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**Fiscalism in the Emergence and Extinction of *Societates Publicanorum*\***

Abstract

There has been a resurgence of interest in the Roman *societates publicanorum* especially among economists and legal historians. The present paper participates in this newer research by offering an economic explanation of why this precocious form of business organization was limited to dealings with the state and why it died out. The Roman state granted the legal right to corporate status to contractors doing business with the government, but denied it in the private sector. The central argument is that this discrimination in legal treatment was fiscally motivated. The state's intention was to increase the number of public contractors and thereby to lower the price paid for public works contracts/raise the price received for tax-farming contracts. If accepted, this argument casts new light on the economic rationality, or at least economic sophistication, of educated Romans. The second argument is that predatory fiscalism by rulers in the later Republic and the Empire steeply reduced the number of businesspersons willing to bid competitively on government contracts. This behavior reduced the gains to the treasury. Roman rulers had broken the outsourcing system beyond repair and increasingly they had to rely on "second-best" alternatives including in-house production and the reliance on (costly) negotiations with individual contractors.

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Since the publication of Badian's classic work *Publicans and Sinners* in 1972 (updated in 1983), classical scholars have continued to make progress in exploring Rome's *societas publicanorum*. Recently, however, there has been a resurgence of interest in this precocious form of business organization among economists and legal historians. The present paper participates in this newer research by offering an economic explanation of why the *societas publicanorum* was limited to dealings with the state and why it died out. In the interest of perspective, the article begins with a brief review of the basic *societas* and the *peculium*-firm.

The Roman *societas* "partnership" lacked mutual agency; each partner had to endorse a contract to be bound by it. Moreover, "Roman law made no distinction between the obligations and assets of the *societas* and those of its members, precluding the weak asset partitioning that characterize the modern partnership" (Hansmann, Kraakman, and Squire 2006: 1356). Another problem was that Roman law did not provide for the transfer of a partnership in a *societas* to a third party. However, it appears that such transfers might be accomplished by resort to powers of attorney (Zimmerman 1990: 60-2, 454-57). Some of the problems of the *societas* were mitigated by work-arounds and, as we shall see, by reliance on the *peculium*.

Apparently Rome did know a weak form of limited liability. A creditor might bring an action against the owner of a slave based on obligations entered into by that slave under the authority of the owner. However, in the event that the slave was not acting directly under the authority of his owner, the amount that the creditor could recover from the owner was limited to his personal profit from the transaction and the *peculium* (see Andreau 1999: 67-8). The *peculium* was a fund or working capital (originally) put at the disposal of the slave (or other dependent) by his owner (Johnston 1997; Verboven 2002: 25-6). The arrangement might be compared to the "limited partnership" wherein "The active partners (in this case the slaves) are liable *in solidum*, whereas the idle partners [in this case the slaveowners] are liable only for their part of the capital" (Verboven 2002: 28). Zwalve (2002: 122) argues that

the *peculium* ...was treated as a separate legal identity.... In this way Roman

law met the same needs as those underlying modern company law, where the liability of a shareholder in a company is limited to his duty (to the company) to pay up for his shares in full. No wonder, therefore, that many Roman business enterprises—banks, factories, shops and even schools—were run by slaves acting as grantees of a *peculium*.

Further, using a common slave (*servus communis*) might facilitate the formation of joint enterprises. In this event, the joint masters became economic associates even in the absence of a company contract (Di Porto cited by Andreau 1999: 68). I would understand the common slave as the entrepreneur and his owners as limited liability “stockholders.”

<sup>1</sup> On the other hand, although this is not stated in the sources, it appears that, unlike contemporary commercial firms, personal creditors had a claim on resources that slaveowners committed to a *peculium* firm (Hansmann, Kraakman, and Squire 2006: 1358-1359).

Malmendier (2005: 38) takes matters further with her finding that “The most important elements of the modern corporation ... seem to have been granted to the *societas publicanorum* [‘society of government leaseholders or contractors’].” A difficult and vague passage in Tacitus (*Annals* 13.50) seems to suggest that consuls and tribunes (at first) created corporations by means of special grants. The latter were groups of investors/entrepreneurs (*publicani*) who made bids to implement various government projects. The projects included *opera publica* “public works”, supplies and services, exploitation of mines and salt-works, and the collection of various taxes.<sup>2</sup> Auctions were usually conducted publicly in the Forum. It is probable that the state farmed the taxes to the highest bidders and let out the public works contracts to the lowest bid-

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<sup>1</sup> See, however, Andreau’s (1999: 69-70) comments on the infrequency of shared slaves in the sources and on the difference in management structures between Roman and contemporary limited liability enterprises.

<sup>2</sup> Key sources: Cicero *pro C. Rabirio Postumo* 2.4; Cicero’s *Verrines*; Livy 24.18.10-49; 39.44.7-8; Polybius 6.17; Strabo 3.2.10. Government projects were contracted out by censors, or by other magistrates, using public auctioneers. For details of the censorial procedure and additional sources, see Du Plessis

ders (Livy 39.44; Du Plessis 2004: 290-91). The contract institution dates from no later than the third century and, possibly, from the fourth century B.C.E. (see Du Plessis 2004, 290 with n. 9). Polybius (6.17.2-4) describes the scope of contracting in the last quarter of the third century B.C.E.:

Through the whole of Italy a vast number of contracts, which it would not be easy to enumerate, are given out by the censors for the construction and repair of public buildings, and besides this there are many things which are farmed, such as navigable rivers, harbours, gardens, mines, lands, in fact everything that forms part of the Roman dominion. Now all these matters are undertaken by the people, and one may almost say that everyone is interested in these contracts and the work they involved. For certain people are the actual purchasers from the censors of the contracts, others are the partners of these first, others stand surety for them, others pledge their own fortunes to the state for this purpose. (Yonge)

There is probably some exaggeration here and Polybius may well have been thinking of the third quarter of the second century when he was writing his *History*. Further, not every contract was necessarily in the hands of a corporation.

Malmendier (2005: 38; cf. 2002 esp. 249-55, 273-74) explains that “The existence of the *societas publicanorum* did not—to a large extent—depend on the individuals involved; a representative could act ‘for the company;’ ownership was fungible, traded in the form of shares [*partes*], and separated from control of the company” (cf. more cautiously Brunt 1990: 362, 370-76). The shares, Malmendier (2005: 37-8) argues, had different nominal values, fluctuated in price, and were held by a significant section of the public. Admittedly, the view that Rome knew corporate shares that were transferable and fluctuated in price has not won general accep-

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(2004: 290-300), Brunt (1969: Appendix I) and Anderson (1997: 79-88). For detailed examinations of tax-farming, see France (2001, 2003).

tance among legal and economic historians. It has been suggested that the “shares” mentioned by Cicero (*ad Vatinius* 12.29) are merely “portions” of material wealth owned by publicans, not paper assets of some kind.<sup>3</sup> Malmendier’s understanding of the shares is, however, consistent with the existence of dealers in mortgages (*praedatores*) and, more generally, with the fact that the use of negotiable paper was not uncommon in ancient Rome (Harris 2006, Cicero *pro Balbo* 20.45 and *ad Atticus* 12.14.2). Indeed, Andreau (1999: 17-18), citing *ad Atticus* 6.2.3, notes the transfer/purchase of debt claims with the result that a “debt would be set on a new footing with a change of creditor. This way of proceeding ... must have been quite common...The mechanism seized up as soon as a liquidity crisis or a debt crisis developed.” There would be no insuperable institutional or cultural barrier to a functioning stock market.

What is clear is that shareholders in *societates publicanorum* stood only to lose their investments—that is, their personal assets were shielded against claims by creditors of the *societas*. It is also clear that an individual could participate in the corporation not only as a *socius* “partner” but also as an *adfinis* “sharer” (Livy 43.16.2; Anderson 1997: 98). Hansmann, Kraakman, and Squire (2006: 1360-1361) infer that the assets of the enterprise were also shielded against claims made by personal creditors of the owners (“entity shielding”), but this is not certain.

A salient advantage of the contemporary limited liability public enterprise is its provision to many persons of a relatively safe opportunity to invest in entrepreneurial ventures without having to bear the costs (time and money) of participating in or closely monitoring management. In

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<sup>3</sup> It appears that Malmendier’s main source for marketable shares is a passage in Cicero’s *ad Vatinius* 12.29: “whether you did not at that time deprive people of the most valuable part of their privileges? Whether it was Caesar or the farmers of the revenue that you were robbing? (Yonge). The relevant Latin is as follows: “*eriuertisne partis illo tempore carissimas partim a Caesare, partim a publicanis?*” It is certainly possible that Vatinius extorted large *portions* of the income or gains of Caesar and the publicani. Further, text reads “*partis*”, not “*partes*”. With respect to *partes* vs. *partis*, I am advised that Sallust and Cicero frequently use archaic *-is* accusative spellings in place of *-es*. Perhaps this and no more than this is what is going on here. Further, I have consulted with specialists in Latin/Roman economic history who consider that the “shares” in *Vatinius* are paper assets of some kind, not merely portions of material wealth owned by publicans. I am not in a position to settle these difficult problems, which are, in any event, not central to my argument.

short, limited liability and transferability of ownership raise wealth by facilitating specialization. With the exception of the *societas publicanorum*, Rome did not provide a comparable opportunity. The scope of the *societas publicanorum* was however limited to commercial dealings with government and it died out in the second century C.E.<sup>4</sup>

It is well to add a few cautions before proceeding. Legal limited liability and entity shielding are most helpful but they are not required for raising large amounts of capital. First, ordinary debt (bank loans and other fixed/nonresidual claims) limit the liability of creditors. The liability of a debt investor is limited to his investment. Second, the personal assets of equity holders can be shielded, albeit at increased transaction cost, by means of contracts with firm creditors, (Hansmann, Kraakman, and Squire 2006: 1341). Third, while limited liability lowers the risk borne by owners (providers of equity capital/residual claimants) it simultaneously raises the risk borne by lenders/creditors (providers of debt capital) to the enterprise. The greater risk of default on debt restricts the “bond” market and raises interest rates. Fourth, with respect to “entity shielding,” again at higher transaction costs, the assets of the firm can be shielded from personal creditors of owners by means of contracts (compare, Kraakman, and Squire 2006: 1340-1341). The point is that legal limited liability and entity shielding are not economic panaceas and that the absence of these features in no way precludes a nation from enjoying a progressive economy.

Despite these caveats, it is abundantly clear that legal provision of limited liability and (quite possibly) of entity shielding raised the relative value of firms doing business with the state. For the Romans who owned the enterprises, the provisions were an unmitigated economic benefit. The structure of the market for government contracts offers testimony to this view. First, as far as can be determined, corporations were commonplace (not rare) and may well have dominated this market (see Polybius 6.17.2-3). Second, the sources do not establish that the Roman state required contractors to adopt the corporate form (see below). Third, it seems to be the general

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<sup>4</sup> It may be objected that the practice of granting corporate capacity to tax-farming companies did not totally disappear under the empire.

opinion of ancient historians that not every *societas* dealing with the state was granted *corpus*.<sup>5</sup> My tentative conclusion is that (fortunate) entrepreneurs *chose* the corporate form when they might instead have participated as independent contractors or by means of basic *societates*. It appears that the organizational preferences of entrepreneurs were revealed by their behavior.

In fact, basic (non-corporate) *societates* participated in the government market alongside corporations. These would have relied on internal funds or borrowed capital. (“*Peculium*-firms” would not be permitted to bid and participate in basic or corporate *societates* because slaves were

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<sup>5</sup> There are reasons for believing that not every *societas* dealing with the government was granted *corpus*. First, there is a difficult (for me) passage in Tacitus (*Annals* 13.50). Badian (1972: 69-70 with n. 13) comments:

We are not told in our source whether (and how) this right of legal personality was conferred on the companies under the Republic. But we have seen that it is almost necessary to assume it; and fortunately Tacitus provides the evidence: in a passage [*Annals* 13.50] that has puzzled some commentators he tells us that in the days of the Republic these companies were established by consuls and tribunes. It is therefore probable that at least the large companies (Tacitus says ‘plerasque’ [most], which should imply that not all companies had this right), after purchasing a contract, were given certain privileges (including what added up to legal *corpus*) by a special law of the assembly. Unfortunately, we do not know how far this extended. For instance, we do not know whether, with the death of the *manceps*, the company legally ceased to exist... But these and other legal puzzles cannot be firmly resolved on our evidence.

Badian (1983: 161) comments that Cimma “adds important evidence to my use of Tac. *Ann.* xiii 50... to prove that the large *societates* of the late Republic (though not the small ones) had legal personality, that point may now be treated as established” (cf. Brunt 1990: 359-60). My thanks to Koenraad Verboven for clarifying this argument for me.

The translations I have consulted run as follows: “Many companies for the collection of indirect taxes had been formed by consuls and tribunes, when the freedom of the Roman people was still in its vigour, and arrangements were subsequently made to insure an exact correspondence between the amount of income and the necessary disbursements.” In any event, it appears that not all the companies taking government contracts were corporations.

The jurist Gaius (active 130-180 C.E.) provides testimony that is more solid in his commentary on the “Provincial Edict”:

Partnerships, *collegia*, and bodies of this sort may not be formed by everybody at will; for this right is restricted by statutes, *senatus consulta*, and imperial *constitutiones*. In a few cases only are bodies of this sort permitted. For example, partners in tax-farming, gold mines, silver mines, and saltworks are allowed to form corporations. Likewise, there are certain *collegia* at Rome whose corporate status has been established by *senatus consulta* and imperial *constitutiones*, for example, those of the bakers and certain others and of the shipowners, who are found in the provinces too. (*Digest.* 3.4.1.1-2; Watson). The comments of Brunt (1990: 368-69) on this legal extract should be consulted. Brunt (1990: 366) also refers to the “mysterious body of *decumani*” as “some sort of board of directors” that might appoint the “magister” [a kind of chief executive officer?].

not citizens.) Badian (1972: 68) refers to the “custom of forming associations rather than submitting individual bids.” He adds:

As early as we can trace individual *publicani*—the three companies of the Hannibalic War [216-215 B.C.E.]—we find them already acting in association<sup>6</sup>... Our best example of the fact that association was practised without regard to the size of the sum...[is] from a Roman colony, where we may take it Roman law and custom was closely followed [compare Du Plessis 2004: 289, 295]. In the year 105 B.C. the town council of Puteoli let a contract for the building of a wall in front of the temple of Serapis. The specifications are carefully set out [in the contract agreement], and the total sum comes to 1,500 sesterces (375 denarii). On this small contract, no fewer than five contractors sign. The chief of them is the bidder, who provides surety (acts as *praes*) in the amount mentioned... The status of the other four is not defined. But, to judge from what we know of Roman companies, they were probably the *socii*—the partners who made up the company. (Badian 1972:68)

The fact that the names of all five partners in the Puteolean case are publicly recorded seems perhaps to argue against the idea that their venture had corporate capacity. The remarks of Brunt (1990: 363-64) should also be consulted in this connection, however.

Fortunately, this issue does not have to be settled here. It is sufficient to note that the manifest advantages of the corporate form made it the preferred status of contractors. Moreover, the cost to the state of providing corporate status was minimal. Why then did not the Roman state make the *societas publicanorum* legally available to enterprises operating within the private sector?

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<sup>6</sup> Erdkamp (1998: 114) considers the testimony of Livy (23 and 25) regarding the role of *publicani* in supplying Roman armies with food during the Hannibalic War to be “a rather dubious story.”

(cf. Hansmann, Kraakman, and Squire 2006: 1363-1364).<sup>7</sup> Usually the question is answered by considerations pertaining to institutional supply or demand. To take the crudest examples, the Roman state was not concerned with commercial needs or commercial life was too primitive to require refinements such as limited liability. It does appear, however, that Roman jurists consider *corpus* as a feature of public institutions or only the most important private activities. In the *Digest* extract from Gaius quoted in note 5 the jurist is not explicit about the reasons why some public activities should be granted *corpus* and others not. Neither does Gaius explain why important private activities such as wine exporting or sea transport generally should not be eligible for *corpus* (legal personality). Why did informed jurists assume that corporate status had to be limited to enterprises dealing with the state? There are, after all, important examples attesting the willingness of the jurists to facilitate or permit innovative economic growth-enhancing legal arrangements in the private sector (see, for example, Rowe 2005; Sirks 2002). Gaius is not explaining but rather summarizing existing practice. It is argued below that the practice of granting *corpus* only to enterprises dealing with the public sector is grounded in fiscalist considerations—that is, in the interests of the state and its treasury.

*It is possible to propose a rational economic explanation if one begins by asking why corpus was made available for dealings with the government.* Roman legislation, as has been noted, presented *publicani* with an economically valuable bundle of benefits. The added benefits constitute a kind of bonus, which raise the profit available to firms in the government sector relative to the profit earned in the private sector. Attracted by the extra (abnormal) profit, firms enter the government sector. What is the outcome of the increase in the number of contractors?

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<sup>7</sup> I have been cautioned that we do not have direct evidence proving that the Roman state denied corporate status to firms operating outside the public sector. However, a legal restriction of this kind seems very probable given (1) the view of the jurists (cited in note 5 and discussed below) that corporate status was special and restricted; and (2) the absence of evidence that a handful (or even one) of private sector firms chose to become corporations, despite the manifest benefits of corporate status.

In order to focus attention on the result of entry a number of simplifying assumptions are made: (1) “public works” is a divisible, composite good; (2) participants in the bidding for contracts do not collude; (3) each contractor is a price taker. [Each contractor takes the price as unaffected by his actions and outside his control.]; (4) the supply curve (marginal cost curve) of each contractor and the industry supply curve are positively sloped—that is, an increase in price increases the quantity of public works offered for sale. [A supply curve shows the quantity of public works a contractor will offer to produce and sell at each price. This curve is derived from the contractor’s marginal cost curve, which shows, for each quantity of public works produced, the additional or incremental cost of producing one additional unit. The industry supply curve is derived from the supply curves of the individual contractors.]; and (4) the demand curve of the state is negatively sloped or, more simply, vertical. [The demand curve shows the quantity of public works the state will offer to purchase at each price. The quantity demanded generally increases as the price declines.] In a simple kind of auction with recontracting, the successful bid and the aggregate quantity of public works are determined by the intersection of the market supply curve with the state’s demand curve. That is, the successful bid price is the market-clearing price. [The market clearing or market equilibrium price is the price at which the quantity of public works the contractors wish to sell is equal to the quantity the state wishes to purchase. At this price, there is neither a surplus nor a shortage of public works.] A more realistic auction is considered in a note.<sup>8</sup>

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<sup>8</sup> The type of auction assumed in the text works in the following way. The auctioneer begins by calling out a low price. Each of the bidders (contractors) consults his marginal cost curve and calls out the quantity of public works he is willing to supply at that price. The state calls out the quantity it wishes to purchase. If the quantity demanded by the state exceeds the quantity supplied by the contractors, the auctioneer calls out a higher price. This process continues until the aggregate quantity supplied is equal to the quantity demanded. The auctioneer then awards to each contractor a contract for the quantity he offered to produce at the market-clearing price. *An increase in the number of contractors increases the quantity supplied at each price and hence lowers the market-clearing price.*

For additional realism, let us consider fixed quantity, first-bid outcry auctions. The trading rules for realizing the market-clearing price are as follows. The *praeco* “auctioneer/one who calls” calls out a low price for a fixed quantity of public works (a “project”) to be produced in a given contract period. Each contractor considers his average total cost curve (or total cost) and decides whether to accept that price.

Finally, to answer the question posed above, the entry of profit-seeking firms into the government market increases the supply of public works. [That is the market supply curve of public works is shifted to the right.] This has the effect of lowering the market-clearing contract price paid by the state. [The intersection of the new industry supply curve with the unchanged negatively sloped demand curve of the state occurs at a lower price.] Thus, a policy of informed fiscalism earns for the Roman *fiscus* a kind of “incorporation fee” from each participating contractor.<sup>9</sup> This fee created a basis for increasing the supply of public works, fighting wars, providing welfare and/or reducing the tax burden. There is no documentary evidence but it seems probable that this was precisely the outcome sought by the rulers.

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Acceptance is signified verbally or by a standard gesture. If none of the contractors accepts, the auctioneer calls out a higher price. (Latin *auctio* “auction” is a derivative of *augere* “to increase.”) This process continues until one of the contractors accepts the price. In this model, the bidders are price takers. For each bidder, the dominant strategy is to accept a price equal to his average total cost for the project (see Milgrom 1989: 7-8, 11-12). The project is awarded to the producer with the lowest cost per unit for the offered quantity of public works. Next, the auctioneer calls out a low price for a second quantity/project for the same contract period as the first. This is followed by a third project and a fourth, and so on. Assuming that average total cost increases with output, the corporation that is already undertaking the first project will be a higher cost producer for the second or, if not the second, for the third... (To sharpen the argument, assume that the average total cost curves of the contractors are identical or nearly identical.) The projects will be awarded to a number of different contractors. *The point is that the effect of increasing the number of contractors is to reduce the contract cost of the state.*

With respect to the bidding of quantities of public works and successive auctioning of “projects,” it is some interest to note that “the paving of the Via Caecilia was divided into stretches, each of which was let out to a different *manceps*” (Brunt 1980: 85, 87 with n. 27). (The Via Caecilia was built in 117 B.C.E. and the repairs in the early first century B.C.E.). Also note “A contractor might undertake not to construct a whole building ‘*uno pretio*’ even for a private client, but to build for so many feet, supply material and labour...” (Brunt 1980: 86). We do not know the details of the Roman auction procedure. However, given the standard operating procedure of *praecones* “heralds/auctioneers,” an outcry system seems most likely (see Rauh 1989: 452-54). On the other hand, perhaps a sealed bid system was employed so that government contractors would not need to be physically present at the auction (cf. Balsdon 1962: 136). The fiscal benefits of increasing the number of contractors would not be affected, however, My model assumes a competitive market. In fact, this market structure may be the result of entry by additional firms. Entry increases the thickness of the market and reduces the volatility of bids for the production of public works.

For a discussion of the auctioning of tax-farming contracts in Old Regime France, see Johnson (2006: 972).

<sup>9</sup> In the limiting case, the *fiscus* transfers to itself the entire “bonus” conferred on firms by the grant of the corporate form.

Why was not the corporate form made available for private business (see note 7)? This could have been done at minimal cost to the *aerarium* or *fiscus* “state treasury.” Suppose it had been made available. Undoubtedly, given the opportunity to retain corporate status, some, very possibly many, firms would have shifted out of the government market into other lines of business. The predictable thinning-out in the number of firms is important for two reasons. First, in a competitive market, a decrease in the supply of public works would raise the market clearing contract price paid by the state. (Recall that a decline in the number of firms would raise the marginal cost of producing any given aggregate quantity of public works.) Second, a decrease in the number of firms would reduce the cost of joint action and facilitate bid collusion (cartelization) among the remaining *publicani*.<sup>10</sup> Other things equal, the smaller the number of participants in a market the lower the cost of organizing them into an effective cartel (Cassady 1967: 177-78; Levenstein and Suslow 2006). Collusion is not a free good!<sup>11</sup> Therefore, it is predictable that making the corporation generally available would have lowered the “incorporation fee” (rent) captured by the *fiscus*. If the rulers believed this scenario to be realistic, they would have good reason to withhold the private sector corporation.<sup>12</sup> In short, limiting *corpus* to public contractors served an

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<sup>10</sup> We are fortunate in having a cartel agreement among the salt-dealers of Egyptian Tebuntis dating to the first century C.E. The document (P. Mich. 5.245) explicitly sets minimum salt prices and specifies the maximum quantities the members are permitted to sell (van Minnen 1987: 66-8; van Nijf 1997: 13-14).

<sup>11</sup> With auctions being held publicly in the Roman Forum (or sometimes in Sicily), it was not possible for price-cheaters to avoid detection by “honest” members of the cartel. This is a familiar problem in auctioning government contracts.

<sup>12</sup> Both “entity shielding” and “owner shielding” encourage opportunistic behavior that increase borrowing costs (see Hansmann, Kraakman, and Squire 2006: 1350-1354, 1361). It is not self-evident that the spread to the private economy of the *societas publicanorum* would have improved the allocation of resources in the Roman economy. Indeed, the lower contract cost for government projects may well have been engineered at the expense of the general welfare. History is strewn with examples of fiscalism and with rulers using their monopoly of force to implement policies improving their budgetary positions or promoting special interests while misallocating society’s scarce resources (see, for example, Ekelund and Tollison 1997). To take a Roman example, in 364 C.E. Valentinian I granted a monopoly over all private cargo arriving at the port of Rome (Portus Uterque) to a corporation of *saccarii* “unloaders of cargo.” This measure was very likely aimed at lowering the cost of handling imperial cargo. “The Urban Prefect had to establish fair prices, depending on the time of year. Evasion of this monopoly by the

important public purpose. I do not assume, however, that the jurists were necessarily aware that this purpose was pecuniary.

An alternative approach to securing the “incorporation fee” would have been for the *fiscus* to sell the legal right to adopt the corporate form to all entrepreneurs willing to pay the price. This solution is probably less simple than it sounds. A form of *resale* stands as a major difficulty impeding this policy. One buyer (the *manceps* “chairman”) could, in effect, resell (share) the use of the corporate form with non-buyers by acquiring their enterprises or bringing them in as *socii* “partners.” Indeed, this might be a mutually agreed upon purchase strategy. Strategic behavior of this kind would make it more difficult for the *fiscus* to determine the income-maximizing price of corporate status. I will not try to demonstrate that the Roman policy of restricting the use of the corporation to the public sector *maximized* wealth but it is clear that it *increased* the wealth of the *fiscus*.

There is some reason to believe that the state’s fiscalist intentions were served reasonably well. In 184 B.C.E. the Roman Senate actually cancelled public works contracts because the censors had auctioned them at very low prices! In the end, the censors excluded the protesting bidders who had evaded the original contracts and let them all out to other contractors at an even lower price (Livy 39.44.8; Du Plessis 2004: 299 with n. 66).<sup>13</sup> Badian (1972: 36) observes that “The incident makes it amply clear that there was no ring or cartel—which entitles us to conclude that, even under censors less strict than Cato, profits would have been held down to level tolerable for the State.” (Perhaps it would be safer to say that we have not evidence of rings.)

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owners or transporters of the cargo was punishable by confiscation of one-fifth of the cargo” (Sirks 1991: 258).

<sup>13</sup> Strong’s (1968: 98) understanding of the events in 184 is that Cato and L. Valerius (the other censor) “tried to clamp down on excessive profits and let the building contracts out at exceptionally low figures.” He does not specify the placement of the censor’s “clamps.” That is, how were *publicani* induced/forced to make lower bids than they wished to? It seems more probable that the bidders simply underestimated the cost of completing the projects/or overestimated the returns from tax collection (see Jones and Brunt 1974: 120; for the situation in 61, see Balsdon 1962: 136-37).

Indeed, the state's reliance on auctions offers testimony to the existence of competition among contractors.<sup>14</sup>

Why then did the *societas publicanorum* become extinct? This is not a simple problem. Hansmann, Kraakman, and Squire (2006: 1364) answer that "When Rome transformed itself from a republic into an empire in the first century B.C., the wealth and influence of the *publicani* drew jealous attention from the emperors who ordered the state to take over much of the construction of public works." This is possible and might be counted as one more example of "Caesar madness" which led emperors to believe that economic laws were subject to their veto. There is little doubt that shirking by public employees would have operated to raise the costs of producing conventional public works and of collecting taxes (see White 2004; compare Williamson 1999: esp. 319, 339). The Roman state's reliance on private firms over several centuries reflects an awareness of the costs of monitoring public employees. Possibly, the emergence and growth of a bureaucracy can be understood in "functionalist" terms. It is certainly reasonable to link the latter development with the growth of the Roman state. In strictly economic terms we might think that economies of scale in the provision of public works more than compensated for additional monitoring costs.<sup>15</sup>

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<sup>14</sup> A strong interest in the fiscal health of the treasury and an awareness of the threat posed by cartelization seems apparent in a law of around 50 B.C.E. An extract in the *Digest* (48.12.2pr., Ulpian) preserves the *lex Julia de annonae* that authorizes punishment for those who enter partnerships making the *annona* more expensive (see Liu 2004: 206-07). *Annona* includes the state subsidized or free distribution of grain to adult male citizens.

<sup>15</sup> See Levi (1988: 93). Strong (1968: 98) suggests that "The censors were amateurs without a professional staff of advisors, and they were often at the mercy of unreliable contractors." However, he provides neither examples nor citations showing that the censors were taken advantage of. A.H.M. Jones (1949: 38-9 with n. 9) comments that "We know very little about the Roman civil service till we get down to the last fifty years of the Republic... We hear at this period of many subclerical grades, doctors (*medici*), surveyors (*architecti*), ...but we know little of the organization and terms of service of these technical officers... *Praecones* are recorded for censors." No doubt, censors were sometimes fooled, no system is without flaws. Anderson 1997: 74-5) points out that the two building contracts for which we have the terms, the repairs of the Via Caecilia and the building of a wall around the temple of Serapis in Puteoli, are very detailed and explicit: This very fullness "demonstrates clearly why contracts in *location conductio* came to be preferred in building contracts: their very completeness must have served as a 'sword of Damocles' suspended over the neck of the contractor who had to fulfill their terms to the satisfaction

In the case of tax-collection, the situation is more complicated, however. On the one hand, profit-maximizing *publicani* would reduce tax evasion and, hence, they would offer a higher price to the state for tax-farming contracts. On the other hand, the “overdetection” of tax evasion by private collectors would displease taxpayers and consequently undermine the rulers (see Toma and Toma 1992). As Levi (1988: 85) notes, quoting Weber, a tax-farmer “will not have the same long-run interest in preservation of the subjects’ ability to pay as the political lord.”<sup>16</sup> Kiser and Kane (2007: 203) suggest, “The problem [under the Republic] derived from the fact that the senate was a multiple principal. Although it may have been in the interests of the senatorial order as a whole to monitor tax farms effectively, individual senators found it more profitable to invest in them and then ignore the abuses that were making them rich at the expense of taxpayers.” An (alleged) centralization of tax farming worsened the problem of senatorial corruption (Kiser and

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of those who let the contract and had to undergo a *probatio* [evaluation/inspection] to insure it.” Of course, more detailed contracts are more costly contracts.

Bargaining/negotiating with contractors would, it is quite true, have required some expertise on the part of censors. However, the costs and dangers of bargaining were avoided by reliance on an auction trading system, which played one contractor against all the others. Milgrom (1989: 19) points out that “In the early New England textile trade, established merchants sponsored laws against auction sales, thus indicating their awareness of how effectively auctions narrow their margins and prevent them from extracting better terms from the cotton farmers.”

In the Late Republic we find *societates publicanorum* selling the right to collect taxes to local communities. Why did not the Roman state impose the tax directly on the communities? The motivation of the state, I think, is to maximize the use of market processes to collect taxes instead of relying on the services of bureaucrats. It is not entirely clear, however, whether the communities levied taxes directly on individuals or on collectives.

The resort to collective responsibility (of city governments and others) for the payment of taxes (e.g. Jones and Brunt 1974: 181; Brunt 1981: 169-70) introduces not only hardships but extreme distortions in the allocation of scarce resources. Joint responsibility for taxation, including the land tax, transformed the once proud *curiales*, property owning urban middle-class members of municipal senates (*decuriones*), into peasant/serf-like figures. In the fourth and fifth centuries the dire results became strikingly evident: Individual *curiales* sought to evade their responsibilities by means of a variety of expedients, including joining the church or even renouncing their property and adopting an ascetic life. We know a great deal about the compulsive methods used by the imperial authorities to prevent the escape of their cash-cows but not much about the behavioral adjustments within the *curiales* themselves.

<sup>16</sup> For the legal ground rules of tax-farming contracts in Asia in about 62 C.E., see, conveniently, Malmendier’s (2005: 41-2) translation of relevant excerpts of the *Monumentum Ephesenum*. The translation is based on the edition and German translation by Engelmann and Knibbe. For discussion and analysis, see Maganzani (2002). Rauh (1993: 46-7) notes that publican agents received tax-exemptions on slaves they conveyed through the province.

Kane 2007: 204). Some scholars believe that in the early Empire Roman rulers became attuned/sensitive to taxpayer protests including by provincial communities and switched to collection by public employees to deal with them. Thus, it may be noted that Augustus gave taxpayers the right to charge publicans with theft and violence. Monson (2007) notes the Tiberian taxation strategy, “to shear the sheep rather than flay them.” Despite these examples I rather doubt this hypothesis, however. We certainly have evidence of tax gouging by governors in republican times and by emperors (see Brunt 1961: esp. 197-98, 221-23).

An alternative line of explanation for an increased importance of bureaucrats in tax-collection relies on a change in the form of tax-collection contracts. Instead of making a flat payment at the time of the auction the publicans began to pay to the treasury a percentage of what they collected (Brunt 1990). This change is attributed to several new taxes introduced by Augustus that supposedly made it more difficult for contractors to estimate their profits. The new taxes included a five- percent tax on inheritance and a two- percent tax on the sale of slaves. A larger bureaucracy was now required to monitor the activities of the publicans. This interpretation holds together reasonably well. A major feature of share contracting is a more even sharing of risk and reward between publicans and treasury. At the same time, the share contract would be a breeding ground for disputes regarding both amount of tax actually collected and the direction and magnitude of the effort put forward by the publican. That is, the share contract encourages cheating and shirking by the publican. Most obviously, the publican will try to hide or disguise from the treasury what he has collected. Second, the link between the profit of the publican and his effort is incomplete. Relative to the flat payment arrangement there is a built-in disincentive effect.<sup>17</sup> The

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<sup>17</sup> The share contract tempts the publican to shirk by diverting his labor power and other resources into alternative employments including even leisure. At the least, the treasury would expect the publican to apply his resources to the point at which its opportunity cost is equal to the value of its marginal product. However, as is most easily visualized by means of the traditional analysis, since the publican receives only a fraction  $p$  of the total tax collections, he would maximize his own return by applying his efforts only to the point at which its opportunity cost is equal to  $p$  times the value of its marginal product. Thus, from the perspective of the treasury, the tenant is not doing enough work and, consequently, he is

main line of defense against opportunistic behavior by the publican is increased reliance on (costly) direct oversight by the treasury. A problem here is that, as Aubert (1994: 329-30) notes: “There is ...inescapable evidence that by the time of Commodus [later second century B.C.E] imperial procurators assisted by imperial freedmen and slaves did more than supervising the publicans, at least in certain areas (Illyricum, and perhaps Gaul and Africa). Aubert (1994: 330) adds, citing Brunt (1990) that the replacement of the publicans “may have been a temporary expedient to make up for the dearth of tax farmers, as an alternative for compulsory service.” The question is why there would have been a dearth of publicans willing to collect taxes.

In any event, neither the replacement of “multiple (senatorial) monitors” by a “political lord (emperor)” or nor the introduction of new and uncertain taxes would seem to explain the extinction of production of ordinary public works by *publicani*. My favored scenario is that contending rulers, pressed for cash to finance civil and international wars and welfare, sought to have the cake and eat it (see Levi 1988: 92-4). Predatory fiscalism produced the very result that had been avoided by permitting the *societas publicanorum* to be available only for government business. There is evidence that a confiscatory process makes an appearance before Rome became an empire. Republican rulers (and pretenders) sought to transfer the wealth of the *publicani* to their own coffers. Thus, Badian (1996: 1276; also 1972: 116) notes that “The Civil Wars [of the mid-first century B.C.E.] brought the companies huge losses, as their provincial *fisci* were appropriated by opposing commanders. They never recovered their wealth and power.” The wealth of the *publicani* had become quite fragile and insecure.

Trust in the state was a “common pool” (a kind of public good) which, lacking reasonably assured ownership, successive rulers had limited interest in conserving. By robbing the *publicani* the contending rulers behaved as “free-riders” extracting maximum short-term income at the expense of higher future income. To put the issue in another way, significant uncertainties con-

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undercollecting. The higher the fraction  $p$  the more “high powered” is the incentive of the publican to apply resources.

cerning control over the state apparatus raised the discount rate applied to future revenue and encouraged predatory behavior by rulers (Levi 1988). Predictably, the redistributive (rent-seeking) efforts by contending rulers steeply reduced the number of businesspersons willing to bid on government contracts. As noted above, the reduction in numbers would have increased the market clearing contract price paid by the state. Indeed, the contract price had to rise enough to compensate the remaining firms for the increased insecurity of property rights. Just as seriously, the decline in the number of firms decreased the cost and, hence, the likelihood of rings of contractors (compare Johnson 2006: esp. 978-79). The postulated rise in contract-price together with a possible collapse of the competitive market signaled that the auction-based system no longer minimized the cost of government projects. Roman rulers had broken the outsourcing system beyond repair and increasingly they had to rely on “second-best” alternatives including in-house production and the reliance on (costly) negotiations and monitoring of individual *redemptores* “contractors”(Einzelpächter) (see Brunt 1990: 356-57, 361, 367, 370-71, 400-402, 413-14).<sup>18</sup>

To illustrate the problem, in Republican times the maintenance of Rome’s aqueducts was sold to private contractors (Frontinus 96). By the end of first century C.E., however, the maintenance task was divided between a workforce of 700 men, the *familia aquaria*, paid by the treasury (Frontinus 116-18) and private contractors employed as the need arose. The difficulties (costs) of this system are well explained by Frontinus (119):

Since we have set forth that which seemed pertinent to the working-crew, we shall now turn (as I promised) to maintenance of the conduits: this is a matter worthy of the most earnest attention, for it serves as a particularly impressive symbol of the greatness of the Roman Empire. Many, sometimes large-scale, tasks are constantly arising, which should have prompt attention before exten-

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<sup>18</sup> See Frank 1940: 235-36; Brunt 1980: 84-5; compare Malmendier June 2006: 16-17. For in-house production of public works, see especially Anderson (1997: 88-95).

sive remedy may be required; much of the time, however, tasks of maintenance are to be deferred through wisdom and restraint, for one should not always put trust in those who urge work of construction or extension. For this reason the commissioner ought not only to avail himself of the knowledge of specialists, but he ought also to be equipped with some practical experience of his own. He ought not only to consult the engineers in his own office, but also to call upon the reliable judgment and expertise of numerous others, that he may in the end determine which tasks are to be undertaken without delay and which are to be postponed, and, again, which are to be carried out by independent contractors and which by workmen of the domestic staff. (Rodgers)

Bruun (2003: 311 cf. 316-17) notes “Frontinus’ skeptical attitude towards those who are involved in the building industry.” It might be added that the safeguards recommended by Frontinus raised the cost of aqueduct maintenance.

Certainly the events of 184 B.C.E. and, as we shall see, those of 61 B.C.E. show the contracting system working with no contract price collusion, or at least no *effective* collusion, among *publicani* and no evidence that the censors were being corrupted. On the other hand, I have not found direct evidence of a decline in the number of publicans.

There are perhaps indications of collusion among bidders. Badian (1996: 1276) mentions joint action of *publicani* in activities in Bithynia in Asia Minor during the mid-first century B.C.E. “the Bithynian company was made up of the other companies.” Broughton (1938: 539) explains that “It was natural that the same people should be members of more than one company and that the companies both in the provinces and in Rome should combine to exert pressure on the central government and upon the provincial governors.” He goes on to refer to the “probability that the losses sustained by the companies in 61-59 caused them to unite their organizations throughout the eastern provinces...” (Broughton 1938: 539). Frank (1933: 345-6) adds:

In the censorship of 61 B.C. the companies that bid for the Asiatic tithes apparently offered too much. They thought that the holder of the Asiatic contract that year might find lucrative opportunities in the new provinces. It would seem that competition for the enterprise was keen. The company which secured the collection presently found itself losing money and it appealed to the Senate for a remission of a third, as it had a right to do under the Sempronian law..., but despite the aid of Caesar, Cicero, and Crassus, its efforts were for some time successfully obstructed by Cato. Perhaps because of the disastrous competition in 61..., the various companies operating in the East (Bithynia, Asia, and Cilicia) combined even more closely than those that operated in Sicily in 72-70. At any rate it seems that in 51 the *societas* of Bithynia consisted of a union of all the other eastern companies...It would seem that for this lustrum [period of five years] there was something of a monopoly in the eastern tax-gathering. However, their success could not have lasted long. Pompey took direct charge of finances in the East in 49 and, after his defeat in 48, Caesar forever ended the tithes contracts of the provinces of Asia...Thereafter there were only the *scriptura* [the tax which was paid for the use of the public pasture lands] and the port dues for the companies to gather, and in the early Empire they lost these also.

All of this seems consistent with a reduction in the number of companies and of cartelization. Possibly, the bidder for the Bithynia companies refused to accept an auction price until it had been raised to the level of the average total cost of the highest cost member of the ring (see note 8). This assumes that the ring consists of the lowest cost producers (see Cassady 1967: Chap.

13). The ring would then parcel out among its members the extra profits and production quotas (see Graham and Marshall 1987).<sup>19</sup>

Of course, there is no “smoking gun” and the textual evidence for a merger or cartel of publicani is rejected by Cotton (1986). Possibly, the *societas bithynica* collected taxes only in Bithynia, not in all of Asia Minor, and, consequently, does not stand as an example of collusion between the bidders or as an example of increasing concentration of the societies.<sup>20</sup>

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<sup>19</sup> In the course of an excellent discussion of tax farming in Old Regime France, Johnson (2006) makes the counterintuitive suggestion that crown revenues increased when small, competitive bidders were replaced by a large cartel known as the Company of General Farms. In his explanation, a number of threads may be detected not all of which need to be accepted or are relevant to the Roman experience. First, there is the “economies of scale” explanation: “the consolidation of tax farms after 1661 resulted in efficiencies in tax collection, such as more clearly defined jurisdictions for the farmers and less replication of offices across farms” (Johnson 2006: 970). This suggestion is not entirely convincing but it becomes unacceptable when Johnson (2006: 971) adds that the “cartel ... was able to pool enough capital so that it could take advantage of the scale economies associated with tax collection.” I see no reason why competitive firms cannot raise capital to take advantage of scale economies. A second, more appealing version of this thread is that the French crown, fearful of exploitation by cartels of tax farmers, implemented various legal measures that prevented competitive tax-farmers from raising capital (Johnson 2006: 972-74, 977). For example, in distinct contrast to Roman corporate practice, the number of partners in a French tax-farming firm was limited and each partner had full liability under the law. However, “whereas the General Farms was technically a partnership in which liability was shared equally among the participants, by the end of Colbert’s tenure [d. 1683] it acted as something more resembling a corporation in which liability was limited” (Johnson 2006: 982). Johnson also puts forward a “property rights” explanation. The cartel was in a position to limit the crown’s predatory impulses: “By acting as a corporate body... the farmers were better able to threaten to withhold their coins in the case the crown violated their property rights” (Johnson 2006: 966, cf. 971, 977-78). “By the seventeenth century there was a tension between the incentives of the crown to maximize its short-run payoff by preying on the farms and the increasingly important role played by the farmers as financial intermediaries and investors in the king’s tax system” (Johnson 2006: 979). This began to change in the second half of the century when, in 1668, Colbert created the General Farms. My understanding is that in order to send a signal that it would henceforth respect property rights, the crown accepted, even encouraged, the formation of a cartel of tax-farmers (see Johnson 2006: 981). The predictable price of this signal would of course be monopsonistic exploitation of the crown by the farmers! (see Johnson 2006: 987-988). In the end, Louis XVI called upon the Estates General to help him eliminate the tax-farming cartel. This part of the story may have some application to the Roman experience.

*If* the revenues of the French crown increased the reasons were that: the crown (1) allowed tax-farmers to pool their capitals: (2) granted limited liability, and, most importantly, (3) honored private property rights. Thus, in my view, the market in Old Regime times would have responded well to economic logic.

<sup>20</sup> A generalized concern for collusive monopoly is manifested in chapter 75 of the *lex Irnitana* dating from the reign of Domitian in the later first century C.E.: (Gonzalez and Crawford 1986: 193):  
Rubric. That nothing may be bought up or hoarded. No one in that *municipium* is to buy up or

This much seems reasonably clear: “The *publicani* persisted for a time as tax collectors, but repeated clampdowns eliminated them even from this role by the end of the second century A.D.” (Hansmann, Kraakman, and Squire 2006: 1364; Malmendier 2005). Brunt (1990: 380) says that “The Roman government seems to have progressively narrowed the sphere of tax-farming, without (as far as we know) entirely eliminating it; as late as the third century it is still attested.” Aubert (1994: 328-29 with n. 20), however, suggests that the remarks of Ulpian and Gaius cited by Brunt refer to the historical past not to contemporary activity by publicans. It is not clear to me that the tax farmers in later times had corporate status (see Brunt 1990: esp. 419-20; cf. Aubert 1994: 329).

Summary: The Roman state granted the legal right to the *societas publicanorum* for government contracting and denied it for private business. Fiscalist considerations motivated this policy choice. The discrimination in treatment increased in the number of government contractors, which lowered production costs of public works and raised collusion costs among contractors. The *fiscus* benefited from lower prices for conventional public works contracts and higher prices for tax-farming contracts. Beginning in the later Republic these benefits were eliminated or reduced by confiscatory policies. Consequently, the Roman state turned to “second best” alternatives for producing public works and collecting taxes. All in all, I think that my fiscalist account of the emergence and extinction of *societates publicanorum* makes sense and it may well have happened this way. At the same time, this argument casts in a new positive light the economic rationality, or at least economic sophistication, of educated Romans.

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hoard anything or join with another or agree or enter into a partnership in order that something may be sold more dearly or not to be sold or not enough be sold. Anyone who acts contrary to these rules is to be condemned to pay 10,000 sesterces to the *municipes* of the *Municipium Flavianum Irnitatum* for each case and the right of action, suit and claim of that money and concerning that money is to belong to any *municipes* of that *municipium* who wishes and who is entitled under this statute.

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