DOI: 10.14754/CEU.2024.02

Doctoral Dissertation

Justinian's Conniving Bankers
Lobbying and the Imperial Bureaucracy in Sixth-Century Byzantium

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Submitted to the Medieval Studies Department and
the Doctoral School of History
Central European University

in partial fulfillment of the requirements for the degrees of
Doctor of Philosophy in Late Antique, Medieval and Early Modern Studies,
and
for the degree of Doctor of Philosophy in History

Vienna, Austria and Budapest, Hungary
April 2024

DOI: 10.14754/CEU.2024.02

To the memory of my father

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ACKNOWLEDGEMENTS

Most doctoral dissertations, at least in the humanities, have long gestations these days, but I feel on safe ground in asserting that this one's was longer than most. It has its germ in the 1980s, when as an undergraduate student of Classics at UC Berkeley I had the good fortune to take courses from the Greek legal historian David Cohen (now at Stanford). I thank David for introducing me not just to the history of law as a field of study but also for teaching me how to think about the relation between law, politics, society, and much else besides. After Berkeley, the power of economic incentives led not to graduate school in Byzantine legal history but to reading law at Cambridge University and then to Harvard Law School. The student debt burden of the latter in turn led to the need for the kind of job that would let me repay it. That led to a rewarding if demanding career as a financial lawyer on Wall Street, in Frankfurt, and in the City of London. Some 30 years after first incurring that J.D.-related debt (which, for the avoidance of doubt, I did repay), the time came to leave day-to-day legal practice, at an age when still possessed of the energy, both mental and physical, to pursue something interesting. One way of thinking about this dissertation is thus as an answer to the question "what if I had taken that other path?".

Naturally, I have accrued some other debts of the scholarly variety along the way. Courses at the Open University in the United Kingdom and, later, by distance with the University of Wales Trinity St. David helped me keep my Greek and Latin sharp throughout middle age, in course formats flexible enough to allow me to pursue them despite the demands of a busy legal practice. I thank Kyle Erickson at UWTSD in particular for some well-timed encouraging words. But it was the Medieval Studies department of Central European University (CEU) that really took its chances with me. I cannot reconstruct the thought processes that led them to think that I would be a suitable candidate for graduate degrees in Late Antique, Medieval and Early Modern Studies after nearly three decades of thinking about initial public offerings, bond indentures and broker regulation. My debts to those at CEU are many: to Daniel Ziemann for his droll wit; to Kati Szende for her example of how to teach so as to engage the interests of all students; to Baukje van den Berg, for keeping my Greek on point; to my fellow PhD candidates, Juan-Bautista Juan-López, Michał Machalski, and Anja Božič, from each of whom I have learned much; and especially to Csilla Dobos, for her administration of the department in a way that looks effortless but very much is not. I am also grateful to Zeynep Olgun of the University of Cambridge and Nelson Bennett of CEU for their helpful comments to individual chapters, and to Anthony Kaldellis of the University of

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Chicago and Peter Candy of the University of Cambridge for serving as external examiners of this dissertation as a whole.

Special thanks go to Volker Menze, who took me on at the beginning of my transition back to what I like to call scholarship and saw me through to the end of the process in supervising this dissertation. It must have been unusual to serve as *Doktorvater* for a student older than oneself, but Volker did so admirably and without the least trace of awkwardness. I thank him for all his guidance, both formal and informal, and wish that all graduate students might have the benefit of Volker-style feedback: always relevant, always clear, always well-chosen, always useful.

There are non-academic debts, too. My mother and sisters are models of supportiveness. Karen Robinson has been a valued friend for decades, administering the firm smack of good sense where needed, with greater tact than I deserve. Nik Andronikos and Oriane Simonet supplied tasty meals and good cheer at key points. Nicholas Barker insisted that mind and soul be fed with cultural enrichment beyond just scholarly articles. And Stella Tillyard has been a living reminder that good history is first and foremost a good story, which it is the historian's responsibility to furnish. She also cooks a chicken pie to salve the soul. I thank them all for their support and friendship.

Finally, I thank Zsombor for at least 10,003 interruptions of my work, each precisely timed to break my concentration just before I reached the German, Greek, or Latin verb that would make sense of whatever text I was poring over. Despite the interruptions, I hope I have nevertheless been able to eliminate most errors in what follows. Responsibility for any that remain rests with me.

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INTRODUCTION

Law is a social phenomenon. When it takes the form of legislation (and not just then) it is also a political one, in two senses. First, it requires the legislator to choose how the new measure should benefit or burden affected constituencies. Second, it presents the question of how to communicate the measure's benefits for the polity as a whole. This was as true for the sixth-century emperor Justinian (527–565) as it was for his predecessors and perhaps even more so, due not only to the vast scope of his legislative output but also to the role it played amongst his techniques of governance. To a greater extent than other late antique emperors—even the second Theodosius (408–450)—Justinian relied on law-making as a tool of governance: if ruling is an art, legislation was a favoured medium of his *oeuvre*.[1] To be sure, that *oeuvre* was by no means monochromatic,[2] for the payment of tribute, the erection of buildings, and the prosecution of war also played key roles. But legislation figured prominently both as an instrument of Justinian's rule and as a tool for communicating the benefits of that rule. It is an indispensable source for the history of his reign.

These observations—so self-evident to social, economic, cultural, and political historians of the period—immediately situate this dissertation at, if not some distance beyond, the margins of the specialist legal history with which it largely engages. Much recent scholarship on Justinian's *Novels* generally and on the financial ones in particular operates within the framework of traditional continental legal history, *i.e.*, *Rechtsgeschichte*. The priorities of that discipline can bemuse historians working in other traditions and its literature leave them cold, for the *Novels* offer much more than just fodder for juristic speculation. As Clifford Ando has observed, "the tendency of historians of law to accept and to function within the imaginative and discursive boundaries of the systems they study has issued, in the case of Roman law, in a remarkably narrow conception of intellectual history."[3] Jean Andreau was even more incisive when he called attention to another feature: "Legal historians are still generally inclined to interpret each regulation as an aspect of the legal system which makes up Roman law, and to explain its logical and cultural value in relation to the rest of the system. They pay much less attention to the genesis of regulations and to the opposing interests which might have been present when they were elaborated."[4]

[1] Anthony Kaldellis, *The New Roman Empire: A History of Byzantium* (New York: Oxford University Press, 2024), 269, 292.
[2] Cf. Bill Watterson, "Calvin & Hobbes: Just Snow," *Universal Press Syndicate*, February 22, 1990.
[3] Clifford Ando, *Law, Language, and Empire in the Roman Tradition* (Philadelphia: University of Pennsylvania Press, 2011), x.
[4] Jean Andreau, "Roman Law in Relation to Banking and Business," in *Ancient Economies, Modern Methodologies: Archaeology, Comparative History, Models and Institutions*, ed. Peter F. Bang, Mamoru Ikeguchi, and Harmut G. Ziche (Bari: Edipuglia, 2006), 210–11.

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Now, one need not agree with every facet of these critiques. Legal historians working within the continental scholarly tradition have produced a wealth of knowledge that, if handled carefully, can serve more broadly conceived historical inquiries of a social, economic, or political nature. I have learned much from these legal scholars, and my intellectual debt to them will be evident throughout this dissertation. Nevertheless, for the late antique historian there remains much that is unsatisfying about legal history as conducted in the continental mode. One reason, perhaps, is its depopulated character. Its focus is on the development of whatever legal doctrine is the object of study, often more concerned with how it was supposed to function than with how it actually did.[5] To be sure, the differences between statutes and documents of practice are sometimes studied, but traditional legal history places the focus on the formal system rather than on the historical actors.[6] Emperors and their high officials may make their appearances, but the subjects of empire, those expected to comply with new laws, too often go missing.[7] So, too, do those who advised them on how to construe the law, how to apply it to their individual circumstances, and how to seek favourable interpretations of it or changes to it.[8] It is one aim of this study to recenter the late antique empire's subjects as participants in its legal system, as individuals equipped with agency in the use of law, in its interpretation and, if need be, in its amendment.

Justinian's *Novels*

Our sixth-century legal sources offer rich evidence for such a recentering exercise. Or at least one collection of them does so, namely Justinian's *Novels*, the body of legislation promulgated by him in the period from 535 to 565.[9] Unlike the constitutions included in his *Codex repetitae praelectionis* of December 534, Justinian's *Novels* were not subjected to a thorough-going process

[5] See Bernard H. Stolte, "Not New but Novel. Notes on the Historiography of Byzantine Law," *Byzantine and Modern Greek Studies* 22, no. 1 (1998): 264–79, https://doi.org/10.1179/byz.1998.22.1.264.
[6] Janne Pölönen, "Framing 'Law and Society' in the Roman World," in *The Oxford Handbook of Roman Law and Society*, ed. Paul J. du Plessis, Clifford Ando, and Kaius Tuori (Oxford: Oxford University Press, 2016), 12.
[7] An attempt to remedy this problem was pioneered decades ago in John Crook, *Law and Life of Rome* (Ithaca, New York: Cornell University Press, 1967) but has found little echo. Caroline Humfress in a number of important contributions has endeavoured to shift focus away from doctrine toward practice, especially in litigation, but not unfortunately with respect to the financial matters addressed herein. See, *e.g.*, Caroline Humfress, *Orthodoxy and the Courts in Late Antiquity* (Oxford: Oxford University Press, 2007); Caroline Humfress, "Thinking through Legal Pluralism: 'Forum Shopping' in the Later Roman Empire," in *Law and Empire: Ideas, Practices, Actors*, ed. Jeroen Duindam et al. (Leiden: Brill, 2013), 225–50.
[8] It is disconcerting that so much recent legal historical scholarship of late antiquity, to a great extent conducted by scholars situated not in history departments but in law faculties, manifests so little interest in the actual lawyering on display in the sources.
[9] Several *Novels* are undated in the sources or otherwise of uncertain date but are nevertheless assumed to fall within this 30-year period. At least one though, *Nov.* 155, is dated to 533 and thus prior to the completion publication of the second edition of Justinian's *Codex* in December 534. In addition, at least one, and perhaps all, of the "prefectural" edicts, *Novs.* 166, 167, and 168 may also belong to this early period, as may *Novels* 151 and 152. The reason for the inclusion of these early constitutions in the *Novels* is unknown, but it is notable that they all appear at the tail end of the Greek Collection (on which, see "The Financial *Novels*" below), where the basis for inclusion becomes inscrutable. Pierre Noailles, *Les collections de novelles de l'empereur Justinien* (Paris: Recueil Sirey, 1912 and 1914), 1:133–138.

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of editorial snipping as a prelude to compilation.[10] As a result, they preserve material relevant to the circumstances of their promulgation of the sort unavailable for that earlier legislation, comparable passages of which were left on the floor of the compilers' workroom. As the legal historian Pierre Noailles demonstrated a century ago, the collections that make up our sources for the *Novels* share a common source in a *liber legum* maintained by the office of the *quaestor sacri palatii*. This was the source for bundles that were compiled at six-monthly intervals to communicate to the provinces all new legislation of general application, as well as certain other constitutions selected for inclusion.[11] Now, much about how imperial constitutions were selected for inclusion in the *liber legum* and the form thereof remains uncertain. But whatever editing the laws so included endured (if any), it was small by comparison to the process to which the constitutions compiled in the *Codex* (and those compiled in the fifth-century Theodosian Code before them) were subjected.[12] Transmission of the *Novels* outside the context of any official compilation has preserved valuable information that, for the vast bulk of earlier materials, has been shorn away.[13]

That preserved information has not, of course, been entirely ignored by Byzantinists, philologists, and scholars working in traditions other than legal history, narrowly defined. The *Novels'* opening and closing provisions, especially, have long been mined from perspectives other than the *Rechtshistorische*.[14] But the substantive legal provisions also convey precious information as to the social, economic, and political circumstances of their time. These substantive provisions, often addressing complex issues of Roman law in language marked more by rhetorical turgidity than clarity of expression, have lain relatively unexploited by general historians, who are perhaps relieved to leave their mysteries to the legal colleagues. It is one objective of this dissertation to

[10] The story of Justinian's codification of Roman law has been told many times. For a recent account, see Wolfgang Kaiser, "Justinian and the *Corpus Iuris Civilis*," in *The Cambridge Companion to Roman Law*, ed. David Johnston (Cambridge: Cambridge University Press, 2015), 119–48. See also Tony Honoré, *Tribonian* (Ithaca, NY: Cornell University Press, 1978), 40–57. As for Justinian's later legislation, an official compilation was contemplated but never prepared. See note 74 below.

[11] Noailles, *Collections*, 1:41–55 and *passim*. The basis of inclusion of laws in the *liber legum* was, for Noailles, not only substantive but also formal: *leges generales* were those for which the quaestor, rather than the *scrinia* or *pragmaticarii*, had drafting responsibility. Noailles, 1:12–13 and 24–26. Such laws were included in the *liber legum*; others were not unless designated *ad hoc*.

[12] On the editing of constitutions in the Theodosian Code, see *Cod. Theod.* 1.1.5 (excising their *inanem verborum copiam*), and of those in Justinian's *Codex*, see *Const. Haec* 2, *Const. Summa* 1, and *Const. Cordi* 3 and 4.

[13] Jill Harries, *Law and Empire in Late Antiquity* (Cambridge: Cambridge University Press, 1999), 25; David Miller and Peter Sarris, eds., *The Novels of Justinian: A Complete Annotated English Translation*, 2 vols. (Cambridge: Cambridge University Press, 2018), 1:14. Of course, some earlier materials survive in unedited (or less edited) form, such as various mid-fifth-century *Novels* and the constitutions preserved in the *Collatio* or the Sirmondian Constitutions. These survivals are invaluable for preserving those otherwise lost (see Robert M. Frakes, *Compiling the Collatio Legum Mosaicarum et Romanarum in Late Antiquity* (Oxford: Oxford University Press, 2011), 79–82) and for controlling the processes to which constitutions were subjected by their late antique compilers (see John Matthews, *Laying Down the Law: A Study of the Theodosian Code* (New Haven: Yale University Press, 2000), chap. 6). In number, however, such survivals are dwarfed by the thousands of constitutions preserved only in edited codices.

[14] The most important studies remain Herbert Hunger, *Prooimion: Elemente der byzantinischen Kaiseridee in den Arengen der Urkunden* (Vienna: Hermann Böhlaus Nachf., 1964); Giuliana Lanata, *Legislazione e natura nelle novelle giustinianea* (Napoli: Edizioni Scientifiche Italiane, 1984).

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rescue some, at least, of these provisions from such obscurity, for the scope, frequency, and ambition of Justinian's legislation all hint at its utility for gleaning insights into the circumstances of his reign.[15] To be sure, one must be cautious in using normative sources like legislation to write social, economic, or political history. There is always the problem of distinguishing what the lawmaker wanted to happen from what actually did happen. In the cautionary words of Bernard Stolte, one of the most sensitive of legal historians, "No historian in his right mind will … take information from formal sources as first-hand evidence about social realities."[16] But however well-taken that objection may be for many types of Roman law sources (very much including Justinian's *Codex* and *Digest*), it has less force with respect to the *Novels* precisely because those laws never suffered the kind of editorial cuts that those other sources did. As even Stolte has admitted, "that emperor's [i.e., Justinian's] own constitutions offer some hope of directly reflecting the social conditions of the period."[17] And so far as one can discern from the papyri, Justinian's *Novels* appear to have percolated down into practice, at least on some topics.[18]

One area where the *Novels* demonstrably reflect practice is Justinianic propaganda. In pre-industrial conditions, a main challenge to effective governance is distance, *i.e.*, the challenge of receiving information, and communicating achievements and aims, over large areas with no means of transmission even as fast as today's "snail mail." Receiving information was the easier task. As discussed in Chapter 1, the emperor could count not just on reports from officials of both state and church but also on petitions received directly from his subjects for information on conditions throughout empire, even if those reports and petitions would never be free from bias (in the case of petitions, by design). Communication of the achievements and aims was the more pressing problem and the more difficult one. But for an empire like the late antique Roman one, with its long, rich history of usurpation and other irregularities in succession to rule, it was essential. Reliance on force alone was hardly a viable long-term strategy for secure tenure on one's throne, and Justinian, like his predecessors, faced an ongoing need to assert the legitimacy of his rule.[19] Yet the means of communication by which those assertions might reach the emperor's widely dispersed subjects were few. Coins, portraits, diptychs, and other pictorial representations all had their place, of course, but they allowed for only limited, if any, text. Law-making was different: here an emperor could craft

[15] Marie Theres Fögen, "Legislation in Byzantium: A Political and a Bureaucratic Technique," in *Law and Society in Byzantium, Ninth-Twelfth Centuries*, ed. Angeliki E. Laiou and Dieter Simon (Washington, D.C.: Dumbarton Oaks, 1994), 54–61.
[16] Stolte, "Not New," 277.
[17] Bernard Stolte, "The Social Function of the Law," in *The Social History of Byzantium*, ed. John Haldon (Malden, MA: Wiley-Blackwell, 2009), 80–85. Quotation from p.80.
[18] For example, his many constitutions on the legal status of women. The classic study is Joëlle Beaucamp, *Le statut de la femme à Byzance (4e–7e siècle)*, 2 vols. (Paris: De Boccard, 1990 and 1992).
[19] Peter N. Bell, *Social Conflict in the Age of Justinian: Its Nature, Management, and Mediation* (Oxford: Oxford University Press, 2013), 272–73.

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his message with as much rhetorical care, and at as great a length, as might be thought necessary to impress the desired message upon those who would read it when posted in the cities of his realm. In a large empire characterized by slow and limited means of communication, the propaganda possibilities of legislation for (re)producing imperial legitimacy were too promising to be ignored.[20] Justinian thus framed many of his new laws as instruments for ameliorating the lot of his subjects.[21]

Matters dealt with in the surviving *Novels* range from the highest levels of the political organisation of empire—and even higher, to matters more spiritual than temporal— down into the most mundane and quotidian areas of life. Justinian thought that little lay outside his legislative grasp, and many of his constitutions evince a touching confidence about the power of law-making to change actual behaviour. That confidence was, however, shared by his subjects at least to some extent, as is shown by their well-attested practice of petitioning the emperor for relief in an infinitude of matters large and small. The *Novels* abound with references to the petitions that prompted them, as well as with claims of the emperor's responsiveness to the prayers for relief set forth therein. These portrayals of the practice of petition-and-response allow us to use the *Novels* to reconstruct the processes prompting new law-making and the occasionally conflicting interests behind them, of the sort noted by Andreau in the remark quoted above. It is one aim of this thesis to uncover those processes and those interests.

The Financial Trades

Financial law is an especially fruitful field for such an exercise. As the classical philologist and legal scholar Alfons Bürge once noted in respect of an earlier period, the Roman legal sources give us precious information for the history of banking insofar as they speak of the types of banking functions that were conducted, what was possible, and what was not.[22] We are also helped in our inquiry that the bankers and other financiers of Justinian's reign were active and, with some regularity, successful petitioners for relief favourable to their interests. As a result, bank and financial legislation is richly attested in the *Novels*, far more so than that for any other trade.

[20] Hunger, *Prooimion*, 16, 27, 203–4 and 211–14; Charles Pazdernik, "Justinianic Ideology and the Power of the Past," in *The Cambridge Companion to the Age of Justinian*, ed. Michael Maas (Cambridge: Cambridge University Press, 2005), 198–205; Bell, *Social Conflict*, 310–17. For discussion of Justinian's *Novels* as propaganda for a new vision of the empire, one emancipated from a traditionally minded bureaucracy, see M. Shane Bjornlie, *Politics and Tradition between Rome, Ravenna and Constantinople: A Study of Cassiodorus and the* Variae *527-554* (Cambridge: Cambridge University Press, 2013), 254–56.

[21] As was the case for Valentinian, Constantius and others. Sebastian Schmidt-Hofner, "Ostentatious Legislation: Law and Dynastic Change, AD 364–365," in *Contested Monarchy: Integrating the Roman Empire in the Fourth Century AD*, ed. Johannes Wienand (Oxford: Oxford University Press, 2015), 67–99; Clifford Ando, *Imperial Ideology and Provincial Loyalty in the Roman Empire* (Berkeley: University of California Press, 2000), 117–19; O. F. Robinson, *The Sources of Roman Law: Problems and Methods for Ancient Historians* (London: Routledge, 1997), 122.

[22] Alfons Bürge, "Fiktion und Wirklichkeit: Soziale und rechtliche Strukturen des römischen Bankwesens," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (romanistische Abteilung)* 104, no. 1 (August 1, 1987): 466, 557–58, https://doi.org/10.7767/zrgra.1987.104.1.465.

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The Bankers

Sixth-century Constantinople knew two trades engaged in the activities that we might characterise as banking: silversmiths (*ἀργυροπρᾶται*) and money-changers (*τραπεζῖται*). The distinction between the two had been eroding for at least a century; the extent of overlap is not fully understood but was likely significant, at least outside Egypt.[23] It is in any event the silversmiths that figure prominently in our legal sources, and it is they who are referred to as "bankers" in this dissertation. Now, the literal translation of *ἀργυροπρᾶται* is workers of silver. But by the mid-sixth century, at least, their activities had far surpassed mere silversmithy to encompass the making of loans, the issuance of guarantees and other promises of payment, and certain other matters more properly viewed as related to banking than to craftsmanship.[24] Indeed, one might question the extent to which the working of precious metal continued to feature in their activities at all, but there are indications here and there that they had not been wholly left behind.[25] Whatever the extent of artisanal activity by Constantinople's bankers in this period, no archaeological trace of them has (yet) been found.[26]

As with other late antique trades, bankers did not enjoy high social status. We can see this in a constitution of Theodosius and Valentinian III of 436 that bars all tradesmen, expressly including bankers, from provincial offices in order to preserve the honour thereof from the taint of association (*contagione*) with trade.[27] If even provincial offices were to be kept safe from such taint, so too must offices in the central and prefectural services *a fortiori*. Even if silversmiths enjoyed some

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[23] *Cod. Iust.* 11.18.1 (23 Mar. 439); Michael F. Hendy, *Studies in the Byzantine Monetary Economy c. 300-1450* (Cambridge: Cambridge University Press, 1985), 242–46; Wolfram Brandes, *Finanzverwaltung in Krisenzeiten: Untersuchungen zur byzantinischen Administration im 6.-9. Jahrhundert* (Frankfurt am Main, Löwenklau Gesellschaft, 2002), 622; Gilbert Dagron, "The Urban Economy: Seventh–Twelfth Centuries," in *The Economic History of Byzantium: From the Seventh through the Fifteenth Century*, ed. Angeliki E. Laiou, vol. 2 (Washington, D.C.: Dumbarton Oaks, 2002), 432–36. The distinction was maintained in Egypt, where the money-changers were petty tradesmen while the silversmiths performed more important functions. Raymond Bogaert, "La banque en Égypte byzantine," *Zeitschrift für Papyrologie und Epigraphik* 116 (1997): 90–91. The two professions are distinguished in the tenth-century *Book of the Eparch*, but one must be cautious in reading its evidence back to the sixth century. See the discussion at notes 52–55 below.

[24] *Nov.* 136 c.1, c.3 (1 Apr. 535); *Edict* 9 c.4, c.5 (undated); *Edict* 7 c.7 (1 Mar. 542); *P.Cair.Masp.* II 67126 (7 Jan. 541).

[25] For example, in the provision of *Nov.* 136 c.3 on the banking practice of delivering or selling valuables (SK 693/4–5). See Raymond Bogaert, "Changeurs et banquiers chez les Pères de l'Église," *Ancient Society* 4 (1973): 239–70; S.J.B. Barnish, "The Wealth of Julianus Argentarius: Late Antique Banking and the Mediterranean Economy," *Byzantion* 55, no. 1 (1985): 9 n.35; and 17 n.96. On the difficulty of disentangling financial and artisanal functions, see Jean-Pierre Sodini, "L'artisanat urbain à l'époque paléochrétienne (IVe–VIIe s.)," *Ktéma: civilisations de l'Orient, de la Gréce et de Rome antiques* 4 (1979): 95. Cf. Jean-Michel Carrié, "Les métiers de la banque entre public et privé (IVe–VIIe siècle)," in *Finanza e attività bancaria tra pubblico e privato nella tarda Antichità. Definizioni, normazione, prassi. Atti dell'Accademia Romanistica Costantiniana, XII Convegno Internazionale (Perugia, 11–14 ottobre 1995)* (Napoli, 1998), 87–93, for the claim that it was not that functions were mixed but that nomenclature was confused. Carrié does not address how *Nov.* 136 affects his argument.

[26] Isabella Baldini and Zuzanna Nowak, "Ceti artigiani e modi di produzione nell'orificeria protobyzantina," in *Luoghi, artigiani e modi di produzione nell'oreficeria antica*, ed. Isabella Baldini and Anna Lina Morelli (Bologna: Ante quem, 2012), 253–75. The city is nevertheless generally assumed to have been a center of their artisanal production. Sodini, "L'artisanat urbain," 96.

[27] *Cod. Iust.* 12.57.12 c.3 (3 Apr. 436).

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slight preference over other tradesmen, they still figured squarely amongst them, lower in status than any official. Eventually, though, the strains of continuous warfare in the west, Persian invasion in the east, plague and, as we are better coming to understand, environmental crisis in the 530s led to greater prominence for those who could arrange the funds Justinian needed. The rank of *vir honestus* most often given to bankers in documents of practice of the early sixth century gradually gave way to the more distinguished rank of λαμπρότατος/*clarissimus*, but that may merely reflect Justinianic "grade inflation."[28] Surer evidence appears in the form of the emperor's modifications to the rules on eligibility for office. Bankers of the capital—uniquely among the trades—won the distinction of being allowed to acquire civil *militia* early in late 528 or 529.[29] The prize was not merely theoretical, for some bankers actually did hold office. We know this because *Novel* 136 of 535 addresses the problem of how the offices held by a banker might be distrained upon by his unpaid creditors.[30] In addition, the slightly later *Edict* 9 reveals that at least some borrowers sought to evade the 8% *p.a.* cap on interest rates that bankers could charge for loans by arguing that bankers who held office should be able to charge only the lower rates available to officials.[31]

Some have argued that such offices as bankers acquired were mere sinecures.[32] We should not be so sure, however, or least not sure that such offices were any more sinecures than were imperial offices generally.[33] While some officials might work through the night to attend to business, John Lydus reports that many might be idle for lack of business.[34] John's own official

[28] A.A. Chekalova, "Константинопольские аргиропраты в эпоху Юстиниана," *Bizantiyskiy Vremennik* 34 (1973): 18; Barnish, "Wealth," 7 with nn.21 and 22.
[29] *Cod. Iust.* 12.34 cc.1–2 (of 528 or 529).
[30] *Nov*. 136 c.2. See the discussion under the caption "*Rights to a Borrower's Assets: Purchased Offices*" in Chapter 2. For earlier provisions relating to such offices that bankers might acquire for their sons or other relatives, or for third parties, see *Cod. Iust.* 8.13.27 (1 June 528).
[31] *Edict* 9 c.6 (undated). The cap had been imposed in late 528, as part of Justinian's reregulation of interest rates in *Cod. Iust.* 4.32.26 c.2 (13 Dec. 528). This constitution limited the rates of interest that could be charged on ordinary cash loans to 4% *p.a.* for lenders for *illustres*, 8% for lenders that were bankers or in charge of workshops, and 6% *p.a.* otherwise. The literature on this rate regime is substantial. Gustav Billeter, *Geschichte des Zinsfusses im griechisch-römischen Altertum bis auf Justinian* (Leipzig: Teubner, 1898), 331 ff. and Grégoire Cassimatis, *Les intérêts dans la législation de Justinien et dans le droit byzantin* (Paris: Recueil Sirey, 1931), 49 ff., though in need of updating, remain foundational. Among more recent studies, see Mariagrazia Bianchini, "La disciplina degli interessi convenzionali nella legislazione giustinianea," in *Studi in onore di Arnaldo Biscardi*, vol. 2 (Milan: Istituto Editoriale Cisalpino-La Goliardica, 1982), 389–426, and now Giovanni Luchetti, "Il prestito di denaro a interesse in età giustinianea," in *Nuovi contributi di diritto tardoimperiale e giustinianeo* (Bologna: Bononia University Press, 2021), 71–97.
[32] *E.g.*, A.H.M. Jones, *The Later Roman Empire, 284–602: A Social Economic and Administrative Survey* (Norman, Okla.: University of Oklahoma Press, 1964), 1:571, 2:864 and 2:871; Barnish, "Wealth," 25. That bankers' posts were sinecures might at first glance be thought to find support in the evocative title of given to the lending banker, Anastasius, in a papyrus from Aphrodito dated to Justinian's reign: καθοσιομένος καστρανιανὸς [τῆς] θείας τραπέζης, or "Attendant of the Divine Table." *P.Cair.Masp*. II 67126, l.61–62 (7 Jan. 541), with the edits suggested by Dimitri Gofas, "La banque lieu de rencontre et instrument d'échange à Byzance," *Cahiers du Centre Gustave Glotz* 7 (1996): 149 n.25. That title more likely refers to a dining table than to one used by a money-changer—Jones even translated it as "Waiter" (Jones, *LRE*, 864)— and as such might be viewed as trivial, but we should bear in mind that, even in modern Britain, a member of the order of the "Bath" would enjoy lofty status indeed.
[33] Cf. Jones, *LRE*, 604 ("The service abounded in sinecure posts").
[34] Particularly under John the Cappodocian. John Lydus, *De mag*., 3.66 [=Anastasius C. Bandy, ed., *Ioannes Lydus: On Powers, or, The Magistracies of the Roman State* (Philadelphia: American Philosophical Society, 1983), 236].

DOI: 10.14754/CEU.2024.02

duties hardly taxed him, at least after his first, "Cinderella," year in the service: "I passed my life in ease."[35] Even the emperor noticed, without any hint of disappointment at what might anachronistically be called lack of work ethic: "although he is properly discharging the service in your Excellency's courts of justice, he has chosen along with it both to spend his life among books and to dedicate his whole self to scholarship."[36] John's life of ease evidently did not prevent him from fulfilling his official duties "ὀρθῶς" (*i.e.*, properly). Hence, it ought not surprise us that bankers would seek such offices: they were not so much in the nature of jobs but rather in the nature of assets, from which one could derive income by way of salary, fees, and *sportulae*.[37] Of course, imperial office conferred not just prospective material gain but also benefits in terms of social status, as well as network opportunities for the further acquisition of both, by the banker himself or by members of his family. Other advantages of office might, depending on individual circumstance, extend to what we might call "inside information"—knowledge obtained in one's official capacity that might be used profitably in one's private capacity—or perhaps even "influence peddling" — say, by arranging the appointment of favourably inclined adjudicators over cases of interest to one's trade. The opportunities to take such advantage depended, of course, on the nature of the office and the gravity of the duties with which the office-holder was charged.

We should not, therefore, assume that bankers were limited to lowly office. Which is not to say that they regularly held higher ones.[38] One financier, however, surely did: Peter Barsymes. Peter was a former banker or perhaps rather money-changer who rose to occupy at least great offices of state—*comes sacrarum largitionum* in 542, master of offices in 546, and twice *praefectus praetoriae Orientis.*[39] Procopius' account of his character, while entertaining, must be read with caution in light of the historian's poorly concealed class, or more precisely status, prejudices.[40] Peter's rise is thus a key piece of evidence for the rise of financiers to prominence, or at least to greater prominence than other trades, in the middle part of Justinian's reign.

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[35] John Lydus, *De mag*., 3.30 (ἐν ἀνέσει τὸν βίον παρέδραμον) [=Bandy, 178]. All translations of Lydus herein are, with minor modifications, those of Bandy.

[36] John Lydus, *De mag*., 3.29 (καίτοι τῆς στρατείας αὐτῷ τῆς ἐν τοῖς δικαστηρίοις τῆς σῆς ὑπεροχῆς ὀρθῶς φερομένης, ἑλέσθαι μετ' αὐτῆς καὶ τὸν ἐν βιβλίοις ἀσκῆσαι βίον καὶ ὅλον ἑαυτὸν ἀναθεῖναι τοῖς λόγοις) [=Bandy, 178].

[37] Sam Barnish, A.D. Lee, and Michael Whitby, "Government and Administration," in *The Cambridge Ancient History: Late Antiquity: Empire and Successors*, ed. Averil Cameron, Bryan Ward-Perkins, and Michael Whitby, vol. XIV, The Cambridge Ancient History (Cambridge: Cambridge University Press, 2000), 170.

[38] As Gunnar Mickwitz once surmised. G. Mickwitz, "Die Organisationsformen zweier byzantinischer Gewerbe im X. Jahrhundert," *Byzantinische Zeitschrift* 36 (1936): 64.

[39] John Robert Martindale, *The Prosopography of the Later Roman Empire. Vol. III: A.D. 527–641*, vol. 3 (Cambridge: Cambridge University Press, 1992), 999–1002, *s.v. Petrus qui est Barsymes* 9. Peter was the addressee of at least 11 *Novels*, in his various capacities: *Novs.* 118 (16 July 543), 125 (15 Oct. 543) (addressee supplied from Athanasius), 119 (20 Jan. 544); 120 (9 May 544); 124 (15 June 544), 130 (1 Mar. 545), 131 (18 Mar. 545), 128 (24 June 545), 123 (1 May 546), and 159 (1 June 555), and *Edict* 11 (27 Dec. 559); Antonio Díaz Bautista, *Estudios sobre la banca bizantina: negocios bancarios en la legislación de Justiniano* (Murcia: Universidad de Murcia, 1987), 116–17 n.22.

[40] Procop., *Hist. Arcana* 22.3–11 [=Jakobus Haury and Gerhard Wirth, eds., *Procopii Caesariensis Opera Omnia*, corrected ed., vol. 3 (Leipzig: Teubner, 1963), 134–36]. Procopius' term for his profession, ἀργυραμοιβός, is likely an unflattering synonym for one or the other of the two trades.

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In addition to offices, we also have legislative evidence for the growing importance of the capital's bankers in the middle years of Justinian's reign.[41] Each of *Novel* 136 of 535, *Edict* 7 of 542, and the intervening *Edict* 9 provides accommodations to prayers for relief lodged by them. As discussed more fully below, many who have studied the laws that ensued from the bankers' petitions have concluded that they amount to what is effectively a *Sonderrecht*, a body of law exclusively for the benefit of those active in the banking trade.[42] Perhaps more importantly for present purposes, these pragmatic sanctions abound with statements as to the benefits bankers provide "throughout the realm" "to virtually all who need assistance" and as to the importance of their activities to the "public good."[43] These undoubtedly propagandistic claims can be explained, at least in part, by Justinian's need for cash to fund his building programme and, especially, his wars.

By Justinian's final years, the status of bankers had risen to the extent that some may well have come to rue the increased attention it drew toward them.[44] In 562, at least a few bankers were disgruntled to the point that they fostered and funded a conspiracy (thwarted) to take Justinian's life.[45] While the reasons for the conspiracy are not precisely known, it is likely that one, perhaps even a main, cause of grievance was Justinian's exaction of forced loans to fund his assorted projects. These loans even left their mark in poetry: The poet Corippus (*fl.* 550–565) portrays the lenders—bankers likely among them—brandishing unpaid loan documentation as they beseeched the newly crowned Justin II (565–578).[46] In his account of Justin's accession, Corippus confirms what we might already have surmised about the conduct of public events of the period from other data, namely that crowds were precisely serried by status and group membership.[47] In this vein, the tenth-century *De Cerimoniis* relates that, in a procession by Justinian in the year 559, bankers

[41] Bankers of the capital likely enjoyed greater influence than their counterparts in the provinces. Chekalova, "Константинопольские аргиропраты," 16.
[42] See the discussion at note 93 below.
[43] *Nov.* 136 pr. (SK 691/10–12: αὐτοὶ πολλοῖς ἑαυτοὺς παρεχόμενοι χρησίμους, ἐξ ὧν ἀντιφωνήσεις καὶ δανείσματα ὑπέρχονται παντὸς κινδύνου μεστά); c.1 (SK 691/23: διὰ γὰρ τὴν τῶν ἀργυροπρατῶν περὶ τὰ κοινὰ συμβόλαια σπουδὴν); c.2 (SK 692/21–23: φιλοτιμούμεθα διὰ τὸ κοινὸν τῆς αὐτῶν λυσιτελείας, ἣν παρέχονται τοῖς συναλλάγμασι, πολλοῖς ὁμιλοῦντες κινδύνοις ἵνα τὰς ἑτέρων θεραπεύσαιεν χρείας); and c.4 (SK 693/17–18: τοὺς γὰρ πᾶσι σχεδὸν τοῖς δεομένοις ἑτοίμους ὄντας βοηθεῖν); *Edict* 9 c.2 pr. (SK 773/22–23: καὶ τῆς κοινῆς λυσιτελείας προβεβλῆσθαι); *Edict* 7 c.4 (SK 765/27–28: αὐτῶν οὐκ ὀλίγοις τισίν, ἀλλὰ τοῖς ἐν πάσῃ σχεδὸν τῇ πολιτείᾳ γινομένοις συναλλάγμασιν ὑπουργούντων); and c.8.1 (SK 767/19–21: οἷα τούτου … τοῖς ἁπάσης τῆς πολιτείας συναλλάγμασι πρέποντος, ὧν τὰ μέγιστα καὶ ἀναγκαιότατα διὰ τοῦ προειρημένου ἀεὶ συστήματος γίνεται).
[44] Chekalova, "Константинопольские аргиропраты," 18–19.
[45] John Malalas, *Chron.*, 18.141 [493–5] [=Hans Thurn, ed., *Ioannis Malalae Chronographia* (Berlin: W. de Gruyter, 2000), 425–29]; Theophanes, *Chron.*, a.m. 6055 [=Carolus De Boor, ed., *Theophanis Chronographia*, vol. 1 (Leipzig: Teubner, 1883), 237–38], Paul the Silentiary, *Ekphrasis tou naou tes Hagias Sophias*, 24 ff. [=Claudio De Stefani, ed., *Paulus Silentiarius: Descriptio Sanctae Sophiae, Descriptio ambonis* (Berlin: De Gruyter, 2011), 2]. On the conspiracy and its implications, see Mischa Meier, *Das andere Zeitalter Justinians: Kontingenzerfahrung und Kontingenzbewältigung im 6. Jahrhundert n. Chr.* (Göttingen: Vandenhoeck & Ruprecht, 2003), 264–73.
[46] Corippus, *In Laudem Iustini*, 2.361–378. On the likelihood that the petitioning creditors were bankers, or "businessmen" of some sort, cf. Averil Cameron, ed., *Flavius Cresconius Corippus: In Laudem Iustini Augusti Minoris Libri IV* (London: Athlone, 1976), 176–77; Barnish, "Wealth," 26.
[47] Corippus, *In Laudem Iustini*, 4.68; Cameron, *Corippus*, 194.

DOI: 10.14754/CEU.2024.02

enjoyed a position of some preference in those ranks, behind what we might term the public sector but prior to merchants and all other guilds.[48] The tenth-century *Book of the Eparch* likewise gives the silversmiths and their colleagues the money-changers pride of place before the other guilds of the capital, behind only the notaries.[49]

Their Guild

Like other trades active in the city, the bankers of Constantinople were organized in a guild.[50] Guilds were a long-standing feature of late antique empire, though their objectives and roles differed from the associations of the later medieval west that go by the same name in English. The principal distinguishing characteristic was their respective relationship to state authority: although the late-antique guilds of Constantinople coordinated private activity, they did so subject to more state oversight than their later, western counterparts. Guild formation required imperial approval; their activities were supervised by the *praefectus urbi*; they could be called upon to implement imperial economic policy; and their members were subject to potentially burdensome duties.[51] Though originally social in function, guilds developed into institutions that could, among other things, facilitate petitioning by their members for relief of various kinds, and they were likely the initiators of much regulation governing their members. As discussed at length in Chapters 2 and 3, such lobbying by the bankers especially is well attested for sixth-century Constantinople: All three of Justinian's surviving pragmatic sanctions on the topic of bankers' contracts (*Novel* 136; *Edict* 9; *Edict* 7) were prompted by their own petitions.

Sixth-century sources tell us little about guilds of Constantinople in general or the bankers' guild in particular beyond what we can glean from these pragmatic sanctions. To be sure, there are scattered references to guilds elsewhere in the *Novels*, but these reveal little. The *Codex* too is less

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[48] Ann Moffatt and Maxeme Tall, trans., *Constantine Porphyrogennetos: The Book of Ceremonies* (Canberra: Australian Association for Byzantine Studies, 2012), 497 l.14 to 498 ll.13, esp. 498 ll.2–5.

[49] Johannes Koder, ed., *Das Eparchenbuch Leons des Weisen* (Wien: Verlag der Österreichischen Akademie der Wissenschaften, 1991), 84–91.

[50] *Nov.* 136 and *Edict* 9 refer to the association of bankers lodging the petition that prompted them as σύστημα; *Edict* 7 refers to it both as a σύστημα [c.1 (SK 764/13), c.2 (SK 764/21), c.5 (SK 766/5), c.7 (SK 766/19), and c.8.1 (SK 767/15 and SK 767/21)] and as a σωματεῖον [pr. (SK 764/6), c.2 pr. (SK 764/18), c.3 (SK 765/4), c.4 (SK 765/20 and 26), c.7 (SK 766/25), and c.8 (SK 767/11)]. The latter term appears nowhere else in the *Novels*. Whatever the distinction between the forms of organisation may referred to by the two terms in the tenth and later centuries (on which, see George C. Maniatis, "The Domain of Private Guilds in the Byzantine Economy, Tenth to Fifteenth Centuries," *Dumbarton Oaks Papers* 55 (2001): 339–69), the terms are indistinguishable in *Edict* 7, as shown by its interchangeable use of them, as well as by its confirmation of prior relief granted to the same petitioners, which can only refer to *Novel* 136 and *Edict* 9. *Edict* c.7 (SK 767/4).

[51] Prior approval: *Dig.* 3.4.1 pr. Supervision by *praefectus urbi*: *Cod. Iust.* 1.28.4 (15 Apr. 391); Gofas, "Banque," 148. Implementing policy: Procop., *Hist. Arcana* 25.13 [=Haury and Wirth, *Procop. vol. 3*, 3:155]; Dagron, "Urban Economy," 405–6. State oversight and public services: Albert Stöckle, *Spätrömische und byzantinische Zünfte: Untersuchungen zum sogenannten ἐπάρχικον βιβλίον Leos des Weisen* (Leipzig: Dieterich, 1911), 11–16; Jones, *LRE*, 1:695; Charlotte Roueché and Nathalie de Chaisemartin, *Performers and Partisans at Aphrodisias in the Roman and Late Roman Periods: A Study Based on Inscriptions from the Current Excavations at Aphrodisias in Caria* (London: Society for the Promotion of Roman Studies, 1993), 125–26; Bogaert, "La banque en Égypte byzantine," 90–91.

DOI: 10.14754/CEU.2024.02

forthcoming than one might hope. In the absence of meaningful contemporary information, the temptation to reach to subsequent sources and read their evidence back to the reign of Justinian has proved irresistible to some. The *Book of the Eparch,* in particular, has been a favoured source.[52] But earlier scholarship's blithe confidence of continuity between the guilds of the sixth century and those of the tenth is misplaced.[53] With respect the bankers, in particular, the crude financial operations described in the *Book of the Eparch* show a marked decline in sophistication from the activities known from the legislation of Justinian examined in this dissertation.[54] In addition, the long-distance banking operations known from a nearly contemporary papyrus are unthinkable within the framework described in the 10th-century source.[55] Indeed, the *Book of the Eparch* may not even be a sure guide to its own time, much less to preceding centuries, in that it omits all reference to other trades known to be active at Constantinople.[56]

One hundred years ago, it was widely thought that the guilds in general, and that of the bankers in particular, acted as manifestations of the state, generally serving as some sort of quasi-functionaries.[57] Such interpretations were prevalent not just for the bankers' guild but extended right down to the level of the individual. Of the two best attested individuals, Peter Barsymes is certainly notable for his governmental service.[58] The other well attested banker of the period is Julianus Argentarius who, though of eastern origin, funded San Vitale and so much else of note in Ravenna.[59] Older scholarship held that Julianus was a functionary of, or at least owed his prosperity to, Justinian's administration.[60] Such views are now rightly recognised as outdated. Of Peter Barsymes, we know almost nothing about his early money-changing activities beyond Procopius' prejudicial characterisation of them as tawdry, and even less about the relationship of those

[52] Text and commentary in Koder, *Eparchenbuch*.
[53] *E.g.*, by J.-P. Waltzing, *Étude historique sur les corporations professionnelles chez les Romains depuis les origines jusqu'à la chute de l'Empire d'Occident*, vol. 2 (Louvain: Charles Peeters, 1896), 347–48; Stöckle, *Spätrömische Zünfte*.
[54] Rules governing the sliversmiths appear in ch. 2 of the *Book of the Eparch*; ch. 3 deals with the money-changers. See Koder, *Eparchenbuch*, 84–91. That said, the relevant regulations of the *Book of the Eparch* do not appear solely in those chapters, for at least some of the provisions appearing in the chapter on bakers (ch. 18)—such as the ban on exercising more than one trade—are generally assumed to have applied to all trades. Michel Kaplan, "Les artisans dans la société de Constantinople aux VIIe–XIe siècle," in *Byzantine Constantinople: Monuments, Topography, and Everyday Life*, ed. Nevra Necipoğlu (Leiden: Brill, 2001), 255–56.
[55] See *P.Cair.Masp.* II 67126 (7 Jan. 541); James G. Keenan, "A Constantinople Loan, A.D. 541," *The Bulletin of the American Society of Papyrologists* 29, no. 3/4 (1992): 175–82; Gofas, "Banque," 149–50; Bogaert, "La banque en Égypte byzantine," 125.
[56] Michel Kaplan, "The Producing Population," in *The Social History of Byzantium*, ed. John Haldon (Malden, Mass.: Wiley-Blackwell, 2009), 159–62, giving the examples of "metallurgy, glass-making, … pottery, … leather and textiles, without even mentioning armaments and naval construction." (quotation from p. 159).
[57] An extreme argument for the state function of late antique bankers can be found at Georges Platon, *Les banquiers dans la législation de Justinien (première partie)* (Paris: Recueil Sirey, 1912), 16–25. For another interpretation placing undue weight on the state's instrumentalisation of guilds generally, see Stöckle, *Spätrömische Zünfte*.
[58] See note 39 above.
[59] On Julianus' architectural and inscriptional legacy, see Friedrich Wilhelm Deichmann, *Ravenna: Hauptstadt des spätantiken Abendlandes*, vol. II, Kommentar, 2. Teil (Wiesbaden: Fritz Steiner, 1976), 3–33.
[60] See the collection of literature at Barnish, "Wealth," 5–6 at nn.2 and 5.

DOI: 10.14754/CEU.2024.02

activities to state power.[61] As for Julianus, whilst we know precious little about how, exactly, he earned his money,[62] it seems that his success owed less to public grift than private enterprise, perhaps by financing trade from the east or by the exchange of coin.[63] At a more general level, for bankers as a trade, it is now widely accepted that, though they held the occasional office, they in no way formed a structural part of imperial governance.[64] And the guild system as a whole has also been extricated by recent historiography from theories that it acted as a mere appendage of the state and has been put on a more private-sector footing.[65]

If, in fact, if our knowledge of the actual activities in which the guild of late antique bankers engaged is not as fulsome as we might wish, one activity of which we are informed is their lobbying, *i.e.*, petitioning the authorities for legal changes favourable to their interests. The bankers' lobbying efforts are richly attested in the laws discussed in subsequent chapters, in particular in their many references to the petitions that prompted them. As Chapter 1 shows, petitioning the emperor was something nearly any subject could do and did do, sometimes successfully, sometimes not. The guild of the bankers of Constantinople, as is evidenced by Chapters 2 and 3, were no different, save perhaps in the success that they increasingly enjoyed with the passage of time.

Other Financiers

We should not think that the bankers and the money-changers made up the whole of what we might call the financial sector of sixth-century Constantinople. Indeed, if one looks at the extension of loans in particular, they were certainly not the only providers of that service or even the most important ones. The topic of who supplied loan capital, in what amounts, to whom, and for what purposes is a vast one, better left for future research, but it can safely be said that bankers had much, and much better capitalised, competition in the business of providing loans.[66] One niche form

[61] Procop., *Hist. Arcana*, 22.3–11 [=Haury and Wirth, *Procop. vol. 3*, 3:134–36]. From what Procopius tells us of Peter, he was a Syrian and thus perhaps unlikely to be a member of the Constantinopolitan guild in any event. Procop., *Hist. Arcana*, 22.3–11.

[62] Salvatore Cosentino, "Le fortune di un banchiere tardoantico: Giuliano argentario e l'economia di Ravenna nel VI secolo," in *Santi Banchieri Re: Ravenna e Classe nel VI secolo San Severo il tempio ritrovato*, ed. Andrea Augenti and Carlo Bertelli (Milano: Skira, 2006), 43.

[63] Barnish, "Wealth," 5–6; Cosentino, "Le fortune," 43. Trade: Barnish, "Wealth," 12–17. Coin exchange: Salvatore Cosentino, "Banking in Early Byzantine Ravenna," *Cahiers de recherches médiévales et humanistes*, no. 28 (December 31, 2014): 250, https://doi.org/10.4000/crm.13746.

[64] For the evidence, see Barnish, "Wealth," 24–26. See also Carrié, "Métiers," 85–86 and 92; Cosentino, "Banking," 247. Wolfram Brandes has attempted to breathe new life into older views in, *e.g.*, Brandes, *Finanzverwaltung*, 624–25, and Wolfram Brandes, "Anmerkungen sur Rolle der argentarii/ἀργυροπρᾶται zur Zeit Justinians. Erfüllungsgehilfen kaiserlichen Finanzpolitik und Hochverräter," in *Antecessor: Festschrift für Spyros N. Troianos zum 80. Geburtstag*, ed. Vassiliki A. Leontaritou, Kalliopi (Kelly) A. Bourdara, and Eleftheria Sp. Papagianni (Athens: Ant. N. Sakkoulas Verlag, 2013), 217–26. These efforts are unpersuasive, as the practice of Egyptian bankers taking deposits from tax collectors there (reported at Bogaert, "La banque en Égypte byzantine," 90–93) only demonstrates that the state and its officials might be bank clients, not that bankers occupied a "*halbstaatliche Position*" (Brandes, *Finanzverwaltung*, 624).

[65] See Jean-Michel Carrié, "Were Late Roman and Byzantine Economies Market Economies? A Comparative Look at Historiography," in *Trade and Markets in Byzantium*, ed. Cécile Morrisson (Washington, D.C.: Dumbarton Oaks, 2012), 13–26.

[66] Hendy, *Studies*, 247.

DOI: 10.14754/CEU.2024.02

of finance, maritime lending, features in the *Novels* and in a manner that potentially sheds much light upon lobbying by financial interests, much as the banking *Novels* do. This subject is taken up in Chapter 4. Though we cannot be sure, the risk profile of these loans suggests that they were the province of specialised lenders, who were able by virtue of prior experience and sector knowledge to weigh the risk of individual ventures, and not members of the bankers' guild or of any other.

Their Petitions

That the guild of bankers of Constantinople was a lobbying force to be reckoned with cannot be doubted.[67] Three pragmatic sanctions, *Novel* 136, *Edict* 9, and *Edict* 7, from the period 535 through 542 illustrate that the bankers were able to lobby collectively to seek, and win, legal changes favourable to their interests. Physical proximity fostered the ability to act together,[68] but the guild also facilitated collective action. The first two finance-related laws studied in this dissertation tell us that they were prompted by petitions from members of the bankers' guild. *Novel* 136 and *Edict* 7 are, however, careful to describe the petitioning guild members as a collective rather than as a corporate body. That is, it is not the guild as an entity (singular) that makes the petition but rather those enrolled in it (plural), acting together.[69] The plurality of the petitioners is highlighted both in the prefaces of *Novel* 136 and *Edict* 7, and in other provisions.[70] Even in those few instances where the guild is referred to in the singular, the sense of a collective, rather than a corporate entity, is manifest.[71] The undated *Edict* 9 similarly takes up the subject of bankers' contracts. It, too, was prompted by bankers' petitions.[72]

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[67] A point noted long ago by Gustave Cruchon, *Les banques dans l'antiquité: étude historique, économique et juridique* (Paris: G. Pedone-Lauriel, 1879), 234, and reasserted by many scholars since.

[68] The bankers' shops were, if we can read back later evidence on a point of physical location, all situated on small stretch of the *Mese* between the Constantine's Forum and Lausus' Palace. *Book of the Eparch* 2.10 [=Koder, *Eparchenbuch*, 88]; Theophanes, *Chron.*, a. m. 6022 [=De Boor, *Theophanis Chronographia*, 1:184]; Speros Vryonis, Jr., "Byzantine ΔΗΜΟΚΡΑΤΙΑ and the Guilds in the Eleventh Century," *Dumbarton Oaks Papers* 17 (1963): 299. The guild was undoubtedly helpful in coordinating collective action, but probably not essential to it, at least in some instances, for example when the bankers hid their wealth from the usurper Gainas as he advanced to seize it. Sozomen, *Eccles. Hist.* 8.4.11 [=Joseph Bidez and Günther Christian Hansen, eds., *Sozomenus Kirchengeschichte*, 2., durchges. Aufl. (Berlin: Akademie Verlag, 1995), 355].

[69] For illustrative purposes, one might compare with the practice in the United Kingdom of referring to the Government, or the Cabinet, or a corporate board, in the plural. The collective nature of the city's guilds also in later periods is noted by George C. Maniatis, "The Guild System in Byzantium and Medieval Western Europe: A Comparative Analysis of Organizational Structures, Regulatory Mechanisms and Behavioral Patterns," *Byzantion* 76 (2006): 538.

[70] *Nov.* 136 pr. (SK 691/9–10); *Edict* 7 pr. (SK 764/6). Other provisions emphasizing collectivity: *Nov.* 136 c.2 (SK 692/21); and *Edict* 7 c.1 (SK 764/12–13); c.2 pr. (SK 764/18); c.3 (SK 765/4); c.5 (SK 766/5); c.7 (SK 766/19 and SK 766/25); c.8 pr. (SK 767/10–11); c.8.1 (SK 767/15–16 and SK 767/21).

[71] *Nov.* 136 pr. (SK 691/14: τὸ κατ' αὐτοὺς σύστημα); *Edict* 7 c.2 (SK 764/21: τὸ κατ' αὐτοὺς σύστημα) and c.4 (SK 765/26: τὰ τῷ προειρημένῳ σωματείῳ καὶ τοῖς αὐτῶν συναλλάκταις παρεχόμενα) (emphases supplied).

[72] The preface to *Edict* 9, might be thought to offer a contrast in regard to its underlying petition, inasmuch as it contains a passage that speaks in terms of the bankers acting as a corporate body. *Edict* 9 pr. (at SK 772/7: Τὸ κοινὸν τοῦ συστήματος τῶν ἀργυροπρατῶν τῶν ἐπὶ ταύτης τῆς μεγάλης πόλεως ὄντων ἱκέτευσε). But several substantive provisions of that *Edict* make clear that the petitioners for it were plural. See especially *Edict* 9 c.8 (SK 776/8: τῶν δεήσεων ἤτησαν), as well as c.3 (SK 774/6: ἐδίδαξαν, ὥς τινες ἐξ αὐτῶν) and c.5 (SK 774/28: ἤτουν).

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Of the non-banking laws discussed here, those on maritime loans, *Novel* 106 provides an exensive account of the preliminaries leading up to it, including the information that it was prompted in part by a petition. But of the petitioners themselves we know only their names, Peter and Eulogetus, and that they made their business from extending maritime loans. For reasons discussed in Chapter 4, it is unlikely that they were bankers or members of the bankers' guild and that they were more in the nature of specialist lenders. The repealing statute, *Novel* 110, tells us much less, stating only "petitions were made", with no information given as to the source[s] thereof.

The Financial *Novels*[73]

The *Novels*, unlike the earlier imperial constitutions included in the second edition of Justinian's *Codex*, the *Codex repetitae praelectionis*, do not survive in official compilation—what we have instead are the remains of private collections, existing in different forms in different manuscripts.[74] The most important source is the so-called Greek Collection, which collects 168 different laws, two of which are repetitions and two of which are counterparts in Greek and Latin, respectively, for a total of 165 distinct enactments. The Greek Collection consists of a core collection of more-or-less regularly compiled laws of 120 constitutions up to around the year 544, with three later supplements, each less regular than the last.[75] It is known to us principally through two manuscripts, the Venetian *Cod. Marc. Gr.* 179 of the 12th century (Kroll's *M*) and the inferior Florentine *Cod. Laur. Gr.* plut. LXXX 4 of the 14th century (Kroll's *L*). Each of these manuscripts has a later copy, in the Vatican and Bologna, respectively. *M* includes an annexure of 13 *Edicts*, for several of which, including *Edict* 7, it is the sole source.[76] A second important source is the so-called *Authenticum*, a Latin version of 133 laws, most of them originally issued in Greek; it survives in numerous manuscripts. While the *Authenticum* gives the full text of the *Novels* included in it and not just summaries, its Latin is of such poor quality as to rule out the possibility of it being an official compilation.[77] The earliest source is the *Epitome Juliani*, a compilation in Latin of

[73] The following discussion of our sources for the *Novels* does not purport to be complete but only to highlight information essential for understanding the treatment of the bank and finance-related *Novels*. For information on the textual transmission of the *Novels* as a whole, see especially Kroll's preface to Rudolf Schoell and Wilhelm Kroll, eds., *Novellae*, 4th ed., vol. 3, *Corpus Iuris Civilis* (Berlin: Weidmann, 1912) (translated from Latin into English in abridged form at David J.D. Miller and Timothy G. Kearley, "Wilhelm Kroll's Preface to Justinian's Novels: An English Translation," July 23, 2013, http://dx.doi.org/10.2139/ssrn.2297619), as well as Noailles, *Collections*; Timothy G. Kearley, "The Creation and Transmission of Justinian's Novels," *Law Library Journal* 102, no. 3 (2010): 377–97.

[74] An official compilation of Justinian's post-codification legislation was contemplated in 534 (*Const. Cordi* 4) and ordered in 554 (in c.11 of *App.* 7 (SK 800/38–42), aka the *pro petitione Vigilii* or Pragmatic Sanction) but none was prepared. Paul Krüger, *Geschichte der Quellen und Litteratur des Römischen Rechts* (Leipzig: Duncker & Humblot, 1888), 353; Caroline Humfress, "Law and Legal Practice in the Age of Justinian," in *The Cambridge Companion to the Age of Justinian*, ed. Michael Maas (Cambridge: Cambridge University Press, 2005), 175.

[75] On the formation of the Greek Collection, its core, and its supplements, see above all Noailles, *Collections*, chap. 4.

[76] While *Edict* 7 and some other *Edicts* in the set of 1–13 are known to us through this manuscript, they did not form part of the Greek Collection also included in it. Noailles, 1:244–249, 2:44; Leopold Wenger, *Die Quellen des römischen Rechts* (Wien: Österreichische Akademie der Wissenschaften, 1953), 673; Miller and Sarris, *Novels*, 1:17.

[77] In the words of Kroll's preface (p. vi), it "bristles with idiotic errors" (*vitiis stultissimis scatet*). Scheltema's conjecture that the infelicities reflect translation of the Greek originals *kata poda* is attractive. Herman Jan Scheltema,

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summaries of 122 distinct *Novels* plus two repeated ones.[78] It is thought to have been compiled in the sixth century as an aid to Latin-speaking students.[79] There are also other, less important sources, of which the most relevant to the present inquiry are two epitomes compiled as teaching or practice aids by the sixth-century jurists Athanasius of Emesa and Theodore of Hermopolis, respectively.[80] These track the Greek Collection closely, suggesting use of a common source collection, which may have been an earlier version of the Greek Collection itself.[81] Among the later sources, less sound for reconstructing the text of the *Novels* as a whole but useful in places, those relevant to the matters discussed in this dissertation are the synopsis of Justinian's *Novels* found in the *Codex Athos Pantokrator* 234, fol. 505r–522r[82] and, for *Edict* 9, fragments inserted into the epitome of the *Procheiron* contained in the so-called *Anonymous Bodleian* 3399.[83]

Each of the banking and finance-related *Novels* discussed in this dissertation comes to us by a different path. The text of *Novel* 136, the subject of Chapter 2, survives only in the Greek-language sources, namely *M* and *L* and, in part, copies of the latter. It is also summarised in each of the three sixth-century epitomes.[84] Of these, only Julian's *Epitome* gives a Latin version, or rather a short summary characterized by that author's customary brevity and lucidity. *Edict* 7, the subject of Chapter 3, survives solely in *M*, where it appears in the annexure that is distinct from the text of the Greek Collection that precedes it. *Edict* 9, which is not the subject of its own chapter of this dissertation but features prominently in the relevant discussions of *Novel* 136 and *Edict* 7, similarly comes to us principally via the annexure to *M*, though there is also the aforementioned epitome in the *Anon. Bodl.* manuscript.[85] Neither *Edict* appears in any of the sixth-century epitomes, nor has any Latin text of them datable to the period come down to us. None of these three constitutions on banking contracts form part of the first 120 that form the regularly compiled "core" of the Greek Collection. *Novels* 106 and 110, the subjects of Chapter 4, by contrast, do form part of the Greek Collection's regularly compiled core; they come down to us via the Greek of *M*, the Latin of the *Authenticum* and, in the case of *Novel* 110, the Greek of *L*. Both these *Novels* are reflected in the

L'enseignement de droit des antécesseurs (Leiden: Brill, 1970), 57; Filippo Briguglio, "Sull'origine dell'*Authenticum*," *Archivio Giuridico* 219, no. III/IV (1999): 501–51.

[78] Gustavus Haenel, ed., *Iuliani Epitome Latina Novellarum Iustiniani* (Leipzig: Hinrichsium, 1873).

[79] Scheltema, *L'enseignement*, 47–48.

[80] Dieter Simon and Spyridōn N. Trōianos, eds., *Das Novellensyntagma des Athanasios von Emesa* (Frankfurt am Main: Löwenklau, 1989) and Karl Eduard Zachariä von Lingenthal, ed., *Anekdota: Theodori Scholastici Breviarum Novellarum* (Leipzig: Barth, 1843), respectively. See also Kroll's preface, vii–viii; Kearley, "Creation," 390–91; Miller and Sarris, *Novels*, 1:17–18.

[81] Simon and Trōianos, *Novellensyntagma*, x.

[82] A. Schmink and D. Simon, eds., "Eine Synopsis der Novellen Justinians," *Fontes Minores* 4 (1981): 119–217.

[83] *Anon. Bodl.* no. 3399 (Selden 10; Coxe 590), published at Zachariä von Lingenthal, *Anekdota*, 211–26.

[84] At Athanasius, *Syntagma*, §15.3 [=Simon and Trōianos, *Novellensyntagma*, 412–14]; Julian, *Epit.*, Const. CXIII (¶¶ *D–DV*) [=Haenel, *Iuliani Epitome*, 164–65]; Theodore, *Breviarum*, *Nov.* CXXXVI [=Zachariä von Lingenthal, *Anekdota*, 150–51].

[85] Zachariä von Lingenthal, *Anekdota*, 224–26.

DOI: 10.14754/CEU.2024.02

three sixth-century epitomes but not, it must be said, to much effect, given that the latter *Novel* erased the former within a few months.[86]

Of necessity, then, this dissertation differs from some studies of Justinianic legislation inasmuch as it focuses on the Greek text of these laws rather than on the Latin texts where they exist (only for *Novels* 106 and 110 in the *Authenticum* and for *Novel* 136, Julian's brief summary). Given the objectives of this study—to examine how law was used by Justinian's subjects by examining the operation of the system of petition-and-response in the hands of a sophisticated participants—the Greek texts would have been the focus even had reliable Latin texts existed. Those who lodged the petitions prompting the constitutions that make up the object of study of this dissertation were all situated in Constantinople: in the case of *Novel* 136 and *Edict* 7 (as well as of *Edict* 9), the bankers of the city and, in the case of *Novels* 106 and 110, two individuals engaged in the business of maritime lending there. Given the time and location of these subjects' petitions, they necessarily would have been drafted in Greek, as were the constitutions that Justinian promulgated in response to them.[87] For the period covered by the *Novels* discussed herein, and indeed from 535 generally, Justinian legislated mainly in Greek, a choice he acknowledged was necessary if his subjects were to understand his pronouncements.[88] If one wishes to examine the language of petition and response, it is the Greek, not the Latin, of the *Novels* that must be in focus.

Prior Scholarship

The legislation relating to bankers—ἀργυροπρᾶται—in particular has attracted a secondary literature that is formidable, though less for its volume than for its technical complexity. The foundational legal work on the banking *Novels*—*Novel* 136, *Edict* 9 and *Edict* 7—is the 1987 monograph of the Spanish legal historian Antonio Díaz-Bautista.[89] This study, which is perhaps less well-known than it ought to be on account of being in Spanish, forms the basis of all subsequent work on these three laws.[90] In it, however, Díaz-Bautista expressly eschewed pursuit of any social,

[86] At Athanasius, *Syntagma*, §§17.1 and 17.2, respectively [=Simon and Trōianos, *Novellensyntagma*, 430]; Julian, *Epit.*, Const. XCIX and CIII, respectively (¶¶ *CCCLX* and *CCCLXV*, respectively) [=Haenel, *Iuliani Epitome*, 120 and 122]; Theodore, *Breviarum*, *Novs.* CVI and CX [=Zachariä von Lingenthal, *Anekdota*, 102 and 105], respectively.
[87] The *Authenticum*, even if its Latin text reaches back to the 6th century, was on the best theory prepared for instructional purposes in Italy.
[88] *Nov.* 7 c.1 (15 Apr. 535); Kaldellis, *New Roman Empire*, 290 with n.94. Latin was reserved for a few formalistic areas, such as the role of the *quaestor sacri palatii* in authenticating pragmatic directives, and laws specifically directed at areas where Latin was the main language of administration (newly reconquered Italy, the Illyrian countryside).
[89] Díaz Bautista, *Estudios*.
[90] Prior scholarship tended to address these constitutions only as part of studies of the *Novels* as a whole. See, *e.g.*, the first edition of N. van der Wal, *Manuale Novellarum Iustiniani: Aperçu systématique du contenu des novelles de Justinien*, 1st ed. (Groningen: J.B. Wolters, Swets & Zeitlinger, 1964), subsequently updated in N. van der Wal, *Manuale Novellarum Iustiniani: Aperçu systématique du contenu des Nouvelles de Justinien*, 2nd ed. (Groningen: Chimaira, 1998). The earlier study by Georges Platon, though purporting to be a study of Justinian's banking laws in fact concentrates principally on his earlier reform of the *constitutum* and the fusion of the *receptum argentarium* into it, as reflected in the *Codex*. Platon, *Banquiers*. Platon's study is in any event marred by the author's anachronistic application of the attitudes of early 20th-century industrial capitalism to the very different circumstances of the sixth.

DOI: 10.14754/CEU.2024.02

cultural, or economic analysis, limiting himself instead to legal questions only.[91] Nor have all his legal arguments commanded assent, at least not among the remarkable group of scholars at the University of Bologna who have led scholarship on this topic in recent years. Giovanni Luchetti, professor of law, criticised Díaz-Bautista's study in an important review article of 1991 for its tendency to see the survival and influence of Hellenistic Greek law and practice behind these *Novels'* many innovations.[92] Luchetti himself assigned greater weight to economic developments leading to the increased importance of bankers to the empire (without much exploration of those developments), and he characterised Justinian's banking *Novels* as effectively amounting to a *Sonderrecht*, or a body of law exclusively for the benefit of those active in the banking trade.[93] Luchetti has followed up this argument in subsequent essays that perhaps do not add much to the trenchant power of his original critique.[94] Another law professor at Bologna, Filippo Briguglio, made important contributions to the understanding of *Novel* 136 in his 1999 monograph on certain procedural aspects of Roman law guarantees.[95] And in late 2019 yet another Bologna colleague, Fabiana Mattioli, brought out a monograph on the banking *Novels* that currently represents the state of the legal historical art on the subject, even if her own incremental contributions are often expressed only with utmost reticence.[96] The influence of Mattioli's monograph upon this dissertation is great, and gratefully acknowledged, but it will be apparent that I differ with her views on many points both large and small, starting with the nature of the questions to be asked of the sources. Like the works of Díaz-Bautista, Luchetti, and Briguglio, Mattioli's monograph fits squarely within the bounds of the continental tradition of legal history. As such, it tends to end its analysis just as it approaches the kinds of social, economic, and political questions that might make it of interest to historians working in other disciplines.

Of historians working outside the legal historical tradition who have addressed themselves to Justinian's bankers, the most useful contribution remains Sam Barnish's 1985 study, which

[91] Díaz Bautista, *Estudios*, 4–6.
[92] Giovanni Luchetti, "Banche, banchieri e contratti bancari nella legislazione giustinianea," *Bullettino dell'Istituto di Diritto Romano "Vittorio Scialoja"* 94–95 (1991–1992): 449–72.
[93] Luchetti, 453 ("*vero e proprio 'Sonderrecht'*"); followed by Fabiana Mattioli, "El Sonderrecht de los *Argentarii*: La Especifidad de los Contratos Bancarios en la Novela 136 de Justiniano," *Seminarios Complutenses de Derecho Romano* 30 (2017): 459–87. If the characterization as a *Sonderrecht* is accepted, this body of legislation is notable not only insofar as it pre-figured the mercantile law of the Western European medieval period by centuries (Díaz Bautista, *Estudios*, 8; Giovanni Luchetti, "Spunti per una indagine sulla legislazione giustinianea riguardante gli *argentarii* costantinopolitani," in *Contributi di diritto giustinianeo* (Milano: Giuffrè, 2004), 168–69) but also for the contrast it marks from Justinian's legislation generally, which otherwise cleaves to general lawmaking applicable broadly rather than to special regulatory regimes. Marie Theres Fögen, "Gesetz und Gesetzgebung in Byzanz: Versuch einer Funktionsanalyse," *Ius Commune: Zeitschrift für Europäische Rechtsgeschichte* 14 (1987): 143.
[94] Luchetti, "Spunti"; Giovanni Luchetti, "Il prestito di denaro a interesse in età giustinianea," *Cultura giuridica e diritto vivente* 3, no. Special Issue (2016): 1–20 [=Luchetti, "Prestito," 2021].
[95] Filippo Briguglio, *"Fideiussoribus succurri solet,"* Seminario giuridico della Università di Bologna, CXCIV (Milano: Giuffrè, 1999).
[96] Fabiana Mattioli, *Giustiniano, gli* argentarii *e le loro attività negoziali: la specialità di un diritto e le vicende della sua formazione* (Bologna: Bononia University Press, 2019).

DOI: 10.14754/CEU.2024.02

brings to bear a broader range of considerations on the topic.[97] Salvatore Cosentino, a Bologna Byzantinist, has made a thoughtful intervention on the relative dating of *Novel* 136, *Edict* 9 and *Edict* 7,[98] as well as several contributions on Ravenna's bankers.[99] More generally, however, the great expansion in recent decades of studies on Roman law outside the *Rechtshistorische* tradition has not really reached the sixth-century sources, save perhaps in relation to plague.[100] And recent revisitations of Roman banking specifically, by historians such as Jean Andreau and others, likewise focus on the bankers of periods earlier than late antiquity, *i.e.*, the *argentarii*.[101] The *argentarii*, though, disappeared in the course of the third century, done in by the inflation that ensued upon serial devaluations of the imperial coin.[102]

The maritime lending *Novels* that form the subject of Chapter 4—*Novel* 106 and its repeal by *Novel* 110—have a more extensive history in scholarship. Though these *Novels* are less technically formidable than the banking constitutions discussed in the previous paragraphs, they form part of the history of the institution of the maritime loan (δάνειον ναυτικόν in Greek; *pecunia traiecticia* or *fenus nauticum* in Latin), which has proven irresistible to legal historians in part due to its function as a form of insurance, perhaps the world's first. These two *Novels* have thus often supplied chapters, albeit small ones, in histories of the maritime loan as a Roman law institution.

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[97] Barnish, "Wealth." Barnish, however, sought to construe Justinian's changes to banking law as measures to save the profession from economic crisis (Barnish, 35 with n.219). The prevailing, and more plausible, view is that they rather reflect the bankers' increasing socioeconomic importance in the late 530s and early 540s. See, *e.g.*, Bianchini, "Disciplina," 418; Díaz Bautista, *Estudios*, 8–9; M. Amelotti, "Giustiniano e la comparatio litterarum," *Subseciva Groningana: Studies in Roman and Byzantine Law* 4 (1990): 6; Luchetti, "Banche," 452–53; Aldo Petrucci, *Profili giuridici delle attività e dell'organizzazione delle banche romane* (Torino: G. Giappichelli, 2002), 205; Mattioli, *Giustiniano*, 12–13, 181–83 and *passim*.

[98] Salvatore Cosentino, "La legislazione di Giustiniano sui banchieri e la carriera di Triboniano," in *Polidoro: Studi offerti ad Antonio Carile*, ed. Giorgio Vespignani (Spoleto: Fondazione Centro Italiano di Studi sull'Alto Medioevo, 2013), 347–62.

[99] Cosentino, "Le fortune"; Cosentino, "Banking"; Salvatore Cosentino, "Bankers as Patrons in Late Antiquity," in *I Longobardi a Venezia: Scritti per Stefano Gasparri*, ed. Irene Barbiera, Francesco Borri, and Annamaria Pazienza, Haut Moyen Âge (Turnhout: Brepols, 2020), 235–47, https://doi.org/10.1484/M.HAMA-EB.5.118880.

[100] Excellent examples of such studies can be found in recent essay collections looking at law from sociologic and economic perspectives contained in Paul J. du Plessis, Clifford Ando, and Kaius Tuori, eds., *The Oxford Handbook of Roman Law and Society*, Oxford Handbooks (Oxford: Oxford University Press, 2016); Giuseppe Dari-Mattiacci and Dennis P. Kehoe, eds., *Roman Law and Economics*, 2 vols. (Oxford: Oxford University Press, 2020), respectively. On the temporal limitations, see Ari Z. Bryen, "Law in Many Pieces," *Classical Philology* 109, no. 4 (October 2014): 346–65, esp. 347. On laws and plague, see Chapter 3.

[101] Jean Andreau, *La vie financière dans le monde romain: les métiers de manieurs d'argent IVe siècle av. J.-C.-IIIe siècle ap. J.-C* (Rome: Ecole Française, 1987); Jean Andreau, *Banking and Business in the Roman World*, trans. Janet Lloyd (Cambridge: Cambridge University Press, 1999); Andreau, "Roman Law in Relation to Banking and Business." The same can be said of the Roman essays contained in Koenraad Verboven, Katelijn Vandorpe, and V. Chankowski, eds., *Pistoi Dia Tèn Technèn: Bankers, Loans, and Archives in the Ancient World: Studies in Honour of Raymond Bogaert* (Leuven: Peeters, 2008), and in relation to credit extension by lenders other than bankers, in François Lerouxel, *Le marché du crédit dans le monde romain* (Rome: Publications de l'École française de Rome, 2016).

[102] On the relationship between debasement and inflation in the context of the third-century crisis, see Christopher J. Howgego, *Ancient History from Coins* (London: Routledge, 1995), 121–40. On the consequences for the bankers, see William V. Harris, "The Nature of Roman Money," in *The Monetary Systems of the Greeks and Romans*, ed. William V. Harris (Oxford: Oxford University Press, 2008), 204 ff.; Morris Silver, "Finding the Roman Empire's Disappeared Deposit Bankers," *Historia* 60, no. 3 (2011): 301–27; H.L.E. Verhagen, *Security and Credit in Roman Law: The Historical Evolution of Pignus and Hypotheca* (Oxford: Oxford University Press, 2022), 386.

DOI: 10.14754/CEU.2024.02

German studies of the late 19th century are, as one might expect, infused with the positivistic spirit of the age, though Heinrich Sieveking at least avoided such errors sufficiently to spot that some element of deception was at work behind *Novel* 106.[103] The turn of the 20th century and the immediately subsequent decades saw studies touching upon Justinian's two maritime loan *Novels* as part of studies on much broader subjects, such as interest rates generally in antiquity or in the Byzantine period, or the Rhodian Law of the Sea.[104] The middle years of that century saw a provocative contribution by the English Marxist scholar, Geoffrey de Ste Croix, that, true to its author's commitment to materialist explanations, emphasized the insurance-like function of maritime loans.[105] But scientific legal analysis of Roman law maritime loans was mainly the preserve of Italian scholarship in the middle years of the 20th century, as first Francesco de Martino in 1935 and Arnaldo Biscardi in 1947 subjected the legal institution to their very different analyses of its contractual nature.[106] Rather later Gianfranco Purpura turned his analytical skills to explicating the rules in Justinian's *Digest* and *Novels* governing the *fenus nauticum* in light of new evidence in the form of tablets.[107] The topic has received renewed attention in recent years at the hands of yet another of the Bologna cohort, Ivano Pontoriero.[108] In each of these studies, though, the innovations of *Novels* 106 and 110 tend to be treated not quite as afterthoughts but as tangential to the main thrust of the arguments, which focus instead on the meatier legal problems of the *Digest.* Only Pontoriero, in the half-chapter he devotes to Justinian's lawmaking on maritime loans, really engages with the issues the two *Novels* raise.

Curiously, lobbying and its relation to the legislative function has received relatively little attention at the hands of legal historians. For the reasons given in the comments of Ando and Andreau at the beginning of this dissertation, this is regrettable, for it is an odd theory of statutory

[103] Heinrich Sieveking, *Das Seedarlehen des Altertums* (Leipzig: von Veit, 1893). See also Rudolf von Jhering, *Gesammelte Aufsätze aus den Jahrbüchern für die Dogmatik des heutigen römischen und deutschen Privatrechts*, vol. 3 (Jena: Gustav Fischer, 1886), 227–32 [First published the 1881 edition of the *Jahrbuch* (vol. 19) under the title *Das angebliche Zinsmaximum beim foenus nauticum*, pp. 1–23]; Hermann Kleinschmidt, *Das Foenus Nauticum und dessen Bedeutung im römischen Recht* (Heidelberg: J. Hörning, 1878); Karl Buechel, *Das gesetzliche Zinsmaximum beim foenus nauticum nach l.26 Cod. de usuris 4, 32* (Erlangen: Andreas Deichert, 1883); Karl Eduard Zachariä von Lingenthal, "Aus und zu den Quellen des römischen Rechts, XXXV–L," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (romanistische Abteilung)* 13 (1892): 1–52.

[104] Billeter, *Geschichte*; Cassimatis, *Intérêts*; Walter Ashburner, ed., *The Rhodian Sea-Law, Edited from the Manuscripts* (Oxford: Clarendon, 1909), respectively.

[105] G.E.M. de Ste. Croix, "Ancient Greek and Roman Maritime Loans," in *Debits, Credits, Finance and Profits*, ed. H. Edey and B.S. Yamey (London: Sweet & Maxwell, 1974), 41–59.

[106] Francesco De Martino, "Sul Foenus Nauticum," *Rivista del diritto della navigazione* 1, no. 3 (1935): 217–47; Arnaldo Biscardi, "Actio pecuniae traiecticiae: contributo alla dottrina delle clausole penali," *Studi Senesi* 60 (1947): 567–709. Biscardi would go on to reissue his study some decades later in book form, without change to the body of the text but with the addition of an intemperate "Postilla". Arnaldo Biscardi, *Actio pecuniae traiecticiae: contributo alla dottrina delle clausole penali*, 2nd ed. (Torino: Giappichelli, 1974).

[107] Gianfranco Purpura, "Ricerche in tema di prestito marittimo," *Annali del Seminario Giuridico dell'Università di Palermo* 39 (1987): 189–336.

[108] Ivano Pontoriero, *Il prestito marittimo in diritto romano* (Bologna: Bononia University Press, 2011). Peter Candy's forthcoming monograph on maritime loans was not published by the time work on this dissertation was complete.

DOI: 10.14754/CEU.2024.02

construction that is oblivious to the circumstances of the promulgation of new norms, however grubby those circumstances may be. Instead, petitions as an object of study in their own right have largely been left to historians working in other disciplines. The portions of Fergus Millar's famous study on Roman emperors dealing with the process of petition-and-response have, deservedly, been influential, even if the time frame he treats ends with the reign of Constantine.[109] For late antiquity, papyrologists, epigraphers, and historians working closely with such sources have led the way. The most useful work on the topic is the 2004 volume of essays edited by Denis Feissel and Jean Gascou, many of which are indispensable.[110] The papyrological archive of Dioscorus of Aphrodito, with its many draft petitions and responsive rescripts, is a rich trove of material, and scholars working on it have also contributed much that is useful in the course of their wider studies.[111] Ari Bryen's monograph on Egyptian petitions purports to extend down to the reign of Justinian, but the vast bulk of its examples are from earlier centuries; in addition, his focus on violence entails that the petitions he studies relate to litigation rather than to requests for changes to law and in any event have little bearing on bankers or banking.[112] As for *Novels* 106 and 110, modern examination of the lobbying process attested in them has not yet been forthcoming.

Aim and Scope of This Dissertation

The aim of this dissertation is to examine selected *Novels* relating to finance for what they can tell us about the system of imperial petition-and-response as it operated in the middle years of Justinian's reign and then to apply what that contextualisation tells us about the circumstances of the *Novels'* promulgation to the interpretation of their substantive legal provisions. In the banking guild and maritime financiers of Constantinople as they appear in these *Novels*, we have sophisticated actors, as well-versed in relevant laws as they were well-organised to lobby for changes to them. Chapter 1 of this dissertation examines the practice of petitioning the emperor as it is portrayed in Justinian's *Novels* generally, supplemented by information about that process from

[109] Fergus Millar, *The Emperor in the Roman World (31 BC–AD 337)*, 2nd ed. (London: Duckworth, 1992).
[110] Denis Feissel and Jean Gascou, eds., *La pétition à Byzance* (International Congress of Byzantine Studies, Paris: Association des amis du Centre d'histoire et civilisation de Byzance, 2004). Feissel's essay in that volume, in particular, is a fount of wise observations. Also of exceptional value is Constantin Zuckerman, "Les deux Dioscore d'Aphroditè ou les limites de la pétition," in *La pétition à Byzance*, ed. Denis Feissel and Jean Gascou (Paris: Association des amis du Centre d'histoire et civilisation de Byzance, 2004), 75–92, the latter of which should be read in conjunction with Peter van Minnen, "Dioscorus and the Law," in *Learned Antiquity: Scholarship and Society in the Near East, the Greco-Roman World, and the Early Medieval West*, ed. Alisdair A. MacDonald, Michael W. Twomey, and Gerrit J. Reinink (Leuven: Peeters, 2003), 115–33.
[111] See most notably, Jean-Luc Fournet, *Hellénisme dans l'Egypte du VIe siècle: la bibliothèque et l'œuvre de Dioscore d'Aphrodité*, 2 vols. (Cairo: Institut français d'archéologie orientale, 1999); Jean-Luc Fournet, ed., *Les archives de Dioscore d'Aphrodité cent ans après leur découverte: histoire et culture dans l'Egypte byzantine: actes du Colloque de Strasbourg, 8–10 décembre 2005* (Colloque de Strasbourg, Paris: De Boccard, 2008), as well as Fournet's contributions to the collective volume cited in the preceding note, Jean-Luc Fournet, "Entre document et littérature: La pétition dans l'antiquité tardive," in *La pétition à Byzance*, ed. Denis Feissel and Jean Gascou (International Congress of Byzantine Studies, Paris: Association des amis du Centre d'histoire et civilisation de Byzance, 2004), 61–74.
[112] Ari Z. Bryen, *Violence in Roman Egypt: A Study in Legal Interpretation* (Philadelphia: University of Pennsylvania Press, 2013).

DOI: 10.14754/CEU.2024.02

other sources, mainly papyrological. This part of the dissertation demonstrates that many constituencies throughout the empire were no mere passive recipients of new law-making but rather sophisticated users of it. Chapter 2 then applies those findings to the interpretation of *Novel* 136, examining each of its requests for relief and Justinian's response to them. Among other things, it finds that the bureaucratic practice of lifting wording from petition to legislative text makes the manuscript dating of that law—which many scholars have doubted—entirely plausible. Chapter 3 then applies that same technique to *Edict* 7 of March 542. It establishes that many of the *Edict's* provisions do not, as is often assumed, have much to do with the so-called Plague of Justinian, and that even those that plausibly do relate to it are better explained as responses to expected effects of plague than as responses to its actual effects as at the date of the *Edict's* promulgation. Chapter 4 then turns attention away from the guild of bankers to the maritime lenders. Together, *Novel* 106 and its quick reversal in *Novel* 110 reveal the iterative nature of petition-and-response and how it handled conflicts between the interests of different constituencies, illustrating how such conflicts might find expression in successive petitions to the emperor and responses by him. These two *Novels* additionally demonstrate that the lobbying game need not be guild-centred: individuals could play, too. The Conclusion then summarises the findings of earlier chapters, demonstrating how each of the *Novels* examined, when contextualised against the late-antique social practice of petition-and-response, shows that Justinian's subjects were no mere passive recipients of new legislation. They could instead be sophisticated consumers of it, possessed of agency in its interpretation, ready to exploit its silences, ambiguities, and contradictions in application, and prepared where need to be to petition for its amendment.

In addition to *Novel* 136 and *Edict* 7, to each of which a chapter of this dissertation is devoted, there survives a third banking *Novel*, temporally situated between the two, that was also prompted by the petition of the bankers of Constantinople. The undated *Edict* 9 shares the structure of the two other banking *Novels* in that it is transparent as to the structure of the petition that prompted it via Justinian's successive responses to the prayers of relief therein. This dissertation takes up various provision of *Edict* 9 where relevant to the discussion but does not devote a separate chapter to it.[113] This treatment is due to reasons of length and, more substantively, because the uncertainty of the *Edict's* dating and addressee would require a treatment different from that used for the other banking *Novels*.[114] The few provisions of *Edict* 9 not dealt with in this dissertation

[113] The provisions of *Edict* 9 discussed herein include the opening words of its preface and c.2, c.7 and c.9 *in extenso* as well as, more briefly, c.5 and c.6. The remaining provisions, on highly technical matters, are left for the monograph.
[114] The difficulties of dating the *Edict* 9 and identifying its addressee have attracted considerable attention. It cannot be later than 1 March 542, the date of *Edict* 7, which refers to it. *Edict* 7, c.6 (SK 766/9); William Sims Thurman, "The Thirteen Edicts of Justinian Translated and Annotated" (PhD Thesis, Austin TX, University of Texas, 1964), 129 n.251; Luchetti, "Spunti," 163–64; Cosentino, "Legislazione," 353–55. Cosentino is likely correct in assigning it to the period

DOI: 10.14754/CEU.2024.02

reinforce and do not meaningfully alter its findings with respect to the dynamic of petition-and-response between the emperor and bankers.

Finally, the *Novels* include a few other constitutions on the finance-related topic of interest *ultra duplum*, that is, the legal prohibition against interest payments on any loan aggregating more than the amount of the principal.[115] This long-standing Roman-law doctrine—sometimes observed, sometimes not, and often subject to exceptions or interpretations that effectively gutted it—was given new life by Justinian in a constitution of 529, the terms of which were ambiguous, perhaps deliberately so.[116] These ambiguities, perhaps inevitably, led to litigation. The *Novels* addressing these disputes fall outside the scope of this dissertation inasmuch as, so far as one can discern from their text, they did not come to the emperor in the form of petitions for change of law, but rather as judicial matters, whether as appeals, as requests to initiate litigation via the so-called rescript procedure, or as requests by the judge for pre-judgment instruction (*consultatio ante sententiam*).[117]

Conventions

Unless otherwise specified, the text of all of Justinian's *Novels* discussed in this dissertation is drawn from the edition universally used for scholarly purposes, namely the stereotype edition begun by Schoell and finished by Kroll.[118] Because frequent reference is made in the notes to specific text, such references are identified by page and line number in Scholl and Kroll's edition, indicated by the abbreviation "**SK**".

In citations, the term *Novel* is abbreviated as ***Nov.***, and the laws appearing in the *Appendix Constitutionum Dispersarum* at the end of Schoell and Kroll's edition are referred to by the abbreviation ***App***. Each of the laws appearing in these collections as well as those appearing in that edition as *Edicts* are referred to by the numbers assigned to them therein.

All translations of the *Novels* herein into English are (with modifications) those of David Miller published in 2018.[119]

All references to the *Codex* are, unless otherwise specified, to the second edition, the *Codex repetitae praelectionis,* promulgated by Justinian in December 534.

With regard to the three epitomators of Justinian's *Novels,* Athanasius of Emesa is referred to as **Athanasius**, Theodore of Hermopolis is referred to as **Theodore**. Julian is just Julian.

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539 to 541 (Cosentino, "Legislazione"), and Luchetti's *terminus post quem* of 15 December 539 (Luchetti, "Banche," 455 n.17) is not unreasonable.

[115] *Nov.* 121 (15 Apr. 535); *Nov.* 138 (undated); *Nov.* 160 (undated).

[116] *Cod. Iust.* 4.32.27 c.1 and c.2 (1 Apr. 529). The best discussion of this topic remains that in Bianchini, "Disciplina."

[117] For these forms of litigation and their relation to petitions, see the caption "*Litigation-Related Petitions as Prompts for New Lawmaking*" in Chapter 1.

[118] Schoell and Kroll, *Novellae*, the standard edition, reducing earlier editions to the status of mere "auxiliary material." Wolfgang Kunkel, *An Introduction to Roman Legal and Constitutional History*, trans. J.M. Kelly (Oxford: Clarendon, 1966), 223. The 1912 edition was the last supervised by Kroll. See Kearley's introduction to Miller and Kearley, "Wilhelm Kroll's Preface," 3.

[119] Miller and Sarris, *Novels*.

DOI: 10.14754/CEU.2024.02

Holders of the office of *praefectus praetorio Orientis* are sometimes referred to with the abbreviation **"*PPO*"**. Holders of the office of *praefectus urbi* are sometimes referred to with the abbreviation **"*PU*".** Holders of the office of *quaestor sacri palatii* are sometimes referred to simply as **"*quaestors*"**. Holders of the office of *comes sacrarum largitionum* are sometimes referred to with the abbreviation **"*CSL*"**.

All dates given are CE.

DOI: 10.14754/CEU.2024.02

CHAPTER 1

PETITIONING IN JUSTINIAN'S *NOVELS*

Introduction

Since publication of the first papyri from his archive in the early 20th century, scholars have puzzled over the extent to which Dioscorus—notary of Aphrodito and on some views the worst poet of late antiquity—was *au fait* with successive developments in Justinianic lawmaking.[1] Both for others and for himself, Dioscorus prepared petitions and related materials, some in prose, some in verse, as well as suggested responses.[2] His petitions present requests for remissions of tax and rulings on questions of succession to family property of the sort common in late antiquity. In exploring Dioscorus' sometimes opaque treatments of technicalities like the "Falcidian share" and the "*legitima portio*,"[3] scholars have wondered whether their conflation of distinct concepts was due to confusion in Justinian's legislation or in the author's mind, or if there was any confusion at all.[4] Dioscorus' efforts, together with the pace of new lawmaking, have led some to question the extent to which the Justinian's subjects had accurate and timely knowledge of his many legal innovations.[5]

[1] The bibliography on Dioscorus is enormous. Foundational are Jean Maspero, "Un dernier poète grec d'Égypte: Dioscore, fils d'Apollôs," *Revue des Études Grecques* 24, no. 110 (1911): 426–81; H.I. Bell, "An Egyptian Village in the Age of Justinian," *The Journal of Hellenic Studies* 64 (1944): 21–36. On the quality of his poety, cf. Bell, 27–29 and Alan Cameron, "Wandering Poets: A Literary Movement in Byzantine Egypt," *Historia: Zeitschrift für alte Geschichte* 14, no. 4 (1965): 478, 483, 490, 509, with Leslie S.B. MacCoull, *Dioscorus of Aphrodito: His Work and His World* (Berkeley: University of California Press, 1988). For a recent reassessment, see Fournet, *Hellénisme*.

[2] There are ca. 35 petitions extant from his archive, nos. 9–37, 41–42, 57–60 and 105–106 in inventory at Jean-Luc Fournet and Jean Gascou, "Liste des pétitions sur papyrus des Ve–VIe siècles," in *La pétition à Byzance*, ed. Denis Feissel and Jean Gascou (International Congress of Byzantine Studies, Paris: Association des amis du Centre d'histoire et civilisation de Byzance, 2004), 141–96; Jean-Luc Fournet, "Les tribulations d'un pétitionnaire égyptien à Constantinople. Révision de *P.Cair.Masp.* III 67352" (Twenty-Fifth International Congress of Papyrology, Ann Arbor 2007, American Studies in Papyrology (Ann Arbor 2010), 2010), 243. That the verse was meant to accompany the petitions in prose (the legally effective version) is now clear. See Fournet, *Hellénisme*, 259–64 and the discussion at notes 263–265 below. The responses are *P.Cair.Masp.* I 67024–67025, I 67026–67027, I 67028 and I 67029. For their status as suggested responses rather than real ones, see the discussion at note 293 below.

[3] In *P.Cair.Masp.* I 67097, III 67312 and III 67353. In classical law, the Falcidian share was the minimum proportion of a decedent's net estate that could be left to the designated heir, an important point where inheritances could be burdensome and designated heirs might need persuasion to accept. The *legitima portio* was the minimum proportion of a decedent's estate that could be left to those thought to be the natural heirs, principally his or her children, who were not completely disinherited. W.W. Buckland and Peter Stein, *A Text-Book of Roman Law from Augustus to Justinian*, 3rd ed., reprinted with corr. and add. (Cambridge: Cambridge University Press, 1975), 328–320 and 342–43; Paul J. du Plessis and J. A. Borkowski, *Borkowski's Textbook on Roman Law*, 4th ed. (Oxford: Oxford University Press, 2010), 229–30, 236–37; Max Kaser, Rolf Knütel, and Sebastian Lohsse, *Römisches Privatrecht: ein Studienbuch*, 22., überarb. erwt. Aufl. (München: C.H. Beck, 2021), 464–465 [§81 ¶¶1–8] and 488–489 [§87 ¶24].

[4] Cf. Max Kaser, *Das römische Privatrecht*, 2. neubearb. Aufl. (München: C.H. Beck, 1971 and 1975), 2:515; van Minnen, "Dioscorus"; Jakub Urbanik, "Dioskoros and the Law (on Succession): *Lex Falcidia* Revisited," in *Les archives de Dioscore d'Aphrodité cent ans après leur découverte. Histoire et culture dans l'Égypte byzantine*, ed. J.-L. Fournet (Paris: De Boccard, 2008), 117–42.

[5] On the challenges of keeping abreast, see Procop., *Hist. Arcana* 6.21 and 14.1–11 [=Haury and Wirth, *Procop. vol. 3*, 3:41–42 and 3:89–92, respectively] and, more level-headedly, Humfress, "Law and Legal Practice," 171–76.

DOI: 10.14754/CEU.2024.02

If, however, one wishes to inquire into the extent to which imperial subjects had such knowledge, one need not limit one's inquiry to papyri dug out of the furthest corners of empire, for a trove of information relevant to such an inquiry and far closer to the centre of power exists in Justinian's *Novels*.[6] These include numerous rescripts responding to requests for relief of all kinds lodged via petitions from subjects of every rank and background. Such petitions had long been a feature of empire: they originated in the *libellus,* a form known from as early as the late Republic.[7] But their final flourishing took place in the sixth century of our era: in Constantin Zuckerman's formulation, "*L'époque de Justinien représente… l'apogée de la petition.*"[8] The *Novels* richly attest to the truth of Zuckerman's assessment. Because they have come down to us outside any official compilation, they preserve circumstantial information that for the vast bulk of earlier imperial contitutions was shorn away by the compilers of the codes through which we known them.[9] One must of course be cautious in reading from normative text to social practice, but the texts of the *Novels* give many clues, direct and indirect, as to the use of petitions by subjects to seek relief of various kinds. From such clues we can infer much about the petitioning process, even if the petitions themselves have not survived.

The information that the *Novels* convey on these topics has lain largely unexploited. There are several reasons for this: the information is scattered and difficult to systematize. More importantly, though, the sixth-century legal system as experienced by imperial subjects—those living at its sharp end—does not, with rare exceptions, figure prominently in the research agendas of legal historians equipped with the technical background needed to unwind the material's many complexities. For many such scholars, especially in continental Europe, Roman law is an object of study as a well-wrought conceptual system, an intellectual bauble, scholarship on which serves to explain how it might or should operate in theory. To the extent that individuals figure into those scholarly agendas, the focus is on the classical jurists or, for our period, the *quaestores sacri palatii* and other imperial officials whose role it was to make the legal system function as part of governance. To be sure, such topics warrant scholarly investigation. But the conceptual system of Roman law also operated in historical context, or rather in many different historical contexts, and it

[6] For the papyri, the question of the extent to which Egyptian circumstances attested in them can be said to be typical is of course an old chestnut but it is an illusory one, for no city or province of late antique empire was "typical." Each exhibited its own distinct profile. Thus, if the circumstances relayed to us via the papyri are not "typical," they are in any event "comparable" to those prevailing elsewhere. Chris Wickham, *Framing the Early Middle Ages: Europe and the Mediterranean 400–800* (Oxford: Oxford University Press, 2005), 23–24.
[7] Suet., *Jul.* 81.4; Plut., *Caes.* 65; Appian, *BC* 2, [116] 486–7; Cassius Dio, *Hist.* 18.3; Millar, *Emperor*, 240–52.
[8] Zuckerman, "Les deux Dioscore," 80.
[9] See the discussion at notes 12–13 in the Introduction.

affected the lives and livelihood of countless subjects in their everyday activities.[10] This Roman law—as seen from the perspective of the subject—also warrants study not least because it is potentially useful to historians working in other disciplines to which law is relevant.

This chapter examines how *Novels* were prompted by petitions, who petitioned, for what, and how. It argues that the *Novels'* evidence of subjects' petitions and Justinian's replies tells us much about the relationship of the emperor's subjects to his lawmaking in the period from 535 to 565. Justinian's subjects were to a large extent not just familiar with his lawmaking efforts but astute consumers of them, using—and sometimes abusing—rules both old and new in pursuit of their own ends. Many subjects, individually or collectively, applied Justinian's legislation cleverly and made it their business to keep abreast of its many changes. Of course, not all his subjects were so attentive, nor were all topics attended to in equal measure. Rules changing long-standing customs of daily life in particular might take long to percolate through.[11] But subsequent chapters of this dissertation will demonstrate that Justinian's legislation on banking and financial activities reveals real savvy on the part of subjects, both in their use of his laws and in their petitions for changes to them. For the bankers and other financiers of Constantinople especially, the active and intelligent application of the Justinian's laws—and of lobbying to change them—made up an important part of their activities as we know them. First, though, some background.

Petitions and Their Responses

The concepts of "petitions" and "petitioning" as objects of study perhaps owe more to the fields of papyrology and epigraphy than they do to traditional legal historical scholarship, where they generally do not feature prominently as a distinct conceptual category. To be sure, such scholarship does know of petitions, but the focus of its investigations is rather on their uses within the legal system formally conceived, the most important of which was to initiate litigation under the so-called "rescript procedure."[12] But the process of making a formal request to the governmental authorities had uses in many different contexts beyond those principally of interest to legal historians. Petitions were also the means for requesting relief that was not in principle legal at all,

[10] The pathbreaking demonstration of this for the late Republic and early Empire in Crook, *Law and Life of Rome* has found little echo in legal historical scholarship, to its detriment.

[11] As for example, in the case of Justinian's changes to formal requirements for the validity of wills. In a constitution of 531, he introduced a new formal requirement, conditioning validity of the will on the name of the designated heir being written in the testator's own hand (or if that was impossible due to illiteracy or illness, attested by witnesses). *Cod. Iust.* 6.23.29 (1 Mar. 531). This legislation took the form of an edict and hence would have received widespread publication by posting. Nevertheless, the new requirement was still being widely disregarded some seven years later, as Justinian complained of having to ratify non-compliant wills in which the heir's name was, in accordance with prior practice, not given in the testator's own hand. *Nov.* 66 c.1.1 (1 May 538) (SK 341/23–28). Justinian ratified past wills at that time, in the hope of future compliance, but that hope was forlorn. He reverted to the earlier rule a few years later. *Nov.* 119 c.9 (20 Jan. 544).

[12] See the discussion at notes 106–117 below.

DOI: 10.14754/CEU.2024.02

such as pleas for the remission of tax, protection, preferment, jobs, and of course money. Responses to these sorts of non-legal requests—also designated by the term rescripts—had always made up a significant portion of petitions to emperors, but because they did not interpret or change of law they feature little in the normative sources.[13] More interestingly for our purposes, petitions were used to request resolution of disputes, changes to existing law or, what often amounted to the same thing, interpretations thereof. These uses may look quite distinct from the perspective of the legal historian. From the perspective of the subject, however, they are perhaps more alike than different, for they share many qualities in terms of format, language, preparation, and presentation. At bottom, petitions were the means by which subjects asked emperors for action of all types.[14]

Subjects' petitions thus sought imperial replies. Those replies took different forms, usually some sort of imperial pronouncement with legal effect. There is an extensive scholarship on the different forms new legislation might take in late antiquity, and how those forms differed from those of the principate. This is not the place to address the many points of controversy—such was the terminological confusion that it was difficult even for contemporaries to distinguish different types of laws from each other.[15] The most important distinction was that between laws intended to be of universal validity on the one hand and those intended to be of more limited scope on the other.[16] Justinian eliminated form as the determinant of universal validity vs. limited scope by a constitution of 539, pursuant to which any judicial decision, or indeed any interpretation of law, made by an emperor would have effect not just in the matter at hand but in all similar cases (*omnibus similibus*).[17] Of course, as his subsequent lawmaking in the *Novels* shows, Justinian still made use of different forms and of the distinction between laws intended to be of universal validity vs. those of more limited scope. But while form influenced publication and distribution of new laws, it was no longer determinative of their scope.[18]

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[13] Noailles, *Collections*, 1:144.
[14] Not just, as once was thought, for advice. William Turpin, "Imperial Subscriptions and the Administration of Justice," *Journal of Roman Studies* 81 (1991): 102.
[15] N. van der Wal, "*Edictum* und *lex edictalis*: Form und Inhalt der Kaisergesetze im spätrömischen Reich," *Revue internationale des droits de l'antiquité*, 3, 28 (1981): 291–92. To at least some extent, responsibility for this circumstance must be laid at the door of the quaestors, who, in van der Wal's polite formulation, "*nicht alle gleiches Gewicht auf eine sorgfälitg Terminologie legten.*" van der Wal, 301.
[16] The distinction between laws of general application and those of more limited scope of application is not always as crisply drawn as one might wish. In the words of John Matthews (in relation to the *Theodosian Code* but applicable with at least equal force to Justinian's *Novels*), "the formal definition does not comprehend the varied nature of the actual material." John Matthews, "The Making of the Text," in *The Theodosian Code: Studies in the Imperial Law of Late Antiquity*, ed. Jill Harries and Ian N. Wood (London: Duckworth, 1993), 26.
[17] *Cod. Iust.* 1.14.12 (30 Oct. 529). It has been disputed whether that principle applied to all of the emperor's pronouncements or only to some of them. It may have been that universal application of the decision or interpretation depended on some statement to that effect in the ruling itself. Peter Kußmaul, *Pragmaticum und Lex: Formen spätrömischer Gesetzgebung, 408–457* (Göttingen: Vandenhoeck und Ruprecht, 1981), 27–29.
[18] On the relationship between form and publication in the *Novels*, see Lanata, *Legislazione*, 107–61.

DOI: 10.14754/CEU.2024.02

Late antique imperial replies to petitions generally go by the generic name of "rescript." In earlier periods these might take the form of an informal *subscriptio* at the foot of the petition itself, or of a more formal *adnotatio.*[19] In the century prior to Justinian's reign, a newer form of response, the pragmatic sanction, grew in importance, though it is difficult to determine what its defining characteristics were.[20] On some theories, rescripts might be classified as *adnotationes*, pragmatic sanctions, or ordinary private rescripts, but by Justinian's time, these distinctions had lost much of whatever importance they once had. To be sure, a constitution included in his *Codex* purports to distinguish between the format of rescripts issued to individuals (*adnotationes*) vs. those issued to corporate groups like guilds, cities and the like (*pragmaticae sanctiones*).[21] But the inclusion of that distinction was perhaps more ideal than real, for in Justinian's post-codification practice it hardly figures at all. Instead, the *Novels* show enormous plasticity in the form of responses made to petitions. *Adnotationes* in the sense of rescripts do not appear, at least not characterized as such.[22] The greater number take the form of pragmatic sanctions, styled as [θεοὶ] πραγματικοὶ τύποι[23] or just [θεοὶ] τύποι.[24] Justinian's responses to petitions were, however, by no means limited to

[19] On this characterisation of *adnotationes* as more formal responses to petition for rescripts, see *Cod. Iust.* 7.39.3.1 (14 Nov. 424); Max Kaser and Karl Hackl, *Das römische Zivilprozessrecht*, 2. Aufl. (München: C.H. Beck, 1996), 634 with n.11. But the nature of *adnotationes* and their differences from *subscriptiones* and, later, private rescripts, is the subject of dispute. For a concise overview of the different theories and an argument that *adnotationes* were defined not by formal characterisitics but in substantive terms, as one-time exemptions, see Ralph W. Mathisen, "*Adnotatio* and *Petitio*: The Emperor's Favor and Special Exceptions in the Early Byzantine Empire," in *La pétition à Byzance*, ed. Denis Feissel and Jean Gascou (International Congress of Byzantine Studies, Paris: Association des amis du Centre d'histoire et civilisation de Byzance, 2004), 23–32.

[20] So diverse, in fact, are those constitutions that modern legal science has failed to come up with a definition of pragmatic sanction capable of commanding consensus among legal historians. See the trenchant critiques by Wenger, *Quellen*, 457–58; van der Wal, "*Edictum*," 292; Kußmaul, *Pragmaticum*, 14–19. On the phenomenon of pragmatic sanctions edging out other forms of rescript, see Denis Feissel, "Pétitions aux empereurs et forms de rescript dans les sources documentaires du IVe au VIe siècle," in *La pétition à Byzance*, ed. Denis Feissel and Jean Gascou (International Congress of Byzantine Studies, Paris: Association des amis du Centre d'histoire et civilisation de Byzance, 2004), 40.

[21] *Cod. Iust.* 1.23.7 pr. and c.2 (23 Dec. 477).

[22] In *Nov.* 114 c.1 (1 Nov. 541), one of the few *Novels* to be issued solely in Latin, the term is used in the sense of a signed footnote (SK 533/11). In the two other instances of the term in the *Authenticum*, *adnotatio* is used to render the Greek term παρασημείωσις, a streamlined court procedure. The Greek calques (ὑποσημείωσις, ἐπισημείωσις and their derivatives) also appear, but only in the sense of signature, not in the sense of rescript. *Nov.* 136 c.5 pr. (1 Apr. 535) (SK 693/24); *Nov.* 18 c.7 (1 Mar. 536) (SK 133/12–13 and 33); *Nov.* 48 c.1 pr. (18 Aug. 537) (SK 286/29); *Nov.* 105 c.2.4 (28 Dec. 537) (SK 506/34); *Nov.* 128 c.18 (24 June 545) (SK 643/22). The absence of the term in its earlier sense might explained by the *adnotatio* having been replaced by the pragmatic sanction. But if *adnotationes* were in the nature of personal exemptions they would not have been the sort of law ordinarily deposited in the quaestor's *liber legum*, from which our extant collections of *Novels* ultimately derive. Noailles, *Collections*, 1: 31–58 and 87–145.

[23] As at *Nov.* 155 c.1 and ep. (1 Feb. 533) (SK 732/1 and SK 732/27); *Nov.* 121 ep. (15 Apr. 535) (SK 592/13–14); *Edict* 12 ep. (18 Aug. 535) (779/25–26); *Nov.* 103 c.1 (1 July 536) (SK 497/17–18); *Nov.* 43 c.1.3 and ep. (17 May 537 or 536) (SK 272/38 and SK 273/12–13); *Nov.* 59 ep. (3 Nov. 537) (SK 324/31–32); *Nov.* 162 (9 June 539) (SK 749/12); *Edict* 7 c.4, c.7, and ep. (1 Mar. 542) (SK 765/19, SK 767/4–5, and SK 767/22 and 24); *Nov.* 157 ep. (1 May 542) (SK 734/15); *Nov.* 139 ep. (undated) (SK 701/7–8); *Nov.* 151 ep. (undated) (SK 727/10–11); *Nov.* 154 ep. (undated) (SK 730/27); and, in Latin, *App.* 3 (29 Oct. 542) (SK 797/27: *per hanc divinam pragmaticam sanctionem*); *App.* 7 ep. (13 Aug. 554) (SK 802/44: *per hanc divinam pragmaticam sanctionem*).

[24] As in *Nov.* 153 ep. (12 Dec. 541) (SK 729/12). This is also the case for *Nov.* 160 c.1 (undated) (SK 744/23), though the titulus (which is probably not original) characterises this *Novel* as a copy of a pragmatic sanction (SK 744/2).

DOI: 10.14754/CEU.2024.02

pragmatic sanctions or other private forms of response. They could also take the form of "laws" or even "general laws."[25] Conversely, pragmatic sanctions might issue not in response to petitions but in the wake of official reports. In other words, form waned in importance. The hybrid formulation θεῖος πραγματικὸς νόμος appears in several *Novels*;[26] and we even have a few characterized both as a νόμοι/*leges* and as τύποι/*sanctiones*.[27] Some have no formal designation at all.[28] This variety of expression indicates the lack of importance attributed to consistency in drafting by those who prepared the legislative text of the *Novels*.[29] Procopius would have us believe that Justinian penned his own *Novels*, and that may even be true in a few instances.[30] But in the vast majority of cases the emperor relied, as his predecessors did, on officials charged with the responsibility for preparing responses for his signature.[31] Imprecision in drafting is a feature of late antique administration, not a characteristic unique to Justinian.

Petitions as an Instrument of Governance

Petitioning was not some epiphenomenon to sixth-century governance but fundamental to it. Justinian, like emperors before him, built petitioning into the design of his administration. First and foremost, he had to have in place arrangements for their receipt. There was an imperial office for the purpose, namely the *referendarii,* of whom there were many. Too many, in fact, as Justinian complains in a law of 535 that imposed a hiring freeze aimed at reducing their number from 14 to eight.[32] But Justinian's plan of governance for petitions did not end with arrangements for their receipt. That plan also assumed the flow of information via petition for many governmental

[25] "Law": *Nov.* 39 pr. (18 Apr. 536) (SK 258/6–7, in response to petitions from those who have suffered losses); *Nov.* 50 (1 Sept. 537) (SK 294/36, responding to petitions from Caria, Rhodes, and Cyprus); *Nov.* 145 pr. (8 Feb. 553) (SK 711/20–21, in response to petitions from the two Pisidias and Phrygia); "general law": *Nov.* 2 (1 Mar. 535) pr. (SK 12/9–10, in response to petition of Gregoria); *App.* 1 c.1 (7 Apr. 540) (SK 796/13–14, in response to a petition from the people of Lugdunum).

[26] *Nov.* 136 ep. (1 Apr. 535) (SK 694/22); *Nov.* 64 c.2 (19 Jan. 538) (SK 338/15–16); *Edict* 2 ep. (undated) (SK 760/21); *Edict* 9 (undated) (SK 776/29); *Edict* 10 (undated) (SK 777/10–11).

[27] *Nov.* 43 (17 May 537 or 536) (cf. c.1.3 SK 272/37–38 and ep. SK 273/12–13 with pr. SK 271/3–4); *App.* 8 (undated, ca. 555) (cf. SK 803/10 with SK 803/22). The list of pragmatic sanctions given at van der Wal, *Manuale 2nd*, 1 n.2. lumps the various τύποι and νόμοι together without distinction.

[28] *Nov.* 156 (post 539) (rescript responding to a request from the stewards of the church of Apamea); *App.* 2 (6 Oct. 541) (response to petition of the synod of Byzacium); *Nov.* 158 (14 July 544) (decision in Thekla's case).

[29] As indeed for much other legislation of late antiquity. See Wulf Eckart Voß, *Recht und Rhetorik in den Kaisergesetzen der Spätantike: eine Untersuchung zum nachklassischen Kauf- und Übereignungsrecht* (Frankfurt am Main: Löwenklau, 1982).

[30] See note 219 below.

[31] As Justinian acknowledged in *Nov.* 114 c.1 (1 Nov. 541). The practice of designating an official to handle rescripts on the emperor's behalf extended back to the reign of Tiberius. Tony Honoré, *Emperors and Lawyers*, 2nd ed., completely revd. (Oxford: Clarendon Press, 1994), 7–8 with n.22.

[32] *Nov.* 10 pr. 1 (15 Apr. 535) (SK 92/18–23); Jones, *LRE*, 1:575. As must have surprised no-one, their position as intermediaries positioned the *referendarii* well for mischief. In 544 Justinian criticised them for getting above their station, stripping them of any powers of enforcement and by limiting their role to announcing his reponses. *Nov.* 124 c.4 (15 June 544). Procopius was more cutting, accusing them of intrigue and extortion of the subjects they were meant to serve. Procop., *Hist. Arcana* 14.11–12 [=Haury and Wirth, *Procop. vol. 3*, 3:92].

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functions. One such function was law enforcement: ordinary subjects were regularly called upon to report lawbreaking, as in laws contemplating the reporting improper ordinations, appointments, or inheritances of bishops;[33] unlawful dispositions of church property;[34] illegal private churches;[35] forgeries;[36] corruption amongst judicial staff;[37] dilatory governors;[38] treasonous plots;[39] excess *sportulae*;[40] missing tax receipts;[41] and castrations.[42] Such reporting was usually elective but in some instances compulsory.[43]

Petitions also figured in Justinian's surveillance of the empire's many officials, whether imperial, ecclesiastical, or local. Receiving petitions extended the emperor's reach, enabling him to be informed of, and thus more effectively to oversee, matters over long-distances by recruiting the services of watchful eyes *in situ*. Of particular importance in this regard was his enlistment of ecclesiastical authorities as informants. Quite understandably, ecclesiastical discipline was largely entrusted to their care.[44] But bishops' sway extended far more broadly, for the emperor called upon them to monitor civil officials in their local sees.[45] Now, official misconduct in the form of what one might call corruption was a fact of late antique life.[46] Many of Justinian's *Novels* thus charge

[33] *Nov.* 6 ep. pr. (1 Apr. 535) (SK 47/5–8 and SK 47/12–14, anyone of any rank might report infractions).
[34] *Nov.* 7 ep. (15 Apr. 535) (SK 62/40–63/1, anyone who wished might report dispositions of church property).
[35] *Nov.* 58 pr. (3 Nov. 537) (SK 315/41–SK 316/1, private churches to be reported to the *PPO* for subjection to episcopal authority).
[36] *Nov.* 80 c.7 (10 Mar. 539) (SK 394/18–22, forgeries to be reported to the *quaesitor*, failing which to the emperor).
[37] *Nov.* 82 c.7.1 (8 Apr. 539) (SK 404/25–28, officials to ensure that losses resulting from staff corruption are recompensed when they learn of it by petition).
[38] *Nov.* 86 c.1 (17 Apr. 539) (SK 420/4–20, frustrated litigants may petition local bishop to apply pressure to dithering governor and, if that doesn't work, to apply to the emperor for relief, with letter from bishop).
[39] *Nov.* 117 c.8.1 (18 Dec. 542) (SK 557/15–18, if husbands fail to report plots, wives may do so through intermediaries).
[40] *Nov.* 124 c.3 (15 June 544) (SK 628/16–18, officials informed by petition or otherwise).
[41] *Nov.* 128 c.3 (24 June 545) (SK 638/4–7, contemplating that the relevant provincial governor may be petitioned where receipts not given).
[42] *Nov.* 142 c.2 (17 Nov. 558) (SK 706/12–15, the unfortunate victims might petition a range of officials for succour).
[43] These instances these cases were likely of more rhetorical than actual effect; they tended to address topics particularly offensive to the Justinian's Christian sensibilities. Thus, *Nov.* 141 c.1 (15 Mar. 559) (SK 704/12–13 and 19–20, homosexuals of Constantinople called upon to report themselves to the patriarch); and *Nov.* 14 pr. 1 (1 Dec. 534) (SK 107/37–42, those who, unwittingly or otherwise, had pimps operating out of their premises were expected not just to report them but to put them out). In 535, the emperor purported to make reporting of official misconduct mandatory by provincials (*Nov.* 8 c.9 (15 Apr. 535) (SK 72/34–36) and by bishops, though for them the penalties for failure to report were expressed more in spiritual terms than temporal ones. *Nov.* 8 *Edict pr.* (SK 78/27–29 and SK 78/33–38).
[44] See discussion at notes 170–174 below.
[45] Even if the normative legal sources perhaps overstate the extent to which bishops held sway in the secular affairs of cities, it is clear that the bishops' role in local governance had grown since the fourth century such that, by the sixth, they were a leading force in many. Dietrich Claude, *Die byzantinische Stadt im 6. Jahrhundert* (München: Beck, 1969), 121–23 and 155–61; Peter Brown, *Power and Persuasion in Late Antiquity: Towards a Christian Empire* (Madison: University of Wisconsin Press, 1992); J.H.W.G. Liebeschuetz, *Decline and Fall of the Roman City* (Oxford: Oxford University Press, 2001), chap. 4; Claudia Rapp, *Holy Bishops in Late Antiquity: The Nature of Christian Leadership in an Age of Transition* (Berkeley: University of California Press, 2005), 279–89. In Egypt, the patriarch was even charged with granting licenses of indemnity for taxes. *Edict* 13 c.10 pr. (undated) (SK 784/19–21).
[46] The structural nature of official corruption is rightly emphasised by Evelyne Patlagean, *Pauvreté économique et pauvreté sociale à Byzance: 4e–7e siècles* (Paris: Mouton, 1977), 279–81. Cf. Ramsay MacMullen, *Corruption and the*

bishops with snitching to the emperor or senior officials in cases of malfeasance or other failures on the part of civil officials.[47] The bishops' power over provincial governors even extended to the exercise of jurisdiction in suits against them, with heavy penalties if the governor should fail to comply and the case subsequently come before the emperor.[48] Nor were bishops the only eminences swept into Justinian's network of snitches. Many of the *Novels* that recruit or empower the bishops to report official misconduct also call upon local dignitaries, property owners, or other officials of church or state to do the same.[49] City defenders were empowered to snitch on governors,[50] who were empowered to do the same to them.[51] Governors were also charged with reporting abuses by imperial officials visiting the provinces by a *Novel* of 535, in a passage that gives a nice little *tour d'horizon* of many ways in which officials on walkabout could extract payments from their reluctant hosts.[52] The governor's power to report also extended to priests and to bishops.[53]

Of course, Justinian did not legislate for petitions solely in the context of constructing some proto-police state.[54] They served as the principal means by which he learned of his subjects' concerns. The first extant *Novel* following completion of the great compilation reports that "private concerns reported from our subjects [are] continually pouring in."[55] Those private concerns could be mundane, such as the blocking of one's precious sea-views,[56] or extend into areas that one might think of as lying outside imperial remit, such as the language in which Jews might discuss their

Decline of Rome (New Haven: Yale University Press, 1988) with the more nuanced views of Christopher Kelly, *Ruling the Later Roman Empire* (Cambridge MA: Harvard, 2004) and Tim W. Watson, "The Rhetoric of Corruption in Late Antiquity" (PhD Diss, Riverside, University of California, 2010).

[47] This was a structural feature of Justinian's reform of provincial governance, *Novel* 8, but also of several other of his constitutions on that topic. *Nov.* 8 c.8.1 (15 Apr. 535) (SK 72/13–16); *Nov.* 8 *Edict pr.* (SK 78/27–29); *Edict* 12 c.2 (18 Aug. 535) (SK 779/21–22); *Nov.* 51 c.1.1 (1 Sept. 537) (SK 296/18–21); *Nov.* 86 c.9 (17 Apr. 539) (SK 422/26–423/2); *Nov.* 128 c.17 (24 June 545) (SK 643/2–6); *Nov.* 123 c.27 (1 May 546) (SK 614/24–26); *Nov.* 134 c.3 pr. (1 May 556) (SK 680/18–23); Rapp, *Holy Bishops*, 288–89; Peter Sarris, *Economy and Society in the Age of Justinian* (Cambridge: Cambridge University Press, 2006), 210.

[48] *Nov.* 86 c.4 (17 Apr. 539) (SK 421/14–29).

[49] *Nov.* 8 c.8.1; *Nov.* 128 c.17; and *Nov.* 134 c.3 pr.

[50] *Nov.* 15 c.5.pr. (13 Aug. 535) (SK 113/3–5).

[51] *Nov.* 15 c.1.1 (13 Aug. 535) (SK 111/15–16).

[52] Late antique emperors had long sought to curtail such practices. See, *e.g.*, *Cod. Iust.* 10.20 (14 Mar. 400). For Justinian's use of governors to police such measures, see *Nov.* 17 c.4 pr. (16 Apr. 535) (SK 119/25–31); *Nov.* 26 c.4.2 (18 May 535) (SK 207/36–SK 208/1).

[53] *Nov.* 137 c.6 (26 Mar. 565) (SK 699/18–19).

[54] One need not go so far as likening Justinian to Josef Stalin (as did Honoré, *Tribonian*, 28–30) to acknowledge the emperor's totalitarian tendencies.

[55] *Nov.* 1 pr. pr. (SK 1/14–15: ἐπιρρέουσι καὶ ἰδιωτικαὶ φροντίδες παρὰ τῶν ἡμετέρων ὑπηκόων ἀεὶ προσαγγελλόμεναι). Such "private concerns" are reflected not only in the *Novels*. They almost certainly prompted much of Justinian's earlier lawmaking that made its way into the great compilation, too. See *Nov.* 2 pr. pr. (16 Mar. 535) (SK 10/16–20).

[56] *Nov.* 63 (9 Mar. 539); *Nov.* 165 (undated).

scripture.[57] In Justinian's eyes, of course, little lay outside his remit,[58] but in any event many private concerns relayed to him touched upon matters falling squarely within imperial responsibility: questions of family law and succession,[59] the inconveniences of long-distance litigation,[60] failures of local governance,[61] and the apparently innumerable complaints of concubines.[62] He especially made the tool of the petition available to address what we might call humanitarian ends, prompting *Novels* addressing unfortunate personal circumstances: wives abandoned by their soldier husbands;[63] wives and children of deceased officials who wished to hypothecate the office to the creditor who had lent the funds for its acquisition (presumably to prevent him from distraining upon other assets);[64] belated attempts by fathers to legitimate their bastards,[65] or, where those fathers had died, by the bastards themselves;[66] eunuchs seeking protection from those seeking to enslave them;[67] and minors wishing to renounce inheritances that proved burdensome.[68] Justinian's *Novels* also provided for future petitions in matters requiring some kind of vetting, as in the case of a person wishing to take the place of a decurion who died heirless,[69] or to protect bequests to the Church, by allowing anyone to report unfulfilled ones.[70]

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[57] *Nov.* 146 pr. (8 Feb. 553) (SK 715/1–7). The matter may not have related solely to Jews alone but to disputes between them and the Samaritans. Hagith Sivan, *Palestine in Late Antiquity* (Oxford: Oxford University Press, 2008), 137–42.
[58] For especially sweeping assertions of power, see *Nov.* 64 c.2 (19 Jan. 538) (SK 338/20–24); *Nov.* 133 pr. (18 Mar. 545) (SK 666/21–25). For the Christian dimension of such claims, see Jochen Martin, "Zum Selbstverständnis, zur Repräsentation und Macht des Kaisers in der Spätantike," *Saeculum* 35, no. 2 (June 1984): 115–20, https://doi.org/10.7788/saeculum.1984.35.2.115; Rene Pfeilschifter, *Der Kaiser und Konstantinopel: Kommunikation und Konfliktaustrag in einer spätantiken Metropole* (Berlin: De Gruyter, 2013), 76–85.
[59] That is, wills, legacies, manumissions, dowries, pre-marital gifts and the like. See *Nov.* 1 pr. pr. and pr. 1 (1 Jan. 535) (SK 1/22–28, legacies and manumissions); *Nov.* 39 pr. (18 Apr. 536) (SK 254/21–22, restitution of dowries/marital gifts); *Nov.* 66 c.1.1 (1 May 538) (SK 341/28–34, reporting a regular practice of legitimising defective wills by rescript), on which see Wolfgang Kaiser, "Abhilfe für gescheiterte Gesetze. Zur Novelle Justinians vom 1. Mai 538," in *Die Bedeutung der Rechtsdogmatik für die Rechtsentwicklung: ein japanisch-deutsches Symposium*, ed. Rolf Stürner (Tübingen: Mohr Siebeck, 2010), 65–88. In addition, though we have no rescripts granting divorce after the abolition of divorce by consent (*Nov.* 117 c.10 (18 Dec. 542) and *Nov.* 134 c.11 (1 May 556)), they were likely frequent, at least following Justinian's death (and perhaps also before it), until divorce by consent was restored by Justin II. *Nov.* 140 pr. (14 Sept. 566) (SK 702/16–22).
[60] *Nov.* 49 pr. 2 (18 Aug. 537) (SK 208/11–29); *Nov.* 50 pr. pr. (1 Sept. 537) (SK 293/26–34); *Nov.* 53 pr. (1 Nov. 537) (SK 299/23–33); *Nov.* 69 c.1.1 (1 June 538) (SK 351/9–11).
[61] *Nov.* 30 c.5.1 (18 Mar. 536) (SK 228/15–21); *Nov.* 102 pr. (27 May 536) (SK 493/15–18); *Nov.* 145 pr. (8 Feb. 553) (SK 712/1–6).
[62] *Nov.* 74 c.5 pr. (5 June 537) (SK 376/8–16).
[63] *Nov.* 22 c.14 pr. (18 Mar. 536) (SK 154/35–36). In fact, Justinian was being pusillanimous here: his *Novel* required ten years without contact before the wife could remarry; Constantine, with his far greater military experience, had allowed that after only four years. *Cod. Iust.* 5.17.7 (337).
[64] *Nov.* 53 c.5.1 (1 Nov. 537) (SK 304/5–11, allowing them to petition the emperor for permission).
[65] *Nov.* 74 c.2 pr. (5 June 538) (SK 373/8–12, by petition to the emperor). This provision was reiterated in *Nov.* 89 c.9.1 (1 Sept. 539) (SK 438/41–439/1).
[66] *Nov.* 74 c.2.1 (5 June 538) (SK 373/26–29). This provision, too, was restated in *Nov.* 89 c.10 (1 Sept. 539) (SK 439/16–18). The father's will had to contemplate legitimation.
[67] *Nov.* 142 c.2 (17 Nov. 558) (SK 706/12–15).
[68] *Nov.* 119 c.6 (20 Jan. 544) (SK 575/20–23, by petition to provincial governor for *restitutio in integrum*).
[69] *Nov.* 89 c.5 (15 Sept. 539) (SK 434/26–33, applicant may petition the emperor).
[70] *Nov.* 131 c.11.4 (18 Mar. 545) (SK 660/20–22).

DOI: 10.14754/CEU.2024.02

Justinian did not just allow subjects to bring such pleas to him—by his responsiveness he encouraged them to do so. The quality of responsiveness formed a cornerstone of the propaganda by which asserted the legitimacy of his rule.[71] For the *Novels* were not just normative texts, they were communicative ones, too, freighted with rhetorical intent. In an empire with few means of mass communication, new legislation offered possibilities for advertising the benefits of imperial rule too attractive to pass up.[72] Answering petitions offered an opportunity not merely to remedy unjustices of the most various kinds but also to take credit for doing so. Justinian equalled and excelled his predecessors in this regard, preening himself on his diligence,[73] his thoroughness,[74] and his responsiveness to the pleas of his subjects.[75] Of particular note is the emperor's repeated claims that his reponses inured not just to the benefit of petitioner but to the benefit of all subjects similarly situated.[76] The *Novels* abound in assertions of the emperor's attentiveness, whether in measures aimed at tamping down litigation abuses;[77] halting vexatious litigation by heirs;[78] combatting "perverse" interpretations of laws;[79] or responding to cases brought by women, to whose concerns Justinian was especially keen to be seen as responsive.[80] These assertions, too, made up an important part of the rhetoric of the legitimacy of Justinianic rule.[81] "We take upon ourselves [our subjects'] concerns on all matters," announces the preface to one constitution of 535.[82]

The importance attached to responsiveness in Justinianic propaganda is apparent already in his first piece of post-codification lawmaking to have come down to us, quoted toward the beginning of this section, the preamble to which informs us of reports of private concerns

[71] Justinian's responsiveness has been well noted at least since Lanata, *Legislazione*, 165–88. It features as a prominent theme of the annotations in Miller and Sarris, *Novels*.
[72] See discussion at notes 19–21 of the Introduction.
[73] *Nov.* 8 pr. pr. (15 Apr. 535) (SK 64/10–19); *Nov.* 88 (1 Sept. 539) (SK 425/22–24).
[74] *Nov.* 8 pr. pr. (15 Apr. 535) (SK 64/19–23); *Nov.* 84 c.1 pr. (SK 412/14–16); *Nov.* 97 c.2 (17 Nov. 539) (SK 471/3–5).
[75] *Nov.* 1 pr. pr. (1 Jan. 535) (SK 1/14–16); *Nov.* 18 c.5 (1 Mar. 536) (SK 130/35–37); *Nov.* 98 (16 Dec. 537) (SK 478/35–479/1); *Nov.* 147 pr. (15 Apr. 553) (SK 718/25–SK 719/1). See also *Nov.* 10 ep. (15 Apr. 535) (SK 93/32–34, praising the *referendarii* who devote their lives to petitioners and the assistance provided by the emperor to them).
[76] *Nov.* 1 pr. pr. (1 Jan. 535) (SK 1/16–21); *Edict* 12 c.1 (18 Aug. 535) (SK 779/9–10); *Nov.* 18 c.5 (1 Mar. 536) (SK 130/36–SK 131/3); *Nov.* 49 pr. 2 (18 Aug. 537) (SK 289/24–27); *Nov.* 88 (1 Sept. 539) (SK 425/25–27); *Nov.* 98 (16 Dec. 539) (SK 479/1–4); *Nov.* 108 pr. pr. (1 Feb. 541) (SK 514/17–23); *Nov.* 147 pr. (15 Apr. 553) (SK 719/1–6).
[77] As in *Nov.* 49 pr. 2 (18 Aug. 537) (SK 289/11–29, combatting judicial delays); *Nov.* 96 c.2 pr. (1 Nov. 539) (SK 467/32–SK 468/4, barring pursuit of "pac-man" counterclaims in different courts); *Nov.* 135 pr. (24 Feb. of a year post-541) (SK 690/5–7, overruling a governor to allow a defendant to recover his own property).
[78] *Nov.* 48 pr. and c.1 pr. (18 May 537) (SK 286/11–12 and SK 287/10–11).
[79] *Nov.* 160 pr. and c.1 (undated, post-534) (SK 744/7–8 and SK 744/25).
[80] *Nov.* 155 pr. and c.1 (1 Feb. 533) (SK 731/5); *Nov.* 2 pr. 1 (1 Nov. 535) (SK 10/23–24); *Nov.* 158 pr. (14 July 544) (SK 734/23). On Justinian's solicitude for womens' welfare, see Helmut Krumpholz, *Über sozialstaatliche Aspekte in der Novellengesetzgebung Justinians* (Bonn: R. Habelt, 1992), chap. III.5; Antti Arjava, *Women and Law in Late Antiquity* (Oxford: Clarendon Press, 1996), 260–61.
[81] *E.g., Nov.* 88 pr. (1 Sept. 539) (SK 425/23–24); *Nov.* 98 pr. (16 Dec. 539) (SK 478/35–479/4).
[82] *Nov.* 8 pr. pr. (15 Apr. 535) (SK 64/18–19).

"continually pouring in", to each of which the emperor would give "appropriate directive."[83] There is obviously some survivorship bias in our source material, inasmuch as legislation that does issue figures more prominently in the historical record than legislation that is requested but refused.[84] Now, we hear of at least a few instances on which petitioners did not get the result they were hoping for.[85] But the overwhelming impression left by the *Novels* is one of an emperor keen to provide—and to be seen to provide—relief. "No-one has left our presence empty-handed of our goodwill."[86] In this, Justinian emulated the practices of his predecessors, especially Constantine.[87] Of course, tying the legitimacy of one's rule to one's responsiveness is not a costless strategy, for as Ari Bryen observed in his study of Egyptian petitions, it "opens up a series of crucial possibilities for his subjects."[88] Those possibilities were not left unexploited, a phenomenon noticed by Justinian's contemporaries, not all of whom were impressed. John Lydus' praise of the manner in which Peter (the Patrician) dealt with cases and petitions before him is indicative. John carefully noted that Peter was not cowed by those whose station in life was high, nor was he "manipulable [or] inclining toward requests outside the laws."[89] John also notes Peter's ability to discern the motives of those petitioning him.[90] As is so often the case with John Lydus, praise of one official implies criticism of another, and we are meant to infer that, in John's view at least, there were at least some recipients of petitions of whom the same could not be said.[91] While John Lydus' passage can be read to suggest that Justinian was perceived as a bit of a patsy, prone to manipulation by citizens who knew how to work his sympathies, Procopius' verdict was harsher. For him, it was not the emperor's gullibility

[83] *Nov.* 1 pr. pr. (1 Jan 535) (SK 1/14–16). Indirect self-praise is also visible in the praise the emperor gives to officials charged with receiving petitions on his behalf. *Nov.* 10 ep. (15 Apr. 535) (SK 93/31–34). See also *Nov.* 18 (1 Mar. 536) (SK 130/36–37).

[84] As true for this period as it was for the Tetrarchy, on which, see Simon Corcoran, *The Empire of the Tetrarchs: Imperial Pronouncements and Government, AD 284–324*, revd. paperback ed (Oxford: Clarendon Press, 2000), 54.

[85] *E.g., Nov.* 156 (undated, post-539) (church of Apamea loses claim to children of *coloni*); *Nov.* 159 c.3 (1 June 555) (The "Most Illustrious Alexander" loses on all fronts against the "Most Illustrious Ladies Maria"); and, at least in some respects, *Nov.* 136 (1 Apr. 535), discussed in Chapter 2.

[86] *Nov.* 147 pr. (15 Apr. 553) (SK 718/26–27: οὐδεὶς φιλανθρωπίας δεηθεὶς ἄπρακτος ἐκ τῆς ἡμετέρας ἀνεχώρησεν ὄψεως).

[87] Euseb., *Vit. Const.* 4.4 (even disappointed litigants received gifts so as not to leave the emperor's presence downcast and distressed) [=Friedhelm Winkelmann, ed., *Über das Leben des Kaisers Konstantin*, 2., durchges. Aufl., Eusebius Werke, Bd. 1 Teil 1 (Berlin: de Gruyter, 2008), 121.

[88] Bryen, *Violence*, 43.

[89] John Lydus, *De mag.*, 2.26.13–16 (ἐδείχθη καὶ δικαστὴς ὀξὺς καὶ τὸ δίκαιον κρίνειν εἰλικρινῶς ἐπιστάμενος, κατὰ μηδὲν αὐτὸν ὑπτιαζούσης τῆς τύχης. πρᾶος μὲν γάρ ἐστι καὶ μειλίχιος, ἀλλ᾽ οὐκ εὐχερὴς οὐδὲ πρὸς τὰς αἰτήσεις ἔξω τοῦ νόμου καμπτόμενος) [=Bandy, *On Powers*, 122] The translation is from Thomas M. Banchich, *The Lost History of Peter the Patrician: An Account of Rome's Imperial Past from the Age of Justinian* (Abingdon, Oxon: Routledge, 2015), 17.

[90] John Lydus, *De mag.*, 2.26.16–17 (ἀσφαλὴς δὲ ὁμοῦ καὶ προσβλέπων τὰς ὁρμὰς τῶν προσιόντων). Bandy's translation of ὁρμὰς as "motives" (Bandy, *On Powers*, 123) captures the flavour of this Greek passage better than does Banchich's "desires" (Banchich, *Lost History*, 17).

[91] As in the case of Lydus' description of Phocas, a thinly veiled criticism of John the Cappadocian. John Lydus, *De mag.*, 3.72–76 [=Bandy, *On Powers*, 248–57]; Kelly, *Ruling*, 54–56.

that drove the pace of legal change but his hypocrisy and avarice; the historian also complains that the emperor had a henchman in constant legal change in the form of Tribonian, the *quaestor sacri palatii*.[92] Whatever the reason, one result was to make the law a bit of a moveable feast, where even experienced practitioners might have found it difficult to know what rule should apply.[93]

Petitions as Prompts for New Lawmaking

A Roman emperor's monopoly over law was, in Justinian's eyes, threefold: to make it, to interpret it, and to adjudicate it.[94] The focus of this chapter, and of this dissertation generally, is on the making of it, or legislation. Late antique legislation is often classified by what prompted it. One well-known schema, proposed by Jill Harries in relation to the *Theodosian Code*, identifies four prompts: the emperor's own inspirations; proposals by governmental officials; cases in litigation; and petitions for new legislation.[95] That offers an attractive theoretical framework, but one need not read far into the *Novels* to understand that it needs real plasticity of application to serve as a useful hermeneutic tool (as indeed it does for the *Theodosian Code*). Justinian's legislative practice in the *Novels* is too messy to fit within so tidy a schema. But even a cursory reading suffices to show that the greater part of his post-compilation legislation stemmed not from imperial or bureaucratic initiative but from subjects' petitions for legal relief or other assistance.[96] The same was in all likelihood true for much of his legislation included in the *Codex,* even if the direct evidence is lacking due to the editorial process to which that legislation was subjected. A *Novel* issued sufficiently close to completion of the second edition of *Codex* for the process to be fresh in mind

[92] Procop., *Hist. Arcana* 13.1–3 and 14.9–11 [=Haury and Wirth, *Procop. vol. 3*, 3:84, 91–92]; *Wars* 1.24.16 [=Jakobus Haury, ed., *Procopii Caesariensis Opera Omnia*, vol. 1 (Leipzig: Teubner, 1905), 126]. For a recent overview of Procopius' polemical attitude that is itself admirably polemical, see Rene Pfeilschifter, "The *Secret History*," in *A Companion to Procopius of Caesarea*, ed. Mischa Meier and Federico Montinaro (Leiden: Brill, 2022), 121–36.
[93] Humfress, "Law and Legal Practice," 171–76; Miller and Sarris, *Novels*, 2:796 n.1.
[94] *Const. Tanta* 21; *Const. Dedoken* 21; *Cod. Iust.* 1.14.12 c.4 (30 Oct. 529); *Inst. Iust.* 1.2.6. The tripartite division is analysed masterfully by Jean Gaudemet, "L'empereur, interprète du droit," in *Festschrift für Ernst Rabel*, ed. Wolfgang Kunkel and Hans Julius Wolff, vol. 2, 2 vols. (Tübingen: J.C.B. Mohr, 1954), 169–203. "Interpretation" however, is a notoriously elastic concept, one capable of accommodating a broad variety of imperial interventions. Roberto Bonini, *Ricerche di diritto giustinianeo*, 2nd ed. (Milano: Giuffrè, 1990), 233–68. It can be difficult to discern where an act of interpretation verges into promulgation of a new norm; these activities might instead be seen as a synthesis of ways that the imperial will might manifest itself. Gian Gualberto Archi, "Interpretatio iuris—interpretatio legis—interpretatio legum," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (romanistische Abteilung)* 86 (1970): 41–47. Where interpretation/creation of a new norm occurred in the context of adjudicating a case, all three elements might be present at once. If, as Gaudemet argued, the emperor's authority as interpreter of law was not as well-grounded as Justinian might have wished (*Const. Deo auctore* 4 and *Dig.* 1.3.11 and 12 acknowledge the practice of expert and judicial interpretation, respectively), Justinian was "touchy" about his asserted monopoly over it. Th.E. van Bochove, "For the Mouth of the Emperor Hath Spoken It: Some Notes on C.1,14,12 and the Prohibition of Commentaries in Const. Tanta," *Subseciva Groningana: Studies in Roman and Byzantine Law* 10 (2019): 85–96 (p. 95: "touchiness"). On the other hand, the imperial monopoly on new lawmaking had been established for centuries. Justinian nevertheless took care to reassert it vigorously and often: *Nov.* 113 c.1 pr. (22 Nov. 541) (SK 530/13–14); *Nov.* 143 pr. (21 May 563).
[95] Jill Harries, "Introduction: The Background to the Code," in *The Theodosian Code: Studies in the Imperial Law of Late Antiquity*, ed. Jill Harries and Ian N. Wood (London: Duckworth, 1993), 1–16.
[96] As he acknowledged. *Nov.* 2 pr. pr. (16 Mar. 535) (SK 10/16–22).

DOI: 10.14754/CEU.2024.02

confirms that many of his constitutions therein arose out of prompts external to government, *i.e.*, from his subjects.[97] In this respect, Justinian was merely following in the footsteps of his predecessors.[98] External prompts for new lawmaking are not unique to the *Novels*, just uniquely visible to us there.

That visibility often is not, however, so fulsome as to permit the confident application of Harries' schema to every *Novel*. Some difficulties result from incomplete evidence. Many *Novels* do not say what prompted them beyond unspecified "information," and we are left to surmise its nature from context.[99] Others *Novels* are attributed to multiple prompts, some combination of official report, litigation, and petitions for new laws, sometimes all three at once.[100] To be sure, distinctions between the different prompts were understood.[101] But in the *Novels*, and undoubtedly in the petitions that gave rise to them, the same vocabulary recurs without distinction across various procedural contexts.[102] Any of them might involve petitions.

Beyond such evidentiary considerations, there are also substantive reasons why we cannot limit our investigation to petitions for new lawmaking. For the evidence from Justinian's legislation made in response to petitions of all kinds tells us much about the relationship of his subjects to his lawmaking activities. And what that evidence shows is that, far from being passive recipients of new legislative dictates, Justinian's subjects could be active and intelligent users—manipulators, even—of his laws, applying them imaginatively in furtherance of their own ends, often in ways the emperor did not expect. Each successive measure was met with creative intelligence, as affected subjects sought out the contours of the new law, its perimeter of application, its limitations in scope, its ambiguities, and its silences to fashion work-arounds, interpretations, and loopholes in pursuit of their not always honourable ends. Their tool of choice, or perhaps rather of necessity, was the petition, which served as a device for requesting relief of various kinds, be it resolution of a dispute,

[97] *Nov.* 2 pr. pr. (16 Mar. 535) (SK 10/16–22).
[98] Millar, *Emperor*, *passim*, esp. pp. 6, 10, 266, 317, 379 ("[T]he emperor's role in relation to his subjects was essentially that of listening to requests, and of hearing disputes" (Millar, 6)). Of course, Roman emperors did not lack all agency. Even responsive lawmaking afforded scope to pursue imperial ends, even if programmatic policy-making was limited to a few traditional areas, such as bureaucracy, army, and tax. For a useful qualification to Millar's views, see (for the period 364–375 in particular but with wider applicability), Sebastian Schmidt-Hofner, *Reagieren und Gestalten: der Regierungsstil des spätrömischen Kaisers am Beispiel der Gesetzgebung Valentinians I* (München: C.H. Beck, 2008), 337–50 and *passim*.
[99] *E.g.*, *Edict* 12 (18 Aug 535) (SK 779/3); *Nov.* 22 c.6 (18 Mar. 536) (SK 151/3); *Nov.* 79 pr. (10 Mar. 539) (SK 388/7–9); *Nov.* 33 c.1 (16 Mar. 539) (SK 667/12); *Nov.* 96 pr. (1 Nov. 539) (SK 467/12); *Edict* 10 pr. and c.1 (undated) (SK 776/23–24 and SK 776/25).
[100] See the discussion under "*Other Prompts for New Lawmaking*" below.
[101] See, *e.g.*, *Nov.* 2 pr. pr. (16 Mar. 535) (SK 10/18–20); *Nov.* 80 c.3 (10 Mar. 539) (SK 392/24–26); *Nov.* 112 c.1, c.3 pr. and c.3.1 (10 Sept. 541) (SK 524/5, SK 527/3–4, and SK 527/33–34).
[102] See the discussion under "The Power of *Paideia*" below.

some non-legal benefit, some interpretation or, where no other alternative presented itself, some change of law. It is to these use-cases that we now turn.

Litigation-Related Petitions as Prompts for New Lawmaking

"Issues in cases launched are constantly giving us grounds for laws," announces one *Novel* of 538.[103] Even a cursory review of the *Novels* suffices to confirm the truth of that statement, particularly in the areas such as family law and succession, to which Justinian returned again and again.[104] Cases came up to Justinian and his court, both at first instance and on various forms of appeal, via several channels.[105] There were in principle two modes of initiating litigation at first instance. In the ordinary procedure, the plaintiff lodged a *libellus conventionis* with the judge of first instance, usually the provincial governor, to hear and decide the case.[106] Alternatively, the plaintiff might petition the emperor for relief, in which case the emperor might decide the case himself or, more usually, issue a rescript stating the applicable legal rule and assigning the case to a judge to hear and decide.[107] The ordinary procedure and the procedure by rescript were in origin

[103] *Nov.* 66 pr. (1 May 538) (SK 340/12–13).
[104] With at least 14 different overlapping and often conflicting constitutions issued from 535 to 542: *Nov.* 2 (16 Mar. 535); *Nov.* 22 (18 Mar. 535); *Nov.* 12 (16 May 535); *Nov.* 19 (16 Mar. 536); *Nov.* 61 (1 Dec. 537); *Nov.* 68 (25 May 538); *Nov.* 74 (4 June 538); *Nov.* 89 (1 Sept. 539); *Nov.* 91 (1 Oct. 539); *Nov.* 97 (17 Nov. 539); *Nov.* 100 (20 Nov. 539); *Nov.* 98 (16 Dec. 539); *Nov.* 109 (7 May 541); *Nov.* 117 (18 Dec. 542); Honoré, *Tribonian*, 19 n.178; Kaiser, "Justinian and the *Corpus Iuris Civilis*," 138.
[105] Just because the *Novels* boast of the emperor's just resolution of cases does not entail that he heard such cases personally. Like his predecessors, Justinian largely delegated the actual hearings to officials to decide in his name. See, *e.g.*, *Not. Dig. Or.*, *s.v. XII Insignia viri illustris quaestoris* (*Sub dispositione viri illustris quaestoris: Leges dictandae, preces*) and *s.v. XIX Magistri scriniorum* (*Magister memoriae: adnotationes omnes dictat et emittit, et precibus respondet; Magister epistolarum: legationes civitatum, consultationes et preces tractat; Magister libellorum: cognitiones et preces tractat*) [=Otto Seeck, *Notitia Dignitatum* (Berlin: Weidmann, 1876), 34 and 43–44; László Borhy, *Notitia utraque cum Orientis tum Occidentis ultra Arcadii Honoriique Cæsarum tempora* (Budapest: Pytheas, 2003), 22–23 and 33–34; Concepción Neira Faleiro, *La* Notitia Dignitatum*: nueva edición crítica y comentario histórico*, Nueva Roma 25 (Madrid: Consejo superior de investigaciones científicas, 2005), 197–99 and 215–17]; *Cod. Iust.* 1.23.7 c.1 (23 Dec. 477) (rescripts drafted by *quaestor sacri palatii* and officials from the imperial *scrinia*); *Cod. Iust.* 7.62.34 pr. (by Justin I, 520–524) (*consultationes* delegated to two high-ranking officials plus the *quaestor sacri palatii*); Édouard Andt, *La procédure par rescrit* (Paris: Recueil Sirey, 1920), 39–50. Several *Novels* similarly provide for officials to hear cases in the emperor's stead: *Nov.* 30 c.10 (18 Mar. 536) (the *praefectus praetorio orientis* and quaestor to hear high-value *consultationes* and appeals from the proconsul of Cappadocia); *Nov.* 82 cc.1–4 (8 Apr. 539) (especially SK 402/24–26). It was openly acknowledged that rescripts might be prepared by any number of officials. *Nov.* 114 c.1 (1 Nov. 541). The fact of delegation was well understood by his subjects, at least some of whom knew to seek out the judge of his or her choice for their cases, as is evident from a law of 539 praising a *iudex pedaneus* by the name of Marcellus, "sought out by virtually all who petition us." *Nov.* 82 c.1.1 (8 Apr. 539) (SK 402/17–18: παρὰ πάντων σχεδὸν τῶν ἡμῖν προσιόντων διὰ τοῦτο αἰτούμενον).
[106] On this mode of initiating cases, see Kaser and Hackl, *ZPR2*, 570–76. On the transition from, and differences between, this procedure and the more complex *litis denuntiatio* that prevailed before it, see Bernhard Palme, "Libellprozess und Subskriptionsverfahren," in *Symposion 2017: Vorträge zur griechischen und hellenistischen Rechtsgeschichte (Tel Aviv, 20.–23. August 2017)*, ed. Gerhard Thür, Uri Yiftach, and Rachel Zelnick-Abramovitz (Wien: Verlag der österreichischen Akademie der Wissenschaften, 2018), 257–75. For adjudication as the governor's "principal function" and Justinian's efforts to shore it up, see Charlotte Roueché, "The Functions of the Governor in Late Antiquity: Some Observations," *Antiquité Tardive* 6 (1998): 31–36 (quotation from p. 34).
[107] Turpin, "Imperial Subscriptions," 115–18; Kaser and Hackl, *ZPR2*, 632. The designated adjudicator might be ordinary judicial official (*e.g.*, the provincial governor) or, where this was inappropriate, a specially designated judge.

DOI: 10.14754/CEU.2024.02

distinct but by our period they had come to resemble the other, not least as a result of changes made as part of Justinianic compilation.[108] Both channels appear frequently in the *Novels*, several of which contemplate that suits might be initiated in either.[109] The plaintiff could choose.[110]

Only the rescript procedure was initiated by petition, so it is the one more relevant to this study.[111] As was the case for litigation generally, litigation initiated by the rescript often concerned matters of family law and succession. We thus have many *Novels* issued in response to petitions lodged in disputes over dowries or pre-nuptial gifts.[112] In reflection of that circumstance, women were frequent petitioners, and several *Novels* originated in litigation by women.[113] One states that petitions lodged by women disappointed of their marriage hopes were "more frequent than any other kind of petition," which may even be true.[114]

Petitions to initiate litigation were in the nature of *ex parte* applications, drafted by the plaintiff or his or her advisers alone.[115] Much like modern trial-by-media, the petition set out the claimant's version of the facts without input from the prospective defendant and as such did not reflect any official finding of fact. The imperial response might decide the case or, more usually, state the rule to be applied to the case and refer it to a judge, either an ordinary one or one specially designated, for decision. Because the rescript relied on the account of facts contained in the *ex parte* petition, its relief was made expressly subject to the truthfulness of that account.[116] A *Novel* from

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[108] Andt, *Procédure*, chap. 2, esp. pp. 109–110. The availability of the rescript procedure was, however, subject to limitations: no procedure by rescript could be initiated when litigation on the matter had already begun in the ordinary channel or after judgment in it had already been reached.

[109] *E.g.*, *Nov.* 53 pr. (1 Oct. 537) (SK 299/25–28); *Nov.* 60 c.2.2 (1 Dec. 537) (SK 328/30–33); *Nov.* 112 c.3.1 (10 Sept. 541) (SK 527/31–35); *Edict* 8 c.1.1(17 Sept. 548) (SK 769/22–26); *Nov.* 134 c.3.1 (1 May 556) (SK 680/25–26).

[110] See, in addition to the *Novels* cited in the preceding note, also *Nov.* 112 c.1, c.3 pr. and c.3.1 (10 Sept. 541) (disputes over ownership of property (*litigiosa*) might be initiated either by litigation before an official or by petition to the emperor, SK 524/1–5, SK 527/3–4, and SK 527/33–35); Andt, *Procédure*, 19.

[111] This discussion of the procedure by rescript is drawn largely from Kaser and Hackl, *ZPR2*, 633–36.

[112] *Nov.* 2 c.4 (16 Mar. 535) (SK 16/12–19); *Nov.* 39 pr. (18 Apr. 536) (SK 254/21–22, referring to multiple requests for relief, even if the particular change effected by this constitution was attributed to a single petition); *Nov.* 98 pr. (16 Dec. 539) (SK 478/36–SK 479/4). Justinian's remark on "afterthoughts" in the latter preface—ἔδοξε τὰ δεύτερα καλλίω (SK 479/11–12)—betrays the iterative nature of his legislation in this field.

[113] *Nov.* 155 (1 Feb. 533); *Nov.* 2 (16 Mar. 535); *Nov.* 39 pr. (18 Apr. 536) (SK 254/21–22, petitions by men and women); *Nov.* 94 c.1 (11 Oct. 539) (SK: 461/26–462/1); *Nov.* 158 (14 July 544). Justinian even complained of the slick litigation tactics used by certain women of elite status. *Nov.* 49 c.3 pr. (18 Aug. 537) (SK 292/19–23); Miller and Sarris, *Novels*, 1:415 n.10.

[114] *Nov.* 74 c.5 pr. (5 July 538) (SK 376/8–12: Ἐπειδὴ δὲ ἐκ τῶν προσελεύσεων τῶν γινομένων ἡμῖν ἀεὶ συχνότερον δὴ πάντων γυναικῶν ἀκούομεν ὀδυρομένων καὶ προσαγγελλουσῶν, ὥς τινες προσπαθείᾳ κρατούμενοι πρὸς αὐτὰς εἶτα ταύτας ἀνάγουσιν οἴκοι…).

[115] Examples, or at least of drafts, of such petitions, survive in the archives of Dioscorus of Aphrodito, most notably the lengthy draft petition in his own hand preserved at *P.Cair.Masp.* I 67002, on the *ex parte* nature of which see Bell, "An Egyptian Village," 34; James G. Keenan, "'Tormented Voices': *P.Cair.Masp.* 67002," in *Les archives de Dioscore d'Aphrodité cent ans après leur découverte: histoire et culture dans l'Egypte byzantine: actes du Colloque de Strasbourg, 8–10 décembre 2005*, ed. Jean-Luc Fournet (Colloque de Strasbourg, Paris: De Boccard, 2008), 178. See also *P.Cair. Masp.* III 67352, discussed at Fournet, "Tribulations."

[116] Statements that the rescript depended on the facts appear twice in the draft preserved at *P.Cair.Masp.* I 67028, lines 9–11 and 19–20. If the facts were found to be misstated, the rescript lost binding force. *Cod. Iust.* 1.22.2 (1 Dec. 294),

the year 544 provides an example of this type of rescript, in that it responds to a petition, replies with a decision on the point of law, and tasks the addressee, who is the designated judge, with ascertaining the truth of the facts stated and, if so, instructs him to uphold the petitioner's rights.[117]

Once a case was decided by a court at first instance, challenges to it might come before the emperor in various ways.[118] The two relevant to our study—because they involve petitions—were appeal/*appellatio* and, for judgments no longer open to appeal, *supplicatio.*[119] Appeals from the judgments of lower courts made up a large part of litigation making its way up to the emperor's court.[120] Generally speaking, appeals might ensue only against a final judgment by the court at first instance: that is, interlocutory appeals were generally barred, even if at least a few *Novels*

1.22.4 (11 Nov. 333), 1.22.5 (6 Nov. 426). A statement as to loss of force was to be included in all litigation rescripts, upon pain of loss of rank to the official who neglected to include it. *Cod. Iust.* 1.23.7 pr. and c.1 (23 Dec. 477).

[117] *Nov.* 158 c.1 (14 July 544) (SK 735/21–22).

[118] A case might come up to the emperor for resolution even before a decision by the judge at first instance if he requested instruction as to how to decide it via the procedure known as *consultatio ante sententiam. Cod. Iust.* 7.62.34 pr. (by Justin I, 520–524). See Buckland and Stein, *Text-Book*, 671; Kaser and Hackl, *ZPR2*, 613–14, and in greater detail Wieslaw Litewski, "Consultatio ante sententiam," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (romanistische Abteilung)* 86 (1969): 227–57; Gisella Bassanelli Sommariva, *L'imperatore unico creatore ed interprete delle leggi e l'autonomia del giudice nel diritto giustinianeo* (Milan: Giuffré, 1983), 70–90. Initially, imperial responses to such *consultationes* constituted decisions on points of law, with application of the law to the facts left to the presiding judge; over time imperial responses came to decide the case and render the *sententiam* themselves. Justinian did both. Litewski, "Consultatio ante sententiam," 251. (The attempt to elevate the difference between the two to the level of doctrine by Bassanelli Sommariva, *L'imperatore*, 78–81 is unpersuasive.) *Consultatio ante sententiam* is dealt with is various constitutions collected at *Cod. Iust.* 7.62 and fragments collected at *Dig.* 49.1, and in the *Novels* at, *e.g.*, *Nov.* 112 (10 Sept. 541) (SK 523/24–29); *Nov.* 117 (18 Dec. 542) (SK 551/14–15). The procedure is not relevant to this study inasmuch as it was initiated not by petition but by *relatio* from a judge.

[119] These, together with *consultatio ante sententiam,* made up the bulk of the cases in litigation resolved by the emperor. He also heard cases at first instance, though these must have been limited in number—they could hardly represent good use of imperial time. It has long been held that this possibility was limited to sentencing in criminal matters against *illustres*, though even here fact-finding could be delegated. *Cod. Iust.* 3.24.3 c.1 (485 or 486); M.A. Bethmann-Hollweg, *Der Civilprozeß des gemeinen Rechts in geschichtlicher Entwicklung: Der römische Civilprozeß*, vol. 3: Cognitiones (Bonn: Adolph Marcus, 1866), 93 with nn.31 and 32. We might identify a similar instance (involving high social rank if not criminal charges) in a *Novel* of 555 where the case's importance was such as to make it "beyond the level of a trial before a judge". *Nov.* 159 (1 June 555) (SK 736/8–13).

[120] On the "extremely obscure" origins of the emperor's appellate jurisdiction, see Millar, *Emperor*, 507–16 (quotation from p. 508). The prevailing view is that late antique civil procedure knew two forms of appeal within the formal legal system, known by the terms *appellationes* or ἔκκλητοι, on the one hand, and *appellatio more consultationis*, on the other. Bethmann-Hollweg, *Der römische Civilprozeß*, 3: Cognitiones:294–95. The procedure *consultatio more consultationis* is said to have been fashioned by analogy to the *consultatio ante sententiam* procedure. See Bethmann-Hollweg, 3: Cognitiones:332 ff.; Buckland and Stein, *Text-Book*, 671 ff.; Kaser and Hackl, *ZPR2*, 613 with n.67 and 621 with n.41; Kaser, Knütel, and Lohsse, *Studienbuch*, 89 [§13 ¶15]. Federico Pergami has argued that the source basis for *consultatio more consultationis* is exiguous and that it likely had no separate existence. Federico Pergami, "*Appellatio More Consultationis*," *Studia et documenta historiae et iuris* 69 (2003): 163–83; Federico Pergami, *Amministrazione della giustizia e interventi imperiali nel sistema processuale della tarda antichità* (Milano: Giuffrè, 2007), 64–67. Pergami does not, however, address the problems for his argument presented by the express acknowledgement of appeal by *consultatio* presented by *Nov.* 28 c.8 (16 July 535) (SK 217/37–281/2); or by the use of the verb ἀναφέρω (=*refero*) for appeals against ecclesiastical judgments at *Nov.* 123 c.21 pr. and c.21.1 (1 May 546) (SK 610/5, 610/10 and 610/31). If the two forms of appeal existed separately, the border between them was porous. Kaser, Knütel, and Lohsse, *Studienbuch*, 89 [§6 ¶15]. Only ordinary *appellationes* are relevant here, as they were initiated by petition rather than by *relatio* from the judge at first instance. Examples of such petitions of appeal are referred to in *Nov.* 121 pr. and c.1 (15 Apr. 535) (SK 591/12 and SK 591/20) (that this *Novel* was rooted in an appeal is apparent from SK 591/23); and *Nov.* 82 c.11 pr. (4 Aug. 539) (SK 406/19 and SK 406/26–28).

DOI: 10.14754/CEU.2024.02

contemplate that in limited circumstances one could petition for appeal on procedural matters while a case was ongoing.[121] No more than two appeals were permitted in any case.[122]

Distinct from ordinary appeals, *supplicationes* supplied an extraordinary remedy. They allowed a disappointed litigant to seek the emperor's rehearing of judgments against which formal appeal was not, or no longer, possible.[123] Such unappealable judgments were in principle those issued by the pretorian prefects.[124] Because the hearing of *supplicationes* was often delegated to the prefect who made the judgment complained of, this remedy was closely related to *retractatio*, or ἀναψηλάφησις, whereby a litigant might ask for a judgment against him to be reconsidered by the same judicial level as rendered it.[125] Justinian reconfirmed the availability of *supplicatio* in 539 and again in 544.[126] Like appeals, *supplicationes* were initiated by petition.

Though these various procedural pathways by which litigation might make its way up to the emperor were well-worn, that does not necessarily mean that much importance was given to them in drafting imperial responses. As mentioned above, the rhetorical objective of emphasizing the emperor's responsiveness took precedence over fiddly explanations of how such matters came up to him. Accordingly, the litigation posture of cases prompting new *Novels* often is not specified but must be inferred from context.[127] Regardless of the manner by which cases came to his attention, Justinian legislated both in consequence of individual cases,[128] to resolve or clarify legal issues

[121] *Cod. Iust.* 7.62.36 (undated, but by either Justinian alone or together with Justin, in 527). The prohibition on interlocutory appeals went back at least as far as Constantine (*Cod. Theod.* 11.36.3 (of uncertain date)) and was reaffirmed on several occasions prior to its being picked up in the *Codex*, which tightened the rule by eliminating permitted exceptions. *Cod. Iust.* 7.62.36; Bethmann-Hollweg, *Der römische Civilprozeß*, 3: Cognitiones:327; Buckland and Stein, *Text-Book*, 670; Kaser and Hackl, *ZPR2*, 618–19. Some of these exceptions, particularly in respect of procedural matters, creep back in the *Novels*: *Nov.* 90 c.4 pr. (1 Nov. 539) (SK 449/1–3, petitions to call witnesses on four occasions) and c.5 pr. (SK 450/15–17, petitions to compel testimony of witnesses in Constantonople for litigation in provinces); *Nov.* 135 c.1 (24 Feb. of a year post-541) (SK 690/5–8).

[122] *Cod. Iust.* 7.70.1 (1uly 528); *Nov.* 82 c.5 (8 Apr. 539). Prior to Justinian, it appears that only one appeal was allowed. *Cod. Theod.* 11.38.1 (16 June 391).

[123] See the constitutions at *Cod. Iust.* 1.19; Bethmann-Hollweg, *Der römische Civilprozeß*, 3: Cognitiones:338–41; Buckland and Stein, *Text-Book*, 671; Kaser and Hackl, *ZPR2*, 623; Pergami, *Amministrazione*, 135 ff.

[124] *Cod. Iust.* 7.62.19 pr. (1 Aug. 331). That *supplicatio* was available (once only) against such judgements is apparent from *Cod. Iust.* 1.19.5 (17 Sept. 365).

[125] *Cod. Iust* 7.62.35 (522–527, reconstructed from *Bas.* 9.1.125). Its original aim was protection of the fisc. *Cod. Iust.* 10.9.1 (7 Jul. 212). The quaestor was co-opted as an additional judge where the prefect rehearing the case was the same one who rendered the judgment. *Cod. Iust.* 7.62.35; Kaser and Hackl, *ZPR2*, 623.

[126] *Nov.* 82 (8 Apr. 539) (SK 407/27–28); *Nov.* 119 c.5 (20 Jan. 544) (SK 575/10–12). Some have interpreted this latter provision as abolishing the remedy of *supplicatio* by limiting extraordinary remedies to *retractatio*, but Pergami is probably correct in arguing that the text evinces no abolitional intent. Pergami, *Amministrazione*, 138–39.

[127] The procedural pathway is often left undescribed or is described in ambiguous terms, as in *Nov.* 84 c.1 (18 May 539) (SK 411/24–25: ἦλθε δὲ εἰς ἡμᾶς τι τοιοῦτο); *Nov.* 98 c.2 pr. (16 Dec. 539) (SK 503/18–19: Κἀκεῖνο μέντοι ἔκ τινος δίκης προσαγγελθείσης ἡμῖν εἰς νομοθεσίαν ἀγαγεῖν ᾠήθημεν χρῆναι).

[128] *Nov.* 2 pr. 1 and c.3 pr. (16 Mar. 535) (SK 12/6–10 and SK 13/28–32); *Nov.* 61 pr. (1 Dec. 537) (SK 329/24–28); *Nov.* 91 pr. c.1 and c.2 (1 Oct. 539?) (SK 454/17–19, SK 456/2–4, and SK 456/8–10); *Nov.* 93 c.1 (11 Nov. 539) (SK 460/4–5); *Nov.* 97 c.5 (17 Nov. 539) (*passim*); *Nov.* 98 c.2 pr. (16 Dec. 539) (SK 480/17–18); *Nov.* 108 pr. pr. and ep. (1 Feb. 541) (SK 513/24–25 and SK 516/23–25).

arising in multiple cases,[129] and to take the opportunity of issues arising in individual cases to fix problems arising in many.[130] We need not take these distinctions at face value, for at least some *Novels* described as arising from a single case show signs of having been "pluralized", *i.e.*, presented as responses to multiple cases, not just one.[131] These factors are at work in the two case studies that follow—one from 536 and the other from 537. These legislative examples, both of which relate to all-important questions of personal status, demonstrate that Justinian's subjects were intelligent, active users of his legislation, keen to use (or misuse) it for their own ends.

Case Study 1: Bastards No More!

The first case study is of a constitution of 536 addressing a topic on which Justinian frequently intervened, namely the rules governing the rights of children to inherit property of a (deceased) parent. Under classical Roman law, a child born out of wedlock was generally viewed as related only to its mother, not to its father, and had no entitlement to his estate upon his decease.[132] In *Novel* 19, the emperor felt compelled to intervene, for at least the fourth time in less than a decade, to clarify the rights of children born to a father before his formalisation of marriage with their mother.[133] The tale begins in a constitution of 529, by which Justinian laid down the rule that children born before the exchange of dowry contract and those born after it were to be on equal footing in respect of inheritance of their father's property upon his demise.[134] That law's focus on the equality of children born before and after marriage left an opportunity for those clever and audacious enough to seize it. Where a deceased had no children born post-exchange, those potentially in line to receive his estate in the absence of children (*i.e.*, his other agnatic relations) could argue that since the constitution of 529 only equated pre-contract children with post-contract

[129] *Nov.* 19 (16 Mar. 536), discussed immediately below; *Nov.* 49 pr.2 (18 Aug. 537) (SK 289/24–29, unblocking appellate delays) and c.2 pr. (SK 291/12–16, clarifying how documentary evidence should be authenticated); *Nov.* 50 pr. pr. (1 Sept. 537) (SK 293/27–30, reducing inconveniences of certain appeals); *Nov.* 66 c.1.1 (1 May 538) (SK 341/34–36, referring to petitions to save technically defective wills); *Nov.* 67 pr. (1 May 538) (SK 344/13–16, requiring episcopal approval for founding new religious institutions); *Nov.* 74 c.4 pr. (5 June 538) (SK 374/1–14, establishing conditions for valid marriages); *Nov.* 113 pr. (22 Nov. 541) (SK 529/17–24, precluding certain kinds of common judicial malpractice).
[130] That the two categories could blend into each other is shown by *Nov.* 39 pr. (18 Apr. 536) (citing past judgments on restitution of dowries before turning to the case at hand); *Nov.* 73 pr. pr. (4 June 538) (SK 363/34–364/3, referring to both numerous cases and a particular one out of Armenia); *Nov.* 84 c.2 (18 May 539) (SK 413/39–41, resolving current case and governing both future and pending cases on point); *Nov.* 88 pr. (1 Sept. 539) (SK 425/22–27, resolution of a common issue in one case prompts a general law to resolve it for all).
[131] *E.g.*, *Nov.* 93 pr. (11 Nov. 539) (SK 459/13–15) where the *Authenticum* states that the prompt was a (single) case whereas the Greek text has been pluralized. See translator's note at Miller and Sarris, *Novels*, 2:633.
[132] *Dig.* 1.5.24; *Inst. Iust.* 1.9 pr. and 1.10.12; Plessis and Borkowski, *Textbook*, 116–17; Kaser, Knütel, and Lohsse, *Studienbuch*, 427 [§72.1 ¶4].
[133] *Nov.* 19 (16 Mar. 536). The sequence of constitutions discussed here contemplates that marriages could be formalised by execution of dowry documents (*dotalibus instrumentis*) but such documents were not necessary for valid marriage to subsist in all cases. van der Wal, *Manuale 2nd*, 69 para. 522.
[134] *Cod. Iust.* 5.27.10 (17 Sept. 529).

DOI: 10.14754/CEU.2024.02

children, the legitimation effected by it was otiose where there were no post-contract children.[135] On this view, such children born pre-contract (the only ones) could not avail themselves of the earlier constitution and thus could not inherit: the estate should go to the (more distant) agnates. This was a clever argument, but a bit too clever.[136] Justinian clarified that such was not the intent of his earlier law and that he intended children born pre-contract to be legitimated with the exchange of contract even in the absence of later-born children.[137]

Such was the importance of such questions of inheritance, however, that this clarification did little to settle matters. Children of previous marriages (or their lawyers) noticed that the laws just discussed did not expressly equate the children born to a subsequent wife prior to her marriage with the legitimate children of a prior marriage of the father; they argued that the children of the prior marriage alone should succeed to the inheritance. Justinian gave this short shrift, too.[138] In May 535, he clarified that pre-contract children of subsequent marriages were legitimated for these purposes, as well.[139] But even this was still insufficient to stamp out efforts by wily relatives to do down a decedent's children born prior to the exchange of contracts. Some noticed that the two earlier constitutions had, when promulgated, included statements that their rules were to apply retroactively, but that these statements had been removed when the constitutions were compiled in the *Codex*, and that the constitution of May 535 had no retroactivity clause at all.[140] These omissions, it was argued, meant that Justinian no longer intended for these laws to apply to a child born prior to their promulgation but only for children born thereafter. This interpretation was, in Justinian's view, incorrect, and he made his frustration known.[141] In March 536, the emperor intervened once more by offering, in *Novel* 19, yet another "authentic" interpretation:[142] namely,

[135] The reason given for such equality in *Cod. Iust.* 5.27.10—namely that after-born children owed a debt of gratitude to earlier-born children for inducing their father to marry their mother—gave a toehold for aggressive advocates to argue that where there were no after-born children there was no-one who might owe such a debt of gratitude. Francesco Sitzia, "Il Breviarium Novellarum di Teodoro di Ermopoli," *Subseciva Groningana: Studies in Roman and Byzantine Law* 9 (2014): 209–10.
[136] *Cod. Iust.* 5.27.11 c.2 (19 Mar. 530) (*Quorum supervacuam subtilitatem penitus inhibendam censemus*).
[137] *Cod. Iust.* 5.27.11 (19 Mar. 530). The notes discussing this sequence of constitutions given at Miller and Sarris, *Novels*, 221 are confused in that they fail to recognise that the "second constitution" discussed in *Nov.* 19 pr. is *Cod. Iust.* 5.27.11. Bonini, *Ricerche (2nd ed.)*, 239–45 shows the link.
[138] *Nov.* 12 c.4 (16 May 535) (SK 98/21–22).
[139] *Nov.* 12 (16 May 535). This constitution and those of the *Codex* just discussed would go on to be restated, along with others, in Justinian's restatement of the laws regarding legitimacy, specifically at *Nov.* 89 c.8 pr. (1 Sept 539), on which see Krumpholz, *Sozialstaatliche Aspekte*, 130–41.
[140] *Nov.* 19 pr. (16 Mar. 536). On these aspects, see Francesco Sitzia, "Novella 19: fra problemi di tecnica legislativa e cavilli della prassi," in *Nozione, formazione e interpretazione del diritto. Dall'età romana alle esperienze moderne. Ricerche dedicate al professor F. Gallo*, ed. Filippo Gallo, vol. 4, 4 vols. (Napoli: Jovene, 1997), 519–36.
[141] *Nov.* 19 pr. and c.1 (16 Mar. 536) (SK 139/33–34: ὅπερ ἀτόπως ὑπώπτευσαν, and SK 140/9–11).
[142] Since the work of Francisco Suarez at the beginning of the 16th century, at least, romanist scholarship has identified "authentic" interpretations is those preceding from the same person as promulgated the law being interpreted, issued in response to an uncertainly in the meaning of that law; such interpretations are considered as having retroactive effect.

DOI: 10.14754/CEU.2024.02

that those earlier laws were in fact intended to apply to all cases where the father was still surviving or, if deceased, the affairs of his estate had not yet been settled by verdict or judgment. Just a fortnight earlier, Justinian had stepped in to correct the arguments of yet another class of relative, namely those who sought to cheat children born pre-contract where they had been their father's slaves prior to marriage by arguing that the prior constitutions were silent as to children who were former slaves so they should not inherit.[143] Here, too, Justinian made plain his frustration with his subjects' wheedling, complaining of their "ingeniously dishonest and iniquitous interpretations."[144]

Novel 19 thus alerts us to the obvious point that Roman family law was in large measure constituted by laws governing succession, and that a significant portion of litigation related to the passage of property upon death.[145] But it also tells us something more interesting for our present purposes, namely the attitude with which Justinian's subjects approached his legislation. However pious the emperor's assertions of fostering the interests of illegitimate children were, his subjects included many who were not inclined to let his law-making stand between them and a potentially juicy inheritance. As the series of laws culminating in *Novel* 19 shows, they were, each in their own successive circumstances, capable of reading Justinian's laws, identifying (presumably with the help of adviser) possible lines of argument, and pursuing those arguments aggressively in litigation against the children whom the emperor had intended to benefit.

Case Study 2: Children of Mixed Marriages

Now, it might be objected that such active exploitation of successive legislation may well have been evident amongst subjects whose families had property of a value worth engaging advocates to fight over, but did not penetrate further down the social scale. That argument is belied by a law of 537, which demonstrates that knowledge of new legislation, and of the possibilities for exploiting its silences, could extend quite far down society's ranks. In *Novel* 54, Justinian complains of "criminal schemes" of interpretation to the detriment of estate owners, misusing (in his view) his own earlier innovations to the law of personal status.[146] The matter related to the status of persons born to parents one of whom was free and the other a *colonus adscripticius.*[147]

Gaudemet, "L'empereur," 198–203; Bonini, *Ricerche (2nd ed.)*, 234–38. On *Nov.* 19 as an authentic interpretation of the *Codex* provisions, see van der Wal, *Manuale 2nd*, 2 para. 6 and, more broadly, Bonini, *Ricerche (2nd ed.)*, 235–59.

[143] *Nov.* 18 c.11 (1 Mar. 536).

[144] *Nov.* 18 c.11 (1 Mar. 536) (SK 137/15–16: διὰ τὴν τῶν σοφιζομένων τε καὶ κακούργως ἑρμηνευόντων δεινότητα).

[145] Honoré, *Emperors*, 20 ("propertied Romans were more inclined to litigate about inheritance than anything else").

[146] *Nov.* 54 pr. and c.1 (1 Sept 537) (SK 307/1–3: Ἵνα μὴ τοίνυν ἐξῇ τεχνάζειν καὶ κακουργεῖν καὶ τοὺς τῶν χωρίων βλάπτειν δεσπότας ταῖς τοιαύταις ἑρμηνείαις).

[147] A *colonus adscripticius* was an agricultural labourer, tied to the land and subject to the authority of the landlord who assumed his liability for taxes. Paul Lemerle, *The Agrarian History of Byzantium: From the Origins to the Twelfth Century*, trans. Gearóid MacNiocaill (Galway: Galway University Press, 1979), 7–13, 19–26; A.J.B. Sirks, "The Colonate in Justinian's Reign," *Journal of Roman Studies* 98 (2008): 120–43.

DOI: 10.14754/CEU.2024.02

Under Roman law prior to Justinian, the status of the child of such a mixed marriage did not follow the general rule of the *ius gentium* and take the status of the mother.[148] Instead, the child became *colonus adscripticius* if either parent had that status.[149] Justinian changed that rule as part of his legislative efforts preceding the second edition of his *Codex*, decreeing that the child born of such a mixed marriage should have the status of the mother—if she was free, so was the child.[150] This constitution, in the form in which it appears in the *Codex*, says nothing about retroactive effect. Nevertheless, in the years following its promulgation, children of mixed marriages, some of them of advanced age, had invoked it in suits for their own liberation from *colonus* status, claiming that the *Codex* provision benefitted them even though they had been born prior to its promulgation. Justinian quashed these attempts in 537, decrying those who sought "to interpret the law in such a stupid, or criminal way" as to apply it retroactively.[151] Of course, the claimants' interpretation was neither of those things, for (as *Novel* 54 tacitly concedes) the *Codex* provision did not state whether it was to apply only prospectively or with retrospective effect. Given the prospect of being freed from the burdens incumbent upon *coloni adscripticii*, it was worth the effort to try.

The possibilities inherent in the constitution's silence as to the timing of its application were well-spotted. That the plaintiffs could invoke this law and exploit its silences demonstrates that the ability to intelligently construe and apply legislation for one's benefit was not the exclusive preserve of those of high status but rather shared more broadly.[152] As Paul Stephenson has remarked, "Access to legal advice in family matters was available across the empire to those of modest means as well as to the wealthy and remained so to the end of our period."[153] *Novel* 54 shows that what was true of "family matters" was also the case for personal status.

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As the balance of this chapter demonstrates, this same application of active intelligence to successive legislation that is evident in these case studies from litigation-inspired *Novels* also characterized other petitioning efforts by Justinian's subjects. We discuss each in turn.

[148] A child ordinarily took the status of its mother: Gai., *Inst.*, 1.82 [=F. de Zulueta, ed., *Institutes of Gaius*, 2 vols. (Oxford: Clarendon Press, 1946 and 1953), 1:26]; *Dig.* 1.5.5.1–2. There were limitations where one parent was a slave under the *SC Claudianum* (52 AD) and a decree of Hadrian, but these are irrelevant to the case discussed here and were, in any event, disapplied by Justinian by *Cod. Iust.* 7.24.1 pr. some time between 531 and 534. See *Inst. Iust.* 1.4 pr.; Buckland and Stein, *Text-Book*, 68–69; Plessis and Borkowski, *Textbook*, 92.

[149] According to the description given by Justinian in *Nov.* 54 pr. The true position was more complex than that. See Sirks, "The Colonate in Justinian's Reign," 127–28.

[150] *Cod. Iust.* 11.48.24 pr. (likely from 17 Nov. 533).

[151] *Nov.* 54 pr. (1 Sept. 537) (SK 306/36–38: τινὲς δὲ οὕτως ἀνοήτως ἢ κακούργως ἑρμηνεύειν ἐπεχείρησαν τὸν νόμον).

[152] Accord: Miller and Sarris, *Novels*, 1:436 n.1 and 1:437 n.4.

[153] Paul Stephenson, *New Rome: The Roman Empire in the East, AD 395–700* (London: Profile Books, 2021), 50.

DOI: 10.14754/CEU.2024.02

Non-Litigation Petitions as Prompts for New Lawmaking

Outside litigation contexts, many, perhaps most, petitions had little to do with law in any scientific sense. They dealt instead with more mundane requests— for jobs, tax remissions, favours, *nomismata*.[154] The vast bulk of Justinian's rescripts responding to these requests have not come down to us.[155] Some petitions made outside the context of litigation do, however, engage with law in a substantive way, namely those that derive from petitions for new lawmaking—*i.e.*, lobbying. The *Novels* contain examples of laws promulgated in response to such petitions to a greater extent than is visible to us in the materials from earlier periods, due at least in part to the editing processes to which those materials were subjected as part of codification. As discussed more fully below, the *Novels* thus offer examples of legislative change in response to petitions from a wide range of persons in an even wider range of matters.

Who Petitioned?

The makers of petitions outside the litigation context were as various as the requests they contained. Any citizen, male or female, freeborn or freed, could petition any official, for just about anything. Depending on subject matter, petitions might also be made to persons who were not imperial officials, such as higher clergy[156] or one's landlord.[157] Charismatic holy men were favourite addressees, especially in Syria, it seems, where the locals sought them out for assistance in matters temporal and spiritual.[158] The two sets of concerns were not as distinct as one might think, at least insofar as relates to how one went about pursuing them. As Peter Bell has observed, the leper of Romanos the Melodos makes his prayer using the same word as petition (δέησις) and continues that metaphor, singing "written on the parchment of my soul";[159] and the prayers of Theodore of Sykeon to two saints resemble nothing so much as a petition to higher-ups asking them

[154] For the distinction between rescripts in litigation and these more mundane requests, visible in the sources since at least the Severan period, see Honoré, *Emperors*, 36–38; Tor Hauken, *Petition and Response: An Epigraphic Study of Petitions to Roman Emperors 181–249*, vol. 2 (Bergen: The Norwegian Institute at Athens, 1998), 300–301.
[155] Noailles, *Collections*, 1:144.
[156] *Nov.* 142 c.2 (17 Nov. 558).
[157] *Nov.* 80 c.2 and c.3 (10 Mar. 539) (SK 391/33–35, as well as SK 392/24–26: τοὺς δικαζομένους ἢ δεομένους τινὸς τῶν δικαίων παρὰ τῶν κεκτημένων). The latter passage is notable for its clear distinction between petitioners and litigants. See A.J.B. Sirks, "Making a Request to the Emperor: Rescripts in the Roman Empire," in *Administration, Prosopography and Appointment Policies in the Roman Empire*, ed. L. de Blois (Amsterdam: Brill, 2001), 122–23. For examples of petitions to landlords, see *P.Oxy.* I 130, discussed at Peter Sarris, "Social Relations and the Land: The Early Period," in *The Social History of Byzantium*, ed. John Haldon (Malden, Mass.: Wiley-Blackwell, 2009), 104, and *P.Oxy.* XXVII 2479, discussed at Sarris, *Economy*, 72–73.
[158] Peter Brown, "The Rise and Function of the Holy Man in Late Antiquity," *Journal of Roman Studies* 61 (1971): 80–101, esp. 90–91 on Saint Symeon Stylites.
[159] Romanos Melodos, *Kontakion* 8, str. 11, lines 5–8 (διὰ δύο ῥημάτων ὡς πάνσοφος ῥήτωρ// τὰ νοήματα ταύτης τῆς δεήσεώς μου ἅπαντα διέγραψεν·// ἐν χάρτῃ τῆς ψυχῆς μου γεγραμμένην τὴν αἴτησιν ἔχω// καὶ ταύτην σοι προσφέρω·) [=Paul Maas and C.A. Trypanis, eds., *Sancti Romani Melodi Cantica: Cantica Genuina* (Oxford: Clarendon Press, 1963), 61]; Bell, *Social Conflict*, 259 with n.256.

to seek relief on his behalf from One higher still.[160] Meanwhile, back down on Earth, an important constitution of 535 illustrates the range of subjects who might make petitions to the emperor, streaming into Constantinople to do so, all in pursuit of their individual aims: "priests, city councilors, civil servants, land owners, city folk, agricultural workers," *i.e.*, just about anyone who was not a slave.[161] So great were the numbers of petitioners that Justinian and Theodora provided a hostel for the indigent among them.[162] Of course, some of these petitioners held greater sway, or might elicit greater sympathy, than others.

Church Petitioners. Clerics, especially bishops, were frequent petitioners, as they had long been.[163] So much so that they had their own channels for lodging them, in the form of *referendarii* appurtenant to the Great Church and the *apocrisarii* that each patriarch stationed in the capital to represent the interests of the dioceses under their authority. Petitioning bishops from the provinces were directed to use these channels.[164] The Great Church of Constantinople, surely the source of many petitions, had direct access in any event. Its clergy might also serve as go-betweens for other churches, as they did in 536 for a petition by the Church of the Holy Resurrection in Jerusalem.[165]

The special pathways for petitions by bishops and higher clergy reflected their role as leaders of their local communities.[166] No bishop could claim a larger flock than the pope, so it is unsurprising that it was a petition by him that prompted the well-known "Pragmatic Sanction" aimed at re-establishing Roman legal order in newly reconquered Italy "to the advantage of all known inhabitants of the West."[167] On a homelier scale, Andreas, *apocrisarius* of the church of

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[160] *Vita Theodoros Sykeon* 39 [=André Jean Festugière, ed., *Vie de Théodore de Sykéôn*, vol. 1, Subsidia Hagiographica 48 (Bruxelles: Société des Bollandistes, 1970), 34–35]; Bell, *Social Conflict*, 258–60.

[161] *Nov.* 8 pr. 1 (15 Apr. 535) (SK 66/15–19: συρρέουσιν ἐνταῦθα πάντες ὀδυρόμενοι, ἱερεῖς τε καὶ βουλευταὶ καὶ ταξεῶται καὶ κτήτορες καὶ δημόται καὶ γεωργοί, ταῖς τῶν ἀρχόντων κλοπαῖς τε εἰκότως καὶ ἀδικίαις μεμφόμενοι). Slaves generally could not petition the emperor (*Cod. Iust.* 1.19.1 (8 Oct. 290)) but they might petition bishops and magistrates for protection against outrageous treatment. Gai., *Inst.*, 1.53 [=de Zulueta, *Institutes of Gaius*, 1:17]; *Inst. Iust.* 1.8.2; *Dig.* 1.12.1.8 and 1.6.2. For the effectiveness of the remedy, compare the credulity of W.W. Buckland, *The Roman Law of Slavery: The Condition of the Slave in Private Law from Augustus to Justinian* (Cambridge: Cambridge University Press, 1908), 36–38 with the more realistic views of Kyle Harper, *Slavery in the Late Roman World, AD 275–425* (Cambridge: Cambridge University Press, 2011), 290 n.67. Once obtained, a rescript issued to a slave could not be challenged on account of his status. *Cod. Iust.* 1.19.6 (4 Sept. 410).

[162] Procop., *de Aed.* 1.11.23–27, esp. 25 [=Jakobus Haury, ed., *Procopii Caesariensis Opera Omnia*, vol. 3.2 (Leipzig: Teubner, 1913), 45]. On the need to present petitions at the emperor's residence and not via imperial officials see the discussion at "Making One's Plea" below.

[163] Not just because of their increasing importance, but also in view of that opportunity petitioning afforded to escape one's rustic see for the cosmopolitan whirl of the capital, on which see Rapp, *Holy Bishops*, 265–67.

[164] *Nov.* 6 c.3 (1 Apr. 535) (SK 42/1–6). We may doubt that this instruction was uniformly observed.

[165] *Nov.* 40 pr. 1 (18 May 536). That the petitioner, Eusebius, treasurer of the Great Church, was the architect of the financial engineering that the petition sought to unwind certainly influenced his selection by colleagues in Jerusalem to to petition on their behalf.

[166] See note 45 above, as well as notes 255–256 below.

[167] *App.* 7 (13 Aug. 554), issued in response to the petition of Pope Vigilius (SK 799/11–13: *ad utilitatem omnium pertinentia, qui per occidentales partes habitare noscuntur*).

DOI: 10.14754/CEU.2024.02

Thessalonike, petitioned for a new law on foundlings to ameliorate certain unethical practices of child abandonment that had arisen in his bailiwick.[168] And clerical petitions were not necessarily limited to the benefit of the priest's own flock: even Samaritans could on occasion have local priests petition on their behalf.[169]

Of course, not all petitions by church authorities were made on behalf of their flocks. Many addressed more internal matters. Ecclesiastical discipline was a frequent subject of petitioning. One *Novel* of 539, strengthening the jurisdiction of bishops over monks, is expressly stated to have been made at the request of Menas, patriarch of Constantinople.[170] Justinian did not leave such matters entirely in the hands of the church, however. Clerical control of ecclesiastical affairs might be supplemented by resort to civil authorities or, in some cases, the emperor himself.[171] In addition to the power of civil officials to assist in matters of ecclesiastical discipline, the civil authorities might also intervene in civil or criminal cases against a cleric, monk, or nun to adjudicate where the bishop charged with hearing the case was dilatory.[172] Petitions regarding disciplinary infractions by monks and clergy continued to demand Justinian's attention down to the last months of his long life.[173] That the emperor's interventions in church matters were not always limited to disciplinary or legal proceedings but might on occasion extend to substantive matters of institutional regulation is shown by his response to their petitions requesting confirmation of the privileges of bishops of Africa following its reconquest.[174]

The management of church property was also a productive source of petitions, necessarily so in light of Justinian's ever-changing restrictions on the ability of churches and other religious

[168] *Nov.* 153 (12 Dec. 541) (SK 728/16–18).
[169] *Nov.* 129 (15 June 551) (SK 648/2–5). Samaritans were generally disfavoured under Justinian's legislation, though their disadvantages were to some extent ameliorated in 551. *Nov.* 129 (15 June 551); Karl Leo Noethlichs, "Jews, Heretics or Useful Farm Workers? Samaritans in Late Antique Imperial Legislation," *Bulletin of the Institute of Classical Studies* 50, no. Supp. 91 (March 1, 2007): 62–65, https://doi.org/10.1111/j.2041-5370.2007.tb02376.x.
[170] *Nov.* 83 pr. pr. (18 May 539) (SK 409/15–17). Episcopal control extended not only to matters internal to the church but also to legal proceedings against clerics, monks, or nuns. *Nov.* 123 (1 May 546) cc.21 pr. and 1 (civil cases and criminal charges brought against clerics, monks and nuns to be adjudicated by bishop), and c.22 (complaints against bishops to be made by petition to the metropolitan, and those against the metropolitan by petition to the patriarch).
[171] As in cases of supernumerary appointments of clerics: *Nov.* 3 c.2.1 (16 Mar. 535) (SK 22/40–45, future patriarchs and stewards, as well as any cleric, empowered to report infractions to the emperor); or breaches of monastic discipline: *Nov.* 5 ep. (17 Mar. 535) (SK 35/8–12, civil officials to enforce canons when violations reported to them); and *Nov.* 133 c.6 (16 Mar. 539) (SK 675/22–25, the *PPO* or, in the provinces, the governors may step into assist with "more vigorous enforcement" when so apprised by church authorities. This latter provision foresees that monks frequenting pubs—perhaps not a rare phenomenon—were to be turned over to the civil authorities directly. *Nov.* 133 c.6 (SK 675/ 25–29).
[172] *Nov.* 123 c.21.2 (1 May 546) (SK 610/33–37).
[173] *E.g.*, *Nov.* 123 c.21 c.2 (1 May 546) (SK 609/17–20); *Nov.* 137 pr. (26 Mar. 565) (SK: 695/6–9). This latter provision goes on to note that petitions alleging breach of ecclesiastical discipline were not rarities (SK 695/12–14).
[174] *App.* 2 (6 Oct. 541); *App.* 3 (29 Oct. 542). On these laws, see Wolfgang Kaiser, "Authentizität und Geltung spätantiker Kaisergesetze: Studien zu den *Sacra priviliegia concilii Vizaceni*," Münchener Beiträge zur Papyrusforschung und Rechtsgeschichte 96 (München, C.H. Beck, 2007), 115–31 and 132–55.

DOI: 10.14754/CEU.2024.02

institutions to dispose of their immoveable properties.[175] In May 536, the treasurer of the Great Church in Constantinople sought and won from the emperor a special exemption on behalf of the church in Jerusalem to sell some of its immoveable property (the disposition of which was otherwise prohibited) on favourable terms.[176] Some 18 months later, the stewards of churches responsible for conducting the capital's funerals successfully petitioned for additional income to fund that work.[177] In 538, the bishop of Odessus (modern Varna) likewise won permission to dispose of immoveable property.[178] Slaves were property, too, of course, so it is unsurprising that we find petitions relating to them, as in the case of a petition by a Lycian ascetic by the name of Zosimus, who petitioned on behalf of a monk who had been claimed as a slave.[179] If the surviving record shows Justinian as accommodating to such requests on behalf of church officials, they did not always have it their own way. In one undated constitution, the estate managers of the church of Apamea received a resounding slap when their petition claiming certain children of *coloni* for their church was denied.[180] There are hints in Justinian's legislation on church property that he had to deal with many other questions of management.[181]

As was the case for other petitioners, not all of petitions on behalf of the Church requested relief that was specifically legal. Cyril of Scythopolis' *Vita Sabae* gives an attractive, and perhaps not wholly fictional, account of the eponymous saint petitioning Justinian on behalf of the Church in Palestine for a tax holiday; for monetary subsidies for church repairs, a new hospital, and a new church; and for military protection.[182] The *Vita* of St. Symeon the Younger tells a similar tale of the head of a hospital petitioning for subsidy.[183] Not all such non-legal petitions by church officials were on behalf of the church. Some petitions related to the more personal—one might even say selfish—concerns of clergy, as reflected in a constitution of 537 that responded to petitions from

[175] *Nov.* 7 (15 Apr. 535); and *Nov.* 120 (9 May 544). On these laws, see David Rockwell, "Emphyteusis in a Time of Death: What Can Laws on Church Property Really Tell Us About the Sixth-Century Plague?," *Studies in Late Antiquity* 7, no. 4 (Winter 2023): 561–86, https://doi.org/10.1525/sla.2023.7.4.561.
[176] *Nov.* 40 pr. 1 (18 May 536) (SK 259/10 ff.). The Great Church comprised the Hagia Sofia and the churches of the Theotokos, Hagia Eirene, and Hagia Theodoros, which shared clergy and funding. *Nov.* 3 c.1 pr. (16 Mar. 535).
[177] *Nov.* 59 c.2 (3 Nov. 537) (SK 318/22–24).
[178] *Nov.* 65 pr. 1 (23 Mar. 538).
[179] *Nov.* 5 c.2.1 (17 Mar. 535) (SK 30/7–11).
[180] *Nov.* 156 (undated, post-539) (SK 733/6–7 and 733/15–16).
[181] *E.g.*, *Nov.* 7 c.1 and 12 (15 Apr. 535) (SK 51/21–25, artificially low emphyteutic rents; and SK 62/1–7, gifts of unproductive property).
[182] Cyril of Scythopolis, *Vita Sabae*, 72–73 [=Eduard Schwartz, ed., *Kyrillos von Skythopolis* (Leipzig: Hinrichs, 1939), 175–78].
[183] *Vita Sym. Iun.* 72.2–5 [=Paul van den Ven, ed., La Vie ancienne de S. Syméon stylite le Jeune, vol. 1, Subsidia Hagiographica 32 (Bruxelles: Société des Bollandistes, 1962), 62].

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clergy who had been appointed but excluded from office until they met demands to pay entry fees.[184] We also hear of Cappadocian priests petitioning on account of lost possessions.[185]

Imperial Officials. Beyond the Church, imperial officials were also frequent source of petitions to the emperor. Matters falling within the scope of their official responsibilities ordinarily would have taken the form of a *suggestio* or *relatio*,[186] but officials had personal interests, too, and petitions pursuing them wended their way to Justinian with some regularity. Job applications featured prominently, even if their ephemeral nature means that they leave few traces in the record.[187] Some petitions by officials, however, raised issues of sufficient importance to require new lawmaking in response. We thus hear of many petitions by consuls for exemption from the ban, introduced during the reign of Marcian, on distributing coins to the populace upon their entry to office; it appears that such permission was often granted until Justinian legislated the point afresh in 539.[188] We also hear of numerous petitions by the fathers of senior officials for their sons to be removed from *patria potestas*, a status that subjected them to their father's authority in private law even as they occupied high public office, which ultimately led Justinian to legislate to provide that relief more generally.[189] There may also be petitions by officials lurking behind Justinian's 537 grant of permission, in some cases, for offices to be hypothecated as credit support for loans extended to the office-holder.[190]

Ordinary Subjects. In addition to rescripts issued in response to petitions by the great and good, many *Novels* tell us that they were prompted by petitions made by ordinary subjects—*i.e.*, those who held no office, ecclesiastical or imperial. Many if not most of these would have been to initiate litigation of the sort discussed above or, if not, were of the non-legal type, such as the innumerable petitions for remission of tax.[191] But there are at least a few that involved requests for legal change, such as the coordinated petitioning campaign conducted by the villagers of Sindys and

[184] *Nov.* 56 pr. (3 Nov. 537) (SK 311/11–19). Although this *Novel* does not identify the source of the petitions, it is pretty obviously the excluded clergy themselves.
[185] *Nov.* 30 c.5.1 (18 Mar. 536) (SK 228/15–21). At least some of these petitions were likely not just on the priests' behalf but in part also on behalf of their flocks.
[186] Discussed at notes 225–237 below.
[187] As they did at *Nov.* 10 pr. 1 (15 Apr. 535) (SK 92/23–25).
[188] The ban on distributing coins appears at *Cod. Iust.* 12.3.2 (452). The reference to petitions for exemption appears in Justinian's further regulation of expenditure on new consuls' celebrations. *Nov.* 105 pr. (1 Nov. 539) (SK 501/21–24), on which see note 220 below. The text does not tell us that those previous grants of exemption were in large measure Justinian's own, but the thrust of *Nov.* 105 makes that the way to bet.
[189] *Nov.* 81 c.1.1 (18 Mar. 539) (SK 398/36–SK 399/3).
[190] *Nov.* 53 c.5 (10 Oct. 537) (SK 303/38–39, expanding the circumstances in which offices could be hypothecated that Justinian had allowed under *Cod. Iust.* 8.13.27 (1 June 528)). The text speaks only of petitions by lenders, but if officeholders wanted such loans to be made to them at all, it would have been in their interests to join in those requests. See the discussion under the caption "Rights to a Borrower's Assets: Purchased Offices" in Chapter 2.
[191] *Nov.* 147 pr. (15 Apr. 553) (SK 718/23–25).

Jews of Tyre to legitimate their endogamous marriages;[192] and in all likelihood also some of the petitions complaining of the exorbitant cost of funerals in Constantinople,[193] of malpractice by land-surveyors,[194] of predations by peacekeepers,[195] and perhaps also of abusive building practices blocking "the very great amenity" of being able to enjoy a view of the sea from one's home.[196]

Ordinary subjects were not limited to petitioning in their individual capacities but might also do so as a group. Thus the advocates of Illyria petitioned in 539 for clarification of certain matters that had come up in their experience of litigating cases.[197] Guilds, especially, served as vehicles for collective petitioning by their membership.[198] The bankers of Constantinople, acting as a guild, feature prominently in our evidence, with three *Novels*—*Novel* 136,[199] *Edict* 9,[200] and *Edict* 7[201]—expressly stated to be the result of their lobbying.[202] And beyond petitioning on matters of concern specific to their own members, the guilds could cooperate to submit petitions on matters of common interest, as one of the *Novels* on the funerals in Constantinople tells us occurred when the foremen of the various guilds got together to complain of the numbers claiming exemptions from liturgies.[203] The ability to petition collectively was not limited to formally recognized corporate groups: Even a small number of individuals—as few as two—could petition collectively, as in the case of Peter and Eulogetus, who lodged the petition that led to Justinian's failed regulation of maritime loans in 540.[204] This example, like the example of the petition of the advocates of Illyria, demonstrates the porosity in practice of the conceptual boundaries between the different prompts for legislation: a

[192] *Nov.* 139 pr. (undated) (SK 700/15–18), relayed via an official by the name of Florus, on whom see Martindale, *PLRE*, 3:3A: 490, *s.v.* Florus 1; Miller and Sarris, *Novels*, 2:923 n.2. This example shows that the lines between laws made by petition from those made by report were porous.
[193] *Nov.* 59 pr. (1 Sept. 537) (SK 317/19–24).
[194] *Nov.* 64 pr. (19 Jan. 539) (SK 366/6–10). On their practices, see Miller and Sarris, *Novels*, 1:479 n.1.
[195] *Nov.* 145 pr. (18 Feb. 553) (SK 712/1–2).
[196] *Nov.* 63 pr. (9 Mar. 538) (SK 334/13–14: θαλάττης ἄποψιν, πράγματος χαριεστάτου). See also *Nov.* 165 (undated) on the same topic. On these *Novels*, see Catherine Saliou, *Les lois des bâtiments: Voisinage et habitat urbain dans l'Empire romain. Recherches sur les rapports entre le droit et la construction privée du siècle d'Auguste au siècle de Justinien* (Beirut: Presses de l'Ifpo, 1994), pt. 1, chaps. 3, paras. 49–58, http://books.openedition.org/ifpo/6125.
[197] *Nov.* 162 pr. and c.1.2 (8 June 539) (SK 747/4–5).
[198] On the formal legal recognition of guilds, see *Dig.* 3.4.1. Guilds and their members could also be the object of (complaining) petitions by others, as in the case of the valuers who were members of the guild of market-gardeners and who, on Justinian's telling in the preface of a law of 538, rendered fraudulent valuations for the benefit of their guildfellows. *Nov.* 64 pr. (19 Jan. 538) (SK 336/6–10). Price gouging by guilds was also the object of complaint in *Nov.* 59 pr. (3 Nov. 537).
[199] *Nov.* 136 pr. (1 Apr. 535) (SK 691/9–10).
[200] *Edict* 9 pr. (undated) (SK 772/7–9).
[201] *Edict* 7 pr. (1 Mar. 542) (SK 764/6–7).
[202] Each of the three resulting pragmatic sanctions is discussed at greater length in subsequent chapters. For the possibility that the exemption of bank promises to pay from Justinian's 531 reform of the *receptum argentarium* in *Cod. Iust.* 4.18.2 c.2 (531) might also have been the result of bank lobbying, see note 34 in Chapter 3.
[203] *Nov.* 43 (17 May 536 or 537) (SK 270/10–14). The city's guilds would go on to become the object of complaints of price gouging at these same funerals. *Nov.* 59 pr. (3 Nov. 537) (SK 317/19–24).
[204] *Nov.* 106 pr. (7 Sept. 540) (SK 508/1–2). The same may also be the case for the petitions that led to the repeal of that constitution less than eight months later. *Nov.* 110 (Apr. 541) (SK 520/17–18). This episode is discussed in Chapter 4.

DOI: 10.14754/CEU.2024.02

petition, leading to the emperor commissioning fact-finding hearings by the prefect, which in turn led to an official report by the prefect of his findings.[205]

City councillors, or decurions, were frequent sources of petitions underlying new lawmaking. Of course, there was litigation, such as when the father of the city of Aphrodisias and its propertied class together lodged a petition against those managing its investments.[206] Decurions might also ask for new legal interpretations, which in practice often amounted to new lawmaking, via joint petition.[207] In 540, the city of Lugdunum/Illyricum—or rather the wealthy landowners thereof—did so, petitioning over the status of certain children of their *adscripticii* and *colonii.*[208] In no field, however, were petitions by decurions so frequent as in a matter particularly dear to their individual hearts, namely the protection of their patrimonies.

Case Study: Decurions' Children

One illustrative example of legislation prompted by petitions made (at least in part) outside the scope of litigation is the sequence of *Novels* seeking to preserve the assets of city councillors that has come down to us as *Novel* 38, *Novel* 87, and *Novel* 101.[209] These constitutions show us the evolution of Justinian's (ineffective, in the event) policies to safeguard the financial viability of the traditional system of city governance. Or rather, they show us part of that evolution, for shoring up the financial condition of the empire's cities had given headaches to emperors for centuries, as they did to Justinian himself.[210] "We have gone into this situation repeatedly" sighs the emperor in the preface to the first of these three *Novels*, going on to complain of how each remedy he devised was circumvented by decurions intent on evading the obligations of their status.[211] According to this lament, decurions eager to escape their burdens met each successive measure with ingenious

[205] *Nov.* 106 pr. (7 Sept. 540) (SK 507/31–508/1).
[206] *Nov.* 160 pr. (undated, post-534) (SK 744/4–5). This is one of several cases for which it can be difficult to determine the procedural posture. By the time of the emperor's decision, the matter had reached a stage where the money-men had made their defense. SK 744/14–15. Given it is the argument of the defense rather than the decision of the judge that is cited, the posture may instead be one of referral (*consultatio ante sententiam*) than appeal, though that leaves the *Novel's* characterisation of the town fathers as petitioners (ικέται) difficult to explain. On the financial responsibilities of the *pater civitatis* in Aphrodisias and some other cities, see *Cod. Iust.* 11.33.2 and 4.26; Charlotte Roueché, "A New Inscription from Aphrodisias and the Title Pater Tes Poleos," *Greek, Roman and Byzantine Studies* 20, no. 2 (1979): 173–85; Liebeschuetz, *Decline*, 110–12.
[207] As recounted in *Nov.* 101 pr. (1 Aug. 539) (SK 487/24–27).
[208] *App.* 1 pr. (7 Apr. 540) (SK 796/6).
[209] *Nov.* 38 (15 Feb. 536); *Nov.* 87 (18 May 539); *Nov.* 101 (1 Aug. 539). *Nov.* 38 pr. suggests long-term engagement with the problem at imperial level. *Nov.* 87 pr. is more reticent (SK 423/17, "we have learned": ἔγνωμεν γάρ); *Nov.* 101 pr., by contrast, tells us a petition prompted it (SK 487/24–25). These constitutions are discussed in connection with each other for entirely different purposes in Lanata, *Legislazione*, 135–36.
[210] J.H.W.G. Liebeschuetz, "Civic Finance in the Byzantine Period: The Laws and Egypt," *Byzantinische Zeitschrift* 89, no. 2 (1996): 389–93.
[211] *Nov.* 38 pr. 1 (15 Feb. 536) (SK 246/36–SK 247/4: Ταῦτα ἡμεῖς πολλάκις ἀνερευνώμενοι ᾠήθημεν χρῆναι θεραπείαν ἐπαγαγεῖν τῷ πράγματι· καὶ ὅσῳ περὶ τοῦτο ἡμεῖς πονούμεθα, τοσούτῳ πᾶσαν ἐξεῦρον οἱ βουλευταὶ τέχνην κατὰ τῶν ὀρθῶς καὶ δικαίως νενομοθετημένων καὶ κατὰ τοῦ δημοσίου).

DOI: 10.14754/CEU.2024.02

determination: when Justinian decreed that one-quarter of deceased decurions' wealth should be reserved for the councils, decurions (the emperor asserts) frittered that wealth away during their lifetimes such that nothing would be left at death. And it was not just their wealth that decurions sought to withdraw from the councils but also their progeny: to escape the burdens placed upon their children, some decurions refused to have any (or so Justinian would have us believe). Further, when he sought to bar dispositions of property by the decurions to the detriment of the councils by requiring a prior *decretum*, the decurions allegedly responded by arranging—how, we are not told—for another law to be enacted limiting the requirement of a prior *decretum* to dispositions by way of sale. The result of that was to leave dispositions by other means—*i.e.*, by gift—free from the need of prior approval. And as if that were not enough, when Justinian banned gifts outright save for pre-nuptial ones, decurions resorted to these, too, in purported schemes of evasion.

Such were the costs of legislating piecemeal.[212] Justinian sought to impose greater rigour in the protection of decurial assets in *Novel* 38 by adopting rules aimed at increasing the proportion of a deceased decurion's assets that had to devolve to his city council.[213] The emperor's new rules apparently proved no more successful than his earlier efforts. By May 539, he was back reworking the same area of law again, complaining that decurions had exploited ambiguities in the laws of gifts *causa mortis* to evade restrictions of gifts requiring prior *decretum.*[214] In *Novel* 87, Justinian sought to close this loophole.[215] Further evasions predictably ensued, and in August of the same year, Justinian returned to the subject once more. *Novel* 101 introduced extensive anti-fraud measures aimed at preventing sharp practice by requiring prompt inventory of a decurion's estate following his death, and preventing his successor from gaining possession of it before such time as he succeeded to the corresponding decurional duties.[216]

As frustrating as this episode of legislative *Whac-A-Mole* must have been for an emperor bent on shoring up city finances, it is instructive for us in ascertaining the attitude of imperial subjects to compliance with Justinian's ever-changing laws on succession. We need not believe every detail of the accounts in the *Novels*' prefaces as to the motivations of decurions to deprive city councils of a share of their patrimonies. There were obviously larger social forces at work

[212] *Nov.* 38 pr. 2 (15 Feb. 536) (SK 247/27–28: Ἤδη μὲν οὖν κατὰ μέρος ἐθήκαμεν νόμους).
[213] The stated thrust of the new law was to increase the proportion of assets that would so devolve where the deceased decurion was childless (*Nov.* 38 pr. 4 and c.1), but it also tightened procedures where there were children, legitimate or illegitimate, male or female.
[214] Those rules on gifts *causa mortis* are found at *Dig.* 39.6.13–18.
[215] *Nov.* 87 c.1 (18 May 539) (SK 424/17–21).
[216] *Nov.* 101 (1 Aug. 539) c.3 pr. (SK 489/23–24, to prevent suspicion of deceit) and c.3.1 (SK 490/9–10, to exclude sharp practice).

beyond individual pusillanimity.[217] But this sequence of *Novels* illustrates that many decurions were not just aware of the law and changes to it but modified their behaviour accordingly so as to increase the amount of their assets that might find their way to their preferred beneficiaries. Justinian might initially have expected that as emperor he could pronounce a new rule and his subjects would obediently comply but experience surely disabused him of that illusion. His subjects, too, had agency in legal matters, even if that agency was not legislative in nature.

Other Prompts for New Lawmaking

As the preceding discussion indicates, many *Novels*, maybe even most of them, purport to have their origin outside government, *i.e.*, in litigated cases and lobbying. That said, Justinian and his officials were not entirely bereft of their own policy ideas. Some originated within the bureaucracy; others, presumably fewer, sprang from the emperor's own head. Harries' schema assumes that we can readily distinguish these from each other, but in the *Novels* that distinction is often elusive. To be sure, many *Novels* state that idea has occurred to the emperor, or that he has taken it in mind to make an improvement, or some such formulation, but we cannot take such claims at face value. Justinian, like rulers of all times and all places, took credit for the initiatives of his underlings without necessarily observing modern academic niceties in the attribution of credit. The problem of course is how we might securely identify his ideas from those of his officials. It is perhaps prudent in this regard to view legislative ideas originating within imperial administration as lying on a spectrum. The emperor, as sole legislative authority, was necessarily involved with all of them, but the extent of his participation varied.

At the near end of that spectrum, we have those laws resulting from Justinian's own legislative brainwave. He often boasted of his efforts to come up with them. "We spend day and night pondering with utmost care how we might bestow some God-pleasing benefit upon our subjects" reads the opening of one *Novel* of 535.[218] Procopius would even have us believe that he penned many of his laws with his own imperial hand, rather than relying, as was traditional, upon staff.[219] Perhaps the most likely instance of Justinian's "own" work can be found in his efforts to

[217] Jones, *LRE*, 1:724–763; Liebeschuetz, *Decline*, chap. 3; Rapp, *Holy Bishops*, chap. 9.
[218] *Nov.* 8 pr. pr. (15 Apr. 535) (SK 64/10–13: Ἁπάσας ἡμῖν ἡμέρας τε καὶ νύκτας συμβαίνει μετὰ πάσης ἀγρυπνίας τε καὶ φροντίδος διάγειν ἀεὶ βουλευομένοις, ὅπως ἂν χρηστόν τι καὶ ἀρέσκον θεῷ παρ' ἡμῶν τοῖς ὑπηκόοις δοθείη, and 64/19–23: Διὰ πάσης γὰρ ἐρεύνης καὶ ζητήσεως ἀκριβοῦς ἐρχόμεθα, πράττειν ἐκεῖνα ζητοῦντες, ἅπερ ὄφελος τοῖς ἡμετέροις ὑπηκόοις εἰσάγοντα παντὸς αὐτοὺς ἀπαλλάξει βάρους καὶ πάσης ζημίας). In another example, also on provincial governance, Justinian implausibly claims to have researched the "whole previous history" of the office of praetor. *Nov.* 13 (15 Oct. 535) (SK 101/25–26: Ἐπειδὴ τοίνυν ἡμεῖς πάντα διερευνώμενοι τὰ γενόμενα πρόσθεν…). The historical account in this *Novel* is, like those of offices in other *Novels*, fantastical. Michael Maas, "Roman History and Christian Ideology in Justinianic Reform Legislation," *Dumbarton Oaks Papers* 40 (1986): 17–31.
[219] Procop., *Hist. Arcana* 14.3 [=Haury and Wirth, *Procop. vol. 3*, 3:90]. For an assessment of Procopius' charge, see Honoré, *Tribonian*, 23–26 (esp. n.268) and 120. Church historians, too, have been prepared to see Justinian's own hand

marginalise the consulship.[220] Other examples might be found in measures to scapegoat marginalised communities at times of crisis.[221] The latter laws were crude measures, of the sort requiring no expertise to devise. For more technically sophisticated and far-reaching innovations, the notion of legislative ideas coming from the emperor himself is rather more difficult to credit. Complex pieces of policy must assuredly have been collective efforts, with the participation of many officials in addition to the emperor not just in their formulation but in their conception.[222] One example is a *Novel* of 539 that informs us that "an idea occurred to us" [i.e., to Justinian], before going on to give some nine pages of precise technical instructions for the handling of dowries and pre-nuptial gifts in a variety of fact patterns.[223] We may doubt that the ideas behind its many subtle innovations came from the busy emperor as opposed to more legally trained staff. Even less complex *Novels* credit the emperor for origination yet nevertheless hint at the cooperation at the earliest stages by officials of the imperial bureaucracy or of the Church.[224]

We are on surer ground at the opposite end of the spectrum of imperial involvement, namely those *Novels* that we know originated from reports by officials because their text tells us so. Of course, reports by officials to their superiors make up part of any hierarchical administration, and Justinian's was no different. He made extensive provision for officials to report to their superiors, and to himself, on the bread and butter of daily governance. Those reports might be oral, or written,

in the drafting of his theological treatises. See, *e.g.*, the comments of Fr. Richard Price on the emperor's *Edict on the Orthodox Faith* at Richard Price, trans., *The Acts of the Council of Constantinople of 553, with Related Texts on the Three Chapters Controversy*, Translated Texts for Historians, volume 51 (Liverpool: Liverpool University press, 2009), 123. For doubts, see Kaiser, "Authentizität," 133–34 n.36.

[220] The office was stripped of its pre-eminence in the dating of documents (*Nov.* 47) (31 Aug 537), limited in the expenditures by those entering it (*Nov.* 105 (28 Dec. 537)), and finally allowed to lapse in 541, being aborbed into the emperor's own titulature. On the office's demise, see Marion Kruse, *The Politics of Roman Memory: From the Fall of the Western Empire to the Age of Justinian* (Philadelphia: University of Pennsylvania Press, 2019), chap. 4. The motive is generally assumed to be the emperor's wish to forestall potential rivals from using the consulship to build popular support. Given Belisarius' victory in Africa, and his efforts on the Italian and eastern fronts, Justinian may well be forgiven for thinking he got off lucky with his general's manifestations of loyalty in 534– 535 and sought to forestall any opportunity for Belisarius to fail to repeat them. David Alan Parnell, *Justinian's Men: Careers and Relationships of Byzantine Army Officers, 518–610* (London: Palgrave Macmillan, 2017), 90–93, 97–101. Justinian's suspicions would go on to find fuller expression in 542. David Alan Parnell, *Belisarius & Antonina: Love and War in the Age of Justinian* (New York, NY: Oxford University Press, 2023), 148–54.

[221] Thus, *Nov.* 77 (undated) (against blasphemers); *Nov.* 141 (15 Mar. 559) (homosexuals).

[222] This was undoubtedly the case for major policy initiatives such as *Nov.* 8 (15 Apr. 535), *App.* 7, aka the Pragmatic Sanction (13 Aug. 554), and *Edict* 13 (undated), and probably also the policies on weapons manufacture in *Nov.* 85 (25 June 539).

[223] *Nov.* 97 pr. (17 Nov. 539) (SK 469/19: ἔννοια γέγονεν ἡμῖν).

[224] Imperial officials: *e.g.*, *Nov.* 102 pr. (27 May 536) (SK 493/12–14, relating that the emperor had identified the province of Arabia as bringing in insufficient tax revenue and investigated the reasons). Even if, in a generous moment, we might credit the observation to the emperor rather than to the prefect whose responsibility it was to collect the taxes, it is unlikely that Justinian investigated the causes, at least not *in situ.* Church officials: *e.g.*, *Nov.* 3 (16 Mar. 535) (SK 18/31–SK 19/3, where the nature of the matter (church finances) suggests that the impetus lay in requests for subsidy).

or both.[225] Some had no tie to new lawmaking, or at least were not directly intended to lead to legislation.[226] But sometimes they did: many *Novels* inform us that they were prompted by reports—*relationes, μηνύσεις*—to the emperor setting forth specific proposals for legislation—*suggestiones*.[227] As *praefectus praetorio Orientis* (*PPO*), the notorious John the Cappadocian[228] was a prolific instigator of new legislation.[229] Other imperial officials did so, too.[230] To be sure, not every legislative idea coming from officials within the imperial administration necessarily took the form of an official report. At least some would have been the product of more informal discussions, or were just the result of "experience".[231] We perhaps do not err in identifying an example of informal information sharing in a constitution from early 535 in which, in the course of resolving various questions that had arisen in cases, the text informs us that one of its provisions addressed a

[225] Oral: *Nov.* 45 pr. (18 Aug. 537) (SK 277/28–29: Ῥῆμά τι πρὸς ἡμᾶς ἔναγχος ἡ σὴ μεμήνυκεν ὑπεροχή); that Ῥῆμά τι means an oral report is demonstrated *Nov.* 100 c.1.1 (20 Dec. 539) (SK 485/29); *Nov.* 124 c.4 (15 June 544) (SK 628/33); and *Edict* 2 (undated) (SK 759/10: Ἐκ τῶν ἀνενεχθέντων ἡμῖν ἀγράφως παρὰ τῆς σῆς ἐνδοξότητος ἔγνωμεν) (emphasis supplied). Written: *Nov.* 151 pr. (undated) (SK 726/37: Μήνυσις ἡμῖν ἐστάλη τῆς σῆς ὑπεροχῆς) (emphasis supplied). Both: *Nov.* 106 pr. and c.1 (7 Sept. 540) (SK 507/31–32: Μηνύσεως ἠκούσαμεν τῆς σῆς ὑπεροχῆς, and SK 509/25–26: Ἡμεῖς τοίνυν καὶ αὐτοῖς ἐντυχόντες τοῖς πεπραγμένοις καὶ τὸ πρᾶγμα διδαχθέντες) (emphases supplied).
[226] We have many examples where provincial governors or other administrators are charged with reporting important but mundane details to the emperor or his prefects. Thus: Tax collection difficulties: *Nov.* 17 c.8 pr. (16 Apr. 535) (SK 122/30–34, by tax collectors); *Edict* 13 c.12 pr. and c.25 (undated) (SK 786/20–25, Augustalis to report recalcitrant pagarchs, and SK 793/21–22, duke of Thebaid to do the same). Needed improvements to infrastructure: *Nov.* 17 c.4.1 (16 Apr. 535) (SK 120/11–13, governors generally); *Nov.* 25 c.4.1 (18 May 535) (SK 199/36–38, praetor of Lydia); *Nov.* 26 c.4 pr. (18 May 535) (SK 207/5–7, praetor of Thrace). Need for additional legal authorities: *Nov.* 30 c.8 pr. (10 Mar 536) (SK 232/1–5, proconsul of Cappadocia). Staff compensation: *Nov.* 103 c.1 (1 July 536) (SK 497/34–SK 498/1, proconsul of Palestine, divvying up just 22 pounds of gold); *Edict* 13 c.3 (undated) (SK 781/18–19, nomination of 600 staff members reported to emperor for confirmation). Troublemakers: *Nov.* 17 c.17 (16 Apr. 535) (SK 126/38–SK 127/6). Peace-keepers: *i.e.*, "bandit-hunters, biocolytae, disarmament-officers or any such people." *Nov.* 8 c.13 (15 Apr. 535) (SK 77/2–5).
[227] For the distinction, see Feissel, "Pétitions," 42.
[228] On the Cappadocian, see Martindale, *PLRE*, 3:3A:627–635, *s.v. Fl. Ioannes 11* ("the Cappadocian") and, for the end of his career, Procop., *Wars*, 1.25. [=Haury, *Procop. vol. 1*, 1:134–42] and *Hist. Arcana* 17.38–45 [=Haury and Wirth, *Procop. vol. 3*, 3:110–11]; Averil Cameron, *Procopius and the Sixth Century* (London: Routledge, 1985), 69–70.
[229] Thus: *Nov.* 151 pr. (undated) (SK 726/37–727/1, the jurisdiction of his own court over officials and decurions); *Edict* 13 (undated) (c. 8 at SK 783/8, Egyptian grain production and transit; and c.15 at SK 787/30–31, public accounts of Alexandria); *Edict* 2 (undated but before Apr. 535) (pr. at SK 759/10–12, tax collection difficulties; c.1 pr. at SK 760/4–6, the practice of shaking heretics down for protection money; and c.1.1 at SK 760/11–12, staffing); *Nov.* 45 (18 Aug 537) (pr. at SK 277/28–29, the conditions under which Jews, Samaritans, and heretics were to serve as city councillors; and c.1 at SK 278/30–31, testimony given by heretics); *Nov.* 106 pr. and c.1 (7 Sept. 540) (SK 507/31–32, SK 509/21–24, and SK 509/26–27, on maritime lending practices), and undoubtedly many more that have not survived.
[230] We may be justified in seeing their hand in reports to the emperor prompting *Edict* 3 c.1 (23 July 535) (SK 761/1–3, Armenian inheritances); *Nov.* 157 pr. (1 May 542) (SK 733/26–21, *coloni* in Osrhoene); and perhaps also *Nov.* 145 (8 Feb. 553) (SK 711/21–23, referring to Justinian's prior stationing of peacekeepers Phrygia and Pisidia).
[231] One possible example of such a law is *Nov.* 80 pr. (10 Mar. 539) (creation of the office of *quaesitor*, stated to have been the result of experience with the office of the *praetores plebis* introduced in 535, SK 390/27–SK 391/3); for a *Novel* attributed to "experience", see also the early prefectural *Novel* on sterile lands, *Nov.* 166 pr. (521 or 529) (SK 753/10–11: ἐξ αὐτῶν ἡμεῖς κινηθέντες τῶν πραγμάτων ἐπὶ τὴν ὀρθὴν καὶ δικαίαν τούτων διάκρισιν ἐλθεῖν ἐδοκιμάσαμεν). The reference to "practical experience" in a law of 537 demonstrates the same phenomenon of informal, or at least unspecified, flows of information at work in litigation contexts. *Nov.* 49 c.2 (18 Aug. 537) (SK 291/12–15: ὁρῶμεν δὲ τὴν τῶν πραγμάτων πεῖραν δεομένην προσηκούσης ἐπανορθώσεως ἐν τῷ νόμῳ, καὶ τοῦτο ἐξ αὐτῆς τῆς τῶν δικαζομένων εὕρομεν πείρας).

DOI: 10.14754/CEU.2024.02

point arising "only rarely" in litigation: it was, perhaps, the brainchild of some clever lawyer, maybe even Tribonian himself, pondering hypotheticals of an evening.[232]

What is important for purposes of this study is that many official reports did not arise *sua sponte* but had their own underlying prompts in petitions from subjects. The emperor might commission a *relatio* from his officials to inform new legislation addressing problems that had come to his attention by petition or other means. By way of example, in December 535 a denunciation related to Justinian by persons unspecified led to his commissioning a report from the *praetores plebis*, one of Constantinople's police forces, leading to new legislation against brothels.[233] More common, perhaps, were reports by prefects or other officials encapsulating requests from subjects made to them by petition. Thus, in 539 Domnicus, prefect of Illyria, forwarded to the emperor a set of questions received from advocates on unresolved points that had arisen in the course of litigation there.[234] Likewise, Florus referred requests from certain Jewish communities for recognition of their (otherwise unlawful) marriages.[235] This practice, of local groups petitioning the prefect, who then composed a report to the emperor that prompted new lawmaking is also attested epigraphically for this period. Citizens of one of the many "Justinianopoleis" —in the present case, the city more usually known as Didymus, in Caria— petitioned for and in 533 won confirmation of certain fiscal privileges vis-à-vis Miletus, of which it had formerly been part. So prized was that victory that the city had Justinian's rescript inscribed on stone, in full, together with an extract of the minutes of the *gesta praefectoria* and decree of the provincial governor implementing it.[236] This procedure—petition by subject to prefect, who then files a report with the emperor, who then issues a responsive rescript—finds its fullest expression in *Novel* 106, in which we have an example of a law sprung from the full panoply of prompts: it resulted from a report by the *PPO* arising out of fact-finding hearing ordered by the emperor in response to a private petition that was itself spawned by fears of litigation.[237]

Controlling the Flow

For the reasons discussed above, and as the examples adduced earlier demonstrate, petitions came up to the emperor in floods. To some extent, their number resulted from his own legislative

[232] As one does. *Nov.* 2 c.5 (16 Mar. 535) (SK 17/6–10).
[233] *Nov.* 14 pr. pr. (1 Dec. 535) (SK 106/37–41). The confidential nature of the denunciation points to a source outside the imperial bureaucracy (SK 105/34–35).
[234] *Nov.* 162 (9 June 539) (SK 747/4–5). For Domnicus, see Martindale, *PLRE*, 3:3A:415, *s.v.* Domnicus 2.
[235] *Nov.* 139 pr. (undated) (SK 700/13–20).
[236] Denis Feissel, "Un rescrit de Justinien découvert à Didymes (1er Avril 533)," in *Documents, droit, diplomatique de l'Empire romain tardif* (Paris: Association des amis du Centre d'histoire et civilisation de Byzance, 2010), 251–324 [=*Chiron* 34 (2004): 285–365], esp. 270–316.
[237] *Nov.* 106 (7 Sept. 540). See Chapter 4.

hyperactivity.[238] The much-vaunted nature of his responsiveness invited subjects to take him up on the implied promise of its continued availability.[239] Even if the flow of petitions owed much to the emperor's own initiative, he still complained about their numbers.[240] He sought to limit them by two main methods: arranging for their handling down in the provinces, and reducing the number of occasions for which they were needed. The first was the more important. The emperor's aim—almost assuredly forlorn—was to keep the parties from "running" to the capital.[241] Such litigation-control measures feature prominently in the companion measure to his general reform of provincial governance in early 535, as well as in the many province-specific dispositions promulgated then and in the ensuing years.[242] And for those cases where the litigants had already arrived at the capital, Justinian devised a new office, the *quaesitor*, one of whose main tasks was to expedite their cases so that economically vital agricultural workers might quickly return home.[243] The emperor's efforts to keep litigants down on the farm was by no means limited to those at the bottom of the social hierarchy. Bishops, too—frequent petitioners, as we have seen—added to the numbers, and he took measures aimed at having their petitions, too, dealt with *in situ*.[244]

In addition to measures to keep litigants and petitioners from leaving their provinces and arriving at the capital for decision, Justinian also devised numerous measures with the aim of

[238] At least for a time. Procop. *Hist. Arcana* 28.16 [=Haury and Wirth, 3:174]; Humfress, "Law and Legal Practice," 175; George Mousourakis, *A Legal History of Rome* (London: Routledge, 2007), 189. There are at least 111 laws that can be dated with some certainty to the period 535 to 539. If what has come down to us is even roughly representative of Justinian's legislative activity, the pace of new lawmaking slowed after the mid-530s. But the *Novels* that have come down to us are by no means evenly distributed over time. Nor should we assume that they constitute a representative sample of the entirety of Justinian's legislation during his reign or any period thereof. The early 20th-century confidence of Pierre Noailles to the contrary reflects his careful limitation of scope to *leges generales*, occluding from view the innumerable rescripts, pragmatic sanctions and other legal instruments that have been lost but that would have much to teach us about Justinian's legislative technique. See Pierre Noailles, *Les collections de nouvelles de l'empereur Justinien* (Paris: Recueil Sirey, 1912), 1:144–145). See also Feissel, "Pétitions," 40.

[239] See the discussion at notes 71–93 above.

[240] Especially those of provincials. Generally: *Nov.* 1 pr. pr. and pr. 1 (1 Jan. 535) (SK 1/14–15 and SK 1/22–28). By provincials: *Nov.* 8 (15 Apr. 535) (SK 66/15–19); *Nov.* 30 c.5.1 (18 Mar. 536) (SK 228/15–21); *Nov.* 102 pr. (27 May 536) (SK 493/15–18); *Nov.* 69 c.1.1 (1 June 538) (SK 351/9–11).

[241] For "running," see *Nov.* 17 c.3 (16 Apr. 535) (SK 119/11); *Nov.* 25 c.3 (18 May 535) (SK 199/10–12); *Nov.* 26 c.3.1 (18 May 535) (SK 206/16–18); *Nov.* 30 c.9 pr. (18 Mar 536) (SK 232/26–27). The same metaphor is also used in relation to litigation in *Nov.* 69 c.1 (1 June 538) (SK 351/1–6) and *Nov.* 145 c.1 (8 Feb. 553) (SK 712/29–33).

[242] General: *Nov.* 17 c.3 (16 Apr. 535) (SK 119/12–19, instructions to accompany the sweeping reform of *Nov.* 8 promulgated one day earlier). Similar general measures to keep lawsuits in the provinces can be found in *Nov.* 86 c.1 and c.3 (17 Apr. 539). Province-specific measures: *Nov.* 24 c.2 (18 May 535) (SK 191/36–39, Pisidia); *Nov.* 25 c.3 (18 May 535) (SK 199/10–13, Lycaonia); *Nov.* 26 c.3.1 (18 May 535) (SK 206/19–27, Thrace); *Nov.* 30 c.9 pr. (18 Mar. 536) (SK 232/27–35, Cappadocia). These provincial measures share many common features, including a loose relationship to historical truth; they derive from a common source and hand. See Honoré, *Tribonian*, 246 n.37; Maas, "Roman History and Christian Ideology in Justinianic Reform Legislation"; Kruse, *Politics*, 80–101.

[243] *Nov.* 80 c.1.1 (10 May 539) (SK 391/26–32).

[244] Already from the early years of his reign. *E.g., Nov.* 6 (1 Apr. 535) c.2 (SK 41/4, encouraging bishops to conduct litigation not in person but through intermediaries) and c.3 (SK 42/7, to limit the number of bishops coming to Constantinople to petition him). We may doubt the success of these measures.

DOI: 10.14754/CEU.2024.02

reducing the number of occasions for which future petitions might be necessary.[245] This was especially the case in areas that threw up frequent controversies or petitions requiring action on his part, such as the law of wills and succession;[246] the freeing of high officials from *patria potestas*;[247] and manumissions and the associated "restitution" of free-born status to freed slaves and their children.[248] In some cases, this might take the form of granting relief for existing circumstances while purporting to render future petitions futile, or even threating to punish lodging of additional petitions on the same point in future.[249]

Making One's Plea

The emperor could have had no real hope that such measures would stop the flood of petitions to him; the best he could expect was to reduce their numbers.[250] But those measures nevertheless raised potential obstacles to prospective petitioners. If desired relief was to be attained, such obstacles had to be avoided and, even then, the authorities had to be persuaded to give the requested relief. Still, inasmuch as the emperor was the sole source of new law, the sole authoritative interpreter of existing law, and the ultimate judge of it in any case,[251] he was the addressee of choice and petitions inevitably flowed up to him in great numbers.[252] He complained of petitioners "besieging" him.[253]

He may well have had good reason to feel that way, for in order to petition the emperor, a petitioner had to get in his face, so to speak. In the High Empire, petitions had as a rule to be given personally, that is, presented to the emperor at his then place of residence directly, not via officials

[245] See, *e.g.*, *Nov.* 90 c.4 pr. (1 Oct. 539) (SK 449/28–31, abolishing need for imperial permission to produce witness testimony for a fourth time).
[246] *Nov.* 1 pr. pr. (1 Jan. 535) (SK 1/21–22, to "obviate the need for rescripts": μὴ τῆς ἀεὶ κελεύσεως τῆς ἐκ τῶν βασιλέων δεόμενα); *Nov.* 18 c.5 (1 Mar. 536) (SK 131/1–3, "we shall be ridding ourselves of nuisances": ὥστε τῷ πράγματι καὶ νόμον προσθέντες αὐτοὶ μὲν ὄχλους ἀποσεισόμεθα, δώσομεν δὲ ἅπασιν ἔχειν τὴν ἐκ τοῦ νόμου βοήθειαν); *Nov.* 66 (1 May 538) (SK 341/34–36, "so as not to be troubled daily by requests to lay down directives on [defective wills]": ἵνα τοίνυν μὴ ἐνοχλώμεθα περὶ τούτων καθ' ἑκάστην καὶ τύπους γράφειν αἰτώμεθα, διὰ τοῦτο θεσπίζομεν…); *Nov.* 68 c.1.2. (25 May 538) (SK 348/19–21, to forestall future petitions: Ταῦτα τοίνυν νόμῳ βραχεῖ περιστείλαντες τὰς τοιαύτας ἀμφισβητήσεις ἀναιροῦμεν, ἵνα μὴ διηνεκῶς ὑπὸ τῶν αἰτούντων ἐνοχλώμεθα).
[247] *Nov.* 81 c.1.1 (18 Mar. 539) (SK 398/36–SK 399/3).
[248] *Nov.* 78 c.1 (18 Jan. 539) (SK 384/7–15), c.3 (SK 386/5–7) and c.5 (SK 397/19–27). On this latter point (the restitution of children born to a freed slave prior to her marriage to the father), see also *Nov.* 18 c.11 (1 Mar. 536).
[249] Rescripts granted to future petitions to be ineffective: *Nov.* 90 c.4.1 (1 Oct. 539) (SK 450/5–7). Threatened punishment: *Nov.* 139 c.1 (undated) (future petitioners to legitimise endogenous marriages to be punished).
[250] On least on a few occasions, Justinian acknowledged the practical limits on what he might hope to achieve by way of reducing the number of questions requiring his involvement. See, *e.g.*, *Nov.* 69 c.3.1 (1 June 538) (SK 353/34–SK 353/1); *Nov.* 80 c.2 and c.3 (10 Mar. 539) (acknowledging that peasants would continue to come to the capital to petition their masters, among other things). The expectation that petitions would continue to flow in to him in great (though, the emperor hoped, less great) numbers is also implicit in his remarks in a constitution of 535 on the number of *referendarii*. *Nov.* 10 pr. 1 and ep. (15 Apr. 535).
[251] See note 94 above.
[252] That is not to say that all petitions, even in Justinian's time, were directed to him. See text at notes 156–160.
[253] *Nov.* 102 pr. (27 May 536) (SK 493/15–16: πλῆθος ἡμᾶς τῶν προσιόντων περιίσταται καὶ ὀδύρονται πάντες).

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or the imperial post: Individuals delivered their petitions in person or through a relation; organised groups could use a delegate.[254] Now, in later antiquity, the emperor was more remote from his subjects than were emperors of the Principate. Still the practice of petitioning in person continued. Bishops, naturally, enjoyed access, even in fraught circumstances, as was the case when Flavian, bishop of Antioch, had to go to Constantinople to plead with Theodosius after the so-called Riot of the Statues in 387.[255] Synesius of Cyrene, too, went to Constantinople just prior to the year 400 to petition for tax relief in his province; he spent three years in the effort and later characterised the whole business as a waste of time.[256]

Justinian was, as the evidence of the *Novels* recounted above shows, more approachable than his immediate predecessors or at least took pains to be perceived as such.[257] That does not mean that access was easy. The expectation of personal presence continued to hold sway, irrespective of any inconvenience to petitioners, who might hale from locales very distant from Constantinople. The archive of Dioscorus, the notary/poet with whom we opened this chapter, tells us of three sojourns to the capital by villagers from Aphrodito in the Thebaid (Egypt) to petition the emperor around the middle of the sixth century: a visit by Apollos, Dioscorus' father and the *protokomete* of the village, in the winter of 540–541; a visit by Dioscorus at the end of 548/start of 549; and a visit by Dioscorus in 541.[258] The journey could be arduous.[259] Nor was there any guarantee of access to the emperor's person to allow the petition to be made. Notables of various sorts could presumably arrange audiences on short notice but the less-exalted by were left with seizing opportunities as and when they arose—when they saw the emperor at prayer, for

[254] Wynne Williams, "The *Libellus* Procedure and the Severan Papyri," *Journal of Roman Studies* 54 (1974): 93–98; A. Arthur Schiller, "The Copy of the Apokrimata Subscripts," *The Bulletin of the American Society of Papyrologists* 14, no. 2 (1977): 78; Millar, *Emperor*, 475–76; Honoré, *Emperors*, 32–36; Corcoran, *The Empire of the Tetrarchs*, 43–44. Widows, orphans and other *personas miserabiles* were relieved of this requirement. *Cod. Iust.* 3.14.1 (17 June 334).
[255] On which see Sozomen, 7.23.3 [=Bidez and Hansen, *Sozomenus Kirchengeschichte*, 336–37]; Joh. Chryst., *Hom. ad pop. Antiochenum* 21 [=J.-P. Migne, ed., *Patrologiae cursus completus [Series Graeca]*, vol. 49 (Paris: Garnier, 1862), cols. 211–221]; Brown, *Power and Persuasion*, 105–7.
[256] Synesius, *On Dreams* 14.4 [148C–D] [=Jacques Lamoureux, ed., *Synésios de Cyrène. Tome IV: Opuscules I*, trans. Noël Aujoulat (Paris: Les Belles Lettres, 2004), 298]. On the date of Synesius' journey, see T.D. Barnes, "Synesius in Constantinople," *Greek, Roman and Byzantine Studies* 27, no. 1 (Spring 1986): 93–112.
[257] He was encouraged to be so. Agapetus, *Advice*, 8 and 52 [=J.-P. Migne, ed., *Patrologiae cursus completus [Series Graeca]*, vol. 86.1 (Paris: Garnier, 1865), cols. 1168 and 1180].
[258] *P.Cair.Masp.* I 67126 (Apollos); *P.Cair.Masp.* I 67019 (Dioscorus 548); *P.Cair.Masp.* I 67032 (Dioscorus 551). For the journeys generally, see Zuckerman, "Les deux Dioscore," 82–83, and, for the second voyage especially, Fournet, *Hellénisme*, 318–21, 459–507. Different views have been expressed as to whether the Dioscoroi who made the second and third journeys to the capital were the same person or cousins of each other. Cf. Fournet's views with those of Zuckerman and of van Minnen, "Dioscorus." The answer to this question is not relevant to the argument here.
[259] *P.Aphrod.Lit.* IV:5, 19 (ἄκρια πήματ' ἔπασχον ἐνὶ ῥ{ρ}οθίοισι θαλάσσης); Fournet, "Tribulations," 248–49.

DOI: 10.14754/CEU.2024.02

example.[260] The many *Novels* attesting to Justinian's efforts to get petitioners from the provinces to return to their fields likewise speak to the time-consuming nature of the process.[261]

It was only to be expected that petitioners would make every effort to accelerate the day on which they might make their plea. The *referendarii* were the officials with responsibility to manage the traffic of petitions, a privilege which surely made them the object of what we might call bribery.[262] But the *referendarii* were in no way the exclusive avenues of approach. Those seeking to petition the emperor would exploit every connection they had to move their date with him closer. Officials deemed able to grease the way were thus the objects of approach by waiting petitioners deploying their various blandishments. These did not necessarily take monetary form. The archive of Dioscorus preserves for us the joy of at least eight poems—all of the dubious quality that has earned him the scorn of generations of critics—meant to accompany petitions made to various intermediaries during his second journey to Constantinople in the hope of obtaining their assistance in winning an audience with the emperor.[263] The list of the poems' addressees is instructive: the *praefectus urbi*; an unnamed high official; an official by the name of Romanos; another unnamed addressee; Dorotheos, a silentiary; Domninus, a *cancellarius* of the praetorian prefecture; Hypatios, a clerk of the pretorian prefecture; and Paulos, son of the aforementioned Domninus.[264] These poems inform us that Dioscorus also made approaches to a *curator* of the *domus divina* and to the *PPO* in his efforts to secure an imperial audience.[265]

Of course, once one got before the emperor, there was no guarantee that in one's plea would meet with a positive response. A petitioner still needed to persuade the listening emperor and/or officials to grant relief. In this, there was power in numbers, and in who those numbers were. Even a powerful metropolitan might thus enlist the services of a local charismatic saint to attend a

[260] *Nov.* 30 c.5.1 (18 Mar. 536) (SK 228/15–17). Religious ceremony was, along with the races, one of the few times an ordinary subject might catch sight of the emperor outside a not-always-attainable scheduled audience. Hartmut Leppin, "The Eastern Roman Empire and Its Neighbours in the 'Age of Justinian'—an Overview," in *A Companion to Procopius of Caesarea*, ed. Mischa Meier and Federico Montinaro (Leiden: Brill, 2022), 23.
[261] See the discussion at notes 241–244 above.
[262] See note 32 above.
[263] Fournet has identified two distinct types: petitions in verse, prepared off the original (and official) prose petitions, and encomia of petition, in which the encomiastic elements praising the petition appear almost to the exclusion of the other petition elements; both types were meant to accompany the prose petition, not replace it. Fournet, *Hellénisme*, 262–64, 312.
[264] Respectively, *P.Walters* 2 (inv. 517) (petition in hexameters); *P.Walters* 3 (inv. 516) (ditto); *PRein.* I 82 + *PLond. Lit.* 98 (encomion for a petition); *P.Cair.Masp.* II 67177 (ditto); *P.Cair.Masp.* II 67184 (ditto); *P.Cair.Masp.* III 67316 v°, 9–32 (ditto); *P.Cair.Masp.* II 67185 v°, A (ditto); and *P.Cair.Masp*. II 67185 v°, B (ditto). Texts and commentary at Fournet, 373–89 and 459–508, respectively.
[265] Fournet, 320.

personal audience with the emperor for the purpose of enhancing his prospects of success.[266] But a petitioner did not necessarily have to be powerful or well-known to be persuasive, for there was also power in piteousness. Just as the power of the bathetic appeal was acknowledged by his predecessors, [267] so too was it by Justinian. In-person pleas by women, children, and priests were evidently especially difficult to refuse, or at least Justinian sought to communicate that impression.[268] And if their pleas were made to the accompaniment of weeping and wailing?[269] In the words of Don Basilio, *Ah! meglio ancora!*[270]

Finally, even if a responsive were rescript to be issued, there was no guarantee that it would have the desired effect when brandished before officials back home.. Dioscorus learned this to chagrin when, with a much-desired rescript in hand, he found the benefit of it difficult to obtain in Egypt, very distant from the imperial capital. Perhaps understandably, he seems to have directed future petitions to addressees closer to home.[271]

The Power of *Paideia*

Whatever the true extent of the emperor's much-vaunted accessibility, those hoping to petition Justinian for relief had to run a gauntlet, so to speak, so that their pleas might both reach his ears and be found persuasive to them. Preparation was thus a matter requiring real forethought, already from the initial drafting of one's plea. In the ordinary course, it would have been advantageous to support one's oral presentation with a written document, at least if one had the resources to have one prepared. We should not think that the written form of the petition was intended primarily for the eyes of the emperor. Though there are scattered references to Justinian reviewing documents,[272] many if not most petitions were presumably either delivered to him orally or, if written, read out to him by the petitioner(s) or a representative or perhaps by the responsible

[266] Like the Palestinian (arch)bishops who cajoled St Saba into leaving behind his ascetic abode to visit the imperial capital, twice, to lobby emperors on behalf of the church of his province. Cyril of Scythopolis, *Vita Sabae*, 70 [=Schwartz, 173].
[267] *E.g.*, *Cod. Theod.* 12.17.1 (19 Jan. 324) (complaining of petitioners presenting children borrowed from others as their own, in this case to gain exemption from *munera*, quoted in Millar, *Emperor*, 549).
[268] *Nov* 18 (1 Mar. 536) (SK 130/35–36); *Nov.* 30 c.5.1 (18 Mar. 536) (SK 228/17–18); *Nov.* 74 c.1.pr (5 June 538) (SK 376/9–10). It is no accident that Menander Rhetor's rhetorical handbook prescribed that a petitioner on behalf of a city should emphasise that he was speaking also on behalf of its women and children. Men. Rhet., *Peri Epideiktikon* 2 [XIII] 423.29–30 [=D. A. Russell and N.G. Wilson, eds., *Menander Rhetor* (Oxford: Clarendon Press, 1981), 180).
[269] See the immediately preceding note, as well as the evocative *Nov.* 30 c.5.1 and c.9 pr. (18 Mar. 536) (SK 228/18–19, and SK 232/21–22); and *Nov.* 102 (27 May 536) (SK 493/16–18).
[270] Wolfgang Amadeus Mozart (music) and Lorenzo da Ponte (libretto), *Le Nozze di Figaro*, Act I Scene 7.
[271] *P.Cair.Masp.* I 67002 (ca. 567, to the Athanasios, duke of the Thebaid); *P.Lond.* V 1674 (570, addressed to an unnamed duke); *P.Lond.* V 1677 (ca. 568–570, addressed to an unnamed *magister*); *P.Lond.* V 1678 (ca. 566–568, addressed to *comes* Kallinikos and to another, restored as Dorotheos); Fournet, *Hellénisme*, 323–24 and 328; Keenan, "'Tormented Voices.'"
[272] *E.g.*, *Nov.* 106 c.1 (SK 509/25–26).

referendarius.[273] Sozomen would even have us believe that petitions, at least those for mercy, might be sung to the emperor, over supper.[274] In similar vein, the factions might make petitions by way (unwritten) acclamation, but as the Greens' complaint against the *cubiculospatharius* in run-up to the Nika riots shows, that approach could backfire.[275]

A written petition likely had a different intended audience, or at least an additional one, namely the imperial officials charged with drafting the rescript responsive to it. To see why, consider the question of where any responsive rescript might source the statement of facts necessary to make the legal dispositions included therein comprehensible. In earlier centuries, when imperial rescripts were shorter in length, the petition was attached to the response, thus obviating the need for the facts as set forth in the petition to be repeated in the rescript itself. Already by the early fifth century, though, the practice of attaching the petition to the rescript had fallen away.[276] As a result, the responsive rescript had to contain a statement of relevant facts, even if in short form, if its legal provisions were to be comprehensible. Given that petitions were in the nature of *ex parte* requests, there was only one place from which the rescript's statement of relevant facts could be drawn: the petition itself. No other source of facts of the matter lay at hand.[277]

Well advised petitioners would have known of this state of affairs and prepared their petitions accordingly. But they likely would have gone still further. If it was practice for the chancery officials preparing the text of a rescript to work from the facts as laid out in the petition, and if that practice were understood broadly, then the course for a savvy petitioner was clear: go ahead and prepare a draft of the rescript itself and submit it along with the petition.[278] As an aide to the busy clerk, of course or, in the passive-aggressive formulation used in thousands of emails from legal counsel daily in our times, "in an attempt to be helpful, I attach…". A helpfully supplied draft rescript would summarise the facts, relieving the harried clerk of a tedious task. It would go further,

[273] *E.g.*, *Nov.* 158 (14 July 544) (SK 734/23: Δέησις ἡμῖν ἀνεγνώσθη). The same was true of reports. *Nov.* 106 (7 Sept. 540 (SK 507/31–31: Μηνύσεως ἠκούσαμεν).
[274] Sozomen, 7.23.3 [=Bidez and Hansen, *Sozomenus Kirchengeschichte*, 336–37] (petition of Flavian on behalf of Antioch); Brown, *Power and Persuasion*, 107.
[275] *Chron. Pasch.* [532], after *lacuna* following 529 [=Ludwig Dinsdorf, ed., *Chronicon Paschale*, vol. 1, Corpus scriptorum historiae Byzantinae (Bonn: Ed. Weber, 1832), 620.] On the *lacuna*, see Michael Whitby and Mary Whitby, trans., *Chronicon Paschale 284–628 AD*, Translated Texts for Historians 7 (Liverpool: Liverpool University Press, 1989), 112. The Greens' petition was of course more political than legal in nature.
[276] *Gesta conlationis Carthaginiensis* III.38 (*Peritiam sanctitatis vestrae arbitror non latere pragmaticis inscriptis preces inseri non solere)* [=S. Lancel, ed., *Gesta Conlationis Carthaginiensis, anno 411: Accedit Sancti Augustini breviculus conlationis cum Donatistis* (Turnhout: Brepols, 1974), 188; Clemens Weidmann, ed., *Collatio Carthaginensis anni 411*, *Corpus scriptorum ecclesiasticorum Latinorum (CSEL)*, Band 104 (Council of Carthage, Berlin: De Gruyter, 2018), 196], noted by Feissel, "Pétitions," 39 with n.45.
[277] Feissel, "Pétitions," 40.
[278] Mario Amelotti and Livia Migliardi Zingale, eds., *Le Costituzioni giustinianee nei papiri e nelle epigrafi*, 2nd ed. (Milano: Giuffrè, 1985), 44–45; van Minnen, "Dioscorus," 116–18; Zuckerman, "Les deux Dioscore," 82–83.

too, including the requested relief, cast precisely in terms calculated to be most beneficial to the petitioner, for copying. Win-win, for petitioner and clerk alike.

To be useful then, the petition should be not just persuasive to the emperor but useful to his officials, too. That fact elevated the drafting of its text to a matter of some importance, as officials (if not always emperors) had high expectations of verbal composition as a result of their common education in *paideia.* That meant engaging skilled assistance to help with drafting. As Simon Corcoran has remarked in respect of an earlier period, "A petition's content would probably be much improved by access to a good lawyer."[279] But the word "lawyer" there must be construed loosely, for many if not most petitions might be drafted to a satisfactory standard by a range of helpers, such as notaries, advocates, scribes (as was usually the case in Egypt), or even just the well-educated. Depending on the range of the petitioner's acquaintance, just about anyone with *paideia* might do.

As in the case of so many other forms of communications originating in earlier periods of antiquity, the petition became increasingly rhetoricized by the fourth century at the latest, as officials making up the new "aristocracy of service" tended to share a common education based in large part on rhetoric.[280] The influence of the rhetorical handbooks, especially their prescriptions for the form of speech known as the *presbeutikos logos*, is manifest.[281] The terms used in the handbooks made their way into written petitions lodged with the authorities, at least into those that were prepared with any degree of professional competence, and from there into rescripts. By way of example, Menander Rhetor's instructions for *presbeutikos logos* prescribe use of the terms "ἱκετεύομεν, δεόμεθα... τὰς ἱκετηρίας προτείνομεν", the responsive forms of which appear throughout the *Novels*, familiar to any reader of them.[282] This rhetoricization is one reason why it is futile to expect to find in late antique rescripts the precision and economy of expression of modern parliamentary draftsmen or, indeed, of the classical Roman jurists.[283] What we find instead is a common language of rhetorical formulae that would have been even more immediately recognisable to the educated classes who prepared and processed petitions than they are to us today.

[279] Corcoran, *The Empire of the Tetrarchs*, 59 n.111.
[280] On the new aristocracy of service, see Peter Heather, "New Men for New Constantines? Creating an Imperial Elite in the Eastern Mediterranean," in *New Constantines: The Rhythm of Imperial Renewal in Byzantium, 4th–13th Centuries: Papers from the Twenty-Sixth Spring Symposium of Byzantine Studies, St Andrews, March 1992*, ed. Paul Magdalino (Spring Symposium of Byzantine Studies, Aldershot: Variorum; Ashgate, 1994), 11–33; Jairus Banaji, *Agrarian Change in Late Antiquity: Gold, Labour, and Aristocratic Dominance* (Oxford: Oxford University Press, 2001). On the increasingly rhetorical, as opposed to legal, training of officials and its effects on drafting, see Voß, *Recht*.
[281] Fournet, "Entre document et littérature: La pétition dans l'antiquité tardive."
[282] Men. Rhet., *Peri Epideiktikon* 2 [XIII] 423.6–424.2, quotation from 436.26–28 [=Russell and Wilson, *Menander Rhetor*, 180).
[283] The contrast in drafting styles is well-known; the investigation in Voß, *Recht*, is exemplary.

DOI: 10.14754/CEU.2024.02

Precious few sixth-century petitions to the emperor remain extant for us to examine in this light. We can disregard for purposes of this discussion those extant petitions by monks and clerics that were styled as petitions but were in substance professions of faith. To the extent such petitions asked for anything at all, it was for "the peace of the church," something that experience would show lay outside the gift of any emperor.[284] There are, however, other, more earth-bound petitions preserved for us in the three petitions of Syrian clergy and monks to Justinian preserved in the *Collectio Sabbaitica*, as well as St. Symeon's blood-curdling cry for the "Younger Justin" to dial up his persecution of the Samaritans.[285] From epigraphy, we have just one example, in the form of the inscription of a petition to the emperor Tiberius II seeking confirmation of a right to asylum.[286] Papyri are more productive, as the surviving petitions in the archive of Dioscorus of Aphrodito, most presumably written by him on behalf of himself, his fellow villagers, or members of his family.[287] In these petitions, few though they are, the influence of the rhetorical handbooks is manifest,[288] notably in their structure, where the structure *exordium, narratio,* and *preces* occurs with some regularity.[289] Other indicia of handbook influence can be found in the vocabulary of

[284] By Chalcedonians and Miaphysites alike. For a Miaphysite example, see the petition to Justinian by their bishops recalled from exile, preserved at Zachariae Rhetor, *Ecclesiastical History* 9.15 (English translation at F.J. Hamilton and E.W. Brooks, trans., *The Syriac Chronicle Known as That of Zachariah of Mitylene* (London: Methuen, 1899), 246–53; Geoffrey Greatrex, ed., *The Chronicle of Pseudo-Zachariah Rhetor: Church and War in Late Antiquity*, trans. Robert R. Phenix and Cornelia B. Horn, 1. publ, Translated Texts for Historians 55 (Liverpool: Liverpool University Press, 2011), 345–54) and at Michael the Syrian, *Chronicle* 9.22 [French translation at J.-B. Chabot, ed., *Chronique de Michel le Syrien: Patriarche Jacobite d'Antioche (1166–1199)*, vol. 2 (Paris: Ernest Leroux, 1901), 196–205]. Chalcedonian examples are more numerous. See the petition of the Chalcedonians of Syria, Jerusalem, and Antioch to Justin I preserved at *Collectio Avellana, Epistle* 232a (part II, p. 703.23–707.18); and the petition by the archmandrites Theodosius and Sabas to Anastasius, preserved (likely faithfully) at Cyril of Scythopolis, *Vita Sabae* 57 [=Schwartz, *Kyrillos*, 152–58]. Cyril also reports an earlier oral petition by the saint to Anastasius requesting the "peace of the church" at *Vita Sabae* 51 [=Schwartz, 143].

[285] Syriac petitions at Eduard Schwartz, ed., *Collectio Sabbaitica: contra Acephalos et Origeniastas Destinata*, vol. 3, *Acta Conciliorum Oecumenicorum* (Berlin: De Gruyter, 1940), 30–32, 32–38 and 131–34. St. Symeon's petition appears at J.-P. Migne, ed., *Patrologiae cursus completus [Series Graeca]*, vol. 86.2 (Paris: Garnier, 1865), cols. 3216C–3220A. On its "high-flown rhetoric" see Fergus Millar, *Religion, Language and Community in the Roman Near East: Constantine to Muhammad* (Oxford: Oxford University Press, 2013), 73–74.

[286] *SEG* VII, 327; A. Dain and G. Rouillard, "Une inscription relative au droit d'asile, conserveé au Louvre," *Byzantion* 5 (1929–1930): 315–26.

[287] The lengthy *P.Cair.Masp.* I 67002 is perhaps the best known. It is a draft written in Dioscorus' own hand on behalf of himself and others of his village, Aphrodito; in it, the voice of the draftsman is perhaps heard more distinctly than are the voices of those on whose behalf he wrote. Keenan, "'Tormented Voices,'" 178. For Dioscorus' petitions as reflective of a shift in local taste from the philosophically informed texts of late antiquity to a sensitivity more shaped by the genre of the early Byzantine novel, see Arkady B. Kovelman, "From Logos to Myth: Egyptian Petitions of the 5th–7th Centuries," *Bulletin of the American Society of Papyrologists* 28, no. 3/4 (1991): 135–52.

[288] Petitions for the fifth through seventh centuries are inventoried at Fournet and Gascou, "Liste des pétitions."

[289] This structure is, with some variations, inherent to nearly all the surviving petitions; the petition of St. Symeon the Younger and those in the *Collectio Sabbaitica* are especially instructive. For the structure, see Tor Hauken, "Structure and Themes in Petitions to Roman Emperors," in *La pétition à Byzance*, ed. Denis Feissel and Jean Gascou (International Congress of Byzantine Studies, Paris: Association des amis du Centre d'histoire et civilisation de Byzance, 2004), 11–22, following that author's model for epigraphic petitions of the Severan period in Hauken, *Petition and Response*, vol. 2, pt. II. The fourth element of Hauken's model, the opening *inscriptio,* is, as Hauken notes, "not

petitions, such as where a petition designates itself as a δέησις καὶ ἱκεσία or some close variant thereof; or where the *preces* begins with some form of παρακαλέω.[290]

In ascertaining how sixth-century petitions might have read, however, we are not limited to direct evidence of the small number of actual petitions that survive, for the chancery practice of lifting text from petition to rescript allows the possibility of deducing the text of the petition from that of the responsive rescript. We have extant only a small number of sixth-century epigraphic and papyrological rescripts whose texts can securely be said to preserve some reference to the petition that prompted them.[291] The epigraphic examples include the rescripts at Didymus and Miletus, discussed above, as well as one dated 527 on the protection of an oratory somewhere in Asia Minor, as well as one from Miletus.[292] The texts of the papyrological rescripts, which are almost certainly drafts rather than exemplars, have an even closer relation to their underlying petitions, in that many were prepared by the same hand, namely that of Dioscorus.[293] The influence of the rhetorical handbooks, directly or indirectly through standard forms on Dioscorus is plain: in the aorist forms of προσέρχομαι used for the act of petitioning; in designation of the petitioner as ἱκέτης; in the use of terms λέγων, φάσκων, and διδάσκων to refer to the petitioner's assertions of fact; and in the characteristic use of ᾔτησεν to indicate the petitioner's *preces.*[294]

Justinian's *Novels* enable such an exercise on a far greater scale than does any epigraphic and papyrological source, on account of the far larger number of rescripts preserved in them. The challenge of course is how to determine which *Novels* more faithfully reflect the text of the petition that prompted them. Denis Feissel, in a wise and thoughtful essay, advanced two criteria by which

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rhetorical in character" (p. 261). His model thus aligns with Fournet's three-part model for Dioscorus' verse petitions. Fournet, *Hellénisme*, 260–61.

[290] δέησις καὶ ἱκεσία: Schwartz, *Collectio Sabbaitica*, 3:32 line 18 and 131 10; Dain and Rouillard, "Inscription," 318; Latin *deprecatio et supplicatio* in *Collectio Avellana* 232a (Otto Guenther, ed., *Epistulae Imperatorem Pontificum Aliorum inde ab a. CCCLXVII usque ad a. DLIII datae [Avellana Quae Dicitur Collectio]*, vol. 2 (Prague, Vienna: Tempsky, 1898), 703 line 25). Παρακαλέω: Schwartz, *Collectio Sabbaitica*, 3:31 line 19; alternatively, in St. Symeon's more emotive rendering, ἐνορκῶ (col 3217 line 28); Latin *supplicamus* in *Collectio Avellana* 232a (Guenther, *Collectio Avellana*, 2:707 line 6). On the rhetorical guidance on the use of such terminology in petitions, see Men. Rhet., *Peri Epideiktikon* 2 [XIII] 423.6–424.2, [=Russell and Wilson, *Menander Rhetor*, 180).

[291] Feissel, "Pétitions," 40.

[292] See, respectively, Denis Feissel, "Rescrit de Justinien, 533–565 ap. J.-C. (Milet VI 3, 1575)," in *Inschriften von Milet. T. 3: Inschriften n. 1020–1580*, ed. Peter Herrmann and Denis Feissel, vol. 6.3, Milet (Berlin: de Gruyter, 2006), 289–96; Feissel, "Rescrit Didyme"; Amelotti and Migliardi Zingale, *Costituzioni giustinianee*, 95–100; Amelotti and Migliardi Zingale, 102–4.

[293] The imperial rescripts in Dioscorus' archive appear at *P.Cair.Masp.* I 67024–67029. They are in all likelihood not originals or true copies thereof but rather drafts prepared by Dioscorus himself to accompany his petitions. Zuckerman, "Les deux Dioscore," 83; Bernhard Palme, "Dioskoros und die staatlichen Autoritäten," in *Les archives de Dioscore d'Aphrodité cent ans après leur découverte: histoire et culture dans l'Egypte byzantine: actes du Colloque de Strasbourg, 8–10 décembre 2005*, ed. Jean-Luc Fournet (Colloque de Strasbourg, Paris: De Boccard, 2008), 206 n.14. Cf. Sarris, *Economy*, 105–9, whose discussion of the Aphrodito tax dispute assumes without argument that *P.Cair.Masp.* I 67024 records a rescript actually issued by Justinian.

[294] Indicia found in each of Dioscorus' four draft rescripts, *P.Cair.Masp.* I 67024–25, 67026–27, 67028, and 67029.

DOI: 10.14754/CEU.2024.02

we might identify those *Novels* that more faithfully reflect their petition's text: first, the relative length of the *Novel's* statement of facts vs. its dispositive provisions; and second, the placement of chapter breaks in the transmitted texts. Of these the first is a surer basis on which to proceed than the second, for it has long been recognised that chapter breaks not original but are the creations of Le Conte in the sixteenth century;[295] while often good, they can mislead. The proportion between relative length of the statement of facts vs. dispositive relief, though, is highly suggestive, as it points to several *Novels* where the exposition of facts is clearly structured based on petitions, with borrowings marked by characteristic verbs of informing.[296]

The text of the underlying petitions is also visible in the vocabulary of the *Novels*. A good example is the vocabulary used for the petitioning process itself.[297] The most commonly used term for petition—προσέλευσις—in the *Novels* refers, as contexts demands, to requests for relief made in the context of litigation, to those made in the context of other disputes, or to those made outside any dispute-resolution context.[298] The related verbs for the act of petitioning are used in the sense of starting lawsuits or of lobbying for new lawmaking, again without distinction.[299] Words derived from Greek roots *ἱκετ-* and δεησ- similarly appear across different procedural contexts, both those that are litigation-related and those made for purposes of lobbying.[300] And verbs of learning are

[295] Noailles, *Collections*, 2:49–52.
[296] See, for example, the group of three *Novels* involving litigation initiated by petitions to the emperor: *Nov.* 155 (Martha's case), of 533; *Nov.* 2 (Gregoria's case) of 535; *Nov.* 158 (Thekla's case) of 544; Feissel, "Pétitions," 42–43.
[297] Feissel, 41–42.
[298] In litigation: *Nov.* 82 c.11 pr. (8 Apr. 539) (SK 406/19, requesting review of cases on account of judicial incompetence); *Nov.* 90 c.4 pr. (1 Oct. 539) (SK 449/2, for permission to call witness testimony for a fourth time) and c.5 pr. (SK 450/15, on taking testimony from witnesses in the capital); and perhaps also the petition referred to at the beginning of *Nov.* 101 pr. (1 Aug. 539) (SK 487/25, reform of laws on city councillors). The petitions referred to in *Nov.* 97 c.4 (17 Nov. 539) (SK 473/30, on whether creditors may take security over offices held by the debtors) likely also arose in the context of litigation on enforcement of credit. For disputes that may be outside the context of litigation: *Nov.* 56 pr. (3 Nov. 537) (SK 311/11 and 19: on church appointments; *Nov.* 146 pr. (8 Feb. 553) (SK 715/2, dispute over whether Jews might use Greek to discuss scripture). For petitions to change law: *Nov.* 110 c.1 (26 Apr. 541) (SK 520/17, petitions to repeal *Nov.* 106).
[299] Πρόσειμι: Cf. *Nov.* 79 c.1 (10 Mar 539) (SK 388/24, lawsuits) and *Nov.* 86 c.7 (17 Apr. 539) (SK 422/12, lawsuits) with *Nov.* 147 pr. (15 Apr. 553) (SK 718/23–24, petitions for tax remission). In *Nov.* 86 c.5 (SK 421/32) προσίοντας might refer to either petitioners or litigants; the *titulus* refers to a plaintiff bringing suit using a term also used for petitioner (SK 419/3–4, ΤΟΥ ΠΡΟΣΙΟΝΤΟΣ), but it has long been recognised that the *tituli* to the *Novels* are in no way official (Friedrich August Biener, *Geschichte der Novellen Justinians* (Berlin: Ferdinand Dümmler, 1824), 57–59 (citing Cujacius)), even if they are of early date. Noailles, *Collections*, 1:121–133. Προσέρχομαι: *Nov.* 112 c.1 (10 Sept. 541) (SK 524/7, to litigate); *Nov.* 123 c.21.1 (1 May 546) (SK 610/15–20, prosecute a charge); *Nov.* 43 pr. (17 May 536 or 537) (SK 270/10–12, request new law).
[300] Litigation: *e.g.*, *Nov.* 155 pr. (1 Feb. 533) (SK 731/5: Ἱκετηρίαν ἀνέτεινε Μάρθα); *Nov.* 2 pr. 1 (16 Mar. 535) (SK 10/23: Γρηγορία γὰρ ἱκέτευσε); *Nov.* 158 (14 July 544) (SK 734/23: Δέησις ἡμῖν ἀνεγνώσθη). Lobbying: *Nov.* 136 pr. (1 Apr. 535) (SK 691/9–10: Οἱ ἐκ τοῦ συστήματος τῶν ἀργυροπρατῶν τῆς εὐδαίμονος ταύτης πόλεως ἱκέται γεγονότες); *Nov.* 74 c.2 pr. (5 June 538) (SK 373/1–9: Ἔστω τοίνυν ἄδεια τῷ πατρὶ… ἐπιδοῦναι τῇ βασιλείᾳ δέησιν); *Edict* 9 pr. (undated) (SK 772/7–8: Τὸ κοινὸν τοῦ συστήματος τῶν ἀργυροπρατῶν τῶν ἐπὶ ταύτης τῆς μεγάλης πόλεως ὄντων ἱκέτευσε τὸ ἡμέτερον κράτος) and c.8 (SK 776/8: Ἐπεὶ δὲ ἀρχόμενοι τῶν δεήσεων ἤτησαν); *Nov.* 106 (7 Sept. 540) (SK 508/1: Πέτρον καὶ Εὐλόγητον ἱκετεῦσαι); *Edict* 7 (1 Mar. 542) (SK 767/23–24: ἀδείας οὔσης τοῖς ἱκέταις ἐν παντὶ δικαστηρίῳ … ἐμφανίζειν τόνδε τὸν θεῖον πραγματικὸν τύπον).

DOI: 10.14754/CEU.2024.02

similarly used in the *Novels*, with διδάσκω, μανθάνω, and the like referring variously to information learned by the emperor via report, via experience in litigated cases, via petition, or by other means specified or not.[301] The characteristic vocabulary of the *preces* also appears regularly.[302] Similarly standard terminology also appears in the terms used for the handling of petitions by officials.[303]

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Many *Novels*, arising in many different contexts and addressing a wide range of topics, thus reflect the language of the petitions that prompted them. There is one group of *Novels*, though, for which the relation between rescript and petition are particularly transparent. These are the banking and other finance-related *Novels* discussed in the next chapters, the highly technical nature of which goes some way to explaining why the official preparing the responses might have relied even more heavily than usually on the text of the petitions.[304] That reliance and the resulting transparent view that the legislative language gives into the underlying petitions allows us to glimpse the intelligent, active application of law by Justinian's subjects in its full vigour. This is perhaps unsurprising given that sixth-century banking and finance—as in periods before and since—were characterised by the need for legal certainty, high stakes, and the influence of organised interest groups ready and able to fight their corner. Justinian's financial *Novels* thus give us unique insight into the role of petitioning in the relationship between emperor and subject during his reign. It is to these *Novels*, then, and to their underlying petitions that this dissertation now turns.

[301] Examples are numerous, so only a few are given here: *Nov.* 121 c.1 (15 Apr. 535) (SK 591/14: Ἐδίδαξαν, from petitions made in litigation context); *Nov.* 45 c.1 (18 Aug. 537) (SK 279/5: ἐδίδαξας, a report from John the Cappadocian); *Nov.* 136 c.4 and c.5 (1 Apr. 535) (SK 693/12 and SK 693/19: ἐδίδαξαν, by petition for change to law); and *Edict* 9 pr. and c.3 (undated) (SK 772/9 and SK 774/6: ἐδίδαξαν in both instances); *Nov.* 88 pr. (1 Sept. 539) (SK 425/22–27: μαθόντες, from a single case in litigation); *Nov.* 30 c.5.1 (18 Mar. 536) (SK 228/7: μεμαθήκαμεν, from throngs of Cappadocian petitioners); *Nov.* 82 c.1 pr. (8 Apr. 539) (SK 401/32: μεμαθήκαμεν, from what appears to be nothing more than an internal personnel report); *Nov.* 38 c.5 (15 Feb. 536) (SK 251/27–30: ἐμάθομέν by means unspecified but likely from experience of litigation).

[302] *E.g.*, for the verb αἰτέω, *Nov.* 10 (15 Apr. 535) pr. pr. (SK 92/17, probably in the sense of both petitions and cases) and pr. 1 (SK 93/12–13, ask for an appointment); *Nov.* 94 c.1 (11 Oct. 539) (SK 461/27, mothers requesting guardianship of children); *Nov.* 136 pr. and c.2, c.3 and c.5 (1 Apr. 535) (SK 691/10, SK 692/8, SK 693/1–2, and SK 693/21, petition for change to law); *Edict* 7 c.5 (1 Mar. 542) (SK 765/29, petition for change of law).

[303] Thus, the verb ἐξετάζω and its derivatives can mean the adjudication of cases at first instance, the hearing of appeals, engagement in fact-finding preceding legislation, the investigation of wrong-doing, the scrutinization of documents, the conduct of an audit, and the vetting of a candidate. The range of examples of the broad usage of this term is extensive, and a comprehensive list would be disproportionate to its place in the argument here.

[304] *Nov.* 136 (1 Apr. 535); *Edict 7* (1 Mar. 542); *Nov.* 106 (7 Sept. 540); *Nov.* 110 (26 Apr. 541). On *Edict* 9 (undated), another banking law that is transparent to the underlying petition, see discussion at note 113 in the Introduction.

DOI: 10.14754/CEU.2024.02

CHAPTER 2

THE BANKERS' RAPID REACTION FORCE

Introduction

In 535, or perhaps 536, the bankers of Constantinople made a concerted lobbying effort to obtain a series of legislative changes favourable to their interests. The legislation responding to that effort[1]—to mixed effect—relates that the bankers had requested relief under several heads, which we can conceptually group into four main categories.[2] The first addresses changes to rules governing the order in which creditors had to pursue various obligors when suing on a debt claim. The second deals with the rights of bank lenders in respect of their borrowers' assets if their debt went unpaid.[3] The third main category of issues addressed in *Novel* 136 concerns questions arising out of Justinian's prior legislation on interest rates. The fourth category, not actually requested by the bankers but given to them as a kind of consolation prize in lieu of other relief requested but denied, addresses the consequences flowing from the introduction of certain kinds of evidence to prove debt claims in litigation.

Formal Characteristics of Novel 136

Novel 136 is styled as a "divine pragmatic law," issued in response to a petition by the guild of Constantinopolitan bankers requesting relief on various points of law relating to their activities.[4] In both posture and substance, it falls within the class of legislation designated as pragmatic sanctions in Justinian's *Codex*, which uses the term *pragmaticae sanctiones* for laws issued to corporate groups like guilds, cities and the like.[5] The Latin term was translated inconsistently into Greek of the *Novels*, mainly by variations on πραγματικοὶ τύποι or, as here, πραγματικοὶ νόμοι. Whether there is any real distinction in meaning between the Greek terms in their various instantiations depends on context and on how one construes the effect of variations in the *Novels*' technical vocabulary.[6] Given the conformity of subject matter of *Novel* 136 to the class of

[1] *Nov.* 136 pr. (1 Apr. 535). On the date, see the discussion at "Excursus on the Dating of *Novel* 136" below.
[2] The four-part grouping given in this paragraph is, for clarity, conceptual rather than tied to the presentation in the text of the *Novel* or of the petition that prompted it, which topic is taken up below.
[3] This category encompasses three types of assets, at increasing levels of conceptual generality: the asset represented by an office held by a debtor (or his son), addressed at c.2; assets purchased by a debtor with borrowed money, addressed at c.3; and, more broadly, all others assets of the debtor, addressed at c.5. Despite the conceptual link between the three different requests, *Nov.* 136 suggests that the bankers' petition dealt with them distinctly. We do not know whether that was part of a calculated lobbying strategy or the product of haste or inadvertence.
[4] *Nov.* 136 ep. (SK 694/22: τοῦδε τοῦ θείου πραγματικοῦ . . . νόμου). Other *Novels* so styled: *Nov.* 64 (19 Jan. 538) (SK 338/15–16); *Edict* 2 (undated) (SK 760/21); *Edict* 9 (undated) (SK 776/29); *Edict* 10 (undated) (SK 777/10–11).
[5] *Cod. Iust.* 1.23.7 c.2 (23 Dec. 477).
[6] For discussion the development of the pragmatic sanction over time and the various stylings mentioned here, see the discussion at notes 20–31 in Chapter 1.

DOI: 10.14754/CEU.2024.02

legislation described in the *Codex*, it is generally assumed that, in this case at least, the *Novel's* styling as a πραγματικὸς νόμος in lieu of πραγματικὸς τύπος is of little import.[7]

As published in the critical edition used for scholarly purposes, *Novel* 136 is presented with the standard preface, chapters, and epilogue.[8] But even more so than is usually the case, these editorial divisions do a disservice to the substantive legal content. As with many other *Novels*, the first topic is spread over the preface and the first chapter. But as the *Novel* 136 proceeds, the chapter headings increasingly obscure rather than clarify the matter at hand. The topic of interest rates on bank loans is dealt with, in different ways, in both the fourth and fifth chapters. And the response to the petition request underlying the fifth chapter sprawls over both that chapter and the following one, while what is its arguably most important content (on hypothecs) conceptually belongs rather with the matters addressed by the third chapter. For clarity of exposition, the discussion of *Novel* 136 here addresses the content both by petition request as recounted in it and by chapter.

The manuscripts by which we know the text of *Novel* 136 omit the identity of its addressee. The sixth-century epitomator Athanasius supplies the name Strategius, in his capacity as *comes largitionum* (presumably for *comes sacrarum largitionum*, or *CSL*).[9] This Strategius was Flavius Strategius, son of the renowned Flavius Apion, who had served as *PPO* under the emperor Anastasius in the early years of the sixth century and then again under the emperor Justin.[10] The trades generally fell under the jurisdiction of the *CSL* save for matters arising in the city of Constantinople, which fell to the *praefectus urbi*, or *PU*.[11] The bankers of Constantinople were thus subject to the jurisdiction of *PU* of the capital rather than to that of the *CSL*.[12] Why, then, was *Novel* 136 addressed to the *CSL* Strategius, rather than to the *PU*, at least in the version that Athanasius

[7] van der Wal, *Manuale 2nd*, 1 n.2. includes *Nov.* 136 as a *sanction pragmatique*, as he does all *Novels* styled as πραγματικοὶ νόμοι or τύποι without distinction.
[8] SK 691/6–SK 694/25. The chapter breaks are not original but the creations of Le Conte in the 16th century. Noailles, *Collections*, 2:49–52.
[9] Athanasius, *Syntagma* §15.1 [=Simon and Trōianos, *Novellensyntagma*, 412 line 14]. On Athanasius and his work, see the discussion at notes 80–81 in the Introduction.
[10] On the father, see John Robert Martindale, *The Prosopography of the Later Roman Empire. Vol. II: A.D. 395–527*, vol. 2 (Cambridge: Cambridge University Press, 1980), 2:111, *s.v.* Apion 2. On the son, Martindale, 2:1034–1036, *s.v.* Strategius 9; Martindale, *PLRE*, 3:1200–1201, *s.v.* Strategius. For different reconstructions of these men's careers and family, see James G. Keenan, "Egypt," in *The Cambridge Ancient History: Late Antiquity: Empire and Successors*, ed. Averil Cameron, Bryan Ward-Perkins, and Michael Whitby, vol. XIV, The Cambridge Ancient History (Cambridge: Cambridge University Press, 2000), 625–28; Sarris, *Economy*, 17–24; T.M. Hickey, *Wine, Wealth, and the State in Late Antique Egypt: The House of Apion at Oxyrhynchus* (Ann Arbor: University of Michigan Press, 2012), 8–18. The differences between the various reconstructions do not affect the argument made here.
[11] At Constantinople, the guilds had come under the jurisdiction of the *PU* by no later than the end of the fourth century. *Cod. Theod.* 1.10.4 (15 Apr. 391), restated in redacted form at *Cod. Iust.* 1.28.4 (15 Apr. 391). See also *Nov. Val.* 24 (25 Apr. 447); *Cod. Iust.* 4.63.2 (374?); *Cod. Iust.* 4.63.6 (7 Mar. 423?); Johannes Karayannopulos, *Das Finanzwesen des frühbyzantinischen Staates* (München: Oldenbourg, 1958), 61; Jones, *LRE*, 1:486.
[12] Bianchini, "Disciplina," 416 n.80; Luchetti, "Banche," 453 n.9; Petrucci, *Profili*, 18–23; Mattioli, *Giustiniano*, 110–11 n.51. The jurisdiction of the *PU* of Rome over banking activities in that city is attested already from the time of Hadrian. *Dig.* 1.12.2; see also *Dig.* 1.12.1.9.

saw? Karl-Éduard Zachariä von Lingenthal long ago conjectured that as of the date of *Novel* 136 (536, on his view), banking disputes generally were subject to the jurisdiction of the *CSL* as "*specialis iudex*" without geographical limitation.[13] This conjecture fails to persuade. Though *Novel* 136 contains much material about banking disputes, it says nothing about jurisdiction over them or about revising the allocation of jurisdiction set out in the *Codex* published as recently as December 534. Moreover, although the petition giving rise to *Novel* 136 sprang from the guild of bankers of the city of Constantinople, both the law's addressee "and every other office holder of the realm" were charged with observing its provisions.[14] The mere fact that the *CSL* was an addressee thus compels no inference that that official had gained, and that the *PU* had lost, jurisdiction over banking disputes in the capital. The version that Athanasius had sight of may very well have been the "cc" for Strategius, for his information rather than his application, which fell to the *PU*.[15]

The most important manuscript for the Greek Collection, *Cod. Marc. Gr.* 179, assigns a date of 1 April 535 to *Novel* 136.[16] This is also the date given by one of the manuscripts of Athanasius' *Syntagma*, the *Cod. Par. Gr.* 1381; the other main manuscript of that work, though, assigns a date of 1 April 536 instead.[17] One manuscript of Julian's *Epitome* suggests a date in 541, manifestly incorrect.[18] The date given in Theodore is similarly garbled, perhaps as the result of confusion with the *subscriptio* to the following *Novel* 137.[19] As a result of messy dating in the sources, and in view of the tight timeframe between the 1 April 535 date and the date of *Novel* 4, to which the first chapter of *Novel* 136 responds, some scholars have assigned a later date to *Novel* 136. It is one argument of this chapter that the relationship between petition and legislation supports the 1 April 535 date given in the best manuscript. To see why, we must first examine that relationship.

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[13] Karl Eduard Zachariä von Lingenthal, *Imp. Iustiniani PP. A. Novellae quae vocantur sive Constitutiones quae extra Codicem supersunt, ordine chronologico digestae* (Leipzig: Teubner, 1881), 1:336 n.1.

[14] *Nov.* 136 ep. (SK 694/23: ἥ τε σὴ ἐνδοξότης καὶ πᾶς ἕτερος τῆς ἡμετέρας πολιτείας ἄρχων ἀκέραια φυλάττειν εἰς τὸ διηνεκὲς σπευσάτω).

[15] Such copies for office holders are attested at *Nov.* 7 ep. (15 Apr. 535) (SK 63/35–SK 64/3); *Nov.* 14 *post*-ep. (1 Dec. 535) (SK 108/33–SK 109/3); *Nov.* 22 ep. (18 Mar. 536) (SK 186/33–SK 187/8); *Nov.* 105 (28 Dec. 537) (SK 507/20–24). An example of such a "cc" in elaborate form can be found in Justinian's contemporaneous reform of provincial governance, *Nov.* 8 (15 Apr. 535). This important constitution, though addressed like most general laws to the *PPO* preserves a Latin text of an instruction to a certain Dominicus, the prefect of Illyricum, on the instructions to be given to, and the oaths taken from, subordinate office holders. SK 89/1–SK 91/14. In addition, the *tituli* to *Nov.* 126 (546 or 547) (SK 631/12) and to the undated *Nov.* 160 state that they are copies for specified individuals (SK 744/1). The *tituli* are not, however, original, even if they are of early date.

[16] See the apparatus at SK 694.

[17] See the apparatus at Simon and Trōianos, *Novellensyntagma*, 414.

[18] Julian, *Epit.*, Const. CXVII (¶ *DV*) [=Haenel, *Iuliani Epitome*, 165]. Haenel rightly questioned the date, which perhaps derives from scribal error in transcribing *Belisario* to *Basil[io]*. The subscriptions to the epitomes of both Julian and (see next sentence and note) Theodore are too unreliable to support so late a dating of *Nov.* 136. Mattioli, *Giustiniano*, 48 n.9.

[19] Zachariä von Lingenthal, *Novellae*, 1:342 n.22.

DOI: 10.14754/CEU.2024.02

The Petition

The text of *Novel* 136 is invaluable for the transparent view it affords to the petition that prompted it. The contents of that petition are recounted at several points as the *Novel* addresses the various heads of requested relief *seriatim*. The hallmarks of text drawn directly from the underlying petition are evident in the preface of *Novel* 136, indeed from its very first clause:

> Οἱ ἐκ τοῦ συστήματος τῶν ἀργυροπρατῶν τῆς εὐδαίμονος ταύτης πόλεως ἱκέται γεγονότες τοῦ ἡμετέρου κράτους περὶ πολλῶν ἡμᾶς ᾔτησαν κεφαλαίων βοηθείας αἰτοῦντες τυχεῖν….
>
> "The members of the association of bankers of this fortunate city have become petitioners of our majesty and have asked us for assistance under many heads, requesting that they obtain…"

This clause neatly displays several indicia of petition text: the reference to petitioners (ἱκέται);[20] the framing of the request with the verb αἰτέω (here twice);[21] the characterisation of the relief sought as imperial succour (βοηθεία);[22] and the use of κεφάλαιον to refer to the individual "heads" of a multi-part request.[23] Perhaps the most transparent way of demonstrating the likelihood of lifting text from petition to legislative text by the imperial chancellery is to show how few changes would be needed to turn the opening clause of *Novel* 136 into serviceable petition text or, *per contra*, how few changes the chancellery would have needed to convert petition text to legislation:

> Οἱ ἐκ τοῦ συστήματος τῶν ἀργυροπρατῶν τῆς εὐδαίμονος ταύτης πόλεως ἱκέται γεγονότες τοῦ ὑμετέρου κράτους περὶ πολλῶν ὑμᾶς αἰτοῦμεν κεφαλαίων βοηθείας αἰτοῦντες τυχεῖν….

[20] ἱκέτης and its related forms is the customary term used for petitioner throughout the *Novels*. See discussion at note 300 in Chapter 1. It is frequently used in that sense in Justinian's three main banking *Novels*: here at *Nov.* 136 pr. (SK 691/9); at *Edict* 9 pr. (SK 772/8); at *Edict* 7 c.1 (SK 764/13), c.2.1 (SK 765/2), c.6 (SK 766/7 and 14), c.7 (SK 767/2) and ep. (SK 767/23); and in other finance-related *Novels*: *Nov.* 121 c.1 and ep. (25 Apr. 535) (SK 591/20 and SK 592/15); *Nov.* 106 pr. (7 Sept. 540) (SK 508/1); *Nov.* 160 pr. (undated) (SK 744/5).

[21] *Nov.* 136 pr. (SK 691/10); see also c.2 (SK 692/8), c.3 (SK 693/1), c.5 pr. (SK 693/21).

[22] *Nov.* 136 pr. (SK 691/10). The characterization of grants of legal relief as βοηθεία is a commonplace of Justinian's legislation in the *Novels*. See, *e.g.*, elsewhere in *Nov.* 136, at c.5 pr. (SK 694/4–5) and c.6 (SK 694/12); *Nov.* 76 pr. (15 Oct. 538) (SK 379/12–14); *Edict* 9 pr. (undated) (SK 772/8–9); Hunger, *Prooimion*, 123, 126 n.260. The formula of legal relief as imperial βοηθεία also appears in a rescript drafted by Dioscorus, *P.Cair.Masp.* I 67028 line 7 (τῆς ἐξ ἡμῶν καὶ τῶν νόμων δέεσθαι βοηθείας).

[23] This term can be used to refer to part of a legal text (as at *Nov.* 115 c.4.9 (1 Feb. 542) (SK 546/4) and *Nov.* 117 pr. (18 Dec. 542) (SK 551/14) or document (such as a will, as at *Nov.* 115 at c.3.12 (SK 539/20), c.3.15 (SK 544/3), c.4.7 (S 545/16), and c.4.9 (SK 546/1)). It is especially used in Justinian's banking *Novels* to refer to sections of the bankers' petitions (as here and at c.2 of *Nov.* 136 (SK 691/10 and SK 692/5), and c.2. pr. of *Edict* 7 (SK 764/18)), and to his grant of legal relief responsive to them (as at *Edict* 7 c.5 (SK 766/4), c.7 (SK 766/26), c.8 pr. (SK 767/9), and ep. (SK 767/26)). The repeated use of the term in *Nov.* 136 and *Edict* 7 might suggest the use of a common source, by either the draftsman of the petition or the draftsman of the law, or more likely both.

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> "The members of the association of bankers of this fortunate city have become petitioners of your majesty and ask you for assistance under many heads, requesting that we obtain…"

Beyond its opening sentence, traces of the underlying petition pop up throughout *Novel* 136. Thus, the law's explanations of underlying facts are marked by the verb of informing, ἐδίδαξαν.[24] As in its opening sentence, the *Novel's* later provisions express the bankers' requests using ᾐτησαν[25] and style the relief requested and granted as βοηθεία.[26] In addition, the use of the petition's text in the responsive legislation perhaps goes some way to explaining why the legislation is so complimentary of the Constantinopolitan bankers, who were unlikely to pass up an opportunity to include a bit of self-praise in their prayers for relief.[27] Finally, the *Novel* gives information on market practices—such as the bankers' own borrowing practices mentioned in the second and fifth chapters, their delivery of valuables in lieu of cash attested in the third chapter, and the contractual practices addressed in the fifth and sixth chapters—that could have come only from the bankers themselves.[28]

That there is more than a whiff of the standard form in the preface to *Novel* 136 is evident from comparison with other prefaces, particularly those of Justinian's other banking *Novels*. The undated but later *Edict* 9 opens with:

> Τὸ κοινὸν τοῦ συστήματος τῶν ἀργυροπρατῶν τῶν ἐπὶ ταύτης τῆς μεγάλης πόλεως ὄντων ἱκέτευσε τὸ ἡμέτερον κράτος, πρὸς τοῖς ἄλλοις ἅπασιν, οἷς αὐτοῖς πεφιλοτιμήμεθα, καὶ νῦν καθ' ἕτερον αὐτοῖς βοηθῆσαι τρόπον.[29]
>
> "The body of the association of bankers of this great city has petitioned our majesty that, in addition to all the other favours we have granted them, that we now assist them in another way.…"

That this text was prepared using *Novel* 136 as a model or from a common model is manifest. The most likely explanation is that the draftsman of the petition prompting *Edict* 9 worked off the petition prompting *Novel* 136, a copy of which was presumably in the guild's archive, or perhaps from a common underlying formbook model. [30]

[24] *Nov.* 136 c.4 (SK 693/12) and c.5 pr. (SK 693/19).
[25] *Nov.* 136 c.2 (SK 692/8), c.3 (SK 693/1), and c.5 pr. (SK 693/21).
[26] *Nov.* 136 c.5 pr. (SK 694/4–5) and c.6 (SK 694/12).
[27] *Nov.* 136 pr. (SK 691/10–12); c.1 (SK 691/23); c.2 (SK 692/21–23); c.3 (SK 692/30–31); and c.4 (SK 693/17–18). For the same phenomenon later, see *Edict* 9 c.2 pr. (SK 773/22–23).
[28] See discussion at notes 52, 97 and 151, respectively, below.
[29] *Edict* 9 pr. (undated) (SK 772/7–9). On the dating of *Edict* 9 relative to *Nov.* 136, see note 168 in Chapter 3.
[30] By contrast, the still later *Edict* 7 (1 Mar. 542) has an entirely different opening sentence, most likely not drawn from petition text but reflecting the emperor's own programmatic statement on the difficult circumstances in which it was promulgated. Still, some hallmarks of petition language are evident even there, as in use of the characteristic verb προσῆλθον to mean "petition" and of the participle φάσκοντες in the sense of "recount facts" at *Edict* 7 pr. (SK 764/6–7). On *Edict* 7, see Chapter 3. On characteristic petition text, see the discussion at notes 288–294 in Chapter 1.

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The similarities in these petitions and their tracking of customary petition language reflect the incentives with which the emperor's imperial draftsment were confronted. Where, upon hearing of the petition, the emperor had indicated he was inclined to grant the relief request, there would be little benefit to the legislative draftsman of drafting afresh as opposed to using the text of the petition as a basis from which to start. Given the *ex parte* nature of the rescript process, that petition would in any event have been the sole source of information about the fact patterns addressed. And more generally, why (re-)invent the wheel when text that had already found favour with the emperor was right there, ready for the copying? To proceed otherwise would be to risk deviating from what the emperor had responded to the petitioners or what he thought he had responded. Far better to start from what the emperor had heard recited and had approved in principle, with whatever degree of modification was needed to satisfy the one's pride in one's own *paideia*.[31] There is also the question of ease: As Rudolph von Jhering once noted, "No one will fetch a thing from afar when he has one as good or better at home."[32] For the busy, or lazy, scrivener, text that needs drafting afresh may be equated to something in need of fetching.[33]

Order of Remedies: The *Beneficium Excussionis*

The first head of relief recounted and addressed in *Novel* 136 is the bankers' request for an adjustment to the rules governing the order of remedies in debt claims. Justinian had freshly legislated on this topic, setting it on an entirely new footing in *Novel* 4 of mid-March 535.[34]

Background

It was customary practice in the Roman world (and indeed for most of antiquity) for loans to be secured by some means of credit support, of two main types. The first was real security, that is, some right in respect of an asset designated to serve as collateral for the debtor's obligation.[35] The

[31] For the draftsman's role in composing the rhetorical variation so characteristic of late antique legislation, see Voß, *Recht*. But even where a functionary indulged his fancy in this way, some trace of the base text would remain in descriptions of facts and the justifications offered for the relief requested. Of course, a savvy petitioner would might seek to forestall such rewriting by including a draft response, in the fulsome turgidity expected of late antique legislation, already as part of his petition. See Chapter 1.

[32] Rudolf von Jhering, *Geist des römischen Rechts: auf den verschiedenen Stufen seiner Entwicklung*, 9th ed., vol. 1 (Leipzig: Breitkopf und Härtel, 1954), 1:8.

[33] Tony Honoré, in his examination of the style of Justinian's quaestors, remarked that *Edict* 9 "has some, though no conclusive, marks of [Tribonian's] style." Honoré, *Tribonian*, 68 with n.271. But this is to miss the point: if the imperial draftsman was working from petition text, then the relevant style to be examined is that of the scribe who prepared the petition on behalf of his clients. More fundamentally, Honoré fails adequately to confront the difficulties for his methodology that late antiquity's culture of *paideia*, with its widespread inculcation of common *formulae* among the educated classes that made up the bureaucracy, presents.

[34] *Nov.* 4 (15 Mar. 535).

[35] Such rights *in rem* could in principle take the form of vesting ownership in the lender; of vesting possession in him (by possessory pledge); or of providing another "real" right allowing distraint upon the collateral even when it was hands of third parties—*e.g.*, non-possessory hypothec, a form of interest roughly akin to a modern-day mortgage. Hypothecs might be either specific to a particular asset or general, *i.e.*, extending over the entirety of the debtor's assets. The distinction between pledge and hypothec originally lay in Roman law possession of the subject asset vesting in the

DOI: 10.14754/CEU.2024.02

second was personal security, in the form of one or more persons other than the debtor (secondary obligors) standing surety for the debtor (the primary obligor).[36] The secondary obligors would do this by providing some sort of guarantee or promise of payment, of which Roman law offered several forms. As part of his compilation of Roman law, Justinian had replaced earlier forms with three new ones: the *fideiussio*, the *mandatum*, and the *constitutum alieni debiti* (or *constitutum*).[37] The differences between the three are unimportant for purposes of this discussion, save to note that the *constitutum* was the form usually, or at least often, used as a promise of payment by bankers.[38]

Prior to 535, creditors seeking to enforce a debt claim generally had a choice of which obligor they wished to pursue to obtain satisfaction of a secured debt obligation, and in which order: they could sue the primary obligors or the secondary obligors, or pursue the hypothecated assets, all as the creditors might wish.[39] In March of that year, however, Justinian undertook a thorough-going revision of the rules governing enforcement of debt obligations backed by security.[40] *Novel* 4 provided that henceforth creditors had first to pursue the principal debtor (or his heirs) before proceding against the secondary obligors (or their heirs).[41] In other words, when faced with a

creditor in the case of pledge but remaining with the debtor in the case of hypothec. *Dig.* 13.7.9 c.2; *Dig.* 50.16.238 c.2; Verhagen, *Security and Credit*, 192–205. But this distinction must not be pressed too hard. As Verhagen's discussion (p. 201 at n.106) shows, non-possessory pledges arose at an early stage. "The terminology in the Digest is confused." Barry Nicholas, *An Introduction to Roman Law* (Oxford: Clarendon Press, 1962), 152.

[36] On personal security, see Nicholas, *Introduction*, 151; Kaser, Knütel, and Lohsse, *Studienbuch*, 390 [§68 ¶2].

[37] *Fideiussio*, a contract by stipulation: *Inst. Iust.* 3.20. *Mandatum*, a contract by agreement alone: *Inst. Iust.* 3.22 pr. and 3.26. *Constitutum alieni debiti*, an enforceable pact: *Cod. Iust.* 4.18.2 (22 Apr. 531). See Robin Evans-Jones and Geoffrey MacCormack, "Obligations," in *A Companion to Justinian's Institutes*, ed. Ernest Metzger (Ithaca, New York: Cornell University Press, 1998), 145–48, 165–69. Justinian's classification replaced earlier forms known to classical law. For a succinct overview, see Kaser, Knütel, and Lohsse, *Studienbuch*, 390–396 [§68 ¶¶2–26].

[38] The preface to *Nov.* 136, praising the public benefits provided by bankers, cites their provision of ἀντιφωνήσεις (*i.e.*, *constituta*) even before their provision of loans. *Nov.* 136 pr. (SK 691/10–12).

[39] Under earlier Roman law, a creditor could sue primary and secondary obligors at will (*Cod. Iust.* 8.40.23 (5 Dec. 294)) but he had to choose carefully, for reaching *litis contestatio* against one obligor had the effect of releasing the others, save as otherwise agreed. Justinian cleared this obstacle away in 531, when he decreed that a creditor could enjoy the benefit of all his security, both real and personal, against primary and secondary obligors alike, until his claim was wholly satisfied. *Cod. Iust.* 8.40.28 (18 Oct. 531); Buckland and Stein, *Text-Book*, 451. But he also provided that multiple guarantors could enjoy the *beneficium divisionis—i.e.*, that each could be pursued only for his respective share. *Cod. Iust.* 4.18.3 (1 Nov. 531). He later extended this *beneficium* to joint obligors *in solidum* (*i.e.*, to those who were jointly and severally liable). *Nov.* 99 (16 Dec. 539); van der Wal, *Manuale 2nd*, 123–124 paras. 857, 867; Kaser, Knütel, and Lohsse, *Studienbuch*, 388 [§67 ¶2]. Such joint arrangements were common. *P.Oxy.* LXII 4350, *P.Oxy.* LXII 4351, *P.Hamb.* 23; Sarris, *Economy*, 58–60; Miller and Sarris, *Novels*, 2:661 n.5.

[40] *Nov.* 4 (16 Mar. 535). For an overview of the development of the legal treatment of bankers when acting as secondary obligors here and subsequently, see Díaz Bautista, *Estudios*, and the critique thereof by Luchetti, "Banche."

[41] *Nov.* 4 c.1. This provision (at SK 24/25–26) gives the Greek terms for the various types of obligors as ἐγγυηταί, μανδατόρες and ἀντιφωνηταί. The second, at least, is is a clear reference to the Justinianic form of guarantee known as the *mandatum.* As an example of an instance where we should not expect to find in Justinian's *Novels* the sort of drafting precision expected of the modern parliamentary draftsman, ἐγγυηταί as used in *Nov.* 4 probably equates to *fideiussores* but may perhaps refer to guarantors generally. And whilst ἀντιφώνησις may have a broader meaning when used in the papyri, its meaning here equates to the promise to pay another's debt known as the *constitutum*. Kaser, *RP*, 2:383 n.76; Briguglio, *Fideiussoribus*, 101 n.6. The translation of the term as *sponsor* given in the *Authenticum* is just one example of that text's many bone-headed errors. J. Kerr Wylie, *Solidarity and Correality* (Edinburgh: Oliver and Boyd, 1923), 190 with n.1; Briguglio, *Fideiussoribus*, 99–100 n.6. The *antecessores* were more astute: See Athanasius,

DOI: 10.14754/CEU.2024.02

creditor seeking to enforce a guarantee previously given by him, a secondary obligor could fend off the claim unless the creditor could show that he had first pursued the primary debtor and not succeeded in recovering the amount owed.[42] This privilege is the *beneficium excussionis.* In its second chapter, *Novel* 4 made similar provision with respect to real security: recourse could be had to assets in the hands of third parties only once the creditor had exhausted his remedies against both principal and secondary obligors.[43] Together, these rules established the order in which a creditor must pursue his remedies: first against the primary obligor (or his heirs), then against the secondary obligors (or their heirs), then against assets of the primary obligor hypothecated to third parties and, in the last instance, against assets of the secondary obligors hypothecated to third parties.[44] A creditor who failed to respect this order would be stymied.

These provisions of *Novel* 4 governing the *beneficium excussionis* had a major hole in them though: promises to pay the debt of another made by a banker were excluded from their scope.[45] Or, more precisely, one type of promise was excluded, namely the ἀντιφωνήσεις, or *constitutum*; other forms of guarantee were not. After *Novel* 4, direct recourse against secondary obligors continued to be possible against bank *constituta,* and only against bank *constituta*. Justinian's explanation—"because of the usefulness of their [i.e., bankers'] contracts"—and the bankers' reaction in lobbying for relief that led to *Novel* 136 together show that the *constitutum* was a common, and probably the usual, form of guarantee/promise to pay issued by bankers during this period.[46] The *constitutum* was at this stage of its development a synthesis of two earlier forms of Roman-law promises to pay, the *receptum argentarii* and the earlier *constitutum*, which Justinian had combined into a new form of *constitutum* combining features of both.[47] Its principal purpose may have been to relieve debtors of

Syntagma, §15.1 [=Simon and Trōianos, *Novellensyntagma*, 410]; Julian, *Epit.*, Const. III [¶ *X*] [=Haenel, *Iuliani Epitome*, 25–26]. See also *Syn. Nov.* 71–79 [=Schmink and Simon, "Synopsis," 138].

[42] What that pursuit entailed is not entirely clear. Certainly, the claimant had to bring suit against the debtor (or his heirs) for payment and seek to collect on his judgment. Later, in 542, Justinian would assume that such pursuit of the debtor might involve subjecting him even to ἔκστασις, *i.e.*, *cessio bonorum*, a late-antique version of bankruptcy. *Edict* 7 c.4 (SK 765/15–17 and SK 765/23–24). See note 137 in Chapter 3. But *Nov.* 4 does not by its terms require a creditor to demonstrate that his debtor had been subjected to *cessio bonorum* as a condition to the exercise of remedies against secondary obligors or other security. Díaz Bautista, *Estudios*, 160–61; van der Wal, *Manuale 2nd*, 105 para. 737 with n.52. Cf. Miller and Sarris, *Novels*, 2:1046–1047 n.15.

[43] *Nov.* 4 c.2; van der Wal, *Manuale 2nd*, 105 para. 736. The expression "exhaust remedies" is employed here and elsewhere as a neutral way of referring to the measures—whatever they may have been—that a creditor had to take under *Nov.* 4 against an obligor before proceeding against another obligor or seeking to distrain upon real security.

[44] Briguglio, *Fideiussoribus*, 103 n.9.

[45] *Nov.* 4 c.3.1 (SK 27/43–45).

[46] *Nov.* 4 c.3.1 (SK 27/43–44: τῶν ἀργυροπρατικῶν ἀντιφωνήσεων διὰ τὸ χρήσιμον τῶν συναλλαγμάτων). Payment via *constituta* appears to have been common practice in Egypt. Raphael Taubenschlag, "The Legislation of Justinian in the Light of the Papyri," *Byzantion* 15 (1940–1941): 292 nn.85–86.

[47] Prior to the merger of the *receptum argentarii* and the *constitutum*, the former differed from the latter in that the *receptum argentarii* could, as the name suggests, be issued solely by bankers; the *receptum* could have anything as its object, whereas the *constitutum* was available only to secure obligations measurable by weight, number, or measure; the *receptum* was likely not transferable to heirs and expired annually; and the *receptum*, unlike the *constitutum*, was

the need to transport heavy coin.[48] Some scholars have even inferred from this that bank *constituta* served as the cornerstone of a putative late antique payment system.[49]

Excepting the usual form of bank promise to pay from the *beneficium excussionis* of *Novel* 4 put the bankers in an invidious position: They could be sued directly when they acted as secondary obligors under *constituta* for their clients' obligations, but in their own suits to enforce loans that they themselves had extended they could proceed against secondary obligors only after having exhausted remedies against the primary obligor.[50] That is, under the scheme put in place by *Novel* 4, where a banker sought to enforce a debt owing to him, any secondary obligor could insist that the bank claimant show that he had first exhausted remedies against the primary obligor. But when the shoe was on the other foot, and others sued to enforce *constituta* given by bankers to them, the bankers could not fend off the claimant in the same way. The bank defendant had to pay up, even if the primary obligor still had assets available to satisfy the debt.

Petition and Response

As the preface to *Novel* 136 reports their complaint— in language that likely was drawn from their petition— the order of remedies imposed by *Novel* 4 put the bankers in "the worst possible situation."[51] One might have some sympathy with their plight. Bankers in all periods have had to match cash flows to ensure that incomings suffice to meet outgoings, at least if they wish to remain bankers or, indeed, just to avoid ruin. Even in the sixth century, bankers were not just lenders, they were borrowers, too, and like most borrowers they usually had to pay interest.[52] A banker unable to collect on debts owing to him might find himself embarrassed in his own payment obligations. And what is true of direct lending and borrowing is also true for secondary obligations. A banker forced to pay up on his own promises to pay immediately while thwarted of payment on

unavailable for obligations subject to a condition or to a specified future date. Justinian amalgamated the two forms in *Cod. Iust.* 4.18.2 (44 Apr. 531) (discussed at *Inst. Iust.* 4.6.8), adding the flexible features of the *receptum* to the *constitutum* and abolishing the former in favour of the latter. For a reconstruction of the development, see Francesco Fasolino, "Sulle techniche negoziali bancarie: il 'receptum argentarii,'" *Labeo* 46, no. 2 (2000): 169–89.

[48] As was the case for the *receptum argentarii.* Fasolino, 188.

[49] Platon, *Banquiers*. overstates the case. See the criticisms of Chekalova, "Константинопольские аргиропраты," 17 n.16; Barnish, "Wealth," 19–23, esp. 22 n.135.

[50] On the use of the term "exhaust remedies" see note 43 above.

[51] *Nov.* 136 (SK 691/14: πάσχειν τὰ πάντων δεινότατα).

[52] A fact Justinian mentioned as "obvious", presumably also in words drawn from the bankers' petition. *Nov.* 136 c.5.1 (SK 694/9–11: πρόδηλόν). See also *Cod. Iust.* 8.13.27 pr. (1 June 528) (addressing hypothecs given by *argenti distractores,* among others, to secure debts to their own creditors); *Nov.* 136 c.2 (SK 692/14); *Edict* 7 c.3 (discussed in Chapter 3); and *Edict* 9 c.5 (SK 774/28–29). Borrowing by bankers is attested in the papyri. See *PSI* I 76, discussed at James G. Keenan, "The Case of Flavia Christodote: Observations on PSI I 76," *Zeitschrift für Papyrologie und Epigraphik* 29 (1978): 191–209. Acting as both lender and borrower is of course what the credit intermediation function of banking entails.

DOI: 10.14754/CEU.2024.02

promises made to him might quickly find himself insolvent, a fact of which the bankers petitioning Justinian understandably complained.[53]

The bankers lobbied to level the playing field. The preface to *Novel* 136 informs us that they cast their prayer for relief in the alternative: to cure the assymetrical application of the *beneficium excussionis* by allowing bankers to invoke it when they were sued as secondary obligors just like anyone else or to render the *beneficium* inapplicable vis-à-vis bankers entirely by blocking its invocation against them just as bankers themselves were blocked from doing so for their *constituta.*[54] "Either they [sc. the bankers] too ought to share in the same laws as everyone else, or our constitution ought not to be put up against them."[55]

This lobbying effort met with only limited success. Justinian granted the bankers' request by permitting them to proceed immediately against a secondary obligor, but only if their future written agreement contemplated that.[56] In other words, the bankers would have their relief only if a prospective guarantor renounced his *beneficium excussionis* in writing.[57] For unwritten contracts, the emperor gave no relief at all.[58] Justinian thus left intact the order of remedies that excluded bank *constituta* from the *beneficium excussionis* for all existing contracts; for future contracts, the relief granted was of use only where the secondary obligor could be persuaded to give up the *beneficium* and to do so in writing.[59] In the limited circumstances for which such relief was available, it allowed bankers to proceed directly against guarantors acting as μανδάτωροι or ἐγγυηταί.[60] There was no need to provide relief to allow bank creditors to proceed directly against promises to pay in the form of ἀντιφωνήσεις/*constituta* made by bankers, for any creditor (bank or otherwise) could already do so by virtue of the third chapter of *Novel* 4.[61] But what about guarantees in the form of

[53] *Nov.* 136 pr. (SK 691/14–17).
[54] One may query whether the first alternative was sincerely intended. The second alternative—complete exclusion of the *beneficium excussionis* in the context of banking contracts—was presumably their preferred objective, so that they could have direct access to the presumably more credit-worthy guarantors of their debtors. Díaz Bautista, *Estudios*, 156–57. That said, there is little reason to doubt that the bankers would have welcomed either alternative.
[55] *Nov.* 136 pr. (SK 691/17–18: καὶ προσήκειν καὶ αὐτοῖς ἢ μετεῖναι τῶν κοινῶν νόμων ἢ μηδὲ αὐτοῖς ἀντικεῖσθαι τὴν ἡμετέραν διάταξιν).
[56] *Nov.* 136 c.1 (SK 691/21–23 and SK 692/1–4).
[57] van der Wal, *Manuale 2nd*, 124 para. 865 with n.63. See also Briguglio, *Fideiussoribus*, 109 n.22.
[58] *Nov.* 136 c.1 (SK 692/2–3).
[59] In a further limitation, the relief provided by *Nov.* 136 c.1 addressed only personal security; it provided no relief for real security, which remained subject to the rule of ordering established by *Nov.* 4 c.2.
[60] *Nov.* 136 c.1 (SK 691/21–23: ἄδειαν εἶναι τῷ δανείσαντι χωρεῖν καὶ κατὰ τοῦ πρωτοτύπου καὶ <κατὰ τοῦ> μανδάτωρος καὶ τοῦ ἐγγυητοῦ, μὴ ἀναμένοντι τοὺς τῆς διατάξεως βαθμούς). Athanasius' *Syntagma* renders the point precisely: §15.3.1 (Οἱ ἀργυροπρᾶται ἐξ ἰδικοῦ συμφώνου δύνανται χωρεῖν κατὰ τῶν ἐγγυητῶν καὶ μανδατόρων τοῦ πρωτοτύπου πρὸ τῆς κατ' αὐτοῦ μεθοδείας) [=Simon and Trōianos, *Novellensyntagma*, 412]; see also Athanasius' practice note later in the same page. Julian's *Epitome* speaks solely in terms of *fideiussores*, presumably in a generic sense: Const. CXVIII c.1 [¶*D*] [=Haenel, *Iuliani Epitome*, 164]. Theodore similarly speaks only in terms of ἐγγυηταί. Theodore, *Breviarum, Nov.* CXXXVI [=Zachariä von Lingenthal, *Anekdota*, 150].
[61] Kaser's treatise states that *Nov.* 136 "confirmed" the extension of the *beneficium excussionis* to bankers. Kaser, *RP*, 2:461 n.37. This remark can be understood only when referring to the bankers as plaintiff-creditors, not in their capacity

ἀντιφωνήσεις given by persons other than bankers? Here we are on less certain ground: the third chapter of *Novel* 4 blocked only bankers' ἀντιφωνήσεις from the *beneficium excussionis,* and the relevant provision of *Novel* 136 allows the bankers to proceed directly against μανδάτωροι or ἐγγυηταί but is silent as to ἀντιφωνηταί. To be sure, a later provision speaks of proceedings "against other persons" but that is unsatisfyingly vague.[62] One possible explanation is that non-bank ἀντιφωνήσεις were a non-issue: just as they were the type of promise to pay typically issued by bankers, so too were they not, or not ordinarily, issued by others.[63]

The relief granted pursuant to the first chapter of *Novel* 136, limited though it was, was available to bankers only, acting in their capacity as plaintiff creditors.[64] The emperor gave two reasons for granting the limited relief he did. The first is puzzling: "because it is open to all to spurn what [i.e., the *beneficium*] the law has offered him."[65] Taken literally, that statement would have far broader application than bankers' contracts: if those who gave guarantees to bankers could renounce their *beneficium,* why could not those those who received bank guarantees renounce their ability to proceed against the banker without first proceeding against the main debtor?[66] More to the point, there is no mention in *Novel* 4 of the possibility of renouncing the *beneficium excussionis,* in favour of bankers or anyone else.[67] There is, however, some support for the notion of renunciability of a guarantor's *beneficium* in the *Digest*[68] and, indirectly, in the *Codex,* which contains a constitution by Justinian contemplating the renunciability of different *beneficium*.[69] There is also papyrological evidence for renunciation of the *beneficium excussionis*, though this is dated well

as defendant-guarantors: *Nov.* 4 excluded *constituta* given by bankers from the scope of the *beneficium* entirely, and *Nov.* 136 c.1 did nothing to change that. Moreover, the relief granted by *Nov.* 136 c.1 by its terms applied only to bankers when acting as plaintiffs against guarantors under forms of guarantee other than *constituta*.

[62] *Nov.* 136 c.1 (SK 692/1–2: ἀλλ' εἴ τι γένοιτο τοιοῦτο σύμφωνον, ἐξέστω αὐτοῖς καὶ κατὰ πρώτου τοῦ μανδάτωρος καὶ κατὰ τοῦ ἐγγυητοῦ καὶ κατὰ τῶν ἄλλων προσώπων χωρεῖν).

[63] But see *Cod. Iust.* 4.18.2 c.2, which contemplates the possibility that "other businessmen" (*alii negotiatores*) might have issued such promises to pay in the past. Diaz Bautista is probably on the right track in adducing the "pure antiphoneses" of *Edict* 9 as evidence of a practice of bankers' promises to pay constituting the intended mode of payment in lieu of payments by the clients themselves. *Edict* 9 pr. (undated) (SK 772/10: καθαρὰς ἀντιφωνήσεις). Díaz Bautista, *Estudios*, 157 and chap. 5.

[64] The operative provision is limited to lending by those in charge of banks (SK 691/19–20). Athanasius' practice note highlights that this is for the bankers alone. Athanasius, *Syntagma* §15.3.1 [=Simon and Trōianos, *Novellensyntagma*, 412] This practice note may not, however, be Athanasius' own but rather the product of a later hand. Sitzia, "Il Breviarium," 190–92.

[65] *Nov.* 136 c.1 (SK 691/24–SK 692/1: διότι ἔξεστιν ἑκάστῳ τῶν δεδομένων αὐτῷ παρὰ τοῦ νόμου καταφρονεῖν).

[66] Cruchon, *Banques*, 218.

[67] Briguglio, *Fideiussoribus*, 107–108 with n.20, and 153 n.139. The absence of any mention of renunciation in *Nov.* 4 has led to objections that its *beneficium excussionis* was not, strictly speaking, a *beneficium* at all. Díaz Bautista, *Estudios*, 142. There is no evidence that this quibble troubled anyone involved in the promulgation of either *Novel.*

[68] *Dig.* 2.5.1. On the possible interpolation of such renunciability, see Ludwig Mitteis, "Papyri aus Oxyrhynchos," *Hermes* 34, no. 1 (1899): 106.

[69] The *beneficium* of the *praescriptio fori* attributable to one's rank. *Cod. Iust.* 2.3.29 (1 Sept. 531), cross-referred to already by Theodore, *Breviarum, Nov.* CXXXVI [=Zachariä von Lingenthal, *Anekdota*, 150].

after *Novel* 136.[70] Justinian's second stated reason for this innovation is more revealing, namely "to encourage bankers' readiness to lend, in the public interest" in David Miller's translation.[71] At last something that might smack of the rudiments of monetary policy! But that reading would be too optimistic, for the Greek—περὶ τὰ κοινὰ συμβόλαια—is perhaps better construed to mean encouraging the bankers to conclude loan contracts with the emperor himself, to finance his buildings and his wars. These cost money, and Justinian needed cash.

At least one recent commentary has characterized Justinian's response as a rejection of the bankers' request.[72] That is true in part but overstates the case. As the various *Novels* studied in this dissertation and the petitions prompting them demonstrate, the bankers' guild was well able to coordinate collective action by its members. In a world before modern competition law, it would a straightforward matter for bankers collectively to impose upon their borrowers' guarantors contractual clauses, like the one in the papyrus just mentioned, renouncing the *beneficium excussionis* as a standard condition to lending.[73] The bankers' existing books of business without the new renunciation clause would run off over time; eventually the new clause would appear in all, or substantially all, such written loan contracts. But even so the effect would be limited. In a world where writing was limited to what the human hand could manage, unwritten forms of contract, of the sort that Justinian himself had sought to revitalise in his great codification, had the advantage of speed.[74] And even for written contracts eligible for the relief afforded by *Novel* 136, the benefit may have been impracticable in some cases: *Edict* 7 of 542 tells us that the need for speed sometimes inhibited bankers from seeking security at all.[75] Even if lenders had willing guarantors standing by, it may not always have been practical to depart from the standard model established by *Novel* 4 by negotiating a written solution of the sort permitted by *Novel* 136.[76]

In sum, the rule of ordering established by *Novel* 4 disadvantaged bank lenders compared with others. The first chapter of *Novel* 136 remediated this disadvantage, but only in limited part, by

[70] Thus constituting evidence of the *Novel's* having effect elsewhere than the capital. *P.Oxy* I 136 (583) (lines 37–39, in which the debtor's surety Victor renounces the beneficium: ἀποταττόμενος τῷ προνομίῳ τῶν ἐγγυητῶν, διαφερόντως δὲ τῇ νεαρᾷ διατάξει τῇ περὶ ἐγγυητῶν καὶ ἀντιφωνητῶν ἐκφωνηθείσῃ). See Mitteis, "Papyri aus Oxyrhynchos," 106; Amelotti and Migliardi Zingale, *Costituzioni giustinianee*, 69.
[71] *Nov.* 136 c.1 (SK 691/23: διὰ γὰρ τὴν τῶν ἀργυροπρατῶν περὶ τὰ κοινὰ συμβόλαια σπουδὴν).
[72] Miller and Sarris, *Novels*, 2:906 n.6.
[73] See the complaints of the various trades being organised into monopolies to the detriment of their customers at Procop. *Hist. Arcana* 20.1–5, 25.13, 26.19 [=Haury and Wirth, *Procop. vol. 3*, 3:123–24, 155 and 161]. If shop-keepers could coordinate to fleece the customer, it is naïve to think that bankers could not, or would not, do the same.
[74] There is disagreement as to the relative prevalence of unwritten contracts in sixth-century banking practice, but the many references to them in Justinian's banking laws indicate that they were common enough to lead to disputes requiring resolution. Cf., *e.g.*, Díaz Bautista, *Estudios*, 25–26; Luchetti, "Banche," 455–56.
[75] *Edict* 7 c.4 (SK 765/17–19).
[76] Thurman, "Thirteen Edicts," 114 n.162.

DOI: 10.14754/CEU.2024.02

allowing bankers to seek by written contract the right to proceed directly against secondary obligors without first pursuing the principal debtor. But *Novel* 136 did nothing to address the similar rules established by *Novel* 4 on the pursuit of real security. That issue would have to wait until 542.[77]

Rights to a Borrower's Assets: Purchased Offices

Novel 136 next takes up the first in a series of questions relating to the rights that a bank lender might enjoy in respect of assets of his borrower, in the first instance offices purchased by a borrower for himself or his son. The second chapter of *Novel* 136 deals with the question of how such offices were to be treated as assets when the office-holder had unpaid debts to one of the capital's bankers. The bankers' request in this regard was made with reference to an earlier provision, contained in Justinian's *Codex*, that governed how offices held by the sons and relatives of bankers and other tradesmen were treated when they had unpaid debts.[78]

To the extent an office brought with it cash flows and other advantages, it constituted an asset and thus something that the office-holders' creditors might wish to distrain upon should he fall into arrears.[79] Now, where the office-holder had himself borrowed the purchase price for the office, the situation was relatively clear: in addition to direct remedies *in personam*, the lender would usually have sought and obtained a hypothec over the office, which he might use to distrain upon it in the event of non-payment. By contrast, where the office-holder was the son of the borrower, the son would then hold the office without himself being a borrower on the loan; the lender's contractual counterparty would remain the borrower/father. In this configuration, the lender would have no contractual claim *in personam* against the office-holder due to lack of privity between them.[80] Any prudent lender in these circumstances would naturally seek to protect his interests by seeking the same hypothec over the asset as would have been established if the office-holder was the borrower, so that he could distrain upon it if the debt should go unpaid.

But even with that protection, the office-holder had potential defences that could be raised to stymie any attempt by the lender to distrain upon the asset to pay down the debt. The most obvious of these was to plead the defence that the moneys for the purchase of the office had not come from the (father's) lenders but from other sources. Upon that plea, the lender would have the burden of proof of demonstrating that it was his moneys that had funded the purchase price. Justinian

[77] In *Edict* 7. See Chapter 3 under the caption "*Order of* in rem *Remedies.*"
[78] Bankers' sons and relatives were made eligible to hold office before the bankers themselves. See note 85 below.
[79] Assuming, of course, that the office was of the sort subject to sale or inheritance. *Cod. Iust.* 8.13.27 pr. For information on salable offices, see *Nov.* 35 (23 May 535); *Nov.* 53 c.5 pr. (1 Oct. 537); van der Wal, *Manuale 2nd*, 91 para. 640 with n.1, and 93 para. 658. On the priority enjoyed by those who lent funds to purchase an office over other potential claimants (*e.g.*, the office-holder's wife), see *Nov.* 53 c.5.1; *Nov.* 97 c.3 and c.4 (17 Nov. 539).
[80] Only the borrower, a secondary obligor, if any, or their respective heirs would be liable *in personam*.

DOI: 10.14754/CEU.2024.02

addressed this abuse in June 528, when he flipped the burden of proof, at least for those office-holders that were the sons or relatives of bankers or other tradesmen. The constitution codified at *Cod. Iust.* 8.13.27 established a legal presumption that moneys used by these sons or other relatives to acquire their posts came from loans to the father.[81] The office-holder could overturn that presumption by demonstrating that the funds in fact came from others, but the burden of proof was on him to do so.[82] Where the presumption could not be overturned, the office became subject to distraint by right of hypothec.[83]

In the second chapter of *Novel* 136, Justinian addressed the converse situation, namely where bankers had extended credit to a borrower who then used the funds to acquire office for himself or his son. This was in response to the second head of the bankers' petition, requesting relief permitting them to enforce against offices purchased by their borrowers.[84] Justinian's response addressed borrowers and office-holders generally, not limited to those who were bankers or their relatives. The lobbying strategy of the bankers must be appreciated here, for the manner in which they linked the second head of requested relief to the first reveals a fine understanding of the law on the part of the petitioners. In the first chapter, remember, the gravamen of their complaint was the asymmetry of treatment between bankers as secondary obligors (unable to invoke the *beneficium excussionis*) and those who issed guarantees to bankers (able to invoke it). The transition from this to the second head of relief was supplied by linking it to an entirely different asymmetry, namely that between officeholders who were bankers or bankers' sons when they were indebted to others and officeholders who were indebted to bankers.[85] Bankers and their sons who held office were treated differently than other office holders in debt litigation inasmuch as they were subject to the adverse presumption of *Cod. Iust.* 8.13.27. By virtue of that law, the offices of bankers and their sons were more readily subject to distraint than were the offices of others.

[81] *Cod. Iust.* 8.13.27 pr. (1 June 528).
[82] *Cod. Iust.* 8.13.27 pr.; Díaz Bautista, *Estudios*, 94.
[83] A point highlighted at Julian, *Epit.*, Const. CXVII no. 2 [¶ *DI*] [=Haenel, *Iuliani Epitome*, 164].
[84] *Nov.* 136 c.2 (SK 692/5: Δεύτερον … κεφάλαιον, and SK 692/8: ᾔτησαν).
[85] The attentive reader will have noticed a disconnect between the subject of *Cod. Iust.* 8.13.27, which addresses offices purchased by bankers not for themselves but for their sons, for other relatives, or for third parties, and the summary of that same provision here in *Nov.* 136 c.2, which also addresses offices purchased by bankers for themselves. The explanation lies in an intervening constitution that granted bankers of Constantinople—uniquely—the distinction of being allowed to acquire civil offices. *Cod. Iust.* 12.34.1 cc.1–2 (of 528 or 529); Mattioli, *Giustiniano*, 56 n.21. From this sequence, Mattioli has inferred that while bankers could purchase offices for others prior to 535, it was only from that year that they could do so for themselves. Fabiana Mattioli, "La legislación de Justiniano del Código en materia de negocios bancarios," in *La actividad de la banca y los negocios mercantiles en el Mare Nostrum*, vol. 1 (Cizur Menor (Navarra): Thompson Reuters Aranzadi, 2015), 123.

DOI: 10.14754/CEU.2024.02

Both *Novel* 136 and presumably the underlying petition, too, characterised this asymmetry as yet another "exception" that was the consequence of one of Justinian's own earlier laws.[86] The *Novel* and petition thus tied the asymmetry of the second head of relief, relating to offices, to the asymmetry that was the subject of their first head of relief, namely that relating to the *beneficium excussionis*. Now, these two asymmetrical exemptions have little, or really no, link in legal substance. Their similarity is merely formal, in that bankers were treated less advantageously when they stood one side of a specified bilateral legal relationship than when they stood on the other side, or than others similarly situated were. For the draftsman to slip in the second head of relief via such a formalistic linkage demonstrates a real understanding of the different legal rules governing the two areas on the part of those who conceptualised the petition. Like the citizens whose knowledge of Justinian's legislation we explored in Chapter 1, the bankers (or their scriveners) here evince a sophisticated knowledge of the law and an ability to manipulate its formal structures to seek, and win, changes beneficial to their interests.

As in the case of the petition point addressed in the discussion of the first chapter of *Novel* 136, the bankers framed their request for relief in the alternative: either for the special presumption against them in *Cod. Iust.* 8.13.27 to be disapplied, or that they should be given the benefit of the same flipping of the burden of proof when they (the bankers) were lenders. As with the first head of relief, Justinian declined the first alternative, as accommodating it would have required abrogating one of his own earlier provisions. "Now, we have not enacted that law in a superficial manner, but with due consideration, and we do not readily tolerate its being overturned," states the second chapter of *Novel*, in tones suggesting some wounded pride on the part of the quaestor or perhaps even of the emperor himself.[87] Instead, Justinian left the general rule of the *Codex* in place, electing instead to "provide a remedy" by accommodating the second alternative.[88] This alternative extended the presumption-flipping of *Cod. Iust.* 8.13.27 so that it would operate in favour of bankers when they were creditors just as it operated it against them when they were debtors.[89] In other words, if a bank creditor had lent to a debtor who then acquired an office for himself or one of his sons, there was a presumption that the purchase of office was made out of the borrowed funds.[90] That

[86] *Nov.* 136 c.2 (SK 692/5: τὸ τῆς ἄλλης ἐξαιρέσεως, ἣν πρώην ἐποιήσαμεν).
[87] *Nov.* 136 c.2 (SK 692/11–12: ἡμεῖς τοίνυν οὔτε ἁπλῶς τὸν νόμον τεθείκαμεν, ἀλλὰ μετὰ τῆς προσηκούσης παρατηρήσεως, οὔτε ἀνατρέπειν αὐτὸν ῥᾳδίως ὑπομένομεν).
[88] *Nov.* 136 c.2 (SK 692/21: θεραπείαν διδόντες). On framing of legislation in terms of providing remedy, see Anonymous [Ps. Peter the Patrician], *De scientia politica,* 5.8–13 [=Carlo Maria Mazzucchi, ed., *Menae patricii cum Thoma referendario: De scientia politica dialogus: iteratis curis quae exstant in codice Vaticano palimpsesto*, 2nd ed. (Milano: Vita e pensiero, 2002), 21–22]; Hunger, *Prooimion*, 130–37. This trope was common in late antiquity and by this time was probably little more than cliché. See Lanata, *Legislazione*, 228–31, esp. 229.
[89] Sitzia, "Il Breviarium," 193–4 with n.35.
[90] Always provided that the office was one that was subject to sale. *Nov.* 136 (SK 692/15–16).

DOI: 10.14754/CEU.2024.02

presumption could be rebutted, but only if the office holder could demonstrate by clear and convincing evidence that the office was purchased using moneys from the office-holder's mother or was the result of imperial favour.[91] Absent that showing, the banker could distrain upon the office to satisfy the unpaid debt.[92]

The provisions for burden of proof put in place by the second chapter of *Novel* 136 were available solely to members of the bankers' guild of Constantinople.[93] They were intended as a special mark of favour "on account of the usefulness to the common good that they provide by their loan-contracts and by assuming many risks in order to serve others' needs."[94] But there was a second, more intriguing reason given for the emperor's grant of relief, a little earlier in the same passage. In suggestive wording, Justinian states that he is granting the relief requested by the bankers "because it seems that when making loan contracts with many [counterparties or borrowers] they do so not entirely from their own funds."[95] Here, again, we have something that might hint at a monetary policy, or at least a recognition that if bankers could not collect on loans they had extended they risked being unable to pay their own creditors, with knock-on effects that the *Novel* does not specify. As in the case of the similar hint to a macro-policy response in the first chapter, though, this statement has little probative value for the question of the intensity of credit intermediation in sixth-century Constantinople, for it is as consistent with back-to-back lending as it is with more sophisticated forms of financial aggregation.

Rights to a Borrower's Assets: Assets Purchased with Borrowed Moneys

The third chapter of *Novel* 136 addresses the the nature of the remedies a banker might have with respect to a broader category of borrower assets, namely anything purchased by a borrower with funds borrowed from a banker. Or, more precisely (though the drafting is not a model of clarity), the third chapter addresses remedies in the context of three related but distinct fact patterns:[96] 1) where a banker lends money pursuant to a written contract to a borrower for the

[91] *Nov.* 136 c.2 (SK 692/16–17).
[92] This grant of a power of sale equated to the grant of hypothec in favour of the bank lender over the office. *Nov.* 136 c.2 (SK 692/15); van der Wal, *Manuale 2nd*, 103 para. 729. I cannot agree with van der Wal's comment in n.45 to para. 729 that Justinian had already granted such hypothecs to bankers, silk merchants and other tradesmen in *CJ* 8.13.27: that provision addresses those trades in their capacities as debtors, not creditors, and bankers were hardly the only source of loans.
[93] *Nov.* 136 c.2 (SK 692/20–21). The preferential nature of the remedy is highlighted at Athanasius, *Syntagma* §15.3.2 [=Simon and Trōianos, *Novellensyntagma*, 412].
[94] *Nov.* 136 c.2 (SK 692/21–23: διὰ τὸ κοινὸν τῆς αὐτῶν λυσιτελείας, ἣν παρέχονται τοῖς συναλλάγμασι, πολλοῖς ὁμιλοῦντες κινδύνοις ἵνα τὰς ἑτέρων θεραπεύσαιεν χρείας).
[95] *Nov.* 136 c.2 (SK 692/14: διότι δοκοῦσι πολλοῖς συμβάλλοντες οὐκ ἐξ οἰκείων ἅπαντα πράττειν χρημάτων).
[96] In this I follow Mattioli in distinguishing loans of money *sine scriptis* from deliveries of valuables by way of sale and purchase. Mattioli, *Giustiniano*, 60 n.27. Francesco Sitzia's alternative formulation conflates those two categories under the rubric of purchase/sale. Sitzia, "Il Breviarium," 196.

DOI: 10.14754/CEU.2024.02

purchase of an asset, 2) where a banker lends money without any written contract to a borrower for the purchase of an asset; and 3) where, in lieu of lending money, a banker delivers or sells valuables to a client. This last provision tells us that the delivery or sale of valuables was common practice, a statement that can have come only from the bankers' own petition(s).[97]

These topics are clearly related to the topic of a banker's remedies in respect of a debtor's office, addressed in the second chapter of *Novel* 136. The scope of the third chapter is, however, far broader inasmuch as it addresses any asset purchased with borrowed money.[98] Despite the obvious similarity with the immediately preceding head of relief, the precise nature of the bankers' request in the third head is somewhat difficult to reconstruct. Unlike in other provisions of *Novel* 136, the text is not explicit as to the nature of the request. We are merely told "They thought it not out of place to add another point…."[99] But the very ambiguity gives the clue: whereas the legal concept of assymetrical exemption furnished the link from the petition's first head of relief to its second, it was more straightforward to pivot from the second head's treatment of one kind of asset—offices—to assets purchased with the borrowed money generally. One must respect the deftness of those who conceptualised the petition and their pivot by asset type to transition from one topic to the next.

Despite the laconic nature of the *Novel's* reference to the third head of relief in the petition, the nature of that head can be reconstructed from the relief granted and the reasons given for it. The most plausible reconstruction is that the bankers asked for a hypothec—that is, a real right that they could enforce using the *actio hypothecaria* to pursue assets purchased with funds borrowed from them (or, in the case of the third fact pattern, valuables delivered or sold by them)—ranking in priority to all other claims to the asset; and that this right that would be both "tacit" and "legal," meaning that it was presumed as a matter of law, irrespective of whether mention thereof was made in the contract.[100] But if this is what the bankers requested, it is not what they got.[101] To a certain extent, that is because the request went against some fundamental principles of Roman law. But the relief Justinian went on to grant did so, as well.

Understanding the nature of the bankers' request and Justinian's response to it requires some background in the Roman law of purchase and sale, and of the legal remedies afforded to lenders. Under classical Roman law, a contract of sale was a "consensual" contract, binding once the parties

[97] *Nov.* 136 c.3 (SK 693/4–5). This remark demonstrates that, even in the sixth century, the profession retained some of its original function in silversmithy. See discussion at notes 24–26 in the Introduction.
[98] *Nov.* 136 c.3 (SK 692/24–26).
[99] *Nov.* 136 c.3 (SK 692/24: Κἀκεῖνο μέντοι οὐκ ἄπο τρόπου λέγειν ἔδοξαν). That this language points to the petition is evident from the use of ἤτησαν at SK 693/1 and has long been recognised. Díaz Bautista, *Estudios*, 60.
[100] Díaz Bautista, 61–62, 99–100; Luchetti, "Prestito," 2021, 95.
[101] Luchetti, "Banche," 459 n.27.

agreed the price.[102] The formation of the requisite consensus did not require reduction of the agreement to writing or other formality, but could be communicated orally or even inferred from conduct.[103] Part-performance through payment of the purchase price was not constitutive of a binding Roman law contract of sale, though it might serve as evidence of the consent that was so constitutive.[104] This conception of the contract sale stood in stark contrast to the position under Greek law, pursuant to which part-performance by payment of the purchase price was constitutive of the contract.[105] Under the Roman conception, such payment was not constitutive but instead an obligation arising out of the consent that gave rise to the contract. One could thus become an owner of a thing before one paid the purchase price for it and even if one did not pay at all. Now, such a conception of sale/purchase is obviously unsuitable for any commercial purpose involving readily transferable assets, and significant inroads were made into at an early stage.[106] Still, the general principle continued to hold sway, the inroads being cast as exemptions for specific situations.

That general principle of Roman law had important consequences for the treatment of loans extended to fund the purchase price or, more precisely, for the rights of lenders over the goods purchased with the moneys they lent. The usual form of a Roman law loan was the *mutuum*, a "real" contract consisting of the delivery of something fungible—money above all—for consumption.[107] Because the borrower consumed the thing delivered he could not deliver it back. His obligation therefore was to restore not the exact thing received but its equivalent in size, number, and quality. One consequence of the fungibility of the thing lent was that it could not be specifically identified—ordinarily, specific moneys cannot be traced once commingled with other funds. This inability to trace specific moneys rendered the usual remedy to recover something one owned—*vindicatio*—unavailable to a lender once the funds had been commingled or spent, for that remedy required tracing.[108] The person who lent funds therefore could not under Roman law step into the shoes of—

[102] Gai., *Inst.*, 3.139 [=de Zulueta, *Institutes of Gaius*, 1:196]; *Dig.* 18.1.2.1; *Inst. Iust.* 3.23 pr.
[103] Gai., *Inst.*, 3.136 [=de Zulueta, *Institutes of Gaius*, 1:194–196]; *Dig.* 18.1.1.2; *Inst. Iust.* 3.22 c.1 and c.2. On the Roman law contract of sale generally, see Plessis and Borkowski, *Textbook*, 260–74; Kaser, Knütel, and Lohsse, *Studienbuch*, 301–320 [§52].
[104] Gai., *Inst.*, 3.139 [=de Zulueta, *Institutes of Gaius*, 1:196]; *Dig.* 18.1.35 pr.
[105] Fritz Pringsheim, *The Greek Law of Sale* (Weimar: Böhlau, 1950), 90–92.
[106] For a review of the evidence, see Díaz Bautista, *Estudios*, 76–86.
[107] On *mutuum*, see Plessis and Borkowski, *Textbook*, 296–98; Kaser, Knütel, and Lohsse, *Studienbuch*, 290–291 [§49 ¶¶3–7]. Despite its function, a *mutuum* was not a loan in the strict sense of the word, because the thing loaned was not itself to be returned but rather consumed, the "borrower" acquiring ownership of it. Gai., *Inst.*, 3.90 [=de Zulueta, *Institutes of Gaius*, 1:178–180]; *Dig.* 12.1.2 c.2.
[108] This has long been the *communis opinio.* Max Kaser, "Das Geld im römischen Sachenrecht," *Tijdschrift voor Rechtsgeschiedenis / Revue d'Histoire du Droit / The Legal History Review* 29, no. 2 (1961): 173–83, https://doi.org/10.1163/157181958X00348. For a wholesale re-assessment of the problem in light of considerations arising out of litigation procedure, see Richard Gamauf, "*Vindicatio Nummorum*: eine Untersuchung zur Reichweite und praktischen Durchführung des Eigentumsschutzes an Geld im klassischen römischen Recht" (Habilitationsschrift, Wien, Wien, 2001).

DOI: 10.14754/CEU.2024.02

or "be subrogated to" the rights of—the borrower who purchased something using those funds.[109] Now, a lender might in these circumstances negotiate for a hypothec over the asset to be purchased, which he could then pursue using the *actio hypothecaria.* But this required express agreement, absent which a lender generally would not have a hypothec or any other interest in the purchased asset.[110] Under Greek law, by contrast, the lender would have a real right in respect of the asset by virtue of having funded its purchase.[111]

It is against this legal background that the bankers of Constantinople petitioned for relief. As mentioned above, while the specifics of their request are not preserved, it is tolerably clear that they asked to be put in a position where they would automatically obtain some real interest in the asset purchased with funds borrowed from them, sufficient for them to exercise remedies over that asset in the event of non-payment. Justinian did not grant them this but instead gave them something he claimed was even better.[112] The third chapter of *Novel* 136 grants a sort of hybrid remedy for circumstances where the loan (or purchase price of valuables sold) went unpaid. For loans evidenced by written contracts (the first of the three fact patterns), it provides the lending banker with a real interest over the thing purchased with the borrowed money, so long as the written contract made some mention of hypothec.[113] The remedy furnished here was unusual in two respects: first, the burden of proof was on the banker to show that the purchase price was made up exclusively of funds borrowed from him.[114] Second, and of greater interest to legal scholars has

[109] *Cod. Iust.* 3.32.6 (11 July 239) (no ownership even where purchase price funded out of misappropriated deposit); 3.38.4 (17 Oct. 290); 5.51.10 (22 Jan. 294); 4.50.8 (4 Feb. 294); (ownership vests in purchaser, not provider of funds) 4.50.9 (3 Mar.[?] 294) (ditto); 4.19.21 c.1 (8 Dec. 294); 4.37.2 (undated, possibly 294) (by negative inference, co-owner's claim limited to one under *societas* (partnership), with no claim to sole ownership); Fritz Pringsheim, *Der Kauf mit fremden Geld: Studien über die Bedeutung der Preiszahlung für den Eigentumserwerb nach griechischem und römischem Recht* (Leipzig: von Veit, 1916), 89–114; Kaser, *RP*, 2:279–280.

[110] See *Cod. Iust.* 8.13.16 (12 May 293) and 17 (18 May 293) (no automatic *pignus* for lender);

[111] Greek law and practice had long provided the lender of purchase moneys an interest in the purchased item. Pringsheim, *The Greek Law of Sale*, 205–19; Díaz Bautista, *Estudios*, 97. This stood in stark contrast to the Roman law theory, but perhaps not Roman law practice. Two sixth-century papyri—*P.Lond.* V 1719 and *P.Lond.* V 1723—document transactions transferring ownership of assets purchased with borrowed moneys to the lenders, from which one might deduce that grant to the lender of a real right over such assets by agreement was not uncommon. See Kaser, *RP*, 2:313; Díaz Bautista, *Estudios*, 99 f.; J.H.A Lokin, "Revendication, propriété et sûreté dans le droit justinien," *Subseciva Groningana: Studies in Roman and Byzantine law* 7 (2001): 25–34; Mattioli, *Giustiniano*, 59–60 n.25.

[112] *Nov.* 136 c.3 (SK 693/1–2). One need not believe Justinian's claim, for it is not at all clear how the τιμιώτερα … ἁπάντων δίκαια (SK 693/2) he granted were superior to the κυριώτερα … δίκαια (SK 692/26) they requested. Cruchon, *Banques*, 224.

[113] *Nov.* 136 c.3 (SK 692/31–SK 693/1). It is likely that the fact that the relief was conditioned on mention of hypothec in written contracts constitutes the, or at least a, major respect in which the relief granted did not match what was requested. What the bankers likely asked for was a form of real interest that was both tacit and legal.

[114] *Nov.* 136 c.3 (SK 692/27). Quite obviously, the fungibility of money made such tracing difficult, perhaps even impossible save in cases where the debtor had no other source of funds. Such practical considerations were evidently disregarded in the fashioning of the remedies. Díaz Bautista, *Estudios*, 69–71.

been the nature of the action to enforce the interest,[115] for the banker's hypothec was expressly stated to provide the lender first and indisputable preference over the purchased asset, in preference to all other interests in it.[116] This remedy operated by way of a legal fiction that the lender was the purchaser, with the legal purchaser providing only his name to the transaction.[117] With respect to the second and third fact patterns addressed, namely loans made pursuant to unwritten contracts and deliveries or sale of valuables, the remedy afforded by Justinian was more clearly expressed in terms of ownership. For these transactions, no mention of hypothec was needed.[118] In such cases, if the loan went unpaid, the lending banker could proceed against the asset by right of *vindicatio.*[119] As in the case of written loans, the relief granted was limited to circumstances where the banker could show that he had provided the purchase moneys.

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[115] The precise legal nature of the remedy conferred by this provision (*vindicatio* vs. *actio hypothecaria*) is the subject of much dispute, both ancient and modern. Both the *Breviarum* of Theodore (*Nov.* CXXXVI c.4 [=Zachariä von Lingenthal, *Anekdota*, 150]) and Julian's *Epitome* (no. CXVII c.3, ¶ *DII* [=Gustavus Haenel, ed., *Iuliani Epitome Latina Novellarum Iustiniani* (Leipzig: Hinrichsium, 1873), 165]) speak in terms of the lender having a hypothec, at least where the loan contract is written. By contrast, the *Syntagma* of Athanasius (§ 15.3.3 [=Dieter Simon and Spyridōn N. Trōianos, eds., *Das Novellensyntagma des Athanasios von Emesa* (Frankfurt Main: Löwenklau, 1989), 414]) speaks rather in terms of ownership. All three ancient professors alike, however, discuss the matters addressed by *Nov.* 136 c.3 in practical terms of the bank creditor enjoying preference vis-à-vis competing creditors: Theodore (ἔχει προγενεσίαν ὑποθήκς ἐπὶ τῷ ἀγορασθέντι . . . προτιμώμενος ὅλων τῶν ἐχόντων ὑποθήκην); Julian (*omnibus aliis in eadem re praeferatur*); Athanasius (προτιμάσθω and, for unwritten loan contracts, μὴ δυναμένων τῶν ἄλλων δικαίῳ τῆς ἰδίας ὑποθήκης ἀποσπᾶσαι αὐτά). For modern discussion, see Pringsheim, *Kauf*, 153, 159 ff.; Kaser, *RP*, 2:316 n.6; Díaz Bautista, *Estudios*, 100–105; Luchetti, "Banche," 458–62; van der Wal, *Manuale 2nd*, 103 para. 730 n.46; Lokin, "Revendication." In the end, the distinction may not have mattered, for both remedies may have been made available to the bank creditor, at his election. Díaz Bautista, *Estudios*, 100; Luchetti, "Banche," 459–61 n.27. A similar choice of remedy was provided to divorcing wives in respect of dowries by *Cod. Iust.* 5.12.30 c.1 (30 Oct. 529) and in respect of pre-nuptial gifts by *Nov.* 61 c.1.1 (1 Dec. 537); N. van der Wal, "Opuscula Varii Argumenti: IV. Les hypothèques tacites aux temps de Justinien," *Subseciva Groningana: Studies in Roman and Byzantine Law*, no. 6 (1999): 154–58.

[116] Although the verb used at SK 692/29 (προσκυροῦσθαι) is admirably ambiguous as to the nature of the remedy granted in fact pattern 1, that it is first-ranking is apparent from SK 693/2: τιμιώτερα δίδομεν αὐτοῖς ἁπάντων δίκαια ἐπὶ τοῖς πράγμασι (emphasis supplied). The attempt to construe the genitive in the sense of "in all cases" instead of the more obvious genitive of comparison depending on τιμιώτερα by Díaz Bautista, *Estudios*, 101, is unpersuasive. See also, in respect of fact patterns 2 and 3 SK 693/9–10 in respect of assets held by heirs: μηδεμιᾶς ὑποθήκης κατ' αὐτῶν ἐπὶ τοῖς αὐτῶν πράγμασι παρ' ἄλλων προσγινομένης κρατούσης.

[117] *Nov.* 136 c.3 (SK 692/29: ὡσανεὶ ταῖς μὲν ἀληθείαις παρ' αὐτῶν ἀγορασθέν). This fiction was new. On legal fictions in the *Novels* generally, see David Rockwell, "Justinian's Legal Erasures: Legal Fictions in the Novels," *Annual of Medieval Studies at CEU* 29 (2023): 11–36.

[118] This difference between the treatment of lenders pursuant to written contracts and those pursuant to unwritten contracts suggests that the remedy was in the nature of the *actio hypothecaria* if the contract was written but in the nature of *vindicatio* if the contact was not written. This was the understanding of Julian, *Epit.*, Const. CXVIII nos. 3 (*titulo hypothecarum*) and 4 (*vindicare*) [¶¶ *DII–DIII*] [=Haenel, *Iuliani Epitome*, 165]; and, even more distinctly, Theodore, *Breviarum, Nov.* CXXXVI [=Zachariä von Lingenthal, *Anekdota*, 150]. Such a split solution is, of course, technically indefensible. Like the case of the imprecision with respect to the nature of the remedy granted in the first fact pattern, an experienced lawyer must sometimes lower one's expectations when reading Justinian's *Novels*.

[119] That the intended remedy for the second and third fact patterns (loans *sine scriptis*, and deliveries/sales of valuables) was in the nature of *vindicatio* is evident in the use of the Greek term ἐκδικεῖν in the operative provisions. *Nov.* 136 c.3 (SK 693/6, allowing the banker to pursue the asset as if it were his own even without hypothec (ὡς οἰκεῖα ταῦτα ἐκδικεῖν) and SK 693/8–9, allowing pursuit of the asset in the hands of heirs). The text is unclear whether the asset that could be pursued was the one originally delivered by the bank lender or the asset that was purchased with it or its sale proceeds. Athanasius, at least, was certain that it is the purchased asset that was the remedy's object. Athanasius, *Syntagma*, §15.3.3 [=Simon and Trōianos, *Novellensyntagma*, 414].

DOI: 10.14754/CEU.2024.02

If this interpretation of the relief afforded by the third chapter of *Novel* 136 is correct, then the bankers might well have been satisfied that they had attained the goal of this head of their petition even if the relief was not cast precisely in the terms requested. But the remedies granted marked a substantial departure from classical Roman law principles,[120] which, with one exemption, Justinian had just recently been reaffirmed in the *Codex*.[121] *Novel* 136 justifies the departure merely in terms of the general injustice of one who puts up purchase moneys not having priority with respect to the asset purchased.[122] Modern scholars have expressed divergent views on the reasons behind Justinian's innovation in favour of the bankers. Some scholars have attributed greater importance to the influence of Greek law principles of contract law,[123] whilst others emphasize more immediately pressing economic considerations.[124] Whatever Justinian's motivation, his response marked a meaningful concession to the bankers' interests.[125]

Interest on Loans

The fourth chapter of *Novel* 136 addresses the bankers' prayers for relief on the topic of interest rates. Several years earlier, in December 528, Justinian had re-regulated this area of law, setting new limits for rates of all kinds, including the interest that could be charged under agreements such as loans. *Cod. Iust.* 4.32.26 amended and restated the many previous laws on interest, evincing clear intent to supersede prior legislation on the topic.[126] It established four tiers of maximum permissible interest rates, each expressed as a proportion of the customary *centisimae usurae*—1% per month, or 12% per annum. [127] The first three tiers were based on the status of the

[120] See text at notes 102–110 above.
[121] Kaser, *RP*, 2:280 n.46. That exemption was the one for offices purchased with borrowed money, pursuant to *Cod. Iust.* 8.13.27, discussed above, which foresaw recovery by the lender by right of hypothec (*iure hypothecae*).
[122] *Nov.* 136 c.3 (SK 692/30–31).
[123] Scholars explaining the departure from Roman law principles in *Nov.* 136 to the influence of Greek law include Pringsheim, *Kauf*, 158 ff.; Díaz Bautista, *Estudios*, 60–105; Lokin, "Revendication." Advocates of this position have not, however, persuasively explained how Greek legal concepts and practices might have survived—in the banker's guild and in the imperial chancery at Constantinople—in the face of contrary Roman law principles in the centuries since the *Constitutio Antoniniana* in 212.
[124] The main proponent of explaining *Nov.* 136 c.3 as a result of an economic policy of favouring the bankers in view of their increasing economic importance is Giovanni Luchetti, in a number of contributions, most notably Luchetti, "Banche," 458–62; Luchetti, "Spunti," 169–73 and, in more cursory form, Luchetti, "Prestito," 2021, 94–95, followed by Mattioli, *Giustiniano*, 62.
[125] Lokin, "Revendication," 26–27; Miller and Sarris, *Novels*, 2:908 n.13.
[126] *Cod. Iust.* 4.32.26 c.1 (Dec. 528).
[127] Interest rates in the Roman world ordinarily were expressed in terms of *centisimae usurae*, *i.e.*, hundredths, or percentage points, per month. Andreau, *Banking*, 92. Common rates might include the full *centisimae usurae* (12% per year) or fractions thereof, such as one-half (6%) or two-thirds (8%). In the later empire, and as a simplification measure, rates of interest might alternatively be expressed as a duodecimal fraction of a *solidus/nomisma.* This calculation method leads to fractionally higher rates than the *centisimae usurae* but the differences are negligible. Demetrios Gofas, "The Byzantine Law of Interest," in *The Economic History of Byzantium from the Seventh through the Fifteenth Century*, ed. Angeliki E. Laiou, vol. 3 (Washington, D.C.: Dumbarton Oaks, 2002), 1095. and, for the correspondences, Karl Eduard Zachariä von Lingenthal, *Histoire du droit privé gréco-romain: Droit civil II.* (Paris: Lacroix, Verbeckhoeven, 1869), 134–35. Justinian himself used the two systems nearly interchangeably. By way of example, in

DOI: 10.14754/CEU.2024.02

lender; the fourth provided exceptions from the lender-based limits for two specific loan types. The base case was that lenders could demand interest at rates no higher than 6% per annum.[128] *Illustres* and higher ranks, however, were limited to demanding 4% per annum; those in charge of workshops (*qui ergasteriis praesunt*) or engaged in permitted business activity (*qui . . . aliquam licitam negotiationem gerunt*) could agree to rates up to 8% per annum.[129] Finally, rates of up to a full *centisimae usurae,* 12% per annum, were permissible for maritime loans (*in traiecticiis contractibus*) and loans in kind (*specierum fenori dationes*).[130] The effect of this new legislation was to reduce the rates of interest that could permissibly be charged by lenders generally.[131]

There are indications that prior rate caps had been the object of evasion. *Cod. Iust.* 4.32.26 expressly forbids "customary" techniques by which the rate of interest could be increased beyond the level that could legally be stipulated.[132] The law also banned a range of mechanisms used to evade rate caps, including deductions for sales tax, judicial fees, or charges imposed for any other reason.[133] It also banned intermediary structures, whereby a lender subject to lower substituted as

Novs. 32 and 34 of 535 setting maximum interest rates for loans extended in famine-stricken Illyria to protect peasants there, Justinian set a maximum interest rate of 12.5% for loans in kind. If read literally, this would actually exceed the pre-existing cap for such loans of 12%, yet there can be no suggestion that Justinian intended to increase the permissible interest rates on such loans during a period of famine.

[128] *Cod. Iust.* 4.32.26 c.2. The 6% rate was the base case, from which the other rates were departures. See *Cod. Iust.* 10.8.3 (6 Apr. 529); Billeter, *Geschichte*, 333.

[129] *Cod. Iust.* 4.32.26 c.2. Bankers clearly fell within the rubric of businessmen under this law. *Cod. Iust.* 8.13.[27] (1 June 528); *Cod. Iust.* 12.34.1 pr. (528–529); Billeter, 319 n.4; and 332–33.

[130] *Cod. Iust.* 4.32.26 c.2. Of logical necessity, these loan-type rate caps provided exceptions to the three tiers of status-based loan caps. If they did not, no-one would be eligible to extend such loans.

[131] Justinian's intention in promulgating this legislation has long been a matter of discussion. Was it the protection of debtors, the enforcement of Christian morality, or something else? Grégoire Cassimatis argued that the structure of the regulation itself gives the clue to its objective, namely that setting different rates based on the status of the creditor rather than the status of the debtor points away from the protection of oppressed debtors was not its main aim. Cassimatis, *Intérêts*, 50–53. Perhaps, as Cassimatis suggests, precepts of Christian morality are at work in a different way, namely by discouraging those higher on the social scale from lending at interest at all. But this argument needs more to be persuasive, for discouraging lending by those of high social rank does not preclude a concern for the protection of debtors. The emperor's reduction in the permissible rates of interest across the board can equally be construed as evidence of concern for those who have to pay interest. Moreover, there could be other reasons to set lower rate caps for *illustres*, such as a policy of making the business of lending less attractive to them, thus leaving the field to others. On balance, we might conclude that the policy behind *Cod. Iust.* 4.32.26 did not exclude protection of borrowers, but that it served other objectives, too. For an argument that Justinian's rate reduction might have been in echo of a letter of St. Symeon Stylites, see Amit Gvaryahu, "'The Way It Is in the Church': Late Roman Interest Rates and Syriac Christian Piety," *Studies in Late Antiquity* 6, no. 4 (November 2022): 651–80, https://doi.org/10.1525/sla.2022.6.4.651.

[132] *Cod. Iust.* 4.32.26 c.2.

[133] *Cod. Iust.* 4.32.26 c.4.

legal lender a middleman eligible to apply a higher cap.[134] We may doubt that these measures were effective against efforts by lenders to improve their yields.[135]

The new rate caps introduced in 528 were not met with mute compliance. A few months after their promulgation, Justinian would be compelled to issue a further constitution clarifying and extending the application of his new rules to address evasive maneuvers that had evidently been attempted by lenders.[136] In *Cod. Iust.* 4.32.27, Justinian complained of the "perverse" (*pravam*) interpretation that some had made of his earlier constitution on interest rates. Evidently, lenders had sought to argue that the new, lower rate caps applied only to loans contracted after the adoption of *Cod. Iust.* 4.32.26, with pre-existing loans grandfathered. Justinian rejected this interpretation, reiterating that his new rate caps applied to all loans, whenever concluded, as from the date *Cod. Iust.* 4.32.26 was promulgated.[137] Higher rates of interest could, however, be charged for periods prior to that date if the parties had stipulated for them.

Cod. Iust. 4.32.27 also addressed another ambiguity (real or imagined) as to the scope of *Cod. Iust.* 4.32.26, namely as to whether its rate caps applied to all forms of loan agreement or only to those where the promise to pay interest took the customary form of a *stipulatio.*[138] Now, *Cod. Iust.* 4.32.26 did state that its cap could not be increased "in any way in all other cases in which interest is customarily exacted without stipulation," but that statement appeared in a context where it might arguably be construed to apply only to those lenders subject to the 6% rate cap.[139] This

[134] *Cod. Iust.* 4.32.26 c.5. We may ask what, then, what form banking took if bankers did not stand as intermediaries between those with capital to lend and borrowers. To the extent the bankers did not simply disregard this provision as inapplicable to their activities, it points toward a degree of aggregation in the credit intermediation function and away from mere back-to-back lending models.

[135] In one well-known document of practice from early 541, a Constantinople banker loaned 20 *solidi* to two impecunious visitors from Egyptian Aphrodito on condition that they should pay an ingenious (but nevertheless illegal) "restitution" charge in the amount of 8% of the principal for just two months, beyond interest at the maximum permitted rate of 8% per annum. *P.Cair.Masp.* I 67126 (7 Jan. 541) (ἀποκατάστασις); see Mickwitz, "Die Organisationsformen zweier byzantinischer Gewerbe im X. Jahrhundert," 63–64; Erwin Seidl, Axel Claus, and Lothar Müller, *Rechtsgeschichte Ägyptens als römischer Provinz: die Behauptung des ägyptischen Rechts neben dem römischen* (Sankt Augustin: Hans Richarz, 1973), 198; Gofas, "Banque," 149–50; Bogaert, "La banque en Égypte byzantine," 125.

[136] Perhaps including bankers but that cannot be assumed given that bankers were hardly the only, or even the most important, source of loans in this period.

[137] *Cod. Iust.* 4.32.27 pr. (1 Apr. 529) (*ex tempore lationis*). See Cassimatis, *Intérêts*, 65.

[138] Under classical Roman law, loans by way of *mutuum* did not of themselves incur interest, so interest was not payable unless required by separate *stipulatio* or other enforceable form of agreement—*i.e.*, no action for interest on most loans would arise from a mere pact. *Dig.* 19.5.24; *Cod. Iust.* 4.32.3 (27 Sept. 200); Plessis and Borkowski, *Textbook*, 297. For recent discussion of the theory and practice of pairing loans by *mutuum* with *stipulationes*, see Peter Gröschler, "Die Konzeption des *mutuum cum stipulatione*," *Tijdschrift voor Rechtsgeschiedenis / Revue d'Histoire du Droit / The Legal History Review* 74, no. 3–4 (2006): 261–87, https://doi.org/10.1163/157181906778946010. Though *stipulationes* were originally made orally, by the sixth century the trend of later Roman law toward the increased use of writing meant that it was customary for even *stipulationes* to be reduced to writing. *Stipulationes* reduced to writing did not, however, lose their legal character as oral contracts under Roman law. Cassimatis, *Intérêts*, 26.

[139] *Cod. Iust.* 4.32.26 c.2 (*ceteros autem omnes homines dimidiam tantummodo centesimae usurarum posse stipulari et eam quantitatem usurarum etiam in aliis omnibus casibus nullo modo ampliari, in quibus citra stiuplationem usurae exigi solent).*

DOI: 10.14754/CEU.2024.02

construction would leave open the possibility of arguing that lenders capped at other rates—including 8% lenders like the bankers—might exact higher rates of interest by means other than *stipulatio.*[140] Evidently, some had read this provision carefully and had construed the passage in this way. The correcting constitution of April 529 was obviously aimed at dashing hopes that the new rate caps might not apply to all forms of loan contact.[141] Even here, though, the statutory wording was, in the hands of motivated reasoners, potentially ambiguous inasmuch as its placement in the context of a reference to judgments made it susceptible to the interpretation that it meant to refer only to other, non-contractual or "legal" forms of interest, and not to forms of "conventional" or contract-based interest agreed pursuant to forms other than *stipulatio.*[142] Nor were these the only modes of evasion. Justinian saw fit to reiterate in *Cod. Iust.* 4.32.27 the long-standing, but not universally observed, cap on principal and interest payments to double the amount borrowed.[143] And six months later Justinian restated another long standing rule against the charging of interest on interest (*i.e.*, compound interest or, in the words of the statute, reducing outstanding interest to principal).[144] The fact the emperor felt the need to make these successive clarifications to his own recent legislation on interest rates hints at attempts to evade its rate caps by imaginative structuring.

Even after these corrective measures, ambiguities remained, at least in the eyes of those determined to find them. The fourth chapter of *Novel* 136 tells us that the bankers' petition had complained of borrowers attempting to wriggle out of interest payments when the borrowing was made pursuant to unwritten contracts.[145] In other words, there evidently still remained some question as to whether interest was payable if not expressly stipulated for.[146] Justinian put an end to such "pettifogging" (λεπτότης), permitting loan interest to accrue in favour of bankers on the basis

[140] There were always exceptions from the principle that obligations to pay interest presupposed *stipulatio*—for example, maritime loans. *Dig.* 22.2.5.1; *Dig.* 22.2.7; Ashburner, *Rhodian Sea-Law*, ccxvi–ccxvii; Buckland and Stein, *Text-Book*, 549; Kaser, *RP*, 2:371 n.17. Justinian expanded the circumstances where interest could be deemed to accrue in the absence of *stipulatio,* including by the provision discussed here. Kaser, 2:341; van der Wal, *Manuale 2nd*, 106 para. 741, as well as 108 para. 754.

[141] *Cod. Iust.* 4.32.27 c.2 (1 April 529) (*Quod et in bonae fidei iudiciis ceterisque omnibus in quibus usurae exiguntur servari censemus*) (emphasis supplied); Bianchini, "Disciplina," 395.

[142] On the topic of legal interest, see Giuliano Cervenca, *Contributo allo studio delle 'usurae' c.d. legali nel diritto romano* (Milan: Giuffré, 1969).

[143] The so-called ban on interest *ultra duplum*. *Cod. Iust.* 4.32.27 c.1 (1 Apr. 529).

[144] *Cod. Iust.* 4.32.28 (1 October 529).

[145] *Nov.* 136 c.4 (SK 693/11–12). The implicit contrast in this passage between borrowings made under *stipulatio* vs. those made ἀγράφως would have startled a Roman jurist of earlier periods, as *stipulatio* was in origin oral rather than written. But this provision illustrates that *stipulationes* had in practice been reduced to writing by the sixth century.

[146] Justinian complains about a supposed common misunderstanding that loan interest could not accrue on loans absent *stipulatio. Nov.* 136 c.4 (SK 69/13–14). This common misunderstanding, however, had a good pedigree. *Dig.* 2.14.7.4; *Dig.* 19.5.24; *Cod. Iust.* 4.32.3 (27 Sept. 200); Paulus, *Sententiae*, 2.14.1 (in J. Baviera, ed., *Fontes iuris Romani antejustiniani*, ed. aucta et emendata, vol. 2, 3 vols. (Firenze: Barbéra, 1968); Plessis and Borkowski, *Textbook*, 297, 309 ff.; Evans-Jones and MacCormack, "Obligations," 129.

of a pact alone or automatically, with no agreement at all.[147] Nor was this the end of the matter, for the later *Edict* 9 reports continued efforts on the part of borrowers to exploit ambiguities in Justinian's legal framework to the detriment of the bankers. Despite the clear language in *Novel* 136 to the effect that bankers could charge interest at the rate of 8% p.a., questions evidently persisted.[148] Were loans made by bankers eligible for the 8% rate cap applicable to ordinary business loans in all cases? Or did the lower, tiered rate caps apply to loans made by bankers depending on their own respective individual statuses?[149] In *Edict* 9, Justinian sought to dispel any remaining uncertainty that bankers could demand interest on loans at the ordinary business rate of 8% irrespective of whether they had obtained a post as a civil servant.[150]

Hypothecs, Interest, and the *Exceptio non Numeratae Pecuniae*

The fifth chapter of *Novel* 136 addresses a more complex prayer for relief from the bankers, one requesting for a far more significant departure from the principles of Roman law than the *Novel's* other heads of relief. It recounts market practices—in all likelihood sourced from the bankers via their petition—regarding how their loans were documented, whether in written agreements or accounts, sometimes notarized, sometimes written in the debtor's own hand, and sometimes written in the hand of another but signed by the debtor.[151] The *Novel* tells us that some debtors sought to resists claims for repayment even in the face of such documents by alleging that the sums recounted in them had never in fact been paid out. This defence, the *exceptio non numeratae pecuniae*, has an extensive hinterland.

Collecting unpaid debts can be difficult, especially from borrowers with the wherewithal to resist. Late antique Roman law made it especially so, for it equipped those answering a debt claim

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[147] *Nov.* 136 c.4 (1 Apr. 535). The following provision clarifies that, when a loan contract stated that it was at interest with no rate specified, an 8% rate would apply. See the discusson at notes 156–159 below.
[148] *Nov.* 136 c.4 (SK 693/11).
[149] Civil servants, if of the rank of *illustres* or higher, could otherwise demand interest at a rate of no more than 4% per annum. *Cod. Iust.* 4.32.26 c.2 (Dec. 528).
[150] *Edict* 9 c.6 (undated, but between April 535 and March 542).
[151] *Nov.* 136 c.5 pr. (SK 693/19–21: Καὶ τοῦτο δὲ ἡμᾶς ἐδίδαξαν, ὥς τινες συναλλάττοντες πρὸς αὐτοὺς γραμματεῖα καὶ λογοθέσια ποιοῦνται, καὶ τὰ μὲν ἐπ' ἀγορᾶς τίθενται, τὰ δὲ αὐτοὶ συγγράφουσι τῇ οἰκείᾳ χειρί, τισὶ δὲ ὑπογράφουσιν ἑτέρων ταῦτα καταγραψάντων, and SK 693/26–SK 694/1: εἰ μὲν γάρ τις συμβόλαιον ἀγοραῖον ποιήσειε καὶ ὅλον οἰκείᾳ γράψειε χειρί, ἢ καὶ ὑπογράψειεν ἐν τοῖς παρ' ἑτέρων γραφεῖσιν ἢ γραμματείοις ἢ λογοθεσίοις, ἐνέχεσθαι αὐτὸν καὶ κληρονόμους αὐτοῦ πᾶσι προσήκειν θεσπίζομεν τρόποις, δηλαδὴ ταῖς περσοναλίαις). The second passage—the operative provision—is not a model of clarity as to the number of different types of documents being referred to: "the sequence of Justinian's, or Tribonian's, thought is obscure." Barnish, "Wealth," 22. The operative provision can be construed to address three separate types of documents (notarised, written, and signed), which is what the first passage suggests, and which is the construction given by Theodore, *Breviarum, Nov.* CXXXVI c.6 [=Zachariä von Lingenthal, *Anekdota*, 150]. Thus also Cruchon, *Banques*, 225; Luchetti, "Banche," 463. Cf. Petrucci, *Profili*, 223–24, whose translation suggests rather two categories of documents, those written and those signed, but both public. Petrucci's reading of the text finds some support in the concordance of ὅλον with συμβόλαιον ἀγοραῖον, which suggests that the second passage of c.5 deals only with notarized documents, whether written in the hand of the debtor or merely signed by him, not with private ones, but this construction is harder to square with the first quoted passage. Whether the lack of clarity was in the petition or rather due to poor description thereof on the part of the imperial chancery is difficult to say.

with several modes of legal defence, most notably the *exceptio non numeratae pecuniae.* This *exceptio,* which originated some time early in the third century, was a powerful weapon: if invoked, it had the effect of flipping the burden of proof, requiring the lender to show that the moneys claimed from the debtor had in fact been paid out to him.[152] That is, by invoking the *exceptio,* the defendant could assert that he did not have to repay because the moneys claimed had never been given to him; to defeat the *exceptio,* the plaintiff creditor would have to prove that the sum claimed had in fact been paid to the defendant. This burden-flipping feature made the *exceptio non numeratae pecuniae* unique among Roman-law *exceptiones,* for which the onus of proof lay generally with the defendant seeking to assert them.[153] This unique feature has been attributed to the difficulty that defendants would face in proving a negative proposition, i.e., that money had not been paid out.[154] Even so, the *exceptio non numeratae pecuniae* can appear to modern eyes somewhat overpowered as a defensive weapon, one unjustly prejudicial to creditors.[155]

The fifth chapter of *Novel* 136 recounts that in response to the difficulties on this account that they faced from borrowers, the bankers sought two remedies: hypothecs over the assets of their debtors, and interest on their loans.[156] The second request was easy to accommodate. Having already (in the *Novel's* fourth chapter) acceded to the bankers' requests for confirmation that interest could be charged even in the absence of *stipulatio,* it was a straightforward matter to accommodate the additional request that interest be chargeable even where the documents did not call for interest payments. The legislative remedy was bifurcated. For existing contracts, interest, at the rate of 8% applicable to bankers generally, could be charged even in the absence of any mention of interest payments in the documentation, on the ground that it is "clear" that bankers needed to charge interest because they paid interest themselves.[157] For future contracts, some mention of interest had to be made in the documentation in order for interest to be payable. If the contract

[152] See the constitutions collected at *Cod. Iust.* 4.30, and *Inst Iust.* 4.13.2. On the development of the *exceptio* as a legal doctrine, see H.F. Jolowicz, *Historical Introduction to the Study of Roman Law*, 2nd ed. (Cambridge: Cambridge University Press, 1952), 433–35; Buckland and Stein, *Text-Book*, 442–43.
[153] *Dig.* 22.3.19 pr., 1 and 2.
[154] *Cod. Iust.* 4.30.10 (undated); Kaser, *RP*, 2:542. That is, that because of the difficulty of proving a negative, it was fairer to compel the claimant to prove the positive proposition that the money had in fact been paid out.
[155] Nicholas, *Introduction*, 197; Díaz Bautista, *Estudios*, 45. Its force likely reflects its origin as a measure to combat abusive practices by lenders to evade legal limits on the interest rates that could be charged on loans, namely by including in the debt contract a figure higher than what was actually lent to the borrower. Evans-Jones and MacCormack, "Obligations," 149–50.
[156] *Nov.* 136 c.5 pr. (SK 693/21–24).
[157] *Nov.* 136 c.5.1 (SK 694/9–11). The assertion at Petrucci, *Profili*, 100, that this provision also applied to contracts to be entered into in future ignores the import of the words at SK 694/9 (τοῖς ἤδη γενομένοις λογοθεσίοις or, in the Latin translation Petrucci uses as his text, *in ratiociniis vero iam confectis*) and of μέντοι (*tamen*) at SK 694/11.

DOI: 10.14754/CEU.2024.02

specified the rate, then that was the rate to be paid;[158] if not, interest could still be charged on the loan, at the rate of 8%, so long as some mention was made as to the loan being interest-bearing.[159]

This much relief was easy for Justinian to grant, inasmuch as it continued the same line of development as his preceding legislation on rates of interest. The bankers' other request under this head of relief—the request for hypothecs over their debtors' assets—was much more difficult. The bankers had, it seemed, asked to be given hypothecs not just over assets purchased by their debtors with the borrowed money (as granted in the *Novel's* third chapter), but over all other assets of their debtors, as well.[160] Such a hypothec would be both "tacit," in the sense that it was deemed part of the loan contract whether mentioned or not, and "legal," in the sense of being imposed as a matter of law rather than as some reflection of the intent of the parties.[161] The grant of so broad a remedy would have marked a significant departure from the ordinary principles of Roman contract law, which generally recognised hypothecs only if agreed, and Justinian recognised the bankers' request for the big ask that it was.[162] He refused it, granting only a limited remedy instead. The fifth chapter of *Novel* 136 provides that the bankers' remedies would be in the nature of those afforded by a general hypothec over the assets of the debtor only where that was agreed in writing; otherwise, the bankers' remedies would sound only *in personam,* not *in rem*.[163] Now, that position might be thought to represent no change at all, for it had long been possible for borrowers and lenders to agree by contract that such a general hypothec would exist.[164] But the fifth chapter arguably expanded the circumstances in which one would be found to exist by adopting rules of construction to the effect that the agreement need be couched only in general terms.[165] But, at bottom, the answer to the bankers' request for a hypothec over the assets of their debtors was no, at least at this time.[166]

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[158] *Nov.* 136 c.5.1 (SK 694/5–6).
[159] *Nov.* 136 c.5.1 (SK 694/6–8).
[160] Luchetti, "Banche," sec. 4; van der Wal, *Manuale 2nd*, 104 para. 731; Miller and Sarris, *Novels*, 2:909 n.18.
[161] Cf. the observations of Díaz Bautista, *Estudios*, 61 ff. with those of Mattioli, *Giustiniano*, 57–58 n.23.
[162] *Nov.* 136 c.5 pr. (SK 693/25–26 and SK 694/4–5); Díaz Bautista, *Estudios*, 114–15.
[163] That is, if the bank creditor wished to enforce upon the debt in the event of non-repayment, his legal action was limited to *in personam* claims against the debtor and his heirs and successors. Such claims generally did not allow pursuit of the debtor's assets that had made their way into the hands of third parties.
[164] On the origin and development of general pledges and hypothecs, see now Verhagen, *Security and Credit*, chap. 9.
[165] *Nov.* 136 c.5 pr. (SK 694/1–4) (denying a general hypothec save in circumstances where it is expressly mentioned in the contract or, if not so stated, where the loan is said to be at risk of the borrower's assets or generally if there is something said or written that carries the implication of hypothec) (emphasis supplied: ἢ ὅλως φθέγξονται ἢ γράψαιεν τοιοῦτον ὁποῖον εἰς ὑποθήκης ἔννοιαν φέρει). The nuance was not lost on Athanasius, Julian, or Nico van der Wal: Athanasius, *Syntagma* § 15.3.5 [=Simon and Trōianos, *Novellensyntagma*, 414] (Εἰ δὲ καὶ μὴ ῥητῶς ὑποθῆταί τις τῷ ἀργυροπράτῃ τὰ πράγματα, ὅλως δὲ εἴπῃ <<κινδύνῳ ἐμοῦ καὶ τῶν ἐμῶν πραγμάτων>> ἢ ἄλλως ἔννοιαν παράσχῃ ὑποθήκης, δίδωσιν ὁ νόμος αὐτῷ τὴν τῶν πραγμάτων ὑποθήκην); Julian, *Epit.,* Const. 118 c.6 [¶ *DV*] [=Haenel, *Iuliani Epitome*, 165] (*tunc autem et hypothecariis supponantur, cum dixerint aliquid, quod ad intellectum hypothecam tendit*); van der Wal, *Manuale 2nd*, 104 para. 731. ("*'au risque des biens de l'emprunteur' ou de termes similaires"*). See also Díaz Bautista, *Estudios*, 113 ff.; Luchetti, "Banche," 464.
[166] It has been argued that Justinian returned to this topic in March 542 but there are grounds for doubt. See discussion at notes 115–119 of Chapter 3.

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He did, however, give them a sort of consolation prize, in the form of a narrowing of the circumstances in which the *exceptio non numeratae pecuniae* could be invoked against them.[167] As discussed above, the preface to the *Novel's* fifth chapter informs us that the bankers' clients entered into agreements with them in various forms: publicly executed documents, private documents written in the client's own hand, and private documents written in the hand of another (presumably, that of a bank clerk) but signed by the client.[168] The sixth chapter of *Novel* 136 provided relief to specified subclasses of those documents, namely any account (λογοθέσια) stating the purpose(s) for which the loan is made and bearing the signature of the debtor (regardless of whether that purpose statement is in the debtor's own hand or not), or an agreement (ὁμολογίαν) based thereon.[169] Where documents of that sort contained statements of the purposes for which the money was lent, the debtors could no longer avail themselves of the *exceptio non numeratae pecuniae,* and thus could no longer flip the burden proof to compel the lending banker to prove that the moneys claimed had actually been paid out to the borrower.[170] With the *exceptio* disarmed in this way, the only defence remaining after *Novel* 136 was to put the banker (or his heirs) to oath, compelling them to swear that the money had in fact been so paid.[171] This ordinarily would have posed no obstacle. In other words, the remedy effected by the sixth chapter did not just prevent the flipping of the burden of proof, it also deprived defendant debtors of the defense of non-payment entirely, leaving them only with the remedy of an oath, which the *Novel* itself rightly characterises as "superfluous."[172]

Justinian would subsequently go on to revisit the question of bankers' documentary evidence, specifically their account books, a few years later in *Edict* 9 and then again in respect of

[167] This was not the only measure the emperor took to rein in abuses of this *exceptio.* In March 536, he promulgated a *Novel* that, among other things, imposed a double indemnity against defendants who invoked the *exceptio* unjustly, *i.e.*, where the plaintiff creditor succeeded in demonstrating that the money at issue had in fact been paid over. *Nov.* 18 c.8 (1 Mar. 536); Díaz Bautista, *Estudios*, 45–47 and 110 with n.16. Depending on one's view of the dating of *Nov.* 136 (See "Excursus on the Dating of *Novel* 136" below), this additional measure against abuse of the *exceptio non numeratae pecuniae* was either subsequent to the other measures or roughly contemporaneous with them.
[168] See discussion at note 151 above.
[169] *Nov.* 136 c.6 (SK 694/13–16). Sitzia, "Il Breviarium," 199, corrects the view (expressed by Díaz Bautista, *Estudios*, 46–47) that Justinian's relief encompassed all the document types listed in c.5; rather, such relief only covered documents of the type addressed in c.6. In other words, the text in c.5 only confirms the availability of *actiones in personam* (as discussed above at note 163). To get the additional relief against the *exceptio non numeratae pecuniae,* one had to fit within the four corners of c.6.
[170] van der Wal, *Manuale 2nd*, 109 para. 765, followed by Miller and Sarris, *Novels*, 2:910 n.20. For an example of such a purpose statement, see *P.Cair.Masp.* II 67126 (εἰς ἰδίας ἡμῶν καὶ ἀναγκαίας χρείας); Taubenschlag, "The Legislation of Justinian in the Light of the Papyri," 289.
[171] *Nov.* 136 c.6 (SK 694/16–18); Luchetti, "Banche," 463; van der Wal, *Manuale 2nd*, 109 para. 766; page 173 para. 1127; Mattioli, *Giustiniano*, 74. The imposition of such an oath upon the lenders would not otherwise be permitted in circumstances where the *exceptio non numeratae pecuniae* was unavailable. *Cod. Iust.* 4.30.14 c.3 (1 Nov. 531).
[172] SK 694/17: κατὰ περιουσίαν. And even that superfluous act was permitted only in the two-year period within which the *exceptio non numeratae pecuniae* could be invoked. *Cod. Iust.* 4.30.14 (1 July 530); *Inst. Iust.* 3.21 and 4.13.2.

DOI: 10.14754/CEU.2024.02

private documents in *Edict* 7 of 542, though the precise import of those changes is the subject of dispute. See Chapter 3.

Excursus on the Dating of *Novel* 136

The alert reader will perhaps have noticed that the time between the Justinian's promulgation of *Novel* 4 (16 March 535) and the partial reversal of its provision for bank guarantees/ promises to pay by *Novel* 136 is, on the manuscript dating of the latter (1 April 535), remarkably short, little more than a fortnight. Doubts as to whether the bankers could organise their lobbying effort, and the imperial bureaucracy respond to it, in so condensed a time frame have led many scholars to doubt the 1 April 535 date given to *Novel* 136. To be sure, the most important manuscript, *Cod. Marc. Gr.* 179 gives that date.[173] As noted above, this is also the date given to *Novel* 136 in one of the manuscripts of Athanasius' *Syntagma*, though the other main manuscript of that work assigns a date one year later, 1 April 536.[174] Of the evidence of the sixth-century epitomators, a manuscript of Julian's *Epitome* suggests a date in 541, plainly wrong.[175] The date given in Theodore is similarly garbled, perhaps as the result of confusion with the *subscriptio* to *Novel* 137, which follows immediately thereafter.[176] In the face of this confusion in the manuscript tradition, Zachariä von Lingenthal assigned a date of 18 March 536 on grounds that fail to convince.[177] To be sure, the April 535 date surprises inasmuch as it places *Novel* 136 just two weeks after *Novel* 4, the third chapter of which it purports to correct. Several modern scholars have questioned the plausibility of such speedy action by the bankers and especially by the imperial bureaucracy.[178] But such doubts reflect assumptions about the pace of lobbying and processes of legislative change that are in need of examination.[179] As a textual matter, one notes that the language of the preface to *Novel* 136 speaks in terms of the harm to bankers' interests caused by their exclusion from the *beneficium excussionis* as something expected in the future rather than as an actual fact.[180] This supports the notion that not much time had elapsed between promulgation of

[173] See the apparatus at SK 394.
[174] See the apparatus at Simon and Trōianos, *Novellensyntagma*, 414.
[175] See note 18 above.
[176] See note 19 above and, on Julian and Theodore more generally, the discussion at notes 78–81 in the Introduction.
[177] Zachariä von Lingenthal, 1:342 n.22. Cf. the apparatus at SK 694 and the chronological list at SK 806–7.
[178] Díaz Bautista, *Estudios*, 173–74 n.17; Luchetti, "Banche," 451 n.5; Luchetti, "Spunti," 160–62. Luchetti, "Banche," 451 n.5 adduces the additional point that the addressee Strategius is otherwise attested in the office of *CSL* in 536 by *Nov.* 22 and in either that year or in 537 by *Nov.* 105, but as Luchetti admits that is hardly compelling evidence that Strategius did not occupy that same office in 535.
[179] The conjectured delay to 536 "*a me pare non necessaria.*" Cosentino, "Legislazione," 350 n.12. Cosentino has, however, subsequently given the date of 1 March 536 to *Nov.* 136, unfortunately without discussion or argument. Cosentino, "Banking," 247.
[180] *Nov.* 136 pr. (SK 691/14–17: καὶ πάσχειν τὰ πάντων δεινότατα, εἰ μέλλοιεν αὐτοὶ μὲν μὴ δύνασθαι χρῆσθαι τῇ τῆς διατάξεως βοηθείᾳ, ἀλλ' εὐθὺς ἀπαιτεῖσθαι, εἰ δὲ ἀντιφωνήσεις παρ' ἑτέρων λάβοιεν, μὴ ποιεῖν αὐτοῖς τὸ ἱκανὸν τοὺς ἀντιφωνήσαντας ἢ τοὺς τούτων μανδάτωρας ἢ ἐγγυητάς) (emphases supplied). Franca La Rosa adds that this rapid

Novel 4 and its partial correction by *Novel* 136.[181] Filippo Briguglio attributed that rapid response to Tribonian's greed.[182] Briguglio's explanation is plausible, though of course Tribonian would hardly have been the only official with legislative responsibilities who was biddable. As this Chapter shows, there is no reason why so a rapid reaction could not have ensued on the part of either the bankers or the imperial bureaucracy. The former, acting through their guild, were well-organised for collective action. The responsible officials were at least equally well-equipped for rapid response inasmuch as the banker's petition gave them the wording they needed to do so.[183] Once the emperor had indicated his response in principle, much of what became *Novel* 136 could simply be lifted—it would be anachronistic to say plagiarised—from it.

Conclusion

As mentioned at the outset of this Chapter, *Novel* 136 is notable for the insight it gives to the petition that prompted it. Like the many other *Novels* that refer, with greater or lesser degrees of transparency, to the petitions that prompted them, *Novel* 136 incorporates much of terminology characteristic of petitions or of legislative text referring to the contents thereof.[184] More substantively, it contains descriptions of market practices that give factual background essential for understanding the legal relief granted (or denied) under its various heads that, due to its practice-based nature, could derive only from the bankers themselves via their petition. [185] There are also

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reaction demonstrates the bankers' ability to apply pressure upon the emperor to win favourable legal changes. Franca La Rosa, "La pressione degli argentarii e la riforma giustinianea del constitutum debiti (C.4,18,2,2)," in *Nozione, formazione e interpretazione del diritto. Dall'età romana alle esperienze moderne. Ricerche dedicate al professor F. Gallo*, ed. Silvio Romano and Filippo Gallo, vol. 1, 4 vols. (Napoli: Jovene, 1997), 450.

[181] Another indication supporting a dating to early 535 might be the reference in *Nov.* 136 to *Cod. Iust.* 8.13.27 having been made "πρώην". *Nov.* 136 c.2 (SK 692/5). That constitution was included in the second edition of Justinian's *Codex* promulgated in December 534, less than five months prior to the 1 April 535 date traditionally assigned to *Nov.* 136 based on a construction of "πρώην" in its sense of "lately" or "recently" (the sense it has in *Nov.* 14 pr. (1 Dec. 535) (SK 105/27)). But this argument is hardly compelling: *Cod. Iust.* 8.13.27 was promulgated by Justinian on 1 June 528, and the meaning of πρώην/πρῴην in the *Novels* is often just "previously" with no sense of recentness. To take just a few examples more or less contemporaneous with *Nov.* 136, see, *e.g.*, *Nov.* 2 pr. 1 (16 Mar. 535) (SK 10/24); *Nov.* 3 pr. 1 (16 Mar. 535) (SK 20/19 and 39); *Nov.* 25 pr. (18 May 535) (SK 196/5 and 7).

[182] Briguglio, *Fideiussoribus*, 1–3 n.1 and 108–109 n.20. On Tribonian's greed, at least in the eyes of Procopius, see Procop., *Wars* 1.24.16 [=Haury, *Procop. vol. 1*, 1:126] and *Hist. Arcana* 20.17 [=Haury and Wirth, *Procop. vol. 3*, 3:156]. Tony Honoré, too, accepted the "tight" timing between the two *Novels*. Honoré, *Tribonian*, 53 n.114.

[183] If the distribution of the surviving *Novels* that are datable with any certainty to specific months of the year is any guide, the Spring months of March through June tended to see more a more lively pace of legislative activity than did other months. This might suggest that the bureaucratic machine was particularly geared up for rapid legislation in response to petitions during those months, a factor that would tend to support the possibility that the period between *Novel* 4 and *Novel* 136 was by no means too short to accept the manuscript dating of the latter to 1 April 535. I would not, however, put too much weight on this argument, as it relies upon an assumption that the corpus of *Novels* that survives is somehow complete, or at least statistically representative of, all Justinianic lawmaking for all or part of his reign. For the reasons discussed in note 238 of Chapter 1, that assumption must be viewed sceptically.

[184] Such as the forms of ἱκέτης, αἰτέω, βοηθεία, διδάσκω, κεφάλαιον discussed under the caption "*The Petition*" above.

[185] Such as the information about the bankers' own borrowing in *Nov.* 136 c.2 and c.5 (see note 52 above); about the practice of delivering valuables in lieu of making loans in c.3 (see note 97 above), and of documentary practices described in c.5 and c.6 (see note 151 above). See also the text at note 28 above.

DOI: 10.14754/CEU.2024.02

more indirect hints in the legislative text that point to the petition, such as the law's praise of bankers, which might plausibly be thought to have their origin in self-promoting language of the petition included to justify why the relief requested should be granted.[186] These features of *Novel* 136 suggest that the legislative draftsman was reliant on the petition's language to an even greater extent than usually was the case, where the draftsman faced incentives to cleave closely to petition text when preparing responsive legislation.[187]

What the content of that petition (as determined via the references in *Novel* 136 to it) reveals is a remarkable sophistication on the part of the bankers who conceived the petition and those who assisted in its preparation. That the petition was prepared with the assistance of someone highly trained in law is as certain as anything in this area can be, for its contents—to the extent we can determine them from the text of *Novel* 136—made up a *potpourri* of different topics, each addressed from a standpoint of intimate acquaintance: the order of remedies and the *beneficium excussionis*; the *in rem* rights that bank lenders might have in respect of their borrower's offices, and in respect of other assets purchased with borrowed money; questions under Justinian's legislation on interest rates; before concluding with intertwined questions of *in rem* rights (again), interest (also again), and the *exceptio non numeratae pecuniae*.[188] As shown above, there is little substantive link between the points taken up in the law, and what linkages as exist are contrived and artificial. But it is precisely that artificiality that gives the clue to the petitioning process, for it is in the interstices between the separate heads that we glimpse the scrivener's art. The transition from first head to second head was, as we have seen, purely formalistic, requiring the ability to conceptualise the treatment of bankers in two very different areas of substantive law as "asymmetries." That second head, on *in rem* rights to bankers' offices then provided a hook by which the petition might request relief with respect to borrower assets that was of the same kind, yet far broader, in that it addressed any asset purchased wholly with borrowed money. The fourth head, on interest, was entirely separate, however, and the fifth head of relief (on problems arising from different documents) was a sprawl, covering some of the same topics as were addressed in earlier

[186] See *Nov.* 136 pr. (SK 691/10–12); c.1 (SK 691/23); c.2 (SK 692/21–23); c.3 (SK 692/30–31); c.4 (SK 693/17–18).
[187] See the discussion at notes 30–33 above.
[188] Most scholars have voiced greater or lesser degrees of bewilderment at what links the various strands together beyond the fact of they reflect issues arising in the practice of banking. More recently, Mattioli rightly identified the nature of the links between first three chapters of *Nov.* 136, but without contextualizing those provisions against the social practice of petition-and-response or examining what that tells us about the relationship between legislative text and petition text, the petitioning strategy evident from that relationship, or the advocacy behind the petition. Mattioli, "Sonderrecht," 484–87.

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heads but distinctly.[189] *Novel* 136 affords us a unique insight into the mind of the draftsman, one possessed of legal knowledge and prepared to use it on behalf of his clients.

And those clients, the bankers, were not entirely dependent on the draftsman of their petition (if indeed that draftsman was not himself a banker, albeit one with legal training), for *Novel* 136 demonstrates that they themselves were acutely attentive their legal situation on their own behalf. If, as argued above, the likelihood that the draftsman of the *Novel* lifted much of its language from the language of the petition, there is little reason to doubt the manuscript dating of 1 April 535. This is just a little more than a fortnight after promulgation of *Novel* 4, to which the first chapter of *Novel* 136 responds. To petition and win such relief, even if only in limited form, demonstrates a real ability to not only to ascertain the likely import of *Novel* 4's special treatment of bank promises to pay on the bankers' business, but also a real ability to organize, petition, and shepherd relief through the bureaucracy in a highly compressed time period. In promulgating *Novel* 4, Justinian undoubtedly thought he was establishing rules that would remain in force for some time. The rapid response of the bankers' guild, and the vigour of that response in their petition for relief, would have disabused him of that notion. Emperors could legislate, but affected constituencies too had agency. They could respond not just by altering their private contractual and other legal arrangements but also by seeking legislative remedy. Those responses might, depending on influence and prospects for future benefit, be difficult to ignore.

[189] It is tempting, though speculative, to identify the prayer for relief addressed in c.5 and c.6 of *Novel* 136 as a last-minute addition to the petition, reflecting the press of time that would have been inevitable if the manuscript dating of 1 April 535, just a fortnight after promulgation of *Nov.* 4, is accepted, as I believe it should.

DOI: 10.14754/CEU.2024.02

CHAPTER 3

ON NOT LETTING A SIX-CENTURY CRISIS GO TO WASTE

Introduction

Edict 7 of 1 March 542, the last of Justinian's surviving constitutions on bank contracts, furnishes one of the few clear references to the mid-sixth century epidemic of bubonic plague to be found in his extant legislation. This "looming presence of death in every region"[1] and the legislation in which it appears feature prominently in scholarship on the so-called Plague of Justinian.[2] Together with the unsubtle reminders of victories past tediously recounted in the imperial titulature of the *Edict's* inscription—"*Alamanicus Gothicus Francicus Germanicus Anticus Alanicus Vandalicus Africus pious lucky glorious victorious triumphant ever-revered Augustus*"—the reference to death in its preface might be read to hint that not all was well with empire at the time of promulgation.[3] Yet death, whether induced by plague or otherwise, looms over only a few of the *Edict's* grants of relief. It is not just that plague fails to feature in the reasoning given for its many innovations but, more tellingly, that epidemic is structurally irrelevant to them. This chapter argues that many if not most provisions of *Edict* 7 address fact patterns that neither presuppose death or hold it in prospect, where the parties in contemplation are all very much alive, neither done in by plague nor said to be at risk of being so. In addition, substantially all the *Edict's* grants of relief presuppose the continued orderly operation of courts, archives, notaries, and banking in a manner at odds with the societal breakdown portrayed in narrative sources. These considerations suggest that a more critical examination of the relationship of the *Edict* to plague is warranted.

Like *Novel* 136 (discussed in Chapter 2) and the intervening *Edict* 9, *Edict* 7 is a pragmatic sanction announcing a *potpourri* of legal innovations, addressing rules of evidence (chapters 1 and 2), the rights of bank creditors to pursue debtor assets in the event of non-payment (chapters 3, 4

[1] *Edict* 7 pr. (SK 764/4: ἡ γὰρ εἰς πάντας τοὺς τόπους διελθοῦσα τοῦ θανάτου περίστασις). The expression is widely accepted as a reference to plague. Peter Sarris, "The Justinianic Plague: Origins and Effects," *Continuity and Change* 17, no. 2 (August 2002): 169–82, https://doi.org/10.1017/S0268416002004137.

[2] Widely accepted to be the disease caused by *Yersinia pestis*. See L. K. Little, "Plague Historians in Lab Coats," *Past & Present* 213, no. 1 (November 1, 2011): 267–90, https://doi.org/10.1093/pastj/gtr014, as well as Marcel Keller et al., "Ancient *Yersinia Pestis* Genomes from across Western Europe Reveal Early Diversification during the First Pandemic (541–750)," *Proceedings of the National Academy of Sciences* 116, no. 25 (June 18, 2019): 12363–72, https://doi.org/10.1073/pnas.1820447116, followed by Kaldellis, *New Roman Empire*, 299 with n.9.

[3] *Edict* 7 inscr. (SK 763/16–18: Ἀλαμανικὸς Γοτθικὸς Φραγγικὸς Γερμανικὸς Ἀντικὸς Ἀλανικὸς Οὐανδαλικὸς Ἀφρικὸς εὐσεβὴς εὐτυχὴς ἔνδοξος νικητὴς τροπαιοῦχος ἀεισέβαστος Αὔγουστος). The *Novels* as we have them are rarely so exuberant in their celebrations of Justinian's victories, though two similarly florid examples appear in *Nov.* 17 inscr. (16 Apr. 535) and *Nov.* 43 inscr. (17 May 537). Miller and Sarris, *Novels*, 1:196 n.7; 1:388 n.2; 2:1043 n.2. The use of this particular elaborate entitular provides an instance of Justinian's practice of seeking to assert, at critical moments, the legitimacy of his reign using legislation as the mode of communication. See Bell, *Social Conflict*, 303–17.

DOI: 10.14754/CEU.2024.02

and 7), and measures to facilitate litigation (chapters 5 and 6).[4] This salad of legal remedies manifests little unity save that its distinct ingredients address matters of a prosaic nature arising in the ordinary course of banking. *Edict* 7 bears many hallmarks of tracking the language of the petition by the guild of bankers that prompted it,[5] both in its vocabulary and its substantive terms.[6] At points, Justinian boasts that it is responsive to prayers for relief set forth in that petition, boasts that in this instance may actually be true. This chapter argues that, when viewed in diachronic context—one attending to the position each provision occupies in the law's development over time—many of the *Edict's* responses cannot satisfactorily be explained as direct responses to plague. Instead, they reflect *desiderata* that the guild of the bankers of Constantinople had long lobbied for, or incremental extensions of concessions previously won.[7] And even those innovations that can plausibly be tied to plague do not necessarily reflect the actual experience of it but are better explained as anticipatory responses to its expected consequences, promulgated in response to lobbying by a group that was as practiced in petitioning as it was informed of developments the parts of empire where plague first struck.

Plague's Progress

Edict 7 features prominently in recent scholarship on both the economic consequences of plague and the timing of its arrival at Constantinople. The *Edict's* dating and the language of its preface quoted above have made it irresistible to those historians of late antiquity who maintain what has been termed (somewhat unfairly) as the "maximalist" view that plague inflicted substantial, long-lasting harm upon sixth-century economy and society.[8] There are, of course,

[4] The designation pragmatic sanction (πραγματικός τύπος) appears in several passages of *Edict* 7 (in addition to the titulus at SK 763/14, which is not original): c.4 (SK 765/19); c.7 (SK 767/5); c.8.1 (SK 767/14); ep. (SK 767/22 and SK 767/24). On the Greek terminology for pragmatics, see discussion at notes 20–31 in Chapter 1.

[5] Unlike *Nov.* 136 and *Edict* 9, which refer to Constantinople's association of bankers lodging the underlying the petition as σύστημα, *Edict* 7 refers to the petitioning association both as a σύστημα (c.1 SK 764/13, c.2 SK 764/21, c.5 SK 766/5, c.7 SK 766/19, and c.8.1 SK 767/15 and SK 767/21) and as a σωματεῖον (pr. SK 764/6, c.2 pr. SK 764/18, c.3 SK 765/4, c.4 SK 765/20 and 26, c.7 SK 766/25, and c.8 SK 767/11). The terms are used indistinguishably in *Edict* 7. See note 50 of the Introduction.

[6] Vocabulary: *Edict* 7 pr. (SK 764/6–7: προσῆλθον ἡμῖν, φάσκοντες); c.1 (SK 764/13–14: ὅπερ καὶ παρὰ τῶν ἱκετῶν εὐθυνομένων παρὰ τῶν αὐτῶν διαδίκων γίνεσθαι προστάττομεν); c.2 pr. (764/18: Δεύτερον ἡμῖν … ἀνηνέχθη κεφάλαιον); c.2.1 (SK 765/2: οὐδενὸς τοῖς ἱκετεύουσι γινομένου προκρίματος); c.5 (SK 765/29: Καὶ τοῦτο δὲ αὐτοῖς παρασχεῖν αἰτοῦσι συνείδομεν); c.6 (SK 766/7: Ἐπειδὴ δὲ καὶ τὸ εἰς διάφορα τοὺς ἱκέτας ἕλκεσθαι δικαστήρια, and SK 766/14–15: καὶ τοὺς ἱκέτας τῆς τῶν πραιτωρίων τριβῆς ἀπαλλαττομένους σχολάζειν); and c.7 (SK 767/2–3: ἐφ' ᾧ τε μήτε τοὺς ἱκέτας ἐκ τῆς τῶν χρεωστῶν ἀγνωμοσύνης ἢ ῥᾳδιουργίαςἄδικον ὑπομεῖναι βλάβην, and SK 767/4: τὰ πρῴην τοῖς δεηθεῖσι παρασχεθέντα). Substance: *e.g.*, information about market practices the only plausible source for which is the bankers themselves, in their petition, including the information about bankers' agreeing to transact without security in c.4 (SK 765/18–19) (on which see discussion at notes 74–76 in Chapter 2); or the information about fraudulent conveyances in c.7 (SK 766/18–20).

[7] As alluded to, unfortunately without comment or analysis, at Kaldellis, *New Roman Empire*, 301.

[8] See, notably, Meier, *Das andere Zeitalter Justinians*, 326–327 with n.117; Kyle Harper, *The Fate of Rome: Climate, Disease, and the End of an Empire* (Princeton: Princeton University Press, 2017), 199–245; Peter Sarris, "New Approaches to the 'Plague of Justinian,'" *Past & Present* 254, no. 1 (February 2022): 331,

dissenting voices, especially among the group of "revisionist" historians who have in recent years called into question many of long-held tenets of scholarship on the Plague of Justinian and its consequences for his reign.[9] Somewhat separately, there are the relatively few continental legal scholars who have turned their attention to *Edict* 7, who as a rule attribute the distorting innovations introduced by the *Edict* into Roman law as imperial responses to the ostensibly severe effects of plague.[10] For each of these three groups, the timing of the *Edict's* promulgation relative to the onset of epidemic at Constantinople constitutes a crucial building block for their respective arguments.

Whilst there seems little reason to doubt the promulgation date of 1 March 542 given for the *Edict* in the manuscript, the timing of plague's arrival at the capital has occasioned much disagreement. The sources conflict. Procopius, an eyewitness to events, situates onset at Constantinople in "mid-Spring" 542.[11] Theophanes, writing at a remove of some two centuries, gives October 541 as the date when "the great death took place in Byzantium."[12] John Malalas also attests to a date in 541 for the first onset of plague, but his text relates to Alexandria, not to the imperial capital.[13] None of our other principal narrative sources for plague provide additional meaningful information as to its arrival at Constantinople.[14]

The conflict of the sources has, inevitably, led to disagreements on when the epidemic broke out there. What one may tentatively describe as the majority view among modern scholars favours Procopius' dating of Spring of 542 over Theophanes' alternative dating of late 541.[15] This view

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https://doi.org/10.1093/pastj/gtab024. This chapter does not purport to reconstruct the history of plague or to survey recent scholarhip on it, the bibliography of which vast and growing. See Joris Roosen and Monica H. Green, "The Mother of All Pandemics: The State of Black Death Research in the Era of COVID-19 –Bibliography," google doc, February 29, 2024, https://drive.google.com/file/d/1x0D_dwyAwp9xi9sMCW5UvpGfEVH5J2ZA/view?usp=sharing.

[9] See, *e.g.,* Lee Mordechai and Merle Eisenberg, "Rejecting Catastrophe: The Case of the Justinianic Plague," *Past & Present* 244, no. 1 (August 1, 2019): 21–22 with n.66, https://doi.org/10.1093/pastj/gtz009 ("None of these [laws from Apr.–Aug. 542 (*Edict* 7, *Nov.* 116, *Nov.* 157 and *App.* 3)] … refer even vaguely to the epidemic").

[10] Works in this category include Díaz Bautista, *Estudios*; van der Wal, *Manuale 2nd*; Petrucci, *Profili*; Mattioli, *Giustiniano*.

[11] Procop., *Wars*, 2.22.9 [=Haury, *Procop. vol. 1*, 1:251]. That Procopius was an eyewitness to events when plague first struck the capital is beyond peradventure. *Ibid.*; Cameron, *Procopius*, 8, 40–43.

[12] Theophanes, *Chron.*, a.m. 6034 [=De Boor, *Theophanis Chronographia*, 1:222].

[13] John Malalas, *Chron.*, 18.90 [481] [=Thurn, *Ioannis Malalae Chronographia*, 407].

[14] The most important of these other sources is the account of John of Ephesus preserved in Part 3 of the *The Chronicle of Zuqnin* aka *The Chronicle of Pseudo-Dionysius of Tel-Maire* (trans. at Witold Witakowski, trans., *Pseudo-Dionysius of Tel-Mahre: Chronicle (Known Also as the Chronicle of Zuqnin) Part III*, Translated Texts for Historians 22 (Liverpool: Liverpool University Press, 1996) and at Amir Harrak, trans., *The Chronicle of Zuqnīn, Parts III and IV: A.D. 488–775* (Toronto: Pontifical Institute of Mediaeval Studies, 1999), 37–137). Additional accounts, also lacking precise information on the date of the epidemic's arrival at Constantinople, appear in Evagrius, *Ecclesiastical History*, 4.29 [=J. Bidez and L. Parmentier, eds., *The Ecclesiastical History of Evagrius with the Scholia* (London: Methuen, 1898), 177–79] and Agathias, *Historiarum Libri Quinque*, 5.10 [=Rudolf Keydell, ed., *Agathiae Myrinaei Historiarum Libri Quinque* (Berlin: de Gruyter, 1967), 175–76].

[15] See Dionysios Ch. Stathakopoulos, *Famine and Pestilence in the Late Roman and Early Byzantine Empire: A Systematic Survey of Subsistence Crises and Epidemics* (Aldershot: Ashgate, 2004), 287 (Theophanes is "confused"). The dating to 542 appears in recent historiography of a more general nature, including Stephenson, *New Rome*, 307; Kaldellis, *New Roman Empire*, 299.

takes as its basis a principally land-based spread from Egyptian Pelusium, plague's port of entry to empire, to Constantinople. Stathakopoulos has argued persuasively that initial arrival at Pelusium should be dated not to October 541 but to earlier in that year, probably July.[16] Dating the spread from there is more difficult. John of Ephesus informs us that the disease spread from Pelusium to Alexandria, thence by sea to Palestine and overland from there to Constantinople along the eastern rim of the Mediterranean.[17] Procopius by contrast, informs us that the disease spread from Pelusium in two directions, west to Alexandria and east to Palestine.[18] Neither Procopius nor John specifies the date for arrival at Alexandria precisely, but Stathakopoulos dates it to mid-September 541 based on a prophecy related by John Malalas.[19] That dating is widely accepted but is not without its difficulties as it allows nearly two full months for the plague to travel the short yet busy route from Pelusium to Alexandria.

Regardless of whether the disease reached Palestine directly from Pelusium or via Alexandria, John of Ephesus is explicit that the spread from Palestine to the capital took place overland; Procopius' account of its slow, deadly progress, whilst not specific, does not fundamentally conflict.[20] Overland transmission to the imperial capital is perhaps surprising. Given the high volume of shipping from Alexandria to Constantinople, it might have been expected that, had plague arrived at Alexandria during the shipping season, it would more likely have progressed directly to Constantinople by sea.[21] Grain-bearing ships of the *annona*, especially, would have made congenial homes for the rat-borne fleas that served as the epidemic's vector of transmission. And even after the *annona* had ceased to sail for the season, private merchantmen would still have continued to sail, at least for a time, with the inevitable rats and their fleas in their holds below. The presumptively easier spread of disease by ship combined with Stathakopoulos' mid-September date

[16] See Stathakopoulos, *Famine and Pestilence*, 113, 278, preferring the testimony of Procopius to that of Theophanes.
[17] Witakowski, *Chronicle*, 77 [82], 80 [87]; Harrak, *Chronicle*, 96 [82], 99 [87]. The actual dating given by John, to 543, is too late, however. A late-541 date for plague's arrival to the Negev is demonstrated by the funereal inscriptions first noticed in this connection by Durliat. Stathakopoulos, *Famine and Pestilence*, 278–80, following Jean Durliat, "La peste du VIe siècle: Pour un nouvel examen des sources byzantines," in *Hommes et richesses dans l'Empire byzantin*, ed. Catherine Abadie-Reynal, vol. 1: IVe–VIIe siècle, 2 vols. (Paris: P. Lethielleux, 1989), 107–19. John's account of the spread toward the capital also finds support in an inscription found in Syrian Izra/Zorava of 542–543, mentioning the death by bubonic plague of a bishop by the name of Ouaros. *ILGS* 15.1, no. 179; Pawel Nowakowski, "Cult of Saints, E02116," accessed February 29, 2024, http://csla.history.ox.ac.uk/record.php?recid=E02116 (inscription 1). The inscription's date is insufficiently granular to draw specific inferences as to timing, but it is consistent with John's observation that the disease spread quickly along the coasts but slowly inland. On the importance of John of Ephesus as a historical source for the plague, see Pauline Allen, "The 'Justinianic' Plague," *Byzantion* 49 (1979): 5–20.
[18] Procopius' statement at *Wars* 2.22.6 [=Haury, *Procop. vol. 1*, 1:250] that the plague spread "from there" (ἐντεῦθεν) is ambiguous: it can be read as meaning from Palestine alone or (less likely) from both Alexandria and Pelusium.
[19] John Malalas, *Chron.*, 18.90 [481] [=Thurn, *Ioannis Malalae Chronographia*, 406–7]; Stathakopoulos, *Famine and Pestilence*, 280.
[20] Procop., *Wars* 2.22.6–9 [=Haury, *Procop. vol. 1*, 1:250–51].
[21] Stathakopoulos, *Famine and Pestilence*, 131 and nn.91 and 92.

DOI: 10.14754/CEU.2024.02

for transmission by land implies that shipping from Alexandria to Constantinople had already ceased, or at least slowed considerably, by September 541. On the traditional view of late antique shipping, that is just about possible, for Vegetius tells us that the sailing season ran to 14 September of each year for galleys and 10 November for sailing ships, with the period from 14 September to 10 November considered fraught with risk.[22] This traditional view has come under fire in recent years, however, as new evidence has come to light and old sources re-examined to suggest that winter shipping by private merchants, at least, was more common than the traditional view admits.[23] And even the traditional view acknowledges that there were always sailors brave, or foolhardy, enough to sail during the risky and closed periods.[24] Still, however, if we assume that the ships of the life-sustaining *annona* would not have been entrusted to such daredevils, then on Vegetius' limits for the sailing season, *annona* ships might have ceased for winter if plague arrived at Alexandria toward the later end of Stathakopoulos' mid-September window.[25] This dating would make more plausible the suggestion that the epidemic progressed from there, first by ship to Palestine—likely by smaller ships engaged in cabotage and thus able to sail later in the season than the *annona* ships that could not hug the shore on account of their bulk —and thence by land to Constantinople, arriving at the capital, as Procopius tells us, in the "mid-Spring" 542.[26]

Stathakopoulos has sought to give further precision to Procopius' vague formulation by adducing John Lydus' precise definition of Spring (first adduced in this connection by Michael McCormick) as 7 February to 8 May of each year, thus placing Procopius' "mid-Spring" at 23

[22] Veg., *Mil*., 4.39; Lionel Casson, *Ships and Seamanship in the Ancient World* (Princeton: Princeton University Press, 1971), 270 n.3; John Pryor, "Shipping and Seafaring," in *The Oxford Handbook of Byzantine Studies*, ed. Elizabeth Jeffreys, John Haldon, and Robin Cormack (Oxford: Oxford University Press, 2008), 483.

[23] See Peregrine Horden and Nicholas Purcell, *The Corrupting Sea: A Study of Mediterranean History* (Oxford: Blackwell, 2000), 149 and esp. 565 (Elephantine palimpsest, evidencing ship arrivals to an Egyptian port from March to December); J. Theodore Peña, "The Mobilization of State Olive Oil in Roman Africa: The Evidence of Late 4th-Century Ostraca from Carthage," in *Carthage Papers: The Early Colony's Economy, Water Supply, a Private Bath and the Mobilization of State Olive Oil*, ed. J.T. Peña et al. (Portsmouth, RI: Journal of Roman Archaeology, 1998), 117–238 (*ostraka* from the port of Carthage); James Beresford, *The Ancient Sailing Season* (Leiden: Brill, 2013), 9–52, 265–75 and *passim*. This revisionist view is open to challenge as to the scope of the physical evidence's probative value and the persuasiveness of Beresford's re-readings of the texts, but it usefully reminds us that the sailing season varied by place, by type, and by personal risk-tolerance.

[24] The seas were never wholly closed (Plin., *HN*, 2.125), but sailing out of season was considered exceptionally risky, even by those who did so. de Ste. Croix, "Maritime Loans," 43 n.8. For a self-congratulatory account of one who dared such a winter voyage in the fifth century, see Richard Price and Michael Gaddis, trans., *The Acts of the Council of Chalcedon*, reprint 2007, Translated Texts for Historians 45 (Liverpool: Liverpool University Press, 2005), 2:55.

[25] A constitution of Gratian directs shipmasters transporting the *annona* from Africa to accept cargos at any time between 1 April to 1 October of each year, and to sail between 13 April until 15 October. *Cod. Theod.* 13.3.3 (380). See de Ste. Croix, "Maritime Loans," 43 n.8; Casson, *Ships*, 270–71 n.3. This text suggests a closed period from November to April, different than Vegetius'. But this constitution has Africa as the point of departure, not Alexandria.

[26] On cabotage, see Horden and Purcell, *Corrupting Sea*, 133–43, 565 and *passim.*

DOI: 10.14754/CEU.2024.02

March of 542.[27] Of course, there can be no assurance that Procopius had the same definition of Spring as Lydus, or that he intended his words to be quite so literally construed. Nevertheless, if this reconstruction of events is accepted—and it is probably not too far off—*Edict* 7 was promulgated a few weeks before the plague arrived at the imperial capital. McCormick himself has sought to establish a slightly earlier date for the arrival of the plague in Constantinople, namely in the first days of March, based largely on the evidence of the date of *Edict* 7, which he implicitly assumes reflects actual experience in banking practice.[28] Separately, those legal historians of who have considered the dating of the plague's arrival have tended to align in assigning a March 542 date to plague's arrival at the capital, in large measure because they (perhaps predictably) give pride of place to the legal evidence of the *Edict* 7 in establishing the presence of plague, while at the same time construing the *Edict's* provisions as a consequence of that plague.[29]

Against this majority view of the chronology, Mischa Meier has waged a long and (what must at times seem) lonely battle in favour of dating the plague's arrival at the imperial capital several months earlier, toward the end of 541.[30] The stool of Meier's argument rests on three legs: the rescheduling of the festival of the Hypapante from 14 February to 2 February in 542; Theophanes' mention of October 541 as the date when "the great death took place in Byzantium"; and the date of 1 March 542 given to *Edict* 7, the provisions of which he, like McCormick, implicitly assumes reflect actual experience of plague's effects on the part of the capital's bankers. One difficulty for Meier's argument is that it entails disregarding Procopius' eyewitness account in favour of that given by Theophanes, writing at a remove of some two centuries. A second difficulty is that it implies swift transmission of the disease from Egypt, its first point of landing in the empire, to Constantinople. Such swift transmission would have been possible only if shipping served as the vector of transmission from Egypt to the capital. This mechanism is plausible *a priori*, but it conflicts with the account given by John of Ephesus as to how plague accompanied his own travels along the Mediterranean coast.

[27] Stathakopoulos, *Famine and Pestilence*, 287. Cf. Michael McCormick, "Bateaux de vie, Bateau de mort. Maladie, commerce, transports annonaires et le passage économique du Bas-Empire au Moyen Âge," in *Morfologie sociali e culturali in Europa fra tarda antichità e alto medioevo, 3–9 aprile 1997*, vol. 1 (Settimane de studi del centro Italiano di studi sull'alto medioevo XLV, Spoleto: Sede del Centro, 1998), 53 n.27.
[28] McCormick, "Bateaux," 52–53 with n.27; Michael McCormick, *Origins of the European Economy: Communications and Commerce, A.D. 300–900* (Cambridge: Cambridge University Press, 2001), 539 n.54.
[29] *E.g.*, Mattioli, *Giustiniano*, 119 with n.5. See also Cosentino, "Legislazione," 352 n.22.
[30] Initially at Mischa Meier, "'Hinzu kam auch noch die Pest': Die sognenannte Justinianische Pest und ihre Folgen," in *Pest: die Geschichte eines Menschheitstraumas*, ed. Mischa Meier (Stuttgart: Klett-Cotta, 2005), 92–93, and in somewhat greater detail in Meier, *Das andere Zeitalter Justinians*, 326–327 with n.117, with a more recent re-assertion at Mischa Meier, "The 'Justinianic Plague': An 'Inconsequential Pandemic'? A Reply," *Medizinhistorisches Journal* 55, no. 2 (2020): 179, https://doi.org/10.25162/mhj-2020-0006.

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Edict 7 and the hardships it relates thus figure prominently in each of these reconstructions. But as the balance of this chapter will demonstrate, such evidence of hardship as appears in the provisions of *Edict* 7 is not necessarily or, in many cases, even plausibly attributed to plague. Rather, such distress as appears in its provisions seems to be more generalised in nature. There was a surfeit of reasons other than plague for straitened economic circumstances in 542 and the years leading up to it. The preceding decade saw the damage from the Nika riot of 532 and the ensuing costs of (re)building; any number of earthquakes, fires, floods, and other natural disasters; incursions into Thrace and Illyria by miscellaneous barbarians from the north; and, probably most damaging, the 540 Persian invasion in Syria and elsewhere with its humiliating destruction of Antioch.[31] There may also have been lingering effects from the so-called dust cloud of 536, when the sun shone only dimly and summer temperatures were low on account of what appears to have been a volcanic eruption somewhere beyond the ken of the late antique empire.[32] There also appears to have been another eruption in 540, with similar effects on sunlight and temperature.[33] These events caution us against knee-jerk attributions of every hint of financial distress in the 540s to plague, for those years offer an abundance of alternative causes.

Now, adducing both late antique history and Romanist legal scholarship risks, in an academia where boundaries are often strictly policed, bringing into dialogue discourses that have little experience and perhaps less interest in dialoguing with each other. It is, however, as essential for assessing the *Edict's* evidence for the effects of the Justinianic Plague as it is for proper construction of the *Edict's* formidable technicalities. This chapter has as one of its aims to challenge the mutually supporting, yet somewhat circular, arguments that *Edict* 7 serves both as evidence of plague's arrival at the imperial capital prior to 1 March 542 and that its provisions must be construed in light of conditions of plague as actually experienced there. One finding of this chapter is that the March 542 date given to *Edict* 7 does not necessarily entail that plague had already reached the capital. This is because relatively few of the *Edict's* provisions can securely be linked to

[31] See the catalogue of catastrophe compiled at Meier, *Das andere Zeitalter Justinians*, 656–70.

[32] Cassiodorus reports a dimming of sun and moon in Italy for a full year, with its ensuing discomfiture, effects on tax collection, and welfare provision. Cassiod., *Var.*, 12.25, 12.26, and 12.27, respectively [=Theodor Mommsen, ed., *Cassiodori Senatoris Variae* (Berlin: Weidmann, 1894), 381–83]. Procopius, also in Italy at the time, also reports year-long dimming. Procop., *Wars*, 4.14.5 [=Haury, *Procop. vol. 1*, 1:482–83]. Michael the Syrian preserves an account by John of Ephesus of weak sunlight for 18 months. Michael the Syrian, *Chron.*, 9.26 [296] [=Chabot, *Chronique de Michel le Syrien: Patriarche Jacobite d'Antioche (1166–1199)*, 2:220–21].

[33] M. Sigl et al., "Timing and Climate Forcing of Volcanic Eruptions for the Past 2,500 Years," *Nature* 523, no. 7562 (2015): 543–49, https://doi.org/10.1038/nature14565. For the view that the two eruptions may have led to "climate forcing" with consequent poor harvests setting the stage for plague, see Stephenson, *New Rome*, 303–5. The connection is suggestive but, as Sigl et al. caution, "causal connection of these two large volcanic episodes and subsequent cooling to crop failures and outbreaks of famines and plagues is difficult to prove." Sigl et al., "Timing," 548. For doubts about longer-term effects, see Kaldellis, *New Roman Empire*, 287.

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the epidemic, and those that can be be so linked do so in terms that may well have been prepared when the epidemic was merely approaching the capital, on the basis of expected rather than actual effects on the activites of the capital city's bankers. Another key finding is that those bankers were astute consumers of Justinian's legislation, willing and able to act collectively to seek and obtain legal relief when they perceived that their interests were threatened.

Consumers of the Law

This chapter argues that *Edict* 7 tells us less about the timing of when plague reached Constantinople than it does about its anticipated effects, at least in the eyes of that city' bankers. In those bankers, and their guild, we have a constituency of proven ability to elicit favourable legal changes from Justinian and his imperial bureaucracy.[34] Regardless of whether one takes the view that *Edict* 7 was promulgated shortly before plague struck the city or shortly thereafter, the relief granted by it demonstrates the astuteness of the bankers' guild in anticipating at an early stage what the consequences of epidemic might be on their activities. It also demonstrates their alacrity in seeking legislative relief, not merely against the anticipated consequences of plague but also against other legal inconveniences under which they had chafed for some time.

For the reasons discussed earlier in connection with *Novel* 136, Justinian's legislative draftsmen would in all likelihood have used the text of the bankers' petition as the basis for the initial text of *Edict* 7; this would almost certainly be the case where the emperor had indicated he was inclined to grant the request.[35] In the case of *Edict* 7, that petition would perforce have been submitted some time before promulgation of the responsive pragmatic sanction. Now, Cyril of Scythopolis would like his reader to believe that St Saba obtained from Justinian a positive response to his five-point oral petition on the very same day it was made.[36] But Cyril's account of same-day service from the emperor is rhetorical, aimed at impressing the reader with the sort of responsiveness that holiness could command. Most petitioners had a different experience, having to devote weeks, months, or even years in pursuit of obtaining even an audience to hear their petition,

[34] The prior examples of lobbying by the bankers of Constantinople of *Nov.* 136 and *Edict* 9 are well-known. See now Mattioli, *Giustiniano*, chap. II and III. The suggestion by Franca La Rosa that the exemption of bank promises to pay from Justinian's reform of the *receptum argentarium* in the *Codex* (*Cod. Iust.* 4.18.2 (431) (c.2: *His videlicet, quae argenti distractores et alii negotiatores indefense constituerint, in sua firmatate secundum morem usque adhuc obtinentem durantibus*)) was the result of bank lobbying is intriguing. Franca La Rosa, "Pressione," 445–51. But that argument presumes an interpretation of the expression *et alii negotiatores* that is difficult to defend.

[35] See discussion at notes 30–33 in chapter 2.

[36] Cyril of Scythopolis, *Vita Sabae*, 72 (petition) and 73 (response) [=Schwartz, *Kyrillos*, 175–78]. Cyril states that Justinian gave his response "immediately" (ἀνυπερθέτως), a term that might encompass something longer than a day. But the passage at 178.9–18, describing St Saba's withdrawal while Justinian and Tribonian sat together to fashion a response, demonstrates that Cyril intended the reader to understand that Justinian responded to the saint's petition on the day it was made. On this petition, see Feissel, "Pétitions," 48 no. 36.

DOI: 10.14754/CEU.2024.02

much less a response.[37] What is more, St Saba's demands—mainly for money—were simple and, Cyril would have us believe, the emperor's rescript tracked the saint's oral petition closely. By contrast, the bankers' requests prompting *Edict* 7 were formidably technical and his response equivocal in key respects.[38] It is therefore implausible that the petition prompting *Edict* 7 was submitted and responded to on the same day.

Just as we must avoid the mistake of thinking that the bankers received as speedy a response as St Saba, so too should must we reject the conclusion that their prayers for relief met with the same unqualified acceptance that, in Cyril's telling, the saint's did.[39] Given the nature of their requests, *Edict* 7 would have been preceded by a process of submission and negotiation, as the bankers sought what they wanted and the emperor and his officials determined what he would grant. We should then assume that the bankers' petition preceded the promulgation date of 1 March 542 by some days or more likely weeks. Thus, whether one adopts Stathakopoulos' dating of the plague's arrival to mid-March or McCormick's slightly earlier dating, the consequences would not yet have had time to play out, especially if we can believe Procopius' report that death rates were initially low.[40] The petition prompting *Edict* 7 therefore could have reflected actual experience of the plague in the capital to only a very limited extent, if at all. From this it follows that the petition reflected less the actual experience of the capital's bankers of the effect of plague on their activities than their expectations of what those effects might be.

That is not to say that those expectations were misinformed. Banking is always and everywhere an information business: a banker who does not keep abreast of developments in the value of his security, the fortunes of his customers, and the markets in which they operate does not long remain solvent. Of course, bankers would hardly have been alone in receiving news of "the looming presence of death." In late antiquity, news was a commodity "worth more than its weight in gold," exchanged via extensive networks of correspondents.[41] Some of the expectations expressed by the bankers in their petition would have come from their networks, reporting the progress of plague as it made its way around the Eastern Mediterranean in late 541 and early 542. News travelled fast, but plague, we are told, moved at a more leisurely pace—that rumour and

[37] See discussion at notes 254–265 in Chapter 1.
[38] On the balanced nature of the response, see the discussions of c.2 and c.8 and the caption "*Formal Equality*" below.
[39] And even less that those prayers for relief received a simple "rubber stamp" (or more precisely, purple mark) of the sort that supposedly graced the petition of Appion, bishop of Syene, when it was dispatched by the emperor to the *dux* of the Thebaid. D. Feissel and K.A. Worp, "La requête d'Appion, évêque de Syène, à Théodose II: P.Leid. Z révisé," *Oudheidkundige mededelingen uit het Rijksmuseum voor Oudheden te Leiden* 68 (1988): 99–100, cited at Brown, *Power and Persuasion*, 141–42. The story of Appion's petition, too, is highly rhetorical.
[40] Procop., *Wars*, 2.23.2 [=Haury, *Procop. vol. 1*, 1:256].
[41] Brown, *Power and Persuasion*, 47, quoting Ferdinand Braudel. Of course, news itself has no (physical) weight, but there is no need to let so mundane a point deprive us of the pleasure of Braudel's formulation.

report of plague preceded its actual arrival in Constantinople is as certain as anything can be. Not only do we have the general networks of correspondence upon which scholarship such as Peter Brown's has shed so much light, but we also have the testimony of John of Ephesus, who reports no fewer than three times that denizens of the city received reports from their contacts elsewhere on the plague's progress around the eastern rim of the Mediterranean.[42] While John's assertion that it took "one or two years" for the disease to reach Constantinople is an exaggeration, its denizens of undoubtedly had time to ponder what plague might mean for their futures and their fortunes.

For bankers specifically, the proposition that they enjoyed networks of contacts of the sort that could report the progress of plague is attested by more or less exactly contemporaneous evidence in the papyri. A papyrus of early 541 found at Aphrodito documents a loan of 20 *solidi* by a certain Flavius Anastasius, a banker of Constantinople, to two Egyptian visitors.[43] That document is instructive for several reasons, but most relevant for present purposes is its provision that the loan be repaid to a certain Thomas, the banker's man at his ἀποθήκη in Alexandria. We need not decide the unsettled question of whether that Alexandrian ἀποθήκη represented a customs depot, a branch of the Constantinopolitan bank, a warehouse of an unrelated business owned by the same owner or a different one, or something else entirely.[44] It suffices for purposes of this argument that the banker in Constantinople had a confidant of some sort in Alexandria to whom he could entrust receipt of the amount owed. And if the Alexandrian agent could be entrusted with receipt of funds, so too might he be trusted for news, forming part of the banker's network and relied upon for updates on local conditions relevant to the banker's activities.[45] Nor would much in the way of specificity have been required to prompt concern on the part of the bankers of the sort that might prompt an approach to the imperial authorities with a request for regulatory relief. Even the most general reports of epidemic would have prompted speculation by bankers on the difficulties that might ensue for their lending and other activities.

To sum up the argument thus far, actual, direct experience of the effects of plague in Constantinople can have informed the drafting of the petition underlying *Edict* 7 to only a very limited extent, if at all, due to the necessary lead time between petition and response for so complex

[42] Witakowski, *Chronicle*, 80 [87], 85–86 [93]; Harrak, *Chronicle*, 99 [87], 103 [93].
[43] *P.Cair.Masp.* II 67126 (7 Jan. 541); Keenan, "Constantinople Loan"; Gofas, "Banque," 149–50; Bogaert, "La banque en Égypte byzantine," 125.
[44] Cf. Hendy, *Studies*, 246; Barnish, "Wealth," 28; Raymond Bogaert, "Les banques à Alexandrie aux époques gréco-romaine et byzantine," *Ancient Society* 23 (1992): 39–40; Keenan, "Constantinople Loan," 180–81.
[45] Of course, not all news that bankers received by letter necessarily involved long-distance finance. For a more homely report, see the slightly later letter to an Alexandrian banker named Agapetus, *PL* I/3 (dated on palaeographical grounds to the late sixth or early seventh century), discussed at Rosario Pintaudi and J. David Thomas, "Una lettera al banchiere Agapetos," *Tyche* 1 (1986): 162–68.

a piece of legislation, the responsiveness of which was in key passages finely balanced. To the extent *Edict* 7 represents "copypasta" from that petition that prompted it, the effects on banking resulting from plague reflected in the *Edict* would in large part have represented only expected consequences of plague on banking activities, based on information from the bankers' correspondent networks. Insofar as the bankers can be assumed to have understood their own business model and the risks to which it was exposed, the difference between expectation and eventual reality need not have been great. But, as discussed in the next section, the still-functioning legal and banking apparatus assumed to exist throughout *Edict* 7 contrasts markedly with the depictions of near-complete social and economic breakdown portrayed in the narrative sources.

What's Plague Got To Do With It?

This section examines each substantive grant of relief set forth in *Edict* 7 *seriatim,* with a view to assessing the extent to which it may (or may not) plausibly be construed as a response by Justinian to plague and its consequences. This examination of the legal niceties demonstrates that although the *Edict's* opening grants of relief (chapters 1 and 2 and the first limb of chapter 3) can be plausibly be viewed as measures aimed at alleviating the effects of plague upon the activities of the petitioning bankers, the *Edict's* provisions soon veer off (from the second limb of chapter 3) into matters for which any link to plague can be identified only with difficulty, if at all. Moreoever, the initial measures that can plausibly be construed as responses to plague relate to circumstances that assuredly arose in the ordinary course prior to plague, even if they might be exacerbated by it. In other words, even those grants of relief in *Edict* 7 that can plausibly viewed as responses to plague do so in such a way that suggest they reflect less the actual effects of plague than the petitioners' expectations of what those effects might be *a priori* (in the literal sense—i.e., before the epidemic actually struck the city). What will also become apparent as the review proceeds is what the *Edict's* various provisions do not state but silently assume: namely, the continued operation in the imperial capital of credit intermediation, of money-lending, of orderly succession by both will and intestacy, of documentary practices, of public archives, and of a functioning court system. Similarly, the very fact of the bankers' petition, cited directly or indirectly as the impetus for the *Edict's* various grants of relief, itself presumes the continued functioning of the imperial bureaucracy to hear and respond to subjects' prayers for relief, including in relation to the highly technical matters. If plague was already raging with full force in the capital at the time of petition (or even of promulgation), it is most unlikely that abstruse and technical concerns such as those addressed by, say the second chapter of *Edict* 7, would be top of mind: bankers could hardly be less affected by plague than their borrowers, and there is little reason for thinking that they would be any less concerned to save their skins, or their souls. The circumstances presumed by *Edict* 7 are thus a far cry from the almost

complete collapse of the city one reads in the pages of Procopius and John of Ephesus. The former tells of a complete stoppage of commercial activities in the capital.[46] John describes the consequences of the plague's arrival there as causing a breakdown in orderly succession, as well as a complete halt to commerce: "important money exchanges, indeed the entire city, ground to a halt."[47] Now, these accounts are, like Cyril's tale of St Saba, rhetorical (albeit in different ways), but even if one substantially discounts their testimony, the difference between what they describe and the portrayal of persistent social order implicit in *Edict* 7 is striking. This contrast suggests that, by the time *Edict* 7 was prompted and *a fortiori* by the time of the petition that prompted it, the full force of the plague had not yet been felt in the Queen of Cities.[48]

Bad Heir Days

The first head of relief of *Edict* 7 is described in its preface and granted in its first chapter.[49] It deals with the situation where the heirs or successors of a decedent deny the existence of debt incurred by the decedent to bankers pursuant to an unwritten contract.

Background. Under the Roman law of inheritance, κληρόνομοι καὶ διάδοχοι—that is, heirs and successors—succeeded to a decedent by way of universal succession, meaning that they stepped into the decedent's shoes, so to speak, for (nearly) all purposes. The universal successor inherited not only the decedent's assets but also, with limited exceptions, his debts.[50] Where the decedent's liabilities exceeded his assets, taking on the inheritance could be burdensome, and Roman law had long permitted potential heirs to repudiate.[51] Justinian ameliorated the position of heirs facing such an invidious choice in 531 by introducing the *beneficium inventarii,* whereby an heir taking on such an inheritance could enjoy limited liability.[52] Even after that measure, however, repudiation was still a real possibility because the applicable deadlines might not be met.[53]

Edict 7 c.1. The issue addressed by the first chapter of *Edict* 7 related to those of a decedent's contracts with his bank lenders that were in unwritten form. The bankers complained

[46] Procop., *Wars*, 2.23.17–20 [=Haury, *Procop. vol. 1*, 1:259].
[47] Witakowski, *Chronicle*, 88 [96–97], 93–94 [102–103]; Harrak, *Chronicle*, 105–106 [96–97], 109–110 [102–103].
[48] Procopius relates that the onset initially was not severe, with the mortality rising only with time. Procop., *Wars*, 2.23.2 [=Haury, *Procop. vol. 1*, 1:256].
[49] As is often the case in the *Novels*, the occasion and reasoning for the first grant of relief is distributed between preface and first chapter. The chapter divisions are not original but rather the product of Le Conte's work in the 16th century. Noailles, *Collections*, 2:49–52.
[50] *Dig.* 29.2.8 pr.; *Dig.* 29.2.37; Jolowicz, *Historical Introduction*, 127–28; Plessis and Borkowski, *Textbook*, 226–27; Kaser, Knütel, and Lohsse, *Studienbuch*, 477 [§85 ¶¶1–2].
[51] Repudiation was always possible for *heredes* who were *extranei*. The ability to repudiate was also available, after a period for deliberation, to those who were *sui et necessarii* or *necessarii* under a praetorian *ius abstinendi. Dig.* 28.8.8; *Dig.* 42.6.1.18; Buckland and Stein, *Text-Book*, 312–15; Plessis and Borkowski, *Textbook*, 223–26.
[52] *Cod. Iust.* 6.30.22 (27 Nov. 531).
[53] Indeed, the description of the *beneficium* in Justinian's *Institutes* expressly contemplates that some heirs would not avail themselves of it and thus would need time to consider repudiation. *Inst. Iust.* 2.19.6.

DOI: 10.14754/CEU.2024.02

that heirs and successors of their debtors were denying the existence of loans extended by the bankers pursuant to such unwritten contracts. The problem, of course, was evidentiary in nature: if the contract was written, the document might be introduced to prove the existence of the debt.[54] That was obviously impossible where the contract was unwritten. Justinian granted relief on terms that indicate his willingness to accede the bankers' request.[55] The remedy afforded by chapter 1 of *Edict* 7 is, like the problem it aimed to address, evidentiary in nature: The debtor's heirs and successors were called upon to swear an oath as to amounts received from the bankers by the persons into whose rights they had come.[56] Bankers, when sued by others, were called upon to do the same.[57] Now, obviously, oaths are a weak form of evidence, ordinarily resorted to only in the absence of other, more secure forms.[58] To address this weakness, Justinian added two complementary measures aimed at deterring false oaths. The first was a penalty *in duplum*—if a debt was found to exist by virtue of other evidence after the debtor's heir or successor had denied it by oath, he would be condemned to pay double the amount at issue.[59] The second, and more innovative, measure dealt with these other forms of evidence: in addition to any other permitted form of evidence, *Edict* 7 allowed the existence of the contested debt to be established by the oral testimony of bank clerks, or by the evidence of the banker's daily journals entered into evidence upon oath. [60] The provisions on penalty and on the type of evidence that could be used to establish

[54] Assuming it met the criteria for use as evidence. For this problem, see the discussion of *Edict* 7 c.2 below.
[55] *Edict* 7 c.1 (SK 764/10).
[56] *Edict* 7 c.1 (SK 764/10–12). This passage continues with somewhat cryptic language to the effect that "survivors" had to give the same oath. (SK 764/12–13: ταὐτὸ δὲ τοῦτο καί τινας περιόντας περὶ τοὺς ἐκ τοῦ κατ' αὐτοὺς συστήματος πράττειν). Survivors of whom? The survivors of the deceased customer are already dealt with the preceding clause. Is the second clause a mere doublet, or elegant variation? Unlikely. Mattioli has sought to construe this language as referring to the survivors of the bank lender, deducing that it was not just defendants that had to give oath as to the existence (or non-existence) of the debt but that plaintiffs (or their successors) did, too. Mattioli, *Giustiniano*, 122 n.12. But c.1 makes no provision for oath by bankers in their capacity as lenders. Just as the operative provision on oaths speaks in terms of oaths from those liable as heirs and successors to debtors (τοὺς κατὰ τοῦτον εὐθυνομένους τὸν τρόπον), so too does the "reciprocal" provision requiring oaths from bankers apply only when they act as borrowers (SK 764/13–14: ὅπερ καὶ παρὰ τῶν ἱκετῶν εὐθυνομένων παρὰ τῶν αὐτῶν διαδίκων γίνεσθαι προστάττομεν) (emphasis supplied in both instances). Moreover, the "cryptic" language speaks only in terms of oaths by "survivors" (περιόντας) of the bankers, with no mention of oaths by bankers themselves. Justice Fred H. Blume was probably closer to the mark when he construed this language as referring to the survivors of deceased bankers who were defendant borrowers indebted to other bankers. Fred H. Blume, "Annotated Justinian Code: Justinian's Novels," n.d., chap. 1, University of Wyoming, George W. Hopper Law Library, https://www.uwyo.edu/lawlib/blume-justinian/ajc-edition-2/novels/index.html. If Blume's interpretation is correct, it constitutes one of several references to bankers regularly acting as borrowers as well as lenders. This side of the profession's activities has received little attention.
[57] Accepting, with Schoell & Kroll, Zachariä's emendation of ἱκετῶν for the MS οἰκετῶν (SK 764/13 and note *ad loc.*); ἱκέτης in its various forms occurs elsewhere in *Edict* 7 (SK 765/2; SK 766/7; SK 766/15; SK 767/2; SK 767/23).
[58] See *Cod. Iust.* 4.1.3 (286); Díaz Bautista, *Estudios*, 31–32 n.43.
[59] And this would the case whether the (false) denial was attributable to fraud or only to negligence. Mattioli, *Giustiniano*, 123. Penalty *in duplum* was a common feature of Justinianic legislation. See, *e.g.*, *Nov.* 18 c.8 (1 Mar. 536); van der Wal, *Manuale 2nd*, 171 para. 1117.
[60] *Edict* 7 c.1 (SK 764/15); Miller and Sarris, *Novels*, 2:1044 n.7.

the debt worked together, heightening the risks to heirs and successors of denying the existence of the decedent's debt.[61]

Plague. It is difficult to overstate the extent of the innovation effected by *Edict* 7 in allowing a defendant's oath to be refuted by the evidence of bankers' daily journals alone. Roman law had long abided by the principle that a document prepared and signed by only one party could not bind another to his detriment; some expression of will on the part of a prospective debtor was always required for him to be deemed bound.[62] Yet, whatever may be the case with respect to accounts mentioned in other pieces of Justinian's bank legislation, there is little basis for thinking that the journals mentioned in this chapter of *Edict* 7 were anything other than unilateral documents, prepared, signed and (if applicable) sealed by the banker and/or his clerks alone.[63] By enabling a debt to be found to exist solely on the basis of a mere unilateral account entry, this provision of *Edict* 7 marked a real departure from pre-existing norms. Was plague the reason for it? That is indeed a plausible explanation, but it is not the only plausible explanation. The facts described in the *Edict's* preamble, which clearly derive from the banker's originating petition, suggest that some heirs and successors were committing sharp practice by denying the existence of the predecessor's debts.[64] Such practices were as old as Roman law itself, and the onset of plague cannot possibly have marked the first occasion on which the courts of Constantinople faced the unedifying spectacle of heirs and successors seeking to wriggle out of inherited liabilities.

That said, there is the question of scale: a practice of denying as decedent's debts might be nothing more than a nuisance to bankers in ordinary times but a serious threat to their solvency at a time of mass death. Was such an increase in scale actually evident the time *Edict* 7 was promulgated? Perhaps, but the relevant text does not mention the incidence of such a practice increasing, and it is otherwise consistent with the possibility that such an increase was not yet taking place but as yet only still in prospect. And its remedy—allowing the use of documentary evidence of a sort not previously permitted to establish the existence of a debt—presumes the continuation of prevailing documentary practices in bank lending and the continued operation of

[61] Díaz Bautista, *Estudios*, 31–32.
[62] Evans-Jones and MacCormack, "Obligations," 149 (discussing earlier law, in the form of Gai., *Inst.*, 3.128–138 [=de Zulueta, *Institutes of Gaius* 1:194-196]). The relevant legal institution of the classical law, the contact *lit(t)eris*, had fallen into desuetude by Justinian's reign, and the compilers of his *Digest* omitted the institution even as it retained the principle that some expression of will on the part of the debtor was necessary for a debt to be recognized. *Dig.* 29.5.26 (*Nuda ratio non facit aliquem debitorem…*); *Dig.* 15.1.49.2 (not even where the *nuda ratio* is the purported debtor's own account entry). Somewhat artificially, the compilers of *Institutes* retained the contact *lit(t)eris* for purposes of instruction. *Inst. Iust.* 3.21; Nicholas, *Introduction*, 196–98; Kaser, *RP*, 2:365–366.
[63] Díaz Bautista, *Estudios*, 33. For an example of a provision mentioning accounts countersigned by the client, see, *e.g.*, *Nov.* 136 c.6 (SK 694/13–15).
[64] *Edict* 7 pr. (SK 764/6–8).

courts in a manner inconsistent with the economic standstill and administrative chaos portrayed in the pages of Procopius and John of Ephesus. To the extent bankers were already familiar with such ruses by debtors' heirs from pre-plague experience, their petition need not have been prompted by actual experience of an increase in denials on account of plague. It might instead reflect the bankers' (reasonable) expectation that such denials might increase along with the number of dead debtors. We might then conclude that, even as the first chapter of *Edict* 7 can be linked to plague, it is better explained as a response to the anticipated consequences of its arrival in the capital (or, bearing in mind Procopius' observation that mortality rates were initially low, an anticipated increase in mortality that was not yet in evidence) than to the actual effects of the epidemic there.

Authenticating Documents

We next move on to the second chapter of *Edict* 7, which addresses the means by which a bank creditor might introduce private documents as evidence to demonstrate the existence of a debt claim, and the means by which such documents might be authenticated. These provisions are among the most difficult of Justinian's extant bank legislation, in terms of both the complex doctrinal background against which they operate and their own formidable opacity. Even with all their difficulty, however, it is remarkable how little the provisions of chapter 2 (however construed) do to address the foreseeable consequences of pandemic. But that first requires an analysis of what the provisions do do. And so, with advanced apology to the non-lawyer reader, we dive in…

Background. Classical Roman law had relatively little to say about authenticating written documents.[65] When documents for the most part took the form of wax tablets, the problem of authentication was the relatively straightforward one of verifying the seals affixed by signatories and witnesses.[66] The transition to papyrus or parchment introduced the more complex problems of verifying signatures. By late antiquity, a tripartite approach had developed, one that differentiated by type of document.[67] What we might call official documents (*acta, gesta*, ὑπομνήματα, and other records issued by a public authority) had the highest probative force and could be introduced as evidence with no need for anything more by way of authentication than the public mark they bore. Private parties could, if they wished, give their own documents such force by having them executed

[65] Absent a few exceptions, writing was not constitutive of an obligation in the classical law but rather only evidence of it. Of course, writing often constituted the best available evidence, and under the influence of Hellenistic legal practice it grew in importance in late antiquity such that important transactions came to be reduced to writing in the ordinary course. Kaser, *RP*, 2:75 ff.

[66] Amelotti, "Giustiniano e la comparatio litterarum," 1.

[67] On the tripartite structure described here, see Bethmann-Hollweg, *Der römische Civilprozeß*, 3: Cognitiones:281–83; Dieter Simon, *Untersuchungen zum Justinianischen Zivilprozess* (München: Beck, 1969), 289–98.

by or before a public official (*apud acta*) or filed in the public records through *insinuatio*.[68] The second category of documents comprised those prepared with the cooperation of a notary *(tabellio*): *instrumenta publice confecta, instrumenta publica*, συμβόλαια ἐπ' ἀγορᾶς συντελούμενα, συμβόλαια ἀγοραῖα. Because the notary was not himself a public official, the probative value of these documents was considered inferior to that of official documents: they enjoyed full probative force in litigation only when supported by an oath given by the notary who executed them. Finally, there were privately drawn-up documents: *cautiones, chirographa, ἰδιόχειρα.* These documents did not generally enjoy probative force but could be made to do so, either through *insinuatio* or by notarization. In the third quarter of the fifth century, however, this third category of documents acquired some degree of probative value, depending on how they were drawn up. If not witnessed by at least three reputable persons, privately drawn-up documents were effective only for actions *in personam*; for actions *in rem*, however, including the commercially important actions on pledge and hypothec, they would cede to publicly drawn up documents, even those of later date.[69] But if privately drawn-up documents were witnessed by at least three reputable persons (*instrumenta quasi publice confecta*), they could be introduced into evidence for all purposes, with the same probative value in litigation as notarized documents if supported by the oaths of the witnesses, which served in place of the notary's.[70] Even when fully witnessed, though, private documents continued to be viewed with suspicion for having been drawn up "in secrecy."[71]

In his *Codex*, Justinian rebalanced the relative weight of public documents vs. those drawn up privately. The constitution by which he did so governs the scenario where a party to a dispute claims that a signature on a document purporting to be his is not genuine and his opponent seeks to prove its authenticity by *comparatio litterarum, i.e.*, comparison of the disputed signature with his signature on another, undisputed (or undisputable) document. *Cod. Iust.* 4.21.20 evinces an ill-disguised suspicion of the use of private documents to authenticate other documents in this way. It limited *comparatio* to comparison against judicial or public documents (*vel ex forensibus vel publicis instrumentis*) or, in a concession to practice, against privately drawn-up documents

[68] This kind of public authentication was prescribed not just for litigation but also for certain important transaction types, such as wills or large gifts.
[69] Unlike actions *in rem*, actions *in personam* generally did not extend to third parties, meaning that an asset of the debtor that had found its way into the hands of a third party remained out of reach of a creditor whose actions were so limited. On the distinction between actions *in personam* and actions *in rem*, see Nicholas, *Introduction*, 99–103; Kaser, Knütel, and Lohsse, *Studienbuch*, 50–52 [§4 ¶¶7–11].
[70] *Cod. Iust.* 8.17.11 (472). This saving clause for thrice-witnessed documents may be a later interpolation. Kaser, *RP*, 2:80 n.57 and 2:318 n.35.
[71] *Cod. Iust.* 8.17.11 (472) (*secrete*).

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witnessed by three reputable witnesses.[72] If not so witnessed, private documents could not be used as *comparanda* to establish the authenticity of other documents, not even for the limited purposes allowed by the fifth-century constitution just discussed.[73] Justinian restated these rules of the *Codex* in a *Novel* of 537, with one (wholly reasonable) qualification: if a private document was adduced by a litigant in support of his cause, that same document could be used as a *comparandum* to authenticate a document adduced against him.[74] Not even one year later, though, Justinian would put the doctrine on an entirely new footing: *Novel* 73 asserted the primacy of witness testimony over document comparison as the most favoured method of authenticating documents introduced into evidence, relegating *comparatio litterarum* to a mere back-up role where other forms of proof were unavailable.[75] *Comparatio* would retain this back-up function going forward for all purposes, with one exception.

That exception was disputes involving bank contracts. Justinian had on several occasions acted to give greater weight to documentary evidence in banking disputes, not just at the time of plague but also several years before. In 535 (or perhaps 536),[76] *Novel* 136 allowed bankers to pursue actions *in personam* based on a publicly executed document (συμβόλαιον ἀγοραῖον) purporting to be written or signed by the debtor.[77] In addition, it granted special protection to any account document (λογοθέσια) stating the purpose of the loan and signed by the debtor, or any agreement (ὁμολογία) based thereon, buttressing them against what was perhaps a debtor's most powerful weapon in litigation, the *exceptio non numeratae pecuniae*.[78] If those documents contained statements of the purposes for which the money was lent, the debtors could no longer avail themselves of the benefit of the *exceptio.*

Justinian revisited the question of bankers' documentary evidence, specifically their accounts, a few years later in *Edict* 9, the second chapter of which sets forth two distinct but related provisions. The first deals with account books, of both banker and client.[79] Analogous to the rule of

[72] Such witnessed documents were equated to public documents for this purpose. *Cod. Iust.* 4.21.20 (18 Mar. 530). Justinian had imposed a similar rule for loans of greater than 50 pounds of gold already two years earlier. *Cod. Iust.* 4.2.17 (1 June 528); Kaser, *RP*, 2:80 n.57.
[73] *Cod. Iust.* 4.21.20 c.1.
[74] *Nov.* 49 c.2.1 (18 Aug. 537).
[75] *Nov.* 73 (4 June 538); Amelotti, "Giustiniano e la comparatio litterarum," 5–6; and at greater length Silvia Schiavo, *Il falso documentale tra prevenzione e repressione: impositio fidei criminaliter agere civiliter agere*, Pubblicazioni della Facoltà giuridica dell'Università di Ferrara, ser. 2, 48 (Milano: Giuffrè, 2007), 81–102.
[76] On the date of *Nov.* 136, see "*Excursus on the Dating of Novel 136*" in Chapter 2. Whether it is datable to 535 or 536 is irrelevant to the argument made here: in either case, *Nov.* 136 preceded *Edict* 7 by several years.
[77] *Nov.* 136 c.5 pr. (SK 693/26–SK 694/1). See discussion at note 163 in Chapter 2.
[78] *Nov.* 136 c.6. See discussion at notes 167–172 in Chapter 2.
[79] The documents mentioned in *Edict* 9 c.2.1 are λογισμοὺς, which could be ἀντισυγγράφους ἢ αὐτογράφους (SK 773/24). Λογισμοί are accounts, or in this context, account books. Miller and Sarris, *Novels*, 2:1058 n.7. Such accounts comprised lists of receipts and of expenditures. *P.Oxy* XIX 2243(a); Sarris, *Economy*, 29–49. The λογισμοί were

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reciprocity enacted by the constitution of 537 discussed two paragraphs above (at note 74), it enunciated the eminently just principle that a client adducing a document for purposes of proving what was paid by him could not at the same time deny the validity of that same document for purposes of proving what had been paid to him.[80] To be sure, that document had to bear the signature of the chief banker or one of his managers[81] and be handwritten or signed by the client. But if those conditions were met, a party was barred from claiming a benefit from one side of the accounts while denying a detriment from the other side.[82] The second provision of *Edict* 9 relevant here states that the account books of banker and client should be given equal weight for determining what was owed, with no presumption in favour of the client's.[83] If both account books agreed, what they showed was to be given effect.[84] If they differed, it was open for each party to demonstrate that the other's were in error due to miscalculation or over-charging.[85] The limits of these provisions of *Edict* 9 are manifest: they did not serve to elevate the account books of either bankers or clients to the status of an independent basis of proof (via *comparatio*) to establish the authenticity of other documents, much less their own. Instead, they served merely as a sort of estoppel: a party asserting one side of a set of accounts could not deny what the other side of those same accounts showed. And if banker and client adduced separate accounts that agreed, then the points of agreement were given effect, with the balance left to be determined in accordance with the otherwise applicable rules of evidence. In either case, the bankers were unlikely to have been satisfied with this relief for what they must have wanted was a recognition that their accounts and other private documents sufficed on their own to prove their clients' debts.

Edict 7 c.2. In *Edict* 7 Justinian accorded greater scope for use of private documents as evidence in bank litigation, though to what extent is disputed. The introductory text of chapter 2 tells us that the bankers' petition had identified a practical defect in the regime for *comparatio litterarum* hitherto in force. As discussed above, to the extent the new regime established by *Novel*

ἀντισύγγραφοι if executed in duplicate or counterpart. van der Wal, *Manuale 2nd*, 173 para. 1122; Thurman, "Thirteen Edicts," 125–26 n.221. The λογισμοί αὐτόγραφοι refers to the handwritten entries. See also later in the same provision of *Edict* 9 c.2.1 (SK 773/29: αὐτογράφοις βρεβίοις); Thurman, 126 n.224. Cf. *Cod. Iust.* 4.21.22.5.8 (without date) (ἀργυροπρατικὰ βρέβια, mentioning them as being kept on πυκτάς, *i.e.*, tablets).

[80] *Edict* 9 c.2.1. Bankers were analogously bound to recognize both sides of an account book's evidence. van der Wal, *Manuale 2nd*, 121 para. 844.

[81] The precise import of the term ἁρμαρίται is uncertain but it seems to mean some sort of bank manager, perhaps a high-ranking one. van der Wal, 107 n.5. Thurman notes a scholion to the Greek version of Justinian's *Institutes* 4.7.2 (ἀνάγνωθι οἱ προβληθέντες τῶν πραγμάτων, τούτεστιν οἱ καλούμενα ἁρμαρῆται). Thurman, "Thirteen Edicts," 126 n.223. Zachariä glossed the term as *institor*. Zachariä von Lingenthal, *Anekdota*, 224 n.83.

[82] van der Wal, *Manuale 2nd*, 107 para. 748.

[83] *Edict* 9 c.2.2.

[84] *Edict* 9 c.2.2 (SK 773/31–774/1).

[85] *Edict* 9 c.2.2 (SK 774/2–3).

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73 admitted the use of *comparatio litterarum* at all, it had (subject to the slight accommodations afforded in *Novel* 136 and *Edict* 9) limited it to public documents, notarised documents, or thrice-witnessed private documents. The alleged practical defect was that the bankers' many clients of high social standing were reluctant to have their financial details opened to public scrutiny, as would be the case if their bank loans or other transactions were attested in these relatively public ways: such clients, we are told, insisted that their dealings with the bankers be documented only privately.[86] The result was a paucity of *comparanda* available for use in establishing authenticity, precisely in the context of transactions with the customers most likely to resort to litigation—those who by virtue of birth and status were equipped with the wherewithal to resist even well-founded claims. The bankers thus petitioned for increased scope to introduce private documents as evidence without having to establish their authenticity by *comparatio* against public or notarised documents. Justinian's response in *Edict* 7 was ambivalent, couched as a "middle way", i.e., a compromise.[87]

What was this middle way, and what limitations did it impose on the use of *comparatio litterarum* for purposes of authentication by resort to *comparanda* that were private documents? As Silvia Schiavo has observed, construing the "middle way" to mean simply that the new regime established by second chapter of *Edict* 7 was reciprocal—meaning that they might be used both by the bankers and against them—does little to explain what that new regime entailed for the limitations on the practice of *comparatio.*[88] Whatever these limitations were, they did not meaningfully restrict the type of private documents that could potentially be adduced as primary evidence in bank litigation. The preface to the second chapter recites the bank's petition, which contemplates a world of potential evidence in the form of "contracts, credit notes or account statements, written in the debtor's own hand."[89] The operative provision is similarly capacious, contemplating the introduction into evidence of ἰδιόχειρα τῶν συναλλαξάντων γράμματα., *i.e.*, private documents of the contract parties.[90] The *Edict's* provision on the range of permissible *comparanda* is similarly capacious. On this point, the *Edict* marked a significant change from the rules put in place in 538. In *Novel* 73 Justinian had emphasised the use of testimony by witnesses to

[86] *Nov.* 7 c.2 pr. (SK 764/21–23).
[87] *Edict* 7 c.2.1 (SK 764/25: Καὶ ἐν τούτῳ τοίνυν ἡμεῖς ὁδόν τινα μέσην βαδίζοντες). On the desirability of the middle way in Roman doctrine, see *Dig.* 5.4.3; Thurman, "Thirteen Edicts," 111 n.149. This provision of c.2.1 goes on to state that the middle way should be the one used by both bankers against their debtors and by those debtors against the bankers. Such a reciprocity clause is common to almost all the relief provided by *Edict* 7. See the discussion of *Edict* 7 c.8 below. *Pace* Díaz Bautista, *Estudios*, 41, this reciprocity clause is distinct from the "middle way," which has a different import here, indicating that at least some aspect of the bankers' request is being denied.
[88] Schiavo, *Il falso documentale*, 106–8, in reliance on the text at SK 764/25–26.
[89] SK 794/19–20: ὁμολογίαις ἢ πιττακίοις ἢ λογοθεσίοις τῇ ἐκείνων καταγραφεῖσι χειρί.
[90] *Edict* 7 c.2.1 (SK 764/27). We should not be led by the etymology of ἰδιόχειρα γράμματα to construe the term as referring solely to documents written entirely in the debtor's own hand, to the exclusion of documents merely signed or otherwise subscribed by him. Díaz Bautista, *Estudios*, 15–16.

DOI: 10.14754/CEU.2024.02

the document comprising the primary evidence as the main mode of authentication, relegating *comparatio* to circumstances where no other means of proof were to hand.[91] The range of private documents contemplated for use as *comparanda* by *Edict* 7 instead reverted—at least in the context of bank litigation— essentially to the rules previously in place prior to *Novel* 73, i.e., the rules set out in *Cod. Iust.* 4.21.20.[92]

This renewed ability to resort to *comparatio* was, however, made subject to limitations, which are hinted at in Justinian's reference to a middle way. These limitations suggest that something other than a mere return to the regime of the *Codex* was at issue. The nature of what that "something" was is the subject of significant disagreement, in ways that directly bear on what evidence this provision of *Edict* 7 does or does not provide for the consequences of plague. The text, which is perhaps unsound, is notable for its obscurity:

> θεσπίζομεν, εἰ τοιαῦτα προφέρουσιν ἰδιόχειρα τῶν συναλλαξάντων γράμματα, ἅπερ ἢ αὐτός, οὗτινος εἶναι λέγεται, ἢ οἱ αὐτοῦ κληρονόμοι τε καὶ διάδοχοι οὐ δύνανται μεθ' ὅρκου δόσεως ἀπαρνήσασθαι οἷα παρ' ἐκείνου γεγράφθαι, οὗπερ ὄνομα φέρουσι, τὴν ἀναργυρίαν μὴ προβαλλόμενοι, ἀλλὰ καὶ δυνηθείη πρὸς τούτοις ὁ ἀργυροπράτης ἐξ ἀγοραίου γραμματείου τὸ ἔγγραφον πιστώσασθαι, ἢ αὐτὸς μὲν τούτου κατολιγωρήσειεν, ὁ δὲ ἀντίδικος μὴ δυνηθείη ἐκ τῆς ἄλλου ἀγοραίου συγκρίσεως ἐλέγξαι τὸ ψεῦδος, τηνικαῦτα ἐκ τῶν ὡμολογημένων καὶ ἀναμφιβόλων καὶ τῇ τῶν μαρτύρων ὑπογραφῇ βεβαίων ἰδιοχείρων συμβολαίων πρὸς τὰ παρὰ τῶν ἀργυροπρατῶν ἢ κατ' αὐτῶν προφερόμενα τῶν συναλλαξάντων ἰδιόχειρα γράμματα τὴν σύγκρισιν γίνεσθαι καὶ εἶναι αὐτὰ βέβαια, οὐκ ἐλάττονα τῶν ἀγοραίων συμβολαίων ἔχοντα δύναμιν, οἷα οὐκ ἀσφαλείας αὐτοῖς δεούσης, ἀλλὰ μόνου τοῦ σχήματος.[93]

[91] Díaz Bautista, 47–48; Miller and Sarris, *Novels*, 2:1046 n.12.
[92] *Edict* 7 c.2.1 (SK 764/31–32). The main difference from the *Codex* provision appears to be that the number of (plural) witnesses whose signature is required to be on a private document for it to be used as a *comparandum* is not specified.
[93] *Edict* 7 c.2.1 (SK 764/26–765/3). David Miller's translation (p. 1045) reads as follows: "By this, we decree that if they are producing an autograph document of their clients' such that either the alleged author, or his heirs and successors, cannot deny on oath that they have been written by the person whose name they bear, and cannot enter a claim of non-payment; and should the banker, in addition, be able to establish the genuineness of its contents from a public instrument—or else, should he have disdained to do that, but the adversary should be unable to prove it a forgery by comparison with another document, made publicly—autograph documents confirmed by what has been agreed and is not at issue, and by the witnesses' signatures, are then to be compared with autograph documents produced by the bankers, or by the clients against them; they are then to be confirmed as having no less weight than public instruments, on the ground that all they lack is the form, not the reliability." With greatest possible respect for the skill with which this translation has been rendered, the mysteries of the Greek text discussed in the following paragraphs are such that no translation can capture them. Of necessity, the Greek has to be confronted head-on.

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The principal difficulty lies in the first four lines of the protasis (from εἰ τοιαῦτα to προβαλλόμενοι), of which there are nearly as many interpretations as scholars publishing on it. The various interpretations differ mainly in respect of what this passage says about the two debtor defences mentioned—namely the oath and the *exceptio non numeratae pecuniae*—and their relationship both to each other and to Justinian's vaunted middle way. Some scholars have construed the quoted text as preserving a debtor's ability to defend by way of oath or by the *exceptio non numeratae pecuniae*.[94] This reading is faithful to the Greek but has little else to recommend it, as it would amount to no middle way at all for, if correct, the provision's relief is very nearly illusory.[95] Alternatively, some have sought to avoid that difficulty by construing the text in a diametrically opposed manner, namely as precluding debtors from offering a defensive oath and also from invoking the *exceptio non numeratae pecuniae*.[96] While this reading perhaps makes more doctrinal sense, it stretches the Greek text unduly.[97] And it yields no more of a middle way than does its opposite, tilting entirely in favour of the creditor.

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[94] van der Wal, *Manuale 2nd*, 172 para. 1121. That is, if a banker introduced a private document to prove the authenticity of another by *comparatio*, the debtor could defend by giving an oath that the *comparandum* was not authentic or by lodging the *exceptio non numeratae pecunia.* On τὴν ἀναργυρίαν as a translation of *exceptio non numeratae pecunia*, see Díaz Bautista, *Estudios*, 45 n.66; van der Wal, *Manuale 2nd*, 170 n.49.

[95] The giving of an oath would pose little obstacle to a debtor who *ex hypothesi* was denying the authenticity of a document purportedly signed or handwritten by himself. And the *exceptio non numeratae pecuniae* was, as we have seen, a powerful weapon in the hands of a defendant. See discussion at notes 152–155 in Chapter 2. In addition, as van der Wal himself noted, his reading implies a conceptual disconnect in allowing authentication via *comparatio* against private documents to be defeated by the *exceptio non numeratae pecuniae*, which by its nature challenges not the authenticity of evidence but the underlying fact of the loan. van der Wal, *Manuale 2nd*, 172 para. 1121 with n.62. As Mario Amelotti has pointed out, however, under the provisions of *Nov.* 136, a debtor could not invoke the *exceptio non numeratae pecunia* if he had written the entire document in his own hand or signed a notarial deed or the bankers' books. Amelotti, "Giustiniano e la comparatio litterarum," 6. Now, these provisions of *Nov.* 136 and *Edict* 7 address different evidentiary questions: *Nov.* 136 addresses documents introduced as primary evidence, whereas *Edict* 7 deals with private documents adduced as *comparanda*. But Amelotti's question is apt: What, precisely were the private documents that a bank creditor might seek to adduce for which authentication via *comparatio* was needed, and that were not the type for which use of the *exceptio non numeratae pecuniae* was barred by *Nov.* 136? If one follows this line of reasoning to its end, van der Wal's interpretation has this provision of *Edict* 7 solving a non-existent problem, which is good enough reason to reject it.

[96] Díaz Bautista, *Estudios*, 42–44, arguing from the (assumed) intent of this provision as affording some degree of protection to bankers from debtors bent on defrauding them.

[97] The lines Díaz Bautista purports to construe are in the protasis of the long condition that makes up the first sentence: They describe the factual situation addressed by the legislator, not the relief granted, which appears only in the apodosis commencing with τηνικαῦτα some 30 words later. Díaz Bautista defends this interpretation by reference the word ἅπερ in the passage quoted: where van der Wal (correctly) construed it as a relative pronoun (meaning that the clauses that follow are therefore relative ones, limiting the universe of private documents that can be adduced to those that cannot be denied by oath or made subject to the *exceptio non numeratae pecuniae*), Díaz Bautista construed ἅπερ as a demonstrative (with the following clauses expressing the result that follows from the plaintiff adducing private documents, *i.e.*, closing off the possibility of the defendant offering an oath or lodging the *exceptio*). Díaz Bautista, 42–44. Not only does this reading ignore the import of τηνικαῦτα in introducing the apodosis at a later point, it hangs more weight on the -περ in ἅπερ than the poor little particle can reasonably bear. See *LSJ* sv. ὅσπερ §§I.1 and II.2 and 5; Herbert Weir Smyth and Gordon M. Messing, *Greek Grammar*, 15. print (Cambridge, Mass: Harvard University Press, 1984), paras. 338c and 2965.; J.D. Denniston and K.J. Dover, *The Greek Particles*, 2nd ed (Oxford: Oxford University Press, 1950), *s.v.* περ.

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Far better are interpretations that yield results that one might plausibly describe as the middle way promised by the *Edict's* text. Some scholars have sought simply to split the difference in procedural terms. Giovanni Luchetti, for example, interpreted the text to allow a debtor to defeat private documents proferred against him by denying their authenticity on oath, but only if he did so before the creditor offered his own oath as to its veracity; thereafter, the *exceptio non numeratae pecuniae* would comprise the only defence available.[98] Insofar as the creditor could offer his own oath at the time of his choosing—including at the moment of introducing the document sought to be introduced as *comparandum*—Luchetti's solution would, in practice, deny debtors the use of defensive oaths while allowing them the benefit of the *exceptio non numeratae pecuniae.* This solution might be construed as a middle way, even if only in purely procedural terms, but it is perhaps not entirely satisfying inasmuch as it does not abolish the possibility of giving oath but just renders it illusory in practice. [99]

Fabiana Mattioli, in her turn, has offered another middle-way interpretation, one that also speaks in procedural terms. Under *Cod. Iust.* 4.21.20, recall, thrice-witnessed documents could serve as *comparanda* to authenticate other documents, but only if the witnesses appeared on oath to attest to their signature.[100] And in the limited cases where *comparatio* was permitted after *Novel* 73, testimony by eyewitness was similarly required as a general rule.[101] Even as the second chapter of *Edict* 7 reintroduced the possibility that such documents might once again be used as *comparanda* in bank litigation, it omitted mention of witnesses having to appear to give oath as a condition. Mattioli has identified the innovation of the quoted in this omission, to wit in obviating the need for witnesses to show up in court to swear oaths as to the veracity of *comparanda*.[102] This is, of course, an argument from silence, and it is open to several objections. Is it not at least as likely that those provisions of the earlier constitutions were rather meant to be inferred by the readers of *Edict* 7?[103] These readers, as the various requests recounted in it demonstrates, had a deep understanding of pre-existing law. If Justinian intended to effect such a technical change, what purpose, legal, political, rhetorical, or otherwise, was served by leaving the nub of the matter unstated?

[98] Luchetti, "Banche," 457–58.
[99] In addition, Luchetti arguably misconstrues the Greek text: he takes the words μεθ' ὅρκου δόσεως as referring to an oath offered by the creditor when introducing a document as *comparandum,* when those words clearly relate to the clause within which they appear, namely the debtor's denial (ἀπαρνήσασθαι, *i.e.*, by oath). Luchetti, "Banche," 458.
[100] See text at note 70 above.
[101] *Nov.* 73 c.1, c.2 and c.4. While exception was made for circumstances where witnesses had died (in which case witness testimony could be replaced by oath of the party introducing the document, c.7.3, the entire thrust of *Nov.* 73 was to condition *comparatio litterarum* upon, and subordinate it to, witness testimony. Arrigo D. Manfredini, "Documento di comparazione e 'comparatio litterarum'. C.4,21,20: sive o sine?," in *Iuris Vincula: Studi in Onore di Mario Talamanca*, vol. 5 (Napoli: Jovene, 2001), 142.
[102] Mattioli, *Giustiniano*, 130–31.
[103] Accord: Schiavo, *Il falso documentale,* 113.

DOI: 10.14754/CEU.2024.02

A more substantive conception of the middle way is implied by Justice Blume's early 20th-century translation from remote Wyoming. To the extent from one can discern from a translation without commentary, the learned judge construed the quoted text to mean that that, if a defendant could not deny the authenticity of document by oath, then he could not avail himself of the defence of *exceptio non numeratae pecuniae* either.[104] This reading construes the text as denying the benefit of the *exceptio* where the defendant cannot swear that the document is not genuine, but where he can so swear, both oath and *exceptio* are available as defences. Here is a true, substantive, not merely procedural "middle way" that the other readings lack.[105] Another substantive middle way can be found in Silvia Schiavo's study, which construes the second chapter of *Edict* 7 in a manner that gives full voice to the complexity of its Greek text and makes good (if complex) doctrinal sense, even if one cannot agree with her methodology of comparing different Latin translations that post-date it by centuries. On Schiavo's reading, the provision quoted above has the following import: If the debtor has not invoked the *exceptio non numeratae pecuniae* but has challenged the authenticity of a document adduced against him without offering an oath that it is not genuine, then if the banker can demonstrate authenticity by reference to a notarised document he can resort to *comparatio* using that as a *comparandum* or if he does not seek establish authenticity by reference to a notarised *comparandum* and the creditor or his heir does not establish the inauthenticity by reference to a notarised *comparandum*, then the banker may seek to establish authenticity by *comparatio* against private documents.[106] Here, too, is a true, if arduous, "middle way."

Plague. Which of these various views one adopts of the effects of *Edict* 7's provisions on the use of private documents as *comparanda* will influence the extent to which one views those measures as constituting a response to plague. As the preceding discussion shows, the range of views on the effects of these changes extends from the meaningless to the momentous. If one views

[104] Blume, "Justinian's Novels", specifically at https://www.uwyo.edu/lawlib/blume-justinian/_files/docs/AJCNovels2/Novels2-new-pdf/Edict%207_Replacement.pdf .

[105] Díaz Bautista, unaware (perhaps understandably) of Justice Blume's work, considered this interpretation but rejected it on the ground that it implies the existence of a category of documents that could not be denied by oath, which category does not exist as a matter of Roman law. Díaz Bautista, *Estudios*, 43. This objection is, however, too limited to persuade, for it addresses only the (non-existent) category of documents that cannot be denied as a matter of law. But the relevant passage—οὐ δύνανται μεθ' ὅρκου δόσεως ἀπαρνήσασθαι —does not necessarily speak in terms of a category of documents that cannot be challenged as a matter of law. It also encompasses documents that a defendant cannot deny on oath as a matter of fact, *i.e.*, because they are genuine. The factual situation in prospect in this passage is thus, on Blume's reading, one that was perhaps common under the law existing before *Edict* 7 and remains common even today, namely where a defendant seeks to exclude from evidence a document damaging to his case not on the ground that it is false but because it fails to meet applicable rules of evidence. In other words, on grounds of a technicality of the sort that practicing lawyers like Justice Blume would confront every day but that might escape the imagination of academic lawyers less attuned to the hurly-burly of real litigation.

[106] Schiavo, *Il falso documentale*, 110–13. Schiavo's adduction of Agylaeus' translation is not really helpful, and the *Synopsis* text upon which her argument relies is perhaps not compelling in view of the ambiguities of its genitive absolute constructions in the key passages. See Schmink and Simon, "Synopsis," 212–13.

the import of the *Edict's* second chapter as saving the possibility for debtors to defend by both oath and the *exceptio non numeratae pecuniae*, then this provison cannot be attributed to plague, for if the plague impaired the activities of bankers in any serious way, the evidentiary concessions granted to them might be expected to be something other than merely illusory.[107] Interpretations that veer to the other extreme—*i.e.*, as denying defendant debtors the opportunity of defending by either oath or the *exceptio*—can more readily be attributed to plague, by positing widespread difficulties in repaying loans, with the result that borrowers and their successors sought to challenge the evidence of documents, even those signed by themselves, on what might be seen as technicalities [108] This is an attractive argument, but suffers from the (perhaps fatal) weakness that the provisions under consideration do not presuppose death of clients, due to plague or otherwise. They apply, in the first instance, to the debtors themselves, while still alive.[109]

Of those scholars who have offered more plausibly "middle way" interpretations, Luchetti did not attribute this provision of *Edict* 7 to plague, and elsewhere he appears to favour explanations of Justinian's bank legislation that look to the increased social and political importance of bankers over interpretations of that legislation as responsive to crisis.[110] Mattioli has gone further, seeking to link this provision of *Edict* 7—the effect of which in her view was to eliminate the need for courtroom testimony—to plague by construing it as a prudential measure to minimize interpersonal contact.[111] If so, this would appear to be the only such measure put in place by Justinian's administration. Her ostensible link owes more to modern germ theories of disease than it does to understandings of understandings of disease prevalent in sixth-century Byzantium. Procopius, an eyewitness to events, tells us that person-to-person transmission was not an important vector for spread of the disease.[112] And Justinian's position, at least publicly, was that the plague was divine

[107] *Pace* van der Wal, *Manuale 2nd*, 172 n.61.
[108] As at Díaz Bautista, *Estudios*, 41. This reading is more coherent than van der Wal's inasmuch as the relief granted would be sufficiently significant to constitute a meaningful response to the bankers' petition.
[109] The preface to the *Edict's* second chapter posits the (living) client/debtor himself denying the debt. And while the operative provision (c.2.1) mentions the debtor's heirs and successors, it mentions the "alleged author" of the document, too, *i.e.*, the debtor. In other words, the provision's mention of the heirs and successors is not structural to the relief it grants and is better viewed as a matter of good legislative drafting under a legal regime where heirs, as universal successors, succeeded not just to the decedent's assets but also to his liabilities. See discussion at notes 50–53 above.
[110] Luchetti, "Banche," 543 n.9. His reading of the provision implies the abolition of defensive oath to defeat *comparatio* by oath in all but name, which would represent a meaningful shift in advantage from debtor to creditor. Thus it would be possible, to construct a theory whereby that shift represented some considered response to the consequences of plague upon bank activities, even if Luchetti himself did not do so.
[111] Mattioli, *Giustiniano*, 149.
[112] Procop. *Wars*, 2.22.23 [=Haury, 1:253]. See also the account in Evagrius, *Ecclesiastical History* 4.29 [=Bidez and Parmentier, *Evagrius*, 177–79], reporting that close proximity did not lead to illness in some cases but did so in others. To the extent that the plague took the (attested) bubonic form, direct person-to-person transmission would have been limited, but there is no way of knowing the extent to which it also assumed the more transmissible pneumonic form. Robert Sallares, "Ecology, Evolution, and Epidemiology of Plague," in *Plague and the End of Antiquity: The Pandemic of 541–750*, ed. Lester K. Little (New York: Cambridge University Press, 2007), 231–89.

DOI: 10.14754/CEU.2024.02

retribution for the population's sins.[113] It is implausible that either would have conceived of modern social-distancing measures as effective precautions against infection.

My own view is that those views like those of Justice Blume and Schiavo, which tread Justinian's middle way in terms that are substantive as well as procedural, make the stronger claims. On any view, however, the second chapter of *Edict* 7 represents a concession to the interests of bank creditors, even if on some interpretations that concession may not be significant. And if it is difficult to trace a link between these provisions on any interpretation and the death of debtors, linkage to more generalised economic distress is plausible, though that may or may not be the result of plague. On balance then, while we might rather agree with Amelotti that the provisions of *Edict* 7 reflect the growing importance of the bankers in early Byzantine politics and society,[114] it is at least possible that *Edict* 7 c.2 was intended to constitute an effort by Justinian to protect the bankers of Constantinople against the consequences of epidemic. But while such an interpretation is possible, it is hardly compelling, and not at all if by "consequences" we mean actual ones. Note what the second chapter of *Edict* 7, on any interpretation, assumes: the continued effectiveness of the capital city's courtroom system for the pursuit of debt claims. Moreover, to the extent it contemplates the pursuit of such claims not just against the debtor but also against his heirs and successors, this provision also assumes orderly functioning of succession, both testate and non-testate. As such, it presents a very different picture of the maintenance of social order than do our narrative sources, which speak of administrative chaos and of entire families being wiped out. Now, to some extent, that difference can be attributed to the differences between a normative statute issued by government vs. a highly rhetorical narrative account. But it is notable that these provisions of *Edict* 7 do not go further than they do in addressing scenarios foreseeable at a time of widespread death.

Wait, I'm Not Done Beating the Dead Horse of c.2 Just Yet: Before taking leave of our examination of *Edict* 7 c.2, it is worth casting a glance at its final sentence, which has caused much perplexity amongst modern scholars. It states that "no prejudice against the suppliants [*i.e.*, the

[113] See *Edict 7* pr. (SK 764/1–3: εἰ δὲ … ἡ τοῦ θείου νεύματος κίνησις τοῖς ἀνθρωπίνοις ἐνσκήπτει κακοῖς, ἡ ἐπαγομένη ἄνωθεν μετὰ φιλανθρωπίας παιδεία τῆς βασιλικῆς προνοίας τε καὶ φιλανθρωπίας ὑπόθεσις γίνεται), and perhaps also *Nov.* 77 c.1.1 (SK 382/ 20–28: διὰ τοῦτο οὖν πάντας τοὺς τοιούτους προτρέπομεν ἐκ τῶν εἰρημένων πλημμελημάτων ἀποσχέσθαι καὶ τὸν τοῦ θεοῦ φόβον κατὰ νοῦν λαμβάνειν καὶ ἀκολουθεῖν τοῖς καλῶς βιοῦσιν. διὰ γὰρ τὰ τοιαῦτα πλημμελήματα καὶ λιμοὶ καὶ σεισμοὶ καὶ λοιμοὶ γίνονται, καὶ διὰ τοῦτο παραινοῦμεν τοῖς τοιούτοις ἀποσχέσθαι τῶν εἰρημένων ἀτοπημάτων, ὥστε μὴ τὰς αὐτῶν ἀπολέσαι ψυχάς). See also John Malalas, *Chron.*, 18.92 [482] [=Thurn, *Ioannis Malalae Chronographia*, 407] and, in gory detail, the five vignettes by John of Ephesus preserved in the Chronicle of Zuqnin [79–109]. Witakowski, *Chronicle*, 74–98; Harrak, *Chronicle*, 94–113. For cautionary observations on the limits of early Byzantine conceptions of divine agency in human affairs, cf. Anthony Kaldellis, "The Literature of Plague and the Anxieties of Piety in Sixth-Century Byzantium," in *Piety and Plague: From Byzantium to the Baroque*, ed. Franco Mormando and Thomas Worcester (Kirksville, MO: Truman State University Press, 2007), 1–22.

[114] Amelotti, "Giustiniano e la comparatio litterarum," 6. Luchetti also may read as favouring this view. Amelotti further observes that the *Edict's* documentary reforms were transitory, leaving no trace future lawmaking. *Id.*, at n.190.

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bankers] is to arise from there being no hypothecs, nor any named heirs or successors, contained in the written agreements with them made by their clients."[115] Nico van der Wal, followed by Miller and Sarris, construed this language as granting a lending banker a tacit hypothec over the entirety of his debtor's property.[116] If this were the case, it would be remarkable, and not just for its grant of such a hypothec, which the bankers had requested and Justinian had denied some years earlier in *Novel* 136.[117] The terms by which that grant is given would also be remarkable, as (if one accepts that construction of the text) the final sentence of *Edict* 7 c.2.1 presents the grant of such a hypothec as no innovation at all, much less a significant one. On this view, that provision merely clarifies the obvious, namely that the absence of mention of a tacit hypothec cannot give rise to a negative inference as to its existence because the hypothec is by its nature tacit, *i.e.*, requiring no mention. Van der Wal spotted the problem, even if he could not solve it.[118] As Díaz Bautista recognized (probably correctly), the language of this final sentence does not, when properly construed, purport to grant some novel right of tacit hypothec *sotto voce*. Rather, the legal draftsman here more likely misconstrued the nature of a creditor's actions against a debtor's heirs and successors under Roman law, thinking that a creditor would require a hypothec or other right *in rem* to pursue property of his deceased debtor in the hands of an heir or successor. But of course, a decedent's creditor did not need such *in rem* rights to proceed against a universal successor, *i.e.*, the heirs and successors who are the object of this clause.[119] Those who succeeded to a decedent by way of universal succession inherited both the decedent's assets and his liabilities. The decedent's creditors could therefore pursue their debt claims *in personam* against them just as they could against the decedent. Rights *in rem* were unnecessary. The better view, then, is that this final sentence of *Edict* 7 c.2 did not grant a new tacit general hypothec in favour of bank creditors but instead simply clarified that creditors could pursue heirs and successors using whatever actions *in personam* survive. Lack of mention of hypothec was neither here nor there.

Subrogation of Claims

The third head of relief addressed by *Edict* 7 granted additional remedies for bank lenders to pursue debtor assets to meet unpaid debt claims. These additional remedies took the form of so-called subrogation rights—rights to step into the shoes of the debtor, so to speak, to pursue assets

[115] *Edict* 7 c.2.1 (SK 765/2–3: οὐδενὸς τοῖς ἱκετεύουσι γινομένου προκρίματος ἐκ τοῦ μὴ ἐγκεῖσθαι ὑποθήκας ἢ κληρονόμων ἢ διαδόχων ὄνομα τοῖς παρὰ τῶν συναλλαξάντων εἰς αὐτοὺς ἐγγράφοις γενομένοις).
[116] van der Wal, *Manuale 2nd*, 104 para. 732; Miller and Sarris, *Novels*, 2:1046 n.13.
[117] See discussion at notes 160–166 in Chapter 2.
[118] van der Wal, *Manuale 2nd*, 104 n.49.
[119] Díaz Bautista, *Estudios*, 48–49 is likely correct in seeing in this provision evidence of a marked decline in juridical reason. Perhaps as a result of Tribonian's powers fading toward the end of his life? Or his successor as *quaestor sacri palatii*, the dim-witted Junillus, already assuming the duties of the office?

DOI: 10.14754/CEU.2024.02

owed to the debtor or held by others on his behalf. By the time *Edict* 7 was promulgated in 542, the subject of the remedies available to a bank lender to pursue debtor assets was well worn: The bankers had requested related relief in the petition leading to *Novel* 136, in which the emperor granted the bankers' prayers only in very limited respect. What was new in 542 was not the bankers' requests but the emperor's response.

Background. Two provisions of *Novel* 136 provide relevant background to the relief discussed here. As discussed in Chapter 2, the third chapter of *Novel* 136 addressed the situation where a banker extended credit to fund a borrower's purchase of goods. It provided that, where it could be shown that an item had been purchased wholly from funds lent by the banker, the lending banker would be treated as if he had purchased the item himself.[120] The grant to the bankers of this special treatment—which departed substantially from classical Roman legal principles, pursuant to which ownership of a purchased item vested the purchaser absent any agreement to the contrary—marked a meaningful concession, one conferred several years prior to onset of plague.[121] The second, and more relevant, provision of *Novel* 136 prefiguring the relief granted in 542 was its fifth chapter. As that provision recounts, the bankers had asked for rather more than the remedy granted by *Novel* 136 c.3 with respect to items purchased by their debtors with borrowed money, for in 542 they asked, we are told, to be given tacit, legal hypothecs over the entirety of all the other assets of their debtors, as well.[122] The grant of so broad a remedy would have represented a significant departure from the ordinary principles of Roman contract law, and Justinian refused it, at least at that time, granting only a limited remedy instead.[123]

Edict 7 c.3. In the petition prompting *Edict* 7, the bank lobbyists returned to this theme, seeking relief denied them in *Novel* 136. Justinian's response to their renewed effort appears in the third chapter of *Edict* 7.[124] Its opening provision addresses the circumstance where a debtor dies and, due to poverty, has no heirs.[125] It allows a bank creditor to be subrogated to the rights of the

[120] *Nov.* 136 c.3 (1 Apr. 535). See "*Rights to a Borrower's Assets Purchased with Borrowed Moneys*" in Chapter 2.
[121] Lokin, "Revendication," 26–27; Miller and Sarris, *Novels*, 2:908 n.13.
[122] Luchetti, "Banche," sec. 4; van der Wal, *Manuale 2nd*, 104 para. 731; Miller and Sarris, *Novels*, 2:909 n.18.
[123] By way of reminder, *Novel* 136 c.5 provided that the bankers' remedies would be in the nature of those afforded by a general hypothec over the assets of the debtor only when agreed in writing; otherwise, the bankers' remedies would sound only *in personam,* not *in rem*. If the bank creditor sought to enforce upon the debt in the event of non-repayment, his legal action was limited to the debtor and his heirs and successors; it would not extend to assets of the debtors in the hands of others. See the discussion at notes 163–166 of Chapter 2.
[124] The text of *Edict* 7 c.3 itself contains no mention of the bankers' petition, but the preamble, c.8 and the epilogue make clear that the *Edict* was prompted in its entirety by bank petition(s). On c.3 as a response to a long line of bank requests, see van der Wal, *Manuale 2nd*, 104 n.50.
[125] *Edict* 7 c.3 (SK 765/5: εἴπερ τινὲς τῶν τετελευτηκότων δι' ἀπορίαν κληρονόμους μὲν οὐκ ἔσχον…). van der Wal, 104 para. 733. makes an uncharacteristic error when he attributes the ἀπορίαν to the heirs rather than to the decedent. It is clear from both text and context that the circumstance addressed is a deceased debtor who has no heirs because none was willing to assume universal succession because his debts exceeded his assets.

DOI: 10.14754/CEU.2024.02

deceased with respect to three categories of assets, namely 1) claims the decedent had against his own debtors, 2) assets pledged or hypothecated to the deceased by others, and 3) assets of the decedent held on deposit with others.[126] That remedy might be thought responsive to the predictable difficulties of lenders seeking to enforce debt claims at a time of widespread death. But the *Edict's* third chapter goes further, with a superficially modest but in fact significant change of emphasis. It grants to the bankers the same remedies in respect of debtors who were not dead but still very much alive. In the chapter's second limb, any reference to decedents, to lack of heirs, or even to death is gone. Also gone is any reference to the debtor suffering from poverty. In this second limb, then, even the assets of bank debtors still living, thriving, and unaffected by disease would henceforth be subject to rights of subrogation in favour of bank lenders. The justifications given for this change are hardly satisfying: Justinian asserts that such remedial actions are the sort that "naturally" (φύσει) accompany bank contracts[127] before going on to state a principle that owes more to Hellenistic law than to Roman, namely that it is unjust for a debtor to have rights over a purchased thing superior to those of a lender who provided the funds for its purchase.[128] Perhaps because of the law's weak reasoning, the scope and nature of these subrogation rights are disputed: some scholars take the view that they amount to a general hypothec over the entirety of the debtors assets, while others (probably correctly) have construed the relief as limited to the three categories of assets enumerated just above.[129] On either interpretation, though, the relief granted represented a meaningful improvement over prior law in the position of bank lenders vis-à-vis the assets of their debtors, both living and dead.

Plague. Regardless of which interpretation of this provision one adopts, the remedy it provides is readily enough linked to plague insofar as relates to deceased debtors. Not much legal or historical imagination is needed to envisage circumstances where lenders might be reduced to desperation in locating and pursuing the assets of deceased borrowers with which to satisfy unpaid debt claims at a time of widespread death. But with the extension of the same remedy to debtors still alive, that direct connection with plague is lost. The disjunction between the two limbs of the

[126] *Edict* 7 c.3 (SK 765/6–7: … χρεώστας δὲ κατέλιπον, ἢ καὶ πράγματά τινα ἐκείνοις διενεγκόντα ἐν παραθήκῃ ἢ ὑποθήκῃ παρά τισιν εὑρίσκεται). There is some uncertainty as to the construction of the words πράγματά τινα ἐκείνοις διενεγκόντα ἐν παραθήκῃ but Luchetti, "Banche," 465–66 is likely closest to the mark in seeing them as third-party assets pledged to the debtor. Cf. Díaz Bautista, *Estudios*, 133, 140; van der Wal, *Manuale 2nd*, 104 para. 733.
[127] *Edict* 7 c.3 (765/10–1). On nature in Justinian's *Novels* generally, see Lanata, *Legislazione*, 165–87.
[128] *Edict* 7 c.3 (765/11–13). See the discussion at notes 107–111 in Chapter 2.
[129] General hypothec: Díaz Bautista, *Estudios*, 133; van der Wal, *Manuale 2nd*, 104 para. 732; Miller and Sarris, *Novels*, 2:909 n.18 and 2:1046 n.13. Enumerated categories only: Luchetti, "Banche," 465–66; Mattioli, *Giustiniano*, 134 n.33. The Greek text supports only the latter. In addition, though the three categories of named assets may well exhaust the range of assets that a bank creditor might ordinarily be able to locate and pursue in the case of a deceased debtor without heirs on account of ἀπορία—the fact pattern addresssed by the first limb of *Edict* 7 c.3—there is little cause to think that would be the case for debtors still living and not in a state of ἀπορία, *i.e.*, those of the second limb.

DOI: 10.14754/CEU.2024.02

relief afforded by chapter 3 is significant. If we can assume that the grants of relief largely track the bankers' petition, then that petition had tacked onto a provision readily justifiable by the advent of plague (*i.e.*, the remedy with respect to deceased debtors) an additional provision that was superficially similar but in effect quite different, namely a remedy against debtors still alive. That similarity—to wit, the grant to bank lenders of additional rights to pursue the assets of debtors owed by or found in the hands of third parties—places the relief sought and granted by this chapter 3 of *Edict* 7 squarely within the field of the request for a tacit general hypothec over debtor assets that the bankers had requested and Justinian denied some years earlier in *Novel* 136 c.5. Whilst that earlier law had afforded limited relief, debtor assets still remained out of reach in many cases.

Plague provided the occasion for the bankers to have another go, so to speak. It is of course difficult to know whether their petition prompting *Edict* 7 repeated the earlier request for tacit general hypothecs or was rather couched in terms of the more tailored subrogation right that Justinian ended up granting. What we can be certain of, however, is that the bankers requested, and got, an improvement of their position vis-à-vis debtor assets as compared with earlier law, and that that improvement related both to deceased debtors, to whom plague was relevant, and to living debtors, to whom it was not. [130] While one might be tempted to claim that plague provided a mere pretext for the bankers cynically to lodge a series of requests unrelated to it, it is more prudent to take the view that plague provided the occasion for them to tack on such unrelated requests to a few that were related or that might plausibly be presented as such. Inasmuch as improving a bank lenders' position vis-à-vis debtor assets generally was understandably a *desideratum* on the part of the guild, it is not surprising that they should include within a request for relief that could be justified by plague—*i.e.*, that with respect to deceased debtors—a superficially similar request for relief against living debtors that could be justified by reference to plague only with difficulty, if at all. On this occasion, a strategy of tying a speculative request for relief to one more readily justifiable in light of the "looming presence of death" was successful. Neither the request nor the response to it, however, entail that the epidemic had already reached Constantinople, or that its effects had taken on meaningful extent, at the time of either the banker's petition or Justinian's promulgation of the *Edict.* That is because the circumstances addressed by both limbs were readily foreseeable long in advance of plague's arrival there.

[130] van der Wal, *Manuale 2nd*, 104 n.50, is perceptive in seeing the bankers and imperial chancellery as engaged in a long game of continued lobbying and piecemeal relief in this series of provisions, even if one might disagree with his characterisation of the details.

DOI: 10.14754/CEU.2024.02

Order of in rem *Remedies*

The fourth chapter of *Edict* 7 regulates the order in which bankers should pursue *in rem* remedies over properties hypothecated to secure loans made by them. Despite their brevity and apparent simplicity, these provisions have a complex hinterland that renders their interpretation complex.[131] Whichever interpretation one adopts, however, these provisions find little or no apparent justification in plague or its consequences.

*Background.*As explained in Chapter 2, it was customary practice in the Roman world for loans to be secured, in the form of personal security (guarantors), of real security (collateral), or both. Whereas in earlier periods creditors generally had a free choice as to which order they could pursue the various remedies available to them under these arrangements, that all changed in March 535. In *Novel* 4, Justinian revised the rules governing the order of such remedies, establishing a definite order in which creditor remedies had to be pursued: first against the primary obligor, then against the secondary obligors, and only then against hypothecated assets.[132] A creditor who failed to respect this order of remedy could be stymied by the defendant's invocation of the *beneficium excussionis,* i.e., the defence that he was not proceeding in accordance with the order required. As discussed more fully in the preceding chapter, these provisions of *Novel* 4 excluded bank promises to pay from their scope, leaving the bankers who issued them as part of their activities in an invidious position.[133] Where a banker sought to enforce a debt owing to him, any secondary obligor could insist that the bankers demonstrate that he had first pursued the primary obligor. But when the shoe was on the other foot, so to speak, and others sued to enforce ἀντιφωνήσεις/*constituta* extended by bankers to them, the bankers could not fend off the plaintiff in the same way. The bankers therefore sought relief from the emperor, and in *Novel* 136 obtained it, if only in limited part and in respect only of personal security. The relief provided by *Novel* 136 did not, however, cover real security, which remained subject to the ordering rules of *Novel* 4.

Edict 7 c.4. Justinian was moved to address this omission in March 542, in response to the bankers' petition, as a mark of favour unique to them.[134] The fourth chapter of *Edict* 7 permitted bankers to proceed directly against persons who had acquired property subject to hypothec in favour of the banker without first having to demonstrate, as he did under *Novel* 4, that he had exhausted his remedies against the obligors.[135] More generally, the banker's claim to an asset would have priority

[131] If indeed they are not wholly misconceived. For the argument that *Edict* 7 c.4 reflects a decline in technical precision on the part of the legislative draftsmen, see Díaz Bautista, *Estudios*, 167.
[132] *Nov.* 4 (16 Mar. 535).
[133] *Nov.* 4 c.3.1. See the discussion under the caption "Order of Remedies: The *Beneficium Excussionis*" in Chapter 2.
[134] *Edict* 7 c.4 (SK 765/20: κατ' ἰδικὴν αὐτοῖς διδομένου φιλοτιμίαν).
[135] van der Wal, *Manuale 2nd*, 105 para. 737.

DOI: 10.14754/CEU.2024.02

over the similar claims of others, including one who had purchased that asset from the debtor, by virtue of the bank lender's priority in time.[136] The issue is related to that discussed in the context of the first chapter of *Novel* 136, discussed in Chapter 2, to wit, in what order did a creditor have to pursue his various remedies in respect of a debt? While there has been much perplexity among modern scholars as to the precise relation between these provisions of *Edict* 7 and those of *Novel* 4—specifically, how hard did a creditor have to go against the principal debtor (and his guarantors) before going after properties of their hypothecated to others?— these niceties do not affect the argument made here.[137] What is salient for present purposes is the recognition that the relief afforded by *Edict* 7 on this point represented the completion of unfinished business from *Novel* 136. In short, *Novel* 4's rules of order governing creditor remedies with respect to personal and real security disadvantaged bank lenders compared with other types. *Novel* 136 remediated this disadvantage in limited part for personal security by allowing bankers to seek by written contract the right to proceed directly against guarantors without first pursuing the principal debtor. Only in 542, with *Edict* 7, did remediation of the rules governing real security follow.

Plague. To what extent can this grant of relief be attributed to plague? The *Edict's* fourth chapter makes no mention of either sickness or death, or even of heirs or successors; in the fact pattern it addresses, the banker, his debtor, and the holder of the real security being pursued are all very much alive. Mattioli has argued for a connection between the relief afforded by the *Edict's* chapter 4 and plague by linking it to chapter 3, which as discussed above can be so tied, even if that tie is hardly compelling. On Mattioli's view, if the emperor allowed banker lenders to be subrogated to the rights of deceased debtors without heirs, it was a simple matter to extend that relief to allow the creditor to pursue his other *in rem* remedies while the debtor was still alive.[138] As in the case of the disconnect between the fact patterns addressed by the two links of chapter 3, however, it is precisely this dissimilarity in fact patterns that shows there is more at stake. As discussed above, the first limb of chapter 3 allowed the pursuit of property of deceased debtors without heirs. As such, it might rhetorically be justified as measure aimed at countering the effects of plague, whether actual or expected. To the extent Justinian was inclined to grant relief against the consequences of epidemic, the banker's petition for it therefore might expect to find favour. The (obvious) lobbying

[136] *Edict* 7 c.4 (SK 765/22–23 and SK 765/26).
[137] These provisions of *Edict* 7 assume that the banker's pursuit of the debtor must proceed to the extent of subjecting him to ἔκστασις, *i.e., cessio bonorum*, a late-antique version of insolvency: *Edict* 7 c.4 (SK 765/15–17 and SK 765/23–24). But, as discussed in the context of *Nov.* 136 at note 42 of Chapter 2, the text of *Nov.* 4 as we have it nowhere requires that. For the struggle to make sense of the discrepancy, cf. Schoell and Kroll's note to SK 765/15; Thurman, "Thirteen Edicts," 113 n.160; Díaz Bautista, *Estudios*, 160–67; Luchetti, "Banche," 468–69 n.53; van der Wal, *Manuale 2nd*, 105 n.52; Mattioli, *Giustiniano*, 136–137 with n.39. See also Miller and Sarris, *Novels*, 2:1046–1047 n.15.
[138] Mattioli, *Giustiniano*, 149–50.

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strategy was to leverage that relief by tacking on requests for other relief that could plausibly be presented as analogous, even if the resemblance was merely superficial and that other relief could not itself be cast as a response to epidemic. As in the case of the second limb of chapter 3, so too in the case chapter 4: both provisions allowed bankers to pursue the current and former property of debtors very much alive in ways not contemplated by prior law. In the case of chapter 4, the bankers might hope that the limitations on enforcement of *in rem* security set forth in *Novel* 4, under which they had long chafed, could at last be remediated. That this objective would come to be achieved via a superficially plausible but doctrinally misleading analogy between the factual circumstances addressed in chapters 3 and 4 of the *Edict* 7 is neither here nor there: The bankers had once again spotted an opportunity, pursued it, and met with an accommodating response in Justinian's legislation. And one might note another similarity between chapters 3 and 4 of *Edict* 7, namely that both provisions presume the continued regular functioning of a court system in which their claims could be pursued and vindicated.

Exemption from the Need to Provide Sureties for Litigation Deposits

The fifth chapter of *Edict* 7 conferred futher relief to the bankers of Constantinople, this time in their capacity as plaintiffs in lawsuits, which bankers must often be if they wish to enforce their debt claims against broke or recalcitrant borrowers. This provision of the *Edict* exempted members of the capital city's banking guild—alone—from a recently introduced requirement that plaintiffs initiating a law suit provide sureties for the (required) undertaking to pay to the defendant 10% of the amount at issue if it should be found that the plaintiff's suit was brought "unjustly" (ἀδίκως/*inuste*)[139] This exemption from the need to provide sureties for the undertaking otherwise required of plaintiffs cannot plausibly be ascribed to the actual or expected consequences of plague. A review of the diachronic development of the relevant legal institution demonstrates that the innovation brought about by this provision of *Edict*, like those of its fourth chapter and the second limb of its third chapter, is more compellingly explained as an instance of the Constantinopolitan bankers using the opportunity of looming plague to obtain relief from unrelated provisions of law under which they already chafed.

Background. The matter relates to procedures for initiating a law suit, specifically measures instituted to deter vexatious litigation. Justinian's elementary textbook, the *Institutes*, explains the background succinctly.[140] Whereas earlier law provided for an *actio calumniae* to penalize an

[139] *Nov.* 112 c.2 pr. (10 Sept. 541) (SK 525/37–38; SK 525/35–36). Both Greek and Latin texts are relevant because this constitution was one of the few from this period issued in bilingual form. See SK 523 note *ad Nov. CXII,* following Biener, *Geschichte der Novellen Justinians*, 19 n.44; Honoré, *Tribonian*, 136, 124 n.3.
[140] *Inst. Iust.* 4.16.1. The constitution referred to is *Cod. Iust.* 2.58.2 pr. (20 Feb. 531), discussed immediately below.

DOI: 10.14754/CEU.2024.02

unsuccessful plaintiff by requiring him pay in one-tenth of the value of his or her suit, that *actio* had fallen into desuetude.[141] As Justinian explains, he had replaced the old *actio* with the requirement that the plaintiff swear an oath that his litigation was not vexatious.[142] Under this new regime, if one of the parties were ultimately found to have acted vexatiously, he would have to reimburse the other for costs and losses incurred.[143] But there was no longer a fixed monetary penalty, at the level described in *Institutes* of both Gaius and Justinian or otherwise. From 531, then, plaintiffs were no longer at risk—even in theory—of effectively wagering one-tenth of the amount of their prospective suits upon the eventual outcome. That happy situation lasted for just a decade. In September 541 the emperor re-introduced a requirement that the plaintiff undertake to pay one-tenth of the amount at issue to compensate the defendant for costs and expenses into law. The new requirement was couched in terms somewhat different from the Justinianic constitution it replaced as well as from older law. In addition to measures aimed at compelling the plaintiff to pursue litigation once initiated, *Novel* 112 required a plaintiff to undertake on oath, at the outset of litigation, to pay to the defendant an amount equal to one-tenth the amount at issue in the suit if the litigation should ultimately be found to have been brought unjustly.[144] Most importantly for present purposes, however, it also required that the plaintiff's undertaking be backed by a surety (*fideiussor*/ἐγγυητής). For plaintiffs, then, especially frequent ones as bankers necessarily are by virtue of their activities in relation to the extension of credit, *Novel* 112 necessarily increased not just the risk of litigating but also the upfront costs of doing so: sureties had to be located and persuaded to act from the start of the suit, and they had to be compensated for their trouble.[145]

[141] *Inst. Iust.* 4.16.1 (*haec autem omnia* [i.e., Justinian's new rulemaking on the topic] *pro veteris calumniae actione introducta sunt, quae in desuetudinem abiit, quia in partem decimam litis actionem multabat, quod nusquam factum esse invenimus*). The textbook oversimplifies: earlier law knew at least three different remedies that could be interposed at various stages and for various amounts. Gai. *Inst.*, 4:174–181 [=de Zulueta, *Institutes of Gaius*, 1:300-302]. While Gaius' remedies may reflect later interpolations (de Zulueta, 2:299 n.4.), we need not date them to any specific period; it suffices for the argument made here that they are pre-Justinianic. For discussion of the older law, see Buckland and Stein, *Text-Book*, 641–42 and, for the possibility of its survival, Díaz Bautista, *Estudios*, 31–32 n.43.

[142] *Cod. Iust.* 2.58.2. A similar oath was imposed upon the advocates of both parties. Justinian had already in 529 taken preliminary steps against dilatory measures in litigation in *Cod. Iust.* 2.58.1 (20 Sept. 529) but this law related to evidence only.

[143] *Inst. Iust.* 4.16.1.

[144] *Nov.* 112 c.2 pr. (10 Sept. 541) (SK 525/35–SK 526/2: ὁμολογοῦντα ὅτιπερ καὶ μέχρι πέρατος τῆς δίκης προσεδρεύει καὶ τὰς ἰδίας ἐναγωγὰς ἢ δι' ἑαυτοῦ ἢ διὰ νομίμου ἐντολέως ἐγγυμνάζει, καὶ εἰ μετὰ ταῦτα δειχθείη ἀδίκως τὴν δίκην κινήσας, ὀνόματι ἀναλωμάτων καὶ δαπανημάτων δέκατον μέρος τῆς περιεχομένης τῷ βιβλίῳ ποσότητος ἀποκαταστήσει τῷ αἰτιαθέντι). The underlined words show that the amount of one-tenth was conceived of not merely as a deterrent to plaintiffs but also as a form of liquidated damages for the aggrieved defendant. For the relationship of *Nov.* 112 to prior law more generally, see Riccardo Fercia, "*Intentiones Exercere*: Problemi e Prospettive in Nov. 112," *Studia et documenta historiae et iuris* 74 (2008): 159–207. As Fercia shows, the penalty was not payable in all cases where the plaintiff's suit was unsuccessful, but only where pursit of it was unjust.

[145] We can infer that such sureties did not generally serve gratuitously from the *Novel's* alternative provision for the swearing of an oath where a plaintiff could not afford to supply one. *Nov.* 112 c.2 pr. (SK 526/3).

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Edict 7 c.5. The bankers would not wait long before seeking, and obtaining, relief from this new burden. Just six months after Justinian introduced the new requirement for sureties and the increased costs of litigating that the new requirement of *Novel* 112 imposed, the bankers petitioned for relief from the requirement or, perhaps more precisely, included a prayer for that relief in the petition they were otherwise preparing for the emperor as plague loomed. Justinian acceded to the bankers' request by exempting them from the requirement to provide sureties for their litigation undertakings, though they remained bound to provide the undertakings themselves.[146] The reason given for the change was that because bankers' promises to pay were deemed reliable when made on behalf of another, so too ought they to suffice when made on their own behalf.[147] This reasoning might appear unremarkable save for one consequence of it that Justinian emphasises: the relief from the requirement to provide surety is available to bankers only, as mark of special favour to them;[148] those acting as plaintiffs against them remained bound to provide the sureties required by *Novel* 112.[149] As such, chapter 5 is the sole provision of *Edict* 7 that is not reciprocal, even if only in the formal sense of being available equally to bankers and their oppoents in litigation alike.[150]

Plague. On this reconstruction, which gives primacy to the diachronic development of the law governing litigation deposits, the connection of the fifth chapter of *Edict* 7 to plague is tenuous at best.[151] Inasmuch as the new exemption for litigation deposits applies to bankers' litigation against both the living and the dead, plague is strictly speaking extraneous to it. Now, one might object that plague could stand more squarely in the causative chain underlying the relief by imagining scenarios in which the epidemic had thinned the ranks of those prepared to stand surety for bankers looking to initiate legal proceedings. But given that the plague had arrived in

[146] *Edict* 7 c.5 expressly states that it resulted from the bankers' petition (SK 765/29: αἰτοῦσι). The required undertaking remained in force: though *Nov.* 112 c.2 pr. and *Edict* 7 c.5 refer to it in different terms, the identification is secure. van der Wal, *Manuale 2nd*, 163 para. 1066 with n.15.

[147] *Edict* 7 c.5 (SK 766/1). The trustworthiness of bankers is a common topic in Justinian's legislation concerning contracts made with them. See, *e.g.*, *Edict* 7 c.1 (bankers worthy of trust, which was extended even to the testimony of their underlings); *Edict* 9 c.4 (oath of a banker suffices to prove the cash price received upon sale of pledged items); Díaz Bautista, *Estudios*, 31 n.43.

[148] *Edict* 7 c.5 (SK 766/6).

[149] *Edict* 7 c.5 (SK 766/4–6).

[150] Whilst bankers, as lenders and guarantors, would likely have been frequent plaintiffs against clients in default and holders of pledged or hypothecated properties, it has often been assumed without argument that bankers would be on the receiving end of litigation to a much lesser extent. See, *e.g.*, Bianchini, "Disciplina," 417–18; Luchetti, "Banche," 454 n.13. That assumption warrants reconsideration, as legislation of the period contains several references to bankers acting not merely as lenders but also as borrowers. See, *e.g.*, *Cod. Iust.* 8.13.27 pr. (1 June 528) (addressing hypothecs given by *argenti distractores*, among others, to their creditors); *Nov.* 136 c.2 (SK 692/14) (discussed in Chapter 2); *Edict* 7 c 3 (discussed above); and especially, *Edict* 9 c.5 (SK 774/28–29: τὸ τὸν βίον αὐτοῖς [*i.e.*, bankers] ἐν τῷ δανείζειν καὶ δανείζεσθαι καθεστάναι καὶ ἀντιφωνεῖν ὑπὲρ ἑτέρων καὶ τόκους τελεῖν) (emphasis supplied).

[151] Accord Mattioli, *Giustiniano*, 151, who otherwise is more ready to see plague as a motivating factor for the various provisions of *Edict* 7. Even she acknowledges that c.5 is among the provisions "*tendenzialmente svincolate dalla situazione contingente che costituisce l'*occasio legis *dell'Editto.*"

Constantinople only a short time before *Edict* 7 was promulgated, if indeed it had arrived there at all, there is little reason to assume a substantial thinning of the ranks of potential sureties.[152] And even if plague had arrived there in time to exact a deadly toll, what reason is there to suppose that sureties were disproportionately affected? Is it not more likely that plague would equally reduce the ranks of bankers seeking such sureties, thus balancing supply and demand, so to speak? And even if the ranks of potential sureties had been reduced disproportionally, why would the reduced numbers not be able to cover demand? There was at this time no legal limit on the number of times or the amount for which a male might stand surety for another.[153] While there might be financial reasons why a potential surety might wish to limit the amount of obligations he was willing to assume, there appears to be no limit from the recipient's side: the relevant provisions make no mention of the court receiving the undertaking performing anything like a modern credit assessment on those acting as surety. Any proposed link of the *Edict's* fifth chapter to plague based on a supposed shortage of potential sureties must therefore be considered implausible.

Alternatively, one might posit a significant increase, or perhaps better, an expected increase in litigation as a result of plague at the time the banker's lodged the petitions prompting the imperial authorities to issue *Edict* 7. While superficially plausible, such an explanation faces significant difficulties when comparison is made to the dispositions of the *Edict's* chapter 6, discussed in the following section. That provision relates to the jurisdiction of a special adjudicators for disputes relating to banking contracts. It lists many reasons why having a special tribunal for such disputes was warranted, but an increase of litigation, actual or expected, due to plague or otherwise, does not figure among them. In other words, in a plague-era provision specifically dealing with the adjudication of bankers' disputes—*i.e.*, precisely where a mention of a change in volume of such litigation, actual or expected, might be expected—there is none. This silence in chapter 6 cautions us against attributing the motive cause of the abolition of the requirement for bankers to provide sureties in chapter 5 to some expected increase in volume of their litigation involving bank matters.

I submit that the diachronic explanation given above suggests a more plausible explanation for the innovation introduced by the fifth chapter of *Edict* 7, namely that the exemption conferred by that provision results from bank lobbying to be freed from the (for bankers, costly) requirement to provide litigation security that had been imposed just six months earlier by *Novel* 122. On this

[152] Recall Procopius' observation that the mortality rate was initially low, rising only later. See note 40 above.
[153] Such limits as had existed under the ancient *lex Cornelia* attested at Gai., *Inst.*, 3.124–125 [=de Zulueta, *Institutes of Gaius*, 1:192] had disappeared by the time of Justinian. Buckland and Stein, *Text-Book*, 447–48; Kaser, *RP*, 2:458. Women had long been constrained in their ability to stand surety for others; this continued to be the case, with modifications, under Justinian.

DOI: 10.14754/CEU.2024.02

view, the inclusion of such an exemption in *Edict* 7 is the result of a a further instance of opportunism on the part of the bankers, who sought to leverage the opening afforded by the onset of plague to petition for a range of relief, some plausibly linked to it and others less so if at all. This alternative account better explains the presence in *Edict* 7 of the provisions of its fifth chapter, which were granted for the benefit of bankers but neither mention plague as a justification nor, more tellingly, assume it as a factor in the scenarios it governs.

Praescriptio Fori

The next provision of *Edict* 7 to be examined shows equally little sign of having been prompted by plague. The *Edict's* sixth chapter prescribes, or perhaps rather reiterates, the appointment of specified adjudicators with exclusive jurisdiction to hear disputes to which bankers of Constantinople were party.[154] These provisions of the *Edict*, too, have a hinterland that must be taken into account when assessing the extent to which they may or may not constitute an imperial response to the onset of plague.

Background. Late antique dispute resolution comprised anything but a streamlined system of clearly demarcated lines of stable jurisdictional authority. It offered a bewildering array of options: not just the official judicial system, but also binding arbitration, less formal mediation, and, at least in the cities, bishops empowered to resolve disputes referred to them.[155] Even if one limits one's view to the official judicial system and judgments at first instance, complexity reigned.[156] The ordinary rule in civil cases was *actor rei forum sequatur—i.e.*, the plaintiff should bring suit in the place of the defendant's domicile.[157] Disputes relating to trade, though, generally fell under the jurisdiction of the *comes sacrarum largitionum* save for matters arising in the city of Constantinople, which fell to that of the *praefectus urbi.*[158] But these principles were subject to widespread evasion if not outright disregard. Artful pleading afforded many avenues for plaintiffs to

[154] This topic is mainly addressed in c.6 of the *Edict*, but related provisions of c.7 and c.8 are also discussed here.
[155] Humfress, "Law and Legal Practice," 176–82. That multiplicity of possible avenues of approach was due, at least in part, to the absence (characteristic of many pre-industrial legal systems) of the clear distinction between litigation on the one hand and alternative dispute resolution, on the other. Barry E. Hawk, *Law and Commerce in Pre-Industrial Societies* (Leiden: Brill Nijhoff, 2016), 154.
[156] Jones, *LRE*, 1:479–494. The provisions for seeking pre-judgment guidance or post-judgment revision of judgments at first instance, whether by petition or appeal, were at least as complex and are out of scope here.
[157] *Cod. Iust.* 3.22.3 (12 Apr. 293); *Cod. Iust.* 3.13.2 (27 Aug. 293); *Vat. Frag.* 325 (293 or 294); *Vat. Frag.* 326 (294?); *Cod. Theod.* 2.1.4 (1 Dec. 364); and *Nov. Marc.* 1.6 (450). Alternative fora were sometimes provided for (as in *Cod. Iust.* 3.19.3 (22 June 385) (allowing actions *in rem* where property located), but these were just limited derogations from the general principle. Paolo Garbarino, "La 'praescriptio fori' nel secoli V e VI: aspetti procedurali," in *Legislazione, cultura giuridica, prassi dell'impero d'Oriente in età giustinianea tra passato e futuro (Atti del Convegno, Modena, 21–22 maggio 1998)*, ed. Salvatore Puliatti and Andrea Sanguinetti (Milan: Giuffrè, 2000), 3–6.
[158] See note 11 of Chapter 2. The judicial functions of the *praefectus urbi* are even attested poetically. Corippus, *In Laudem Iustini*, 4.3–7; Alan Cameron, "Some Prefects Called Julian," *Byzantion* 47 (1977): 59. In 538, Justinian sought to reallocate provincial disputes to governors (*Nov.* 69 c.4.1 (1 June 538) but provincial suits are out of scope here.

DOI: 10.14754/CEU.2024.02

vex their opponents in inconvenient fora.[159] One *Novel* of 539 tells the tale of a defendant in a suit before one court prosecuting the plaintiff before another court, in a tail-eating litigation strategy "simultaneously pitiable and comic."[160] Emperors repeatedly sought to quash such forum shopping, but the very repetition of their efforts suggests that they did not meet with universal compliance.[161] Efforts to rationalise the jurisdictional system were thwarted in part by the practice of granting selected persons the privilege of *praescriptio fori*—i.e., the privilege of having one's case heard by designated officials, presumably those who might be expected to lend an indulgent ear. Many classes of persons could invoke the privilege. Soldiers, tenants of imperial estates, holders of high office, palatine officials, bishops, and senators all might be able to escape the ordinary courts and instead have their suits in designated tribunals.[162] Members of guilds of Constantinople had won the privilege of *praescriptio fori* to have all their cases heard by the *praefectus urbi* by no later than the end of the fourth century.[163]

In theory, then, banking activities outside Constantinople were subject to the jurisdiction of the *CSL* while those in the city fell under that of the *PU.*[164] Of course, a banker's own ability to enjoy the benefit of that official's jurisdiction was good only insofar as it was not trumped by a competing principle—such as that a particular defendant had to be sued in a different court by virtue his own *praescriptio fori* or that defendants had to be sued in their province of domicile.[165] Bankers' customers thus might reasonably seek to invoke their own such privilege, if they had one.

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[159] Jones, *LRE*, 1:493; Humfress, *Orthodoxy*, 38–51; Humfress, "Legal Pluralism"; Ernest Metzger, "Litigation," in *The Cambridge Companion to Roman Law*, ed. David Johnston (New York: Cambridge University Press, 2015), 272–98.

[160] *Nov.* 96 c.2 (1 Nov. 539) (SK 468/6–7: ἐλεεινόν τε καὶ γελοῖον κατὰ ταὐτὸν).

[161] Justinian tried in *Nov.* 69 (1 June 538); his efforts there were comprehensive but the policy was hardly new. See *Cod. Theod.* 2.1, esp. 2.1.4 (1 Dec. 364), 2.1.6 (30 Apr. 385), 2.1.8 (25 Dec. 395); 2.1.9 (24 Nov. 397); *Cod. Iust.* 7.51.4 (11 Oct. 450); and *Nov. Marc.* 1.1.5 (22 Apr. 455). Whilst Jill Harries has offered intriguing arguments for the proposition that repetition of laws should not necessarily be viewed as evidencing lack of compliance (Harries, *Law and Empire*, 82–88), her arguments are inapposite to the context here: *Edict* 7 (SK 766/7: εἰς διάφορα τοὺς ἱκέτας ἔλκεσθαι δικαστήρια) expressly states that bankers were being hauled before various courts, despite the earlier grant of *praescriptio fori* to them in *Edict* 9, discussed below.

[162] Jones, *LRE*, 1:487–494. The privilege was in most cases available when a member of the beneficiary class was defendant, but in some cases, including the bankers' disputes discussed here, also as plaintiff. I cannot agree with Garbarino's characterisation of the latter as of only marginal importance. Garbarino, "La praescriptio fori," 9–10.

[163] *Cod. Theod.* 1.10.4 (15 Apr. 391). Whilst this law may have fallen into disuse by Justinian's time (if it had ever been really effective), the *Codex* restated it in redacted form. *Cod. Iust.* 1.28.4 (15 Apr. 391).

[164] Bianchini, "Disciplina," 416 n.80; Luchetti, "Banche," 453 n.9; Petrucci, *Profili*, 18–23; Mattioli, *Giustiniano*, 110–11 n.51. It seems that the jurisdiction of the *PU* over banking activities was the older of the two, being attested already from the time of Hadrian. *Dig.* 1.12.2; see also *Dig.* 1.12.1.9.

[165] A few of Justinian's *Novels* provide that *praescriptio fori* would not be effective for certain kinds of cases or before certain judges. Thus: *Nov.* 8 c.12 pr. (15 Apr. 535) (cases heard by provincial governors); *Nov.* 80 c.3 (10 Mar. 539) (by the *quaesitor*); *Nov.* 41 (536 or 537) (by a certain Bonus as *quaestor exercitus*). On the procedural aspects, see Garbarino, "La praescriptio fori," 21–35. The effectiveness or otherwise of a claim to *praescriptio fori* in actual specific case would have depended on many variables, including whether the party entitled to it pleaded it timely, whether any competing privilege was available to defeat it, and whether the judge was inclined to respect a challenge to his jurisdiction in any event. A litigant could also forego any *praescriptio fori* to which he was entitled by consent in the proceedings (*Dig.* 5.1.1, 5.1.2 pr. and 2.1.18) or by agreement (*Cod. Iust.* 2.3.29 pr. (1 Sept. 531)).

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This would especially be the case for "well-born folk" who figured prominently among them.[166] A banker might expect little help from the other tribunal, for it had its own incentives: more cases meant more fees, and more *sportulae.*[167]

The extent to which bankers were in fact hauled before courts other than that of the *praefectus urbi* prior to the promulgation of *Edict* 9 is unknown, but that *Edict* accedes to a petition by their guild to designate the *Edict's* addressee—said to be the *PU*— as the exclusive adjudicator for disputes on contracts to which its members were party.[168] The identification of that addressee—whom the manuscript gives as Τριβουνιανῷ, ἔπαρχῳ πόλεως—is the subject of significant debate.[169] Nevertheless, whether one adopts the view that the addressee was the *praefectus urbi* or instead the *quaestor sacri palatii*, or if he was the famous Tribonian, some other Tribonian, or no Tribonian at all, the salient point is that this chapter of *Edict* 9 vested in a single individual jurisdiction over disputes to which bankers of the capital were a party.[170] That jurisdiction is stated to be exclusive and to apply whether the bankers were litigating as plaintiffs or defendants.[171] In other words, the bankers of the capital could now invoke the jurisdiction of the *PU* even where they were suing defendants not otherwise subject to his jurisdiction.

Whilst the relevant provision of *Edict* 9 is not as forthcoming as one might wish as to the reason for assigning a special judge to for such disputes, there are clues. The *Edict's* addressee (the designated judge) is praised for his "strict application of the laws, observance of justice, and facility

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[166] *Edict* 7 c.2 pr. (SK 764/21–22: διὰ τὸ τὸ κατ' αὐτοὺς σύστημα πολλοῖς μέν, μάλιστα δὲ τοῖς εὐγενέσιν ἀνθρώποις πιστεύειν).

[167] On the link between litigation volumes and officials' incomes, see, John Lydus, *De mag.*, 3.13, 3.49, 3.66, 3.76 [=Bandy, *On Powers*, 153–54, 208–10, 236, 254–56]; Kelly, *Ruling*, 68–81, 138–43.

[168] *Edict* 9 c.8. The date of this *Edict* its uncertain. Its c.8, which presents the appointment of a special adjudicator for banking disputes as an innovation, securely places *Edict* 9 prior to *Edict* 7, the relevant chapter of which refers to that apppointment as having taken place in the past. *Edict* 7, c.6 (SK 766/9); Thurman, "Thirteen Edicts," 129 n.251; Luchetti, "Spunti," 163–64; Cosentino, "Legislazione," 353–55. See "*Excursus on the Addressee*" below. Consentino adds as an additional proof that the reference in *Edict* 7 c.8 to the addressee as τὴν σὴν λογιότητα means that the addressee of *Edict* 7 can only be the *PU*, the same official to which *Edict* 9 was addressed, from which it follows that the provisions of *Edict* 7 on bank litigation modify the provisions for such litigation established by *Edict* 9, meaning that *Edict* 9 must predate *Edict* 7. The identities of the addressees of both *Edicts* are, however, the subject of much uncertainty. Díaz Bautista views it as at least conceivable that *Edict* 9 might post-date *Edict* 7 on the basis that its dispute resolution provisions might have fallen into disuse when Peter Barsymes left the post of *CSL* in 543 to take up the post of *PPO*. Díaz Bautista, *Estudios*, 174 n.17. This argument leaves the reference in *Edict* 7 to the earlier appointment unexplained, however.

[169] One main cause of the uncertainty surrounding the identity of the addressee of *Edict* 9 lies precisely in the provision discussed here, which presents the vesting of jurisdiction over Constantinopolitan banking disputes in the *Edict's* addressee as an innovation. But if, as the *Edict's inscriptio* would have it, the addressee was the ἔπαρχος πόλεως (*i.e., praefectus urbi*), that jurisdiction was not new: the innovation appears limited to making that jurisdiction exclusive. There is also the problem that no Tribonian is otherwise attested in this office.

[170] The jurisdiction of the *CSL* over banking disputes outside the capital was unaffected. Indeed, that jurisdiction had only just recently be confirmed, albeit obliquely, by *Nov.* 136. See discussion at notes 13–15 of Chapter 2. Per an attractive conjecture by Mattioli, the emperor might have intended the benefit of *Edict* 9 to extend to bankers throughout the empire, not just to those of the capital who petitioned for them. Mattioli, *Giustiniano*, 110–11 n.51.

[171] *Edict* 9 c.8 (SK 776/12–13).

DOI: 10.14754/CEU.2024.02

in devising ways by means of which solutions can be found even to problems that appear very difficult, and inaccessible to others."[172] Notably absent is any reference to problems arising as a result of bankers being dragged before various courts or to high volumes of litigation. The inference must be that the petitioning bankers had complained of the poor quality of justice received from other tribunals in complex financial disputes. Hence the need to free the capital's bankers from judges who were sloppy in applying the law, insensitive to the equities of cases arising in the ordinary course of banking, and lacking the sophistication needed to devise practical solutions within the framework of Roman law.

Edict 7 c.6. Whatever the reason for Justinian's grant to the bankers of a special adjudicator for their disputes in *Edict* 9, it did not long have the desired effect. By March 542, *Edict* 7 tells us, the bankers were back before the emperor with complaints of being hauled into courts hither and yon.[173] In response, *Edict* 7 reiterated the earlier grant of *praescriptio fori* for the bankers' benefit, appointing two officials to hear their cases and emphasizing the exclusive nature of their jurisdiction.[174] Perhaps in response to the non-observance of the earlier *Edict*, the epilogue of *Edict* 7 details how bankers might receive the privilege before every court of the empire.[175] A further provision instructs every officeholder to assist them in obtaining that benefit.[176] To reinforce the point, the closing provision states that *Edict* 7 was to have the same force as the general laws, even though its form was that of a pragmatic sanction.[177]

In addition, *Edict* 7 brings in several revealing changes of emphasis in the justification given for the designation of special adjudicators with exclusive jurisdiction over banking disputes. The main such emphasis is the specific designation of Peter Barsymes, himself a former financier (ἀργυραμοιβός) and then serving as *comes sacrarum largitionum,* as one of the adjudicators.[178]

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[172] *Edict* 9 c.8 (SK 776/10–12: διὰ τὴν περὶ τοὺς νόμους ἀκρίβειαν καὶ τὴν τοῦ δικαίου τήρησιν καὶ τὸ τρόπους ἐξευρίσκειν ῥᾳδίως, δι' ὧν ἔξεστι καὶ τὰ σφόδρα δοκοῦντα δύσκολά τε καὶ ἑτέροις οὐκ ἐφικτὰ διαλύειν).
[173] *Edict* 7 c.6 (SK 766/7–8).
[174] *Edict* 7 c.6 (SK 766/10 and SK 766/12). The two officials were not to sit together when judging cases; rather, such cases were to be tried by one or the other. *Edict* 7 c.6 (SK: 766/11–12).
[175] *Edict* 7 ep. (SK 767/23–25).
[176] *Edict* 7 c.8.1.
[177] *Edict* 7 ep. (SK 767/26: δύναμιν ἔχοντος, ὅσην ἐπὶ τοῖς ἄλλοις πράγμασιν οἱ γενικοὶ ἡμῶν ἔχουσι νόμοι). This language attempts to address a real issue of late antique legal practice, namely the relative force of general laws vs. pragmatic sanctions and other legal pronouncements of a specific nature. The tendency for private parties to invoke specific laws to derogate from general ones was one that emperors, including Justinian, had long fought against. See, *e.g.*, *Cod. Theod.* 1.2.11 (6 Dec. 398) and *Cod. Iust.* 1.22.6 (1 July 491[?]); *Nov.* 7 c.9 (15 Apr. 535) (purporting to invalidate future pragmatic sanctions granting exemptions from his general laws on church property); *Nov.* 69 c.4 (1 June 538) (denying force to privileges, powers and directives save for the emperor's own pragmatic sanctions) and *Nov.* 113 c.1.1 (22 Nov. 541) (denying force to those pragmatic sanctions, too); Jones, *LRE,* 1:472. This provision of *Edict* 7 works in the other direction: what was an emperor to do when he wanted to ensure that the recipients of a pragmatic sanction could in fact invoke its benefit in the face of general laws to the contrary?
[178] On Peter Barsymes, see the discussion at notes 39–40 in the Introduction.

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Peter's professional background in the industry (if one may use such an anachronistic expression) is relevant: like its precursor, *Edict* 7 praises the exactness of the appointed judges and justifies the (renewed) grant of *praescriptio fori* as allowing litigants to obtain judgments complying with law.[179] But it goes further. Beyond facilitating a legally compliant conclusion to banking cases, that conclusion should also be σύντομον. Miller translates this term as "compendious," presumably in its usual sense of brief or concise.[180] Now, verdicts in this period were both rendered in written form and read aloud in court,[181] but one may wonder whether it is not so much the brevity of the verdict that is on point here as the speed with which it was rendered. In other words, we might rather translate the term σύντομον as "expeditious" or even "quick."[182] This reading finds support later in the same provision, where the *Edict* explains that the bankers, having their own court, will be freed from the hassle (τριβή) of the courts of the praetorian prefecture, i.e., the ordinary courts.[183] This is a factor that went unmentioned in *Edict* 9's provisions on disputes.

The alert reader will perhaps have noticed that while compliance with law is invoked as an aim, fairness is not. In *Edict* 7, the emphasis is on a very different notion, one that appears under the guise of various forms of the term for "compliant, obedient" (*εὐγνώμων*) and its antonym (*ἀγνώμων*).[184] These passages, which have no parallel in *Edict* 9, cite the tricksiness of bankers' customers as a justification for the renewed grant of *praescriptio fori.* To the modern eye, these passages are remarkable for their portrayal of the sophisticated bankers of the capital not as perpetrators of commercial sharp practice but as its victims.[185] Justinian's framing of *praescriptio fori* in *Edict* 7 highlights the aim of promoting behaviour that is *εὐγνώμων* and at thwarting behaviour that is *ἀγνώμων*. The use of these terms in this context is striking, for within the corpus of Justinian's *Novels* they more frequently describe behaviour in more morally freighted circumstances, such as the duties owed by children to parents, by freedmen to former masters, or by heirs to decedents.[186] By far the most frequent usage of these terms in the *Novels*, though, is to

[179] *Edict* 7 c.7 (SK 766/32–SK 767/1); c.6 (SK 766/13–14).
[180] Miller and Sarris, *Novels*, 2:1048.
[181] See the constitutions collected at *Cod. Iust.* 7.44.1–3.
[182] See G.W.H. Lampe, ed., *A Patristic Greek Lexicon* (Oxford: Clarendon, 1961), *s.v.* σύντομος, -ον 2
[183] *Edict* 7 c.6 (SK 766/14). Delays and expense were bywords for litigation before the courts of the praetorian prefecture as a result of high volumes. Miller and Sarris, *Novels*, 2:1048 n.19. Matters could hardly be otherwise at a tribunal staffed by jobsworths like John Lydus. While the entirety of Book 3 of his *De Magistratibus* betrays near-comic disregard for the virtues of speed and efficiency in the provision of justice, especially piquant vignettes appear at Lydus, *De mag.*, 3.11, 3.20, 3.66, 3.68 [=Bandy, *On Powers*, 148–50, 162–66, 236, 238–40].
[184] Positive forms of these terms (including nouns, adjectives, verbs and adverbs) appear 23 times in the *Novels* and the negative ones 44 times (excluding, for the avoidance of doubt, four instances of διαγνωμ-). Of these 67 total instances, five are omitted from the following survey as they are non-Justinianic.
[185] *Edict* 7 c.6 (SK 766/14–17); c.7 (SK 767/2–4 and SK 767/7–8); and c.8.1 (SK 767/16–18).
[186] Children: *Nov.* 18 pr. (1 Mar. 536); *Nov.* 89 c.13 (1 Sept. 539); *Nov.* 92 c.1.1 (10 Oct. 539). Freedmen: *Nov.* 78 c.2.1 (18 Jan. 539) (*bis)*. Heirs: *Nov.* 1 pr. 1 and c.3 (1 Jan. 535).

DOI: 10.14754/CEU.2024.02

describe the attitude that Justinian expected of his tax-paying subjects, namely willing compliance rather than stubborn refusal to cough up what they owed.[187] That is not to say that these terms are not used in relation to business matters, but such instances are rarer and in nearly every case still freighted with ethical implications, such as the duties of a tenant of church property to pay rent, of a deposit holder to return items entrusted to him, and of a signatory to acknowledge his signature.[188]

The repeated usage of such morally freighted terms in the context of so mundane a matter as the adjudication of banking disputes is remarkable. What is perhaps most striking to the modern reader is that these terms are applied not so much to the duties that a banker owes to his customer, but to the converse: the duties owed by bank customers to him.[189] These usages are prefigured in the emperor's earlier pragmatic sanctions on banking, where similar terms are used to describe borrowers who refuse to pay interest at the appropriate rate, or at all.[190] And in the few instances where these terms are applied to bankers themselves, they do not refer to the banker's duties toward his customers but rather to his duties to the empire generally.[191] In Justinian's eyes, it seems, the customer was not always, or even often, right, and even if he was, the interests of the bankers were to be given priority. They, and the transactions they handled, were too important.[192]

Plague. We may ask whether the additions of *Edict* 7 to the *Begründung* for banker's special courts reveal some slowdown or clogging of the ordinary courts in March 542—at last, factors that one might look to as evidence that *Edict* 7's provisions on the bankers' special court might somehow relate to plague and its consequences! Unfortunately, there is little support for such a reading. Whilst the *Edict's* sixth chapter mentions the delays of the praetorian courts, there is no indication such delays had increased or that the courts had otherwise become more vexatious to litigants seeking succour there. The repeated references to recalcitrant counterparties are more revealing: if the sort of person against whom banks would often find themselves in litigation—

[187] Taxpayer-related instances account for nearly half of the occurrences in the *Novels: Nov.* 8 c.8 pr. (*bis)*, c.10 pr., c.10.2 (six instances) and *iusiur.* (*bis*) (15 Apr. 535); *Nov.* 15 c.3.1 and c.6.1 (*bis*) (13 Aug. 535); *Nov.* 17 c.5.3 (*bis*) (16 Apr. 535); *Nov.* 102 c.2 (*bis*) (27 May 536); *Nov.* 103 pr. 1, c.11.1 (*bis*) and c.11.2 (1 July 536); *Edict* 4 c.1 (May 536); *Edict* 13 c.9 (undated). To these we may add the three appearances in *Edict* 13 in relation to pagarchs who fail to forward tax payments with sufficient alacrity. *Edict* 13 c.12 pr. and c.25 (*bis*).

[188] Lease payments: *Nov.* 7 c.3.2 (15 Apr. 535). Deposit holders: *Nov.* 88 c.1 (*bis*) (1 Sept. 539). Signatures: *Nov.* 18 c.8 (three instances) (1 Mar. 536); *Nov.* 73 c.4 and c.7.3 (4 June 538).

[189] Specifically in relation to banking disputes: *Edict* 7 c.6 (at SK 766/8 and twice at SK 766/16), c.7 (at SK 767/2 and 7) and c.8.1 (at SK 767/18). The same notion appears earlier in the same *Edict*, at pr. and c.1 (*bis*) (SK 764/8 and twice in 16); while these provisions are formally cast as applying equally to bankers, it is sort of equality that forbids rich and poor alike to sleep under bridges (Anatole France, *Le Lys Rouge* (Paris: Calmann-Lévy, 1894), 111): the nature of credit extension is such that bankers are more often plaintiffs than defendants.

[190] Thus, *Nov.* 136 c.4 and *Edict* 9 c.6 (*bis*).

[191] Thus, *Edict* 7 c.6 (at SK 766/15) and c.8.1 (at SK 767/19). In addition, c.8.1 uses such terms to describe how a banker ought not to be made to appear intransigent by having to enforce his rights via the legal process.

[192] See the passages cited in notes 223–225 below.

borrowers, guarantors, other clients, and holders of customer assets—were engaging in sharp commercial practice to a greater extent than before, this might serve as indirect evidence of generalised economic distress. Such evidence is, of course, highly contingent and, even if probative, might be due to causes other than plague. More generally, there is no mention of plague or even of death in the reasoning supporting *Edict* 7's renewed grant of *praescriptio fori*, apart from a single reference to the handling of cases where the presiding judge has died.[193] From this, Mattioli has attempted to construe the entirety of these provisions as a response to plague, based on the single word indicating some judges might have died *in medias res* while overseeing bank litigation.[194] But the text cannot bear the weight she puts upon it. As a preliminary remark, one may note that the relevant provision does not state that the judges who died did so as a result of plague. Holders of office could die at any time, and often did so, both before plague and after it, and even for reasons unrelated to it. We should resist the temptation to ascribe all unexplained deaths in mid-sixth century Constantinople to plague: other causes of death had always existed and continued to do so. The provision of the *Edict* on this point is more in the nature of good housekeeping than of crisis response, as it simply makes provision for pending cases to be reassigned in circumstances where they needed to be reassigned in any event. Accordingly, we must conclude the *Edict's* provisions on adjudication of banking disputes provide only weak evidence that the plague's consequences were consequential, if indeed they provide any such evidence at all.

Excursus on the Addressee. One overlooked and perhaps surprising possible link between *Edict* 7 and plague might be found in the identity of the other person (besides Peter Barsymes) it assigned to adjudicate bankers' disputes, namely the *Edict's* addressee. That individual, referred to in chapter 6 as "Your Eloquence", is identified in the *inscriptio* by a single word, the name Julian.[195] The manuscript reads Ἰουλιανῶς, obvious nonsense; Schoell and Kroll give us the dative the context requires by emending to Ἰουλιανῷ. Their emendation follows, at least in part, a conjecture by Zachariä von Lingenthal that the manuscript reading is a corruption of Ἰουλιανῷ σ[υνηγόρῳ].[196] On this conjecture, the addressee, Julian, was an advocate of the city of Constantinople rather than the holder of high imperial office. This identification, based as it is solely on Zachariä's emendation, has not met with universal acceptance. If the addressee Julian was

[193] *Edict* 7 c.6 (SK 766/12–13).
[194] SK 766/13: ἀποβιώσασιν; Mattioli, *Giustiniano*, 142, 150. Mattioli concedes the speculative nature of her argument. Mattioli, 150.
[195] At least in the text established by Schoell and Kroll. *Edict* 7 inscr. (SK 763/18: Ἰουλιανῷ). The reference in c.6 is at SK 766/10: τήν τε σὴν λογιότητα.
[196] Zachariä von Lingenthal, *Novellae*, 2:197 n.1, followed without examination by Díaz Bautista, *Estudios*, 8. Zachariä's conjecture was likely based on the reference in *Nov.* 82 to three newly appointed *iudices pedanei* as λογιώτατοι συνήγοροι. *Nov.* 82 c.1 pr. (8 Apr. 539) at SK 401/29; Luchetti, "Banche," 451, n.5.

a mere advocate, there is a certain imbalance between the two individuals whom *Edict* 7 assigns to adjudicate: the exalted *comes sacrarum largitionum* on the one hand and a lowly advocate on the other.[197] Friedrich Biener already 200 years ago purported to identify the addressee of *Edict* 7 as the *praefetus urbi*, based on the title λογιώτητος used to refer to the addressee in several of its passages, which title is used to refer to that official in other laws of the period.[198] As discussed above, the practice of assigning jurisdiction over banking disputes to the *PU* was of long standing; in any event, the sixth-century had an abundance of prefects (and ex-prefects) with the name of Julian,[199] so the identification of Julian as *PU* is possible, and it has some modern advocates.[200] But the mere use of the title λογιώτητος is a thin reed upon which to proceed. That form of address was not exclusive to the city prefect, and the more typical form of address for him would in any event be not just λογιώτητος but rather λογιώτητος καὶ ἐνδοξότατος.[201] While these objections to the identification of the addressee of *Edict* 7 as the *PU* may not be conclusive they do leave room for other possibilities. The notion that a private advocate could be appointed to adjudicate such cases, as Zachariä supposed, cannot simply be dismissed out of hand on grounds of imbalance. In 539, Justinian had appointed 12 judges, mostly current or former advocates, to adjudicate various cases,[202] and the delegation of the judicial function to advocates was otherwise a common practice in the period.[203] It is, moreover, attested precisely during the first wave of plague, in the form of a constitution of 544 resolving a vexed family law dispute.[204] We even have evidence that a private lawyer named Julian helped adjudicate the charges of treason brought against those participating in

[197] Cosentino, "Legislazione," 360.
[198] Biener, *Geschichte der Novellen Justinians*, 533. The relevant references in *Edict* 7 can be found at SK 763/18, SK 766/10, SK 766/32, SK 767/15, and SK 767/23. The title was used for the *PU* by virtue of his role as judge for cases involving Senators. Cosentino, "Legislazione," 360 with n.54, in reliance on Cassiod., *Var.*, 6.4 [=Mommsen, 177–78].
[199] For a sense of the range of possible candidates, some better attested than others, see Martindale, *PLRE*, 3:3.1: 729–740. For their attestations in epigram, see Cameron, "Some Prefects." One city prefect by the name of Julian was the addressee of *Nov.* 140 (566), but that identification derives only from the *Authenticum* and Athanasius.
[200] Cosentino, "Legislazione," 360–62; Miller and Sarris, *Novels*, 2:1043 n.3.
[201] Luchetti, "Banche," 451 n.5.
[202] *Nov.* 82 c.1 pr. and 1 (8 Apr. 539). These appointees may have been *iudices pedanei*. Martindale, *PLRE*, 3:3A: 732–733, *s.v.* Iulianus 9; for doubts, see van der Wal, *Manuale 2nd*, 15 n.13, followed by Miller and Sarris, *Novels*, 1:563–564 n.3. On sixth-century *iudices pedanei* generally, see *Cod. Iust.* 2.7.25 pr. (1 Dec. 519) (restoring their pay); and the other provisions of *Nov.* 82 (8 Apr. 539) (putting the institution on a new footing); Jones, *LRE*, 1:501–502.
[203] *Cod. Iust.* 3.3.2.1 (18 July 294) (permitting delegation to *iudices pedanei* by overworked magistrates); W.W. Buckland, Arnold McNair, and F.H. Lawson, *Roman Law and Common Law: A Comparison in Outline*, 2nd ed. (Cambridge: Cambridge University Press, 1952), 6, followed by Humfress, *Orthodoxy*, 53.
[204] *Nov.* 158 (14 July 544)., discussed at Humfress, *Orthodoxy*, 54. "Thekla's Case" lays before our eyes the unsavoury image of an advocate giving advice to one party in a case and then going on to serve as judge in it. By acting in this way, he violated not only any conceivable ethical principle of adjudication but also a constitution forbidding precisely that conflict. *Cod. Iust.* 2.6.6 pr. (23 Aug. 368). To add insult to injury, the advocate went on as judge to render judgment contrary to the advice he himself had given to his former client. Hence the appeal to the emperor and, undoubtedly, his willingness to grant it.

the "bankers' conspiracy" of 562, though of course that trial took place some two decades after *Edict* 7 was promulgated.[205]

The identification of the addressee as an advocate thus remains possible, and this potentially furnishes a link to plague. Giovanni Luchetti has suggested that the addressee of *Edict* 7 might have been an advocate appointed to adjudicate cases as a stopgap measure resorted to in the circumstances of plague.[206] Whilst this conjecture has a certain attractiveness, it assumes that plague had already reached the capital sufficiently in advance of *Edict* 7's promulgation such that potential replacement officials were already dying off in sufficient numbers to make resort to private persons as adjudicators necessary. Whilst the text does make provision for adjudication by the new appointees of cases already begun where the officiating judge has died, it does so in terms that are more in the nature of good housekeeping by the draftsman than crisis management.[207] Those terms resemble the many instances of pre-plague laws that mention heirs and successors in order to provide certainty in the event of someone's decease. Death was an ever-present feature of late antique life even prior to plague, one that any competent legal draftsman had to contemplate. Even if this provision of *Edict* 7 was prompted by plague, the provision of an advocate as a special judge might have been anticipatory, to free up the *praefectus urbi* for other matters expected to arise as a result of impending catastrophe.

Even if we read all these inferences in favour of a plague-driven cause for the appointment of "Julian" to act as the colleague of Peter Barymes to adjudication banking disputes, the result is still unpersuasive, however. *Edict* 9 had established a regime for a special official with exclusive jurisdiction to hear banking disputes in the capital some time before *Edict* 7, and before the arrival of epidemic to Constantinople. Such incremental changes to that regime as *Edict* 7 effected were more in the nature of details than anything fundamental. If in March 542 plague really had changed the nature of bank litigation, or appeared likely to do so, one might have expected *Edict* 7 to put in place far greater changes to the system for adjudicating banking disputes put in place earlier by *Edict* 9. The absence of any change to procedure, beyond the mere provision of a second judge, suggests that at the time *Edict* 7 was promulgated the emperor contemplated the continued operation of judicial arrangements for bank disputes more or less commensurate with what had gone before.

[205] John Malalas, *Chron.*, 18.141.27–28 [494] (Ἰουλιανοῦ ἀντιγραφέως) [=Thurn, 427–28]. For the possible identification of the addressee of *Edict* 7 as this Julian, see Thurman, "Thirteen Edicts," 108 n.137.
[206] Luchetti, "Spunti," 168. Luchetti contemplates that the addressee was *iudex pedaneus* but this is not essential to his argument.
[207] See discussion at notes 193–194 above.

DOI: 10.14754/CEU.2024.02

Fraudulent Conveyance

In the next chapter of *Edict* 7, Justinian granted relief against what we would today term fraudulent conveyances: transfers, or rather purported transfers, by a debtor to a third party with the aim of putting assets out of the reach of creditors. Specifically, the seventh chapter of *Edict* 7 addresses the fact pattern where a debtor—on a pretext—arranges for moneys owing to him, or property he owns, to be transferred to his wife or other close connexion not otherwise bound up with the creditor. Roman law had strong doctrines of privity, requiring that parties have some connection for contractual obligations to be found to exist between them. Accordingly, fraudulent conveyances would, if unremedied, have the effect of depriving creditors of the ability to satisfy claims by pursuing debtor property once it had made its way into the hands of others.[208] The problem of debtors putting assets out of reach of creditors, being as old as time, was hardly unknown to Roman law. This provision of *Edict* 7 is thus another provision with a hinterland.

Background. The seventh chapter of *Edict* 7 has a direct Justinianic predecessor, of a sort, in the seventh chapter of *Edict* 9, issued a few years earlier. This statement might cause consternation on the part of some readers, inasmuch as the two provisions deal with distinct questions of legal doctrine. The relevant provision of *Edict* 7 deals with a question of substantive law, namely the remedies of a bank lender, including subrogation to the rights of the borrower, in cases of fraudulent conveyance. The comparable chapter of *Edict* 9 by contrast addresses a problem of evidence, namely how a banker might compel production of documents helpful to his case. Whatever the doctrinal distinction, however, both address like factual patterns: someone who has borrowed or otherwise incurred a debt to a banker seeks to arrange for assets to which he is entitled to be put in the name of someone else, with the purpose of rendering those assets inaccessible to the lender when the latter seeks to enforce upon the debt.[209] In the case of *Edict* 9, that "someone else" was the debtor's wife; in the case of *Edict* 7, the scope was cast more broadly, encompassing not just wives but also other connexions. So long as the transferee had no connection with the creditor, the doctrine of privity would, unless relaxed, defeat the creditor's pursuit of the assets so transferred. In

[208] *Edict* 7 c.7 (SK 766/25–26). The doctrine of privity, whereby a contract generally could neither benefit nor bind third parties, remained strict even into the sixth century. *Inst. Iust.* 3.19.3–4; *Dig.* 45.1.83 pr.; Plessis and Borkowski, *Textbook*, 259–60. There were always exemptions, though. Even where Justinian widened them, he typically acknowledged the doctrine's continued force.

[209] That *Edict* 9 c.7, though cast in terms of production of evidence, was in fact aimed against the underlying fraudulent conveyance to, and unjust enrichment of, the transferee is manifest. *Edict* 9 c.7 pr. (SK 775/27–28 and, later, SK 775/32–776/1). See Díaz Bautista, *Estudios*, 56–59 for an example of how *Edict* 9 c.7 is often treated merely as a matter of document production. The connection between procedure and substance is, however, noted by Thurman, "Thirteen Edicts," 128 n.241, and, with greater precision, Mattioli, *Giustiniano*, 145.

DOI: 10.14754/CEU.2024.02

addition, *Edict* 7 expands upon the protection afforded by *Edict* 9 also in terms of asset type.[210] Both *Edict*s are of a piece, however, in facilitating enforcement of debt claims. [211]

Plague. The attentive reader will have noticed that these provisions of *Edict* 7 omit any mention of one crucial element: death, whether from plague or otherwise. The factual situations that chapter 7 of the *Edict* addresses do not presuppose or even contemplate the decease of any party, any more than did the corresponding chapter of *Edict* 9, issued some time before *Yersinia pestis* first arrived at Pelusium. Just as it omits any mention of death or plague, so too does the text of this provision of *Edict* 7 omit any mention of heirs or successors. In the factual scenario this provision addresses, all parties—debtor, wife (or other connexion), and banker—are still very much alive. The provisions against fraudulent conveyance found in *Edict* 7 are thus yet another example of legal accommodations made at a time of plague but not necessarily connected with it in any substantive way.[212] We should rather view such provisions as accommodations by Justinian to the bankers' petition to strengthen the relief granted some years earlier by *Edict* 9. That this petition came at a time when the bankers perceived that they had leverage—*i.e.*, as plague was approaching and the empire needed money—should not surprise us.

Formal Equality

Before closing this chapter of the dissertation, it is worth spending a few words on the final chapter of *Edict* 7, which repeats yet again a point that had appeared in all but one of the *Edict's* preceding provisions, namely that the concessions afforded by the bankers by the *Edict* were to be enjoyed equally by their opponents in litigation.[213] Now it might be objected that this is the sort of equality that forbids rich and poor alike to sleep under bridges.[214] After all, bankers were sources of credit and in that capacity were perhaps more likely to be plaintiffs than defendants in debt-claim

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[210] Whereas the earlier provision dealt only with the situation where the debtor arranged for his own debtors to pay their debt over to the debtor's wife rather than to the debtor himself, the later one cast its net more broadly, addressing not just the fraudulent conveyance of debt claims but also other asset types.

[211] *Edict* 7 in particular features prominently in assessments of Justinianic efforts to promote speed and certainty of such enforcement. See Díaz Bautista, *Estudios*, 8 with n.17; Mattioli, *Giustiniano*, 143.

[212] Accord: Mattioli, *Giustiniano*, 151.

[213] *Edict* 7 c.8 pr. (SK 767/9–13: Ὅπερ δὲ ἐν ἑκάστῳ τῶν εἰρημένων κεφαλαίων ἰδικῶς ἐθήκαμεν, τοῦτο γενικῶς ἐν τῷ τοῦ λόγου ἐπισφραγίσματι θεῖναι συνείδομεν, ἐφ' ᾧ τε ἐν ἅπασι τοῖς προλεχθεῖσιν ἴσα προνόμια τοῖς ἐν τῷ προειρημένῳ τῶν ἀργυροπρατῶν σωματείῳ καταλεγομένοις καὶ τοῖς τούτων κληρονόμοις καὶ διαδόχοις *** ἐφ' οἷς κατὰ τῶν ἀργυροπρατῶν κινοῦσιν ὑπάρχειν. πρέπει γὰρ ἐκείνην ἑκάτερον μέρος τὴν ἀκεραιότητα ἐν τοῖς οἰκείοις συναλλάγμασί τε καὶ πράγμασι διαφυλάττειν, ἣν ἑαυτῷ ζητεῖ παρὰ τοῦ ἑτέρου φυλάττεσθαι). Agylaeus completed the lacuna in the text (marked with the ***) with καὶ τοις αὐτῶν συναλλάκταις καὶ τοῖς τούτων κληρονόμοις καὶ διαδόχοις, and his suggestion has generally been accepted on grounds of sense. See, *e.g.*, the translation at Miller and Sarris, *Novels*, 2:1050. The arguments against Agylaeus' suggestion given at Thurman, "Thirteen Edicts," 115–16 n.174, are unpersuasive and in any event do not affect the interpretation of the passage. The sole exception to this mirror-image equality is the relief afforded by *Edict* 7 c.5 exempting bankers, and only bankers, from the need to provide sureties in support of the 10% deposit required of plaintiffs upon starting litigation. See the discussion of c.5 above.

[214] The adage is from France, *Le Lys Rouge*, 111.

suits of the sort contemplated by the various chapters of *Edict* 7. But Justinian's legislation tells us that bankers were also borrowers; as such they might also be on the receiving end of debt enforcement claims if they failed to repay their borrowings when due.[215] Hence it might be thought that the *Edict's* reciprocity clauses were required as a technical matters, in conformity with a general principle of Roman law that special privileges, where granted, should be made available on a reciprocal basis.[216] But the incessant repetition of the principle of mirror-image equality for bankers and their opponents, expressed individually in each chapter (other than the fifth) and generally in the eighth chapter, suggests that something more was at stake than mere compliance with a general principle of the sort that an emperor could, in any event, disregard at will.

Conclusion

The repetition of formal equality in *Edict* 7, I submit, was rhetorical flourish, aimed at downplaying the extent of the concessions made to bankers by highlighting their availability—in theory—to all parties to suits on banking contracts. As the foregoing discussion shows, several of the concessions granted by the *Edict* 7 conferred meaningful advantages upon (bank) lenders, whether in terms of rules of evidence (chapters 1 and 2), rights to pursue debtor assets (chapters 3, 4 and 7), or measures to reduce the cost and time of litigation (chapters 5 and 6). These grants of relief were generous and, as the *Edict's* closing provisions—which enjoin officeholders throughout the empire to assist in securing the benefit of the emperors' lawmaking for the banker's benefit—show, that generosity was not accidental but very much intended.[217]

One might ask why. Two theories have generally been put forward. One posits that the bankers as a trade had to be rescued from ruin brought about by environmental and economic crisis.[218] This theory finds some support in various pre-plague legal provisions on how certain assets of a banker were to be treated in the event of his bankruptcy, which suggest that the profession was experiencing some form of distress already in the years before plague hit.[219] In addition, several sources hint at inflation, always and everywhere a bane to those who make their living from credit extension.[220] The second theory, by contrast, is not one of banker weakness but rather of banker strength, namely that that Justinian's grant of concessions in 542 reflected the

[215] See note 150 above.
[216] For similar provisions requiring reciprocity, see, *e.g.*, *Cod. Iust.* 4.44.7 (on rescission of sale); *Dig.* 17.1.3.2 (on mandate); Thurman, "Thirteen Edicts," 116 n.174.
[217] *Edict* 7 c.8.1 (SK 767/14–18).
[218] Barnish, "Wealth," 35 with n.219 (suggesting economic crisis reduced bankers to a state of dependency).
[219] On imperial offices held by bankers (or their sons): *Cod. Just.* 8.13.27 (1 June 528); *Nov.* 136 c.2; Jones, *LRE*, 1:864 (suggesting bankers went bankrupt "fairly frequently").
[220] The (attempted) imposition of wage and price controls in *Nov.* 122 (23 Mar. 544) is presumptive evidence of inflation, at least at a later stage of plague. For bankers' responses to inflation, see Procop., *Historia Arcana* 22.38 and 25.12 [=Haury and Wirth, *Procop. vol. 3*, 3:140 and 155]; Barnish, "Wealth," 35 with n.219.

DOI: 10.14754/CEU.2024.02

increasing importance of the bankers to the imperial authorities.[221] This importance can be explained by the imperial government's pressing need for funds, to fund Justinian's ambitious building program and, especially, his two-front war in Italy and the East.[222] It is this latter theory, one of the importance of the banking profession to the welfare of empire, that finds expression in the various provisions of *Edict* 7, in two respects. First, there are the provisions of the *Edict*, such as the subrogation rights of chapter 3, which address points previously petitioned for by the bankers' guild and initially rejected but later acceded to, in whole or in part, in 542. Second, we have the *Edict's* many provisions praising bankers' usefulness and benefit to the empire public generally,[223] as well as more pointed ones about the need to leave them undisturbed to pursue their business.[224] Now, one need not take these various assertions of banker importance at face value, nor should we attribute them to plague alone, as similar expressions of praise also appear in Justinian's earlier, pre-plague lawmaking.[225] But in light of the vast expenditures demanded by Justinian's programmes and his wars, any constituency that could provide ready money might be expected to find warm welcome in his consistory.

Whatever the reasons for it, the generosity on display in *Edict* 7 likely needed justification in the eyes of other groups those whose interests were not necessarily aligned with those of bankers. Justinian was at this period set back on his heels, so to speak, by a range of crises, of which plague was just one (to the extent it was a crisis as opposed to just a contributing factor of greater or lesser

[221] Bianchini, "Disciplina," 418; Díaz Bautista, *Estudios*, 9 n.21.

[222] It may also have been the case that revenues fell short of expectations as a result of a lower number of taxpayers on account of plague (as suggested by Peter Sarris, *Empires of Faith: The Fall of Rome to the Rise of Islam, 500–700* (Oxford: Oxford University Press, 2011), 159) but it is unlikely that this factor had manifested itself in full force already in March 542, when *Edict* 7 was promulgated.

[223] Usefulness: *Edict* 7 c.3 (SK 765/12: τοὺς μὲν εὐεργέτας); c.4 (SK 765/15: τοὺς εὐεργέτας); c.7 (SK 766/25: τοὺς δὲ ἐκ τοῦ εἰρημένου τῶν ἀργυροπρατῶν σωματείου εὐεργέτας). Public benefit: c.4 (SK 765/27–28: αὐτῶν [*i.e.*, the members of the banking guild] οὐκ ὀλίγοις τισίν, ἀλλὰ τοῖς ἐν πάσῃ σχεδὸν τῇ πολιτείᾳ γινομένοις συναλλάγμασιν ὑπουργούντων); c.7 (SK 767/6–7: τοὺς ὀφείλοντας διὰ τὸ τοῖς τῆς πολιτείας πράγμασιν ὑπουργεῖν); and especially c.8.1 (SK 767/19–21: οἷα τούτου … τοῖς ἁπάσης τῆς πολιτείας συναλλάγμασι πρέποντος, ὧν τὰ μέγιστα καὶ ἀναγκαιότατα διὰ τοῦ προειρημένου ἀεὶ συστήματος γίνεται).

[224] See the statement equating harm to the bankers to public nuisance at c.6 (SK 766/8–9: οὐ μόνον αὐτοῖς βλάβην, ἀλλὰ καὶ τοῖς κοινοῖς πράγμασιν ἐμπόδισμα φέρειν εὑρίσκεται), and the statement of the importance of leaving them free from bother to do their business later in the same provision (SK 766/14–17: τοὺς ἱκέτας τῆς τῶν πραιτωρίων τριβῆς ἀπαλλαττομένους σχολάζειν τῷ οἰκείῳ ἐπιτηδεύματι, τοσοῦτόν τε εὐγνωμονέστερον φέρεσθαι περὶ τὰ τῶν ὑπηκόων συναλλάγματα, ὅσον ἢ αὐτοὶ ἥττονος ἀγνωμοσύνης πειρῶνται ἢ <οἱ> ἀγνωμονεῖν ἐπιχειροῦντες οὐ συγχωροῦνται ἀδίκους αὐτοῖς ἐπιφέρειν βλάβας).

[225] *Nov.* 136 pr. (SK 691/10–12: αὐτοὶ πολλοῖς ἑαυτοὺς παρεχόμενοι χρησίμους, ἐξ ὧν ἀντιφωνήσεις καὶ δανείσματα ὑπέρχονται παντὸς κινδύνου μεστά); c.1 (SK 691/23: διὰ γὰρ τὴν τῶν ἀργυροπρατῶν περὶ τὰ κοινὰ συμβόλαια σπουδὴν); c.2 (SK 692/21–23: φιλοτιμούμεθα διὰ τὸ κοινὸν τῆς αὐτῶν λυσιτελείας, ἣν παρέχονται τοῖς συναλλάγμασι, πολλοῖς ὁμιλοῦντες κινδύνοις ἵνα τὰς ἑτέρων θεραπεύσαιεν χρείας); c.3 (SK 692/30–31: οὐδὲ γὰρ δίκαιόν ἐστι τοὺς τὰ οἰκεῖα χρήματα προϊεμένους μὴ καὶ πρώτην καὶ ἀναμφισβήτητον τάξιν ἐπὶ τοῖς ὠνηθεῖσι πράγμασιν ἔχειν); and c.4 (SK 693/17–18: τοὺς γὰρ πᾶσι σχεδὸν τοῖς δεομένοις ἑτοίμους ὄντας βοηθεῖν); *Edict* 9 c.2 pr. (SK 773/22–23: καὶ τῆς κοινῆς λυσιτελείας προβεβλῆσθαι). The catalogue of provisions is from Díaz Bautista, Estudios, 9 n.22.

DOI: 10.14754/CEU.2024.02

extent).[226] At such points in his reign, Justinian was concerned to assert the legitimacy of his rule in the face of the misfortunes afflicting it, in which assertions via legislation featured prominently.[227] The need for such assertions might have been especially compelling in the case of *Edict* 7 inasmuch as the bankers "had form," so to speak, in winning changes of law favourable to themselves. From the earlier *Novel* 136 and *Edict* 9 emerges a picture of a group skilled at working the levers of influence. *Edict* 7 marked yet another lobbying success by them, one that might have been looked at askance by other constituencies of empire, including powerful ones that, we are told, were often their customers. To be sure, some of the *Edict's* provisions— the rules of chapter 4 on order of remedies, of chapter 6 on adjudicators, and of chapter 7 on fraudulent conveyances—might be presented as mere continuations or incremental extensions of measures previously enacted and thus as the mere completion of unfinished business. Others, like the exemption from the requirement to provide sureties for litigation deposits conferred by chapter 5, were more in the nature of technical fixes to recent lawmaking that affected bankers disproportionately. Still other elements of *Edict* 7, though, would have been more difficult to justify to other influential constituencies, such as those elements that granted relief that had been requested before but already denied, as in the case of subrogation to the rights of debt debtors granted in the first limb of chapter 3. Even more challenging to explain would have been those provisions that conferred wholly new substantive advantages upon the bankers, such as the rules on chapter 1 making it easier for them to enforce their claims against debtors' heirs, and the right of subrogation conferred by the second limb of chapter 3 to the rights of the living.

Edict 7 purports to provide justifications in the well-known words of the preface of "the looming presence of death." But as this chapter demonstrates, plague can be linked with confidence only to the forms of relief granted by the chapter 1, the first limb of chapter 3 and, perhaps, chapter 2 (even if only marginally in the latter case). Other provisions contemplate neither death nor disease, nor even some generalised economic crisis. Instead, they address fact patterns that either can be traced to developments other than plague (as in the case of chapters 5 and 6) or that necessarily arose in the ordinary course of banking before plague and that there is little reason to think plague exacerbated (as in the case of chapters 4 and 7). As a result, fewer provisions of *Edict* 7 can be securely linked to the Justinianic Plague than one might expect in view of the role *Edict* 7 has often played in scholarly discussions of it.

[226] The various crises of Justinian's reign are catalogued, in convenient chronological order, at Meier, *Das andere Zeitalter Justinians*, 656–70.
[227] On these efforts, see Bell, *Social Conflict*, 303–17.

DOI: 10.14754/CEU.2024.02

Also remarkable is an absence of some lobbying measures that one might expect to see tried on by bankers at a time of crisis, notably any requested change in law to facilitate lenders' ability to call their loans in early. Now, it is unknown to what extent to which loans in the sixth century were repayable *in diem* (on a specified date) or on request; presumably, both types were in use. If one might look to the behavior of lenders in the financial crisis of the year 33 under the emperor Tiberius as an example, bank lenders facing incipient crisis might be expected to seek advantage over competing lenders to the same debtors by calling in their debts before those other lenders could do so.[228] If promulgation of *Edict* 7 was as tightly bound to plague and its consequences as some scholars have made it out to be, one would not have been surprised to see some innovation in its provisions aimed at facilitating jockeying for position by the bankers in this way. Yet there is none. I would not, however, place too much weight on this argument from silence in the *Edict* or by implication in the underlying petition, especially so when there were good reasons for silence in this particular case. As discussed at several points earlier in this dissertation, bankers were often lenders to imperial officials for the purchase of their offices and presumably also for other purposes. As a lobbying strategy, lodging petitions for legal change that would permit bankers to call in their loans with imperial officials who were the bankers' debtors would have been madness. Tactful omission of such a request in the petition might reflect some tactical *nous* on the part of the bankers.

But we do not need to rely on inferences from what *Edict* 7 does not say to detect lobbying savvy on the part of the bankers, for what the *Edict* does say furnishes ample evidence of it. Linking the prayers for relief for non-plague related measures to prayers that were more obviously plague-related in the petition prompting *Edict* 7, in the manner outlined in this chapter, shows no little skill on the part of the guild of bankers. In particular, the linking request for the two different kinds of subrogation rights addressed by the two limbs of chapter 3, as well as the subsequent link between those and chapter 4, would have required not just detailed knowledge of the relevant law but also considerable legal ingenuity. As the foregoing discussion demonstrates, the process of mid-sixth-century lawmaking, at least in the specialist area of banking contracts, was an iterative one, one in which the bankers' guild of Constantinople and the imperial bureaucracy engaged in dialogue over time. The bankers are thus revealed not merely as subjects of Justinian's legislation, but as consumers of it as well: ready to request changes favourable to their interests, to counter the negative effects of other lawmaking in a timely manner, and to go back repeatedly with revised requests if their initial efforts were rejected. The bankers of Constantinople are thus revealed to be astute, even canny, practioners of imperial petitioning in the middle period of Justinian's reign.

[228] On the behaviour by lenders during the financial crisis under Tiberius, see Tac., *Ann.*, 6.17.

DOI: 10.14754/CEU.2024.02

CHAPTER 4

MARITIME LENDERS AT THE COURT OF JUSTINIAN

The bankers were not the only financiers to lobby the imperial court for changes in law to benefit their activities. Bankers, whether the ἀργυροπρᾶται of the east or their western precursors the *argentarii* of the west, had long been just one of many sources of debt finance and by no means the most important. For the sixth century as in prior periods, many who were not bankers—*illustres*, non-bank businessmen and other private individuals—also extended loans. This chapter examines a particularly confused episode of Justinianic law-making, one in which lobbying by financiers, in all likelihood not bankers, played a prominent and well attested role. The matter relates to so-called "maritime loans," or *pecunia traiecticia.*[1] In September 540, Justinian issued a law that gave the imperial imprimatur to certain customs relating to such loans.[2] Less than eight months later, he declared it "altogether inoperative" as though it "had, in fact, not even been laid down."[3] This U-turn took place just twelve years after Justinian had re-regulated the rates of interest that could be charged on loans of all types including, for the first time, maritime ones.[4]

This chapter explores Justinian's promulgation of *Novel* 106 in 540, which overturned his own earlier re-regulation of maritime loans of 528, and his subsequent return to the *status quo ante* by *Novel* 110 in April 541.[5] These two laws have been the subject of numerous studies by continental legal historians. My analysis departs from this tradition in that it attributes greater

[1] Or *fenus nauticum*. Buckland and Stein, *Text-Book*, 466–67; Kaser, *RP*, 2:370–371 n.17. While some scholars have viewed these two terms as referring to distinct legal institutions, it seems more likely that they, and the term *pecunia nautica* used at *Dig.* 45.1.122.1, *Dig.* 49.1.7 and *Dig.* 22.2.3, are synonymous. Wieslaw Litewski, "Römisches Seedarlehen," *IVRA: Rivista Internazionale di Diritto Romano e Antico* 24, no. 1 (1973): 113–17. *Nov.* 106 uses *pecunia traiecticia* as the *terminus technicus* (SK 508/6–7: τὰ τοῖς θαλαττίοις ταῦτα δανείσματα, ἃ καλεῖν ὁ καθ' ἡμᾶς εἴωθε νόμος *traiecticia*) (Latin text in original)), but Julian still epitomised it as *de nautico faenore*. Julian, *Epit.*, Const. XCIX (¶ *CCCLX*) [=Haenel, *Iuliani Epitome*, 120].

[2] *Nov.* 106 (7 Sept. 540).

[3] *Nov.* 110 (26 Apr. 541). See discussion at notes 172–173 below.

[4] *Cod. Iust.* 4.32.26 (Dec. 528). It is uncertain whether this constitution should be dated 11 Dec. or 13 Dec. Purpura, "Ricerche," 318; Giovanni Luchetti, "La disciplina del prestito marittimo in Nov. Iust. 106 (a. 540)," in *Nuovi contributi di diritto tardoimperiale e giustinianeo* (Bologna: Bononia University Press, 2021), 115–16 n.2 [originally published in *Interpretatio Prudentium* 3 (2008): 245–259]. The precise date is irrelevant to the argument of this chapter.

[5] The following discussion of maritime loans and interest upon them makes no claim to comprehensiveness: it addresses only those features needed to understand *Nov.* 106 and the lobbying efforts that led to its promulgation and repeal. As such, many continental legal historians will likely be disappointed at the short shrift given to topics dear to the romanist heart but irrelevant to my purpose, such as: the formal legal nature of the maritime loan and its place within the system of Roman law contracts; whether either interest or risk transfer were essential elements of the contract; the nature of the legal basis of an enforceable claim for interest; the caps on the rates of interest that might be charged on loans other than maritime ones; whether interest rates were in practice double those agreed to contractually; the prohibitions on interest *ultra duplum* and interest-upon-interest; interest rates outside contractual contexts; the formal characteristics of the *actio pecuniae traiecticiae*, with or without *poena*; the manner in which "round trip" voyages were accommodated within the legal framework; and the provisions for expenses of the lender's slave accompanying the voyage and the opportunities such arrangements afforded for evading rate caps.

DOI: 10.14754/CEU.2024.02

weight to the well attested processes leading to promulgation and repeal of *Novel* 106. This chapter focuses on what those processes can tell us about the role of petition-and-response in constituting a dialogue between the emperor and his subjects, especially on matters where the latter were expert in the matter at hand, possessed of a direct interest in its outcome, and astute in how they approached the bureaucracy charged with handling petitions.

Pecunia Traiecticia

Roman law defined a maritime loan by its purpose, namely as a loan of money to be carried overseas or, if the money was used to purchase goods, the goods were to be carried overseas, but in either case only if certain risks of voyage were borne by the lender.[6] It is generally accepted that maritime loans were an institution imported into Roman law from its Greek analogue, the δάνειον ναυτικόν.[7] Now, the Greek legal institution required some adaptation to fit into Roman law's different conceptual framework.[8] But the maritime loan as a legal institution shows remarkable continuity from its origins in classical Athens through the Hellenistic age and on into Roman period, and thence through to medieval times.[9] As a mode of finance, the maritime loan is the only type of credit attested in antiquity that was mainly productive rather than consumptive in purpose.[10]

Risk-Shifting

Maritime loans shifted risks of voyage—shipwreck, piracy, jettison—from borrower to lender for the period the ship was underway.[11] If the risks of voyage remained with the borrower the

[6] *Dig.* 22.2.1 (*Traiecticia ea pecunia est quae trans mare vehitur: ceterum si eodem loci consumatur, non erit traiecticia. Sed videndum, an merces ex ea pecunia comparatae in ea causa habentur? Et interest, utrum etiam ipsae periculo creditoris navigent: tunc enim traiecticia pecunia fit*).

[7] Buckland and Stein, *Text-Book*, 464; Kaser, *RP*, 2:370. The timing is unknown but likely followed Roman conquest of the Mediterranean. Lietta De Salvo, *Economia privata e pubblici servizi nell'impero romano: i corpora naviculariorum* (Messina: Samperi, 1992), 340–41; Christoph Krampe, "Fenus nauticum," in *Der Neue Pauly: Encyclopädie der Antike*, ed. Hubert Cancik and Helmuth Schneider (Stuttgart: Metzler, 1998), 471. The Greek term appears in the Roman-era *P.Vindob.* G 19792 [=SB 6 9571], line 7 (δ̣άν̣ιον(*) ναυτικὸ(ν)).

[8] Litewski, "Römisches Seedarlehen," 180–83; De Salvo, *Economia*, 336–39, 342–343 with n.235; Dominic Rathbone, "The Financing of Maritime Commerce in the Roman Empire, I–II A.D.," in *Credito e moneta nel mondo romano: Atti degli Incontri capresi di storia dell'economia antica (Capri 12–14 ottobre 2000)*, ed. Elio Lo Cascio (Bari: Edipuglia, 2003), 212, 221–26.

[9] Ashburner, *Rhodian Sea-Law*, ccx; Purpura, "Ricerche," 327; Andreau, *Banking*, 54–55; M.T.G. Humphreys, *Law, Power, and Imperial Ideology in the Iconoclast Era, c.680–850* (Oxford: Oxford University Press, 2015), 183.

[10] Evelyne Patlagean, *Pauvreté économique et pauvreté sociale à Byzance: 4e–7e siècles* (Paris: Mouton, 1977), 177. That loans in antiquity were overwhelmingly for consumption rather than productive purposes has long been recognised. Cassimatis, *Intérêts*, 66; M.I. Finley, *The Ancient Economy*, updated ed. (Berkeley: University of California Press, 1999), 141–44 and 197. Alyssa A. Seckar-Bandow, "Traders and Merchants in Early Byzantium: Evidence from Codified and Customary Law from the 4th to 10th Centuries" (Ph.D. Thesis, Cambridge, Cambridge University, 2013), 117 implausibly sees productive loans everywhere under Justinian's general constitution on interest rates, *Cod. Iust.* 4.32.26 (discussed below).

[11] The risks to be borne by the lender are referred to as *navigii periculum* (*Cod. Iust.* 4.33.[4], undated), *incertum periculum, quod ex navigatione maris metui solet* (*Cod. Iust.* 4.33.[3], 14 Mar. 286), *maris periculum* (*Pauli Sententiarum Interpretatio* to 2.14.3 [=Paul-Frédéric Girard and Félix Senn, *Textes de droit romain*, 7th ed., vol. 1 (Paris: Dalloz, 1967), 381], and τῶν θαλαττίων κινδύνων (*Nov.* 106 pr., SK 509/19). Covered risks included those such

loan was not a maritime one, even if made for the purpose of financing sea-borne commerce.[12] Unlike in the case of an ordinary loan, where a borrower is unconditionally committed to repay the principal when due, a borrower's obligation to repay a maritime loan depended upon safe arrival of the ship and/or the goods at an agreed port of destination.[13] That is, the repayment obligation was subject to a contingency, one determined by whether risks of voyage materialized. By shifting such risks from borrower to lender, maritime loans functioned something like insurance, even if protection was limited compared with that provided by insurance in the modern sense, which neither Roman nor Byzantine law ever developed.[14] Of course, this risk-shifting effect was subject to conditions, and also to controls on the part of the lender. It was evidently practice for the route to be specified in the contract; if the borrower failed to adhere to what was agreed, the insurance-like protection lapsed.[15] A drop-dead date might also be imposed, after which protection would expire.[16] In addition, the protection applied only if the loss of ship or cargo was due to a reason other than *dolus* or *culpa* on the part of the borrower.[17] Lenders might seek to monitor compliance with these conditions by installing a dependent, usually a slave, as "supercargo" on the voyage.[18]

Interest Rates

Maritime loans could bear higher rates of interest than other types of cash loans; under classical Roman law, maritime loans were not subject to any of the interest-rate caps that applied to

as shipwreck, piracy and jettison, but excluded ordinary commercial risks such as price risk on goods during shipment. Litewski, "Römisches Seedarlehen," 125–26.

[12] *Cod. Iust.* 4.33.[2] (12 Mar. 286); *Dig.* 22.2.4; Fritz Klingmüller, "Fenus nauticum," in *Paulys Real-Encyclopädie der classischen Altertumswissenschaft*, ed. Georg Wissowa, Neue bearbeitung (Stuttgart: Metzler, 1909), col. 2201; Kaser, *RP*, 2:370–371 with n.17; Pontoriero, *Prestito*, 55–56. This was also the Byzantine understanding, as shown from a provision of the *Basilica* presumed to have been codified at *Cod. Iust.* 4.33.1 but lost from our MSS. See *Bas.* 53.5.16 [=H.J. Scheltema and N. van der Wal, *Basilicorum Libri LX*, vol. A VII: Textus Librorum LIII–LIX (Groningen: Wolters, 1974), 2456, lines 10–11]. The "vulgar law" understanding in the west was similar. *Pauli Sententiarum Interpretatio* to 2.14.3 [=Girard and Senn, *Textes*, 1:381]. Doubts to the contrary (expressed by, *e.g.*, Litewski, "Römisches Seedarlehen," 128–37) are unpersuasive and, because actual practice was to agree such risk transfer, trivial.

[13] *Cod. Iust.* 4.33.[5] (8 Oct. 294); Buckland and Stein, *Text-Book*, 466; David Johnston, *Roman Law in Context* (Cambridge: Cambridge University Press, 1999), 95.

[14] de Ste. Croix, "Maritime Loans," 42; Rathbone, "Financing," 206–7; Neville Morley, *Trade in Classical Antiquity* (Cambridge: Cambridge University Press, 2007), 73; H. Edwin Anderson III, "Risk, Shipping, and Roman Law," *Tulane Maritime Law Journal* 34 (2009): 185–86 and 204–5.

[15] *Cod. Iust.* 4.33.[4] (undated) (debtor departs from agreed route; when goods are seized as a result, the loss cannot be allocated to creditor).

[16] *Dig.* 45.1.122.1; Buckland and Stein, *Text-Book*, 467.

[17] Sieveking, *Seedarlehen*, 33. While the governing principles are clear, we have little direct evidence beyond *Cod. Iust.* 4.33.[4] on unauthorized change of route. On the temptations to wreck one's own ship to escape the obligation to repay in the event of an unsuccessful venture, see Philostratus, *Vita Apollonius of Tyana*, 4.32.2 [=C.L. Kayser, ed., *Flavii Philostrati opera*, vol. 1 (Leipzig: Teubner, 1870), sec. 32]; Jean Rougé, "Droit romain et sources de richesses non-foncières," in *L'origine des richesses dépensées dans la ville antique: (Actes du Colloque organisé à Aix-en-Provence 11 et 12 Mai 1984)*, ed. Philippe Leveau (Aix-en-Provence: Université de Provence, 1985), 164 with n.20.

[18] *Dig.* 22.2.4.1; Buckland and Stein, *Text-Book*, 466–67.

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loans generally, at least for the period when the lender bore the risks of voyage.[19] The higher rates of interest that could be charged were thought justifiable, even by some good Christians like John Chrysostom, precisely because they involved transfer of risks of voyage.[20] Without it, a loan was not a maritime loan, and maritime rates of interest could not be charged for it.[21] The higher rates of interest were permissible only for the period that the lender was "on-risk", *i.e.*, bore the risks of voyage.[22] This period typically began on the date upon which it was agreed that the ship would sail and ended on the date the ship pulled into the harbour at the agreed final destination.[23] For periods when the lender was not on-risk, the interest-rate caps imposed by Roman law on non-maritime loans—speaking very generally for periods preceding Justinian's reign, 1% per month, or 12% per annum—[24] applied with full force.[25] That said, maritime loans could be combined with non-maritime ones, or with other types of business arrangements, to achieve tailored results.[26]

Roman law generally reckoned interest on loans as a function of time. Time-based rates were ordinarily expressed in units of the *centesimae usurae*, *i.e.*, hundredths, or percentage points, per month. Interest at the full *centesimae usurae* equated to 1% per month, *i.e.*, 12% per annum. Lower rates were expressed as fractions thereof. Thus, one-half or two-thirds of a *centesima usura* equated to 6% or 8% per annum, respectively. After the Constantinian reform of the currency and

[19] The precise legal basis for this exclusion is unknown. Buckland and Stein, 466; Kaser, *RP*, 2:370–371 n.17; Jean-Jacques Aubert, "Commerce," in *The Cambridge Companion to Roman Law*, ed. David Johnston (New York, NY: Cambridge University Press, 2015), 233. See discussion following note 31 below.

[20] See Chrysostom's Homily on Psalm 111 [=J.-P. Migne, ed., *Patrologiae cursus completus [Series Graeca]*, vol. 55: (Paris: Garnier, 1862), col. 298] and Homily 14 on the First Letter to the Corinthians [=J.-P. Migne, ed., *Patrologiae cursus completus [Series Graeca]*, vol. 61 (Paris: Garnier, 1859), col. 117]. Cf. Gregory of Nyssa, *Contra Usarios*, 200.5–11 [=G. Heil et al., eds., *Gregorii Nysseni opera: Sermones Pars I*, vol. 9 (Leiden: Brill, 1967), 200]. See Jean Rougé, *Recherches sur l'organisation du commerce maritime en Méditerranée sous l'empire romain* (Paris: S.E.V.P.E.N., 1966), 346; Julie Velissaropoulos, *Les nauclères grecs: recherches sur les institutions maritimes en Grèce et dans l'Orient hellénisé* (Genève: Droz, 1980), 302; Andreau, *Banking*, 54.

[21] This was also the later Byzantine understanding: *Bas.* 53.5.16 [=Scheltema and van der Wal, *Basilicorum Libri LX*, 1974, A VII: Textus Librorum LIII–LIX:2456, lines 14–16]; and the "vulgar" one, too: *Pauli Sententiae* 2.14.2 and the *interpretatio* of that provision.

[22] *Dig.* 22.2.3 and 4 pr.; Buckland and Stein, *Text-Book*, 466.

[23] *Dig.* 22.2.3; *Cod. Iust.* 4.33.[2] and [5]; Kaser, *RP*, 2:370–371 n.17.

[24] See discussion at note 46 below.

[25] *Cod. Iust.* 4.33.[2]; *Cod. Iust.* 4.33.[3]; *Cod. Iust.* 4.33.[4]; *Cod. Iust.* 4.33.[5]; *Pauli Sententiae*, 2.14.3. Inasmuch as maritime loans could bear interest at significantly higher than other kinds of loans of money, the consequences of a loan's failure to qualify as "maritime" could be significant. The lender of a failed maritime loan—one purporting to be maritime but without transfer of risk—would not be entitled to receive the higher rate of interest but instead only a rate lower, perhaps much lower, than the one bargained for.

[26] See *Dig.* 45.1.122.1 (maritime loan with other loan); Christoph Krampe, "Der Seedarlehensstreit des Callimachus—D. 45, 1,122,1 Scaevola 28 digestorum," in *Collatio iuris romani: études dédiées à Hans Ankum à l'occasion de son 65e anniversaire*, ed. Robert Feenstra et al., vol. 1, 2 vols. (Amsterdam: J.C. Gieben, 1995), 207–22; Boudewijn Sirks, "Sailing in the Off-Season with Reduced Financial Risk," in *Speculum Iuris: Roman Law as a Reflection of Social and Economic Life in Antiquity*, ed. Jean-Jacques Aubert and Boudewijn Sirks (Ann Arbor: University of Michigan Press, 2002), 134–50; Pontoriero, *Prestito*, 137–52; and Plut., *Cato minor*, 21.6 (loans, likely maritime, with *societas*); Ulrich von Lübtow, "Catos Seedarlehen," in *Festschrift für Erwin Seidl zum 70. Geburtstag*, ed. Heinz Hübner, Ernst Klingmüller, and Andreas Wacke (Köln: P. Hanstein, 1975), 103–17; John H. D'Arms, *Commerce and Social Standing in Ancient Rome* (Cambridge, Mass: Harvard University Press, 1981), 39–45.

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the introduction of the *solidus* made up of 24 *keratia*, rates of interest might alternatively be expressed as a duodecimal fraction as a simplification measure, at the cost of some loss of precision. This alternative method of calculation led to fractionally higher rates but the differences were small.[27] Justinian himself used the two systems nearly interchangeably.[28]

It is, however, uncertain if the time-based method for calculating interest that was typically used under Roman law also applied to maritime loans, at least prior to Justinian's imposition of that method in December 528.[29] Under Greek practice, maritime loans differed from other types of loans in that interest on them was calculated per voyage, regardless of how long the voyage lasted.[30] It is unknown if Roman practice pre-528 followed Greek in calculating maritime interest not by time but by voyage, and we have next to no reliable evidence as to the level of interest rates actually charged on such loans in the Roman period,[31] but in my view it is more likely that Roman law followed Greek practice on this point. This is because the adoption of a distinctive, per-voyage basis for calculating interest provides the most plausible reason for why maritime loans were not made subject to the interest-rate caps that Roman law imposed on all other types of loans.[32] If Roman law's "early adopters" of Greek practice had wished to express time-based rate caps—whether at the same level as applied to other loans, or at some other level to reflect the different risk profile of maritime loans—they could easily have done so by using already existing conceptual tools for time-based loans and setting a specifically "maritime" cap at some level. Our sources give us no hint of

[27] Gofas, "The Byzantine Law of Interest," 1095. For the correspondences, see Zachariä von Lingenthal, *Histoire du droit privé gréco-romain: Droit civil II.*, 134–35. This difference of expression has misled some scholars into thinking that rates of interest (expressed in terms of *centesimae usurae*) were distinct from rewards for risk (expressed as fractions). See the discussion at note 66 below.

[28] By way of example, in *Nov.* 32 (15 June 535), Justinian set a rate cap of one-eighth, or 12.5%, on loans-in-kind to peasants in famine-stricken Illyria. If read literally, this cap would exceed the pre-existing cap of 12% for such loans. It is unlikely that Justinian intended to increase interest rates on loans to peasants during a famine. Anna Pikulska-Robaszkiewicz, "L'usure dans la la législation des empereurs chrétiens," in *Au-delà des frontières: Mélanges de droit romain offerts à W. Wolodkiewicz*, vol. 2 (Warsaw, 2000), 729.

[29] Different bases of calculation may have been used concurrently, even in the same loan transaction. Rougé, "Droit romain," 164–65; Andreau, *Banking*, 55.

[30] Paul Millett, *Lending and Borrowing in Ancient Athens* (Cambridge: Cambridge University Press, 1991), 189; Edward E. Cohen, *Athenian Economy and Society: A Banking Perspective* (Princeton: Princeton University Press, 1992), 52 ff.

[31] Jean Rougé once ventured that interest might typically amount to fully one-third of the principal amount lent. Jean Rougé, "Prêt et société maritimes dans le monde romain," *Memoirs of the American Academy in Rome* 36 (1980): 294–95, https://doi.org/10.2307/4238711. As even he admitted though, the absence of any indication of interest rate in the only surviving maritime-loan contract of the Roman period (*Dig.* 1.122.1, which may not be an actual contract) meant that his calculations necessarily relied on sources more literary than documentary or historical in nature. The figure of one-third led Gianfranco Purpura to re-edit *TP* 34 [=*TPSulp.* 31, 2–3, of 52 CE] and suggest that might be evidence for a Roman maritime loan with interest calculated per-voyage. Gianfranco Gianfranco Purpura, "Tabulae Pompeianae 13 e 34: Due documenti relativi al prestito marittimo," *Atti del Accademia di Scienze Lettere e Arte di Palermo*, 5, 2, no. 2 (1981–1982): 449–74. Purpura's interpretation of the tablet has not met with acceptance. Peter Gröschler, *Die* tabellae-*Urkunden aus den pompejanischen und herkulanenischen Urkundenfunden* (Berlin: Duncker & Humblot, 1997), 163–64; Pontoriero, *Prestito*, 15 with n.38.

[32] Accord: Cohen, *Athenian Economy*, 53 n.69.

DOI: 10.14754/CEU.2024.02

any attempt to do so prior to Justinian. It is accordingly more likely that maritime rates were calculated on a different basis and not fully assimilated to Roman practice to loans of other types. Faced with a choice between devising a new conceptual framework, one suitable for capping interest rates on the basis of voyage rather than of time, or following long-standing Greek practice of leaving rates uncapped, Roman law's early adopters might well have opted for the course of least resistance. This might especially be the case where there was no demand from affected constituencies—lenders and borrowers—to impose time-based reckoning upon an institution that had proven its usefulness over centuries using a different, voyage-based, interest convention.

Borrowers and Their Obligations

The borrower under a maritime loan could be a shipper (ναύκληρος/*navicularius*) or a merchant (ἔμπορος/*negotiator*) proposing to ship goods.[33] The two roles could be combined in a single person.[34] In the case of a merchant borrower, the borrowed money would be used either to purchase goods in another port to bring back home for sale (i.e., to finance imports); to purchase goods in the home port for shipment and sale elsewhere (i.e., to finance exports); or, in the event of a return voyage, both.[35] In the case of a borrower who was a shipper or captain, the use of proceeds from the loan might be used for goods of their own to import or export as part of their own activities, or perhaps also for the needs of the ship itself, the expenses of its kit and repair, or its

[33] In general usage, the term ναύκληρος was capacious, encompassing not just active shippers, but also non-travelling shipowners as well as ship captains. Paul Magdalino, "The Merchant of Constantinople," in *Trade in Byzantium: Papers from the Third International Sevgi Gönül Byzantine Studies Symposium*, ed. Paul Magdalino, Nevra Necipoğlu, and Ivana Jevtić (Uluslararası Sevgi Gönül Bizans Araştırmaları Sempozyumu, Istanbul: Koç Üniversitesi, Anadolu Medeniyetleri Araştirma Merkezi, 2016), 182. Given the definition of *pecunia traiecticia* (see note 6 above), the first sense (active shippers) prevails in the context of Roman law maritime loans.

[34] As in the case of Amarantus, the shipowner *cum* captain who transported Synesius from Alexandria back to Cyrene in 396. Synesius, *Epist.* 5 [=A. Garzya, ed., *Synésios de Cyrène, Tome II Correspondance: Lettres I–LXIII*, trans. Denis Roques, vol. 2 (Paris: Belles Lettres, 2000), 6–19]. See also Cic., *De inv.* 2.154. Combining roles is also attested by the Dramont A shipwreck, where the name Sex. Arrius appears on both anchor and amphorae, demonstrating that he acted as both shipper and merchant. Peter Candy, "Credit for Carriage: *TPSulp.* 78 and P.Oxy. XLV 3250," in *Roman Law and Maritime Commerce*, ed. Peter Candy and Emilia Mataix Ferrándiz (Edinburgh: Edinburgh University Press, 2022), 179 with n.35. See also Jones, *LRE*, 2:868; Rougé, *Recherches*, 280; Casson, *Ships*, 314–18.

[35] See the definition of *pecunia traiecticia* given at *Dig.* 22.2.1 quoted in note 6 above: The fragment's reference to shipment of goods addresses the transport of goods from one port to another for sale there; the reference to the shipment of money addresses the purchase of goods for coin at another port, which then could be resold at the home port (or elsewhere). Accord: H. Ankum, "Tabula Pompeiana 13: Ein Seefrachtvertrag oder ein Seedarlehen?," *IVRA: Rivista Internazionale di Diritto Romano e Antico* 29 (1978): 167–68. To be sure, the legal sources are largely silent on the transport of coinage by ship, in the normative sources perhaps only by the attempted prohibition of the practice in *Cod. Theod.* 9.23.1 (8 Mar. 354 or 356) (discussed at Hendy, *Studies*, 291–94). For documents of practice, there is perhaps only the sixth-century *P.Oxy.* I, 144. H. Ankum, "Noch einmal: Die Naulootike des Menelaos in TP 13 (=TPSulp. 78)–Ein Seedarlehen oder ein Seefrachtvertrag?," in *Roman Law as Formative of Modern Legal Systems*, ed. J. Sondel, J. Reszczynski, and P. Scilicki (Krakow: Jagiellonian University Press, 2003), 22 n.45. But archaeological evidence suggests that transport of large sums of coin, whilst scarcely attested for the classical period, might have been more common in late antiquity. Johan van Heesch, "Transport of Coins in the Later Roman Empire," *Revue Belge de Numismatique et de Sigillographie* 152 (2006): 55, 57–59; W.V. Harris, "A Strange Fact About Shipboard Coin Hoards Throws Light on the Roman Empire's Financial System," *Athenaeum* 107, no. 1 (2019): 150–55.

running costs.[36] Repayment generally was due upon safe arrival of the ship and/or goods to the agreed port of destination, subject to what seems to have been a long-standing custom for the borrower to be granted a grace period of 20 days from arrival to repayment.[37]

Whilst some shippers seem to have commanded a degree of wealth, merchants generally would not have.[38] In any event, neither figured amongst the political or financial elite.[39] We do not, however, have a good deal of insight as to the relative wealth of borrowers or of the typical size of the ventures for which they took out maritime loans. Certainly, shipments of the *annona* would have been out of scope, for they were financed by the state. That said, *annona* shippers could conduct other business in parallel with their official transports, and maritime loans might be used to finance other goods carried on the same ship, perhaps on its return leg to Alexandria to satisfy the lively demand for imported goods there.[40] The structure of the maritime loan, which conditioned repayment upon safe arrival of the ship, has led many scholars to assume that borrowers were by

[36] Uses other than for goods are attested for Greek practice but nothing in the Roman law sources speaks to them; such uses appear inconsistent with the definition in *Dig.* 22.2.1. Litewski, "Römisches Seedarlehen," 123.

[37] Dem., 35.11.4–7; Purpura, "Ricerche," 228, 235, 292, 327. Such a grace period also appears in a Hellenistic-era papyrus that represents one of only two, or perhaps three, ancient maritime loan agreements to have survived. SB III 7169, lines 14–15.

[38] Jones, *LRE*, 2:864–872; Simon Loseby, "The Mediterranean Economy," in *The New Cambridge Medieval History. Volume 1, c. 500–c.700*, ed. Paul Fouracre, vol. 1 (Cambridge: Cambridge University Press, 2005), 628–29. Matters were perhaps different in Alexandria, where the prosperous shipper *cum* merchant was a stock figure of hagiography. See *Vita Ioh. Eleem.* 25[26] [=J.-P. Migne, ed., Patrologiae cursus completus [Series Graeca], vol. 93 (Paris: Garnier, 1865), 1638–39]; John Moschus, *Pratum Spirituale,* 193 (the deceased father) [=J.-P. Migne, ed., *Patrologiae cursus completus [Series Graeca]*, vol. 87.3 (Paris: Garnier, 1865), cols. 3072–3076; Palladius, *Hist. Laus.* 14 (deceased father) [=G.J.M. Bartelink, ed., *Palladio: La storia Lausiaca* (Verona: Fondazione Lorenzo Valla, 1974), sec. 14]; Rufinus, *Hist. Monachorum* 16 [=Eva Schulz-Flügel, ed., *Tyrannius Rufinus, Historia monachorum sive de vita sanctorum patrum* (Berlin: de Gruyter, 1990), 340 ff.]. But those same sources also report tales of merchants in financially embarrassed circumstances. *Vita Ioh. Eleem.* 10 [=Migne, *PG*, vol. 93, cols. 1623–1624]; John Moschus, *Pratum Spirituale,* 186 (the shipwrecked husband), 189 (shipwrecked merchant) and 193 (the son) [=Migne, *Patrologiae cursus completus [Series Graeca]*, 1865, vol. 87.3, cols. 3061–3064, 3068–3070, and 3072–3076, respectively]. The portraits in these sources are idealised for the authors' morally improving ends. It seems that the relative importance of Alexandrian shippers increased as the sixth century went on. Michael McCormick, "Movements and Markets in the First Millenium: Information, Containers, and Shipwrecks," in *Trade and Markets in Byzantium*, ed. Cécile Morrisson (Washington, D.C.: Dumbarton Oaks, 2012), 54.

[39] See, *e.g.*, *Cod. Theod.* 13.1.5 (17 Apr. 364) (*potiores* must refrain from business or lose their exemption from the *collatio lustralis*); *Cod. Iust.* 4.63.3 (408/9) (*nobiliores* must refrain from commerce to facilitate trade between plebeians and merchants); *Cod. Iust.* 12.20.5 pr. (ca. 466) (merchants barred from imperial service); *Cod. Iust.* 12.57.12 c.3 (3 Apr. 436) (tradesmen of all kinds, including *venditores* and *ceteros institutores*, barred from provincial office); *Dig.* 50.6.6 cc.3–9 (shipowners immune from public *munera* only if actively engaged primarily in servicing the *annona*); Jones, *LRE*, 2:871. If artisans and merchants came to assume somewhat higher status, that was a phenomenon somewhat later than the events that are the subject of this chapter. Enrico Zanini, "Artisans and Traders in the Early Byzantine City: Exploring the Limits of the Archaeological Evidence," in *Social and Political Life in Late Antiquity*, ed. William Bowden, Adam Gutteridge, and Carlos Machado (Leiden: Brill, 2006), 376, 406. For the shippers of Alexandria as a possible, limited exception, see note 38, just above.

[40] As attested at Procop., *Buildings* 5.1.11[=Haury, *Procopii Caesariensis Opera Omnia*, 3.2:151]. The *navicularii* may well have carried their own private goods as top-up cargoes in *annona* shipments as well, but that is less than certain for the eastern half of empire. Cf. McCormick, "Bateaux," 75–93; Bryan Ward-Perkins, "Specialisation, Trade, and Prosperity: An Overview of the Economy of the Late Antique Eastern Mediterranean," in *Economy and Exchange in the East Mediterranean during Late Antiquity: Proceedings of a Conference at Somerville College, Oxford, 29th May, 1999*, ed. Sean Kingsley and Michael Decker (Oxford: Oxbow Books, 2001), 173–74.

DOI: 10.14754/CEU.2024.02

and large men of modest means, such that their ability to repay depended on successful completion of their venture.[41] But the famous *Muziris* papyrus indicates that the hugely valuable cargo listed therein was financed at least in part by maritime loans, which in turn suggests that such loans were not the exclusive preserve of the modest, at least not in the middle of the second century of our era.[42] In truth, though, we cannot be sure of the typical wealth of maritime loan borrowers or of the size of their ventures given the dearth of actual loan agreements that survive. The profile of such borrowers would in any event have varied over time and by location.[43]

As was usual for other types of loans, the borrower's obligations under a maritime loan were typically not just personal to himself but also secured, via either *in rem* security, *i.e.*, collateral, or personal security, in the form of a third-party guarantee.[44] And whilst it is conceivable that a shipper or merchant might take out a maritime loan for the purpose of shifting risks of voyage on to the lender rather than as a source of capital—i.e., using the maritime loan structure for insurance purposes rather than financing ones—no source indicates that this occurred.[45]

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[41] See, *e.g.*, Ashburner, *Rhodian Sea-Law*, ccix–ccx.

[42] *P.Vindob.* G 40822, text and discussion at Lionel Casson, "New Light on Maritime Loans: P. Vindob. G 40822," *Zeitschrift für Papyrologie und Epigrafik* 84 (1990): 195–206. On the inference drawn from the size of the loan, see Andreau, *Banking*, 55–56. Only a part of the total financing transation documented by the *Muziris* papyrus in fact took the form of a maritime loan. Federico De Romanis, *The Indo-Roman Pepper Trade and the Muziris Papyrus* (Oxford: Oxford University Press, 2020), 188–97. Moreover, if the maritime loan agreement discussed at *Dig.* 45.1.122.1 was an actual one, then that would provide additional support the view that maritime loans were, at least in the late second century of our era, taken out by borrowers of some sophistication. But that extract in the *Digest* may just be a thought experiment. See discussion at note 152 below. Separately, Beresford, *Ancient Sailing*, 49–50, has argued that maritime loans were too complex for small-scale use, but his argument assumes the construct was more complex than it was.

[43] It is worth bearing in mind that the *Muziris* papyrus pre-dates the events of this chapter by some four centuries.

[44] *In rem* security: Where the borrower was a shipper, the ship itself might serve as collateral and perhaps also the freight to be earned; where the borrower was a merchant, the goods to be shipped served as collateral. *P. Vindob. G* 19792; Amelia Castresana Herrero, *El prestamo maritimo griego y la* pecunia traiecticia *romana* (Salamanca: Universidad de Salamanca, 1982), 113–18; Lionel Casson, "New Light on Maritime Loans: P. Vindob. G. 19792," in *Studies in Roman Law in Memory of A. Arthur Schiller*, ed. Roger S. Bagnall and W.V. Harris (Leiden: Brill, 1986), 16; Andreau, *Banking*, 55; Rathbone, "Financing," 213. Additional credit support could be provided in the form of goods of the borrower located on other ships, or even land. Litewski, "Römisches Seedarlehen," 170. Personal security: Some scholars have sought to identify a personal guarantee for a maritime loan in *TP* 13 [=*TPSulp* 78, of 38 CE] (Ankum, "Tabula Pompeiana 13: Ein Seefrachtvertrag oder ein Seedarlehen?"; Purpura, "Tabulae"; Gröschler, *Die* tabellae-*Urkunden*, 160), but this identification has not found favour (Éva Jakab, "Vectura pro mutua: Überlegungen zu TP 13 und Ulp. D. 19,2,15,61," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (romanistische Abteilung)* 117, no. 1 (August 1, 2000): 244–73, https://doi.org/10.7767/zrgra.2000.117.1.244; Joseph Georg Wolf, "Aus dem neuen pompejanischen Urkundenfund: die ναυλωτική des Menelaos—Seedarlehen oder Seefrachtvertrag?," in *Iuris Vincula: Studi in Onore di Mario Talamanca*, vol. 8, 8 vols. (Naples: Jovene, 2001), 421–63; Giuseppe Camodeca, "Il credito negli archivi Campani: il caso di Puteoli e di Herculaneum," in *Credito e moneta nel mondo romano: Atti degli Incontri capresi di storia dell'economia antica (Capri 12–14 ottobre 2000)*, ed. Elio Lo Cascio (Bari: Edipuglia, 2003), 88–90) and its principal proponent has resiled from it. Ankum, "Noch einmal." *TP* 13 remains subject to an impressive variety of suggested explanations. See the surveys in Jakab, "Vectura"; De Romanis, *Indo-Roman Pepper Trade*, 194–97, and now Candy, "Credit for Carriage." Any credit support, whether *in rem* or personal, was subject to the same condition as the borrower's obligation to repay, namely safe arrival of the ship. *Dig.* 22.2.6.

[45] Buechel, *Das gesetzliche Zinsmaximum*, 41–42; Anderson, "Risk," 204–205, n.136. Cf. Jones, *LRE*, 2:868, who is more open to the possibility. Dimitri Gofas and Éva Jakab have sought, in different ways, to identify a fictitious loan relating to shipping in the text of a tablet of the Sulpician archive. Dimitri C. Gofas, "Encore une fois sur la Tabula Pompeiana 13 (Essai d'une interprétation nouvelle)," in *Symposion 1993: Vorträge zur griechischen und hellenistischen*

DOI: 10.14754/CEU.2024.02

Justinian's First Reform of Maritime Loans: *Cod. Iust.* 4.32.26

Roman law had long, if intermittently, sought to limit rates of interest that could be charged on loans. Subject to much variability over time and place, loans other than maritime ones were generally speaking subject to a rate cap of 12% per annum from the late republic through empire.[46] Maritime loans, by contrast, had long remained free from such interest rate restrictions, at least for the "sea" part of the loan, i.e., the period in which the creditor bore the risks of voyage.[47] In 528, Justinian reformed the legal regime governing interest rates that could be charged on loans of all kinds, including maritime ones, by the constitution that appears at *Cod. Iust.* 4.32.26, a law of general application that replaced the many previous imperial constitutions on point.[48] Its thrust was to reduce the rates of interest that could permissibly be charged generally.[49] The most notable innovation it introduced was the setting of maximum rates based mainly on the status of the lender.[50] *Cod. Iust.* 4.32.26 established four tiers of maximum rates, each expressed in terms of the customary *centesimae usurae*. The first three tiers were based on the status of the lender; the fourth was based on type of loan. The base case was that lenders could demand interest at rates no higher than 6% per annum.[51] *Illustres* and higher ranks were limited to demanding 4% per annum, while those whom we might call "businessmen"—those in charge of workshops or engaged in permitted business activity—could agree to rates up to 8% per annum.[52] Rates of up to a full *centesimae usurae* (12% per annum) were permissible for maritime loans (*in traiecticiis contractibus*)[53] and

Rechtsgeschichte (Köln Wien: Böhlau, 1994), 251–66; Jakab, "Vectura," 253–54. But the use of fictitious loans for insurance purposes remains a matter of speculation rather than attestation and is arguably impossible in Roman law. Gerhard Thür, "Die Aestimationsabrede im Seefrachtvertrag: Diskussionsbeitrag zum Referat Dimitri C. Gofas," in *Symposion 1993: Vorträge zur griechischen und hellenistischen Rechtsgeschichte* (Köln Wien: Böhlau, 1994), 267–71; De Romanis, *Indo-Roman Pepper Trade*, 194–95.

[46] See, *e.g.*, *Cod. Theod.* 33.2 (25 Oct. 386); Billeter, *Geschichte*, 115–306; Litewski, "Römisches Seedarlehen," 154; Kaser, *RP*, 2:341; Andreau, *Banking*, 92. Formal application of this rate cap seems to have been patchy; compliance in practice assuredly was.

[47] *Dig.* 22.2.4 and 45.1.122; *Cod. Iust.* 4.33.2 (12 Mar. 286); 4.33.3 (14 Mar. 286).

[48] *Cod. Iust.* 4.32.26 c.1 evinces clear intent to supersede prior legislation and reduce the burden on borrowers (*etiam generalem sanctionem facere necessarium esse duximus, veteram duram et gravissimam earum molem ad mediocritatem deducentes*). For an overview of the rate caps and other limits on interest in this and related laws of Justinian included in the *Codex*, see the excellent Bianchini, "Disciplina."

[49] See note 48 just above; Cassimatis, *Intérêts*, 49; Kaser, *RP*, 2:341. Justinian's motivation for reducing rates of interest via *Cod. Iust.* 4.32.26 has long been disputed. Was his primary motivation to protect of debtors, to foster Christian morality on the part of lenders, or something else entirely? Such questions lie outside the scope of this chapter.

[50] This innovation was not wholly without precedent. At least in theory, lenders who were senators had been limited in the rates of interest they could charge since 405. *Cod. Theod.* 2.33.4 (12 June 405).

[51] *Cod. Iust.* 4.32.26 c.2. Though the provision is not drafted in terms a modern legislator might use for a base-case rule, it is nonetheless clear that the 6% rate was intended to be one, from which the other rates departed. See *Cod. Iust.* 10.8.3 (6 Apr. 529); Billeter, *Geschichte*, 333.

[52] *Cod. Iust.* 4.32.26 c.2 (*qui ergasteriis praesunt; qui . . . aliquam licitam negotiationem gerunt*). Bankers fell within this latter rubric. *Cod. Iust.* 8.13.[27] (1 June 528); *Cod. Iust.* 12.34.1 pr. (528–529).

[53] The term *traiecticius contractus* is used uniquely in this passage but manifestly refers to the contract for *pecunia traiecticia, i.e.*, maritime loans.

DOI: 10.14754/CEU.2024.02

also for loans in kind (*specierum fenori dationes*).[54] Of logical necessity, the loan-type rate caps provided exceptions to the three tiers of status-based rate caps: if they did not, no-one would be eligible to extend them.

The wording of *Cod. Iust.* 4.32.26 is less clear than one might wish on the question of how that interest on maritime loans was to be reckoned.[55] As noted above, Roman law maritime loans prior to Justinian probably accrued interest by voyage rather than by unit of time.[56] The text of Justinian's new rule, however, strongly suggests that maritime loan interest was henceforth to be figured per annum. The cap on maritime interest rates is expressed with the same grammatical construction (*usque ad centesimam*) as the immediately preceding clause that caps interest on cash loans extended by businessmen (*usque ad bessem centisimae*), which indubitably refers to the time-based reckoning of interest applicable to cash loans generally.[57] In addition, that same provision subjects maritime loans and loans in kind to the same rate cap, in the same clause, by the same verb.[58] There can be no question of calculating interest on loans in kind on a per-voyage basis.[59]

[54] The *Codex* does not tell us why it was thought appropriate for loans in kind to be subject to a less stringent cap than loans in cash. Cassimatis' theory that higher rates were justified by the price risk inherent in assets other than cash is attractive but perhaps neglects the extent to which coin, too, could fluctuate in value. Cassimatis, *Intérêts*, 55.

[55] In addition to the ambiguity discussed in the text, there was also some ambiguity (real or imagined) as to whether the rate caps established by *Cod. Iust.* 4.32.26 applied to all loan agreements, regardless of the form by which they were concluded, or only to those where the promise to pay interest took the (customary) form of a *stipulatio.* In April 529, Justinian dispelled any hopes on the part of lenders that his caps were somehow not meant to apply to all types of loan irrespective of the form of contact. *Cod. Iust.* 4.32.27 c.2 (1 April 529); Bianchini, "Disciplina," 395.

[56] See the discussion following note 32 above.

[57] *Cod. Iust.* 4.32.26 c.2. This same provision gives similar formulations for the undoubtedly time-based reckoning of cash loans extended by *illustres* (*minime licere ultra tertiam partem centesimae usurarum…stipulari*) and those extended by others not falling into specific categories (*dimidiam tantummodo centesimae usurarum posse stipulari*).

[58] *Cod. Iust.* 4.32.26 c.2 (*in traiecticiis autem contractibus vel specierum fenori dationibus usque ad centesimam tantummodo licere stipulari nec eam excedere*). The corresponding provision of the *Basilika* does the same. *Bas.* 53.5.15 (Ὁ διαπόντια ἡ καρπούς δανείζων τελείαν ἑκατοστήν δύναται λαβεῖν) [=Scheltema and van der Wal, *Basilicorum Libri LX*, 1974, A VII: Textus Librorum LIII–LIX:2465]. See the trenchant comments of Buechel, *Das gesetzliche Zinsmaximum*, 17.

[59] As for maritime loans, this provision of *Cod. Iust.* 4.32.26 thus also put loans in kind on a time-based footing for purposes of calculating interest. This reading is confirmed by two measures adopted in the wake of a famine in Illyria in June of 535, in which Justinian re-affirmed time-based reckoning of interest of such loans. See *Nov.* 32 (SK 240/8–11: εἰ μὲν οἱ δανεισθέντες εἶεν καρποί, ὀγδόην τοῦ μοδίου μοῖραν ἐφ' ἑκάστῳ μοδίῳ εἰς ἐνιαυτὸν ὅλον, εἰ δὲ νομίσματα τὰ δανεισθέντα εἴη, ἐφ' ἑκάστῳ νομίσματι ἐνιαύσιον κεράτιον ἓν προφάσει τόκου. τοῦ λοιποῦ δὲ τοὺς δανειστὰς ἀρκουμένους ὀγδόῃ μοδίου μοίρᾳ ἐφ' ἑκάστῳ μοδίῳ εἰς ἐνιαυτὸν ἕνα (ἢ ἐφ' ὅσον μένει τὸ δάνεισμα κατὰ τὴν ἀναλογίαν ταύτην) ἢ τῷ κερατίῳ ἀποδιδόναι πάντως); and *Nov.* 34 (SK 241/13–14: *hoc reddito in praesenti cum parte modii octava pro singulo modio in unoquoque anno praestanda terrulas colonis restituere*….; SK 241/16: *nihil amplius quam unam siliquam pro singulo solido annuam praestare*; and SK 241/19–20: *creditores tam quod dederunt accipientes quam pro usuris octavam modii partem annuam pro singulis modiis, vel siliquam pro singulo solido (et secundum hunc modum in quantum fenus permanserit) omnibus reddere)* (emphasis supplied in each case). The innovation of the applicable interest rate from 12% to one-eighth (12.5%) was a measure to facilitate calculation for goods measured by volume. See note 28 above and note 127 in Chapter 2.

DOI: 10.14754/CEU.2024.02

When read with attention to both the text and the context, the cap of 12% for maritime loans established by *Cod. Iust.* 4.32.26 cannot be figured on a per-voyage basis.[60]

For these reasons, whatever may have been the case prior to December 528, interest-reckoning per annum, capped at 12%, was the new regime for maritime loans thereafter. If—as I think likely for the reasons discussed in the following paragraphs—the rate-cap of 1% per month, or 12% per annum, was intended to apply to maritime loans in their entirety, both land and sea parts, then *Cod Iust.* 4.32.26 constituted the first-time that Roman law fixed an upper limit on the rate of interest that could be charged on the sea part, *i.e.*, the time the creditor bore the risks of voyage.[61] The combined effect of the cap and the change of reckoning would have been significant. Work-arounds were prohibited: local custom could not be invoked in derogation of the new figure, nor could clever structuring be used to evade the new limits.[62] That is, of course, if the new framework of *Cod. Iust.* 4.32.26 for maritime loans, and for loans of other types, was in fact observed. As with much of Justinian's interest-rate legislation in both *Codex* and *Novels*, there are hints of substantial non-compliance.[63] If one assumes a similar culture of non-compliance with respect to maritime loans after *Cod. Iust.* 4.32.26, some lenders perhaps sought to continue prior practice, maybe even with some success.[64] But if (when?) the new interest rate regime for maritime loans eventually percolated into practice, the combined effect would be profound.

This element of Justinian's reform of maritime-loan interest rates has been the subject of much bewilderment on the part of those who have studied it. Earlier generations of legal historians viewed any capping of interest rates that might permissibly be charged on loans for risky maritime adventures as economically irrational.[65] To explain Justinian's decision to make such a change, they devised a variety of rationalizations that share little save their implausibility. Some sought to explain Justinian's new interest-rate regime for maritime loans by creative interpretation to limit its

[60] Buechel, *Das gesetzliche Zinsmaximum*, 17; Billeter, *Geschichte*, 337; Klingmüller, "Fenus nauticum," col. 2204; Cassimatis, *Intérêts*, 54; Purpura, "Ricerche," 320–21.
[61] Wolf, "Pompeianischen Urkundenfund," 437. Even with this cap, though, the maximum interest rate that could be charged on maritime loans remained higher than what could be charged for other cash loans.
[62] *Cod. Iust.* 4.32.26 c.3 and c.4, respectively. To the extent these provisions were observed in practice, it meant the end of measures aimed at increasing the interest rate artificially, such as the *actio* with *poena* and the practice of claiming expenses for a slave of the creditor to ride as "supercargo."
[63] *Cod. Iust.* 4.32.26 hints at non-compliance with prior rate caps in its cc.4–5 (anti-avoidance measures forbidding additional fees and intermediary structures), and subsequent legislation reveals non-compliance with *Cod. Iust.* 4.32.26 itself. See *Cod. Iust.* 4.32.27 (1 Apr. 529) (attempts to avoid the rate caps of *Cod. Iust.* 4.32.26 on pre-existing loans); *Cod. Iust.* 4.32.28 (1 Oct. 529) (attempts to evade the prohibition on payments *ultra duplum*); *Novs.* 32, 33 and 34 (15 June 535) (needing to reiterate rate caps on loans in kind) and *Edict* 9 c.5 (grandfathering past receipts *ultra duplum*).
[64] Bianchini, "Disciplina," 419.
[65] These scholars, more ideologically committed to notions of freedom of contract than is generally the case today, argued that the creditor's assumption of risk warranted the greatest degree of liberty for the parties to agree terms between themselves. See, *e.g.*, Sieveking, *Seedarlehen*, 45–46; Cassimatis, *Intérêts*, 53.

scope of application. Thus, one can read arguments purporting to explain the new rate cap as limited solely to maritime loans characterized by "low risk" or as applicable solely to the interest element of the compensation to be paid to the lender, who remained otherwise free to demand additional compensation for shouldering the risks of voyage (the *pretium periculi*).[66] By far the most influential of this type of argument was that put forward by Rudolf von Jhering, who argued that the 12% cap of *Cod. Iust.* 4.32.26 applied only to the land-based element of the maritime loan, *i.e.*, the period after the risks of voyage had passed.[67] Jhering's argument, which has found many adherents among legal historians in decades past and more recently,[68] is unpersuasive for reasons both methodological and textual. Karl Buechel put his finger on the methodological problem already in 1883, noting that Jhering's reading can only be explained by what might today be termed "motivated reasoning."[69] That is, Jhering's interpretation did not start from the text of the various provisions with a view to constructing a coherent account of them. Rather, it took as its starting point an assumption that capping maritime interest would have been an exercise in economic irrationality and that such a reading of Justinian's laws must be avoided. Of course, there is no reason that Justinianic law-making could not have been economically irrational. Legislation sometimes is irrational, even today. More importantly, it is anachronistic to assume that Justinian had concepts of "economy" or "efficiency" that he used in devising legislation.[70] As discussed more fully in Chapter 1, the emperor's legislative efforts were, like those of his predecessors, largely responsive in nature, driven by individual petitions, and reactive to the particular interests that prompted them. And to the extent *Cod. Iust.* 4.32.26 can be said to have a stated policy at all, it was to quash prior laws governing rates of interests on loans and replace them with Justinian's own, lower rates.[71] In addition to the general statement to that effect in the law's first chapter, the passage in its second chapter specific to maritime loans and loans in kind expressly states that higher rates

[66] See the review of such forlorn arguments, and the swift despatch given them, by Billeter, *Geschichte*, 334–36.
[67] von Jhering, *Gesammelte Aufsätze*, 3:227–32 [First published the 1881 edition of the *Jahrbuch* (vol. 19) under the title *Das angebliche Zinsmaximum beim foenus nauticum*, pp. 1–23]. Jhering had been anticipated in this argument at the distance of two centuries by Carl Gustav Vegesack, Hanc de periculi pretio, ad l. 5. ff. de nautico foenore (Giessen, Petri u. Liebenstein, 1678), *n.v.*
[68] *E.g.*, Bernhard Matthias, *Das foenus nauticum und die geschichtliche Entwicklung der Bodmerei* (Würzburg: Stuber's, 1881), 29–30; Paul Huvelin, *Études d'histoire du droit commercial romain* (Paris: Recueil Sirey, 1929), 208; Purpura, "Ricerche," 321–28.
[69] Buechel, *Das gesetzliche Zinsmaximum*.
[70] Fritz Klingmüller, "Streitfragen aus der römischen Gesetzgebung," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (romanistische Abteilung)* 23 (1902): 76–79. Of course, this is not to deny that the empire of the sixth century had an economy or that Justinian did not seek to regulate parts of it. But the notion that Justinian used any modern understanding of "the economy" as a category of analysis in his legislation finds little support in in the *Novels*.
[71] *Cod. Iust.* 4.32.26 c.1 (*Super usurarum vero quantitate etiam generalem sanctionem facere necessarium esse duximus, veterem duram et gravissimam earum molem ad mediocritatem deducents*); Cassimatis, *Intérêts*, 49–52; Kaser, *RP*, 2:341–342; Pontoriero, *Prestito*, 162.

were permitted before, the inference being that this passage meant to lower interest rates on these types of loans especially.[72] There is thus no methodological basis for concluding, as did Jhering, that the sea part of maritime loans somehow lay outside the emperor's grasp.[73]

Jhering's construction of *Cod. Iust.* 4.32.26 is also impossible for textual reasons. His text-based argument rested on two main planks. The first is the different expressions for interest used in the *Codex:* Jhering sought to equate expressions using the term *centesima* with land-based interest charges calculated by time, and expressions of fractional amounts with sea-based interest charges calculated by voyage. This plank is unsound, for several reasons. *Cod. Iust.* 4.32.26 c.2 states that, in contrast to its new 12% rate applicable to maritime loans, higher rates were formerly permitted (*licet veteribus legibus hoc erat concessum*). This clause would have been inapposite if the new 12% rate applied only to the land-based part of loans, as the land-based part of maritime loans had long been subject to rate caps under Roman law, usually at that same rate of 12% per annum (or its nearest duodecimal equivalent of 12.5%).[74] For the second plank of his argument, Jhering supposed a conflict between *Cod. Iust.* 4.32.26 c.2, which caps interest on maritime loans at 12% (*usque ad centesimam tantummodo licere stipulari nec eam excedere…*), and *Cod. Iust.* 4.33.[2] (12 Mar. 286), which frees maritime loans from the usual rules on interest rates (*liberam esse ab observatione communium usurarum*). This second plank collapses as soon as one realises that the *communium usurarum* referred to in the latter provision is the 6% base-case rate established by the former.[75] Moreover, Jhering's construction of *Cod. Iust.* 4.32.26 requires its expression for maritime loans (*in traiecticiis autem contractibus*) to refer to the land part only. This is implausible on etymological grounds: *traiecticius* clearly refers to passage or transport across something (*i.e.*, the sea).[76] It is also inconsistent with the relevant provisions of the *Digest*, where the term and its variations refer to movement across the sea.[77] Thus, if the expression *in traiecticiis autem contractibus* were meant to refer to only part of a maritime loans, it would far more naturally refer

[72] *Cod. Iust*. 4.32.26 c.2 (*in traiecticiis autem contractibus vel specierum fenori dationibus usque ad centesimam tantummodo licere stipulari nec eam excedere, licet veteribus legibus hoc erat concessum*) (emphasis supplied).
[73] A point supported by later Byzantine understandings of this provision to impose the 12% rate on maritime interest. *Bas*. 23.3.74 [=H.J. Scheltema and N. van der Wal, *Basilicorum Libri LX*, vol. A III: Textus Librorum XVII–XXV (Groningen: Wolters, 1960), 1134, lines 18–21]; *Bas*. 53.5.15 [=Scheltema and van der Wal, *Basilicorum Libri LX*, 1974, A VII: Textus Librorum LIII–LIX:2456, lines 8–9] and scholion 1 to *Bas*. 17.1.12 in MS *Par. Gr.* 1352 [=H.J. Scheltema and D. Holwerda, *Basilicorum Libri LX*, vol. B III: Scholia in Libr. XV–XX (Groningen: Wolters, 1957), 1041–42, *s.v.* 17.1(P).12, lines 3–5]. See Buechel, *Das gesetzliche Zinsmaximum*, 16; Luchetti, "Disciplina," 118 n.10.
[74] Billeter, *Geschichte*, 115–306; Cassimatis, *Intérêts*, 49; Litewski, "Römisches Seedarlehen," 154; de Ste. Croix, "Maritime Loans," 55; Kaser, *RP*, 2:341.
[75] The Byzantines understood this: *Bas*. 23.3.74 [=Scheltema and van der Wal, *Basilicorum Libri LX*, 1960, A III: Textus Librorum XVII–XXV:1134, lines 17–21].
[76] *Oxford Latin Dictionary*, P.G.W. Glare, ed. (Oxford: Clarendon, 1997), *s.vv. traicio* 6 and 7, *traiecticius*, *traiectio*.
[77] See, *e.g.*, *Dig.* 22.2.1, where *pecunia* that is not transported is not *traiecticia*. Even in *Dig.* 22.2.4, the *pecunia* that is not *traiecticia* is only so because not transported at the lender's risk; it was still transported across the sea.

to the sea part of the loan than to the land part, as Jhering's reading requires.[78] More generally, Jhering's effort is an exercise in futility, for there is neither need nor reason to divide maritime loans into parts at all for purposes of *Cod. Iust.* 4.32.26. Whatever the prior practice, Justinian meant to legislate anew in 528: his new rate cap applied to maritime loans *tout court*.[79]

In the mid-20th century, the romanist Arnaldo Biscardi made a similar error as Jhering even while disagreeing with him.[80] Jhering had devised his interpretation of *Cod. Iust.* 4.32.26 as a means of avoiding his own (strawman) argument to the effect that the law's new interest rate regime would, if applied to "maritime" interest, lead to a *Todesschuss* for sea-borne commerce.[81] Biscardi took that strawman literally: On his view, the new rate cap failed to compensate lenders adequately for the risks they assumed; supply of maritime loans plummeted; shippers and merchants went begging for capital; seaborne commerce declined; the economy of the empire suffered.[82] *Novel* 106 could thus be explained as an attempt to arrest the decline. This account makes for an attractive tale of rational actors behaving in ways that neo-classical economics predicts but it remains unpersuasive for all that, even if we accept for the sake of argument Biscardi's unstated premise of *imperator economicus*. If the adoption of new rate caps in *Cod. Iust.* 4.32.26 had led to the grave decline in maritime commerce from 528 postulated by Biscardi, one might expect to find some evidence for that in the historical record. But there is none. To the contrary, the archaeological evidence (much of which came to light after Biscardi's *floruit*) rather suggests that maritime trade was remarkably robust and resilient in the eastern Mediterranean in the first half of the sixth-century, even if that evidence is not (yet) fine-grained enough to allow us to follow fluctuations by year or by decade.[83] Moreoever, if the consequences were as dire as Biscardi makes them out to be,

[78] Jhering's arguments rest on an anachronistic view of legislative technique. Late antique legislation was unacquainted with modern conventions of legislative drafting, with their emphasis precise and consistent usage of defined terms and eschewal of unnecessary variety of expression. See Kußmaul, *Pragmaticum*; Voß, *Recht*.

[79] Jheringian attitudes toward Justinian's capping of maritime-loan interest persisted well into the 20th century. In the 1980s, Gianfranco Purpura looked to later Byzantine materials in an attempt to resuscitate the argument that any reference to interest expressed in terms of the *centesima usura* (or its Greek equivalents) was assumed to relate solely to land-based interest. Purpura, "Ricerche," 321–26. But this argument is subject to the same, fatal, criticisms as Jhering's: it ignores the statements in the *Codex* that this provision aimed at establishing a new norm in favour of an unsupported assertion that the emperor cannot possibly have meant what his new law said.

[80] Biscardi, "Actio pecuniae traiecticiae," 1947, 42 n.1.

[81] von Jhering, *Gesammelte Aufsätze*, 3:214.

[82] Biscardi, "Actio pecuniae traiecticiae," 1947, 54–56, followed in the latter point by Bianchini, "Disciplina," 419.

[83] To be sure, shipping operated at lower volumes in late antiquity than in the late republic and early empire, due to loss of territories and population. McCormick, *Origins*, 105–13; Cécile Morrisson and Jean-Pierre Sodini, "The Sixth-Century Economy," in *The Economic History of Byzantium: From the Seventh through the Fifteenth Century*, ed. Angeliki E. Laiou (Washington, D.C.: Dumbarton Oaks Research Library and Collection, 2002), 206–9. But the archaeological evidence suggests that, if anything, Justinian's reign saw an upswing compared with the immediately preceding period, at least until the consequences of the plague that struck in 541–542 made themselves felt. Ward-Perkins, "Specialisation," 352–54, 358–61, 371–74, 384 and *passim*; Hadas Mor, "The Socio-Economic Implications for Ship Construction: Evidence from Underwater Archaeology and the *Codex Theodosianus*," in *Shipping, Trade and Crusade in the Medieval Mediterranean: Studies in Honour of John Pryor*, ed. Ruthy Gertwagen and Elizabeth Jeffreys

why did it take 12 years from the adoption of *Cod. Iust.* 4.32.26 for corrective measures to be taken? And if the effects of the rate-cap regime brought in by *Cod. Iust.* 4.32.26 were so dire, why would Justinian be eager to return to it when he repealed *Novel* 106 less than eight months later?[84]

Justinian's Second Reform: *Novel* 106

Twelve years after his reform of maritime loan interest in 528, Justinian revisited the topic in September 540 with a second, wholly different, revamp. *Novel* 106 informs us that it was prompted by two petitioners. Who were they?

The Petitioners

The description of legislative preliminaries in the preface to *Novel* 106 identifies them as a certain Peter and Eulogetus, who made their living by "lending money to shippers, or to traders, especially those doing maritime business."[85] It is, of course, tempting to identify the petitioning Peter with the well-known Peter Barsymes, but that identification is wholly speculative.[86] Neither petitioner is otherwise attested.[87] Whilst it is not expressly stated that the petitioners were based in Constantinople (as opposed to the provinces), this is a reasonable inference from the language of the repealing statute, *Novel* 110, which implies that *Novel* 106 was conceived with the needs of the capital in mind, thus entailing that those who petitioned for it were themselves based there.[88]

The fact that Peter and Eulogetus made their living extending maritime loans does not entail that they were bankers.[89] Some scholars have deemed that they were, but that is unlikely.[90] There was no reason why the petitioners should have been. In the sixth century as in prior periods, the extension of loans was in principle open to all, or nearly so. Though late antique Christian piety was unenthusiastic about the practice of lending at interest, it was, at least in the eastern part of empire,

(London: Routledge, 2012), 55–56; Justin Leidwanger, *Roman Seas: A Maritime Archaeology of Eastern Mediterranean Economies* (New York: Oxford University Press, 2020), 223 with nn.102 and 103. If (if!) there was a downturn in ship-borne trade in the sixth century, it occurred only later than the events discussed in this chapter, after the first wave of plague or possibly even after Justinian's reign had ended.

[84] Cf. Patlagean, *Pauvreté*, 177 (situating the law's effects on commerce in the context of rivalry between the Roman empire and Persia, without however conjuring up a Biscardian collapse of seaborne trade).

[85] *Nov.* 106 pr. (SK 508/3–5: εἰώθασι ναυκλήροις ἤτοι ἐμπόροις δανείζειν χρυσίον, καὶ μάλιστα τοῖς ἐν θαλάττῃ τὰς πραγματείας ποιουμένοις). Some have speculated that the petitioners might rather have acted as borrowers, rather than lenders, of maritime loans (*e.g.*, Purpura, "Ricerche," 327; Pontoriero, *Prestito*, 166 n.20), and the ensuing consultation process might admit of easier explanation if they were. But the use of the active δανείζειν at SK 508/3 rather than the middle δανείζεσθαι, together with the datives ναυκλήροις and ἐμπόροις, precludes so convenient a reading.

[86] Cf. Díaz Bautista, *Estudios*, 117 n.22. On Peter Barsymes, the former money-changer (ἀργυραμοιβός) who went on to occupy the offices of *comes sacrarum largitionum, magister officiorum* and (twice) *praefectus praetoriae orientis*, see the discussion at notes 39–40 in the Introduction.

[87] Miller and Sarris, *Novels*, 2:697 n.2.

[88] *Nov.* 110 c.1. See the discussion under the caption "The Repeal(s) of *Novel* 106" below.

[89] *Nov.* 106 pr. (SK 508/5–7).

[90] *Contra* van der Wal, *Manuale 2nd*, 109 n.12.

DOI: 10.14754/CEU.2024.02

not actually prohibited for anyone other than clergy.[91] And for all of Procopius' complaints of Justinian's corralling of the trades of Constantinople into monopolies,[92] credit extension was the exclusive preserve of no class. If, in prior periods, bankers were just one of many sources of loan capital of all types (and by no means the most important),[93] the provisions of *Cod. Iust.* 4.32.26 setting maximum rates by lender type show that that continued to be the case in late antiquitty.

The lack of exclusivity for bankers as sources of debt finance is especially manifest for maritime loans. Under *Cod. Iust.* 4.32.26, the status of the lender was irrelevant to the rate of interest that could be charged for such loans: that is, they could be made by lenders of all statuses. In prior periods, the main sources of such loans were members of the landed elite, non-bank businessmen and other merchants, as well as others who did not necessarily fall into any of those categories.[94] "Bankers" (*argentarii*) instead acted more in ancillary capacities, such as intermediaries, paying agents, custodians, and witnesses.[95] There were good commercial reasons for this practice, and for its likely continuation into later antiquity. Because maritime loans, uniquely, transferred risks of voyage to the lenders, the necessary credit assessment differed from that needed for other kinds of loans. A prospective maritime lender who hoped to stay in business for any length of time would necessarily have to assess not just borrower creditworthiness, security (both personal and *in rem*) and other customary credit assessments, but also shipping routes, weather patterns, the

[91] Canon 17 of the Council of Nicaea; Andreas Weckwerth, "The Twenty Canons of the Council of Nicaea," in *The Cambridge Companion to the Council of Nicaea*, ed. Young Richard Kim (Cambridge: Cambridge University Press, 2021), 175. And, in addition to Justinian's various laws discussed in this chapter, such indubitably Christian emperors as Constantine, Theodosius, Arcadius, and Honorius issued laws expressly countenancing the extension of loans at interest (subject to rate caps): *Cod. Theod.* 33.1 (17 Apr. 325) (imposing caps on certain loans in kind); *Cod. Theod.* 33.2 (25 Oct. 386) (reasserting cap of 12% per annum for cash loans); *Cod. Theod.* 33.4 (12 June 405) (limiting loans by senators to one-half the otherwise applicable rate); Pikulska-Robaszkiewicz, "L'usure"; Gofas, "The Byzantine Law of Interest," 1096. In the west, Canon 20 of the Synod of Elvira purported to ban even laity from lending at interest. Alfred William Winterslow Dale, *The Synod of Elvira and Christian Life in the Fourth Century: A Historical Essay* (London: MacMillan, 1882), 177–78 and 321; Pikulska-Robaszkiewicz, "L'usure," 719. Late antique Christian disdain for money-lending drips from Miracles 38 and 39 of the Miracles of St. Artemius. Virgil S. Crisafulli, John W. Nesbitt, and John F. Haldon, eds., *The Miracles of St. Artemios: A Collection of Miracle Stories by an Anonymous Author of Seventh Century Byzantium* (Leiden: E.J. Brill, 1997), 196–205 and note *ad loc*. on 285. But churches themselves might extend loans from time to time. See *Vita Joh. Eleem.* 34[35] [=Migne, *PG*, vol. 93, cols. 1644–1645]. Such loans ought not to have borne interest, but the *Vita* is studiously silent as to whether or not they did.

[92] Procop. *Hist. Arcana* 25.13 [=Haury and Wirth, *Procop. vol. 3*, 3:155].

[93] Andreau, 3–6 and, for a survey of the different groups, 9–70. See also Koenraad Verboven, "Faeneratores, Negotiatores and Financial Intermediation in the Roman World (Late Republic and Early Empire)," in *Pistoi Dia Tèn Technèn: Bankers, Loans, and Archives in the Ancient World: Studies in Honour of Raymond Bogaert*, ed. Koenraad Verboven, Katelijn Vandorpe, and V. Chankowski (Leuven: Peeters, 2008), 211–29.

[94] Others: *Cod. Iust.* 4.33.[4] (lender a woman and thus, per *Dig.* 2.13.12, not a banker); Philogelos, 50 [=R.D. Dawe, ed., *Philogelos* (Munich: K.G. Saur (Teubner), 2000), 18] (Σχολαστικός δανειστής); André Tchernia, "Reves de richesse, emprunts et commerce maritime," in *L'exploitation de la mer de l'antiquité à nos jours, 2. La mer comme lieu d'échanges et de communication* (VIèmes Rencontres Internationales d'Archéologie et d'Histoire d'Antibes, Valbonne: Éditions A.P.D.C.A., 1986), 123–30; Andreau, *Banking*, 56, 151.

[95] As in the transaction referred to in *P.Vindob. G* 19792 [=SB VI 9571]; Andreau, *La vie financière*, 603–4, 668; Andreau, *Banking*, 56.

seaworthiness of vessels, crew skills, and much else besides. These assessments required different knowledge and skills than the kinds needed before extending other kinds of loans. In addition, two fragments included in the *Digest* can be read to suggest that maritime lenders may have been more "hands-on" with respect to the underlying commercial transaction than was the case for other lenders.[96] Maritime loans were therefore in all likelihood the province of specialists, perhaps former shippers and merchants, rather than bankers, who served mainly as intermediaries.[97] And there are additional, sixth-century reasons for doubting that Peter and Eulogetus were bankers. In three different pragmatic sanctions dating from the mid-530s to the early 540s—*Novel* 136,[98] *Edict* 9[99] and *Edict* 7[100]—the emperor and his legislative draftsmen well knew how to attribute credit to the bankers and their guild for new laws for which they had petitioned. By contrast, both *Novel* 106 and *Novel* 110 notably omit any such attribution. And, as was the case in prior periods, late antique maritime loans continued to require different risk assessments, suggesting that they continued to be the province of specialised lenders.[101]

For all these reasons, the petitioners Peter and Eulogetus who initiated the process that led to *Novel* 106 were engaged in maritime commerce as lenders, were based in the capital city, and served its community of shipper and merchant borrowers by extending them maritime loans, but in all likelihood were not themselves bankers in the narrow sense (ἀργυροπρᾶται).

Purpose of the Petition

What did the petitioners hope to achieve? *Novel* 106 informs us that they feared litigation in respect of maritime loans and that they therefore sought clarification and confirmation of existing commercial practices in the form of an imperial pragmatic sanction.[102] We are not told the nature of the disputes, though the use of the present participial phrase (ἀμφισβητήσεων ἐντεῦθεν αὐτοῖς ἀνισταμένων) might be thought to suggest that they were live rather than merely theoretical possibilities. It is easy enough to imagine how such litigation might arise. As discussed more fully below, the maritime-loan customs described in the preamble of *Novel* 106 are difficult to square

[96] *Dig.* 4.9.1 c.7 (seaman's obligation is to lender who entrusts pledged goods, not to their owner); *Dig.* 14.1.7 pr. (lender's duty to ensure that repairs for which money was lent were necessary); Seckar-Bandow, "Traders and Merchants," 105–6, 108–9.
[97] Rougé, *Recherches*, 348–49; Barnish, "Wealth," 15. As had been the case for Athens: Raymond Bogaert, *Banques et banquiers dans les cités grecques* (Leiden: Sijthoff, 1968), 372–74; Cohen, *Athenian Economy*, chap. 5; Millett, *Lending and Borrowing*, 188–89); for republican Rome: David Jones, *The Bankers of Puteoli: Finance, Trade and Industry in the Roman World* (Stroud: Tempus, 2006), 185–86); and for High Empire: *P.Vindob.* G 19792; Andreau, *Banking*, 56; Rathbone, "Financing," 221.
[98] *Nov.* 136 pr. (1 Apr. 535). See Chapter 2.
[99] *Edict* 9 (undated). See note 113 in the Introduction.
[100] *Edict* 7 (1 Mar. 542). See Chapter 3.
[101] Jones, *LRE*, 2:868.
[102] *Nov.* 106 pr. (SK 508/7–11).

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with the interest-rate limits of *Cod. Iust.* 4.32.26 c.2, despite Justinian's assertions to the contrary.[103] That said, there remains scope for doubt as to whether the disputes complained of actually existed: As discussed more fully below, the account of preliminaries gives no hint as to their nature and instead rather suggests unanimity of views, at least amongst those whose views were taken.

The Consultations

How did the petition make its way into the imperial authorities? And how was it dealt with once in their hands? Peter and Eulogetus addressed their petition to the emperor but it was in fact lodged with the praetorian prefect of the East or his staff.[104] There was nothing remarkable about this: the pretorian prefecture had responsibility for both the administration of justice and the collection of the land-tax; as a result it was the civil (*i.e.*, non-military) department most directly facing the empire's citizens, especially in its powerful *Orientis* manifestation.[105] The *PPO* at the time was John the Cappadocian, a character disliked by Procopius and John Lydus alike, ostensibly for his corruption but probably more for his administrative reforms, which touched upon the vested interests of their class.[106] Upon notification of the petition by John, Justinian returned the matter to him for official inquiry.

The emperor, undoubtedly acting at John's suggestion, vested the Cappadocian with responsibility for a fact-finding exercise and instructed him to summon the shippers (ναύκληροι) for consultations to ascertain the customary practices for maritime loans.[107] No mention is made of summoning lenders for consultation but, given the identity of Peter and Eulogetus, it may be assumed that the views of lenders were taken into account, either via the petition itself or otherwise during the fact-finding process. The shippers presumably were summoned to give evidence as to customs of which they were knowledgeable in their capacity as borrowers under maritime loans. But shippers were never the only class of persons that took out such loans. As discussed above, merchants (ἔμποροι), too, were always borrowers under maritime loans. Yet *Novel* 106 makes no

[103] *Nov.* 106 pr. c.1 (SK 509/29: διότι μηδὲ τοῖς ἤδη τεθειμένοις μάχεται νόμοις). See the text at notes 163–171 below.
[104] Addressee: *Nov.* 106 pr. (SK 508/1–2). That the petition was made via the prefecture is apparent from the fact that it was the *PPO* who notified the emperor of it (SK 507/32–SK 508/1: ἐδίδαξας).
[105] Not all petitions needed to be or were made directly to the emperor; they could be lodged at virtually any level of the bureaucracy, and a savvy petitioner would undoubtedly choose his addressee with care. See Chapter 1. On the pretorian prefecture, see Jones, *LRE*, 1:448–462; Barnish, Lee, and Whitby, "Government and Administration," 174–75; Kelly, *Ruling*, 11–12; John F. Haldon, "Economy and Administration: How Did the Empire Work?," in *The Cambridge Companion to the Age of Justinian*, ed. Michael Maas (Cambridge: Cambridge University Press, 2005), 44, 50.
[106] John Lydus, *De Mag.*, 3.57, 3.59, 3.60, 3.62, 3.65 [=Bandy, *On Powers*, 220–227,230–235]; Procop., *Wars*, 1.24.12–15 [=Haury, *Procop. vol. 1*, 1:125–26]; Cameron, *Procopius*, 245; Martindale, *PLRE*, 3:3A:627–635 (Fl. Ioannes 11 ("the Cappdocian"). John's career came to a sticky end at about the time *Nov.* 110 was promulgated. Procop., *Wars*, 1.25 [=Haury, *Procop. vol. 1*, 1:134–42].
[107] The consultations were likely coordinated via guilds. Miller and Sarris, *Novels*, 2:698 n.5.

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mention of their being summoned to give their views, even though it would go on to govern their maritime loans just as it did those of the shippers.[108]

In any event, the Cappadocian duly summoned the shippers and took their testimony under oath. The customs sworn were found to be "of various kinds" or, as one might alternatively translate the term used, "complicated."[109] They were neither of those things. The loan structures as described were just two, both closely related one to the other and utterly straightforward.[110] *Novel* 106 does not tell us that the customs were those specific to the capital but the repealing constitution of *Novel* 110 can be interpreted to hint that they were.[111] As Gianfranco Purpura has noted, however, at least some of the customs described in the preliminaries to *Novel* 106—namely the reckoning of interest per voyage rather than as a function of time, and 20-day grace period between arrival and repayment—had deep roots in practice throughout the Mediterranean basis.[112] Even as Purpura is correct in the long view, however, one need not necessarily believe that the customs described in the preface to *Novel* 106 reflected contemporary commercial practice subsequent to December 528, when *Cod. Iust.* 4.32.26 was promulgated, whether in the capital or elsewhere. There are several reasons for this. First, as mentioned just above the existing customs for maritime loans as described were neither "various" nor "complicated". Second, regardless of whatever disputes may have prompted Peter and Eulogetus to make their petition, *Novel* 106 betrays no hint of their being aired at the consultation, the description of which suggests there was consensus as to the loan structures in use and their respective terms.[113] Third and most importantly, if the customs described in *Novel* 106 were in fact prevailing, this would indicate widespread violation, if not outright disregard, of the rate regime for maritime loans introduced twelve years earlier by *Cod. Iust.* 4.32.26. To see why, let us examine the two loan structures described in *Novel* 106.

[108] The description of the consultation at SK 508/17 mentions only the shippers; the binding provisions of SK 509/31, SK 509/36–37, SK 510/5, and SK 510/7 state that they regulate just the disputes and contracts of shippers but also those of merchants. Bianchini's study here puts a rare foot wrong when it asserts that all affected constituencies were consulted. Bianchini, "Disciplina," 419.

[109] *Nov.* 106 pr. (SK 508/20: τρόπους εἶναι ποικίλους).

[110] The customs described in *Nov.* 106 are models of simplicity in comparison to the maritime-loan contraption that is the subject of *Dig.* 45.1.122.1, or the arrangements Plutarch reports that Cato employed.

[111] For the same reasons that point toward the petitioners being based there.

[112] Purpura, "Ricerche," 218 and 327.

[113] Billeter, *Geschichte*, 324–25 sought to identify variety in presumptive differences of subordinate importance not described in the legislation. There is no indication any such undescribed complexities in the text. And if such differences were too minor to be identified, why would they have led to ἀμφισβήτησεις sufficient to prompt Peter and Eulogetus to seek a new law? Why would the legislative draftsman have bothered to mention them as ποικίλους? And how would the new legislation have resolved them?

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The Structures

In their testimony, the shippers described two forms of maritime loan. Because the lender had to make an affirmative election to employ the structure first described, failing which the second structure governed, it is generally accepted that that second structure was both the more commercially important and the default, with the first a mere variant of it.[114] Loans made under the default structure bore interest at the rate of one-eighth, equivalent to 12.5%.[115] Loans made under the alternative structure bore a rate of interest of one-tenth, *i.e.*, 10%,[116] and the lender was additionally entitled to ship onboard a specified amount of wheat or barley—one *modius* (ca. nine litres) per *solidus* lent.[117] If the lender chose to ship freight, it was the borrower rather than the lender who was liable for any applicable port duties.[118] Risk of loss of the creditors' cargo, at least, remained with the creditor; the text does not expressly state that risk of loss on other (non-creditor) cargo also lay with the creditor.[119] In all likelihood, it did: The fact that the 10% rate payable on the freight structure exceeded the 8% payable on ordinary business loans suggests that the lender bore the risk on the entirety of the cargo financed, not just the portion that represented his free freight.[120] Only that would justify higher rates of interest. On either loan structure, repayment of principal, together with interest accrued, was due upon return to port or, for the final voyage of the season,

[114] *Nov.* 106 pr. (SK 508/30–31: εἰ δὲ οὐχ ἕλοιντο τὴν ὁδὸν ταύτην οἱ δανείζοντες); Billeter, 325–27; Purpura, "Ricerche," 325 with n.402; Pontoriero, *Prestito*, 169.
[115] *Nov.* 106 pr. (SK 508/31–32: τὴν ὀγδόην μοίραν λαμβάνειν ὑπὲρ ἑκάστου νομίσματος).
[116] *Nov.* 106 pr. (SK 508/27–28: κατὰ δέκα χρυσοῦς ἕνα κομίζεσθαι μόνον ὑπὲρ τόκων).
[117] The compensation for the loan was thus mixed, comprising both cash and services in kind. On mixed transactions, see Patlagean, *Pauvreté*, 357–58, and, now, Candy, "Credit for Carriage." The restriction of freight to wheat or barley might suggest that the alternative structure was intended for use by lenders other than professional ones, but of course professional lenders could conduct other forms of business alongside lending.
[118] *Nov.* 106 pr. (SK 508/23–26: καὶ μηδὲ μίσθωμα τοῖς δημοσίοις παρέχειν ὑπὲρ αὐτοῦ τελώναις, ἀλλὰ τό γε ἐπ' αὐτοῖς ἀτελώνητα πλέειν τὰ σκάφη). If one were to figure the port duties payable as part of the interest expense, the all-in interest expense paid under the alternative structure could perhaps in some cases exceed the 12.5% payable under the default structure. We do not know the level of port duties during this period with any certainty; the figures given by Procopius in *Hist. Arcana* 25.10 [=Haury and Wirth, *Procop. vol. 3*, 3:154] (fees tripling the price of shipped merchandise) should be treated with caution. For purposes of calculating the charge applicable to loans of the alternative freight structure, the additional costs of port duties borne by the borrower must be calculated based on the value of only the lender's cargo, since only that represents compensation to the lender from the borrower (the borrower being responsible for duties on his own cargo in any event). Inasmuch as maritime loans were instruments of finance rather than insurance (see at note 45 above), the total principal amount of the loan would ordinarily have been larger, covering some or all of the total amount of the borrower's own cargo, otherwise the loan would have lacked commercial sense as a a financing instrument. The resulting additional port-duties charge on the smaller amount of lender cargo might on occasion exceed 2.5% of the total loan amount—*i.e.*, the gap between the 10% of the alternative structure and the 12.5% of the default structure— but that can have happened only rarely. Cf. Billeter, *Geschichte*, 327 n.3 (rejecting outright the possibility that tolls could exceed 2.5%).
[119] *Nov.* 106 pr. (τὸν ἐκ τῶν ἀποβησομένων κίνδυνον). Theodore, *Breviarum*, *Nov.* CVI, is similarly ambiguous (τὸν κίνδυνον ἀναδεχόμενος) [=Zachariä von Lingenthal, *Anekdota*, 102]. The Synopsis states only that the lender takes the risk on his own freight (τους δανειστὰς δὲ ὁρᾶν τὸν ἐκ τούτων ἀποβησόμενον κίνδυνον) (emphasis supplied), but does not expressly exclude broader risk coverage. Schmink and Simon, "Synopsis," ll. 1511–1512.
[120] Accord: Purpura, "Ricerche," 325 n.403.

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within 20 days of return.[121] This grace period, during which interest did not accrue, allowed the cargo to be sold to generate funds for repayment.[122] If the loan was not paid by the due date, the interest rate would go down, to 8% per annum, because the creditor no longer bore maritime risk.[123]

We may well ask to what extent the customs described in the preface to *Novel* 106 and attributed to the testimony of the shippers in fact reflected actual practice, as opposed to customs that those consulted wished to be enshrined in law. There are a number of issues. The practices so described are not otherwise attested in other Roman law sources.[124] More importantly, the interest-rate provisions of the two loan structures of *Novel* 106 conflict with Justinian's regime for maritime-loan interest promulgated in 528. This conflict arises from the different interest-rate calculation regime applicable to loans made on the default structure and, though not stated in so many words, to those made under the alternative, freight-based structure, as well. Under *Novel* 106, the interest rate was to be calculated on per-voyage basis, unlike the per-annum basis applicable to maritime loans under *Cod. Iust.* 4.32.26.[125]

Promulgation of Novel 106

The prefect communicated the findings of his consultations back to the emperor in a formal report.[126] The use of the verb ἠκούσαμεν at the beginning of the preamble of *Novel* 106 suggests

[121] *Nov.* 106 pr. (SK 508/34–35). The provision for repayment upon arrival might reflect a practice of reinvesting the loan proceeds with the same borrower in a further loan pursuant to a new maritime loan contract, and this possibility is reflected in the shippers' testimony. *Nov.* 106 pr. (SK 509/5–9); Huvelin, *Études*, 203–4.

[122] *Nov.* 106 pr. (SK 509/13–15).

[123] *Nov.* 106 pr. (SK 509/15–20). This decrease in the interest rate if the loan is not paid when due makes manifest the insurance-like element of the structure: the fact that the interest rate declines even after payment default because the risks of voyage have passed entails that the higher rate compensates the lender for shouldering them.

[124] Though, as noted above, at least some aspects of the customs attested to have roots in non-Roman practice. Purpura, "Ricerche," 327. More recently, Peter Candy has sought to identify a possibly Roman precedent for the mixed compensation of the alternative structure of *Nov.* 106 in a pompeian tablet that, it is argued, documents a transaction combining both freight and credit. Candy, "Credit for Carriage."

[125] *Nov.* 106 pr. (SK 508/32–34: οὐκ εἰς χρόνον τινὰ ῥητὸν ἀριθμουμένων, ἀλλ ἕως ἂν ἡ ναῦς ἐπανέλθοι σεσωμένη. κατὰ τοῦτο δὲ τὸ σχῆμα. . . θᾶττον γε μὴν ἐπανιούσης αὐτῆς τὸν χρόνον εἰς ἕνα μόνον ἢ δύο παρελκυσθῆναι μῆνας, καὶ ἐκ τῶν τριῶν κερατίων ὠφέλειαν ἔχειν, κἂν οὕτως βραχὺς διαγένηται χρόνος κἂν εἰ περαιτέρω παρὰ τῷ δανεισαμένῳ μένοι το χρέος). That this language calls for per-voyage rather than time-based calculation of interest is the overwhelming consensus of commentators both ancient and modern. See Theodore, *Breviarum, Nov.* CVI [=Zachariä von Lingenthal, *Anekdota*, 102]; the Synopsis of Justinian's *Novels* found in the *Codex Athos Pantokrator* 234, fol. 505r–522r [=eds. Schmink and Simon, "Synopsis," ll. 1513–1518]; Billeter, *Geschichte*, 325–29; Ashburner, *Rhodian Sea-Law*, ccxx; Klingmüller, "Fenus nauticum," col. 2204; Cassimatis, *Intérêts*, 53–54; Biscardi, "Actio pecuniae traiecticiae," 1947, 56; Castresana Herrero, *El prestamo maritimo*, 103; Purpura, "Ricerche," 325, 327; Gofas, "The Byzantine Law of Interest," 1097 with n.17. The argument to the contrary by Pontoriero, *Prestito*, 174–75 ignores the import of the Greek text. Moreover, his arguments *ex absurdo* that short voyages would lead to high real interest rates curiously neglects that Greek practice, from which Roman law borrowed the institution of the maritime loan, contemplated just that by its calculation of interest on a per-voyage basis. In any event, calculating interest differently for the maritime and terrestrial parts of a loan is hardly "*absurdo*": if, as *Nov.* 106 expressly contemplates, the two parts could have different rates of interest, it is but a small step to calculate those different rates on different bases.

[126] Μήνυσις, appearing (in its genitive singular form) as the first word of *Nov.* 106 (SK 507/31), is the Greek translation of *relatio*, the formal report of an imperial official. *Nov.* 151 (undated) begins with the same word, as does the so-called

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that John gave his report orally, though the first chapter of the law later suggests that there were also written minutes that the emperor used to familiarise himself with the issues.[127] Justinian enshrined the customs so ascertained into law on 7 September 540, in the form of an ἰδικὸς νόμος that has come down to us as *Novel* 106.[128] This term, ἰδικὸς νόμος, was the Greek translation for *lex specialis, i.e.*, a law intended not to be of general application throughout empire but only of more limited scope, such as a rescript or pragmatic sanction. But if *Novel* 106 was formally a pragmatic sanction,[129] it was no ordinary one. Like Justinian's pragmatic sanctions generally, it lacked provisions for its own publication, but that had little bearing on the substantive force of the new rules it set forth.[130] The dispositive provision of *Novel* 106 states that it is to provide a general rule of resolution for current and future disputes relating to maritime loans, without regard to the identity of lender or borrower.[131] To underscore the point, Justinian instructed that *Novel* 106 was to be incorporated into the corpus of general laws.[132]

Didymes rescript. Feissel, "Rescrit Didyme." This word and others from the same root appear regularly in the *Novels* in relation to official reports. See Chapter 1.

[127] Cf. *Nov.* 106 pr. (SK 507/31: ἠκούσαμεν) with c.1 (SK 509/25–26: Ἡμεῖς τοίνυν καὶ αὐτοῖς ἐντυχόντες τοῖς πεπραγμένοις καὶ τὸ πρᾶγμα διδαχθέν) (emphasis supplied). For the use of ἠκούσαμεν to indicate that a report was read aloud before the emperor, see Hunger, *Prooimion*, 164 n.13. Given the record-keeping habits of the prefectural staff recounted at John Lydus, *De mag.*, 3.20 [=Bandy, *On Powers*, 162–67], it would scarcely have been possible that no written record was compiled, even taking into account the decline in the number of speedwriters lamented at John Lydus, *De mag.*, 3.66 [=Bandy, 236–37]. See the well-known "papyrasserie" joke at Jones, *LRE*, 1:602, as well as Kelly, *Ruling*, chap. 3. and *passim*.

[128] The classification of *Nov.* 106 as an ἰδικὸς νόμος has confounded scholars committed to the maintenance of strict distinctions between *leges generales* and other types of legal instruments in the face of Justinianic practice to the contrary. See, *e.g.*, Noailles, *Collections*, 1:46–48. The distinction between different legislative forms was observed only loosely in late antiquity. For Justinian's reign, see *Cod. Iust.* 1.14.12 (30 Oct. 529); Detlef Liebs, "Das Gesetz im spätrömischen Recht," in *Das Gesetz in Spätantike und frühem Mittelalter: 4. Symposion der Kommission "Die Funktion des Gesetzes in Geschichte und Gegenwart,"* ed. Wolfgang Sellert (Göttingen: Vandenhoeck & Ruprecht, 1992), 22 ff.; and, for late antiquity more generally, Peter Kußmaul, *Pragmaticum und lex: Formen spätrömischer Gesetzgebung 408–457* (Göttingen: Vandenhoeck und Ruprecht, 1981), pt. 2; Alexander Demandt, *Die Spätantike: römische Geschichte von Diocletian bis Justinian, 284–565 n. Chr*, voll. bearb. und erweit. Aufl. (München: C.H. Beck, 2007), 281 n.66.

[129] See Wolfgang Kaiser, "Zum Zeitpunkt des Inkrafttretens von Kaisergesetzen unter Justinian," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (romanistische Abteilung)* 127 (2010): 190 ("*sanctio pragmatica*").

[130] Justinian's general lawmaking typically made provision, transmitted to us in greater or lesser detail, for publication. In a few cases, these took the form of references to general publication rules set forth in other laws, but these general rules have not come down to us. See, *e.g.*, *Novs.* 1 ep. (1 Jan. 535) and 2 ep. (16 Mar. 535); Lanata, *Legislazione*, 111. Justinian's pragmatic sanctions generally lack publication provisions. For a list, see van der Wal, *Manuale 2nd*, 1 para. 2 with n.2, along with Lanata, *Legislazione*, 129–130 with n.81.

[131] *Nov.* 106 c.1 (SK 501/4–6: ἐπὶ τῶν ναυκληρικῶν ἤτοι ἐμπορικῶν ἀφορμῶν εἰς τὸν ἅπαντα χρόνον κρατοῦσαν, ὡς γενικὴν οὖσαν νομοθεσίαν) (emphasis supplied). In this respect, *Nov.* 106 resembles another indisputably "general" law that lacked publication provisions. *Nov.* 88, which aimed at ending the practice of abusive injunctions blocking tenants from paying landlords or dole recipients from receiving their grain, stated that it not private but "a universal, general law." *Nov.* 88 pr. (1 Sept. 539) (SK 425/26–27: κοινῷ καὶ γενικῷ νόμῳ διορίσαι ταῦτα δίκαιον ὑπελάβομεν). Given the nature of the prohibitions it imposed, *Nov.* 88 required widespread publication for its very effectiveness. Lanata, *Legislazione*, 137–39.

[132] *Nov.* 106 c.1 (SK 508/8–9: μέρος γενέσθαι τῶν ἤδη παρ' ἡμῶν τεθειμένων νόμων). On its inclusion in the so-called *liber legum*, see Noailles, *Collections*, 1:140. Another law of limited application (to the province of Thrace) similarly designated for inclusion in the corpus of general law is *Nov.* 26 (18 May 535) (the designation appears at c.5.1 (S/K

DOI: 10.14754/CEU.2024.02

In any event, the absence of a publication provision did not prevent *Novel* 106 from being communicated to at least some provinces. As discussed below, the repealing statute of *Novel* 110 states expressly that *Novel* 106 had in fact been so communicated.[133] From this, some have inferred that Justinian might not have intended for *Novel* 106 to be so communicated, as he might have intended its new legal regime for maritime loans apply solely in Constantinople.[134] But this inference is belied by the wording of the law's dispositive provision, which emphasises that it is to apply to "all other cases that will arise hereafter" with no mention of geographic limitation.[135] The conclusion is inescapable: when promulgating *Novel* 106, Justinian intended his new maritime-loan regime to apply everywhere, including its change to the manner of calculating interest. This change was fundamental, as it significantly altered the balance of commercial interests between lenders and borrowers. To see why, one must consider the limitations of ancient navigation.

Excursus on Ancient Shipping

Trading at sea was always risky, even for experienced captains and crew.[136] In all periods of antiquity, navigation by sea was an activity concentrated the months of late spring, summer, and early autumn. As mentioned toward the beginning of Chapter 3, the seas were much less amenable to sailing during winter, leading to less (probably much less) shipping in that season.[137] That said, closure was never absolute.[138] There were always sailors brave, or foolhardy, enough to sail during the closed period,[139] and at least one route, the one from Alexandria to Rhodes, appears to have remained open regardless of season.[140] The limitations on ancient shipping were, nevertheless, real and are reflected in the Roman law sources. Thus, an imperial constitution of 380 directed shipmasters transporting the *annona* from Africa to accept cargos at any time between 1 April to 1

209/2–3). The term "corpus" is chosen advisedly so as to avoid getting bogged down in discussion of what physical form it took in this period. On the *liber legum*, see the discussion at notes 11–13 in the Introduction.

[133] *Nov.* 110 (SK 520/20–21). See the brief but useful discussion at Lanata, *Legislazione*, 140–41.

[134] Bianchini, "Disciplina," 420–21.

[135] *Nov.* 106 c.1 (SK 500/39–SK 501/2: πῶς οὐκ ἐστὶ δίκαιον καὶ ἐπὶ τῶν ἄλλων ἁπάντων κρατεῖν τῶν μετὰ ταῦτα ἐσομένων;) (emphasis supplied). This provision continues in the same vein of universal application, also without express geographic limitation (SK 501/2–11). See Purpura, "Ricerche," 327; Kaiser, "Zeitpunkt," 191.

[136] See, *e.g.*, *Vita Ioh. Eleem.*, 10 and 27[28] [=Migne, *PG*, vol. 93, cols. 1623–1624, 1640–1641]; Loseby, "The Mediterranean Economy," 617. For an introduction to the matters discussed in this section, see Casson, *Ships*, 270–99.

[137] See discussion at notes 22–23 of Chapter 3, as well as McCormick, *Origins*, 98. As mentioned earlier, the traditional view is that the seas were virtually closed to sailing in the winter months. This traditional view has in recent years been challenged, by Horden and Purcell, *Corrupting Sea*, 149 and esp. 565; by Peña, "The Mobilization of State Olive Oil in Roman Africa: The Evidence of Late 4th-Century Ostraca from Carthage"; and especially by Beresford, *Ancient Sailing*, 9–52, 265–75 and *passim*. This revisionist view is itself open to challenge, but it usefully reminds us that the sailing season varied by place, by type, and by individual risk appetite.

[138] Plin., *HN*, 2.125; Edward E. Cohen, *Ancient Athenian Maritime Courts* (Princeton: Princeton University Press, 1973), 51.

[139] For a self-congratulatory account of such a fifth-century winter voyage, see Price and Gaddis, *Acts of the Council of Chalcedon*, 2:55.

[140] Dem. 56.30.

October of each year, and to sail between 13 April until 15 October.[141] In addition, Vegetius tells us that in the fourth century the sailing season ran from 27 May to 14 September of each year for galleys and from 10 March to 10 November for sailing ships, with the periods from 10 March to 26 May and from 14 September to 10 November considered fraught with risk.[142] There is little reason to think that sixth-century conditions were significantly different from fourth-century ones in this respect: nearly the same limits to the sailing season were preserved well into the Middle Ages.[143]

Due to these limitations, voyages were as a rule completed within a single sailing season and thus shorter than one year.[144] Shorter durations are amply attested. Diodorus Siculus reports that a voyage from the Sea of Azov to Rhodes, a distance of at least 1,600 kilometers, could take as few as ten days, and a voyage from Rhodes to Alexandria as few as four.[145] Even the ships of the western *annona*, sailing as a fleet and hindered by paperwork, could manage two round trips per year between Rome and Alexandria if starting from Alexandria.[146] This distance, ca. 2,300 kilometres each way, is greater than the distances between Constantinople and the other principal commercial centres of the sixth-century empire.[147] There is comparatively little data on voyage times to and from Constantinople itself, but Mark the Deacon gives a voyage time from there to Rhodes of just five days (with fair winds) and a return trip of just twice that (with adverse winds).[148] The same author reports sailing times from Constantinople to Gaza and back again at ten days and 20 days, respectively.[149] For Alexandria to Constantinople—in all likelihood the sixth century's most heavily travelled route—[150] Procopius tells us the ships of the *annona* sought to achieve two or three round trips per season between Alexandria and the storage facilities of Tenedos, just outside the mouth of

[141] Ships of the western *annona* were thus not supposed to sail from November to April. *Cod. Theod.* 13.3.3; de Ste. Croix, "Maritime Loans," 43 n.8; Casson, *Ships*, 270–71 n.3.
[142] Veg., *Mil.*, 4.39; Casson, *Ships*, 270 n.3; Pryor, "Shipping and Seafaring," 483.
[143] Casson, *Ships*, 270 n.3.
[144] Jones, *LRE*, 2:868.
[145] Diod. 3.34.7; Cohen, *Athenian Economy*, 56 n.83 (noting, however, that the return voyage would be substantially longer due to adverse winds); Casson, *Ships*, 287 nn.76–77.
[146] Casson, *Ships*, 277–79.
[147] The Stanford Geospatial Network Model of the Roman World (ORBIS) (http://orbis.stanford.edu) (accessed 29 Feb. 2024) gives the following one-way voyage distances: Constantinople to Alexandria: 1,505 kilometres; Constantinople to Antioch: 1,664 kilometres; Constantinople to Gaza: 1,789 kilometres. Routes from Black Sea ports to various ports of the Mediterranean could involve potentially greater distances but such voyages would have bypassed the ready market of the metropolis without stopping only rarely, if at all. The Constantinople–Carthage route, at 2,556 kilometers, was also longer. Theophanes, *Chron.*, a.m. 6100–6102 [=De Boor, *Theophanis Chronographia*, 1:295–99]; McCormick, *Origins*, 104; Loseby, "The Mediterranean Economy," 626.
[148] Marcus Diaconus, *Vit. Porph.* 55 and 37, respectively [=Henri Grégoire and M.-A. Kugener, eds., *Marc Le Diacre: Vie de Porphyre, évêque de Gaza* (Paris: Belles Lettres, 1930), 45 and 31].
[149] Marcus Diaconus, *Vit. Porph.* 27 and 26, respectively [=Grégoire and Kugener, 22–24]
[150] Theophylactus Simocatta, *Historiae*, 2.14.7 [=Carolus De Boor, *Theophylacti Simocattae Historiae* (Leipzig: Teubner, 1887), 98]; see also Greg. Naz., *Or.* 34.7 [=J.-P. Migne, ed., *Patrologiae cursus completus [Series Graeca]*, vol. 36 (Paris: Garnier, 1858), col. 248] (δενδρομένην τὴν θάλασσαν). Even if many ships on that route were in service to the *annona*, there still would have been much private commercial traffic. McCormick, *Origins*, 109.

DOI: 10.14754/CEU.2024.02

the Dardanelles.[151] We also have a practical legal evidence, of a sort, for typical voyage duration of less than one year: the sole surviving example of a Roman law maritime loan contract (which might be a hypothetical example or a form rather than an actual example) provides for a sailing period of 200 days.[152] It is uncertain whether that period relates to the expected duration of the journey—a round trip between Beirut and Brundisi—or to the sailing season as a whole.[153] On either view, the voyage would last less than one year. As a general rule, of course, the duration of any given voyage would depend upon the direction of travel in relation to the prevailing winds and on the strength of those winds. But all evidence points toward average voyage duration of well under a full year.[154]

Novel 106 Increased Interest Costs for Borrowers

If voyages as a rule lasted less than one year, then the average duration of maritime loans—repayment of which was due upon safe arrival or at most 20 days thereafter—was also less than one year.[155] This conclusion has important consequences for how one assesses the effects of the change in basis of calculation of maritime loan interest introduced by *Novel* 106. One might, if one took the view that voyages typically exceeded one year's duration, surmise that the borrowers would prefer for interest on their loans be reckoned per voyage, ostensibly on the basis that doing so would give certainty as to the amount of total interest payable in the way that no time-based reckoning could. On this view, the testimony of shippers leading up to *Novel* 106 would be aimed at winning the reduction of interest costs that would ensure from a change from time-based to voyage-based

[151] Procop., *de Aed.* 5.1.10 [=Haury, *Procopii Caesariensis Opera Omnia*, 3.2:150–51]; Brian Croke, "Justinian's Constantinople," in *The Cambridge Companion to the Age of Justinian*, ed. Michael Maas (Cambridge: Cambridge University Press, 2005), 69 n.48.

[152] *Dig.* 45.1.122.1. Cf. Rougé, *Recherches*, 349–51, De Salvo, *Economia*, 341–42 (fictional contract); with Rathbone, "Financing," 215–16; Jones, *Bankers of Puteoli*, 181 (fictionalized contract, perhaps based on a real transaction); and with Mario Talamanca, "I clienti di Q. Cervidio Scevola," *Bullettino dell'Istituto di Diritto Romano "Vittorio Scialoja"* 103–104 (2000–2001): 588; Gerhard Thür, "Arnaldo Biscardi e il Diritto Greco (Riflessioni sul prestito marittimo SB VI 9571)," *Dike* 3 (2000): 182 n.12; Pontoriero, *Prestito*, 139–40 n.4 (actual contract).

[153] *Dig.* 45.1.122.1. Cf. Richard Duncan-Jones, *Structure and Scale in the Roman Economy* (Cambridge: Cambridge University Press, 1990), 21, with Sirks, "Sailing," 146–49.

[154] Two late-antique laws have been adduced as evidence that sailing times typically were longer than one year. The first (*Cod. Theod.* 13.5.21 (16 Feb. 392)) required shipmasters to provide cargo receipts within two years of sailing. The second (*Cod. Theod.* 13.5.26 (23 Dec. 396)) reduced that period, granting only one year to produce receipts, which were to be dated within the same consular year; the shipmaster would have the benefit of an additional year only in cases of poor weather or *force majeure.* Richard Duncan-Jones has argued that these laws point to typical sailing times of longer than one year. Duncan-Jones, *Structure and Scale*, 21. There are many reasons to doubt this. First, the time periods given in the law are stated as maxima, not average or indicative times. *Cod. Theod.* 13.5.1 (*intra biennium*); *Cod. Theod.* 13.5.26 (*intra annum*. Also: *biennium autem propter adversa hiemis et casus fortuitos*). Second, both provisions set deadlines for the return of documents, not for the completion of voyages. Especially where a ship was making a voyage of several stops, or where it was sailing from a port other than its home port, it might take some time after completion of the voyage for a shipper to return to the port for document delivery. Sirks, "Sailing," 140 ff.

[155] Rathbone, "Financing," 212; Jones, *Bankers of Puteoli*, 180.

DOI: 10.14754/CEU.2024.02

reckoning.[156] These arguments fail in their premise. Because most voyages, and thus most maritime loans, were of less than one year's duration, the shorter the journey, the higher the effective rate of interest.[157] For any given rate, converting from a time-based reckoning to per-voyage interest one would increase the interest costs payable by borrowers. Far from benefitting borrowers, *Novel* 106 was to their disadvantage.

With these considerations in mind, let us make some sample calculations, based on admittedly theoretical figures. If one assumes a maritime loan on the default structure and a voyage time of six months, a nominal interest charge of 12.5% per voyage would equate to 25% per annum; for a three-month voyage, 50% per annum. The import of the change brought about by *Novel* 106 becomes immediately apparent when one contemplates the possibility of multiple voyages within a single shipping season. Consider, for purposes of achieving a conservative calculation, voyages between Constantinople and Alexandria, and only those that take place within Vegetius' "safe" sailing season of 27 May to 14 September (excluding his "shoulder seasons"). For the respective months (June, July, August and September), the Stanford Geospatial Network Model of the Roman World (ORBIS) generates indicative fast voyage durations of ca. eight days for the Constantinople to Alexandria leg and ca. 18 days for the return leg.[158] These figures comport with the evidence of Diodorus Siculus and Mark the Deacon discussed above for the different legs in and out of Rhodes. On these assumptions, a shipper starting no earlier than Vegetius' safe start date of 27 May could complete five distinct legs of this route without extending past Vegetius' safe end date of 14 September by more than a couple days, provided that turnaround time in the respective ports could be limited to ten days.[159] If one extends the assumed turnaround time in each port to 20 days, the number of legs achievable in the safe sailing season is three. If we include Vegetius' shoulder periods, ships running between Constantinople and Alexandria could, if time in port could be

[156] Such arguments would have some similarity to those of Purpura, who however argued from a different premise, namely that *Cod. Iust.* 4.32.26 imposed no limit on the rate of interest that could be charged on the "maritime" portion of maritime loans. Purpura, "Ricerche," 327–28. See note 79 above.

[157] In addition, to the extent lenders operated out of multiple cities, loan contracts could require that interest be paid at ports along the way (rather than at the point of origin), reducing repayment periods still further. Jones, *LRE*, 2:863; Rougé, *Recherches*, 354. We know that at least some Constantinopolitan bankers were equipped to receive loan repayments in other cities during this period. For an example almost exactly contemporaneous with the events analysed in this chapter, see *P.Cair.Masp*. II 67126 (7 Jan. 541), discussed at Gofas, "Banque," 150; Bogaert, "La banque en Égypte byzantine," 92, 97, 125.

[158] ORBIS (http://orbis.stanford.edu) (accessed 29 Feb. 2024).

[159] The risks of voyage and the investment in human capital needed to manage them made it likely that ships would ply the same routes and destinations repeatedly. McCormick, *Origins*, 90–91.

DOI: 10.14754/CEU.2024.02

limited to ten days, achieve three round trips—six legs—per sailing season.[160] These figures comport with Procopius' report of what ships of the eastern *annona* would seek to achieve.[161]

Let us now turn from time to money or, more precisely, interest charges. If one assumes loans of 1,000 *solidi* for each of three legs, then under the default structure of *Novel* 106, with its per-voyage basis of calculation, the borrower would owe 375 *solidi* (3 x 12.5% of 1,000 *solidi*) in interest for the season. Under the time-based reckoning of *Cod. Iust.* 4.32.26, by contrast, the amount of interest payable for the same loans would have been between 30 and 40 *solidi* in total (the safe season's roughly 3.5 months of interest on 1,000 *solidi* at the rate of 12% per annum). Even this latter amount is conservatively high, as it assumes there were no gaps between loans such that there were no days in the period on which interest did not accrue. On these assumptions, the increase in interest charge on maritime loans brought about by the innovations of *Novel* 106 would have been of an order of magnitude of about ten times. If we were to take a more expansive view of the sailing season and assume a higher number of voyages per season,[162] the increase in interest cost to borrowers on account of the change to per-voyage reckoning would be even higher still. In fact, it is not necessary to assume multiple voyages per season at all to demonstrate that the adoption of *Novel* 106 led to a substantial increase in interest payable on maritime loans of all sizes. The change in interest rate regime would have been significant even for a borrower making just a single voyage per year. If we assume a loan to a shipper making one voyage from Constantinople to Alexandria in June, a loan of 1,000 *solidi* on the basic structure of *Novel* 106 would generate an interest bill of 125 *solidi* at the specified rate of 12.5% per voyage. Under the corresponding provision of *Cod. Iust.* 4.32.36, that same maritime loan would, for a voyage of ca. nine days, generate interest of ca. three *solidi* (12% of 1,000 for nine days, using a 360-day count convention). Significant indeed.

This increase in the effective rate of interest brought about by the change of reckoning from per annum to per voyage necessarily brought in train a substantial improvement, from the lenders' perspective, in the profile of risk-to-reward for maritime lending as an activity from which to make a living, as we are told Peter and Eulogetus did. Under the per-voyage method, a lender making a loan of any given value could expect to receive interest equivalent to one-eighth of that value upon safe arrival of the ship to port. Of course, if the ship and its cargo failed to arrive, the interest would be lost, and the principal, too. On the per-voyage reckoning, then, the amount of lost principal would equate to the interest the lender might expect to accrue on other loans equivalent to eight times that amount. By way of example, if one again assumes a loan amount of 1,000 *solidi*, the loss

[160] McCormick, 106.
[161] Procop., *de Aed.* 5.1.10 [=Haury, *Procopii Caesariensis Opera Omnia*, 3.2:150–51].
[162] Along the lines of the revisionist arguments discussed in note 137 above.

DOI: 10.14754/CEU.2024.02

of principal on a failed loan would offset the interest income expected to accrue to the lender from other maritime loans (bearing interest at the same rate) totalling 8,000 *solidi*, in addition to the foregone interest on the failed loan of 125 *solidi.* In other words, the failure of a maritime loan under the per voyage reckoning method of *Novel* 106 would wipe out not just the interest expected from that loan but also the interest income expected from loans totalling eight times as much. By way of illustration, if one makes a simplifying assumption that all maritime loans were of equivalent amount, the failure of any one loan would deprive the lender not only of the interest expected from it but also of the interest expected from eight other loans. As harsh as this might sound, it in fact represented a marked improvement in the terms of trade for lenders. If the calculations in the previous paragraph are even roughly correct, then the interest payable on a maritime loan of any given amount under the per annum method of reckoning under *Cod. Iust.* 4.32.26 were only around one-tenth the amounts payable on the same loan under the new regime of *Novel* 106. That in turn implies that the loss of principal from a failed loan under the per annum method would offset the expected interest income from other maritime loans totalling not eight times the lost loan amount, but 80 times that figure. Using the same simplifying assumption of standardised loan amounts for the sake of illustration, that means that the failure of a maritime loan under the per annum method would wipe out the interest expected not from nine loans (the failed loan plus eight others) but from 81 loans.

The lenders must have celebrated their good fortune upon the promulgation of *Novel* 106. Sadly for them, it was too good to last. The new, higher effective rates of interest under the new per voyage method of reckoning would in all but exceptional circumstances exceed the level permitted under the *Codex*. If (if!) we can believe the claim made in *Novel* 106 that the customs it describes were pre-existing ones, the conflict between law and practice had been around for some time. Yet *Novel* 106 states expressly that the "existing customs" given legal force by it are "not in conflict with already-enacted laws."[163] This statement is difficult to credit at face value.[164] By operation of arithmetic, a loan on the default structure made at the newly specified interest rate of 12.5% per voyage would exceed the 12% per annum rate under *Cod. Iust.* 4.32.26 for any voyage (and loan) with a duration of less than one year.[165] Gustav Billeter attempted to reconcile the two calculations by arguing for an assumed average commercial voyage time of one year.[166] There is little reason to believe that this was in fact the case, for the reasons discussed in "*Excursus on Ancient Shipping"*

[163] *Nov.* 106 c.1 (7 Sept. 540) (μηδὲ τοῖς ἤδη τεθειμένοις μάχεται νόμοις).
[164] Accord: Bianchini, "Disciplina," 420.
[165] This would be the case even if we equate 12% with 1/8, or 12.5%, as discussed at notes 27–28 above.
[166] Billeter, *Geschichte*, 338.

DOI: 10.14754/CEU.2024.02

above and, in any event, Billeter offered no evidence for it. And even if one grants Billeter his premise, the new basis of calculation under *Novel* 106 would still lead to inevitable conflict with the rate cap of the *Codex* for many loans. That is because the legality of the rate of interest on any individual loan is not determined using averages or other aggregates, but using the rate agreed for that loan itself.[167] If, as Billeter maintained, voyages lasted on average precisely one year, at least some of those voyages would be shorter than one year. For any such voyage, a maritime loan bearing interest at the rate charged under the default structure of *Novel* 106 would, by operation of arithmetic, yield interest in excess of what was permitted by the *Codex.*

The statements in *Novel* 106 to the effect that the customs given legal effect by it were consistent with prior law must therefore be viewed with a critical eye. One may also question whether the customs described in *Novel* 106 were, in fact, real customs. To be sure, the text states in at least four different instances that they were real.[168] Many have taken those statements at face value, in particular those who have argued that the customs described were both current and of long standing, predating the adoption of *Cod. Iust.* 4.32.26 in 528.[169] If, as noted above, some aspects of those customs—such as the per-voyage basis of calculation and the grace period—had deep roots,[170] that does not entail that the level of interest charged (about which we have little reliable Roman evidence) had similarly deep roots, or that Justinian had not intended to quash those very customs by his legislation of 528. The conflict between the customs described in *Novel* 106 and the provisions of *Cod. Iust.* 4.32.26 are such that readings of the evidence downplaying it are too credulous. We thus cannot exclude the possibility that the customs described in *Novel* 106 were part of a scheme to evade the rate caps of the *Codex*.[171]

The Repeal(s) of *Novel* 106

Less than eight months after promulgating *Novel* 106, Justinian declared it "altogether inoperative," with retroactive effect.[172] Repeal was expressed in the most robust of terms, erasing

[167] Accord: Pontoriero, *Prestito*, 174 n.36.
[168] The preface alone tells us that: Peter and Eulogetus had sought publication and legal force be given to "the prevailing usage in these matters" (SK 508/9–12: δεῖσθαι διὰ τοῦτο γενέσθαι φανερὸν τὸ κρατοῦν καὶ ἐπὶ τούτοις ἔθος, ὥστε καὶ θείαν ἡμῶν ἐπὶ τούτῳ προελθεῖν κέλευσιν τὴν τὸ ἔθος εἰς σαφέστατον ἄγουσαν τύπον); that the inquiry made of the shippers was to ascertain "the precise nature of the long-standing practice" (SK 508/18–19: πυθέσθαι ποῖόν ποτε τὸ ἀρχαῖον ἔθος ἦν); and that the shippers gave their testimony under oath (SK 508/19–20: τοὺς δὲ καὶ ὅρκον προσεπιτιθέντας μαρτυρεῖν). The dispositive provision adds that the customs so described were "what has been in use and force, unaltered, over such long periods." (SK 509/37–38: τὸ γὰρ ἐν μακροῖς οὕτω πολιτευόμενον χρόνοις καὶ κρατῆσαν ἀπαραλλάκτως). One may wonder whether this insistent repetition indicates that readers of the new law might have required some reassurance on the point.
[169] *E.g.*, Billeter, *Geschichte*, 323–24.
[170] Purpura, "Ricerche," 327.
[171] As argued most notably by Sieveking, *Seedarlehen*. See note 201 below.
[172] *Nov.* 110 c.1 (SK 520/21–22: θεσπίζομεν τὸν τοιοῦτον νόμον παντοίως ἀργεῖν).

DOI: 10.14754/CEU.2024.02

Novel 106 entirely from the record: "The way in which we wish the matter to proceed is as if the said law had, in fact, not ever been laid down."[173] Although Justinian's legislation is otherwise replete with examples of individual provisions enacted and then discarded in favour of something new, *Novel* 106 is our only extant example of a *Novel* abrogated both in its entirety and *ab initio*, as if it had never existed.[174] Unlike other instances where Justinian reversed prior legal positions, *Novel* 110 did not preserve agreements entered into under the repealed legislation.[175] Instead, maritime loans entered into under the repealed law were not to be judged under the legal regime in force at the time the contract was entered into; rather, laws previously in force were to apply to them.[176] Now, the time between the promulgation of the *Novel* 106 and its repeal ran in parallel with the low season for sailing the Mediterranean.[177] As a result, few maritime loans may have been entered into while *Novel* 106 remained in force. But the fact that the otherwise terse *Novel* 110 makes express provision for how such loans were to be adjudicated suggests that their number was not zero.[178] One may wonder whether the lenders who extended such loans would have extended all of them had they known that the Justinian's reform law (and the higher effective interest rates it permitted) would soon be erased.

The Procedure

In fact, the time between promulgation and repeal was even shorter than the nearly eight months separating *Novel* 106 from *Novel* 110: The latter states that the emperor had already repealed the former.[179] *Novel* 110 was thus in the nature of a "clean-up," completing the job of repeal already attempted in an earlier constitution no longer extant. The date of that first repeal is

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[173] *Nov.* 110 c.1 (SK 520/24–26: καὶ οὕτω βουλόμεθα τὸ πρᾶγμα προϊέναι, ὡς εἰ μηδὲ γραφεὶς ἐτύγχανεν ὁ εἰρημένος νόμος).

[174] For more information on this abrogation, see Rockwell, "Justinian's Legal Erasures." The *damnatio legis* operated at the level of legal practice but not of legal education. *Nov.* 110 deprived *Nov.* 106 of all effect and did so retroactively, but the ancient professors still passed knowledge of it along to their students. The technique of "erasing" an entire constitution sufficiently impressed Julian that he mentions it multiple times in space of two brief entries. Julian, *Epit.*, Const. XCIIX (¶ *CCCLX*) and CIII (¶ *CCCLXV*) [=Haenel, *Iuliani Epitome*, 120 and 122, respectively]. Both Theodore and Athanasius also mention *Nov.* 106 and its repeal. Athanasius, *Syntagma*, §§17.1 and 17.2 [=Simon and Trōianos, *Novellensyntagma*, 430]; Theodore, *Breviarum*, *Novs.* CVI and CX [=Zachariä von Lingenthal, *Anekdota*, 102, 105].

[175] Examples where Justinian amended or repealed legislation but preserved pre-existing rights include: *Nov.* 7 c.1 (15 Apr. 535) (past dispositions of Church property); *Nov.* 35 (23 May 535) (right of senior assistants to the quaestor to sell office without being subject to price cap); *Nov.* 55 pr. (18 Oct. 537) (past dispositions of Church property via the emperor); *Nov.* 99 c.1.2 (undated) (responsibilities of co-obligors); *Nov.* 115 ep. (1 Feb. 542) (sundry matters, expressly applicable to cases not yet finished); *Nov.* 120 (9 May 544) (alienations of Church property); *Edict* 9 c.5 (undated) (repayments in excess of twice principal).

[176] *Nov.* 110 c.1 (SK 520/26–28: κατὰ τοὺς ἤδη περὶ τῶν τοιούτων τεθέντας νόμους παρ' ἡμῶν τὰς ὑποθέσεις ἐξετάζεσθαι καὶ κρίσεως ἀξιοῦσθαι). The retroactivity is highlighted by Zachariä von Lingenthal, *Anekdota*, no. CX (κελεύει γὰρ τὰ παλαιὰ κρατῆσαι τὰ περὶ τῶν τοιούτων τόκων νομιμα καὶ νῦν καὶ ἐπὶ τὸ διηνεκὲς πολιτεύεσθαι).

[177] See "*Excursus on Ancient Shipping*" above.

[178] This passage thus provides additional indirect evidence for the revisionist views of, *e.g.*, Beresford, *Ancient Sailing*.

[179] *Nov.* 110 pr. (SK 520/18–20: προσετάξαμεν τὸν νόμον ἐκεῖνον μὴ κρατεῖν ἀναληφθῆναι αὐτὸν προστάξαντες ἐκ τοῦ δικαστηρίου τοῦ σοῦ) (emphasis of aorists supplied).

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unknown, but even if it preceded *Novel* 110 by just a few days, its speed is still remarkable, especially in light of the mechanics of making a new legislation known in this period.[180] It is in the interaction of these mechanics with the rules governing effectiveness of new lawmaking that a basis for reconstructing the circumstances of the repeal of *Novel* 106 can perhaps be found.

For new laws to have practical effect, it is not enough for them to be promulgated by the sovereign. They must also be brought to the attention of the officials charged with implementing them and of the subjects expected to abide by them.[181] This was as true in the late antique Roman empire (or, if you wish, early Byzantium) as it is today. In terms of legal validity as opposed to practical effect, however, the considerations can be somewhat different. While some have thought that in late antiquity promulgation alone (or, alternatively, delivery to the relevant official) was constitutive of a new law's effectiveness, the better view is that publication, too, was a necessary for a new law to have valid legal force.[182] Considerations of legal validity and practical effect thus coincide: the emperor' subjects could hardly be expected to follow new rules absent publication in a manner reasonably designed to apprise them of their contents. Justinian's legislative practice thus contains many references to the process by which new legislation was made known. In the case of ἰδικοὶ νόμοι like rescripts or pragmatic sanctions, effectiveness required both promulgation and delivery to the relevant provincial governor (or, in the case of Constantinople, to one of the prefects with jurisdiction over the city) for publication in the affected area; lawmaking of more general application (γενικοὶ νόμοι) required an edict of publication as well as actual publication in the form of public posting in Constantinople and in the metropole and other cities of the provinces.[183]

Some two years prior to promulgating *Novel* 106, Justinian had sought to clarify the relation between publication and effectiveness.[184] *Novel* 66 provided, among other things, that new legislation of a general nature on the making of wills was to come into force in a given location

[180] Though perhaps not unprecedented. If the transmitted dates of transmission of *Nov.* 4 (16 March 535) and *Nov.* 136 (1 Apr. 535) can be accepted, only about two weeks elapsed between the adoption of former constitution and its revision in favour of the bankers in the latter. See "*Excursus on the Dating of Novel 136*" in Chapter 1.
[181] Matthews, "Making," 42.
[182] Kaiser, "Zeitpunkt." *Contra* Claudia Kreuzsaler, "Aeneis tabulis scripta proponatur lex: Zum Publikationserfordernis für Rechtsnormen am Beispiel der spätantiken Kaiserkonstitutionen," in *Selbstdarstellung und Kommunikation: Die Veröffentlichung staatlicher Urkunden auf Stein und Bronze in der römischen Welt*, ed. Rudolf Haensch (Munich: Beck, 2009), 209–48.
[183] Kaiser, "Abhilfe," 73–74. Additional requirements applied to select types of law. Pragmatic sanctions on tax matters had first to be registered with the court of the praetorian prefect (*Nov.* 152 pr. and c.1 (1 June 534)), and *divinae iussiones* required the signature of the *quaestor sacri palatii* (*Nov.* 114 (1 Nov. 541)).
[184] *Nov.* 66 (1 May 538). For the limitation of scope to new laws on wills (at least initially), see *Nov.* 66 c.1 pr. (SK 340/28–29: τὰς ἡμετέρας διατάξεις τὰς ὑπὲρ διαθηκῶν and SK 341/3–4: εἰ γραφείη τοιοῦτος νόμος) (emphases supplied); Kreuzsaler, "Aeneis tabulis," 247–48.

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only after two months following its date of publication there.[185] But was this two-month-post-publication rule applicable to legislation on subjects other than will-making? It later came to be viewed as applying to legislation generally by scholars as diverse as Accursius and Wolfgang Kaiser.[186] But even if one accepts the argument for general application in later times, there are reasons to doubt that the two-month rule applied regardless of subject matter already by 540–541, the time of the events discussed in this chapter. Regardless of what Accursius and later scholars may have thought, our sixth-century sources provide little evidence for so early an expansion of scope: Each of the three sixth-century *antecessores* addresses the two-month post-publication rule set forth in *Novel* 66, and each states that the rule applied to new laws on wills.[187] This more contemporaneous evidence suggests that it is on balance unlikely that the two-month rule of *Novel* 66 had come to apply to all legislation by the time of *Novel* 106. And even if it had, the publication requirement applied only to general legislation. It thus still may not have applied to *Novel* 106: Although *Novel* 106 was stated to have general effect, it was nevertheless an ἰδικὸς νόμος in formal terms, with no provision for its publication as was customary for general laws.

For the question of effectiveness in Constantinople, at least, these considerations mattered little. Whatever was required, John the Cappadocian, the addressee of *Novel* 106, and the *praefectus urbi* were in place to see to it. *Novel* 106 thus became effective there nearly immediately or after a two-month delay, depending on one's view of the force of *Novel* 66. But *Novel* 110 tells us *Novel* 106 had also been made public in at least some of the provinces.[188] This statement is perhaps surprising inasmuch as *Novel* 106 makes no provision for publication, as might be expected if that were the intent. Such publication can be explained as the result of Justinian's instruction in *Novel* 106 that it should be deposited in the *liber legum* despite being only a private law. The emperor's chancellery would presumably thus have bundled it together with the other laws (those of general application) deposited there and sent the bundles off to the provinces in accordance with their

[185] This is the most plausible reading of *Nov.* 66 based on the text at SK 341/2–10: Ὅπως δ' ἂν σαφέστερον ἔτι τὸ πρᾶγμα δηλωθείη, θεσπίζομεν, εἰ γραφείη τοιοῦτος νόμος, τοῦτον μετὰ μῆνας δύο τοῦ δοθέντος αὐτῷ χρόνου κρατεῖν καὶ πολιτεύεσθαι εἴτε ἐπὶ ταύτης τῆς εὐδαίμονος πόλεως εἴτε ἐν ταῖς ἐπαρχίαις, μετὰ τὴν ἐμφάνισιν ἀρκοῦντος τούτου τοῦ χρόνου πᾶσι φανερὸν αὐτὸν καταστῆσαι, τῶν τε συμβολαιογράφων τὴν αὐτοῦ μανθανόντων δύναμιν τῶν τε ὑπηκόων γινωσκόντων καὶ τὸν νόμον τηρούντων. But *Nov.* 66 is notable for its imprecision and lack of internal consistency, the contours of which are out of scope here. See Kaiser, "Abhilfe," 86–87.

[186] Accursius, *Glossa ordinaria* "*Ut autem. Huiusmodi lex*" to col 1. V, const. 15; Kaiser, "Abhilfe."

[187] Julian, *Epit.*, Const. LX (¶ *CCIV* c.1: *Haec constitutio iubet leges de ordinandis testamentis a nostro imperatore scriptas post duos menses ab intimatione earum numerandos tenere*) [=Haenel, *Iuliani Epitome*, 83]; Theodore, *Breviarum, Nov.* LXVI (Πᾶς νόμος περὶ διαδόχων ἐκφωνούμενος κρατείτω μετά β᾽ μῆνας τῆς κατὰ τόπον αὐτοῦ ἐμφανείας) [=Zachariä von Lingenthal, *Anekdota*, 69]; Athanasius, *Syntagma*, §9.5 (Πᾶς νόμος περὶ διαδοχῆς ἤτοι κληρονομίας ἐκφωνούμενος μετά β᾽ μῆνας τῆς ἐμφανείας κρατείτω) [=Simon and Trōianos, *Novellensyntagma*, 280] (emphases supplied).

[188] *Nov.* 110 pr. (SK 520/20–21). This publication in the provinces evidently occurred even though *Nov.* 106 contained no publication provision. Lanata, *Legislazione*, 140–41.

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regular practice. That does not mean that *Novel* 106 was dispatched to the provinces immediately. As has long been known, bundles of new legislation generally were not sent out to the provinces on a continuous basis, but rather only once every six months or even less regularly than that.[189] Moreover, *Novel* 106 was promulgated in mid-September; its communication to the provinces would have been subject to the vagaries of off-season sailing.[190] Whenever *Novel* 106 was sent to the provinces, it either took effect immediately upon publication there or, depending on one's view of the scope of *Novel* 66, two months later. In either case, publication would have alerted affected provincial communities to the new regime for maritime loans.

This background explains the convoluted language of *Novel* 110 with regard to repeal. Once promulgated, *Novel* 106 became effective in Constantinople as soon as the Cappadocian or the *PU* could complete the necessary preliminaries. Effectiveness in the various provinces, however, took longer, as effectiveness required publication, and publication required arrival. These could not have been completed as quickly as in the capital on account of the arrangements for dispatching new laws to the provinces mentioned just above. And because such dispatches, like most long-distance travel of the period, took place via ship, transmission and receipt of *Novel* 106 was subject to the vicissitudes of sea transport, at the time of year when the sailing was winding down (or perhaps even closed) for the winter season. The inference to be drawn, then, is that the first repeal of *Novel* 106 referred to in *Novel* 110 was intended to have effect in the capital and to prevent dispatch of *Novel* 106 to the provinces, thus preventing it from ever becoming effective outside the capital. This repealing law might have taken the form of a pragmatic sanction or other instrument of the sort not subject to deposit in the *liber legum*; this might explain why it has not come down to us. Once it was discovered that *Novel* 106 had already made its way to some provinces, however, the problem could no longer be nipped in the bud, so to speak. It was too late for so tidy a solution, and nothing less than full repeal by a mechanism of at least equal standing to *Novel* 106 itself would do.

Why?

The procedural considerations just discussed go some way to explaining why Justinian promulgated *Novel* 110 to confirm the repeal of *Novel* 106, but they do not explain why he repealed it in the first place. That initial act of repeal has not come down to us and, by contrast with the

[189] Six-monthly dispatch: Noailles, *Collections*, 1:87; Miller and Sarris, *Novels*, 1:16. Unevenness: Salvatore Puliatti, "'Eas quas postea promulgavimus constitutiones'. Sui rapporti *Novellae-Codex* nella prospettiva giustinianea," in *"Novellae Constitutiones": L'ultima legislazione di Giustiniano tra oriente e occidente da Triboniano a Savigny, Atti del Convegno Internazionale Teramo, 30–31 ottobre 2009*, ed. Luca Loschiavo, Giovanna Mancini, and Cristina Vano (Naples: Edizioni Scientifiche Italiane, 2011), 19–22.

[190] Jones, *LRE*, 1:403 (new laws passed in autumn "practically never reached Africa till the following spring or early summer").

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fulsome explanation of legislative preliminaries set forth in *Novel* 106, *Novel* 110 tells us little. It gives no reasoning beyond a curt "petitions were made."[191] But even that little tells us something, and it is worth examining the relevant sentence in full. It reads:

> "Ἀλλ' ἐπειδήπερ ὕστερον προσελεύσεων ἡμῖν γενομένων προσετάξαμεν τὸν νόμον ἐκεῖνον μὴ κρατεῖν ἀναληφθῆναι αὐτὸν προστάξαντες ἐκ τοῦ δικαστηρίου τοῦ σοῦ, ἔγνωμεν δὲ αὐτὸν καὶ ἔν τισι τῶν ἐπαρχιῶν ἤδη καταφανῆ γενέσθαι, διὰ τοῦτο θεσπίζομεν τὸν τοιοῦτον νόμον παντοίως ἀργεῖν, καὶ εἰ συνέβη κατὰ χώραν αὐτὸν πεμφθῆναι, μηδὲ ἐκεῖσε κρατεῖν, ἀλλ' ἀνίσχυρον εἶναι."[192]
>
> "… however, petitions were subsequently made to us, as a result of which we have instructed that that law is not to be in force; but having instructed it to be withdrawn from your court, we have discovered that it had already been made public in some provinces. For that reason, we are decreeing that such law should be altogether inoperative, and if it had already come to have been sent abroad, it is not to be in force there, either."

The most natural reading of the genitive absolute is that the aorist participle γενομένων indicates that the petitions preceded Justinian's first repeal of *Novel* 106 (προσετάξαμεν τὸν νόμον ἐκεῖνον μὴ κρατεῖν…). The second clause (ἔγνωμεν δὲ…), however, is potentially ambiguous. It might be construed to mean that publication in the provinces came to the emperor's attention at the same time as the first repeal. But that construction does not provide the reasoning for the second repeal required as a referent for διὰ τοῦτο θεσπίζομεν. The clause beginning with προσετάξαμεν cannot supply the required cause: to say that the second repeal is due to the first repeal is a *non sequitur*. The better reading is that that the fact of publication in the provinces was learned (ἔγνωμεν δὲ…) only subsequent to the first repeal. Only then does this sentence give a reason for the second repeal as required by διὰ τοῦτο θεσπίζομεν.

If this construction of the relevant sentence of *Novel* 110 is correct, then the petitions that prompted the first repeal of *Novel* 106 cannot have come from the provinces, otherwise the fact of that law's publication there would not be something the emperor came to learn only later. The emperor's surprise on this point might result from the strange hybrid nature of *Novel* 106. Justinian might have assumed that, as an ἰδικὸς νόμος containing no provision for its own publication, *Novel* 106 would not be communicated to the provinces or (more likely) that his first repeal measure

[191] SK 520/17–18: προσελεύσεων ἡμῖν γενομένων. Herbert Hunger once glimpsed in this concision of *Nov.* 110 the lingering influence of the economy of expression characteristic of the classical legal discourse of earlier times. Hunger, *Prooimion*, 157 with n.1. Such an explanation cannot possibly satisfy in this particular instance given the garrulous description of preliminaries given in *Nov.* 106 on the same subject matter less than eight months before.
[192] *Nov.* 110 pr. (SK 520/17–24) (emphases supplied).

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would have preceded any dispatch of *Novel* 106 to them. But that law's inclusion in the *liber legum*, as called for by its dispositive provision, would have led to its inclusion in the bundles of otherwise general laws periodically assembled from the *liber legum* and sent to the provinces for publication there, perhaps more quickly than he expected.

Whatever the reason for the emperor's surprise at the publication of *Novel* 106 in the provinces, the fact that Justinian learned of it only after his first act of repeal means that the petitions prompting that first repeal cannot have come from the provinces: they must necessarily have been Constantinopolitan ones. There are more practical reasons, too, why it is unlikely that *Novel* 106 was repealed in response to petitions from the provinces. The interval between adoption and repeal occupied the period in which the seas were closed for all but pressing needs.[193] Even if no great interval elapsed between promulgation of *Novel* 106 on 7 September 540 and the date of its dispatch to the provinces, some time would still be needed to reach them given the season. And then when the new law was published locally, provincial business interests would have to read and digest it, form consensus within their own communities as to how to respond, sail to the capital during the same "closed" season, lobby the emperor and the bureaucracy to reverse course on a highly technical matter, and see the repeal to fruition, all within less than eight months. Whilst this might be possible, it is scarcely plausible.

For these reasons, the better view is that Justinian repealed *Novel* 106 in response to petitions received before he learned that the law had been communicated to the provinces, and that therefore these petitions cannot have come from the provinces but only from the capital.[194] Who lodged them? We are not told, but we can eliminate some possible candidates. The term for "petitions" used in *Novel* 110 (προσελεύσεων) allows us to eliminate the imperial bureaucracy as the source, for that term is otherwise used within the *Novels* generally only for petitions that come from outside it.[195] We can similarly exclude the lenders of maritime loans as the source of petitions

[193] See "*Excursus on Ancient Shipping*" above.

[194] This finding allows us to put aside the many theories seeking to explain the repeal of *Nov.* 106 as the result of pushback from the provinces against that law's supposed extension of Constantinople-based customs to the entire empire. These explanations characterise the customs described in *Nov.* 106 as those of the capital's business community that, when enshrined in a law stated to have general effect, inconvenienced business communities elsewhere that are conjectured to have followed different customs and objected to the imposition of the capital's customs upon them. Thus, Matthias, *Foenus Nauticum*, 31; Billeter, *Geschichte*, 338. None of the advocates for these purported differences in customs has adduced evidence of their existence.

[195] Though the term προσελεύσεις (used here at SK 520/17) also has an unrelated meaning of entering into a bequest or inheritance, its usual meaning in Justinians' *Novels* is petitions from subjects (not reports from officials). See *Novs.* 17 c.3 (16 Apr. 535) (SK 119/12) (by provincials); 56 pr. (3 Nov. 537) (SK 311/11 and 19) (from "many"); 66 pr. (1 May 538) (SK 340/14) (from litigants); 74 c.5 pr. (5 June 537) (SK 376/8) (from women); 82 c.7.1 (8 Apr. 539) (SK 404/25), c.11 pr. (SK 406/19) and c.11.1 (SK 407/4) (from litigants); 86 c.1 (17 Apr. 539) (SK 420/23) and c.3 (SK 421/5) (litigants); 90 c.4 (1 Oct. 539) (SK 449/2) and c.5 (SK 450/15) (litigants); 93 pr. (11 Oct. 539) (SK 459/15) (from an advocate); 97 c.4 (17 Nov 539) (SK 473/30) (from creditors); 99 c.1.2 (15 Dec. 539) (SK 483/15) (received by

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to repeal *Novel* 106. Once they had succeeded in persuading the emperor to introduce the new legal regime for maritime loans, one that entailed much higher real interest costs for borrowers, lenders would be fools to reopen the question. We are probably also justified in eliminating the shippers as the source of the petitions for repeal. To be sure, it is at least conceivable that the shippers, having giving evidence at the consultations, belatedly realised that they had been bamboozled into attesting to customs (real or otherwise) that, when given the force of law, had the effect of increasing their own interest costs, and then sought the *Novel's* repeal. This explanation—of shippers recanting their earlier testimony once they felt its full effect—might offer an attractive explanation for the curtness of *Novel* 110 ("petitions were made"). But that testimony had been given under oath, in a consultation process that was both very public and very elaborately documented in the preface to *Novel* 106. Recanting would amount to a public admission that the shippers had perjured themselves, to their own detriment, in 540. Without additional evidence, it is difficult to argue that the shippers were the source of the petitions for repeal, or to explain why the emperor would be inclined to accommodate them.

The fact that petitions objecting to *Novel* 106 were lodged so promptly after its promulgation suggests instead that those objecting to it were either not given the opportunity to participate in the consultations preceding the law's promulgation, or that their objections had been ignored. The latter possibility cannot be excluded. Why would John the Cappadocian in his report, and the speedwriters in their minutes, omit mention of objections raised in the consultations? Given the obvious advantage to lenders conferred by *Novel* 106 and the higher rates of interest it permitted, it is at least conceivable that the lenders might have sought to persuade officialdom, by fair means or foul, to keep objections from reaching the emperor's ears. If there is even a scintilla of truth in the accounts of the Cappadocian's corruption found in Procopius and John Lydus, the prefect was certainly biddable.[196] So was Tribonian, who still occupied the office of quaestor.[197]

judges); 101 pr. (1 Aug. 539) (SK 487/25) (from councillors); 123 c.22 (1 May 546) (SK 611/21 and 29) (to episcopal authorities); 124 c.3 (15 June 544) (SK 628/17) (by those from whom *sportulae* are demanded); 128 c.3 (24 June 545) (SK 638/5) (to governors); 137 pr. (26 Mar. 565) (SK 695/13) (reporting ecclesiastical infractions); and 146 pr. (8 Feb. 553) (SK 715/2) (from Jews).

[196] See John Lydus, *De Mag.*, 3.57, 3.59, 3.60, 3.62, 3.65; Procop., *Wars*, 1.24.12–15 [=Haury, *Procop. vol. 1*, 1:125–26]. See discussion at note 106 above.

[197] Tribonian's date of death is uncertain, but Tony Honoré established a *terminus post quem* of 1 March 542 and a *terminus ante quem* of December 542. Honoré, *Tribonian*, 63, 128–29. However one reconstructs his chronology, all evidence points toward his holding the quaestorship at the time of *Nov.* 106 and likely at the time of *Nov.* 110, as well. See Honoré, viii–ix, 8–9, 117–123, 237; Procop., *Wars*, 1.25.2 [=Haury, *Procop. vol. 1*, 1:134]; and Anthony Kaldellis' note at Anthony Kaldellis, trans., *Prokopios: The Secret History with Related Texts* (Indianapolis: Hackett, 2010), 158 n.48. On his corruptibility, Procopius' censure is resonant: In the *Wars*, he claims that Tribonian engaged daily in the proposing of some laws and the repealing of others, in accordance with the needs of those he thought of as his clients. Procop., *Wars*, 1.24.16 [=Haury, *Procop. vol. 1*, 1:126]. See also Procop. *Hist. Arcana*, 20.17 [=Haury and Wirth, *Procop. vol. 3*, 3:156]; Honoré, *Tribonian*, 64. Might promulgation of *Nov.* 106 be an instance of his selling a new law

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And if there was motive to suppress inconvenient facts, so too was there opportunity. [198] Any senior official of sufficient wiliness to survive in the cut-throat environment of the court of Justinian (and Theodora) would have been more than equal to the task of keeping objections from rising to the emperor's notice.[199] But such arguments are speculative. We are perhaps on surer ground in opting for the first alternative, namely that the objections in the petitions prompting *Novel* 110 were not raised in the consultations leading to *Novel* 106 but came to light only later.

It may perhaps be helpful in this regard to ask why Justinian heeded the objections made in the petitions for repeal. Some have argued that it was the belated realization that the customs given legal effect in *Novel* 106 put a hole through the tiered interest-rate regime established by him the *Codex* that led Justinian to reimpose the *status quo ante.*[200] Is some rarefied intellectual concern with conceptual coherence of his legislation, and the risk to it from the conflict between the new interest rate regime of *Novel* 106 and his own earlier law of *Cod. Iust.* 4.32.26, plausible as a motivating cause?[201] The answer must be no. *Novel* 110 gives no indication that such a conflict was the reason for repeal.[202] Given the impact of the change in basis of calculation from per annum to per voyage, the incompatability of the new regime with the 12-year-old one cannot possibly have been news to any reasonably savvy official who might consider the point. Certainly not to Tribonian, still very much in office at the date of the preliminaries leading up to *Novel* 106. As for the emperor himself, he was hardly reticent about tinkering with his laws in ways both large and small, working and reworking many topics again and again.[203] And he had already modified, under

to just such a group of clients (the lenders), with *Nov.* 110 an example of selling repeal of the same law to another group (the borrowers) just a few months later?

[198] As *PPO*, the Cappadocian was particularly well situated for mischief: he was not just the addressee of *Nov.* 106 but also a key player in its passage. It was he who informed the emperor of the initial approach by Peter and Eulogetus; was charged with conducting the consultations to find ascertain the prevailing customs; summoned the shippers; conducted the consultation; reported the findings back to the emperor for them to be given the force of law; and was given responsibility for overseeing compliance with the new legal regime. John's career came to a sticky end, however, at about the time of *Nov.* 110. Tribonian was well-placed throughout: as *quaestor sacri palatii*, he would have participated in the drafting of both laws.

[199] The elaborate stymying measures employed by Romulus and his accomplices to prevent information from reaching the emperor's attention reported by Ammianus date from the late fourth century, but such strategems were undoubtedly a feature of imperial administration throughout late antiquity. Amm. Marc., 28.6; John Matthews, *The Roman Empire of Ammianus* (London: Duckworth, 1989), 383–87; Kelly, *Ruling*, 204–5.

[200] See Kleinschmidt, *Foenus Nauticum*, 29; Buechel, *Das gesetzliche Zinsmaximum*, 28; Zachariä von Lingenthal, "Aus und zu den Quellen," 31–36.

[201] Such as those offered in the studies cited in the immediately preceding note. Heinrich Sieveking went still further, arguing that the description of customs in *Nov.* 106 was part of a "scam" (*Schliche*) on the part of the "business community" (*Handelswelt*) to escape the strictures of *Cod. Iust.* 4.32.26 by bamboozling the emperor, who then reacted in rage. Sieveking, *Seedarlehen*, 46.

[202] Pontoriero, *Prestito*, 181.

[203] The emperor was aware of his habit of revisiting the same points again and again; his defensiveness on the point is manifest in *e.g.*, *Nov.* 60 pr. (1 Dec. 537) (failure to foresee the consequences of his own earlier initiatives); *Nov.* 74 pr. (5 June 538) (merely emulating the pratices of the past); *Nov.* 98 pr. (16 Dec. 539) (changeability of all things earthly),

DOI: 10.14754/CEU.2024.02

the guise of clarification, the interest-rate regime of *Cod. Iust.* 4.3.26 itself on several occasions.[204] It is therefore naïve to think that Justinian would be roused to anger on behalf of the coherence of the constitution's ostensibly pure conceptual framework. Such an account perhaps reflects the priorities of law professors in their studies more than it does those of a busy emperor faced with the immediate exigencies of governance.

We must seek our explanations in more prosaic concerns. Mariagrazia Bianchini, in an otherwise admirable study, sought to identify these reasons in lobbying by the bankers of Constantinople, who ostensibly sought to exert exclusive control over the "*lucrosa attività*" of maritime loan lending to the exclusion of other lenders.[205] Now, those bankers were situated in the capital city, so their petitions could have prompted repeal of *Novel* 106 in a way that provincial petitions could not have done. But there are many reasons to doubt that the bankers were to blame. First, we do not know that bankers in sixth-century Constantinople even engaged in the business of maritime loan lending on a regular basis. There was to be sure no legal bar to their doing so. But as noted above, maritime lending presented a risk profile very different to that of other kinds of loans. To the extent non-bank lenders were better able to assess those risks because they were shippers or merchants (or former ones), the bankers may well have left that field of lending to them, willingly. Second, even if the bankers did engage in maritime loan lending, there is nothing in *Novel* 106 that would prevent them from continuing to do so. The *Novel* imposed no limit on the ability of bankers to engage in maritime lending or to avail themselves of the higher interest rates permitted under it on the same terms as any other lender.[206] Third, and most importantly, maritime loan lending could only be made less *lucrosa* by the repeal of *Novel* 106: by the terms of *Novel* 110, repeal meant reversion to prior law, i.e., reintroduction of the 12% per annum rate cap established by *Cod. Iust.* 4.32.26.[207] If, as Bianchini argued, the bankers sought to exert control over maritime lending for their own benefit, lobbying for repeal of *Novel* 106 would, like Brexit, have been an act of economic self-harm.

and the other examples collected at Lanata, *Legislazione*, 165–88. See also Bjornlie, *Politics and Tradition*, 256–57. Many of Justinian's *Novels* expressly contemplate their own evanescence. Puliatti, "Eas quas postea."

[204] By *Cod. Iust.* 4.32.27 (1 Apr. 529), *Cod. Iust.* 4.32.28 (1 Oct. 529), *Nov.* 136 c.4 (1 Apr. 535) and by this time likely also *Edict* 9 c.5 and c.6 (on the dating of which see note 113 in the Introduction).

[205] Bianchini, "Disciplina," 418–22. The quoted words appear on p. 420.

[206] *Nov.* 106 c.1 specifies that it is to govern all cases of maritime loans taken out be shippers or merchants. No distinction is made between loans extended by bankers and those by non-bank lenders.

[207] The inadequacy of which Bianchini herself acknowledged. Bianchini, "Disciplina," 419. It is difficult to see what advantage could accrue to the bankers from a return to the prior legal regime. Pontoriero, *Prestito*, 182.

DOI: 10.14754/CEU.2024.02

An Alternative Reconstruction: The Merchants

If we thus far have considered and rejected provincial businessmen, maritime loan lenders, shippers, and the bankers of Constantinople as the source of the petitions prompting repeal of *Novel* 106, we have perhaps neglected one other group that could have complained and would have had every incentive to do so. This is the group that goes curiously unmentioned in the description of the initial consultations that led to that law: i.e., the merchants (ἔμποροι). The merchants of Constantinople leave little trace in our sources generally, less visible to us than other types of tradesmen or the merchants of more notably commercial centers such as Alexandria.[208] In Justinian's post-compilation law-making, too, merchants make not much of an impression: according to TLG, the word ἔμπορος occurs precisely once in the *Novels*, in *Novel* 106, where they are mentioned as among the customers of Peter and Eulogetus. The word's derivatives appear with greater frequency, though they are by no means abundant. Such appearances typically carry a whiff (and sometimes more than a whiff) of disdain insofar as they describe attitudes toward matters for which, in the (Christian) emperor's view, thoughts of material gain were inappropriate. Thus, we find variations on the root ἔμπορ- used to describe the sorts of dirty dealings that must be avoided by public officials, by officers of the church, or by private persons in areas where the profit had no place: negotiation of dowries, the production of weapons for the empire's defense, or the treatment of fallen women.[209] Unsurprisingly, such terms also appear in Justinian's famous constitution against price-gouging at a time of plague-induced economic crisis.[210] But it would not be correct to infer from such uses that the ἔμποροι were always the object of imperial disdain. They are treated neutrally or even with respect in *Novels* dealing with arrangements for funerals in Constantinople.[211] And in one law of 538 on the important topic of marriage, they are even classed together with the eminently respectable higher imperials officials and those engaged in "more worthy" trades.[212] In *Novel* 106 itself, there is no evident disdain for them and, indeed, their cases

[208] Jones, *LRE*, 1:688; Magdalino, "The Merchant of Constantinople," 182.
[209] Imperial officials: *Nov.* 17 c.1 (16 Apr. 535) (SK 118/15) (schemes against subjects); *Nov.* 26 c.4 pr. (18 May 535) (SK 207/10) (needless inspections by officials of the prefecture); *Nov.* 30 c.5.1 (18 Mar. 536) (SK 228/5) (property allowed to decay to ruin). Church offices: *Nov.* 3 c.2 (16 Mar. 535) (SK 21/31–32) (swapping for better); *Nov.* 56 c.1 (SK 312/3 and 5) (3 Nov. 537) (purchase). Private persons: *Nov.* 14 c.1 (SK 107/9) (1 Dec. 535) (women not to be traded like chattels); *Nov.* 85 c.3 pr. (SK 416/4) (25 June 539) (weapons); *Nov.* 97 c.1 (17 Nov. 539) (SK 470/9) (dowries); *Nov.* 100 (SK 484/10) (20 Dec. 539) (dowries). See also *Edict* 11 c.3 (27 Dec. 559) (SK 778/21) (those engaged in business not to skim *obryza*), though the usage here may be more neutral in tone.
[210] *Nov.* 122 c.1 (23 Mar. 544) (SK 592/24–26).
[211] *Nov.* 43 pr. (17 May 537 (or perhaps 536)) (SK 270/19–21); *Nov.* 59 c.2 (3 Nov. 537) (SK 318/13–15).
[212] *Nov.* 74 c.4.1 (5 June 538) (SK 375/4–7: ἐν ἐπιτηδεύσεσιν ἀξιολογωτέραις ἐστίν). The difference in tone here may be attributable to the language of the law being derived from the petitions of the petitioning tradesmen.

DOI: 10.14754/CEU.2024.02

and contracts are expressly provided for in conformity with the law's new disposition.[213] But while their activities are present in *Novel* 106, their testimony is not.

Whilst it is possible that omission of the merchants in the account of the consultations leading to *Novel* 106 was inadvertent, I would suggest that it is in fact meaningful. Those consultations were likely coordinated via the respective guilds.[214] The shippers of Constantinople would have been much easier to organize inasmuch as they belonged to a single guild.[215] Merchants, by contrast, would have been more difficult to organize for purposes of seeking their views. Even limiting our assessment solely to merchants based in Constantinople, some would have been dispersed among different guilds depending on the wares they handled.[216] Others, perhaps more numerous, would have belonged to no guild at all, whether because they served as agents of others who belonged to guilds or they acted merely "on spec".[217] It may also case that, for reasons of looser organisation or otherwise, the merchants were, like the unfortunate market-gardeners of *Novel* 64, less effective in pursuing and defending their collective interests than were other trades.[218] For officials arranging the consultations preliminary to promulgation of *Novel* 106, it might have been tempting to look to the shippers (via their guild) as authentic representatives of the "borrower side," especially in view of the practice for shippers to combine their activities as such with trading activities. Those officials therefore may have plausibly believed, or been persuaded to

[213] *Nov.* 106 c.1 (SK 509/ 31 and 37; SK 510/5 and 7), as well as pr. (SK 509/5–6).
[214] Jones, *LRE,* 2:827–829; Miller and Sarris, *Novels*, 2:698 n.5.
[215] We hear much of shippers' *collegia* in the Theodosian Code (*e.g., Cod. Theod.* 13.5.11 (11 Jan. 361); 13.5.14 (11 Feb. 371); 13.5.20 (12 Apr. 392); 13.5.32 (19 Jan 402); 13.5.34 (14 Aug. 410); 13.6.2 (11 June [Jan.?] 365); 13.6.4 (28 Apr. 367)). At least two of these provisions (*Cod. Theod.* 13.5.32=*Cod. Iust.* 11.2.4 and *Cod. Theod.* 13.5.34=*Cod. Iust.* 11.2.6) were repromulgated by Justinian in his *Codex.* Among later evidence, no shippers' guild is attested in the tenth-century *Book of the Eparch*, but one is attested for seventh-century Alexandria (see Stöckle, *Spätrömische Zünfte*, 137), and Nikephoros I had no trouble gathering together the shippers of Constantinople in 802. Theophanes, *Chron.*, a.m. 6302 [=De Boor, *Theophanis Chronographia*, 1:487 ll. 17–19]; Karl Eduard Zachariä von Lingenthal, *Geschichte des griechiesch-römischen Rechts*, 3rd ed. (Berlin: Weidmann, 1892), 19; Billeter, *Geschichte*, 323 n.3.
[216] The principal salesmen for wares were the artisans who produced them, and many merchants travelling by ship were undoubtedly selling wares produced by themselves, or were their slaves or other agents. See, for example, the ship-travelling merchant of Attica known from Synesius of Cyrene, *Epist.* 54 [=Garzya, *Synésios de Cyrène, Tome II Correspondance: Lettres I–LXIII*, 2:72]; and the jeweller of John Moschus, *Pratum Spirituale*, 203, who thwarted murderous sailors by casting his gems overboard [=Migne, *Patrologiae cursus completus [Series Graeca]*, 1865, vol. 87.3, cols. 3093–3094]; Rougé, *Recherches*, 291 ff.; Sodini, "L'artisanat urbain," 104, 110, and 111–17.
[217] For an example of one acting as agent for a principal who was a guildmember, consider Justus, who sailed to Carthage to sell Constantinopolitan clothes, and whose story is told in Book 5 of the *Doctrina Jacobi nuper baptizati,* esp. §19 [=Gilbert Dagron and Vincent Déroche, *Juifs et chrétiens en Orient byzantin* (Paris: Association des amis du Centre d'histoire et civilisation de Byzance, 2010), 212–215 esp. n.127]. For the argument that small traders might not have been organised into guilds at all on account of the lack of strategic importance of their activities, see Maniatis, "Domain of Private Guilds," 344–45; Maniatis, "Guild System," 535–36). Maniatis' observations by their terms relate only to the 10th–12th centuries, but his argument may have some force for the 6th century, too.
[218] The market-gardeners (κηπουργοί) of the capital and its suburbs were the targets of *Nov.* 64 (19 Jan. 538), which was promulgated to the detriment of their interests because "everyone is aggrieved at their malpractice" (pr.).

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believe, that by inviting shipper testimony sufficed for that end and that inviting the merchants for their views was an unnecessary bother.

One may ask why any importance should be attributed to the failure to elicit merchant testimony: Would the testimony of the shippers not adequately represent the interests of borrowers? This question is especially trenchant in light of the fact that, as compared with the legal regime governing maritime interest provided for by *Cod. Iust.* 4.3.26, *Novel* 106 necessarily increased the effective interest cost for any borrower for any given loan amount. One possible answer is that the shippers, inasmuch as they were generally more prosperous than merchants who were not shippers, might have been less sensitive to the increased interest costs because they were better equipped to bear them. Of course, that does not explain why the shippers would testify to customs that would have the effect of increasing those costs.[219] But in circumstances where capital was in short supply—and it appears that capital was short throughout this period—the shippers may have been willing to assume the additional interest costs, which they were better able to bear than the merchants, as the price for freeing up more capital to finance their activities.[220]

These considerations suggest an alternative hypothesis about the reasons for the swift repeal of *Novel* 106. On this reconstruction, the customary practices described in *Novel* 106 were indeed long standing in that they reflected maritime practice as it existed prior to the adoption of *Cod. Iust.* 4.32.26. The rate caps of that law and the mandated change to per-annum reckoning reduced the interest maritime loans could yield, significantly so. As with much of Justinian's interest-rate related legislation elsewhere in both *Codex* and *Novels*, there are hints of substantial non-compliance.[221] If one assumes a similar culture of non-compliance with respect to maritime loans

[219] Biscardi's theory that *Cod. Iust.* 4.32.26 had led to a collapse in supply for maritime loan capital and thus to a precipitous decline in maritime commerce (discussed at notes 80–84 above) might perhaps be thought to provide an explanation for why the shippers would be prepared to do so: namely, that they were prepared to accept the possibility of higher rates as the price of once again accessing needed capital. But if the shippers were as desperate for financing as Biscardi makes them out to be, one still would expect to see some evidence of the decline of seaborne commerce that he postulates. And if the legal regime of *Cod. Iust.* 4.32.26 had had the catastrophic effects that Biscardi posits, why would the emperor, having remedied the problem by *Nov.* 106, reinstate it via *Nov.* 110?

[220] The normative legal sources provide ample evidence of at least a perceived shortage of debt finance thoughout the early-to-middle years of Justinian's reign. The *Novels* relating to bankers abound with language indicating the importance, even necessity, of their lending activities, and *Nov.* 136 contains language implying that it was aimed at encouraging lending. See *Nov.* 136 c.1 (SK 691/23–24) and c.4 (SK 692/17–18); *Edict* 9 c.2 pr. and c.8; and *Edict* 7 c.4 and especially c.8. For similar words of praise in the *Codex*, see *Cod. Iust.* 12.34.1 pr. and c.1. Even allowing for the excesses of late imperial legal rhetoric, it would be unwise to discount the truth value of such language entirely. Shortage of capital is also evidenced by the many constitutions barring churches from selling immoveable property. See, *e.g.*, *Nov.* 46 (18 Aug. 536 or 537), which permitted provincial churches to make such sales to pay tax or to deliver such property to creditors in lieu of cash repayment. This permission, we are told, was needed on account of a "serious lack of money" in the provinces. *Nov.* 46 c.3 (SK 282/30–31: πολλή τίς ἐστιν ἀπορία χρημάτων).

[221] *Cod. Iust.* 4.32.26 cc.4–5 (additional charges; intermediary structures); *Cod. Iust.* 4.32.27 (1 Apr. 529) (attempts to avoid the rate caps of Law 26 on pre-existing loans); *Cod. Iust.* 4.32.28 (1 Oct. 529) (attempts to evade the prohibition on payments *ultra duplum*); *Novs.* 32, 33 and 34 (each 15 June 535) (needing to reiterate rate caps on loans in kind); and *Edict* 9, c.5 (grandfathering past receipts *ultra duplum*).

post-*Cod. Iust.* 4.32.26, some lenders had perhaps attempted to continue their pre-existing practice.[222] Eventually, however, such continuation became untenable, for reasons that are unclear—had maritime lenders simply run out of funds after more than a decade of doing business under *Cod. Iust.* 4.32.26? As discussed above, the interest payable under the per annum regime of *Cod. Iust.* 4.32.26 implied that the failure of a loan of any given amount would wipe out the interest income expected not only from that loan but also from loans totalling many multiples thereof. Given the risks of ancient shipping, this rate could not possibly have sufficed to compensate the risks that maritime lender had to shoulder. We would do well to remember that the preface to *Novel* 106 refers to "disputes" having arisen, so perhaps it is more likely that borrowers, having accepted the continuation of older lending practice at higher rates for some time as the price of continued availability of financing, started to dispute those, invoking *Cod. Iust.* 4.32.26 in defense against claims interest at higher rates. Regardless of the reason, we may well ask what took them so long.

In any event, some 12 years after the adoption of *Cod. Iust.* 4.32.26, the lending community sought legislation to return to the old system of voyage-based interest. I suggest that, as a negotiating strategy, they offered as a gambit an upfront concession to cap rates at one-eighth, or 12.5%, functionally equivalent to the 12% established by *Cod. Iust.* 4.32.26. From the lender's perspective, the lack of any meaningful increase in the headline rate would hardly matter if the principle of reckoning interest per-voyage could be reinstated. The gambit was successful, and *Novel* 106 was adopted. Inasmuch as most voyages were shorter than one year, the new law's interest rate regime brought in its train much higher effective interest rates on maritime loans. The immediate effect was a substantial increase in the cost of such loans to the borrowers. If demand for maritime loans was high and capital to provide them short, borrowers might not have been able to resist demands for interest at the highest legally permissible rate. In these circumstances, pushback was to be expected. When it came, and the full import of the recent change in law was made clear through petitions by the merchants, repeal swiftly followed.

Conclusion: Astute Users of the Petitioning Process

Throughout this episode of Justinianic law-making, the law applicable to maritime-loan interest is ever-shifting: from the intermittent but long-standing efforts to cap interest rates on loans other than maritime ones, to Justinian's own efforts to impose lower rates and bring maritime loans within the scope of Roman law's rate caps with *Cod. Iust.* 4.32.26 in 528 and thence through to the upheaval of *Novel* 106 and its (purported?) return to prior customary practice, and the swift repeal of that effort in *Novel* 110. One thing, though, remains constant: the participation of lenders and at

[222] Accord: Bianchini, "Disciplina," 419.

least some borrowers in the legislative process. This participation, which had its start in the petition of Peter and Eulogetus, is particularly accessible to us in *Novels* 106 and 110: in the former through its unparalleled and fulsome description of the consultation process that followed their initial petition for relief; and in the latter through the very laconicity of its report of other petitions, leading to the abrupt reversal of the emperor's efforts of just a few months before. These petitions were constitutive of a dialogue between emperor and citizen, one in which the direction of travel was not all in one direction. One of the many remarkable features of *Novel* 106 is the frankness with which it describes maritime-loan customs that were manifestly in conflict Justinian's earlier provisions for such loans in *Cod. Iust.* 4.32.26. Even more remarkable is the petitioners' success in persuading the emperor to abandon those arrangements for those the "industry" preferred. Here it is not the subjects that bowed to the will of the sovereign, but the sovereign that acceded to the requests of his subjects. That their success was short-lived does not impair its instructiveness. To the contrary, it deepens our understanding of the iterative nature of communication between emperor and subject during Justinian's reign. In a specialised area like maritime loans, consultations might be expected, as it was unlikely that the imperial bureaucracy would be *au fait* with market practices in so banausic a trade. Who was invited to those consultations, and who was not invited, mattered, and was perhaps even determinative of the outcome, at least initially. But, as Justinian's regulation of *pecunia traiecticia* demonstrates, legislation promulgated during his reign should not necessarily be seen as some sort of culmination of process, but rather as part of an ongoing dialogue. Those disgruntled with a particular piece of new law-making, whether because they were excluded from the process of its formation or otherwise, might lodge their own petitions in campaigns of revanchist lobbying. In addition, the *PPO*, or his officials, controlled the consultation processes, and the quaestor and other officials of the central departments also had the opportunity to influence new rules in gestation. In all, the many constituencies involved were engaged in a process, one that played out over time. In practice if not in principle, finality was elusive, even for Justinian, that most totalitarian of emperors.

DOI: 10.14754/CEU.2024.02

CONCLUSION

The conventions governing the late antique petition demanded that it conclude with a *preces*, or prayer for relief, addressed with all due ceremony to the addressee, especially if that addressee was the emperor. The purpose of the petition's *preces* was to impress upon the busy sovereign's mind what in modern managerial parlance would be called the key takeaways. It is now my turn to conclude this study in a manner compliant with the conventions for modern dissertations in the humanities.

In the first book of his *Wars*, Procopius gives a brief character sketch of Tribonian, Justinian's long-serving *quaestor sacri palatii*, an office that combined the functions of chief legislative draftsman with those of minister for propaganda.[1] It was a lucrative post: "he was extraordinarily fond of the pursuit of money and always ready to sell justice for gain: every day, as a rule, he would repeal some laws and propose others, selling either favour off to those who requested (τοῖς δεομένοις), according to their need."[2] The historian's distaste for the bureaucrat's truck with money in exchange for legislative change drips from this and other passages.[3] But Procopius' criticisms are less than entirely fair. Bureaucrats' entitlement to *sportulae* and other fees for performance of their duties was a fixed a feature of late antique governance, as Justinian implicitly conceded even as he sought to regulate the amounts.[4] So, too, was constant legislative change, at least in the 530s and early 540s. To be sure, Justinian, and undoubtedly Tribonian too, were possessed of policy notions with which to inspire new law-making. But as this dissertation, especially Chapter 1, demonstrates, much new-lawmaking in this as in earlier periods resulted not from bureaucratic report or imperial brain-wave but from the requests of the emperor's subjects.

The vehicle by which those subjects lodged their requests was the petition. It is no accident that the term Procopius uses for those who made requests for legal change in the passage quoted

[1] *Not. Dig. Or., s.v. XII Insignia viri illustris quaestoris* [=Seeck, Notitia Dignitatum, 34; Borhy, Notitia, 22–23; Neira Faleiro, Notitia Dignitatum, 197–99]; *Nov.* 114 (1 Nov. 541); Noailles, *Collections*, 1:4, 25; Honoré, *Tribonian*, 8–9; Demandt, *Die Spätantike*, 281–82.

[2] Procop., *Wars*, 1.24.16 (Τριβουνιανὸς … φιλοχρηματίαν δαιμονίως ἐσπουδακὼς οἷός τε ἦν κέρδους ἀεὶ τὸ δίκαιον ἀποδίδοσθαι, τῶν τε νόμων ἡμέρᾳ ἐκ τοῦ ἐπὶ πλεῖστον ἑκάστῃ τοὺς μὲν ἀνῄρει, τοὺς δὲ ἔγραφεν, ἀπεμπολῶν τοῖς δεομένοις κατὰ τὴν χρείαν ἑκάτερον). The translation, with some modifications, is that of H.B. Dewing, trans., *Procopius: History of the Wars Books I–II*, The Loeb Classical Library 48 (Cambridge, Mass.: Harvard University Press, 1914), 225.

[3] Other comments by Procopius on the quaestor's character and career, displaying a mix of the same disdain for his greed with grudging respect for his talents, can be found at Procop., *Wars*, 1.25.1 [=Haury, *Procop. vol. 1*, 1:134]; *Hist. Arcana*, 13.12 [=Haury and Wirth, *Procop. vol. 3*, 3:86]; and *Hist. Arcana*, 20.16–17 [=Haury and Wirth, 3:126–27].

[4] *Novs.* 8 c.6 (15 Apr. 535); 105 c.1 (28 Dec. 537); 82 c.7 pr. (8 Apr. 539); 86 c.9 (17 Apr. 539); 124 c.3 (15 June 544); and 123 c.28 (1 May 546); as well as *Edict* 9 c.7.1 (undated); Kelly, *Ruling*, 64–68 and 175–77.

DOI: 10.14754/CEU.2024.02

above is τοῖς δεομένοις, a word that appears frequently in the *Novels* as a term for "petitioners."[5] Whilst it may be true that Tribonian was inclined to accommodate requests for new law-making (especially when those requests were accompanied by *sportulae*), it is perhaps unfair to think of those petitioners as receiving some kind of special treatment at his hands. Petitions were the means by which one asked the authorities for things, of whatever kind. And in important matters, at least, (nearly) all roads led ineluctably to the centre. So Procopius' petitioners were in an important sense not, or not only, Tribonian's clients but the emperor's own.[6] Indeed, we should think of them less as clients pressing their demands with promises of money than as subjects presenting their prayers for relief in matters large and small via such avenues as the late antique system of governance made available for the purpose.

Justinian's *Novels* give us a glimpse into how those avenues channeled the flow of petitions into legislation. Because the *Novels* were spared the indignity of vigorous editing as part of being prepared for some formal compilation, they describe the circumstances of their promulgation in a way that legal source materials for earlier periods only very rarely do. The *Novels* speak of subjects from every rank and station of petitioning the emperor with their prayers for relief, in numbers sufficient to provoke him to complaint on not a few occasions. The *Novels* thus illuminate the operation of an important political institution of Justinian's reign, namely the system of petition-and-response that constituted a key mode of communication between emperor and subject. This system was no ancillary feature Justinian's system of governance but intrinsic to its working. This dissertation has examined the petition-and-response system in the context of three financial *Novels—Novel* 136 on banking contracts, *Edict* 7, also on banking contracts, and *Novel* 106, on maritime loans. These three constitutions provide unusually informative descriptions of the petitions that prompted them, descriptions sufficiently detailed so as to allow one to reconstruct the petitions' contents even if the petitions themselves have not survived.

Before embarking on the detailed exploration of the individual *Novels,* it was necessary to contextualize the bankers' petitions within the system of imperial petition-and-response more generally. Chapter 1 thus examines the practice of petitioning the emperor during Justinian's reign as portrayed in across the entire *corpus* of the *Novels*, supplemented by evidence from literary history, epigraphy, hagiography and, especially papyri. This chapter provides a *tour d'horizon* of

[5] As at *Nov.* 2 pr. pr. (16 Mar. 535) (SK 10/19); *Nov.* 6 c.3 (1 Apr. 535) (SK 42/1); *Nov.* 10 (15 Apr. 535) pr. 1 (SK 92/20–21) and ep. (SK 93/33); *Nov.* 121 pr. (15 Apr. 535) (SK 591/12); *Nov.* 74 c.2.1 (5 June 538) (SK 373/26); *Nov.* 80 c.3 (10 Mar. 539) (SK 392/25). See the discussion under the caption "The Power of *Paideia*" in Chapter 1.
[6] *Pace* the translation of "his [Tribonian's] customers" found at Anthony Kaldellis, ed., *Prokopios: The Secret History with Related Texts* (Indianapolis: Hackett, 2010), 139.

DOI: 10.14754/CEU.2024.02

the many ways in which subject's petitions might lead to new legislation. Among other contributions, this chapter classifies the various references to petitions and petitioning across the *Novels* by function and context. It demonstrates that for many individuals and groups throughout empire, legislation was no mere spectator sport but rather a process in which they could, by petitioning, participate. Justinian's subjects are revealed in these pages to be no mere passive recipients of new laws but in many instances sophisticated users—and abusers—of them, ready to exploit any wiggle-room the emperor's legislation allowed in pursuit of their own, not always honourable, ends.

The ensuing chapters then go on to apply the lessons of Chapter 1 to each of the financial *Novels* in turn. The methodology of the analysis is bi-directional in each case. First, it demonstrates how the *ex parte* nature of most petitions and their rhetorical characteristics shaped the legislative response to them, as the conventions of vocabulary and rhetorical structure, together with the incentives of legislative draftsmen, facilitated the practice of recycling petition text in legislative text. Second, it applies the insights so gained to the interpretation of each of *Novel* 136, *Edict* 7, and *Novel* 106, subjecting each one to social, economic, and legal scrutiny so as to address and, it is hoped, resolve certain long-standing open questions with respect to each.

Chapter 2 thus takes up the interpretation of *Novel* 136, a constitution issued in response to a petition by Constantinople's bankers addressing a range of technical questions in respect of banking contracts. This chapter examines each request for relief cited in the *Novel* and Justinian's response to them against the context of pre-existing Roman legal practice and against other recent lawmaking, notably Justinian's own *Novel* 4 of March 535. The chapter identifies the organizational principles behind the composition of *Novel* 136, which at first reading appears to be have no more structure than a *potpourri*, and which in all likelihood reflects the lobbying strategy embodied in the bankers' petition. In addition, the chapter demonstrates that the bureaucratic practice of lifting wording from petition to legislative text makes the manuscript dating of *Novel* 136 to April 535—which many scholars have doubted on account of its proximity to *Novel* 4, to which it responds—entirely plausible.

Chapter 3 applies the same methodology to *Edict* 7 of 542. It establishes that many of the *Edict's* provisions do not, as is often assumed, provide evidence for the effects of the so-called Plague of Justinian, or indeed relate to the disease and its consequences at all. Even those provisions that do plausibly relate to plague are better explained as responses to its expected effects than to its actual ones as at the date of the Edict's promulgation. *Edict* 7 therefore cannot serve as evidence that the plague had arrived at Constantinople prior to 1 March 542. This finding knocks out a key pillar of the chronologies of plague's progress put forward by some leading scholars and suggests

DOI: 10.14754/CEU.2024.02

that a dating of the epidemic's arrival in the capital should rather be put back some weeks or months, to the "mid-Spring" attested by Procopius.[7]

Chapter 4 then turns the focus of attention from bankers to maritime lenders. Together, *Novel* 106 of September 540 and its swift reversal by *Novel* 110 in April 541 reveal the iterative nature of the imperial system of petition-and-response and its management of conflicts between the interests of different constituencies. The chapter demonstrates the weaknesses of earlier explanations offered for the promulgation and swift repeal of *Novel* 106, arguing that it was instead the result a lobbying gambit by the maritime lenders to bamboozle the shippers and merchants who were their customers. This gambit took the form of a subterfuge that left the headline rate of interest intact but increased effective interest charges by changing the basis of calculation from time-based reckoning to voyage-based reckoning. The lenders' success was, however, short-lived. Justinian repealed the new interest-rate regime of *Novel* 106 with retroactive effect just eight months later for reasons that remain obscure but likely result from petitions from merchant-borrowers in Constantinople complaining about the higher effective interest rates that *Novel* 106 necessarily brought in train. This episode also demonstrates that successful lobbying need not be guild-based, as the petition that prompted *Novel* 106 was lodged from two individuals, for whom there is no evidence that they were members of the bankers' guild or any other.

Read together, these *Novels* suggest then that the bankers and other financiers of the city of Constantinople comprised a constituency skilled at working the imperial system of petition-and-response. In them we find a group of sophisticated actors, as well-versed in the laws applicable to their business activities as they were well-organised to lobby for changes to them. Justinian's bankers and maritime lenders were thus no mere passive recipients of his successive waves of new legislation but sophisticated consumers of it, possessed of agency in its interpretation and ready to exploit its silences, its ambiguities, and its contradictions in application. Above all, they were prepared to lobby where need be for its amendment. Whilst Justinian's legislation, like that of his predecessors, was in large measure reactive, the lobbying efforts of the bankers and financiers of Constantinople were anything but. They were by no means unique in this respect, but the financial *Novels* that ensued from them provide unparalleled accounts of the mechanics by which "special interests" might work the imperial system of petition-and-response.

To the extent these special interests of finance worked against what we might call the general or public interest, one might be tempted to suggest that the term "conniving" in this

[7] Procop., *Wars*, 2.22.9 [=Haury, *Procop. vol. 1*, 1:251].

DOI: 10.14754/CEU.2024.02

dissertation's title is not inaptly applied to them. That said, one may question whether either Justinian or his bureaucracy had any workable concept of "the general interest" that might be deployed to resist the cacophony of special interests petitioning him at every opportunity, or indeed whether he had the theoretical equipment required to generate such a concept. I leave that question for future research, to which this dissertation is preliminary. More work remains to be done on Justinian's legislative responses to petitions from other powerful interests, among them the imperial officials, local grandees and, above all, the Church. But that is by no means the only work to do. The recent flourishing of Roman legal studies in recent years, inspired by the application of economic and sociological methodologies, has had as its focus the periods of the Republic and of the Early and High Empire.[8] Save for a few studies on the Theodosian Code, these approaches have not yet reached the study of late antique law; the sixth-century sources, treated as sources in their own right for their own period rather than merely as repositories of earlier materials, have hardly been touched by such new techniques. As a result, Justinian's legislation as preserved in his *Codex* and, especially, his *Novels,* has largely been left to the continental legal historians pursuing research paradigms and methods that have remained essentially unchanged for the better part of a century.

I make no claim that this dissertation has pioneered the application of some sparkling new technology like Law & Economics or the Sociology of Law to Justinian's post-codification lawmaking. My aims in this dissertation have been modest, less flashy than those methodologies but perhaps a necessary precursor to their application: namely, the application of the ordinary methods of social, economic, and political history to Justinian's financial *Novels* with the aim of situating them within the context of the imperial system of petition-and-response. This admittedly broad contextualization will undoubtedly cause consternation among legal scholars committed to the distinctions between, say, petitions for legal change, petitions to start litigation (the rescript procedure), and petitions for other, non-legal purposes. Those sorts of distinctions may indeed be necessary for studies of late antique litigation as an object of study in its own right. But when viewed in this broader context, petitioning the emperor looked largely the same—in terms of preparation, terminology, rhetoric, structure, strategy, and pursuit—irrespective of whether the object of one's prayer was justice, money, preferment, office, or new lawmaking. From the perspective of the subject—a perspective that too often goes missing in legal history as conducted in the continental mode—the differences would pale in comparison with the similarities.

It is submitted that an inter-disciplinary offers a promising path forward for the study of other, non-financial *Novels,* as well. It may also provide a gateway for the application of other,

[8] See Bryen, "Law in Many Pieces."

DOI: 10.14754/CEU.2024.02

newer technologies that have made the study of the Roman law of earlier periods so dynamic in recent years. But I hope this dissertation might also offer a third stepping-stone to further research, and that is to open up the world of sixth-century banking as portrayed in the *Novels* to scholars outside the narrow circle of continental legal historians who have enjoyed this topic as almost their private preserve.[9] The legal colleagues are owed a debt of gratitude for their careful explication of the many legal subtleties that Justinian's banking and maritime loan legislation presents. But that legislation offers historians more—much more—than just fuel for romanist fires. One hope for this study is that, in addition to whatever else it achieves, it cracks open Justinian's financial *Novels* and the world of his money-men for study by those whose training is not primarily legal. Translation from lawyer to layman will, it is hoped, ease the way for social, economic, cultural, political, and other historians to deploy these underutilized sources in service of their respective inquiries.

Of course, bringing those different disciplines into dialogue—especially the crossing of the boundary that separates *Rechtsgeschichte* from *Altertumswissenschaft*—risks bringing together scholarly traditions that, in the context of late antiquity, may not have much interest in dialoguing with each other. Since Peter Brown's *The World of Late Antiquity,*[10] the historiography of late antiquity has focused on cultural topics such as religion and *paideia*. Scholars in working in that tradition as well as those pursuing more materialist approaches might be forgiven for leaving the formidable technical difficulties of Justinian's financial *Novels* to their colleagues in the legal faculties. Perhaps that now might change. As for the romanists, I fully anticipate the shade they are wont to cast at those who intrude on "their" turf. But with law degrees from Cambridge and Harvard and now three decades of practice in the area of financial law under my belt, I would hope that the historical study—of financial laws—in this dissertation might be spared the sniffy responses ("*manque de culture profonde juridique*") that have often greeted earlier efforts to study Roman law in different, inter-disciplinary, ways.[11]

[9] Raymond Bogaert's vast papyrological studies on Egyptian banking (notably Bogaert, "Les banques à Alexandrie"; Bogaert, "La banque en Égypte byzantine"; Bogaert, Raymond, "Les documents bancaires de L'Égypte gréco-romaine et byzantine," *Ancient Society* 31 (2001): 173–288, https://doi.org/10.2143/AS.31.0.50., among others) had as their object the papyrological documents of practice rather than normative sources such as the *Novels*.
[10] Peter Brown, *The World of Late Antiquity: AD 150–750* (London: Thames and Hudson, 1971).
[11] See John Crook's recollections of the responses to his *Law and Life of Rome*, recounted at John Crook, "Legal History and General History," *Bulletin of the Institute of Classical Studies* 41 (1996): 31–36.

DOI: 10.14754/CEU.2024.02

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