



The Roman Clan

The Gens from
Ancient Ideology
to Modern
Anthropology

C. J. SMITH

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THE ROMAN CLAN

The *gens*, a key social formation in archaic Rome, has given rise to much controversy in modern scholarship. In this comprehensive exploration of the subject, Professor Smith examines the mismatch between the ancient evidence and modern interpretative models influenced by social anthropology and political theory. He offers a detailed comparison of the *gens* with the Attic *genos* and illustrates, for the first time, how recent changes in the way we understand the *genos* may impact upon our understanding of Roman history. He develops a concept of the *gens* within the interlocking communal institutions of early Rome which touches on questions of land-ownership, warfare and the patriciate, before offering an explanation of the role of the *gens* and the part it might play in modern political theory. This significant work makes an important contribution not only to the study of archaic Rome, but also to the history of ideas.

C. J. SMITH is Professor of Ancient History at the University of St Andrews. His previous publications include *Early Rome and Latium: Economy and Society c. 1000 to 500 BC* (1996), *Trade, Traders and the Ancient City* (1998), *Religion in Archaic and Republican Rome* (2000) and *Sicily from Aeneas to Augustus* (2000). He is the co-editor of *Fragmentary Roman Historians* (forthcoming).

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For Susan

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Preface

The origins of this book lie in my dissatisfaction with my own account of the *gens* in a previous account of early Rome. For almost a decade, I have been trying to improve upon a few sentences in an earlier book, and I am slightly horrified that the result is as long as it is. Perhaps that is a testament to my obsession, but I hope it also reflects the importance of the subject.

Over such a long period, more people have contributed in direct and indirect ways than any preface can acknowledge. Nonetheless it is a pleasure to bring to mind at least some of my debts. Early versions of parts of the argument were offered as papers to stimulating audiences at Leicester, Cambridge and St Andrews. The real impetus to put my thoughts down as a whole came from the very kind invitation from Trinity College Dublin to present this as the Stanford Lectures in spring 2001. I am immensely indebted to my friends and colleagues there for their hospitality, and the stimulating environment in which I was able to present an early version of these ideas – I hope now to have answered some of the questions so pertinently posed on those occasions. I was then fortunate enough to gain research leave from the AHRB, which gave an invaluable period of time to think, reflect and write.

By that stage the revision of H. Peter's *Historicorum Romanorum Reliquiae* of which I am an editor was well under way. This has been an immensely formative intellectual journey for me, and much of what follows has been coloured by insights gained from that enterprise. It has deepened relationships already formed and created new ones, and to all involved I am very grateful.

Several colleagues kindly commented on all or part of a draft, and I am both lucky in my friends, and indebted to them. Michael Crawford and Jill Harries helped me with Roman law, and Robin Osborne and Robert Parker with the chapter on the *genos*; in so doing they improved the whole immeasurably. Ed Bispham, Guy Bradley and Fay Glinister provided insights and encouragement just when I needed them, and made me feel that the project

was worthwhile. Sally Humphreys provided immensely valuable comments; Nicola Terrenato was both a generous but also a discerning reader of the text, and I was enormously pleased to be able to talk through some of the issues with him and Laura Motta in Chapel Hill, where by good fortune I was also able to discuss *Osteria dell'Osa* with Anna Maria Bietti Sestieri. Andrew Lintott and Fergus Millar were immensely supportive, as always. Tim Cornell, Andrew Drummond and John Rich read between them several drafts, commented in great detail, and have improved, quite literally, every page of what follows by their good sense, acumen and scholarship. This was particularly kind, since I have from time to time had the temerity to disagree with them. There is but a pale reflection of the dialogue which I have enjoyed with each of them, and their published works, in this book. Colleagues in St Andrews have been remarkably tolerant of and responsive to my importuning in many ways, and not just in Classics; Nigel Rapport helped me with some of the anthropological issues, and the University Library staff were tremendously helpful; in this context I would also like to thank Sophia Fisher at the Institute of Classical Studies Library. I owe a particular debt to Iveta Adams for her helpful and extremely valuable copy-editing in the final stages.

I have learnt much from all those who have commented on the text, or discussed my ideas, and I have been hugely encouraged by their support. They are not responsible for the positions I have taken, or the errors I have made, but they, and many others who I have bothered and badgered, have contributed both to whatever is good in the book, and to my sense of purpose in writing it. In what follows, despite my best endeavours, much is prefaced by 'perhaps' and 'maybe' so one definitive statement seems appropriate. Susan, who has read this book several times, always with tremendous acuity and faith, and has lived with it for almost as long as I have, gave me the strength to finish what I often thought was beyond me; no dedication could ever say enough.

Abbreviations

Bremer <i>LA</i>	F. P. Bremer, <i>Iurisprudentiae antehadrianae quae supersunt</i> (Leipzig 1896–1901).
<i>CAH</i> ²	<i>The Cambridge Ancient History</i> (2nd edn.) (Cambridge, 1961–).
<i>CIL</i>	<i>Corpus Inscriptionum Latinarum</i> (Berlin 1862–).
<i>FGrH</i>	F. Jacoby (ed.), <i>Die Fragmente der griechischen Historiker</i> (Leiden 1923–50).
Funaioli <i>GRF</i>	H. Funaioli (ed.), <i>Grammaticae Romanae fragmenta</i> (Leipzig 1907).
<i>GL</i>	H. Keil (ed.), <i>Grammatici Latini</i> (Leipzig 1857–80).
<i>IG</i>	<i>Inscriptiones Graecae</i> (Berlin 1873–).
<i>ILLRP</i>	A. Degrassi (ed.), <i>Inscriptiones Latinae liberae rei publicae</i> (Florence 1957–65).
<i>ILS</i>	H. Dessau (ed.), <i>Inscriptiones Latinae selectae</i> (Berlin 1954).
<i>Inscr. Ital.</i> XIII	A. Degrassi (ed.), <i>Inscriptiones Italiae</i> XIII (Rome 1937–63).
<i>LIMC</i>	<i>Lexicon iconographicum mythologiae classicae</i> (Zurich and Munich 1981–99).
<i>LTUR</i>	E. M. Steinby (ed.), <i>Lexicon topographicum urbis Romae</i> (Rome 1993–2000).
Malcovati <i>ORF</i>	H. Malcovati (ed.), <i>Oratorum Romanorum fragmenta</i> (Turin 1967).
<i>MRR</i>	T. R. S. Broughton, <i>The Magistrates of the Roman Republic</i> (New York 1951–86).
<i>RE</i>	A. Pauly, G. Wissowa and W. Kroll (eds.), <i>Realencyclopädie der classischen Altertumswissenschaft</i> (Stuttgart 1894–1980).
<i>Roman Statutes</i>	M. H. Crawford (ed.), <i>Roman Statutes</i> (<i>BICS</i> Suppl. 64) (London 1996).
<i>RRC</i>	M. H. Crawford, <i>Roman Republican Coinage</i> (Cambridge 1974).
<i>TLL</i>	<i>Thesaurus linguae Latinae</i> (Leipzig 1900–).

General introduction

The *gens*, of all Roman institutions, is the one most alluded to and least explained. Only the absolute power of a father over his son has had such influence in subsequent philosophical and political thought.¹ Historians have made the *gens* the key to Roman politics, archaeologists have sought the *gens* on the ground, and both have described as ‘gentilicial’ a huge array of activities and traces of social behaviour. Early modern thinkers found the justification for their definitions of contemporary nobility in the concept of *gentilitas*. Social anthropologists have used the *gens* as a model to help them understand societies as distant as Africa and native America. Engels developed Marx’s belief that the Roman *gens* helped to explain the origin of private property. One of the most profound divisions in twentieth-century Italian jurisprudence has been between those who thought the *gens* (embodied by family) predated the state, and those who saw it as the product of the state. This debate is not only still ongoing, but also shadows a much wider, and much deeper, concern in modern thought about the nature of identity, as a real ethnic, biological fact, or a fictitious, political fig leaf concealing darker motives and deeper fears.

Yet there has been no substantial treatment of the *gens* in English for nearly a century, and none that I know of in any language which sets out to establish both the reality of the institution, and the myriad interpretations that have been laid upon it. This book is therefore at its heart the history of a debate which began in antiquity, and which, in unexpected ways and along surprising paths, continues to be relevant to this day.

The history of the Roman *gens* has fascinated scholars for centuries, and the obscurity of the institution has not prevented imaginative if unfounded reconstruction. This book has two themes, an attempt to state as clearly as possible the evidence for the role of the *gens* in early Roman history,

¹ For a powerful attempt to demonstrate that the power of life and death held by a Roman *paterfamilias* was a myth, but one deeply embedded in the Roman self-image, see Shaw (2001).

and an account of the use which scholars have made of the *gens* from the early modern period onwards. The reason for this twofold purpose is simple. My argument is that we have largely misunderstood the nature of the Roman *gens* because we have brought to it preconceptions which derive from the way the *gens* has been presented in other disciplines such as social anthropology. For the *gens*, of all Roman institutions, has been unusually significant outside the ancient historical discourse.

The word itself is very difficult to translate without importing meanings from other contexts. 'Clan' has been popular, though 'House' has had its champions, especially in the early translations of Niebuhr and Mommsen. Modern anthropologists distinguish 'lineage' from clan through the accuracy of genealogical knowledge; a lineage traces descent from a common ancestor through known links, and a clan is a group where the genealogical links are not all known. This definition of a clan would actually fit the *gens* well, since, as we shall see, the relationship between members was based on a largely fictive kinship.² In some parts of the study of kinship, 'gens' is used itself as a technical term. On the whole I have tried to avoid translation, but where appropriate I have tended to use 'clan', and for one important reason, which is that this most aptly indicates the way that the concept has travelled far beyond its own time and place. The translation is intended more as a signifier of the dangers of the cross-cultural comparison.³

Paradoxically, this book will argue that both in its own time and subsequently, the Roman *gens* has been more important as part of an argument than as a social institution. Most Romans did not regularly and explicitly refer to their *gens* as their core self-definition, but it represented aspects of aristocratic behaviour which were important, and were disputed and contested. Much of this work will focus on the debates about the community at Rome in the fifth and fourth centuries BC, a period characterised by the sources as one of violent and bitter antipathy between patricians and plebeians.

At the same time, the book will demonstrate that, consciously and unconsciously, scholars from Vico to Morgan and Maine used the perception of the *gens* to reinforce their vision of the world. The disjunction between the Roman reality and the presentation in later writers is

² In an influential account, Finley (1983) 45 rejected the concept of the clan, and insisted on lineage. He was denying the importance of any form of kinship as a basis of power. Finley stated that the *gens* unlike the *genos* was a lineage, and nothing like a clan or tribe, but it is not clear to me that Finley's usage is exactly the same as modern anthropologists' usage, and it makes assumptions about the ancestry of these lineages which are difficult. Nevertheless, Finley was correct in his observation that one cannot find either a tribal or a feudal system behind the *gens*.

³ For definitions of clans and lineages, see Stone (1997) 62–6; Parkin (1997) 17–18.

sometimes very sharp, and has led to the confusing use of a concept of a 'gentilicial' society in archaic central Italy which actually has very little relationship to the social institution from which the adjective is derived. This argument has profound consequences for archaeological research in particular.

In seeking a new understanding of the Roman *gens*, our argument flows naturally into many areas of early Roman history at least as obscure as, and if anything more controversial than, the *gens* itself. The connection between the *gentes* and the Roman patriciate (a hereditary nobility) is undeniable, though the extent to which the connection was exclusive is one of the most difficult of issues. It is impossible to understand the *gens* without looking at Roman society as a whole, and this book will lay unusual emphasis on the importance of the citizen community in the early Republic. To this end, we shall discuss in detail both the patriciate and the assemblies of the people, most particularly the curiate assembly, which has received a great deal of rather eccentric analysis over the past thirty or so years. Much of this has been dismissed, and the institution has consequently been rather underestimated in standard accounts. These are not digressions, however, but form part of a vision of the early Republic which stresses the wider social context, and which finds a role for the *gens* within that community. On this argument, the *gens* was not an obscure archaic survival, which was symptomatic of aristocratic disdain for community, but a form of organisation which reveals the tense and difficult negotiation of power between aristocracy and people.

This argument is itself not without consequences for the way we see the Struggle of the Orders, a modern phrase describing the rivalry between patricians and plebeians which emerges clearly from the sources, and was an aspect of Roman history of intense interest to the early modern period. Since this book is neither a history of Rome at that time, nor an account of the influence of the Roman narrative on later periods (both of which would be valuable nonetheless), it is at times much more cursory than the subject matter deserves, but it is my hope that it will contribute to the debate on both topics.

What underlies this account as a whole is a belief first that Roman history has been and continues to be of central importance in political discourse, and second that Roman politics was neither without ideological argument, nor alien to ideas of democracy. No apologist can make an Athens out of Rome, but at the same time, far too little is made of the important debate, which I believe was perennial at Rome, over the nature of community, the proper roles and duties of its citizens, and the interlocking of the various

institutions of the city state. There is a temptation to see regal and early Republican Rome merely as a kind of idea-free bloodbath, a militaristic machine run by selfish aristocrats, and tergiversant demagogues only too willing to pull the ladder of political advantage up after themselves. Readers will find a different early Rome here.

Every argument about early Rome is also an argument about sources, and indeed has been ever since de Beaufort set out to demonstrate the unreliability of the tradition in the eighteenth century. The problem is easily stated: none of our sources were remotely contemporary with events (the first Roman historian wrote at the end of the third century BC), and they are themselves pessimistic about the quality of the information which they had to go on. Yet write they did, and demonstrably with the concerns and the political language of their own day. What evidence exists for the nature and functions of the *gens*, how reliable is it, and can we reconstruct a reliable picture of the role of the *gens* in early Rome?

Chapter 1 sets out all the evidence which can be used in the process of defining the *gens*. It is varied in nature; we have legal definitions, some of considerable antiquity, others much later, some stories in historians or antiquarian writers, etymologies, and snippets of information about customs and practices. None of this can be overlooked, but equally, it may not all be of the same value. We must not underestimate the difficulty late Republican and early imperial writers had in discovering about their more distant past, or the extent to which they could resort to weak arguments and invention to supplement the facts as they saw them. In chapter 2, I will argue that preconceptions and methodologies can influence conclusions; the same was true of ancient writers.

The additional important source we have is the names of magistrates from the beginning of the Republic. This is far from uncontroversial, and we shall have to address it in detail, but readers should be aware of my position from the outset. We can produce a list of magistrates from a variety of sources that survive to us: the historians, primarily Livy, Dionysius of Halicarnassus and Diodorus Siculus, and the inscribed list of magistrates on the Capitol, known as the Capitoline Fasti, which is also Augustan in date. There are problems and discrepancies; some versions have additional years, and there are disputes over some names, and more particularly over the inclusion of the *cognomina* of early magistrates. (These are the names that are added after the *nomen*, often thought to indicate families within *gentes*, although some are nicknames or markers of a particular success, and they may have been added later.) That said, there is a striking degree of uniformity which suggests a single source, and we know that the names

of consuls and magistrates, along with significant events, were inscribed in the pontifical tables, a record kept on an annual basis.⁴

This is not unimpeachable evidence. Livy himself claims that the records were mostly destroyed in the Gallic sack. There are uncertainties in the earlier parts of the lists, to be sure, and the list creates a picture of a rather smooth transition from kingship to Republic that may conceal a more troubled period. However, complete scepticism is, to my mind, unjustified. The sequence of magistrates is, at a broad level, reliable, both in indicating the existence of constitutional magistracies, and in demonstrating a pattern of office-holding which will become an important element in our understanding of the *gens*.

Some scholars have called for a methodology to sift the good evidence from the bad.⁵ The extent to which this can be successful depends on the degree of control we have over the accuracy of the sources. It is not possible to prove that Livy was telling an accurate story, and even the recovery of all the fragmentary historians who preceded him would only help us piece together how the story was built up, and not whether it was true, at any philosophical or historiographical level. It would be much more useful if we knew what sources the earliest historians used (and it is important to note in this context that Cato the Elder, who wrote a history of Rome in the second century BC, makes reference to the pontifical tables). When we come to sources which are not telling a narrative, the problems grow. Lawyers' definitions are not necessarily a guide to past practice so much as a way of tidying up present reality; antiquarian information may look archaic, but that is simply a modern perception. The absence of evidence does not provide an argument in the context of early Rome, since so much evidence is missing.

The view taken here is that it was possible for information and knowledge about both events and structures to have been transmitted from early times to the time when history was being constructed, and in a number of different ways, not simply through the lists of magistrates. A whole range of media were available, from inscriptions and monuments to stories, oral tradition, family archives, and the simple continuance of some practices and features of archaic Rome down into the Republic and beyond. If one accepts the possibility that Romans could know about their past, as I do, then the questions become ones of reliability, and the general approach taken here is that whilst the ancient sources are capable of misunderstandings and

⁴ Frier (1979); more generally on the *Fasti*, see Oakley (1997) 21–109.

⁵ There are several such statements in Raaflaub (1986b), but little agreement nonetheless.

mistakes, they are rarely setting out to mislead. Moreover, contradictions and confusions may be a more accurate reflection of a contradictory and confusing reality than a picture produced by a rational preference of one source over another.

Given these deep-seated problems, it is tempting to look for assistance from other kinds of evidence. Archaeology is helpful for much Roman history, especially the development of the early city, but it is much less helpful in the context of a political argument. As we shall see, one major problem is the influence of preconceived notions of the *gens* on archaeological descriptions. It has been common to describe evidence of gentilicial activity in the archaeology of central Italy, but this is not the same as finding the *gens* on the ground. Comparative history and social anthropology have their part to play, but one has to start from some perception of what Rome was like in order to choose the comparandum, or apply the model. One can use the same sources to describe Rome in the fifth century BC as a society of feuding *condottieri* with local powerbases, or a society collectively developing complex and sophisticated, and dare one say rational, responses to the problems of maintaining a civic community.

We can give as an example an event in fifth-century history, directly relevant to the history of the *gens*, and to which we will return at length later. Early in the fifth century, Rome was at war on several fronts, and under pressure. One of the best known patrician *gentes*, the Fabii, offered to undertake the war against Veii themselves, and they marched out as a kind of state-sanctioned private army and formed a garrison on the Cremera river. They were successful for some time, before being ambushed, and killed almost to a man. Did this event really happen? We do not know for sure; presumably the Fabii claimed it did, but the sources give quite different versions, from the numbers involved, to the reasons for the disastrous denouement, and careful source criticism can reveal putative reasons for all the variants. Part of the importance of the episode lies in what it might or might not tell us about early Rome. Was this how all Roman warfare was conducted at that time, or was it the last gasp of an antiquated tribal mode or do we have the embellishment of a local brawl? We do not know, and all three interpretations (and several others too) are, strictly speaking, possible. In order to resolve this one way or the other we have to refer to the nature of the Roman army, the reconstruction of which is, in the first place, controversial in the extreme, in the second place, often predicated on our response to the prior question about the Fabii, and in the third place actually capable of supporting any answer about the Fabii. One might argue that the Roman army had achieved a measure of uniformity which shows

just how out of date the Fabii were, but it is not incontrovertible, nor is it impossible to believe that Romans sometimes conducted warfare for communal purposes, and sometimes for local purposes.

This is not meant to be a criticism of the tremendous efforts of many scholars to establish more clearly the nature of Roman history and the historical record; nor is it a denial of the necessity for careful analysis of every source on every point. It simply reflects a conviction that Roman history is not a problem which can be cracked if only one applies the right method, nor is it a jigsaw which only admits of one solution. Much of the history of early Rome was approached through debate in antiquity, and we see the traces of later arguments. One may think, for instance, of the origins of the Republic itself. There were a number of stories which were told, and a number of different ways of thinking about why and how (and when) the Romans expelled their last king and established a Republic. Which version is 'true' is not the only, and not necessarily the most interesting, question.⁶

This does not mean that we cannot write early Roman history, or that we must disbelieve everything we read in the sources. It does however render it a peculiarly difficult task. The first part of this book, which takes a rather sceptical line towards many current reconstructions of the *gens*, indicates a number of pitfalls, and makes the second part, where I attempt my own account of what the *gens* was and how it operated, vulnerable to similar criticism. This is all the more the case because of my belief that an understanding of this social institution can be arrived at only through an effort to understand those institutions which made up the contemporary political and military structures, all of which are themselves the subject of much dispute. Others will judge if the picture which emerges reflects the sources we have, and is coherent in its own terms, but the book will have achieved one of my major aims if it provides a basis for further debate.

⁶ Wiseman (1998b).

PART I

The evidence for the gens

The first part of this book focuses on the range of evidence which can be and has been brought to bear on the problem of the *gens*. We begin with the ancient evidence itself. What we know about the *gens* is actually confined to a few areas: inheritance, and various markers of identity such as burial grounds, legendary genealogies and religious rituals. One problem is that it is very difficult to find specific aspects of the *gens* which are not shared with many other social groups, so that what makes the *gens* different is elusive. The absence of a political dimension is also striking. The sources do not describe the *gens* as a political unit, though it is clear that members of *gentes* participate in political life in various ways; this will be the focus of the second part of this book. What is important here is to note that one source, Livy, indicates that an argument could be made that the *gens* was an institution which was possessed only by patricians. At the same time, our analysis of the evidence indicates the difficulty of making that argument with any cogent force, and indicates equally the existence of clear counter-indications, including evidence for non-patrician *gentes*, and definitions which are at variance with a patrician monopoly. The evidence does not give a single, straightforward picture, and my argument will be that this reflects ancient realities.

The [second chapter](#) considers how the concept of the *gens* has been treated by historians from the early modern period to the present day. It should be noted that many of the early figures are somewhat isolated. Renaissance thought, represented here by Carlo Sigonio, had already developed important arguments about the *gens* and the patriciate. These had their own context in contemporary debates about the definition of nobility. Although Sigonio was an enormously significant figure in the development of the discipline, his importance was rather overlooked in the nineteenth century, yet his approach was far more analytical than that of our next key thinker,

the early eighteenth-century scholar Giambattista Vico. Vico's approach is confused and inaccurate, and to a large extent fantastic; moreover, it had practically no influence whatsoever on the nineteenth-century German development of the discipline of ancient history. Vico became important once more through quite different channels, particularly in France where he was championed by Michelet, an important influence on Fustel de Coulanges, and in early twentieth-century Italy, where he was taken up by Croce. German scholarship developed in a different direction, but the conclusions of Niebuhr especially were identified as the factual basis from which scholars outside the discipline would work. The *gens* became a crucial part of the development of the discourse on kinship invented by Lewis Henry Morgan and Henry Sumner Maine amongst others. The conclusions of the former were taken up by Marx and Engels, and have been influential ever since, but our investigation shows how Morgan's creative misrepresentation of the Roman *gens* led to the development of a model of gentilicial society that was in fact radically different from the evidence which the sources give us. This chapter concludes with a brief statement of the key modern theories, and an indication of their intellectual inheritance.

Study of the Roman *gens* has not proceeded with the same degree of methodological sophistication as research into the Athenian *genos*. The *genos* has always been the obvious parallel institution for the *gens*, but the radical re-evaluation of the Greek evidence has not been systematically juxtaposed with the Roman evidence. The purpose of the [third chapter](#) is to do exactly that, and I have therefore developed in some detail the Greek parallels. Since these owe much, consciously and unconsciously, to the development of social anthropology subsequent to Morgan, this chapter also continues one aspect of the interaction between ancient evidence and modern interpretation. Whilst the *gens* and the *genos* appear far more dissimilar now than they used to, the kinds of interpretation which have been applied to the *genos* will be useful for our own final attempts to explain the *gens*.

One area where modern theory and ancient evidence have been most closely connected with regard to the *gens* is archaeology. In the [fourth chapter](#), I consider some of the most relevant archaeological evidence, and show the way that preconceptions drawn from the social anthropological models outlined in [chapter 2](#) have directed archaeological identifications of material remains with an ancient social institution. This connection raises serious problems of interpretation, whilst remaining an extremely

exciting and productive area. The problems are at their most acute when one extends the field of investigation into central Italy more generally, and Etruria in particular. These considerations bring us directly to the problem of the historical context of the alleged gentilicial structures in the sixth to fourth centuries BC, which is the subject of the second part of the book.

CHAPTER I

The ancient evidence

I. INTRODUCTION

We have significant evidence for the nature and history of the *gens* but, as so often for social institutions which are obvious to those who live with them, but obscure to those who come after, our information is scattered in time and disparate in character. Much is missing that might have helped; the wreckage of Varro's abundant work is particularly unfortunate for our understanding of early Rome. From what we know, Varro was both knowledgeable about the traditions of early Rome, and interested in many of the questions which we will have to address. However, there is no reason to suppose that even if all that the ancients wrote was restored to us, we would have an account that was accurate and cogent. The idea that the *gens* had a single form which even ideally might be recovered is one which this book explicitly rejects. As we shall see, the evidence suggests that the *gens* was not an institution which stood still, and that it was part of an argument, an argument which was conducted with some passion on a number of fronts over a long period of time. Our task must be to recover the lineaments of the argument, without the expectation that putting them together will reveal even a half-complete jigsaw of a single picture.

If one considers the chronological spread of the references, it is immediately clear that there is a large gap between our first source, the Twelve Tables of the mid-fifth century BC, and the rest of our sources, most of which come from the historians and antiquarians of the late Republic and early Empire. We shall uncover differences in the ways in which writers use the word *gens*, which may imply that, at least for different writers, the word had different resonances. Gaius in the second century AD informs us that the law of the *gens* had fallen into desuetude and obscurity by his own time, but he preserves important earlier information. From the start, therefore, we must recognise that each reference must be taken on its own terms. Later sources use earlier sources themselves; we should say for instance that

Aulus Gellius has a second-century AD understanding of earlier material, not that Aulus Gellius tells us about the *gens* in the second century AD. We begin with the most significant structural facts about the *gens*, some of which will be discussed further later on. This will establish the basic nature of the group, and identify some of the questions we must address.¹

2. ETYMOLOGY, MEANING AND DEFINITION

We may begin with the word *gens* itself. The word has distant roots connected with family and descent; Kübler gives various Sanskrit equivalences, which indicate that it is Indo-European in origin.² It is cognate with the verb *gigno* and in Greek γίγνομαι and the general sense is of a social group based on relationship through common descent. From it we have *gentilicius*, *gentilis* as adjective and noun, and *gentilitas*.

This fundamental concept of relationship through descent allowed the group of related words to develop a wider reference. The easiest way to demonstrate this is by reference to the *conspectus materiae* at the beginning of the article in the *Thesaurus linguae Latinae* on *gens*, which commences with the sense of the group of those who draw their descent from a single *princeps*, and then develops the technical Roman sense of a conjunction of several families, and thereafter the wider sense of a nation or people. This wider meaning is found quite early; Ennius has *magnae gentes opulentae* in what appears to be a reference to the peoples of Latium, and the word may be found in this sense of other peoples in Accius, Naevius and Plautus, whereas the earliest literary references to the *gens* in the sense of a familial group are found in Cicero, and the antiquity of the concept is based on the appearance of the *gentiles* as an inheritance group in the Twelve Tables.³ Eventually, by translation of a Hebrew term, the word develops connotations of opposition to true religion, and is equated with paganism, which brings us to its reincarnation as our familiar word 'gentiles'.⁴ All the related words follow the same trajectory, referring both to the narrow Roman group, and to the concept of a wide nationality, often not Roman.

¹ I omit here discussion of the relationship between *gentes* and *tribus*, e.g. the Claudii and *tribus Claudia*. No ancient source fully explains the fact that some tribes have the names of patrician clans, and therefore this will be discussed later; see below, chapter 7.2. I also omit here discussion of one of the most famous actions by a *gens*, the military action conducted by the Fabii in the fifth century BC; this will also be considered in full at a later stage (chapter 9.2).

² Kübler (1910).

³ Ennius *Ann.* 141 Skutsch; Acc. *trag.* 523 *Dardaniis gentibus*; Naev. *com.* 109 *qui apud gentes solus praestat*; Plaut. *Rud.* 1 *qui gentis omnis mariaque et terras mouet*.

⁴ See Ernout and Meillet (1959) 250–3 for a clear account.

We should certainly note that there is a clear parallel to be drawn between the search for familial ancestry and the process of identifying the founders of nations, or searching for the *origines gentium*.⁵ It is from this sense of a 'nation' that Roman writers developed the concept of the *ius gentium*, a law of nations, and later scholars from Grotius onwards developed this into theories of natural justice. This meaning is a long way from, and not directly connected with, *gens* in the sense of a 'clan', but the use of the same word as an early social institution at Rome, and in a phrase loaded with meaning for early moderns, was productive, as we shall see, of some interesting and perhaps deliberate confusions. The early *gens* does not easily escape the shadows of its later definition.

It is worth briefly noting that, as the lexicographers show, *gens* is not alone in referring in the narrow sense to a group with common descent. *TLL* is most explicit here, referring to *familia*, *stirps* and *domus* as parts of the whole referred to by *gens*; and there is also the clearly related word *genus* in its sense of a birth group. This lexical entry is derived from Kübler's account, and may make too tidy the relationship between these different groups, while some writers use them interchangeably.⁶ There may be distinctions to be drawn between these words, but as the lexica show, these distinctions are not clear and are often ignored by the time we have substantial amounts of literature to deal with. The word *gens* and its cognates had already had centuries of use and development by the time Latin literature begins, and that in itself is an important fact. We shall see below a number of definitions of the *gens*, but at this point we may note a late one, that of Isidore (*Orig.* 9.2.1), who gives no indication whatsoever that the word has any meaning more narrow than that of a nation or people. When he writes that *gens est multitudo ab uno principio orta* and *gens . . . appellata propter generationes familiarum, id est a gignendo, sicut natio a nascendo*,⁷ he is thinking of the nations of the world in a sense which modern theorists of natural law would have understood more readily than those who drafted the law of the Twelve Tables, which is where the *gens* in the sense in which this book is interested

⁵ Bickerman (1952); see now Fromentin and Gotteland (2001). Rodríguez (1996) largely discusses the use of the word *gens* for a nation, people or state, and suggests that the word implies an elemental or primary collection of individuals, based around sometimes fictitious concepts of kinship, language, customs and historical past rather than political identity or territory.

⁶ Kübler (1910).

⁷ 'The *gens* is a multitude sprung from the same beginning'; 'the *gens* is named because of the generations of families, that is from *gignendo*, coming into being, just as the nation is from *nascendo*, being born'. See Rodríguez (1996) 44–5, acknowledging here the importance of the fictive kinship of the Roman *gens* in the creation of legendary ancestries for the nations.

first makes its appearance. To indicate what the *gens* in the sense of a ‘clan’ looked like, a preliminary definition will be given to clarify the argument.

3. THE *GENS*: A DEFINITION

The clearest and most comprehensive definition comes from Q. Mucius Scaevola, a notable and highly regarded individual who held the consulship in 95 BC, was a distinguished governor of Asia, and subsequently *pontifex maximus*, and who wrote an eighteen-book codification of the *ius civile*. The definition, which is quoted by Cicero as a good example of how to make a definition, runs as follows:

itemque [ut illud – sc. hereditas]: gentiles sunt inter se qui eodem nomine sunt. non est satis. qui ab ingenuis oriundi sunt. ne id quidem satis est. quorum maiorum nemo seruitutem seruiuit. abest etiam nunc. qui capite non sunt diminuti. hoc fortasse satis est. nihil enim uideo Scaeuolam pontificem ad hanc definitionem addidisse.⁸

The *nomen* was inherited through the male line, and so the *gens* can be seen as a group comprising all agnates, and so, potentially at any rate, a collection of families. Agnates are defined as legitimate descendants of a common male ancestor, through the male line only, but for some purposes at least this stopped at what was known as the sixth grade (i.e. second cousin); there was no such limit on the *gens*. In the *gens* of the Fabii then, every free member born into the group took the *nomen* Fabius and was a *gentilis*. The basic situation may be illustrated figuratively (Figure 1).

As we shall see, the sources refer to collectives such as the Fabii, Claudii, Cornelii and so forth as *gentes*, although they also describe them in other ways. From the definitions we have seen in the preceding section, we can see that there will have been a tendency to try to identify the first holder of a given *nomen*, the ancestor of the *gens*, and this is the subject of a later section, but, to anticipate that discussion, it will be evident that these figures are mythical, and that the relationship to a single ancestor is fictitious, and this raises questions over how genuine was the kinship between members of a *gens*. Many complications follow of course, and Scaevola’s definition indicates some of them; not everyone with the *nomen* Fabius is on an equal footing with other Fabii. Freed slaves took the *nomen* of their master, but

⁸ Cic. *Top.* 29: ‘Again: “*gentiles* in relation to each other are those who share the same *nomen*.” That is not enough. “Those who are born from freeborn citizens.” That too is not enough. “Of whose ancestors no-one has served in slavery.” There is still something missing. “Who have not suffered *capitis diminutio*.” Perhaps that is enough. For I see that Scaevola the *pontifex* has added nothing to this definition.’ On this work, and on Scaevola, see Reinhardt (2003).

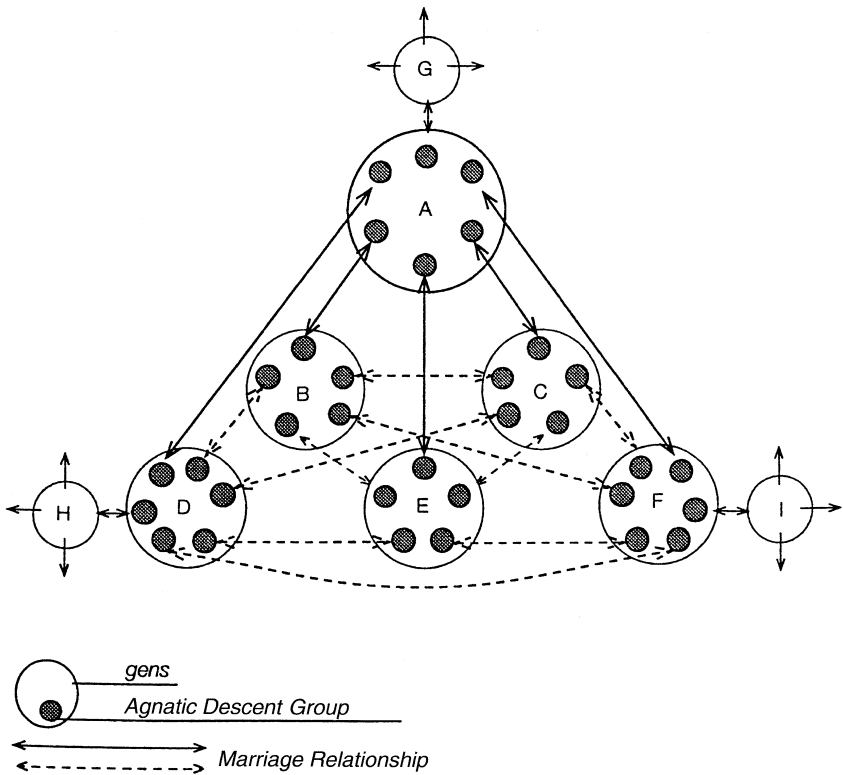


Figure 1. Schematic representation of relationship between *gens* and agnatic descent group; after Linke (1995) 25.

were not thereby part of the *gens*. Another issue is whether every *nomen* reveals a *gens*, and hence whether every freeborn Roman citizen who fitted the Scaevolan definition belonged to a *gens* or not.

Finally, some *gentes* were indisputably patrician. We find the phrase *patricia gens* in Livy, and we know of a division of patrician *gentes* into *gentes maiores* and *minores*, though this is mysterious.⁹ A freeborn individual, descended from others who were freeborn and where no instance of *capitis diminutio* had taken place, would inherit patrician status and share that status with all other members of the *gens*. It is tempting to see the *gens*, especially the patrician *gens*, as a collective body, and to assign it functions, identity and agency, and many modern accounts, as we shall see in the following chapter, have done precisely that. It is important therefore to

⁹ Below, chapter 8.2.

state at the outset that this has more to do with modern interpretation than ancient evidence, and we should beware of confusing the action of all or some members of a *gens* with the action of the *gens* as a collective group, with or without a leader.

Scaevola is, as De Sanctis pointed out, defining *gentiles inter se*.¹⁰ In other words, these are characteristics which relate to whether someone did or did not belong to the same *gens* as someone else. The definition excludes freedmen, amongst other categories, and precedes the massive influx of citizens after the Social War. It would have been very interesting to know the context in which Scaevola gave his definition. It is possible that he was trying to elucidate previous law – the word *gentiles* appears in the Twelve Tables, as we shall see shortly. Alternatively, Scaevola may have been defining the situation in his own day. Whether anything had changed between the fifth and the first centuries BC is part of the concern of this book.

In the following sections, we shall consider the evidence in more detail, and we shall return to Scaevola's definition, but nothing that follows seriously affects the validity of the positive statements made in this section. We may move forward then from this basis to consider the rest of the evidence for the nature and function of the *gentes*, and the activities of their individual members. We begin with the *nomen* itself.

4. THE NOMEN

Scaevola's definition of a *gens* begins with the shared name. The *nomen* is the second name, after the *praenomen* and before the *cognomen* (which not all Romans used).¹¹ We appear to have a technical term for the *nomen*, *nomen*

¹⁰ De Sanctis (1960) 226–7.

¹¹ For an admirably clear discussion of Roman practice generally, see Salway (1994). The issue is enormously complex, and the bibliography is considerable, especially since we have to understand the system as a whole to understand the *nomen*. Many aspects of the problem were first set out by Mommsen (1864–79) I.1–284 (two essays originally published in 1860 and 1861). There is an early and important contribution by Chase (1897), and a major study followed shortly afterwards in Schulze (1904). Two studies by different scholars published in the same year came to completely different conclusions about where the system originated; Bonfante (1948) suggested a Sabine origin, whilst Pulgram (1948) suggested that the *nomen* began as an Etruscan practice, but was taken on by the Italic peoples. A major overview was provided by Rix (1972), whose preference was for a Faliscan origin. When such varied answers are offered to a question, it may well be suggested that the question is the wrong one, or the evidence insufficient to answer it, or both. Several contributions to Duval (1977), an important collection of papers, are relevant; see in particular Heurgon (1977); Nicolet (1977); cf. Ménager (1980). There is an important and current Italian debate; see Colonna (1977); Marchesini (1997) 154–9; and below, chapter 4.8. Finally, we should note the position of Franciosi, who denies that the *nomen* was a patronymic and associates the Roman onomastic system with a sort of totemism; Franciosi (1999) 223–60; Franciosi (1984b).

gentilicium,¹² in a work on *praenomina*, found in Julius Paris' epitome of Valerius Maximus. The unknown author quotes Varro, and the whole work is therefore thought to be an essentially Varronian account. This account appears to underlie all later grammatical accounts, which do not differ substantially.¹³ The author notes that the earliest figures in Roman history, Faustulus, Romulus and Remus, had only one name. With the admixture of Alban and Sabine families, the necessity to distinguish between individuals so that their *gens* might be known led to the introduction of the second name, the *gentilicium*. Varro estimated that there were 1,000 *gentilicia*, and about 30 *praenomina*. It is hard to see 1,000 *gentes* in early Rome, so at best Varro must be making an observation about his own time. It is also not clear that there has to be a *gens* for every *nomen gentilicium*. The number is a suspiciously round figure, and when combined with the number thirty for *praenomina* (admittedly transmitted as approximate) raises suspicions that Varro is playing a numbers game.¹⁴ Certainly, this is extremely problematic evidence, under any reconstruction, for early Roman society, or for the *gens*.

Modern scholarship has shown that the *nomen* was in essence an adjectival patronymic.¹⁵ The date of the introduction of the two-name system is unclear, as with the three-name system with the addition of the *cognomen* which distinguished between individual branches of a family, and also between individuals. The debate hinges partly on epigraphic evidence, which, scanty as it is, would appear to allow for the binominal system by the end of the sixth century, at least among the class of people who used writing, but the trinominal system not before the third century. The versions of the list of chief magistrates provide additional information. There are two rather different types of evidence for this list. One comes from historians such as Livy, Dionysius of Halicarnassus and Diodorus Siculus. The other is the inscribed list of magistrates on the Capitol which dates from the Augustan period. The historians and the *Fasti Capitolini* are in broad agreement, but the latter gives far more *cognomina* and sometimes multiple *cognomina* for an individual, for the early period. Mommsen doubted whether this could be genuine, and suspected later

¹² Cf. also Varro. *Ling.* 9.60; Suet. *Claud.* 25.3; for *nomen gentile*, see Suet. *Nero* 41.1.7, Porphy. *Ep.* 1.13.8, Sil. *Pun.* 5.646, Stat. *Theb.* 6.342.

¹³ See Prisc. in *GL* II.57.12–17; Diom. in *GL* I.321.3–11, quoted in Salway (1994) 125 n. 5, 128 n. 29.

¹⁴ Salway (1994) 125 n. 8 counts fifty-six *praenomina*. It is also notable that according to D. Hal. 1.85, Varro claimed there were fifty *Troianae gentes*, though we can count only fourteen; see Nicolet (1977) 51–2.

¹⁵ Rix (1972).

interference, since we do not see the *cognomen* epigraphically before the third century.¹⁶

The later insertion of the *cognomina* has been disputed, and the current view appears to be that the evidence does not permit us to deny the use of the *tria nomina* from an early period.¹⁷ This may be optimistic. It is extremely significant that a relatively recently discovered inscription, dated to the late 270s and found at Caere, gives us the name C. Genucio(s) Clousino(s), which must be C. Genucius Clepsina, consul in 276 and 270 BC.¹⁸ The *cognomen* is Etruscan, and the context may explain its appearance. Slightly earlier are the well-known inscriptions with the names of Cornelius Scipio and Cornelius Scapula.¹⁹ There is still a long gap from the third century back into the fifth, and a further difficulty which is the date of the transformation of the *cognomen* from a nickname into an inherited marker of a family, especially a family within a *gens*. Since most of our argument has to do with the *nomen*, the *cognomen* is of lesser significance, but scepticism has important consequences; first it becomes difficult to make arguments from the transmitted *cognomina* about the number of branches within a *gens*, and second we cannot be absolutely certain that the trinominal system was used extensively from an early period, and this means that we cannot with complete confidence use onomastic evidence to support a picture of

¹⁶ For the binominal system, a date around 650 BC is common; see Heurgon (1977); for the *tria nomina*, Bonfante (1948), and Kajanto (1977) rely on the epigraphic evidence, first used in this way by Mommsen (1864–79) 42–68. The sceptical approach was most firmly pressed by Cichorius (1886), and see the balanced and far-reaching account of Ridley (1980). See also Alföldi (1966).

¹⁷ The counter-argument to Mommsen on the authenticity of the *cognomina* in the early consular *Fasti* was put by Beloch (1926) 46–52, accepted by Cornell (1995) 440 n. 14, though in fact Beloch's arguments are not particularly strong. Mommsen argued that some of the *cognomina* were patently retrojected (Augurinus for the Genucii for instance); Beloch responded that this simply meant that some, especially plebeian, *cognomina* were interpolated into a list which had genuine *cognomina*. Beloch also argued however that no-one could have engaged in the full-scale invention that Mommsen envisaged, though he has to accept that some invention has taken place; and that it did not follow from the absence of *cognomina* in other contexts that they were also absent from the lists of magistrates, where the *cognomen* was of greater significance. Beloch's strongest argument, as he saw it, appears to be that *cognomina* appear in Licinius Macer's account of the *Libri Lintei*. This argument is only strong if one believes that the Linen Books were a genuine source, and not one displaying precisely the sort of invention which Mommsen was suggesting. Both Mommsen and Beloch doubt that Greek influence was sufficient to permit the names Q. Publilius Philo (cos. 339) and P. Sempronius Sophus (cos. 304), but that might underestimate plebeian contacts with the Greek world. Badian (1988) describes the *cognomen* as being in a 'no-man's land between name and description'; see now Bruun (2000) 49–56.

¹⁸ Torelli (2000), with earlier bibliography.

¹⁹ *CIL* 2 6 = VI 1285 = *ILS* 1 = *ILLRP* 309; *ILLRP* 1274a. On the problems over dating the first inscription, see *LTUR* IV.281–5, s.v. *Sepulcrum (Corneliorum) Scipionum*; there is a longer inscription, which may date to around 200 BC, but there is also a painted name, which could still be early third century.

gentes comprising large numbers of families from an early period.²⁰ One other oddity of our evidence is that the tribunes, whose names survive only in the historians who tend to give the *tria nomina* less conscientiously than the epigraphic *Fasti*, usually appear with only two names. Does this mean, as some have thought, that the plebeians began to use *cognomina* later than the patricians? A very few early tribunes do have three names, and although Dionysius of Halicarnassus, who gives consular names in full more often than Livy, not infrequently uses only two for tribunes, there is enough doubt for us to suspect that the dividing line here was not between patricians and plebeians, or was not used rigorously.²¹

The binominal system arose at much the same time across central Italy. It has been argued that the name indicated membership of a group wider than the nuclear family, i.e. the *gens* or a similar group, and that this was not confined to any one social group, but was a universal system.²² This has profound implications, and has been particularly useful in the analysis of Etruscan society where the epigraphic record takes on an additional significance in the absence of any substantial historical accounts. It is worth pausing to note a possible objection. The connection between the *nomen* and the *gens* might be derived from observation of common behaviour, rather than an original feature of either phenomenon. If the *nomen* is indeed an adjectival patronymic, one cannot simply derive from it the notion of social institutions larger than the agnatic family, and of course these groups may have varied enormously in terms of size and complexity. The use of the *cognomen* might have emerged precisely in those groups which had indeed developed this greater level of complexity, and needed additional markers. For now, we must note that, whatever the nature of the relationship, those who had the same *nomen* were likely to have belonged to the same *gens*, and were *gentiles*. We turn now to the earliest evidence for what the *gentiles* did, Rome's first lawcode, the Twelve Tables.

²⁰ It is possible that after the restoration of the consulship in 367, or after the requirement for a plebeian as well as a patrician consul in 341, the lists of magistrates may have been kept more accurately, but that is only a speculation.

²¹ For early tribunes with *tria nomina*, see C. Terentilius Harsa (462), and M. Volscius Fictor, whose dates are disputed; it is interesting that both names indicate non-Roman descent. 'Harsa', unattested elsewhere, is perhaps Etruscan (Schulze (1904) 357); 'Volscius' will have been connected with the Volsci. The distinction is admitted by Beloch (see above), and more generally; see Kajanto (1977). Salway (1994) 127 leaves the matter somewhat open in his formulation 'the evidence suggests that they were pioneered by the élite, perhaps keen to differentiate a noble family ancestry'; there are strong arguments for seeing a plebeian nobility imitating the patricians, or sharing patrician habits, from an early stage.

²² Conveniently and elegantly, Momigliano (1989) 98–9; see also below, chapter 4.8.

5. THE TWELVE TABLES

The members of a *gens*, or *gentiles*, are first referred to in the Twelve Tables, Rome's earliest surviving lawcode, created in the middle of the fifth century BC. The story of the promulgation of the code in 451 and 450 BC is famous; a Decemvirate was established to set out a new basis for Roman society as a result of the pressure from the plebeians against the dominance of the patricians.²³ Ten *tabulae* were set up for discussion, and, after amendment, were adopted by the *comitia centuriata*, and as Livy says of these ten laws (3.34.6), *qui nunc quoque, in hoc immenso aliarum super alias aceruatarum legum cumulo, fons omnis publici priuatique est iuris*.²⁴ The remaining two laws were more controversial, and we need not consider them at present; and the ultimate disgrace of the Decemvirate did not affect the success of their code. Much of the narrative story in which the development of the code is embedded is highly problematic, including the suggestion that the Romans drew inspiration from Athens,²⁵ but the most recent edition of the laws accepts the general reliability of the laws as transmitted to us.²⁶ Arguments against a fifth-century code²⁷ are different from arguments that the code we have has changed since the fifth century, but any reconstruction would then be purely speculative. The creation of such a code was within the capacity of the Romans of the fifth century,²⁸ and the provisions we have were appropriate for the period.²⁹ There are specific historical problems associated with the Decemvirate, but this has little effect on the laws themselves. The evidence we have can still relate to a fifth-century lawcode compiled by a body similar to the Decemvirate.³⁰

²³ Livy 3.33–55 and D. Hal. 10.56–11.44 give the major narrative accounts; see Cornell (1995) 272–92 for a balanced discussion of the issues surrounding the Decemvirate and its lawcode. A number of articles in Raafaub (1986b) also address the Decemvirate from a variety of standpoints.

²⁴ '[Laws] which even now, with the immense mass of legislation heaped up since, are still the fount of all public and private law.' This is an exaggeration, but reflects the reverence with which the laws were regarded; cf. Cic. *de or.* 1.195; *Leg.* 2.59. See also Eder (1986) 272–3.

²⁵ An account gathering all the sources can be found at Ogilvie (1965) 449–50, concluding 'the whole episode is a fiction of the early first century BC'. Nevertheless there are some interesting similarities with Greek lawcodes; see Cic. *Leg.* 2.59–64; *Roman Statutes* II.560–1; Martini (1999). Wieacker (1971) suggests that the idea of codification may itself have had Greek origins.

²⁶ *Roman Statutes* II.555–721 gives introduction, reconstruction, commentary and bibliography; see also Wieacker (1988) 287–309.

²⁷ For instance, Nap (1925) 407–29 argued implausibly that the Twelve Tables were invented in 225 BC.

²⁸ See Cornell (1991) for a clear positive statement that written material could have existed in, and survived from, the archaic period.

²⁹ See for instance Ogilvie (1965) 452: 'the parochial character of some of the provisions of the Tables . . . is only compatible with a fifth century date'. See also Cornell (1995) 273 for further discussion of the Decemvirate.

³⁰ Ungern-Sternberg (1986) accepts the existence of the Decemvirate and the laws, but little else.

A different kind of problem relates to the transmission of the laws. It is complex; there is the issue of the transmission from the original laws to our sources (and one might add that the sources are disparate, and whether all of them had exactly the same view of the content of the laws is an insoluble issue), and then from the sources to the surviving manuscripts, and then again to modern editions and their distribution of the fragments to specific Tables.³¹ Cicero attests that some form of the Twelve Tables existed in the late Republic;³² the provisions remained of interest to lawyers for obvious reasons, and to antiquarians and grammarians because of oddities in language. The careful analyses in *Roman Statutes* demonstrate that the provisions of the laws were known, if not always clearly understood because of the language and the passage of time, and we can therefore hope to get close to the contents of the code, albeit in a fragmentary and distorted fashion. Our main concern is with testamentary law, and we can tell from Cicero that this was still a controversial area.³³ To anticipate though, it is extraordinarily difficult to see why the provisions concerning the *gentiles* should have been inserted at a date later than the middle of the fifth century. The references to the Twelve Tables are the best and indeed almost the only evidence we have for the operation of the *gens* at such an early date, and in the field of inheritance; the evidence is therefore crucial.

Our knowledge of the Twelve Tables depends on later citations, and the reconstruction of the order of the fragments and their assignment to specific tables is a difficult task, based as it is on the most recalcitrant of information. It is a reasonable inference from evidence in Cicero that the fifth Table dealt in detail with issues of succession, and this is where our reference to the *gens* lies.³⁴ It is impossible to say with certainty what a complete Table looked like, but what we have of the fifth Table suggests that an attempt was made to set out a coherent position on inheritance as a whole, and for that reason, it would be a mistake to treat V.5 and V.7 in

³¹ *Roman Statutes* II.556; compare for instance the scepticism of Levi (1995a).

³² *de or.* 1.195; *Leg.* 2.9.

³³ *de or.* 1.176 on the case between the Claudii and Marcelli; see below, 1.9.

³⁴ Two important texts, Cic. *Top.* 26–7 and *de or.* 1.173, give what appear to be lists of contents from a narrow band in Tables V, VI and VII (*Roman Statutes*, II. 567); we also know from *Dig.* 38.6.1. *pr.* that the Twelve Tables dealt with testamentary succession and then intestate succession. It is fair to say that given the rarity with which reference is made in the sources to a specific Table, in addition to the difficulty of reconstructing clauses, any attribution of a clause to a specific Table can be contested.

isolation. I begin by presenting the whole of the Table as reconstructed in *Roman Statutes* first, and then consider each provision in more detail.³⁵

V.1 *uirgo Vestalis* <<<*a tutela libera esto.*>>>

V.2 <<<*mulieri tutor auctor esto.*>>>

V.3 *uti legassit super familia ?pecuniaue? tutelaue sua, ita ius esto.*

V.4 *si intestato moritur, cui suus heres nec essit, agnatus proximus familiam ?pecuniamque? habeto.*

V.5 *si agnatus nec essit, gentiles familiam ?pecuniamque? h[abento].*

V.6 <<<*si tutor nec essit, agnatus proximus tutelam habeto.*>>>

V.7 *si furiosus ?prodigusue? ess<i>t, agnatum gentiliumque in eo <familiaue> ?pecuniaue? eius potestas esto.*

V.8 *si libertus . . . ex ea familia . . . in eam familiam . . .*

V.9–10 <<<*familiam erciscunto ciento. si petit, iudicem arbitrumue postulato.*>>>

V.1 A Vestal Virgin <<<is to be free of *tutela.*>>>

V.2 <<<To a woman her guardian is to be *auctor.*>>>

V.3 As he has disposed by will concerning his *familia* ?or goods?, or guardianship, so is there to be source of rights.

V.4 If he dies intestate, to whom there be no *suius heres*, the nearest agnate is to have the *familia* ?and goods?.

V.5 If there be no agnate, the gentiles are to have the *familia* ?and goods?.

V.6 <<<If there be no guardian, the nearest agnate is to have guardianship.>>>

V.7 If there be a madman ?or spendthrift?, power in respect of him <and his *familia*> ?and goods? is to belong to his agnates and *gentiles*.

V.8 If a freedman . . . from that *familia* . . . to that *familia* . . .

V.9–10 <<<They are to collect and divide the *familia*. If he sues, he is to demand a judge or arbiter.>>>

The first two provisions relate to the guardianship of women. The Vestal Virgins are exceptional in their legal status, as a number of sources indicate.³⁶ The more normal situation is found in V.2, which refers to the guardianship of women and their rights to dispose of and obtain property. The formal position is that a woman of any age is required to have a *tutor* or

³⁵ See *Roman Statutes* II.581 for the basic text and translation; 634–51 for details; and discussions in Voci (1960) 1–83 and Kaser (1955) 81–98. [. . .] and <. . .> are used to indicate where the word, not simply the form, is restored or results from correction; <<<. . .>>> reflects a belief that a text can be reconstructed with reasonable plausibility, but no source claims to report it.

³⁶ Gell. *NA* 1.12, including citation of Antistius Labeo's commentary on the Twelve Tables; Gai. *Inst.* 1.144–5; Plut. *Num.* 10.5 attributes this rule to Numa, so it may be one of the so-called *leges regiae*, on which see *Roman Statutes* II.561–3.

guardian. A woman who is in the *tutela* of her *agnati* requires their authorisation for the usucapion (acquisition) or alienation of *res Mancipi*. The intention appears to be to protect the interests of the prospective intestate heirs by disallowing any action that might materially affect the woman's wealth. It is important to note that although it is more common to see a single *tutor* operating, and that is envisaged in the discussion of V.6, here the woman is in the *tutela* of her *agnati*, which may imply some element of co-operative action.³⁷

The intention of these provisions however is not simply a reflection of Roman male mistrust of the ability of women to make intelligent decisions, but relates to marriage. In Cicero's *pro Flacco*, the defendant Flaccus is accused of having deprived Sextilius Andro, whose wife (Flaccus' relative) had died, of his inheritance.³⁸ The defence is that the *tutores* had given their approval neither to the transfer of property consequent on a marriage by *usus* nor to a marriage by *coemptio*.³⁹ The *tutores*, or one of them at any rate, thus prevented the transfer of property to the new husband. What Flaccus did was to ensure that the property went instead to a young relative of his, L. Flaccus. This is a later case of course, but there is no reason to suppose that the Twelve Tables, in discussing arrangements for succession, did not allow for the wider group, either collectively or through a single representative, to regulate what was potentially a loss of property through marriage.⁴⁰ We can see therefore that this provision allows for the preservation of property within the agnatic family, unless the guardians permit it to be transferred.

The main problems over V.3 relate to the reconstruction of the text of the Twelve Tables, and whether the original wording included *pecunia*, as argued in *Roman Statutes*, the meaning of *legare*, which simply must

³⁷ The reconstruction mentions a single *tutor*, but Gai. *Inst.* 2.47 allows for multiple *tutores*. There were two kinds of *tutores*: those appointed by will, and those to whom the decision fell in cases of intestacy, or as here, the automatic *tutores* of one not *sui iuris*, a group later defined by the term *tutor legitimus*. On *tutela* see Fayer (1994) 379–611; Kaser (1955) I.76–8; briefly, Crook (1986) 62–3. The subject needs a new treatment which takes account of the social context of *tutela*, as has been provided for *tutela* over children by Saller (1994) 181–203.

³⁸ Cic. *Flac.* 84–9.

³⁹ Cic. *Flac.* 84: *nihil enim potest de tutela legitima nisi omnium tutorum auctoritate deminui* ('for nothing can be taken from an estate in lawful guardianship without the permission of all the guardians').

⁴⁰ It should be said that this issue has been the subject of considerable controversy. Watson (1967) 21–3 argues that the original clause expressed 'the restriction on usucapion with reference to *res Mancipi* only', and goes on to argue that the extension of this provision to the acquisition of *manus* through *usus* must have been a late development, intended to enable most marriages to be *sine manu*. Drummond (1989a) 151 writes that the *agnati* 'had to authorize any disposal of [a woman's] property, including probably her conclusion of an *in manum* marriage' (a better formulation might be disposal of any *res Mancipi* she owned). Whether this extended to testamentary *tutores* is quite unclear. The nature of the dispute in the *pro Flacco* is also controversial; for the suggestion that Flaccus claimed the inheritance through his *gens*, see Watson (1971) 181; Kaser (1955) 74–81.

be 'dispose by way of testament' here, and the kind of will envisaged, on which *Roman Statutes* states that 'the bibliography is enormous, and there is no evidence' (II.639).⁴¹ Although the arguments are difficult, one may conclude that the outcome was that the testator had freedom to dispose of (at least some of) his property and goods⁴² and to assign *tutela*.⁴³

The provisions we have considered so far indicate that the fifth Table was concerned with the control of property. V.4–5 refer specifically to the case of intestacy, and those who inherit by default.⁴⁴ In the case of intestacy and the absence of a *suus heres*, the estate devolves first to the *agnatus proximus* and then to the *gentiles*.

Some definitions are required. A *suus heres* is one who is in the *patria potestas* or *manus* of an individual, and who becomes *sui iuris*, independent, after that person's death.⁴⁵ Put another way, *sui heredes* are all those for whom the deceased was the sole surviving male ascendant. The succession of the *sui heredes* was automatic in cases of intestacy, but it was entirely possible that there were none (this would always be the case for a woman). The *agnati* encompass those who, outside the *sui heredes*, are related to an individual through the male line. Thus all brothers, and their descendants, are agnatically related to our hypothetical individual; as indeed are his sisters, because all of them descend from the same man; but sons of a sister are not encompassed, nor are any relations whatsoever on the wife's side

⁴¹ See Watson (1975) 52–60 for a more substantial treatment, arriving at somewhat different conclusions, followed by Drummond (1989a) 148–9. Watson argues from the absence of the word *familia* in the clause that it 'was not envisaging the appointment of an heir. The testamentary provisions involved relate only to the making of individual bequests and the appointment of tutors' (59).

⁴² Watson (1975) 59 argues that *pecunia* appears alone here as meaning 'property' without the word *familia* which means 'a man's property considered as a unit' and relates to the assets of the *paterfamilias*, including people; whereas in the following two clauses, *familia* appears without *pecunia*. *Roman Statutes* prints both words in all three clauses. For *tutela* in this clause, see *Dig.* 50.16.120; *Tit. Ulp.* 11.3.14; *Dig.* 50.16.53 *pr.* (Paul).

⁴³ Gai. *Inst.* 2.224 comments that this freedom could so diminish the value of any inheritance, by spreading legacies too widely outside the family, that heirs refused to take up inheritance, and many died intestate (*qua <r> e qui scripti heredes erant, ab hereditate se abstinebant et idcirco plerique intestati moriebantur*). This led to a rash of laws, beginning probably in the second century BC, which tried to limit the testator's capacity to give away more than a certain amount of his estate to people other than his family; see Watson (1971) 163–74. This leads us to conclude first that there was substantial disintegration of family property and second that there were efforts to restrict this. It is interesting that laws had to be passed later to protect the continuity of the family (and its *sacra*, *Cic. Leg.* 2.21.52, the concern of two *pontifices maximi*, and see below, 1.8), an intention which the aspects of the Twelve Tables we discuss here also seems to enshrine.

⁴⁴ Doubts about the text centre on whether the word *pecunia* appears here as suggested by Ciceronian evidence, as reported in *Cic. Inu.* 2.148 (and identically in *Rhet. Her.* 1.13.23) or not, as in the legal texts, *Tit. Ulp.* 26.1–1a; *Coll.* 16.4.1–2; *Dig.* 28.2.9.2 (Paul); *Dig.* 50.16.195.1 (Ulpian). The whole issue is dealt with in Gai. *Inst.* 3.1–17.

⁴⁵ Gai. *Inst.* 3.1–9; Watson (1971) 68; Johnston (1999) 51.