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The Supreme "Courts" of the Roman Empire

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The Supreme “Courts” of the Roman Empire: Constantine’s Judicial Role for the Bishops

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{Thesis statement in progress}

The Christian republic... gradually formed an independent and increasing state in the heart of the Roman Empire.

Edward Gibbon, *The Decline and Fall of the Roman Empire*†

There seems in the minds of the Romans to have been some association between the enactment of a large body of statutes and the settlement of society after a great civil commotion.

Sir Henry Maine, *Ancient Law*††

Question

Why and how did Constantine go further than merely tolerating Christianity, and put himself at the head of their affairs and legislate Christian bishops into the position of Roman judges whose decisions were not subject to appeal? What effect did the rescript of 333 have on the meaning of the earlier edict of 318, and why is this important?¹

Introduction

Constantine, the Roman Emperor from 315-337, was a law-giver who first put the Christian Church in the place of primacy in the organization of the state that it only lost as recently as the seventeenth century; as such, he is very important to legal and social

¹ Thesis question.

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

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

history in the Western experience. This thesis explores the degree to which the Emperor Constantine's adoption and adaptation of the Christian religion's bureaucratic structure affected the social and legal order of the Roman state bureaucracy in the fourth century: I do this by examining both the question of his legislation pertaining to making bishops judges and the legal nature of his relationship with the bishops which developed as they appealed their own decisions to his imperial court, specifically in both the Donatist and Arian crises. Constantine's two pieces of legislation that most directly bear on this question come from 318 and 333: Codex Theodosianus (CTh) 1.27.1² and Sirmondian Constitution (Sirm.) 1, respectively. In the first, an edict, Constantine allows that any litigant may have their case transferred to a bishop's court if they so choose, but he is careful to emphasize the right of the presiding judge to make this transfer official. In the second, a rescript, Constantine significantly expands the powers of the bishop's as judges, and indicates that, among other things, just as with decision of the praetorian prefects, any decision of a bishop is not subject to appeal. In this way, the bishop's court seemed to be positioned by Constantine as an appeal court of kinds, but in practice and according to the small amount of evidence we have on the subject, these courts, the *episcopalis audentia*, heard most legal matters as a working court of first instance, like that of any other local magistrate. The uniqueness of the court is evident not so much in their powers as judges, but in the fact that they began to hear matters between litigants applying Roman law to enforce their rights. The focus of my research is the seeming expansion of

² Codex Theodosianus, *The Theodosian Code*, trans. Clyde Pharr (New York: Greenwood Press, 1952), 1.27.1, 31.

powers that Constantine gives to the bishops from the first to the second piece of legislation. The 333 rescript was actually a reply to the Prefect of Rome, Ablavius, who was questioning the use of the Edict of 318, and because of this, perhaps, we learn a great deal more about what Constantine wanted that earlier law to mean in 333, but whether he initially had this in mind is unknown since the first piece of legislation was very brief. I argue that he did not have this in mind, and that only after his relationship with the bishops grew in the intervening years, highlighted jointly by his blatant adoption of the Christian religion and subsequently assuming state responsibility for their protection and dispute settlement mechanism at the Council of Nicaea in 325, would such expansion of judicial authority make any reasonable sense. The emperor was in some ways compelled into a relationship with the Church because of the internecine conflicts within it which threatened the stability of his Empire, the two most important being the Donatist and Arian crises.

In the Donatist controversy, not only did the bishops appeal to Constantine for a final judgment on a particular ruling, he also directed other bishops, not directly involved, to sit as an appeal court and decide the case on his behalf, the case ultimately being appealed to him following two of these hearings. Nicaea was a case of the same thing on a larger scale. The years for the series of events surrounding the Donatist crisis compared with Constantine's bishops as judges legislation is suggestive. Two separate courts of bishops heard this case (Rome 313, Arles 314) and a final appeal to the emperor against

these decisions was made in 316.³ Constantine made the bishops appeal court judges via legislation in 318. His intimate involvement with the bishops throughout the controversy seems to have contributed to his decision to make them judges ordinary in the Roman legal system. The fact that he had the support, and they his, of these bishops' courts, which he had initially sequestered during the Donatist controversy, makes his subsequent decision to bring them into the empire's legal system, in a similar role, somewhat more understandable.

Constantine and Christianity

I suggest that Constantine's adoption of Christianity was the single most important confluence of state *and* state-like ecclesiastical powers in Late Antiquity. I demonstrate that Constantine did this, in part, by instrumentalizing legislation regarding religious tolerance and by vaulting bishops into the position of Roman judges throughout the Roman Empire. I suggest that Constantine was attempting, first, to inject his own moral conscience, his preference for morally just behaviours and attitudes, into the legal life of the Empire by making Christian bishops the court of first instance for anyone who felt they would get a fairer hearing before a bishop than they could before a Roman provincial magistrate.⁴ Very importantly, as we know from the legislative record, Constantine was very concerned to root out corruption in the practice of court officials across his empire.

³ George Mousourakis, *Roman Law and the Origins of the Civil Law Tradition* (New York: Springer, 2015), 67: "The decreta (decrees) were decisions issued by the emperor in exercise of his judicial powers on appeal and, on occasions, as judge of first instance." At footnote 117, "...as the emperor received his powers from the people and hence acted in their name, an appeal to him was the exercise of the age-old citizen's right of appeal from a magistrate's decision to the judgment of the people in the assembly."

⁴ The legislation is worded such that a litigant could request to have his case transferred to a bishop's court at any point during a trial, even while decision was being made, but it also makes the bishop's decision final; the possibility of transfer of jurisdiction to a bishop's court when combined with their role as judges above whom no appeal was possible combine aspects of both an appeal court and supreme court.

Second, since both prior to and after this move it was primarily local magistrates and governors who heard cases at law, while the four praetorian prefects and, at times, governors, heard appeals, it seems, if we take the legislative evidence of Constantine's effort to root out corruption in the legal system generally, that he may have wanted to use the bishops' appeal power as a check on the rulings of magistrates and governors — a deterrence of kinds — so as to combat abuse of the justice system, something the wealthy and powerful did regularly. He was able to accomplish these aims in large part, I suggest, by availing himself of new and additional courts across his empire, namely bishops' courts, which were already hearing and deciding legal matters within the Christian community; under Constantine, now all Romans, Christian or not, could theoretically get a more just hearing before the bishops if they so chose. In this way, I will demonstrate how Constantine, having the bishops already beholden to him by both the fact the bishops already looked to him as their court of appeal on church leadership disputes and that he assumed the role of supreme patron of their religion, likely thought he could count on these prelates to employ his moral sensibilities, or conscience, to the various matters that came before their courts. By 'conscience,' I do mean moral sensibility, but also his ostensible will: what he would see as ethically fair in more commonplace decisions or *sui generis* cases, because even though a number of pieces of legislation reveal what Constantine's "will" was on a particular matter, he obviously could not hope to speak to all matters comprehensively, nor does any legislator or legislative body intend to; that is why the courts have discretion. Based on his legislation of 318 which made bishops judges, we can reasonably infer that it is this power of discretion in decision-

making, this judicial power, that Constantine knew would be practiced by the bishops. He was adding another judicial element beyond magistrates, governors, and praetorian prefects to Roman governance, the courts of bishops.

Methodology and Evidence

In this thesis I suggest that Constantine's legislation of 318 and 333 show a marked shift in his appreciation of what exactly the bishops were capable of as judges, and this was a result of his intimate involvement with the Church, assuming a leadership role over the entire corps of bishops, which reaches a zenith in 325 at the Council of Nicaea. Beyond this, Constantine was likely attempting: (1) to reform the Roman legal system by "injecting his own moral conscience"; (2) to consolidate his own control over the Roman legal system; (3) to use the bishops' potential intervention as a means of encouraging better behaviour from magistrates and governors. In order to demonstrate how these claims can be supported, and how both this emperor's intentions and the outcomes of his reforms worked, I will be using evidence that comes from within Constantine's reign, but also looking further, approximately one hundred years, to see how Constantine's foundational move of making the bishops judges would affect the actual experience of bishops as judges into the time of Augustine. The evidence for his reforms, and intentions regarding those reforms, can be most easily sourced in his extant legislation, not only where it concerns making the bishops judges, but also where it concerns his trying to thwart corruption in the legal administration generally. The legislation will serve as the primary basis for evidence supporting my claims. Another valuable source for evidences will be the writings of contemporary figures such as Eusebius of Caesarea, Lactantius, and

the Panegyrist who both knew and wrote for and about him. In this group will also be some later writers, whose historical accounts were written within a couple centuries of Constantine's reign, and these are important because the sources used by these historians, in certain cases and pursuant to certain claims, have been lost to history. Where their evidence corresponds to earlier evidence, or fills in details in ways that can be reasonably tied to it, a better sense of context and activity can thus be gained. This second swath of evidence will provide the most evidence for Constantine's actions where it concerns the perception of these by both the Christian Church, the beneficiaries of his benefactions, and the Roman populace, at least in so far as the latter can be gauged by the information we glean about how this emperor was perceived in the panegyrics. Third, as further evidence to support my claims, are distillations of the same historical facts by other historians who have looked at Constantine the emperor more generally, or on specific and related matters: Robert M. Grant, Peter Brown, Jill Harries, Ramsay MacMullen, and John Noël Dillon, among others.

The original contribution made by this research, and where it moves forward from the suggestions of these aforementioned, is the exclusive consideration of Constantine's intentions and motivations for bringing the Christian bishops into the legal machinery of the state. Beyond that, and more specifically, I look at the change in the level of authority accorded to bishops from the initial legislation of 318 to a rescript of 333 wherein he has significantly defined and expanded it. To date, there has not been, to my knowledge, anything written specifically on this transformation in meaning which Constantine occasioned as it pertains to the authority of bishops in these two pieces of legislation. It is

a fact that has been noted by authors, considered below, but no research has yet made this change or a suggestion as to why it happened their focus. In this way, it is my hope that this research will add to the ongoing conversation about Constantine's relationship to the law, the state, and religion.

By using the traditional historical method spelled out in detail in my methodology section below, my aim is to produce an imaginative re-construction of an historical event and its concomitant personages which is based on extant data, but which also must engage in a participatory re-thinking pursuant to the motivations of the characters involved such that the end result can be read as an intelligible whole. My goal is to examine the legislation and the other source evidence about Constantine's actions, and perceptions about him as emperor, and use both of these to support my suggestions about his intentions and contrast that with the suggestions of other historians who have looked at similar bodies of evidence, to suggest an explanation of these very particular historical events that can be read and understood as an intelligible whole. My hope is that by focusing on this particular move of Constantine to bring the bishops into the legal system of the Empire, it will hopefully invite constructive elaboration and criticism from other scholars with the aim of better understanding a moment in history that would lay the foundation for Church involvement with state and legal matters which continues to influence Western social and legal history to the present day. Constantine's adoption of the church in the early fourth century set the stage for so much of what we understand as constituting state governance in the Middle Ages, and this research merely brings the light of examination to one very small but important aspect of that historical instance.

Bishops as Judges: Constantine's Actions and Intentions

In past generations, the jurists had served the Roman legal system by giving voice to the content and technicalities of law, and how it was to be applied. By giving the bishops a role in the judiciary, Constantine ensured that they would, eventually, need to familiarize themselves with Roman law and for any situations which were beyond their experience, and as we see in the case of Augustine, they would be forced to seek legal help from, not jurists, but other judges and lawyers who knew the law, and this is discussed herein. Constantine took his supreme role as the final court of appeal, theoretically shared with the governors and prefects, and seems to have shared this power with the bishops as well. Related to this notion is the fact, evidenced in the legislation itself, that this emperor avowedly believed in the benefit of proper worship and moral practice for a state's prosperity. Since he could not possibly hope to regulate legal matters over such vast tracts of both geography and subject matter, and because proper worship and enforcing Christian morality was the bishop's main function, he found himself quite willing to let his conscience on matters be, at least in theory, represented by them; and the 318 legislation shows that he seems to have thought they were capable of this. In other words, his close relationship to the bishops, initiated early on in his reign and then solemnized at the Council of Nicaea (325), was in part used in an attempt to consolidate his control over the Roman legal system by making the courts of bishops a regular legal court for the citizens of the Roman Empire — and this was a consolidation which began with his 318 legislation relating to this matter. By alleging this I then agree with Burckhardt, that Constantine used the Church for his own political ends by outflanking

the judicial system of his time, or at least attempting to, by installing bishops as judges whose decisions were not subject to appeal; this latter fact is important because he was putting the bishops on a similar legal footing to praetorian prefects, the highest imperial officials in the empire next to the emperor himself.

Manner of Court

Of course, the bishops were not a supreme court the way we think of such a group of judges today; and although Constantine allowed a litigant to have their case moved from the courts ordinary to a bishop's court at any time in the proceedings, even when sentence is being delivered, it is tempting to then think of the bishops as operating a kind of de facto appeal court, but it is important to remember that they were not the primary avenue of appeal under the Roman legal system, the prefects were. The bishops did not have a regular docket of cases assigned to them, and they certainly did not sit en banc hearing appeals, but in the localities of the Roman Empire where the bishops were senior officials in the cities, perhaps the most senior, and because their term was for life, rather than the transitory magistrates and governors which changed with regularity, the bishops courts did end up serving a key role in the administration of Roman law in the provinces. The evidence during the reign of Constantine for the bishops courts, and for litigants requesting their matters to be transferred to those courts, is scarce, which seems to suggest that as an either an initial court of first instance or an avenue of appeal, keeping in mind the restricted nature of such nomenclature applied to bishops, they were not much used, but this remains uncertain due to the lack of evidence. What we do know, though, is that after Constantine's reign the bishops' courts became much more

important and used with regularity, and this is evidenced most clearly in the writings of Augustine, a Christian bishop and sitting judge of the early fifth century. The initial dearth of evidence on cases being heard by bishops in the time of Constantine strengthens the point that this power could have been framed as more of a check on the existing judicial apparatus rather than an attempt at replacing it. Other evidence supports this notion, because time and again his legislation rails against the legal profession, judges included, for corrupt practices. The evidence rather suggests that Constantine's reforms in this area did not really take root until after his reign, when bishops slowly began hearing cases which were outside their regular jurisdiction of church matters and were based on Roman law. By the time we reach Augustine, the bishops' courts are almost overwhelmed with litigants, and the law employed is almost entirely Roman.

Supreme "Courts"

The title of this dissertation, "The Supreme Courts of the Roman Empire," is suggestive and provocative, and is intended to make the reader think about the strength of my claim that Constantine felt his will and laws on a number of matters would be capably represented by a cadre of bishops that were beholden to him for saving and vaulting their religion to the forefront of the fourth century Roman experience, and related to this that just knowing the bishops had this authority to hear appeals of magistrates and governors might encourage these latter to judge matters more fairly in the innumerable localities across the empire in which Constantine could not hope to attend personally, and under the Roman system of his emperor predecessors, he was never meant, nor did he intend, to. By noting "Supreme Courts," I point to the fact that given the fact a bishop's decision

could not be appealed by anyone, and that they shared this right of authority with praetorian prefects, they were, then, essentially one of two Supreme “courts”: a court beyond which no one may appeal their case.

Constantine’s ultimate aim, it seemed, was a strengthening of the integrity in the practice and outcomes of the Roman legal administration, his related legislation is all directed this way: just outcomes for all. As well, he must have known that by bringing the bishops into the machinery of the state by making them part of the judiciary, that their sensibilities would colour local outcomes for litigants. In this way, because we know he did exactly this, he must have felt that Christian bishops would be able to decide matters of law in a way that would both inure to less corruption and be more just for the common person. The dearth of information we have on bishops hearing cases, and the Praetorian Prefect of Rome’s, Ablavius, questioning the emperor on whether this “bishops as judges” law was still in effect, some fifteen years later, seems to point to the fact that it was not much used; but if Constantine intended it more as a check on abuse, then this evidence would fit quite well because if the magistrates knew this kind of appeal was available to litigants, then one could imagine they would attempt to ensure none of their decisions were censured by the court of a bishop, whereby their possible transgression would be made known to the emperor. If one attempts to argue Constantine did not consider this, then they would have to show why he felt it necessary to make bishops judges whose decisions could not be overturned in a Roman system that already had those. Constantine was not fixing what was not broken, his legislation and the other primary source evidence tells us the system was broken, and badly, in favour of the wealthy and powerful.

Christianity and Empire

By bringing the Church in to the state machinery of justice, he was also making Christianity part of the constitution of the Roman Empire, and hence part of their sovereign organizing matrix. I believe he made the bishops judges on purpose for the reasons specified above, but the constitutionalizing of the Roman Church, something that defined the rest of European history, given the dominant role of the Roman Catholic Church in the governance of civil life in these regions, was an unintended consequence: I suggest Constantine was not looking any farther than the rule of his own sons and the imperial legacy of his family, certainly not one thousand years hence and beyond, as the case turned out to be. My claim is that by bringing the Church into the legal framework, the constitution, of Roman society, his purpose was that these bishops, who avowedly believed Constantine was the saviour of their religion and were thus beholden to him, could then act as a conduit for his legislative intentions in their new role as judges, discussed above, and dynastic ambitions; for how else, other than by using a constitutional format, the law, could he have done this and ensured his choices outlived him to the reign of his sons?

I also suggest that given the fact Constantine, as emperors before him all had, believed that the gods prospered those they were pleased with, was in some sense faced with a situation which was both beyond his control and one that was obvious to him: the Christian church was growing exponentially, even in the face of persecution. It is very likely Constantine's mind, moulded as it had been at Diocletian's, ergo Galerius's as well, court in Nicomedia as a young man, saw the growth of the Christian church as a sign that

the divinity was favouring them, and what better way to curry favour with the “divinity” than to co-opt the religion that seemed to be pleasing that divinity. This emperor’s actions, his laws, letters, and building program, support this notion comprehensively. But this is not a suggestion that Constantine no longer believed in the efficacy of catering to other gods, discussed herein, but that he simply identified himself with what was clearly the force majeure religion of his day. He did this, I suggest, because, besides the reasons specified above with regard to him making the bishops judges to bring moral stability and fairness to legal administration, he saw clearly that the religion was prospering, and he wanted that same favour bestowed on his rule and dynasty.

Other Aspects

In terms of whether Constantine was trying to Christianize his empire and the Roman legal system or make his the empire’s legal administration more just, a la Ulpian, I would tend to the latter, and specifically because Constantine thought that divine favour, attached as it was to good morals according to Roman traditional thinking, would inhere to his and his family’s long and prosperous rule. If I tried to argue Constantine was attempting to introduce a new Christian ethic into his laws and empire, I would have to then assume that he was solely convinced of the truth of the Christian religion against all others, which, as the evidence demonstrates, he was not. His belief in other gods was ingrained in him from childhood, and his actions bear out the character of someone who was covering their bets with a variety of religions, although he definitely preferred Christianity and more so as his life and reign went forwards. As discussed in chapter three, below, while I agree with John Firth that Constantine, given his patronage and

intervention with and for the Christian religion, might fairly be styled with the name “Christian,” or Christian of a kind, I also agree with John Dillon who noted, “Constantine was a terrible Christian who thought he was a good one.” And further, that at the same time you can call him a Christian, you could just as rightly, based on the evidence, call him a part time devotee of Apollo and, to a lesser degree, the pantheon so common to Roman religious practice. By the end of his reign, Constantine’s religious proclivities lined up in this order: Christianity first and foremost, borne out by his actions and legislation; the religion of the sun god, Apollo, as evidenced in both his early life and adornment of Constantinople with the statue of Apollo, later in life; and lastly, various other gods of the pantheon, for instance, transferring the Palladium of Troy to Constantinople shows at least deference to its supposed effectiveness to incur favour with the divine. Put in a more accessible way, Constantine was raised as a devotee of Apollo and the other gods, but began to be more and more attracted and attached to the Christian religion as his life went forward, starting sometime in the period between 305 when he inherited his father’s imperial role, and 312 when he claimed to have been contacted directly by the Christian divinity before the Milvian Bridge episode. Because his coinage reliefs depicted Mithras and Jupiter up until 323, we can reasonably infer that Constantine still believed in the efficacy of appealing to these religions, and also suggest that this could signify the end of his treatment of them as his favoured religions, but probably not much else.

Constantine was not only trying to keep the gods happy to encourage their bestowal of favour on his empire, he was clearly trying to keep the people of empire happy as well; given the fact that never more than fifty percent of his population was Christian but

attached to other religions, this practice of Constantine to remain loyal to the old religions is hardly surprising. If Constantine's legal and constitutional reforms, and specifically his wanting to make the legal system more just, point to anything, it is not a purely Christian ethic but rather an ethic of good moral practice which would please the "divine will," and thus act as a guarantor on the stability of his, and his sons,' empire. In order to help achieve this moral stability across his empire, Constantine adopted a new cadre of civil servants into the legal administration of Empire, discussed herein, the bishops.

If his choice of religion and concomitant rule, laws, and dynastic ambitions were to be fulsomely engaged in by all parts of the empire, the bishops, already holding seats of social power in every city, were a ready-made vehicle to achieve this. Making the bishops local judges meant that, being beholden to him as their "saviour", Constantine was in a position to expect them to vouchsafe his decisions and support his sons' patrimony of imperial rule. Constantine had originally given the highest power of appeal to the very powerful four praetorian prefects, *praefectus praetorio*, in charge of the four prefectures Constantine created out of the twelve dioceses, serving under him, but since these were powerful figures and threats to an emperor's rule from below had a long pedigree, so the move concerning the bishops' new role also seems to fall into the pragmatic category. By giving this judicial power to the over five-hundred bishops in his empire, he was also splitting this judicial power up in a way not unlike Diocletian had split up the provinces to establish greater control over the state. By co-opting the courts and religion of Christian bishops, though, he was, however unknowingly, sowing the seeds for a more

democratic decision-making process by his eventual, and related, expropriation of Church councils as a state prerogative, where bishops would decide issues of great religious importance en banc. What he did inadvertently in making the bishops judges, as well, was give the law back to a religious authority, as it once was under the college of pontiffs for early Rome, and the Church would carry that law into the Middle Ages and reintroduce it to European kingdoms in the eleventh century with the discovery of the *corpus juris civilis*. This would in turn be the basis for such influential constitutional documents as the *Napoleonic Code*. As noted, some of these consequences were intended, while others were only possible *because* of his actions; but that he was the initial impetus behind these changes and the prime reason that the after effects were possible is hard, if not impossible, to deny.

He knew his laws would outlive him and pass to the reign of his sons, we know this because his sons were already Caesars before his death, and he was setting the bishops in local seats of power all over his empire, most likely, to stabilize society and ensure that his choices, his *res gestae*, were going to be part of his ongoing legacy to the empire. Another piece of evidence to support his intentions on the bishops' place in society after him, was that he had his sons tutored by Christian bishops and priests: his sons that would be future emperors. The fact that they were being groomed and instructed by Christian priests is very likely indicative of his plans, generally, and his installing his sons as rulers under him later in life shows he wanted a dynasty. I suggest the education of his sons and future emperors gives evidence of what kind of a dynasty he was seeking, as John Firth first noted.

Constantine made the bishop a prefect and judge. Augustine would be, in turn, just such a judge; Gregory the Great was a praetor/judge who was pressed ganged into the seat of Roman Bishop, and raised a standing army for the city of Rome and established a taxation system for the Western Church. Thus, within two hundred years of Constantine's death, his intended change, bishops as judges, was getting traction and this is shown by the careers of the two most influential Western characters of the early Middle Ages, Augustine and Gregory.

While this research will not look further than Augustine into the future ramifications of Constantine's decision to patronize the Christian religion, especially through the bishops, the mere mention of these two later characters and events shows just how significant this emperor's changes turned out to be. But, as noted, both herein and discussed below, Constantine's choice was not sui generis in its trajectory: other Roman emperors before him had seen fit to interact with the Christians; some, like Philip, wholeheartedly, and others, say Aurelian, less enthusiastically. But the fact that the emperors engaged with the Christians at all was the beginning of a process of acknowledging what would become, under Constantine, a kind of fait accompli in history. Christianity was being constitutionally recognized by the state, whether for or against at various times, and even the persecutor and emperor Galerius realized at the end of his life that given the Christians were a growing segment of his empire's population, it was much wiser to permit their society than persecute it, and when authority permits a thing, it also tends to ultimately regulate it. Enter Constantine.