\(^{251}\) Griffin (1997) 249. The six or seven surviving copies of the text include major fragments that are sufficiently large for us to be relatively sure we have a complete and accurate text. Cf. Griffin (1997) 249 n. 1 for a discussion of the few textual uncertainties.


\(^{253}\) The text of the earlier *senatus consultum* is preserved in CIL 6.31199. This inscription was discussed first in Dennison (1898) and unsurprisingly has amassed a substantial bibliography.
documents from the early Principate, and those examples mentioned above most clearly of all, pronounce upon the propriety of the conduct of certain individuals deemed publically important, and thereby carry immense normative weight. They offer a forum for senatorial praise of the imperial family, and strive toward imperial unity and an official account of an affair. Some *senatus consulta*, most clearly those concerning the establishment of physical boundaries, the diversion of rivers, and the appointment of individuals to administrative posts, look very similar to those decrees of the Republic. Moreover, there are famous republican examples meant to quash threats to the social order, most notably the *Senatus Consultum de Bacchinalibus* of 186 BCE, which look different from the republican norm and have a purpose similar to those of the imperial period.\(^{254}\)

Nevertheless, a difference emerges when we consider the prescriptive, expressive force of the decrees from the Principate. Whereas republican decrees addressed single administrative issues in the form of a request to a magistrate or an official acting *pro consule* or *pro praetore*, the *senatus consulta* of the early Empire, including the *Senatus Consultum de Mense Augusto* of 8 BCE and the *Senatus Consultum de Honoribus Drusi Decernendis* of 23 CE, concerned broader questions of morality. Although they still often attached to one person, as in the case of the *Senatus Consultum de Pisone Patre*, their broader normative force is obvious; an interest in exemplarity demands that we consider a document calling for *damnatio memoriae* as rather different from one empowering an individual to erect a mile-marker.\(^{255}\) This enlargement of the *senatus consultum* had already taken place by the beginning of the principate of Tiberius, and it

\(^{254}\) Tierney (1945) 93 contends that the language and timing of the *Senatus Consultum de Bacchanalibus* different drastically from many other republican *senatus consulta* because it was meant to communicate to the entire Italian peninsula and addressed a matter that was somewhat irregular.

\(^{255}\) On these issues of morality as regards the *Senatus Consultum de Pisone Patre*, cf. Cooley (1998).
is likely that we could further characterize the earlier stages of this change if there existed a greater number of *senatus consultum* from the principate of Augustus.

I believe that we can relate this change in the nature of *senatus consultum* to an evolving conception of the proper role of the senate in the institutional environment of the early Principate. This conception would have the senate act as administrative body with minimum oversight by the *princeps*; the senate would act in accordance with his interests, but ideally would operate with authority and a degree of procedural independence. Crucially, the senate had to police its members and craft its relation to the *princeps* in order to cultivate the requisite moral clout. It is in this light that we should understand the *senatus consultum* of 19 and 20 CE, and indeed the events leading to the crisis of 33. Tiberius’ actions before the crisis are best grasped as an attempt to induce the senate into corralling the excesses of its members, in this case in the realm of private lending. The strain on credit that would result from senators scaling back lending was not his chief interest; if it had been, he could simply have blocked any prosecution for usury. Rather, Tiberius was primarily concerned that senators act in accordance with the statute on usury, which, as we have seen, was an issue of perennial anxiety at Rome. He was at base concerned with the integrity of the senate in order that its administrative decisions carry sufficient moral force.

**CAESAR’S LAW IN IMPERIAL CONTEXT AS REFRAMED BY TIBERIUS, AND TREATMENTS OF THE CRISIS OF 33 AFTER THE FINANCIAL CRISIS OF 2007/8**

We turn now to the motivations behind Tiberius’ revival of the Caesarian law as the means to spur senatorial reform. This section will argue that crucial to the rationale for this law’s
revival was a desire to promote Italy as a unique space, ideologically speaking, within the empire. This took the form in our case of creating legislation that directed resources toward Italy, specifically by requiring that wealthy Romans invest part of their capital in Italian land. That such legislation would have had an effect on land prices and the health of various markets within Italy is certain, and was likely understood to some extent in antiquity, and we do not seek to discount the economic implications of this policy. Rather, we will highlight several considerations that argue for the notion that there were ideological considerations at work as well, in an attempt to fill out our understanding of the political environment of the early 30s CE. As we will see, the ideological promotion of Italy was very much a project of the Roman Empire. Although Italy had long been treated administratively and legally as a differentiated space within the empire, as mentioned above, the political and rhetorical elevation of Italy as the locus of Romanitas arose from an impulse that postdated the Republic from which it purported to draw its authority.

The intention to promote Italy was present both before and after Tiberius’ principate, as was the related impulse to describe the Republic in laudatory terms: in this formulation, the Republic’s Italian foundations had allowed the empire to grow, but in the process that earlier character had been lost, or at least needed reinforcing by the time of the Principate. As we have seen, Augustus showered the spoils from his defeat of Antony and Cleopatra on Italy, causing inflation in the process. We also noted in the previous chapter that Nero’s ministers had located the origin of the societates, which upon their account had been created by consuls and tribunes, in the Republic, using the previous age as a byword for proper governance and accountability. The same impulse is to be found in Piso’s insistence earlier in Tiberius’ principate that the senate at Rome was different from the other assemblies across the empire. This position advances the
idea that even within Italy, Rome was unique, but it deals in similar ideas about to the value and competence of the pre-imperial administration of the state.

When considered alongside what we have argued was Tiberius’ desire to embolden the senate administratively, the fact that the promotion of Italy inherent in the law that produced the crisis is framed in terms of senatorial landowning comes into focus. The means by which Italy is to hold special rhetorical and ideological significance is through requirements of the senate and the resultant example. These provisions therefore have an expressive force as well. In this light we think again of the Senatus Consultum de Pisone Patre and its interest in proper senatorial behavior, which gestures toward the ongoing concern with such issues during Tiberius’ principate. In that the our interest in senatorial usury is meant to regulate the commercial actions of senators, whose dealings impact the moral weight of the body, we can connect the developments leading to our crisis to the lex Claudia of 218 BCE, which severely limited senatorial engagement in shipping.256 Here the intention is check what is presented as a perennial problem at Rome by means of legislation grounded in a territorial ideology of a kind with other imperial projects that lauded the Republic. We note as well that the repeated disregard of the prohibitions on charging interest was not the desuetude that interests us elsewhere in this dissertation. The picture that comes from Tacitus is one of intentional avoidance, rather than societal change that led to different notions of legality or proper regulation.

Before we turn to the topic of how the legislative response to this crisis differed from the reasoning of the jurists, and in order to prime us to think of the chaos and ad-hoc nature of response that often characterizes such situations, we will briefly mention a few of the aspects of the crisis of 33 that are highlighted in treatments of it prompted by the financial crisis of 2007/8.

256 Cf. Livy 21.63.
In addition to those treatments by Gannon and Taylor mentioned above, we would also reference another by Taylor and one by Reed and Hyden that takes a somewhat longer timeline. These treatments come from across the political spectrum, and are variously successful in making their intended arguments.

Many have seen parallels between Tiberius’ actions, even though we have only the broad sketches of his responses, and those of the institutions of the United States, particularly on the part of the Federal Reserve. There is in particular the size of the response undertaken in each case: each was without precedent in its society’s history, and required a massive infusion of liquidity to prompt those who had been stockpiling cash to engage in financial transactions again, and to restore some measure of confidence to all economic actors. In both cases, the type of response was also unprecedented, with new tools being used, and in both cases, a powerful central actor was required in order to carry through the solutions envisaged.

What also comes through in accounts of both crises is the ad-hoc nature of the governmental response. There was a great deal of trial and error in both 33 and in 2007/8 and the years following, and those directing the response struggled to engender or provide the crucial components of confidence and liquidity. The measures required often hinged upon the personalities involved as much as upon the broader legal or economic structure. We cannot help but see a pressing concern with the morality of various actors as well. Those who were deemed to have caused the crisis, whether the delatores or the aristocracy in the Roman case, or the banks, financial regulators, borrowers or others in the case of 2007/8, are morally attacked by sources chronicling the crisis. As the crisis of 2007/8 developed, the issue often became whether to save the system by empowering the people whom many deemed responsible for the crisis. The

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257 Taylor “Was the Financial Crisis of 33 AD the First Case of Quantitative Easing?” (2013b), and Reed and Hyden “The Slow-Motion Suicide of the Roman Empire” (2015).
same, speaking generally, seems to have happened at Rome, especially if Tiberius’ focus was that which Elliott attributes to him. These larger, moralizing and ideological questions are and were quite different from those that the jurists were accustomed to discuss.

CONCLUSION: THE DIFFERENCE BETWEEN THE EVENTS OF 33 AND JURISTIC PRACTICE

By way of conclusion, let us consider how different the legal activity in connection to what became the crisis of 33 was from the conduct and concerns of the jurists. An argument that the jurists and the legal tradition existed without acknowledgement of contemporary politics or engagement with the issues of the day is unsustainable. Frier and Schiavone, among many others, have documented in detail the political interests and social maneuverings of the republican jurists and proto-jurists, and Honoré has done the same for the jurists of the later classical period, and indeed for that most famous of Justinian’s compilers, Tribonian.258 For the intervening period, we need only look at the career of M. Antistius Labeo and many others to see that some of those who drove developments in the law had deep connections to politics; Robinson has certainly shown as much for other figures as well.259

We should not think, however, that the jurists as a class were in the business of policing senatorial morality and conformity with the law by the early Principate. Furthermore, the jurists did not address questions such as the proper rate of interest or the percentage of one’s portfolio that ought to be in Italian land. Questions of this order of political magnitude that were grounded primarily in morality and imperial ideology were not their area of expertise or concern. Indeed none of the legal decision-making during the unfolding or resolution of the crisis seems to have


259 Robinson (2013).
been akin to that of the jurists. The avenue of prosecution in the courts, the handing over of the case to the senate, and grants from the emperor such as we see all appear subject to a reasoning quite other than the casuistic logic of Roman private law. And even if we posit that some members of the *concilium principis* will have been jurists, we imagine that any advice given on political issues would have looked quite different from that given regarding the development of the law.

Roman law did recognize distinctions between Italian and non-Italian land, notably as regards conveyance, but we should not without qualification relate this to the ideological project of promoting the centrality of Italy within territorial conceptions of Roman *res* and the Roman Empire. One aspect of this process with which the jurists would certainly have been involved is the inevitable renegotiation of contracts that must have come after the senate was granted a period of time to bring the affairs of its members into line. How exactly these re-workings would have been structured is difficult to posit, given that no mention of them survives in any of our accounts. Perhaps such an absence is telling: what attracted the attention of those chronicling the event in antiquity were the first-order political and economic questions. The particularities subject to fine-grain legal reasoning were relatively far from their minds.
INTRODUCTION

This chapter examines an illustrative case of social change caused by political and economic development, and of legal adaptation to evolving societal circumstances. The social change in question is the diminishing ability of the *gens* to influence the affairs of its members. Although its importance was never entirely erased, the *gens* gradually lost influence over the conduct of its members in many arenas, and for the most part the functions once provided by the *gens*, or others roughly similar, came to be provided by one element or another of the state apparatus. This topic fits into the themes of the dissertation in several ways. First and foremost, we have here an example of change resulting from the acquisition of empire, and the growth of the institutions needed to govern that empire. These institutions, which developed through a combination of design and ad-hoc solutions to problems in practice, in time came to be the means by which other social issues were adjudicated. The particular institutions in question were subsumed under the label of the *ius honorarium*, and those issues that came to be addressed in this forum had previously been handled by the *gens*. It was this imperial change that the jurists theorized and classified only later.

As mentioned, the presence of the *gens* in these affairs was not, in the period that concerns us, entirely eradicated, and its persistence leads us to another theme. We observe that change in political forms is far more easily accomplished than is change in underlying mechanisms of the transfer of *res*. The power of the *gens* persisted amid extreme changes in
Roman society from the regal period through to the Principate, and it only lost its standing in the realm of inheritance after centuries of legal and social development. This relation allows us a further window onto the particulars of desuetude in Roman law. Furthermore, this change is a powerful example that the categories present in later Roman juristic writing arose from and at times obfuscated a far more complex social and political history.

Scholars have long been interested in this question, and have described the sway that the *gens* held in military affairs, religion, and politics.\(^{260}\) These studies and others have shown that the *gens* was an important force for centuries after Rome’s founding, but that its power did gradually decrease. This chapter adds to this literature by examining the development of the power of the *gens* in cases of intestate inheritance. As will become clear, the area of intestate inheritance is meant as a lens by which to view the internal organization of the *gens*, as well as the dynamics and desirability of adapting social conditions that developed away from the *gens* into a legal framework delineating their involvement. I will argue that, although the power of the *gens* in this area of the law did eventually give way to a more centralized and stronger state, a development that, as mentioned, took place elsewhere in Roman society as well, the *gens* was nonetheless able to continue to exert its influence in this area of the law on its members for a considerable time longer than elsewhere in their lives.

This chapter will begin with a broader description of the *gens* in the early and mid Republic and a more substantial discussion of the question at hand, including what evidence we have. The evidence that allows us to fix the broad window within which this change occurs consists of the XII Tables and Gaius’ *Institutes*. We will then examine the several cases that will form the core of our analysis, all of which date to the late Republic; these cases will allow us to

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see the means by which this centuries-long change took place, and both to highlight a particular period as that which witnessed a potential acceleration of the trend away from gentilicial importance, and to underscore subsequent legislation. The source of law that we hypothesize provided the means for alternative legal remedies to arise, to the detriment of the *gens*, is the *ius honorarium*, and the period that accelerated its tendency away from the interests of the *gens* was the civil wars of the mid first century BCE and the principate of Augustus. We will then return to the circumstances of early Rome to propose some dynamics for legal change during this period that differ from what we come to observe in later periods when our evidence improves.

The questions of this chapter highlight crucial aspects of the main interests of this dissertation. The process described demonstrates a legal and political response to economic and social changes, and indicates an important way in which Roman society responded to its greater economic and political integration into the broader Mediterranean world, as discussed in detail in Chapter One. Also evidenced is the uneven pace of change, with periods of intense adjustment often following profound disruption in other areas of the law or public life and other periods of prolonged inactivity in the legislative realm. The question of desuetude is also centrally important, and juxtaposes sources of law with an interest in the discrepancies in their responsiveness to social and economic change.

THE *GENS* IN EARLY AND MID REPUBLICAN ROME

We begin, however, with the early Republic. At the beginning of Livy’s second book, we read that, in the year 509 BCE, after he had overthrown the last king, Tarquin the Proud, L. Iunius Brutus established the consulship, already replete, as Livy describes it, with the trappings that
would distinguish its holders centuries later. Next, by returning its number to three hundred, he repopulated and re-empowered the senate.\footnote{2.1-8.} We then go on to read of the very orderly process by which Brutus’ consular colleague, Lucius Tarquinius Collatinus, was persuaded by the remarkable entreaties of his friends and family to leave the city, as the people could not be convinced that a man so named did not harbor plans of becoming king. Finally we read of the election, in the \textit{comitia centuriata}, of P. Valerius, who would go on to adopt the \textit{cognomen} “Publicola,” once laws declaring his irreproachable opposition to kingship had produced such great affection among the people.

Although students of the early Republic agree, for the most part, that Livy’s presentation of early Rome is too orderly and its institutions too like what we observe in the later years of the Republic, the agreement does not extend much further.\footnote{262 Among many, cf. Ogilvie (1965) 236-237 for his treatment of what he call’s Livy’s “over-schematic” presentation of early institutions, and Forsythe (2005) 153-155 for Livy’s attempts to make his varying records fit with the parameters of political institutions as familiar later in time. Cf. also Capogrossi Colognesi (2014) 67-69 for his description of many possible disruptions at the time of the expulsion of the monarchy. For the opposing view, that from the monarchy there emerged a coherent and orderly state, cf. Cornell (1995), esp. 226-230.} One of the central sticking points is over the degree to which we can speak of a coherent state apparatus at any given point, and how expansive that apparatus’ interests and powers, and how developed its institutions, might have been. Though opinions over just what this early state apparatus looked like have certainly differed, just about all are in accord that it was smaller and less ambitious than what would characterize later periods.

Scholars have emphasized the roles of other forms of social organization in the absence of a strong centralized power. One such form that has received particular attention in the context of early Rome is the enigmatic \textit{gens}. Smith has investigated, in addition to the several famous interpretations and supposed analogues of the \textit{gens}, the imprecision and interrelation of the term
“gens” and of many of the other social descriptors used at Rome;\textsuperscript{263} he also illustrated the power of the \textit{gens} to mobilize its members to effect particular political outcomes or to undertake military action, especially during the early and mid Republic.\textsuperscript{264} Similarly, Capogrossi Colognesi has documented many of the ways in which gentilicidal ties still mattered later in the Republic in the performance of state business, and has argued unwaveringly that the \textit{gens} still mattered long after the demise of the Republic.\textsuperscript{265} However, although some \textit{gentes} clearly coordinated their concerns for some time after the Republic, the heyday of the \textit{gens} was, broadly speaking, early Rome through perhaps the fourth century.\textsuperscript{266} And yet, in spite of its early political importance and its continued relevance in later times especially for social matters, the \textit{gens}, so the familiar story goes, yielded more and more to the centralized state apparatus, as the Roman government grew in its abilities and ambitions.\textsuperscript{267}

As mentioned, this chapter will contribute to discussions of when the importance of the \textit{gens} may have begun to lessen by examining one area in which, in fact, its power may have

\textsuperscript{263} Smith (2006), esp. 15-17 and 184-192; see the latter for Smith’s discussion of the relationship between the \textit{curiae} and the \textit{gentes}. Cf. also Brancato (1999) for a fascinating treatment of the relationship between the nuclear family and the \textit{gens} on the basis of an inscription in which are represented a man, his son, and his brother, each of whom has a different \textit{nomen gentilicum}.

\textsuperscript{264} Cf. Smith (2006) 55-64 for several instances, and 208-217 for his treatment of the military and political roles of the \textit{curiae}.


\textsuperscript{266} Carandini (2007) 23-24 reminds us that archaeological evidence shows that the vicinity of Rome was inhabited long before the foundation of a city, and he strongly suggests that we see the \textit{gens} as dominant in this early period, and therefore as older than Rome itself. Cf. Bietti Sestieri (1992) for her seminal discussion of what may be evidence of archaic \textit{gentes} in the mortuary record.

\textsuperscript{267} Cf. Capogrossi Colognesi (2014) 59 for one of the many presentations of this development.
persisted rather longer, namely matters of intestate inheritance.\textsuperscript{268} Again, I will argue that, as we might expect, the increasingly centralized state eventually supplanted the \textit{gens} in regulating inheritance, but that here the development occurred later, and in a far less comprehensive manner, than elsewhere in the law or in public life. This paper will proceed in three parts. First, we will see that the XII Tables of 451-450 BCE appear to have codified a strong position for the \textit{gens} in cases of intestacy.\textsuperscript{269} That the \textit{gens} would play an important role in these early years of the Republic is not surprising. Second, we will read in Gaius that by his time, gentilicidal law had fallen into disuse.\textsuperscript{270} It will therefore remain for us to explain the intervening change, and we will do so by examining several cases from the late Republic, some of which have attracted a great deal of attention in the past: these are, first, the case documented in Cicero’s \textit{de Oratore}, in which the Claudii Marcelli and the Claudii Pulchri contested a particular inheritance; and, second, the attempt, related in the \textit{laudatio “Turiae,”} by an unnamed party to have a will declared invalid. I will argue that these two cases, and several complimentary of the first, through the

\textsuperscript{268} On this issue, we should keep in mind that the majority of Romans almost certainly did not make written wills, and so this topic implicates the greater part of Roman society – or at least that which was organized into \textit{gentes} and which could have had estates large enough to trigger interest beyond the immediate family and the possibility of the case being brought to court. On this question, often referred to in the Roman context as the “horror of intestacy” after Maine (1946 (1861)) 184-185, cf. especially Daube (1965) and Cherry (1996). On succession more broadly, cf. Watson (1971), which contains many ideas and analyses that may well also be applicable to earlier years of the Republic.

\textsuperscript{269} Cf. Watson (1975) 3-4 for a list of several works that question the conclusion that “the XII Tables were a Roman codification of law, of around 450 B.C.,” which is his stance and mine.

\textsuperscript{270} I do not find the claims to the contrary made in Franciosi (1995) persuasive, as the two passages that prompt his argument do not contradict what Gaius says. The first in his presentation, \textit{Coll. 16.4.2 (=Ulp. 24.1A, \textit{hinc restitutus})}, states that gentilicidal law is no longer in use. Franciosi states that the last sentence in this passage, which declares that gentilicidal law is no longer used, is a later addition and not found in the \textit{Tituli}. However, he fails to note that the sentence restating the rule from the XII Tables, that the \textit{gentiles} are called to the inheritance when no agnate can be found, is also a later addition: we either have to include both the restating of the rule from the XII Tables and the immediate clarification that gentilicidal law has fallen into disuse, or we discount both sentences and thereby any mention of the \textit{gens}. The second passage comes from just earlier in the \textit{Collatio}, 16.3.3 (\textit{= Pauli Sententiae 4.8.3, \textit{hinc restitutus}}), and refers to a prior situation when it states that the inheritance of those who died intestate at times fell to the \textit{gens}, as the imperfect tense of the verb indicates. Franciosi understands this second passage, as he orders them, to concern the situation in Paulus’ day, and fixes upon the adverb, \textit{aliquando}, as proof of ‘il carattere residuale della successione dei gentili’ (92); this seems impossible to me given the imperfect tense of \textit{deferrebatur}.
discrepant position of the *gens* between them, suggest that the late Republic and Augustan periods saw the crucial diminution of the power of the *gens* in matters of intestacy.

Although some six centuries separate the XII Tables from Gaius, this discussion will have to focus on the first century BCE, because that is the period for which we have the best and most evidence. We simply do not know of many cases from these intervening years concerned with matters of intestacy. However, and while acknowledging the difficulties involved in attempting to trace broad trends from so little evidence, I will argue that, when they are juxtaposed, the several cases discussed here do suggest the changes that interest us. We will see that, in the earlier cases, the *gens* was quite important for the resolution of the matter, whereas in the later case its significance and even its membership were rather less well understood by those involved and of little, if any, consequence. The two implications that most interest us are, first, that gentilicial law had not entirely died out by the time of our later case; and, second, that acute change is more easily effected in state-level political institutions than in underlying structures of the transfer of *res*.\(^{271}\) I will suggest that Augustus, who follows just after the time of our second case, might have created mechanisms that finally led to the complete desuetude that Gaius describes. We will see also that the trends that Augustus’ laws enshrined, to the detriment of the position of the *gentes*, had developed through the *ius honorarium* for centuries.

\(^{271}\) This second conclusion implies among much else that Roman law’s insistence on the freedom of the testator may have been due to necessity as much as philosophy.
First, the XII Tables.\textsuperscript{272} We are concerned here with 5.4-5. I reproduce the text below:

4 si intestato moritur, cui suus heres nec essit, agnatus proximus familiam ?pecuniamque? habeto.
5 si agnatus nec essit, gentiles familiam ?pecuniamque ? h[abento].

4 If he dies intestate, to whom there be no \textit{suus heres}, the nearest agnate is to have the \textit{familia} ?and goods?.
5 If there be no agnate, the \textit{gentiles} are to have the \textit{familia} ?and goods?\footnote{273}

The syntax of these clauses seems clear and the text can be translated easily enough, even if the precise identities and relationships of the individuals indicated are not so readily discernable: when there is not a \textit{suus heres}, which is to say someone who becomes \textit{sui iuris} upon the death of the person in question, and there is no agnate male kinsman, the \textit{res} passes to the members of the \textit{gens}. Kaser argued that the \textit{gens} delegated the task of administering the \textit{res} to one of its members.\textsuperscript{274} These clauses suggest strong gentilicidial organization, or at the very least a means of managing \textit{res} that passed to the group.\textsuperscript{275}

If these first clauses are indicative of the potential power of the \textit{gentes} in organizing the \textit{res} of their members under certain circumstances, our second passage is equally clear about the

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\begin{itemize}
\item \textsuperscript{272} There are of course many seminal works on early Roman law, and the place of the XII Tables in it. Of the many that warrant mention, I would list Schulz (1946), who takes pains to point out that his subject is the history of Roman legal science, not of Roman law; Kunkel (1971); Franchini (2005); Schiavone (2012); and, for a fascinating though unlikely view, Westbrook (2015), chapter 5.
\item \textsuperscript{273} Text and translation Crawford (1996) 2.580.
\item \textsuperscript{274} Kaser (1955) 1.25.1, which also presents a clear discussion of agnate relation. Cf. also Kaser (1955) 1.25.2 and 1.158.2 for the related regulations regarding freedmen and their patrons.
\item \textsuperscript{275} For additional analysis of this text, and of others in the XII Tables which indicate the importance of the \textit{gens}, cf. Manzo (1995).
\end{itemize}
eventual obsolescence of that power within the legal realm. Gaius tells us that by his day, gentilicial law was no longer in use. We read at 3.17:

si nullus agnatus sit, eadem lex XII tabularum gentiles ad hereditatem uocat. qui sint autem gentiles, primo commentario rettulimus; et cum illic admonuerimus totum gentilicium ius in desuetudinem abisse, superuacuum est hoc quoque loco de eadem re iterum curiosius tractare.

If there are no agnates the same Twelve Tables give the inheritance to the members of the clan. Now, we explained who the members of the clan are in the first commentary; since we pointed out there that the whole law relating to the clan has fallen out of use, it is a waste of time to go into any details here again. 276

The relevant section of Book 1 has, unfortunately, been lost. 277 Gaius tells us that gentilicial law has become obsolete by his time, and that therefore, as we would expect given the purpose of his work, he has no interest in relating it.

During the course of the intervening six hundred years, the legal position of the gens in cases of intestacy has quite clearly changed. It now remains for us to try to ascertain when this shift might have occurred. In doing this, we will ask when things might have changed in common practice, and also if and when we might posit the concentrated introduction of perhaps several other legal remedies that provided alternative ways to address such issues of inheritance, and so encouraged this desuetude.

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276 Text and translation Gordon and Robinson (1988) 274-275; iterum is a conjecture by Hugo (1832) 140.

277 de Zulueta (1946) ad loc. thinks that this section would have come between sections 164 and 165, and would have been prompted by Gaius’ recounting that, if agnates were lacking, legitima tutela would have fallen to the gentiles. Franciosi (1995) 87 agrees, and mentions that the relevant area in the Verona manuscript is illegible.
In order to suggest when practices might have changed, it will be useful to look now at our several cases. Mention of the first is found only in Cicero’s *de Oratore*, in a speech in which Crassus stresses the importance of knowledge of the details of an area of law. *De Oratore* is set in 91 BCE, which will have to serve as the case’s *terminus ante quem*. The record that we have of this case is below.

What again of the dispute between the Marcelli and the patrician Claudii, determined by the centumviral court, when the Marcelli alleged that an inheritance had devolved on them from a freedman’s son by *stirps*, while the patrician Claudii claimed it as theirs by reversion by *gens*; did not both counsels in that case have to discuss the entire law of lineal descent and clanship.\footnote{Cic. *De or.* 1.176. Text and translation Smith (2006) 52.}

The facts of the case seem to be that the son of a freedman of a certain Claudius Marcellus has died intestate, and both the plebeian Claudii Marcelli and the patrician Claudii Pulchri have claimed the inheritance, the former by *stirps* and the latter by gentilicial law.\footnote{I say “by *stirps*” rather than “*per stirpes,*” which is used by modern lawyers, because the Claudii Marcelli do not have in mind that each branch of the family receive an equal share, which is what is denoted in the modern usage. By the term *ius gentilitatis* as above, our sources seem to mean law as relates to the *gens*, rather than the rules governing the internal conduct of the *gens*. I therefore use the translation “gentilicial law” as we would say “family law.”} How this situation might have come about and how it might have been resolved, as we do not have the verdict, have been debated since Mommsen, and our point here is not to argue in favor of any...
one particular solution.\textsuperscript{280} However, it seems clear that the Claudii Marcelli based their claim on being more closely related to the deceased, whereas the Claudii Pulchri rested theirs on being the chief family of the \textit{gens Claudia}. Although we do not know how this case was decided, the fact that Cicero has Crassus use this case to show how knowledge of the details of an area of law was indispensable suggests that the opposing counsels had to make careful presentations to the court, and that neither claim was obviously the stronger. The Claudii Pulchri would seem to have the XII Tables on their side, but if in fact they had the better claim to primacy within the \textit{gens}, an assertion the Claudii Marcelli seem not to have challenged, the case presumably was not decided on that rule alone; on the other hand, the claim of the patrician Claudii Pulchri was still taken seriously enough for the case to be heard by the centumviral court. We see that having the opening for decision according to gentilicial considerations, which will clearly benefit one party, did not resolve the case. We observe instead that claims based on proximity of relation might have carried more weight, if in fact the plebeian Claudii Marcelli prevailed. I believe that we have here an indication that close personal or familial relation might have been growing in legal importance at the expense of previously dominant social structures and their legal scaffolding.\textsuperscript{281}

Our understanding of this case must also take account of the likelihood that the person who died was the son of a freedman. It would be easy to press this point too forcefully, but we should consider the potential inability of gentilicial relations to account in law for social or societal developments such as the practice of manumission and the conduct of freedmen at

\textsuperscript{280} For a review of the opinions on this case, cf. Smith (2006) 52-55.

\textsuperscript{281} We should also acknowledge that perhaps the definition of the \textit{gens} and knowledge of its purview had become sufficiently imprecise as to make legal judgment difficult.
This is extremely difficult to gauge or even to suggest without a more detailed knowledge of how the various gentes understood and incorporated potential new members, but perhaps we can fruitfully extrapolate from the fact that slaves were owned primarily by individual nuclear families to judge that the ties that continued after manumission would have redounded to the benefit of the particular nuclear or extended family, and not to the gens. It is clear that in cases where a rich freedman, or his son, has died, the gens would want to extract what it could. The fact that this case went to the centumviral court, however, which again indicates that the claim of the patrician Claudii Pulchri was not obviously the stronger, may stem from the estate being that of a freedman’s son, and therefore claims upon it may have been unclear. In the resultant case, as we have seen, the Claudii Pulchri argued that the estate should devolve to the gens and the Claudii Marcelli that it should be awarded to the family or branch of the gens, and the latter may have relied upon common practices of slave ownership and freedman patronage to make their case.

Two other cases from the early first century also attest to the power of the gens, and show more conclusively that the gens did in fact inherit when there was no proximus agnatus.

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282 Cf. Mouritsen (2011) 36 ff. and 120ff. for his discussions of freedmen’s relations to patrons and practices of manumission.

283 Although the fact that the centumviral court used the legis actio procedure is interesting from the point of view of procedural development, it need not alter our interpretation of events here, as the legis actio sacramento in rem allowed one to bring the action of hereditatis petitio.

284 Cf. Watson (1971) 180-181 for his treatment of these cases.

There is also the report in Suetonius (Iul. 1.2), to which Watson (1971) 180 alerts us, that upon refusing to divorce Cornelia at Sulla’s insistence, Caesar was et sacerdotio et uxoris dote et gentilicis hereditatibus multatus. Although this phrase is tantalizing, we do not know enough about what these hereditates were to specify the date of their coming into being, and they cannot shed much light on when the inheritance may have taken place. That they were dissociable form Caesar’s other res in 82-80 when Sulla was dictator shows that the institution of gentilicial inheritance was in use.

Watson (1971) 180 also draws our attention to Catullus 68, lines 119-124, where he notes that the daughter’s happiness (which Watson attributes to the grandfather) at the birth of a grandson who will inherit is due to the fact that the grandson will prohibit a predatory derisus gentilis from inheriting. Watson reasons that this probably would not have been written long after gentilicial succession was no longer common, and states that this
Cicero is also our source for the case of a Minucius who died intestate while Verres was urban praetor; we read of this affair that *lege hereditas ad gentem Minuciam veniebat* (“by law the inheritance went to the gens Minucia”). Cicero tells us that, according to all previous and subsequent edicts, Verres should have given possession to the gens, allowing anyone who may have thought himself heir by the will, although there was not one known in this case, to make a claim; or, following such a person’s giving and taking security for his claim, he should be able to bring an action for the inheritance. Cicero goes on to tell us how Verres polluted justice by modifying his edict with this case in mind to afford special protections to an associate, which he accomplished by blocking someone not in possession but wishing to lodge a claim to the estate from suing for it. He did this, according to Cicero, by inserting into his edict the clause *si possessor sponsionem non faciet* (“If the possessor does not agree to the sponsio”). This effectively closed off any lawsuit to which the possessor did not wish to be party. We are not surprised when Cicero says that this clause was not included in any subsequent edicts of the urban praetor, or indeed in Verres’ edict as praetor in Sicily. This further specification of Cicero’s only confirms that the gens inherited in this case; the point for our purposes is that until Verres’ praetorship in 74 BCE, it was by no means strange for the estate of a man without a will

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portion of the poem was likely written after 60 BCE. I agree with Watson’s assertion that this would not likely have been included in such a way long after gentilicial succession had ceased entirely, but *derisus* should perhaps give us pause over the frequency and legitimacy in popular estimation of the practice. Additionally, we should not place too much stock in the dating of this poem, notorious as it is for issues of coherence and composition; cf. Skinner (1972) and Tuplin (1981).

285 *Verr*. 2.1.45.115.

286 *Verr*. 2.1.45.116. By not agreeing to the *sponsio*, the possessor would block the lawsuit.

287 Cicero goes on to say (*Verr*. 2.1.45.117) that according to Verres’ edict, in instances where the inheritance is disputed, he will examine properly witnessed testamentary documents and award accordingly, but where documents cannot be produced, he will award the estate to he who claims to be the heir. This is beyond the scope of our interest, but Cicero makes much of the fact that one person’s unsubstantiated claim is given more weight than a will with one witness fewer than is required by law.
to revert to the *gens*, which indeed is what happened when this Minucius died in or just prior to 74.

Our other case before the *laudatio* "Turiae" only hints at gentilicial inheritance and I do not wish to push this point too forcefully. In the *pro Flacco*, which was delivered in 59 BCE, Cicero states that Valerius Flaccus did not usucapte Valeria’s *hereditas* when she died. Cicero does not try to rebut the charge that Flaccus acted as though the inheritance was his, and Cicero does not assert that Flaccus’ claim to it was based on being the *proximus agnatus*. We do not read anywhere that Flaccus was a close relative of Valeria, and Watson concludes that the idea that Valerius Flaccus and Valeria were of the same *gens* is what motivated Flaccus’ action.

289 We might expect Cicero to state as much, unless this basis would make his client’s claim seem weaker. I include this case as another in which claims to inheritance based on gentilicial ties may have been made, but also one in which the grounds of gentilicial relation may have been viewed as bordering on insufficient for their reliance upon archaic provisions that were still legally potent, but that were based upon bygone social practices. We cannot, however, say as much with any certainty based on the state of our evidence.

Our last case comes from the so-called *laudatio* "Turiae," which probably dates to the first years of the Principate, but which details events that occurred near the end of the republican period. Of the unnamed heroine’s many deeds that ensured her and her husband’s survival during and after the civil wars of the first century, I want to focus on her success in securing her father’s patrimony against a competing claim. We read that after her parents were killed, “Turia” and her sister were pressured to renounce their claim to their father’s estate, because, it was asserted, his will was invalid. The relevant section of the text, lines 13 to 26, is reproduced below:

288 34.84.


Then there was an attempt to make both you and your sister recognize that the will, in which we were heirs, was broken, because of the coemption your father made with his wife. In consequence (it was said), you along with your father’s entire estate automatically would revert to the guardianship of those who were pursuing this matter; your sister would be cut out of the inheritance altogether, because she had come under the manus of Cluvius. With what resolution you dealt with all this, with what presence of mind you resisted, I know full well, even though I was then away. You defended our shared position by stating the facts: the will had not been broken, with the result that each of us should hold onto our inheritance rather than having you alone take possession of the whole estate. It was your firm intention to uphold the acts of your father, so much so that even if you did not win your case, you insisted that you would share the inheritance with your sister; nor would you enter into the situation of agnatic guardianship, of which there was no claim against you in law, since for your family no clan could be proved that could prevent you from doing this; even if the will of your father had been broken, those who were bringing action had no such right, since they were not members of the same clan. They gave way to your steadfastness and did not pursue the matter further. In having achieved this, you completed the defense that you had undertaken, all on your own, of respect for your father, devotion to your sister, and loyalty to us.290

This is a rich passage, full of assertions and supposed consequences. What is clear is that certain unnamed individuals wanted “Turia’s” father’s estate, and mounted what is presented as a brazen attempt to get it. Their first claim, which would trigger the series of events they desire, was that “Turia’s” father’s will had been rendered invalid by his subsequent, at least second,

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290 Text and translation Osgood (2014) 156-159, with modifications.
marriage, which was contracted *coemptione*, which is to say *cum manu*. Instead of the arrangement that he specified in his will, namely that “Turia,” her future husband, and her sister were to be the heirs, the party asserted that the estate should now devolve to “Turia” alone, as she was the sole *suus heres* of her father, who had died intestate.²⁹¹ In contrast to her sister, who, we are told, had been married *cum manu*, “Turia” had yet to be married.²⁹² As she was not in the *manus* of anyone, the party claimed, “Turia,” bringing her father’s estate along with her, must pass into a condition of *tutela mulieris*. It is, of course, unclear how the subsequent management of the *res* would have been structured, and the only hint we have is the report of “Turia’s” declaration that she would share her inheritance with her sister, who would in this scenario be legally entitled to none.²⁹³ Surely, the members of the party must have thought that they would have the final say over how the *res* would be managed, and maybe over whom “Turia” would marry.

Our worry turns out to be moot: “Turia” was able to rebut the claim that her father’s will was invalid, and indeed we can find no reason why a subsequent marriage *cum manu* should have invalidated a will. Furthermore, we read that, even if she had conceded this point, she could still have asserted that her father, and therefore she too, did not belong to a *gens* that could compel *tutela* in cases of intestacy.

The sentence *certa quidem sententia te ita patris acta defensuram ut, si non optinuisses, partituram cum sorore te adfirmares, nec sub condicionem tutelae legitimae venturam, quouis*

²⁹¹ That “Turia” and her sister would have been heirs is difficult to square with the *Lex Voconia* of 169 BCE, which prohibited women from being named heirs to an estate over a specified amount, on which the jurists disagree, and which did not apply to cases of intestacy. The easiest solution seems to be either that “Turia’s” father’s estate fell below this minimum, or perhaps more likely that her husband presents her as an heir even though she had in fact received a legacy, a circumvention that Gaius describes (2.274).

²⁹² Although she seems not to have been married at this point, the *sponsio* has taken place (cf. line 3).

²⁹³ We might doubt that her tutor would allow this level of freedom.
per [legem in te ius non] esset, neque enim familia[e] gens ulla probari poterat, quae te id facere [impediret] suggests that, even if “Turia’s” could not, certain gentes could control the actions of at least some of their members in this way. The assertion also suggests that knowledge of which gentes could do this and which could not was not very common, and here we recall Gaius’ remarks on desuetude, which we must judge to be apt at least to some extent even at this time. In the end, this was of no importance in “Turia’s” case, as those challenging her did not belong to the same gens.

POTENTIAL DIFFERENCES AMONG GENTES

Before turning to the question of desuetude, I want to examine further this possible differentiation between, on the one hand, those gentes that could control actions in cases of intestacy and, on the other, those that could not. We do not read of this distinction in the XII Tables, or anywhere else as far as I know.294 But to look for such a distinction as the result of a legal decision made by rudimentary organs of the state is the wrong way to proceed.295 It is not as though the state bestowed the power to administer res in cases of intestacy without a proximus agnatus upon the gens straightaway. Instead, the early state had to recognize that such power was not its to wield, and that control in fact resided with the gentes: the state, in its law, endorsed rather than established a system.

294 If there were considerable evidence of this potential distinction, we might try to relate it to the issue or major and minor gentes, or to plebeian gentes (cf. Smith (2006) 81-85 for a succinct discussion of these differentiations which builds on the views of Niebuhr; Smith focuses on 1.286-337 in the translation of Hare et al. (1847-1851)). As it stands, I do not wish to push this evidence any further.

295 I use the term “state” most cautiously to refer to the inter- and/or super-gentilicial structure(s) in effect.
Our possible distinction, between those gentes that could compel tutela and those that could not, in contrast to a situation in which all gentes could appoint tutors in the same way, indicates more variation, and thus potential discretion, on the part of the gens rather than less, and also less control by the state. This discretion would no doubt have been exercised differently according to the cohesion and character of a particular gens. This would, in turn, point to an increased relevance for the gens in early Rome and, indeed, for as long as these circumstances governed conduct. I have just argued that these systems of the management of res remained important until possibly the early first century BCE, which would suggest a perseverance of structures of the transfer of res amid changing political institutions.

DESUETUDE, THE IUS HONORARIUM, AND AUGUSTUS

Gaius tells us that desuetude brings us from these circumstances to those of the mid-second century CE. I can see no reason to doubt this explanation, but on its own this is hardly a comprehensive account of what was probably a lengthy and complex process. The sloppiness of the anonymous claim on “Turia’s” father’s estate, and “Turia’s” concern to cover all of her bases in rebutting it, suggest strongly that this question did not come up regularly in court. Indeed, we may get the same impression from the detail in Cicero’s admittedly brief description of our first case, according to which both counsels had to present all of the aspects of the law of descent and gentilicial law to the court; it is possible that this desire to be comprehensive arose from uncertainty as to just what aspects of these areas of law would be judged relevant. Of course, almost two hundred years intervene between the affairs described in the laudatio “Turiae” and Gaius’ discussion, and during such a long period of time gentilicial law might have fallen further
into disuse, but we seem to have something approaching desuetude already in the late Republic. It will be useful to look for a legal tendency and/or specific legislative activity that might have further disempowered the \textit{gens}, or resulted in the absolute desuetude that Gaius describes.

In fact, I want to suggest that both a long-term legal tendency and a more specific period of legislative activity need to enter any explanation of the situation in the mid-second century CE. To take the long-term tendency first, we see over the course of the middle and late Republic an increasing consideration being given to the nuclear family and the interests of cognates. Immediately after his statement that gentilicial law has fallen into disuse, Gaius explicitly contrasts the rules of intestate inheritance in early Rome with those that began to develop probably in the third century BCE.\footnote{Gai. 3.25-28.} Of the several developments which meant that these relations received greater consideration, I wish to mention two. The first is the increasing willingness to grant \textit{bonorum possessio}, variously \textit{cum} and \textit{sine re}, to family members who were not the \textit{proximus agnatus}, and who therefore would not have received consideration under the XII Tables or other statutes. The second is the creation of an action by which the wife, or her \textit{paterfamilias}, could recover the dowry in cases of divorce. The husband was allowed to make certain deductions, but the wife’s family could recover the \textit{res} with increasing ease.

Both of these developments grew through the \textit{ius honorarium}. We should recall Papinian’s description of the \textit{ius honorarium}: \textit{ius praetorium est, quod praetores introduxerunt adiuvandi vel suppleandi vel corrigendi iuris civilis gratia propter utilitatem publicam. quod et honorarium dicitur ad honorem praetorum sic nominatum} (“The praetorian law is that which the praetors have introduced to support, supplement, or correct the \textit{ius civile} in the public interest.\footnote{Gai. 3.25-28.}
This is also called [iu
t] honorarium, so named for the office of the praetor.”). Helpfully, Marcian likewise says of this means of making law: nam et ipsum ius honorarium viva vox est iuris civilis (“For indeed the ius honorarium is itself the living voice of the ius civile”). Brennan helpfully summarizes previous discussions as to how the praetor may have changed the law before our first-century BCE sources give us a somewhat clearer understanding. He lists the praetor’s massaging of existent civil procedure for new purposes or effects, the praetor’s allowing of new actions, and the praetor’s expansion of the discretion of the iudex as to what the latter should consider when rendering his judgment in the stage apud iudicem. Brennan concludes that the foremost contribution of the praetor was “the promotion of the principle of aequitas.” The fact that the ius honorarium allowed for modifications to the law to be brought about by magistrates in response to changing circumstances or social pressures, and the fact that, as we can see in Gaius and the relevant section of the Digest, the enhancement of bonorum possessio and the ability of the wife’s family to retrieve her res came through praetorian law, should encourage us to see this viva vox as trending against the gentes.

Of course, long-term trends are often punctuated by periods of increased activity. With this mindset, we should look to Augustus, who fostered this promotion of the nuclear family and close cognatic kinship, and thereby undermined the position of the gens. Keeping our two

297 Dig. 1.1.7.1. Cf. Kunkel (1971) for an account of the development of the ius honorarium.

298 Dig. 1.1.8.

299 Brennan (2000) 131. In addition to section 5.6, cf. also Brennan’s section 12.1. As regards bonorum possessio intestati, cf. La Pira (1930) and Berger (1953) ad loc.

300 Cf. Gai. 3.25 and Dig. 24.3. A fascinating question that is impossible to uncover is the degree to which commercial activity may have pushed toward the awarding of inheritance to specific individuals as opposed to the gens. This impetus would have been felt in the court of the peregrine praetor, likely in the form of foreign merchants desiring that potential ownership and/or administration of the res of their Roman counterparts be clearly expressed; it would have been far easier to deal with an individual then a group such as a gens.
developments in mind, and starting with inheritance by the nuclear family, which was at the heart of the enhancement of bonorum possessio, we should recall the Lex Iulia de vicesima hereditatium of 5 CE. This law taxed inheritance at five percent unless the estate was left to children or parents, or did not meet the minimum valuation. This was certainly a change in practice, and was clearly meant to encourage people to leave their estate to their closest of family members, and not to more distant relatives.

When considering the second development, the action for the return of the dowry in cases of divorce, we can call to mind a passage from Pomponius. At Dig. 24.3.1, we read: **dotium causa semper et ubique praecipua est: nam et publice interest dotes mulieribus conservari, cum dotatas esse feminas ad subolem procreandam replendamque liberis civitatem maxime sit necessarium** ("An action for dowry is foremost at all times and in all situations: for the public has a stake in dowries being kept by women, because it is absolutely crucial for women to have dowries for producing offspring and replenishing the state with children"). The same rationale was behind much of the Augustan marriage legislation. Although Augustus was of course neither the first nor the last to propound this thinking, much of what was written at Rome on this topic derives from commentaries on his famous laws. We should consider the lex Iulia de maritandis ordinibus of 18 BCE and, with it, the lex Papia Poppaea of 9 CE. Part of the law, related at Dig. 24.3.64, makes clear the legislation’s concern with the return of the wife’s res in cases of divorce,

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302 I mention both because the jurists wrote about these laws as, to quote Berger, “two distinctive legislative acts and as one unified piece of legislation” (cf. Berger (1953) ad Lex Iulia de maritandis ordinibus (emphasis added)). As a result, our understanding of exactly what each law contained is imperfect.
or upon her death, to her *paterfamilias*, if he was still living. Again we see Augustus legislating an action existent in the *ius honorarium*.\(^{303}\)

Augustus is therefore an important window onto earlier periods of the Republic because he finally stabilized, through *leges*, trends that had been developed by magistrates through the *ius honorarium* for centuries. These trends resulted in the primacy of the nuclear family, and the elevation of the cognatic side of what we would call the extended family, over the more distant *gens*. By increasingly modifying the system codified in the XII Tables, and in the process marginalizing the *gens*, the state grew in relative importance through the *ius honorarium*. It is of crucial importance that nothing approaching a robust *ius honorarium* was probably to be found before the last decades of the early Republic, if it could even be found as early as that. Augustus affirmed these developments, but his laws are certainly a far remove from the first stages of these trends that may have characterized the early Republic.

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**THE FORMATION OF LEGAL INSTITUTIONS AND EARLY LEGAL CHANGE AT ROME**

Having examined how various sources of law in the mid and late Republic operated, we can say that although different forces were at work in early Rome during the creation and first refining of legal institutions, we can posit some broad outlines of how, perhaps paradoxically, the families who were powerful in early Rome set in motion the events that would undermine the gentilicial position in later law. The short description that follows is meant to illustrate the

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\(^{303}\) The *lex Iulia et Papia*, as Ulpian and others refer to it, also released free-born women who had had at least three children, and freedwomen who had had four, from *tutela mulierum*, which is of course what “Turia” had fought off. With this legislation, Augustus may have been endorsing a less frequently exercised option within the *ius honorarium*, but he was certainly followed by Claudius, Hadrian, and other emperors who chipped away at *tutela mulierum*. Of course, this erosion further reduced the standing of the *gens*, and promoted the familial ties discussed above.
dynamics of development of state legal institutions, even when they are originally obfuscated. The relatively straightforward development is this: the patrician families in early Rome contributed members to the pontificate, which at that time controlled much of the private law administered by the state.\footnote{For the view that the group known in later Rome as the patriciate were the descendants not only of the earliest senators but also of early priests, cf. Mitchell (1990). My argument does not rest on the patricians’ forebears being the only priests in early Rome, which seems impossible to prove given the state of our evidence, but merely that these powerful families contributed some of the members of the priesthhoods.} This early purview included family law, which in important ways would continue to be the domain of the pontiffs, as exemplified by their role in administering cases of \textit{adrogatio} and \textit{confarreatio} in the \textit{comitia curiata}.\footnote{An investigation into the propriety of continuing one family’s \textit{sacra} at the termination of another’s in cases of \textit{adrogatio} was undertaken by the \textit{pontifex maximus}, and it was done in the \textit{comitia curiata} because the \textit{comitia} would have a political interest in the merging of two important families. Rules developed to govern this institution, such as that the person adrogating must have no children and be more than sixty-years-old (which was meant as a sign that he was likely no longer able to produce children), as the continuation of the family was the point of the act. Additionally, the person to be adrogated could not be older than the person adrogating. Cf. Nicholas (1962), 77ff. Along with the \textit{flamen dialis}, the \textit{pontifex maximus} had to be present at marriages conducted \textit{confarreatione}, which form was required for the offspring to be eligible to be vestals or the \textit{flamen dialis}. The \textit{pontifex maximus} was thereby guaranteed involvement in the marriage of powerful patricians who would not have wanted to disqualify their children from prestigious religious offices. Cf. Watson (1992) 51ff., where he also posits that the infamous decemviral prohibition of marriages between patricians and plebeians may have been a subsequent misunderstanding of the requirement of \textit{confarreatio} for priests.}

Their centrality in other areas of private law, however, did not continue, as we have shown, notably in the first chapter.\footnote{Cf. also Frier (1985) and Schiavone (2012) for two prominent accounts of the rise of the juristic profession, as we have noted.} Much of this loss of prestige was due to the inflexibility of the forms and procedures that the pontiffs oversaw, which aspects were underscored by interaction with non-Romans who had differing commercial or administrative expectations. This call for flexibility was absent from the areas of family law under the purview of the pontiffs, because these would only have concerned Romans engaging other Romans, and so the relevant religious actions would not have extended to foreigners or people without a deep and long-
standing presence in Roman society. Further, in the case of *confarreatio*, we are discussing only the highest and most restricted echelons of Roman society.

Whether the pontiffs retained their influence or not, the fact that private law was largely concentrated in their hands, and that this law was later subject to forces of the state, means that it was out of the control of the *gentes*. The *gentes* filled the ranks of the early pontificate, and thereby elevated a state institution that would lead to their eventual displacement. This institution of the state underwent changes away from whatever its original form was, and the use of the state’s law to settle such questions grew to displace gentilicial remedies. This broad development says a great deal about the productive and sustaining power of some Roman institutions.

**CONCLUSION**

We should say that Augustus does not seem to have passed these laws in order to prevent the accumulation of power and resources by the *gentes*, or that a world of gentilicial social organization could have re-emerged after Actium; that time had long since passed. For Augustus, closing off this archaic world might have been a consequence of legislating, but it was almost certainly not a motivation. Even so, the civil wars of the mid to late first century BCE and the political changes seen afterward prompt two final conclusions. First, that Augustus and many like him were not ones to let a good crisis go to waste: such a reorganization of political institutions and social structures as his would not have been not feasible without the seismic disruption of the civil wars. Fascinatingly, we must note here that mechanisms of the transfer of *res* were not radically changed, even now. And second, those acting either to govern or to remake the state in the first centuries BCE and CE were doing something quite different than were
those who oversaw the creation of the XII Tables. We must think that the power to administer *res* in cases of intestacy, since we have been focused on this, was Augustus’ to delegate as he saw fit, in a way that it was not at the discretion of the *decemviri*. Additionally, attention to the importance of the *ius honorarium* in these developments conditions us to be very cautious when describing the early Republic, as only at the end of the period, if even then, do we imagine changes to the law to come substantially through this means. The window onto legal developments in the early Republic is quite opaque for this reason and others, which characterization will hardly be surprising. Legal relationships and legal mechanisms shed much light on the political landscape at any given time, and legal history can be a means to think about changes in what the state was. Here we must recognize a fundamental difference that cautions against reading later conditions back onto structures of political power and the law in early Rome.
Conclusion

We have mobilized a number of case studies in this examination of how the effects of empire determined the first-order rules governing res in Roman law. We have seen how a system of private procedure, instituted in Sicily following a slave uprising through the lex Rupilia, informs upon the development of private procedure at Rome, specifically the passage of the lex Aebutia. We corrected the prevailing narrative regarding the collective fortunes of the societates publicanorum, and demonstrated that they were seminal to the development of the Roman law of contract; we emphasized as well that the affairs of the societates also shed light on representation and corporate personhood in Roman political thought. We then discussed the crisis of 33 CE, drawing out the moral interests of our ancient sources and emphasizing the political calculations that related the proper use of private funds by senators to the ability of that body to govern effectively. Finally, we examined the changing position of the gens in cases of intestate inheritance, and both highlighted the gradual nature of this change, underscoring its relation to other social and political forces, over the longue durée, and demonstrated that the first century BCE saw a marked decline in gentilicial importance in such cases. It remains for us to draw some conclusions from these cases.

IMPLICATIONS AND INFERENCES

These case studies gesture toward larger themes in Roman imperial and legal history, and indeed in the history of legal systems more broadly. Of course, not all of the case studies speak to each theme to the same degree. It is hoped, however, that most case studies have contributed
to our understanding of the major themes discussed here. The first major inference to be drawn is that political forms are more easily changed than are underlying mechanisms of res. This project examines cases that straddle instances of political change, both at Rome and in various provincial settings. This is not only the change from Republic to Empire at the Roman center, but also the evolution from a stronger senatorial body in the mid Republic to more powerful individual magistrates and military leaders in the late Republic. We see as well the consolidation of the power of the princeps, which occurred as the decades of the first and early second century CE passed. The relevant periodization in any particular provincial setting was somewhat different, but the conclusion remains the same.

The chapters in which this inference is most unavoidable are those concerning Sicily and the lex Rupilia, the societates publicanorum, and the role of the gens in intestate inheritance. In the case of Sicily, we observe that upon initial annexation of the province, which is to say, when the political governance of the province first changed, regulations of res were left untouched. Even with the passage of the lex Rupilia, which was the legislative response to an extremely disruptive slave revolt and which led to an increased Roman presence, many if not most disputes, those between citizens of the same community, were left untouched by Roman regulation. When we consider that the minority of transactions would have ended in disputes that used official legal channels sanctioned by the governing authority, the Roman presence is even less transformative.

Turning to the societates publicanorum, we detail their likely origins in the regal period, their continued presence and increased clout during the Republic, their survival of the civil wars of the first century BCE, and their continued prominence during the Principate. Throughout this long history, the societas remained the method of organization for collective action and means of
pooling res. This mechanism continued to be available throughout the classical and post-classical periods of Roman law, even after it ceased to be employed by those who collected taxes on behalf of the Roman state. Finally, our examination of the gens cannot but communicate the remarkable persistence of this institution; we concentrate on the role of the gens in cases of intestate inheritance, where it remained relevant for centuries after the establishment of a centralized state. The emphasis that we place on the gradual change of the gens in this area of law shows that when the growth of the state did influence the power of the gens, this influence developed extremely slowly and was not tied directly to changes in political form.

The second theme to emerge from the case studies is the several ways in which Roman law accounted for desuetude. The chapters that most immediately touch upon this theme are again that examining Sicily and the lex Rupilia and that concerning the gens; the disregard of laws on usury discussed in the chapter on the crisis of 33 should not be thought of as desuetude. We see in these chapters that Roman law in some instances allowed for the continued use of certain legal institutions that were generally disregarded, and in others blocked later invocation of past mechanisms or principles. In the chapter on Sicily, we see how the formulary system developed to displace in many ways the older and more cumbersome legis actiones. The superiority of the formulary system was demonstrated in no small part by its applicability in a provincial setting, in contrast to the geographical restriction of the legis actiones. The lex Aebutia, the statute that enshrined the use of the formulary system, did not bar anyone to whom it was available from using the legis actiones. It rather promoted the newer formulary system in one of two ways, as we discuss in the chapter. Indeed, the same can be said about the later elevation of the system of cognitio extraordinaria, which occurred to the detriment but not termination of both the legis actiones and the formulary system.
This is in contrast to the situation we explore in the chapter concerning the *gens* and intestate inheritance. There we see that gentilicial considerations in such matters were eventually replaced. The reason for the variation in response is likely to be found in that preserving the *legis actiones* did not entail furthering an entire social logic and normative system that had managed to exist in many ways outside of the state apparatus. Additionally, there were many now living at Rome and in other areas under the sway of Roman law who did not belong to any *gens*. We see here again the effects of economic change and political development, which is to say of imperial administration, leading to legal change.

Third, the pluralized and to some extent decentralized nature of law-making at Rome emerges from consideration of many of these cases. Our discussion of the *societates* demonstrates the layered nature of Roman administrative regulations, particularly that various legal actors may at different times influence the creation of the rules governing different activities. Our treatment of the crisis of 33 makes clear that the resolution of an issue may involve the interaction of several policy instruments, in our case both senatorial displays and imperial pronouncements. Of these various tools and institutions for making policy and law, the *ius honorarium* was that which is most consequential from our point of view, and we observed as well that this avenue of legal change was highly political. In empowering a number of magistrates to make law through the tasks of their office, there emerged also a requirement that certain practices be reaffirmed on a somewhat regular basis.

This decentralization clearly has bearing upon the question of desuetude, as without a somewhat regularized acknowledgement of, for instance, the importance of gentilicial interests in cases of intestate inheritance, those relying on such arguments were out of luck. This phenomenon has another implication for how we think of the strength that magistrates had to
have within the system of Roman law. The resultant impression, which of course is visible in the constitutional structure of the state during the Republic, is that a strong monarch or sovereign was not envisioned for the system to function. The regularized reaffirmation of certain principles by magistrates meant that appeals resting on the personality of one specific individual who had made a law were not efficacious; the fact that a magistrate had made known the law meant of course that one could cite his edict, but that edict had legal purchase only because of the constitutional position of the magistrate. This is in contrast to a system in which precedent without statutory backing is the prime force, and similarly differs from a reification of custom without basis in statute or other source of law.

There are, as mentioned, other case studies that would complement those arrayed here. To name but one, an examination of the development of title, chiefly as regards land, in Roman law would, I believe, bear similar marking of imperial influence. Such a case study would concentrate on Italy of the second and first centuries BCE. Specifically, it would investigate the implications for proving ownership or the ability to work certain land of C. Gracchus’ lex agraria, which sought to reorganize much of the productive land of Italy, both public and private. The motivations for such a law were long-standing at Rome, and were the result of changes in economic production and in society from imperial expansion and governance. Additionally, the means by which the reorganization envisioned was to be financed was the bequest by Attalus III of his kingdom to Rome. We therefore must see an interrelation of provincial expansion and social initiative at Rome, with changes anticipated in crucial areas of the Roman law of res.

Such a case study would further underscore the conclusions discussed above. First, we would see that a sudden political opportunity arising from a change in imperial governing structure would run up against long-standing practices of land ownership and use; there had
developed complicated means of determining rights to the *ager publicus* over the course of the Republic, and this case study would demonstrate the difficulties of trying to transform such a situation.\(^{307}\) We should not think these practices immutable, however, and we would also see, I believe, the gradual systematization and spread of title in these spaces, and in the process examples of the absorption, modification, and decline of pre-existing practices. Finally, in its empowering of additional commissions, the *lex agraria* demonstrates the tendency to decentralize law-making power at Rome. This is just one of many cases that could be added to those here, and which show that the administration of empire, rather than juristic contemplation, was the prime force behind the development of the rules governing *res* in Roman law.

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