Case Study: The *Theodosian Code* in Its Christian Conceptual Frame

The preceding eight chapters have been an attempt to understand some aspects of the intellectual climate of the Theodosian Age; a history of practice examining the way that Theodosian scholars thought about, and went about, producing new knowledge. I began by documenting a wholesale change in the ideology and practice of scholarship within the narrow domain of Christian theology, stemming from the failures of the Council of Nicaea to quell doctrinal dispute and produce the unity which would assure heavenly favor. I then argued that some of the changes in the ideology and practice of scholarship can be traced as they left the domains of theology and were taken up by late ancient historians, miscellanists, military antiquarians, and even in the purposefully insular world and work of rabbis conceiving the genre of *Talmud*. I want to complete my argument with a case study, arguing that some of the changes in ideology and practice spurred from doctrinal controversy came to inflect one of Late Antiquity's crowning achievements: the *Theodosian Code*.

Thus far, arguments about the underlying "Christianity," or "secularity" of the *Theodosian Code* (*CTh*) are equivocal. The relegation of "religious" matters to book 16 may suggest that they are an addendum, but it may also suggest that religion is a central concern to the project – central enough to justify its own, separate treatment. That the compilation begins with Constantine, and specifically with constitutions promulgated after 312 CE, suggests that Constantine's "conversion" may be in view, but ancient ideas about Constantine's embrace of Christianity are fluid and not univocal on the date of the shift. In these and other arguments, the substantive content of the *Code* is prioritized over the conceptual framing of the project in trying to understand what it means, both to

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its ancient framers and to contemporary historians. But it is the framing of the *Code* where we find some of the clearest evidence for the effect of Christian scholarship on later Roman law. The constitutions which call for the creation of the code, *CTh* 1.1.5 and 6, demonstrate the importation of Christian vocabulary and conceptual frameworks into the Roman juristic sphere. They show the dramatic extent to which Christianity had taken hold in the Theodosian empire not only by virtue of increasing adherence, but by virtue of the interconnection of the domains of law and theology. The *Theodosian Code* is a source of law, but it was compiled in response to a legal proclamation that appears in the *Code* itself, which speaks to the form, content, and conceptual framing of the project. The conceptual framing of the *Theodosian Code*, I argue, points to the "Christianization" of structures of knowledge and governance in the later Roman empire.

The organizing principle of the *Theodosian Code* is "general law (*lex generalis*)." Its compilation began with a constitution of 429 (*CTh* 1.1.5) that identified eight men and tasked them with a two-step process: first, they were to collect and edit imperial constitutions from the reign of Constantine through their present day that were based on formal edicts or laws that were designated "general" (1.1.5). Their second task was never completed: they were to compile a "guide to life (*magisterium vitae*)" which eliminated all legal ambiguities, and to promulgate this corpus under the name of the emperor. The language of "general law" does not appear in the text of any ancient juristic commentary. It is not discussed as a category of law in the way that, for instance, Ulpian copiously delineated the concept of an "edict (*edictum*)" in its various instantiations. That the language is novel within the Roman legal tradition is clarified by a constitution from three years before the *Theodosian Code* project began, in which the Western court of Valentinian III issued a law defining the precise boundaries of what constitutes a "general law (*lex generalis*)."[1] These two facts alone suggest that the terminology does not derive from classical Roman jurisprudence, and might suggest that the concept itself was novel as well. This odd state of affairs, in which the crowning jewel of Roman juristic scholarship is organized around terminology that appears only late in the history of the tradition, has caused a handful of scholars to wonder at the conceptual history of "general law."[2]

[1] *CI* 1.14.2,3.

[2] Those who have spent any time unpacking the concept do so only cursorily, and almost unfailingly with reference to an article published in 1981 by van der Wal that, according

This Appendix returns to the question of the conceptual history of these two organizing principles of the *Theodosian Code* – "general law (*lex generalis*)" and "guide to life (*magisterium vitae*)." I argue that the sense in which the *Theodosian Code* is intended to constitute a "guide (*magisterium*)" invokes the word with a meaning exclusive to Christian theological contexts. The idealized framing of the *Theodosian Code*, in other words, is senseless outside of an environment suffused by peculiarly Christian Latin usages. I argue as well that legal historians are correct in suggesting that the language of "general law" is not internal to classical Roman jurisprudence. Historians are incorrect, however, to presume that it has no clear intellectual lineage. In fact, from the second through the fifth centuries, elite Christian men discussed and debated precisely the definition and contours of what could be considered a "general law": a category of scholastic concern that arose ultimately out of Jewish biblical commentary of the first century CE. Questions regarding the interpretation of the letters of Paul of Tarsus and the relationship of traditional Jewish *halakha* to an increasingly gentile and politically ascendant Catholic Christianity gave form and voice to the idea and language of "general law," and it is this language with which the *Theodosian Code* was framed. Others have demonstrated in recent years that Christian theological pronouncements had visible effects on the wording of imperial constitutions throughout the fourth and fifth centuries.[3] I argue here that Christianity's influence on the *Theodosian Code* is witnessed not only in the wording of its constitutions but in its proposed structure, the language that it uses to describe the codification effort, and the motivation for the project in the first place: as the first step toward creating a "guide to life." The law calling for the compilation of the *Theodosian Code* itself, in turn, serves as a prism through which to view the effect of Christian governance

to the citations of Turpin, "The Law Codes and Late Roman Law," 342; Matthews, *Laying Down the Law*, 66; Harries, *Law and Empire in Late Antiquity*, 226; Resano, "La acepción de *interlocutio* en derecho romano," 251; Harper, "The *SC Claudianum* in the *Codex Theodosianus*," 612; Dillon, *The Justice of Constantine*, 274; Wiewiorowski, "The Abuses of Exactores and the *Laesio Enormis* – a Few Remarks," 75; and others, is titled "*Edictum* und *lex generalis*. Form und Inhalt der Kaisergesetze im spätrömischen Reich." The title, as cited, is incorrect. The article is called "*Edictum* und *lex edictalis*," and while it treats the concept of "general law" in a cursory manner, the article cannot bear the weight placed on it by these studies. It is not the last word on the topic; it is barely on the topic whatsoever.

[3] See, for instance, Caseau, "L'adjectiv *profanus* dans le livre XVI du Code Théodosien"; Freu, "Rhétorique chrétienne et rhétorique de chancellerie."

on domains of later Roman life that do no obvious theological work, but which are nevertheless described with peculiarly Christian language and conceived in line with the dominant scholastic framework – a framework that I argued earlier proceeds from Christian theological disputation, and over the course of the Theodosian dynasty came to undergird Roman scholarship writ large.

MAGISTERIUM VITAE AND CHRISTIAN TRADITION

The clearest sense in which Christian language and concepts are redeployed in the framing of the *Theodosian Code* is that the project as originally conceived was intended to undergird a *magisterium vitae*, a "guide to life." *CTh* 1.1.5 does not only call for a collation of edictal and general law (or, roughly the project as reframed in 1.1.6). The initial constitution envisioned a subsequent step of the process, in which the same group of distinguished legal scholars who collected together the mass of edictal and general law would produce a *magisterium* that allows no contradiction, and that has been worked over again and again until it is worthy to bear the name of the emperor. As Sebastian Schmidt-Hofner notes of *magisterium vitae* in 1.1.5: "This is a term *and concept* unfamiliar from the Roman legal tradition."[4]

It has been known for quite some time that late ancient Christians used the term *magisterium* in a sense particular to them.[5] Gian Gualberto Archi admits as much, though he offers little comment regarding the peculiarly Christian usage of this word in the framing of the *Theodosian Code*.[6] The *Thesaurus Linguae Latinae* glosses the term in this particular valence as a "guide" or a "tutor," and Christians overwhelmingly invoke the term in this sense. For instance Ambrose, a member of the court of Valentinian I, lays out three precepts of life which each saint exemplifies in his Christian recreation of Cicero's *De officiis*:

> These are the three principles, then: let us take any one of the saints, and see if we can show that his life illustrates all of them to perfection. First, consider our father Abraham himself, who was shaped and taught so as to be a guide for those to

[4] Schmidt-Hofner, "Plato and the Theodosian Code," 52, emphasis added.
[5] TLL 8.0.90.5–6. "institutio, educatio, disciplina, doctrina (tam active de actibus instituendi quam passive de praecepto, regula)" See LSJ s.v. "*magisterium* 4."
[6] Archi, *Teodosio II e la sua codificazione*, 29.

come (*Primum ipse pater Abraham qui ad magisterium futurae successionis informatus et instructus est*).[7]

This is the sense in which Christians deploy the term *magisterium*: to mean a "guide to life." Writing his *Divine Institutes* from the court of Constantine I, Lactantius likewise employs the term repeatedly for two purposes, and always with the same meaning: to demonstrate that no worthwhile virtue can be learned from the Traditionalist philosophical schools,[8] and that it was Christ's *magisterium* that led people to believe in his divinity.[9]

By and large, Traditionalists do not use the term *magisterium*. When the lemma shows up at all, it is invariably employed with a meaning that would make no sense in the context of *CTh* 1.1.5; it is used to denote an office of control over people or an institution. Cicero uses the term to denote the master of ceremony at banquets,[10] and to characterize the censor's strict supervision of customary tasks.[11] Suetonius likewise describes Augustus's great grandfather as enjoying *municipalibus magisteriis*: surely offices within a *municipium*, and not the position of being the town's moral exemplar.[12]

The charts in Figures 35 and 36 will suffice to bear out both that the word *magisterium* is exceedingly rare before the fourth century, and that when it begins to be used with any regularity, it is used almost exclusively by Christians.[13] Furthermore, when Christians use the term, they use it in a sense different from classical authors, and to the same end as it is invoked in the *Theodosian Code*: a guide or moral examplar.

The universalizing statement of moral and jurisprudential orthodoxy that is envisioned in 1.1.5 – the *magisterium vitae* – speaks to the extraordinary extent to which Christian language and concepts have suffused imperial ideology, and are invoked as foundational for the new legal

[7] Ambrose, *On Duties* (*De Officiis*) 1.106–107. Text *PL* 144.55C. On Ambrose's recasting of Cicero's work for a Christian audience see Davidson, "Ambrose's *De officiis* and the Intellectual Climate of the Late Fourth Century."

[8] For instance, 3.14.20, 3.15.21.

[9] Lactantius, *Divine Institutes* (*Divinae Institutiones*) 4.16.3. Text *PL* 6.496B.

[10] Cicero, *On Old Age* (*De Senectute*) 46.

[11] Cicero, *On the Consular Provinces* (*De Provinciis consularibus*) 46.

[12] Suetonius, *On the Lives of the Caesars* (*De Vita Caesarum*), *Augustus* 2.3.

[13] The data for these charts were collated from the *Library of Latin Texts* (Series A and B). Total counts for charts 1 and 2 in the fifth century do not match because I have excluded the use of *magisterium* in the *Theodosian Code*, so as not to bias the data. Data compiled from the *Thesaurus Linguae Latinae* on March 6, 2018. The trend appears even more stark if the data are normalized against the overall production curve for Latin literature, but the poor preservation of third-century Latin sources, and the overrepresentation of Christian materials in the third-century corpus, renders true data normalization impossible.

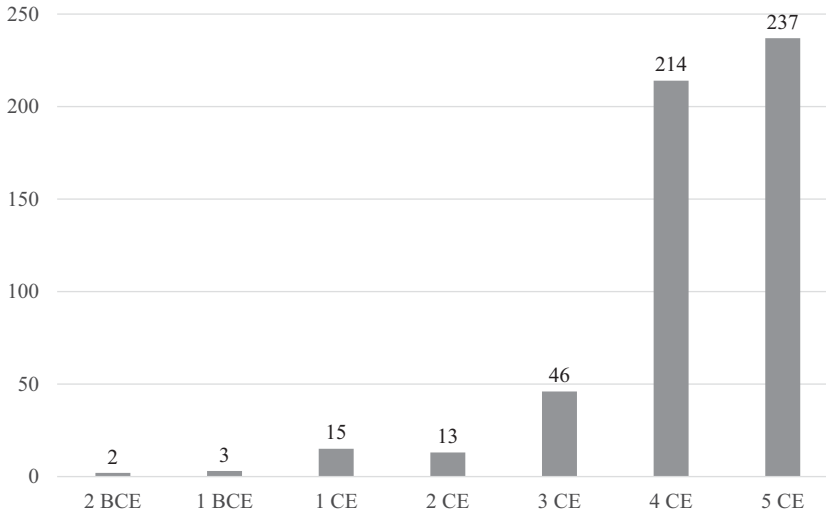

FIGURE 35. Occurrences of the lemma *magisterium* across Latin literature.

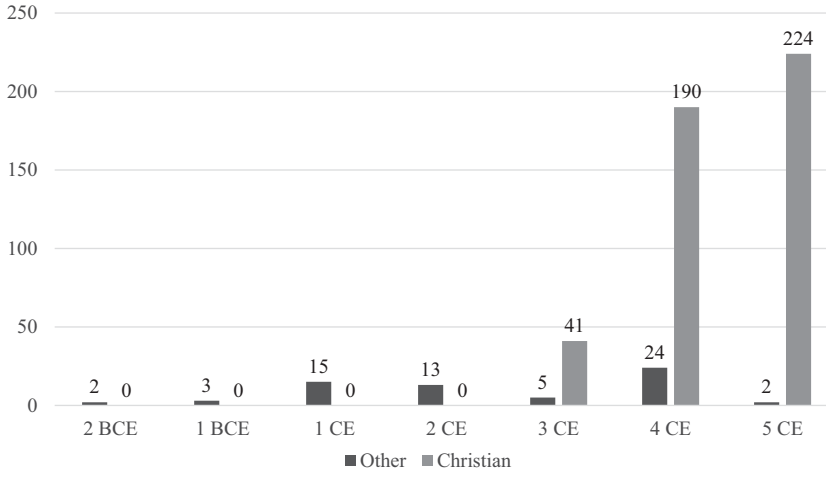

FIGURE 36. Occurrences of lemma *magisterium* across Latin literature, Christians separate.

order of the Theodosian empire. In Chapter 5 I explored the intellectual history by which such aggregative scholarly products came to be deemed worthy of serving as a "guide to life." It is quite a strange notion, after all.

Sebastian Schmidt-Hofner recently pointed out the peculiarity of this usage, and he is undoubtedly correct in claiming that:

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> [W]hat had no model in Roman legal science and what makes Theodosius' codification project stand apart from the entire Roman legal tradition is the final step envisaged in 429. This was that the collection and condensation of the legal and juristic material would not be the end product, but only the basis for a much larger undertaking, a *magisterium vitae* . . . Such a comprehensive and systematic exposition of the entire private and public (so it must be assumed) law governing the life of all subjects of the empire had – to our knowledge – never been envisioned before in Roman legal thought.[14]

Schmidt-Hofner explains the impetus to sum up the mass of Roman law into a "guide to life" as a response to a general renaissance of interest in Plato's *Laws* among the intellectual elite of the Theodosian Age. He argues that "Plato's *Laws* offered a reference point in the classical tradition to both the concept of the rule of law and the idea that it was to be achieved in an all-encompassing law code."[15] It may well be the case that the compilers of the *Theodosian Code* idolized Plato's *Laws* as an intellectual forbearer. But, as Schmidt-Hofner shows, just about everybody was interested in Plato's *Laws* at this time, not just lawyers. And while the idea of a *magisterium vitae*, the prominence of religious legislation, and a discourse around the rule of law may have echoed in Late Antiquity from the distant age of Plato, as I demonstrate later, these very same ideas were being shouted daily from pulpits just down the street from the law courts of Rome, Constantinople, Ravenna, and Antioch, in Nicene churches attended by members of the *Theodosian Code* commission. Their statement of purpose in *CTh* 1.1.5 may nod subtly to the "classical tradition," but we shouldn't lose sight of the fact that these jurists do so by invoking the language of theological disputation. Scholarship on Roman law has spent far too long seeking out subtleties while ignoring the explicit words chosen by this committee, and the words of the laws that they codified – laws that, as we learned from the *Sirmondian Constitutions*, often dripped with virulently partisan Nicene Christian rhetoric before being diffused through excision and re-placed in the *Theodosian Code*, decontextualized except for the hints that remain in the framing of the project itself. We ignore the social and the intellectual context of these men at our peril, and we run the risk of fundamentally misunderstanding the world in which these men spoke if we fail to account for the language that they chose to put to it. If we want to know what they mean, we must start with their words. In this case, their words are telling.

[14] Schmidt-Hofner, "Plato and the Theodosian Code," 44–45. [15] Ibid. 57.

There is another way in which the peculiarities of Christian scholarship and usage found their way into the conceptual framework of the *Theodosian Code*, however. The *Code* is explicitly conceived as a collection of edictal and "general" law, but it was Christians, and not jurists, who used those terms and theorized about the definition and boundaries of "general" versus "specific" law for 200 years preceding their invocation in the domain of law.

LEX GENERALIS IN CLASSICAL JURISPRUDENCE

The language of "general law" has no precedent in classical jurisprudence, though a few scholars have asserted, uncovered, or otherwise contrived a classical backstory. Clyde Pharr, for instance, sees a doctrine of legal universalism equivalent to late ancient *generalitas* in the Twelve Tables' prohibition of *privilegia*: statutes implicating only one subject.[16] Of course, the text of the statute in question is not extant, and surviving fragments contain no discussion of *generalitas*, by that name or any other. Furthermore, even a cursory overview of the history of Roman jurisprudence from the earliest republic onward will show that, in any case, *privilegia* were plenty to be had; the language of *generalitas* is not found in the Twelve Tables, and even if the *language* were there, the statute which supposedly comprised its source appears to have carried no weight.[17]

Archi offered a more nuanced analysis, though he is of two minds on the subject. He finds compelling evidence to localize the creation of *lex generalis* as a term of legal art to the chancery of Theodosius I.[18] He nevertheless finds *some* precedent for laws of general force in the text of Ulpian as preserved in the *Digest*, who twice discusses *generalia … rescripta* (47.12.3.5, 28.5.9.2) and once a *generalis epistula* of Marcus Aurelius and Commodus (11.4.1.2). In Archi's first example, Ulpian wonders whether a municipal law (*lex municipalis*) could contravene an imperial rescript (*rescripta principalia*) in order to allow for internment of the dead within the city's walls.[19] Ulpian's answer is that the rescript in question is general in scope and thus should be considered of similar force

[16] Pharr, *The Theodosian Code*, 4n24.

[17] The jurist Sextus Caecilius (as reported by Gellius) makes clear extent to which the *Twelve Tables* were considered all but obsolete already in the Antonine Age. Aulus Gellius, *Attic Nights* (*Noctes Atticae*) 20.1.4–5.

[18] Archi, *Teodosio II*, 75. [19] *D* 47.12.3.5.

to a statute. Ulpian reasons that, therefore, even if there were a municipal law that allowed for internment within the city, the imperial rescript supervenes. That is to say, Ulpian makes a statement about the relationship between a *lex municipalis* and an imperial rescript; he is not discussing the state of rescripts in and of themselves, nor the validity of statutes *or* rescripts in all cases. There is no doctrine of General Law be uncovered here, despite the discussion of a "rescript of general application."

Archi's finds a second "precedent" at *D* 11.4.1.2, where Ulpian claims:

> There is also a general letter (*generalis epistula*) from the deified Marcus and Commodus which declares that governors, magistrates, and police must assist the owner in searching for runaways, both with returning them when they find them and with punishing the people on whose property they hide, if an offense is involved.[20]

This is not a compelling precedent for a concept of legal *generalitas* because Ulpian here considers an *epistula* to be "general" only in the sense that it applies to "both governors and magistrates and police (*et praesides et magistratus et milites stationarios*)," not that it applies to all people. Not only does this text not discuss the relationship between *leges* and *epistulae*, it does not discuss either in the sense of *generalitas* defined by the Ravenna law of 426 (*CI* 1.14.2,3), and invoked in the creation of the *Theodosian Code*.[21]

I will myself suggest one more possible precedent for a classical concept of "generality" to the examples typically adduced: Pliny the Younger's letter to Trajan from the year 110 or 111, where the governor enquires about the legal status of "foundlings (θρεπτοί)." Pliny claims to have looked for imperial precedent that would be relevant to his particular situation in Bithynia, but did not find anything "either particular or universal which bore on Bithynia (*aut proprium aut universale, quod ad Bithynos referretur*)."[22] He claims to have investigated edicts from Augustus, Vespasian, and Titus, as well as letters from Domitian to a wide variety of provinces and provincial governors, but Pliny remained at a loss as to the relevant

[20] *D* 11.4.1.2. Translations of the *Digest* follow Watson.

[21] Archi's argument is repeated, though without citation, in Harries, "'Sacra Generalitas' the Administrative Background to the Theodosian Code," 36.

[22] "Having investigated myself imperial pronouncements, and having found nothing either specific or universal that bears on Bithynia, I thought that I must consult you which to follow in this matter (*In qua ego auditis constitutionibus principum, quia nihil inveniebam aut proprium aut universale, quod ad Bithynos referretur, consulendum te existimavi, quid observari velles*)." Pliny the Younger, *Letters* 10.65. Text and translation *LCL* 59.

procedure in his own province. Not only does the governor appear to be unaware of *any* standardized terminology of "generality" for the type of precedent for which he was looking, but further, the force of *aut proprium aut universale quod ad Bithynos referretur* suggests that Pliny thought it possible that a "universal" precedent *did not apply* in Bithynia. This is, at the very least, a concept of universality that strains credulity if universality is supposed to mean something like "applicable everywhere, without distinction."

Other commentators have discussed the relationship between general law and other legal categories but, apart from Archi, a comprehensive discussion of the intellectual history of the concept has not been undertaken – seemingly because there is so little material to work with in the classical sources for Roman law.[23] As mentioned earlier, the *locus classicus* for discussions of the history of the concept of a general law is an article by van der Wal that is cited incorrectly almost without exception.[24] The article discusses *lex generalis* only insofar as it relates to the force and meaning of edicts but not as a concept in and of itself. On the other hand, significant work has been carried out on the relationship between specific cases which motivated particular rescripts and their application as general principles, especially between the reigns of Constantine and Justinian. Mariagrazia Bianchini's *Caso concreto e "lex generalis"* constitutes a sustained attempt to understand this relationship. Her analysis has stood the test of time in clarifying the manner in which general rules were extracted from specific cases, but it does not investigate the intellectual history of the terminology or ideology of "generality" as it appeared under the Dominate.[25] Likewise, Sebastian Schmidt-Hofner has shown convincingly that, in reality, even statutes explicitly labeled as

[23] Specifically, Wenger has a useful discussion of the relation between *leges generales* and other types of laws, but does not trace the history of the concept. Wenger, *Die Quellen des römischen Rechts*, 2:433–441. Likewise Kussmaul discusses *leges generales* only in so far as they interface with *leges pragmaticae*, specifically whether a *pragmaticum* could contravene a general law. Kussmaul, *Pragmaticum und Lex: Formen spätrömischer Gesetzgebung 408–457*, 86–89. See also a cursory discussion of the evidence, and of Honoré's treatment of it, in Sirks, "Observations on the Theodosian Code: *Lex Generalis*, Validity of Laws."

[24] The exceptions, which cite the article according to its actual title, are: Honoré, *Law in the Crisis of Empire*; Matthews, "The Making of the Text"; Sirks, *The Theodosian Code*; and Schmidt-Hofner, *Reagieren und Gestalten: der Regierungsstil des spätrömischen Kaisers am Beispiel der Gesetzgebung Valentinians I.*

[25] Bianchini describes her specific aims in *Caso concreto e "lex generalis": per lo studio della tecnica e della politica normativa da Constantino a Teodosio II*, 19.

"general laws did not necessarily carry validity throughout the empire or in a large-scale administrative area like a prefecture."[26] My argument, on the other hand, concerns the language of General Law as a technical term in Roman law, and its conceptual history, rather than the history of its application.

There is one further salient aspect of the Theodosian concept of General Law that deserves mention: it is not related conceptually to either the "law of nations" or to the abundant ancient discourses on "natural law." This much is clear from Ulpian's presentation of what constitutes civil law: "The *ius civile* is that which neither wholly diverges from the *ius naturale* and *ius gentium* nor follows the same in every particular. And so whenever we add anything to the common law, or take anything away from it, we make a law special to ourselves, that is *ius civile*."[27] Papinian further defines civil law as comprising "statutes, plebiscites, *senatus consulta*, imperial decrees, or authoritative juristic statements."[28] Needless to say, the concept of General Law invoked by *CTh* 1.1.5 refers to members of the class *ius civile* and, explicitly, not those of the class *ius gentium*. Further, even though the tradition of Greco-Roman legal theory from Aristotle onward has included a concept of "universal law," universal laws in classical jurisprudential theory were always of the genus "natural" and contrasted with the law of particular peoples. The pattern holds from Aristotle's *Rhetoric* onward. "Now there are two kinds of laws: some are particular, and others are general (τὸν μὲν ἴδιον τὸν δὲ κοινόν). By particular laws I mean those established by each people in reference to themselves (ἴδιον μὲν τὸν ἑκάστοις ὡρισμένον πρὸς αὑτούς), which again are divided into written and unwritten; by general laws I mean those based upon nature (κοινὸν δὲ τὸν κατὰ φύσιν)."[29]

Again, the concept of a General Law invoked in *CTh* 1.1.5 is defined within the category of what Aristotle would call "particular law"; the General Law of the Theodosian court could not have been conceptually dependent on the Natural Law or Universal Law of Aristotle, or that of

[26] Schmidt-Hofner, *Reagieren und Gestalten*, 23. Schmidt-Hofner continues on pages 23–34 with an excellent overview of the various ways in which appellations of *generalitas* operated as regards specific statutes, apart from doctrine. See also Harries, "Sacra Generalitas," 35.

[27] *D* 1.1.6. [28] *D* 1.1.7.

[29] Aristotle, *Rhetoric* 1973b4–8. Text and translation adapted from *LCL* 193. Aristotle goes on to clarify that even when similar concepts exist in both civil and natural legal systems (for instance the concept of what is "just"), they do not need to come to the same conclusion.

Cicero.[30] It is true that there are laws and legal concepts from the classical tradition that apply generally. It is also true that linguistic systems often have "covert categories," as Benjamin Whorf put it, which are operative even when they are not explicitly named or articulated.[31] It may be the case that a concept of General Law was lurking in the mass of Roman legal theory, and simply remained unarticulated as such until 426, when it was named and defined by *CI* 1.14.2,3 to be invoked by *CTh* 1.1.5 in 429. I find it unlikely that such a foundational concept would go wholly unremarked upon in a tradition so self-consciously interested in delineating categories of analysis – if it did indeed exist for the likes of Ulpian, Papinian, and Paul – but you may disagree. If so, then the weaker form of my claim nevertheless holds: that the *language* of General Law arrives completely *de novo* in 426, and paying attention to the common usage of that language by members of the court and their intellectual peers will help us to understand where it is that they got it from and what it meant to them.

I am not the only commentator who has found support for a stronger claim, however. As mentioned earlier, Archi, Harries, and most recently Schmidt-Hofner all agree that there is no precedent in classical juristic writings for the Theodosian *concept* of General Law as it is articulated and used in the Theodosian court. That is, the definition of General Law that we see in *CI* 1.14.2,3 is particular, and deserves to be understood as a fully formed concept of extraordinarily specific legal application, rather than a (as it were) general category of analysis. It is clear that the classical tradition witnesses to a concept of laws with widespread application. But what Schmidt-Hofner, Harries, Archi, and I mean when we say that General Law "is a term and concept unfamiliar from the Roman legal tradition" is more specific than saying that there was no capacity for laws of general application.[32] Rather, we are claiming that the specific bounds of General Law are new to the Theodosian Age, when it first appears as a technical term in the sense of a universally applicable subset of the *ius civile*.

The term *lex generalis* arises in the documentary record with a technical definition only during the reign of Theodosius II (*CI* 1.14.2,3). If Tony Honoré is correct in identifying the author of this constitution with Antiochus senior, chairman of the first *Theodosian Code* commission,

[30] For Cicero's definition of universal, natural law, see *De re publica* 3.22(33).
[31] Whorf, "Grammatical Categories," 2.
[32] Schmidt-Hofner, "Plato and the Theodosian Code," 52.

then the connection between this technical definition of General Law, interest in its clarification and promulgation, and its use as a conceptual frame for the *Theodosian Code* project becomes all the more clear.[33] It is unclear whether *CI* 1.14.2,3 presented the very first technical definition of General Law – given that the definition appears in the context of a broader discussion of inheritance law, it seems like a strange place to roll out a new legislative tool.[34] Interest in the universality of law is a known ideological interest in the court of Valentinian III and Galla Placidia, however, and Honoré has demonstrated the that Eastern officials in 426 and thereafter used legislation to propagate the ideology of the rule of law. A refinement of definition as we see in *CI* 1.14.2,3 fits perfectly well with the aims and methods of the court from which it was issued.[35]

It is clear that one of the problems which the concept of "General Law" addresses – the use of case-specific rescripts as legal precedent – is in evidence already from the reign of Constantine.[36] That is, there is some reason to believe that already during the reign of Constantine, jurists made a functional distinction between case-specific rulings and those that were more widely applicable.[37] From the early fourth century, as well, many constitutions were specifically ordered to be promulgated widely.[38] Ulpian too notes that some rescripts were considered to be precedential while some were not.[39] But the choice of *this* conceptual tool – General Law – as an answer to these concerns is neither accidental nor historically necessary; rather, I argue that it reflects the scholastic language of a Christian imperial court.[40]

The decision to invoke a concept of *lex generalis* and to cast civil law in its frame is hardly the only way to fix the issues outlined earlier. For one, a simple constitution clarifying that edicts and *orationes* are henceforth to

[33] Honoré, *Law in the Crisis of Empire*, 252–257.

[34] Harries on the other hand thinks that the single *oratio* simply "covered two unrelated topics: the question of how justice was to be administered and categories of imperial law defined; and the law of succession." Harries, "Sacra Generalitas," 34.

[35] Honoré, *Law in the Crisis of Empire*, 248–257.

[36] For instance, *CTh* 1.2.2, 315 CE.

[37] Sirks argued as much in *The Theodosian Code*, 29–35.

[38] For instance *CTh* 11.27.1, 12.5.2, *Sirm.* 4.

[39] *D* 1.4.1.2

[40] See, for instance, an article by Gisella Bassanelli Sommariva, who argues that *leges generales* are not a new type of constitution created by Constantine's chancery, but that the choice of this particular framing tool by the chancery of Theodosius II reflects the confluence of Christian and Neoplatonic ideology that began in Constantine's court, in which the imperial will was immediately supposed as universally normative. "*Leges generales*: linee per una definizione," 2. I disagree on the period in which this tool was first established among the canon of juristic practice, but Bassanelli Sommariva's conclusions hold for a later period as well.

be considered *generalis* without instituting a new category of General Law would solve the issue in a more elegant manner, without multiplying categories.[41] Similarly, if the skeptics are right that there is a covert concept of generality inherent to the Roman legal system across time, could it not have just as well remained unarticulated, as it allegedly had been for a millennium? My next question, then, is "why articulate the covert concept now?" Bianchini even admits that after the Ravenna law of 426 (the *Law of Citations*), the difference between a general law and a rescript remained "exceedingly vague if not non-existent,"[42] and that the *Theodosian Code* itself as reenvisioned in its second iteration disregarded the directive in its strict reading (1.1.6).[43]

There is another problem: namely, that if there *is* a covert concept of generality in Roman law, we probably shouldn't look to *generalitas* as its emic language. Rather, the concept of the creation of a corporate body out of individual members of society and applying legal principles to them en masse already had a long tradition of exposition in Rome under the heading *universitas*. If late ancient lawyers wanted to solve the "problem" of case-specific rescripts, and point to and an ideology of generality, then *universitas* is the obvious lexical and conceptual solution, with a rich tradition in Roman legal thought stretching back centuries.[44] Here, again, the problem could have been solved without creating a new legal category of General Law. Similarly, the so-called letter of Domitian appended to the *Lex Irnitana* shows that mechanisms were in place and exploited already in the first century CE to appropriate "even the most informal of imperial pronouncements" and operationalize them to new applications.[45] Late ancient lawyers had any number of ways to deal with the problem of specificity of rescripts and legal precedent, or the need for laws to be widely disseminated, without creating and then defining the boundaries of a novel legal tool. The choice of *lex generalis* as the conceptual framework for a solution is telling. It is telling because the concept, both formally and lexically, appears in our sources for the first time not in the writing of a jurist or legal scholar, but rather in the biblical exegesis of a first-century Jew so beloved by Christians of the Theodosian

[41] Christoph F. Wetzler offers a similar objection in *Rechtsstaat und Absolutismus: Überlegungen zur Verfassung des spätantiken Kaiserreichs anhand von CJ 1.14.8*, 93–95.

[42] Bianchini, *Caso concreto e 'lex generalis'*, 145. [43] Ibid., 146. See also 150n25.

[44] *D* 1.3.4 is one example. See also *D* 1.8.1.0, 1.8.1.2, 1.8.1.6, 1.18.6.8.

[45] Harries, "Sacra Generalitas," 36. On the *subscriptio* itself, see Mourgues, "The So-called Letter of Domitian at the End of the Lex Irnitana."

Age that he was believed to have converted to Christianity later in life: Philo of Alexandria.

GENERAL LAW IN CHRISTIAN TRADITION

Philo of Alexandria's works, like those of his contemporary Josephus, remain extant solely due to the interest of Christian scribes and scholars in the third and fourth century, who saw in his exegetical method tools useful for interpreting the Hebrew Bible in ways amenable to their universalizing and supersessionist aims. Philo is the first thinker in the Greco-Roman tradition to theorize explicitly about "general" and "specific" law as a special category of legal analysis, and in those terms. In his *Who Is the Heir?*, Philo writes that the two tablets of Exodus 32 were given by a "lawgiver (θεσμοθέτης)," and comprise "ten general laws (γενικῶν δέκα νόμων)," composed on two slabs of stone as an allegory "to the rational and irrational (λογικῷ καὶ ἀλόγῳ)" halves of the human soul.[46] In a teaching tractate titled *On Mating with the Preliminary Studies*, he returns to this theme and introduces a further distinction: between "general" and "particular" laws.

In fact, among the concepts that animate Philo's magnum opus *On the Special Law* is the difference between "general laws which god expounds (γενικῶν νόμων, οὓς προεφήτευσεν ὁ θεός)" and are given "to all humankind (πρὸς πάντας ἀνθρώπους)" in the form of the Ten Commandments, and special laws which are available only "through an interpreter (δι' ἑρμηνέως)" – presumably the laws that god revealed to Moses directly, which have significance only to the nation of the Jews.[47] For Philo, the distinction between general and special law is operative on the level of class: special laws are those which are binding only on Jews, being distinct from and legally subordinate to another category: general laws. Philo invokes the distinction between "general" and "special/specific" with slightly differing valences throughout his corpus, and later commentators in the Christian scholastic tradition took up his distinction in a variety of ways. It is the deployment of the distinction itself that is important for my purposes.

Little is known about the source known as Ambrosiaster (the "would-be Ambrose"), but the contents of their *Notes on Paul's Letter to the*

[46] Philo of Alexandria, *Who Is the Heir?* (*Quis rerum divinarum heres sit*) 167. Text Wendland.

[47] *De specialibus legibus* 2.189–190. Text *LCL* 320.

Romans, as well as other commentaries from the same pen, place the author's floruit securely between 366 and 384 CE, in the city of Rome.[48] The quality of the Latin and the content of the commentary suggest that whoever Ambrosiaster was, they were highly educated, likely a native speaker of Latin, and intimately familiar with both Roman legal and Christian exegetical scholarship.[49] In the New Testament text *Romans* 7:1, Paul deals with the relationship between the Hebrew Biblical law and those who are "in Christ." Ambrosiaster's commentary on this verse begins with a direct quotation of Paul: "*An ignoratis, fratres, scientibus enim legem loquor*,"

"Do you not know, brothers (I am speaking to those who understand law)," that in order to confirm their spirits in divine teaching, he uses the example of human law, thus again earthly things reinforce heavenly things, just as also god is known from the creation of the world. Because everything is of a piece, things often have similarities to each other in some ways, though they appear different. Thus, Romans understand law because they are not barbarians. Rather, they understand natural justice – partially on their own, partially from the Greeks, and partially from the Hebrews. Even so, law was not obscured before Moses, it merely had neither order nor credibility. In fact, the order of law was conveyed to Rome from Athens.[50] So [Paul] says to those not ignorant of law: Law rules over a person so long as he lives. It is no secret: every human life is under natural law, which was given to the world. This is "general law" (*non est occultum omnem vitam hominis esse sub lege naturae, quae data est mundo. haec lex generalis est*). Though he declares another "special [law]," (it is also general, only being made special in so far as it is not undertaken by everyone), through which he intends to prove his claim (*nunc vero aliam proponit specialem, quamvis et ipsa generalis est, sed dum non recipitur ab omnibus, fit specialis, per quam vult probare adsertionem suam*).[51]

[48] The text is extant in three recensions. The Γ recension of the text, quoted here, was selectively edited (almost certainly by Ambrosiaster himself) as late as 384 CE, though the differences between recensions in this section are immaterial to my argument. On dating see de Bruyn, *Ambrosiaster's Commentary on the Pauline Epistles: Romans*, xiii–xxix, and on the phenomenon of post-publication revision that is particularly common among "Patristic" authors of the fourth and fifth centuries, see Cavallo, "I fondamenti materiali della trasmissione dei testi patristici nella tarda antitichità: libri, scritture, contesti," 52–59. Ambrosiaster claims Rome as a base of operations in both *Quaestiones* 115.16 (*SC* 512:168) and *Commentaria in Epistolam ad Romanos* 16:3–5 (*CSEL* 81.1:479).

[49] The quality of the Latin is evidenced by, among other things, the fact that it was mistakenly understood to be written by Ambrose through the modern period. For his part, Augustine thought that the commentary in question was written by Hilary (presumably of Poitiers).

[50] Here Ambrosiaster invokes a tradition recorded in Livy *Ab urbe condita* 3.31, where three men are sent to Athens to copy the laws of Solon.

[51] Ambrosiaster, *Notes on Paul's Letter to the Romans* (*Commentarius in Pauli epistulam ad Romanos*) 7.1. Text *CSEL* 81.

In the ample history of theorization as to what, precisely, constitutes General Law, no modern commentator has cited this section, this work, or even this author – a surprising fact given the explicit statement *haec lex generalis est*, and even more so given that the sentiment is expressed in the context of Roman jurisprudence and composed on the eve of the Theodosian dynasty, when the concept of a General Law first found regular deployment as a term of legal art. Ambrosiaster begins his discussion by signaling an intended audience: "those who understand law." Lest the passage be understood to discuss *lex* in a merely symbolic or "religious" domain, Ambrosiaster begins the commentary on this section of Paul's epistle by offering a brief historiography of Roman law from time immemorial through his own day in the late fourth century CE. According to the author, Paul intended to introduce a legal distinction between "general law" (*lex generalis*) and laws that are "particular" (*specialis*) – a distinction that is formally identical with the distinction made by Philo in *De specialibus legibus* and likely dependent on it. That is, for Ambrosiaster and Philo both, "general laws" (*leges generales*) are those "given to the world" and which apply to all, distinctions of class/gender/location notwithstanding. General laws remain in force even in the context of special laws and thus supersede them. For their part, special laws are those which are given to particular groups of people. Ambrosiaster himself underlines this aspect of the special–general distinction with his interjection in the last line of the earlier quotation. He makes clear that "special" law is understood as generally applicable for those *within the relevant class*: it is "not undertaken by everyone." It is interesting to note that Ambrosiaster, as well, has been plausibly suggested as the compiler of the *Comparison of Mosaic and Roman Laws* (*Collatio legum Mosaicarum et Romanarum/Lex dei*).[52] I will not wade into the debate here, except to say that the author of both texts had an acute knowledge of classical Roman jurisprudence and an interest in reconciling it with Christian concept of *lex*; the list of possible authorial attributions for the *Collatio* is short.

One of Ambrosiaster's highly placed contemporaries took up the distinction between "general" and "particular" laws. We can say something more substantial about Gregory of Nyssa: he was a bishop during the

[52] Wittig, *Der Ambrosiaster "Hilarius": Ein Beitrag zur Geschichte des Papstes Damasus I*. See also Souter, *Pseudo-Augustini: Quaestiones veteris et novi testament*, xxiii; Heggelbacher, *Vom römischen zum Christlichen Recht: iuristische Elemente in den Schriften des sog. Ambrosiaster*, 144–145.

reign of Theodosius I, and he was part of a complex web of interrelations between the Eastern court and the Nicene episcopate in the waning years of the fourth century. Gregory also invokes the distinction between general and special laws, distinguishing between laws that are binding on humanity (those found in the Decalogue) and laws which are binding only on Christians: again invoking a class distinction between the two types of law.[53] Gregory published the text as part of his homilies on Ecclesiastes sometime around 380 CE. The distinction between general and specific law carries on in elite Latin works of the fifth century as well, written by such men as Augustine, whose formal legal training was not insignificant.[54] Augustine picks up the same distinction and deploys it to yet another end, contrasting the differing senses of "law" in the Latin Bible around 415 CE.[55] In *Questions on the Heptateuch*, he discusses actions of Abraham done according to "special law" versus those he did according to "general law."[56] He deploys the distinction polemically, too, in his *Against the Letter of Parmenion*.[57]

A full accounting of Christian theorization about the connection between law, "generality," and universality is beyond the scope of this Appendix. The distinction is found throughout the field of early Christian scholarship: early in the third century, Hippolytus commented on an anonymous "Naassene hymn" of the early second century, which declares that the "primal intellect of the cosmos is General Law."[58] Origen's mid-third-century *Selections in Psalms* declares that: "The commandment of the Lord is of the species 'General Law.'"[59] During the reign of Constantine, Calcidius connected the concepts of General Law and universality, without distinctions of class, in his *Commentary on*

[53] "If someone is investigating the meaning of sin, we shall surely say that one should not do anything against one's neighbor. For example, 'You shall not commit adultery, you shall not commit murder, you shall not steal,' and the other things about which there is a general and comprehensive law, which includes within it each particular law (ὧν γενικός τις καὶ περιληπτικός ἐστι νόμος τὰ καθ' ἕκαστον ἐν ἑαυτῷ περιέχων) – the one about 'loving one's neighbor as oneself.'" Gregory of Nyssa, *Homilies on Ecclesiastes* 8 (393–394). Text Paul Julius Alexander, translation adapted from Stuart George Hall.

[54] Humfress, "Patristic Sources," 102.

[55] Augustine, *Tractate on John's Gospel* 48.9. Text *CCSL* 36.

[56] Augustine, *Questions in the Heptateuch* 7.49.5. Text *CPL* 270.

[57] Augustine, *Against the Letter of Parmenian* 1.12. Text *CPL* 331.

[58] Νόμος ἦν γενικὸς τοῦ παντὸς ὁ πρῶτος Νόος. Hippolytus, *Refutation of All Heresies* 5.10.2. Text Miroslav Marcovich.

[59] Ἡ ἐντολὴ Κυρίου ἐν εἴδει γενικοῦ νόμου ἐστίν ἐντολή. Origen, *Selecta in Psalmos* 18. Text *PG* 12.1244B. The ancient Latin translation reads *Praeceptum domini in specie est praeceptum legis generalis*. Text *PG* 12.1243B.

Timaeus.[60] Likewise, Constantine's biographer Eusebius speaks in his *Commentary on the Psalms* of "laws named 'general'."[61] John Cassian makes the same connection in his *Conlationes* around 420 CE.[62] Jerome discusses the idea of generally applicable divine law in his *Commentary on Galatians* written in 394/395 CE,[63] and further about the relationship between the *leges Cesarum* and *leges Christi* in his letters – a distinction to which I return later. A survey of the available evidence demonstrates that before the concept of a General Law was conceived as a foundational distinction in Roman jurisprudence, it was operative and often deployed by elite Christians who were trying to adjudicate the relationship of the "*Torah* (law)" of the Hebrew Bible with their new, increasingly gentile movement. The general–specific distinction is found first in the text of Philo, the most beloved Jewish exegete among late ancient Christians. By the fourth century it was integral to Nicene Christian doctrine in both the Greek East and the Latin West, and it was used by men of imperial power with close connections to both courts, all of whom were actively engaged in projects to understand the relation between case-specific and generally applicable law: both divine law and imperial law.

THE *THEODOSIAN CODE* AND GENERAL LAW

The term *lex generalis* first appears in a purely juristic source in an imperial constitution of Constantine promulgated in 321, concerning eligibility of Jews to serve in the *curia*. Many commentators have wondered over the odd language of the constitution as it is recorded in the *Theodosian Code*, beginning improbably as it does with an invocation of General Law (16.8.3). If this constitution originally began with "We permit, by general law … " it is an outlier. Archi wondered at the seemingly anachronistic terminology, and suggested that it could be explained by the editorial work commanded in *CTh* 1.1.6; which is to say that it was added during the Theodosian Age, rather than being the single use of a phrase which would not be repeated for two more

[60] Chalcidius, *Commentary on Plato's Timaeus* (*Commentarius in Platonis Timaeum*) 179. Text *CPL* 579.

[61] Γενικῷ ὠνομασμένῳ νόμῳ. Eusebius, *Commentaries on the Psalms* (*Commentaria in Psalmos*) 23.193. There is some doubt as to the authenticity of this text, but no decision can be made before a critical edition of the manuscript has been completed.

[62] John Cassian, *Collections* 23.11. Text *CPL* 512.

[63] Jerome, *Notes on Galatians* 2.5.4. Text *CCSL* 77A.

generations.[64] Archi's case is made more plausible in the context of recent work by Caseau,[65] Pietri,[66] and Freu,[67] who have all adduced other places in the *Code* where the wording of constitutions was edited in line with Christian doctrinal terminology that did not yet exist when the constitution was originally promulgated. Freu argues specifically that "the evolution of the vocabulary used by the chancellery witnesses to the rapidity [of Catholic Christian influence in legal domains] ... the use of the words *ecclesia* and *clericus* illustrates the influence of Christianity on juristic culture."[68] So, this Constantinian constitution may or may not have begun with an invocation of General Law; in any event, the text of this one constitution needn't hold us here. The terminology of "General Law" does not show up again in an imperial constitution until the reign of Honorius, and does not appear consistently until the last years of Theodosius I's reign.[69] As Lucio De Giovanni showed, "the use of the expression *lex generalis* was established and systematically consolidated between the end of the fourth and the beginning of the fifth century."[70] The selection process involved in producing the *Theodosian Code* on the basis of General Law should render incidences of the terminology *more* prevalent in the corpus, and not less – suggesting further that the few pre-Theodosian usages of the term are outliers.[71]

Sirmondian 12 mentions a series of "General Laws against the Donatists, the Manicheans, and other such heretics and Traditionalists" given in the years before 408; but the term itself, as one of legal art,

[64] "We grant to those men who are about to undertake this work the power to remove superfluous words, to add necessary words, to change ambiguities, and to emend incongruities (*adgressuris hoc opus et demendi supervacanea verba et adiciendi necessaria et demutandi ambigua et emendandi incongrua tribuimus potestatem*)." *CTh* 1.1.6. Archi wonders "Sono, quelle parole, una anticipazione del futuro o un addentellato col passato?" Archi, *Teodosio II*, 69.

[65] Caseau, "L'adjectiv *profanus*."

[66] Pietri, "Les pauvres et la pauvreté dans l'Italie de l'Empire chrétien (IVe siècle)."

[67] Freu, "Rhétorique chrétienne et rhétorique de chancellerie."

[68] Pietri, "Les pauvres et la pauvreté," 210.

[69] Archi, *Teodosio II*, 72. De Giovanni proposed a number of *leges generales* from Constantine's reign. His examples include *CTh* 1.4.1, which is supposed to constitute "proprio in una *lex generalis* del 321," though the text of the statue does not support the conclusion, nor is the suggestion otherwise argued. De Giovanni, "Il diritto prima e dopo Costantino," 230.

[70] De Giovanni, "Il diritto prima e dopo Costantino," 228.

[71] Sirks intimated as much in "Observations on the Theodosian Code: *lex generalis*, validity of laws," 147–148.

appears to be new to the Theodosian era.[72] The fact that Theodosius II and Valentinian III issued a constitution[73] in 426 (the *Law of Citations*) which precisely defined the term and its legal force, first negatively and then positively, suggests that no established discourse of legal theory defined precisely what constituted a General Law.[74]

The same *Augusti* to the Senate. Laws that are contained in a legislative proposal (*oratio*) sent to your venerable assembly or that are called "edicts" with that term inserted, no matter whether a spontaneous impulse has suggested them to us or a petition or report or pending lawsuit gives occasion for them, in the future shall be obeyed (*in posterum observentur*) as General Laws (*leges generales*) equally by all (*ab omnibus aequabiliter*). For it is sufficient that the laws be distinguished by the designation "edict" or published for all peoples in the edict of the provincial governors, or that it be stated in them explicitly that what the Emperors have decided in specific lawsuits should decide the fate of similar cases. Also if a law is called "General" or is ordered to apply to all people, it shall have the force of an edict (*Sed et si generalis lex vocata est vel ad omnes iussa est pertinere, vim obtineat edicti*). Interlocutionary decisions, which we have issued or shall afterwards issue while trying a single case, shall not have the force of precedential rulings, and special grants to specific cities, provinces, or legal persons shall not be

[72] *... generalibus legibus contra Donatistas, Manichaeos adque huiuscemodi haereticos vel gentiles ... Sirmondian* 12. Text Mommsen. The same constitution claims that the emperors "have issued with the authority of general laws against the Donatists, who are called Montenses, against the Manichaeans or the Priscillianists, or against the pagans (*in Donatistas, qui et Montenses vocantur, Manichaeos sive Priscillianistas vel in gentiles a nobis generalium legum auctoritate decreta sunt*)."

[73] Sommariva, "La legge di Valentiniano III del 7 Novembre 426," 285–287, argues that these comprise two separate constitutions that happen to have been issued on the same day. I am persuaded, however, by Wetzler, *Rechsstaat und Absolutismus*, 96–97, that these two fragments issue from the same constitution. I, with most, accept the standard interpretation (first proposed in 1665 by Jacques Godefroy, *Codex Theodosianus*, 33) that *CTh* 1.4.3, *CI* 1.14.2, 1.14.3. 1.19.7, and 1.22.5 are fragments of a single constitution. My contention, however, does not rest on a single adjudication of this thorny issue – whether the legislation of November 426 involved one constitution on inheritance and another on sources of law, or whether they are one and the same only affects the interpretation of these statutes in themselves, and has little bearing on their appropriation of the language in *CTh* 1.1.5 and 1.1.6.

[74] "Emperors Theodosius and Valentinian *Augusti* to the Senate. What we have decided with regard to a case brought before the common court of the most eminent noblemen of Our Sacred Palace, pursuant to reports and inquiries sent to consult (Our opinion); or what We have granted to any manner of corporation, or to ambassadors, or to a province, city, or curia, are not general law but are laws only for those cases and persons for whom they have been promulgated (*nec generalia iura sint, sed leges fiant his dumtaxat negotiis atque personis, pro quibus fuerint promulgata*) and they shall not be reconsidered by anyone. Given at Ravenna November 6 (426)." *CI* 1.14.2. Translations of the *Justinianic Code* are adapted from Frier (ed.), *The Codex of Justinian*.

considered General (*nec his, quae specialiter quibusdam concessa sunt civitatibus vel provinciis vel corporibus, ad generalitatis observantiam pertinentibus*).[75]

This *Law of Citations* was given from Ravenna on the 7th of November 426,[76] nearly three years before the commissioning of the *Theodosian Code* on the basis of the General Law concept.[77] The constitution demonstrates that the chanceries of Valentinian III and Galla Placidia in the West were interested in offering a technical definition of General Law as a term of legal art, perhaps in order to rein in its use by jurists and others with a wide array of significations in the years leading up to its first extant definition, and perhaps as a way of messaging an expansive ideology of rule of law known elsewhere from this chancery and from its counterpart in the East. Wetzler concluded as much twenty years ago, when he offered a plausible context for the law. He argued that, mired in a thicket of inheritance and citational law, the issue presented a springboard from which to begin the process of legal reform centered on the concept of "generality."[78] He concludes:

> In general, the Ravenna legislation on legal sources of November 426 [the *Law of Citations*] bears the signature of a professional jurist and announces a new style of legislation. However, it is not the targeted prelude to a long-planned legislative project . . . What we have before us is an *ad hoc* solution born of the situation. The problem is recognized as such, and it is taken care of as expeditiously as possible. Ravenna had no power to accomplish more. There is no continuation. Nevertheless, the measure certainly had some effect on the imperial chancery of the West. Laws passed subsequently are in fact formulated so that they can be identified as such with the help of the catalogue of criteria established in November 426.[79]

A problem faced jurists in the Western chancery who were responsible for the first formal definition of General Law, and they used readily available concepts and language to solve it. It is apparently the case that the language and the framework most readily available to them was not strictly the result of an internal revolution in juristic thought and praxis,

[75] *CI* 1.14.3. That these two fragments are compiled separately in *Codex Iustinianus* only underlines the technical nature of the distinction invoked, even though they were apparently excerpted from the same constitution.

[76] According to Otto Seeck's revised date. Seeck, *Regesten der Kaiser und Päpste für die Jahre 311 bis 476 n. Chr.*, 352.

[77] It is nearly certain that the constitution stood originally in the *Theodosian Code*. Matthews, *Laying Down the Law*, 66.

[78] Wetzler, *Rechtsstaat und Absolutismus*, 96–108. [79] Ibid., 108.

but was imported from another tradition readily present in the Western court: the tradition of theological disputation.

The force of *in posterum observentur* in *CI* 1.14.3 further clarifies that whether the law is a restatement of what is already in effect (as is often the case with imperial constitutions), or whether it defines a newly relevant legal category, henceforth, when deployed in constitutions, the term General Law (*lex generalis*) is to have a purely technical meaning, such that it is of the same power as an edict (*lex edictalis*). Bassanelli Sommariva has concluded as much already: "This reading of *CI* 1.14.2, 1.14.3, 1.19.7, 1.22.5 in fact gives rise to the impression that the chancery was concerned with regulating only the future, that is, it concerned itself with imperial constitutions that would have been issued from that moment onward."[80] Archi pointed out that before the promulgation of this constitution, "among Roman sources there is no equivalent to such a precise position."[81] However, as I have demonstrated, Archi's statement only holds true if one's definition of "Roman sources" excludes the mass of Roman Jewish and Christian theorization on precisely this topic, where the distinction was invoked with different valences from what we see in the *Law of Citations*, but with no less degree of sophistication or precision.

Each of the ancient scholars surveyed here holds a different view of the distinction between General Law and law of another type. There is daylight between, for instance, the concept of General Law as defined in *CI* 1.14.3,4 and Ambrosiaster's own conception. For that matter, neither the chancery of Theodosius II nor Ambrosiaster use the distinction between General Law and other types of law in the same way that it was originally meant Philo, and the concept is invoked in different and increasingly specified ways throughout the *Code* itself. Furthermore, the *Theodosian Code* that was proposed in 429 (1.1.5) took up the definition of General Law as defined and promulgated in the 426 *Law of Citations* (*CI* 1.14.3), but the revised *Theodosian Code* project of 435 disregarded it (1.1.6). In other words, nearly every time it is invoked, the concept of General Law means something slightly different, even in the constitutions calling for the creation of the *Theodosian Code*. The fact of multivalence does not make the slightest bit of difference for the purpose of my argument. I am not arguing that any jurist in the chancery of Theodosius II read any Christian scholarly source and reflexively,

[80] Bassannelli Sommariva, "La legge di Valentiniano III del 7 Novembre 426," 289.
[81] Archi, *Teodosio II*, 15.

woodenly applied the concept to their own work in a legal domain. The juristic invocation of the concept of a General Law shows, rather, that the *language* of Christian scholarship had so suffused the court that jurists assumed a distinction that was current in Christian scholarship and redeployed it in the domain of law. The shifting signification of *lex generalis* in application does not invalidate its intellectual lineage traceable to Christian usages. It simply renders the concept slippery. But then again, what legal concept is not slippery when viewed on a long enough timeline?

An analogous case, from more recent history, is the assumption of Thomas Kuhn's coinage "paradigm shift" in modern English parlance. The term was initially defined in 1962, in Kuhn's *The Structure of Scientific Revolutions*. It had a specific, technical meaning that has been debated, expanded, and resignified within the literature of the history of science in the sixty years since Kuhn's initial publication. The term "paradigm shift," however, has transferred from this technical domain of the history of science into more general usage, especially among scholars in the humanities. To read any contemporary humanities article that uses the term "paradigm shift" as a direct invocation of *The Structure of Scientific Revolutions* would be to overinterpret dramatically a phrase that is, at present, relatively banal. To try to understand the history of the phrase without reference to Kuhn's work, on the other hand, would be utterly myopic. So it is with the concept of General Law as invoked in *CTh* 1.1.5.

"RESTING ON THE FORCE OF EDICTS OR ON SACRED IMPERIAL GENERAL LAW"

In 429 CE, Theodosius II and Valentinian III called for a new compilation of law "based on the structure of the Gregorian and Hermogenian codes," and which comprised imperial constitutions that "rest on the force of edicts or on sacred imperial General Law/generality." Bianchini notes that the specification of "sacred generality/General Law (*sacra generalitate*)" in 1.1.5 refers to the intention of the emperor to promulgate a General Law, distinct from the more flexible invocation of *generalitas* invoked for the revise *Theodosian Code* project, which required the compilation of laws that were *generalis observantia* (1.1.6).[82]

[82] Bianchini, *Caso concreto e* "lex generalis," 152.

The *Theodosian Code* was intended to be compiled "based on the structure (*ad similitudinem*)" of the Diocletianic codices, but the statute makes clear that the Theodosian product was to hold a fundamentally different status than the previous codices.[83] Unlike its predecessors, the *Theodosian Code* comprised but the first step toward the creation of yet another code, which "shall permit no error, no ambiguities" and which "shall be called by our name (*qui nostro nomine nuncupatus*) and shall show what must be followed and what must be avoided by all" (1.1.5). The final *Theodosian Code* as we have it was precisely intended for "more industrious types (*diligentiores*)," and it was to serve as the basis for a universal statement of jurisprudential orthodoxy that defined the bounds of the law, and to carry the name of the emperor as a sign of its authoritative status.[84] It was meant as the basis for a codification in the sense of an authoritative compilation. It is, in other words, fundamentally different from the Gregorian and Hermogenian codes, even though it is based on their structure. Whoever Gregorius and Hermogenian were, they were certainly not emperors, and their products did not carry the weight of juristic authority, nor were their productions apparently intended to do so. The Gregorian and Hermogenian were *codices*, but they were not *codes*.[85] The *Theodosian Code* is styled on the pattern of the earlier codices, but by its own admission the status of the final product was intended to be fundamentally different from its exemplars. There is, in fact, evidence of a Constantinian project that looks significantly like the Gregorian and Hermogenian codes *in nuce*. The *Life of Constantine* 3.24.1–2 envisions a "special collection (οἰκείας ὑποθέσεως)" of imperial rescripts regarding the Church written by Constantine. What is clear from Eusebius's proposal is that this "collection" would be intended for use by

[83] The structure of the Diocletianic codes, in turn, was perhaps based on the structure of the Hadrianic *edictum perpetuum*, on which see Tuori, "Hadrian's Perpetual Edict: Ancient Sources and Modern Ideals in the Making of a Historical Tradition."

[84] Sirks, *The Theodosian Code*, 5–6 makes a compelling case that these earlier codices likely did not include outdated laws, or at least did not include them purposefully as part of their design. Pages 147–151 offer the range of possibilities as to whether the final product, as (re)envisioned in *CTh* 1.1.6 and appearing in the manuscript tradition in fact comprises only valid law, or also comprises disused law. In any event, my interest is in the framing and stated intention of the collection, and later collections like the *Summaria Antiqua* regularly note in the margins laws which were old and disused by *haec inutilis est* or *superflua*, as discussed in Chapter 6. If the Theodosian code did include only valid laws in 438, it did not long remain that way. The project as it was used, at least, and as it was received, both necessarily and evidentially included laws known to be disused.

[85] Sirks, *The Theodosian Code*, 4–5. I explore this distinction in Chapter 5.

interested parties and as an addendum to his encomium, rather than as a promulgation of imperial law. Whether Eusebius had the Diocletianic codes in mind, he proposed another collection of imperial rescripts that appears substantially similar to the *Hermogenian* and *Gregorian codices* and substantially different from project proposed in *CTh* 1.1.5

By the time that the *Theodosian Code* project was announced there had already been three centuries of theorization as to what, precisely, constitutes General Law, even though the term had been defined as one of legal art just three years prior. The theorizing did not occur, however, in the writings of Ulpian, or of Paul the Jurist, but more often than not through exegesis of Paul the Apostle. John Matthews has rightly pointed out that General Law was not, apparently, a particularly effective conceptual frame when it came to the day-to-day work of the *Theodosian Code*'s compilers. Of course, the structural element of the *Code*'s production was defined by the beginning of *CTh* 1.1.5, and Matthews is right to suggest that "[a]ll the edicts and general constitutions that have been ordered to be valid or to be posted in definite provinces or in districts"[86] of the revised plan in *CTh* 1.1.6 was meant as a clarifying addendum, because the revised *Theodosian Code* project departed from the strict definition of generality promulgated the *Law of Citations* (*CI* 1.14.2–3).[87] But the choice of the language of "generality," whether it was particularly effective in carrying out the task, nevertheless points to the *Code*'s idealized conceptual setting; there is certainly an interesting gap between the conception of the *Code* and its execution, but the mere fact of the gap itself does offer much insight into the initial intention of the project. Additionally, the fact that it was *CTh* 1.1.5 – and *not* 1.1.6 – that was read out in the Roman senate upon its receipt in the West suggests that the gap between the intended project and the product received was not as great in the minds of ancient readers as it is in the analysis of modern scholars.[88]

Christian influence on parts of the *Code*, and the wording of the constitutions that it contains, has been demonstrated time and time again. I argue here that even the animating structure of the work that was called for in *CTh* 1.1.5 already demonstrates the extent to which Catholic Christian ideas had suffused the ideology of the Theodosian court.

[86] *Omnes edictales generalesque constitutiones vel in certis provinciis seu locis valere aut proponi iussae* … *CTh* 1.1.6.
[87] Matthews, "The Making of the Text," 29. See Matthews's full discussion on 25–30.
[88] See *Gesta senatus urbis Romae* 4, about which I wrote in Chapters 5 and 8.

Jerome was certainly right in 399 CE to opine that "Caesar's laws differ from Christ's. Papinian prescribes one thing, and our own Paul another."[89] But language of the Theodosian constitutions preserved in *CI* 1.14.2,3 defining the concept of General Law for the legal domain, and the constitution calling for the compilation of the *Theodosian Code* itself both speak to the fact that by the mid-420s, "Caesar's laws" operated in an ideological environment thoroughly inflected by scholarship on "Christ's laws." For Jerome, the sense in which "Laws of Caesar" and "Laws of Christ" differ is precisely that "Laws of Caesar" make class and gender distinctions, while *leges Christi* apply universally – that is, Laws of Christ are, by nature, given on the condition of generality. He claims that the Laws of Caesar operate "as if culpability rested upon the rank of the victim, not the will of the perpetrator." But according to the Laws of Christ, Jerome clarifies, "what is unlawful for women is unlawful for men, just the same. And as both serve, they are assessed on the same conditions."[90] Priscus of Panium echoed the same concern and argument in a (possibly imaginary) exchange with a Greek-speaking Roman who he claims had been taken captive by the Huns. Judges should deliberate slowly, he claims, lest they "wrong a person or offend against god, the institutor of justice (τὸν τοῦ δικαίου εὑρετὴν θεόν). The laws apply to all, such that even the Emperor obeys them."[91] The Western quaestor of 425–426 insisted on the same notion of universal jurisprudence: "they shall be subservient to all of the laws, to which even the emperors are subject."[92]

Avenues of exchange for this type of scholastic knowledge are not hard to imagine, either – in fact, we needn't "imagine" a connection between theological and juristic scholarship; the connection appears directly in our sources. Members of the *Theodosian Code* commission had direct and substantial links with members of the highest echelon of Christian theological scholarship of the day. Antiochus (*vir inlustris quaestor sacri*

[89] *Aliae sunt leges Caesarum, aliae Christi; aliud Papinianus, aliud Paulus noster praecipit.* Jerome, *Letters* 77.3. Text *CSEL* 55. For analysis of the interchange of ideas (and perhaps insults) between Jerome and Ambrosiaster in the early years of the Theodosian dynasty see Vogels, "Ambrosiaster und Hieronymus."

[90] *. . . quasi culpam dignitas faciat, non voluntas. Apud nos, quod non licet feminis, aeque non licet viris; et eadem servitus pari conditione censetur.* Jerome, *Letters* 77.3.

[91] Fragment 8.550–552. Text Bornmann. Translation Blockley, *The Fragmentary Classicising Historians of the Later Roman Empire*. On this trend see also *CI* 1.14.4.

[92] *CTh* 10.26.2. On the identity of this quaestor see Honoré, *Law in the Crisis of Empire*, 252–257.

palati), the same jurist responsible for the definition of General Law in 426, was a member of both the first and second *Theodosian Code* commissions, as well as being a drafter of the two constitutions calling for the compilation of the *Theodosian Code* (in 429 and 435).[93] But his work in the chancery of Theodosius II was not relegated solely to juristic pursuits. He also corresponded with both Theodoret and Nestorius, two of the most influential theological minds of the 420s in Antioch and Constantinople, respectively.[94] Antiochus's ongoing relationship with Nestorius is borne out by arranging safe passage through Asia and Pontica for Nestorius[95] and, perhaps, his arrangements made on behalf of Celestine I, bishop of Rome.[96] Theodorus (*vir spectabilis, comes sacri nostri consistorii*) was on both commissions as well.[97] He is, in all likelihood, identical with the Theodorus (ὁ μεγαλοπρεπέστατος ἀπὸ κυεστόρων) present at the Council of Chalcedon.[98] Likewise Apollodorus, a member of the second commission, is almost certainly the same Apollodorus present at the Council of Chalcedon.[99] The legal scholars tasked with the compilation first of Theodosius's "guide to life (*magisterium vitae*)," and then the more modest *Theodosian Code* based on the novel concept of General Law, were not interlopers in the word of elite Christian theological scholarship – they were part of it.

I wrote earlier about the plurality of definitions of General Law in scholarship of the second through fifth centuries; this diversity of uses for the term did not continue. While a variety of uses are witnessed in the years before 426, we can see the reticulated nature of imperial and ecclesiastical scholastic networks precisely in the fact that the definition of *lex generalis* appearing in the 426 *Law of Citations* (*CI* 1.14.2,3) was assumed not only in subsequent juristic legislation but also in language legislating the faith of the Catholic Church. At the Council of Chalcedon held in 451 CE, the accused bishop Dioscorus attempted to share blame for heresy with the rest of the bishops who attended the council he was defending, which was held two years before in Constantinople. He complained:

> We pronounced judgment accordingly, and the whole council gave its assent ... the matter was referred to the most pious emperor Theodosius [II] of blessed memory, who confirmed all the judgements of the holy and ecumenical council by

[93] *PLRE* II, Antiochus 7. [94] Theodoret *Epistle* 39 (*SC* 111).
[95] *ACO* 1.1.7 (p. 71n55). [96] Celestine, *Epistle* 13.2. [97] *PLRE* II, Theodorus 24.
[98] *ACO* 2.1.2 (p. 139). [99] *PLRE* II, Apollodorus 5.

General Law (ἐβεβαίωσεν πάντα τὰ κεκριμένα παρὰ τῆς ἁγίας καὶ οἰκουμενικῆς συνόδου νόμωι γενικῶι).[100]

Here, the official record of the council of 451, compiled and authorized by the court chancery of Theodosius II, claims that decisions of the council held in 449 were conveyed to the late emperor, who in turn promulgated them as "General Laws."[101] Lest the Greek text of the proceedings obscure the technical nature of this pronouncement by the emperor, it will prove useful to reference the translation of the *acta* produced some time after the council to circulate in the West: *confirmavit omnia quae iudicata sunt a sancta et universali synodo, generali legi.*[102]

Given the date and provenance of this Latin court document, there can be no doubt that we have here evidence of a Christian reimportation of the recently circumscribed definition of General Law back into Christian theological discourse. This text demonstrates clearly that in 451, Christian bishops considered their synodal decrees to be legally commensurate with the *Code* that Theodosius had promulgated in 438. And after the constitutions of 426 defining the legal force of the term General Law, Christian scholastic sources that invoke the term use it in its technical, juristic sense. That is to say, Christian scholars used the concept invariably in line with the strictures set out in a *novella* of Theodosius II composed in 447, which requires "that if any law should afterwards be established by one of us, it should obtain proper force also in the realm of the other Emperor only if it was decreed as a general constitution (*quod generatim constitutum esset*) and was accompanied by the divine imperial documents and had been issued to the other Emperor."[103] This change in

[100] *ACO* 2.1.1.53 (p. 75).

[101] This is a significant departure from the status of synodal decrees beginning during the reign of Constantine, in which Eusebius reports that the emperor "affixed his seal on the decrees of bishops made at synods (τοὺς τῶν ἐπισκόπων δὲ ὅρους τοὺς ἐν συνόδοις ἀποφανθέντας ἐπεσφραγίζετο)." *Life of Constantine* 4.27.2. The fact of Constantine's assent to imperial conciliar decisions is assured, but the precise legal status of those decisions is unclear. See also *Life of Constantine* 3.23, and analysis by Davide Dainese, who concludes "L'unico caso, infatti, in cui Costantino sembra attribuire valore legale a decisioni ecclesiali avviene secondo le modalità prescritte nei capitoli del CTh che disciplinano la competenza dei giudici in materia edilizia." Dainese, "Costantino a Nicea," 414. Text Ivar August Heikel.

[102] *ACO* 2.3.1.53, p. 50.

[103] *Nov. Theod.* 2.0. This *novella* in turn deals with the problem of designating *both* edictal and general law as universally binding, as is proposed in *CTh* 1.1.5, by restricting the terminology when the distinction does not involve a difference.

Christian use of the concept demonstrates the extraordinary extent to which the court documents of Theodosius II, both in the form of legal codifications and conciliar pronouncements, were of a piece: they issued from the same court with the same underlying terminology, scholastic methods, and Christian universalizing aims. And each corpus' deployment of that terminology responds to legislation regarding what, precisely, can and must be designated a General Law.

I argue that the proposed creation of a "guide to life" on the basis of a framework of legal generality proves the extent to which Christian scholastic frameworks had suffused the legal scholastic frame by the time of the *Theodosian Code*. Clifford Ando has stressed the continuity of concepts such as *ius publicum* as described by Ulpian into post-classical Roman law. In cases where common terminology is redeployed to new ends ("Papinian cannot, it seems to me, have meant the same thing by a 'sacred building' as Justinian did"),[104] he wonders, "[h]ow are we to assess and describe changes in the understanding of government, law, and religion, or their respective and mutually-implicated roles in the constitution of society, if the terms devised by Romans in the classical period to articulate these fundamental truths passed without remark into the linguistic toolboxes of Christian lawyers in late antiquity?"[105] Ando's concern is necessary, and is characteristically well articulated. It is true that change is not easily visible in places where such an insular domain of scholastic production relies on terms of legal art that were conceived long before Christians became a ruling elite. I argue, however, that one fruitful avenue of analysis is to identify *newly minted* terms of legal art, and to try to understand their own genealogies, as I did earlier.[106] Such analysis demonstrates clearly that, in the Theodosian Age, government, law, and religion are indeed "mutually-implicated," because the clerical elite involved were often one and the same.[107] The rest of

[104] Ando, "Religion and *Ius Publicum*," 131. [105] Ibid.

[106] Ando's chapter discusses a genealogy of the concept of *ius naturale* only with reference to juristic sources. I would suggest that in order to understand Justinian's use of the term as the language of the sixth century, one needs to deal with the significant body of scholarship among Jews and Christians that mutually informed the lawgiver, and which Justinian explicitly invokes in the texts under analysis.

[107] I would thus dispute Ando's conclusion: "This is not to say, of course, that legislation on particular issues did not come to reflect some new set of 'Christian priorities'; nor do I claim that it was impossible so to reimagine the foundations of society. It is merely that government lawyers did not do so, and that fact itself had important social-historical consequences." Ando, "Religion and *Ius Publicum*," 133. Heggelbacher's careful work

this book has sought to bear out this fact, along with its many implications.

The reconceptualization of civil law as the sort of discourse that could constitute a "guide to life (*magisterium vitae*)" demonstrates the extraordinary extent to which the law itself had been reimagined by the early fifth century. It is not that law, in the Theodosian Age, was no longer considered to be a foundation of society; rather the firm foundation of law rested on new ground fertilized by a century of imperially instigated Christian scholasticism. Whether this translation of law was the work of specific jurists or whether it drifted on a wider cultural current is an interesting issue to ponder, but is ultimately immaterial to the question posed here. Imperial lawyers drafting constitutions such as those that called for the creation of the *Theodosian Code* already assumed a reimagined foundation of society in their language and in their call for a universal statement of orthodoxy such as the proposed "guide to life." Their work was in large part reactive, and serves as a particularly potent case study in the diffusion of Christian scholastic frameworks into the domain of post-classical law. The change that I describe here, then, is in essence the mirror image of the change that Aldo Schiavone locates in the work of Scaevola and other late republican jurists, and the "epistemic revolution in Roman thought" that they instigated. As he argues:

> Abstract concepts conceived through formal juristic investigation would not have been considered, from [Scaevola] forward, solely as categories of thought. They were seen, in an increasingly circumscribed way, also as modes of being, as real entities with a life of their own, and with an inescapable objectivity which legal thought was limited solely to reflect.[108]

Schiavone showed how legal categories came to define social realities. I argue that in Late Antiquity, social realities inflected legal categories.

The *Theodosian Code* is a quintessentially Theodosian document.[109] It issued from a court in which contemporary scholarly distinctions between discourses of "religion" and "law" fail. Not only the structure but the very fact of the *Theodosian Code*'s compilation as a universalizing statement of jurisprudential orthodoxy conceived on the concept of General Law (*lex generalis*) and in view of a "guide to life (*magisterium vitae*)" speaks to the extent to which peculiarly Christian structures of knowledge

on the Christian notion of *lex naturalis* in post-classical law suggests an alternative conclusion. Heggelbacher, *Vom römischen zum Christlichen Recht*, 8–43.

[108] Aldo Schiavone, *Ius: l'invenzione del diritto in Occidente*, 195–196.

[109] Kerr, "A Theory of Law," 111.

had suffused the imperial administration by the mid-420s. Not only book 16 on "religious matters" but the entire intellectual ideal behind the production of a *Code* points to the fact that "the Codex Theodosianus was intended to showcase a new, imperial and Theodosian, ordering of knowledge concerning matters human and divine."[110] Lines of transmission, however, do not invariably lead from Christian discourses to influence the presentation and theorization of law. The *acta* of the Council of Chalcedon show that theological disputation and scholarship of the mid-fifth century was conceived and promulgated in a manner that responded to legal definitions recorded in texts such as *CI* 1.14.2,3 and *Nov. Theod.* 2.0. Each tradition of scholarship has its own history, but it is an error to allow divergent scholastic lineages among theologians and jurists to overshadow the profound convergence of the two precisely in the Theodosian Age.

[110] Humfress, "Ordering Divine Knowledge in Late Roman Legal Discourse," 161.