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# Pope Leo of Bourges, clerical immunity and the early medieval secular

CHARLES WEST

*This article investigates the early medieval secular through the lens of clerical immunity – that is, the legal exemption of clerics from courts labelled as secular. It focusses on a short text, eventually attributed to Pope Leo, which was written in fifth-century Gaul to define this immunity. By pursuing this text's fate as it was revised and put to use into the eleventh century, the article demonstrates how the early medieval secular was a religious category employed for different purposes at different times.*

Any investigation of the secular in the early Middle Ages may initially seem to be wilfully flirting with anachronism. It is now widely agreed that the early medieval political order was constructed neither in contrast nor in opposition to the church, but rather that the church, or *ecclesia*, largely constituted that order.<sup>1</sup> This would appear to leave little early medieval scope for the secular, understood in conventional terms as the absence of religion (and moreover often associated with

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<sup>1</sup> For instance, M. de Jong, 'The State of the Church: Ecclesia and Early Medieval State Formation', in W. Pohl and V. Wieser (eds), *Der frühmittelalterliche Staat – europäische Perspektiven* (Vienna, 2009), pp. 241–54. Cf. I. Wood, 'The Early Medieval West as a Temple Society', *Rivista storica dell' antichità* 49 (2019), pp. 107–34. For a review of recent work in this vein in French, see C. West, 'Quelle place pour l'église dans l'Europe médiévale?', *Médiévales* 74 (2018), pp. 165–78.

modernity).<sup>2</sup> This perspective is broadly reflected in the recent historiography, which focusses either on Augustine's short-lived notion of the secular in late antiquity, or on the role of Gregorian Reform in beginning a slow secularization of political authority.<sup>3</sup> These discrete approaches are spared from intersecting by the six early medieval centuries in between, which are regarded, as so often, as either too late or too early for key developments.

However, in recent years, the argument has been forcefully made across a range of fields that, far from being a neutral or universal category, the secular is in reality 'a historically produced idea', and, furthermore, one that encodes a disguised theology.<sup>4</sup> As a consequence, 'to tell a story of secularism is to simultaneously render its Christian underpinnings visible'.<sup>5</sup> This scholarship has significant implications for the early Middle Ages. If we should be searching for the secular *within* a religious frame rather than outside it, then that renders the period an immediately more plausible and appealing field of enquiry.

This article therefore seeks to shed light on the early medieval secular in the neglected centuries between St Augustine and Pope Gregory VII. It does so through a quite specific lens: the issue of clerical legal immunity from secular courts, sometimes known as the *privilegium fori*. This is not a topic that has attracted much recent historiographical attention, unlike the related but distinct issue of the scope and nature

<sup>2</sup> See for instance J. Casanova, *Public Religions in the Modern World* (Chicago, 1994), and S. Bruce, *Secularization: In Defence of an Unfashionable Theory* (Oxford, 2011).

<sup>3</sup> For Augustine, see R.A. Markus, *Saeculum: History and Society in the Theology of Saint Augustine* (Cambridge, 1970). For emphasis on Augustine's pastoral motivation, and his secular as a suspension of claims more than a drawing of boundaries, see the concise K. Cooper, 'Religion, Conflict and the Secular: The View from Early Christianity', in J. Wolffe and G. Moorhead (eds), *Religion, Security, and Global Uncertainties* (Milton Keynes, 2014), pp. 13–15. For Gregorian Reform, see the remarkably influential H. Berman, *Law and Revolution* (Cambridge, MA, 1983), and for more recent discussion K. Gabriel, C. Gärtner and D. Pollack (eds), *Umstrittene Säkularisierung: Soziologische und historische Analysen zur Differenzierung von Religion und Politik* (Berlin, 2012). See too Conor O'Brien's introduction to this special issue.

<sup>4</sup> Political theory: L. Siedentop, *Inventing the Individual: The Origins of Western Liberalism* (London, 2017), p. 261; F. Oakley, *The Emergence of Western Political Thought in the Latin Middle Ages*, 3 vols (New Haven, 2010–15). Anthropology: S. Mahmood, *Religious Difference in a Secular Age: A Minority Report* (Princeton, 2016); H. Agrama, *Questioning Secularism: Islam, Sovereignty, and the Rule of Law in Modern Egypt* (Chicago, 2012), both drawing on the important work of Talal Asad. For friction between these two fields, see Mahmood's incisive critique of Charles Taylor's Eurocentrism in her 'Can Secularism be Other-wise?', in M. Warner *et al.* (eds), *Varieties of Secularism in a Secular Age* (Cambridge, 2010), pp. 282–99. For older traditions, see W. Conze, H.-W. Strätz and H. Zabel, 'Säkularisation, Säkularisierung', in O. Brünner, W. Conze and R. Koselleck (eds), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, 7 vols (Stuttgart, 1984), V, pp. 792–829.

<sup>5</sup> Mahmood, 'Can Secularism be Other-wise?', p. 284.

of episcopal jurisdiction (the *audientia episcopalis*).<sup>6</sup> But it was an issue that encouraged contemporaries to take an explicit position on the secular, and thus offers a useful perspective on the broader question. This article will first present a synopsis of the existing historiography on the subject, before tracing the vicissitudes of a single revealing text from the fifth to the eleventh century as a means of addressing this delicate problematic.

### The historiography of clerical legal immunity in the early Middle Ages

A conventional synthesis of the early history of clerical legal immunity might run as follows. After his dramatic conversion to Christianity, Emperor Constantine I kept most clerics under the jurisdiction of Roman law for criminal matters, but he and his successors ceded some ground for bishops, though even they could still be tried in a secular court if first found guilty in a clerical one. In the eastern Roman empire, the emperors maintained this position. In the sixth-century west, however, the church began to contest the exercise of state jurisdiction. The state retained its judicial grip on clergy in the minor orders, but eventually in the Carolingian period made concessions for clergy in major orders (subdeacons, deacons and priests), though it still sought to impose punishment if they were found guilty in clerical courts. Even so, some Carolingian clerics persisted in their struggle to obtain more extensive legal immunity, with some success. From the twelfth century, however, state authorities began to clamp down again, and despite the scandal caused by Thomas Becket's murder in 1170, the rest of the Middle Ages was essentially a story of the Church in tactical retreat.

Syntheses such as these are in large part the product of painstaking nineteenth-century research, such as that conducted by Paul Hinschius, on whose magisterial multi-volume study of church law the preceding

<sup>6</sup> See, however, A. Banfi, *Habent illi iudices suos: studi sull'esclusività della giurisdizione ecclesiastica e sulle origini del privilegium fori in diritto romano e bizantino* (Milan, 2005), for analysis of the earlier part of the period, and A. Duggan, 'Clerical Exemption in Canon Law from Gratian to the Decretals', *Medieval Worlds* 6 (2017), pp. 78–100, for the situation from the twelfth century. For a recent study of pre-conquest England, see N. Marafioti, 'Secular and Ecclesiastical Justice in Anglo-Saxon England', *Speculum* 94 (2019), pp. 774–805 (I am grateful to Professor Marafioti for sharing her work in advance of publication). For enquiry in a comparative global frame, see the special issue of *Medieval Worlds* 6 (2017), 'Religious Exemption in Pre-modern Eurasia'. Michael Heil's forthcoming *Clerics, Courts, and Legal Culture in Early Medieval Italy* will shed light on the strategic negotiation of secular and ecclesiastical courts by clerics in an Italian context. For a landmark contextualization of the *audientia episcopalis* and early Christianity's wider relationship with law in late antiquity, see C. Humfress, *Orthodoxy and the Courts in Late Antiquity* (Oxford, 2007).

paragraph is based.<sup>7</sup> They are also, however, a product of nineteenth-century concerns and anxieties. Hinschius and others were working in the context of the *Kulturkampf* that raged in contemporary Germany over the place of the Catholic church within an emerging German state.<sup>8</sup> This debate played a key role in the emergence of classical secularization theory;<sup>9</sup> it also stimulated a great deal of work on the legal position of the medieval church, first in Germany and then later in France.<sup>10</sup> With hindsight, it is plain that for all their astonishing erudition, Hinschius and others projected the controversies of their day, in which they were very closely involved, onto the past that they studied, creating a history of the state struggling to escape and to master the church.

One of the problems was the level of systematization that their arguments assumed, which obscured profound uncertainties in the evidence. Take for instance an important law originally issued by Emperors Honorius and Theodosius II in 412, which has often been read as declaring that bishops, priests and other clerics should only be tried before bishops. As such, this law features prominently in historiographical discussions of clerical immunity.<sup>11</sup> Yet its precise meaning hangs on a qualifying clause that is frustratingly ambiguous. Does the crucial clause read *siquidem alibi non oportet*, that is, as the standard English translation has it, ‘since he [the priest] must not be accused elsewhere’, thus intensifying the imperial command?<sup>12</sup> Or does it instead read *si quidem alibi non oportet*, as proposed in recent French

<sup>7</sup> P. Hinschius, *Das Kirchenrecht der Katholiken und Protestanten in Deutschland*, 6 vols (Berlin, 1869–97), esp. IV, pp. 794–7, 849–63; and V, pp. 402–24.

<sup>8</sup> See S. Ruppert, *Kirchenrecht und Kulturkampf: historische Legitimation, politische Mitwirkung und wissenschaftliche Begleitung durch die Schule Emil Ludwig Richters* (Tübingen, 2002). Ruppert’s study covers Friedburg, Sohm, Hinschius and others.

<sup>9</sup> For the origins of secularization theory in the German *Kulturkampf*, see M. Borutta, ‘Genealogie der Säkularisierungstheorie. Zur Historisierung einer großen Erzählung der Moderne’, *Geschichte und Gesellschaft* 36 (2010), pp. 347–76. For a wider view, see K. Davis, *Periodization and Sovereignty: How Ideas of Feudalism and Secularization Govern the Politics of Time* (Philadelphia, 2008).

<sup>10</sup> Beyond Hinschius, *Kirchenrecht*, see R. Sohm, ‘Die geistliche Gerichtsbarkeit im fränkischen Reich’, *Zeitschrift für Kirchenrecht* 9 (1870), pp. 193–271; A. Nissl, *Der Gerichtsstand des Clerus im Fränkischen Reich* (Innsbruck, 1886); and K. Voigt, *Staat und Kirche von Konstantin dem Grossen bis zum Ende der Karolingerzeit* (Stuttgart, 1936). French research on the topic: G. Lardé, *Le Tribunal du clerc dans l’empire romain et la Gaule franque* (Moulins, 1920); R. Génestal, *Le privilegium fori en France du décret de Gratien à la fin du XIV siècle* (Paris, 1921–4); and, most famously, H.-X. Arquillière, *L’Augustinisme politique: Essai sur la formation des théories politiques du moyen âge* (Paris, 1934), of which Courtney Booker is preparing an English translation.

<sup>11</sup> *Theodosiani libri XVI cum Constitutionibus Sirmondianis* XVI.2.41, ed. T. Mommsen (Berlin, 1905), pp. 849–50, with the incipit ‘Clericos non nisi aput episcopos’. Banfi, *Habent*, provides an up-to-date account of the historiography, pp. 213–21.

<sup>12</sup> *The Theodosian Code and Novels and the Sirmondian Constitutions*, trans. C. Pharr (Princeton, 1952), p. 447.

translations, with the interjection of a space watering down the imperial decree through the condition ‘if really/however he should not be accused elsewhere’?<sup>13</sup> The second reading has seemed more plausible to those historians intent on late Roman law’s legal consistency, but early medieval scribes and authors such as Florus of Lyon and Pseudo-Isidore preferred the first reading; the oldest manuscript for this part of the Theodosian Code, a sixth-century codex now in the Vatican, is written in *scripta continua*, and so cannot resolve the question.<sup>14</sup>

In any case, it is not clear that an assumption of rigorous systematization is the best approach to early medieval law, which was not a defined body of material, and so did not really constitute a consistent system.<sup>15</sup> In view of such difficulties, seeking to update Hinschius’ synthesis, or replace it with an alternative, would seem an ill-conceived endeavour. Instead of offering a fresh systematization, therefore, this article seeks out clues towards a history of early medieval clerical immunity from secular courts, by focusing on one particular text.<sup>16</sup> It is a decree setting out the parameters for clerics’ use of secular courts that declares it was issued by Pope Leo and a Roman synod, and it runs as follows:<sup>17</sup>

<sup>13</sup> See *Le Code Théodosien: livre XVI*, trans. E. Magnou-Nortier *et al.* (Paris, 2002), p. 167 (‘si toutefois il ne doit pas être accusé ailleurs’) with n. 135, and *Le Code Théodosien: livre XVI*, trans. J. Rougé and R. Delmaire (Paris, 2005), p. 203 (‘si vraiment on ne doit pas le faire ailleurs’), with n. 1. The difficulties of this passage were already discussed by Jacques Godefroy in the seventeenth century: see his *Codex Theodosianus cum perpetuis commentariis*, 7 vols (Paris, 1665), VI, pp. 81–2.

<sup>14</sup> Vatican, BAV, Reg. lat. 886 (s. vi), fol. 408v. A later reader has closed up the gap between *si* and *quidem*. Mommsen used this Theodosian Code text to ‘reconstruct’ Sirmondian Constitution XV, passing over the evidence of the eighth-century Sirmondian manuscript Berlin, SB, Phillips 1745, which renders the passage inelegantly but clearly as ‘non ab alio oportet’: *Theodosiani libri XVI*, ed. Mommsen, p. 920. This is how Florus of Lyon cited it: K. Zechiel-Eckes, ‘Florus’ Polemik gegen Modoin. Unbekannte Texte zum Konflikt zwischen dem Bischof von Autun und dem Lyoner Klerus in den dreißiger Jahren des 9. Jahrhunderts’, *Francia* 25 (1998), pp. 19–38, at p. 37. The Theodosian passage was borrowed by the Pseudo-Isidorian forgers (e.g. Benedict Levita, Book III, ch. 438 and Ps. Gaius I), but with the *si quidem/siquidem* changed into *quia* which removed any ambiguity.

<sup>15</sup> As pointed out in a different context by S. Patzold, ‘Verhandeln über die Ehe des Königs. Das Beispiel Lothars II’, in B. Stollberg-Rilinger and A. Krischer (eds), *Herstellung und Darstellung von Entscheidungen: Verfahren, Verwalten und Verhandeln in der Vormoderne* (Berlin, 2010), pp. 391–410.

<sup>16</sup> On the concept of clues as an alternative to systematization, see C. Ginzburg, ‘Clues: Roots of an Evidential Paradigm’, in *Clues, Myths, and the Historical Method*, trans. J. and A. Tedeschi (Baltimore, 1992), pp. 96–125.

<sup>17</sup> Latin text based on Berlin, SB, Phillips 1741, fol. 34: see pp. 15–16 below. I have modernized punctuation and capitalization, and silently expanded abbreviations. S. Schoenig, S.J., ‘An Erased Canon and Roman Law in the Collectio Britannica’, forthcoming, provides a collated edition and an accompanying translation based on the *Collectio Pitbouensis* version of the text (my thanks to Steven Schoenig for sharing his work prior to its publication).

Leo, Victorius, Eustachius et synodus romana, Sarmationi, Caratoni, Desiderio episcopis et presbyteris omnium ecclesiarum intra provinciam tertiam constitutis, cum suis subscriptionibus hæc quæ secuntur miserunt.

Tantam saeculi potestates circa sacerdotalem ordinem reverentiam praevalere voluerunt, etiam hi quos sub imperiali nomine terris divina potentia praeesse praecepit, ut ius distringendorum negotiorum episcopis sanctis iuxta divalia constituta permiserint. Quod cum et iuris antiqui edictis et in latis frequentius sit legibus confirmatum, praesenti tempore a plerisque invenimus fuisse calcatum. Nam praetermisso sacerdotali iudicio, passim ad examen secularium transierunt.

Quocirca nobis visum est ut hanc et sacrarum legum et nostri ordinis contumeliam et ad praesens ulcisceretur plena districtio, et observandam formulam constitueret in futurum. Censuimus itaque ut quicumque praetermisso sacerdote ecclesiae suae ad disceptationem venerit saecularium, sacris liminibus expulsus, a caelesti arceatur altario; neque ullus post hanc diffinitionem quae communi

Leo, Victorius, Eustachius and the Roman synod, sent what follows with their subscriptions to the bishops Sarmatio, Carato, Desiderius, and to the priests of all the churches established within the Third Province.<sup>18</sup>

The authorities of the world wished such great reverence to prevail towards the sacerdotal order – even those whom divine power had ordered to be in charge of the earth under the imperial name – that they permitted the right of deciding cases to be conferred upon the holy bishops, according to the divine constitutions. What was confirmed both in the edicts of the ancient law and many times in the enacted laws, we find in the present time to have been trampled upon by many people. For passing over the sacerdotal judgement, they move everywhere to the examination of secular people.

Therefore it seemed to us that a full punishment should now avenge this insult both to the holy laws and to our order, and should establish a formula to be kept in future. We have accordingly decided that whoever passes over the bishop of his church and comes to the judgement (*disceptatio*) of the seculars will be expelled from the holy thresholds and kept away from the heavenly altar. Nor, after this decision, which stands

<sup>18</sup> The ‘third province’ probably refers to *Lugdunensis Tertia*, an administrative region created in the late fourth century: broadly the Loire valley and Brittany (cf. the later province of Tours). Desiderius may have been bishop of Nantes; Eustochius was bishop of Tours; the sees of Cariato and Sarmatio are not known, but were probably Vannes, Rennes, *Corisoliti* or *Osismi*. As bishop of Bourges, it is odd to see Leo here, since Bourges was in the region of *Aquitania Prima*. However, most of that region was under Visigothic control at this time, which might explain Leo’s presence at the council. My thanks to Simon Loseby for advice here.

sedit arbitrio quicumque sibi ultra  
praescriptum vindicare nitatur.

Ita fieri ut et hi qui ante erraverunt  
congrua emendatione se corrigant, et  
qui sub observatione clericali caelesti  
probatur servire officio ex clero  
habendum se noverit, si praetermisso  
sacerdotum iudicio saecularium adierit  
potestatem. Quod ideo singulos  
universosque volumus agnoscere, ut  
quod pleno iustitiae et iuris ordine  
constitutum est, effectum totius  
firmitatis ex omnibus clericorum  
negotiis sortiatur.

Sane si clericus laicum pulset, prius  
audiri se ab episcopo poscat; tum si  
petitioni suae laicum viderit obviare, ex  
permissio episcopi sui in saeculi  
moderatoris disceptatione confligat.

Leo episcopus subscripsit.  
Victorius episcopus subscripsit.  
Eustochius episcopus subscripsit.  
Et ceteri qui adfuerunt episcopi  
subscripserunt.

by common sentence, should anyone  
attempt to win for himself beyond  
what is prescribed.

So may it happen that both those who  
have previously erred should correct  
themselves with a fitting emendation,  
and he who is proven to serve in a  
clerical office under heavenly  
observation should know that he is cast  
out from the clergy if, having passed  
over the judgement of bishops, he goes  
to the authority of secular people. We  
therefore wish each and everyone to  
recognize that what is constituted in  
the full order of justice and law shall  
take the effect of total confirmation in  
all the affairs of clerics.

But if a cleric accuse a layman, let the  
cleric first demand to be heard by the  
bishop; then if he sees the layman is  
opposed to his demand, let him, with  
the permission of his bishop, contend  
in the judgement of the secular  
moderator.

Bishop Leo subscribed.  
Bishop Victorius subscribed.  
Bishop Eustochius subscribed.  
And the remaining bishops who were  
present subscribed.

In essence, this text makes three points. First, secular authority – here meaning a reference to imperial Roman law – stated that bishops could decide legal cases, a rule that was apparently and regrettably being neglected. Secondly, any cleric who took a case to a secular court without permission from his bishop was to be excommunicated and deposed. Finally, a cleric who was in dispute with a layman might go to the secular court if the layman insisted, as long as the bishop allowed it.

This might appear all perfectly straightforward. But on closer inspection, the matter is delightfully complicated, for this text, which we may call *Tantum saeculi potestates*, has an intriguing history, the relevance of which to the question of the early medieval secular the rest of this article will attempt to unpack.

*Tantam saeculi potestates and the Collectio Pithouensis*

Into the seventeenth century, *Tantam saeculi potestates* was considered to be a genuine letter of Pope Leo the Great (c.400–61). But since the edition of the text by the French Jesuit Jacques Sirmond in 1629, it has been generally treated as spurious.<sup>19</sup> That is because Sirmond's edition, unlike previous ones, was based on the earliest witness to the text, the manuscript Paris BnF lat. 1564. This manuscript contains a set of normative ecclesiastical material known as the *Collectio Pithouensis*.<sup>20</sup> That collection presents our text at folio 20v–21r (Fig. 1): not however as the decree of Pope Leo, but of an entirely different and much less well-known though approximately contemporary Leo, the bishop of Bourges in west-central France, who was active between 453 and 461.<sup>21</sup>

The date of the *Collectio Pithouensis* is disputed. Some historians argue that because its most recent contents date from the sixth century, it must have been compiled around then. Others point out that one cannot date a compilation simply on the basis of its latest elements, since compilers could have deliberately sought to create a historical collection.<sup>22</sup> In any case, the extant *Collectio Pithouensis* manuscript, copied by the nuns of Chelles, among them a scribe named Altildis, is palaeographically late eighth or early ninth century in date. As such, it is the earliest

<sup>19</sup> The text is presented as Pope Leo's ninety-sixth letter in *D. Leonis eius nominis I. Romani pontificis . . . opera* (Cologne, 1561), p. 168, and in *Epistolarum decretalium summorum pontificum, Tomus Primus* (Rome, 1591), p. 286. For its unmasking, J. Sirmond, *Concilia antiqua Galliae*, 4 vols (Paris, 1629), I, p. 119, with commentary at p. 599. The text was thereafter treated as spurious in subsequent editions, e.g. *Sancti Leonis Opera*, ed. P. and G. Ballerini (Venice, 1753–7), though strangely Jean Devisse persisted in treating the Leo text as genuine: *Hincmar, archevêque de Reims, 845–882*, 3 vols (Geneva, 1975–6), II, p. 734, n. 53 ('Lettre de Léon le Grand à Sarmacionus') and III, p. 1437.

<sup>20</sup> B. Bischoff, *Katalog der festländischen Handschriften des neunten Jahrhunderts*, 3 vols (Wiesbaden, 1998–2014), III, no. 4027, pp. 35–6; *Codices Latini Antiquiores* 5 (Paris, 1950), no. 529, p. 40. Detailed description in G. Dunn, 'Collectio Corbeiensis, Collectio Pithouensis and the Earliest Collections of Papal Letters', in B. Neil and P. Allen (eds), *Collecting Early Christian Letters: From the Apostle Paul to Late Antiquity* (Cambridge, 2015), pp. 175–205, at pp. 200–5. The manuscript can be consulted online at <http://gallica.bnf.fr/ark:/12148/btv1b9066891d/f22>. item. See further R. McKitterick, 'Knowledge of Canon Law in the Frankish Kingdoms before 789: The Manuscript Evidence', *Journal of Theological Studies* 36 (1985), pp. 97–117, at p. 107; B. Bischoff, 'Die Kölner Nonnenhandschriften und das Skriptorium von Chelles', in *Mittelalterliche Studien. Ausgewählte Aufsätze zur Schriftkunde und Literaturgeschichte*, 3 vols (Stuttgart, 1966–81), I, pp. 16–34; and <https://elms.nuigalway.ie/catalogue/886>.

<sup>21</sup> *Concilia Galliae*, ed. C. Munier, CCSL 148 (Turnhout, 1963), p. 136. For the early history of the see of Bourges, see F. Prévot and X. Barral I Altet, *Topographie chrétienne des cités de la Gaule des origines au milieu du VIII<sup>e</sup> siècle. Volume 6, Province ecclésiastique de Bourges (Aquitania prima)* (Paris, 1989), pp. 15–26.

<sup>22</sup> Arguing for a sixth-century date: R. Mathisen, 'Between Arles, Rome and Toledo: Gallic Collections of Canon Law in Late Antiquity', *Revista de ciencias de las religiones* 2 (1999), pp. 33–46; and more emphatically, Dunn, 'Collectio corbeiensis'. Urging caution: R. McKitterick, *History and Memory in the Carolingian world* (Cambridge, 2004), pp. 253–4; M. Hoskin, 'Prolegomena to a Critical Edition of the Letters of Pope Leo the Great: A Study of the Manuscripts', Ph.D. thesis, University of Edinburgh (2015), p. 161.

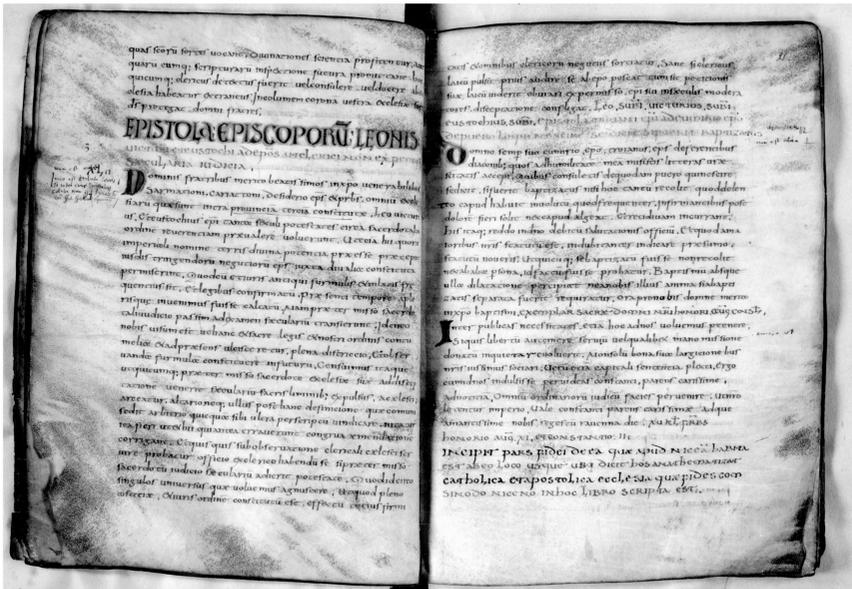


Fig. 1 The Leo text in the *Collectio Pithouensis*. Paris, BnF, lat. 1564, fols 20v–21r (source: gallica.bnf.fr/BnF)

attestation of the Leo text, and very likely preserves it in its original form, as a synodal decree from Bourges, not Rome. The actual text is for all intents and purposes identical to that found in later manuscripts; the only significant changes are to the address and the subscriptions.

Since Sirmond showed that it was not a genuine papal text, Leo’s letter has fallen off the radar. But the letter is significant for those concerned with the secular, given how prominent such vocabulary is within what is only a short text: *saeculi potestates, examen seculare, disceptatio secularium, secularis potestas, seculi moderator*, and in the rubric, *secularia iudicia*. It bears emphasis that the text’s ostensible aim is not to delegitimize or condemn outright ‘secular’ authority or legal process, but simply to regulate clerics’ participation in it. Naturally *secularis* and similar words do not have exactly the same meaning as the bewilderingly polyvalent modern English word ‘secular’.<sup>23</sup> But nor can we simplistically read the secular of this document a priori as wholly distinct from its modern meanings.<sup>24</sup>

<sup>23</sup> For a brief summary of the word’s history, see S. Dunning, ‘Saeculum’, in the *Oxford Classical Dictionary, digital edition* (2017), <https://oxfordre.com/classics>, in anticipation of her forthcoming book on the *Ludi saeculares*.

<sup>24</sup> Cf. here P. Buc, *The Dangers of Ritual: Between Early Medieval Text and Social Scientific Theory* (Princeton, 2001), pp. 1–11, for an analogous point about the overlap between medieval and modern categories of ritual.

The fifth-century context of the decree deserves consideration. It forms part of a set of material from western Gaul produced at this time, characterized by Jean Heudin as ‘un vaste programme réformateur’.<sup>25</sup> Alongside Leo’s text, there were acts from the Council of Angers of 453, the Council of Tours from a decade later, and a Council of Vannes around the same time, as well as another jointly written letter, addressed to Bishop Talasius of Angers.<sup>26</sup> Together, these texts give us an insight into the very beginning of the institutionalized church in Gaul, just before Sidonius Apollinaris’ letters, and long before Gregory of Tours. Leo of Bourges is in fact the first known bishop of Bourges, just as his co-signatory to our decree, Victorius, is the first known bishop of Le Mans.<sup>27</sup>

It is striking how all these mid fifth-century texts concern themselves with distinguishing clerical behaviour from that of the laity.<sup>28</sup> For instance, and perhaps surprisingly for those who associate such matters with the eleventh century, the letter to Bishop Talasius recommends that men who are already married should not be appointed as clerics ‘if possible’, since they are more likely to have children whilst in office, contrary to canon law: better instead to ordain unmarried men.<sup>29</sup> As the church’s structures became increasingly autonomous of the failing institutions of the Roman empire that had previously framed everything, there was a great deal of boundary policing to be done, and this had legal implications that continued to be worked through into the sixth century.<sup>30</sup> This situation was by no means unique to Gaul;

<sup>25</sup> J. Heudin, *Hommes de Dieu et fonctionnaires du roi en Gaule du Nord du Ve au IXe siècle* (Paris, 1998), p. 34.

<sup>26</sup> Edited in *Concilia Galliae*, ed. Munier, pp. 135–58, with a summary of the set (preserved in separate manuscripts) at p. 135.

<sup>27</sup> *Prosopographie chrétienne du bas empire, IV: La Gaule Chrétienne, 314–614*, ed. L. Pietri and M. Heijmans, 2 vols (Paris, 2013), II, pp. 1110–11 (Leo) and pp. 1951–2 (Victorius).

<sup>28</sup> Cf. L.K. Bailey, *Religious Worlds of the Laity in Late Antique Gaul* (London, 2016), p. 25.

<sup>29</sup> *Concilia Galliae*, ed. Munier, p. 140: ‘Generationem uero filiorum ab his quos coniugatos assumimus, melius est, si fieri possit, arceri: quos melius est non assumi, quam de his postea sub diuersis sensuum uarietate certari, cum melius sit omnes disceptationum causas excludi; ut qui non uult in clericatu generari, non constituat in altario coniugatos.’ See on this issue now R. Stone, ‘Spiritual Heirs and Families: Episcopal Relatives in Early Medieval Francia’, in A. Höfert, M. Mesley and S. Tolino (eds), *Celibate and Childless Men in Power: Ruling Eunuchs and Bishops in the Pre-Modern World* (London, 2018), pp. 129–48; cf. G. Vocino and C. West, ‘“On the life and continence of judges”: The Production and Transmission of Imperial Legislation in Late Ottonian Italy’, *Mélanges d’Ecole française de Rome* 131 (2019), pp. 87–117.

<sup>30</sup> Cf. Robin Whelan’s article in this special issue. On Gaul, see S. Esders and H. Reimitz, ‘After Gundovald, Before Pseudo-Isidore: Episcopal Jurisdiction, Clerical Privilege and the Uses of Roman Law in the Frankish Kingdoms’, *EME* 27 (2019), pp. 85–111. For discussion of the Symmachian forgeries in Rome, see E. Wirbelauer, *Zwei Päpste in Rom. Der Konflikt zwischen Laurentius und Symmachus (498–514)* (Heidelberg, 1993). For a useful framing, P. Griffith, ‘Canon Law in Post-imperial Gaul’, unpublished Ph.D. thesis, King’s College London (2018), with a luminous discussion of sixth-century Gallic legislation on the *privilegium fori* at pp. 185–7.

the issue of clerical jurisdiction featured in the letters of Popes Gelasius (d. 496), Pelagius I (d. 561), and Gregory the Great (d. 604), all of whom held that clerics should be dealt with by clerical courts.<sup>31</sup> It should be remembered that all these late antique popes' letters have been filtered by later copyists and compilers, meaning that to some extent we read them through medieval spectacles. But their position was echoed by the compilers of the so-called Sirmondian Constitutions, which may have been put together in the fifth century, perhaps in response to the Theodosian Code.<sup>32</sup>

The mid-fifth-century letter of Bishop Leo of Bourges and his colleagues should therefore not be seen as a radical or isolated text, but as an early Gallic manifestation of a broader process, as clerics within institutionalizing churches grappled with the legacy of imperial law and legal process, and their place within an increasingly post-imperial world. Its conceptual origins may lie less in direct Augustinian theological influence – though his work was known in fifth-century Gaul, Augustine did not explore the practical legal implications of his theological elaborations – than in the aftershock of the Priscillian scandal.<sup>33</sup> Priscillian, a Spanish bishop, was brought before the imperial court on charges of sorcery, and his eventual execution around 385 shocked observers at the time: our main source, Sulpicius Severus, writing in western Gaul around 403 in an ascetic context, pinned the

<sup>31</sup> References are provided to P. Jaffé *et al.*, *Regesta Pontificum Romanorum ab condita ecclesia ad annum p. Chr. n. 1198*, 2nd edn (Leipzig, 1888), as well as to the new edition of the Regesta (J3) prepared by K. Herbers *et al.* (Göttingen, 2016–). For Gelasius: letters J3 1335 (JK 694) and J3 (JK 728), and B. Neil and P. Allen, *The Letters of Gelasius I (492–496): Pastor and Micro-Manager of the Church of Rome* (Turnhout, 2014), esp. pp. 23–4. For Pelagius, see *Pelagii I Papae Epistolae quae supersunt (556–561)*, ed. P. Gasso (Montserrat, 1956), nos. 8 (J3 1902/JK 948), 81 (J3 2004/JK 965) and 91 (J3 1986/JK 964); and B. Neil, 'De profundis: The Letters and Archives of Pelagius I of Rome (556–561)', in Neil and Allen (eds), *Collecting Early Christian Letters*, pp. 206–20. As Neil puts it, 'Pelagius shared with Leo I and Gelasius I the expectation that misdemeanours of clergy would be dealt with by ecclesiastical rather than secular courts', p. 215. For Gregory the Great, see Ep. IX, 24, ed. P. Ewald and L. Hartmann, *MGH Epistolae* (Berlin, 1891), vol. 2, p. 285; and L. Giordano, *Giustizia e potere giudiziario ecclesiastico nell'epistolario di Gregorio Magno* (Bari, 1998), pp. 67–85. On the filtering of Gregory the Great, see C. Leyser, 'The Memory of Gregory the Great and the Making of Latin Europe, c. 600–1000', in K. Cooper and C. Leyser (eds), *Making Early Medieval Societies: Conflict and Belonging in the Latin West, 300–1200* (Cambridge, 2016), pp. 181–201.

<sup>32</sup> On the dating of the Sirmondian Constitutions, see now Olivier Huck's introduction and translation in R. Delmaire, O. Huck, F. Richard and L. Guichard (eds), *Les lois religieuses des empereurs romains de Constantin à Théodose II (312–438)*, vol. II. *Code Théodosien I–XV, Code Justinien, Constitutions Sirmondiennes* (Paris, 2009), pp. 429–68.

<sup>33</sup> On Augustine's early reception in Gaul, see C. Leyser, 'Augustine in the Latin West, 430–900', in M. Vessey (ed.), *A Companion to Augustine* (Oxford, 2012), pp. 450–64. On Priscillian, still the best study is V. Burrus, *The Making of a Heretic: Gender, Authority, and the Priscillianist Controversy* (Berkeley, 1996).

debacle on the unwise decision to involve ‘secular judges’ (*saeculares iudices*) in the dispute.<sup>34</sup> The concept of the secular also made its way into Roman imperial law, appearing there for the first time as a demarcation from the clerical or ecclesiastical in an edict issued in the name of Emperor Theodosius II and Caesar Valentinian III in October 425.<sup>35</sup> As a means of shoring up collective episcopal authority, and organizing a distinction within a Christian society, the demarcation had a long future ahead of it.

### The Carolingian reception of *Tantum saeculi potestates*

It is hard to say how the *Tantum saeculi potestates* text was read and circulated in the fifth century, and what influence it exerted at the time of its composition, because it has been preserved in its original form only in the ninth-century Chelles manuscript. Although the nuns at Chelles were not the only people in Carolingian Francia to be interested in the decree, elsewhere it was copied in the revised form translated above, in which Bishop Leo of Bourges has transmuted into Pope Leo. It was in this papal form that *Tantum saeculi potestates* was cited by the great Carolingian archbishop of Reims, Hincmar (d. 882). Hincmar is the first-known author to cite the Leo text, which he did on no fewer than eight occasions.<sup>36</sup> Clearly this was a text that he thought useful and important. What is especially interesting is that he put it to work for two distinct purposes.<sup>37</sup>

On the one hand, Hincmar drew on ‘Pope Leo’ to defend the notion that clerics should not be compelled to attend secular courts. In 868, he quoted Leo in support of his nephew, the bishop of Laon, who had refused to attend the royal court to answer legal charges.<sup>38</sup> When that nephew eventually changed his mind, deciding

<sup>34</sup> Sulpicius Severus, *Chronica*, ed. and trans. G. de Senneville-Grave (Paris, 1999), p. 336; cf. p. 342.

<sup>35</sup> *Theodosiani Libri XVI*.2.47, ed. Mommsen, p. 852: ‘Clericos etiam, quos indiscretim ad saeculares iudices debere deduci infaustus praesumptor edixerat, episcopali audientiae reservamus’ (a related text is also transmitted as Sirmondian Constitution VI). On the edict, see Banfi, *Habent*, pp. 233–41.

<sup>36</sup> Cf. the pioneering work of L. Böhringer, ‘Der ehrethliche Traktat im Paris. Lat. 12445’, *Deutsches Archiv* 46 (1990), pp. 18–47, at p. 25, though, drawing on H. Schrörs, *Hincmar, Erzbischof von Reims, seine Leben und seine Schriften* (Freiburg, 1884), she mentions only three of Hincmar’s references to this text. Cf. the discussion in Devisse, *Hincmar*, III, p. 1437.

<sup>37</sup> On Hincmar’s views on the secular/lay divide, see Devisse, *Hincmar*, I, pp. 515–25, II, pp. 790–3.

<sup>38</sup> Hincmar, *Epistolae*, no. 211, ed. R. Schieffer, *MGH Epistolae* 8.2 (Wiesbaden, 2018), p. 234: ‘Et S. Leo sanctae Romanae Ecclesiae pontifex in synodo Romae habita, statuit dicens’; bookended by Roman law and Frankish capitularies. *Ibid.* no. 212, ed. Schieffer, p. 251: ‘Unde sanctus Leo, cum synodo Romae habita Serminationi et caeteris episcopis scripsit.’

that secular judges (*iudices saeculares*) would be more favourable to his case, and turned to them, in 871 Hincmar again drew on Pope Leo to castigate him.<sup>39</sup> Hincmar was not only concerned with bishops; he also defended the notion that priests too should enjoy some exemption from secular courts. To judge from a stray reference in Flodoard's register of Hincmar's letters, this was not a merely theoretical question in ninth-century Francia.<sup>40</sup> And in two works on the legal position of priests, one undated and the other of around 876, Hincmar drew again on *Tantum saeculi potestates*, in each case in combination with a ruling from the 419 Council of Carthage preserved in the *Canones de causa Apiarii*, declaring that priests should not wilfully abandon ecclesiastical courts.<sup>41</sup>

But Hincmar also used the Leo text to defend the rights of the kings and the role of secular law in judicial procedure. In fact, this was the context of his very first reference to it, in 863, concerning the case of Bishop Rothad of Soissons, who had complained to the pope about Hincmar's attempts to depose him.<sup>42</sup> Here, Hincmar used Leo's text to justify his use of royal proof texts in a set of conciliar acts that is now sadly lost; Hincmar's point was that 'Pope' Leo had validated secular courts, so it was perfectly all right to draw on secular legal traditions. In 871, the Leo text features again in two letters written by Hincmar of Reims, or at least composed with his assistance, in the name of King

<sup>39</sup> Hincmar, *Libellus expostulationis*, ch. 19, ed. W. Hartmann, *Die Konzilien der karolingischen Teilreiche 860–874*, MGH *Concilia* 4 (Hanover, 1998), pp. 445–6. This quotes *Tantum saeculi potestates* in full, including the *edictis* formulation, though divided in two sections, alongside the Theodosian Code and canons from the Council of Carthage. Note that Hincmar added a requirement for an advocate as a gloss to the text: 'videlicet, non per se, sed per advocatum, sicut leges et regule sacre decernunt' (p. 445); see on this C. West, 'The Significance of the Carolingian Advocate', *EME* 17 (2009), pp. 186–206.

<sup>40</sup> Flodoard, *Historia Remensis Ecclesia* III.26, ed. M. Stratmann, *MGH Scriptores* 36 (Hanover, 1998), p. 335, recording an undated letter Hincmar sent to a count of the palace Folco concerning an unnamed priest from the neighbouring diocese of Soissons. On Flodoard, see now E. Roberts, *Flodoard of Rheims and the Writing of History in the Tenth Century* (Cambridge, 2019).

<sup>41</sup> Hincmar, *De Causa Teutfridi* (undated), ch. 4, *PL* 125, col. 1113: 'Et sanctus Leo papa et synodus Romana: "Censemus ut quicunque, praetermisso sacerdote ecclesiae suae, ad disceptationem venerit saecularium, sacris liminibus expulsus, a caelesti arceatur altario"'; Hincmar, *De presbiteris criminosis*, ch. 12, ed. G. Schmitz, *MGH Studien und Texte* (Hanover, 1994), p. 106: '. . . Leo et Romana synodus'. In both cases, the Leo text follows the Council of Carthage, c. 15 (in the Dionysio-Hadriana numbering) or c. 9 (in the Hispana numbering), 'Quisquis . . . relicto ecclesiastico', as it does also in his *Libellus expostulationis*: see Hincmar, *De presbiteris criminosis*, ed. Schmitz, p. 105, n. 196. On the origins of the Carthage collection, see now C. Leyser, 'Law, Memory and Priestly Office in Rome, c. 500', *EME* 27 (2019), pp. 61–84.

<sup>42</sup> Hincmar, *Epistolae*, no. 160, ed. E. Perels, *MGH Epistolae* 8.1 (Berlin, 1939), pp. 122–40, at p. 138: 'Leo et synodus Romana'. Here *Tantum saeculi potestates* is followed by Gelasius JK 637, about church property.

Charles the Bald, where it performed a similar function: to justify the role of kings in judging bishops, ‘according to the divine constitutions’.<sup>43</sup>

What made the Leo text helpful for Hincmar was, we may surmise, its balance: on the one hand, its assertion that clerics should be treated differently; on the other, its support of secular law in principle, including a limited application to clerics. This tied in very well with Hincmar’s overall position on these matters. Hincmar assumed that all the authentic texts bequeathed from antiquity must fit together in some way, so the challenge was simply to work out by what deft interpretation and occasional light editing – for instance, the omission of awkward clauses – was required to bring out that intrinsic coherence.<sup>44</sup> This coherence was the point Hincmar emphasized with reference to Bishop Rothad’s case, shortly before quoting ‘Pope’ Leo:<sup>45</sup>

Let no one be upset that in this account of what happened (*series gestorum*), we sometimes put the edicts of the laws in front of the sentences of the holy canons, and sometimes put them after the chapters of the canons . . . For in ecclesiastical judgements and cases between ecclesiastical people, the sentences of the laws and of the canons are sought, read out and set forth, so that the legal sentences sought and requested by the leaders of the church and issued by the sentence of the *princeps* are treated as canons, and the canonical sentences are seen to decide matters no differently from the legal ones, as anyone who reads the canons understands.

<sup>43</sup> Letter of Charles the Bald, ed. W. Hartmann, *MGH Concilia* 4 (Hanover, 1998), p. 530: ‘ut Leo ac Romana synodus scripsit, reges et imperatores, quos terris divina potentia praecepit preesse, ius distinguendorum negotiorum episcopis sanctis juxta divalia constituta permiserunt; non autem episcoporum vilici extiterunt’; repeated in the second letter at p. 537. On this letter, see J. Nelson, “‘Not bishops’ bailiffs but lords of the earth’: Charles the Bald and the Problem of Sovereignty”, in D. Wood (ed.), *The Church and Sovereignty c. 590–1918. Essays in Honour of Michael Wilks* (Oxford, 1991), pp. 23–34, who plays down Hincmar’s contribution, in part on the basis of Delalande’s edition (though see note 50 below). Robert Smith has a study of this letter in hand.

<sup>44</sup> On the omission of ‘quantum ad causas’ by early medieval authors, including Hincmar, see Banfi, *Habent*, pp. 171–2. On Hincmar’s attitude to the law, see C. West, ‘Hincmar of Reims’, in Philip Reynolds (ed.), *Great Christian Jurists and Legal Collections in the First Millennium* (Cambridge, 2019), pp. 429–43.

<sup>45</sup> Hincmar, *Epistolae*, no. 160, ch. 8, ed. Perels, p. 138: ‘Et ne quem moveat, quia in hac gestorum serie legum edicta interdum sacrorum canonum sententiis praeponimus, interdum autem capitulis canonum legum edicta subiunximus . . . Nam in ecclesiasticis iudiciis interque ecclesiarum personarum questiones ita cognatim legum sententiae exquiruntur, releguntur et proferuntur et canonum, ut legales sententiae non numquam ab ecclesiae rectoribus petita et impetratae atque a principali sententia prolatae habeantur canonicae et item canonicae sententiae non aliud quam legales videantur decernere, sicut qui canones legit intellegit.’ The acts of the Council of Soissons of 862 to which Hincmar here refers are unfortunately lost.

Of course, not everyone in Carolingian Francia agreed with Hincmar about the nature of the relationship between royal and ecclesiastical law that he sought to establish in this dense passage, either in practice or in theory. On this, as on so much else, there was no single ‘Carolingian’ position.<sup>46</sup> We might see Hincmar’s efforts as attempts to reconcile the distinction between laity and clerics, which included a judicial aspect, that was being increasingly strongly emphasized in the ninth century by authors such as Florus of Lyon and the compilers of Pseudo-Isidore, with the archbishop’s abiding respect for traditions of Roman law.<sup>47</sup>

That raises the question of who was responsible for transferring the attribution of the *Tantum saeculi potestates* text from Leo of Bourges to Pope Leo, to make a useful text more authoritative. Might it have been Archbishop Hincmar himself? Certainly Hincmar attributed the text to Pope Leo and the Roman synod on every occasion.<sup>48</sup> More suggestively, not only was Hincmar the first author to cite the text, but the earliest manuscripts with the papal version of the letter, Paris BnF lat. 12445 (fol. 204) and Berlin SB Phillips 1741 (fol. 34v), are both ninth century, strongly associated with Reims in general and with Hincmar in particular.<sup>49</sup> In fact, the letter was added as an afterthought into the Berlin manuscript, from which the Paris one was copied in around 870 (Fig. 2).

However, we should not jump to conclusions. Although Hincmar has a reputation for devious textual emendation, he is not renowned as a proponent of papal authority, and indeed in his *De presbiteris criminosis* he claimed that the decree of ‘Pope Leo’ was really based on the fifth-century Council of Carthage.<sup>50</sup> And while Hincmar was the

<sup>46</sup> Cf. Gerda Heydemann’s article in this special issue, on Carolingian legal and exegetical debates about the meaning of *secularia negotia*.

<sup>47</sup> For ninth-century views counter to Hincmar’s, see Zechiel-Eckes, ‘Florus’ Polemik gegen Modoin’, and G. Schmitz, ‘Die Appendix dacherianae mettensis, Benedictus Levita und Hinkmar von Laon’, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Kanonistische Abteilung* 92 (2006), pp. 147–206, who shows that Hincmar of Laon had access to Florus’ material. The Pseudo-Isidore decretals are unambiguous that *cognitores saeculi* have no jurisdictional power over clerics (e.g. Ps. Clemens I). For the visual articulation of this distinction through clothing, see the pathbreaking M. Miller, *Clothing the Clergy: Virtue and Power in Medieval Europe 800–1200* (London, 2016).

<sup>48</sup> This is contrary to what has sometimes been supposed on the basis of Delalande’s hypercorrection of the original text in his *Concilia antiquae Galliae, Supplementum* (Paris, 1666), col. 265, which led even the great Hincmar scholar Schrörs into error (Schrörs, *Hinkmar*, p. 395, n. 32).

<sup>49</sup> Paris, BnF, lat. 12445, online at <http://gallica.bnf.fr/ark:/12148/btv1b9072677g/f224.item>. Berlin, SB, Phillips 1741: Bischoff, *Katalog der festländischen Handschriften*, I, no. 419: ‘Reims, IX Jh, 3. Drittel’. On the datings of the manuscripts, see Böhlinger, ‘Der eherechtliche Traktat’.

<sup>50</sup> Hincmar, *De presbiteris criminosis*, ed. Schmitz, p. 106: ‘. . . Carthaginenses canones cap. XV decernunt et ex eisdem canonibus Leo et Romana synodus uniformiter decreverunt, ut . . .’ (my emphasis).

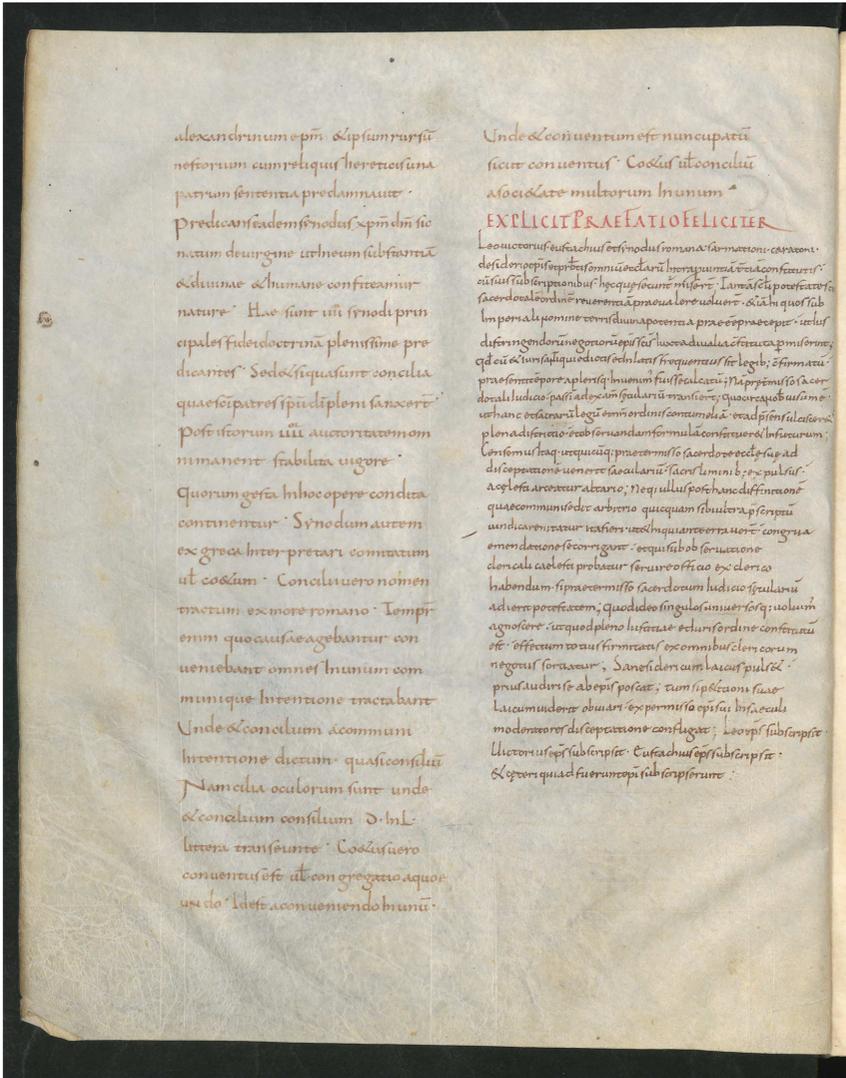


Fig. 2 The Leo text in Berlin, Staatsbibliothek, Phillips 1741, fol. 34v. Staatsbibliothek zu Berlin – Preußischer Kulturbesitz, Handschriftenabteilung. [Colour figure can be viewed at [wileyonlinelibrary.com](http://wileyonlinelibrary.com)]

only Carolingian author to cite the Pope Leo text, he was not the only Carolingian author interested in it. For *Tantum saeculi potestates* also appears in the notorious and dauntingly complicated ninth-century forgery known as Pseudo-Isidore. This massive collection of legal material appeared in various different versions or classes, most of

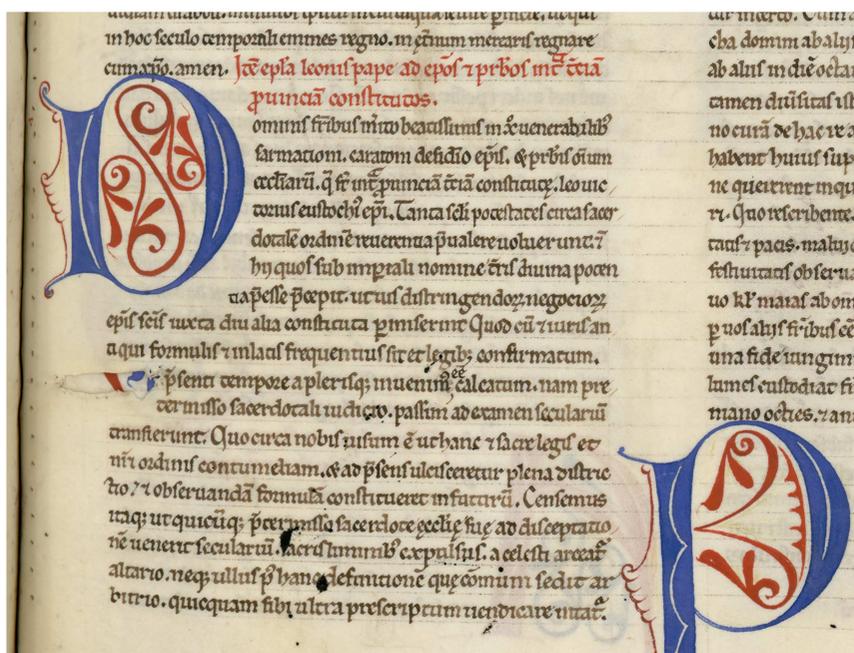


Fig. 3 The Leo text in Pseudo-Isidore Class C. Reims, BM, ms 672, fol. 128r. [Colour figure can be viewed at [wileyonlinelibrary.com](http://wileyonlinelibrary.com)]

which pay little attention to secular law. But one of them, known as Class C, provides a bumper collection of Pope Leo's letters;<sup>51</sup> and nestled amongst them we find our Pope Leo text.<sup>52</sup> Because Pseudo-Isidore Class C is preserved only in half a dozen twelfth-century manuscripts, such as Reims BM ms 672 (Fig. 3), it has usually been considered a twelfth-century redaction. But Steffen Patzold has recently suggested that C could actually have been compiled in the ninth century, even if no early manuscript has survived.<sup>53</sup> The fact that the Leo letter it contains is not directly

<sup>51</sup> For the stages by which Leo's letters were amassed, see A. Chavasse, 'Les lettres du pape Léon le Grand (440–461) dans l'Hispania et la collection dite des Fausses décrétales', *Revue de droit canonique* 25 (1975), pp. 28–39, at p. 33; and now Hoskin, 'Leo I'.

<sup>52</sup> On its place in C, see *Decretales Pseudo-Isidorianae*, ed. P. Hinschius, 2 vols (Leipzig, 1863), I, pp. lxxvii–lxxiii ('De codicibus classi C attribuentis'), at p. lxx. Hinschius did not include C in his edition, but a Class C manuscript was the basis of Merlin's edition of Pseudo-Isidore, reprinted in *PL* 130, where the letter of Leo appears at col. 922. I have checked the text in two Class C manuscripts: Vat. Lat. 1340, where it is at fol. 242v, and in Reims, BM, 672, where it is at fol. 128r. The text is also present in a Prague manuscript of the Pseudo-Isidore C collection, according to F. Schulte, *Die canonistische Handschriften der Bibliotheken* (Prague, 1868), p. 17.

<sup>53</sup> S. Patzold, *Gefälschtes Recht aus dem Frühmittelalter. Untersuchungen zur Herstellung und Überlieferung der pseudoisidorischen Dekretalen* (Heidelberg, 2015).

derived from Hincmar's version might offer some circumstantial evidence to support Patzold's argument.<sup>54</sup>

It is therefore conceivable that Bishop Leo was already cast as pope in the text that Hincmar used, whether this was a manuscript of Pseudo-Isidore Class C or material preparatory to it. When Hincmar started to use the Leo text in 863 (and also had it added to a blank page in the Berlin manuscript), he was still on reasonably good terms with his nephew Hincmar of Laon, who we know to have been close to Pseudo-Isidorian circles, and who may have been connected with Class C in particular.<sup>55</sup> Perhaps the younger Hincmar supplied Pope Leo to his uncle, who was cautious about unfamiliar texts with which he disagreed, but welcomed those that supported his point of view.

### *Tantum saeculi potestates and papal reform c.1100*

It may not be a surprise to learn that the Leo text won new relevance in the late eleventh and early twelfth centuries, when questions about the boundary between clerical and lay returned to the fore.<sup>56</sup> It features in some eleventh- and twelfth-century canon law manuscripts, such as the *Collectio Sinemuriensis* (which drew on the C class of Pseudo-Isidore) and the *Collectio Atrabatensis* (which drew on the *Sinemurensis*).<sup>57</sup> Steven Schoenig S.J. has discovered that the Leo text also appeared in

<sup>54</sup> The version in Pseudo-Isidore C cannot derive directly from Hincmar, since it is at some points closer to the Pithou version, e.g. in the reading *formulis* rather than *edictis*, and in the short clause *Dominis fratribus merito*; conversely, Hincmar's version adds text to emphasize the synodal context. An extract from the Leo text appears in *Die Collectio Sangermanensis*, ed. M. Stadelmeier (Frankfurt, 2004), p. 184.

<sup>55</sup> See Schmitz, 'Appendix'; K. Zechiel-Eckes, 'Pseudoisidor-Rezeption bei Hincmar von Laon: ein Fragment des verloren geglaubten "Unterschriftenwerks" vom Juli 869', *Deutsches Archiv* 66 (2010), pp. 19–54; and K.-G. Schon, *Unbekannte Texte aus der Werkstatt Pseudoisidors. Die Collectio Danieliana* (Hanover, 2006). Class C of Pseudo Isidore has a great deal of material relating to Pope Martin, in whom Hincmar of Laon was especially interested: see C. West, "And how, if you are a Christian, can you hate the emperor?" Reading a Seventh-Century Scandal in Carolingian Francia', in K. Kellermann, A. Plassman and C. Schwermann (eds), *Criticising the Ruler in Pre-Modern Societies – Possibilities, Chances and Methods* (Bonn, 2019), pp. 411–30. Hincmar's first citation (see note 41 above) placed the letter just under a reference to the decrees and letters of the popes, which could suggest a Pseudo-Isidorian provenance.

<sup>56</sup> Cf. already C. Mirbt, *Die Publizistik im Zeitalter Gregors VII* (Leipzig, 1894), p. 1. For a recent summary, see C. Leyser, 'Church Reform – Full of Sound and Fury, Signifying Nothing?', *EME* 24 (2016), pp. 478–99.

<sup>57</sup> Both these unedited collections are now best accessed via the *Clavis Canonum* website <http://www.mgh.de/ext/clavis/> which provides their incipits: *Collectio Sinemuriensis* (SM01): 'sane si clericus' 120; *Collectio Atrabatensis* (AR301): 301. For descriptions of these works, with further references, see L. Fowler-Magerl, *Clavis Canonum: Selected Canon Law Collections Before 1140* (Hanover, 2005), pp. 104–10, 206–7. For a fuller discussion of the text's reception in canonical collections c.1100, see Schoenig, 'An Erased Canon'.

the collection known as the *Collectio Britannica* – though it was later erased in the collection's only manuscript, perhaps for purely practical reasons – and that, intriguingly, it seems to have been copied from Hincmar's version of the text.<sup>58</sup> In this respect, the decree's revival forms part of a pattern of rejuvenated interest in comparable late antique texts, such as the letters from the fifth- and sixth-century popes Gelasius and Pelagius I on clerical exemption already mentioned above – though unlike Leo's, some of these letters had not been cited in the Carolingian period, instead appearing for the first time in the late eleventh century.<sup>59</sup>

Its most revealing appearance is however in a treatise by a cleric named Deusededit. Having started as a monk at Tulle in Aquitaine, Deusededit became a cardinal at Rome in the 1070s.<sup>60</sup> He is today best known for his *Collectio Canonum*, a remarkable canon law collection in support of papal primacy, which he completed around 1087 and for which he drew on an unusual range of sources.<sup>61</sup> However, Deusededit also wrote a fiery Investiture Controversy polemic, the *Libellus contra invasores et symoniacos*, the second draft of which he finished around 1097.<sup>62</sup> This text has been relatively little studied, though it exercised significant influence at the time. Like his canon law collection, Deusededit's *Libellus* drew on an unusual variety of material.<sup>63</sup> Its overt aim was to attack those who wished 'to subject the Church of Christ to royal

<sup>58</sup> Schoenig, 'An Erased Canon'. Schoenig is preparing an eagerly awaited critical edition of the *Collectio Britannica*; in the meantime, the manuscript, British Library, Add. 8873, can now be viewed at [http://www.bl.uk/manuscripts/Viewer.aspx?ref=add\\_ms\\_8873\\_f210v](http://www.bl.uk/manuscripts/Viewer.aspx?ref=add_ms_8873_f210v).

<sup>59</sup> In the case of Pelagius, letters 1–11 are preserved in the *Collectio Arelatensis*, which survives in two ninth-century manuscripts. The rest of his letters (i.e. 12–96, including JK 964 and 965) are first attested in late eleventh- and early twelfth-century collections such as the *Collectio Britannica*, which also contains several relevant letters from Gelasius (e.g. JK 728, as cited in note 31, above): see *Pelagii I papae epistulae quae supersunt (556–561)*, ed. P. Gassó and C. Batlle (Barcelona, 1956), and C. Rolker, 'Die Briefe Papst Pelagius' I: Handschriften, Editionen und Regesten. Kritische Notiz zur dritten Auflage der Regesta pontificum', *Deutsches Archiv* 75.2 (2019), pp. 415–48. Cf. the *Collectio Avellana*, on which see now the contributions in R. Lizzi Testa and G. Marconi (eds), *The Collectio Avellana and its Revivals* (Cambridge, 2019). See in general D. Jasper and H. Fuhrmann, *Papal Letters in the Early Middle Ages* (Washington, 2001), p. 67, as well as D. D'Avray, *Papal Jurisprudence: Social Origins and Medieval Reception of Canon Law, 385–1234*, forthcoming.

<sup>60</sup> H. Zimmermann, 'Deusededit', *Dizionario Biografico degli Italiani* 39 (Rome, 1991), pp. 504–6. See too *Die Carmina des Kardinals Deusededit*, ed. P. Jacobsen (Heidelberg, 2002), and the literature cited there.

<sup>61</sup> A good summary of Deusededit's canon law collection is provided in K. Cushing, *Papacy and Law in the Gregorian Revolution: The Canonistic Work of Anselm of Lucca* (Oxford, 1998), pp. 95–102.

<sup>62</sup> Deusededit, *Libellus contra invasores et symoniacos et reliquos scismaticos*, ed. E. Sackur, *MGH Libelli de Lite* (Hanover, 1892), pp. 292–365. See further Mirbt, *Die Publizistik*, pp. 508–10, and Manitius, *Geschichte*, p. 44.

<sup>63</sup> Deusededit, *Libellus*, ed. Sackur, pp. 295–7.

power', and to show that kings and clerics had distinct duties (*aliud quippe sacerdotum, aliud est officium regum* – 'the duty of priests is one thing, the duty of kings another').<sup>64</sup>

In the course of his third book, on how clerics should be treated, Deusdedit turned to the question 'of those who dare to persecute or judge [priests], setting aside fear and the Judgement of God'.<sup>65</sup> After providing quotations from the Bible on the special role attributed to priests, he argued that these principles applied to priests both sinful and pious, and that sinning priests should be judged only by clerics, before turning to what the 'statutes of the holy fathers' had decreed on this matter. It was in this context, as part of his defence of a judicial separation between laity and clergy, that Cardinal Deusdedit quoted five lines of Leo's text, presented as a papal decree from a Roman synod.<sup>66</sup>

Deusdedit's use of the Leo text is particularly telling if we compare it with Hincmar's, for two key differences emerge. First, whereas Hincmar tended to present the text in the context of church councils and Roman law, Deusdedit included the text in a chapter mostly made up of quotations from Pseudo-Isidore, reflecting his clearer focus on papal authority (and perhaps giving a hint as to where Deusdedit came across the text). Secondly, and more importantly, all that Deusdedit excerpted from the Leo text was the declaration that emperors transferred judicial authority to bishops, and that clerics who go to secular courts were to be excommunicated. The final passage that permitted clerics to go to a secular court with episcopal permission was silently omitted. As a consequence, Deusdedit's Pope Leo is rather less nuanced than Hincmar's.

Like Hincmar, Deusdedit was aware of the complexity of late antique law. Unlike Hincmar, however, he did not regard this as a coherent system that needed to be properly understood and cherished. Not long after he had quoted the Leo text, Deusdedit explained that

since we are aware that in the Justinianic Code and in the books of Novels and in certain other books of secular law (*legum saecularium*), there are some things that seem to dissent from the decision of the aforementioned fathers and Christian emperors about the judgement of God's ministers, it must be said that secular laws should be followed and embraced insofar as they do not go against

<sup>64</sup> Deusdedit, *Libellus*, ed. Sackur, p. 300: 'qui dicunt regali potestati Christi ecclesiam subiacere'.

<sup>65</sup> Deusdedit, *Libellus*, ed. Sackur, p. 347: 'de his, qui districto Dei iudicio iudicio sive timore postposito eosdem vel persequi audent vel iudicare . . .'

<sup>66</sup> Deusdedit, *Libellus*, ed. Sackur, p. 350, with n. 9.

ecclesiastical ones . . . but in those matters in which they seem openly to dissent, they should be spewed out.<sup>67</sup>

And Deusdedit goes on to provide examples of law – in fact Roman law, specifically the *Epitome of Julian* – that fell into this retch-worthy category.<sup>68</sup> Secular law (*saeculi leges*) could not prejudice canonical authority on the question of the judgement of clerics (*de iudicio clericorum*). Where Archbishop Hincmar had deployed the Leo text to bridge the imperial and canonical traditions, Cardinal Deusdedit used it to lever them apart.

After this brief burst of interest c.1100, the Leo of Bourges or Rome text fell back into obscurity. That was not because the question of clerical immunity lost its relevance, nor because the text fell into complete abeyance: *Tantum saeculi potestates* continued to be copied in many twelfth-century Class-C manuscripts of Pseudo-Isidore. However, canon law arguments about clerical immunity came increasingly to revolve around the selection made by Gratian in his *Decretum* around 1140, and it seems Gratian did not have access to the Leo text.<sup>69</sup> Instead, his proof texts for clerical legal immunity – a topic on which he had a great deal to say – were apocrypha attributed to different and earlier popes, notably Pius and Fabian, and so it was on these that later debates would concentrate.

### Conclusion: *Tantum saecularis potestates* and the early medieval secular

This article has not sought to reconstruct ‘the law’ of clerical immunity in the early Middle Ages, nor has it treated this immunity as a front in

<sup>67</sup> Deusdedit, *Libellus*, p. 352: ‘Et quoniam non ignoramus quaedam esse tam in codice Iustiniano, quam in libro Novellarum et in quibusdam aliis legum libris saecularium, quae a prefatis patrum et christianorum principum sanctionibus de ministrorum Dei iudiciis dissentire videntur, dicendum est, quoniam saeculi leges, in quantum ecclesiasticis non obviant, sequendae et amplectendae sunt . . . in his autem, in quibus aperte dissentire videntur, penitus respuendae sunt.’

<sup>68</sup> *Iuliani epitome latina novellarum iustiniani*, Const. 115, ch. 10, 34, ed. G. Haenel (Leipzig, 1873): ‘Nullus episcopus’; ‘Si quidem apud episcopum’. These texts are taken from Justinian’s Novel 123, now available in modern English translation (from the Greek original rather than the Latin abbreviation): D. Miller and P. Sarris, *The Novels of Justinian*, 2 vols (Cambridge, 2018), II, pp. 801–28.

<sup>69</sup> Duggan, ‘Clerical Exemption’; H. Fuhrmann, *Einfluß und Verbreitung der pseudoisidorischen Fälschungen. Von ihrem Auftauchen bis in die neuere Zeit*, 3 vols (Stuttgart, 1972–4), III, pp. 563–85. Gratian’s main source for Pseudo-Isidore, Anselm of Lucca, relied on A1 and perhaps A2 (*ibid.*, p. 514); Gratian may also have had direct access to A1 and A2 (*ibid.*, pp. 581–2). Version C of Anselm of Lucca’s canon law collection did feature the Leo text, but Gratian seems not to have had access to this version. See Schoenig, ‘An Erased Canon’.

a long and continuous war between church and state. Instead, it has tracked the vicissitudes of a particular text which classed certain laws and procedures as 'secular' and others as clerical. What clues does this history have to offer to a study of the secular in the early Middle Ages?

The first is that any such history has to be comfortable with complexity. There was no agreed canon of texts in the early Middle Ages for these kinds of questions, and relevant texts circulated in different forms, or were simply rare and difficult to access. Any attempt at a systematic reconstruction of the early medieval law on this issue would therefore be misconceived.<sup>70</sup> Nevertheless, there was a tradition of drawing a distinction between the 'secular' and the sacerdotal in terms of legal immunity that reached back into late antiquity, and never quite faded away. Like a flare, the history of *Tantum saeculi potestates* marks moments at which the boundary between clerical and secular was especially significant: the mid-fifth century, as institutionalized Christianity established itself in Gaul in the context of a fading empire; the ninth century as bishops began to work through the implications of a renewed empire; the late eleventh century, when the papacy and its fellow travellers sought to establish papal autonomy in the face of imperial claims. As is apparent from the successive textual manipulations of Leo's letter, this tradition involved editing and adaptation, and was not just a passive or reactive adoption of the legacies of the past. Even so, as Leo's letter also suggests, the process was to some extent cumulative, in that ninth-century arguments often – though not always – revolved around late antique texts, while eleventh-century arguments often – though not always – relied on the copying, organizing and elaboration of these texts by Carolingian clerics.

Yet despite this continuous tradition, or rather through it, we can also see shifts in how the secular was deployed in arguments about clerical immunity. The content of the Leo text, as opposed to its labelling, did not much change: substantially the same text can be read in twelfth-century manuscripts as in ninth-century ones. But it nevertheless meant different things at these different times. In the fifth century, *Tantum saeculi potestates* was issued as a measure to boost episcopal authority within a fledgling church. In the ninth century, now sailing under a papal flag, it was used to express the ideal balance between royal and ecclesiastical jurisdictions, and indeed even to

<sup>70</sup> Cf. C. Humfress, 'Bishops and Law Courts in Late Antiquity: How (Not) to Make Sense of the Legal Evidence', *Journal of Early Christian Studies* 19 (2011), pp. 375–400, on the late antique context.

support the liability of clerics to secular law, in the face of alternative views. In the eleventh century, it was employed more selectively to express the supremacy of papal jurisdiction over imperial. The thread that connects these episodes was the effort to create a distinction, and not that distinction's precise meaning or implications, which changed with the wider historical context.

Where then does this history of clerical immunity leave the question of the early medieval secular? As recent research has emphasized, the notion of the secular fundamentally implies drawing a boundary to create a bracketed space. In early medieval Europe, that boundary was most often drawn by the church – or more accurately, by particular clerics – whereas in the modern world it is usually drawn by the secular state – or rather, by particular politicians. Yet though the polarity of the operation has been reversed, the kind of distinction established in texts such as the various iterations of *Tantum saeculi potestates* remains recognizable, not least in how it was articulated or emphasized to suit specific political circumstances. It follows that if we wish to write a full history of how this boundary has been established and performed, whether in legal terms or more generally, then the European early Middle Ages must be included, not as a static backdrop but as a dynamic and integral phase within an evolving tradition.

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