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## SOME OBSERVATIONS ON THE TEXTUAL TRANSMISSION OF JULIAN'S LAW ON SUBORDINATE JUDGES\*

Peter Riedlberger

The Theodosian and Justinian Codes share a similar name, and to any casual onlooker their respective editions resemble one another very much. But this apparent similarity is treacherous, for the essence of the two enterprises which yielded these works was very different indeed. The Theodosian Code, compiled in the 430s, is merely an ordered collection of the relevant material. In its creation, constitutions were stripped of their non-juristic parts. The remaining juristic cores were split if they pertained to more than one subject, and the resulting excerpts were then organized according to their content matter (for example, a juristic rule pertaining to heretics was put into book 16 on religion, and there into the partition, 'title,' devoted to heretics, i.e., title 5). One might describe the creation of the Theodosian Code, therefore, as a taking of inventory and preparation of the raw material. This had not been the original purpose: initially, Theodosius II had planned the logical next step too, namely the removal of outdated rules and the elimination of contradictions. But nothing came of it, and he settled for what he had, merely adding the rule that any newer rule supersedes the older ones, even if the older ones themselves were included in the Theodosian Code.<sup>1</sup>

Theodosius' compilers had little liberty to modify the wording. They were supposed to, and did, shorten the texts, but could otherwise change the wording only in cases of textual problems or obscurely phrased passages, a license they were furthermore reluctant to use. It took almost another century until Justinian ordered the creation of a consistent Code. This time, editing was carried out much more drastically. Anything diverging from the current legal status quo was removed or recklessly rewritten. By the same token, Justinian's editors went to great lengths to keep the resulting texts as short as possible, eliminating on the way much further text which Theodosius' compilers had spared.

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\* This contribution is part of a project that has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation program under grant agreement No. 101001991. – The topic of the present contribution brings together an unabridged constitution, some epigraphical evidence and even a Bamberg manuscript. In my eyes, it seemed ideal to honor a birthday celebrant who is an epigrapher, and to whom I owe a huge debt of gratitude for being able to work on unabridged constitutions in Bamberg.

1 Riedlberger 2020, 136–152.

The Theodosian Code which originally comprised 16 books is not extant in its entirety. While we possess books 6 to 16 almost completely, books 1 to 5 must be pieced together from various sources. Yet between all of these sources, only about a third of the content of these five books can be reconstructed. This is why there has always been a dangerous temptation to add material extant only in the Justinian Code. It is true enough that the Justinian Code almost exclusively derives its raw material for the period covered by the Theodosian Code from it, hence anything extant in the Justinian Code without counterpart in the extant Theodosian Code should derive from a portion of the Theodosian Code that is lost to us. But the idea of using Cod. Iust. material to patch our incomplete Cod. Theod. text is not salutary. Although it is a customary practice for modern scholars to add rephrased passages to the reconstruction of a text otherwise extant in genuine citations or fragments, in the case of the Cod. Theod. / Cod. Iust. we are faced not with ‘rephrased’ but ‘possibly deliberately and profoundly modified passages’ which consequently could deform our vision of the real contents of the Cod. Theod. Furthermore, the structure of the Cod. Iust. was designed afresh, with many excerpts being moved to different titles, which means that we can never be sure into which Cod. Theod. title a fragment extant only in the Cod. Iust. belongs. At any rate, there is no reason whatsoever to add an additional and superfluous ‘Cod. Theod.’ label to these Cod. Iust. texts, as they can be conveniently cited as ‘Cod. Iust.’ and such a reference should also be a clear warning to any competent scholar that the corresponding lost Cod. Theod. fragment might have had a strikingly different content. So, when reconstructing the first five books of the Cod. Theod., let us better stick to the sources that transmit unaltered passages of it. The three most important of these sources are, first, the Visigothic Breviary (extant in numerous manuscripts) which includes a fixed selection of unmodified fragments from the Theodosian Code; second, a manuscript called **A**, which transmits a large portion of book 1; and third, a now destroyed palimpsest called **T** which consisted of individual pages from a full Theodosian Code manuscript, many of which pertained to books 1 to 5. In our modern editions of the Cod. Theod., the overwhelming majority of fragments in books 1–5 are derived from these three sources.<sup>2</sup>

Yet some more scraps can be gathered: in a time when people still had access to full manuscripts of the Theodosian Code, they sometimes copied fragments they deemed useful and cited them in other contexts. For example, in one recension of the collection of grammatic writers we find the full Cod. Theod. title (2.26) *de finium regundorum* of five fragments, of which the Breviary had preserved only two (three of them, one of them extant in the Breviary, are included in the Cod. Iust. in radically shortened and rewritten versions).

Manuscripts that transmit additional Cod. Theod. texts can be divided into two categories: ‘augmented Breviaries’ and ‘other.’ An ‘augmented Breviary’ is a Breviary manuscript which includes more fragments than the canonical Breviary selection does.<sup>3</sup> This means that apparently some scribe or later user deemed the Breviary selection too restricted

<sup>2</sup> Riedlberger – Niemöller 2021, 3–10; Riedlberger 2020, 172–180.

<sup>3</sup> Mommsen (1905, LXXXII–LXCII) gives a full survey of all such augmented Breviaries, and how they contributed to his Cod. Theod. edition.

and added some more unaltered fragments from a full Cod. Theod. manuscript still available to him. The most important such manuscript is manuscript **A** which has already been mentioned: between the fragments which belong to the Breviary, **A** adds further ones, which doubtlessly stood there in the full Codex Theodosianus (which can sometimes even be confirmed, if there is the odd page of **T** available). One welcome feature of the augmented Breviaries is that we can be quite sure about the original position of the additional fragments they present: after all, we can expect that they stood in the Cod. Theod. title in which the scribe added them into his Breviary manuscript. With 'other' sources, i.e., manuscripts which transmit single Cod. Theod. texts in various contexts (like the gromatic writers mentioned above) things are only evident when the citation is introduced by a reasonably clear reference. For example, Berlin Staatsbibl. Ms. Cod. Philipps. 1741 transmits two Cod. Theod. fragments, each of them introduced with *lex de Theodosiano sub titulo XXVII de episcopali definitione*. Consequently, we (1) know for sure that these texts directly come from the Theodosian Code, and we (2) also know exactly where to place them (well, almost: the book number, namely 1, must be inferred; and there is no way to be sure about the exact sequence number of these two excerpts within the title).<sup>4</sup>

The fragment which is the subject of the present article is not known from any extant manuscript at all. The only source we have is an indication in a 17th century printed work, namely Gothofredus' Theodosian Code edition, which was published only posthumously. Cod. Theod. 1.16.8, the number by which scholars know it today, was assigned to it by Mommsen. As the authenticity of the text as a Cod. Theod. fragment is at the core of the present article, I will call it 'Gothofredus' law' rather than 'Cod. Theod. 1.16.8,' in order to avoid any preconceptions. This is what the relevant portions in the first posthumous edition of 1665 (by Antoine de Marville) look like:<sup>5</sup>

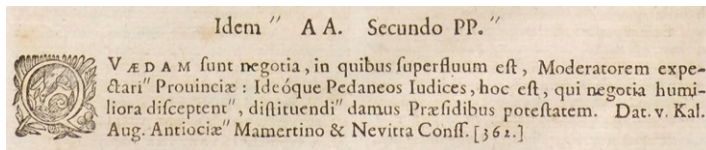


Fig. 1: Gothofredus 1665, bottom section of page 42  
(National Library of the Czech Republic, F II 000030/T.1).

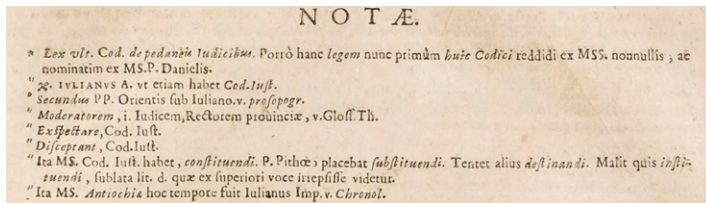


Fig. 2: Gothofredus 1665, top section of page 43  
(National Library of the Czech Republic, F II 000030/T.1).

4 Riedlberger 2020, 195–196.

5 Gothofredus 1665, 42–43.

This, i.e., *ex MSS. nonnullis, ac nominatim ex MS. P. Danielis* (see fig. 2), is all we have. No manuscript today (apart from Cod. Iust. manuscripts, see below page 123) is known to include the text. Gothofredus fails to mention the Daniel manuscript anywhere else in his work, and despite much effort by later scholars, it has not been identified. Most manuscripts of Pierre Daniel d'Orléans (1531–1604) ended up in the Vatican, where Hänel and Krüger attempted in vain to retrieve Gothofredus' manuscript.<sup>6</sup> Their last hope was a manuscript which, according to a Vatican catalog entry, might have been a possible candidate. This manuscript apparently spent the 19th century misplaced at an unknown location so that neither Hänel nor Krüger could follow up on that lead. Today, a full reproduction of this manuscript is available online, but this last hope has been dashed as well.<sup>7</sup> Even more mysterious is Gothofredus' remark that he edited Julian's law "from several manuscripts." Manuscripts kept vanishing in the modern period, it is true – but how can "several" manuscripts disappear without leaving any trace? An alternative explanation is to assume an inaccuracy by Gothofredus (or by his editor Antoine de Marville), i.e., he had seen the text only in the Daniel manuscript (and his "several others" are just imaginary or perhaps Cod. Iust. manuscripts); note that he claims that he edits the fragment "from several mss., and especially from the Daniel manuscript," but later cites textual variants with the abbreviation "MS." rather than "MSS."

Mommsen<sup>8</sup> counted Gothofredus' law as one of the fragments contributed by an 'augmented Breviary' – but this is haphazard, as Gothofredus does not provide any indication at all whether the Daniel manuscript and the "several others" were Breviary manuscripts or not. This means that we do not know how the Daniel manuscript presented the text, and even less from which source the text was added to it. This also leads to our ignorance as to why Gothofredus chose to integrate his fragment at the position he did, i.e., into the Cod. Theod. title *de officio rectoris provinciae*, "on the function of a provincial governor." Certainly, *if* he found it in an augmented Breviary at this position, the answer is straightforward. But it is equally likely that the Daniel manuscript transmitted this fragment without any context, and Gothofredus tentatively put this text in the Cod. Theod. title on provincial governors because, after all, it talks about provincial governors. For good reason, Hänel insisted that the position of Gothofredus' fragment cannot be considered assured (a warning not repeated by Mommsen or Krüger).<sup>9</sup>

There is one further observation to make which should very much raise an alarm. The excerpt Gothofredus transmits is otherwise unknown as a Cod. Theod. fragment, but we are familiar with the text: it is (practically) identical with a fragment of the Justinian Code, namely Cod. Iust. 3.3.5. I mentioned above that a majority of Cod. Theod. frag-

6 One might think of Vat. Reg. Lat. 520 (Mommsen 1905, LXXXVI–LXXXVII), which actually belonged to Pierre Daniel and furthermore contributes several Cod. Theod. fragments otherwise unknown. But of course, no manuscript was more carefully scrutinized than this one, to no avail.

7 Riedlberger – Niemöller 2021, 68–69, n. 163.

8 Mommsen 1905, LXXXV.

9 Hänel 1842, 161–162; cf. Mommsen 1905, LXXXV and Cod. Theod. 1.16.8 in the edition, Krüger 1923 in the edition.

ments were shortened or rewritten if taken over into the Cod. Iust., and that this was done in order to reduce the bulk, to make things clearer, or to adapt to the legal situation under Justinian. I have made a rough count among the preserved fragments of Cod. Theod. book 1: there, around 80% of fragments adopted into the Cod. Iust. are modified in one way or other (more than 40 examples), only 20% are not (I counted eleven such cases). So, yes, it is not unheard of to encounter identical Cod. Theod. and Cod. Iust. fragments, but it is not terribly common, and this unlikely coincidence might make one feel uneasy. After all, we have no indication whatsoever from where the Daniel manuscript adopted 'our' fragment. Given that it presented the Cod. Iust. text, one cannot escape a hunch that its source was a Cod. Iust. manuscript (rather than a Cod. Theod. manuscript). The first to voice this suspicion was probably Ritter in his Gothofredus edition of 1736.<sup>10</sup> Furthermore, remember Gothofredus' indication that he edited the text *ex MSS. nonnullis, ac nominatim ex MS. P. Danielis*; Hänel<sup>11</sup> was quite right to point out that we do not know the Daniel manuscript, let alone "several manuscripts" that contain it – except if we count the numerous Cod. Iust. mss. containing Cod. Iust. 3,3,5. I share Hänel's opinion that at least with regard to the "several manuscripts," Gothofredus' notes must have been misunderstood by his posthumous editor Antoine de Marville.

But then again, there is also conflicting evidence, i.e., evidence which points to an origin of Gothofredus' fragment being something other than a Cod. Iust. manuscript (which in turn would hardly leave any explanation other than accepting it as an original Cod. Theod. fragment). This evidence is twofold: on the one hand Gothofredus' own indications, on the other hand the (few) variants the text presents to the Cod. Iust. text.

In his commentary, Gothofredus clearly distinguishes between "MS." and "Cod. Iust." So, in his eyes, there was reason to presume that the text present in the "MS." was *not* from "Cod. Iust." Gothofredus was an outstanding scholar, and I deem it unthinkable that he himself simply overlooked the possibility of the fragment stemming from the Cod. Iust. I wish we knew more about why he was so optimistic that the text from the "MS." does not derive from "Cod. Iust." Yet it would be questionable to take his opinion (which is devoid of supporting evidence and presented in a posthumous publication to boot) as proof. Furthermore, it could easily be that it was exactly the textual differences between the canonical Cod. Iust. text and the (possibly) isolated fragment he found in the Daniel manuscript that made Gothofredus exclude a Cod. Iust. origin for it.

Let us now compare the text of Gothofredus' fragment with the text of Cod. Iust. 3,3,5. What follows is the text as printed in Mommsen's Cod. Theod. edition:

<sup>10</sup> Ritter 1736, 46, and on the second unpaginated page of Ritter's preface.

<sup>11</sup> Hänel 1842, XXX, n. 174.

Cod. Theod. 1.16.8

*Imp. Iulianus A. Secundo PPO.*

*Quaedam sunt negotia, in quibus superfluum est moderatorem expectari provinciae: ideoque pedaneos iudices, hoc est qui negotia humiliora disceptent, constituendum praesidibus potestatem.*

*Dat. V kal. Aug. Antiochiae Mamertino et Nevitta cons.*

In his apparatus, Mommsen succinctly indicates that the only source for this alleged Cod. Theod. fragment is Gothofredus; that the text has been adopted into the Cod. Iust.; and that there are two pieces of epigraphical evidence (to avoid the ambiguous word ‘inscription’ for once, as I shall presently need it in the sense of ‘introductory line of a constitution / Cod. Theod. fragment’)<sup>12</sup> which feature the full constitution (more on that below, page 126). Otherwise, Mommsen mentions only two things: that the Cod. Iust. has *expectari*, and that the subscription is preserved by a Cod. Iust. manuscript (he should have added by all means: “as well,” as Gothofredus clearly indicates that *his* subscription directly comes from the Daniel manuscript). A glance into Gothofredus’ edition is revealing, as it shows us the incompleteness of Mommsen’s apparatus. Ignoring for now the inscription and subscription (which are especially important for our interests), a complete list of variants is:

- *expectari*: both the Cod. Iust. (with one known exception)<sup>13</sup> and the epigraphical evidence concur on *expectare*.
- *disceptent*: confirmed by both the Cod. Iust. and the epigraphical evidence. Gothofredus claims (likely based on Haloander’s edition) that the Cod. Iust. has *disceptant* which, however, is a variant not even mentioned in the apparatus of Krüger’s *editio maior* (accordingly, Haloander’s *disceptant* might be no more than a misprint).
- *distitutendi*: both the Cod. Iust. and the epigraphical evidence concur on *constitutendi*.

The chain of transmission is clear: from the full constitution (as preserved to a large extent by the epigraphical evidence), the Cod. Theod. version was derived; from the Cod. Theod. version, the Cod. Iust. version. Hence, whenever the stones and Cod. Iust. concur, we can be fairly confident to have the correct Cod. Theod. version, too. It is therefore infelicitous that Mommsen printed *expectari* instead of *expectare*; but it is praiseworthy (if inconsistent) that he has *constitutendi* (although there is little excuse for not indicating Gothofredus’ diverging reading). None of these variants offers conclusive evidence to answer the question whether Gothofredus’ text derived directly from a full Cod. Theod. manuscript or rather from a Cod. Iust. manuscript (*expectari* and *distitutendi* are certainly mistakes that originated at a later point in time during the textual transmission).

12 Confusing these two types of ‘inscriptions’ can lead to unfortunate gaffes, cf. my note 17.

13 This is the Bamberg manuscript Msc. Jur. 20 (formerly, i.e., at the time of Krüger, known as DI 3). Given that Msc. Jur. 20 does not share any further reading with Gothofredus’ law and is devoid of a subscription, we may assume that the incorrect *expectari* arose independently twice.

But we still have the inscription and the subscription. Gothofredus gives the subscription as *Dat. V kal. Aug. Antiochiai Mamertino et Nevitta cons.* The latter is identical (except for the spelling of *Antiochiai*) with the subscription found in Krüger's Cod. Iust. edition which itself is based on the sole evidence of Haloander's early Cod. Iust. print (which used the lost Codex Egnatianus). It is well known that the vast majority of our Cod. Iust. manuscripts do not preserve subscriptions, and many subscriptions are extant only in Haloander's edition. In Julian's law as preserved by the epigraphical evidence there is a direct address to the recipient Secundus (*Secunde parens carissime atque amantissime*), who furthermore happened to be Pretorian Prefect in the year given by the subscription. Consequently, the subscription should be correct.<sup>14</sup> Gothofredus' subscription is furthermore not based on Haloander's edition, because Gothofredus himself explicitly notes the difference between *Antiochiai* in his manuscript and *Antiochiai* in "Cod. Iust." So, if Gothofredus' law ultimately derived from a Cod. Iust. manuscript, then this manuscript was a rare specimen which included subscriptions. But let us not forget that we cannot tell when the text was added to the Daniel manuscript. It could have been at a point in time when many more such manuscripts were still around.

Even more significant is the inscription which Gothofredus gives as *Idem AA. Secundo PP.*, "The same two emperors to Secundus PP." (cf. fig. 1). Let us note, first, that Gothofredus has PP (just like Krüger's Cod. Iust. edition), while Mommsen prints PPO without further ado. Abbreviations fluctuated greatly between individual scribes, and this would not be newsworthy if there were not modern scholars who identify a divergence between the Cod. Theod. text (based on Mommsen) and the Cod. Iust. text because of this alleged PP/PPO variance.<sup>15</sup> The sender indication is more interesting than the recipient. Gothofredus himself notes that instead of *Idem AA.*, this should be *Iulianus A.*, "*ut etiam habet Cod. Iust.*," "just as the Cod. Iust. has it, too."<sup>16</sup> If the law was copied from a Cod. Iust. manuscript to the Daniel manuscript, how could *Iulianus A.* have been changed to *Idem AA.*? Without any doubt, this is the most compelling piece of evidence to indicate that Gothofredus' law does not derive from a Cod. Iust. manuscript but rather from a Cod. Theod. one where it seemingly had a different inscription.

However, we are not finished yet. First of all, Gothofredus' inscription (if authentic at all) must be somewhat corrupt, because Julian had no colleague. Admittedly, correcting from *Idem AA.* to *Idem A.* is not a violent emendation, but an emendation it is. Let us

14 Saturninius Secundus Salutius (PLRE I 814–817, Secundus 3) was PPO of Oriens during the period 361–367 (apart from a short break in 365). The consuls indicated in the subscription are those of 362. One might add that the subscription is consistent intrinsically: according to Julian's letter 114 [Bidez], this emperor was present in Antioch on the 1st of August 362, which confirms the date/place combination of the present subscription (which has Julian at the same place four days earlier).

15 In this respect, the otherwise magisterial article by Feissel 2010 unduly relied on Mommsen's edition of Cod. Theod. 1.16.8. Of the three variants Feissel 2010, 221, n. 45, points out as differences between the Cod. Theod. (i.e., Gothofredus' law) and the Cod. Iust., two are actually in-existent (including *PP/PPO*), while he leaves the most important variant unmentioned.

16 Mommsen omits to tell his readers that his inscription of Cod. Theod. 1.16.8 (*Imp. Iulianus A. Secundo PPO*) has nothing to do with the inscription to be found in our only source, Gothofredus.

ponder what it means if we accept it. If *Idem A.* is correct and really comes directly from the Cod. Theod., then there was (at least) one further, older, totally unknown Julianic constitution in the same title Cod. Theod. 1.16 before it (because *Idem A.* needs to pick a preceding *Imp. Iulianus A.*). So thought Krüger<sup>17</sup> who consequently added an empty dummy entry for a Cod. Theod. fragment with the number Cod. Theod. 1.16.7b. While this is possible, it is unlikely. Given his short reign, Julianic constitutions are not numerous, and it is an even rarer occurrence to encounter two or more of these rare specimens in the same title. I have counted only eight such cases, a result which corresponds to around 20% of all known Cod. Theod. titles which include at least one Julianic constitution. Hence, it is an existing but rather infrequent phenomenon. One should perhaps be wary of creating it artificially by applying an emendation.

Pondering the evidence from the inscription and the subscription, I think it is fair to conclude that it remains inconclusive. The subscription proves that the text either comes from the Theodosian Code, or that it is an early addition from a Justinian Code manuscript before it became fashionable to leave out subscriptions. The inscription does not match the Cod. Iust. inscription and, in the way in which it is transmitted, cannot match the Cod. Theod. inscription either. The most straightforward correction *Idem A.* is possible if unlikely, as it would artificially create a rare case of several Julianic excerpts in sequence in the same title. If we stick to the transmitted *Idem AA.*, we must assume a confusion with perhaps Valentinian and Valens (which could have happened at any stage of the textual transmission). Given that Gothofredus' manuscript did not preserve a pristine text (remember the mistakes *expectari* and *distitutendi* in the precious few words it contains), one should not put too much trust into the transmitted text.

We have one last methodological avenue to explore. Julian's law on subordinate judges belongs to the very few constitutions excerpted for the Cod. Theod. for which the full constitution is extant (or mostly extant).<sup>18</sup> We know of two epigraphical copies of the full constitution, one displayed on Amorgos (CIL III 459), the other on Lesbos (CIL III 14198). The latter, however, is so fragmentary that it cannot help us here. The Amorgos inscription once covered (together with a publication edict) two slabs, of which one is still extant, the other one is only known through a drawing.

The Amorgos inscription uses an atrocious orthography, which means that it is quite taxing to do a careful edition of it. The authoritative study is an article by Denis Feissel<sup>19</sup> who gives the text no fewer than three times, first diplomatically (e.g., *ouopipi solent nonnull[ . . ]*), then in a restored version (e.g., *Ovoriri solent nonnull[le]*) and finally in a tentative reconstruction of the official version (e.g., *Oboriri solent nonnullae*). It would make

17 Krüger's reasoning was strangely misunderstood by Brendel 2017, 90–91, who took *ex inscriptione c. 8 colligitur* as referring to the epigraphical evidence (not to the introductory line of constitution no. 8).

18 There are 19 such cases all in all. Ten from the Sirmondians, three each from the Vatican fragments and various conciliar acts, one from the *Mosaicarum et Romanarum legum collatio*, and two from inscriptions (including our present case). See Riedlberger 2020, 219.

19 Feissel 2010.

little sense to repeat Feissel's work here, hence I provide here only his 'official' version. However, unlike him, I have abstained from marking any completions I deem fully safe, but I have put any heavily reconstructed portions (whose reconstruction as proposed by Feissel is, furthermore, quite possible, but then again far from compelling) in cruces. The two underlined portions made it into the Cod. Iust. version (and Gothofredus' law, if they are really to be cited as independent entities). Words in bold font are adapted in the Cod. Iust. (and in Gothofredus' law):

*Exemplum sacrarum litterarum: Oboriri solent nonnullae controversiae quae notionem requirant et examen iudicis celsioris, tum autem quaedam **negotia sunt** in quibus superfluum **sit** moderatorem expectare provinciae. Quod nobis utrumque pendentibus rectum admodum visum est, **ut pedaneos iudices, hoc est eos, qui negotia humiliora disceptent, constituendi **daremus** praesidibus potestatem. Ita enim et sibi partem curarum ipsi dempserint et tamen nihilominus quasi ipsi hoc munus administrabunt cum illi quos legere administrent. Cuius rei †conscii ani[- - -]† atque eminentem Excellentiam Tuam sancimus, Secunde parens carissime atque amantissime, †[- - -]icum e[- - -]jici[- - -]i[- - -] gratissimum conc [- - -] tare in quo publico commodo consulatur.†***

- negotia sunt : sunt negotia
- sit : est
- ut : ideoque
- eos : -
- daremus : damus

All of these changes are fully in line with the reduction of this constitution to its mere essence. None of the text left out belongs to the legal core.<sup>20</sup> Note that the legal content of the full original is unchanged in Gothofredus' law. Otherwise, this would constitute proof that it cannot derive from the Cod. Theod.; but as things stand, this is not evidence for either side. Perhaps one might feel that the extreme conciseness of Gothofredus' law rather suggests the application of the Cod. Iust. editors' radical procedure (rather than the more conservative one used by the Cod. Theod. compilers). Yet there are also numerous very succinct Cod. Theod. fragments, and at any rate any such argument is far too speculative to be taken seriously. So once again, the result is inconclusive.

All in all, our investigation ends up in aporia. The diverging inscription and subscription of Gothofredus' law rather seem to indicate that this text does not derive from the Cod. Iust. (for counterarguments see above), and there is furthermore Gothofredus' own opinion (which, however, remains unexplained and was, perhaps, based exactly on the apparent textual differences between 'his' law and the Cod. Iust. version). Then again, the other side of the scale is not empty. If we accept Gothofredus' law as a genuine

<sup>20</sup> Even if the conclusion of the text is fragmentary and can be reconstructed only tentatively, I dare say that there is no doubt that it does not include more legal rules to follow.

Cod. Theod. text, we must swallow the simultaneous occurrence of several rare phenomena: a Cod. Theod. fragment shortened in an untypical manner, a fragment unchanged between the Cod. Theod. and the Cod. Iust.,<sup>21</sup> and two Julianic laws encountered in the same Cod. Theod. title. Even worse, all of that based on the sole assertion of Gothofredus which is dubious intrinsically (“several manuscripts”); besides, the text cannot stand as it is, because its inscription certainly must be emended to *Idem A.*, a change which, of all things, affects the most important portion.

However that may be, the real result of our short survey of the evidence stands: the authenticity of Cod. Theod. 1.16.8 in the shape we know it must be considered ‘dubious’ – certainly not ‘disproved,’ but nevertheless ‘dubious.’ And this result is crucial.

There are only 19 (more or less) fully extant constitutions known to us which were excerpted for the Theodosian Code. Our heuristic knowledge of the procedure followed by the Cod. Theod. compilers is based on a comparison of these precious few texts with their excerpts. Several scholars have compared the text of the epigraphical evidence for Julian’s law with the alleged Cod. Theod. version – the list includes Faass, Fridh, Ries, Pack, Feissel, and Brendel.<sup>22</sup> All of them cite Gothofredus’ law confidently as Cod. Theod. 1.16.8, with nobody alluding in any way whatsoever to the problematic transmission of Mommsen’s Cod. Theod. 1.16.8. Some of them draw further conclusions about the Cod. Theod. compilation by comparing the epigraphical text with a version whose authenticity as a Cod. Theod. text is dubious. The danger is that these scholars unwittingly analyze the procedure of Justinian’s team instead.

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<sup>21</sup> Note that this is much less surprising if the Cod. Theod. version was already excessively short, i.e., this is not really an additional argument to the preceding point of ‘untypically succinct Cod. Theod. text.’

<sup>22</sup> Faass 1908, 256; Fridh 1956, 22–24; Ries 1983, 201–202; Pack 1986, 245; Feissel 2010, 220–222; Brendel 2017, 87–91.

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## Figures

- Fig 1: Gothofredus 1665, bottom section of page 42 (National Library of the Czech Republic, F II 000030/T.1). Reproduced by courtesy of the National Library of the Czech Republic. Public domain.
- Fig. 2: Gothofredus 1665, top section of page 43 (National Library of the Czech Republic, F II 000030/T.1). Reproduced by courtesy of the National Library of the Czech Republic. Public domain.