BISHOPS ON THE BENCH: WHY CONSTANTINE LEGISLATED CHRISTIAN BISHOPS INTO THE ROLE OF JUDGES

by

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Abstract

This research is focused around a central question: why did Constantine make bishops judges and legislate them into this role with two pieces of legislation in 318 and 333? The short answer to this question is that he appears to have made this move based on his firsthand experience with the bishops sitting as judges in the Donatist hearings, wherein certain rigorist bishops had appealed their case to his court. He ultimately sat with a panel of other bishop judges in 316 and, as Emperor, decided the matter by making the same findings as the lower court of bishops he had initially sequestered for this task. The main reasons Constantine made the bishops judges can be summarized as follows: 1) Christian bishops were beholden to Constantine for saving their religion from persecuting emperors. After witnessing their ability to decide the Donatist legal proceedings at various levels of court and himself coming to the same decision, Constantine dovetailed their role as judges in the Christian community to one that would serve the state, and he reasonably expected them to cooperate. 2) The second reason is connected to the first, and concerns Constantine's anger against the level of corruption in Roman courts, something he clearly legislated against in 331. As bishops were commissioned by their own religion to care for the poor, and because of the strict moral code of the bishops, it seems reasonable to suggest that Constantine hoped that bishops as judges might be part of the answer to making sure that the poor in society had access to justice in a court that was not corrupt. This may also have been an end-run on the rank-and-file judges in so far as the knowledge that litigants could simply request their case be transferred to a bishop's court may have been intended to spur them to less corrupt practices more generally. The timing of his decision to make them judges is suggestive, if not conclusive: almost immediately following his experience in the Donatist appeal cases, Constantine made the bishops judges in the Roman legal system.

Lay Summary

Constantine was a Roman Emperor from 312 – 337 C.E. As emperor, he was forced to deal with a rapidly growing part of Roman society, the Christian religion. One of the ways he did this was to legislate the Christian bishops into the role of judges. This thesis answers the question of why Constantine made the bishops judges; he did so for two reasons. One was his direct experience of competency sitting as a judge with bishops in a case that came under his purview; the second was connected to his wish to rid the legal system of corruption. He felt the bishops' courts would create a suitable additional venue for litigants who regularly felt their cases were not being given a fair hearing in the Roman legal system. Such a claim adds to the significance of my assertions on the importance of Constantine making the bishops judges.

Preface

This dissertation is original, unpublished, independent work by the author, Craig Garfield Bateman.

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Acknowledgments

I first wish to extend my sincere thanks to my supervisor, Professor Dennis Pavlich, for his comments and support on my research that have in turn made my argument much clearer and stronger. Similarly, I wish to thank Joost Blom, QC, and Dr. John B. Toews for their support and feedback. I also wish to thank Professor Ian Townsend-Gault, my first thesis supervisor who was forced to bow out due to medical issues, for his support and comments. Sadly, Ian passed away during the course of my studies. He is dearly missed.

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While I received this generous support from so many during my research, I just wish to state that all opinions and suggestions herein are things that I decided to include, and should there be any errors, they are wholly my own.

... public opinion in the fourth century — and indeed for many centuries both before and after — was not only willing to believe in supernatural intervention at moments of great crisis, but actually insisted that there should be such intervention. The greater the crisis, the more entirely reasonable it was that some deity or deities should make their influence especially felt and turn the scale to one side or the other.

John Firth, *Constantine the Great*

The conversion of Constantine marks a turning point in the history of the Church and of Europe. It meant much more than the end of persecution. The sovereign autocrat was inevitably and immediately involved in the development of the church, and conversely the Church became more and more implicated in high political decisions.

Henry Chadwick, *The Early Church*

[Constantine] was the first emperor to become a Christian, and who first posed the problem, which was to be fundamental for all medieval history, of the relationship between Church and State.

R.H.C. Davis, *A Medieval History of Europe*

Chapter I

> The Christian republic… gradually formed an independent and increasing state in the heart of the Roman Empire.
>
> Edward Gibbon, *The Decline and Fall of the Roman Empire*†

> There seems in the minds of the Romans to have been some association between the enactment of a large body of statutes and the settlement of society after a great civil commotion.
>
> Sir Henry Maine, *Ancient Law*††

I.i: Introduction

Constantine, Roman Emperor from 306-337,[1] was a lawmaker who set the Christian Church on a trajectory for primacy in the organization of the state that it only lost as recently as the seventeenth century; as such, he is very important to legal and social history in the Western experience. As Henry Chadwick aptly put it: "[t]he conversion of Constantine marks a turning point in the history of the Church and of Europe. It meant much more than the end of persecution. The sovereign autocrat was inevitably and immediately involved in the development of the church, and conversely the Church

† Edward Gibbon, *The Decline and Fall of the Roman Empire, Vol. 1 (A.D. 180-476)*, (New York: The Modern Library, 1993; 1931; 1776-1789), 383.

†† Sir Henry Maine, *Ancient Law*, *Everyman's Library*, vol. 734, ed. Ernest Rhys (New York: E.P. Dutton, 1931; 1861), 25.

[1] Constantine became titular Emperor upon the acclamation of the Alamannic king Chrocus and his father's troops at York sometime in the summer of 306, his father dying just previous to this in July. He was not recognized as Augustus in the East until 310, but was the senior Augustus of the Empire beginning in 312, and not until 324 did he become sole Augustus over the Empire. The extent of the Empire during Constantine's reign stretched from Great Britain to Egypt, and ran in a great swath and surrounded the Mediterranean Sea completely. The size of the Empire was approximately 2.5 million square miles, with a population of somewhere between 40 – 50 million people. Unless otherwise noted, all dates from the Common Era (C.E.) in this research will simply be noted by indicating the year without the "C.E."

became more and more implicated in high political decisions."[2] And as Gibbon and Maine noted, as emperor he was forced to deal with a growing part of Roman society verging on state-like organization, the Christian religion. Constantine did this in part using the instrument of legislation. The fact that this religion's internecine conflicts threatened the stability of parts of his empire meant that Constantine, at least in some sense, *had* to legislate regarding the Christian religion. In one sense, it was an act of homogenization. By legislating on behalf of the Christians he was, perhaps ironically, following the lead of the persecuting Emperor Galerius who was responsible for the Edit of Toleration in 311, itself a very important piece of legislation aimed at the same religion.

This study is focused on two specific pieces of Constantine's legislation, discussed immediately hereafter, wherein he made the Christian bishops judges in the Roman legal system. The question this research seeks to answer is "why?". The central question is: why did Constantine make bishops judges and legislate them into this role in 318 and 333? Employing the principle of plausibility based on extant evidence, I suggest the most credible inference is that it was Constantine's direct and favourable experience sitting alongside bishops as judges in 316 wherein he had convened a court, for the third and final time, to deal with the Donatist crisis:[3] a result of his being invited by the clergy to intervene in this dispute. At this hearing, he was sitting as essentially Chief Justice; he was emperor, after all. Constantine's first piece of legislation making the bishops' judges was put in place in 318. This was no accident. Second, it seems clear from his legislation that

[2] Henry Chadwick, *The Early Church* (Middlesex, England: Penguin, 1984), 125.

[3] For the best ancient source for the proceedings surrounding the Donatist Crisis, see Mark Edwards, trans. and ed., *Optatus: Against the Donatists*, Translated Texts for Historians, vol. 27 (Liverpool: Liverpool University Press, 1997).

Constantine saw the legal system in general as something in need of reform, due to corruption in the courts. This fact is based squarely on another piece of legislation, discussed below, wherein he condemned the first-instance judges and court officials throughout the Empire for requiring bribes and in so doing robbing the poor of their chance to get justice. That the courts of bishops might have been an alternative legal forum for Roman litigants to counter such a state of affairs, and thus a motivation to Constantine making them judges, seems at least a plausible suggestion. Another important and related point I will argue for is that contrary to some scholars who see the bishops' role as judges as arbitration or mediation oriented, the emperor actually gave bishops the imperial authority to hear and judge any and all cases at law. Neither piece of legislation speaks to the question of arbitration, and both the late fourth century emperors' legislation attempting to rein in the jurisdiction of bishops' courts to religious matters alone and the later evidence of Augustine (Bishop of Hippo) hearing criminal matters proves they had and exercised that judicial authority, even if they did not wish it so. I will also make other suggestions related to the central question of why Constantine made the bishops judges that focus on the text of the legislation, the basis for the bishops' authority, and on to what degree we are reading the words of Constantine himself in the two pieces of legislation.

Constantine's two pieces of legislation that most directly bear on these questions were enacted in 318 and 333: see Codex Theodosianus (CTh) 1.27.1[4] and Sirmondian

[4] *Codex Theodosianus, The Theodosian Code*, trans. Clyde Pharr (New York: Greenwood Press, 1952), 1.27.1, 31.

Constitution (Sirm.) 1,[5] respectively. The question of the authenticity of these two pieces of legislation out of the *Theodosian Code* that bear directly on this subject is here answered in the affirmative. The majority of scholars, two notable ones being Simon Corcoran[6] and Timothy Barnes,[7] accept the edict at *Codex Theodosianus* 1.27.1 and the rescript at *Sirmondian Constitution* 1 as authentic. I accept their authenticity on a number of grounds, which I will mention at points, but which are not the focus of this study. One, alluded to above, is the fact that there are two later uncontested pieces of legislation which come from Roman emperors in the late fourth century that clearly rein in the jurisdiction of bishops sitting as judges,[8] limiting them only to matters where the parties' consented to the bishop's court or where the matter was strictly a religious one. The question then becomes, why were these bishops in need of being reined in regarding the types of matters they heard? The answer seems obvious: they *were* hearing matters beyond these types of cases. The corollary and fundamental question at that point is, 'why were they hearing cases of the types that any magistrate might have heard that necessitated reining them in?' The only answer to this in a Roman imperial state that was as strong and organized as it had been since Diocletian, perhaps stronger, is that the state at one point granted the bishops the authority to sit as judges, hearing a variety of cases

[5] Sirmondian Constitutions, *The Theodosian Code*, trans. Clyde Pharr (New York: Greenwood Press, 1952), Title 1, 477.

[6] Letter to the author, July 2019. See Professor Corcoran's various related works, including *The Empire of the Tetrarchs: Imperial Pronouncements and Government AD 284-324* (Oxford: Clarendon Press, 1996).

[7] Timothy Barnes is a senior Constantinian scholar and has written at length on this emperor: his various works on Constantine include: *Constantine and Eusebius* (Cambridge, Massachusetts: Harvard University Press, 1981); *Constantine: Dynasty, Religion and Power in the Later Roman Empire* (Oxford: Wiley-Blackwell, 2011). Cf. Caroline Humfress, "Bishops and Law Courts in Late Antiquity: How (Not) to Make Sense of the Legal Evidence," *Journal of Early Christian Studies*, 19.3, (Fall 2011), 385.

[8] *Codex Theodosianus* (CTh.), *The Theodosian Code*, trans. Clyde Pharr (New York: Greenwood Press, 1952): in 376 from the Emperors Valens, Gratian, and Valentian (CTh.) 16.2.23, 444; in 399 by the Emperors Arcadius and Honorius CTh. 16.11.1, 476.

as any magistrate would. Employing the 'but for' formula, we have, I suggest, our answer: but for Constantine's edict of 318 making the bishops eligible to hear cases from all manner of litigants regarding matters that would normally be brought to a magistrate in the Roman legal administration, the bishops would have no reason or legal authority to be venturing out beyond their long-established intra-religion role as judges holding a purely religious court. This point is made stronger when one considers that by this time in Roman legal history, it was the *cognitio* system of law procedures with professional judges and not the prior *formulary* system where judges were chosen based on their standing in the community. In other words, how would it be possible for a bishop to assume the role of state magistrate in, say, a civil or criminal matter and then expect the state to solemnize their decision? Given that the *cognitio* system of law had replaced the *formulary* system (untrained judges under a praetor) at the beginning of the third century, bishops would not have been eligible to be chosen as judge by a praetor as they theoretically could have been in the second century, thus a law bringing these new courts into the Roman legal administration was the only way they could have been judges at all. The 318 edict is just such a law. From then on, at least from the perspective of the law on the books, litigants could request that their case be transferred to a bishop's court and the magistrate so requested would have to comply.

Another 'but for' question is central to this thesis and concerns Constantine's direct involvement in the Donatist controversy: but for the rigorist bishops appealing to Constantine directly and the emperor's subsequent intimate involvement in the proceedings, even sitting with the bishops as judges at the final appeal hearing in 316,

would he have made the bishops judges by way of an edict in 318? Unless one finds a better reason for why Constantine might have made the bishops judges in the way he did at this early date in his ongoing and growing relationship with the Christian religion, his experience with them in the Donatist context seems to present itself as, if not the only cause, a supremely important cause. The dates and sequence of events that led to Constantine's constitutions on bishops as judges are suggestive on this point, as the following table shows:

Donatist Commission ordered by Constantine based on direct appeal to the emperor from the rigorists/Donatists. Hearing in Rome.	313
Council of Arles ordered by Constantine based on another direct appeal to the emperor by the rigorists/Donatists.[9]	314
Final Appeal to Constantine by the Rigorists; Constantine sits with the other bishops in judgment.	316
Edict of 318 making Bishops judges: CTh 1.27.1	318
Council of Nicaea	325
Edict Against Court Corruption in the legal administration: CTh 1.16.7	331
Rescript of 333 expanding the judicial powers of bishops as judges: Sirm 1	333

Table 1: Chronology

It is also worth pointing out that when Constantine convened the bishops to hear the initial hearing and two subsequent appeals, it was in each case a select group, and was not in the style of the later church-wide councils; but the suggestion here is that the experiences he had with these few in this specific case led to him legislating judicial

[9] While Constantine ordered the first hearing at Rome, and this second appeal hearing at Arles, there appears to be no evidence that Constantine attended the Council of Arles. This argument was first made by K.M. Girardet, and Noel Lenki, cited herein, agrees: K.M. Girardet, "Konstantin d. Gr. und das Reichskonzil von Arles (314) - Historisches Problem und methodologische Aspekte." In *Oecumenica et Patristica*, *Festschrift für W. Schneemelcher*, eds. W. Bienert, K. Schäferdiek, and D. Papandreou (Chambésy-Geneva: w. Kohlhammer, 1989) pp. 151 – 174. See also Noel Lenski, "Constantine and the Donatists: Exploring the Limits of Religious Toleration," *Religiöse Toleranz*, Collegium Rauricum 14, ed. Martin Wallraff (Berlin; Boston: De Gruyter, 2016): 101 – 139, at 106.

powers to the entire corps of bishops throughout the empire, and for ostensibly any and all legal matters. As to what it was about his experience in these hearings that made him legislate the bishops into the role of Roman judges, the main reasons suggested herein stem from two forces and one reality playing on his mind: the two forces were the corruption of the courts that he clearly legislated against later on, see below, and the fact that he had the sworn loyalty of the bishops to support his rule since he was both their deliverer from persecution and was beginning to act more and more like their patron; the reality he had to consider was that the bishops had been hearing legal cases in their own communities for many decades, and Constantine having adopted their religion some time around 312 and having been tutored in the religion by bishops such as Lactantius, he would have known they served this role in communities across the empire and that their decisions would be respected by Christian adherents.

Constantine had inherited a Roman bureaucracy that included professional judges. One of the changes to that bureaucracy he made was to make the courts of bishops part of the Roman legal administration. Was this an effort to stem what he understood as corruption in the courts, an injustice that he specifically legislated against in 331? I suggest that is a reasonable conclusion. Also here, the pragmatic choice to enrol a phalanx of judges who were already deciding legal cases in their own communities to hear cases at Roman law between any Roman litigants, and would-be judges who were avowedly pro Constantine, presents itself. The timing of his decision to make them judges is suggestive, if not conclusive: within two years of his experience in the Donatist appeal cases, Constantine made the bishops judges in the Roman legal system. But for this direct

experience with the bishops in the court setting of a case on appeal, it would be difficult to know if he would have made the bishops judges, but it is certainly a possibility. The historical importance of answering the question of why Constantine made the bishops judges is that it may help us to better understand the important beginning of the confluence of the Roman state and the Christian religion going on at the time, of which Constantine was the author. This was, in nascent form, the coalescence of Church and State that dominated Europe for over 1500 years.

From the emperor's initial adoption of the religion some time around 312 to the end of his reign and death in 337, Constantine's relationship with the Christian Church deepened and was marked by important events, such as his victory at The Milvian Bridge, which he credited to the god of the Christians, the Donatist controversy and hearings, and his significant body of legislation relating to Christians. But the nexus of these events saw its zenith at the empire-wide council of Bishops at Nicaea in 325, in which he called, led, and solemnized the proceedings; and so, eight years latter in 333, when called on to explain the 318 edict in more detail to a Roman praetor wondering about its meaning, the fact that Constantine expanded the authority of bishops as judges compared with his earlier legislation is a reality that plausibly corresponds to his involvement and growing relationship with bishops in these other quasi-legal contexts.

The importance of Nicaea to my research is based on the fact that in as much as Constantine's Nicene council would impact the Church's leadership for the rest of the Middle Ages with the initiation of Church wide councils and a law-making body, the council also seems to have made a significant impact on Constantine himself, and this is

evidenced in part by the expansion of meaning in the bishops-as-judges legislation referred to above. To illustrate this, we see the first piece of legislation in 318 seems to have been a matter of pragmatics: Constantine saw the bishops of this burgeoning religion were capable of judging their own affairs and seconded them into the state judiciary to serve his purposes, discussed herein. But in the second piece of legislation, with its markedly increased authority for bishops and expansive language about the divine authority attached to a bishop's decision, we can see perhaps a change has taken place in Constantine's thinking. He writes that a bishop's decision "must be observed as forever inviolate and unimpaired, namely, that whatever has been settled by the judicial decisions of the bishops shall be considered as forever holy and revered."[10] Could it be that the doctrine common in the church at the time that when a group of bishops decide something as a group, two or more bishops, that it meant it was actually God's decision[11]

[10] Sirmondian Constitutions, *The Theodosian Code*, trans. Clyde Pharr (New York: Greenwood Press, 1952), Title 1, 477.

[11] This doctrine, known as the infallibility of ecumenical councils is now adhered to by the Catholic and Orthodox churches, although with the caveat that the pope must approve the council in the case of the Catholic Church, whereas with the Orthodox, the decisions of the council of bishops is infallible all on its own. In terms of precedent, as late as 397 it was considered to be "ancient form" that no less than three bishops could consecrate a new bishop (Philip Schaff, Henry Wace, et al. eds., *The Seven Ecumenical Councils* (Grand Rapids, MI: 1892), 864). The earliest precedent in Christian writings comes from the New Testament book of Matthew at 18:20, where the author has Jesus of Nazareth indicating that "For where two or three are gathered in my name, I am there among them.'" (NRSV: bible.oremus.org). A passage from the book of John (8:17, "In your law it is written that the testimony of two witnesses is valid." (NRSV)) indicates a similar thing, in fact referencing this idea to a previous Jewish source. Very likely this refers to Deuteronomy 17:6; 19:15, the latter reading "A single witness shall not suffice to convict a person of any crime or wrongdoing in connection with any offence that may be committed. Only on the evidence of two or three witnesses shall a charge be sustained" (NRSV).

That Constantine himself had adopted this view of the Christian bishops that divine authority derived from two or more, which was based on the Jewish precedent, is not only clear in his own statement following the Council of Nicaea, but expanded to mean that decisions of the assemblies of bishops are indicative of the Divine will: "For whatever is determined in the holy assemblies of the bishops is to be regarded as indicative of the Divine will" (Philip Schaff, Henry Wace, et al., eds., *Life of Constantine*, *Nicene and Post-Nicene Fathers*, vol. 1, 2nd ser. (Edinburgh : T & T Clarke, 1890), 3.20). This idea dovetails into Constantine's more general perception that as the God of the Christian religion gave him victory in battle and had chosen him as the instrument to entrench his chosen religion, that not only he as emperor, but the

help us understand why Constantine wrote this later piece of legislation in this forceful way? I think it does. For this reason, Nicaea will be looked at briefly in this research to consider some of the wider related considerations related to the interplay in the deepening relationship between Constantine and the bishops that led him to expand his notion of what bishops were capable of as judges, which itself was importantly attached to his wish for "divine favour". The reader must keep in mind that in an age dominated by superstition and a variety of religions, thus a variety of gods, it was only natural for Constantine to have sought divine favour throughout his reign. He truly believed that the condition of the Empire was dependent on such favour, and this is made abundantly clear in his own statements recorded by Eusebius of Caesarea in *Life of Constantine*.[12]

In a real sense, Constantine was not simply making bishops judges; they were already operating as judges on religious matters with their own courts in Christian communities across the empire, certainly in the larger Roman cities.[13] Constantine was importantly changing their *de facto* role as judges in the religious community to *de jure* judges in the Roman legal administration. He widened their jurisdiction using these two pieces of legislation and within one hundred years of his death, you had bishops such as Augustine deciding cases on a variety of legal matters in their locales, more and more as the Western Roman Empire fell and the Church was left standing with the Roman law in one hand and their traditions in the other. By Augustine's time, bishops were filling a role that

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Empire itself, would prosper under such divine and temporal leadership (See Schaff, *Life of Constantine*, 1890; Cameron and Hall, *Life of Constantine*, 1999: Books 2 and 3).

[12] Philip Schaff, Henry Wace, et al., eds., *Life of Constantine*, *Nicene and Post-Nicene Fathers*, vol. 1, 2nd ser. (Edinburgh : T & T Clarke, 1890), Books 2 and 3, primarily. See also Noel Lenski's list of known references to Constantine referring to the fact he had divine favour: Noel Lenski, *Constantine and the Cities: Imperial Authority and Civic Politics* (Philadelphia: University of Pennsylvania Press, 2018), 56 – 60.

[13] Eusebius, *HE*, 7.30.7-9, 217-219.

the Roman legal administration was slowly being forced to abandon.[14] Of course, Constantine would likely never have imagined that this would be the case: either the disappearance of Roman administration in the West or the fall of the Roman Empire which occasioned it.[15]

In the 318 edict, Constantine allows that any litigant may have their case transferred to a bishop's court if they so choose, but he is careful to emphasize the right of the presiding judge to make this transfer official. In the 333 rescript, Constantine significantly expands the powers of the bishops as judges, and indicates that, among other things, just as with decisions of the praetorian prefects, any decision of a bishop is not subject to appeal.[16] In this way, the bishop's court seemed to be positioned by Constantine as an appeal court of a kind. However, in practice and according to the small amount of evidence we have on the subject, these courts, the *episcopalis audientia*, heard most legal matters as either (and perhaps primarily) a vehicle of reconciliation between litigants in the Church environs,[17] or at times as a working court of first instance,[18] like that of any other local

[14] See James A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (Chicago: University of Chicago Press, 2008), 73. He notes "When Roman administrative structures began to crumble in the sixth century, clergymen moved in to fill the breach."

[15] See discussion below on Augustine and the vaulted place of the bishop in a crumbling Roman legal administration.

[16] Of course, one would think that appeals could still be made to the Emperor, but that is uncertain, for if Constantine foresaw that as a possibility, then why did he specify that these bishops' decisions were not subject to appeal? Surely he would have known that some litigants may attempt this, so perhaps there is the answer: he did not want to deal with appeals and he seems to have trusted the bishops enough to give their decisions this special protection. Constantine's justification for this aspect of his legislation is found in the legislation itself: basically that the bishops were servants of God and their decisions would therefore be inviolable. In other words, he appeals to the supernatural. See discussion below on the legislation itself.

[17] See this observation on the *episcopalis audientia*, among others, in Jill Harries, *Law and Empire in Late Antiquity* (Cambridge: Cambridge University Press, 1999), 191 – 211.

[18] Augustine's letters that speak to his role as a judge are perhaps the strongest evidence we have for bishops as judges and what kinds of disputes they heard. This will be discussed further below, but in the main, the cases were almost entirely civil, with Augustine himself admitting that although he dealt with criminal law matters at times, he would rather have not and leave them for local magistrates. The problem

magistrate's court. The uniqueness of their court is evident not so much in their powers as judges, but in the fact that they began to hear matters between litigants applying Roman law to enforce their rights.

One focus of my research which may help answer the main question of why Constantine made the bishops judges at all involves the apparent expansion of powers that Constantine gives to the bishops from the first to the second pieces of legislation. The 333 rescript was actually a reply to the Prefect, Ablavius,[19] who was questioning the use of the edict of 318, and because of this, perhaps, we learn a great deal more about what Constantine wanted that earlier law to mean later in 333. But, whether Constantine initially had such expansive authority for the bishops in mind is unknown, since the first piece of legislation was very terse and merely adopted the bishops into the Roman system, and kept the Roman judge who transferred the case as the primary source of authority. I argue that he did not intend the edict to confer such wide authority to bishops in 318, and that only after his relationship with the bishops grew in the intervening years, highlighted jointly by his evolving adoption of the Christian religion and assuming state responsibility for their protection and dispute settlement mechanism at the Council of Nicaea in 325, would such an expansion of authority become a reasonable outcome. It is important to remember, though, that this emperor was in some ways compelled into a closer relationship with the Christian religion because of the

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of course is that Augustine lived while the Roman Empire of the West was crumbling, and with it its legal administration we can assume. Thus, that bishops being by this time in the fifth century both highly respected in the community, serving for life unlike Roman judges, and technically able to hear cases from all Roman litigants due to Constantine's laws, it is not difficult to imagine situations where they served as judges hearing both civil and criminal matters. With Augustine, we know that was the case, but to speculate that others did likewise seems reasonable.

[19] Sirm 1, 477.

internecine conflicts within it which threatened the stability of his Empire, the two most important being the Donatist and Arian crises.[20]

In the Donatist controversy, not only did the bishops appeal to Constantine for a final judgment on a particular intra-religion ruling involving church leadership and thus ownership of church property, he then directed other bishops, not directly involved, to sit as a kind of court of first instance and decide the case on his behalf, the case then being appealed two more times requiring the Emperor's direct involvement in the proceedings. Nicaea was a case of the same thing on a larger scale. The years for the series of events surrounding the Donatist crisis compared with Constantine's bishops-as-judges legislation is suggestive. Two separate courts of bishops convened by Constantine heard the Donatist case (Rome 313, Arles 314) wherein the first in Rome was merely a trial to determine the challenge made by the Donatist party, the second being more properly an appeal on the grounds that the court at Rome did not hear all the evidence (Arles), and a final appeal to the emperor against these decisions was made in 316.[21] Constantine then issued an edict enforcing the previous decisions against the Donatists in 317, followed by making the bishops judges via legislation in 318.

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[20] Of course, as Walter Ullmann points out, Constantine was also, as emperor, responsible for the *utilitas publica* and the *ius publicum*, which meant he would have to intervene to some degree for the sake of the public good, and then may be required to use the public law to do it, which he did. See Walter Ullmann, *Public Law as an Instrument of Government in Historical Perspective: New Rome and Old Rome in the Light of Historical Jurisprudence*, *Law and Jurisdiction in the Middle Ages*, ed. George Garnett (London: Variorum Reprints, 1988), 37 – 52.

[21] See discussion below on the details of these various hearings. For the Roman tradition of citizens having the right to appeal to the emperor, see George Mousourakis, *Roman Law and the Origins of the Civil Law Tradition* (New York: Springer, 2015), 67: "The decreta (decrees) were decisions issued by the emperor in exercise of his judicial powers on appeal and, on occasions, as judge of first instance." At footnote 117, "…as the emperor received his powers from the people and hence acted in their name, an appeal to him was the exercise of the age-old citizen's right of appeal from a magistrate's decision to the judgment of the people in the assembly."

I.ii: Constantine and Christianity

To understand better why Constantine even considered making the bishops' judges, I will introduce the reader to select aspects of context around which the law of 318 and rescript of 333 came into being. Constantine was a complex person, and his reasons for doing what he did were likely various. The following aspects of context are things that speak to the main question of this thesis: why did Constantine legislate the bishops into the role of judges in the Roman legal system? To this end I will consider a few aspects of context.

I suggest that Constantine's adoption of Christianity was the single most important confluence of state *and* state-like ecclesiastical powers in Late Antiquity; and if his construction program of building churches is any indicator, which I think it certainly is, this relationship dwarfs the involvement of the previous Illyrian emperors' involvement with any other single religion. I demonstrate that Constantine did this, in part, by enabling legislation regarding religious tolerance and by vaulting bishops into the position of Roman judges throughout the Roman Empire. I suggest that Constantine was likely attempting to inject his own moral conscience, his preference for morally just behaviours and attitudes, into the legal life of the empire by making bishops' courts an option as a court of first instance for anyone who felt they would get a fairer hearing before a bishop than they could before a Roman magistrate. Very importantly, as we know from the legislative record, Constantine was very concerned to root out corruption

in the practice of court officials across his empire.[22] This is a key consideration: corruption was so rampant that litigants could not even get in to court without bribing an official. A.H.M. Jones puts the matter clearly:

> Like all the later Roman emperors, Constantine waged a losing campaign against the greatest curse of the declining Empire — the corruption of the civil service. There was nothing which money could not obtain, and without money nothing could be obtained. Suitors could not gain admission in the law courts without feeing the numerous officials, and wealthy litigants could get their cases transferred to a distant, higher court beyond the means of their opponents.[23]

These fees may well have represented the bulk of an officials pay, aside from what they received from the state, so it creates a bit of a puzzle as to whether this was true corruption or just business as usual; and yet, it surely put justice out of the reach of the poor, as Jones implies. On one hand, if this state of things was truly corrupt in the mind of Constantine, which his 331 legislation I consult below indicates, the idea of bishops serving as judges presents itself, perhaps even forces itself on historians as being a possible solution in Constantine's mind to attempt to right this state of affairs. On the other hand, if Constantine saw that the Christians were already caring for the poor, who could not afford the system of bribes in Roman courts, perhaps he saw the bishops' courts as a viable option to allow the poor to seek justice. The fact that there is a 13 year gap between his 318 and 331 legislation may suggest that he was not aware of the level of corruption at the earlier date and so challenge this assertion, but this would better be explained by looking at the wording of the statutes and the general context: Constantine was a co-emperor in 318, meaning he was not fully in control of the Empire; second, the

[22] *Theodosian Code*, trans. Clyde Pharr, Theresa Sherrer Davidson and Mary Brown Pharr (New York: Greenwod Press, 1952), 1.16.7, 28.

[23] A.H.M. Jones, *Constantine and the Conversion of Europe* (Middlesex: Penguin, 1949; 1962), 215 – 216.

language of the 318 edict is vastly different from the 331 edict, indicating he likely wrote the latter, but not the former, a point which will be discussed in Chapter IV. That corruption in the courts was only news to him just prior to or in 331 is extremely unlikely, and so it seems to make more sense to explain the gap by noting that with full control over the Empire, he could legislate whatever he wanted, but previously, he had to choose his battles in the legal arena more carefully.

If we take this legislative evidence of Constantine's effort to root out corruption in the legal system generally, then he may have wanted to use the bishops' judicial authority and essentially appeal court role[24] as a check on the rulings of magistrates and governors — a deterrence of kinds — so as to combat abuse of the justice system. To make this emperor's concern to root out corruption clearer to the reader, the 331 Edict reads, in part:

> *Codex Theodosianus*, 1.16.7
> The rapacious hands of the [civil servants] shall immediately cease, they shall cease, I say; for if after due warning they do not cease, they shall be cut off by the sword. The chamber curtain of the judge shall not be venal; entrance shall not be gained by purchase, the private council chamber shall not be infamous on account of the bids. The appearance of the governor shall not be at a price; the ears of the judge shall be open equally to the poorest as well as to the rich.
> ....
> Always shall the diligence of the governor guard lest anything be taken from a litigant by the aforesaid classes of men. If they should suppose that anything ought to be demanded by them from those involved in civil cases, armed punishment will be at hand, which will cut off the heads and necks of the scoundrels. Opportunity shall be granted to all persons who have suffered extortion to provide an investigation by the governors. If they should dissemble, We hereby open to all persons the right to express complaints about such conduct before the counts of the provinces or before the

[24] This relates to the 333 legislation where Constantine gives the litigant the opportunity to move his case to the bishop's court, even as late as the reading of the sentence, which makes the courts of bishops *de facto* appeal courts, discussed herein.

> praetorian prefects, if they are closer at hand, so that We may be informed by their references to Us and may provide punishment for such brigandage.
> *Given on the kalends of November at Constantinople in the year of the consulship of Bassus and Ablavius – November 1, 331.*[25]

Constantine's laws, as Ramsay MacMullen aptly noted, at times, burst forth from the page,[26] and Constantine, as Pohlsander wrote, "thundered"[27] against these improprieties. While this is only one of many of Constantine's laws, it is indicative of the spirit of many of them. Many of his laws seem to convey that the Roman Empire will legally enforce the strictest punishments against those who cheat the current system. But there is the point to keep in mind, the 'current system.' In other words, the Roman system, the status quo, with a few emendations by Constantine. Thus, even free women and children still have virtually no rights, and it was worse for the indentured workers and slave populations who could be beaten severely for "improprieties," and Constantine seems to have thought this quite proper, even if death was the result.[28] But we must view the man as one of his

[25] *Theodosian Code*, trans. Clyde Pharr, Theresa Sherrer Davidson and Mary Brown Pharr (New York: Greenwod Press, 1952), 1.16.7, 28.

[26] Ramsay MacMullen, *Constantine* (New York: Dial Press, 1969), 234; 192, 196. "Treating the art of the legist as just an obstacle between himself and the measures needed by the age, on the impulse of fury, impatience, or kindness, he occasionally bursts right through the ancient, wonderful structure of Roman law." A.H.M. Jones notes on the legislation noted above, "At times Constantine became quite hysterical in his impotent fury." Jones, *Conversion of Europe*, 218.

[27] Hans A. Pohlsander, *The Emperor Constantine* (London: Routledge, 1996), 68.

[28] CTh 9.12.1, 235. In cases of parricide, he allowed the *poena cullei*, being sewn up in a sack with a variety of live animals (CTh 9.15). But, he also tried to avoid this in another law by commanding the Praetor of Rome, Ablavius (the law applied to all municipalities in Italy) that poor parents who could not afford to feed or clothe their children and were considering parricide (…whereby the hands of parents be restrained from parricide…) should be stopped by this law which ordered the issuance of food and clothing to these children to be paid for out of "Our fisc and Our privy purse" (CTh 27.1). Just noting the odd alignment here between a certain Ablavius being the Praetor of Rome who is addressed by Constantine in the 333 rescript, and here the same name appears. It is entirely reasonable to think it was the same person, given the locale (Italy) and future role (Praetor of Rome) of this onetime official (Vicar?). What is also strange is that this law is numbered 27.1 by the compilers of the Theodosian Code, and they ascribe the number 1.27.1 to the 318 legislation that Ablavius questions the emperor on later in 333. If there is any intended connecting in the numbering, it was wholly the compilers doing. For, of course, these laws were not numbered by Constantine or the imperial court, it was done under Theodosius II much later on.

age, and from that contextual vantage point we must acknowledge that Constantine did move the situation for the average Roman more in the direction of "fair treatment" from the courts, and with the notion that people had "rights" which were to be respected and enforced. Compared with emperors both before him and after him, Constantine's record on this matter is a reasonably good one; again, relative to others.

Under Constantine, now all Romans,[29] Christian or not, could theoretically seek a hearing before a bishop if they so chose. I suggest that Constantine, having the bishops already beholden to him by the fact he had delivered their religion from the previous Illyrian emperors' horrific persecution of them (Diocletian (284 – 305), Galerius (305 – 311), and Licinius (308 – 324)), the fact that the bishops accepted him as their court of appeal on church disputes, and that he was ever-increasingly taking on the role of supreme patron of their religion, likely thought he could count on these prelates to employ his moral sensibilities and stringency, or conscience, to the various legal matters that came before their courts.[30]

I.iii: Methodology and Evidence

In this thesis I also suggest, and again to help answer the main question of why Constantine made them judges in the first place, that Constantine's legislation of 318 and 333 show a marked shift in his appreciation of what exactly the bishops were capable of as

[29] How far the proclamation of this law had gone in Constantine's time is unknown, but as pointed out by Otto Seeck and noted below, laws would often be delayed in reaching the various parts of the Empire due to the daunting nature of the task and geography to be traversed. We know it was known in at least 333 because Ablavius knew of the law, but very likely it was known long before this, but perhaps not much in question because it was either not engaged by litigants much or when it was, there was no challenge to employing it until Ablavius.

[30] On the close relationship between the bishops generally, see also H.A. Drake, *Constantine and the Bishops* (Baltimore: The Johns Hopkins University Press, 2000).

judges, and this was a result of his intimate involvement with the Church, which reaches a zenith in 325 at the Council of Nicaea. Beyond this, Constantine was likely attempting to consolidate his own control over the Roman legal system and to use the bishops' potential intervention as a means of encouraging better behaviour from magistrates in general. In order to demonstrate how these claims can be supported, and how both this emperor's intentions and the outcomes of his reforms worked, I will be using evidence that comes from within Constantine's reign. However, I will also briefly look further, approximately one hundred years, to see how Constantine's foundational move of making the bishops judges would affect the actual experience of bishops as judges into the time of Augustine.

The evidence for his reforms, and intentions regarding those reforms, can be sourced in his extant legislation, not only where it concerns making the bishops judges, but also where it concerns his trying to thwart corruption in the legal administration generally. The extant legislation will serve as the primary basis for evidence supporting my claims. Another valuable source for evidence will be the writings of contemporary figures such as Eusebius of Caesarea, Lactantius, and the Panegyrists who both knew him and wrote for and about him. In this group will also be some later writers, whose historical accounts were written within a couple centuries of Constantine's reign, and these are important because the sources used by these historians, in certain cases and pursuant to certain claims, have been lost to history. Third, as further evidence to support my claims, are distillations of the same historical facts by other historians who have looked at Constantine the emperor more generally, or on specific and related matters: the works of

Caroline Humfress, Walter Ullmann, Robert M. Grant, Peter Brown, Jill Harries, Ramsay MacMullen, and John Noël Dillon, among others.

The original contribution made by this research, and where it moves forward from the suggestions of these aforementioned, is the exclusive consideration of Constantine's intentions and motivations for bringing the Christian bishops into the legal machinery of the state. Beyond that, and more specifically, to better understand why he made the bishops judges in the first place, I look at the change in the level of authority accorded to bishops from the initial legislation of 318 to the rescript of 333 wherein he has significantly defined and expanded it. To date, there has not been, to my knowledge, anything written specifically on this transformation in meaning that Constantine occasioned as it pertains to the authority of bishops in these two pieces of legislation. It is a fact that has been noted by authors, considered below, but no researcher has yet made either why he made the bishops judges or this specific expansion of powers, or a suggestion as to why it happened, their focus. In this way, it is my hope that this research will add to the body of research about Constantine's relationship to the Christian religion, specifically where it concerns laws made for or about them.

By employing the principle of plausibility, as my historical method section below lays out, my aim is to produce an imaginative re-construction of an historical event and its concomitant personages which is based on extant data, but which must also engage in a participatory re-thinking pursuant to the motivations of the characters involved such that

the end result can be read as an intelligible whole.[31] My goal is to examine the legislation and the other source evidence about Constantine's actions, and perceptions about him as emperor, and use both of these to support my suggestions about his intentions and then contrast that with the suggestions of other historians who have looked at similar bodies of evidence. My hope is that by focusing on this particular move of Constantine to bring the bishops into the legal administration of the Empire, it will invite constructive elaboration and criticism from other scholars with the aim of better understanding a moment in history that would lay the foundation for Church involvement in state legal matters that continues to influence Western social and legal history to the present day. Constantine's adoption of the church in the early fourth century set the stage for so much of what we understand as constituting state governance in the Middle Ages, and this research brings the light of examination to one very small but important aspect of that historical instance.

I.iv: Manner of Court

The question of whether there was such a thing as "Christian law" in the early fourth century is here answered generally in the negative, although certainly the writings considered sacred would have been common fare for bishops addressing legal matters that were strictly religious in nature, or where both litigants were Christians and therefore under the authority of the bishop.[32]

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[31] This characterization of historical method is taken primarily from P.H. Nowell-Smith, *Are Historical Events Unique?*, *Proceedings of the Aristotelian Society*, New Series, vol. 57 (1956-1957). This notion will be explored more fully in Chapter II.

[32] The only Christian "law" were the canons/decisions of councils, and since they were scattered and small until Constantine, there was nothing like a recognizable body of law. A certain Sabinus collected

The evidence during the reign of Constantine for the bishops' courts, never mind for litigants requesting their matters to be transferred to those courts, is scarce, which seems to suggest that as a court of first instance they were not much used, but this remains uncertain due to the lack of evidence. What we do know, though, is that after Constantine's reign the bishops' courts became much more important and used with regularity, and this is evidenced most clearly in the writings of Augustine, a Christian bishop and sitting judge of the early fifth century.[33] The initial dearth of evidence on cases being heard by bishops in the time of Constantine strengthens the point that this power could have been framed as more of a check on the existing judicial apparatus rather than an attempt at replacing or buttressing it.[34] Other evidence supports this notion, because, as noted above, his legislation rails against the legal profession, judges included, for corrupt practices. A related suggestion involves Constantine's education in the imperial court of Diocletian and Galerius where he was very likely exposed to the political theory of the Greeks, and while a direct connection cannot be established because of the lack of evidence from his time in that court, it looks as if he may have been influenced by the strictures of the Greek philosophers on how judges ought to be selected and what powers

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some of them, and as I point on out this issue further below, he ends up calling those bishops at Nicaea "simpletons" for some reason. Perhaps because the issues they ruled on were so obviously part of church tradition, or possibly for another reason, maybe even linked to the unspecific and unsettled nature of the creed itself. The Nicene council would go on to be presented as the cornerstone for the building up of canon law, in any event. No hard evidence for a recognizable and agreed upon single and unified body of Christian law before Constantine exists, outside of the written accounts of the life of Jesus of Nazareth and a handful of letters written by the apostles of this religion. To call those documents a body of law is not correct given their variegated use and lack of acceptance in some cases.

[33] See discussion below.

[34] 1 Corinthians 6:1 – 6. It is a possibility that bishops in the larger cities would have been moderately busy with cases between Christian litigants, because as noted herein, the Apostle Paul chided the Christians for lowering themselves to have their disputes heard by Roman courts and we know from the *Didascalia*, discussed later on, that being a judge was something bishops were expected to do as part of their mandate. See further observations below.

should be accorded them. In short, their moral character was to be of the highest degree.[35] Further and compelling in terms of my own claim here that Constantine was partially influenced to make the bishops judges because of their high moral calibre compared with the corrupt court officials of his day, was that in Plato's writings we have recommended these functionaries named "Scrutineers" who would sit in judgement over corrupt judges, and they were to be also none other than priests.[36] While it seems clear that Constantine never meant to have the bishops sit in judgement in the case of an accused judge, it is a fact based on his two pieces of legislation that litigants who thought they would get a fairer hearing before a bishop were allowed to have their case moved, even if this choice was made at the reading of the sentence. While the Roman judge was not on trial, their ability to proceed with the case before them very much was. It seems as though Constantine's experience with the bishops, both as judges in the Donatist hearings and as members of his court, and their high moral pedigree aligned with Constantine's stated wish to rid the legal system of corruption, and these I suggest were the primary motivations for his legislation of 318 which made the bishops judges.

The evidence suggests that Constantine's reforms in this area did not really take root until after his reign, when bishops slowly began hearing cases which were outside their

[35] The evidence for this claim amounts to an embarrassment of riches, and is a topic too large to even sketch in this research, but ready examples will be found in Plato, *The Laws*, *Plato: Complete Works*, ed. John Cooper (Indianapolis: Hacket Publishing Company, 1997), 2.659.a ff., 6.752.d – 6.756.b, 6.766.d, 9.855.c – d, etc; *Republic* 3.409.a – d; *Statesman* 305.b – c: Here it is noted that not only are judges required to be keeping the law of the legislator, but they must not decide cases on the basis of being given "presents of some sort," bribes, which is something Constantine specifically legislates against. On the Greek element in Roman education, E.B. Castle notes, "Secondary schools first appeared in the third century B.C. in response to new educational needs. … Both Greek and Latin were subjects of study; …. For those aiming at a public career higher education continued in the school of the *rhetor*, the teacher of rhetoric, where the youth ambitious for public advancement underwent a gruelling training in the art of public speech." E.B. Castle, *Ancient Education and Today* (Middlesex, England: Penguin, 1967), 125

[36] Ibid., *The Laws*, 12.945.b ff; related to this, 6.761.e – 6.762.a.

regular jurisdiction of church matters and were causes of action solely under Roman law.[37] As I will discuss below, by the time we reach Augustine, the bishops' courts are almost overwhelmed with litigants, rich and poor alike, and the law enforced is mostly Roman, but of course through the lens of a bishop.

The evidence also seems to suggest Constantine thought his own preferences on legal matters would be capably represented by bishops that were beholden to him for saving and vaulting their religion to the forefront of the fourth century Roman experience,[38] and related to this that just knowing the bishops had this authority to hear what amounted to appeals[39] of magistrates might encourage these latter to judge matters more fairly in the innumerable localities across the empire.

Constantine's ultimate aim, it seemed, was a strengthening of the integrity in the practice and outcomes of the Roman legal administration, and much of his related legislation is directed this way: just outcomes for all, even if the outcomes were different based on the litigant's social status. As well, he must have known that by bringing the bishops into the machinery of the state by making them part of the judiciary, that their sensibilities would colour local outcomes for litigants. In this way, because we know he

[37] This will be discussed at length and cited further below, but primarily as evidence, we have the evidence given by Augustine, Bishop of Hippo and a sitting bishop-judge of the 5th century.

[38] Constantine's adoption of the religion was early in the fourth century. By the mid to late fourth century, we are in the wheelhouse of the Roman Christian confluence. Of course, following the fall of the West, the Church's political power grew exponentially, starting with Gregory I. Like Constantine's reorganization of society as far as it concerned inculcating the Christian leadership into Roman society, Gregory's reorganization went even further to secure for the Church much of the power previously exercised by the Roman state; not all, of course, because the barbarian kings and houses who would rule Europe would eventually adopt Constantine's seat of Emperor, and thus the two universal powers of the Middle Ages were born.

[39] Constantine's 333 rescript allows the litigant to request a venue change to a bishop's court even up to the reading of the sentence, and in this obvious way, if it was engaged, the move is tantamount to an appeal.

did exactly this, he must have felt that Christian bishops would be able to decide matters of law in a way that would both inure to less corruption and be more just for the average litigant.[40] The dearth of information we have on bishops hearing cases, and the Praetorian Prefect of Rome's, Ablavius, questioning the emperor on how this "bishops as judges" law was to be understood, some fifteen years later, seems to point to the fact that it was not much used. If Constantine intended it more as a check on abuse, then this evidence would fit quite well because if the magistrates knew this kind of transfer was available to litigants, then one could imagine it might encourage a more just application of the law, and such a claim fits most reasonably with the rescript of 333 wherein Constantine allows litigants to request having their case moved to a bishop's court as late in the proceedings as when the magistrate is reading out the sentence.[41] This amounts to a right of appeal. If one attempts to argue Constantine did not consider this, then they would have to show why he felt it necessary to make bishops judges whose decisions could not be overturned in a Roman system that already had them. Constantine was not fixing what was not

[40] This observation is based on the point noted above about the many bribes that were the status quo in Roman courts. A bishop's court was a different venue, and there is no indication these courts engaged in the same level of corruption and bribery. One imagines a bishop's scribes and legal advisors would be paid, so there was money changing hands, but the idea of the Christian poor being denied justice because they could not afford it does not present itself. Again, the lack of evidence on bishops' courts during Constantine's times constrains any final word on this subject, but a sideways look at other circumstantial evidence seems to suggest that at the same time Constantine made the bishops' judges, he was also legislating against corruption in the Roman courts more generally, which makes it seem likely the bishops court presented itself to the Emperor as a more fair alternative.

[41] The reasoning here is that if, as we suspect, there were very few cases that employed this in Constantine's time, those few instances would stand out and likely occasion mention both among imperial officials and the emperor, as well as amongst bishops. My suggestion is that because they were rare instances, the cases would be more likely to draw the attention of the emperor who crafted the law allowing the transfer.

broken, his legislation and the other primary source evidence tells us the system was broken, and badly, in favour of the wealthy and powerful.[42]

I.v: Christianity and Empire

By bringing the Church in to the state machinery of justice, he was also making Christianity part of the constitution of the Roman Empire, and hence part of their sovereign organizing matrix. I believe he made the bishops judges on purpose for the reasons specified above, but the constitutionalizing of the Church, something that defined the rest of European history, given the dominant role of the Roman Catholic Church in the governance of civil life in these regions, was an unintended consequence: I suggest Constantine was not looking any farther than the rule of his own sons and the imperial legacy of his family, certainly not one thousand years hence and beyond, as the case turned out to be. By bringing the Church into the legal framework, the constitution, of Roman society, his purpose might well have been that these bishops, who avowedly believed Constantine was the saviour of their religion and were thus beholden to him, could then act as a conduit for his and his sons' legislative interventions and more generally, their rule, and he likely saw that their care for the poor could be dovetailed into an official state role, all discussed herein. How else, other than by using a constitutional format, the law, could he have done this and ensured his choices outlived him to the reign of his sons? Constantine had already made his sons Caesars by the time of his death in 337, and they had from their youth been trained in the Christian faith: Constantine

[42] Most poignantly instanced by Constantine himself in the 331 legislation, and as many legal historians have noted; see discussion below and reference to the work of Peter Brown.

wanted a dynasty. The bishops may have appeared to him a ready source to foster such a result, given their influence among the populace.

I also suggest that given the fact Constantine, as emperors before him all had, believed that the gods prospered those they were pleased with, was in some sense faced with a situation which was both beyond his control and one that was obvious to him: the Christian church was growing exponentially, even in the face of persecution. It is very likely that Constantine, moulded as he had been at Diocletian's (284-305) and Galerius's (305-311) court in Nicomedia as a young man, saw the growth of the Christian church as a sign that the divinity was favouring them, and what better way to curry favour with the "divinity" than to co-opt the religion that seemed to be pleasing that divinity. This emperor's actions, his laws, letters, and building program, support this notion comprehensively. But this is not a suggestion that Constantine no longer believed in the efficacy of catering to other gods, discussed herein, but that he simply identified himself with a burgeoning and highly organized religion that, to his mind, gave him victory in battle. He did this, I suggest, because he saw clearly that the religion was prospering, and he wanted that same favour bestowed on his rule and dynasty.

I.vi: Roadmap of this study

The main thesis question and answer, noted above, will now be supported and explained by what follows in this study: Chapter II is a brief overview of my historical method, noted above; Chapter III is focused on the general context for Constantine leading up to the creation of the two laws which are the focus of this study, and will also look at Constantine's relationship, both legal and otherwise, to the bishops both as

emperor and ultimately their patron; Chapter IV consists of both my detailed analysis of the two laws, which are the focus of this study, and my engagement with other scholars in this field where I present and contrast my suggestions with theirs, whether in disagreement or agreement; and Chapter V, the conclusion, reiterates my suggestions about why Constantine made the bishops' judges, drawing on some of the more detailed information from the chapters.

Prefatory observation

As the reader will observe, I use the symbol '†' to denote opening quotations for chapters which I have selected as somehow important given the subject matter discussed. This particular symbol, of course, looks like a cross; but it is not. It is a dagger. In this mistaken identity — and this was not intended by the author, and only realized long after use of the symbol had been employed — lay much of the problem associated with interpreting Constantine's adoption of the Christian Church in the early days of his reign, perhaps officially in 313 with the Edict of Milan but more likely later when his coinage begins depicting Christian symbols in the early 320s. What looks like a Christian symbol of a cross is really a weapon of war; and indeed, for peoples of whatever nationality or religion in the Middle Ages, the cross came to be associated with the violent arm of the church and state, whatever their justification; often, ironically, pacification or securing the peace. Constantine's adoption of the Christian church brought the 'sword' into the purview of the Christian state. Perhaps we reach the tragic pinnacle of the effects of Constantine's momentous change with the Crusades, beginning in 1095 under the leadership of Pope Urban II. The terrible outcomes occasioned by involving the Church in the governance of Rome in the late antiquity/early Middle Ages context still haunt and affect us today. It is no melancholy anachronism to cite Constantine's bestowal of this kind of involvement to the Christian hierarchy as a colossal wrong done to humanity: there are times, and this is one of them, where allegations of ignoring historical context and cries of anachronism die on the heels of the basic moral fibre of human experience that demands that lives are not

extinguished in the name of one's belief. The modern period delivered us from many of the evils associated with the over-involvement of religion in state "law and order", but the world we live in is still very much one affected by religious claims for which no person can verify the veracity thereof.

This research is neither an indictment on Constantine's actions nor a defense of the same, but the author highlights his own historical and ideological contextual outlook for the reader by acknowledging these obviously brutal realities related to the decision of the Emperor Constantine to adopt the Christian church into the Roman state in the early fourth century, as he most certainly did.

I have also chosen to set this research in the font 'Constantia,' on purpose.[43] Constantia was the name of Constantine's sister, and sometime in 311 – 312 he offered her in marriage to Licinius as a gesture of good faith to cement an alliance with this co-emperor. Licinius's eventual rebellion against Constantine ended in his death in 325 at the order of Constantine. Constantia was an important figure in the life of Constantine and the events that marked his adoption of the Christian religion. Because her husband was Augustus of the East, and Nicomedia the capital, she formed a close relationship with the bishop of that city, Eusebius of Nicomedia, the most powerful bishop of the Arian persuasion. It was this Eusebius who baptized the Emperor Constantine on his deathbed in 337.

Constantia also attended the Council at Nicaea when her brother was otherwise occupied, and she encouraged peaceful concord. While the historical records are mostly

[43] The font was named Constantia simply because the man who designed it for Microsoft had to give a name (as Microsoft required for all fonts in its ClearType series) that began with a C, and he picked the word out of a Latin text he came across. As Professor Joost Blom, QC, has observed, he may also have been influenced in his choice by one of the fonts he used as a model being named Perpetua.

silent on her activities, it is clear she played a role in this Gestalt shift going on in the Roman experience. The little evidence we have seems to suggest she was an important figure, and I employed the font bearing her name to remind myself and the reader of the crucial role this woman took on, and the courage she must have had to marry a stranger at the request of her brother, live to watch her husband be killed by that same brother, and then in that same year continue to press for peace at the Council of Nicaea, the turning point for the relationship between church and state which lives with us to present times.

Chapter II

II.i: Historical Method

The historical method I employ in this research is one I have written on previously,[44] and the article I refer to was written in relation to this specific study. Therein the reader will find a detailed justification for my basic suggestion that the historian must seek to offer an imaginative re-construction of an historical event and its concomitant personages which is based on extant data, but which also must engage in a participatory re-thinking pursuant to the motivations of the characters involved such that the end result can be read as an intelligible whole.[45] In other words, my historical method is grounded in a principle of plausibility. What I mean by that is that any claim or suggestion about why some historical event happened must be able to be plausibly inferred by the evidence

[44] C.G. Bateman, "Method and Metaphysics: A Legal Historian's Canon," *The Journal Jurisprudence*, vol. 23 (Michaelmas Term, 2014): 255-312.

[45] My statement of method borrows the concepts of a number of historians, but primarily P.H. Nowell-Smith, *Are Historical Events Unique?*, *Proceedings of the Aristotelian Society*, New Series, vol. 57 (1956-1957). Other important studies on method I have considered in my own formulation of method include: Marc Bloch, *The Historian's Craft*, trans. Peter Putnam (Hong Kong: Manchester University Press, 1954; 1991); G.R. Elton, *The Practice of History* (New York: Thomas Y. Crowell; Sydney University Press, 1967); John Lukacs, *Historical Consciousness: The Remembered Past* (New Brunswick (U.S.A.): Transaction Publishers, 1968; 1985;1994; 2003); Carl G. Gustavson, *A Preface to History* (New York: McGraw-Hill Book Company, Inc., 1955); E.H. Carr, *What is History* (Harmondsworth, Middlesex: Penguin, 1961; 1973); R.G. Collingwood, *The Idea of History* (Oxford, Clarendon Press: Oxford, 1946, 1949); et al. Scholarly and historical contributions from academics or philosophers in other disciplines that have also influenced the breadth of my method include: the dialogues of Plato, *Apology*, *Plato: Complete Works*, trans. G.M.A. Grube, ed. John M. Cooper (Indianapolis/Cambridge: Hackett Publishing Company, 1997); the dialogues of Cicero, *De Re Publica De Legibus*, trans. Clinton Walker Keyes, (London: William Heinemann Ltd., 1977); Peter L. Berger, *The Sacred Canopy: Elements of a Sociological Theory of Religion* (Garden City, New York: Doubleday, 1967); Peter L. Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Garden City, N.Y. : Doubleday, 1966); Thomas S. Kuhn, *The Structure of Scientific Revolutions*, 2nd ed., enlarged (Chicago: University of Chicago Press, 1962; 1975); Anthony F.C. Wallace, "Revitalization Movements," *American Anthropologist* 58 (1956): 264-281; et al.

given for it. For this present study, it will suffice to briefly outline this method that is covered in more detail elsewhere, noted above.

II.ii: A Brief Outline of Method

> History is the most dangerous product evolved from the chemistry of the intellect. Its properties are well known. It causes dreams, it intoxicates whole peoples, gives them false memories, quickens their reflexes, keeps their old wounds open, torments them in their repose, leads them into delusions either of grandeur or persecution, and makes nations bitter, arrogant, insufferable, and vain.
>
> History will justify anything. It teaches precisely nothing, for it contains everything and furnishes examples of everything.
>
> Paul Valéry, *On History* †

Paul Valéry's famously wry comment on what people do with history on many occasions, while correct and alarming on a number of levels, really does not touch the work of a historian who only wishes to get at a sensible reconstruction of a past event. I see Valéry's statement here as a warning, and a good one. Historians should take their reconstructions seriously, and of course leaving their own predilections aside to the best of their ability. Marc Bloch approaches historical studies more hopefully:

> Are we so sure of ourselves and of our age as to divide the company of our forefathers in the just and the damned? How absurd it is, by elevating the entirely relative criteria of one individual, one party, or one generation to the absolute, to inflict standards upon the way in which Sulla governed Rome, or Richelieu the States of the Most Christian King! .... Robespierrists! Anti-Robespierrists! For pity's sake, simply tell us what Robespierre was.[46]

So while we may not judge as historians, we can employ history in helping us make better judgements. Carr suggests that "[t]he past is intelligible to us only in the light of the present; and we can fully understand the present only in the light of the past. To enable

† Paul Valéry, *On History* [1931], Paul Valéry: History and Politics, trans. Denise Folliot and Jackson Matthews, Bollingen Series XLVm (New York: Pantheon Books, 1962), 114.

[46] Bloch, *Historian's Craft*, 140.

man to understand the society of the past, and to increase his mastery over the society of the present, is the dual function of history."[47] As one might expect, there are subtle differences of opinion amongst historians as to what we can expect from history, but there is general agreement on how it should best be constructed.

I have suggested that a synthesis of some of the most important contributions to historical method is something well within the reach of a historian, and I have cast it roughly as follows: the historical method requires an imaginative re-construction of an historical event and its concomitant personages which is based on extant data, but which also must engage in a participatory re-thinking pursuant to the motivations of the characters involved such that the end result can be read as an intelligible whole. The historian has no access to actual history, with the exception of their own of which they form a part. They are only part of history as a result of their participation in the present. Once a moment passes, it departs into the metaphysical, it cannot be revisited or recaptured with any hope of total accuracy. But it is actual history, that ideal form, which historians are most concerned to reflect in their own suggestions: they hope they are striking as close to that ideal form as possible.

Historians use real non-metaphysical evidence from that elusive actual history to reconstruct the lives of people who are, for the most part, unless you are studying the history of someone still living, no longer able to inform us about what actually happened. Yet this kind of documentary and physical evidence often provides historians with enough congruent information that we can be relatively certain about the main brush

[47] Carr, *What is History?*, 55; see also page 68.

strokes about what was going on in, for instance, the Roman empire during the early fourth century. The less information we have about a place or person, the less which can be suggested in any historical reconstruction, but the opposite case produces reconstructions by historians which are sufficiently close enough to what the general consensus of the extant evidence demands, and thus are accepted as reasonable suggestions about what most likely happened at a given moment in history. In other words, if the suggestions of historians can be plausibly inferred from the evidence, they ought to be taken seriously in the absence of anything more plausible. So, while an "actual" or "ideal" history is elusive, a historical reconstruction/suggestion that can be plausibly inferred from the evidence is often the closest we can get when it comes to "knowing" what happened.

Historians and readers of history must be satisfied with this middle ground of 'plausibly inferred' with regard to events that have long passed. The writing of history is not like a criminal trial wherein the judge demands evidence which she or her jury must be convinced of beyond a reasonable doubt. History is much more like a civil trial where the judge or jury is satisfied that the evidence bears out a given claim on a 'balance of probabilities,' a lower standard of proof than 'beyond a reasonable doubt.'

History is not then out of reach completely. But like the word 'history' itself demands, the process of writing history will always be to some degree about constructing a story. In the article referred to above, I emphasized my suggestion that some of these stories, these responsible reconstructions of past events based on a sound historical method, are as close as we are ever going to get to what happened; and, in the absence of new evidence

which might throw their conclusions into doubt, for this reason they ought reasonably to be taken seriously.

This method, briefly outlined here, was chosen as the best way to get an answer to the question of what led Constantine to legislate as he did on bishops as judges, which in turn helps us understand what Constantine intended that legislation to mean and accomplish. His direct experience sitting with bishops as a fellow judge in the Donatist hearings, as a motivation for sequestering them in to the judiciary, then, gives us some basis for understanding what it was about the bishops that Constantine thought he could accomplish by making them judges; for instance, attempting to provide a venue for justice which might serve more than merely the rich and powerful in society. His concern seems to have been with the level of corruption in the court system and how that precluded the poor from accessing justice. The fact that one of the bishops' fundamental roles was to care for the poor better fills in the picture of why Constantine was motivated to make the decision to make them judges based on his direct experience with them. Thus, my historical reconstruction/suggestion about what led Constantine to do this is one that can be plausibly inferred from the little evidence we have.

Chapter III

III.i: Context for Constantine

So far in this study I have given an introductory statement about why Constantine made the Christian bishops judges in 318, primarily because of his direct involvement sitting with the bishops as a fellow judge in judicial proceedings during the Donatist crisis, and I have very briefly emphasized my historical method upon which my process of arriving at conclusions about what the evidence tells us are based. To assist the reader more fully in understanding the relationship between Constantine and the Christian bishops more generally, and therefore to lay a foundation upon which the question of why he made bishops judges might become more accessible, I will devote this chapter to a brief overview of merely some aspects of context to help us better understand Constantine and his relationship with the bishops and so give context to the significant act of appointing them judges. While the main thrust of my argument and analysis on the two primary pieces of legislation will come in the next chapter, Chapter IV, this chapter will be focused on the context in which those laws were made, and not so much with the details of the laws themselves. To this end I provide brief overviews of both the Donatist crisis, in which I suggest lay Constantine's motivation for making the bishops judges, and the Council of Nicaea, the apogee of the relationship between Constantine and the bishops coming prior to both his 331 judicial corruption edict and the 333 rescript that expanded the authority of bishops as judges. This chapter is not a biography of Constantine, but readers interested in looking deeper into his reign from beginning to end are advised to consult the works of MacMullen and Barnes, amongst others, whose works can be found

in the bibliography of this study. I have also included in this research an overview of some of the aspects of Constantine's relationship to Christianity, and the nature of religion in general in the fourth century, which can be found in Appendix E.

> Constantine is not a man to be summed up in a few words.
> W.H.C. Frend, *The Early Church*†

III.i.a: Introduction

While Frend was right — scores of books have been written, and continue to be, on this first Christian Roman emperor, and the fact that the writing continues reveals an enduring interest in his life and activities —, I will merely briefly lay out some relevant aspects of Constantine's context in this chapter. Constantine's involvement in both the creation of and promulgation of laws regarding the Christian bishops as judges[48] are the subject of this research. I have narrowed the questions to help guide my inquiry: why and how did Constantine go further than merely tolerating Christianity, and put himself at the head of their affairs and legislate Christian bishops into the position of Roman judges whose decisions were not subject to appeal? What were the meaning and effects, short and long term, of the edict of 318 and the rescript of 333, and how was the interpretation of the former affected by the latter? Also, given the evidence we have in a 331 piece of legislation of his against corruption in the Roman courts, was Constantine in making the bishops judges merely side-stepping and placing a check on the Roman judiciary and legal administration, who were often guilty of corruption, in an effort to ensure that his

† W.H.C. Frend, *The Early Church* (London: Hodder and Stoughton, 1973), 161.
[48] CTH 1.27.1, Sirm 1.

own moral strictures regarding legal fairness[49] might get more traction on the ground? To answer these questions, one needs to look not only at the legislation itself, but the larger context that produced them.

While I suggest that Constantine made the bishops judges for pragmatic reasons, the bishops would ultimately, a century later, fill this role due to a crumbling imperial bureaucracy: by this time in the early fifth century the bishops were doing what they were being compelled to do in part because of the beginning of the fall of the Western Roman Empire.[50] Society needed it, and they responded; the fact Constantine had put them in this official role in the early fourth century only made the high use of their courts later on something that was recognizable as being imperially sanctioned and thus, in some sense, already a part of the governance status quo. As to why Constantine as Roman emperor would be involved in a religion's organization and maintenance, I turn next to a consideration of the duty emperors had to ensure the common good using the law as a tool to achieve that end.

III.i.b: Constantine's Duty, as Emperor, to Ensure the Common Good

The idea of a Roman Emperor being able to adopt Christianity and then assume authority over it was something that, as Walter Ullmann pointed out, was easily done given the aim of *utilitas publica*, the common good, under the auspices of *ius publicum*, the public law. This author notes:

[49] Constantine created a law in 331 which condemns the corrupt practices of the legal machinery of state: *Theodosian Code*, trans. Clyde Pharr, Theresa Sherrer Davidson and Mary Brown Pharr (New York: Greenwod Press, 1952), 1.16.7, 28. Referenced above, and noted below.

[50] My thanks to John B. Toews for making this important observation to me: the Church was often to take up roles that they were compelled to by the exigencies of the time.

> In fact, Constantine's governmental measures cannot be understood without taking into account the role played by public law. In its pristine and original shape, it embraced the *sacra*, the *sacerdotes* and the *magistratus*. In his function as sole emperor he had quite evidently at his disposal the interpretation, manipulation, application and modification of the *ius publicum*, and since the Christian body had *sacerdotes* as administrators of the *sacra*, the emperor in his governmental capacity clearly had the right to exercise jurisdiction over them, especially as the Christians considered themselves as a *corpus* entirely in consonance with the Roman law as well as with Pauline doctrine. Hence the legal presuppositions were at hand: the Christians constituted a body which had hitherto been proscribed and which, by virtue of its own strong monocratic structure, could profitably be harnessed to the interests of the Roman common weal: the *utilitas publica* virtually suggested the measures enacted by Constantine.[51]

Ullmann makes the point that Constantine's legislation regarding the Christian church and bishops was something which was already part of his portfolio as emperor. In another place, Ullman observes "[t]he public law enabled Constantine to integrate the Christian body into the empire and to allocate to it a decisive role in the task of the empire's revival. There is warrant for saying that the Roman public law appeared as if it had been fashioned for Constantine's religious and ecclesiastical legislation."[52] The fact that it fit with the goals of Constantine to bulwark his own legitimacy by employing the bishops as his representatives across the Empire, a point highlighted by Jacob Burckhardt, does not diminish the importance of the fact that Constantine had little choice but to take responsibility for the Christian Church in the social and legal contexts of the Roman state. The adherents of this religion were also a force to be reckoned with population-wise, so the fact that as emperor, regulating this religion for the common good was under his

[51] Walter Ullmann, *Public Law as an Instrument of Government in Historical Perspective: New Rome and Old Rome in the Light of Historical Jurisprudence*, *Law and Jurisdiction in the Middle Ages*, ed. George Garnett (London: Variorum Reprints, 1988), 38.

[52] Walter Ullmann, The Constitutional Significance of Constantine's Settlement, Scholarship and Politics in the Middle Ages (London: Variorum Reprints, 1978), 5 – 6. Originally appeared in *Journal of Ecclesiastical History* 27 (University Press. Cambridge, 1976).

purview, the resultant connection between them becomes easier to understand. Such a purview in fact grew under Constantine because he assumed jurisdiction over their external activities, protection of them at the state's cost, and also took jurisdiction over their foundational constitutional mechanisms of control.[53] The fact that Christians were almost in a constant state of internecine conflict throughout his reign following the repeal of persecution in 311 – 313 by Galerius, Licinius, and Constantine, meant that Constantine had to pay close attention to this religion's bothers because, due to the sheer number of adherents, it meant that the state's stability was on the line until these problems were dealt with. The fact that Constantine had something which amounts to a legal responsibility under the *ius publicum* to take control of the Christian religion acts as a tonic to the idea that Constantine was merely a religious devotee who found a new religion and doted on them. He was far more than that. He was the emperor, and as such was in charge of public law, a law which fit the burgeoning Christian 'state within a state' in lock-and-key fashion.

The use and expansion of the role of public law under Constantine continued with later Emperors, reaching its zenith with the rescript of Theodosius the Great, *Cunctos populus*, in 380.[54] This was a law that made Christianity the only legitimate religion of the Empire, the *utilitas publica* and *ius publicum* in action. This fact means that the legal trajectory that Constantine set the empire and Church on, with his use of the public law, would have tremendous consequences for the future of the West. As Ullman notes on the impact of the *Cunctos populus*: "… imperial jurisdiction was now constitutionally greatly

[53] Ibid., 40.
[54] CTh 16.1.2 (1.1.1); 16.5.6 (1.1.2).

extended: deviation from the faith became a public crime and hence to be dealt with by the imperial courts. And not the least important consequence of this decree was the constitutionally sanctioned imperial control of the clerical body which was directly attributable to the tenor of the rescript. For its over-all effect was the coalescence of Roman empire and Christendom: it was the union of *Rõmerreich* and *Christenreich*. The two entities had become identical."[55] Constantine, then, through his use of the public law with the Christian religion, set a trajectory that led to what came to be known as the two universal powers throughout the Middle Ages, the Empire and the Church.

It is important to remember that by the time we reach the later fourth century in the reign of Theodosius I, the emperor is seen by some as the embodiment of the law itself. A panegyrist, Themistius, wrote of this emperor: "[f]or he [the emperor] is the animate law, not merely a law laid down in permanent and unchangeable terms. This means that God sent kings to the earth to serve men as refuge from an immovable law to the safety of the animate and living law."[56] When Constantine legislated on any number of matters, including making bishops judges, to the average Roman he was not doing so merely as a functionary of the people's will, as is supposed to be the case with modern democracies. Instead, he was the representative of the divine will, and his will was somehow associated with a god's will.[57] Here, less than sixty years after the death of Constantine, such an idea could be employed comfortably in the presence of the emperor Theodosius I and those who witnessed the speech.

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[55] Ibid., 41.

[56] Themistius, *Oration* 19 (227d, 228a), *Readings in Late Antiquity: A Sourcebook*, ed. Michael Maas (London: Routledge, 2000), 5.

[57] On Constantine's view of himself as divinely appointed and under divine favour, see, for instance, Lenski, *Constantine and the Cities*, 56 – 60.

III.ii: Constantine in the Sources

What can be known about Constantine's life and times, strictly in terms of biography, comes primarily from three extant sources. Eusebius of Caesarea, Bishop of Caesarea during Constantine's reign, wrote *Vita Constantini* (*VC*), or *Life of Constantine*, this being the largest work devoted to the Emperor which survives. Zosimus, a pagan historian from the early sixth century,[58] wrote *Nea Historia*, or New History, which covers the first four centuries of the Roman Empire and includes a short account of the Emperor's reign and politics. The third source is an even shorter work known as *Origo Constantini Imperatoris*, and it is written in the style of an epitome, and therefore it covers the events of Constantine's life in a rather abbreviated manner.[59] Although the author is unknown, it has been suggested that it would have been someone writing from the late fourth century.[60] There are other important sources, such as the writings of Lactantius, and the

[58] Ronald T. Ridley, *Zosimus: New History* (Canberra: Australian Association for Byzantine Studies, 1982), xii.

[59] A. Diane Boleyn, *Origo Constantini Imperatoris: A Translation and Commentary* (Master's Thesis: Boise State University, 1996), 1. See also the translation of the Origo in Samuel N.C. Lieu and Dominic Montserrat, eds., *From Constantine to Julian: Pagan and Byzantine Views, A Source History* (London: Routledge, 1996).

[60] Ibid., 6. Whether there were advisors in Constantine's court who were not Christian, and since we know he did not enforce Christianity such as emperors after him did, that the Empire itself was never more than 50% Christian during his reign (vide infra), likely no more than 30%, and that we do not have a detailed list of his advisors and their religious preferences, the reasonable assumption is that a good number of them were not, and the percentage of them or their total remains a mystery. Constantine did have advisors who were bishops, Ossius of Cordoba, Eusebius of Caesarea, and later Eusebius of Nicomedia, all being in this group, but there is no indication they advised the emperor on secular matters, although as discussed below, a number of his pieces of legislation were directed towards a Christian sensibility and this tends to make us think that the bishops wielded some influence in his decision making on issues not touching the Church. My own sense is that these instances would be rare, and if there was advising of this nature, it would have amounted to indirect influence.

information we glean from the panegyrists and later Church historians, and those will be canvassed as needed below.[61]

III.ii.a: Church Historians on Constantine and the Law

It is with Eusebius, the Church historian who wrote the first definitive history of the Church, *The Ecclesiastical History*,[62] and who was importantly a confidant and friend to the Emperor Constantine, and would write his biography, *Life of Constantine*,[63] that we learn aspects about not only the laws of Constantine but the way they were seen by this contemporary bishop. In the latter work we find more information on Constantine than in any other single source, and Timothy Barnes, noted Constantinian scholar, has suggested that while the first Church historian often delves into hagiographic writing, most of his information is correct and verifiable with other sources;[64] and thus this work becomes the central evidentiary source for an accounting of the activities of Constantine.

Eusebius references the lawmaking of Licinius, co-Emperor with Constantine for a short time, noting:

> ...he issued a law decreeing that the bishops should never communicate actively with each other at all, ... and that no synods, councils, or discussions of common interest be held.[65]

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[61] In terms of state and Church historians, sponsored by either in an official capacity, the closest we have to that is Eusebius, who wrote a good deal about Constantine in his *Ecclesiastical History*, and exclusively on the same subject in his *Life of Constantine* (see below on these two works). No other official sources beyond what comes far later in history, for instance Zosimus, who was a civil servant, gives us any significant treatise on the life of this Emperor. Instead, this information must be gleaned where it can be found and collated.

[62] Eusebius of Caesarea, *Eusebius: The Ecclesiastical History*, [*HE*], trans. J. E. L. Oulton, in two vols. (1926; 1932), The Loeb Classical Library, eds. T. E. Page, E. Capps, et al. (William Heinemann Ltd: London, 1926; 1932).

[63] Eusebius of Caesarea, *Eusebius: Life of Constantine*, [*VC*], trans. Averil Cameron and Stuart G. Hall (Oxford: Clarendon Press, 1999).

[64] Timothy Barnes, *Constantine: Dynasty, Religion and Power in the Later Roman Empire* (Oxford: Wiley-Blackwell, 2011), see discussion of sources.

[65] Eusebius, *VC*, 1999, 1.51.1, 90.

> Furthermore, because the friend of God [Constantine] saw fit to receive the servants of God within the imperial court, the Godhater [Licinius] chose the converse and drove all the godly men [Christians] under him from the imperial court, ...[66]
>
> ... he finally came into the open and ordered that members of the army in each city were to be demoted from ranks of command, if they would not sacrifice to the demons. The ranks of officers in every province were thus deprived of Godfearing men, ...[67]

The fact that Licinius removed political and military figures from the imperial court and their military offices, a very destabilizing act, perhaps gives us more insight into why Constantine continued so whole-heartedly to support the Christian religion as it would mean all those state servants returning to their posts, at the very least in those parts of the Empire once under Licinius's command. Licinius ended up being an enemy and rival of Constantine, and so his anti-Christian laws are reasonably linked to this fact.

On Constantine's reversal of Licinius's legislation, Eusebius notes:

> Constantine reversed the effects of these laws of Licinius by making laws of his own. [Constantine enacted laws that] summoned home those who for refusing to worship idols had been sentenced to banishment... those who had on the same grounds been enrolled among the *curiales*... and [these laws] recalled from disgrace those also who had been stripped of military ranks for their determined religious devotion, offering them the free choice either of recovering what was theirs and resuming the honours of their former station, or if they were attracted by civilian life, to receive permanent immunity from public duties.[68]

Law was the instrumentality used by these two emperors in this exchange of denying and granting societal powers to Christians that were indispensable to the maintenance of stability in the state. Licinius used them, perhaps, to unseat a part of society in the Eastern part of the Empire which was predominantly Christian, and by so doing dealing a

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[66] Ibid., I.52.1, 91.

[67] Ibid., 1.54.1, 91.

[68] Ibid., 2.20-2.21, 102-10 3. See also on this passage and these laws, Noel Lenski, "Constantine and Slavery: Libertas and the Fusion of Roman and Christian Values," *Atti dell'Accademia Romanistica Costantiniana XVIII*, pp. 5–8 (Giugno, 2011), accessed online: https://www.academia.edu/2489952/Constantine_and_Slavery_Libertas_and_the_Fusion_of_Roman_and_Christian_Values.

blow to his rival's religion of choice. Constantine used his laws to reverse this effect and bring legitimacy to state servants who would both stabilize things politically and, I suggest, be ever grateful and loyal towards an emperor who gave them their jobs back, essentially.

Eusebius also speaks to the lawmaking power Constantine conferred on bishops when he wrote:

> He also put his seal on the decrees of bishops made at synods, so that it would not be lawful for the rulers of provinces to annul what they had approved, since the priests of God were superior to any magistrate.
>
> He made countless decrees like these for those under his rule. It would need leisure to commit them to a separate work for the precise analysis of the Emperor's policies in those also. ....[69]

While the historian laments that Eusebius did not engage in "committing them to a separate work," it is still important to note that he writes that Constantine was in the practice of regularly making decrees "like these," perhaps other law concerned with making sure the Roman government did not annul judgements of bishops concerning the Christian community, or perhaps referring to other religions and Constantine's respectful treatment of their leadership structures. Either way, Eusebius was sure there were enough of them created to extract themes pursuant to Constantine's policies, and because Constantine's policies exercised in relation to the Christian church are fairly detailed and on record, it may be fair to generalize on some of these policies as they would have related to other matters in the state.

The Church historian Sozomen (c. 400 – 450) notes the importance of Constantine's changes to the legal system where it concerned the Christian religion and its bishops.

[69] Ibid., 4.27.2-3, 163.

Besides noting the Emperor's law stating that the unmarried and childless should enjoy the same legal advantages, in terms of estates, as the married,[70] reversing an Augustan law aimed at promoting the growth of the Roman population, Sozomen records:

> Constantine exempted the clergy everywhere from taxation,[71] and permitted litigants to appeal to the decision of the bishops if they preferred them to the state rulers. He enacted that their decree should be valid, and as far superior to that of other judges as if pronounced by the emperor himself; that the governors and subordinate military officers should see to the execution of these decrees: and that the definitions made by synods should be irreversible.
>
> Having arrived at this point of my history, it would not be right to omit all mention of the laws passed in favor of those individuals in the churches who had received their freedom. Owing to the strictness of the laws and the unwillingness of masters, there were many difficulties in the acquisition of this better freedom; that is to say, of the freedom of the city of Rome. Constantine therefore made three laws, enacting that all those individuals in the churches, whose freedom should be attested by the priests, should receive the freedom of Rome.
>
> The records of these pious regulations are still extant, it having been the custom to engrave on tablets all laws relating to manumission. Such were the enactments of Constantine; in everything he sought to promote the honor of religion; and religion was valued, not only for its own sake, but also on account of the virtue of those who then participated in it.[72]

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[70] Sozomen, *The Ecclesiastical History of Sozomen*, *Book 1*, trans. rev. Chester D. Hartranft, *Nicene and Post-Nicene Fathers*, second series, vol. 2, *Socrates, Sozomenus: Church Histories*, eds. Philip Schaff and Henry Wace (Edinburgh: T&T Clark, 1886-1900; Grand Rapids: Eerdmans, 1997), 1.9, 245-246.

[71] The relevant exemptions referred to here can be found in part at CTh 16.2. 1 – 6. There are others which are referred to by Constantine's son and future emperor Constantius II in other legislation: CTh 16.2.14, It was not only the clerics, even if they had other streams of revenues such as selling goods, etc. who were to be exempt from any taxes, but their entire family, including wives and children "…shall continue to be exempt forever from tax payments and free from such compulsory services." Clearly the "shall continue" combined with the reference to Constantine's provisions for exemptions means that such tax exemptions most likely were at the hand of Constantine. It is clear from the legislation here that Constantine did this so that bishops could focus on proper service to the deity, the efficacy of which Constantine believed in strongly, but I think it is interesting to see in later legislation of Constantius II which was based on his father's policy towards the bishops that the later emperor specifically notes how when bishops make extra money "this must be administered for the use of the poor and needy." It looks very much like Constantine would have communicated through either the non extant legislation which served as the basis for this law or told his son directly about how he saw the exemptions working for the benefit of the state in this way. See further discussion of this in T.G. Elliott, "The Tax Exemptions Granted to Clerics by Constantine and Constantius II," *Phoenix*, Vol. 32, No. 4 (Winter, 1978): 326-336.

[72] Sozomen, *Ecclesiastical History*, I.ix, 245-246. See Noel Lenski on Constantine's laws on manumission, Lenski, "Constantine and Slavery," at 246 – 252.

The exemption from taxes here noted is important because the bishops were expected to care for the poor and needy, it was something inherent in their leadership responsibilities and part of their mandate.[73] Seeing this tax break as a kind of trade-off for service has been noted by T.G. Elliott, who wrote: "[i]n return for their benefits to it [the Church] both rulers [Constantine and Constantius II] supposed that the Church would operate more powerfully as a social welfare agency. They must have foreseen that such an effect of their legislation would make both the Church and the Constantinian dynasty more attractive to the general population of the Empire."[74] What is further interesting about this passage is the mention of the new legal role of bishops as judges, or legislators via the synod, which is further evidence of these realities, and it clearly refers to the bishops-as-judges-legislation discussed in detail below.

Sozomen's last mention of Constantine's legislation is of that relating to heresies, a law which forbade non-Nicene Christian groups to meet in public, and this was interestingly to be monitored by "...the bishops and clergy of their city."[75] While it is not the purpose of this study to examine the policing activities of the bishops, it is interesting to observe that bishops took on this role of monitoring adherence[76] to a law, something usually reserved for those directly in the employ of the state's legal machinery; perhaps another piece of evidence that bishops were now, then, exactly that.

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[73] Their mandate was in the form of the teachings of Christ that were reinforced by Paul, who was thought to have properly interpreted and expanded those teachings.

[74] T.G. Elliott, *Tax Exemptions Granted to Clerics*, 336.

[75] Sozomen, *Ecclesiastical History*, II.XXXii, 280.

[76] It is interesting to note that in the history of enforcement, here the bishops were being asked to investigate these situations and then of course as judges, give the foregone determination. This fits nicely with the inquisitorial role taken on by bishop judges which ultimately found its way into the civil law systems of the world via the Church's introduction of the Justinian Code which was taken up by various kingdoms of Europe following the Church's lead.

Theodoret's Ecclesiastical History covers from Constantine forward to approximately his own day, but by now in the chronology stretching from Eusebius to Theodoret, we see the idea of Constantine as ordained by God reaching heights unknown previously: he equates Constantine's calling with that of the Apostle Paul. The idea that Constantine was heaven sent, so to speak, lies with himself[77] and the vouchsafing of the idea by the likes of Eusebius, but here in the fifth century we catch a glimpse of just how entrenched such a perception had become, and this is important because in the very next sentence from this historian, after comparing Constantine to Paul, he writes on Constantine as a lawmaker.

> This [calm] was established for her [the church] by Constantine, a prince deserving of all praise, whose calling, like that the divine Apostle, was not of men, nor by man, but from heaven. He enacted laws prohibiting sacrifices to idols, and [ordered] churches to be erected. He appointed Christians to be governors of the provinces, ordering honour to be shown to the priests, and threatening with death those who dared to insult them.[78]

It is indicative of the importance this historian placed on law as a key instrumentality in the hands of someone who was sent by heaven to rescue Christians, I suggest, that the first two accomplishments of the emperor were enacting pro-Christian, anti-pagan, laws and appointing Christian governors. This seems to have been a person well aware of the power and importance of both politics and law, and it is somewhat strange to consider he credits a person sent by heaven as being concerned with both. Perhaps there is a purposeful analog here to Moses, who certainly has been cast as someone who brought

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[77] Lenski, *Constantine and the Cities*, 56 – 60.

[78] Theodoret, *The Ecclesiastical History of Theodoret, The Ecclesiastical History, Dialogues, and Letters of Theodoret*, trans. Blomfield Jackson, *Theodoret, Jerome, Gennadius, Rufinus: Historical Writings, etc.*, *Nicene and Post-Nicene Fathers of the Christian Church*, second series, vol. 3, eds. Philip Schaff and Henry Wace (Edinburgh: T&T Clark, 1886-1900; Grand Rapids: Eerdmans, 1979), 1.1, 33. Important to note here that Constantine outlawed private, not public, sacrifice, which I cite and discuss briefly later on. Theodoret is exaggerating, and may be reading back onto the record a situation that was indicative of his own era.

the very same from God to the Jewish people. The founder of Christianity, though, did not engage in this legislative activity or bother himself with state affairs, driving a wedge between politics and religion by allegedly directing that people to render to Caesar what is his, and to God, his own.

Theodoret notes the emperor's beneficence to the bishops following the Council of Nicaea, and one can see how edicts/letters conferring monetary benefits to the bishops would immediately and henceforth become a boon for the coffers of the church; in fact, this historian hints at exactly this:

> He then wrote to the governors of the provinces, directing that provision-money should be given in every city to virgins and widows, and to those who were consecrated to the divine service; and he measured the amount of their annual allowance more by the impulse of his own generosity than by their need. The third part of the sum is distributed to this day. [The reason for this is that the state was hit financially by a famine and could not maintain this, but he reflects that if it is merely one third and yet sufficient for Bishops to live comfortably with, then the magnitude of Constantine's salaries for priests and bishops coming from state coffers is evident.][79]

Although the bishops were not technically salaried state officials,[80] Constantine was directing money to them for redistribution out of the *imperial res privata*,[81] and thus his secondment of them into the legal apparatus of Empire becomes perhaps more understandable. On the other hand, having the bishop's courts open to litigants as early

[79] Theodoret, *HE*, 1.10, 48.

[80] The question of what the money was for is likely at least threefold in nature: The church edifices required funding and upkeep, and this surely would have been one reason for funds; the clerics themselves needed funds, a salary for basic living expenses; and thirdly, the care of the "poor and needy," noted above, was a part of the church's role in society at that time, a kind of social services for those with nowhere to turn. That some of the bishops would have used the funds inappropriately for their own personal gain is almost certain in some cases, and this can be inferred from various evidences, one of the strongest being Constantine's legislation against those who rushed to the offices available in the church for personal advancement (*CTh* 16.2. 1 – 6).

[81] Noel Lenski, Observations and Suggestions on Dissertation, 2022.

as 318,[82] the first pronouncement of this law, and they serving out of a sense of obligation and gratitude to their erstwhile deliverer, perhaps Constantine saw this gratitude waning as the church began the largest internecine conflict in its history up to then, the inaccurately styled Arian crisis; and perhaps he thought by essentially legislating[83] generous state funding for priests and bishops, it would assuage their petty but yet real differences. History shows he was wrong, the bishops and priests continued to joust[84] for supremacy over what Constantine called petty philosophical speculations.

But the benefactions of Constantine did not stop at salaries, he continued to be committed to the program of rebuilding damaged or ill-repaired churches, and expanded them, and had new ones built in large numbers. Here again, Constantine used the instrumentality of legal and political mechanisms and actors to ensure this would happen. Theodoret reproduces a letter, which he takes from Eusebius's *Ecclesiastical History*, of Constantine to Eusebius of Caesarea on the subject.

> [I am convinced the churches have fallen into disrepair for various reasons, so] ...now that freedom is restored, and that dragon [Licinius], through the providence of god, and by our instrumentality, thrust out from the government of the Empire, I think that the divine power has become known to all, ... Exert yourself, therefore, diligently in the reparation of the churches under your own jurisdiction, and admonish the

[82] That the legislation came in in 318 did not mean that bishops were immediately chosen or available as judges, for the simple reason noted by Seeck and discussed below, that imperial legislation could take months or more to reach parts of the Empire.

[83] Of course, he and Licinius had done this in an official way previously in the *Edict of Milan* 313 where it was ordered by law that churches and property be restored and state funds were to be used for their repair where necessary. Closer to Nicaea in 325, and even at Arles in 314, state funds were ordered to be employed for transport and accommodations of the bishops. Letters to governors of the provinces, one cited here immediately below, or to the more senior bishops themselves prove this reality of Constantine's reign. After Nicaea, gifts of wealth were given to all the bishops, according to rank, discussed below. Most of the churches that were built at Constantine's order are still in existence today and need no elaboration here. The city of Constantinople as New "Christianized" Rome also looms large on this point.

[84] The church wide split based on the antagonism between Eusebius of Nicomedia and Arius against Alexander and Athanasius needs no elaboration here but is discussed in detail below. The Donatist controversy has many of the same characteristics, also discussed below.

> principal bishops, priests, and deacons of other places to engage zealously in the same work; in order that all the churches which still exist may be repaired or enlarged, and that new ones may be built wherever they are required. You, and others through your intervention, can apply to magistrates and to provincial governments, for all that may be necessary for this purpose; for they have received written injunctions to render zealous obedience to whatever your holiness may command.[85]

The judges and governments of the provinces had been sent written injunctions commanding them to order money from public funds to be given over 'zealously' to the church for its building endeavours. For those who might claim the connection between the emperor and Eusebius of Caesarea was in some way merely casual, which I suggest the evidence demonstrates otherwise,[86] here it seems Eusebius[87] was trusted enough to have been named in these injunctions because he was to apply directly to magistrates and provincial governors[88] to receive funds, and he was the conduit for other bishops and clerics to receive funding as well. This example affords another example of Constantine's almost knee-jerk reaction to an appeal to law and the legal machinery to ensure his desire for the church's security in Roman society was followed through on.[89]

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[85] Ibid., 1.14, 53. See also Lenski's discussion of the fact that similar letters for building churches went to other parts of the Empire, *Constantine and the Cites*, 179 – 196.

[86] See Appendix B.

[87] In this letter, Constantine notes "Exert yourself, therefore, diligently in the reparation of the churches under your own jurisdiction, and admonish the principal bishops, priests, and deacons of other places to engage zealously in the same work", which means Eusebius was the conduit for funds for those churches under his particular jurisdiction, and there were other principal bishops that Eusebius is encouraged to "admonish" to act in the same way for other jurisdictions (see Lenski, *Constantine and Cities*, 179 – 1960).

[88] See letter of Constantine quoted immediately above.

[89] As pointed out in the discussion above, Constantine knew that an important part of the bishop's role was care for the poor and needy, hence part of the reason for the exemption from taxes and public duties. That the Roman governors of his day carried out this function badly is perhaps something which amounts to common knowledge. The third century chaos in so many areas of Roman experience which was followed by the heavy handed taxation and expropriation of riches by the Tetrarchy likely meant the bishops found themselves well suited to an aspect of governance that Constantine knew they were beholden to do as part of their religious mandate, as well as what the bishop's ostensibly owed him for saving their religion from destruction.

Theodoret also characterizes the work of the bishops at Constantine's Council of Nicaea as lawmaking. "[After pronouncing the Arian position as heretical in a series of sidebar interrogations][90] [t]he bishops then returned to the council, and drew up twenty laws to regulate the discipline of the Church."[91] These are the canons of Nicaea, laws on various matters from a prohibition against emasculation,[92] to one regarding bishops moving from see to see, the latter having been a live issue since the Arian Eusbius of Nicomedia had previously moved himself from the see at Berytus to the imperial capital of Diocletian, Nicomedia, where he was at the time of the Council in 325. Since this latter Eusebius was in a minority at the council, in support of the Arian position, it is no surprise his actions would be impugned by the Council in such a way. But in this case the important point was form and not content. These canons were laws made under the authority of Constantine, there was no pope or lead bishop at the time.[93] It is here that

[90] Theodoret, *HE*, VII, 45. This historian also speaks of the canons as laws in another place when he refers to Eusebius of Nicomedia breaking the law which may have been fashioned for him, when he left Nicomedia as bishop to assume the seat in the quickly growing city of Constantinople. Theodoret writes "… that those who carry their infatuation so far as to deny [the divinity of Christ] should likewise violate other laws, cannot excite surprise." (XVIII, 55).

[91] Theodoret, *HE*, VII, 46.

[92] No doubt in reference to Origen of Alexandria who did just that and is perhaps the single most important early Christian source revealing that the majority of Christians in his own time did not think of Christ as God himself; thus, because Origen was so influential to so many aspects of Christian doctrine, a problem for the anti-Arian or Orthodox party.

[93] The role of Pope comes much later, and there were, at best, senior bishops at this time. And the reason they were thought of as senior to the rest is twofold. The most important consideration was that these bishops had the biggest churches due to the fact they were concomitant with the largest city centres of the time: Rome, Palestine, Antioch, Alexandria, and Nicomedia. More people meant more wealth, and these churches were more conspicuous to the Imperial government, quite naturally. The second reason for senior bishops is apparently grounded in traditional notions of which places were most important for important occasions in Christian history which had taken place there. Thus, Palestine needs no explanation, Rome was the place of martyrdom for Peter and Paul, and Antioch was the place where followers of Christ were first called Christians and was also associated with Peter. Alexandria and Nicomedia were latecomers, the first vaulted because of its population and wealth of highly educated philosophers and teachers, the second was the residence of Diocletian. Rome as a city did not impress Constantine to any large extent, and there is no indication his relationship with any bishop associated with Rome was anything more than in

the confluence between church and state took on a legal trajectory previously confined to state laws that *affected* the Christian adherents. The two streams of legislation here became intertwined, as similarly noted by Ullmann and discussed throughout.[94]

Theodoret henceforth refers to bishops in council as judges, for instance when describing a council of bishops in Antioch in 330, they are characterized as "equitable judges"[95] and "truth-loving judges."[96] Interestingly, perhaps only because he was so closely connected to Constantine, is that Eusebius of Caesarea was chief among these judges.[97] The matter before the court council then was an allegation of adultery against one of the chief anti-Arian bishops, which was not surprisingly upheld by the pro-Arian panel of judges who deposed him. Here again, it is the form of the justice being administered that is worth noting, and the authority that now rested with bishops thanks to Constantine's intervention; and in this noted case, specifically because the judges took their decision to him and he fully accepted their judgement and authorized the banishment ordered.

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passing. Constantine's focus was always, and remained, on the East, the place of his origin and future capital of the new Roman Empire.

[94] See the discussion of the nature of the law emanating from Nicaea below.

[95] It should not be assumed that "equitable" refers to equity, as in the law of equity. Theodoret is likely referring to the bishops as merely "fair minded," not given to bribes, etc. It is more important for my purposes that he refers to them as judges in more than one place. That someone of his provenance did so is important to understanding how the church understood the bishop's role as including that of judge.

[96] Ibid., XX, 57.

[97] While Eusebius was close to Constantine and that alone would have vaulted his status amongst his peers, there is no suggestion here that he was anything like a Chief Justice of a Supreme Court, as in modern times. While the bishops did sit as judges, that certainly was not their prime function, and when they sat *en banc*, it was on church matters exclusively. On the other hand, just as a chief justice of a supreme court in modern times does not really have any more authority than their peers on the bench due to majority decisions being the rule, so too it was the majority of bishops who ruled on a matter. The emperor at times demanded the decision be unanimous, as with Nicaea.

III.ii.b: Other Sources on Constantine and the Law

Another source which speaks to Constantine's life and achievements is the *Origo Constantini*, the *Origin of Constantine*. The author remains anonymous, but the text is dated to sometime immediately after Constantine's death in 337 due to the precise nature of the information, not having been amended with unsupported details as with some later historians. Two important things are gleaned from this brief history of Constantine relating to his religious outlook and legal actions. The first was the observation that Constantine was indeed the first Christian Emperor, perhaps not including Philip the Arab, and that the former was instrumental in bringing a sea change in Roman religious life by making Christianity the premier religion of the state. The author notes on this change that "Constantine made the change with due order and care. He issued an edict that the temples of the pagans should be closed[98] without any loss of life."[99] This is ostensibly corroborated by Eusebius at VC 2.45, and we do see a law at *CTh* 16.10.1 prohibiting domestic sacrifices, but there is no indication Constantine issued an edict on the matter; his son, Constantius II, did issue an edict requiring some temples to be closed,[100] and when he refers to his father in the legislation as he does elsewhere, he

[98] Coming from a source favourable to Christianity and Constantine, it is likely that this interpretation of an Empire wide prohibition may refer to Constantius II in *CTh* 16.10.2 – 4, and thus have been read backwards as perhaps assumed to be the wish of Constantine, but it was not until after his death in November and December of 346 that any such legislation requiring temples to be closed was issued, at least as far as the records tell us.

[99] *Origo Constantini*, *From Constantine to Julian: Pagan and Byzantine Views: A Source History*, eds. Samuel N.C. Lieu and Dominic Montserrat (London: Routledge, 1996), para. 34, 48.

[100] In the two pieces of legislation regarding this prohibition, in the first in November of 346, CTh 16.10.3, Constantius II says that temples outside the city were to be left alone because they were the origin of "long established amusements" for the Romans. In December of that year, he issued another edict, CTh 16.10.4, ordering that "the temples shall be immediately closed in all places and all cities." It leaves open the door for interpretation that when he says in "all paces and all cities," he refers to inside the city walls of Rome

merely notes that sacrifices were prohibited, not the closing of Temples.[101] The unwarranted enthusiasm of this author, along with the later Christian historians, about Constantine's reforms mirrors the praiseworthy tone of Eusebius, but it was not until the time of those later historians that Temples were actually closed. There is no indication that paganism stopped in its tracks, or that Constantine did not allow various public rites to continue.[102] It is perhaps better to sound out a trajectory here, to notice the direction of this emperor's laws: away from the support of pagan worship to the encouragement of Christian religion. As noted above, Constantine's law at CTh 16.10.1 did prohibit the practice of private pagan sacrifices,[103] but it also directed that if lightning hit Imperial buildings, then soothsayers ought to be consulted as to the reason for this, and written records of these events were to be meticulously kept and referred up to the emperor's court. While this law can hardly be attributed to Christian influences, some of his other laws noted above on exemptions for bishops, laws making them judges, and legislation regarding family law and slavery were explicitly or implicitly connected to Christian religion and mores. It also has to be remembered that this law comes in 321, Constantine having not yet changed his coinage to reflect Christian symbols, but continuing to employ traditional pagan images. That he had begun legislating in favour of the religion in 313 with the Milan Edict does not imply he had changed religions, and the statute of 321

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and every other city, but his edict of one month previous was still valid: temples used merely for the amusement of the people and that were outside city walls were allowed to continue. If one tried to claim that he changed his mind over that brief time period, then it would require explanation why Theodosius II left the November law in his collection. It is very likely it was left in because it was still good law and the policy of Theodosius was still the same regarding temples used for entertainment by the people.

[101] CTh 16.10.2 – 4.

[102] See N.C. Lieu and Dominic Montserrat, *Origo Constantini*, end note 90, 61.

[103] On whether Constantine issued a law against sacrifice, see Scott Bradbury, "Constantine and the Problem of Anti-Pagan Legislation in the Fourth Century," *Classical Philology* 89.2 (April, 1994): 120 – 139.

noted above proves that. Constantine was an emperor caught between two world-views, between two epochs of Roman history; that he would have his feet on both sides of the fence throughout his reign is no surprise. He is important for introducing and embracing the Christian religion and bringing the bishops into the constitution of the Roman empire, setting them on a trajectory for societal power and influence from which they never retreated for some 1500 years.

In terms of perhaps the most interesting of the sources for Constantine's era and his adoption of the Christian religion into the environs of the state is that of Zosimus (fl. 590 – 510). This historian served as advocate of the imperial treasury under Eastern Roman Emperor Anastasius (491 – 518), and was naturally a resident of Constantinople. His sole seminal work is entitled *Historia Nova*, and is a rich source for the life of Constantine. He was a polytheist who saw the departure from the worship of the traditional Roman gods as the reason for the fall of Rome. He writes: "When Constantine and Licinius were in their third consulship (A.D. 313), the period of one hundred and ten years had elapsed and they ought to have kept up the traditional festival. By neglecting it, matters were bound to come to their present unhappy state."[104] Zosimus was as zealous for the traditional gods of Rome as Eusebius was for the Christian god, and it is perhaps ironic that their accounts of Constantine remain the two most important in terms of scope and detail.

There is no doubt that Zosimus saw the move of Constantine towards Christianity and his concomitant actions as the death knell for the glory and power of the Roman Empire,

[104] Zosimus, *Historia Nova*, trans. Ronald T. Ridley (Canberra and Sydney: Australian Association for Byzantine Studies, 1982; 2006), 2.7.2, 28.

and this writer shows a marked distaste for him at many points, delving into what otherwise would be thought of as petty and disparaging comments. Yet, he does commend Constantine on a number of points, and coming from a critic, this praise, jaded though it may be, is doubly important when compared with estimations at the hands of historians who were beholden to the emperor.

Historia Nova introduces Constantine as the son of "illegal intercourse of a low woman with the emperor Constantius…."[105] We are also told that by the time of his flight from the Court of Galerius, that it was clear to many people that Constantine already wanted to be emperor.[106] This is apparently because of the desperate move of Constantine to maim the horses he rode on after disembarking from them at each station along the way to avoid any pursuers, but there is no record of anyone ever pursuing him, and how Zosimus makes this leap from maiming horses, even if it were somehow proven accurate, to wanting to be emperor is unclear at best — perhaps he was just afraid for his life. But it gives a salient indication of how this historian saw Constantine's character: desperate and calculating. He gives a good report of Constantine's tactics at the Milvian Bridge episode, and paints Constantine as the deliverer of Rome, in keeping with the other historians' accounts and the Arch of Constantine which celebrates the fact and stands to this day. Constantine apparently punished only a handful of Maxentius's closest associates[107] and is pictured as a fairly even-handed conqueror, not bent on any overzealous revenge, which is interesting because as noted it shows Constantine in a good light. Contrary to the

[105] Ibid., 2.8.2, 28.

[106] Ibid., 2.8.3, 28.

[107] As Noel Lenski points out, Constantine actually rewarded many of Maxentius's closest associates; see Noel Lenski, "Evoking the Pagan Past: *Instinctu divinitatis* and Constantine's Capture of Rome," *Journal of Late Antiquity*, 1.2 (Fall 2008): 204 – 257.

Church historians who allege Licinius provoking Constantine's response to take up arms against him owing to the former's harsh persecution of Christians, Zosimus alleges it was because Constantine hived off one of the provinces under Licinius's jurisdiction, and it was apparently Constantine's "way" to break pacts, as was the case here.[108]

This historian then spends the next ten paragraphs, 2.18 – 2.28, describing Constantine's military prowess over a ten year period in his victories over both Licinius and Barbarian armies in spite of being outnumbered in many cases and having chosen to support the Christian religion at the expense of traditional Roman religious predilections. Constantine, we read, was then the sole ruler of the Roman empire, and:

> At last he no longer needed to conceal his natural malignity but acted in accordance with his unlimited power. He still practiced the ancestral religion, although not so much out of honour as necessity, and he believed the seers, since he had learned by experience that they prophesied the truth in all his successes, but when he came to Rome, he was filled with arrogance, and thought it fit to begin his impiety at home.[109]

The account of Eusebius reads contrary to this and has Constantine receiving victory upon consulting the Christian god for victory early on, but that a Christian historian associated the emperor's victories with God and the polytheistic one with the gods is hardly surprising, and the truth of his predilections probably lies somewhere in the middle. The impiety noted in the above quoted passage is important because it is how Zosimus sees the conversion of Constantine to Christianity coming to pass. It regards the killing of his own son, Crispus, on being suspected of having intercourse with his step-Mother Fausta, the wife of Constantine and daughter of Constantine's enemy, Maximianus Herculius; Constantine had her killed as well. Zosimus records that

[108] Ibid., 2.18.1, 32.
[109] Ibid., 2.29.1, 36.

Constantine felt such guilt over these actions, and being unable to be absolved from his sin by the Roman priests, turned to an Egyptian Christian priest who was friendly with the ladies of the court and told him his sin would be forgiven.

> Constantine readily believed what he was told and, abandoning the ancestral religion, embraced the one which the Egyptian offered him. He began his impiety by doubting divination; for since many of its predictions about his successes had been fulfilled, he was afraid that people enquiring about the future might hear prophecies about his misfortune. For this reason he applied himself to the abolition of divination. (5) When an ancient festival fell due and it was necessary for the army to go up to the Capitol to carry out the rites, for fear of the soldiers he took part in the festival, but when the Egyptian sent him an apparition which unrestrainedly abused the rite of ascending to the Capitol, he stood aloof from the holy worship and thus incurred the hatred of the senate and people. [30] Unable to endure the curses of almost everyone, he sought out a city as a counterbalance to Rome, where he had to build a palace.[110]

While there are obvious difficulties with this account of Zosimus, the fact that Zosimus sees Constantine's adoption of the Christian religion as being connected to his murder of his son and wife is important. It is important because it goes to the heart of perhaps why Constantine seems so zealous about the Christian religion at many points in his various letters,[111] and the odd time in a rescript; and if making the Christian god happy was a way for him to be released from his crimes, is it any surprise then, that he would one day make the bishops of this Christian god his close personal allies and judges throughout his empire?

Interestingly, Zosimus's account of Constantine's building activities borders on the hagiographic, praising him for how he built edifices for Apollo, Rhea, and Fortuna Roma, and thus giving us another piece of evidence on the fact that Constantine was an

[110] Ibid., 2.29.4-2.30.1, 37. On Constantine incurring the hatred of some of the people of Rome, see Hans-Ulrich Wiemer, "Libanius on Constantine," *Classical Quarterly* 44.2 (1994): 511 – 524, at 516 – 518.

[111] Cameron and Hall, *Life of Constantine*, 1999. See, amongst many other examples of Constantine's letters in the same translation of this work of Eusebius, Book 3, 16 – 20, p. 127 ff.

emperor clearly covering his bases in terms of religion. But Zosimus writes something telling in the very next sentence of his history, and this after he noted Constantine's conversion from the traditional Roman gods to Christianity out of guilt for his crimes, and strangely inserting praise for Constantine for making Byzantium an essentially pantheistic city scape. He writes: "Constantine fought no more successful battles."[112] Of course, this was Zosimus's thesis statement, essentially. Once Constantine made the move away from traditional Roman religion to Christianity, according to this historian, the favour of the gods left both the emperor and his empire. But for an emperor who Zosimus had praised for prowess in battle over a number of passages, winning him sole rule of the Empire, the statement is ironic and a categorical error, because as the historian notes, the Empire with Constantine as sole emperor was at peace,[113] so the fact he fought no more successful battles during peace time is hardly, then, conclusive of his claim.

In terms of Constantine's legal machinations indicated by Zosimus, structurally the emperor doubled the number of Praetorian Prefects to four, who in authority were second only to the emperor himself, and this move likely for political expediency along the lines of Diocletian's reforms. These prefects had previously been in charge of food distribution, the army, and prosecuting and punishing military crimes, and Constantine assigned them to four sections of the Empire, a move very reminiscent of Diocletian's restructuring. But Constantine upset the balance according to this historian and let the prefects continue only to be in charge of pay and food distribution for the armed forces, while he instituted a further military court of magistrates, the *Magistri Militum*, one for

[112] Zosimus, *Historia Nova*, Ridley, 1982/2006, 2.31.2, 38.
[113] Ibid., 2.32.1, 38.

infantry and the other for horse divisions, who would be the judges for military crimes. We read that by making the paymaster and the judge two different civil servants instead of one, the soldiers acted with impunity and did as they pleased, whereas they were more obedient, out of concern for pay no doubt, under the old system. The interesting aspect of Zosimus's observations of this transition of powers was the fact that he sees Constantine doing this to ensure the prefects, previously second only to the Emperor in prestige, would not have too much power assigned to them, the inference being that Constantine was drawing all authority to himself,[114] and I suggest this is reasonably borne out by the facts and is also noted by Dillon, as discussed above.

This sixth century civil servant, after criticizing the emperor on other counts, gives evidence of his own attitude toward Christianity, something important when assessing the rest of what he has to say about Constantine. He wrote: "After this, Constantine continued wasting revenue by unnecessary gifts to unworthy and useless people, and oppressed those who paid taxes while enriching those who were useless to the state; for he thought that prodigality was liberality."[115] This is likely a reference to the Christian Bishops and of note is the fact that Zosimus saw them as 'useless to the state.' Because of his distaste for Constantine's choice of religion, it is only partly helpful that we have this perspective, because he was not alive in Constantine's time so would have no proof of the character of the bishops upon whom Constantine gave gifts of estates and funds, and so his 'unworthy and useless' people more reasonably affixes to the Christian religion of his own day in the late fifth and early sixth century, and he is merely projecting that distaste

[114] Dillon notes this, discussed herein.
[115] *Historia Nova*, ibid., 2.38.1, 40.

back to Constantine's activities in his account. Immediately following this passage he gives us insight about Constantine legislating on taxation.

> (2) He also laid a gold and silver tax on all merchants throughout the empire, including the poorest urban shopkeepers; he did not allow even unfortunate prostitutes to escape. .... Anxious also to contrive some harm for the more affluent, Constantine appointed each of them to the rank of praetor and used this honour as a pretext for demanding a large sum of money. (4) So when those appointed to arrange this came to the various cities, everyone could be seen fleeing and going abroad, for fear of gaining this honour and losing all their property. He also made a list of the property of the richest people, on which he imposed a tax called a follis. By such exactions the cities were exhausted; for as these demands [laws] persisted long after Constantine, they were soon drained of wealth and most became deserted.[116]

The idea of taking on duties, giving over property, and paying heavy taxes as a praetor, or being under the burden of guilds under contract to the state, started with Augustus, not Constantine. It was a process of social-financial degeneration that started long before the fourth century emperors. While Zosimus is right that such exactions did hasten the fall of the empire, he was wrong to ascribe it to one single emperor.[117] This history, as it concerns Constantine, ends with a comment symptomatic of the partisan views of Zosimus: "After oppressing the state in all these ways, Constantine died from a disease."[118]

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[116] Ibid., 2.38.1-4, 40-41.

[117] As to why the tax regimes of earlier emperors, even the first, Augustus, did not bring the Empire to its knees as was the case during the tetrarchy, seems fairly clear. Augustus expanded the borders of Rome immensely, and with that new area came wealth in not only tax revenue, but agricultural goods, mining, expanse of trade, etc. During the reigns of emperors after him, they rode on his coattails, as it were, literally, and were mostly just maintaining a status quo until the Ilyrian emperors attempted to reorganize and expand the empire once again, which they did, but by this time the cultural crossover between the barbarian and Roman peoples of empire began a process of organized tribes seeing the value and prestige of taking back their lands, and conquering Rome itself, which they eventually did. The constant incursion of these tribes eventually wore away at the imperial purse and resources such that the Ilyrian emperors were faced with either giving up territory and working with a smaller empire or taxing people to the brink of collapse. Their decision to tax, expand, and conquer, rather than retreat and economize cost the Roman Empire its Western territories.

[118] Ibid., 2.39.1, 41.

To help fill out the context for Constantine regarding how he was seen as a lawgiver, two Byzantine histories give us a few things to consider. The first, *The Anonymous Life of Constantine (BHG 364)*, perhaps written as early as the ninth century and using some unknown sources making it of interest to historians,[119] points to an influence of Constantine's early training at the hands of his father, Constantius, in the business of lawmaking. It is recorded that:

> Moreover, he made a practice of instructing the child about imperial rescripts; so from childhood he had all the qualities of an emperor: prudence, character, bearing, reverence, courage and, in sum, all the finest qualities in word that he later came to fulfil in his deeds.[120]

That Constantine's father had cared about his son from an illegitimate union in more than a passing way is clear in that we know Constantius sent his son to the Court of Diocletian to be trained as a future leader. Diocletian clearly accepted this choice. The mention of Constantine being trained in imperial lawmaking from a young age, even before going to Diocletian, is at least a reasonable presumption given the very highest of education that would have been the lot of the son of a Caesar in the Tetrarchy. The notion also accords to Constantine's seeming familiarity and usage of legislation to get his point across in many instances, immediately following his rise to power. A corresponding piece of evidence which may stand to corroborate this practice of training the young is found further on.

> He was the first emperor to promulgate, as his foremost statute, a decree that the shrines of idols should be restored to those who had been consecrated to Christ; furthermore, his son Crispus joined him in making this legislation. Constantine's

[119] *The Anonymous Life of Constantine (BHG 364)*, trans. Frank Beetham, rev. Dominic Montserrat and Sam Lieu, Lieu and Montserrat, *Constantine to Julian*, 97-106.

[120] *The Anonymous Life of Constantine*, *Constantine to Julian*, [68r].4, 110.

> second enactment was that only Christians should serve in the army and be held worthy of imperial rank....[121]

The important thing to notice here is the reference to Crispus working with Constantine to create and implement this legislation. Crispus had not fallen out of favour with his father at this time, and so here again is the Father training the son and future leader in the business of legislation, and thereby giving us a clue as to the importance attached to it by Constantine himself, and again, by inference to the above, where Constantine likely learned his conviction about the importance of lawmaking: from his own father. We also learn, from Eusebius, that Constantine had his other sons, of Fausta, trained in the laws.[122] Since the author of this life of Constantine used sources unknown to us currently, we also have to take the reasonableness of the inference in combination with the fact that as this is unstated elsewhere, the writer could be referring to accounts far closer to the events themselves.

John Zonaras was a late eleventh and early twelfth century legal civil servant in the imperial court of the Byzantine Empire, and he wrote an *Epitome of Histories*, the second Byzantine history considered here. Since this writer uses unknown sources no longer extant when describing the period covering the reign of Constantine, his work remains important to historians.[123] He was First Secretary of the Chancery in Constantinople sometime during the reign of Alexius Comnenus (1081 – 1118), and as a legally trained

[121] Ibid., [68r].21, 125.

[122] Eusebius, VC or HE; see also, Firth, *Constantine the Great*, chp. 15. "[S]pecial professors had been engaged to make them proficient in political affairs and a knowledge of the laws."

[123] Banchich and Lane, *Zonaras*, 1-3.

scholar in charge of the courts, his insights on Constantine based on his sources are worthy of consideration here.

On Constantine himself and his particular view of his own role as Emperor, Zonaras gives us an important fact, from an unknown source, that is found nowhere else, but would seem to fit. Zonaras records:

> It has also been recorded that he despised evil and regularly remarked that it was necessary that the man in control spare nothing at all, not even his own limbs themselves, to ensure the stability of public affairs. Being humanely disposed toward those converting from evil, he used to say that one must amputate the diseased and rotted limb lest it also infect the healthy, not however, that which already happened to be healthy or was becoming healthy.[124]

For my purposes in providing evidence for Constantine's character as a lawmaker and ruler engaging the instrumentality of Christian bishops as judges in the Roman legal system, this statement is important. It well accords with the Constantine we know from a variety of other important sources, such as Eusebius, Lactantius, and the Church historians. Constantine was apparently willing to do anything to make the empire stable: his lead involvement with the affairs of the Christian church's bureaucracy and their de-stabilizing activities is borne out by the facts, the most pressing being the fact it was Constantine who convened the empire wide constitutional gathering of Nicaea. Nothing like it had ever taken place before in the history of the Church, although much smaller synods of bishops had made decisions on regional matters from time to time. His knee-jerk reaction to call the Council of Nicaea and root out the discordant elements, as he certainly did when he banished Arius and his handful of supporters, gives us an example of the lengths this emperor was willing to go. If the 'stability of public affairs' was at the

[124] Ibid., 4.25-26, 158.

heart of Constantine's thinking, something he repeated regularly as we are told, then one is basically forced, if we accept the premise to be good, to accept that Constantine's intervention in the Donatist and Nicene controversies was far more about this kind of stability than doctrine.[125]

III.ii.c: Conclusion on Constantine's Observers

The panegyrists are obviously in the mode of delivering speeches that praise their subject, and in the same way we must employ caution when reading the evidence of his Christian contemporaries, recently delivered by him, and their overly laudatory characterizations of the emperor, so we are obliged to apply the same caution to these speechmakers. But the caution does not take away from what are otherwise hard facts about the main features of Constantine's actions. He certainly did forgive debts, encouraged Romans in the towns to come back to their previous occupations without fear of being held to account for debts accrued under the previous regime, and was a famously dedicated builder of forts, bridges and other infrastructure for the towns. He was also famously successful on the battlefield, and fairly merciful to his enemies of Roman persuasion, and this is explicitly noted by the historian Zosimus who had an extreme distaste for Constantine. He was groomed by his father in the business of governance and was tutored and trained up at the court of Diocletian, the senior emperor in the tetrarchy. These sources give us important evidence of the perspectives of Constantine's contemporaries when it comes to his law-making, his upbringing, his military prowess, and his policies where it concerned the welfare of the

[125] This emphasis on Constantine's wish to control a volatile situation in a growing religion cannot be interpreted without also factoring in his zealous support of the religion and his own actions which bear out the character of someone who thought his reign rested in the temper of the gods. Pragmatism only goes so far in explaining Constantine.

state and its citizens. In terms of Constantine's specific decision to make the bishops judges, I have suggested that the most salient event that would have moved him in this direction was the Donatist controversy, to which I turn next.

III.iii: Constantine and the Donatist Crisis

Almost as soon as Constantine chose to adopt Christianity[126] for himself, he was faced with a Christian crisis; it was one of two in the nexus of his attempts at religious pacification of this unwieldy population of Christian prelates, and ergo the concomitant populations, that were at each other's throats over issues of what essentially boiled down to either questions of property ownership or philosophical disputes within the theology of the Christian religion.[127] As R.M. Grant observed on the emperor's adoption of Christianity, Constantine's "[r]ecognition led to intervention."[128] It is with the first crisis, the Donatist controversy,[129] where I suggest we can find Constantine's motivation for making the bishops judges, as he did in 318.

Because this event is so important to Constantine being exposed to the bishops in a judicial role, I will discuss aspects of the Donatist crisis in somewhat more detail than I have with other contextual factors so far. This first crisis the Emperor faced revolved

[126] As will be discussed below and first noted by Walter Ullmann, Constantine as emperor was expected to be the keeper of the peace in both society and relating to the practice of religion, hence *Pontifex Maximus*. The fact that social unrest amongst Christians was affecting public order meant that their various internecine conflicts would have been directly under his authority in any event. That he got so involved with the religion beyond mere peace keeping is an important factor when considering the vaulted place in society that Constantine gave them above and beyond the leadership types of any other religion.

[127] The Donatist and Arian crises.

[128] Robert M. Grant, *Augustus to Constantine: The Thrust of the Christian Movement into the Roman World*, (New York: Harper & Row Publishers, 1970), 238.

[129] As noted at the outset, for the best ancient source for the proceedings surrounding the Donatist Crisis, see Mark Edwards, trans. and ed., *Optatus: Against the Donatists*, Translated Texts for Historians, vol. 27 (Liverpool: Liverpool University Press, 1997).

around a group of rigorist priests and bishops who had not handed over their scriptures/writings to the Romans during the persecution of Decius, and who felt that those who had should not be admitted back into their previous offices in the church's governance. Perhaps unsurprisingly, the Donatists, so named because of Donatus who challenged the 'lapsing' bishop of Carthage for the seat of power, felt they should be the ones to govern the church and keep the Church's property, and they, perhaps surprisingly, appealed this decision directly to the Emperor.[130] Averil Cameron points out how Constantine's decision to intervene based on this appeal, "…initiated a momentous precedent for Christian rulers of intervening in Church disputes."[131] But as Ullmann noted above on Constantine's role as it relates to the issuance of the *ius publicum* and being responsible for the *utilitas publica*, this was not so much of a precedent setting as an engaging of the legal status of the religion as a *corpus* that was legally recognized. In terms of Constantine's direct involvement in the bishops' disputes generally, Ullmann wrote:

> Only from the point of view of public law is the convocation by an emperor who is no Christian in any formal sense, comprehensible. His presidency of a council, organisation, participation, confirmation of its decrees and conferment of legal, that is, enforceable character on them is accessible to understanding only from the standpoint of the Roman public law which manipulated (as it now was) by an absolute ruler, considers him as the custodian, the guardian, the curator or conservator of the *status rei Romanae*. To act in the interests of this *status* is the ruler's foremost duty, and especially when this so recently liberated body of Christians exhibited a degree of dissension that threatened the very programme which Constantine pursued.[132]

[130] Firth, Constantine the Great, chp. 9.
[131] Averil Cameron, *Constantine and the Peace of the Church*, 545.
[132] Ullmann, *Constantine's Settlement*, 9.

The fact the some of the religious leadership thought of Constantine as their legal custodian is suggested initially by their appeal to him in this dispute from the Donatist party, as well as the cooperation and involvement of the so-called Catholic bishops in the hearings that Constantine ordered following the appeal. And yet, this suggestion has to be countered with the real possibility that the rigorist bishops might have appealed to any emperor that was not openly hostile to the Christian religion. Constantine's growing relationship with the religion seems at least one salient factor in the decision of the rigorists to appeal their case directly to him.[133]

Cameron's observation of a first implementation of a precedent in the Donatist situation, leading to the Council of Nicaea in 325, must be bounded by the contextual reality that Constantine was acting in his legal role as emperor and responsible for both the status of the Roman people and the *utilitas publica*. That he intervened using the public law is not the precedent, but his secondment of the mechanism of the synod to employ this law was indeed a precedent setting event.

If there was a shift in the state's relationship to the Church, it was not so much on the part of the emperor but the Christian religion itself. David C. Alexander points out, "…the willingness on all sides to consider ecclesiastical issues as subject to the state's adjudication in the form of a Christian emperor is one of the most striking results of

[133] My own sense is that the rigorists would have appealed their case to any emperor that was not openly hostile to the religion. This time period represents Constantine's initial and growing relationship with the bishops, and was a long way off from the reliefs on coinage being changed in the 320s which replaced the pagan images with Christian ones (noted in chapter III). Because of this, it would be difficult to prove that he was thought of by all bishops as a Christian emperor, although certainly the bishops of his court like Lactantius and Ossius thought of him that way.

Constantine's ascendance to the purple and movement through the "Donatist" issue."[134] The fact the Donatists appealed to the emperor[135] shows their willingness to use legal imperial means to achieve their end, meaning they acknowledged the legitimate judicial power and role of the emperor; and another author has pointed out that Donatus was certainly a character who was committed to the state, even if not wholly aware of how his unwillingness to compromise would hurt the Donatist cause in the long run, because he apparently once openly condemned a corrupt judge for bringing dishonor to an esteemed Roman institution.[136]

While the rigorists demanded the opposite, those who had held office and handed over Christian writings during the persecutions felt they should hold their posts, and thus a polemical struggle which amounted to 'us' versus 'them'. The question arose as to which group of Christians should inherit all the property being returned to the Church by Constantine. In a real way, it was a dispute over property, over wealth and power. Constantine referred the question to a legal hearing involving the Bishop of Rome and other bishops, perhaps prescient of the future strengthening of deference paid to this otherwise, at least in theory, regular bishop, and the decision was against the Donatists. Timothy Barnes observes on this first attempt by Constantine to have the case be decided by "nonpartisan" bishops sitting as judges and arbitrators in the case:

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[134] David C. Alexander, "Rethinking Constantine's Interaction with the North African "Donatist" Schism," *Rethinking Constantine: History, Theology, and Legacy*, ed. Edward L. Smither (Cambridge: James Clarke & Co, 2014), 55. Alexander cites S.L. Greenslade, *Church and State from Constantine to Theodosius* (London: Camelot, 1954), 16-17.

[135] Edwards, *Optatus*, 1.22, at p. 22.

[136] José Fernandez Ubiña, "The Donatist Conflict as Seen by Constantine and the Bishops," *The Role of the Bishop in Late Antiquity: Conflict and Compromise*, eds. Andrew Fear et al. (London: Bloomsbury Academic, 2013): 44-45.

"although[Constantine] names the bishops Maternus of Cologne, Reticius of Autun, and Marinus of Arles as arbitrators, they were not to decide the issue by themselves. They were to go to Rome[137] to hear representations from Caecilianus and ten African bishops from each side with the bishop of Rome presiding."[138] This was pragmatic thinking by Constantine:[139] he employed a group of religious leaders to arbitrate their own dispute, but it cannot be ignored that by this time he had begun the process of adopting the Christian religion and therefore his involvement in the final hearing is more understandable. While Caecilianus was acquitted by this initial bishops' court, Constantine received another direct appeal from the rigorists[140] and reopened the case on the basis of an allegation that the Council had not heard all the evidence, but had instead met in secret and given a biased verdict. Constantine accepted this appeal and summoned a council of Western bishops at Arles in 314,[141] calling certain bishops of all the Western provinces to sit *en banc*.[142] A second and final appeal was heard in 316 with Constantine himself sitting with the bishops as judges to pronounce the verdict, which affirmed the

[137] Edwards, *Optatus*, 1.23 – 1.24, at p. 23 – 24.

[138] Timothy Barnes, *Constantine and Eusebius* (Cambridge, Massachusetts: Harvard University Press, 1981), 57.

[139] Constanine's involvement was first secured by a letter from the proconsul of Africa, Anulinus, who was approached by Donatist bishops with charges against Caecilian, bishop of Carthage. This letter has been preserved by Augustine, Ep. LXXXCIII.2 (J. Stevenson, ed., *Report of Anulinus to Constantine, 15 April 313*, *A New Eusebius: Documents illustrative of the history of the Church to A.D. 337* (London: S.P.C.K., 1963), 316) What is clear is that by this time, Anulinus had both been at the Emperor's court where he received orders to be on the look out for "certain persons of unstable mind" who were causing grief to the "holy and Catholic Church" (Eusebius, *HE*, 10.6, 463) and sent a letter by Constantine instructing him to ensure that the clerics under Caecilian be "once for all be kept absolutely free from all the public offices" (Ibid., 10.7, 465) so that they could focus on proper worship and "confer incalculable benefit on the affairs of the State" (Ibid.). Anulinus subsequently received two documents from "certain persons" of the Donatist faction ("party of Majorinus") followed by a "great throng of the populace" (*Report of Anulinus*) and in his official capacity sent these documents with a letter to Constantine to decide the matter. These orders and letters and official involvement were the beginning of the Church State relationship, it seems.

[140] Edwards, *Optatus*, 1.25, at p. 25.

[141] Eusebius of Caesarea, *HE*, X.v.21 – 24.

[142] Ibid., see discussion at 58.

bishops' previous decisions.[143] The Donatists would not give up, and when Constantine ultimately resorted to ordering the vicar of Africa to confiscate the rigorist churches because they would not heed the decisions reached by the bishops' courts, violence ensued and Roman soldiers and a mob are alleged to have killed several Donatists, including two bishops.[144] With Licinius to deal with, Constantine, finding himself in the difficult position of supporting what looked to be the violent suppression of Christians, even if they were a sect, ultimately decided to let the two parties co-exist. As the Donatists had taken over the Basilica in Cirta and had many clerics on the local senate, he had another Basilica built for the exclusive use of Christians who sided with Caecilianus. Under Constantine's new compromise in 321, the Donatists flourished, and at a Council in Carthage some years later, 270 Donatist bishops attended, virtually the same number as would be at Nicaea, a daunting and telling number indicating the superiority the Donatist church enjoyed in Africa over their Catholic counterparts.

In terms of how Constantine's handling of this case and his employment of the bishops as judges was seen by Augustine, his description of it is indicative of the legal nature of the proceedings:

> For the Emperor, being appealed to, sent bishops to sit with him as judges, with authority to decide the whole matter in the way which seemed to them just. This we

[143] Augustine, "Letter of Constantine to Eumalius, Vicar of Africa," *Contra Cresconium* III.82 (*P.L.* XLIII.541); Routh, *Reliquiae Sacrae*, ed. 2, IV, p. 317, as in J. Stevenson, *A New Eusebius*, 327. See also W.H.C. Frend, *The Donatist Church: A Movement of Protest in Roman North Africa* (Oxford: Oxford University Press, 1952), 158 – 159, citing Augustine on dating (*Ad Donatistas post Collationem*, xxxiii).

[144] *Sermo de Passione Donati* (PL 8.752 ff). In Ibid., 61. But see, on the tenuous evidence that Constantine was directly responsible for any violence and the fact that such violence may have rather occurred "accidentally in the course of a scuffle over church property", Noel Lenski, "Constantine and the Donatists," 107 – 108 (see also generally 109 – 114); accessed online at https://www.academia.edu/25027535/Constantine_and_the_Donatists_Exploring_the_Limits_of_Religious_Toleration.

> prove, both by the petitions of the Donatists and the words of the Emperor himself, both of which were, as you remember, read to you, and are now accessible to be studied or transcribed by you. Read and ponder all these. See with what scrupulous care for the preservation or restoration of peace and unity everything was discussed; how the legal standing of the accusers was inquired into, and what defects were proved in this matter against some of them; and how it was clearly proved by the testimony of those present that they had nothing to say against Caecilianus, but wished to transfer the whole matter to the people belonging to the party of Majorinus, that is, to the seditious multitude who were opposed to the peace of the Church, in order, forsooth that Caecilianus might be accused by that crowd which they believed to be powerful enough to bend aside to their views the minds of the judges by mere turbulent clamour, without any documentary evidence or examination as to the truth. .... But assuredly they had not come to judges who could be persuaded to such madness.[145]

Important for this study is the fact that Constantine employed the machinery of Roman public law to enforce the decisions of the Bishops, and this was previous to his legislation of 318, discussed below, making the bishops judges. It is also the case that North Africa was a major food producing region of the empire, so again his motives for quelling this dispute can as easily be seen as more of a secular move versus a purely religious one.

Ullmann observed that Constantine's use of the mechanism of the synod was calculated and politically astute:

> It was the employment of the instrument of the synod which can be reckoned by all accounts a real master stroke on the part of Constantine — and entirely within the framework or public law. ...Constantine realized the potentialities which the approach by an African Christian body to him presented. He asked the pope, Miltiades, to enquire together with other bishops, into the pending questions.... When the desired result was not achieved in October 313 and appeal was made to him, he himself now ordered that a synod take place at Arles on 1 August 314. The specific significance of this measure of Constantine was that the eventual decision was formally to be taken by the ecclesiastics and, therefore, be synodal, although it was Constantine's will alone which brought the synod into existence and sustained it.[146]

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[145] Augustine, *Letter XLIII, Letters of St. Augustin, The Confessions and Letters of Augustin, With a Sketch of His Life and Work, Nicene and Post-Nicene Fathers*, vol. 1, first series, ed. Philip Schaff (Peabody, Massachusetts: Hendrickson Publishers, 1886; 2004), 43.14, 280.

[146] Ullmann, *Constantine's Settlement*, 9 – 10.

Constantine wrote to the victorious party of Cecilianus, Bishop of Carthage, instructing him that he had made imperial officials beholden to carry out orders involving paying the Church in Africa tremendous sums for their support, and involving the proconsul and vicar of the prefects/judges, who were to punish those of the Donatist party if they persisted in their unlawful course of challenging the bishops' decision. Constantine wrote:

> I have sent dispatched a letter to Ursus, the most most distinguished finance minister of Africa, and have notified to him that he be careful to pay over to thy Firmness three thousand *folles*. .... And since I have learnt that certain person of unstable mind are desirous of turning aside the laity of the most holy and Catholic Church by some vile method of seduction, know that I have given such commands to Anulinus, the proconsul, and moreover to Patricius, the Vicar of the Prefects, when they were here, that they should give due attention in all other matters and especially in this, and not suffer such an occurrence to be overlooked; therefore if thou observest any such men continuing in this madness, do not though hesitate to go to the above-mentioned judges and bring this matter before them, so that (as I commanded them when they were here) they may turn these people from their error. May the divinity of the great God preserve thee for many years.[147]

In his concomitant letter to Anulinus, Constantine wrote instructing him that all Catholic Church clergy under Cecilianus:

> ...should once and for all be kept absolutely free from all the public offices, that they be not drawn away by any error or sacrilegious fault from the worship which they owe to the Divinity, but rather without any hindrance serve to the utmost their own law. For when they render supreme service to the Deity, it seems that they confer incalculable benefit on the affairs of the State.[148]

Here we touch on the epicenter of Constantine's mind on the matter of the importance of religion to the state, and these rescripts of his show how he was fully engaged in the dispute resolution of a religion because he was convinced the pleasure of the divinity would inhere to the stability of the state, to the *utilitas publica*. He was also concerned to

[147] Eusebius, *HE*, 10.6.1-5, 461-463. As Dennis Pavlich pointed out to me, this missive shows the emergence of a process that recognizes the power of the church to resolve disputes enforceable by the state.

[148] Ibid., 10.7.1-2, 463-465.

have disputes settled peaceably rather than having these fractious groups killing each other, a direct threat to the public good. That he was deeply concerned to keep the one God on his side is seen another letter to the Donatists where he is justifying his wish to interrogate Cecilianus himself in Rome rather than in Donatist laden African provinces: he writes, "it seemed to me best that … if the investigation took place here [meaning "there" in Africa] the end of the matter will not be that which is proper and demanded by the spirit of truth, and that through your excessive obstinacy the event will be such as displeases the heavenly divinity and greatly impair my own judgment, which I hope will remain forever unblemished …."[149] R.H.C. Davis noted on Constantine's superstitious nature that "…Constantine thought that as God had entrusted him with the government of all earthly things, He would punish him if he did not enforce the divine laws by helping to preserve the harmonious unity of the Church."[150] It is no surprise, then, that a man of this mind would then employ bishops as judges throughout his empire immediately following these hearings,[151] for we might wonder who better to decide on local matters than the representatives of the 'divine will' which vouchsafed Constantine's rise to power. As for the Donatist party, Constantine's efforts came to naught: the rigorist faction in

[149] Optatus, *Optatus: Against the Donatists*, Mark Edwards, trans. and ed., *Translated Texts for Historians*, 27 (Liverpool: Liverpool University Press, 1997), Appendix Six, 192.

[150] R.H.C. Davis, *A History of Medieval Europe*, 14.

[151] It may be asked why, if Constantine made the bishops judges because he thought they were capable of it, did he not dismantle the regular modes of dispute resolution in the courts, but as noted above and below, Constantine both evinces anger concerning the level of corruption in the legal system and shows a clear respect for the courts by making the presiding judge the one who is to authorize the bishop's decision in the 318 legislation. The merging of the bishops' courts into the Roman legal system may have been done to act as a check on the level of corruption in the courts at the time, by giving litigants faced with it another avenue of redress.

Africa continued and Constantine was finally forced to let the two factions exist cheek by jowl in their localities.[152]

While the bishops' connection to the divine and Constantine's wish to please that divinity are paramount in any analysis of why Constantine would appoint bishops judges, it must also be pointed out that not only were the bishops already acting as sitting judges for disputes between litigants in their own religious communities across the empire, we know from a third century text entitled *The Didascalia Apostolorum* that being a judge was essentially one of the bishop's primary roles. The *Didascalia*, put simply, was ostensibly a manual of practice for the Christian bishop. Where it discusses bishops, much of the text, it describes the qualifications necessary for someone to be made a bishop and what duties and mode of practice they ought to follow as bishops.

While the title of the third century work translates to 'Teaching of the Apostles', scholarly consensus amounting to common knowledge in the field holds that it has no connection to the Apostles whatsoever, except insofar as it might have relied on oral traditions, which of course expand and transform over time. What the *Didascalia* does give us, though, is the perspective of a Christian, almost certainly a bishop from the early-mid third century, on what a bishop's role and duties were as leader of the Christian community they were responsible for. The author's main emphasis when it comes to the role of the bishop is the bishop as judge of those under them. While I will canvass some of these details more fully in the next chapter, it is enough here to observe that this

[152] There is no suggestion here that Constantine intervened all the way along in this process based on religious zeal, nothing of the kind, it was a local problem that ultimately could only be contained and not solved. His fondness for the religion and adopting their bishops as judges stands outside of his primary motive in this dispute of bringing public order to this unsettled and very important province of the empire.

author sets out the following duties for bishops in their role as judges. Bishops are to be righteous judges, and familiar with the law of Moses from Deuteronomy;[153] they should see themselves as judges and teachers who sit in the place of God Almighty;[154] Deacons (leaders below bishops) can decide any matters they are able to, but what they cannot the bishops must judge;[155] bishops ought to discourage religious adherents from lawsuits, but if they proceed, it should not be before heathen courts, any heathen witnesses/testimony are not to be relied on as against a Christian litigant, and the heathen is not to be informed about lawsuits in the Church;[156] when a lawsuit happens, the bishop must judge, and it must be scheduled for a Monday, so that there will be a week in which to come to a peaceful resolution between the parties, before the following Sabbath day;[157] the litigants must be present before the bishop judge, the bishop must investigate the lawsuit carefully, and must also investigate whether and what previous accusations or lawsuits have been brought by either litigant;[158] bishops must by investigation determine the characters of the litigants in the community in general, and with great caution pronounce judgment, and they are forbidden to make judgment only on the testimony of one litigant; etc.[159]

The reason why this evidence for bishops operating as judges in their own communities is important to Constantine's making them judges in the Roman legal

[153] Margaret Dunlop Wilson, trans., ed., *The Didascalia Apostolorum in English* (London: C.J. Clay and Sons, 1903), IV, 25.
[154] Ibid., V, 27 – 28.
[155] Ibid., XI, 59.
[156] Ibid.
[157] Ibid., 60.
[158] Ibid., 61.
[159] Ibid., 62.

system, is that Constantine would have been well aware of this fact due to his contact with the bishops, noted above, previous to the Donatist hearings. He knew of the bishops' role as judges within Christian communities prior to making his decision to invite them to sit as judges in his place in the Donatist hearings, eventually sitting and judging the case with them. Could his first hand experiences being taught as an initiate by bishops and seeing how they governed and sat as judges in their own communities help explain why he turned the hearings over to the bishops to decide the matter? Further, could both this knowledge of bishops as judges and his sitting as a judge alongside them have acted on his thinking cumulatively and led him to make them judges in the Roman legal system soon after the Donatist hearings? I think the principle of plausibility leads us to just such a conclusion.

Yet, as noted above, the Donatist faction was recalcitrant, and unwilling to abide by the decision that Constantine and the bishops had made. After a failed attempt to force the matter, Constantine gave way to the pragmatic choice to let the large Donatist church exist alongside the churches represented by the bishops who sided with him. It certainly was not an optimal situation, two separate Christian groups with their own separate churches in the cities of North Africa, but Constantine was willing in this case to compromise. Going forward, you would think Constantine might then in future, because of the failure of the bishops' decisions in the Donatist proceedings to carry the day, adopt different means to bring the warring factions within the Christian church to heel, but no: as Roland H. Bainton first pointed out: "[t]o reach a solution, three methods had been tried: reference to the bishop of Rome, to the emperor, and to the council of bishops.

Though none had succeeded, Constantine was committed henceforth to the conciliar approach."[160] The emperor's later reaction to the Arian problem, his immediate calling of the Council and changing the location last minute to ensure he would lead the deliberations, was colored by his experience with the Donatist hearings. David C. Alexander makes this point: "[t]hat Donatist action specifically anticipated, shaped, or altered imperial response to the Arian disputes is clear; the issues are in terms of development and degrees. .... The current study shows that Constantine was moving toward an increasingly refined understanding of schism and heresy as states of spiritual war. The degrees to which that "war" in North Africa only reached a stalemate primed and informed Constantine's determination to address new spiritual wars in the East in strategic ways."[161] I would suggest Alexander's language of "spiritual wars" is misleading, though, because Constantine was primarily concerned with public order as the emperor, not with dogmatic points of view, as he clearly evinces in the Nicene dispute, chastising the parties for fighting over such trifles, discussed below. Constantine was, by calling the Council of Arles, for instance, and subsequent Council of Nicaea, engaging in a levelling of practice, an entrenching of custom;[162] he was also supporting the idea of inter-regional authority: that leaders of many regions would make judgements which were binding for the whole. It is tempting to see the proliferation of international organizations in the twentieth century as somehow an echo of, in part, the inter-regional hearings that Constantine called in these instances. Following the Donatist crisis, Constantine faced a

[160] Roland H. Bainton, *Christendom: A Short History of Chistianity and Its Impact on Western Civilization*, vol. I, (New York: Harper & Row, 1964; 1966), 96-97.

[161] Alexander, *Rethinking Constantine*, 89.

[162] The custom that he as emperor would convene these synodical hearings and pay for them out of state revenues.

larger problem, the Arian controversy. To deal with this problem, Constantine called all bishops, not just a select few, to attend to his Council of Nicaea. Because Constantine issued Roman law at this gathering, had the bishops create their own laws, the canon law, and because this more than any other event saw Constantine interacting and building relationships with bishops on an unprecedented scale, leading as it would to his expansive 333 rescript, it is worth a brief review of what happened.

III.iv: Constantine, the Bishops, and the Council of Nicaea

> The great and holy council of Nicæa having been convened by the grace of God, and by the most religious emperor, Constantine, who summoned us from different provinces and cities, we judge it requisite that a letter be sent from the whole Holy Synod to inform you also what questions have been mooted and debated, and what has been decreed and established.
>
> Theodoret, *Ecclesiastical History*

I have suggested that the historical method is best employed when the historian engages in an imaginative re-construction of an historical event and its concomitant personages which is based on extant data, but which also must engage in a participatory re-thinking pursuant to the motivations of the characters involved such that the end result can be read as an intelligible whole. What gives the historian of this event great hope, and perhaps great anxiety, is that there is no existing record of the Council which is considered fulsome and first hand.[163] It is hopeful from my perspective because reconstructing the aspects of the Nicene Council relating to lawmaking requires the employment of the historical method I have just laid out, the focus of which lay in an 'imaginative reconstruction.' There are sources which tell us what Constantine's role was,

[163] Robert M. Grant, "Religion and Politics at the Council of Nicaea," *The Journal of Religion*, vol. 55.1 (January 1975): 1 – 12.

along with a few of his key comments at the Council of Nicaea, and this coming to us through the eyes and worldviews of usually very partisan authors, the Church historians Eusebius, Socrates, Sozomen, Theodoretus, and Athanasius, and yet with enough cross-referenced points of agreement such that we know the basic outlines of what happened. While we are not left with a written account in the style of Hansard, we know enough to reconstruct the Council in its most important instantiations.[164]

I argue that while the Council of Nicaea's standardizing flashpoints, aimed at the Church at large, appeared to be only based on questions of Church doctrine and tradition, it was a council called by the Emperor, headed by the Emperor, and had tremendous consequences for the status of bishops in society and the state's citizens at large. Nicaea was as much about securing peace in Roman society as it was about securing peace in the Christian Church, and it was both a council deeply connected to Roman law and was the birthplace of canon law that would dominate and influence the budding legal systems of the nascent states of Western Europe, almost all of which would join the Church, after the fact, in their "re-discovery" of the Justinian Code in the 11th century. On the legal significance of Nicaea, Walter Ullmann noted that the *ius publicum* came to play a major role as Constantine tried to bring the Christian religion to a peaceful concord, and Nicaea was one of the most significant instances of this:

> He, not yet a Christian, summoned councils, and notably the ecumenical council to Nicaea, in which the theological and dogmatic controversies were to be thrashed out. In this measure alone the efficacy of public law showed itself plainly: the requirement of public peace and the public interest alike presupposed a united body that was capable of assisting the imperial designs, and it could do only if it had a commonly agreed doctrine and programme. Organization, management and administration of the

[164] *Vide infra*.

> Council lay entirely in the hands of the imperial commissions and committees. The substantive decisions, however, were taken solely by the 318 participants. The decrees did not acquire general validity in law until the imperial government had sanctioned them. This requirement was likewise based upon the *ius publicum*, because both the *sacra* and the *sacerdotes* were involved, and they were involved as fully constituted and structural parts of the Roman empire.[165]

The intimate confluence of religion and state was a contextual reality for the late antiquity Roman empire, and not driven solely by the predilections of the emperor. As R.H.C. Davis wrote, "[i]t is often hard for an irreligious age to recognize that religion has in fact been capable of dividing men as effectually as political doctrine or economic status, but unless the fact is recognized the history of the Middle Ages will remain a meaningless labyrinth."[166] These two realities were intertwined. Like so many watershed events in history, it was as much about context as content.

Timothy Barnes emphasizes that when Constantine conquered Licinius and the East in 324, the Church was already a sizeable part of the Roman Empire's population, especially in the East, with whole villages of Christians in some parts.[167] As to the exact size of the Christian population, many scholars including Adolf von Harnack, A.H.M. Jones, and R.M. Grant refuse to commit to exact numbers, but Rodney Stark has suggested that it was 1.9 percent in 250, 10.5 in 300, and 56.5 in 350.[168] As well, and perhaps more

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[165] Ullmann, *Public Law as an Instrument of Government*, 39.

[166] R.H.C. Davis, *Medieval Europe*, 32.

[167] Barnes, *Constantine and Eusebius*, 191. "When Constantine conquered the East in 324, the Christian church which he rescued from persecution was not a small and insignificant sect, nor did his patronage alone immediately raise it to a position of dominance. Christianity was powerful and respectable long before it acquired an imperial champion. .... Throughout the East, the Christian bishop had become a respected figure of the urban establishment who provincial governors treated with respect or deference, and bishops acted as judges in legal disputes within the local Christian community."

[168] Frank Trombley, *Geographical Spread of Christianity*, *The Cambridge History of Christianity*, vol.1 *Origins to Constantine*, eds. Margaret M. Mitchell and Frances M. Young (New York: Cambridge University Press, 2006), 306. See also the primary work by Rodney Stark, *The Rise of Christianity: How the Obscure, Marginal Jesus Movement Became the Dominant Religious Force in the Western World in a Few Centuries*

importantly, if sheer numbers are not enough to make a ruler sit up and take notice, the bishops were, as H.A. Drake has detailed, powerful political figures in Roman society even before the ascendance of Constantine.[169] The bishops enjoyed this influence due to their senior position in their local constituencies and without being primarily answerable and accountable to the emperor.[170] Drake writes:

> There was a reason for Constantine to be cautious. For Christians were never fully dependent on the resources he had placed at their disposal. What gave bishops their greatest power were certain intangible assets unique to their office, such as the longevity of their tenure — for life, under ordinary circumstances — which allowed them to forge a bond with their congregations which few local aristocrats and none of the annually rotated imperial governors could hope to match.[171]

Perhaps Constantine's bequest of political, legal, and financial power to the bishops can then be put in more understandable context when the power the bishops already had is considered. I suggest, similar to Burckhardt's political pragmatist thesis, that he was adopting an existing and growing bureaucracy that would better be able to handle and pacify a growing Christian population, and in time, the entire population of the Western Empire; whether this was intended or not is not the point, it happened. In short, then, Constantine had little choice *but* to adopt the Christian church: they were too large to ignore, and conveniently, for him, espoused a theology which embraced rulers as appointed by God.

(San Francisco, CA: Harper San Francisco, 1997), cited in and discussed at length in Adam Schor, "Conversion by the Numbers: Benefits and Pitfalls of Quantitative Modelling in the Study of Early Christian Growth," *Journal of Religious History* 33.4 (December 2009): 472 – 498.

[169] H.A. Drake, *Constantine and the Bishops* (Baltimore: The Johns Hopkins University Press, 2000), see generally 393-440.

[170] Ibid., 399.

[171] Ibid.

As Robert M. Grant notes, emperors in the second and third century, and before Constantine, had had the opportunity of working this aspect of the Christian Church to their own advantage, since Christians were often very strict about obedience to secular rulers,[172] but it was not until Constantine and his association of Christ as the god of victory in war that this relationship blossomed. Constantine's Nicaea followed his earlier adoption of the Christian god of war, legislating an end to persecution, and the legal proceedings of the Donatist crisis, and the Nicene council was a direct response to two further disputes within the Empire wide Christian Church. It could be maintained that, to some degree at least, both sides of each conflict were also indicative of the Eastern and Western halves of the Roman Empire, although not entirely. One longstanding dispute concerned the date for Easter, some Churches following the practice of the Jews and others chose a different time and did not want to have anything to do with the traditions of those "outside the grace of the Gospel."[173] Many of the Churches of the East preferred the Jewish dating, and many in the West were against it. It may be little surprise, then, Constantine's rule emanating from the West and bishops such as Lactantius and Ossius teaching him and his family about the religion, that Constantine ruled on this matter in favour of the West.[174] But in other matters such as the focus of his building program, his

[172] Robert M. Grant, *The Sword and the Cross* (New York: The MacMillan Company, 1955), 71.

[173] Eusebius, *VC*, 3.5.1; see generally 3.5.1-3.52.

[174] On this issue Constantine seems to have won the day almost single-handedly, but his prejudice against Jews was neither constitutive nor indicative of all Christian Churches of the time, and this is clear not only because of the churches who wished the date of Easter to remain fixed to the Jewish dating, but also because many early Christian groups were essentially Jewish offshoots, in nature and practice, with strong ties to the parent religion. The Roman Empire had a long history of conflict with the Jews of Palestine going back to the bloody annihilation of Jerusalem and its Second Temple in 70 C.E. by the Roman General Titus, later to be Emperor. It seems that in some very real way, the Roman world, Constantine included, bestowed their racist attitudes and perceptions of the Jews directly to many Christian Bishops, one of the prime and perhaps tragic examples being Eusebius of Caesarea; tragic because he was to

later relationship with the bishops of Nicomedia and Caesarea, sympathy for Arian Bishops generally, and his general whereabouts for most of his latter reign, he was an emperor of the East; the further on in his reign we examine, the more Eastern his sympathies and commitment became.

Aside from the dispute over the dating of Easter, the major flashpoint at Nicaea came about due to a dispute between a priest and a Bishop in Alexandria, and it concerned a strictly theological question about God the Father's relationship to Christ. Constantine had just finished putting down his last rival and consolidating his sole power over the Empire in 324, and soon upon his docket came a case of monumental proportions, but one bearing on the societal and religious, not the military aspects of his rule. Constantine apparently referred to it as yet "another war which he must struggle to win."[175] As soon as the Church had been freed from her erstwhile oppressor in the anti-Christian emperors of Rome's past, it found itself the beneficiary of a Christian and sympathetic Emperor in Constantine; but now that life and limb were not a concern going forward for the bishops and priests, they turned the psychology of conflict on themselves[176] concerning an issue which basically split the Church down the middle, and as with the Easter conflict, it was also an East-West (Arian-Alexandrian) conflict. Eusebius reports that because of this

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write the Church history of the first three hundred years that became the standard unchallenged version of events for centuries. In it, for instance, he credits the massacre of Jerusalem by Titus as God's fitting punishment to the Jews for killing Christ (Eusebius, HE). We can see the same language here used by Constantine. While the proof of aligned attitudes is present in the sources, a discussion of causes and correlations is outside the scope of this research. This question of the dating of Easter, though, was ancillary to the main issue which caused Constantine to convene his Council of Nicaea.

[175] Eusebius, *VC*, 3.5.3.

[176] R.M. Grant, Augustus to Constantine, 242. "In both instances [Donatist and Nicene crises] the unity of the church, long precariously maintained under the threat of impending persecution, was nearly shattered once this external pressure was removed. In the west the problem of discipline, acute for nearly a century, came to the fore; in the east the unfinished business of speculative theology created violent controversy."

crisis, churches and bishops were coming close to physical conflict with each other[177] and Constantine was not about to let his recently won peace crumble at the hands of his adopted religion.

The two disputants who were at the centre of this particular dispute over Christ's relationship to God, for their were previous disputes of this nature which were handled by the Bishops themselves in smaller scale Councils (for instance, the first Council of Antioch in 325 prior to Nicaea at which Eusebius of Caesarea and two others were excommunicated/suspended for their beliefs about Christ), were Alexander, Bishop of Alexandria, and Arius, one of his priests. The flashpoint was one of doctrine for the bishop and priest. Although the theologies at issue had histories of their own and many ancillary complicating matters, for this discussion it is enough to say that the crux of the matter was over whether Christ was of the same essence as the Father God, like him in every way, "God from God", as Alexander the Bishop preached openly, or whether he was the firstborn of all creation, and although like God, not part of God himself, which was the basic view held by Arius. In essence, the latter view claimed that Christ was a separate essence from God and, being a created being, there was a time when he did not exist. Alexander first met with Arius with a small conclave of ecclesiastical types in Alexandria to hear him out, and according to Sozomen, vacillated between agreeing with Arius and then returning again to the alternative opinion, deciding at the conclusion of the small

[177] Eusebius, *VC*, ed. Cameron and Hall, *Constantine's Letter to Alexander and Aruis*, 2.63-2.72.3, 122.

tribunal that Arius was wrong.[178] Due to Arius and the many Christians that agreed with his viewpoint, primarily in the East, Alexander ultimately branded him as an atheist and had him thrown out of the city. Although the victorious Nicene party — variously called the orthodox, the Nicene, or the *homoousios* party — later claimed it was Arius who began the dispute by espousing his views, both Socrates's and Eusebius's histories paint a different picture, the former explicitly writing that because of Alexander's open discussion on the Trinity, people were upset at this, notably Arius.

On learning of this dispute, Constantine sent his court bishop, Ossius of Cordova, with a letter addressed to the two disputants, but to no avail, the growing rift was too large by this time. Ossius convened a Council at Antioch just previous to Nicaea, and had the notable bishop Eusebius of Caesarea and two others excommunicated, and this seems to have upset Constantine, as noted by Henry Chadwick: "[i]t was a clear attempt to prejudge the issue and Constantine reacted at once by transferring the council from Ancyra to Nicaea (Iznik) near Nicomedia so that he could personally control the proceedings."[179] As with so many of Constantine's acts as Emperor, he acted decisively, and here the emperor would be the sole judge and arbitrator between the parties. Given his role as patron of the *utilitas publica,* this was clearly a big enough issue for the emperor to step in.

The council itself lasted from May 20th, 325 C.E. and went until June 19th. The Bishops stayed on and were invited by Constantine to celebrate his twentieth anniversary at a

[178] Sozomen, *The Ecclesiastical History of Sozomen*, Book 1, trans. & rev. Chester D. Hartranft, *Nicene and Post-Nicene Fathers,* second series, vol. 2, *Socrates, Sozomenus: Church Histories*, eds. Philip Schaff and Henry Wace (Edinburgh: T&T Clark, 1886-1900; Grand Rapids: Eerdmans, 1997), I.XV, 251..

[179] Chadwick, *The Early Church*, 130.

banquet on July 25. There was first a speech by Eusebius of Nicomedia who represented views similar to Arius[180] and it is understood that what he read was a credal formula which was subordinationist, or Arian leaning, in nature. Then Alexander, Athanasius, and their group shouted down Eusebius before he could finish and ripped up his creed, denouncing it as heresy. Then Constantine directed the reading by Eusebius of Caesarea of the credal statement that he as Bishop of Caesarea had used, and which could be seen to be a middle road between Alexander's party and Arius's group. Importantly, Constantine praised this creed from the Caesarean and proclaimed in front of all its orthodoxy and conformity with his own beliefs, which likely grieved folks like Athanasius and Alexander. Chadwick observes of the Emperor, "[h]e quickly made it clear that he deplored the censure of Eusebius of Caesarea and declared full support for his doctrines."[181] The final creed was the formulation that was likely put together by Ossius and informed by the Alexandrian party, but it was based on the Eusebian creed. They knew they could not stray too far from something the emperor lauded in front of all, so instead they kept the form and altered the content slightly, and importantly inserting the *homoousios* and knowing Arius would not accept it, because this Greek word meant "of the same essence", referring to Christ's relationship to God. While Constantine

[180] Eusebius held very similar views to Arius right up to the time of the council. Arius writes to Eusebius of Nicomedia [not Eusebius of Caesarea], "Eusebius, your brother bishop of Caesarea, Theodotus, Paulinus, Athanasius, Gregorius, Aetius, and all the bishops of the East, have been condemned because they say that God had an existence prior to that of His Son;..." See Arius, *The Letter of Arius to Eusebius, Bishop of Nicomedia*, in Theodoret, *The Ecclesiastical History*, trans. Rev. Blomfield Jackson eds. Philip Schaff and Henry Wace, *Nicene and Post-Nicene Fathers* vol.3, 2nd series (Peabody, Massachusetts: Hendrickson, 1994; Christian Literature Publishing Company, 1892), IV, 41. See also Lenski, *Constantine and the Cities*, 263 – 272 on the Arian controversy where it concerns Eusebius of Caesarea, Arius, and Eusebius of Nicomedia, among others.

[181] Chadwick, *The Early Church*, 130.

vociferously approved Eusebius's creed, it is not certain that he was even there when the final version by Ossius was presented, because we know that it was the sister of Constantine, Constantina, who encouraged the bishops to put away any petty differences and sign off on the creed. Ossius signed first, and then the other bishops, but Arius and a few others refused, but many of his party signed in spite of their reservations.[182] These once Arian bishops decided, in the true spirit of Constantinian pragmatism, to sign the document for the sake of peace. The only problem was, they had only done this to appease: but in my opinion that is exactly what Constantine wanted, bishops willing to appease each other for the sake of peace. Quite frankly, given the Emperor's character, I suggest he was likely rather more proud of this large group of dissenting bishops, those who held a view of the question very similar to Arius, because they did what he would have done, and performed outwardly for peace while the more immature bishops, at least from his calculating perspective, fumed over the "silly question."[183] Alexander achieved his temporary goal and had Arius excommunicated. Then, the date for Easter was decided upon, Constantine agreeing and insisting that it should be the same for all, and thus the

[182] Theodoret, *Ecclesiastical History*, 7, 44. Theodoret writes: "The above named [dissenting] bishops, however, did not consent to it in sincerity, but only in appearance." Theodoret then goes on to quote Eustanthius, the Bishop of Antioch as writing, *inter alia*, "After the Eusebian gang had been clearly convicted, and the impious writing [the confession of faith from Eusebius of Nicomedia stating that Christ was the firstborn of God's creation, his only begotten Son, and God the Word, etc.] had been torn up in the sight of all.... [Those adhering to the then impugned confession] fearing they should be ejected from the Church by so numerous a council of bishops, sprang forward to anathematize and condemn the doctrines condemned, and unanimously signed the confession of faith. Thus having retained possession of their Episcopal seats through the most shameful deception, although they ought rather to have been degraded, they continue, sometimes secretly, and sometimes openly, to patronize the condemned doctrines, plotting against the truth by various arguments." 7.44. Athanasius, quoted by Theodoret, writes similarly, "So these men concealed their unsoundness through fear of the majority, and gave their assent to the decisions of the council...." 7, 45-46.

[183] Eusebius, *Life of Constantine*, 2.71.6, 118-119: see 2.64-2.72 for the entire letter; see also Barnes, *Constantine and Eusebius*, 213.

traditional Jewish dating for the event was jettisoned. There were a number of other policy matters that were quickly dispensed with, and after the banquet, the Bishops were sent home with the new creed, gifts and money from the state, and in anticipation of the newly promised authority and building projects which awaited them in their respective regions.

That the emperor issued edicts[184] proscribing Arius and his writings, employing the threat of capital punishment for those guilty, means that there were two types of law emanating from Nicaea: church canons and state law.[185] Importantly, it was the church who directly influenced the subject matter of these edicts. Constantine would likely have agreed with either side of the debate, as long as there was unanimity, but because Arius

[184] A mention is made of this law of Constantine in a law of Theodosius of 435: ChT 16.5.66 (463).

[185] Socrates, Chapter XXIII: "Canons appointed by the Council; Paphnutius, a certain Confessor, restrains the Council from forming a Canon enjoining Celibacy to all who were about to be honored with the Priesthood.

Zealous of reforming the life of those who were engaged about the churches, the Synod enacted laws which were called canons. [1133] While they were deliberating about this, some thought that a law ought to be passed enacting that bishops and presbyters, deacons and subdeacons, should hold no intercourse with the wife they had espoused before they entered the priesthood; but Paphnutius, [1134] the confessor, stood up and testified against this proposition; he said that marriage was honorable and chaste, and that cohabitation with their own wives was chastity, and advised the Synod not to frame such a law, for it would be difficult to bear, and might serve as an occasion of incontinence to them and their wives; and he reminded them, that according to the ancient tradition of the church, those who were unmarried when they took part in the communion of sacred orders, were required to remain so, but that those who were married, were not to put away their wives. Such was the advice of Paphnutius, although he was himself unmarried, and in accordance with it, the Synod concurred in his counsel, enacted no law about it, but left the matter to the decision of individual judgment, and not to compulsion. The Synod, however, enacted other laws regulating the government of the Church; and these laws may easily be found, as they are in the possession of many individuals."

While there is mention of this law at ChT 16.5.66, there is no verbatim text of the edict, but enough similar prohibitions against heretics to correspond with the claim made here in the church histories and in the Code. While Constantine ordered state enforcement, it would most likely have been the bishops who could bring a case against anyone in regard to breach of the law, because it would be hard to imagine the secular authorities either knowing or caring what the bishops did, unless it was brought to their attention, after which they had the authority to punish according to the law. Yet, because this edict does appear to have existed, the point stands, Nicaea was the occasion for law making, both from the state and church.

On threat of capital punishment in edict, see footnote 191 on Sozomen's mention of such an edict.

stubbornly refused to cooperate for the general peace, the emperor had reason to be angry with him, and the Athanasian party knew Arius would not agree with their alterations, so they crafted the creed to that end. It was the Athanasian party who ensured it would be Arius who would be legislated against. Yet while that is true, the Athanasians ultimately failed because Constantine was won over to the Arian contingent of bishops within three years and Arius was commanded back into the church by the emperor following a personal visit between the returned priest and emperor, very possibly orchestrated by Eusebius of Caesarea. The creed remained the official position, but Constantine had the cooperation of the Arian bishops, and not Athanasius, and it is therefore no surprise he gravitated to those bishops.

While the decisions made at the council, whether doctrinal or canon law, were supposedly binding, they were not only disagreed with, at least in reference to the most significant decision, by the bishop of Nicomedia and others, but openly condemned as being the product of unsound minds by at least one bishop who was in the habit of collating canon law in this early period. We learn from Socrates that a certain "Sabinus the Macedonian, who calls all those who were convened there ignoramuses and simpletons. For this Sabinus, who was bishop of the Macedonians at Heraclea in Thrace, having made a collection of the decrees published by various Synods of bishops, has treated those who composed the Nicene Council in particular with contempt and derision; …."[186] While we do not know with certainty, one possible reason for this criticism of Sabinus might be due to the very general nature of the creed itself, which had

[186] Socrates, XXIII.

to be crafted so as not to swing too far one way or the other, and be vague enough, "of the same essence," for both sides of the debate to agree.[187] Another factor might be that the canon law proscribed certain things which were themselves obvious: that Christian adherents not castrate themselves (this a direct attack on the popularity of the teachings of Origen of Alexandria who did exactly that), or that bishops not move from city to city on a whim, something that Augustine was still addressing in cases brought before him a century after Nicaea. He writes on exactly this point in a case involving the bishop of Fussala, Antonius, referring this Nicene canon, "[b]ut [our judgement] whether in kindness or laxity, he attempts to turn to account, and use as a legal objection to our sentence. He boldly protests: "Either I ought to sit in my own episcopal chair, or ought not to be bishop at all," as if he were now sitting in any seat but his own. For, on this very account, those places were set apart and assigned to him in which he had previously been bishop, that he might not be said to have been unlawfully translated to another see, contrary to the statutes of the Fathers."[188] Augustine is making a direct reference, in *obiter* no doubt, to canon law created at Nicaea, which is taken as settled law, but it is clear Augustine's judgement simply accorded this controversial bishop limited privileges in the same see he had previously, and so it seems as if the idea of moving from see to see

[187] The creed would apply only to those inside the church, even though the emperor was involved in the promulgation of it, he did not enforce the religion on all people, that came later with *cunctos populus*. Issued by Theodosius the Great, where the Christian religion was proclaimed the only licit religion of the state.

[188] Augustine, *Letter CCIX*, *Letters of St. Augustin*, *The Confessions and Letters of Augustin, With a Sketch of His Life and Work, Nicene and Post-Nicene Fathers*, vol. 1, first series, ed. Philip Schaff (Peabody, Massachusetts: Hendrickson Publishers, 1886; 2004), 561.

was a surprisingly bold thing to be considered. Besides the canon law[189] and one edict at Nicaea, there was another more specific legal directive which arose, but as with the canon law, whether it was necessary remains in doubt.[190]

What can be said in summary about the Council of Nicaea's outcomes is that they were of a legal nature in the creation of canon and edict law, and Constantine's employment of the public law at Nicaea has been noted by Ullmann and I agree with that assessment. The deliberations showed the characters of the main players: Constantine, willing to agree to anything that meant unity and in no mood to rule on petty individual grievances between parties; Athanasius, unwilling to change his views even slightly to accommodate Arius, in fact, the opposite: he wanted him banned and temporarily succeeded; and Eusebius of Caesarea, falling in line with the emperor at every point, and clearly so much so that it was arranged by the emperor that it was the creed of this Eusebius that would be read out following the Arian party, and whose reading brought the emperor's heartened approbation in front of all the bishops. As to whether this was a finding of fact or rule of law, it seems clear that it was out of the domain of fact, being a theological

[189] The canon law applied at this time to those in the church only. While the state would enforce it, it was only the bishops who could reasonably police it.

[190] Socrates, Chapter XXIV.-- *Concerning Melitius; the Excellent Directions made by the Holy Council in his Complications*. The emperor ordered or sanctioned an investigation into the conduct of the bishop Melitius, and demoted him to essentially a bishop without a city, sentencing him to reside in Lycus, and this because "Melitius and his followers had manifested great rashness and temerity in administering ordination;..." The sentence, though, was confused, because all those ordained by him were allowed to continue in their positions of authority, but were thought of as being lower in "dignity" to the rank and file of church leadership; they were even allowed to move up in the ranks when any new appointments opened because of the death of the previous bishop. Again, if they were allowed to continue in their roles, adding that they could move up when any vacancy occurred, this is superfluous because that had always been the practice and thus it simply makes the general investigation and subsequent sentence look more like an instance of shaming than of substantive law, as Sabinus may have meant.

matter than could not be proven but merely decided by consensus, and was more akin to a rule of law.

The edicts sent to the bishops against the malcontents and their teachings were serious in nature, with capital punishment[191] threatened to those who "secreted" Arian writings and refused to destroy them on such accusation, at least according to the Church historian Sozomen; there does not appear to be any evidence on record that anyone died as a result of this instruction of Constantine to the bishops. The canon law was much less serious, although important for future generations. One interesting note is the fact that the idea of celibacy was agreed on by all as being too harsh for those who were already married before taking their office. That this canon law was done away with later on and celibacy reinstituted against the wishes of such an important council, the very first one, is perhaps surprising against the fact that the creed is still repeated in churches to this very day. Yet, it is not surprising in some ways: the only reason the creed survived is because in spite of the imperial favour moving in one generation to bishops of the Arian view, in another the Athanasian view, and with various emperors, it was ultimately the view taken by the Athanasian party which outlasted the very large contingent of Christians who had adopted the Arian view; in fact, the large majority of the barbarian tribes of Europe were converted to the religion from those who adhered to the Arian position. It was not until

[191] Sozomen, *The Ecclesiastical History of Sozomen*, Book 1, trans. & rev. Chester D. Hartranft, *Nicene and Post-Nicene Fathers*, Second series, vol. 2, *Socrates, Sozomenus: Church Histories*, eds. Philip Schaff and Henry Wace (Edinburgh: T&T Clark, 1886-1900; Grand Rapids: Eerdmans, 1997), 1.17-1.25, 253-257. Sozomen wrote at chapter 21: "[XXI: 1127] [t]he emperor punished Arius with exile, and dispatched edicts to the bishops and people of every country, denouncing him and his adherents as ungodly, and commanding. that their books should be destroyed, in order that no remembrance of him or of the doctrine which he had broached might remain. Whoever should be found secreting his writings and who should not burn them immediately on the accusation, should undergo the penalty of death, and suffer capital punishment. The emperor wrote letters to every city against Arius and those who had received his doctrines,….".

the Catholic conversion of Frankish king Clovis that the momentum began to swing in the other direction.

Constantine was a military general and king, not a theologian. He saw the epicenter of the internecine conflict as petty and ridiculous, and from a modern vantage point it was; it is almost a certainty he with his inner court of advisors and military men saw through the machinations of Alexander, Ossius, and Athanasius to get Arius banished, but the emperor was more concerned with the bishops unified than the few conniving prelates, even if one of them were sacrificed in the process. The fact that he welcomed back Arius, after he had acquiesced to the ruling at Nicaea, with open arms shows how little he thought of the overly harsh judgment of the Athanasian party.

One of the roles of Constantine that is central to this research is that of law-maker, and here at Nicaea he issued edicts regarding his findings and judgement on the issues. He was also certainly the one to encourage the recording of the decisions of the bishops by the imperial chancellery, as observed by Ullmann and noted above, and we know they were eventually adopted into the church's code[192] of canon law. While it is true that other decisions had been made by other smaller scale courts/synods of bishops, like those collected by Sabinus, nothing approaching the official documents issued by Constantine's court, with the exception of his edicts regarding the Donatist rulings, had ever existed.

[192] While certainly not a code in the style of the Theodosian or Justinian, it would be seen as foundational for church governance in centuries to come, with some modifications along the way.

Even the early Christian writings of the first century and a half were yet to be collated as a canon,[193] never mind the smaller church councils.

As a lawmaker, Constantine was always on the move, legislating far more than any emperor before him had,[194] and so much so that a good deal of the Theodosian Code is his. The subjects of his lawmaking seem to have been largely dictated not by legal innovation but the exigencies of the times. That he had adopted the Christian religion meant that he had to accommodate them legally, and he did that to make them a *religio licita*, but he did more than that. Following his experience with the bishops in the Donatist crises and all the hearings that were necessary, Constantine brought the Christian bishops into the legal administration of the Roman empire by making them judges. Nicaea then, was an instance the supreme mediator and judge, Constantine, expecting this section of the judiciary, the bishops, to be able to decide based on the evidence the proper course to take, after which he would vouchsafe their decision. The judgements were enforced with laws of the most serious nature.[195] Constantine was the supreme judge in the deliberations, but just as with the Donatist crisis, he preferred to have the bishops do all the judicial legwork for him. Eight years after Nicaea, Constantine apparently felt so comfortable with his decision to make bishops judges that he significantly expanded their powers and authority, discussed below.

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[193] It was not until at least 367 with the Festal Letter of Athanasius where the record shows a list of books. See footnoted herein, C.G. Bateman, *Origen's Role in the Formation of the New Testament Canon*, 2008.

[194] See above, Constantine's three hundred plus laws in the Theodosian Code, in addition to the ones that were left out, leave very little room to argue there was an emperor previous to him that legislated more.

[195] See discussion above. Capital punishment and confiscation of land and properties bear out the nature of his laws.

Chapter IV

IV.i: Constantine's Laws and the Bishops

Now that the reader has a basic understanding of the focus of this thesis, from the introduction, an account of the method I will be employing to support my claims, in the chapter on methodology, and some salient facts about the background and context in which Constantine decided to make the bishops judges, I will now focus in this chapter on the two laws of his which speak to this decision, and in the process bring in the opinions and claims of other scholars and present my own arguments which either challenge or support their suggestions. I close the chapter with some discussion, a sort of "then-what-happened?" section, of how these laws and Constantine's relationship with the church helped set the stage for the development of law and legal administration, and the Church's involvement in it, in Western Europe.

That Constantine as emperor was the source of law is important, and the content of laws credited to him do give us clues as to the degree to which Christianity affected his decision-making for the organization of Roman society. What follows is a brief series of observations of the salient probable causes that led Constantine to legislate in the way he did, the most relevant to this study being his association and public support of the Christian religion. This is important to this study because it helps us understand why Constantine would have wanted to enrol bishops into the Roman judiciary.

Constantine's laws seem to have been founded mostly on his own Roman ideals, and some, noted herein, betray almost a viva voce character, where his personality comes

bursting off the pages, as MacMullen noted. Where his laws do not jump off the page, one is tempted to suggest they were written by another hand, assistants and scribes, but that it was not his will behind them would be almost impossible to claim because these were public laws and each one of them that made it through the hands of the codes-makers continued to bear a date with his name.[196] Of course he also had counsel from his ministers, prefects, and governors, no doubt, and it may be the case that as J. Westbury Jones noted, "[o]ne thing is clear, that the bishops and clergy had great influence at court. Thus the law forbidding the selling of infants is ascribed to the influence of Lactantius, as well as the law forbidding crucifixion and branding on the face."[197] Lactantius lived to 320 and would have been part of Constantine's life up until his death, which is two years after the emperor issued the law on bishops as judges in 318, and five years previous to Nicaea. While the laws of emperors previous to Constantine had legislated against Christianity as a religion, as a group, the laws of Constantine relevant to Christians, part of the *ius publicum*, were directed at specific Christians, usually the bishops.

This change of focus from "group" to "person" relates to a suggestion by Eric Kahler that in the early fourth century, and with the confluence of church and state under Constantine, humankind was nearing the end of a transformation from the tribal

[196] I cannot believe that Constantine was not the prime mover on any of his laws. That he would delegate the creation of laws seems very unlikely. He seems preoccupied with control. I can assent to scribes and legal advisors writing them, dialoguing with him about them, but not either creating them or changing them in any significant way. He was a brutal emperor to some, and one cannot imagine his advisors wanting to upset him.

[197] Jones, *Roman and Christian Imperialism*, 200-201. But see on the fact that Constantine does not outright forbid the selling of infants, but instead attempts to forestall it, Judith Evan Grubbs, "Constantine and Imperial Legislation on the Family," *The Theodosian Code*, eds. Jill Harries and Ian Wood (Ithica: Cornell University Press, 1993): 120-142; *Law and Family in Late Antiquity: The Emperor Constantine's Marriage Legislation* (Oxford: Oxford University Press, 1995).

association to "individuality facing universality."[198] Law played a significant part in hiving off the individual vis-à-vis their community[199] and referred to rights of a kind. Such individual-centered legislation had been going on in the Roman experience since the Republic, but previous to that it was a very bifurcated affair with directives and policies aimed at keeping the two factions of Roman society, the plebians and patricians, separate and apart, and to the detriment of the former. Beginning with the Twelve Tables, which were created by pressure from the Plebians to make law more of a citizen-centered affair — making law public — and moving away from the dualistic and tribal essence of the law previously, law became more concerned with the individual. In the age of Constantine, the laws are focusing more on individuals, in this case bishops, and their rights and duties in Roman society, and not merely blanket provisions about groups like the Christians. And yet it is also the case that Constantine's (along with Galerius and Licinius) Toleration and Milan edicts[200] do bear this stamp. For those readers interested in the development of Roman law up until and including the time of Constantine, I have provided a very brief overview of the different stages of this process in Appendix D.[201]

As noted herein, some scholars see Constantine's moral preferences in his law much more attached to a traditional Roman austerity versus a purely Christian ethic, and thus

[198] Erich Kahler, *Man: The Measure* (New York: Pantheon Books, 1943), 174-175. "The Roman Empire in its last expansion created a new attitude in the human being. It evolved the private individual estranged from the community and defending himself against the exactions of that community. .... The fundamental innovation of this whole epoch is that the individual stands forth, the lonely private individual.... And this is the turning point of human history."

[199] Ibid., 174.

[200] On the problematic nature of the so-called "Edict of Milan", see Noel Lenski, "The Significance of the Edict of Milan," *Constantine: Religious Faith and Imperial Policy*, ed. Edward Siecienski (London: Routledge, 2017), 27 – 56.

[201] Appendix D: A brief overview of Roman legal development up to the Edict of Milan.

the claim is that Constantine's reforms simply followed trends that far preceded him, but there is sufficient evidence that some of his laws have a Christian basis. He legislated on the observance of Sunday as a day of rest,[202] Christian clergy were absolved from civic duties,[203] Christian churches were recognized as corporate bodies and anyone was allowed to leave all their property to the church in a will,[204] clergy were allowed to legally manumit slaves in their churches and their franchise would be recognized,[205] he forbade excessive cruelties to slaves and mandated that once free for twenty years a person could no longer be made a slave,[206] and the poor were to be taken care of at the expense of the state if parents could not afford to raise their child.[207] All these were examples of laws either directly concerning the church or influenced by Christian mores and practice, but there was a tacit push and pull from the new morality to old practice, and very rarely was the former solely the result of Christian influence. Also, very likely connected to his new Christian association was his abolishing the gladiatorial games in the same year as the Council of Nicaea in 325.[208] It is also true that the practice sporadically continued.[209]

Regarding Constantine making the bishops judges in 318, Judith Perkins notes that Constantine's adoption of Christian bishops into the administration of justice seemed to

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[202] Cod. Just. iii.12, 2. Although, while it is true the emperor ordered that the day of sun be a day of rest, it was the day of the Sun, after all. But as Jones, points out, it could have been made to serve two purposes, to set aside the Christian day of worship, and give honour to the pagan sensibility by honouring the Sun god. See consideration in Jones, *Roman and Christian Imperialism*, 209-210.

[203] CTh xvi.2.2. See also xvi.2.1; xvi.2.3; xvi.2.5-xvi.2.7.

[204] CTh xvi.2, 4. See also P.W. Duff, *The Charitable Foundations of Byzantium*, *Cambridge Legal Essays* (Cambridge: W. Heffer & Sons, 1926), 85. P. Clemente Pujol, *Conspectus Historiae Iuris Ecclesiastici Byzantini* (Romae: Pontificium Institutum Orientalium Studiorum, 1963), 31, p. 48.

[205] CTh ii.8, I. CTh iv.7, 1.

[206] Cod. Just. vii.22, 3.

[207] CTh xi.27, 1.

[208] CTh xv.12, 1.

[209] Ramsay MacMullen, "What Difference Did Christianity Make?," *Historia: Zeitschrift für Alte Geschichte*, Bd. 35, H. 3 (3rd Qtr., 1986), 331.

fit with his vision of a reordered judiciary, and this in line with a trend to make the *honestiores* (the rich) more liable to the punishments inflicted on the *humiliores* (the poor) for the same crimes, something they had previously avoided due to their status.[210] On slavery, Ramsay MacMullen claimed that, actually, slaves in Christian times were not treated any better than in the pagan era,[211] but Constantine's lawmaking did make treatment of slaves more humane, even if ghastly punishments of the Roman past continued, and given that many Christians, in a society with droves adopting the religion after the choice and favour of their emperor, naturally owned slaves. He also observed that "[i]n the fourth century as a result of the social advancement of its upper crust, church members while increasing their ownership of slaves lost their fellow-feeling for them too, and thereby no doubt were all the easier in their minds about administering harsh laws and treatment."[212] Also important is the fact that throwing criminals to the beasts and crucifixion also disappear from the record following Constantine, another piece of evidence to support Constantine's, at times, humanizing tendencies. MacMullen sees this as proof that Christianity did indeed make a difference, in the disuse of these practices.[213] Christianity also seems to have coloured Constantine's laws on sexuality and

[210] Judith Perkins, *Roman Imperial Identities in the Early Christian Era* (London: Routledge, 2009), 178.

[211] Ramsay MacMullen, "What Difference Did Christianity Make?," 325. But see Simon Corcoran's article on the fact that the law in question (which is the focus of MacMullen's article) is actually a law of Galerius: Simon Corcoran, "Emperors and Caesariani inside and outside the Code," S. Crogiez-Pétrequin and P. Jaillette, eds., *Société, économie, administration dans le Code Théodosien* (Villeneuve d'Ascq, 2012): 265 – 284.

[212] Ramsay MacMullen, "What Difference Did Christianity Make?," pp. 322-343.

[213] Ibid., 334.

marriage, and resulted in changes that were reflected in court proceedings, as MacMullen observed.[214]

While Christianity did not often alone steer Constantine's lawmaking, it seems reasonable to conclude that it did likely colour his thinking on a number of matters. The Christian bishops/advisors of his court[215] and his growing interest in church politics combined with his own strict morality — based largely, I would suggest, on his superstitious nature and fear of the Divine — are reasonable sources for laws which are arguably colored with a Christian sensibility. This relates to the push and pull going on in society at this very early stage of the Church's influence over societal norms, and with Constantine, that push and pull was going on in his own mind, evidenced by his laws which at times veer to Christian morals, and at others to a more strictly Roman and reforming sensibility. The laws which sit in the middle, such as the Sun-day legislation, leave some room for suggesting Constantine was happy for both sides to have it their own way, and as someone aiming at unifying an empire, perhaps this is why so many of his laws are arguably neither wholly Christian nor completely pagan, but some murky middle ground where both sides could claim ownership; certainly this was exactly the case with the compromise reached at the Council of Nicaea: fuzzy language that would allow the

[214] He writes, "The identification of areas where Christianity made a difference can perhaps best focus on sexual conduct. In this regard Christian ideas induced a change of law to legitimize slave marriages (but not to free the offspring thereof) and changes also to sharpen penalties against sexual deviance or misbehavior. Misbehavior was defined much more broadly. Pederasty, rape, any roughness toward respectable women, adultery, and seduction were all newly attacked by death penalties;72 and a letter of Jerome (above, note 43) shows us the enforcement of such laws, or similar ones, in the courts." Ibid., 342.

[215] The only way one can ascertain how this might have happened, because there is no records of such influence being manifested other than the laws, is the way Constantine's letters recorded by Eusebius give us insights into how the emperor viewed the bishops. The laws themselves give us information on this too. He seems to have thought very highly of them and that by giving them privileges and enabling them to focus on proper worship, he and his empire would be the benefactor.

two extremists Athanasius and Eusebius of Nicomedia to eventually sign off on the same wording of the creed with wildly different opinions about what they meant.

Many of the bishops summoned to Nicaea by Constantine were skilled rhetoricians in the law, and this is understandable given the fact that as a seat of significant power in the community, even the specifically Christian one, a learned man, revered in his own right, would reasonably seek the Bishop's seat in such a top-down Roman societal context. The historian Sozomen notes: "[m]any of the bishops who were then assembled, and of the clergy who accompanied them, being remarkable for their dialectic skill, and practiced in such rhetorical methods, became conspicuous, and attracted the notice of the emperor and the court."[216] Caroline Humfress, in her watershed work on bishops and courts that explores what she calls "the vibrant and creative culture of late Roman forensic ('courtroom') argumentation," notes that leading Christian ecclesiastics and polemicists were thoroughly immersed in this culture,[217] and that "…bishops educated in dialectical reasoning and rhetoric … appear as a fixed part of the Constantinian landscape;"[218] we know this is true given the restrictions which later emperors placed on bishops in their role as judges, because it meant they were truly immersed that role, and to a degree later emperors wanted to curtail, a point I will discuss below.

It is also true that Constantine saw first-hand the legal acumen of bishops early on in the Donatist hearings and then as delegates at Nicaea, so it is more reasonable to suggest

[216] Sozomen, *The Ecclesiastical History of Sozomen*, Book 1, trans. & rev. Chester D. Hartranft, *Nicene and Post-Nicene Fathers*, second series, vol. 2, *Socrates, Sozomenus: Church Histories*, eds. Philip Schaff and Henry Wace (Edinburgh: T&T Clark, 1886-1900; Grand Rapids: Eerdmans, 1997), XVII.1118.

[217] Caroline Humfress, *Orthodoxy and the Courts in Late Antiquity* (Oxford: Oxford University Press, 2007), 2.

[218] Ibid., 138.

that his making bishops judges in 318 and then his expansion of the bishops' powers in the 333 rescript were instances, again, based partly on experience, and not merely his fancy with the Christian religion.

Regarding the efficiency associated with political moves such as the adoption of bishops' courts, John Noel Dillon has observed more generally that Constantine seems to have been prone to close the gap between himself and his subjects by bold moves of administration:

> It is regrettable that the record of the administration of Constantine depends almost wholly on the legal sources, which often exclude references to administrative acts in preference to the principles that underlie them. The ecclesiastical sources offer at least a plausible analogy: the emperor might at any time cut through the veil of bureaucracy by sending trusted men to enforce his will. Therein lay the particular value of extraordinary administrators such as the *comites provinciarum* in contrast to the more mundane vicars established by Diocletian. The employment of confidants from the court to investigate and monitor provincial administrators facilitated the enforcement of existing and new rules; it moreover strengthened Constantine's own power—provided that the men on whom he relied proved worthy of that trust.[219]

This observation of Dillon about trusted men is exactly the point about the bishops: Constantine thought he could trust the bishops as judges to speak to legal matters in a way that would reflect his own policies and morality based on superstition, keeping in mind the fact they were now beholden to him because of his both rescuing their religion and adopting it. For Constantine, in many instances, his impetus seems to have orbited around the notion of efficiency. In this case, the efficiency of making bishops judges, I suggest, was ultimately intended to further entrench his rule, regardless of my suggestion that he saw the bishops as good candidates for judges on more superstitious grounds.

[219] John Noël Dillon, *The Justice of Constantine: Law, Communication, and Control* (Ann Arbor: University of Michigan Press, 2012), 116.

Constantine also employed the instrumentality of acclamation with the people of the Roman provinces, such that governors would have to hold court in public with a "throng" of people to either cheer or denounce the judgement in order to help keep the governors in line.[220] Praetorian prefects and counts were standing by to observe and pass on to the imperial court just who the crowd favoured. Constantine did not always give in to the populace, but it seems that if he did not agree with them, he would at the very least respond in a public letter encouraging them to reconsider,[221] and in this way a dialogue between the ruled and ruler was engaged in, and the people knew that their concerns had at least been heard and considered. It is also a matter of common historical knowledge via the historian Eusebius that Constantine wrote letters to his subjects on matters of religion, not merely to Christians, and this meant he intended that all his subjects were to

[220] Ibid., see footnote below.

[221] Ibid., see 131-136. "It will surprise no one that our record of public demonstrations and imperial response is far more extensive for religious controversy than for secular unrest. Bishops adeptly mustered broad and not infrequently violent support in the name of their beliefs. The actors and their causes were naturally of great significance to ecclesiastical authors, who indeed might themselves have been the instigators of such acclamations. The victims of judicial crimes must also have found patrons, although an obvious leader was hardly necessary to produce an enraged crowd. Public acclamation, though a weapon of the weak, was nonetheless formidable. The successors of Constantine likewise availed themselves of the potential for information, communication, and control offered by public acclamations. As Clifford Ando writes, "Later emperors evidently liked Constantine's legislation." [C. Ando, Imperial Ideology and Provincial Loyalty in the Roman Empire (Berkeley, 1999), 204.] Reports of acclamations circulated regularly between the provinces and the courts of subsequent emperors; by the reign of Valentinian and Valens, provincials were granted use of the public post in order to expedite the delivery of acclamations.65 Once the report of public acclamations was authorized, there was no return, nor is any such desire to repudiate the system established by Constantine detectable. The proliferation of acclamations and their record in late antiquity is a testament to the changed spirit of the times and of the monarchy itself. Ulrich Wiemer argues that the late antique emperors sought to involve as many of their subjects as possible in as many ceremonies as possible that brought them necessary and highly desired approval, unmediated by the civic elite; the emperors sought to encompass the whole empire in a net of symbolic communication. [Wiemer, "Akklamationen im spätrömischen Reich," 59–60; Brown, Power and Persuasion, 149–50] Constantine was the first to realize the potential of acclamations. His decision to authorize them would shape the relationship of emperor and subject long after his reign."

be informed about his preference for the burgeoning religion.[222] Here, Dillon's overall thesis is supported: Constantine at times was a consummate populist; but of course he needed to be if he planned to keep the Roman population, still in the process of societal recovery due to the third century calamities and violent demise of the tetrarchy, on an even keel. In Ecclesiastical matters, Constantine's concern seems to have been the very same: let the bishops have their say and decide things by majority or unanimity and in so doing concomitantly keep the peace. Further, while his preference for Christianity and his state sponsored "orthodoxy" arising out of the Nicene settlement colour many of his edicts and letters, his acrimony against heresies rarely found its end in the death of Christians of different views — as was the case with some in the Donatist crisis considered above — but rather exiling, forbidding, or thwarting their, to him, disruptive practices (it seems that it was not so much that the practices themselves irritated him, but rather that it challenged the peace he thought he had won at Nicaea). Charles Dodd notes:

> The heretics were certainly harassed, but what the precise legal position may have been we are not able to say with confidence. If there was any persecution, it was not because the Emperor wished it, but because Christians found it impossible to extend to one another the tolerance he had intended for them all. His whole policy was an honest attempt to put into practical operation the enlightened principles of the Edict of Milan, and to find a place within the religious system of the Empire for the free expression of all types of faith and worship. He was too far ahead of his time to succeed. The attempt broke down under his successors, and not for centuries was it renewed.[223]

While he was not overtly persecuting unorthodox Christians, he did want his Nicene settlement to be treated as good law and obeyed, and it rankled with him that many

[222] Eusebius, *Vita*, III.16-III.20, 127-130 (Letter to the Churches); II.24-II.42, 104-109 (Letter to provincials of Palestine: encouraging them to accept God's chosen servant and embrace Christianity).

[223] Dodd, *From St. Paul to Constantine*, 483-484.

stood so firm on points of doctrine for which no one had any proof other than conjecture. The degree to which this frustration affected Constantine's lawmaking is highlighted by a law of his following the Council of Nicaea, in the year 326:

> The privileges that have been granted in consideration of religion must benefit only the adherents of the Catholic faith. It is our will, moreover, that heretics and schismatics shall not only be alien from these privileges but shall also be bound and subjected to various compulsory public services.[224]

That this legislation is dated to immediately following the Council of Nicaea, and did not appear subsequent to the Donatist hearings, may indicate that this legislation was directed at those of an Arian persuasion and not those of the Donatist.[225] The Donatists were by this time, because of the emperor's willingness to allow them to exist alongside the Catholic party, deeply entrenched in Africa and in the majority. To allow them to continue seems to have been a concession on Constantine's part knowing that he could not force such a large group without instigating unrest, and the fact he did not legislate in this way from the close of the Donatist crisis to Nicaea seems to suggest they continued to enjoy the privileges that Constantine had bestowed on bishops generally.

Another interesting aspect of Nicaea is that what became law was decided not by the emperor alone, but by a unanimous vote,[226] or what Constantine hoped would be a unanimous vote. By using a democratic model with the Christian bishops and, as he had in the Donatist hearings, allowing their decisions all along to be decided by a majority of bishop judges, it seems his aim was to settle and satisfy the largest group of Christians

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[224] CTh xvi.5.1, 450.

[225] But see Noel Lenski, "Imperial Legislation and the Donatist Controversy: Constantine to Honorius," ed. Richard Miles, *The Donatist Schism: Controversy and Contexts* (Liverpool: Liverpool University Press, 2016) 166 – 219, at p. 174.

[226] Eusebius, HE, 3.17.1 – 2, 128.

that he could: again, pragmatism. While the bishops of the Donatist persuasion, say, or those of the Arian party, may have taken advantage of the legislation and patronage issued by Constantine, and they certainly did, I think it is important to keep in mind that he ultimately became focused on promoting his preferred Catholic Christianity and those who gratefully and dutifully accepted both his beneficence and intervention in their religious organization, one which he dovetailed to the state legal system due to its *de facto* existence at the local levels. Though Nicaea was not a perfect compromise for all, and bishops like Athanasius continued to chafe at Constantine, he thought he had achieved a single legal constitutional compromise which could be adopted by all.

IV.ii: Bishops as Judges

> In a sense, to establish a court is to elect officials. Every official, you see, sometimes has to set up as a judge as well; and a judge, although strictly he has no official position, becomes in a way an official of considerable importance during the day on which he sits in judgement and gives his verdict.
>
> Those [judges] who pass the scrutiny are to sit in judgement on the cases of the litigants who refuse to accept the decision of the other courts.
> Plato, *Statesman*, 6.767.a-d

As Mousourakis notes about the growing judicial power of Christian bishops from the time of Constantine, "…a significant part of private law (especially family law) was increasingly encompassed by the jurisdiction of Church organs."[227] Considering a much later period in history, James A. Brundage notes that the closest approach to a learned legal profession in the early Middle Ages was in the ranks of the clergy, and in fact churchmen were involved in every aspect of the legal and institutional structures of the

[227] George Mousourakis, *A Legal History of Rome* (London: Routledge, 2007), 158.

early Middle Ages.[228] This fact is borne out by later evidence from the likes of Augustine as a judge in the Roman legal system and it reaffirms what the earlier legislation of Constantine of 318 and 333 tells us: bishops were judges who were allowed to hear matters in cases involving strictly Roman law involving Christians and others, although it was mostly in civil cases. They tended to hear matters between Christians, of course, for a variety of reasons which seem reasonably clear: first, bishops were already in a position of power in their own community and were obliged to decide legal matters between Christians in their own courts up to the time of Constantine, as the *Didascalia* makes clear and noted herein; second, one can imagine that as the Roman court system took care of the legal needs of the day, that citizens other than the Christians, the vast majority of the population up until about 350, would have no reason to want their case to be heard by a bishop, especially if there was any animosity against the upstart religion from someone who was committed to ancient Roman tradition; third, and related to the second observation: what reason would a person want to have their case to be heard by a bishop, unless for a more favourable judgement? But if that were the case, what reason would they have to think they would get a different judgement in that venue? I suggest the facts would inhere to the opposite. Bishops at the time of Constantine were not, as a rule, trained in law, although some were.[229] I suggest that a case coming before a bishop based on Constantine's transfer-of-jurisdiction legislation would likely frighten most of the bishops called upon to re-try a case which had already been before a secular court.

[228] James A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (Chicago: University of Chicago Press, 2008), 73.

[229] Sozomen, *The Ecclesiastical History of Sozomen*, Book 1, trans. & rev. Chester D. Hartranft, *Nicene and Post-Nicene Fathers*, second series, vol. 2, *Socrates, Sozomenus: Church Histories*, eds. Philip Schaff and Henry Wace (Edinburgh: T&T Clark, 1886-1900; Grand Rapids: Eerdmans, 1997), XVII.1118.

What would the consequences of essentially overturning a decision, a decision in process because Constantine allowed the transfer right up until the reading of the sentence, made by a local magistrate do to the relationship the local bishop had with that class of people in that very caste driven culture? Not only that, such a new decision would likely reach the court of the emperor, and would a bishop want to put his reputation before Constantine on the line for a matter in a civil dispute?

We do know from evidence[230] in the letters of Augustine that bishops did hear cases both religious and civil,[231] but the evidence we have shows the majority of cases to have been concerning matters involving bishops and priests, and mostly involving civil law matters. Noel Lenski's chapter on new evidence for the *episcopalis audientia* reviews the evidence. This author writes:

> The corpus [of letters] thus conforms to and supplements what we learn from the law codes: while a bishop could have authority over any civil suit, he had exclusive jurisdiction over cases involving clerics. Moreover, at least in the new letters, Augustine seems to have preferred to confine his legal activity to clerical cases, although occasionally, as in *Epist*. 24, he did take on others.[232]

It also seems clear that Augustine could hear both civil and criminal cases, which is interesting because some argue that bishops were only supposed to act as arbitrators in

[230] See discussion below, *Epst*. 24, for instance.

[231] Augustine was approached by various people to decide disputes on matters of property. At Epistle 33.5, he wrote: "When we may be serviceable to men that are desirous of terminating through our help disputes concerning secular affairs, they address us as saints and servants of God, in order that they may have their questions as to property disposed of by us: let us at length, unsolicited, take up a matter which concerns both our own salvation and theirs. It is not about gold or silver, or land, or cattle, matters concerning which we are daily saluted with lowly respect, in order that we may bring disputes to a peaceful termination…." Augustine, *Letter XXXIII*, *Letters of St. Augustin*, *The Confessions and Letters of Augustin, With a Sketch of His Life and Work, Nicene and Post-Nicene Fathers*, vol. 1, first series, ed. Philip Schaff (Peabody, Massachusetts: Hendrickson Publishers, 1886; 2004).

[232] Noel E. Lenski, *Evidence for the Audientia episcopalis in the New Letters of Augustine*, in ed. Ralph W. Mathisen, *Law, Society, and Authority in Late Antiquity* (Oxford; New York: Oxford University Press, 2001), 83-97.

civil cases.[233] But if one considers the many letters of this bishop, or chapter nineteen of his *City of God* where he talks about torturing witnesses in a legal case to get at the precious truth, some of them dying in the process (we learn that he lamented such an awful necessity of truth-finding in his role as a judge: "From my necessities deliver Thou me," he wrote),[234] we know that he was forced to deal with criminal matters at times, most likely involving clerics. But, as Lenski points out, Augustine does seem to shy away from handling cases of a criminal nature and preferred the secular authorities to handle it.[235] But he did not shy away from civil cases and was very involved in them as a legal advisor and a judge. "Though most of his attention was devoted to issues involving clerics, he did not shy from civil suits even where the church was not involved. A bishop could also have criminal jurisdiction, though here his authority seems to have been limited to cases that somehow involved clerics."[236] Augustine was also involved in the soliciting of new laws in various places, and was a close associate with a practicing lawyer and Bishop of Thagaste, Alypius, often seeking his advice on a variety of matters, and in such a way and based on such an understanding of law and legal language that Lenski suggests Augustine himself was clearly well trained in law.[237] The evidence from a letter

[233] A. J. B. Sirks, "The episcopalis audientia in Late Antiquity," *Droit et cultures* 65 (2013): 79-88.

[234] Augustine, *The City of God*, trans. Marcus Dods, George Wilson, and J.J. Smith, intro. Thomas Merton (New York: Modern Library – Random House, 1950), 19.6, 682-683. He also uses this argument to support the doctrine of just war [Ibid., 19.7, 683] which he borrows from Cicero, who borrowed it from Socrates and Plato.

[235] Ibid., 87.

[236] Ibid.

[237] Ibid., 89. Cf. James A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (Chicago: University of Chicago Press, 2008), 44.

addressed to this same Alypius in 405 gives a clear example of Augustine's masterful grasp of Roman property law.[238]

In his role as judge under the Roman legal system, Augustine would hear cases in the mornings, as a rule, but is sometimes said to have sat all day hearing cases, and as with his apparent distaste for legal procedures and duties noted above, he found the amount of time he spent hearing cases to be burdensome.[239] Brundage notes, "Bishops were already complaining as early as the fifth century about the burden that this laid upon them, and the volume of their judicial business grew still more onerous under Germanic rule."[240] As to sanctions as a result of the decisions of episcopal courts, especially where it regarded their own, they included relegation (for clergy), penance, and certainly excommunication was used as the ultimate punishment, being a tangible threat to a Christian;[241] but it is also clear that corporal punishment, whipping, was used regularly and administered at the command of the bishops.[242] We know that the power to pass sentence of capital punishment rested with the imperial authority, a proconsul or higher, alone.[243] Leslie

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[238] Augustine, *Letter LXXXIII*, *Letters of St. Augustin*, *The Confessions and Letters of Augustin, With a Sketch of His Life and Work, Nicene and Post-Nicene Fathers*, vol. 1, first series, ed. Philip Schaff (Peabody, Massachusetts: Hendrickson Publishers, 1886; 2004), 83.4, 362-363.

[239] Ibid., 93. Lenski writes: Indeed, Augustine was said regularly to have spent mornings and sometimes all day hearing cases. Augustine thus regarded his legal duties as burdensome, even annoying. Nevertheless, in this same passage, he went on to say that legal jurisdiction was a pastoral demand incumbent on all bishops because of St Paul's injunction that worldly disputes between Christians be brought to 'the holy'.

[240] James A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (Chicago: University of Chicago Press, 2008), 69.

[241] Jill Harries, *Law and Empire*, 192.

[242] Ibid., 91. Lenski notes: Indeed, elsewhere Augustine distinguished between torture and mere virgarum verbera' ('blows from switches') (*Epist.* 133.2: *CSEL* 44.82) which, he claimed, were often used in episcopal courts. See also, Lamoreaux, *Episcopal Courts in Late Antiquity*, 161-165.

[243] Augustine wrote to a Christian recently elevated to proconsul, "…in that you, such a man, and so devoted to the name of Christ, have been raised to the dignity of proconsul…. In fact, there is only one thing of which we are much afraid in your administration of justice, viz., [that you meet out capital punishment in crimes against the church out of zealous regard for it]. …. We beg you, therefore, when you are

Dossey noted that even though enforcement of corporal punishment was something in theory in the control of the state officials of the Empire, "…when we turn from normative law to practice it becomes clear that clerics throughout the late Roman empire were more involved in beating people than the law allowed."[244] She notes that although these beatings as punishment for crimes was usually confined to members of the church, including and often the clergy, bishops also regularly dealt out punishments of this kind to the poor and those eager to avoid the secular courts, but they were on dangerous ground when they attempted to punish those of higher rank.[245] Dossey points out that "[w]ith the imperial courts reluctant to torture or flog members of the elite, bishops (much less priests or deacons) did so at their peril. The image of a person of lesser status beating his superior was profoundly disturbing."[246] Such a scenario was a real possibility because many bishops were born of humble birth and were raised in the priestly ranks to be in authority over various elites.[247] Dossey's conclusion is:

> The history of clerical coercion is full of contradictions. As the church came to mimic the procedure of the secular courts, by necessity it adopted some of the methods of Roman interrogation and punishment (flogging in particular) and found the scriptures to justify doing so. At the same time, clerics' ability to coerce was limited both by imperial law and by church canons. In practice, there appears to have been a tacit acceptance that the church could punish corporally those in its own power (clerics and

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pronouncing judgment in cases affecting the Church, how wicked soever the injuries may be which you shall ascertain to have been attempted or inflicted on the Church, to forget that you have the power of capital punishment, and not to forget our request. Augustine, *Letter C*, *Letters of St. Augustin*, *The Confessions and Letters of Augustin, With a Sketch of His Life and Work, Nicene and Post-Nicene Fathers*, vol. 1, first series, ed. Philip Schaff (Peabody, Massachusetts: Hendrickson Publishers, 1886; 2004), 100.1-2, 411-412.

[244] Leslie Dossey, Judicial Violence and the Ecclesiastical Courts in Late Antique North Africa, in ed. Ralph W. Mathisen, *Law, Society, and Authority in Late Antiquity* (Oxford; New York: Oxford University Press, 2001), 98-114 at 102. See also on this subject, Jennifer V. Ebbeler, *Disciplining Christians: Correction and Community in Augustine's Letters* (Oxford: Oxford University Press, 2012).

[245] Ibid., 108.

[246] Ibid., 109.

[247] Ibid.

> monks) or those whose low social status made beating inconsequential. But when clerics tried to coerce the wealthy and influential, they found themselves labelled social revolutionaries, but so would have most municipal magistrates.[248]

This observation points to a key fact, that the imperial law actually put the enforcement in the hands of imperial officials, not bishops. In fact, the rescript of 333 from Constantine directed the Praetorian Prefect to enforce the judgments of bishops. The law is written to a Prefect and reads: "Whether, therefore, a bishop has decided a case between minors or between adults, it is Our will that the obligation for its enforcement shall rest upon you, who hold the highest judicial authority, and upon all other judges."[249]

It is also notable here that four years before the end of his reign and death, Constantine acknowledges that the Prefects are, in fact, the highest judicial authority, and so the bishops could not usurp that power, which may be tempting to infer from the language of the 318 Edict, CTh. 1.27.1:[250]

> Emperor Constantine Augustus.
>
> Pursuant to his own authority, a judge must observe that if an action should be brought before an episcopal court, he shall maintain silence, **and if any person should desire him to transfer his case to the jurisdiction of the Christian law and to observe that kind of court, he shall be heard, even though the action has been instituted before the judge, and whatever may be adjudged by them shall be held as sacred**; provided, however, that there shall be no such usurpation of authority in that one of the litigants should proceed to the aforementioned tribunal and should report back his own unrestricted choice of a tribunal. For the judge must have the unimpaired right of jurisdiction of the case that is pending before him, in order that he may pronounce his decision, after full credit is given to all the facts as presented. [Emphasis added]
>
> *Given on the ninth day before the kalends of July at Constantinople in the year of the consulship of the Augustus and of Crispus Caesar. – June 23, 318.*[251]

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[248] Ibid., 113.

[249] *Sirm.* 1 (333), 477.

[250] I present the legislation here to give the reader a point of reference for the discussion that follows, but my detailed analysis of this edict appears below where I examine the different elements within.

[251] *Codex Theodosianus*, *The Theodosian Code*, trans. Clyde Pharr (New York: Greenwood Press, 1952), 1.27.1, 31.

The even stronger language used in the 333 rescript, "[f]or We previously sanctioned, just as the official statement of Our edict makes clear, that the judicial decisions, of whatsoever nature, rendered by the bishops, without any distinction as to age, must be observed as forever inviolate and unimpaired,[252] namely, that whatever has been settled by the judicial decisions of the bishops shall be considered as forever holy and revered,"[253] must therefore be contrasted and interpreted against the reality of Constantine's simple acknowledgement that the Praetorian Prefects were the highest judicial authority next to the Emperor. The 333 rescript, Sirmondian Constitution 1, reads:

Sirmondian Constitutions, 1

Emperor Constantine Augustus to Ablavius, Praetorian Prefect.

We are much surprise that Your Gravity which is replete with justice and the approved religion should have wished to inquire of Our Clemency what Our Sovereignty has either previously ordained or what We now wish to be observed as to the judicial decisions of bishops, O Ablavius, dearest and most beloved Father.

Therefore, because you wished to be instructed by Us, We again, by means of Our salutary power do hereby spread abroad the ordinance of Our previously promulgated law.

For We previously sanctioned, just as the official statement of Our edict makes clear, that the judicial decisions, of whatsoever nature, rendered by the bishops, without any distinction as to age, must be observed as forever inviolate and unimpaired, namely, that whatever has been settled by the judicial decisions of the bishops shall be considered as forever holy and revered.

Whether, therefore, a bishop has decided a case between minors or between adults, it is Our will that the obligation for its enforcement shall rest upon you, who hold the highest judicial authority, and upon all other judges.

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[252] That the bishops heard cases involving laws which were religious and belonging to their own sect had been going on for decades before Constantine's 318 law, the novelty was that now they would hear cases involving Roman law, as noted in the case of Augustine. The bishops would not have the latitude to ignore secular laws, nor do we have any reason to think that was even a temptation for them, at least while the empire in the West held. The case that came before them, whether they were versed in the law in that area or not and, again, as with Augustine and even regular Roman magistrates, they could consult others about how to approach the decision, but they were constrained by the laws of Rome.

[253] *Sirm.* 1 (333), 477.

Therefore, if any man, either as defendant or as plaintiff, should have a suit at law, and either at the beginning of the suit, or after the statutory time limits have elapsed, or when the final pleadings are being made, or when the judge has already begun to pronounce sentence, and if such litigant should choose the court of a bishop of the sacrosanct law, even though the other party to the suit should oppose it, immediately without any question, the principals in the litigation shall be dispatched to the bishop.

For the authority of sacrosanct religion searches out and reveals many things which the captious restrictions of legal technicality do not allow to be produced in court.[254]

Therefore, all cases which are tried either by praetorian or by civil law, when settled by the decisions of bishops, shall be affirmed by the eternal law of permanence; nor shall any case be subject to review which the judgment of a bishop has decided.

Furthermore the testimony given by a bishop, even though he may be the only witness, shall be unhesitatingly accepted by every judge, nor shall any other witness be heard when the testimony of a bishop has been promised by any party whatsoever.

For that is established with the authority of truth that is incorruptible, which the consciousness of an undefiled mind has produced from a sacrosanct man.

This We formerly decreed by Our salutary edict, this We confirm by Our eternal law, thus crushing out the mischievous seeds of litigation, that wretched men, entangled in the long and almost endless toils of litigation, may at length, with timely settlement, escape from unscrupulous legal attacks and from an unreasonable avarice.

Therefore Your Gravity and all others shall forever observe whatever Our Clememcy formerly decreed as the judicial decisions of bishops and whatever We have now embodied in this law which has been issued for the general good.

Given on the third day before the nones of May at Constantinople in the year of the consulship of Dalmatius and Zenophilus. – May 5, 333.[255]

Yet even in light of the command to Prefects to enforce the judgments of bishops, the realities of the sometimes absent imperial structure at the local levels in the Roman Empire, certainly in Africa in Augustine's case, meant that enforcement[256] was left to the bishop and whomever they could second to carry out the punishments; and as Dossey points out, noted above, the bishops regularly employed corporal punishment regardless

[254] Constantine echoes this sentiment in his 331 legislation against the corruption in the Roman courts generally, where he promises corporal punishment for those officials who are guilty of such, noted above.

[255] Sirmondian Constitutions, *The Theodosian Code*, trans. Clyde Pharr (New York: Greenwood Press, 1952), Title 1, 477. Here again, I place the rescript before the reader at this point so as to give a point of reference for some of the discussion that follows, but I will examine the rescript more closely further below.

[256] Based on the evidence and scholarly interpretations of it, here discussed, it looks as though enforcement related to all judgements, whether criminal or civil.

of Constantine's law directing this remain the purview of the state official. On the absence of any relevant imperial officials to carry out the sentences delivered by bishops, Lenski notes,

> …Augustine laments that only the church, not public authorities, enforced the law on rape. So, too, *Epist.* 10.5.1 indicates that imperial authorities were largely absent from the local scene when it came to enforcing laws on illegal slave trading, leaving the responsibility entirely to Augustine himself. …The state, therefore, was hardly a real presence for the enforcement of justice at the community level.
>
> In the state's absence, the church filled the void. Beginning in the early fifth century one begins to hear of a parallel local official in North Africa termed the *defensor ecclesiae*. In 407 the Council of Carthage called for and obtained imperial sanction for such officers, apparently to help with the enforcement of the laws against the Donatists. That the *defensor ecclesiae* also played a larger role as a law enforcement factotum is confirmed, moreover, by *Epist*. 20: in Fussala, Antoninus used his *defensor ecclesiae*, along with town *vigils* ('watchmen'), locally garrisoned soldiers, and even members of the clergy, to enforce his decisions.[257]

While Augustine was aware of well-defined boundaries in jurisdiction between secular and Christian courts, he was forced of necessity to serve the judicial role that was needed for the simple reason that the state was often not there to do so,[258] and I suggest that Constantine's incorporation of the bishops into the judicial apparatus of the state made this merging of jurisdictions on the local level something that, by Augustine's time, appears to have been an evolution of the growing power of the bishop which was born out of necessity. Lenski also points out that there was a slippage in terminology in Augustine's time and writing which was transforming the *episcopalis audientia* into the *episcopale iudicium*, and *iudicium* was the term used of the public courts. Augustine used this latter term often,[259] and in locales where the state's *iudicium* was often or always

[257] Lenski, 92.
[258] Ibid., 96.
[259] Ibid., 95.

absent, its growth in use for the bishops' courts is perhaps hardly surprising. Due to the wide nature of judicial authority being practiced by bishops such as Augustine, Lenski rightly concludes that such "authority at the local level was virtually beyond question."[260] Indeed, in some cases there was no arm of the state there to question it.

Claudia Rapp makes a more general but related point on this general blurring of roles in the legal arena. As I have noted elsewhere in this work on both the Emperor's close perceived association with the divinity and the Church's role of inheriting Roman law and carrying it, both in theory and practice, to the Middle Ages, she writes: "…the notion of the association of imperial authority with the divine that guided, protected, and guaranteed the emperor's rule was pervasive in the Roman Empire and was passed on—in Christian guise—to the Byzantine Empire and the Medieval West. Just as imperial authority was intricately linked to the divine, the religious authority of holy men had overtones of secular power."[261] But as pointed out by both Lenksi and Dossey, these were more than overtones, and the secular, not merely the religious, power the bishop wielded in the local setting was oftentimes the penultimate one, second only to the Emperor himself. The fact that this was born out of necessity given the oftentimes absence of imperial officials on the local level does not diminish the reality that bishops served exactly this role and would continue to expand their judicial purview into the Middle Ages until the Enlightenment brought about the beginning of a sharper distinction between the secular and religious.

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[260] Ibid., 97

[261] Claudia Rapp, *Holy Bishops in Late Antiquity: The Nature of Christian Leadership in an Age of Transition* (Berkeley: University of California Press, 2013), 6.

As pointed out by Peter Brown and noted above, as the local governance of Rome's environs became more important from the third to fifth centuries, the Bishops, following Constantine's adoption of their religion and his legislating them into a judicial role, became the very topmost of the officials who regulated justice for the average Roman provincial. As the classical separation of sources of Roman law (*leges*, *senatus consulta*, and the interpretations of the jurists) became weaker and the imperial enactments grew in scope and number, according to Mousourakis, "local systems of law prevailed in the form of custom that was now recognized as an official source of law on an equal footing with legislation. …The law that actually applied in the provinces was a mixture of this 'debased' Roman law and local practice."[262] In a letter from Jerome to Augustine in 416, the absence of a Roman presence was hinted at when Jerome notes, "[w]e suffer in this province from a grievous scarcity of clerks acquainted with the Latin language."[263] So not only were the bishops becoming senior officials in the administration of justice on the local level, but as Mousourakis points out here, they were administrating justice which was an admixture of local custom, Roman law, and the overarching Christian lens through which both of these were interpreted and delivered to the populace. This is important because as Lenski finds with the bishop Augustine, he participated in virtually

[262] Mousourakis, *A Legal History of Rome*, 159. As Noel Lenski points out to me, though, this is definitely not the way people think about this problem in more recent scholarship: one speaks of legal pluralism, which exists throughout the empire, but actually diminishes in Late Antiquity (in the East down to the sixth century).

[263] Augustine, *Letter CLXXII*, *Letters of St. Augustin*, *The Confessions and Letters of Augustin, With a Sketch of His Life and Work, Nicene and Post-Nicene Fathers*, vol. 1, first series, ed. Philip Schaff (Peabody, Massachusetts: Hendrickson Publishers, 1886; 2004), 544. As per Noel Lenski, this lack of knowledge of Latin is important because bishops who didn't speak Latin (who were common in the east) would have had trouble knowing or understanding what the law meant, even though they were interpreters of it by virtue of the introduction of *episcopalis audientia*.

every kind of legal forum and role that was possible at the time, and as Rome's administration in the West disintegrated — Augustine lived to witness the first sack of Rome in 410 by Alaric — it was the bishops who were left holding the remains of the Roman legal system, and they were the conduit through which Roman law was delivered to the barbarian kingdoms of Medieval Europe. The fact that the bishop's role in society was initially enhanced and consolidated by Constantine's legislated role for the bishops as judges[264] is then foundational for understanding how it was that the Church came to be one of the two universal powers who ruled Europe throughout the entire Medieval period.

IV.iii: Constantine's Legislation of 318 and 333

Just previous to 318, and continuing long after, in Roman legal practice, the governors of Diocletian's ninety-six provinces were the main judicial figures in the legal system of their day, and the emperors demurred on ruling on decisions which should be the purview of the governor.[265] While the emperor did make direct law as a judge at times, Constantine included,[266] these cases were rare, understandably. For instance, in those cases where a powerful citizen tried to defy the governor openly, Constantine would be

[264] As discussed above, Constantine's choice to make the bishop's judges was, I suggest, pragmatic. The bishops had a wide sphere of influence in their own communities. Someone like Augustine, even more so, as he had held the Latin chair in Rome before converting to the religion and commanded the respect of his peers who helped him understand the technicalities of the law he was not familiar with. Earlier on, the respect paid to bishops by devotees of the religion was obvious for Constantine to see, and that likely made his decision to employ them as judges a lot more of a natural thing to do. Augustine was very much a product of Constantine's adoption of the religion, and the fact that he left a traditional seat of influence in Roman society for a Christian seat of influence may indicate that part of his decision to cross the floor was a pragmatic choice of following the power and influence where they seemed to be trending.

[265] Corcoran, *Empire of the Tetrarchs*, 234 ff.

[266] Ibid., 254-260. *CTh* 7.20.2 and *CTh* 8.15.1.

forced to intervene.[267] Petitions of litigants to the emperor seeking a rescript would most often result in the petitioner being directed to the governor of the province, and perhaps act as a spur to both motivate the governor to hear the case and give a favourable judgment.[268] Under Constantine, the Praetorian Prefects of the four prefectures were made the highest appeal court in the legal system. Outside this system of justice was another operating within the Christian community, where civil disputes between parties were largely dealt with by the presiding bishops.

Paul's instruction in his first letter to the Corinthian church that Christians should judge matters of conflict between themselves came to be used as a justification for bishops deciding disputes involving those under their authority.[269] By the early fourth century, their role as judges had made bishops essentially analogous to local magistrates, but strictly within the confines of the Christian community.[270] In the two laws, one edict and one rescript, discussed below, Constantine expanded the jurisdiction of bishops to

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[267] Ibid., 243.

[268] Ibid., 236.

[269] 1 Corinthians 6:1 – 6: When any of you has a grievance against another, do you dare to take it to court before the unrighteous, instead of taking it before the saints? [2]Do you not know that the saints will judge the world? And if the world is to be judged by you, are you incompetent to try trivial cases? [3]Do you not know that we are to judge angels—to say nothing of ordinary matters? [4]If you have ordinary cases, then, do you appoint as judges those who have no standing in the church? [5]I say this to your shame. Can it be that there is no one among you wise enough to decide between one believer[*] and another, [6]but a believer[*] goes to court against a believer[*]—and before unbelievers at that? [* Greek word is "brother"](*New Revised Standard Version Bible: Anglicized Edition*: 1989, 1995 National Council of the Churches of Christ in the United States of America; bible.oremus.org). While this does appear to be the scriptural basis for the *episcopalis audientia* in at least a *de facto* way, it is hard to imagine that the author would have had courts of the likes that developed in mind, with the trappings of local magistrates. One imagines a more rough and ready or simpler approach was intended.

[270] Bishops got their post largely through a closed process within the religion, the state had nothing to do with this before the time of Constantine or, it is assumed, during his reign. The ancient tradition of being consecrated by two or three other recognized bishops was the formal process, but in many cases powerful Christians or popular figures, like Gregory I who was essentially press ganged into the role, were seconded virtually by acclamation, and not to elect them would cause strain amongst those who must be governed by them.

include all litigants, Christian or otherwise, and this was a big step in the process of bishops being recognized as state judges. Constantine's patronage of the bishops and covering of expenses at Arles and Nicaea, legislating them immunities regarding taxes and civil service, handing over large sums of state money to build new churches and repair older ones, and his legislating that Bishops were to serve as judges, were crucial actions which would deeply affect the future.[271] The legal instrument Constantine used to effect this was the *ius publicum*, the Roman public law. Ullmann observed:

> Considering, therefore, his role as a *pontifex maximus* one can effortlessly understand why and how the Roman public law was considered directly applicable to his legislation in regard to Christians: this legislation would be difficult to explain on any other grounds. The two departments of the public law — the *sacra* and the *sacerdotes*[272] — were so to speak the channels through which Constantine's Christian legislation passed. And by virtue of the monarchic government, the administration, interpretation, the application, modification and, if necessary, creation of public law lay exclusively in the hands of the emperor himself. It was all very Roman in the contemporary sense.[273]

Again, the public law was the emperor's jurisdiction, and Constantine, once adopting the Christian religion and considering its size and rate of growth, was very naturally going to set the parameters for the bishops' involvement in public life in his empire using the law. That he went so far is the surprising thing: having first with Galerius given the religion legal status as a *corpus*, and thus the individual churches were legally recognized *corpora*,[274] he subsequently went so far as to also give them exemptions on a previously unknown level and made them judges whose decisions were not subject to appeal. Constantine was legislating on the religion and the bishops not as a devotee, but in his

[271] Averil Cameron, *Constantine and the Peace of the Church*, 545-546.
[272] *Sacra* and *sacerdotes*, rites and priests.
[273] Ullmann, *Constantine's Settlement*, 6 – 7.
[274] Ibid., 3, 7.

role as a Roman emperor, although his affection for the religion surely relates to the expanded duties and favours he ascribed to them. Constantine also must have seen the governmental structure of the religion's leadership in its powerful bishops and adherents' devotion to them as fitting with his aims of using them for his own political gains, discussed herein.

Even before 318, bishops were already major power players in their communities. Averil Cameron observes that "[s]uccessful bishops came to hold great influence in the cities and elsewhere, including by the end of the century such powerful figures as Ambrose of Milan and John Chrysostom, as well as ascetic leaders like Basil of Caesarea."[275] Yet, as R.M. Grant has noted, the bishops' seat of political power brought with it a concomitant opportunity for corruption. For instance, Origen's view on problems with Church leadership in the 3rd century were centered on:

> …bishops, especially in the great cities, who imitated governmental officials and terrorized the poor. There were clergy who used church funds for themselves instead of the poor. Tyrannical and ignorant bishops, priests, and deacons could be described as "selling whole churches." Deacons, supposed to administer the church's funds well, were actually dipping into them in order to grow rich from funds given for charitable purposes. Presbyters were engaged in business, and bishops bequeathed their sees to relatives and friends, sometimes paying for popular votes. There is no reason to suppose that such situations existed always or everywhere, but there are sufficient grounds for supposing that church administrators did not always, or perhaps even often, come up to Origen's ideal.[276]

On just how ensconced some of the bishops became in their seats of power, analogous to magistrates or governors, in their communities, Eusebius's picture of Bishop Paul of

[275] Averil Cameron, *Constantine and the Peace of the Church*, 546.
[276] R.M. Grant, *Augustus to Constantine*, 175.

Samosata is a case in point.[277] Eusebius gives evidence on Paul produced, as it happens, at a legal hearing in front of bishops on his fitness to continue in the seat of Bishop of Antioch:

> …He has now come to possess abundant wealth, as a result of lawless deeds and sacrilegious plunderings and extortions exacted from the brethren by threats; for he deprives the injured of their rights, and promises to help them for money, yet breaks his word with these also, and with a light heart makes his harvest out of the readiness of persons engaged in lawsuits to make an offer, for the sake of being rid of those that trouble them.… …clothing himself with worldly honours and wishing to be called *ducenarius*, [procurator] rather than bishop, and struts in the marketplaces, reading and dictating letters as he walks in public, and attended by a bodyguard.… …thus astonishing the minds of the simpler folk, with the tribunal and lofty throne that he prepared for himself, not befitting a disciple of Christ, and the *secretum* [private chamber of a judge] which, in imitation of the rulers of the world, he has and so styles. Also, he smites his hand on his thigh and stamps the tribunal with his feet.…[278]

Along with the evidence from the *Didascalia* from the early-mid third century on how the bishops were to conduct themselves as judges, here we have an intersecting point of reference from the 270s, the time of this bishop, showing again that bishops were judges in their own communities. While Paul of Samosata clearly offended the sensibilities of fellow bishops with his extravagances and corrupt behaviour, the problem was not that he held court, it was its nature and his illicit actions in that judicial/leadership role that led to censure. The synod or council of bishops that judged Paul's case was a pre-ecumenical council in Antioch which sat three times from 264 – 269, at which a large number of bishops, presbyters, and deacons[279] attended and ruled in favour of deposing Paul.

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[277] HE, 7.27.1-7.30.19, 209-225 See discussion in Barnes, *Constantine and Eusebius*, 144-145.

[278] Eusebius, *HE*, 7.30.7-9, 217-219.

[279] Ibid. Eusebius says there were at least two bishops and many other senior churchmen (pastors, deacons) at the first of three hearings, but at the final one there were apparently an "exceedingly large number" of bishops (7.29.1, 213). Given the preceding hearing's modest numbers, one might be hard pressed to say whether that was more than thirty, but the records do not tell us. My guess is no more than twenty appeared, the travel costs alone would have been significant, and these were not being paid by the state as

Interestingly, here, when Paul refused to acknowledge the ruling and give up his church building and position, the bishops appealed directly to the emperor, just as the Donatist party would later do under Constantine, and here the emperor Aurelian decided in favour of supporting the judgement of the bishops as to which person should be appointed to take possession of the church building, essentially underwriting their other rulings.[280]

But to see this condemnation of Paul in isolation, as if it were a one-off, is difficult when we look at the direction given to bishops in the *Didascalia*. There we learn that bishops were to consider themselves as rightfully above others in the community, and that they were to sit on a "throne" in the midst of their religious community. As the *Didascalia* evidences, there was a fairly detailed pecking order amongst religious adherents:

> Let a place be reserved for the Elders in the midst of the eastern part of the House, and let the throne of the Bishop be placed amongst them ; let the Elders sit with him ; but also at the other eastern side of the house let the laymen sit ; for thus it is required that the Elders should sit at the eastern side of the house with the Bishops, and afterwards the laymen, and next the women : that when ye stand to pray the rulers may stand first, afterwards the laymen, and then the women also, for towards the East it is required that ye should pray, as ye know that it is written, ….[281]

To understand the place of honour the bishop was to occupy, given the fact that bishops are directed to sit on a throne in the midst of those they rule over, and see themselves as

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with Nicaea some fifty years later. But that twenty could have attended seems reasonable given Antioch's proximity: we know that Alexandria was represented, it was considered on par with Rome by the judges in this case who sent their decision to Rome and Alexandria. But even if we come geographically closer to Antioch and see Jerusalem in the south and Nicomedia in the North West as reasonable circumference points for possible attendees matching Eusebius's "large number," we are looking at representatives from at least fifteen Roman provinces, and add in the fact we know some came from even further out, twenty seems to be a fair suggestion.

[280] Ibid., 7.30.19, 225. For more detailed analysis of the Paul of Samosata and Aurelian episode, see Fergus Millar, "Paul of Samosata, Zenobia and Aurelian: The Church, Local Culture and Political Allegiance in Third-Century Syria," *The Journal of Roman Studies* 61 (1971): 1 – 17.

[281] Margaret Dunlop Wilson, trans., ed., *The Didascalia Apostolorum in English* (London: C.J. Clay and Sons, 1903), XII, 65.

in the position of "God Almighty"[282] as teachers and judges, it is perhaps somewhat more clear how the excesses of Paul of Samosata came to be a reality in the first place.

While the potential for abuse was clearly shown in this case, it is important to note that the judicial role of bishops up until Constantine's reign was one confined to matters between Christians under the authority of the Church, and no one else. It is also the case that Constantine's relationship with the bishops would change that. His 318 edict placed the bishop into the position of a local magistrate who could hear cases involving any and all litigants, and one earlier instance gives us some indication of how the emperor thought the bishops' courts and Roman courts might work together, which is also evidenced in the edict.

It is in a letter to the Bishop of Carthage, Caecilian, that we get a glimpse of Constantine's earlier perception (313) of how the Bishops' and Roman Courts might operate in conjunction. He wrote to instruct the bishop that should he have any problem from the Donatist faction bothering his community of Christians, "…do not hesitate to go to the above-mentioned judges [proconsul Anulinus and Vicar of the Prefects, Patricius] and bring this matter before them, so that (as I commanded them when they were here) they may turn these people from their error."[283] At this point in his rise to power, Constantine understandably turns to state judges to enforce his will on behalf of the Bishops. Constantine was essentially backing up his promise to Caecilian by directing him to seek redress via the authority of Roman judges who in turn could order state force to be applied to solve the problem. What is interesting about the timing of this letter is that

[282] Ibid., V, 27 – 28.
[283] Eusebius, *HE*, I.vi.2, 463.

it comes just previous to the emperor deciding to have a group of bishops sit at two different hearings to decide the Donatist matter. Constantine involves the Roman courts by ordering two Roman judges, the proconsul and Vicar of Prefects, to guarantee the safety of Caecilian and his community, while at about the same time, ordering the bishops to sit as judges and decide the case on their own. Does this confluence of judicial contexts and events give evidence of how Constantine was beginning to see how bishops as judges could work in tandem with the Roman state? If we take the content of the 318 edict at face value, that the bishop's decision was sacred and to be enforced by the original judge from whose court the proceeding had been transferred in the first place, we see just that. In fact, in Constantine's letter to Caecilian and Constantine's edict of 318, the thinking is identical: bishops decide, the state enforces the decision. Further, John Dillon has argued that what 1.27.1 meant by *sacra* in reference to a bishop's decision went beyond sacred or holy, and actually meant that as with the nature of the emperor's jurisdiction, the bishop's decision was inappellable.[284] If that is correct, that means that the change between the two pieces of legislation from 318 to 333 noted herein, specifically the fact that in the latter the bishop's decision was clearly stated to not be subject to

[284] Dillon, *The Justice of Constantine*, 153. Dillon writes, "In both CTh. 1.27.1 and Sirm. 1, Constantine states that the rulings of bishops are to be considered *pro sanctis*. This is an unusual phrase, and the translation given above, "considered sacred," captures only part of its meaning. While the word *sanctus* is generally recognized as an adjective ("holy," "sacred," etc.), it is also the past participle of the verb *sancire*. In late antique usage, it was the emperor whose business it was to *sancire*: it is the Latin verb par excellence used to describe the decrees of the emperor (θεσπίζειν in Greek). For example, Constantine himself says of his earlier edict in Sirm. 1, *sanximus*, "We decreed that . . ." In effect, Constantine has given bishops the same judicial power as he gave to the high imperial officials who presided *vice sacra*, in the place of the emperor and with his inappellable jurisdiction. [Dillon's citation here: So already Waldstein, "Stellung der episcopalis audientia," 556: "Aus alledem ergibt sich, daß Konstantin die *episcopalis audientia* wohl als vom Kaiser delegierte Sondergerichtsbarkeit eingeführt hat.]" The Waldstein citation in full is: Waldstein, W. "Die Stellung der *episcopalis audientia* im spätrömischen Prozeß." In *Festschrift für Max Kaser zum 70. Geburtstag* (Munich, 1976), 533–56.

appeal, is perhaps no change at all, but simply more clearly defined in the later rescript. See my further discussion of 1.27.1 below.

In another letter[285] to the same proconsul mentioned in the letter to Caecilian, Anulinus, Constantine shows his new trajectory of favour to the Church bishops by absolving them from any duty to public office, a unique turn in the body of Constantinian legislation, compared with past emperors, and an important stage in the ongoing changing of the guard given the high status of the men that were often, but not always, found under this rubric. Important, though, is again, the reason why Constantine felt this intervention on their behalf to be so important: "[w]herefore it is my wish that those persons who, … bestow their service on this holy worship… be once and for all be kept absolutely free from all the public offices…. For when they render supreme service to the Deity, it seems that they confer incalculable benefit on the affairs of the State."[286] Over and over in Constantine's legislation, and that of other emperors, is this notion that the success of their reign, their rule, their state, was somehow intrinsically dependent on proper religious observances. In this light, then, and perhaps only in this light, can one understand the sea change of Constantine's thinking from the Roman pantheon, under which the Roman state had seemingly fallen into disrepair in the third century, to Christianity, a new religion to which Constantine attributed his military victories. This new religion also accorded with his strict stoic and classical views on morality which fit hand and glove with the religious hierarchy of influential historical Christian figures, however ironically, of which almost every one, to a man, were of a deeply classical bent

[285] Eusebius, *HE*, X.vii.1-end, 463-465.
[286] Ibid., X.vii.1-end, 465.

themselves: Justin Martyr, Tertullian, Cyprian, etc. What matters in consideration of these facts is not whether it accorded to early Christian views on church and state relations, but the reality that it was the view taken by Constantine and his bishops on them. Thus, a transfer of judicial oversight to bishops who served his divine benefactor, held courts of their own, and whose conservative morality reflected the emperor's personal convictions becomes more understandable.

When Constantine raised the Bishops to state sponsored judges in 318,[287] he made them officials of the empire, and they remained in that social role until the modern period. As indicated above, via the prefects and counts, Constantine made the transmission of people's complaints and acclamations of governors more expedient. What Constantine also did, in the same fashion, was allow that if a person wanted their case brought before a Christian Bishop, they could request the civil judge to do so and it would have to happen.[288] In this way, then, Bishops were, in an important way, a kind of appeal court, although it was not technically the decision being appealed — however much it may be implied in the language of the edicts — it was the venue and judge.

[287] "State sponsored" is meant to indicate that it was Constantine both vouchsafing their involvement in deciding legal matters via his own legislation and sponsoring their religion financially by building churches and providing for their expenses for hearings and councils out of the state treasury.

[288] The only evidence we have on this is significant, because clearly the rescript of 333 was in response to a litigant wanting to do exactly that. That we have no other evidence of these kinds of requests should not be a surprise, given the lack of evidence we have about the bishops' courts of this period in general. But, the evidence of Augustine being so busy hearing cases 60 years after the death of Constantine means that it would be fair to assume that while the Western Empire held, even while weakened, and perhaps exactly because the administration of justice would also have been weakened, that litigants were requesting bishops to hear their cases long before Augustine sat on the bench.

IV.iv: CTh 1.27.1

Constantine's first and most important piece of legislation pertaining to making bishops judges is CTh. 1.27.1, and was promulgated in the year 318. It reads:

> Emperor Constantine Augustus.
>
> Pursuant to his own authority, a judge must observe that if an action should be brought before an episcopal court, he shall maintain silence, and if any person should desire him to transfer his case to the jurisdiction of the Christian law and to observe that kind of court, he shall be heard, even though the action has been instituted before the judge, and whatever may be adjudged by them shall be held as sacred; provided, however, that there shall be no such usurpation of authority in that one of the litigants should proceed to the aforementioned tribunal and should report back his own unrestricted choice of a tribunal. For the judge must have the unimpaired right of jurisdiction of the case that is pending before him, in order that he may pronounce his decision, after full credit is given to all the facts as presented.
>
> *Given on the ninth day before the kalends of July at Constantinople*[289] *in the year of the consulship of the Augustus and of Crispus Caesar. – June 23, 318.*[290]

The Roman magistrate was here being compelled to allow cases of litigants to be heard by Bishops whose decisions were to be then recognized by that same judge. Important here is Constantine including the judge in the process and forbidding the litigants to go off under their own recognizance and select the court of their choosing, but in actual fact the

[289] There is a problem with this, given that Constantinople was not founded until 324. The Theodosian Code's compilers were doing so in Constantinople, and that they ascribed Constantine's law's creation to that place could have been for various reasons. Employing the principle of plausibility, here again, I suggest that the fact that Byzantium (name of the city before Constantinople) was under Roman control well prior to Constantine means the law might well have been drafted by Constantine while he resided temporarily at this location in 318, and that the compilers simply changed the name from "Byzantium" to "Constantinople" to reflect what they thought of as the city's "correct" name. We know that Constantine drafted laws wherever he happened to be in the Empire, so the idea he would be in Byzantium in 318 when drafting this law is a reasonable suggestion. Otto Seeck determined Constantine to have been in Sirmium in December of 318, and that city is not too far, in terms of an Empire-wide scale, from Byzantium: Otto Seeck, *Otto Seeck's Register of the Emperors (311 – 476 A.D.)*, translated by Martin and Patricia Milewski, ed. C.G. Bateman (Vancouver, 2019), for the year 319, page 36.

[290] *Codex Theodosianus*, *The Theodosian Code*, trans. Clyde Pharr (New York: Greenwood Press, 1952), 1.27.1, 31.

legislation forces the judge's hand in any event, so the apparent problem is superfluous.[291] In terms of what can be taken from this very important piece of legislation where it concerns Constantine's bestowal of judicial authority on the bishops, Dillon has noted:

> The thrust of the constitution, then, seems to be this: if during proceedings a litigant demands to be heard by a bishop instead of a public judge, he must be accommodated; the case is to be transferred to a bishop. The civil judge then adopts the bishop's ruling as his own. One litigant may not, however, obtain a ruling from a bishop independently, unknown to the other party, and expect the original civil judge to enforce it. It is unclear whether one party can compel the other to go to the bishop's court.[292]

While Dillon's point that it is uncertain whether one party is able to compel the other is correct on a bare reading, the inference of the legislation seems to indicate they likely could. Some scholars have taken the position that both parties would have to be in agreement for the case to be transferred,[293] but I suggest this is a gratuitous reading and neither well evidenced enough of a claim nor grounded to what can reasonably be inferred in the plain language of the legislation itself. The legislation reads "and if any person should desire him to transfer his case to the jurisdiction of the Christian law and to observe that kind of court, he shall be heard, even though the action has been instituted before the judge." The "person" desiring to transfer the case is in the singular, and thus the plain language seems to imply that one party's desire for transfer will be enough to compel the judge to have the case moved to the bishop's court. Against

[291] If the judge is instructed to allow a litigant's case to be transferred to the court of a bishop, and the litigant so chooses, the latter are given the power, apparently, to simply make that request for the successful transfer. If that were the case, and the litigant were aware of it, then there would be no need to attend the bishop's court first. If they were not aware of it and did so, presumably they would soon learn of the proper procedure and simply request transfer before the local magistrate or governor hearing the case.

[292] Dillon, *Justice of Constantine*, 149.

[293] See, for instances of this view: Claudia Rapp, *Holy Bishops in Late Antiquity: The Nature of Christian Leadership in an Age of Transition* (Berkeley: University of California Press, 2013), 243; A. J. B. Sirks, "The episcopalis audientia in Late Antiquity," *Droit et cultures* 65 (2013): 79-88.

scholars who think both parties had to agree, John Lamoreaux seems to take a similar position:

> …Constantine simply states that secular judges, if any party of an action pending before their court desires that the case be instead heard before an episcopal court (*epsicopale iudicium*) — that secular judges are obligated not to attempt to block this motion to change venue, and this even though the action is not yet finished (*negotium…inchoatum*). Further, decisions rendered by bishops are to be treated as if they had been handed down by the emperor himself (*pro sanctis habeatur observare*).[294]

The part of the legislation that perhaps causes some to think it had to be agreed by both parties is the following: "…there shall be no such usurpation of authority in that one of the litigants should proceed to the aforementioned tribunal and should report back his own unrestricted choice of a tribunal." A close reading of this part of the legislation brings to light a very important thing stressed by Constantine in this legislation — taking up half of the written text — which is in keeping with his support of the Roman judicial system of his day noted above: he clearly marks off the judge as being the one who has to approve the transfer, and almost certainly finalize the matter once decided by the bishop given the fact that bishops could not be expected to put into motion the process of ordering the state enforcement mechanism to deliver a punishment at this early date;[295] "[f]or the

[294] John C. Lamoreaux, "Episcopal Courts in Late Antiquity," *Journal of Early Christian Studies* 3 (Jan. 1, 1995): 147.

[295] While the legislation does not say clearly whether the jurisdiction of the initial presiding judge includes pronouncement of sentence based on a bishop's decision, beyond the permission required to transfer the case, the fact that Constantine is so adamant about recognizing the jurisdiction of the judge in the first instance makes it at least possible that some kind of approval, some might be tempted to call it a rubber stamping, on the bishop's decision may have been expected in the usual course of legal procedure. This would certainly seem to have been the case at this early date if any enforcement of a punishment were required as a result of the decision, because the Prefects were responsible for enforcement, even though, as noted above, enforcement regularly devolved on bishops in future decades due to the lack of an imperial presence to carry out justice at the local level. At this early period in Constantine's rule, though, the idea of bishop's enforcing punishments against those outside the Christian religion seems too fantastic to consider seriously. I think the tenor of the legislation clearly points to the judge in the first instance as the one who

judge must have the unimpaired right of jurisdiction of the case that is pending before him." That the judge has to approve the transfer proves that Constantine saw that it was that judge's case until such time as it was transferred. The "usurpation of authority" Constantine was clearly concerned about preventing was the local magistrate's authority, and the fact that one party was being forbidden to go to the bishop's court first, without appearing before the judge, is therefore tied to the authority of the magistrate who was the only one who could have the case transferred to the bishop's court. This part of the legislation is not implying that the other party had to agree to the venue change, but rather that the judge had to approve it. So in the scenario where one "person" wishes the change of venue, allowed in the first part of the legislation, that would have to be agreed on not by the other party, but by the judge. This reading accords with the plain language of the statute as a whole, and is therefore preferable to assuming otherwise: that the forbidding of one party seconding an episcopal court on their own meant that both parties had to agree; the prohibition was merely a bulwark against any usurpation of the judge's authority.

The scholar who has written most significantly on the subject of the bishops' courts generally, and the 318 and 333 constitutions specifically, is Caroline Humfress. She notes in a 2011 article[296] that the 318 and 333 legislation were aimed at specific cases and therefore not to be understood as proclamations on episcopal jurisdiction, or on the

would be in charge of legal procedure, including arranging any enforcement. The fact that the later rescript insists on this supports this supposition.

[296] Caroline Humfress, "Bishops and Law Courts in Late Antiquity: How (Not) to Make Sense of the Legal Evidence," *Journal of Early Christian Studies*, Volume 19, Number 3 (Fall 2011).

depth of the relationship between church and state.[297] In her notable 2007 monograph on orthodoxy and the courts in late antiquity, she emphasized that she focuses on law as a process,[298] and that, as in the more recent of her works, the laws of Constantine of 318 and 333 were more tied to realities on the ground than they were to official imperial policy. Her claim is summed up perhaps best when she writes: "[u]nder my proposed reading, however, these 'laws', at least up until Valentinian III, are in fact imperial reactions to a series of highly specific procedural questions that arose out of the practice of the bureaucratic courts."[299]

While that is true, all rescripts were of this nature: they were the answers of the emperors to specific legal questions directed at them. Even the edict, and in fact all law at its very inception, is an instrument brought about for certain aims at certain times, even if they are subsequently presented to be the norm going forward. As for the fact they dealt with specific circumstances, it does not change the essential quality of the legislation as good law that reflected the intentions of its creator more generally and applied to the Roman litigant specifically. The compilers of the Theodosian Code and the Justinian Code understood these laws in just such a fashion. Regardless of the specific details of its original promulgation, if it was recognized as law by the state and resulted in a jurisdiction for bishops previously unknown to them, then the observation about the

[297] Ibid., 375: Paying particular attention to the original contexts in which the relevant fourth- and early fifth-century imperial constitutions were issued, it argues that, prior to the publication of the Theodosian Code in 438, these constitutions should be understood as specific responses to circumstances thrown up by courtroom practice. Having reassessed the nature of the legal evidence both before and after the promulgation of the Theodosian Code, the article attempts to re-contextualize the *episcopalis audientia* within a broader late Roman socio-legal landscape, hence challenging the traditional framing of the debate on the *episcopalis audientia* as a question of "church" and "state."

[298] Humfress, *Orthodoxy and the Courts*, 3.

[299] Ibid., 167.

circumstances of its creation are only helpful insofar as we are looking at the initial impetus used to move the bishops into this vaulted position, and it does not challenge either the magnitude of the law or the intentions of its creator, Constantine.

But what might be inferred from Humfress's observation is the question that arises if we think of 1.27.1 as not only occasioned by a single instance, but then being reflective of the decision of Constantine to make bishops judges in an official way via legislation and just using this opportunity to do something he intended to do for a longer period of time; if my suggestion is correct, since the end of the Donatist hearings (perhaps from as early as 315, following the various proceedings that took place). The question that arises by inference is 'would Constantine have legislated bishops into this role in or around 318 had he not had to deal with the specific situation that gave rise to the legislation?' Given the language in both 1.27.1 and Sirm 1 themselves, it seems likely. This is not based on the specifics which gave rise to the law, but on Constantine's reasoning as to why the decisions of bishops were to be treated as valid at Roman law and enforced by the magistrate overseeing the case. The evidence for this comes first from the 318 legislation, and here I will use Humfress's translation: "and whatever judgment is reached by these people [sc. the Christians][300] must be regarded as sacrosanct";[301] Constantine's language in the 333 rescript is even more emphatic: "the judicial decisions, of whatsoever nature, rendered by the bishops, without any distinction as to age, must be observed as forever inviolate and unimpaired, namely, that whatever has been settled by the judicial decisions

[300] More specifically, the Christian bishops.
[301] CTh 1.27.1, Humfress, *Bishops and Law Courts*, 385.

of the bishops shall be considered as forever holy and revered."[302] Further on, "[f]or the authority of sacrosanct religion searches out and reveals many things which the captious restrictions of legal technicality do not allow to be produced in court. Therefore, all cases which are tried either by praetorian or by civil law, when settled by the decisions of bishops, shall be affirmed by the eternal law of permanence; nor shall any case be subject to review which the judgment of a bishop has decided." Both constitutions show that the Emperor felt that not only should litigants have the right to be heard by a bishop, but that the decisions of bishops were sacred and not to be questioned based on the source of the decision: priests of the Christian God. As for a reason why the emperor might emphasize this aspect of the basis for his decision, he gives us clues in two places: one is explicit in the 333 constitution where he writes "[f]or the authority of sacrosanct religion searches out and reveals many things which the captious restrictions of legal technicality do not allow to be produced in court. … This We formerly decreed by Our salutary edict, this We confirm by Our eternal law, thus crushing out the mischievous seeds of litigation, that wretched men, entangled in the long and almost endless toils of litigation, may at length, with timely settlement, escape from unscrupulous legal attacks and from an unreasonable avarice."[303] The second clue comes from the 331 edict noted above where Constantine rails against the judicial and legal systems in general for their rampant corrupt practices.[304] Could it be that Constantine uses the "sacrosanct" justification for his

[302] Sirm 1.

[303] Sirm 1.

[304] CTh 1.16.7 The rapacious hands of the [civil servants] shall immediately cease, they shall cease, I say; for if after due warning they do not cease, they shall be cut off by the sword. The chamber curtain of the judge shall not be venal; entrance shall not be gained by purchase, the private council chamber shall not be

decision to support and enforce the decisions of bishops because the rank and file of the Roman legal system were doing such a bad job of it? It seems entirely reasonable to suggest this. Caroline Humfress suggests that some educated late Roman bishops, particularly Ambrose, while praising the 'good' judge's conduct,[305] they were also capable of criticizing the 'bad' as well;[306] this is a tradition that goes back to Origen's criticism of Paul of Samosta's court, noted above. Humfress also notes that Constantine uses similar language elsewhere, where he insists that "… the judgments of the bishops should be regarded as if God himself were in the judge's seat,"[307] and while this was directed to bishops after the 314 Council of Arles and refers to their corporate judgment, it seems clear that this could be interpreted to cover how he felt about their judgment in the court context, specifically raised by 1.27.1 and Sirm 1.[308]

Generally speaking, Humfress understands the bishops' courts as being an important part of Roman dispute resolution. She notes "[d]espite the relative lack of primary evidence, the *episcopalis audientia* should be understood as ". . . a crucial aspect of the presence of the church in late Roman society" and also as a fundamental part of late Roman dispute processing."[309] Yet she wants to distance herself from more mainstream scholarship that sees the bishops' new role as an indication of them being given state

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infamous on account of the bids. The appearance of the governor shall not be at a price; the ears of the judge shall be open equally to the poorest as well as to the rich.

[305] Ambrose, *Ex. Ps*. 118, *Littera 'Res'* 36 (*CESL* 62, 462). See Humfress, 2007, 56.

[306] Humfress, *Orthodoxy and the Courts*, 56.

[307] *Optatus: Against the Donatists*, trans. M. Edwards (Liverpool: Liverpool University Press, 1997), 190. See Humfress, *Orthodoxy and the Courts*, 156.

[308] Humfress, *Orthodoxy and the Courts*, 156.

[309] Humfress, *Bishops and Law Courts*, 377.

power in this late antiquity context.[310] She argues that 1.27.1 does not give any definition on the nature of episcopal judgments in its 318 context but is rather a focused and technical response to a specific query.[311] She notes: "[a]s it stands, this constitution addresses a highly specific procedural issue under Roman law: the transfer from one jurisdictional forum, or type of process, to another. Late Roman litigants seem to have frequently attempted to forum-shop, for example from the jurisdiction of "ordinary" *iudices* to various kinds of courts of special jurisdiction. … Our 318 text is concerned with a specific scenario, in which a litigant requests to transfer a case that is pending before a magistrate's court to a bishop's *iudicium*."[312] As I noted above, she also sees the focus of the legislation as the due procedure that must be adhered to,[313] which, as I pointed out, is focused on the authority of the judge to have authority over the case and issue the final decision, and likely because it was that judge which had to deal with the state enforcement of the decision. She concludes both that this edict did not invest civil *cognitio* to the bishops and make them equal to imperial magistrates, but neither did it limit bishops to cases of arbitration.[314] In her earlier monograph on the subject, she takes exception to understanding these late Roman imperial constitutions as constituting

[310] Ibid., 379: Recent Anglophone scholarship, such as the work of Jill Harries, has stressed the importance of both mediation and arbitration procedures across late Roman society and specifically with respect to episcopal dispute resolution. The fact that bishops decided civil cases at all, however, still tends to be used as evidence that the Christian church acquired "state" powers in late antiquity. This fact is then elaborated within two broad, contrasting trends within the existing scholarship: on the one hand, it is deployed as evidence that the church became an integral part of the administrative structure of the empire; on the other hand, it is used as evidence that the church was in fact recognized as separate and distinct from the "state" and its officials.

[311] Ibid., 384 – 385.

[312] Ibid., 386.

[313] Ibid.

[314] Ibid., 387.

"'founding laws', or as laws that regulate or define the scope and functions of the *episcopalis audientia* …, whereas in fact they were responses to concrete situations."[315]

I can see her point: the 318 edict does not explicitly put the bishops on a equal footing with the judge, but I would argue it does this implicitly. Noel Lenski observes that Humfress assumes that CTh 1.27.1 and Sirm.1 were the only Constantinian laws about this, but that is clearly not the case, according to him; he notes there was some sort of edict, as it was mentioned twice in Sirm. 1, even if it is no longer extant. This missing edict apparently had broader scope than 1.27.1 and it is likely to have pre-dated 318. If this is correct, according to Lenski, it actually reinforces my case that the missing edict making bishops judges may be somehow connected to the Donatist controversy.[316] In *Constantine and the Cities*, Lenski explains that although the two laws constitute meager evidence, "both offer clear signs that these were only part of what was originally a larger dossier of legislation on the matter."[317] Lenski also sees 1.27.1 as missing a good deal of its original verbiage, "which would have recorded the details surrounding its issuance and possibly more specifics on the provisions of the law itself."[318] My own reading is that 1.27.1 reads as a fairly complete law, even if it is missing opening and/or closing details that might speak to the occasion for it. I also see it, at least provisionally and plausibly, as the edict referred to in Sirm. 1, the "our edict" referred to by Constantine.[319] While I remain open to and interested in Lenski's idea that we are missing the edict referred to, and will look at the

[315] Humfress, *Orthodoxy and the Courts*, 157.

[316] Noel Lenski made this observation in his role as external examiner on this PhD research, and the relevant section of *Constantine and the Cities* where he discusses Humfress's interpretation are pages 198 – 199.

[317] Lenksi, *Constantine and the Cities*, 198.

[318] Ibid.

[319] Ibid., 199; see here Lenski's discussion of Sirm. 1 and "our edict".

matter in more detail as this research evolves, for the present study I will proceed on these grounds.

If, as I have suggested, Constantine is doing an end run on the oftentimes corrupt judiciary by forcing their hands and having certain decisions removed from them and moved to a bishop's court on the application of only one of the litigants, he is giving the bishop the most important role in the proceeding, that of making the decision. The judge who originally heard the case keeps the case in two important ways: they must ensure the decision is connected to the facts and see to enforcement.[320] Constantine at this early date seems to have had no inclination to attempt to join the bishops to state law enforcement mechanisms, but by giving them the right to decide the case, the bishop is only the lesser of the judge in the sense that the latter has an inferred right of review. By splitting jurisdiction in this way, having two judges speaking to the same matter at different stages, it is possible this was an early attempt by Constantine to thwart corruption in the courts. This relates to my earlier suggestion of Constantine, in making bishops judges, engaging in an end-run on the judiciary to encourage them to run their courts more justly. Whatever his reasoning, the result of the 318 edict leading to two judges for a single case is an important point because it shows that Constantine's opinion seems to have changed between the two laws: the 318 law gives bishops a circumscribed role with the Roman judges as the ones who must then adopt the decision as if it were made by that judge ("[f]or the judge must have the unimpaired right of jurisdiction of the case that is pending before him, in order that he may pronounce his decision, after full credit is given

[320] Ibid. see generally.

to all the facts as presented"), but the 333 rescript instructs the state to enforce the decision of the bishop without question, and this order is aimed specifically at the Praetor of Rome and "all other judges." While the answer to the question of why Constantine made the bishops judges seems to remain the same — his familiarity with them from both his itinerant court and the Donatist episode and their connection with his preferred god —, what level of authority he accords them seems to require a nuanced approached based on whether we are asking the question based on the earlier or later law, since the authority given the bishop expands from one to the other. Constantine first made bishops judges subject to the authority of the presiding judge, so he looks merely to be opening the door to bishops being part of the process of deciding the case, but never having jurisdiction over the matter entirely. By the time of the rescript, he orders the state to enforce any decision of a bishop, making the bishop's decision final instead of merely one that ought to be preferred if, in the presiding judge's opinion, that decision lined up with the facts.

Further, the fact that this law addresses a specific situation does not preclude it from reflecting imperial policy; I suggest, in fact, it argues the other way. Constantine is consistent in both pieces of legislation at issue on the fact that the bishop's connection to the divine means that their judgements are somehow special and to be implicitly trusted as reflecting the divine will. His being convinced of this is evidenced in a number of his letters, noted herein, and given that he was emperor, the argument that these were no indication of imperial policy is to go beyond what the consistent evidence over a period of twenty years indicates about how Constantine understood the role of the bishops in

society, at the very least where it concerns his role for them as judges. For Humfress to be correct on this point, there would have to be evidence that Constantine's reactions to specific situations in these constitutions were clearly different from what he evidences elsewhere. The fact that he is consistent in his appreciation of what kind of authority attaches to the decisions of bishops means that as the fountainhead of imperial policy during his reign, this was imperial policy. Whether the bureaucratic cadre of civil servants would have agreed at all times and in all places with Constantine's policy is, of course, another question. The text of Sirm 1, discussed below, bears out this consistency quite convincingly.

One last interesting point on 1.27.1 that Humfress borrows from an anonymous reviewer of her 2011 article[321] is that Constantine could have created the *episcopalis audientia* with an edict prior to 318 which has been lost to history, which is a claim that Noel Lenski has argued for. Such a founding edict, if it existed, might have spoken to the nature of the bishops' courts and answered Humfress's point that the 318 law did not do this. As noted above, Noel Lenski thinks an earlier edict on the subject is extremely likely, and that the missing edict is what is referred to in Sirm. 1.[322] If the code-makers included the 318 and 333 legislation, it is hard to imagine them not having any idea about an earlier edict which was the basis for them, especially given their vast resources, but here again Lenski would argue that the codifiers did know of it, because it is referred to in Sirm 1.[323]

[321] Humfress, *Bishops and Law Courts*, footnote 38, 387. This observation was made by an anonymous reviewer of the JECS.

[322] Lenski, *Constantine and the Cities*, 198 – 199.

[323] Noel Lenski, in discussion on the present research.

Constantine's two pieces of legislation that we do have on this subject are really focused on the power of the litigant to have their case transferred to a bishop's court, and the Roman judge's responsibility to make it happen. Constantine's legislation ensures that bishops can not only be preferred but secured as judges. While 1.27.1 allows a litigant to change the venue and have their case heard in front of a bishop, the legislation does not indicate anything about what areas of law are applicable, nor what law may be applied.[324] The assumption has to be that if the litigants came before a Roman magistrate, it is Roman law at issue, so there is no question about whether it was Roman or Christian law being decided. But one could ask whether the bishops when hearing cases brought under Roman law could then apply their own law, but as unlikely as this scenario seems to this author based on the legislation, even the historical record shows that until Constantine's time there was no organized body of Christian law,[325] merely religious teaching (writings), mores, the occasional decision of a synod, and rites. That these factors might influence a decision is very likely, but that anyone of them could negate the application of Roman law seems too fantastic a speculation, and I base this directly on the content of both pieces of legislation relating to the bishops' authority as judges. Ullmann may have suggested that Constantine was allowing the *lex Christiana* to be then binding in civil matters according to this legislation,[326] but such a suggestion is overreaching. There is

[324] My informed guess would be that it would be civil law mostly, and that is based on the evidence of Augustine. Constantine could have specified, but he noticeably does not.

[325] See, for instance, Yifat Monnickendam, "Late Antique Christian Law in the Eastern Roman Empire: Toward a New Paradigm," *Studies in Late Antiquity* 2.1 (2018), p. 74.

[326] Ullmann, *Constantine's Settlement*, 7 – 8. I note he "may" have suggested it because it is only mentioned once and briefly at that: "… the *lex Christiana* was to be binding even in civil matters: every litigant could invoke the episcopal court, the decision of which was inappellable." Reading this phrase in the larger context of his argument, it is unlikely that he meant Christian law would be applied, but was

only the mention in 1.27.1 of a litigant moving their action to the bishop's court: "the jurisdiction of the Christian law and observe that kind of court"; but this is describing the context of the forum, and not so much the law to be applied. On the other hand, Constantine would have known that Christian principles would come into play in that court, and perhaps this explains Ullman's use of *lex Christiana*. As Jill Harries suggests, *lex Christiana* is best regarded as merely judgment on Christian principles.[327] Such, then, is not law. Given that the case started before a Roman magistrate in 1.27.1, we know with certainty that it would be a case based on Roman law, and thus a mere transfer of forum does not inhere to the conclusion that a new law or laws would be in issue.

While it has been suggested this 318 law may be the legislation of Licinius, there are too many evidentiary problems with connecting it to him, as pointed out by Simon Corcoran.[328] This scholar suggests that besides the fact the law is in keeping with Constantine's attitude, "[i]t is most likely this passage that he refers to in a letter addressed to the praetorian prefect Ablavius in 333,…"[329] and Constantine chastises the prefect for not knowing of his previous law. I agree in a provisional way with Corcoran on the connection between the two laws, but as noted above and according to Lenski, there may well have been an earlier law that is being referred to by Constantine in his 333 rescript as "our edict", the piece of legislation I turn to next.

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merely pointing to the bishops and their religious worldviews now being brought into the court, noted above. The fact that he notes the actual import of the legislation next when he writes that every litigant could invoke the bishop's court is important when attempting to speculate on what he meant.

[327] Jill Harries, *Law and Empire*, 195.

[328] Simon Corcoran, *The Empire of the Tetrarchs: Imperial Pronouncements and Government AD 284-324* (Oxford: Clarendon Press, 1996), 284-285. See also, Humfress, Bishops and Law Courts, 385.

[329] Ibid., 285.

IV.v: Sirmondian Constitution 1

The story behind the 333 constitution is directly connected to 1.27.1. In this case Constantine was writing a rescript to his Praetorian Prefect, Ablavius, and was vouchsafing the authority of the previous law, recorded at C. Th. 1.27.1,[330] concerning the untrammeled right of a bishop to be preferred as the judge of choice of any litigant over the state magistrates. Why Ablavius was writing Constantine about this earlier law[331] is considered by Seeck: "[e]ven though it [the 318 law] had been valid for 15 years, it had remained obscure to the highest official of the empire, and upon his enquiry, it is reiterated in this letter to him. … Thus when Constantine and likewise his son, emphatically declares that he must reiterate a previous law, (XII 1,35: *iterate lege sancimus*) this cannot have been an exceptional case."[332]

Constantine writes to Ablavius in the 333 rescript:

> *Sirmondian Constitutions*, 1
>
> Emperor Constantine Augustus to Ablavius, Praetorian Prefect.
>
> We are much surprise that Your Gravity which is replete with justice and the approved religion should have wished to inquire of Our Clemency what Our Sovereignty has either previously ordained or what We now wish to be observed as to the judicial decisions of bishops, O Ablavius, dearest and most beloved Father.
>
> Therefore, because you wished to be instructed by Us, We again, by means of Our salutary power do hereby spread abroad the ordinance of Our previously promulgated law.

[330] See discussion above on Lenski's suggestion that there was very likely an earlier edict that was referred to, and thus not 1.27.1.

[331] As Lenski reminded me in discussion on this research (and what seems to have been the main impetus behind Ablavius's enquiry), the main concern in Sirm. 1 is whether it applies to minors in addition to adults: this was, of course, a major concern in Roman law (*tutela impuberum*, and *curatela*); legal decisions were easily rescinded for *impubes* and *minores*, but Constantine is affirming that the earlier law applies to these as well (*sine aliqua aetatis discretion … Sive itaque inter minores sive inter maiores*).

[332] Otto Seeck, *Otto Seeck's Register of the Emperors (311 – 476 A.D.)*, translated by Martin and Patricia Milewski, ed. C.G. Bateman (Vancouver, 2019), 12 – 13.

For We previously sanctioned, just as the official statement of Our edict makes clear, that the judicial decisions, of whatsoever nature, rendered by the bishops, without any distinction as to age, must be observed as forever inviolate and unimpaired, namely, that whatever has been settled by the judicial decisions of the bishops shall be considered as forever holy and revered.

Whether, therefore, a bishop has decided a case between minors or between adults, it is Our will that the obligation for its enforcement shall rest upon you, who hold the highest judicial authority, and upon all other judges.

Therefore, if any man, either as defendant or as plaintiff, should have a suit at law, and either at the beginning of the suit, or after the statutory time limits have elapsed, or when the final pleadings are being made, or when the judge has already begun to pronounce sentence, and if such litigant should choose the court of a bishop of the sacrosanct law, even though the other party to the suit should oppose it, immediately without any question, the principals in the litigation shall be dispatched to the bishop.

For the authority of sacrosanct religion searches out and reveals many things which the captious restrictions of legal technicality do not allow to be produced in court.[333]

Therefore, all cases which are tried either by praetorian or by civil law, when settled by the decisions of bishops, shall be affirmed by the eternal law of permanence; nor shall any case be subject to review which the judgment of a bishop has decided.

Furthermore the testimony given by a bishop, even though he may be the only witness, shall be unhesitatingly accepted by every judge, nor shall any other witness be heard when the testimony of a bishop has been promised by any party whatsoever.

For that is established with the authority of truth that is incorruptible, which the consciousness of an undefiled mind has produced from a sacrosanct man.

This We formerly decreed by Our salutary edict, this We confirm by Our eternal law, thus crushing out the mischievous seeds of litigation, that wretched men, entangled in the long and almost endless toils of litigation, may at length, with timely settlement, escape from unscrupulous legal attacks and from an unreasonable avarice.

Therefore Your Gravity and all others shall forever observe whatever Our Clememcy formerly decreed as the judicial decisions of bishops and whatever We have now embodied in this law which has been issued for the general good.

Given on the third day before the nones of May at Constantinople in the year of the consulship of Dalmatius and Zenophilus. – May 5, 333.[334]

The authenticity of this letter has been questioned by A. J. B. Sirks, mainly on the following bases: the earlier legislation in 1.27.1 requires both parties to consent, whereas this does not, and the author assumes the earlier edict applied only to lawsuits; he

[333] Constantine echoes this sentiment in his 331 legislation against the corruption in the Roman courts generally, where he promises corporal punishment for those officials who are guilty of such, noted above.

[334] Sirmondian Constitutions, *The Theodosian Code*, trans. Clyde Pharr (New York: Greenwood Press, 1952), Title 1, 477.

maintains the bishops were being given the role of arbitrators, hence the role of both parties needing to consent; there was no appeal to the decision, and in cases of arbitration where both parties agreed, there would be no appeal either.[335] What kind of role Constantine had in mind for the bishops is an important question, because if they were simply being seconded as arbitrators and could not deal with adversarial cases, then they were not true judges. But the evidence does not support Sirks' view in my opinion. As noted above, the first piece of legislation does not say clearly whether one party could not in fact request to have their case moved, in fact the language of the statute implies otherwise: the request of a single litigant could be the basis for having the case transferred. Sirks wrote, "Constantine had ordained that if parties in a law suit wanted to defer their case to a bishop as arbitrator, and have the *Christiana lex* applied, the judge had to accept that and to pronounce the bishop's verdict as his verdict."[336] There are problems with this claim: Constantine did not permit "parties" in a law suit, he permitted a "person," in the singular; the legislation says nothing about arbitration at all; third, while I agree with Sirks that the judge may have pronounced the bishop's verdict, that is a fact absent from the legislation and only inferred from a wider view of the context in which it was created. Sirks' main argument is really about the similarity the bishops shared with arbitrators in the Roman legal system, and he therefore sees Constantine's legislation through this lens.[337]

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[335] A. J. B. Sirks, "The episcopalis audientia in Late Antiquity," *Droit et cultures* 65 (2013): 79-88.

[336] Ibid.

[337] Sirks [ibid.] writes: One may say that the constitutions at the end of the fourth century indicate that bishops previously did judge in secular cases on the wish of one party alone. It is an argument a contrario, which yet has some plausibility in itself. But what makes this [implausible] is that if Sirm.1 were true, it would mean that whoever was cited against his wish before a bishop, never had the possibility to appeal.

Jill Harries similarly makes the assertion that the idea that only one of the parties could have the case referred to a bishop's court ran counter to the "principle fundamental to all forms of arbitration, that the arbiter was able to act because he had the consent of both parties."[338] But again, if we dispense with the idea of Sirks and Harries that a bishop's court was merely a forum for arbitration, something assumed based both on the fact that bishops' courts before Constantine's reign were usually aimed at producing reconciliation between Christian adherents and that consent between the parties was essential, we are left with the text of the statute, and the nature of this text evidently caused Ablavius a good deal of hesitation, and understandably, as Harries puts it.[339] But with both Sirks' and Harries' similar claims about the nature of the bishop as arbitrator, any evidence pointing to the fact that a bishop's court was *always* reconciliation-focused and based on the consent of the parties is absent. Of course, Harries does, at the beginning of her chapter on the courts of bishops, note that indeed, bishops were not merely arbitrators but were judges adjudicating on the basis of Roman law. They were both.[340] But later on in that chapter, she makes the claim noted above that 1.27.1 is at variance with the "consent

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That were completely contrary to the principles of secular jurisdiction, which is very hard to believe to have been the case. Appeal was a long established and inveterate part of the legal system. Only with arbitration parties, as with a settlement, repudiated basically their right to appeal. If somebody wants to save Sirm. 1, he has to reduce its force to religious matters. But even there not a single bishop, but only the synod had the authority to make decisions which were not appealable. [On his mention of bishops hearing secular cases in the late fourth century, based on the discussion of Lenski above, it seems that in certain places, and certainly growing over time, they did hear such cases, and that they were based on Constantine's 318 legislation C.Th. 1.27.1. But this judicial activity can be seen as separate from Sirm. 1, because, if as Sirks suggests, the "saved" Sirm. 1 is not genuine, then we still have to deal with the facts that bishops did hear civil and criminal cases, and in significant amounts, even involving people outside the Christian community. His point about the lack of a right of appeal being at variance with Roman practice is fair, given the language of Sirm. 1. But for reasons discussed below, I think the internal and external evidence of the text proves otherwise: Sirm. 1, in my opinion, appears to be genuine.]

[338] Jill Harries, *Law and Empire*, 197.

[339] Ibid.

[340] Ibid., 191.

principle" fundamental to all forms of arbitration, and this reads as if she is claiming that all cases before the bishop would be of that nature. Constantine's law assumes otherwise, and it seems disputes, even amongst two Christian adherents, would not always be hearings based on consent and/or reconciliation: theft, assault, etc.

On the other hand, Harries' emphasis on the "reconciliation" focus of the courts of bishops is certainly true when it was both Christian litigants involved and was a matter where consent was possible. Harries convincingly points to the fact that bishops were both in their station for life and they had to govern Christians under them, as well as being their teacher and judge;[341] such a confluence of roles virtually demands that a principle of reconciliation be adopted whenever possible, if the bishop's authority was to be durable. Harries goes on to put the authority of bishops as judges primarily in early Christian writings, but I suggest this emphasis is too strong when it comes to understanding a bishop as judge hearing a case based on Roman law. While contrasting bishops with Roman *iudices* who only served for a short time, Harries notes "…bishops were a fixture, and their *auctoritas* was dependent on tried and tested rules laid down, not by emperors, but by the Gospels and St. Paul."[342] If this is only a reference to bishops' courts with two consenting Christian litigants, then one might be able to assert that their authority is largely based on such traditions, but in cases where one or both of the litigants were outside the religion, or where one or more Christian litigants were recalcitrant regarding the bishop's authority, the laws of Constantine address exactly that and the bishop's authority to try such cases falls squarely, based on the edicts still extant,

[341] Ibid., 211.
[342] Ibid.

on either 1.27.1 or its companion rescript. Further, appealing to the apostle Paul is problematic in its own right when it comes to either bishops as judges or bishops solely as arbitrators.

When Paul admonishes the Christians in Corinth about appointing judges from their own numbers to decide matters, one does not see any evidence he is referring merely to the arbitration context:

> When any of you has a grievance against another, do you dare to take it to court before the unrighteous, instead of taking it before the saints? Do you not know that the saints will judge the world? And if the world is to be judged by you, are you incompetent to try trivial cases? Do you not know that we are to judge angels—to say nothing of ordinary matters? If you have ordinary cases, then, do you appoint as judges those who have no standing in the church? I say this to your shame. Can it be that there is no one among you wise enough to decide between one believer* and another, but a believer goes to court against a believer—and before unbelievers at that?[343]

And there is the rub, "decide between one believer and another". In "ordinary cases" such as claims of theft or contracts broken, Paul here is of course writing about an *ad hoc* and inquisitorial judgment where either the "saints" or an appointed judge — note, not the bishop — will be able to decide the case because, as the apostle states, since Christians in the next life will judge "the world" and "angels", surely they can determine who is a guilty party between one believer and another. Regardless of his theological speculation on what Christians will be up to in the next life, he is clearly expecting that "grievances" and "ordinary cases" ought to be handled in the context of a community of Christians, rather than before Roman courts. Unlike Constantine later on, who does not confine the bishop to "ordinary cases", Paul here seems to do just that, but there is nothing in the passage

[343] 1 Corinthians 6: 1 – 6. *New Revised Standard Version Bible: Anglicized Edition*: 1989, 1995 National Council of the Churches of Christ in the United States of America; www.bible.oremus.org.

about where the line should be drawn beyond which cases become extraordinary, or whether Paul is referring exclusively to matters appropriate to arbitration. If amongst their own, as Harries implies, the bishops point to Paul's directive for their authority, what happens in the situation where pagan Romans come before a bishop judge, as clearly anticipated in Constantine's legislation under consideration? The only place such authority could be found is the command of the emperor, and thus 1.27.1 and Sirm 1 constitute such commands. So while Harries does acknowledge the bishops were made *iudices* in the Roman legal system, her concluding sentence that their authority comes from Christian writings puts the emphasis too strongly in the context of a discussion about bishops deciding cases on the basis of Roman law, unless, again, we are only talking about a case involving two Christian litigants. The authority to try cases based on Roman law could only be authorized by the lawmaker; in the fourth century, that was the emperor.

Another difficulty with citing Paul as a source for the authority of bishops as judges, is that in another letter considered authentically his, in fact both are, he seems to argue at cross purposes with the above quoted passage, at least where it concerns his mocking the idea of having Roman courts try cases between Christians. In his letter to the Roman Christians, he writes:

> Let every person be subject to the governing authorities; for there is no authority except from God, and those authorities that exist have been instituted by God. Therefore whoever resists authority resists what God has appointed, and those who resist will incur judgement. For rulers are not a terror to good conduct, but to bad. Do you wish to have no fear of the authority? Then do what is good, and you will receive its approval; for it is God's servant for your good. But if you do what is wrong, you should be afraid, for the authority does not bear the sword in vain! It is the servant of God to execute wrath on the wrongdoer. Therefore one must be subject, not only

> because of wrath but also because of conscience. For the same reason you also pay taxes, for the authorities are God's servants, busy with this very thing.[344]

But to execute wrath on the wrongdoer in the Roman context of Paul's time, in most cases, would involve pronouncement of judgment by a competent court. If Paul is commending and supporting the judgment of "their courts" in this context, but lambasting it in the other, it makes relying on the passage in the letter to Christians in Corinth about having "saints" serve as judges seem uncertain, or at least difficult to understand fully. The general tack of this passage from his letter to the Romans seems to indicate that he thinks the governing authority, and presumably this includes Roman judges and courts, are competent and authorized by his god to judge those Christians in Rome he was writing to. While it might be argued that in the letter to the Corinthians Paul is confining saints as judges to "ordinary" cases, and that in the letter to the Romans he is referring to serious crimes, such as capital offenses, this still does not clear up the point he is making in the latter, which is that Christians ought to be subject to the Roman legal authorities. Since he is writing about legal punishments, it seems clear that he would know that a Roman court process would be engaged. It is common knowledge that Paul himself was a Roman citizen, and learned to a significant degree.

The teachings in the gospels themselves, also, do not seem to fit perfectly with Paul's "the state as God's servant" dictum. To cite one obvious example, the author of Matthew has Jesus say, on whether a Jewish person ought to pay taxes, "'[g]ive therefore to the

[344] Romans 13: 1 – 6. *New Revised Standard Version Bible: Anglicized Edition*: 1989, 1995 National Council of the Churches of Christ in the United States of America; www.bible.oremus.org.

emperor the things that are the emperor's, and to God the things that are God's.'"[345] If the emperor's taxes are his, then are not the emperor's courts? If the religion's founder actually said this, he seems to have wanted to distance himself from the state's authority, while at the same time agreeing that one ought to give back to Caesar those coins which bear his likeness. Even if we stretch the meaning of this to infer that if summoned to court under a Roman law, then his followers ought to go straight away because it is "the Emperor's" court, then we are back at variance with Paul's "appoint Christian judges on matters you are bringing before the Roman courts" dictum in his letter to Corinthians. This is because matters that those Christians were bringing before Roman courts would by necessity have to have been based on Roman law, but then if so, on Jesus's reckoning, it ought to be Roman courts deciding Roman law. Regardless of other possible examples of conflicting ideas in early Christian writings on the role of the state vis-à-vis the religion, my disagreement with Harries is only in her emphasis on the fact that despite the emperor's laws, the bishops had a more cogent bases for their judicial authority, the Gospels and letters of Paul. Prior to 318, I could accept such a claim, but not after it.

Caroline Humfress, noted and recent scholar on the courts of bishops, takes a point of view which aligns with my own on the subject, that the 318 and 333 constitutions were in no way a limiting mechanism on the jurisdiction of judges. In her 2007 monograph on the subject, she notes that in terms of the 333 rescript, it is "…not concerned, however, with defining whether bishops should be understood as 'judges' or 'arbitrators'—both avenues

[345] Matthew 22.21 (*New Revised Standard Version Bible: Anglicized Edition*, 1989, 1995 National Council of the Churches of Christ in the United States of America; bible.oremus.org).

of approach were open to litigants, amongst others."[346] When discussing the subject more generally in her 2011 article, specifically about the relatively fluid way appeals were made by bishops to the imperial court for rulings on what were ostensibly church matters, she notes that:

> … ecclesiastics sought to invoke emperors and imperial magistrates as judges in their own cases. So at any given time, the principle that Christian clerics should have exclusive jurisdiction over other clerics, and ecclesiastical business, could be both asserted and challenged in imperial and ecclesiastical forums alike. The important point here, however, is simply that imperial constitutions confirming *privilegium fori* [like should judge like] for clerics should not be understood as imperial attempts to restrict episcopal decisions to church business alone.[347]

She reiterates the point made by Walter Selb[348] that scholars often make the fatal error of confusing the *episcopalis audientia* with the development of the *privilegium fori* amongst clerics.[349] The fact that some bishops wished to limit cases involving clerics to church jurisdiction alone, has no prima facie connection to, say, Majorinus and the rigorists appealing to the Imperial Court for a ruling which would overturn the appointment of Caecilian as Bishop of Carthage. The appeal of the rigorist bishops in the Donatist crisis to the Emperor's court is the opposite of *privilegium fori*, in fact it invites the state to rule on church matters of the highest import. True, as Ullman notes, this was part of Constantine's jurisdiction anyway as the Pontifex Maximus, but there was nothing compelling the rigorist bishops, certainly no legal obligation, for them to appeal to the Imperial Court. The reason they did so is clear: they required a court with the jurisdiction

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[346] Humfress, *Orthodoxy and the Courts*, 161.

[347] Caroline Humfress, "Bishops and Law Courts in Late Antiquity: How (Not) to Make Sense of the Legal Evidence," *Journal of Early Christian Studies*, Volume 19, Number 3 (Fall 2011), 308 – 381.

[348] Walter Selb, "Episcopalis audientia von der Zeit Konstantins bis zur Novelle XXXV Valentinians III," *Zeitschrift der Savigny-Stiftung für Rechtgeschichte,* Rom. Abt. 84 (1967): 162–217, at 214 – 217.

[349] Humfress, *Bishops and Law Courts*, 380. Citing Selb at 214 – 217.

to override that of the Bishops of Rome's; and the Emperor, having by this time adopted the Christian religion to himself and being compelled[350] by his duty to intervene based on his role as keeper of the *utilitas pubilca*, the common good, under the auspices of *ius publicum*, the public law, had little choice but to make a ruling. Contrary, then, to Sirks' claim, the fact remains that the long tradition of clerics and bishops judging their own, and its subsequent growth as the church became more of a societal force, is not the same thing as either the bishops launching an action under the state's legal authority or Constantine deciding that bishops ought to be hearing cases based on Roman law.

Here again, Humfress, although supporting the thesis that the kinds of judges the bishops were to be was not limited in any way by the constitutions under consideration, does want to defend the claim that the piecemeal nature of the two constitutions, and others in the fourth and fifth centuries on episcopal jurisdiction, were only created when the Emperors were prompted by case-specific instances.[351] But the fact that specific instances meant that Constantine was encouraged to set out his policy in a law directed to address that instance, does not then mean that the policy did not exist absent the law. If, as I have evidenced and scholars all acknowledge, the bishops were already deciding cases in their own communities long before, up to, and more so following the 318 edict; and if Constantine, as a Christian emperor, let his choice of deity be known to the empire in no uncertain terms, having himself sat with bishops as judges in the Donatist hearings which, technically, only wound up a year previous to the 318 legislation with a piece of legislation against them; and given the evidence we have about the Emperors following

[350] Vide supra.
[351] Humfress, *Orthodoxy and the Courts*, 161 – 162.

Constantine having to rein the bishops in with their own legislation on the scope of a bishop's authority to hear civil matters between those outside of the religion, then it becomes possible that the courts of bishops began to hear matters outside of religious ones during the reign of Constantine. The fact that the 318 edict and 333 rescript seem to imply this seems to follow quite naturally. In fact, it may be that Constantine did not need to issue legislation to create the courts and enable them to hear matters of Roman law, because they were already doing that. Here, one would do well to keep in mind Humfress's point about forum shopping which was a regular aspect of the Roman legal context of the fourth century, noted above. Her acknowledgement, also noted above, about the possibility there may have been an intervening piece of legislation lost to history between his adoption of the Christian religion and the 318 edict is also interesting, and it may be that Constantine's language in the edict about the sacrosanct nature of the bishops' decisions would have been an attempt to further define such a law. But the language of the 333 rescript argues against this, because there he rebukes Ablavius for not knowing or remembering his initial legislation on the matter, and since there is no such rebuke in the 318 edict about any earlier one, it seems unlikely.

Another aspect of Humfress's argument I wish to challenge is her framing the late fourth and fifth century constitutions on the bishops as judges as being created by "drafters". Similar language was previously introduced by Jill Harries regarding 1.27.1: "Constantine's legal draftsman uses the words [court jurisdiction (*iudicium*) and formal arbitration] interchangeably, referring to both episcopal and secular lay jurisdiction as

'iudicuim' and the decisions reached by both as 'arbitrium'."[352] In Humfress's text, she often portrays the legislation as being somehow created by drafters, versus the Emperor in whose name they were issued. For instance, she writes variously: "[i]n the late fourth and fifth centuries, emperors—particularly Eastern ones—may have deliberately promoted legal experts as the drafters of their constitutions, ….";[353] "…then it seems a fair inference that *iurisperiti* (other than any legally expert drafters of the imperial text itself) could have had an input in promoting imperial legislation.";[354] "The drafters of the imperial reply ….";[355] etc. In her more recent 2011 article, she comments on the seemingly primary role of the drafter/s in creating the 318 law: "Thus from the drafter's (or drafters') perspective, the 318 constitution sought to remind magistrates that even if a case had already opened before them, they should allow litigants to appeal to a different process or forum—here, that of a bishop."[356] On the 333 rescript, she wrote: "In the preamble to *Sirmondian Constitution* 1 the drafter directs Ablavius's attention to a previous Constantinian edict and reaffirms the ability of litigants to transfer their cases to the bishop's judgment, at any stage in the initial proceedings before a magistrate—even if the other party to the case does not agree."[357] In another place she makes her inferences on this subject very clear:

> The drafter of Valentinian III's Novel 35 thus manages to express the emperor's reverence for the Christian religion, at the same time as ensuring that an imperial magistrate could judge a bishop in both criminal and civil suits. In sum, the drafters of

[352] Harries, *Law and Empire*, 195.
[353] Humfress, *Orthodoxy and the Courts*, 66.
[354] Ibid., 88.
[355] Ibid., 245.
[356] Humfress, *Bishops and Law Courts*, 387.
[357] Ibid., 388.

> Valentinian III's Novel 35 are engaged in their own "historicized" reading of the Theodosian Code, motivated by their own contemporary realities.[358]

The main assumption guiding her emphasis on the "drafters" seems to be that behind the curtains of the imperial court there were drafters of the laws that were writing the laws of the emperors as much based on the emperors wishes as their own legal understanding. When she writes things like "… the drafter expects that litigants will continue to lodge 'illicit' cases …",[359] she is implying that the drafter's role was very significant, and perhaps even more so than the emperor. That there were imperial servants (drafters, scribes) tasked with writing out the laws, and legal experts at the Emperor's disposal, is common knowledge. That these drafters would take it upon themselves to manipulate the laws of the Emperor Constantine to suit their own take on any given subject is not. Humfress's emphasis on the drafters leaves the reader with the impression that they are not merely scribes at the King's right hand, but actually creating content independent of the emperor, or at least crafting it in a way that was of their own making, and not the emperor's. This, I suggest, at least where it concerns these two laws of Constantine and other laws of this emperor, is not supported by the evidence,[360] nor does it seem plausible given Constantine's character (see chapters above). A case in point would be to look at the language of the 331 edict against abuses of the members of the legal administration at

[358] Ibid., 394.

[359] Humfress, *Orthodoxy and the Courts*, 166.

[360] I think the idea itself is problematic: a mere civil servant re-writing laws to fit what they saw as most prudent. To slight the emperor in this fashion would seem to me out of the realm of possibility. No doubt there could have been and likely was communication between officials and Constantine, especially with the 318 edict, but Constantine would have approved it, and therefore we can infer that Constantine was satisfied with the final version. The 331 edict and 333 rescript are written altogether differently, and are most likely Constantine dictating most of the content.

ground level, keeping in mind all the while MacMullen's observation that Constantine was "[t]reating the art of the legist as just an obstacle between himself and the measures needed by the age, on the impulse of fury, impatience, or kindness, he occasionally bursts right through the ancient, wonderful structure of Roman law;" and "…he distrusts what he thinks are the tricks and pedantry of the expert in legislation."[361] What part, for instance, would the drafter have played in the creation of the following edict?:

> The rapacious hands of the [civil servants] shall immediately cease, they shall cease, I say; for if after due warning they do not cease, they shall be cut off by the sword. The chamber curtain of the judge shall not be venal; entrance shall not be gained by purchase, the private council chamber shall not be infamous on account of the bids. The appearance of the governor shall not be at a price; the ears of the judge shall be open equally to the poorest as well as to the rich.[362]

Was this not simply the very words, or something close to them, of Constantine? Is that not the drafter's role, after all? As Pholsander has noted, Constantine "thundered" against such improprieties.[363] While one might suggest that this is a case of what A.H.M. Jones' once noted, that "[a]t times Constantine became quite hysterical in his impotent fury,"[364] I suggest it is something quite different to claim the drafter had a central role in creating this law. On the other hand, the two laws under consideration in this study give evidence that in the latter we are dealing with the same outspoken and brutally frank emperor, but in the former also likely getting the gloss of the drafter. Consider the following excerpt from the 318 Edict:

> Pursuant to his own authority, a judge must observe that if an action should be brought before an episcopal court, he shall maintain silence, and if any person should

[361] MacMullen, *Constantine*, 234.
[362] Ibid.
[363] Hans A. Pohlsander, *The Emperor Constantine* (London: Routledge, 1996), 68.
[364] Jones, *Conversion of Europe*, 218.

> desire him to transfer his case to the jurisdiction of the Christian law and to observe that kind of court, he shall be heard, even though the action has been instituted before the judge, and whatever may be adjudged by them shall be held as sacred; ....[365]

The wording of this does seem to be apart from the 331 and 333 legislation, but keep in mind that this came thirteen years before in 318. Does it seem reasonable that at an early stage in his reign, when he had co-emperors to deal with, that Constantine would have given instructions on this matter and then let the legal experts/drafters do the rest? What I think corresponds to the fact we are dealing with Constantine alone here is the import of the law, its content and implications, not its structure. That Constantine, having adopted the religion at least six years previous, would have insisted on such a provision seems to fit. But that "legal advisors" and "drafters" would have had any significant role beyond that of offering their opinions to the one creating and approving the final draft of the law does not seem straight forward in the case of 1.27.1; having noted that, this law is different enough from the wording of Constantine's later legislative material that I think it ought to be conceded that in this case in 318, these were not his exact words. In contrast, I would suggest it is out of the question in the 333 rescript that we are hearing the lone voice of the drafter. It was as exaggerated and fulsome as the 331 edict, and as Harries noted, it shows us Constantine having difficulty couching his laws in ways that would fit the legal process norms of his day.[366] Perhaps the fact that there was some care taken for this in the 318 law, giving the judge in the first instance authority to fulfil the verdict of the bishop once made, shows us that this earlier law was a translation of the

[365] *Codex Theodosianus, The Theodosian Code*, trans. Clyde Pharr (New York: Greenwood Press, 1952), 1.27.1, 31.

[366] Harries, *Law and Empire*, 197.

wishes of Constantine into words that would fit the relevant legal procedure. Later in his reign and as sole emperor, I suggest the drafters had little to do with the wording of the meaningful passages in some of his edicts and rescripts, as I suggest the 331 edict and 333 rescript show clearly.

In relation to the drafters' involvement with 1.27.1, as noted above, the reliefs on the coins during Constantine's reign did not begin to convert to Christian imagery until the early 320s, and thus to think that the drafters would have seen the bishops' decisions as "sacred" assumes they held or shared an affinity with the religion. At this early date of 318, we can only say with certainty that the emperor had begun to adopt and favour the religion, his imperial staff would have been a different matter altogether, although it is possible even there one would find Christian adherents. The law is definitely guarded in the privilege it grants to litigants, noting that the original magistrate must keep jurisdiction and pronounce the judgment, and thus it is really only granting the bishops the right to decide a matter, not be responsible for the administrative aspects of it, such as declaring the sentence and enforcing it. The fact that it is guarded also speaks to its early Constantinian provenance. But the 333 rescript is quite different, and here Constantine's own voice seems more than evident, expanding in flowery terms the qualities of the bishop as judge, and rebuking Ablavius for not being aware of the earlier law.

> Emperor Constantine Augustus to Ablavius, Praetorian Prefect.
>
> We are much surprise that Your Gravity which is replete with justice and the approved religion should have wished to inquire of Our Clemency what Our Sovereignty has either previously ordained or what We now wish to be observed as to the judicial decisions of bishops, O Ablavius, dearest and most beloved Father.

Here is the subtle rebuke to Ablavius. If it is the work of a drafter, it is one who is sure that this Praetor of Rome should have known about what "Our Sovereignty" had previously ordained. Interesting too is the fact that they (Constantine, the drafters, or both) are surprised that not only should he have known the previous law (presumably the edict of 318), but that he ought to have also known "what We now wish to be observed as to the judicial decisions of bishops, …." This implies that what is contained in this rescript must have been known to some legal functionaries previous to its creation. Some other examples of what seem to be Constantine's words appear clearly.

> For We previously sanctioned, just as the official statement of Our edict makes clear, that the judicial decisions, of whatsoever nature, rendered by the bishops, without any distinction as to age, must be observed as forever inviolate and unimpaired, namely, that whatever has been settled by the judicial decisions of the bishops shall be considered as forever holy and revered.[367]

So what in the first law was merely sacred, important on its own, is now "forever inviolate and unimpaired" and "forever holy and revered." Now, Constantine's reasoning for this:

> For the authority of sacrosanct religion searches out and reveals many things which the captious restrictions of legal technicality do not allow to be produced in court.
>
> Therefore, all cases which are tried either by praetorian or by civil law, when settled by the decisions of bishops, shall be affirmed by the eternal law of permanence; nor shall any case be subject to review which the judgment of a bishop has decided.
>
> …
>
> For that is established with the authority of truth that is incorruptible, which the consciousness of an undefiled mind has produced from a sacrosanct man.
>
> This We formerly decreed by Our salutary edict, this We confirm by Our eternal law, thus crushing out the mischievous seeds of litigation, that wretched men, entangled in the long and almost endless toils of litigation, may at length, with timely settlement, escape from unscrupulous legal attacks and from an unreasonable avarice. ….[368]

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[367] Sirmondian Constitutions, *The Theodosian Code*, trans. Clyde Pharr (New York: Greenwood Press, 1952), Title 1, 477.

[368] Ibid.

Clearly, just as with his attack on the "mischievous seeds of litigation" in 331, here we seem to be dealing with the same "drafter", whom I suggest is simply Constantine. In other words, this law does not in any way seem to veer from the intent of the Emperor to whom it is ascribed.

While Humfress's book is a veritable gold mine on the subject of late fourth and fifth century legislation on the role of bishops as judges, we cannot overlook this emphasis on the drafters being framed in her text as co-creators and thus lay a basis for distrusting the content of the laws themselves, at least vis-à-vis Constantine's wishes. It seems Humfress, as with the whole tack of her work in attempting to show what a multi-faceted process the creation of laws, their promulgation, and the resultant practice on the ground was, wanted to remind the reader that there was at least one step between the emperors will and the law as received. I grant this without question, the commonly known legal apparatus around the emperor need not detain us, and as she points out, there were actually many steps before laws actually touched the lives of Romans under these laws. Their implementation on the ground is what her focus is. But without evidence that the drafters actually interpolated their own views into these constitutions means that evidence which suggests the opposite must be reasonably accepted, even if that conclusion goes along with an orthodox historical interpretation.

Humfress's conclusion in her monograph on the subject is that in order to better understand the development of late Roman law in its proper context, we ought to move beyond "normative legislation" to a study of forensic activity in the actual courts.[369] I

[369] Humfress, *Orthodoxy and the Courts*, 270.

agree with her where this concerns how the laws were interpreted and enforced, and her work is to date the best and most detailed research on the subject. From this general vantage point, she makes two key observations, one I agree with, and one I do not. She points out that neither of the constitutions' aim was to limit the bishops to hearing either religious matters, or cases between litigants who agreed to use the bishops court, and I think she would agree, because it is implied, that this would include the fact they were not being limited to hearing legal matters between Christians. Nothing like this appears in the legislation of Constantine, and to come to this conclusion would be to both read backwards from the legislation of later emperors who attempt to limit bishops to certain mostly religious matters and then give them more of an arbitrator's role, and thus use it as a lens to understand the import of the earlier laws. Thankfully, one of the later laws clears this point up for us, as noted above. Later emperors who attempted to limit bishops to hearing only religious matters tells us in stark terms that bishops were hearing matters based on Roman private and public law that were outside of these restrictions; otherwise, why the need to restrict them in this way?

The point of Humfress that I do not agree with is her emphasis on the fact that because these constitutions arose out of case specific circumstances, they were therefore not reflective of imperial policy. For the reasons I note above, I cannot agree with this. The gravamen of this thesis is, on the evidence, arguing the other way. During Constantine's early reign, shared amongst the tattered remains of the tetrarchy, imperial policy would, I suggest, be difficult to gauge. But I would argue the 318 edict was indicative of Constantine's policy, especially when seen in a nexus of legal events, laid out for the

reader in the introduction, and again in the conclusion, which run from the *Edict of Toleration* to the 333 rescript. Each legislative step along the way, as well as the vast evidence found in Eusebius and Lactantius, points to the fact that Constantine saw the Christian bishops as ordained by the deity that had made him a ruler, and eventually the sole ruler of the empire. As his rule is consolidated, so too was his belief that the Christian god had chosen him. That his laws would reflect this, even in 318, seems eminently reasonable; and the evidence, direct and circumstantial, seems to point to this. It was these significant legal and societal endowments, I suggest, which caused the later emperors to question them and to attempt to restrict, however unsuccessfully in the long run, the bishops to only certain kinds of cases.

Later emperors attempted to restrict bishops to cases where the parties agreed and not permitting them to hear criminal cases, but as pointed out, by Augustine's time with an imploding Western Empire, this policy was put aside at times out of necessity, and the bishop would hear criminal cases. The legislation that shows this curtailing of powers comes in 376 from the Emperors Valens, Gratian, and Valentian and reads: "[w]hatever is customary in the conduct of civil suits shall likewise be observed in ecclesiastical litigation… with the exception of those matters which criminal action has established shall be heard by ordinary and extraordinary judges or by the Illustrious authorities."[370] In fact, Humfress has observed that "… there is evidence from the early fourth century onwards to suggest that the structural organization of the *episcopalis audientia* came

[370] CTh 16.2.23, 444.

increasingly to mirror that of the bureaucratic courts,"[371] an indication that even before this edict, the courts of bishops had already started drifting in this direction. The demarcation of jurisdiction is again repeated later in 399 by the Emperors Arcadius and Honorius: "[w]henever there is an action involving matters of religion, the bishops must conduct such action. But all other cases which belong to the judges ordinary and to the usage of the secular law must be heard in accordance with the laws."[372] But that the compilers of the Theodosian Code put Constantine's 318 legislation on the matter into the code, means it was still a valid law; but as noted, on a bare reading it gives a wider jurisdiction to bishops than these later pieces of reforming legislation did. Claudia Rapp notes this fact in the nexus of various legislation on the matter of bishops as judges:

> After a hiatus of several decades, during which Julian apparently reversed Constantine's laws, new legislation attempted to regularize the judicial activities of bishops. They were not to hear criminal cases, but only those of religious import; and the consent of both parties was again necessary to obtain episcopal arbitration. A law of Arcadius and Honorius, given in 408, repeated that the consent of both parties was required, that no appeal was possible, and added that the bishop's ruling would be enforced by civil authorities. The compilers of the Theodosian Code who paired this law with Constantine's initial law of 318 under the heading *De episcopali definitione* must have considered it to be either of historical interest or of enduring validity.[373]

The placement of the law in the Code seems to indicate that this law was indeed of enduring validity, but the question remains whether the later Emperors were changing

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[371] Humfress, *Orthodoxy and the Courts*, 167. She goes on to point out that passages from Basil of Caesarea's Moralia on the conduct of the episcopal judge make specific reference to the norms and principles of Roman procedure (168); and, that, as with civil courts, cases were usually open to the public and were at times held at the gateway of the church (169), a point which connects to Deimling's observations, herein; finally, she notes that in some cases, the actual adoption of the Roman judicial basilicas into the Church means that the *episcopalis audientia* assimilated "the very fabric" of late Roman judicial architecture (169).

[372] CTh 16.11.1, 476.

[373] Rapp, *Holy Bishops in Late Antiquity*, 244. As Lenski pointed out to me, this is important: Julian restricts Constantine's measure, and Theodosius, Arcadius, and Honorius only reintroduce some of his ideas.

the nature of Constantine's original intent for his legislation or reining it in on purpose.[374] The end result was that these later laws seem to have attempted to dictate the situation at the local levels — in the case of Augustine, for instance — and specifically that bishops confine their judicial activities to those of a religious or civil nature. But, as noted above, they began to hear criminal cases because the state was in some cases absent from the localities in which the law had to be administered. By the mid fifth century, the circumscribing of Valentinian went even further, insisting that both parties had to agree to be heard by the bishop, and Lamoreaux notes of this law that the bishops had essentially "no court of their own according to law."[375] But it was too late, the Western Empire was crumbling during his reign, and one imagines that just as was the case with Augustine and Ambrose, the absent Roman civil service in the West placed bishops such as these as the only option for adjudicating legal matters on the local level. The fact that Constantine placed these bishops in this position to begin with, however contested their roles became later, and the fact the bishops were often such respected figures in their cities and regions, made them like pro tem governors who would have to deal with the continual and overpowering incursions of the barbarian kingdoms who, in their turn, would adopt Constantine's Roman Church as well.

So while the Church functionaries like Augustine, Ambrose, and presumably others, were being forced to fill in for an absentee judiciary, the question still remains whether their doing so was in line with what Constantine had envisioned for them in his 318 legislation. One of the reasons bishops ended up taking on this role is because there was a

[374] See also Lamoreaux at 148-149.
[375] N Val 35. Lamoreaux at 149.

great difference between a magistrate or governor and a bishop, and this point is made by Rapp:

> The bishop's role as a dispenser of justice departed from tradition in two important respects. First, in contrast to provincial governors, who were sent to their post for a very limited number of years, the bishop was usually firmly integrated into the social life of the city as a well-known and well-respected member of the local community. Moreover, where a magistrate was appointed for a limited amount of time, the bishop had been elected for life. His familiarity with local conditions must have been of great help in dispensing justice, and his social position must have ensured respect for his judgment. This explains why high-profile bishops like Ambrose and Augustine were swamped with legal work. Second, while the civil magistrate could dispense justice either by arbitration or by pronouncing a sentence, the bishop's court was either approached with the transfer of a pending case before a civil judge, in which case the bishop presumably pronounced a judgment, or the bishop's pronouncement was sought in a process of arbitration.[376]

The bishop's role was one for life, while judges and governors were far more temporary officials, and this is key to understanding how the bishops ended up taking on a greater role in local communities once the Western Empire became financially and geographically strained and found it impossible to staff the many locales they had jurisdiction over.[377] The bishops filled the gap left by the vacating imperial administration, and as that became more and more the case with the fall of the Western and rise of the Eastern halves of the Empire, a litigant perhaps had little choice if he or she wanted their case heard at all. Add to this the growth of the Christian religion, over fifty percent of the Empire's citizens by 350, a direct result of Constantine's adoption of and favour towards it, we can also reasonably surmise that perhaps in as many as half the

[376] Ibid., 245.

[377] While it is true the empire and imperial administration were falling in the West, it is not true that the civil service completely stopped in its tracks, and thus local magistrates and praetors continued in the most important cities, and we know this for certain because Gregory I was a praetor in Rome, and that was after the city had already been sacked three times. A vague semblance of administration continued, not for the power of the state, but for the large number of Romans continuing to live within the environs of the former Western empire.

matters requiring adjudication, one or both of the parties was a Christian adherent. With these contextual realities in mind, then, it is no wonder Augustine and Ambrose would hear a broad spectrum of legal matters, even if their personal preferences were to avoid some of them, as we know was the case. The local realities pressed in on these and like bishops who were essentially forced to adjudicate in matters that late fourth century emperors had legislated them out of, but they likely had little choice in communities where they were the most familiar and trusted authorities who were available to the average litigant. That Constantine wanted the bishops to be so circumscribed is not clear, and thus a consideration of his 333 legislation may help to clarify this question, even if ultimately one is forced to see Constantine's recognition and protection of the state judge's jurisdiction as some indication that at the time of his earlier legislation, 318, he felt the Roman Courts should be overseeing all legal matters, even the cases directed to the bishops. What is clear from the early legislation is that Constantine did intend the bishops to serve as judges of some kind[378] and we know this with certainty.

I suggest that Constantine's later rescript of 333 is different enough in nature to the earlier edict to leave the historian no other choice but to conclude he was expanding the powers and authority of bishops far beyond what he had first intended. The legislation's wording does not preclude such a conclusion, it only supports it. The occasion for the rescript was Constantine being asked something about how the 318 law should be understood, to which he responds:

[378] What the nature of the cases were that bishops would have first heard from 318 – 333 is unknown due to lack of evidence, but if we take Augustine's reticence to hear criminal cases even in his own day and read that backwards, it is unlikely they were relied upon. But, the fact is that there is no evidence either way; the legislation does not restrict bishops to areas of law, so the possibility is there that they heard criminal matters occasionally, certainly Augustine did.

> For We previously sanctioned, just as the official statement of Our edict makes clear, that the judicial decisions, of whatsoever nature, rendered by the bishops, without any distinction as to age, must be observed as forever inviolate and unimpaired, namely, that whatever has been settled by the judicial decisions of the bishops shall be considered as forever holy and revered.[379]

Constantine here claims that his previous edict was "clear," but it was not, it only noted the bishops' decisions should be treated as sacred, that a person could have their case transferred, and that the case remained under the authority of the presiding magistrate, even when the proceedings had been transferred. While he was not clear in the edict, the language of the rescript is. In the 333 rescript, what he means by the judicial decisions of bishops being "inviolate and unimpaired" is set out further on in the law: "[t]herefore, all cases which are tried either by praetorian or by civil law, when settled by the decisions of bishops, shall be affirmed by the eternal law of permanence;[380] nor shall any case be subject to review which the judgment of a bishop has decided."[381] Constantine is then explicit about the impossibility of appeal from a bishop's decision. This is a significant departure from the earlier legislation, even though in this rescript his language seems to indicate that this is what he had meant all along: "For We previously sanctioned, just as the official statement of Our edict makes clear, that the judicial decisions, of whatsoever nature, rendered by the bishops, … shall be considered as forever holy and revered."[382]

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[379] Sirmondian Constitutions, *The Theodosian Code*, trans. Clyde Pharr (New York: Greenwood Press, 1952), Title 1, 477.

[380] It has been pointed out to me that it may be possible that this sanctity of bishopric judicial decisions might have been intended to enable the humanizing of Roman law through the advent of Christian values where they differed with the civil law (Dennis Pavlich, 2018). This certainly seems a live option giving the strong wording used by Constantine, but it has to be weighed against his general displeasure with the level of corruption in the administration of justice more generally, and so perhaps both motivations were at work. The fact noted above regarding Constantine's motives for choosing the religion, specifically how the divine seemed to be blessing the religion and gave him victory in arms, should also be taken into account.

[381] Ibid.

[382] Ibid.

Again, he assumes that his edict was clear, but the change in the content which is evident, his elaborations, make it reasonable to suggest he was engaging in an expansion of the law's meaning.

One of the other aspects of the earlier edict that is expanded upon is the person's right to have a case transferred to the court of a bishop. In the edict, it was simply stated that the judge must have the case sent to the bishop's court if one of the party's requested it, there was no mention of at what point in the proceedings this needed to take place or whether the other litigant had to agree to it. In this later rescript, all that is set out in detail:

> Therefore, if any man, either as defendant or as plaintiff, should have a suit at law, and either at the beginning of the suit, or after the statutory time limits have elapsed, or when the final pleadings are being made, or when the judge has already begun to pronounce sentence, and if such litigant should choose the court of a bishop of the sacrosanct law, even though the other party to the suit should oppose it, immediately without any question, the principals in the litigation shall be dispatched to the bishop.[383]

The point in the proceedings at which the request for transfer could be made is essentially anytime, including the reading of the sentence at which point the litigant would know which way the decision would fall, and thus it seems more like a right of

[383] Sirmondian Constitutions, *The Theodosian Code*, trans. Clyde Pharr (New York: Greenwood Press, 1952), Title 1, 477. See also comments by Timothy Barnes: In any type of civil case in whatever court, if a litigant at any stage (even when the magistrate has begun to read his verdict) expresses a wish that the case be judged by a bishop, then the presiding magistrate shall send the litigants to the bishop, even if the other party objects. The bishop's decision shall be final and not subject to any sort of appeal or revision. Constantine does not place any explicit limits on episcopal jurisdiction, but it might be the case that these rules applied only to cases where both litigants were Christian. Timothy Barnes, *Constantine and Eusebius* (Cambridge, Massachusetts: Harvard University Press, 1981), 51. An interesting question as well is whether the unappealable status of these decisions were the beginning of a *de facto* system of stare decisis, because one can imagine a bishop's decision which could not be appealed being used in future by litigants to support the validity of their own similar claim.

appeal. Importantly as well, it did not matter whether the other party to the suit opposed it, one person's request would engage this right to transfer.

As to why these changes took place, the fact that Constantine goes on to emphasize that at whatever time either litigant, even when sentence is being delivered, wishes the case to be transferred to a bishop, the case must be transferred immediately, seems to imply that this clause was inserted to combat the corrupt practices of legal administrators,[384] litigious persons,[385] persons engaging in fraud,[386] and lawyers. This point is made stronger by the evidence we have in the edict that addresses this abuse which occurred just two years previous to the 333 rescript in 331.[387] This is important. Constantine rails against these judges and court officials:

> The rapacious hands of the [civil servants] shall immediately cease, they shall cease, I say; for if after due warning they do not cease, they shall be cut off by the sword. The chamber curtain of the judge shall not be venal; entrance shall not be gained by purchase, the private council chamber shall not be infamous on account of the bids. The appearance of the governor shall not be at a price; the ears of the judge shall be open equally to the poorest as well as to the rich.[388]

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[384] One law of Constantine that is repeated in a law of Valentian (ChT 11.32.1 (333) [365]) states that "If a cause should fail by a second lapse through the fault of the judge, according to the regulation of the sainted Constantine, such judge shall be held liable for the payment of the estimated value of the property that was involved in the suit." In ChT 12.12.4 (380) [364], another law of Constantine dealing with the corruption of petitions from municipalities appears, ordering "…after full discussion has been held in accordance with the wishes of the municipalities, nothing shall thereafter be changed or mutilated, but the petitions of such municipalities shall be brought intact and unimpaired to the knowledge of your …office."

[385] One of Constantine's last laws, posted in the year of his death, on Contracts of Purchase notes his distaste with litigious parties: ChT 3.1.1 (63) [337], which reads, in part, "For a contract that has been executed without any flaw must not be disturbed by a litigious controversy because of the sole complaint that the price was too cheap." In 3.1.2, "Nor shall the formalities between the buyer and the seller be solemnized in hidden corners, but fraudulent sales shall be completely buried and perish."

[386] Constantine fashioned a law that when a person makes a codicil instead of a testament, it should be confirmed by no less than five witnesses, and in the legislation (ChT 4.4.1 (83) [326]) he notes, "…the presence of five or seven witnesses must not be lacking, for thus it will come about that the provisions of testators for succession will come without any trickery."

[387] *Theodosian Code*, trans. Clyde Pharr, Theresa Sherrer Davidson and Mary Brown Pharr (New York: Greenwod Press, 1952), 1.16.7, 28.

[388] Ibid.

Two years later he issues the rescript which significantly expands on the powers of bishops as judges. The timing of the two pieces of legislation is instructive, and if we understand Constantine to have seen the judiciary this way in 331, as opposed to 318, we have a reasonable basis as to why he would feel the need to expand the powers of the bishops in 333. Would he have done this earlier if questioned by Ablavius in 331? Very likely, and perhaps in stronger language.

He reasons in the rescript, "[f]or the authority of sacrosanct religion searches out and reveals many things which the captious restrictions of legal technicality do not allow to be produced in court.... ...nor shall any case be subject to review which the judgement of a bishop has decided."[389] Further on he explicitly writes: "This We formerly decreed by Our salutary edict, this We confirm by Our eternal law, thus crushing out the mischievous seeds of litigation, that wretched men, entangled in the long and almost endless toils of litigation, may at length, with timely settlement, escape from unscrupulous legal attacks and from an unreasonable avarice."[390] This language fits the tone of his 331 edict convincingly. Constantine's expansion on his earlier edict makes it clear that the main reason he wanted bishops to serve as judges was to thwart corruption and encourage fair dealings in the Roman courts. His language in these passages is very clear about what he was aiming to do by making the bishops judges.

[389] Sirmondian Constitutions, *The Theodosian Code*, trans. Clyde Pharr (New York: Greenwood Press, 1952), Title 1, 477.
[390] Ibid.

Lamoreaux made a similar point about the pragmatic nature of a bishop's decision being solemnized with no possibility for appeal:[391] "[b]y giving such wide latitude to the episcopal courts, the "malicious seeds of litigation" will be crushed, with the result that the "long and near perpetual snares of litigation" will find quick settlement and there will be a decrease in the number of suits initiated out of greed."[392] Here we see clearly Dillon's point about cutting through the veil of bureaucracy, and here it was the bishops and their courts Constantine intended to do this with. One can see here Constantine's distrust of the machinery of law, noted by other historians such as MacMullen: "[t]reating the art of the legist as just an obstacle between himself and the measures needed by the age.... ...he distrusts what he thinks are the tricks and pedantry of the expert in legislation."[393] Constantine seems to have attempted to bulwark against treachery by allowing the bishops, who he clearly thought were, at the very least, if not unimpeachable in conscience, then beholden to his views, to have the final say on legal disputes between litigants. The inference is clear: along with the courts of the four Praetorian Prefects, there was no higher court in the Roman Empire, except Constantine himself. But as this new directive comes from 333, bishops already forming a quasi-Senate around the Emperor, what chance would a litigant have against a bishop by appealing to the person who gave the bishop that power to decide? It would have to be a rare instance, if ever,

[391] Lamoreux, *Episcopal Courts in Late Antiquity*. He writes: The reasons given by Constantine for the promulgation of these rather dramatic concessions to the bishops are not only those of piety, but also of a more pragmatic nature. By giving such wide latitude to the episcopal courts, the "malicious seeds of litigation" will be crushed, with the result that the "long and near perpetual snares of litigation" will find quick settlement and there will be a decrease in the number of suits initiated out of greed. (147-148).

[392] Ibid.

[393] MacMullen, *Constantine*, 234.

such an event could have taken place. If Constantine's 333 legislation held firm, it could, by his own words in that rescript, never happen: there was no possibility of appeal.

From the letter of Ablavius to Constantine on this matter, it seems that while bishops' courts in the more rural regions of the Empire may well have employed Constantine's initial legislation on the matter from 318 — it is not hard to imagine smaller cities where bishops would be more revered[394] than local Roman magistrates, and we know there were places where the Christian population amounted to whole villages — that in Rome such an occurrence was either rarely engaged or not in cases of sufficient weight to attract the notice of this Prefect of Rome, Ablavius. The question has to be asked: why was he getting Constantine to confirm or deny his position on a previous law? Perhaps the law seemed too unusual to Ablavius, it gave too much power to the bishops, more than he himself had. Given the lack of clarity about the parameters of the first law in its vague wording and brevity, it may simply be that Ablavius needed the law's meaning to be explained. For how could he apply a law which could not be properly understood? In other words, the request for an explanation on the earlier law was entirely reasonable coming from a seasoned judge and prefect of Rome who was put in the position of making a decision under it.

From what we read in the law of 333, what else might we infer about the content of the letter of Ablavius to the Emperor? Let us also consider what the content of the law says about Constantine's perspective on the legal position of bishops as judges at this

[394] Perhaps detested by the traditionalists, but because the emperor chose this religion, one imagines the religious predilections of many people changed almost overnight and for their own benefit. Certainly the laws which deal with people rushing to become clerics and bishops to avoid civic duties means that people were willing to pretend loyalty for power.

particular moment in time. In the first of three sections I will comment on, we see the impetus behind the law and some indication of the emperor's conviction about this law of his. "We are much surprise that Your Gravity which is replete with justice and the approved religion should have wished to inquire of Our Clemency what Our Sovereignty has either previously ordained or what We now wish to be observed as to the judicial decisions of bishops, O Ablavius,…."[395] Constantine seems to feign surprise when asked about this law by Ablavius, that is what is first noticed here. The inference is fairly made that of course Ablavius knew about the law, for if he did not know about it then why would he write the emperor to ask how it was to be understood. While Constantine's letter shows deference to the senior civil servant, it is not hard to see a gentle rebuke in the wording of this rescript in which Constantine's reaction is one of, I suggest, feigned surprise. But it also gave Constantine the opportunity to expand on what this law could mean for the jurisdiction and legal authority of bishops. While he feigns surprise, and if the detail he goes into is any indication, it seems he was glad to expand the meaning for Ablavius.

> Therefore, because you wished to be instructed by Us, We again, by means of Our salutary power do hereby spread abroad the ordinance of Our previously promulgated law.
>
> For We previously sanctioned, just as the official statement of Our edict makes clear, that the judicial decisions, of whatsoever nature, rendered by the bishops, without any distinction as to age, must be observed as forever inviolate and unimpaired, namely, that whatever has been settled by the judicial decisions of the bishops shall be considered as forever holy and revered.

[395] Sirmondian Constitutions, *The Theodosian Code*, trans. Clyde Pharr (New York: Greenwood Press, 1952), Title 1, 477.

> Whether, therefore, a bishop has decided a case between minors or between adults, it is Our will that the obligation for its enforcement shall rest upon you, who hold the highest judicial authority, and upon all other judges.

Interesting here is, again, as with the earlier legislation, the directive that it is the judge/governor, or in this case, prefect, who will both enforce the bishop's decision and continue to hold the "highest judicial authority." Constantine does give the bishops extraordinary powers and authority, but he acknowledges at the same time the supreme judicial status of the prefect. It may be the case that by making bishops' decisions not subject to appeal, in the same way the prefects' decisions were, that Constantine was confusing not only the line between them, but also raising bishops too far, at least in the eyes of this prefect, so that it would in future be uncertain how a bishop's judicial authority would compare vis-à-vis the prefect; and the fact that later emperors, noted above, reined this authority in perhaps suggests that this blurring of the lines between the two roles needed better defining. Whether this reining in was at the instigation of the prefects over confusion as to who should be hearing cases where a request for transfer was at issue, or some other reason, is currently unknown based on the historical record.

IV.vi: The Characters of Bishops and their Courts

As Jill Harries emphasized, the purpose of the pre-Constantine courts of bishops was reconciliation, or peace, between Christian litigants.[396] She wrote: "[i]n the actual hearings of the pre-Constantinian Christians addressed by the author of the *Didascalia*, contemporary legal formalities were underpinned by a distinctively Christian ideology of

[396] Jill Harries, *Law and Empire*, 193.

reconciliation."[397] She is referring specifically to what is known about bishops holding court before the time of Constantine, and exclusively involving Christian adherents. As noted in the previous chapter, the *Didascalia* gives us evidence on the role of the bishop as judge in the following terms: bishops are to be righteous judges, and familiar with the law of Moses from Deuteronomy;[398] they should see themselves as judges and teachers who sit in the place of God Almighty;[399] Deacons (leaders below bishops) can decide any matters they are able to, but what they cannot the bishops must judge;[400] bishops ought to discourage religious adherents from lawsuits, but if they proceed, it should not be before heathen courts, any heathen witnesses/testimony are not to be relied on as against a Christian litigant, and the heathen is not to be informed about lawsuits in the Church;[401] when a lawsuit happens, the bishop must judge, and it must be scheduled for a Monday, so that there will be a week in which to come to a peaceful resolution between the parties, before the following Sabbath day;[402] the litigants must be present before the bishop judge, the bishop must investigate the lawsuit carefully, and must also investigate whether and what previous accusations or lawsuits have been brought by either litigant;[403] bishops must by investigation determine the characters of the litigants in the community in

[397] Ibid., 193.
[398] Margaret Dunlop Wilson, trans., ed., The Didascalia Apostolorum in English (London: C.J. Clay and Sons, 1903), IV, 25
[399] Ibid., V, 27 – 28.
[400] Ibid., XI, 59.
[401] Ibid.
[402] Ibid., 60.
[403] Ibid., 61.

general, and with great caution pronounce judgment, and they are forbidden to make judgment only on the testimony of one litigant; etc.[404]

Whether this primary focus of reconciliation changed, at least in the context of cases involving only Christian litigants, due to Constantine's two laws is doubtful, but it did seem to mean that the bishop's court became increasingly more Roman, and somewhat less Christian. An earlier trend towards Romanization of the Christian courts is actually noted in the *Didascalia* itself, as the practices of secular court judges of carefully investigating a case and taking as much time as needed to properly decide was recommended to the bishops as the proper way to proceed. The author directs the bishops concerning the practice of Roman judges as follows:

> … the judges question carefully those that have brought [the accused], and learn from them what they have done, and then again they say to that doer of evil things, if these things are so, and he confess and say yea, they send him not at once to die, but again they interrogate [the accused] for many days, and draw the curtains, and consider and consult much together, and then at last pass sentence of death upon him, and lift up their hands to Heaven, and call to witness that we are clear from men's blood ; for they do these things being yet heathen, and knowing not God nor that they shall receive retribution from God on account of those whom they judge and condemn unjustly. But ye, knowing who our God is, and what are His judgments, do ye dare to pronounce sentence on one who is not guilty ? We therefore counsel you to investigate carefully with much caution, because that the sentence of judgment which ye pronounce goeth up to God at once; ….[405]

While the author is using the example of an accused charged with a capital offense, he is using this most serious of scenarios to show with what care the secular judges handle their duties to come to the truth of a matter, and the author thinks such procedures appropriate for bishops who would never be hearing a matter involving a capital offense.

[404] Ibid., 62.
[405] Ibid., 62 – 63.

But this aligns with the stringent morality of the author and is self-admittedly due to the fact that, in their mind, even the most trifling offenses might result in eternal punishment for the Christian litigant who refuses to repent. Thus, for them, the analogy of the behaviour of Roman judges deciding the most serious matters in their context is applicable to bishops deciding far less serious matters; and this is not merely recommended, but insisted upon. Could this hyper-sensitivity to deciding even common matters with a seriousness seemingly all out of proportion to the offense have made the bishops a more attractive choice for an Emperor who was admittedly furious about the injustice present in the Roman court system? Again, the principle of plausibility suggests exactly that.

As noted above, the idea that bishops regularly used the corporal sanction of having a guilty party, a Christian, whipped is wholly Roman, with no direct connection to any part of the New Testament writings on discipline. Harries observes from the *Didascalia* that the bishops who held court prior to Constantine's time were encouraged to decide cases as the Roman judges were in the practice of doing, taking whatever necessary time was needed to conduct their enquiry into the accused, even if that went on for days, noted above.[406] Like Roman hearings, witnesses were called, there were cross-examinations, and the character of either the litigant or the witness was of significant importance.[407] On these pre-Constantinian characteristics of bishops as judges, Harries observes:

> Although some aspects of episcopal jurisdiction, such as the *consilium* of priests and deacons, multiple witnesses and the emphasis on character, echo practices in the Graeco-Roman world as a whole, the bishop's role as judge was to defy categorisation

[406] Ibid., 193 – 194.
[407] Ibid., 193.

> in Roman legal terms. He was clearly not strictly a *iudex*, in a secular juridicial sense: he was not obliged to use Roman, or any other system of law; his judgements, even in 'civil' disputes, could not be enforced by any form of state authority, and the range of formal sanctions available to him was limited.[408]

While her source for these assertions, the *Didascalia*, was admittedly pre-Constantinian, its reworking in the fourth century convinced her that this state of affairs proves that the "imperial conversion" had not changed the essential nature of bishops' courts as guided by their own principles. The question seems to present itself, though: if Constantine was in the practice of ascribing idyllic and sometimes hard to imagine authority on the bishops as judges, like no possibility of appeal in the 333 Rescript, then might the Christians who wrote the *Didascalia* have been painting a too convenient, for their religion's sake, picture of their judicial practice's separateness from the Roman model of justice? It seems literary license could have been going both ways here, and the real problem is that regardless of what the bishop's might have claimed was their locus of authority when trying cases, when it came to a case that had already been before a magistrate pursuant to the 318 Edict, again, that could not have been anything other than a dispute based on Roman law, or in some cases local customary law that Rome was allowing. That a bishop would employ "reconciliation" or early Christian writings as the basis for their judicial authority in such a context is unlikely, but that is not to say it had no effect on their sentiments, which clearly might steer what might be permitted under Roman law at their judicial discretion. Even in light of this, their authority to try cases

[408] Ibid., 194.

being transferred from a Roman magistrate's court could only stem from the Roman state, and in this historical context that meant the directives/laws of the emperor.

In fact, in the 318 Edict, the context imagined by the emperor in the wording of 1.27.1 was one wherein Roman law applied exclusively: as noted earlier, in 1.27.1 the case was first before a magistrate, so it would certainly have been based on Roman and not "Christian law". If we look ahead to the fifth century, we see that indeed, bishops like Augustine were holding court on the basis of Roman law. The paucity of evidence we have for cases being heard in the courts of bishops at all during Constantine's reign, or even previous to or following it, leaves us then with two points of reference. One, the pre-Constantinian court based on the *Didascalia*, as similar in some respects to Roman practice, but distinct from it; and two, Augustine, who is deciding cases on the basis of Roman law. Somewhere between these two points in time, things began to change. It is not within the scope of this paper to suggest too much on this point, but Constantine's two laws on bishops being able to hear cases at Roman law between litigants, whether the latter were Christian or not, and that by the time the 333 constitution is given by the emperor, the state is commanded to enforce the judgment of the bishops, are evidence of a legal basis for explaining how bishops' courts were transformed from being mostly religious and somewhat Roman to mostly Roman and only somewhat religious.

Regarding the 318 transfer of venue edict, if a litigant did choose to have his or her case moved to a bishop's court, again, it would be Roman law that would be at issue. Peter Brown notes: "[there was nothing] exotic or particularly religious about the procedure of the bishop's court. Roman law, based on careful consultation with experts, determined

the bishop's judgment. But the bishop's *audientia* was a constant presence in the city. Augustine would sit in judgement all morning and even into the time of the *siesta*."[409] As Humfress noted on the confluence of the Christian and Roman legal administration by the time of Augustine in the early fifth century, and as he himself wrote, the records of a case heard before the episcopal 'court' at Hippo could be found in the municipal archives.[410] Constantine's legislation of 318 had set the stage for the transformation of the bishops' courts into an arm of the state's legal administration, but as the evidence shows, we have to wait until a century after Constantine's legislation to see bishops holding court and hearing cases based almost exclusively on Roman law. Again, that there was a change in the bishop's role is plain according to the evidence, but exactly when between 318 and Augustine's time this became a more common reality across the empire is unknown. If Augustine was hearing cases based on Roman law all day, and if we take into consideration the barbarian sack of Rome in 410 which Augustine was alive to appreciate and which speaks to the fall of the Empire in the West, then perhaps one might suggest that it is in this transitionary period of Rome's fall in the West where the bishops, because Christianity did not fall with Rome but grew stronger, had by dint of necessity to take their role as judges in Roman communities more seriously. This role was given to them by Constantine.

As men of rank, already, in their communities, some bishops had been exposed and trained in Roman law and philosophy due to their upbringing in the Roman upper

[409] Peter Brown, *Power and Persuasion in Late Antiquity: Towards a Christian Empire* (Madison, Wisconsin: The University of Wisconsin Press, 1992), 100.

[410] Humfress, *Orthodoxy and the Courts*, 170.

classes: Ambrose, Augustine, and before them, Tertullian and Cyprian, were exemplars. The fact that the Christian religion had organized its own regions with bishops as the political heads who sat as judges in the local communities in *episcopalis audientia* was a natural outcome of the late antiquity Roman context, and this is important because an aspect of Roman experience, the law, was being taken up under the auspices of Christian leadership, from which it would be carried through to the Middle Ages.

W.H.C. Frend points out that the high ranking clergy of Constantine's era were men of a wide cross section of society, some of them coming from very wealthy backgrounds, such as Ambrose of Milan, born in the year of Consantine's death: "a member of an aristocratic Roman household and protégé of Anicius Probus, the richest man in the Roman Empire."[411] Other bishops rose up from rural populations through the ranks, such as one Bishop Samsucius of Africa who was illiterate.[412] Bishops consisted of a cross section of Roman society itself, and it is reasonable to think Constantine saw this reality. Given Dillon's thesis of Constantine's populist nature, it is possible that this emperor saw the advantages of being the patron of a large swath of society who represented all classes instead of merely the wealthy. And of course such levelling of authority stood in stark contrast to Neo-Platonism's close ties with classical thinking and traditional bases of power, as noted above.

Important also, was that with the Christian bishops went a concomitant morality based on the precepts of its founder and practice of the early church, and part of this was care for the poor. Brown notes that this aspect of the bishop's duty was made more potent

[411] W.H.C. Frend, *The Early Church* (London: Hodder and Stoughton, 1973), 247-248.
[412] Ibid., 248.

under Constantine's legislation allowing bishops to hear cases. He writes: "...the recognition by Constantine of the bishop's court of arbitration, his *episcopalis audientia*, proved decisive for the elaboration of a Christian representation of society. For this court gave reality to the subtle shift by which the bishop, as "lover of the poor," became also the protector of the lower classes."[413]

The question of why the ecclesiastical courts were so busy, according to the evidence of Augustine, has been addressed by Lamoreaux. He notes that the large number of litigants coming to episcopal courts might have been directly linked to the fact that regular courts involved a well-known system of bribes.

> At every stage in the legal process "bribes" or "tips" (*sportulae*) were required. This is vividly illustrated by the situation in Numidia during the reign of Julian where the following *sportulae* were routinely collected in the lower courts; [*princeps*, five *modii* of wheat (if he was required to go overseas, no more than 100 *modii*.)] Minor officials of the *officium*, the *cornicularius*, and *commentariensis* received half as much. The *executor*, in charge of summoning the defendant, received two *modii*... The court stenographer received five, twelve, or twenty *modii*, depending on the length of the arguments in the case.... Such *sportulae* would have seriously hampered the availability of justice for poorer folk: after all, forty *modii* of wheat were a single person's rations for one year. And it must be remembered that this Numidian court was a court of first instance: fees for the higher courts would have been still more dear, exponentially dearer.[414]

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[413] Peter Brown, *Power and Persuasion*, 100. While the Bishop could not have based his decision on considerations outside of the law, he could, as is the case today, decide the case one of two ways, for or against the litigant, and that alone means that bishops had some latitude to encourage the kinds of outcomes they wanted to see, some of which were certainly influenced by their religion's guiding principles.

[414] Lamoreaux, *Episcopal Courts in Late Antiquity*, 151. On the question of whether this was a fee system at work versus plain corruption, I think it was likely a combination of both, because one cannot imagine state courts with unpaid staff. The bribes were merely a way of bringing their salary up. And because litigants were forced to use the courts for redress, it had to be paid. This is where the corruption is felt and why Constantine legislated against it specifically in 331. The fact that at least Constantine considered it pure corruption is plain in the words of the 331 Edict:

> The chamber curtain of the judge shall not be venal; entrance shall not be gained by purchase, the private council chamber shall not be infamous on account of the bids. The appearance of the governor shall not be at a price; the ears of the judge shall be open equally to the poorest as well as to the rich.
>
> ....

Thus the reason why litigants chose the episcopal courts may suggest itself, because the poor could not afford the costs of the state courts.[415] While it is also true that the bishops' courts were sometimes called out on this account, there exists no evidence that this was not an isolated practice.[416] Also of importance to a litigant's decision would have been the high cost of appeals, and since the bishop's decision could not be appealed, this could be avoided — this combined with the fact that the cost involved in using Roman courts, surfeited with bribes as Lamoreaux points out, makes the decision for a bishop's court almost a certainty for the poor.[417] Overall, the large numbers of litigants attending the bishops' courts led Judith Perkins to observe: "[t]hat numbers of people had recourse to an episcopal hearing indicates that its methods of arbitration did meet a need and provide an alternative. Christianity made a difference in the imperial judicial environment. …The important difference Christianity made in its social and political context was its intervention in the trans-empire elite's monopoly on power and authority."[418] Christian bishops, who were charged with caring for the poor, widows, and

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Always shall the diligence of the governor guard lest anything be taken from a litigant by the aforesaid classes of men. If they should suppose that anything ought to be demanded by them from those involved in civil cases, armed punishment will be at hand, which will cut off the heads and necks of the scoundrels. Opportunity shall be granted to all persons who have suffered extortion to provide an investigation by the governors. If they should dissemble, We hereby open to all persons the right to express complaints about such conduct before the counts of the provinces or before the praetorian prefects, if they are closer at hand, so that We may be informed by their references to Us and may provide punishment for such brigandage. (CTh 1.16.7, 28).

[415] Ibid. Certainly Lamoreaux suggests this could be possible: "An easy answer would be that somehow the church's courts were free from the corruption and incessant graft that plagued the secular courts in late antiquity." He cites, inter alia, Ramsay MacMullen, *Corruption and the Decline of Rome* (New Haven: Yale University Press, 1988), 148-167. It has also been suggested that some litigants, maybe the majority, sought a fairer hearing according to the biblical principles that they now lived by. The bishops' courts could then advance the new expectations of fairer patterns of living (Pavlich, 2018).

[416] Ibid., 152.

[417] Ibid., 152-153.

[418] Perkins, *Roman Imperial Identities*, 179.

orphans in their local communities, were now judges alongside men of rank who cared nothing for these *humiliores*, and thus Perkins is exactly correct: the difference Christianity made through Constantine making the bishops judges was to drive a wedge into the traditional power structure of Rome and allow litigants to prefer courts which promised the highest chance of justice for those of lower status, as well as encourage an emerging legal regime of personal status, as inferred from Khaler's observation above. This wedge hit its mark at exactly the time when Roman power in the West was disintegrating, and while the practice of bishops' courts grew in the vacuum created by the faltering and sometimes absent administration of secular justice, this driving of the wedge also became the laying of a foundation for avenues of justice provided by the church throughout the Middle Ages. One wonders what a Europe of the nature described in Gregory of Tours's *History of the Franks*, fratricidal, factionalized, and brutal, would have ended up like without the stabilizing matrix of the Roman government-like structure and ethos of the Christian church. Constantine's confluence of Church and State powers, however unintentionally, ensured that when the latter died out, the former would carry on the culturally stabilizing traditions of both.

In terms of the court procedure for episcopal courts, the few specific cases that tell us the few things we know highlight the fact that: (1) these courts could be in the bishop's episcopal residence or perhaps their personal home in smaller locales, or at the gates of the Church, similar to the ancient Jewish practice of hearing cases at the city gates; (2) affidavits, and perhaps other written statements seem to have been required for submission to the presiding bishop; (3) oaths may have been required that litigants would

abide by the bishop's decision, and that was required by Constantine's law; (4) the law used in the more rural districts was perhaps a rough and ready justice based partly on custom, and to this point is the fact that whether or not Augustine had been trained in law, a question noted above, he still finds it necessary to ask colleagues about various points of law; (5) judicial assessors (laypeople) were attached to some of these courts; (6) that bishops sometimes appointed others to hear cases for them, for instance we know Augustine called on some rich and respected laymen to assist him in some cases;[419] (7) we also know from Augustine's letters that just as in a magistrates court where a stenographer took the minutes of the proceedings, this also was the case in a bishop's court;[420] and (8) specifically in the era of Constantine and following, the 333 rescript indicates that the bishops may have extra time beyond the usual time limits set for Roman judges, a point made by P.R. Coleman-Norton;[421] this author rightly points out that such an extension of time to try a case would naturally give the bishop more time to get to the truth,[422] rather than having to work with what were sometimes extremely brief windows of time, such as 3 – 5 days for both civil and criminal causes, with extensions granted on some occasions.[423]

[419] Lamoreaux, *Episcopal Courts in Late Antiquity*, 156-161.

[420] Augustine, *Letter CCIX, Letters of St. Augustin, The Confessions and Letters of Augustin, With a Sketch of His Life and Work, Nicene and Post-Nicene Fathers*, vol. 1, first series, ed. Philip Schaff (Peabody, Massachusetts: Hendrickson Publishers, 1886; 2004), 561. Augustine writes: In the numerous minutes of procedure in which our judgment regarding him is recorded, I should have feared that we might appear to you to have passed a sentence less severe than we ought to have done, ..."

[421] P.R. Coleman-Norton, *Roman State & Christian Church: A Collection of Legal Documents to A.D. 535*, v. 1 (Eugene, OR: WIPF & Stock; London, S.P.C.K., 1966), ft. 9, 180.

[422] Ibid.

[423] Ibid., ft. 6.

What is known with certainty is that the latitude given to bishops to hear civil law cases was wide, and they sometimes dabbled with criminal law where necessary. Lamoreaux's conclusion on the nature of the courts from the few pieces of evidence we have is that these courts were serving a functional purpose in their communities which did not entail a necessarily religious one.

> The courts… are redolent not of religious awe but of secular functionality. Aside perhaps from additional efforts to effect reconciliation and to re-establish charity, there are few aspects to their judicial procedure that are dependent on their being religious courts. Indeed, of those factors which gave rise to their popularity in late antiquity, their offering a cheaper form of conflict resolution, their shortening the length of time required for settlement by cutting off appeal, their ability to help the men and women of late antiquity save face—these more than any strictly religious factors go farthest towards explaining their popularity and the way they functioned in the context of the later Roman Empire.[424]

Even in light of his conclusion, other scholars feel much more convinced that the courts of bishops continued, at least in the short term post-Constantine, to decide cases based on the idea of the reconciliation of the parties, and by their consent. Jill Harries, on the nature of the *episcopalis audientia*, concluded:

> …much of bishops' activity in sorting out quarrels among their flock over 'gold and silver, farms and herds' continued to depend, as it had done since well before Constantine, on the consent of the faithful. The authority of the bishop, initially dependent on his position in his city church, was enhanced in the fourth century by his adoption, as required, of the roles of *iudex*, and arbiter. The former endowed him with the jurisdictional authority of the state, the latter allowed him to adjudicate between non-Christian, as well as Christian, disputing parties, as a figure of authority acceptable to both. But the prevalent ideology of the handling of disputes by bishops remained that of mediation and reconciliation, not only because the bishops were true to Christian doctrine but for practical reasons, that they had to govern, for life, the congregations, whom they taught as well as judged.[425]

[424] Ibid., 167.
[425] Jill Harries, *Law and Empire*, 210 – 211.

While I agree that reconciliation was a primary goal of a bishop's decision regarding cases brought exclusively by Christian litigants and especially those brought before 318, in cases brought based on Roman law alone, and either between a non-Christian and a Christian, or two non-Christians, reconciliation could have only gone as far as the Roman law would allow it to. In the end, as noted about Augustine, it was important to bishops to get the Roman law right, and they often brought in more learned people in Roman law than themselves to make sure they got the decision right. In such cases, reconciliation would have to be a secondary consideration, and could not have been the only goal. In fact, it is almost certain that reconciliation was not even possible for those outside the Christian church, since one of them would be successful, and the other not, by definition.

If, as Harries suggests, the authority of bishops was based only on the letters of Paul and the Gospels,[426] it would be very difficult to explain how they began to take on cases dealing exclusively with Roman law involving at least one non-Christian litigant. Rather than putting the locus for their authority in the sacred Christian writings, I think it is more likely that bishop judges like Augustine knew they had, for decades since Constantine, been authorized by the state via the edict and rescript under consideration to adjudicate cases based solely on Roman law. I concede that in cases involving someone outside the Church, even then Christian writings would be influential in the decision of a bishop, but not determinative. In the case of two Christian litigants, it is entirely possible that the suggestion of Harries reflects the situation as it was, even for a short while after 318, but the problem is that bishops were authorized by the state to adjudicate between

[426] Ibid., 211.

non-Christian parties, and as such we cannot explain the judicial authority of bishops based only on the foundational documents of their religion. The edict of 318 and rescript of 333[427] were the only reasonable basis of a bishop's authority to hear cases involving non-Christian litigants.

Constantine's bishops' courts also seem to have been a primarily pragmatic answer to the need for a fairer administration of justice. The question poses itself again about what Constantine intended in making bishops judges. If we consider that there were local magistrates and bishops, provincial governors as judges, and then an appeal court system consisting of the courts of prefects and bishops, one might suggest Constantine was trying to divide the legal system of Rome into the hands of another class of functionaries, perhaps in a way similar to how Diocletian had divided up the Empire to gain greater control, and implement a shared jurisdiction which may cause both to decide more justly. In any case, by adding the over one thousand bishops of the Christian Church to the judicial system as judges over which no one but the emperor could overturn their decision, Constantine may have been attempting in one stroke to outflank the jurisdiction of the governors and prefects, some of which were guilty of corruption.[428] Although it was likely not necessary most of the time, as with the above rescripts from the emperors informing the litigant to have the governor handle the case, which we know Constantine did as well,[429] the mere fact that the emperor had spoken on a given case while not deciding it, and that he had legislated on the jurisdiction of the bishops without

[427] Of course, as Harries and Humfress point out, there could be a third, lost, edict concerning bishops' courts which is lost to history but which is referred to in the sources, and may be the one referred to the rescript. See discussion above engaging the suggestions of Humfress in the sections on 1.27.1 and Sirm 1.

[428] *Codex Theodosianus*, 1.16.7

[429] Brown, Power and Persuasion, 239.

forcing litigants to do so, may have been enough of a spur to encourage a more just application of the law in the other courts. It is enough to know that the governors were in an especially powerful position in the legal machinery of the state, because beyond their being judges in their own provinces, they were also the ones who received the edicts of the emperors, and were in charge of interpreting them, and then distributing their interpretations to the local populations.[430] By bringing the courts of bishops into the purview of his imperial judicial administration, and because the bishops were leaders over whole communities throughout the empire, they would be doing something similar to the governors when they applied Constantine's laws in their own jurisdictions and to a large segment of society who very likely had more respect for the bishops than imperial officials. What we do know is that Constantine did make the bishops judges in the Roman legal system, and seemingly both above the governors and equal to the praetors in the fact that their decisions could not be appealed. The fact that some of these bishops were men of law and learning, and others virtually wholly unlearned, perhaps set the stage for the reforming activities of later fourth century emperors who wished to draw the lines of jurisdiction more clearly, even if ultimately their aims were unrealistic given the failing state of the Western Empire, wherein a bishop's court might have been the only option for justice.

IV.vii: Later Consequences

The consequences that flowed from Constantine's adoption of the Christian church and making the bishops judges is a subject so enormous in that it can only hinted at here. The

[430] Ibid., 245-253.

main observation I make here is that the reforming legislation of the late fourth century and early fifth century emperors where it concerns the jurisdiction of the bishops proves that bishops were hearing cases which these emperors felt would be better handled in the Roman legal system's courts of magistrates: cases based on Roman civil, and in some cases criminal, law.

What were some of the more immediate results of Constantine's legislation? James A. Brundage makes note of one of the key results of bringing the bishops into the judicial system of empire, that of assimilation:

> The judicial functions of bishops expanded rapidly under the new regime, and Constantine obliged the civil courts to recognize and enforce the judgements of episcopal courts (*audientia episcopalis*). The procedures employed in bishops' courts seem at first to have been relatively informal, but little by little they came to resemble those used in the civil courts. At length an imperial constitution of 376 required ecclesiastical courts to observe the same procedures that prevailed in the empire's civil courts. This almost certainly meant that advocates were appearing in bishops' courts as well as in civil courts by the last quarter of the fourth century if not before.[431]

This 376 constitution of Valens, Gratian, and Valentinian (a mere thirty-nine years after Constantine's death) indicates that "[w]hatever is customary in the conduct of civil suits shall likewise be observed in ecclesiastical litigation…."[432] This edict can be understood as an important marker and an effect of the process which Constantine had started with his bishops as judges legislation, because it specifies clearly that it is the Roman civil procedure that will be observed in the courts and litigation of ecclesiastical judges and lawyers.

[431] James A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (Chicago: University of Chicago Press, 2008), 42 .

[432] CTh. 16.2.23, 444.

These same emperors, along with others who ruled up to 460, would also, though, make a distinction that Constantine did not: they attempted to confine bishops to hearing only cases involving religious matters, preferring that matters solely based on Roman law be heard in the secular courts.[433] I provide a table of the laws concerning bishops' courts issued by emperors from 318 – 460 at Appendix A. The interregnum between the 333 law and a 399 law of Arcadius and Honorius limiting the bishops to deciding religious matters in their courts indicates that bishops did begin to hear matters other than religious, and this branching out jurisdictionally, I suggest, seems to have been either based on or facilitated by the constitutions of Constantine. In other words, if the exigencies of the times given the pressures being applied on society by the incursions of the barbarian kingdoms of Europe and the general weakening of the Roman civil administration in the West meant that bishops had to take up the judicial role where necessary, then Constantine's constitutions merely stand for facilitating the bishops hearing other types of cases, rather than being the sole basis of this reality. As noted by James A. Brundage, medieval bishops took on the role formerly performed by civil servants, taking responsibility for, inter alia, proving wills, supervising administration of descendants' estates, monitoring the performance of regional administrators, etc.,[434] and

[433] Caroline Humfress notes: According to the general line of modern secondary scholarship, however, these generous Constantinian provisions were scaled back over time—possibly with an abrupt reversal under the emperor Julian until, by the late fourth century, episcopal jurisdiction became limited to matters concerning religion only. Working on the basis of Justinianic Code 1.4.7 (issued in 398), modern scholars also tend to agree that the bishop's power to decide civil cases was eventually "reduced" from having formal cognitio over an ecclesiastical court under Constantine to something like that of an arbitrator under Arcadius and Honorius, empowered to act only to the extent that the parties in the suit agreed to abide by the final decision. Humfress, Bishops and the Law Courts, 383.

[434] James A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (Chicago: University of Chicago Press, 2008), 49.

having already been judges prior to the fall of the West, their jurisdiction would now grow out of necessity in some contexts. On the other hand, given the fact that the emperors of the 399 edict expect the bishops to aver from hearing cases that are not focused on religious matters or involving the religion's adherents, this means the Roman courts were still seen as robust enough by the drafters of this law to set these boundaries for the bishops. In this case, if the secular courts were still at this time, eleven years short of the first sack of Rome, operating to the degree implied by the legislation, then bishops expanding their jurisdiction looks odd, unless it was based on some official sanction allowing them to. In this case, bishops hearing cases based purely on Roman law would seem to be firmly based on the legislation of Constantine. The only other option would be that some bishops wanted to test these waters and extend their own authority beyond what they were used to, and then one would have to answer the question of why.

The fact that these late fourth century emperors felt the need to rein in the bishops jurisdictionally further suggests that Constantine did indeed either intend or left it open for the bishops to hear all manner of cases, which by 399 they were doing in at least some instances, otherwise there would be no need for the prohibition of Arcadius and Honorius. What is really interesting is that it was during the period of these reforming edicts of the late fourth and early fifth centuries that the most influential bishop in late antiquity was sitting as a judge on an almost daily basis hearing cases: Augustine.

That Augustine sat as a judge deciding matters of Roman law, and because he would be the most influential bishop of the Roman Church, both in philosophy and practice, for the entire Middle Ages, may speak as much to why the bishops' and abbots' courts of the

Middle Ages were as pervasive as they were compared with Constantine's adding them to the Roman bench in the fourth century. Augustine's career was definitely in part a product of Constantine's making the bishops judges and senior officials in Roman society, which by the former's time was a Christian society following *Cunctos populus*.[435] If the only *religio licta* of Empire was the Christian one, then it follows quite naturally that in spite of the late fourth century emperors' attempts to rein in the jurisdiction of the bishops, that such a move in part becomes a bit hard to parse out in a society where everyone is "encouraged" to adopt the Christian religion. In other words, if the state judges had followed policy and adopted the religion as well, then the relationship of authority that the bishop had over all Christian adherents under them, including those who were judges, would seem to mean that although the bishops could no longer hear ultra-religious cases, the judges who could were likely Christians anyways, even if only nominally. This subject is too large to go any deeper at this point, but it suggests a question for further consideration.

If the emperors wanted to limit the bishops to only hearing matters between Christians, then following *Cunctos populus* the bishops could have, by such reasoning, heard ostensibly any and all matters because the Roman state religion was Christianity. But as noted above on Augustine, even during his own time on the bench, he was loath to take on too much of what was traditionally the purview of the secular courts where it concerned criminal matters, but he did take these cases on when he had to. While it is acknowledged that one of the post-Constantine reforming edicts did attempt to prevent

[435] CTh 16.1.2 (1.1.1); 16.5.6 (1.1.2).

the bishops from hearing criminal cases, yet for the reasons noted above on a disintegrating Western Empire, and with it her legal administration, one suspects that these edicts in some cases would have to go by the board if communities run by bishops and prelates were to realize any degree of judicial stability.

Another way of looking at this historical context is simply in terms of pragmatism: the church stepped in to carry on the work that the civil administration could no longer do because they were absent, a la Gregory I, bishop of Rome. From this contextual necessity arose what became the formidable power of the Roman church as *the* source of societal governance during the early Middle Ages, and with that responsibility came the administration of justice.[436] It has been noted by Brundage that not only were the clergy involved in every aspect of the legal and institutional structures of the early Middle Ages, they would also take part in deliberative assemblies and their influence was "out of all proportion to their numbers."[437] Given the fact that the *cognitio* procedure by this time had slid backwards into the formulary practice of choosing judges based on their general good character and status, as they certainly were under the *legis actiones*, then bishops wielding this kind of societal influence would of course end up not only in their own courts, but as judges in the civil courts as well.[438]

In time, with the rise of secular powers in the likes of Charlemagne, the Ottonians, etc., these rulers would at times attempt to distance the administration of justice from the Church's authority, but it was a very intractable piece of work in a society that was

[436] James A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (Chicago: University of Chicago Press, 2008), 73.
[437] Ibid., 74.
[438] Ibid.

made up entirely of votaries of the Christian religion. Recent scholarship from Barbara Deimling suggests that even though Charlemagne did issue decrees forbidding officials from holding court in Churches, the custom of doing so was clearly common enough that it was perceived to be a problem.[439] What's more, as she points out, it continued up to the fourteenth century that religious and secular rulers regularly chose the area in front of the entrance to churches to hold their law courts, church portals.[440] In fact, the whole process of "separation" was so confused, that Deimling notes:

> The location of the imperial throne in front of the church entrance indicates just how interlinked images of secular and religious authority were at this time. Secular or religious magistrates could only express the basis for their power through divine authority, and therefore, even in the Carolingians' attempts to separate secular law from church institutions, they and the Ottonians had no choice but to refer to religious imagery and even to the outlawed church portal sites when defining their own right-to-rule.
>
> The strong association of justice with church portals was reinforced by the legal and regular practice of church law itself before, during, and after the Carolingians.[441]

In fact it was not until the thirteenth to fifteenth centuries and the rise of lay civic institutions that church portals began to be used less frequently as a place to hold court,

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[439] Barbara Deimling, *From Church Portal to Town Hall*, in *The History of Courts and Procedure in Medieval Canon Law*, eds. Wilfried Hartmann and Kenneth Pennington (Washington: Catholic University of America Press, 2016), 33.

[440] Ibid.

[441] Ibid., 35 – 36. Deimling notes further: "The parallels between earthly and divine judgment reflect the situation at the medieval church portal, where the local judge was seated below the figure of Christ, to dispense justice and to remind the participants of the Last Judgment. … Visual and spatial association of the earthly judge to Christ in judgment extended the authority of the judge from the temporal domain to the afterlife, suggesting that even crimes undiscovered would be punished (47)." See her observation on page 46 on the excerpt from the Saxonion compendium of laws in the fourteenth century which advises that wherever judges hold court, God will sit in divine judgment over judge and jurors at the same time, and therefore every magistrate should paint in the town hall the "stern judgment" of Our Lord, which means that although there was a shift from Church portal to town hall regarding the physical location of the courtroom, the epistemology on how a judge makes a decision in his courtroom continued to run from the time when Constantine

and the declining use of the church portal as a judicial site was directly proportional to this rise.[442]

But moving the courts away from the churches did not change the underlying assumptions about where the authority of the judge, bishop, abbot, or emperor came from: it was from the Christian god alone, and no other place. Deimling points to an excerpt from the Saxonion compendium of laws in the fourteenth century which advises that wherever judges hold court, God will sit in divine judgment over judge and jurors at the same time, and therefore every magistrate should paint in the town hall the "stern judgment" of Our Lord, which means that although there was a shift from Church portal to town hall regarding the physical location of the courtroom, the epistemology on how a judge makes a decision in their courtroom continued to run in an unbroken nexus from the time when Constantine wrote:

> … For the authority of sacrosanct religion searches out and reveals many things which the captious restrictions of legal technicality do not allow to be produced in court.
>
> Therefore, all cases which are tried either by praetorian or by civil law, when settled by the decisions of bishops, shall be affirmed by the eternal law of permanence; nor shall any case be subject to review which the judgment of a bishop has decided.
>
> Furthermore the testimony given by a bishop, even though he may be the only witness, shall be unhesitatingly accepted by every judge, nor shall any other witness be heard when the testimony of a bishop has been promised by any party whatsoever.
>
> For that is established with the authority of truth that is incorruptible, which the consciousness of an undefiled mind has produced from a sacrosanct man. ….[443]

While the later Saxonion law expanded on these earlier ideas of Constantine, they are not a departure from it; in fact, quite the opposite: those judges at law who are under the purview of the Christian god — in other words, not simply bishops — now included all

[442] Ibid., 47.
[443] Sirm. 1.

judges, emperors, bishops, abbots, lords, etc. Caroline Humfress comments on the above 333 law of Constantine and suggests that indeed, bishops were thought of as more than just "upstanding" men of the community, but connected to the God of the emperor.[444] She also notes in her monograph on the subject that "… Christ's tribunal could be represented as more terrifying and powerful than that of any secular magistrate …" and that the language and imagery used by the likes of Augustine, in the context of speaking about his role as a judge, are merely imported from one framework (religious) to another (Roman justice).[445]

The rescript of 333 vis-à-vis the later Saxonian law reveals the singular tenet on which the whole of judicial, legal, and political authority rested on for the bulk of the Middle Ages, that of a direct connection to the Christian god who was, himself, as Deimling reminds the reader, first and foremost seen as a judge in these contexts. It was as if the words of the judge took on the sacrosanct nature of the words of God, whose decisions were, to put it mildly, binding; and this in societies under Charlemagne, for instance, where people faced death[446] if they refused to be baptized into the church.

Also key to understanding the development of the church's involvement in both the growing body of canon law, its application, and adjudication in church courts, was the fact that the clergy were also intimately involved with the application, adjudication, and reform of civil law in general, and this was brought to a head first with the church reform of the eleventh century, and the subsequent and concomitant legal reform in secular

[444] Caroline Humfress, "Bishops and Law Courts in Late Antiquity: How (Not) to Make Sense of the Legal Evidence," *Journal of Early Christian Studies*, Volume 19, Number 3 (Fall 2011), 396 – 397.

[445] Humfress, *Orthodoxy and the Courts*, 155.

[446] Massacre of Verden, 782.

courts which orbited around the re-discovery of the *Corpus Juris Civilis*. The cause and results of the church reformers were many, but most important in this context was their wish to free themselves of the direct intervention and influence that emperors, kings, and other civil rulers had over the church, something which began with Constantine. The reformers insisted that laymen no longer be able to appoint bishops, abbots, and rectors of parishes, and that only the clergy were able to dispose of ecclesiastical lands, revenues, and other assets, and that they should be subject only to the jurisdiction of the ecclesiastical courts.[447]

Because of the growth of canon law from the fifth to the eleventh centuries, the ecclesiastical courts were already doing a good deal of business, but this reform movement meant that there would be much more litigation in these courts, not only because of the fact that the clergy would only be subject to these courts, but the reformers were involved in disputes for which these courts were used.[448] During this time of church reform and the rediscovery of the *digest*, as well, came the first systematic approach to legal study led by a certain Master Pepo, and then following him, Irnerius. Pepo was a practicing advocate and judge connected to the court of Count Matilda, and thus involved with the church reform movement, and a part of the circle of Pope Gregory VII; he was described by an eleventh century English canonist as the standard-bearer of Justinian's Code and Institutes.[449] Irnerius has traditionally been more commonly associated with the beginning of systematic legal study of Justinian's code during the

[447] James A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (Chicago: University of Chicago Press, 2008), 79 – 80.

[448] Ibid., 80.

[449] Ralph Niger (1140/46 – 1199), as in James A. Brundage, *Medieval Origins of the Legal Profession*, 81.

reform period, but scholars are now questioning this based on the fact that the evidence seems to indicate that many of the works usually ascribed to him have been shown not to be his, and even those few he may have written remain in doubt.[450] Whether or not Irnerius was as influential as originally thought, it is certain that Pepo was part of both the church reform movement and the reintroduction of Roman law into practice in Medieval courts, and Irnerius, if indeed he was *the* teacher of the four doctors of Bologna[451] responsible for the growth of the civil law tradition generally, was a key proponent of a legal reform movement, intertwined as it was with the church reform movement, of tremendous and lasting import.

At the same time as the civil law tradition was taking off due to the efforts of Pepo, Irnerius, Azo, and later the four doctors et al., the canon law codified by Gratian and the ecclesiastical courts, as noted above, were also seeing a marked increase in their use. In terms of cases based on canon law both before and after the reform movements, it was the bishops who were the ordinary judges for their dioceses. Kings and church authorities hired judges, who might be clerics or laymen, and they were paid fees from the separate parties to an action for their services.[452] The business of the church courts increased sharply with the reform, Brundage noting that "[f]rom the middle of the twelfth century onward, litigants inundated the church's legal system with a mounting deluge of legal actions."[453] This massive influx of litigation into their courts threatened to turn the popes,

[450] Hermann Kantorowicz noted that only two brief introductions to Justinian's Code may have been written by Irnerius, but he is not even sure about those. As in James A. Brundage, *Medieval Origins of the Legal Profession*, 83.
[451] Ibid., 85.
[452] Ibid., 71.
[453] Ibid., 126.

bishops, and other church authorities into full time judges and advocates,[454] and so to deal with this situation the legal administration of the church was forced to delegate the business of deciding cases to individuals who were appointed by pope and bishops.

The pope's began to seek legal counsel from assessors, they appointed cardinals and curial officials to carry out preliminary hearings, and this in turn led to choosing cardinals who were legally trained and thus, by the middle of the twelfth century, lawyers began to dominate the papal curia.[455] The papacy was forced to set up a system of central courts run by professional judges and lawyers, and the bishops and archbishops did likewise, establishing permanent courts of their own staffed by trained lawyers.[456] The records of these courts show they dealt regularly with matrimonial litigation, sexual offenses, transactions involving church property, disputes over benefices, the probate of descendants' estates, defamation, and breach of sworn contracts or other agreements.[457] As for the procedure followed by these courts, it was a mixture of Roman law from Justinian's Corpus and material from Gratian's Decretum.[458] Brundage notes:

> Because it was neither purely civilian nor canonist, but included elements drawn from each of the learned laws, it is conventional to describe the system as romano-canonical procedure. It proved to be exceedingly durable and has been immensely influential in shaping Western procedural practices. Many of its elements remain embedded in modern procedural codes.[459]

This study is not the place to explore the effects or nuances of these occurrences, but the question that is most applicable is whether or not Constantine's legislation on making the

[454] Ibid., 127.
[455] Ibid., 128 – 132.
[456] Ibid., 137.
[457] Ibid., 146.
[458] Ibid., 156.
[459] Ibid.

bishops judges was the reason for, or had anything to do with, the proliferation of both canon law and ecclesiastical courts during the Middle Ages. In other words, were the two separate historical events connected in any meaningful way? My sense is that the principle of plausibility, which is based on the evidence we find in the causal nexus stretching from Constantine's adoption of the Christian religion, making them judges via legislation, bishops like Augustine holding the line, so to speak, in terms of keeping the courts open for business while Rome fell in Western Europe, the bishops' entrenchment and expansion of this practice for centuries, to the "re-discovery" of Justinian's Code by the Church, insists that this is the only reasonable conclusion one could make.

Chapter V

V.i: Conclusion

Constantine made the bishops judges via an edict in 318 within two years of the Donatist crisis and related judicial hearings at which the emperor both ordered and sat *en banc* with other bishops to decide the case at hand, and this first piece of legislation was focused on the right of the litigant to have their case transferred to a bishop's court, the jurisdiction of the original magistrate to keep the case as theirs even though transferred, and the gravity with which a bishop's judgement should be treated: their judgement was "sacred." Constantine's experience with the bishops sitting as judges in the Donatist hearings immediately precedes the 318 legislation, and I suggest the circumstantial evidence convincingly shows that, along with his intimate knowledge of the bishops in his court and very likely his wish to rid the legal process of corruption, it was the primary cause leading him to make the bishops judges. A second piece of legislation on this exact subject appears in a rescript of 333, and therein the powers of bishops are significantly expanded. The transfer clause in the earlier edict was assumed, and it was the subject of the later rescript, but in this later directive is Constantine's order that any decision by a bishop is not subject to appeal. Falling between these two significant laws was both the Council of Nicaea and his 331 edict against corruption in the legal administration.

Nicaea was Constantine's empire-wide conference of bishops which produced laws: both an edict and church laws, the latter of which marks the beginning of canon law. The 331 legislation evinces Constantine's distaste and anger about the high level of corruption in Roman courts. Thus, the interval between the two constitutions was a period

characterized by Constantine's growing commitment to the Christian enterprise, especially in the persons of the bishops, and his growing impatience with a corrupt legal system. Nicaea is the perhaps the pinnacle of the Church-state relationship under Constantine: Constantine's new cadre of judges sitting to decide matters *en banc*[460] and, in the emperor's mind, with finality; Constantine drafting an edict based on the almost unanimous judgement of the bishops, outlawing anyone who promoted an Arian position and using capital punishment as a deterrent; having the judgments of the bishops on church governance put in writing as canons; and finally, inviting them all to a gala event of imperial import celebrating his twentieth year as emperor, bishops reclining with the emperor over supper in a palace surrounded by Roman soldiers, swords drawn as the bishops entered. One wonders at the effect this spectacle and the preceding weeks of hearings organized by the emperor's court would have had on the bishops. We know that with Eusebius of Caesarea, it impressed him significantly, and given the evidence canvassed above from his writings, we know that this bishop was well aware of Constantine's lawmaking activities and interpreted many of them as having a basis in the emperor's devotion to his new religion. That he witnessed the emperor's willingness to craft an imperial law based on the council decision and encourage the promulgation of church law was a new reality for this bishop, but one he appears to have wholeheartedly accepted. The emperor's relationship to the bishops would remain close, although not

[460] Following Constantine's involvement with the bishops, they sat to judge matters in a trial setting on a number of occasions. One instance was the occasion of a law under Valentian: ChT 11.36.20 (p. 337), which reads in part, "Since Chronopius, Ex-Bishop, was the same in your court as he had been previously in that of the seventy bishops, and since he suspended by an appeal a decision from which he had no right to appeal, he shall be compelled to pay a fine…." Apparently, "before the trial [this bishop] sought appeal from a decision of a court of bishops to suspend the decision that was rendered." This law comes from 369.

always unproblematic, for the rest of his reign. But in 333, following his 331 edict against corruption in the courts, Constantine's rescript expanded the powers of bishops as judges, and it is likely that his close relationship with the bishops during the 320s and his growing impatience with the status quo of Roman courts had something to do with this particular expansion. I interpret this nexus of events to suggest that Constantine did not have this enhanced authority for 'bishops as judges' in his mind when he had the 318 law set down. It was something that was the result of his experience over time, and very likely shows a change in his thinking. Whether Constantine was concerned about corruption in Roman courts as early as 318 is not clear, but it might be inferred in general terms from the fact that he decided to make the bishops judges at that time, because we can clearly see later on in the 333 rescript that he thought such corruption could be ameliorated by the bishops acting as judges. The question becomes whether this connection was in his mind in 318. Because we do not have any edict of his that addresses this situation before 331, we can only say with certainty that he felt convinced of the need for reform in 331, even though by definition he would have had to have formulated this opinion at some time previous to that. The fact that he was sole emperor in 331 and 333 and not so in 318 is also a relevant factor to be considered, given that as sole emperor he could make any edict he wished, whereas that may not have been the case earlier on in a shared-rule arrangement. Thus, it is possible he felt the same way in 318 but just did not have the leverage or willingness to enact such a law.

The writing of Eusebius shows us that the bishops saw themselves in the emperor's debt, he was their saviour, and if Eusebius wrote this we can be reasonably sure the

emperor knew it to be the case. That he felt he could expand their powers as judges would fit this arrangement, because in one sense his part of the contract[461] had been fulfilled, and this is evidenced not merely in his bringing their persecution to an end, but in the state funds and resources that were directed squarely at the rebuilding of older churches and creation of many new ones, and the laws which addressed the rights and duties of bishops, among other things. One can imagine bishops under such a benefactor would be willing participants in almost any role the emperor created for them. That such a role was part of their intra-religion mandate, as we learn from the *Disdascalia* and as Constantine would have known from the bishops in his court, just makes the emperor's decision to make them judges more natural in that context.

If we look at some key events concerning Constantine and the bishops in chronological order, and combine them with my suggestions about why Constantine made the bishops judges and why he expanded their powers, it is instructive:

Edict of Toleration Ending persecution of Christians and directing them to worship correctly for the benefit of the state.	311
Milvian Bridge Episode Vision of the Cross and provisional adoption of Christian God	312
Edict of Milan Expansion of the Edict of Toleration: property returned to Church Freedom of Religion for all.	313
Donatist Commission ordered by Constantine based on direct appeal to the emperor from the rigorists/Donatists. Hearing in Rome.	313
Council of Arles ordered by Constantine based on another direct appeal to the	314

[461] As one author puts it, "[l]ocal bishops provided agents for Rome and gained imperial protection in return." Andrew Fear, "Bishops, Imperialism and the Barbaricum," *The Role of the Bishop in Late Antiquity: Conflict and Compromise*, eds. Andrew Fear et al. (London: Bloomsbury Academic, 2013), 223.

emperor by the rigorists/Donatists, and he directing the case be tried with bishops from all Western Provinces.	
Final Appeal to Constantine by the Rigorists, wherein Constantine sits with the bishops as judges when making the decision.	316
Edict of 318 making Bishops judges: CTh 1.27.1	318
Council of Nicaea	325
Edict Against Corruption in the legal administration: CTh 1.16.7	331
Rescript of 333 expanding the judicial powers of bishops as judges: Sirm 1	333

Table 2: Chronology II

To determine whether events precedent had anything to do with what followed, we can ask a simple but-for question. But for Constantine directing the bishops to sit as judges and then sitting with them at the 316 Donatist appeal as a fellow judge, would he have gone on to make the bishops judges in 318 as he did? If Constantine's imperial court had not been appealed to by the rigorist bishops and he then had no reason to direct the bishops to sit as judges in this case, would he have made them judges in 318, and if so, why would he? Of the two sub-causes noted above, his experience with court bishops and anger at judicial corruption, the latter can only speak with certainty to the 333 rescript, but one might ask whether the emperor's previous experience with bishops alone would have been enough of a reason for him make them judges at Roman law in 318. If the Donatist crisis had never happened, then it would likely be the only reason he would have done such a thing, if he even had. But given that it did happen and it involved Constantine not only directing bishops to hear the case first, but then sitting on appeal in person with them, it gives us direct evidence of Constantine witnessing the bishops sitting as judges first-hand. In the absence of a more convincing reason Constantine would make the bishops judges, it seems his experience sitting as a fellow judge with the

bishops in the Donatist hearings is the strongest candidate for an immediate cause. Similarly, if Constantine was not faced with a brutally oppressive and corrupt court system during his reign and thus had no need to legislate against this, as he did in 331, would he have expanded the bishops' powers as judges in 333? In this second instance, it seems reasonable to suggest that the level of corruption and his desire to thwart it, both evidenced by the edict, indicate that this contextual reality may have led him to accord the bishops more authority as judges. The 333 constitution is worded in such a way as to make this claim virtually certain.

The bishops already held court and were acting as judges in their communities by Constantine's time, deciding legal matters between the many adherents under their direct and autocratic authority. Add to this that the bishops in the Donatist crisis had appealed directly to Constantine to rule on a decision with significant legal and social implications, involving not just doctrine, but the office of bishop, lands, buildings, and most importantly, imperial favour. He in turn, appointed judges from among their own ranks to sit *en banc* to judge the matter themselves, and it took a number of years of hearings and appeals before it was finally decided in 316. Two years later, Constantine brought the bishops into the Roman legal administration as judges, and ones that could be preferred over magistrates. The timing does not look to be an accident. In order to dispute this, one would have to come up with a different reason why Constantine would make them judges, aside from the fact he had contact with at least two of them via his court, noted above. Constantine's Donatist experiences do not have to be the only reason, but this fits the evidence better than simply stating he did it because either he was a devotee of their

religion, or that he was manipulating them into public service a la Burckhardt. As I noted at the outset, though, I agree with Burckhardt's basic thesis that Constantine did use the church for his own ends, but that does not preclude either Constantine's making them sit as judges in an internal dispute and then making them judges in the legal administration of the empire, or Constantine's growing affinity for the religion. In other words, the emperor seemed to have realized the political utility of using the bishops this way, but he also evinced a growing affinity for the religion that continued throughout his reign.

The first piece of legislation seems to be set out with caution. Certainly he knew the role of judges and the various powers he could give bishops, we know that from the later legislation, but here the emperor merely gives the right of transfer and is emphatic that even though a litigant may have this right, the magistrate who first hears the case would continue to have authority. While we have no evidence for what this might have looked like, it seems reasonable to suggest the bishop would decide the case and the magistrate would solemnize it and obviously see to enforcement. It would be difficult to argue that something like that was not the case, for how would a bishop's court correspond with the enforcement arm of the state. It was too early in the process for this, but the later rescript changed things dramatically.

The rescript of 333 was in answer to the prefect of Rome on how the earlier edict was to be understood, presumably because he was being forced to engage it. Constantine takes this opportunity to expand both the right conferred on the litigant and the weight of the bishop's decision, connecting the office of the prefect directly with the bishop's court regarding enforcement. There is no lingering presence of the initial magistrate's authority

anymore, except to acquiesce to the transfer. The bishop now gives a judgement that is taken as official once they do, and it is the job of the prefect to enforce the decisions directly. The right of the litigant is expanded by allowing the transfer request to occur at any point in any proceedings, before whatever kind of judge. That is a significant change from the first law which merely gave the right of transfer, because it would be absurd to Roman legal ears to imagine a litigant demanding his case be transferred to a bishop upon sentencing, unless there was legislation which forced their hand. In fact, the scene of a litigant demanding a transfer upon reading of sentence seems almost fantastical. But Constantine's emotions get the better of him in his legislative drafting, as pointed out by MacMullen above, and when we combine this almost rash allowance to the litigant with what he notes later in the rescript about how fiercely he wants to combat corruption in the legal administration generally, it fits quite reasonably that to get his point across, he essentially threatens the magistrates and lawyers with this gratuitous right for litigants.

The other expanded meaning is, of course, that the bishops' decisions would henceforth be treated as inviolable: no appeal was possible following a bishop's decision. This is significant because this was only the case with the court of the Praetorian Prefects and the Emperor himself. Not even governors enjoyed such status. Was Constantine again cutting through the veil of corrupt bureaucracy with this move, as Dillon observed on related matters? Yes, he was. The evidence is in the legislation itself; the difficult part is whether Constantine had thought of his earlier 318 edict in these expanded terms when he first issued it. If he had, then the question presents itself about why then would he not have written it that way? I suggest that 318 was too early for this to be the case for

everyone involved: for Constantine himself who would have no idea how the legislation would take, if at all, and how the bishops would behave — the Donatists were recalcitrant to a degree that chafed the emperor to extremes; for the legal administration community that would have to digest this new law, still somewhat of a mystery to Ablavius in the early 330s; and certainly for the bishops themselves, who were being thrust into the state judicial ring as a corpus for the first time in their history, and this must have been a daunting prospect for the humbler bishops who might be asked to hear a case transferred to them from a magistrate's or governor's court.

On the other hand, by the time we reach 333, the bishops may have had a taste of proceedings here and there, but more importantly they have now become very cozy with the emperor as not only their liberator, but also their patron, and the closest thing to a Pope the church of the fourth century would know. All one has to do is read Eusebius's *VC* to be convinced of how the church began to view their emperor, as divinely sent and ordained by the deity. Constantine had these bishops beholden to him as their liberator, protector, and patron in his building of their churches and legislating them into the Roman constitution. He had the loyalty and ear of almost all bishops, most importantly the two bishops named Eusebius, who conveniently held the levers on both the old imperial capital of the East (Nicomedia) and the written records that have been left to posterity from this era: the Nicomedian and Caesarean, respectively.

Constantine, at times and in some measure, did engage in reforms which were connected to protecting people from abuses, and because of this he stands out in Roman legal history as a somewhat more humane law-maker than most of his predecessors. His

laws gave more protection and rights to the poor, to slaves, and notably for this research, to Christian bishops. That Christian bishops were under an intra-religion mandate to care for the poor and were often involved with slaves desiring to be freed, perhaps here we have another clue as to either why Constantine so favoured the bishops or why he legislated about the poor and slaves as he did. Which way the causal forces flowed in this particular relationship is not the subject of this study, but it is interesting and related to the legislation discussed herein and seems worth noting.

While Constantine's legislation of 318 and 333 were not much engaged in his own time, in less than a century later what they had ushered in, bishops sitting as judges, laid the foundation for an enduring Roman version of justice in communities within the failing and falling Western Roman empire, as suggested above. The church would end up playing a major role in the governance of people's lives throughout the Middle Ages, and it was Constantine's actions that formed the basis for this historical reality. From this perspective, he is perhaps the most influential historical figure affecting the future of Western Europe. He sets the stage, quite literally, for the so-called author of the Middle Ages, Augustine of Hippo.

Constantine was apparently so convinced of the truth of the Christian religion by the end of his life that just before dying he took off his purple robe and donned the plain white robe of a Christian initiate and was baptized by his long-time associate, the Christian Bishop, Eusebius of Nicomedia. He died in a village just outside of that city on May 22, 337. A person so worried about his eternal fate that he would exchange his

emperor's robe for that of a humble Christian initiate says a lot about his being convinced of the action's efficacy.

Eusebius of Nicomedia had become a powerful political figure by the time he blessed the emperor on his death bed. This power, in nascent form in the legal and civil administration of society, was bestowed on the Christian Bishops by Constantine. Dressed in the trumpery of ornamental costume and dress, and hovering over this pallid figure, once his emperor, the picture almost seems a prescient sign of the servant who would become the master, roles reversed. In time, and during the Middle Ages, the Christian religion, administered from Rome, would continue strengthening its jurisdiction over the social life of proto-European society, and this included by definition a number of areas of law. As pointed out above, though, the Church had little choice in such a process in the West because the empire was disintegrating before their eyes. Following the fall of the Western Empire, the Church was the last genuine connection to Roman imperialism, and we know that by the time we reach Pope Gregory, the Church was the undisputed master of Rome. Constantine's adoption of the religion and legislative activism concerning the bishops, his overly generous patronage, and his colossal building program laid the groundwork for Gregory's church to be in such a politically entrenched situation.

While Constantine's making the bishops judges in 318 did not likely result in any sea-change in the way Roman courts did their business, and very likely did not mean the law was much used by litigants in Constantine's reign, it did mean that by the late fourth century and certainly by Augustine's time the bishops were hearing a variety of cases

based on Roman law, some of which were criminal in nature. In the centuries that followed, as Brundage notes, not only were the clergy involved in every aspect of the legal and institutional structures of the early Middle Ages, they would also take part in deliberative assemblies and their influence was "out of all proportion to their numbers."[462] So, Constantine's making the bishops judges and bringing them into the constitution of the Roman Empire via legislation was an important historical event which had consequences for the entire Middle Ages and beyond to our own day. For that reason, I suggest asking questions about why Constantine did this is not only essential for better understanding his reign, historically, but also to note that the potential answers to these questions may serve as further grounds for the critical assessment of legal traditions that started in the Roman Empire, were kept alive by the Roman Church, and which became the basis for many European legal systems.

[462] Brundage, *Medieval Origins of the Legal Profession*, 74.

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Appendix A: Laws on Courts of Bishops 318 – 460

Year	Law	Emperor
318	CTh 1.27.1 Litigants can transfer their case to a bishop's court; original judge retains jurisdiction for enforcement.	Constantine
333	Sirm 1 Litigants can transfer to bishop's court at any time, even while sentence is being read. No appeal from bishop's court is allowed. Bishop's ruling will be enforced directly by local authorities, no original judge involved.	Constantine
355	CTh 16.2.12 Bishops may not be accused before secular judges, only before "a court of other bishops."	Constantius, Constans
369	CTh 11.36.20 Bishop Chronopius had attempted an appeal from the separate courts of seventy bishops and from Claudius, Proconsul of Africa. Was ordered to pay the state fine of 50 pounds of silver to the poor. A confirmation of Sirm. 1 herein that he attempted to appeal a decision "he had no right to appeal." If nothing else it confirms validity, Valentinian's recognizance, of Sirm. 1.	Valentinian, Valens, Gratian
376	CTh 16.2.23 Ecclesiastical litigation must follow the rules of	Valens, Gratian, Valentinian

	civil suits. Possible transfer of Roman procedural law into Canon law.	
384	Sirm 3 Bishops shall not be haled before secular courts in ecclesiastical cases.	Valentinian, Theodosius, and Arcadius
399	CTh 16.11.1 Bishops limited to actions involving matters of religion.	Arcadius, Honorious
405	Sirm 2 Bishops condemned by the judgment of other bishops must be banished from their municipalities.	Arcadius, Honorius, Theodosius
408 (November 27)	Sirm 9 The municipal council shall take responsibility for clerics who have been condemned by the judgment of a bishop; to then be obligated to the performance of compulsory public services.	Arcadius, Honorius
408 (December 13)	CTh 1.27.2 Bishops judgment valid for those who acquiesce.	Arcadius, Honorius, Theodosius
412 (December 11)	CTh 16.2.41 Clerics cannot be accused except before a bishop, and the legal proceedings must be formal. Proof must be supported by documents.	Honorius, Theodosius
412 (December 11)	Sirm 15 (same as above) Clerics must not be accused, except before bishops. This must be demonstrated by proofs and supported by documents. If not, the accuser will lose his status. Bishops can only hear these	Honorius, Theodosius

	cases with the attestation of many witnesses and in formal proceedings.	
421	CTh 16.2.45 Ecclesiastical canons in force shall be observed in province of Illyricum. Cases should be decided by "synod of priests and their holy court" and with the express knowledge of the Bishop of the city of Constantinople, "which enjoys the prerogative of ancient Rome."	Honorius, Theodosius
425 (August 6)	CTh 16.2.47 Clerics who were led before secular judges by [failed usurper John] must have a hearing before judges "*episcopalis audientia*."	Theodosius
425 (August 6)	Sirm 6 Clerics are not permitted to litigate in a secular court.	Theodosius
432	CTh 9.45.5 Law primarily about slaves using church premises as place of refuge and how they must be treated based on the facts; clerics who pervert the regulations herein will be subject to an "episcopal trial" and receive the force of judicial severity.	Theodosius, Valentinian
445 (June 19)	N Val 18.1 – 4 Manichaeans outlawed. They confessed in the court of Pope Leo with the Senate present. This heresy shall be a public crime, and anyone can accuse/prosecute. The	Theodosius, Valentinian

	Manichaeans will forfeit the right of action for outrages against them; they shall have no freedom of contract at all.	
445 (July 8)	N Val 17.1 – 4 A trial of Hilary of Arles was conducted by Pope Leo of Rome for unlawfully ordaining bishops. The authority of the See of Rome supported by: merit of St Peter who was first to hold the episcopal crown; dignity of the city of Rome; authority of the Council of Nicaea. Nothing contrary to ancient custom is allowed with permission of "the venerable Pope of the Eternal City." Also important: if any bishop summoned to the court of the Bishop of Rome refuses to appear, he shall be compelled by the governor of the province to be present. If any judge permits these commands to be violated, they shall be fined ten pounds of gold.	Theodosius, Valentinian
452	N Val 35 Affirmation and expansion of CTh. 16.11.1	Valentinian
460	N Maj 11.1 If anyone is forced [presumably by a bishop] to the duties of the clergy, they have the right to obtain condemnation for such crimes before competent judges. Archdeacon should pay ten pounds of gold to victim.	Leo, Majorian

	The guilty bishop will be summoned to the court of the bishop of Rome to incur the brand of illicit presumption.	

Appendix B: Eusebius's relationship with Constantine

Eusebius wrote the *VC* as a friend and subordinate of the Emperor Constantine. While some scholars want to distance Eusebius from Constantine, as if he was not actually as important as Constantine's letters seem to indicate, there seems little reason to doubt that at least at some later period in his life, Eusebius was, certainly at the Council of Nicaea and beyond, close to the emperor.[463] It might be more accurate to say that although Eusebius became an advisor to Constantine later in the Emperor's Christian period, there were others who were perhaps closer to the emperor for a longer period of

[463] Barnes, *Constantine and Eusebius*, 266. Barnes says basic facts of chronology and geography contradict any idea of Eusebius being a close confidant and adviser. It is perhaps fair to say that he developed a close association and friendship with the emperor towards the end of his life, the high point being Nicaea wherein the emperor knew him well enough to direct that his confession be read after the Arian one had been shouted down, certainly not early on when Lactantius and Ossius were the main Christian advisors. Various evidences in the letters suggest that Eusebius was at least a trusted advisor, (Eusebius, V.C. Constantine writes, "The preparation of the [50] written volumes shall be the task of your Diligence." 2.46.1-2.46.3, 110-111; Constantine writes, later in their relationship, "…with great admiration for your learning and endeavour I have gladly read the book myself, and as you desired I have ordered it to be published for the large number who are sincerely attached to the worship of God." 4.35.2, 166: Emphasis added). This relationship between the bishop and the emperor seems to have deepened in trust and intimacy over time, as in the first letter we see Constantine asking Eusebius to make copies of the *Divine Scriptures* – Likely only the Jewish Scriptures spelled out by Origen. There is no indication Christian writings were included, although Christian historians may want to infer this retroactively due to their predisposition about the imagined importance of Christian writings for the likes of Origen, Eusebius, and then, Constantine. Further evidence that Constantine's idea of the "Divine Scriptures" were the Jewish Scriptures alone is found in Sozomenus' Ecclesiastical History where we learn that [following the signs he claimed to have had from Christ and angels, such as the Cross in the blinding sun-filled sky and the dream which followed] "At daybreak, he called together the priests of Christ, and questioned them concerning their doctrines. They opened the sacred Scriptures, and expounded the truths relative to Christ, and showed him from the prophets, how the signs which had been predicted, had been fulfilled. The sign which had appeared to him was the symbol, they said, of the victory over hell…." Salaminius Hermias Sozomenus (Sozomen), *The Ecclesiastical History*, trans. Samuel Parker (1707), rev. Chester D. Hartranft, *A Select Library of Nicene and Post-Nicene Fathers of the Christian Church*, second ser., ed. Philip Schaff and Henry Wace, vol. 2, *Socrates, Sozomenus: Church Histories* (Grand Rapids, Eerdmans, 1983), 1.3, 242. For the meaning of Divine Scriptures for the early Church, see C.G. Bateman, *Origen's Role in the Formation of the New Testament Canon* (M.C.S. Regent College, Vancouver, B.C. 2008;

Theological Research Exchange Network (Series), #048-0352), 93-104.

In the latter letter, Constantine is taking the advice of Eusebius. The point then that Eusebius was an advisor in some capacity seems plausible based on the evidence. On the other hand, Barnes points out that since Euesbius did not live near the imperial capital, he could not have "ready access to the emperor's presence," (266) and according to him Eusebius could not be considered a "courtier, still less a trusted counselor" (266).

time previous to that. One example of an earlier advisor is Ossius of Cordova, who was "one of the Godly men of his court"[464] and the person who Constantine first worked with to both draft and deliver a letter to Alexander, the bishop, and Arius, a priest, in Alexandria upon learning of the growing dispute which led to Constantine convening the Nicene Council.[465] As a Bishop in Spain at the time of Constantine's growing pre-eminence, it is geographically and chronologically logical, being initially a co-Emperor of the West while Licinius held the East, that Constantine would have taken a Christian advisor from his own territories. Another close advisor to Constantine was Lactantius, also from the West, who had been chosen by Constantine to teach Christian doctrines to his son Crispus and whose writings on Christianity had a great influence on the new Emperor.[466] Lactantius also wrote a polemical work that included information on Constantine's life and rise to power, and this has served to fill in the picture of Constantine's life that we find in the main sources.[467] But to say that because Constantine had met these advisors and others earlier during his rise to power, or that they happened to live closer to the Emperor at various intervals, does not negate the fact that Euesbius became, also, one of Constantine's closest advisors, and clearly prior to Nicaea, a point which I demonstrate herein. The importance of Eusebius of Caesarea's relationship to

[464] Eusebius, *Life of Constantine*, 2.63.1, 115-116.

[465] Theodoret, *The Ecclesiastical History*, VI, 43; Eusebius, *Life of Constantine*, 2.63.1, 115-116; It is recorded of Ossius that: "Philostorgius says that before the synod at Nicaea, Alexander, bishop of Alexandria, came to Nicomedia, and after a convention with Hosius [Ossius] of Cordova and the other bishops who were with him, prevailed upon the synod to declare the Son consubstantial with the Father, and to expel Arius from the communion of the church." Photius, Patriarch of Constantinople, *Epitome of the Ecclesiastical History of Philostrogius*, trans. Edward Walford (London: Henry G. Bohn, York Street, Covent Garden, 1855), Epitome 1.7: http://www.ccel.org/ccel/pearse/morefathers/files/philostorgius.htm.

[466] For an overview of Lactantius, his influence and activities, see Odahl, *Constantine*, 125-128, etc.

[467] Lactantius, *De Mortibus Persecutorum*, trans. and ed. J.L. Creed (Clarendon Press: Oxford, 1984); see also Odahl, *Constantine*, 9.

Constantine is fundamental to this research because it is from Eusebius that we have the most information about the history of Constantine's life, character, and intentions for the Christian Church.[468]

By the time of the Council of Nicaea in 325, the relationship between the emperor and Ossius seems to have been under some degree of strain. Ossius was sent with Constantine's letter to Alexander and Arius, and when it did not have its intended effect of pacification, Ossius clearly having taken Alexander's side in the dispute, this bishop visited Antioch where he convened a council of bishops in early 325 and made the very headstrong move of excommunicating three bishops, one of them the respected Eusebius, bishop of Caeasarea. Ossius, perhaps overstepping his bounds, excommunicated these bishops but allowed them to attend a general Council that Constantine intended to be in Ancyra later that year. That he did not excommunicate them outright means he likely knew he might have been overstepping his own authority. When Constantine learned this, he made two decisive and revealing moves, and I agree with Henry Chadwick that this shows he was not at all impressed with Ossius.[469] First, he had his Council moved close to Nicomedia, at Nicaea, so that he could oversee this gathering himself. We have to

[468] The compromise reached at Nicaea in the formulation of the creed only specifically outlawed the extreme views of Arius, some of which were held by Eusebius of Nicomedia who was temporarily stripped of his bishopric for not signing the condemnation of Arius. But Constantine was a devotee of neither party. His goal all along had been compromise for the sake of peace, and he would have certainly sided with whatever the majority of bishops had agreed upon. While it is wrong to assume that because he was baptised by Eusebius of Nicomedia, having long before been reinstituted to his seat in that city by Constantine, that therefore the emperor was a died in the wool Arian, it is even more mistaken to assume that because he signed off of the majority creed that he was therefore of the Athanasian party, what would much later become known as the orthodox party. Nothing of the kind, Constantine was only concerned with peace between the bishops, and all the baptism by Eusebius proves, is that little historical annoyances like these to those of the orthodox prevent them from claiming Constantine's faith as identical to their own. It was likely not meant as a grand gesture to the Athanasian party either, but merely required by the exigencies surrounding his failing health and the seconding of the most senior bishop on hand.

[469] Chadwick, *The Early Church*, 130.

remember that Constantine had just been wearied by a decade of warring bishops in the Donatist crisis, and then along comes Ossius who, in another growing crisis, excommunicates bishops under his own recognizance. Unlike the Donatist crisis in which Constantine hoped his calculated patience and forbearance, in agreeing to act as a court of appeal for the Church's disputes over many years, would produce fruitful results, this time he was attempting to legislate peace and wanted to be certain is was him, in person, that ruled over the council, with all the gravity that his presence and imperial military entourage would effect. Second, and more importantly, Constantine must have met with Eusebius of Caesarea, as one excommunicated, prior to the Nicene council, something he did not do immediately with the eschewed Donatist party early on.

This claim about Eusebius is based on the fact that at Constantine's council over which he himself presided, where the wording of the creed and whether it favoured an Arian or Alexanderian view was the cause of the quarreling bishops, it was Eusebius of Caesarea's creed which was directed to be read to the Council by Constantine. This reading was preceded by Eusebius of Nicomedia's creed being read, which caused so much consternation in Athanasius and Alexander that the latter two childishly ripped the document up in front of all. Constantine then directed Eusebius of Caesarea to read his creed which the emperor immediately expresses his approval of. At that point, the decision was made, it would be Euesbius of Caesarea's creed which would carry the day, in spite of the small subsequent changes made to specifically harass Arius's views and ensure he was excommunicated. The fact that the Emperor chose the creed of Eusebius of Caesarea, after allowing his namesake of Nicomedia to do so unsuccessfully first, shows

that the Emperor trusted him. Ossius, who sided with Alexander from the time of the failed letter, may have been president of the Nicene Council as Constantine's court bishop,[470] but it makes no sense to think as a supporter of Alexander he would have had the bishop of Nicomedia, who supported Arius, read his credal formula first, and even less sense that he would then call on Eusebius of Caesarea, the bishop he personally excommunicated, to read his second. The choice and order were likely the Emperor's decision, and choosing Eusebius of Caesarea was no chance event, and neither was starting with his namesake. All of it looks obviously calculated. The first creed was read to draw out the attackers, and the second, far away from it, very balanced, and accommodating to both sides, was read to bring on board those, likely the majority of bishops, who had just witnessed the ridiculous spectacle of Athanasius, Alexander, and Ossius ripping up the Bishop of Nicomedia's creed. Another display of that nature may have swung the undecided bishops against the Alexandrian cause. Upon hearing the creed of Eusebius of Caesarea, though, the Alexandrians were largely in agreement with it and refrained from such embarrassing displays. That the emperor openly commended it was likely enough of an encouragement to swing all the bishops towards this decision, even though Alexander and Athanasius got to amend it slightly to impugn Arius.

Further, Constantine put his stamp of approval on the Caesarean's creed immediately, in the presence of all. Two important, necessary inferences arise from these facts which

[470] One of the most respected historians on these matters, Robert M. Grant, thinks it was Ossius who led the council. Some have suggested it remains a bit of a mystery, but they offer no other convincing suggestions of note. Ossius as court bishop (as a bishop in Spain who Constantine trusted to deal with the Arian situation initially, he is supposed to have been Constantine's "court bishop". Scholarship makes this assumption, but nowhere have I seen it in the sources. Eusebius calls him "esteemed bishop" in his *Life of Constantine*) prior to Nicaea for a period of years seems to indicate his importance generally. Robert M. Grant, *Augustus to Constantine* (New York: Harper & Row, 1970), 240.

are uncontested in the sources. First, Constantine must have gone out of his way to meet with Eusebius just previous to the council to assess what his views were and emphasize his wish for unity. Second was the clearly favourable impression that Eusebius seems to have had on the emperor, because Constantine directed that it was his creed which would be read out as a compromise if the Nicomedian bishop was unsuccessful, something which Constantine would have likely known would be the case: he would have known this via both Ossius and Eusebius of Caesarea. The very close relationship of trust between the Emperor and Eusebius of Caesarea in future years are indicated by many things: Eusebius writing the Church's history in terms that flattered Constantine, Eusebius being the one who should arrange for fifty copies of the Sacred Scripture to be made for Constantine, Eusebius writing Constantine's life story for which interviews were evidently allowed and encouraged, and letters, etc., are all more than evidence to show these two were close. If not in proximity to each other, then certainly confidants from a distance. The Nicene drama of the readings makes it clear that Constantine knew of the middle road[471] struck by the bishop of the church of Caesarea, and the suggestion that it may have been made more so with some touch ups prior to the Council makes perfect

[471] A middle road in the sense that it was not openly Arian in nature, but neither was it avowedly Alexandrian either. It left the question of divinity up to interpretation, at least as it existed at the close of the Council. Later amendments would solidify the notion of divinity, especially those of the Nicene-Constantinopolitan Creed at the second ecumenical council of 381, but it is doubtful whether the 381 council promulgated this, and more likely it was stamped with approval at the Council of Chalcedon in 451. It is this later creed which is today used in liturgies. Interestingly, both creeds begin with a statement regarding the supremacy of the Father God, whereas the connection of Christ to the one God is immediately discussed below. The document reads like a frozen relief in time which represents the fluid and changing views of God and Christ, and what those were at a specific point in time. God was still represented as the one God, the definition of Christ came second. Whether the Church would have changed it later on is doubtful, due to their attachment to the idea that Nicaea produced a static dogma, but it is interesting nonetheless to see the supremacy of one God, a partially Egyptian and wholly Jewish notion, front and center in the creed.

sense. In any event, another famous touch up was made, to appease the Alexandrian party, but it was the creed of Eusebius of Caesarea which carried the day at Constantine's court of bishops.

What does all this indicate? First, Eusebius had the ear of the Emperor from just prior to Nicaea and continuing for the rest of his reign. Eusebius was neither a fool nor petulant, he knew what Constantine meant not only to his own personal safety in having ended persecution, but to the growth and benefits that would accrue to his church. The clear position of accommodation evidenced in his post Nicene writings, which is importantly at variance with his stand taken at the Council of Antioch prior to meeting with Constantine, is almost certainly a product of being convinced by the emperor of the importance he placed on accord among the bishops. Second, Ossius seems to have been replaced by Eusebius as the most important bishop to Constantine following Nicaea: we hear little of Ossius and much about Eusebius.[472] Perhaps the emperor's softened views and relationship with Eusebius of Nicomedia later on can be attributed to the spadework of the Caesarean bishop. Whether he was the reason the emperor ended his reign being sympathetic to the Arian bishops is only important insofar as it proves what Constantine maintained from the beginning of his interactions with bishops: he was willing to make accommodations for peace which some bishops like Athanasius were unwilling to accept. Athanasius's disruptive behaviour very likely convinced Constantine of the merit of those bishops who adopted his own *via media* stance.

[472] The church historians Sozomen, Socrates, and Theodosius all credit Eusebius with both the authoritative history of the church which they were picking up on, and the inference is that Eusebius of Caesarea was a main player in the drama involving the Emperor and the church.

Appendix C: Religious Allegiances as Evidenced in the Panegyrics and Histories

The writer of the 310 Panegyric indicates the connection of Constantine, after successfully warding off the barbarian hordes and saving their lives, to Apollo, another contextual marker on the religious views of this emperor:

> 4. For you did I believe, Constantine, see your patron Apollo, and Victory accompanying him, offering you crowns of laurel, each of which represents a foretelling of thirty years.... So quite rightly did you adorn those most venerable temples with such offerings that they no longer miss their former ones, and now all temples seem to be calling you to them — and especially our Apollo, in whose boiling waters are punished perjurers, who you above all have good cause to hate.[473]

Constantine made significant offerings at the Temple of Apollo and is here implicated as having had a vision of that god and Victory, as well, two of the gods appearing on Rome's Senate arch for Constantine a few years after this was written. But this must be understood in light of another observation, that the words spoken in public to Constantine herein, "and now all temples seem to be calling you to them…", speaks to a contemporary's understanding of what Constantine's religious views were, and certainly those of the Roman people who were not in any way tied to one particular god, but the one who brought victory in war; in this case Victory and Apollo. This allegiance based on the correlation/causation relationship between religious worship and victory perhaps helps us understand how this emperor could have so quickly given himself over to the Christian god when he thought this advantageous for victory in war and possibly because he felt it would inhere to a more organized and stable society through the instrumentality

[473] *Anonymous Panegyric (310)*, 221.1-6, 89-90.

of the bishops.[474] A last observation related to this emperor is on the belief that Apollo boiled perjurers as punishment, which Constantine seems to have done to his own wife in 326 – 7, possibly for adultery.[475]

The importance of this heinous act for understanding this emperor's views is that it happens when Constantine is well in to his Christian reign, his toleration having by this time been replaced with church building and financial support on an unprecedented scale. That he would choose to punish her transgression, whatever he thought it was, in this way is perhaps indicative that his connection to Apollo, at least in his mind, for his actions would begin to lean the other way, was still part of his worldview. Add to this also the fact that Constantine, in the same stroke as erecting monumental Christian Churches in his New Rome (Byzantium), raised a giant statue of Apollo, once the property of the city of Ilium in Phrygia, in the city Plaza, fastening some nails to the statue's head that

[474] The question presents itself as to whether the bulk of society who embraced what became known as pagan beliefs offered any pushback to the new religion. The difficulty here is that since the emperor held the sword in one hand and his religions in the other. The fact that he had just put down his enemies in the violent way that he did seems to give some indication as to why there was not, at the time, any public outcry against his newly favoured religion. There likely was some resistance, one cannot imagine there would not have been, but given that this new trajectory in religion would mean that both the state would become more and more aligned with the religion and because the votaries of the religion would be, in large part, those who penned the histories of his era, it is unsurprising that we do not know more about any "pagan" resistance. The bottom line from Constantine forward was that to openly challenge the Christian religion was akin to openly challenging the state itself, and that would have become counterproductive for anyone wishing to prosper under the new regime.

[475] Zonaras, *The History of Zonaras: From Alexander Severus to the death of Theodosius the Great*, trans. Thomas M. Banchich and Eugene N. Lane (London: Routledge, 2009), Book XIII.2.12-13, 150-151. In this account of Zonaras, compiled with the use of various sources, known and unknown, he sets out that Fausta had alleged advances on Cripus' part towards her, because in fact he repelled these causing her anger, and as a result Constantine had his son executed, but on finding out she lied about his actions, had her led into a hot bath and "there she violently ended her life," which either means as a Roman and high ranking citizen she did what many Romans did in baths by slitting her wrists, or it could mean the violent end was death in the heat of the bath itself. Given the few facts provided, I think the former is the more reasonable suggestion given the context and her status.

were purported to be from the cross of Christ, and further transferring the Palladium of Troy to this same location.[476]

Constantine founded Constantinople, then Byzantium, in 324, and it is not without significance that besides already having been looking for an Eastern capital for Empire, Diocletian choosing Nicomedia previously, Constantine would end up winning his penultimate Battle of the Hellespont over Licinius and his forces while stationed in that very city, his son Crispus actually delivering the decisive bow in a naval confrontation. The date is important, 324. We know that coins of Constantine and his sons did not stop depicting tributes to Mithras and Jupiter until 323 when on the Coins of Constantine II, the pagan inscriptions disappear, so Mommsen suggests that Constantine's largescale reorientation to Christianity would not have been until sometime in 322.[477] Again, in 324, Constantine founded his new capital on a very Christian theme, although with pagan accoutrements as noted.

This is important for my analysis of Constantine in his relationship with the Christian bishops and relevant lawmaking because it speaks of the deep contradiction of interpreting this emperor as solely a Christian emperor. He certainly was not exclusively Christian, not even becoming baptized until moments before his own death. John Firth put it succinctly:

> There can be no greater mistake than to suppose that Constantine declared war on the old religion. He did nothing of the kind. When he showered favors on the Christian clergy, what he did in effect was merely to raise them to the same status as that already

[476] Ibid., 3.18, 155. So was Constantine acting the politician when he brought these religious relics to his new city? Perhaps. Why he would want a "Christian" capital and then bring in the Palladium of Troy goes to support my argument that Constantine was not as much "Christian" as he was religious, superstitious, and wanting to cover his bases with a number of gods.

[477] Mommsen, *Rome Under the Emperors*, 448-449.

> enjoyed by the pagan priesthood. He did not take away the privileges of the colleges: and inscriptions have been found which tend to show that he allowed new colleges to be founded which bore his name. In short, to the old State-established and State-endowed religion he added another, that of Christianity, reserving his special favor for the new but not actively repressing the ancient.[478]

Paul Stephenson echoes this sentiment, commenting on those laws that benefit the Christian clergy[479] among the more than three hundred laws that are attributed to Constantine in the *Theodosian* and *Justinian* Codes:

> An important point to note in addressing these early laws is that they did not promote a peculiarly Christian agenda. Rather, they promoted particular Christians, clerics, who might then protect the interests of their communities. The rights of Christians were henceforth to be protected like those of other citizens, by powerful patrons who might interpret both existing law and new laws. Constantine legislated not Christianity but toleration.[480]

Judith Evan Grubbs added to this general consensus among historians by noting that "[i]n general, Constantine, rather than applying 'Christian' principles to imperial law, preferred to grant to Christians (those whose brand of Christianity he recognised) powers and privileges that enable the Church to take over new functions and to amass more wealth

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[478] John Firth, *Constantine the Great*, chp. 15.

[479] Constantine gave bishops the authority to oversee and validate the manumission of slaves by their owners, just as if it had been done under Roman law at the time (CTh 4.7.1); he absolved them from being nominated as tax collectors, and in 313, CTh 16.2.1 refers to prior "privileges granted them" which were in conflict with such nominations still going on and he needing to legislate on it here again; in 319 he uses stronger language to absolve all "clerics" from "all compulsory public services whatever" (CTh 16.2.2; he reiterates this pursuant to clerics in 330 being summoned to serve on municipal councils, which he forbids at 16.2.7), but people attempted to take advantage of this by "taking refuge" as members of the clergy, and he ordered them back to their public services at both 16.2.3 and 16.2.6: in the latter, he importantly states "For the wealthy must assume secular obligations, and the poor must be supported by the wealth of the churches"; he allowed people to will their estates to the church (CTh 16.2.4); some bishops were apparently being forced by various people to perform "lustral sacrifices" which Constantine attempted to protect them from by ordering a public beating for those of low rank who engaged in this, and a heavy fine for those of rank (CTh 16.25).

[480] Paul Stephenson, *Constantine: Roman Emperor, Christian Victor* (New York: The Overlook Press, 2009), 174. See also, José Fernandez Ubiña, "The Donatist Conflict as Seen by Constantine and the Bishops," *The Role of the Bishop in Late Antiquity: Conflict and Compromise*, eds. Andrew Fear et al. (London: Bloomsbury Academic, 2013): 31-46; this author cites three characteristics of Constantine, one of which I have indicated independently herein, that Constantine was not moved so much by a personal faith in Christianity, but as an emperor responsible for proper religious observance (34).

and influence."[481] And yet even in light of this, Firth interprets Constantine's religious character as that of a Christian, proven by the voluminous written and archeological evidence of his actions.

> Had he been indifferent to religion, or indifferent to Christianity, had he even been anxious only to hold the balance between the rival creeds, he would have never have surrounded himself by episcopal advisers, never have set his hand to such edicts as those we have quoted, never have abolished the use of the cross for the execution of criminals or have forbidden Jews to own Christian slaves; never have called the whole world time and again to witness his zeal for Christ; never have lavished the resources of the Empire upon the building of sumptuous churches; never have listened with such extraordinary forbearance to the wranglings of the Donatists and the subtleties of Arians and Athanasians; never have summoned or presided at the Council of Nicaea, and certainly never have made the welfare of non-Roman Christians the subject of entreaty with the King of Persia. Constantine was prone to superstitions. He was grossly material in his religious views, and his own worldly success remained still in his eyes the crowning proof of the Christian verities. But the sincerity of his convictions is none the less apparent, and even the atrocious crimes with which he sullied his fair fame cannot rob him of the name of Christian.[482]

Mommsen notes this dualism, or dialectic, present in the life of Constantine in terms of religious predilections, with a decided leaning towards Christianity in the later years of his reign and life.[483]

As for a date, the year 311, when he co-signed the Edict of Toleration of Galerius, seems at least a likely candidate for Constantine's official willingness to adopt Christianity into his belief system,[484] a process which, according to Mommsen, finally culminates into something which stopped him lauding the Roman gods on coinage in the year 322. After

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[481] Judith Evan Grubbs, Constantine and Imperial Legislation on the Family, *The Theodosian Code*, eds. Jill Harries and Ian Wood (Ithica: Cornell University Press, 1993): 140.

[482] Ibid.

[483] Mommsen, *Rome Under the Emperors*, 450.

[484] His education about the religion and his connections with various bishops almost certainly predates this, given a number of factors discussed herein: his father's treatment of the religion, his relationship with Lactantius and Ossius, and his education at the court of Emperor Galerius would have presumably had him up to speed on the religion's presence in the empire, even if it was at that time considered hostile to the state.

that, Constantine's building of churches, personal involvement in church affairs, and gifts of state funds and materials to the bishops and Christian population seem to show clearly that Constantine was preferring Christianity to all other religions. Mommsen notes:

> Christianity enjoyed substantial privileges. Concurrently with the Edict of Toleration another edict was promulgated granting priests exemption from *munera* — a great boon in those days. For the pecuniary and person burdens of the municipalities were crushing. This exemption led to a huge influx into the priesthood of people both with and without vocations. The Church was likewise granted the right to inherit, which other corporative bodies did not enjoy under Roman law. It had been conferred on individual temples, certainly, but the fact that all churches were granted the same rights at a single stroke is the beginning of a development towards a state Church. Christianity enjoyed privileges not merely alongside, but in preference to pagan faiths.[485]

But, the report of Constantine affixing crucifixion nails to the head of the statue of Apollo which he had expropriated and relocated to Constantinople to thus honour both gods, and bringing the Palladium from Rome there as well, the ancient inscription on wood of Pallus (associated with Athena or Minerva) believed to bring safety to the state, tells us something of the polytheistic views which must have been held by this emperor.[486] It also betrays a kind of "covering his bets" attitude to the stability of his rule, and this, noted herein, aligns with the pragmatic nature of so much of what we know he engaged in, but it also shows that Constantine was sure the favour of the gods was crucial to his success. Charles Dodd noted that in Constantine's letter to the Eastern Provinces, he actually repudiates the idea that he intended to destroy the customs of the Temples, and realizes that such a move would not be in the public interest. The author notes:

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[485] Ibid., 451.

[486] Averil Cameron concluded: He did not make Christianity the official religion of the Roman state, as many continue to assume, nor did he declare polytheism illegal. …Nor did he establish himself as head of the Church. But his actions did bring the Christian church and the Roman state together in a completely new way, and in this his reign was fundamental for subsequent history. *Constantine and the 'Peace of the Church,'* 551.

> The legislation of his reign preserved in the Theodosian Code is in harmony with this. It shows the Emperor, who as Pontifex Maximus was the head of the State religion, regulating pagan cults, defining the privileges of priesthoods, and so forth, just as his predecessors had done. … The old religion in fact remained the religion of the Empire. At most one might speak of a sort of 'concurrent establishment and endowment' of Christianity.[487]

Dodd is here referring to legislation[488] in which Constantine forbids men of the priesthood of the Roman religions, those who held the office of flamen or were civil priests, to be forced to be provosts in public post stations (something reserved for those of a "lower rank"), showing the same deference to the traditional Roman priesthood as the Christian, shown in CTh 16.2.2. He also extends legislative protection to those who "…provide assistance that is innocently employed in rural districts in order that rains may not be feared for the ripe grape harvests… [and etc.],"[489] and these were people ostensibly practicing "magic arts" to this end, something in the traditional Roman way of religious life and completely at odds with a Christian approach. In fact, in another piece of legislation, immediately preceding this latter one in the Theodosian Code and on the same subject, reads, "But you who think that this art is advantageous to you, go to the public altars and shrines and celebrate the rites of your custom; for We do not prohibit the ceremonies of a bygone [misappropriation] to be conducted openly."[490] Constantine was simply forbidding the private practice of these customs, but welcomed their open practice, perhaps for obvious political reasons and wanting to have the desires of these so "gifted" to be open to public and state scrutiny. The fact is that Constantine was Pontifex

[487] Charles Harold Dodd, *The History of Christianity from the Death of St. Paul to the Reign of Constantine, The History of Christianity in the Light of Modern Knowledge* (London: Blackie & Son, 1929), 482-483.

[488] Cod. Theod. XII i.21, 345; XII v.2., 372.

[489] Cod. Theod. IX xvi.3, 237.

[490] Cod. Theod. IX xvi.2, 237.

Maximus for a religious system already functioning across the Empire, and that he legislated privileges for Christian prelates in line with their pagan analogs can be no surprise in light of his growing preference for that religion which began early in his reign. Constantine's attachment to the Christian religion, then, was tempered by the reality that the majority of his subjects were pagan.[491]

I suggest Constantine's playing to the various religions means that he saw them first, as an existing institution of social gravitas which he could not ignore; and second, as a means to an end, for if any of them were an end in themselves, why could he not decide to settle on one? If they were a means to an end, then what end? I think the answer is quite simple, the stability of the Empire's society and the prosperity of political undertakings to guarantee the strength of his rule and legacy. If this is correct, then the laws of Constantine concerning the bishops were much less about the truth of the latter's religious claims as against the laws' efficacy in bringing the court officials in his empire under his direct control, something which is suggested in the work of John Dillon.[492]

The fact that the author of the 310 panegyric connects Constantine with Apollo himself, saying that the emperor saw himself in the god, and that Constantine would one day replace a statue of Apollo with a bust of his own head, and even at this very early stage in the evolution of Constantine the speaker speaks of this young ruler as a "benevolent deity,"[493] all seem to suggest that Constantine saw himself, then, as connected to, if not

[491] R.H.C. Davis, *A History of Medieval Europe*, 13-14.

[492] See generally, John Noël Dillon, *The Justice of Constantine: Law, Communication, and Control* (Ann Arbor: University of Michigan Press, 2012)

[493] *Anonymous Panegyric (310)*, 221.1-6, 89-90.

the incarnation of, Apollo, the sun god.[494] Panegyrics are laudatory speeches aimed at rulers, and the assumption is that the ruler would hear these first hand. The writers were not in a position to speculate on the predilections of the subject or colour them in any way which might offend them; hence, it is reasonable to suggest that Constantine was quite comfortable to be characterized in this fashion. The foregoing also relates to the fact that Constantine seems to, with Apollo, have had an overzealous hatred of perjurers and those who corrupted access to justice before the law, a fact which appears in his legislation at points. For example:

> *Codex Theodosianus*, 1.16.7
> The rapacious hands of the [civil servants] shall immediately cease, they shall cease, I say; for if after due warning they do not cease, they shall be cut off by the sword. The chamber curtain of the judge shall not be venal; entrance shall not be gained by purchase, the private council chamber shall not be infamous on account of the bids.

[494] Ibid., 2.7, 150: Zonaras writes: "When Constantine had thus become sole ruler [following the defeat of Licinius in September of 324] he was named Flavius (and thus, I suppose, was styled Flavius Constantine), and resided in Rome, not having abandoned the worship of the idols but being initiated into and already accepting Christian teachings." The author goes on to describe how Constantine, unable to rid himself of a bodily affliction with the assistance of priests of Zeus, was able to find health again following the instructions of the Bishop of Rome, Silvester. The details of this likely mythical tale are unimportant, it is the fact that Zonaras locates Constantine's conversion here, likely falsely, and that Constantine, after being healed and baptized "proclaimed amnesty for the Christians, threw open the churches for them, and allowed new ones to be built. Contrawise, he closed the precincts of the false gods, and decreed that those who wished join the faith of Christ with impunity. …Thus, then, he came to the faith of Christ. The gospel was spreading and freedom of speech was being granted to Christians." (2.9, 151). In the area of Byzantium where Licinius had ruled previous to being routed by Constantine's forces led by Crispus, persecution against Christians had revived and thus the idea of getting churches back and rights decreed and enforced, including freedom of speech, do fit what we know from other sources. But the idea that Constantine only proclaims amnesty for the Christians here in 324 after being healed flies in the face of the facts: The two toleration edicts of 311 and 313 meant this was already a reality made clear by Constantine and his co-rulers under the tetrarchic system years before, and so whatever source Zonaras here uses to provide the mythical tale of Silvester's intervention and oversight in Constantine's conversion seems to be completely unreliable when contrasted with the contemporary source of Eusebius of Caesarea, who, if such a momentous event actually occurred, would have likely included such stark details. The other major consideration on this point is the accepted baptism of Constantine in 337 by Eusebius of Nicomedia on the former's deathbed recorded by Eusebius of Caesarea in *Life of Constantine*. A final minor consideration is the health of Silvester, apparently due to extreme old age according to Eusebius in *Life of Constantine*, which was so bad one year later in 325 that he was unable to travel to Nicaea on Constantine's summons but sent two priests instead.

> The appearance of the governor shall not be at a price; the ears of the judge shall be open equally to the poorest as well as to the rich.[495]

This is relevant to Constantine's adoption of the bishops, because his obvious concern that the poor were not mistreated, evidenced here, was one of the key functions of the bishop, and it always had been in Christian practice. As noted above, Constantine had a ready and already functional body of leadership dealing with societal welfare amongst their own people, and Constantine cunningly expanded this welfare jurisdiction to include all Romans. Here in this legislation as well, we are exposed to Constantine's tolerance level for corruption and the system of graft: he had none. The bishops, many of them coming from humble backgrounds and bound by religious law, at least initially when the process of Constantine's adoption was taking place in the early fourth century, must have been a very attractive group of quasi civil servants for Constantine to then expropriate into the service of the state; and the fact they were likely seen to be as far away in character from a corrupt civil servant as one could imagine, combined with Constantine's hatred of the latter, meant that seconding the bishops must have seemed to him a great boon, and indeed his treatment of them shows exactly that, discussed herein.

[495] *Theodosian Code*, trans. Clyde Pharr, Theresa Sherrer Davidson and Mary Brown Pharr (New York: Greenwod Press, 1952), 1.16.7, 28.

Appendix D: A brief overview of Roman legal development up to the Edict of Milan

Sources and Structure of Roman Law in the Fourth Century

The rise of the sovereign state following the Thirty Years' War was furnished in all instances, for all states, with some kind of written code or constitutional documents which set the legal boundaries for the relationship between the state and its peoples. That Constantine was thought of as one of the first Roman emperors to begin legislating on a large scale,[496] laws which were later organized and published by Theodosius II, puts him at the beginning of a process that would ultimately stand as one of the tenets of the sovereign state system, fixed constitutions. George Mousourakis writes: "[f]rom the fifteenth century onwards the relationship between the received Roman law, Germanic customary law and canon law was affected in varying degrees by the rise of the nation-state and the increasing consolidation of centralized political administrations. The rise of nationalism precipitated the move towards the codification of the law, which engendered the great European codifications of the eighteenth and nineteenth centuries."[497] Constantine was the great centralizer in all things: law, religion, and imperial rule.

[496] Isidore of Seville, *The Etymologies of Isidore of Seville*, trans. eds. Stephen A. Barney et al. (Cambridge: Cambridge University Press, 2006), V.i.7, 117. Isidore cites Constantine as being the first to put laws into writing, but this is fanciful of course, but it does I think show the importance of a worldview and mythology that was being built up around Constantine by his chosen religion. The mythology would grow to ridiculous proportions when in the ninth century some Frankish clerics forged the now infamous and so called Donation of Constantine. See, C. G. Bateman *Donation of Constantine*, *The Encyclopedia of Political Thought*, vol. 2, eds. Michael T. Gibbons et al. (New York, Oxford, New Delhi, etc.: Wiley-Blackwell, 2014): 954-956. One can see then that this myth building began early with Eusebius of Caesarea, writing the Church history and biography of Constantine, then Isidore expanded this myth, and later the Frankish clerics even more so. That the church leadership would rely on these mythologies to carry out war and persecutions on both the people of Europe and other regions of the world makes the building up of this myth very important for understanding both European history, colonial history included, and how important it is for us to deconstruct these myths which have caused so much suffering in the world.

[497] George Mousourakis, *Roman Law and the Origins of the Civil Law Tradition* (New York: Springer, 2015), viii.

Constantine took over the centralizing reforms of Diocletian, discussed above, and went further, and their transformations in this direction for efficiency and stability for the state were repeated and enhanced in the reforms and erection of the nation states of the Modern Period.[498] While Constantine attempted to apply these reforms to an empire, with at least three main languages (Latin, Greek, Celtic) and many others, a variety of religious groups, and an unwieldy swath of geography to account for, the state building project of the early Modern Period, in contrast, was one in which there very defined localized boundaries, often only one dominant language per state. The religious views were all either Catholic or Protestant, both directly the result of Constantine's adoption of the Christian Church, and thus far easier to control. Just as with Constantine's vision of one religion for the state, a model followed slavishly and tragically by the Frankish kings, Catholic Church, and Holy Roman Emperors, so too these nascent European states would adhere to the same program which the reformers had done so much to dismantle. Constantine's religious freedom mandated in the Milan Edict was out of the question for the entire Middle Ages.

I have discussed some of the aspects of Constantine's reforming activities when it comes to his views on his role as sole emperor of the state, and his choice to prefer Christianity as a religion for the state, ostensibly, and here it will be important to provide

[498] In the sense that the Peace of Westphailia was a group effort, various signatory nations represented, and in some vague way reminds us of either Diocletian's novel Tetrarchy or Constantine's Council of Nicaea. The concessions given in both cases were to ensure stability. Diocletian gave up sole emperorship, Constantine gave up his Arian like belief and went with the majority of bishops, and in both cases to ensure stability. The signatories of the Peace of Westphailia, especially the Catholic Church and Holy Roman Emperor, were giving up their ascendency in religious matters to let the German principalities choose to uphold a Protestant Christianity a la Luther versus the Catholicism of the Holy Roman Emperor. There is one very significant difference, though. Diocletian and Constantine gave their concessions willingly; the Holy Roman Emperor and Catholic Church were being forced by the other signatory nations.

a brief overview of the state of the legal climate of the early fourth century to help place this emperor's law into a clearer contextual framework. I will begin by very briefly sketching out the development of Roman law up to that period.

Early Roman Law

Rome's law began in earnest under the authority of religious figures, the college of pontiffs, and as we see Constantine bestowing fourth century Christian bishops with legal power, it was a default with a long pedigree. Mousourakis writes: "During the early archaic period, Roman society was governed by a body of customary norms with a largely religious character. Their formulation and articulation was mainly determined by the priestly college of the pontiffs. Only the pontiffs were acquainted with the technical forms employed in the typical transactions of private law and were entitled to offer authoritative advice on questions of law."[499] Yet James Brundage points out that pontiffs were mainly concerned with sacral law, and their grip on archaic private and public law was not total, but that magistrates and senators were familiar with it as well, and indeed created the public law.[500] Brundage also notes that archaic Roman private law dealt mostly with family relationships, personal status, inheritance, and property issues[501] and this is of course the very nature of the laws that bishops under Constantine dealt with and would for centuries: marriage and family law, slavery and manumission, etc.[502] In fact, Constantine legislated the bishops into having authority in these matters, as is well

[499] Ibid., 2.

[500] James A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (Chicago: University of Chicago Press, 2008), 13.

[501] Ibid.

[502] Ibid. Although Brundage does not point out this confluence, see his comments on the areas of law involved which had to be sorted out between the imperial government and the church at pages 42 – 43.

known when it comes to the manumission of slaves. But the pontiffs seem to have held the law,[503] set forms of actions, knew the rituals and decisions of their predecessors, and it was to them a citizen would have to go to find out if they had a case 'at law;' and if there was a right protected, there was a corresponding *legis actio*, an action allowed by the law.[504] The pontiffs' monopoly on law, accompanied by the assistance of magistrates and private judges at times, meant that as Roman society grew and conditions changed over time, the strict laws needed to be interpreted such that they fit the circumstances. As Buckland wrote: "…while civilization is advancing, the law cannot stand still, and the power of *interpretatio* and formulation placed on the hands of the Pontiffs was in effect a power to alter the law, by ingenious and useful, though not very logical, interpretations…."[505] The role of the pontiffs in *interpretatio* was taken up by the jurists, but as the jurists would be silenced in their 'settled opinions' giving way to the predominance of the emperors' legislative and judicial roles, one can see an interesting move back towards interpretation being more strongly associated with the court, and in time this would mean not only Constantine's legal advisors, pretorian prefects, and governors, but also his bishops at law would be part of that apparatus, especially when the Roman empire of the West fell and you have bishops such as Augustine as the preeminent judicial figures of their day.[506]

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[503] See James A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (Chicago: University of Chicago Press, 2008), 11.

[504] For a discussion of *legis actio* and its five moulds, *modi lege agendi*, see W.W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian*, 2nd ed. (Cambridge: Cambridge University Press, 1950), 609 ff.

[505] W.W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian*, 2nd ed. (Cambridge: Cambridge University Press, 1950), 2.

[506] The responsibility for law and its interpretation was the sole purview of the priestly pontiffs, then the jurists, then emperors, of whom Constantine shared the power of interpretation back to priestly bishops.

In the same archaic era dominated by the priestly authority over law, came the Twelve Tables,[507] as a result of the discontent of the Plebian class of Romans (the working class poor) who were subject to magistrates that were exclusively of the Patrician class (the rich). Two groups of ten men each, the *decemvirate* as they were known, drew up the laws and made them public, and this for the sake of stability since if something was not done, the Plebians, the work force, threatened to abandon the state. The Tables were, inter alia, about ensuring fairness in legal proceedings, something Constantine was keen to achieve with his legislation as well. The Tables were a series of general legal rules, and also contained some procedural guidelines.[508] Because the laws were often brief and enigmatic, this meant judges could interpret them in various ways and thus litigants still needed legal counsel and the pontiffs continued to exercise tremendous influence.[509] This sea change in the law reminds us of Maine's comment that a great outpouring of legislation seems to follow civil unrest in Rome's history, and it should be no surprise then that this practice of legislation to level the playing field for the poorest should have been the impetus for Constantine in the fourth century as well.

Soon after the Tables, the office of Praetor was introduced, a magistracy in charge of private law, and their edicts would end up being one of the most formative forces in the development of Roman law, ultimately resulting in a source of Roman law known as *ius*

While there are many other characters who figured in the history of Roman law such as praetors, the Senate, consuls, and magistrates, it is the pontiffs, jurists, and emperors as legislators which are shown to have been the most important.

[507] Brundage, *Medieval Origins of the Legal Profession*, 11 – 14.

[508] Ibid., 12.

[509] Ibid., 12 – 13.

praetorium.[510] Following this were a group of legal minds who would end up having likely the largest influence on Roman law, the secular jurists: *iurisconsulti* or *iurisprudentes*. Like the pontiffs, they came from the aristocracy, and the role of interpreting laws in content and practice was, more and more, theirs alone from this period until their interpretations were codified under the emperors as part of the imperial *consilium*.[511] The jurists advised judges on difficult points of law, drafted legal documents, and in time they created collections of their opinions on civil law, a codification of sorts, and not unlike our modern authoritative texts on the various branches of law. During the 2nd century BCE, the old *legis actiones* of the pontiffs' time was replaced by the *Lex Aebutia*, which introduced a new procedure which came to be known as the formulary system. It would go on to be used until the second century CE when it was replaced by the *cognitio extra ordinem*.[512]

Under the formulary and *cognitio* procedures, unlike the *legis actiones*, litigants no longer had to appear in person but could be represented by third parties, and thus the ostensible birth of the lawyer. The litigant now would consult a jurist for a legal opinion and then hire an orator to speak to the court,[513] two roles which eventually were merged into one with the professional lawyer. Key to this research is the fact that under the old system and then the formulary, judges were not chosen for their legal acumen or experience, but rather for their character and the expectation that they would apply common sense to the facts of the case and the law. Brundage notes that these judges were

[510] Ibid. Also known as *ius honorarium*.
[511] Jill Harries, *Law and Crime in the Roman World* (Cambridge: Cambridge University Press, 2007), 12-13.
[512] Brundage, *Medieval Origins of the Legal Profession*, 15.
[513] Ibid.

more like members of common law juries than today's judges.[514] Judges functioned as mediators in these contexts, and for the more difficult points of law, a jurist could be brought in; and of course the orators for either side would attempt to interpret the law for the judge if they could.[515] The formulary system was a two stage process, beginning with preliminary hearing (*in iure*), at which an elected magistrate, a praetor, would hear the plaintiff and hopefully the defendant, and then, sometimes based on the advice of a jurist, he would set out what it was the judge had to decide and what to award depending on the verdict. The second step in the process was the *apud iudicem*, the trial, at which after hearing the arguments of both sides, the appointed judge used the formula given to them by the praetor to give their judgment.[516]

Under the *cognitio* system, importantly, the appointed judges of the praetor were replaced by permanent government officials who were trained in law and legal procedure and thus the role became bureaucratized: defendants were summoned by government order and plaintiffs submitted their claim in writing; in fact, written documents in legal proceedings, generally, took on a significance hitherto unknown.[517] Caroline Humfress notes that under the late Roman *cognitio* procedure, these bureaucratized judges were responsible for every stage of the trial: summons to sentence.[518] The introduction of permanent and government sponsored judges, ostensible lawyers, and the key role of documentation in legal proceedings then brings us very close to our own day in terms of legal proceedings, the only noticeable difference then being that the role of the modern

[514] Ibid.
[515] Ibid., 16.
[516] Ibid., 17.
[517] Ibid., 18 – 19..
[518] Humfress, *Orthodoxy and the Courts*, 2007, 55.

day lawyer was then made up of two distinct roles, that of the jurist (the legal expert) and the orator, who spoke on their client's behalf. Of note, once the Western Empire fell and the barbarian kingdoms became established, bishop judges like Augustine would again, as under *legis actiones* and the formulary system, be chosen because of their upstanding character and common sense,[519] of course grounded in Constantine's legislation under discussion here, and thus in some way a weakening of the advance made under the *cognitio* system of professional judges. In truth, the bishops would have been some of the only judges who could have crossed over into this role under the barbarian kingdoms, primarily because the barbarian kings had displaced the Roman system and yet adopted their religion.

In terms of legal development, in sum, as Rome expanded and economic conditions changed, the rigidity of early Roman law was forced to be flexible, and those that engaged this flexibility were first the pontiffs, followed by the praetors and other magistrates who were allowed to mould the law to the exigencies of the time. As with our own judiciaries today, often creating new law by their practice of moulding law to changes in society, it has been noted that "[a]lthough the magistrates had no legislative authority, they extensively used their right to regulate legal process and thus in fact created a new body of law that was progressive, flexible and subject to continual change and development."[520] That magistrates were forced to change the law to adapt to new circumstances, even

[519] James A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (Chicago: University of Chicago Press, 2008), 53 – 54.

[520] Harries, *Law and Crime in the Roman World*, 3.

though based on legislation, brings us to the role of judges which is common fare in modern common law legal systems, and to a lesser degree, the civil law legal systems.

The mechanics of the law, in terms of bringing a charge to the magistrates attention and having both the charge approved and the prosecutor be selected, was a process involving a number of stages: *postulatio*, *nominis delatio*, *inscriptio*, *nominis receptio*, and then the case would be set for a date at Rome's Forum, for instance.[521] This cumbersome process was streamlined by Augustus who joined the various stages together so that one only had to submit a formal statement to the magistrate in charge of the court, but it had to be done in a particular form, as was the case under the pontiffs, only now the jurists, such as Paulus, set out the way in which cases were brought.[522] While the statutes had been important during the Republican and Principate periods as the basis for actions, by the Dominate period they were being replaced with new forms of law coming from the emperor and his court.[523] As Jill Harries notes: "It is unlikely that any complete texts of the Republican statutes were available to Late Antique commentators or judges."[524] It was the opinions of the jurists on these statutes, and the emperors views on the opinions of the jurist, and their own laws, the *constitutiones*, which would become all important. We are reminded of Maine's comment that upon the advent of the Roman emperors' legislative activity began conditions in legal governance which bring us very close to our own day.[525]

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[521] Jill Harries, *Law and Crime in the Roman World*, 18-19.
[522] Ibid., 20.
[523] Ibid., 24.
[524] Ibid.
[525] Sir Henry Maine, *Ancient Law*, 25; see also in the same work, 40.

Roman Law under the Principate and Dominate

These above developments came in Rome's archaic and pre-classical eras, up to the end of the first century, BCE. From the beginning of the principate, the era of Rome led by the emperors beginning with Augustus, Roman jurists came to exercise more and more influence over the law, being encouraged by the emperors to speak to various matters of law given their superior knowledge of legal matters generally, when compared with the rulers: these were known as the *ius respondendi*, and by the second century when the authorized jurists agreed on a matter, it was taken as settled law.[526] With the rise of the jurists came the end of the influence of the *praetor*.

> The main fabric of Roman law, as we know it today, was established upon the writings of the leading jurists from this period. During the same period, the resolutions of the senate and the decrees of the emperors came to be regarded as authoritative sources of law. On the other hand, the role of the magisterial law (*ius honorarium*) gradually declined as praetorian initiatives became increasingly rare. The final codification of the praetorian edict in AD 130 terminated the development of the *ius honorarium* as a distinct source of law.[527]

The post-classical period, from the third to sixth centuries, where we find Diocletian and Constantine right in the middle, was a period wherein the only effective mode of creating law was the emperor himself. The work of the jurists in the past came to be treated as settled law. It is also, of crucial importance to the future of legal codes, where we see the first serious law codes being enacted, two under Diocletian and a third and fourth under Theodosius II and Justinian respectively. Under the Tetrarchy, there came the first two codes, the *Codex Gregorianus* (291) and the *Codex Hermogenianus* (295): these were

[526] Ibid.
[527] Ibid.

followed in the mid-fifth century by the *Codex Theodosianus* (439), and then later the *Justinian Code* (534).

During the principate, the Roman constitution consisted of the Assemblies of the People, once a legislative branch of governance and now only an honorific post, the Senate, with legislative power but severely curtailed vis-à-vis the wishes of the emperor, and the magistrates; and of these latter, while the praetor's continued to hold jurisdiction in matters civil and criminal, the emperor's expanding judicial role put them further and further from any serious judicial power.[528] Under the model of governance set up by Augustus, the roles of the highest magistrates, consuls, tribunes, etc., were now in the hands of one person and he could veto any magistrate's or governing body's decision. In other words, he took all real power to himself, and this never changed until the end of the empire. As Mousoukaris notes: "the emperor was seen as enjoying *auctoritas*: supreme political prestige, moral authority and social influence," and future emperors regarded this *auctoritas* as the basis for their judicial and legislative activity, [529] including Constantine. Buckland notes that this *auctoritas* stems from *auctoritas patrum*, meaning approval of a law by the patrician members of the senate.[530] For a soldier emperor trying to consolidate an empire, this drawing of power to himself is of little surprise and corresponds to Constantine's own practice following the demise of the Tetrarchy. As a contemporary of Augustus, Cicero wrote of the beginning this transformation of governance from the republican to the imperial: "Here in the city nothing is left – only

[528] Ibid., see discussion at 17-18.
[529] Ibid., 18.
[530] Buckland, *Roman Law*, 3.

the lifeless walls of houses. And even they look afraid that some further terrifying attack may be imminent. The real Rome has gone for ever."[531] The sweeping changes brought to the Roman legal experience during Rome's imperial period are aptly set out by Mousoukaris:

> As the true master of the state, the emperor marshalled a huge administrative machine: a vast civil service composed of trained, paid and permanent officials. These new officials gradually assumed those duties the emperor deemed impossible or undesirable for the old republican magistrates to perform. ....The most important imperial officials were the praetorian prefect (*praefectus praetorio*) [the most important advisor to the emperor in charge of the military] and the city prefect (*praefectus urbi*) [in charge of the city police and judicial matters]. ....When dealing with important administrative and legal matters the emperors consulted a body of advisors (*consilium principis*) composed of trusted friends, senior state officials and experts. By the middle of the third century AD, this body had assumed most of the functions and duties of the Roman senate. The administrative apparatus of imperial Rome included also a complex network of offices (*scrinia*)... the *scrinium a cognitionibus* investigated judicial disputes referred to the emperor; [532]

Jill Harries notes:

> At the end of the first century BC the collective rule of the Senate and People of Rome gave way to the sole rule of Augustus and his successors, whose autocracy became increasingly overt.
> ...
> The advent of imperial rule brought no immediate formal change; Augustus operated within the letter of the Republican constitutional framework. The reality, however, was that the powers of the main magistracies were vested in one man, the emperor, who could also control other magistrates. ... The seriousness with which emperors took their control of law in the second century is shown by Hadrian's 'codification' of the Praetor's Edict, ordaining that any future modifications should be made by the emperor (reported at Justinian, *Constituto Tanta* 18); at the same time, if not earlier, the jurists were brought into the imperial *consilium* and thus became an extension of the imperial will. By the fourth century the independent legal expert had become invisible, concealed behind the formidable rhetoric of imperial legal pronouncements

[531] Cicero, *On Duties*, *Cicero: On the Good Life*, trans. Michael Grant (Middlesex, England: Penguin, 1971; 1979), 8.29, 135.

[532] Ibid., 19-20.

(constitutions), and the tradition of civil-law exposition he represented was subsumed by an all-pervasive imperial bureaucracy.[533]

It is into this system of governance that Diocletian was thrust and Constantine took up, following the reforms of the former, but it must be kept in mind that however minutely the bureaucracy and military were divided up amongst new civil servants, both aimed at controlling the population more tightly, the principle of *auctoritas* prevailed, the emperor's will was the supreme consideration.

In terms of how Constantine used this law-making power to effect his own will using the public law to elevate but also hamstring the bishops into state service,[534] Ullmann observed that "[a] proper assessment of the manipulation of the Roman public law must begin with the law-creative power of the emperor: imperial legislation was now from Diocletian and Constantine onwards, 'die einzige Entstehungsquelle des Rechts'.[535] And in legislating thus, Constantine not only showed himself conservative, but was also aware of the need to preserve historic continuity.[536]

Trajectory of Imperial Legislative Intervention

Constantine used whatever means at his disposal to bring order to a disordered Roman empire. Order is one of the key variables of our modern day understanding of the concept of a sovereign state: the interactions between people are ordered[537] and there is an attempt at fairness. A recent author noted: "[l]aw in the Late Roman Empire was an intellectual,

[533] Jill Harries, *Law and Crime in the Roman World* (Cambridge: Cambridge University Press, 2007), 12-13.
[534] Ullmann, *Constantine's Settlement*, 4 – 5.
[535] "The only source of law."
[536] Ibid.
[537] See, *inter alia*, F.H. Hinsley, *Sovereignty* (New York: Basic Books, 1966).

rhetorical and political construct and a means of social control."[538] We can agree with her that law is always a form of social control, and if Constantine had bishops and priests in authority in every Roman city across the empire, what better way to encourage that control than to employ them as a new state cadre of civil servants to employ his wishes, legal or otherwise, and enforce his will, by giving them constitutional inclusion and legal status by legislating them into the role of judges. Constantine was not met with a pacified and prosperous *imperi modus Augustalis*, and one could hardly understate the importance of this fact when considering this emperor's legacy and military and legal activity during his reign. As Ramsay MacMullen so aptly described, the empire bequeathed to Constantine by various random contingencies was on the verge of complete chaos and was the pagan's version of the 'end of days,' and thus the Roman citizen longed for a god-like leader to get them out of the mess.[539]

Constantine knew what was affecting his populace because he was always 'in the field' and on the move and hardly ever in Rome itself, [540] and in this itinerant fashion with his travelling court he was able to say with authority what the empire so desperately needed, unity. It is no surprise he did not want to be cooped up in Rome and try and defend his power from there because it was exactly such a tactic that Constantine himself had overcome in his war against a rival which ended up with him crushing the forces, at Rome, of Maxentius. It is worth noting, on Maxentius and his brief rule, that he was quite tolerant

[538] Maria Victoria Escribano Paño, "Bishops, Judges and Emperors: CTh 16.2.31/CTh 16.5.46/Sirm. 14(409)," *The Role of the Bishop in Late Antiquity: Conflict and Compromise*, eds. Andrew Fear et al. (London: Bloomsbury Academic, 2013), 105.

[539] MacMullen, *Constantin*, 10, see generally, 1-16.

[540] Jill Harries, *Constantine the Lawgiver*, 2010, 73. See also, in a discussion about Constantine's Master of Offices, MacMullen, *Constantine*, 1969, 47-48.

of Christianity and further to suspending persecution against them, returned to their community things expropriated by Diocletian.[541] Such an observation makes it tempting to think that Constantine saw the wisdom of this attitude and his subsequent wholesale adoption of Christianity may have been, in part, a one-upping of a political line that his rival had been experimenting with. Even in light of this, Constantine was not about to wait in Rome for the eventuality of war, he took his tactics to the places in need of pacification, and this applied to the citizens of his empire more generally and quite obviously, and as Christians made up a growing portion of these, his involvement in church affairs is then merely his *responsum prudentum* to a crisis that required his personal attention via intervention. While he wanted a consensus-based outcome, the fact that he ordered events like Arles and Nicaea shows that he was serious about putting these matters to an end with finality in both cases. In other words, he was quite willing to use state power to pacify the situation.

From the beginning of his ascent to ultimate power, we see Constantine taking every opportunity he could reasonably arrange to take more power to himself in order to bring "peace" to the empire. Contrasted with his many successes, though, it has been rightly observed that he failed at ensuring his dynasty continued.[542] This emperor also delegated power to those under him in the Roman administration, and excerpts from his laws seem to suggest he realized that delegation to competent persons was the only way to keep his society on an even keel. For instance, Constantine legislated concerning the office of Vicar that:

[541] MacMullen, *Constantine*, 62.
[542] Ibid., 85.

> In order that Your Gravity, occupied as you are with other duties, may not be burdened with a huge mass of such rescripts, it is Our pleasure to enjoin upon Your Gravity those cases only in which a more powerful person can oppress an inferior or lesser judge or cases in which a matter arises of the kind that is not permitted to be terminated in the court of the governor, or cases which, although they have long been handled by the aforesaid governors, must now be terminated before you. (325)[543]

In this instance, he delegated, but he often drew matters into his own hands, and in doing so he would regularly overreach, as with the Donatist and Arian crises and his treatment of political rivals. But to achieve unity, the emperor had to satisfy the rich and the poor in society, he could not afford to ignore either. Given that previous emperors had been sent packing in a variety of violent ways, Constantine seems to have known that to stand for those who had no power, the poor or those of less rank, while at the same time keeping the powerful placated was a necessary compromise to secure his rule. It seems that behind the controversial moves this emperor made was, very likely, the aim of pleasing the people who he desired most to convince of his fitness to rule, his subjects; these were, in the last instance, the only guarantors of any lasting peace under his rule. John Noël Dillon says as much when he writes: "Constantine saw his greatest ally, if perhaps after the Christian god, in his own subjects, the provincials of the empire. The edict was the form of law that by its very nature might reach them in the greatest numbers…."[544] And as we know from the record, Constantine was especially fond of the informal edict or letter[545] which, for instance, he sent two different versions of to his Christian and non-Christian subjects across the empire following what he thought was the success of his Council of Nicaea. He

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[543] *Theodosian Code* 1.15.1, *Readings in Late Antiquity: A Sourcebook*, ed. Michael Maas (London: Routledge, 2000), 17-18.

[544] Ibid., 253.

[545] Harries, *Constantine the Lawgiver*, 2010, 74. Harries suggests that Constantine, in crafting such edicts, may well have had the inclination to "…disregard precedent, create his own rules, and even perhaps impose his own style."

was not just addressing prelates, prefects, and priests: he was addressing the rank and file of the citizenry because he knew that without the bulwark of their support, any attempt at order would be impossible. Constantine was not a fool, he knew that to side-step his bloated civil service he must appeal his case to the highest court, the people. Dillon writes elsewhere, "[t]he guarantee of a just administration and the voiciferous denunciation of the injustices perpetrated by the imperial bureaucracy spoke directly to the interests and sympathies of the Roman people."[546] It is in this trajectory of behaviour that we understand Constantine the emperor most clearly. As Emerson wrote about people in general, this emperor was more than a pragmatist and conservative,[547] he was most definitely also a reformer and democrat.[548] Emerson's observation being that in each of us there lingers both. That Constantine's system of governance was centralised, in the sense he took as much power to himself as he could, is fairly clear, but he also used that system to legislate change for the benefit of various classes, noted below, and was therefore engaging in a two-pronged approach: the power was his, the benefits would be shared. The point is that, as Dillon highlights, Constantine was a man *for* the people. Constantine was continuing the work of reform begun by Diocletian,[549] but as sole emperor, he needed the support of citizens which coloured his actions in the legal sphere.

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[546] Ibid.

[547] Pohlsander notes that the tenor of Constantine's governance overall was conservative, but acknowledges that his subjects were of great concern as well, see Pohlsander, *The Emperor Constantine*, 1996, 68-72.

[548] Ralph Waldo Emerson, *The Conservative*, 1841, The Oxford Book of Essays, ed. John Gross (New York: Oxford University Press, 1991), 171-186. Emerson wrote, 'And so whilst we do not go beyond general statements, it may be safely affirmed of these two metaphysical antagonists [conservative and reformer], that each is a good half, but an impossible whole. Each exposes the abuses of the other, but in a true society, in a true man, both must combine.' 173.

[549] Pohlsander, *The Emperor Constantine*, 1996, 68 & 84.

Justice and fairness were part of the Constantinian political trajectory as well. Dillon suggested Constantine believed he would be held to account for the behaviour of his administrators and he openly communicated with his subjects that he knew their livelihoods depended on the integrity and justice of their governors.[550] Again, by creating this precedent, he may have been laying more of a foundation for popular government than historians have recognized. The question arises, though, whether Constantine's reforms embodied in edicts and rescripts were a result of his new religion.

As Pohlsander writes, "[a]ltough Constantine issued a large number of legal decisions ("rescripts"), including some that were prompted by his Christian faith, he did not undertake a revision of the legal system in the light of Christian ethics."[551] I think this is too strongly worded: of course the emperor could not have revised the entire legal system, and certainly not on the basis of Christian ethics, but that he did create a host of laws that were a change, however slight, in trajectory is important. For instance, even though Jill Harries notes this fact about Constantine not revising the legal system based on his new religion — pointing to Constantine's laws in the *Theodosian Code* of which fifteen of sixteen books were those of a secular legislator, even when laws therein resolved on matters Christian[552] — she also observes that "[b]ook 16 is a monument to the process of legislation on Christianity set in motion by him, although, as David Hunt explains… imperial legislation tended to 'lead from behind',[553] while over-simple notions of Christianisation are 'a snare

[550] Ibid., 254. See also Pohlsander, *The Emperor Constantine*, 1996), 68-69.

[551] Pohlsander, *The Emperor Constantine*, 1996, 84.

[552] Harries, *Constantine the Lawgiver*, 2010, 75.

[553] While it is tempting to think of Maine's legal fictions here, "The fact is in both cases that the law has been wholly changed; the fiction is that it remains what it always was," [Sir Henry Maine, *Ancient Law*, *Everyman's Library*, vol. 734, ed. Ernest Rhys (New York: E.P. Dutton, 1931; 1861)] it is actually this process in

and very probably a delusion as well.'"[554] Constantine's focus was not to "Christianize" the Roman law, but to bring the church into the constitution of the Roman state, which he did by legislating about them and their activities, authority, and social advantages. And yet, as noted herein, there are a number of his laws which do seem to have been influenced by his favoured religion. Christianizing the Roman legal system would have been an impossible task, and almost certainly a political mistake, but issuing laws according to his own version of morality, coloured as it had been by the likes of Lactantius, Ossius, and other bishops, appears only a natural outcome of his associations and convictions; here again, the principle of plausibility in play. It is to exactly such laws of Constantine that I turn to next.

Codes, Edicts and Letters

The code of Theodosius II (402 – 450) was produced after the reign of Constantine, but the prominence of place afforded Constantine gives us evidence of both the veneration showed him by the code-maker and how busy Constantine was making laws over the course of his reign.[555] The *Theodosian Code* features the legislation of Constantine *princeps constituo*: as Jill Harries so well put it, "his was the constitution that lawyers

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reverse. Here the laws are put in place but take decades before being put into practice, as with the 318 law which makes bishops judges. We do not have any proof this was regularly being practiced until we get to Augustine, but of course since he is hearing so many cases, we have to assume that the practice did start earlier; how much earlier is unknown, but the rescript of 333 shows us it was at least a question whether the law was to be employed at Rome, so it seems a safe assumption that it began to be applied, likely in the East, in the decade previous, the 320s.

[554] Jill Harries, *Theodosian Code*, 1993, 97.

[555] As Dillon notes, Constantine is responsible for over 300 laws in the code. While it was technically a 31 year reign, beginning in 306, a brief review of the dates on Constantine's laws coming at the beginning of various books of the code shows that he did not start legislating at any notable rate until about 315 (Seeck claims he was not responsible on his own for law until after 312 when Rome named him senior Augustus; see below). If we take that date as the starting point, that means he was making law, on average, about 14 times per year, or just over once a month. This is only a rough estimate, but it does show us how intervention-minded he was and how comfortable he seems to have been inculcating his own sense of justice into the Roman legal system, often in the way of reform.

consulting the code would see first."[556] Theodosius II was the emperor who oversaw the creation of the aforementioned code that bore his name, and he is famous for making Nicene Christianity, as opposed to the widely popular so-called Arian Christianity — likely more correctly styled 'early church Christianity' — the official state religion of the Roman Empire. Since Constantine was the progenitor of the process of adoption of the Christian church into the empire, it is then no surprise that one of his successors put the legislation of this first Christian emperor *prima locus* in the sections of the *Code* which defined Roman law generally.

Like emperors before him, Constantine wrote law in the form of rescripts in reply to various specific legal questions of officials, and these were then used in analogous cases as general law, and Constantine would have likely known his rescripts would have such an effect;[557] strangely, the compliers of the *Theodosian Code* took even Constantine's instructions to individual litigants to be indicative of some more "general law,"[558] for whatever reason. In this way, the compilers, however unknowingly, were adding clarification and predictability on a wider sphere of actions than those covered by edicts alone. In this practice of Constantine to involve himself in the disputes of individual citizens, at times, and of supreme importance here to the governance of the Christian church — not that previous emperors had never engaged in this practice —, meant that such behaviour became embedded in the practice of the emperors who followed Constantine, excepting Julian. Constantine's ostensible legislative activism was practiced

[556] Harries, *Constantine the Lawgiver*, From the Tetrarchs to the Theodosians: Later Roman History and Culture 284-450 CE, Yale Classical Studies vol. XXXIV, eds. Scott McGill, Cristiana Sogno, and Edward Watts, 2010, 75.

[557] Ibid., 77.

[558] Ibid.

to even greater degrees by those emperors who followed him, and the number and length of their laws in this same code bear this claim out.

Constantine did involve himself in matters judicial, even in matters as fine as whether a son should return to the *potestas* of his father after the latter had returned from exile and whether the son's status should be continued or reinstated as previously; but the compilers of the *Theodosian Code* often misconstrued Constantine's overall involvement in changing the laws, making it seem like he threw off entire redactions of certain jurists when he had simply only disagreed with them on a specific point.[559] For instance, in the case of the son, Constantine was merely setting aside the notae of Ulpian and Paulus and preferring Papinian's opinion which was that the son should be reinstated under the father but that all his actions as head of the family during the exile were to be honoured, a seemingly practical decision. Harries notes that by characterizing the emperor Constantine as having set aside Ulpian's and Paulus's notae wholesale, they become lawmakers and not mere editors[560] — and this was the case also with the compilers of the Justinian Code to some degree.[561] The Emperor was concerned to speak to matters legal that affected the lives of Roman citizens, and by doing such he was attempting to better organize, thus stabilize, the various relationships amongst people that inhered to stability for his "state;" his legislation making the bishops judges is proof of this since the 318 law gives an important right to the litigant to have their own choice of venue. While it is true that Constantine, unlike Diocletian and Galerius before him, was able to, or forced to,

[559] Ibid, 78-79.
[560] Ibid., 79.
[561] Ibid., 83.

adapt to the growing presence and needs of the Christian religion, it is also the case that he wanted a more fair shake for the common Roman citizen, regardless of religious preferences.

Another legal relationship that Constantine spoke to was that of the paterfamilias to his children in the legal instrument of a will. In brief, Constantine made the requirements of formality less burdensome so that wills of even a *viva voce* nature could be enforced as valid and thus he made the execution of the wishes of a testator much simpler and more certain.[562] In this way, Constantine was again thwarting the unnecessary bureaucratic nature of Roman civil society and thus endearing his subjects to him on a basis of fair dealing. Harries rightly points out, though, that Constantine, in these kinds of alterations[563] to legislation regarding wills,[564] was merely following the trend of jurisprudence for wills up to his own time which was focused on the importance of the 'testator's intention' and not the formal construction — and that in so doing it remains in doubt that he made these moves strictly on the basis of a Christian sensibility,[565] as Eusebius his chronicler suggested. To this end, we read in Eusebius the claim that: "[i]ndeed, with countless such measures taken by the Emperor in every province, there would be plenty of scope for those eager to record them. The same applies to the laws

[562] Ibid., Harries discusses these reforms in some detail: 79-92.

[563] The evidence indicates this was Constantine's change, but like every emperor, he would have had legal advisors coaching him on these matters, perhaps even penning the laws themselves, no doubt.

[564] Eusebius, VC, 4.26.5-6, 162-163: Eusbius wrote: Furthermore, for those near death ancient laws prescribed that even with their last breath the wills they made must be expressed in precise verbal formulae, and that certain phrases and terminology must be used to state them. This led to much malicious manipulation to circumvent the intentions of the deceased. The Emperor noted this, and changed this law too, saying that the dying person should express what he had in mind in plain simple words and everyday speech, and compose his will in an ordinary document, or even unwritten if he wished, provided he did this in the presence of trustworthy witnesses able to preserve accurately what is entrusted to them.

[565] Ibid., 92.

which he renewed by transforming them from their primitive state to a more hallowed one."[566] This is the general sentiment which Harries refers to, that Constantine promulgated laws or revised old ones on a Christian sensibility, which remains in doubt, although there are some laws, listed below, which do seem to be almost entirely the product of a Christian worldview. It is eminently clear that laws addressing Bishops directly, noted throughout, are based on his involvement, favour, and growing commitment to the religion. His laws, in general, however, reflect both the trends of law reform at the time, as Harries points out, and a moral stringency that seems tied to his superstitious nature and his conviction that pleasing the deity by proper moral behaviour, and especially proper worship, would inhere to the preservation of his rule, noted herein.

Edicts of Toleration and Milan

Following Galerius's *Edict of Toleration* in 311, came the *Edict of Milan* in 313, penned by co-emperors Licinius and Constantine. Given Constantine's superstitious nature, it comes as no surprise that in such a context Constantine would, soon after Galerius's death, continue to ensure via legislation that the Christians and other religious adherents got down to proper worship for the sake of stability for his empire, especially in light of the fact that Galerius had died.[567] That it reaffirms and expands on the Toleration edict is clear, and its opening shows that the connection between state order and good religious practice was paramount in the minds of its authors.

> When we, Constantine and Licinius, emperors, had an interview at Milan, and conferred together with respect to the good and security of the commonweal, it

[566] Eusebius, *VC*, 4.26.1, 162.

[567] MacMullen, *Constantine*, 64. He writes: "The advantage and profit of the state, stressed at the outset [of Edict] as the reason for any kind of legislation.... Prayer is patriotism, the gods directly save or destroy."

> seemed to us that, amongst those things that are profitable to mankind in general, the reverence paid to the Divinity merited our first and chief attention, and that it was proper that the Christians and all others should have liberty to follow that mode of religion which to each of them appeared best; so that God, who is seated in heaven, might be benign and propitious to us, and to every one under our government.[568]

These emperors were concerned about ensuring that "reverence paid to the Divinity" was carried out properly, so that God would prosper their state and empire, and it is interesting that they believe the security of the state was at issue. Like Galerius, state order was something they were aiming at with this law. They go on: "For it befits the well-ordered state and the tranquility of the times that each individual be allowed, according to his own choice, to worship the Divinity; and we mean not to derogate aught from the honour due to any religion or its votaries."[569] This highlights the fact that this Edict was not merely about encouraging the practice of Christianity, although that was surely a key tenet, but about encouraging the free practice of all religions aimed at the Divinity. Here was a sea change going on in imperial state governance and order: the stated plan was that no longer would the persecution of religious adherents be carried out, something the imperial state had engaged in since the times of the Julio-Claudian dynasty in the first century. Further, these religions were *all* to be encouraged, because the rulers saw a direct connection between the success of their rule and pleasing the Divinity, even if that meant encouraging religions that were not traditionally Roman.

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[568] Lactantius, *Of the Manner in Which the Persecutors Died*, trans. Rev. William Fletcher, *Ante-Nicene Fathers: The Writings of the Fathers Down to A.D. 325*, vol. 7, eds. Alexander Roberts and James Donaldson, rev. & arr. A. Cleveland Coxe (Peabody: Hendrickson Publishers, 1886; 2004) XLVIII, 320.

[569] Ibid.

The Edict of Toleration (311) and its companion[570] *The Edict of Milan* (313) were the Roman state's adoption papers, if you will, pursuant to the Christian religion. In those two edicts we find the basis for all other legislation relating to the vaulted place of Christian Bishops in the legal system of the fourth century. One scholar refers to the Milan Edict as a "turning point in world history."[571] All one has to do is consider medieval history in Europe at any point along a 1200 year timeline, 4th – 16th centuries, to realize how the ubiquitous presence of Christianity in society, law, and politics, most notably, began in earnest as Constantine extended his favour to this religion. Importantly, it is with the *Edict of Milan* in 313 that we see the beginning of this long relationship set out in clear terms by a legal instrument. The two edicts not only made legal the practice of Christianity, but encouraged it. In both edicts, the stability of the state was the aim, and the practice of the Christian religion, if carried out according to instructions therein, would apparently encourage such an aim. But the Milan Edict was also about emphasizing anyone's right to worship in the way they saw fit. In a later rescript of Constantine and Licinius to the governors, quoted by Eusebius of Caesarea, we read the words of the Emperors themselves:

> When [we] had come under happy auspices to Milan, and discussed all matters that concerned the public advantage and good… we resolved to make such decrees as should secure respect and reverence for the Deity; … [that besides the Christians] authority has been given to others also, who wish to follow their own observance and form of worship — a thing clearly suited to the peacefulness of our times — so that each one may have authority to choose and observe whatever form he pleases. This has

[570] As I would suggest, also, Philip Hughes saw the *Edict of Milan* a supplement to the *Edict of Toleration*. Hughes, *History of the Church*, 176.

[571] Herbert H. Gowen, *A History of Religion* (Milwaukee: The Morehouse Publishing Co., 1934), 489.

> been done by us, to the intent that we should not seem to have detracted in any way from any rite or form of worship.[572]
>
> …
>
> In all these things thou shouldest use all the diligence in thy power for the above-mentioned corporation of the Christians, that this our command may be fulfilled with all speed, so that in this also, through our kindness, thought may be taken for the common and public peace.[573]

While it is true the Milan edict was undoing some of the damage done to the Christian religion during persecution by the state, it was also levelling the playing field for every religion, and gives the impression that the emperors were giving the first voice to, as Drake points out and noted above, the idea of freedom of religion.[574] These two laws, focused as they were on both the right practice of religion (*Toleration*) and the freedom to choose religion (*Milan*), are paramount to understanding what Constantine's actions concerning the Church were founded on, and they seem to point to an attitude of forbearance in religious matters, as MacMullen noted.[575] As for the impetus behind such an attitude, the desire for a secure and prosperous dominion under his rule plainly suggests itself in the "public peace" Constantine wrote of. That there was freedom of religion previous to these edicts is actually not the case, because Christians were not permitted to practice but forced to sacrifice to the state religion, but there was quite a wide field of options so it is tempting to challenge the novelty of the claim by Drake. But I agree with him, because what is new here is a freedom of religion that is put into law; it

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[572] Eusebius, *HE*, X.v.6-9, 449.

[573] Ibid., X.v.9-13, 451.

[574] H.A. Drake, *Constantine and the Bishops* (Baltimore: The Johns Hopkins University Press, 2000), 194; See also, John Firth, *Constantine the Great: The Reorganization of the Empire and Triumph of the Church* (New York: Palatine Press, 1905; 2015), chp. 6.

[575] *Vide supra*, *Introduction*.

became part of the Roman constitution. But the notion of freedom of religion came to be mangled almost immediately after the Milan law. As John Firth notes on Constantine's reaction to the Donatist crisis, "[s]o little observant was he of his own edict of toleration that he was prepared to use force to secure uniformity within the Church!"[576] Of course such an observation can be applied to most of Constantine's actions to do with the Church in the Arian crisis as well, where he openly outlawed various persons based on their religious views, if only temporarily. The Church and state in Western Europe during the early Medieval period would completely ignore the Milan Edict's institution of freedom of religion, and it was only to be brought back in a noticable way with the early Modern Period's cultural, scientific, and religious revolutions and wars, most pointedly the Thirty Years' War, which gave rise to the sovereign state system wherein states could choose which brand of the Christian religion they wanted to support: Catholic or Protestant.

Also important is the signatures on these two edicts, Constantine's appearing on both. That Galerius was the senior emperor in the edict of 311 is important, and we cannot assume his ill health meant he did not play a primary role in its promulgation; I would suggest the opposite.[577] That Constantine was a signatory with Licinius on this piece of legislation is important, no doubt, because it tells us that for whatever reason, both of them were acquiescing to a new legally binding policy of the acceptance of the Christian religion's adherents and their practices, and the fact that these latter two emperors would

[576] Firth, *Constantine the Great*, chp. 9.

[577] My views on this are beyond the scope of this research, but put simply, Galerius's illness was likely the motivating factor behind the legislation, as he likely saw it as punishment for his persecution of Christians and wanted healing from their God. In my opinion, it is not beyond the scope of possibilities that Galerius may have even undergone a deathbed conversion and baptism, although such is pure speculation.

publish a follow up edict in 313 giving even more rights to Christians further strengthens the possibility that Galerius probably did hold the true authorship to the 311 edict because why would they have needed to amend something they were responsible for on the same subject only two years previous unless they indeed were prevented from including such provisions in the first law. If Galerius did have this change of heart and was the true author of the 311 Edict, then one wonders if his eleventh-hour encouragement of the religion made any impression on Constantine, because the latter might have connected Galerius's terminal illness with the anger of this deity, and thus pleasing this deity would, in his mind, become priority number one. Such a conviction would then be attached to all his future legislative actions where it concerned the bishops. The big difference between the two pieces of legislation concerning their promulgation is the absence of Galerius in the creation of the second. I think it is therefore reasonable to suggest that Galerius is the author of the first, and Constantine, given his proclivity for favouring the Christian religion combined with the vacillating nature of the policies of Licinius, was responsible for the second. If the latter was involved in the authorship of the law, I suggest that perhaps it was a political concession, because of course this co-emperor would renew persecutions against the Christian population in his domains later on.

Otto Seeck's Insights into Constantine's Lawmaking

Otto Seeck's 1919 work in enumerating Constantine's laws from the Theodosian Code of Theodosius II in *Register of the Kaisers (Emperors) and Popes for the years 311 to 476 A.D.* is still considered a leading authority on the laws of this emperor.[578]

Seeck was a student of Theodor Mommsen, who had done significant work on the *Theodosian Code* himself, and Seeck's study aimed to clarify and correct the dates and meanings of the laws found in the *Code* which were perhaps misinterpreted, at times, by the senior historian.

Related to this study is the way in which Constantine's laws were promulgated during his time as emperor, and how because of the lack of a subtle and complex system of publication, laws were often issued on multiple dates to multiple addressees in various parts of the Roman Empire of the early fourth century.[579] On the main piece of legislation at issue in this research, CTh 1.27.1, Seeck notes:

> [e]ven though the law [CTh 1.27.1] had been valid for fifteen years, it had remained obscure to the highest official of the empire, and upon his enquiry, it is reiterated in this letter to him [Sirm 1]. That is not surprising; as in those days the production of laws was so proliferous, and at the same time their dissemination so inadequate, that even the most informed individual would have difficulty keeping up with them. Added to that, was that many of the laws would not be enforced: for example, those that mandated the suppression of the heathen practices, which were certainly not carried out to their full extent by the many officials who had remained true to the religion of their fathers. Others were nonetheless impracticable, which naturally didn't prevent them from being constantly reinforced. Thus when Constantine, and likewise his son,

[578] Otto Seeck, *Regesten der Kaiser und Päpste für die Jahre 311 bis 476 n. Chr. Vorarbeit zu einer Prosopographie der christlichen Kaiserzeit*, trans. Martin and Patricia Milewski (Stuttgart, J. B. Metzler, 1919; Vancouver: C.G. Bateman, PhD thesis, 2016). That there has been no, until now, translation of his work from the early twentieth century from German into English is something approaching the incredible. Because of this, I embarked on a project to get at least some of the significant study translated, which will be available soon at the Bodleian Library at Oxford, and I here extend my translators, Martin and Patricia Milewski, sincere thanks for their meticulous and illuminating work on the project.

[579] Otto Seeck, *Regesten der Kaiser und Päpste für die Jahre 311 bis 476 n. Chr. Vorarbeit zu einer Prosopographie der christlichen Kaiserzeit*, trans. Martin and Patricia Milewski (Stuttgart, J. B. Metzler, 1919; Vancouver: C.G. Bateman, PhD thesis, 2016), see generally, chapter one.

> emphatically declares that he must reiterate a previous law, (XII 1. 35: *iterate lege sancimus*) this cannot have been an exceptional case.[580]

In fact, as I discuss below on the two laws here referenced in the *Theodosian Code* and *Sirmondian Constitutions*, respectively, that bestow on bishops the role of judges, this situation demonstrates a previous law of 318 (CTh 1.27.1) being confirmed, reiterated, and somewhat elaborated in a later 333 rescript (Sirm 1). The fact that laws were reemphasized speaks to a principle of Roman law which appears at the beginning of the *Theodosian Code*: ignorance of the law is no excuse.[581] This exchange concerning 1.27.1 and Sirm 1 also serves as an example of how important Constantine considered the law to be as a tool to maintain order in the state, emphasising to none less than the Praetor of Rome how important it was that he understood the bishops were not only now judges according to the 318 legislation, but also that their judgments[582] were somehow set apart as sacred and inviolable, and could not be appealed.

In terms of the place laws emanate, if they were not sent forth by the Senate, it seems the most common way to institute a law began to correspond to the emperor 's place of residence, and this is especially true of Constantine and his immediate predecessors. In the case of Diocletian, for instance, decrees in the form of a letter would be sent forth and addressed from wherever he happened to be, a logical outcome for this new kind of emperor, in contrast to the Julio-Claudian dynasty types stationed mostly in Rome; and

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[580] Seeck, *Regesten der Kaiser*, 11-12.

[581] Pharr, *Theodosian Code*, 1.1.2, 11. "We do not permit any person either to be ignorant of or to pretend ignorance of the constitutions which have been carefully weighed with long deliberation by Our Serenity."

[582] On the types of disputes bishops would hear, at this point there is a good deal of uncertainty, because while it looks like every kind of dispute is covered, later sources and evidence from Augustine, for instance, tell us the bishops were not keen to deal with much outside of the civil law, but it did happen. It is unlikely that in Constantine's time bishops would hear anything else.

Diocletian, as with Constantine, was always travelling with an itinerant court.[583] The location from which the promulgation of laws took place help one to understand that Constantine's court was a moving one, and understandably we find Constantine resident at places that most demanded his presence, such as an unstable frontier or the Council of Nicaea.

Constantine's itinerant court was the practice of politics as presence, leaders being committed to being everywhere those they ruled were. While today this is common in a given state, the reader must understand that these Illyrian emperors like Diocletian and Constantine were mobile on purpose: Rome was no longer the centre of imperial command, and the fact that they were in so many places may explain why their imperial experiments had more success than any others going back to the late second century. In terms of when Constantine's legal activities began, we know that he entered Rome on 29 October 312, whereafter the Senate named him senior Augustus with the power to write laws.[584] Otto Seeck notes that his laws could not have come any earlier than this. But he began writing them immediately. If we consider some of his movements between 313 and 315 we get an idea of the itinerant nature of his court.

By January of 313 Constantine was in Milan where his sister was married to Licinius. By April of that year, we know Licinius defeated Maximinus near the Bosporus, and Constantine was off to fight the Franconians in Germania even earlier. By the end of 314 he had conquered Licinius in Thracia and had him surrender Macedonia, and thus it was suggested by Seeck that he would have been there in early 315, and then stopping over in

[583] Seeck, *Regesten der Kaiser*, 12.
[584] Ibid., 49.

Sirmium on the way to Rome to celebrate his Decennalia in July.[585] By August he was in Milan, but back at Rome in September, only to leave again at the end of the month. In all these places Constantine was issuing laws as he went.[586] In a real manner of speaking, what these historical facts tell us is that as lawmaking now emanated from the Emperor, this practice was done as an exigency which was at the behest of the itinerary, and not the other way around. In other words, lawmaking was not the reason that Constantine issued his Edict of Milan from Milan, but instead he was there to cement a political alliance, and with that ally then drafted a law.

Theodosius II had his *Code* include everything he could gather from Constantine forward to his own times, and this was important because Bishop Isidore of Seville,[587] just two hundred years later in the seventh century, who wrote the *Etymologiae*, portrays Constantine as the first emperor whose legislation was preserved in a written form and thus the implication is, because such a claim is not true,[588] that Constantine's laws were the only ones worth paying attention to. The other emperors did promulgate edicts, but Isidore leaves them out and starts with Constantine. The reason for that is clear: the latter was the first Christian emperor, and for all practical purposes the model for European sovereigns.[589] Important to keep in mind as well is that Theodosius gives us all the laws at

[585] Ibid.

[586] Ibid., 49-54.

[587] Isidore of Seville, *The Etymologies of Isidore of Seville*, trans. eds. Stephen A. Barney et al. (Cambridge: Cambridge University Press, 2006), V.i.7, 117.

[588] Previous emperors had all issued edicts and rescripts, this was not a new practice as claimed by Isidore.

[589] That Diocletian and Constantine are the most important emperors for the future of Western Europe following the Antoinnes in Roman history is made clear by the way in which European sovereigns and courts and ecclesiastical types kept the trappings and traditions introduced by these two most important emperors of the third and fourth centuries. That Constantine came directly on the heels of Diocletian is

hand, whether they were in effect or not, and where a conflict of laws arose in Roman experience, the later law was given preference.[590] Thus, as Seeck notes, having the dates on the laws in the Codex was highly significant, even if one law took months to promulgate fully across the provinces and important cities of the empire. But if a law had not reached, say, York, it could not be applied retroactively: public issuance was the key factor regarding a law's coming into force, and as Seeck points out, the delays for laws reaching the outer limits of the empire were a significant problem.

In terms of the sources for the *Codex*, Seeck concludes that it was mostly gathered from, even if published in the East in Constantinople, the Western Empire and Africa,[591] because those were the places where Latin dominated and most of the source documents from the time of Constantine and immediately following were originally penned in Latin by scribes, and not Greek. It also seems likely that decrees from Emperors from before Constantine, at least starting with Trajan, were written in a codex, a book of some kind, before being dispatched to the far reaches of the realm. These books would have likely been an important source for the compilators.[592] The way in which some of these legal texts made their way into the *Codex* is interesting:

> Whenever the emperor or his representative was consulted or appealed to in a dispute, the whole set of documents would have to be sent to them, to which belong the laws

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important, because the former would continue the reforms of the latter and taken together, they changed the Roman, ergo European, social and administration of justice landscape forever.

Firstly, Emperors were no longer mere military men, although they were definitely still that, but with these two Illyrians came the introduction of the vaulting of themselves into the position of absolute sovereigns, Kings on a scale unprecedented in the Roman experience. From the Eastern traditions and nations they took on the robes, priest like jeweled vestments which were to become the norm in Western Europe's future full of monarchies on the same model. Their office became sacred, and they positioned themselves as such in their own lives, as opposed to after death with someone like Augustus.

[590] Seeck, *Regester der Kaiser*, 15.

[591] Seeck, *Regester der Kaiser*, 16.

[592] Ibid., 17-18.

> which the opposing parties referred to. In this way documents from the most remote provinces could reach both imperial courts and be entered into the archives of the highest appeal judges; and as the materials from which the Codex was assembled were nothing less than complete, one would not have passed up on these contributions either. .... For all of these the Appeal Courts were simply situated in Rome, whose archive, as we have seen (S. 12.4), has contributed the bulk of the entries for the Codex.[593]

While Theodosius I and those emperors after him made their home Constantinople, thus meaning that for both he and Theodosius II the compilators were dealing with original copies of legislation,[594] a great deal of the laws sourced previous to these, Constantine's included, would have been from a variety of locales, and most of the evidence for these, as Seeck points out, must have come from Italy and Africa, one assumes primarily from Rome and Carthage.

[593] Ibid., 20. The Senate under the Dominate, as noted above, was not longer issuing laws, but merely honorific in nature.

[594] Ibid., 21.

Appendix E: Constantine and Christianity: select aspects

> [God] gave to the Emperor Constantine… such fullness of earthly gifts as no one would even dare wish for. …. He reigned for a long period as sole emperor, and unaided held and defended the whole Roman world. In conducting and carrying on wars he was most victorious; in overthrowing tyrants he was most successful. He died at a great age, of sickness and old age, and left his sons to succeed him in the empire.
>
> Augustine of Hippo, *City of God*, V. *XXV*†

> We must be content, instead, with the figure reflected in the mirror of panegyric or lost in the colossal dimensions of his palace. Perhaps, after all, there is a lesson here. The imperial court was what he had known from childhood, and very little else. To sit on a throne, lead armies, or offer the hem of his garment to be adored, was what he desired of all things. There may have been no rebellious individuality hidden behind all the ceremony, but rather a man happily at one with the role of colossus.
>
> Ramsay MacMullen, *Constantine*††

Introduction

Born a mere seventeen years after Constantine died, Augustine's fifth century view of the first Christian emperor would continue to be held by Western Europe, perhaps is still held by some Western peoples, until we reach the age of Burckhardt in the nineteenth century. Jacob Burckhardt, with his nineteenth century monograph *The Age of Constantine the Great*, started what would in the next century become a cavalcade of critical scholarship about this Roman leader, in the wheelhouse of which we find Ramsay MacMullen. Burckhardt's thesis basically boils down to the suggestion that Constantine manipulated the Church for his own political ends, and in terms of the character of the man, Constantine, the German historian labels him a "murderous egoist."[595] In contrast,

† Augustine of Hippo, *City of God*, *Nicene and Post-Nicene Fathers*, vol. 2, first series, trans. Marcus Dods, ed. Philip Schaff (Peabody, Massachusetts: Hendrickson, 2004; Christian Literature Publishing Company, 1887), V. XXV, 105.

†† Ramsay MacMullen, *Constantine* (New York: The Dial Press, 1969), 53.

[595] Burckhardt, Jacob, *The Age of Constantine the Great*, trans. Moses Hadas (London: The Folio Society, 2007), 278.

the sugared description of Constantine from Augustine was justified by its author because of the fact that it was clear to him God had been the one to guarantee the latter's rule — an old idea, the so-called 'divine right of kings,' sponsored by this 'Author of the Middle Ages,' which would continue to get street level traction until modern times. MacMullen, writing in a post-modern mid-twentieth century context, and given the hundred years of germination time since Burckhardt's classic study in 1853, is much more open about the weaknesses and strengths of this erstwhile Christian king than Augustine, and this statement is emblematic of his overall thesis that Constantine was indeed 'great,' given his achievements and military prowess, but that, after all, he was merely a man who relished his role as Emperor. That there still exists a gulf between scholars today[596] on the nature of Constantine's rule and his character perhaps indicates how strongly entrenched Augustine's recapitulation of a view of the emperor created by the Church,[597] in large part the Church historian Eusebius of Caesarea, was, and how long it may take for Burckhardt[598] et al. to overcome such a constructed memory. I align myself in part with Burckhardt's main thesis that Constantine was content to take advantage of all the benefits which the organization of the bishops gave to his rule and legacy, but this fact has to be considered in concert with at least two other factors: his willingness to devote

[596] On the Augustinian side of the question, see Leithart, Peter J. *Defending Constantine: The Twilight of an Empire and the Dawn of Christendom*. Downers Grove, Illinois: IVP Academic, 2010. For those more in line with Burckhart, see the work of H.A. Drake, Jill Davies and John Dillon quoted herein. A historian who seems to find a middle ground between these two, see the works of Timothy Barnes, quoted herein.

[597] For a contemporary view similar to Augustine's, see generally Peter J. Leithart, *Defending Constantine: The Twilight of an Empire and the Dawn of Christendom* (Downers Grove, Illinois: IVP Academic, 2010).

[598] Burckhardt, *The Age of Constantine the Great*, (1853/2007), 277-278. Burckhardt's depiction of Constantine's character is severe, probably overly so, but as we must take seriously the suggestions and well grounded considerations of those historians who over praise this historical figure, so we must do the same with this scholar who virtually single-handedly proposed a thesis that all historians agree with: Constantine used the Christian Church to his benefit: the argument is about the impetus, not the outcome.

himself to the religion of the god who gave him victory in war, and his ongoing battle to rout out corruption in the courts and enforce a strict morality in society generally.

Constantine had a great concern for how law affected the people of his empire and he was very concerned to root out corruption in the legal process using the instrumentality of edicts. His innovative turn, compared to previous emperors, was that he employed the Bishops of the Christian church and their courts, already in session in their own communities for decades, into the Roman legal apparatus. The Christian Church that Constantine had to engage with in the early fourth century was an entrenched part of the population of the Roman Empire, and one that was more organized — and like Gibbon noted, had to be due to their size — and more politically structured than any other section of society, religious or otherwise, save that of Rome itself. Francis Herbert Stead observed:

> In social organization, Christianity was powerfully influenced by the pagan Empire. The Church may in its earliest local phases have owed much to Greek and Roman *collegia* of various kinds, notably burial clubs, and also to the Jewish synagogue; but the chief formative attraction, whether consciously recognized or not, was Roman Imperialism.[599]

> As the city Church extended and had many branches, they were entrusted to presbyters under the superintendence of the bishop of the mother-Church. Gradually the bishops of the greatest cities extended their sway over the surrounding country; and Diocletian's term — diocese — for a political division of his Empire passed into the Church.[600]

> ...throughout the provinces of the Roman Empire, the Churches felt themselves to be members of One Universal or Catholic Church. The analogy with the Empire is obvious. The Catholic Church grew to be an Empire within an Empire.[601]

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[599] Francis Herbert Stead, *The Story of Social Christianity*, vol. 1 of 2 (London: James Clarke & Co., Limited, 1924), 45. See also, J. Westbury Jones, *Roman and Christian Imperialism* (London: Macmillan and Co., 1939), 198-199.

[600] Stead, *Social Christianity*, 45-46.

[601] Stead, *Social Christianity*, 46.

That Constantine began to involve himself early on with this large part, perhaps 10 – 30 percent in the early fourth century,[602] of Roman society, and began to adopt both their belief system and the many hundreds of Bishops who had authority over hundreds of thousands of people makes Constantine's legislation after the Donatist crisis and intervention at Nicaea more understandable and something that can fairly be characterized as pragmatic given the exigencies of the times.

It was not merely the search for legitimacy and stability that made Constantine's settlement unique; many had longed for that and failed. It was his concession to, in some sense, share the burden of sovereignty[603] with another intra-state power, the Christian Church,[604] which he may have thought would guarantee him the peace and stability he so desired. Burckhardt maintained a very similar interpretation of Constantine's actions.[605]

> It is easy to reproach him, from the standpoint of modern theory, for not maintaining a sharper distinction between Church and state; but what was he to do when, by the general tendency of the age, the Church had turned into the state under his hands and the state in to the Church, when every Christian official in his sphere of duty and every judge upon his tribunal might stray in his function by the confusion of religious and civic points of view, when the intercession of a bishop or of a sanctified eremite for or against any individual or any condition might throw everything into confusion? The theocracy which here developed was not the work of a single emperor who favoured the Church, and as little the conscious foundation of single especially clever bishops, but the large and necessary result of a process of world history.[606]

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[602] See generally Frank Trombley, *Geographical Spread of Christianity*, *The Cambridge History of Christianity*, vol.1 *Origins to Constantine*, eds. Margaret M. Mitchell and Frances M. Young (New York: Cambridge University Press, 2006), noted above and below.

[603] I argue, similar to Hinsley, that sovereignty has essentially to do with a state's ability to facilitate the complex relationships within their own society. I use the phrase 'stabilizing matrix' because it keys in on sovereignty's ultimate marker of genuineness and effectiveness, stability. See F.H. Hinsley, *Sovereignty* (New York: Basic Books, 1966), 233-234.

[604] W.H.C. Frend, *Knowing Christianity*, *The Early Church* (London: Hodder and Stoughton, 1965), 155. Frend writes, "The problems of Church and State had come to a turning point. … At Nicaea the interests of Church and Emperor coincided."

[605] See generally, Burckardt, *Age of Constantine*, 277-319.

[606] Ibid., 292-293.

However much one might disagree with Burckhardt's Hegelian idea of evolutionary historical processes, he is correct that the presence of Christianity within Roman society,[607] from the very top civil servants to slaves, meant that Constantine could not have been the author of such a state of affairs, but only the first emperor to accommodate this on terms that were in many ways dictated to him,[608] and not by him. It is also the case that since Christians were not to make up half the population of the empire until the middle of the fourth century and were during Constantine's time roughly 15 – 25 percent,[609] that sheer numbers were not the only consideration in the process of adoption and intervention. As it is suggested here and by other authors noted herein, it was the organization and geographical, and thus societal, breadth of the bishops' presence that was attractive to the Emperor. I would go further and suggest it made Christianity an irresistible choice for an emperor during this period.

Some recent scholars have tried to unseat Burckhardt and his central thesis of Constantine's un-Christian designs for the Church in securing his power throughout his Empire, the foremost being H.A. Drake. But while Drake openly disagrees with Burckhardt early on in the former's career, he later wrote a short piece on Constantine which gives evidence of Drake using Burckhardt's ideas in a strikingly open fashion. He writes:

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[607] As to the exact size of the Christian population, many scholars including Adolf von Harnack, A.H.M. Jones, and R.M. Grant refuse to commit to exact numbers, but Rodney Stark has suggested that it was 1.9 percent in 250, 10.5 in 300, and 56.5 in 350. Frank Trombley, *Geographical Spread of Christianity*, 306.

[608] Dictated to him in the sense that it was a contextual reality, the Christians were a growing presence in the Empire and he was forced to deal with them. Constantine did not direct the growth of the religion until after he adopted it, and then its growth can be in part attributed to him.

[609] Trombley, *Geographical Spread of Christianity*, 306.

> The one thing the Christian God had that no other deity in the ancient world could match was… an organizational core in the person of its bishops — local leaders who held their local communities together and who also had a tradition of periodic meetings to work out solutions to common problems. This tradition gave the bishops an institutional base that allowed them to function in a way roughly analogous to the way the Senate had in earlier days — as a sounding board for emperors and a formal means for them to receive periodic affirmations of their legitimacy. [610]

This was almost exactly Burckhardt's original point made in the nineteenth century, Constantine was able to use the "organizational core" of the Christian Church, was able to use their Bishops, community structure, and information networks to consolidate his own power. An aspect of this consolidation, making the bishops judges, will be discussed in detail below.

The complaint about Burkhardt, according to Drake, and beginning with Otto Seeck, was that the Swiss scholar did not take into account the context for Constantine which was one wherein religion was part of the very fabric of society.[611] Put simply, Burkhardt's portrayal of Constantine as merely a pragmatic politician in the process of shoring up his Empire without reference to the important role played by Constantine's pious involvement with the Christian religion was seen as unsatisfactory. Drake claims that Burkhardt's real flaw was something he coined "conceptual anachronism."[612] We are asked to believe that Burkhardt's conceptual anachronism was that he did not see the difference between nineteenth century Europe and the fourth century Empire; and the

[610] H.A. Drake, *The Impact of Constantine on Christianity*, *The Cambridge Companion to The Age of Constantine*, ed. by Noel Lenski (New York: Cambridge University Press, 2006), 131.
[611] Drake, *Constantine and the Bishops*, 13 ff.
[612] Ibid., 17.

proof for this being the "disdain for established institutions"[613] which Burkhardt imposed on the fourth century emperor.

While it might be reasonable to argue that Burkhardt overemphasized the level to which Constantine treated the Church on purely means-to-ends terms, Burkhardt's central thesis about Constantine using the vehicle of the Christian Church — a religious vehicle, no doubt, and one for which Constantine was willing to adopt for himself and his empire — as the best way he saw going forward of bringing unity to his empire and lightning speed legitimacy to his rule was a reasonable suggestion. Burkhardt was right that Constantine cunningly used the Church bureaucracy to solidify his rule, but this fact is not mutually exclusive to the later emphasized reality that Constantine also accepted and participated in the life of the Christian religion, especially with its leadership.

In the larger context for Constantine's decision to adopt the Christian Church lay the already ongoing transformation of the Roman world from one in which the Julio-Claudian dynasty had been the model ruling Latin family to a new order of emperor's who came not from patrician Roman lineage but were soldiers from the conquered/barbarian territories. Constantine expanded the role of barbarian soldiers in the Roman army, disbanding the old praetorian guard and replacing them with the *comitatenses*. These newly empowered Franks and Germanic tribal peoples made up one quarter of the armed strength of the Empire, and it is rightly pointed out by MacMullen that here we see the

[613] Ibid.

crossover from the Roman to the Medieval world[614] that was to dominate the Western Roman Empire's, ergo Europe's, future.[615]

In terms of Constantine's own "barbarian" roots, by the mid to late third century, the people living in the geographical area of Illyricum along the Danube had produced generations of skilled soldiers who filled the ranks of the Roman legions,[616] and those who showed military prowess naturally moved up in the ranks. Stephen Williams notes that "[b]y sheer results, these Danubian professional soldiers worked their way up through the crisis years to the highest commands, and behind them trailed ready ladders of opportunity which could not fail to favour their own countrymen."[617] Diocletian, born in the Roman province of Dalmatia, was one of these great military leaders from the region of the Danube, and one of his countrymen, Constantius, had a son, Constantine, born in the neighboring province of Moesia. The fact that these two emperors, Diocletian and Constantine, were the ones to bring stability to a Roman Empire that had not known anything like it since the time of Trajan and Marcus Aurelius, is important if for no other reason than to demonstrate that the primacy of Rome and the Western Empire had long

[614] These barbarian Franks and tribal peoples which filled the ranks of Constantine's army were the same groups who later devastated Rome and took over the governance of Europe, eventually involving such notable figures as Clovis and Charlemagne, hence MacMullen's crossover from the Roman to the Medieval. The involvement of the barbarians in the Roman legions and officer corps was the beginning of this transformation.

[615] MacMullen, *Constantine*, 42-43. See also 45-56: "And on the principle governing so many areas of Constnatine's military policy, indeed of military policy throughout the later Roman Empire, these men who stood nearest him were not only barbarians, almost without exception, but were Franks from clear beyond the frontier. The more barbarian, the more valued. That was the rule." Given the expanding military forces needed in the third century, and the ruinous cost they brought to Roman society, a devalued and worthless currency meant that an economy of kind had to be employed so that slaves could be imported and sold to boost the economy, and these were mostly barbarian slaves as opposed to the earlier Greek slaves and thus the Roman culture began to be barbarized as the barbarians themselves adopted Latin ways of life just as quickly. See discussion of these factors in Davis, *A History of Medieval Europe*, 25-32.

[616] Stephen Williams, *Diocletian and the Roman Recovery* (New York: Methuen, 1985), 23.

[617] Ibid.

been waning and the new trajectory going forward was in the hands of those from the East. This fact in turn dovetails with the concomitant fact that Christianity was a religion that started in the Eastern empire, and unsurprisingly the largest number of bishops and Christian adherents were also from the East. That an Eastern emperor adopted the Eastern religion of Christianity and seconded its bishops into service as judges in the Roman legal system may suggest that his cultural roots and sympathies had something to do with these monumental choices that would certainly not have been made by the likes of the earlier patrician lines of emperors. In other words, but for the East's growing influence in state power via the Illyrian generals becoming emperors, Diocletian, Constantine, et al., it is unlikely the Christian religion would have been adopted at all, much less the bishops be made judges.

Roman Religions

A.D. Lee has noted that the world in which Constantine grew up during the late third century was a world "full of gods."[618] It was full of gods in the sense that religion was part of every aspect of political and social life,[619] and religious life in the Roman Empire encompassed an extraordinary diversity of deities and of expressions of devotion to those deities.[620] But religion for Rome was a public enterprise. As R.M. Grant notes: "Religion in the Graeco-Roman world was closely related to both astrology and magic, but both at Rome itself and in the provinces it was most markedly different from either in that it was essentially public, not private; it was supported and regulated by the state. …new cults

[618] A.D. Lee, *Traditional Religions*, *The Cambridge Companion to the Age of Constantine*, ed. Noel Lenski (New York: Cambridge University Press, 2006), 159. Quoting Keith Hopkins, *A World Full of Gods: Pagans, Jews and Christians in the Roman Empire* (London: Weidenfeld & Nicolson, 1999), 43.

[619] Ibid.

[620] Ibid.

…flourished alongside the great temples of the older gods, built by cities and kings and emperors and usually maintained at public expense."[621] Entering into that context of publicly funded religion was Christianity; but, uniquely, this new religion appealed to not merely the upper classes, but to rich and poor alike. Christianity was also supporting its adherents financially in the case of the poor, something the state did not engage in any systematic way, and thus they were taking to themselves responsibility for something which we now expect the state to account for, the common welfare of the people.

As Peter Brown notes, "[v]ery suddenly, the Christian Church became a force to be reckoned with in the Mediterranean towns. The very seriousness of the measures taken against the Church as a body, and not merely against individual Christians, in the persecutions of 257 and after 303, shows that something was lacking in the life of the Roman town, which Christianity was threatening to fulfil."[622] The tendency of Christian communities to treat everyone as equals, their care for the poor, and their deep sense of community, all of which was overseen by a regional bishop, gave the Church a sense of permanency in a very disjointed Roman world. "The appeal of Christianity still lay in its radical sense of community: it absorbed people because the individual could drop from a wide impersonal world into a miniature community, whose demands and relations were explicit."[623] It was as if the municipal administration of the towns in the Roman empire

[621] R.M. Grant, *Augustus to Constantine*, 15-16.
[622] Peter Brown, *The World of Late Antiquity*, 65.
[623] Ibid., 68.

was being challenged by a more welcoming and consistent, in both practices, ethics, and rites, Christian nomos, a la Peter Berger.[624]

Christianity also welcomed adherents without regard to borders, and Michael Lipka's work on the spacialization of Constantine's new religion and its 'international flavour' are helpful for understanding the impact the rise of Christianity had on the empire. Michael Lipka emphasized the importance of spacialization pursuant to Roman religions. He notes that "all major Roman gods were clearly and emphatically marked by permanent spatial foci of their cults in the city, especially by a temple."[625] Yet Christianity, prior to Constantine, had no such dominating physical and societal edifices. An obvious reason for this was the fact that, being a persecuted and despised religion, as they often were for the first three-hundred years of their existence, they could not hope to be as recognizable or associated with "space" as the Roman religions were.

Lipka notes that the Christian and Jewish religions uniquely had the only 'international gods' in the ancient world.[626] He writes:

> It was the spatial independence that gave the Christian and Jewish gods an advantageous position: first, it made them virtually impregnable and 'immune' to imperial intervention. Since the Jewish and Christian gods were not spacially bound, their cult was elusive and beyond the control of Roman officialdom. Second, such independence made the Christian and Jewish gods extremely marketable merchandises that could easily be accommodated to virtually any environment without further expense. The latter point was reinforced by the monotheistic character of the two gods,

[624] Peter L. Berger, *The Sacred Canopy: Elements of a Sociological Theory of Religion* (Garden City, New York: Doubleday, 1967); See related commentary by Brown, where he notes: "Two generations previously [to 256], the Roman state, faced by similar problems after an invasion, had washed its hands of the poorer provincials: the lawyers declared that even Roman citizens would have to remain the slaves of the private individuals who bought them [the Church of Carthage and Rome did exactly this: paid the ransom on Christian captives] back from the barbarians. Plainly, to be a Christian in 250 brought more protection from one's fellows than to be a *civis romanus*." 67.

[625] Michael Lipka, *Roman Gods: A Conceptual Approach* (Leiden: Brill, 2009), 187.

[626] Lipka, *Roman Gods*, 187-188.

> allowing their export virtually anywhere without the necessity to accommodate their functions (naturally, a single god was functionally indifferent). In fact, in their striking lack of spatial focalization and functional self-sufficiency the Christian and Jewish gods were the only 'international gods' of the ancient world, the gods, as pointedly remarked by Weber, favoured by "itinerant journeyman", (Weber, Economy, 512) or in the words of Ando, "in ambition a truly imperialist cult". (Ando, 2007, 445) It was not until Constantine the Great that the Christian concept of god began to be formed by spacial foci.[627]

Constantine's changes to the practice and "space" of the Christian religion was a monumental shift away from its previously heterogeneous and locally determined existence.

This settling effect which Constantine's political beneficence had on both the Church and the Roman Empire were, according to Lipka, indicative of the longstanding practice to encourage the centralization of a cult in an Empire which was constantly surfeited with transient populations representing a variety of belief systems. Lipka writes: "In polytheistic culture, demographic density and fluctuation, caused by immigration, were tantamount to a dense and constantly shifting system of divine concepts, all competing with each other. The only guarantee of stability and continuity was a permanent spatial focus for the cult."[628] Constantine's attention to the Christian religion and its "space" were indicative of his two most monumental achievements, the building of churches and the founding of his city, Constantinople. Both these events were fixated on a space for change, and both actions were about creating stability and continuity.

On the nature of the Christian religion to welcome even the common people and foreigners, Peter Brown notes: "The idea of 'conversion' was closely related to the idea of

[627] Ibid.
[628] Lipka, *Roman Gods*, 188.

'revelation'. Between them, the two ideas opened a breach in the high wall of classical culture for the average man. By 'conversion' he gained a moral excellence which had previously been reserved for the classical Greek and Roman gentleman because of his careful grooming and punctilious conformity to ancient models."[629] This historian also notes that the Christian apologists of the early fourth century, Lactantius and Eusebius of Caesarea, maintained that Christianity was "…not merely a religion that had found a *modus vivendi* with the civilization that surrounded it. …. They claimed that Christianity was the sole guarantee of civilization — that the best traditions of classical philosophy and the high standards of classical ethics could be steeled against barbarians only through being confirmed by the Christian revelation; and that the beleaguered Roman empire was saved from destruction only by the protection of the Christian God."[630]

Another change, as Peter Brown observes, was that as the third century dawned, converts to Christianity no longer centered around the poor, "…they were groupings of the lower middle classes and of the respectable artisans of the cities. Far from being deprived, these people had found fresh opportunities and prosperity in the Roman empire: but they also had to devise ways of dealing with the anxieties and uncertainties of their new position."[631] The Christian religion would dovetail their structure of authority to fit a very Roman model, and thus provide some of the glue that was needed to give these people on the lower strata of society a sense of security and belonging. Constantine's patronage of the religion was one way in which their commitment to this social group

[629] Brown, *The World of Late Antiquity*, 53.
[630] Ibid., 84
[631] Ibid., 62.

became vindicated. Constantine's conversion would not likely have happened, at least the way it did, Brown opines, "…if it had not been preceded, for two generations, by the conversion of Christianity to the culture and ideals of the Roman world."[632]

The question also has to be asked of Constantine's choice of the Christian religion: why did he not adopt the live option of paganism along the lines of a platonic philosophical option of the kind taken up by his nephew Julian (331 – 363) later on? Why not align himself with the burgeoning presence of the Hellenes, beginning in the third century with Plotinus (204/5 – 270), who was largely responsible for a resurgence in Platonic philosophy as a religious outlook? In the third century, Plotinus lived in a Campanian villa patronized by Roman senators and taught a number of pupils, the most notable of them being Porphyry of Tyre (232 – 303). Plotinus had the same teacher as the Christian teacher Origen of Alexandria, and like Origen, was steeped in Platonic ideals. His teaching, unlike the Gnostic option prevalent in his day which divorced the soul from the body, was focused on an acknowledgement that the body was not mere crude matter of a useless nature, but instead reflected the divine in its own ways; it was a "beautiful instrument by which the soul sought expression."[633] His student Porphyry wrote a devastating criticism on the Christian scriptures, and his younger colleague Iamblichus (245 – 325), while Constantine was surrounding himself with a Christian court, "was able to reassure a whole generation of Greek gentlemen that their traditional beliefs were

[632] Ibid., 82.
[633] Peter Brown, Late Antiquity, 74.

perfectly compatible with the most elevated Platonism."[634] Julian was converted from Christianity to Hellenism by the students of Iamblichus.

What these Hellenes taught was that they could, via contemplation, take hold of the intimate connection between the visible world and the divine and therefore "touch" the centre of things which was available to the senses in the beauty found in visible things.[635] The fact that this religious option was able to dovetail with an upper class and traditional practice of religion and combine the most respected philosophy with the most ancient religious traditions meant that it was of great appeal to those who had no use for Christianity but also wanted to appear on the cutting edge of new religious ideals which stood as a bulwark to their past.

The fact that this strain of religious devotion appealed to Roman senators and Greek gentlemen may give us a clue as to why it never appealed to Constantine as the leader of an empire of 50 million souls: Hellenism was a religious outlook suited for the upper classes, it allowed them to keep their pagan gods and be told that it was in keeping with the most popular philosophical outlook of the age, that of Plato. There is also the important distinction to be made between the forms of the religions, the Hellenistic being largely formal, and the Jewish/Christian one being mostly personal. One can imagine the attraction which a personal god had to the poor in that they sought daily assistance to carry on their lives, while the wealthy could, quite literally, afford to cater only to a formal religion which did not ask much beyond performing rites. The Christian religion, at its very center, was focused on the poor and offered people of all classes a

[634] Ibid., 73.
[635] Ibid., 73 – 74.

direct connection to the one supreme god vis-à-vis all others. But Platonic thinking in the Hellenic tradition did influence this religion significantly, later on. Brown notes: "The 'Hellenes' created the classical language of philosophy in the early Middle Ages, of which Christian, Jewish and Islamic thought, up to the twelfth century, are but derivative vernaculars. When the humanists of the Renaissance rediscovered Plato, what caught their enthusiasm was not the Plato of the modern classical scholar, but the living Plato of the religious thinkers of Late Antiquity."[636]

Constantine, though, came along at a time when this outlook was just beginning to grow, it's last famous apologist Iamblichus passing away in 325, the same year as the Council of Nicaea. The Christian religion was far more ensconced in the social fabric of the Roman Empire at this time, and as noted it appealed to all classes, most importantly the poor.

Constantine and "Christianization"

It is often over-emphasized about Constantine that he was no true Christian and did not Christianize the Roman Empire because his Christian laws were more toleration focused;[637] and what looked like Christian reforms were actually part of the natural evolution of Roman law.[638] The further allegation might be that it was actually under Theodosius II that Christianity became legislated across the board, but both these observations miss the point and put emphasis on the result rather than the cause. Constantine was the one who adopted the Christian religion into the Roman Empire, not

[636] Ibid.

[637] Paul Stephenson, *Constantine*, 174-177.

[638] Judith Evan Grubbs, Constantine and Imperial Legislation on the Family, *The Theodosian Code*, eds. Jill Harries and Ian Wood (Ithica: Cornell University Press, 1993): 120-142.

Theodosius. What we see later is merely the culmination of Constantine's "Christianization" in the reign of Theodosius and not its actual arrival. David Hunt noted further on this general complaint that the evidence for Christianization is wanting in even the Codex itself, "…it would be perverse to deny that the laws in the Code do at least reflect changes in the public life of the Empire directly connected with the new standing of Christianity: the restructuring of the calendar, for example, to accommodate the observance of Sunday…."[639] Constantine did Christianize the empire, but he certainly did not outlaw or even drop his affinity with the old religions. Thus, my suggestion is that Constantine was an accommodating polytheist who leaned towards Christianity more and more later in his reign.

Whether Constantine was a "Christian" is a metaphysical question which rests on a number of assumptions, and history only deals with textual and archeological evidence, not matters which are beyond the reach of analysis: it is enough to note that he publicly adopted the religion and considered himself an adherent. Constantine adopted the Christian religion wholesale, and in time this adoption would be understood as having been on behalf of the Roman state.

A brief look at how and why Constantine adopted the Christian Church and its bureaucracy will be necessary for setting the context for the aforementioned suggestions about why Constantine made Christian bishops judges in 318 and then significantly expanded their judicial powers in 333. To do this we need to first understand what it was that Constantine was in the process of adopting.

[639] David Hunt, "Christianizing the Roman Empire," *The Theodosian Code*, eds. Jill Harries and Ian Wood (Ithica: Cornell University Press, 1993), 144.

For this research, it is enough just to point out to the reader the fact that early Christianity enforced teaching which specifically instructed its followers that whomever happened to be in the seat of political power was put there by God, their God.[640] Beyond the constitutive ideas and texts supporting the notion of Christian advancement and loyalty to the Roman state, both the Roman and Christian experiences were aimed at converting the whole world to their viewpoint and authority. This has been pointed out by Andrew Fear, who noted that Christian writers of the time had come to the conclusion that Romanitas and Christendom were one,[641] and that "…the emperor and his successors were not blind to the obvious advantages presented by the new faith to aid Roman power politics. The crudest of these advantages was that Christianity gave the empire a new *casus belli*."[642] As the Empire had been inundated with Christianity since the first century, adopting a religion which was both found everywhere in the empire and international in nature gave Constantine two tangible benefits: the first is discussed at length herein and was first introduced by Burckhardt, and it is simply that co-opting the organized

[640] Romans 13.4; 1 Timothy 2.1-4; Titus 3.1. Romans 13.6, *NRSV*, 1991, 224-NT. See generally Romans 13.1-7.
The Christian apologist Tertullian wrote, "In the Emperor we reverence the judgement of God, who has set him over the nations…." Tertullian, *Apology*, xxxii. Henry Bettenson, ed., *Documents of the Early Christian Church* (London: Oxford University Press, 1959), 11; Tertullian, *Apology*, V.5-8 in J. Stevenson, *A New Eusebius*, 168-169; Origen, *Against Celsus*, VIII.73 in J. Stevenson, *A New Eusebius*, 226; and see also: Marta Sordi, *The Christians and the Roman Empire*, trans. Annabel Bedini (London: Croom Helm, 1983), 189-190. The Christian apologists of the first two centuries such as Justin Martyr, Apollonius, and Tertullian, confirmed and re-affirmed this idea that the Christian is absolutely loyal to the state, and that the Christian person's worldview fit the empire and its authority structure in kind of a lock and key fashion — not, of course, because Roman history styled a social set of practices in line with Christian teaching, but because whoever was in political control was put there by God, and should be so respected. A religious ethic of this kind could hardly be stronger, and not only were the Christians to be subordinate to Rome, but "good" emperors are seen as being for them. Combined with this, a kind of interwoven set of Pauline ethics being encouraged between Christianity and Rome likely made the transition under Constantine much easier for the average Christian to accept and support.
[641] Andrew Fear, "Bishops, Imperialism and the Barbaricum," *The Role of the Bishop in Late Antiquity: Conflict and Compromise*, eds. Andrew Fear et al. (London: Bloomsbury Academic, 2013), 209-211.
[642] Ibid., 210-211.

leadership structure of the Christian religion meant that this emperor's rule could be promulgated and enforced on a local level by the bishops who were beholden to him for ending persecution and serving as their patron; the second was the fact that Constantine would now have a legitimate pretext for going to war with anti-Christian regimes to ostensibly protect Christians living under them, and that meant Rome would take those territories into their environs upon victory. There was a confluence of expanding the empire and expanding Christianity.[643]

Although it is true that Constantine's abolishment of persecution against Christians and adoption of the Christian God himself are often touted as the main reason the Bishops so quickly acquiesced to the new political arrangements under this emperor, it must not be forgotten that Christianity's most voracious writer and preacher, St. Paul, set out a clear mandate for the church to cooperate and pray for the Roman government, even before the gospels themselves had been written.[644] This kind of benchmark mandate

[643] Near the end of his life and reign as emperor, Constantine used the pretext of protecting the Christian subjects of Persia as a pretext for possible invasion and conquest, so the ideology or frame of mind was certainly there as a precedent for future emperors and later kings of Europe, but in actual fact Constantine never did attack Persia in the end, perhaps dying before he could. But as Zosimus records, it could also be that Constantine was not in a warring mood after securing the empire for himself, and seems to have just kept the status quo in terms of territory; but, given the size of the empire, Zosimus' critique of Constantine not fighting any battles after becoming sole emperor must fall on deaf ears to a degree, because just keeping, maintaining, and building up the territories Rome had acquired was a monumental task in and of itself. The fact that Constantine was able to relocate the Empire's capital to the East in Byzantium and his erecting churches, bridges, and infrastructure across the empire, mostly in the East, means that it was not so much that he slowed down once he reached the pinnacle of governance, implied by Zosimus, merely that he changed from fighting battles to building the empire.

[644] Of course, in those gospels, we have Jesus teaching from this oft quoted passage: Then they sent to him some Pharisees and some Herodians to trap him in what he said. And they came and said to him, "Teacher, we know that you are sincere, and show deference to no one; for you do not regard people with partiality, but teach the way of God in accordance with truth. Is it lawful to pay taxes to the emperor, or not? Should we pay them, or should we not?" But knowing their hypocrisy, he said to them, "Why are you putting me to the test? Bring me a denarius and let me see it." And they brought one. Then he said to them, "Whose head is this, and whose title?" They answered, "The emperor's." Jesus said to them, "Give to the

demanding cooperation with Rome, whether consciously or not, permeated and reflected the actions of the Christian Church from the fourth century onwards. In one sense, at least, the Roman Empire of the West under Constantine gave birth to the *Roman* Catholic Church that was to dominate the social fabric of Western Europe for centuries.

Context for Adoption

Constantine was a Roman general who worshipped the sun god, so what was it about Christianity that drew him towards it? It was certainly not the teachings of the founder of Christianity. Did Constantine respect that divide insisted upon by Christ that what belongs to the Empire is the Empire's and what belongs to God belongs to God? Absolutely not. In fact, he virtually reversed this idea by making Christian bishops servants of the state and making the state available for the bishops and Churches, and this he did on a scale that leaves no doubt on the point. Constantine did not follow the precepts and commandments of Christianity per se, he followed the power, so to speak: the social power of the bishops. Included in that was his supreme wish to have order in "his" Empire, something he once remarked that he would be willing to lose a limb for in the process.[645] So when we recall Burckhardt's redoubtable thesis that Constantine was merely a pragmatist who saw the colossal benefits that could be accrued by adopting this religious organization — and without losing a limb into the bargain — he seems to have taken it immediately and decisively. The church became the beneficiary of the actions of Constantine as he went on an unprecedented construction spree throughout the Empire,

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emperor the things that are the emperor's, and to God the things that are God's." And they were utterly amazed at him. Mark 12.13-17, *NRSV*, 1991, 66-NT.

[645] Thomas M. Banchich, *The History of Zonoras: From Alexander Severus to the death of Theodosius the Great*, trans. Thomas M. Banchich and (late) Eugene N. Lane (London: Routledge, 2009), 13.4.25-4.26, 158.

much of which consisted of building Church edifices; he also notably built a massive city on the Byzantium site, which he dedicated to the Christian god and acquiesced to having it named after himself.

From the time of the Roman Empire's crisis in the third century right through to Constantine's own period of accession to Emperor, the vast and unwieldy dominions of Rome had been reeling in social, political, and military chaos. In 325, just prior to the Council Nicaea, the maelstrom had finally paused. In hindsight, one wonders whether this period was really a cessation of hostilities or merely the eye of the storm for Rome's dominance and rule in the West. Constantine had finally put down his last serious rival in the Emperor Licinius, and after first sparing his life at the request of his sister who was married to the man, and "for fear that Licinius might again, with disastrous results for the State, resume the purple which he had laid down,"[646] Constantine had him assassinated.[647] I think that it is strongly indicative of Constantine's calculating disposition that he called this council at Nicaea on the heels of a newly acquired and tentative political peace. In other words, Constantine was in no mood for another conflict, and certainly not one aided by the internecine conflict of his adopted religion.

[646] *Origo Constantini Imperatoris*, *The Excerpts of Valesius*, trans. John C. Rolfe, *Ammianus Marcellinus*, vol. 3 of 3, *The Loeb Classical Library*, eds. T.E. Page, E. Capps, and W.H.D. Rouse (London: William Heinemann, 1939), 5.29, 525. Diane A. Boleyn translated the passage, …but Constantine, thinking about the example of Herculius Maximian his father-in-law, lest Licinius again take up imperial power to the disaster of the republic, and having been forced by the outcry of the soldiers, ordered that Licinius be killed in Thessalonica, and Martinianus in Cappadocia.: Diane A. Boleyn, "Origo Constantini Imperatoris: A Translation and Commentary" (MA Thesis: Boise State University, 1996), 5.29, 34.

[647] *Origo Constantini Imperatoris*, 5.29, 525. See also, Zosimus, *Zosimus: New History*, trans. Ronald T. Ridley (Canberra: Australian Association for Byzantine Studies, 1982), 2.28.2 – 2.29.2, 36.

Constantine's "conversion" to Christianity may not have been a conversion at all. It might be more prudent to call it an adoption as Eusebius first does.[648] Sozomen's *Ecclesiastical History* records that "Constantine was led to honor the Christian religion,"[649] another characterization further bulwarking against any future claim that the act was anything more than a calculated decision to choose a God who would give him victory. This act of choosing, whether you call it a conversion or adoption, of the Christian God by Constantine is important to this research. Because of it he was perhaps more readily invited to serve as a court of appeal by the Church in the Donatist crisis,[650] followed immediately by making the bishops judges in 318, and by the time of the Nicene Council he takes this role on his own authority. It is important to consider whether Constantine was really concerned with the Christian Church and their dogmatic infighting such that he should call this "world-wide" assembly of Christian bishops, or was he simply bulwarking against unrest in his empire. I suggest what we know about Constantine, and discussed in detail below, was that he was primarily aiming at securing the peace.

Eusebius of Caesarea claims that Constantine had deeply considered the question of which God to adopt to assist him in his military campaigns, and that after much thought,

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[648] Eusebius, *Life* of *Constantine*, 1.27.2: He therefore considered what kind of god he should adopt to aid him…"

[649] Salaminius Hermias Sozomenus (Sozomen), *The Ecclesiastical History*, trans. Samuel Parker (1707), rev. Chester D. Hartranft, *A Select Library of Nicene and Post-Nicene Fathers of the Christian Church*, second ser., ed. Philip Schaff and Henry Wace, vol. 2, *Socrates, Sozomenus: Church Histories* (Grand Rapids, Eerdmans, 1983), 1.3, 241.

[650] See below. It was the Donatist bishops who appealed to the emperor because they felt unfairly judged by the bishops who did no adopt their rigorist stance. This seems only natural, that someone would not want their ostensible enemies sitting as their judges, and claim that any verdict coming from these bishops could be tainted by partisan motives.

he rejected the idea of multiple gods since those he defeated had been so inclined.[651] The religion his Father had extended mercy to, Christianity, was focused on one God alone and had given his Father great favour,[652] and Eusebius relates that when Constantine considered these things in his mind, he made a choice to seek the help of his "Father's" God.[653] Constantine then decided to invite the God of the Christians to war as his patron, and this was referred to by Eusebius as the keystone event for everything he would subsequently engage in. Constantine was taking Christ, largely unbeknown to him at the time,[654] to be his God of war and, if that proved favourable, Christ would be his preferred God of state. The Christ of the Christian Gospels was not a god of war in any sense; in fact, just the opposite.[655]

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[651] Eusebius, *Life of Constantine*, 1.27.3, 80.

[652] Eusebius, *Life of Constantine*, 1.27.2, 80.

[653] Eusebius, *Life of Constantine*, 1.27.3, 80.

[654] Constantine would have known about the existence of the Christian religion, and almost certainly had relationships with them from those Christians working for the Imperial Court and in his dealings with various religious devotees of the religion serving in the military. But it is reasonable to suggest he had no intimate knowledge of them at this time beyond both his father's assessment combined with his own. To say that his father was a devotee, as Eusebius wants the reader to infer, is not supported by any outside evidence. Constantius certainly favoured the Christians, though, and such favour must have impacted Constantine significantly; Eusebius claims this. Constantine's mother, Helen, did not convert to the Christian religion until after he became emperor, therefore she could not have been a source of any knowledge of the religion in his early years.

[655] The famous Continental Philosopher Ernest Renan, in his, now classic, *Life of Jesus*, demonstrated, in his critical study of the sources for Christ, a few realities which bear out clearly the general observation being made here.

> By the sentence, "Render unto Cæsar the things which are Cæsar's, and to God the things which are God's," he [Christ] created something apart from politics, a refuge for souls in the midst of the empire of brute force. Assuredly, such a doctrine had its dangers. To establish as a principle that we must recognize the legitimacy of a power by the inscription on its coins, to proclaim that the perfect man pays tribute with scorn and without question, was to destroy republicanism in the ancient form, and to favour all tyranny. Christianity, in this sense, has contributed much to weaken the sense of duty of the citizen, and to deliver the world into the absolute power of existing circumstances. But in constituting an immense free association, which during three hundred years was able to dispense with politics, Christianity amply compensated for the wrong it had done to civic virtues. The power of the state was limited to the things of earth; the mind was freed, or at least the terrible rod of Roman omnipotence was broken forever. Ernest Renan, *The Life of Jesus*, trans. Charles E. Wilbour (The Modern Library Publishers: New York, 1927), 154-155.

First, Christianity had been a free association which lasted for three hundred years with no need of state politics; second, with the rejection of the world's template for politics and power, Christ also turned the classes upside down and made the childlike the greatest; those who were formerly disenfranchised, such as the many female companions of Christ, were now an integral part of his new social paradigm. The rich, the great teachers, and priests were all sent packing by Christ because they were the sole cause of societal oppression, treating the lower classes like beasts of burden. Third, Christ had no agenda at all for a political revolution: the revolution he sought after was completely on the level of morals and faith and wholly apart from the imperial system in place. Lastly, Christ re-directed social authority away from the Caesars, away from the priests, and away from the rich. Instead he put it in the hands of the disenfranchised, basing it on duty to God rather than duty to earthly masters. A pregnant, implicit, and, one would hope, obvious question then has to be answered in consideration of Constantine's involvement as the final court of appeal in the Donatist and Arian crises: why was the Church who claimed Christ as their only master willing to dispose of his central tenets in exchange for the state as their appeal court, ultimately embracing the political system of this Caesar? The answer to this is unclear at best and not the subject of this research, but it is interesting to observe that the sovereignty of God, understood implicitly by a three-hundred year old free-associating Church to be their sole loci of authority, was going to be sold off to the state not for the end of persecution, for that had already taken place, but in exchange for a state sanctioned protection of church doctrine and order, and for

large and ongoing benefactions like the one consideration which had served to betray Christ himself: money.

This historical reversal of trajectory by Constantine became absolutely fundamental to the future of European governance: Constantine was changing the definition of the Christian God from one who promotes peace, suffering, martyrdom, and miracles, into one who promotes war, doctrinal unity, and suppression of heretics.[656]

H.A. Drake claims that Eusebius's account of conversion did not have the expected and attendant "questioning and searching that lead up to the moment"[657] of conversion, but this is mistaken to some degree. Eusebius does record the questioning and searching of Constantine before conversion in *VC I.XXVI*, where he writes, *inter alia*:

> Knowing well that he would need more powerful aid… because of the mischievous magical devices practiced by the tyrant [Maxentius], he sought a god to aid him. … *He therefore considered* what type of god he should adopt to aid him, and while he thought, *a clear impression came to him* [of many in the past who had gained favourable predictions from a number of gods only to be defeated] …only his father had taken the opposite course to theirs [reliance on the Christian God who was the guardian of his Empire]. *He judiciously considered* these things for himself, and *weighed well* how those who had confided in a multitude of gods had run into multiple destruction… whereas his father's God had bestowed on his father manifest and numerous tokens of his power. He also *pondered carefully*… [etc.][658]

Eusebius, who apparently interviewed the emperor for information on which he based his *Life of Constantine*, is succinct in his description of this stage in Constantine's ultimate choice to adopt the Christian God, and it was clearly for pragmatic considerations, as alluded to already. We have no indication in Eusebius that guilt over sin, as with almost

[656] Constantine tried to supress even the Donatists at first, but their numbers and power base were too large even for the emperor, given that to silence them may have led to uprisings in Africa at the time, something he desperately wanted to avoid.

[657] H.A. Drake, *The Impact of Constantine on Christianity*, *The Cambridge Companion to The Age of Constantine*, ed. Noel Lenski (New York: Cambridge University Press, 2006), 115.

[658] Eusebius, *Life of Constantine*, 1.27.1-1.27.3, 79-80. [Emphasis added].

all other Christians of the era, played any part at all in the Emperor's conversion. Yet ironically, we do get this recorded in the Pagan historian Zosimus's account, a historian who had a distinct distaste for all things Christian and blamed Constantine's adoption of the religion for the loss of the Roman Empire's eminence and strength.[659]

Philip Hughes pointed out that while Constantine was convinced of the fact that the Christian God promised him victory and victory followed, and he was therefore justified in his belief of the superiority of this god, it is also a fact that Constantine did not take up any further Christian practice, and in terms of his new faith in this God who gave him victory in war, "there he halted."[660] The point is made too strongly, perhaps, but it is an important observation that makes the reader question whether in fact Constantine practiced Christianity beyond asking for help in war. That he only chose to be baptized on his deathbed does not bode well for the opposite view, and it may be that Hughes' point stands.

One final point in this section should also be raised in regard to this Rubicon-like event, Constantine's adoption of the religion. On the occasion of Constantine apparently having had a vision of the cross in the sky at midday, and subsequently a dream wherein he was instructed by Christ to use the sign of the cross as protection against the attacks of his enemies,[661] he sought out, quite understandably, the advice of Christian priests to learn the meaning of what he had witnessed. They, in no uncertain terms, gave him a version of their gospel specifically tailored for someone whose hands were stained from

[659] See generally Zosimus, *New History*.
[660] Philip Hughes, *A History of the Church*, vol. 1 (London: Sheed & Ward, 1947), 197.
[661] Eusebius, *Life of Constantine*, 1.28.1, 80-81; 1.28.2, 81.

blood and would be stained a number of times to come. Relaying this instruction in its entirety is the only way to show the reader what kind of deal was being offered. On the morning after the midday vision and nighttime dream of Constantine, we read:

> At daybreak, he called together the priests of Christ, and questioned them concerning their doctrines. They opened the sacred Scriptures, and expounded the truths relative to Christ, and showed him from the prophets, how the signs which had been predicted, had been fulfilled. The sign which had appeared to him was the symbol, they said, of the victory over hell; …Yet, continued they, the means of salvation and purification from sin are provided; namely, for the uninitiated, initiation according to the canons of the church; and for the initiated, abstinence from renewed sin. But as few, even among holy men, are capable of complying with this latter condition, another method of purification is set forth, namely, repentance; for God, in his love towards man, bestows forgiveness on those who have fallen into sin, on their repentance, and the confirmation of the repentance by good works.[662]

The Bishops said that all one need do is engage in repentance and prove it by good works. That Constantine waited until just before his death to be baptized into repentance goes some distance to throwing into doubt his willingness to commit fully to the religion during his lifetime, but also shows that he accepted the bishops' and priests' claim that an act of repentance would be enough to blot out his checkered past. He clearly acted on this advice, just not until the end of his life. The good works, however, could be seen in his benefactions to the Church, and the fact that he got the order backwards, good works followed by repentance, did not seem to raise a cause for concern on the part of the Christians who wrote his histories in the years that followed.

Constantine's adoption was one with precedent going back to the founders of Rome who had relied on gods as their suzerains since the days of Romulus, and then ahead to Emperor's such as Caligula and Claudius who encouraged Egyptian and Asian,

[662] Sozomen, *Ecclesiastical History*, 1.3, 242.

respectively, religions in Rome. These latter were allowed and encouraged because the people following Isis and Attis offered no resistance to Roman rule.[663] Christianity offered no armed resistance to Roman rule either, in fact there were entire Roman legions that were Christian, as with the Thundering Legion,[664] but the behavior of Christians sometimes chafed against Roman rulers and practice when they refused to go along with the rites associated with traditional Roman religion. Just as the Emperor Marcus Aurelius (161-180), not fond of Christianity, found himself able to be grateful for the success of his Thundering Legion of Christian adherents, it seems that victory in war trumped all other considerations, and rightly so in an era where losing a war could mean losing the state.

The fact that the Emperor Aurelian credited victory in war to the intervention of the Sun-god, a god henceforth adopted by the emperors *Severi*, and that he forthwith exalted his new *sol invictus* as the *dominus imperii Romani* — the lord of the Roman Empire,[665] is lost on no one who knows the details of Constantine's divine sign as he stared into the "sun," or his association with the religion of Apollo the sun god. In fact, with Constantine's vision of the *cross* as he stared at the *sun*, here we find a symbolic reference to the merging of the religion of Apollo with Christianity. That Constantine would even think to look to the sun for any kind of guidance makes perfect sense if it were the god of his youth, which it was. Constantine's habit of looking to the sun for help, then, merely

[663] R.M. Grant, *Augustus to Constantine*, 18-19.

[664] Dio, *Dio's Roman History*, *Epitome of Book LXXII*, trans. Earnest Cary, nine vols., vol. 9, *Loeb Classical Library CLXXVII*, ed. E.H. Warmington (London: William Heinemann Ltd., 1969), 9.3-10.5, 30-33. Dio recounts the famous story of Marcus Aurelius who, even at that early date, had honoured a Christian legion who had prayed and received divine intervention amounting to a great victory – involving a thunderstorm and rain – and thus earning the name "Thundering Legion" from the emperor.

[665] Ibid. See also: Michael Grant, *The Collapse and Recovery of the Roman Empire* (London: Routledge, 1999), 49-54.

hearkens to his lifelong connection with the *sol invitcus*; and that his experience was dovetailed to Christianity, whether supernatural sign or merely interpreted that way, the fact is *he* interpreted it that way and put the cross on his soldiers' shields etc. On *sol invictus*, Ernest Barker noted that it:

> 'embodied the idea of a unifying deity to correspond to the sole earthly ruler of the world'; he 'was to be the centre of a revived and unified paganism, and the guarantor of loyalty to the Emperor'. Under the influence of this conception the emperor ceases to be *praesens deus* and becomes 'the vicar of God',... This idea of the *vicarious dei* is thus prior to Constantine and the triumph of Christianity, with God the Word and the Logos banishing and displacing the Sun-god....[666]

Walter Ullmann also observes the importance of this confluence of religious worldviews:

> The Christian scheme of things had an intellectual and rational substance that in contemporary conditions was attractive and appealed to a ruler of Constantine's calibre. And here the monotheistic theme of Christianity was of quite especial significance. Monotheism in different shapes, but notably in that of the *sol invictus*, had made great strides by this time and indubitably facilitated the acceptance of Christian monotheism which saw in Christ the *sol iustitiae*. What, however, distinguished this Christian monotheism was that it could look back on a respectable body of literature which in depth, width and breadth by far surpassed anything that could be found in the corresponding pagan literature. Above all, this Christian literature had scope and range of universal, of 'catholic' dimensions, a feature of some considerable importance at that time. Its themes fell on fertile soil.[667]

Henry Chadwick writes:

> ...Constantine was not aware of any mutual exclusiveness between Christianity and his faith in the Unconquered Sun. The transition from solar monotheism (the most popular form of contemporary paganism) to Christianity was not difficult. In Old Testament prophecy Christ was entitled 'the sun of righteousness'. Clement of Alexandria (c. A.D. 200) speaks of Christ driving his chariot across the sky like the Sun-god. A tomb mosaic recently found in Rome, probably made early in the fourth century, depicts Christ as the Sun-god mounting the heavens with his chariot.[668]

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[666] Ernest Barker, *From Alexander to Constantine* (Clarendon Press, Oxford: Oxford, 1956), 353-354. In quotation marks: A. Alföldi in the *Cambridge Ancient History*, vol. xii, p. 193: H. Mattingly, Ibid., p. 309.

[667] Ullmann, *Constantine's Settlement*, 6.

[668] Chadwick, *The Early Church*, 126.

In this era, also, there was an inextricable connection assumed between legislation and religion, as we read a 295 Edict noting, "The Roman Empire has attained its present greatness by the favor of all the deities only because it has protected all its laws with wise religious observance and concern for morality."[669] By this time in Rome's history, laws were almost solely promulgated by emperors by the use of edicts and rescripts, and there is a notable confluence here between matters religious and legal because Constantine saw his role in society as deeply connected to the divine: we know that in time he even presented himself as the vicegerent of God.[670] Eusebius of Caesarea, the most important contemporary Church historian, helped to cement this idea of Constantine's divine appointment into the political philosophy of the church and state with his interpretation of Rome's role in history as the conduit for the spread of Christianity.[671] As noted, Constantine seems to have chosen the Christian God for pragmatic reasons,[672] but the fact his father looked favourably on the Christian religion and kept them from suffering bloodshed in his environs of the Western Empire during Diocletian's reign was likely an influencing factor. Constantine, with a disposition in favour of Christianity, then followed in his father's footsteps and was acclaimed General in his place on the latter's death. We are told by Eusebius that Constantine prayed that if the Christian God was the strongest and gave him victory in war then he would forever afterward be loyal to the greatest

[669] M. Hyamson, *Mosaicarum et Romanarum Legum Collatio* (London, 1913). *Mos. Rom. leg.* 6, 4. See R. Grant, *Augustus to Constantine*, 227.

[670] Ibid., 354. See also Firth, *Constantine the Great*, chp. 6., quoted immediately below.

[671] Joseph Canning, *A History of Medieval Political Thought: 300-1450* (London: Routledge, 1996), 4-5.

[672] Pragmatic meaning political in nature rather than religious. There is little indication his new religion guided his lawmaking, although there are a few laws which seem to be clearly connected, but those few against the backdrop of the over 300 laws he created.

God.[673] That he chose Christianity and why has been suggested above and below: his Father's treatment of them, their growing ascendency amongst the Roman population, and the leadership roles already in place across the empire in the persons of the bishops. That is exactly what happened: he early on had significant victory in war and forever after Christianity was his favoured religion, even in light of evidence he covered his bases by occasionally offering time or money to the most popular of the Roman gods, most notably the sun god, *sol invictus*. Historian John Firth agreed and wrote:

> Conversion in his case did not mean some sudden or even gradual change permanently altering his outlook upon life, and refining and transmuting personal character. It merely meant worshipping at another shrine, entering another temple, reciting another formula. His ruling motive was ambition. He would worship the god who should bring victory to his arms. The extent of his conviction was to be measured by the extent of his success and by the height to which he carried his fortunes.[674]

While Constantine did cling, out of habit, perhaps, to a polytheistic outlook, in time he would set Christianity on a path that would make it the religion of his empire. He was aligning himself with the religion that gave him victory in war and politics. In the nomenclature of Ramsay MacMullen, we are tempted to suggest that he chose the god that seemed to be surfeiting him with his role as "colossus."[675]

[673] Eusebius, *Life of Constantine*, 1.27.2: He therefore considered what kind of god he should adopt to aid him…."

[674] Firth, *Constantine the Great*, chp. 6.

[675] Vide infra.