

## Class Outline

### Road Map and Announcements for the Rest of the Course

Three centuries in the next three weeks. Two weeks on the 14th and 15th centuries and a week on the 16th, followed by two weeks on 17th century and beyond.

Today, a week from next Monday, and week from that Monday: constitutional and political background basically in chronological order.

Legal History Colloquium, Tue., Mar. 26, 5:00 p.m., WCC 3008. Attendance voluntary.

Session in the HLS Library Casperson Room on Wed. Mar. 27.

For law and grad students statements of your paper topic (i.e., the text on which you are going to write) due Wed. Mar. 27. First draft of paper due Mon. Apr. 8.

### Political and Institutional Developments

If I woke you up in the middle of night and said ‘Europe in the 14th century’ what is the first thing that would come to your mind?

If I woke you up in the middle of night and said ‘Europe in the 15th century’ what is the first thing that would come to your mind? (Hint: It might be a date when a number of things happened.)

Questions about the political and institutional developments 1300–1500.

An old exam question: “A major historiographical question in European history is how we should characterize the systems of governance from 1300–1600. ‘Feudal monarchy,’ with qualifications, is probably acceptable for the period from 1050 to 1200, perhaps to 1300. By 1600 we clearly have early modern territorial nation-states. Three or four hundred years, however, seems to be a long time to describe the polity as ‘transitional’. On the basis of what you have learned this semester how would you describe the European system of governance from the ‘feudal era’ to the ‘early modern nation-state’. Finding a single phrase to describe it is perhaps not so important as describing what it was and what it was not, how it differed both from what it had been in 1200 and what it came to be in 1600.”

Can someone tell me a story from the table about the 15th century councils?

Is conciliarism something brand new in the 15th century?

Who are the theoreticians of conciliarism?

### Jean Gerson

Fuller extracts in Mats p. XI–22 to XI–29. Particularly interesting are his six rules for interpreting law (p. XI–25 to XI–26). This seems to be his ‘bottom line’:

“Corresponding to Aristotle’s threefold distinction of types of polity in the natural order which we mentioned earlier, we may also divide the ecclesiastical polity into three types: the papal, the collegial and the synodal or conciliar. The papal constitution is modelled on the kingly; the

collegial, embodied in the college of cardinals, on the aristocratic; and the general council is modelled on the polity or timocracy. But the perfect constitution is instead that which involves a combination of all three. By contrast, we have those polities, if they deserve special names, which, unlike the foregoing, are not led by a free and, so to speak, fatherly regime but are instead dragged along under a despotic and servile yoke, either because, through their own fault, it is permitted by God, who makes ‘the godless man reign’, according to Job [34:30], to ‘ensnare the people’, or for some other reason by a just judgement of the same God. Aristotle calls the first of these ‘tyranny’, the second ‘oligarchy’ and the third ‘democracy’. In a tyranny, one man rules, seeking only his own good, wishing his subjects to be powerless, ignorant and divided among themselves; in an oligarchy, a few men of similar character rule over the others; while in a democracy the corrupt multitude rules itself, each man seeking his own ends and not those of the community. The attentive reader will recognize for himself from these remarks whether any such phenomenon, with analogous threefold distinction, can be found in the ecclesiastical polity.”

### **Marsilius of Padua**

The Mats. p. XI–18 to XI–22 contain the conclusions of his *Defensor Pacis*. They are too long to include here, but perhaps we can get a sense of them if we list the propositions that were derived from the work that were condemned by Pope John XXII in 1327:

“(1) When Christ ordered the coin which was taken from the fish’s mouth to be paid to the tax collector, he paid tribute to Caesar; and he did this not out of condescension or kindness, but because he had to pay it. From this it is clear that all temporal powers and possessions of the church are subject to the emperor, and he may take them as his own.<sup>1</sup>

“(2) That St. Peter had no more authority than the other apostles, and was not the head over the other apostles; and that Christ left behind no head of the church, and did not appoint anyone as his vicar.

“(3) That the emperor has the right to make and depose popes and to punish them.

“(4) That all priests, whether pope or archbishop or simple priest, are, in accordance with the appointment of Christ, of equal authority and jurisdiction.

“(5) That the whole church together can not punish any man with coercive punishment, without the permission of the emperor.

“The above articles are contrary to the holy scriptures and hostile to the catholic faith and we [John XXII] declare them to be heretical and erroneous, and the aforesaid Marsilius and John [of Jandun] to be open and notorious heretics, or rather heresiarchs.”

### **An Attempt to Summarize Legal Thought from 1100 to 1700**

Van Vechten Veeder,<sup>1</sup> Foreword to J. MacDonald ed., *Great Jurists of the World* (CLHS 2, 1914) p. xxix:

“The Glossators aimed to explain difficult passages, and their work, as collected by Accursius in 1260, constituted the staple of legal learning for centuries. The Glossators were animated by the belief in authority characteristic of the Middle Ages, and their work is therefore without

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<sup>1</sup> The reference is to Discourse 2, chapter 4, paragraph 10 (Gewirth trans., at 119–120). The Biblical passage is Mt 17:23–26. The remaining propositions that were condemned can be derived from Marsilius’ conclusions, in the Mats.

historical perspective; but they rendered a service of great value in collecting and preserving the text of the great monuments of Roman law.

“The post-Glossators or Bartolists, applied to the law the methods of the Schoolmen, developing the comparatively simple methods of their predecessors into a highly artificial system. While they contributed little of importance to the knowledge of Roman law, they undoubtedly aided in adapting it to a later age. To Alciati and Cujas we are indebted for the methodical presentation of Roman law as a portion of classical antiquity. By directing their attention to the sources, and studying them in their historical perspective, they contributed materially to a real understanding of the subject. The influence of Alciati and Cujas in the direction of historical and positive jurisprudence soon gave way, however, to the philosophical conception of natural law.”

1. Born in 1867, Veeder edited a book called *Legal masterpieces, specimens of argumentation and exposition by eminent lawyers* (St. Paul, Minn.: Keefe-Davidson company, 1903). He apparently served as a judge of the Federal District Court for the Eastern District of New York, and the last reference that I have seen to him is the appointment by Woodrow Wilson of a judge to succeed him on 21 March, 1918 (<http://www.fjc.gov/servlet/tGetInfo?jid=824>, last visited 22 May, 2003).

Questions about the commentators in general.

### **What’s wrong with Veeder?**

1. Almost everything that he says about the ordinary gloss is wrong.
2. The post-Glossators cannot be regarded as the first ones who “applied to the law the methods of the Schoolmen.”
3. Alciati and Cujas are leaders of the humanist school of jurisprudence (16th century).
4. The natural law school is a phenomenon of the 17th century, and we’re a long way away from that yet.

## **14th and 15th Centuries—Political and Institutional Developments**

### **The later Middle Ages**

The later Middle Ages as history’s stepchild. The tenor of the times: Johan Huizinga, *The Autumn of the Middle Ages*. It’s an important period for legal historian because the sources start to proliferate.

### **The Plague**

1347–50, The Black Death, Europe-wide invasion of plague. By 1350 between one-third and one-half of the European population was dead.

1. The plague hit an already weakened population.
2. The plague struck again and again. It was still a problem in London in the 17th century.
3. It hit the cities harder than it did the countryside.
4. It hit the poor harder than it did the rich.

Resulting in:

1. A reduction in population that lasted for a century and half.
2. A increase of wealth of the laboring classes.
3. A continual drain of population from the countryside to the towns.
4. A change in mentality? Can we connect this development with the rise of voluntarism?

### **The Papacy and Councils**

1305–1378, ‘Babylonian captivity’ of the papacy at Avignon

1. The creation of the Roman Rota, which paradoxically has the tendency to enhance the power of local churches.
2. Tighter papal control over appointments in local churches, which has the opposite effect.
3. The rapacity of the Avignonese papacy, necessitated, to some extent, by loss of revenue from the Papal States.
4. The disputed papal election of 1378, which leads to:

1378–1417, the Great Schism (Urban VI [Rome], Clement VII [Avignon]), which leads to:

1409–1449, the ‘age of councils’:

Pisa, 1409

Constance, 1414–1417 (election of Martin V)

Pavia-Siena, 1423

Basel, 1431–1449

Ferrara-Florence, 1438–1445

(The last two named began as one and met intermittently.)

#### *Theoreticians of Conciliarism:*

John of Paris (Jean Quidort, O.P.), c.1240–1306 (theologian, proto-conciliarist)

Lemoine, Jean (Johannes Monachus), c.1250–1313 (canonist, proto-conciliarist)

Durantis, Guilelmus, junior, c.1250–1328 (canonist, proto-conciliarist)

Marsilius of Padua, c. 1275 – c. 1342 (political thinker)

William of Ockham, c. 1288 – c. 1348 (philosopher, political thinker)

Zabarella, Francesco, c.1335–1417 (canonist, conciliarist)

Gerson, Jean, 1363–1429 (theologian, conciliarist)

Nicholas of Cusa (1401–1464) (canonist, philosopher, conciliarist [for a while])

1. The church is a vast corporation (*congregatio fidelium*), the general council is its representative body, it can sit over and depose popes.
2. The early canonists had also explored the problem of what was to be done with a pope who strayed. The most commonly raised problem was what was to be done with an heretical pope. The tradition that no one could judge the pope was strong. It was one of the foundations of the theory of papal monarchy, even before the idea became current that the pope possessed the *plenitudo potestatis*. Nonetheless, no canonist could countenance the notion of an heretical pope, and a number of them were willing to extend the idea to a pope who was guilty of serious crimes. The standard resolution of the problem was to say that a general council could depose a pope for heresy, perhaps also for crimes.

3. Writing at the height of the controversy between Philip the Fair and Boniface VIII at the beginning of the 14th century, John of Paris, was to extend the notion that the council is more truly representative of the church than is the pope.
4. Johannes Monachus held that the pope must consult with the cardinals before promulgating general legislation.
5. William Durantis the Younger espoused the powers of a general council in the effort to restore authority to the bishops that he thought was being eaten away by the papacy.
6. The possibility that the ideas of the early conciliarists spilled over into secular governance. Civilians and canonists sat on the commission that advised about the deposition of Richard II of England in 1399.
7. For the church, however, conciliarism was a failure.

### France and England

<i>France</i>	<i>Burgundy</i>
1328–50, Philip VI	
1350–64, John II the Good	
1364–80, Charles V the Wise	1363–1404 Philip
1380–1422, Charles VI the Mad	1404–19, John the Fearless
1422–61, Charles VII the Well-served	1419–67, Philip the Good
1461–83, Louis XI the Spider	1467–77, Charles the Rash
1483–98, Charles VIII	1477–1519, Mary & Maximilian

<i>England</i>	<i>The 100 Years War</i>
1307–1327, Edward II	1346, Battle of Crécy
1327–1377, Edward III	1356, Battle of Poitiers
1377–1399, Richard II	1360, Peace of Bretigny
1399–1413, Henry IV	1415, Battle of Agincourt
1413–1422, Henry V	1429, Siege of Orléans
1422–1471, Henry VI	1453, Effective end of the war
1485–1509, Henry VII	

1. With the extinction of the direct Capetian line upon the death of the last of Philip the Fair's sons without issue in 1328, the next in line to the throne was Edward III of England in the right of his mother Isabella who was a daughter of Philip the Fair. Against this claim was the fact that since the 10th century no woman had ruled over France, indeed, it could be argued that there never was a time when a woman reigned over France. *In terram Salicam mulier ne succedat* ('a woman may not inherit Salic land').
2. The first phase of the war went well for the English and badly for the French.
3. When Henry V of England arrived in France in 1415, he arrived in country that was deeply divided. The Burgundians were on his side. The French recovery under Charles VII owes

much to one of the most extraordinary women of history, Joan of Arc. Charles VII who appears as a fool in all the stories, was no fool. He bided his time, and when Henry V died leaving England with a 9-month-old king he recovered most of the old royal domain.

4. His successor Louis XI turned his attention to the problem of Burgundy.

## **The Empire and Italy**

### *The Empire:*

1356, Charles IV, the Golden Bull, 7 electors: archbishops of Mainz, Trier, Köln; king of Bohemia, count Palatine of the Rhine, margrave of Brandenburg, duke of Saxony; notable for their absence: the pope, the duke of Bavaria.

The real power of the emperor continued to decline. The empire had freed itself from entanglement with the papacy, but possession of the imperial crown became insignificant. The history of Germany in this period is the history of more than a hundred small principalities.

### *Italy:*

The struggles of ‘black Guelfs’ against Ghibellines and ‘white’ Guelfs.

The use of a *podestà*, a job that law professors frequently had, despite its undeniable risks.

Milan, despotism of the Visconti (14th c to 1447), rise of the Sforza.

Venice, oligarchic republic, defeat of Genoa in 1380.

Florence, republic, increasingly under control of the Medici in 15th c.

Urbino, taken over by the *condottiere* [Federico da Montefeltro](#) in 1444.

Papal states, alternation of humanist and politician popes, the Borgia.

Naples, briefly united with Sicily under Alfonso V the Magnanimous, king of Aragon, 1416–1458, divided at his death.



*Local law in Italy:*

1162, Pisa: *Breve Consulium Pisanae civitatis*

1233, Pisa: *Constituta legis et usus*

1286, Pisa: *Breve Pisani communis*

1303, Pisa: *Breve Pisani communis*

1170, Milan: Act of the consuls (regulating relations between lords and tenants)

1216, Milan: *Liber Consuetudinum Mediolani*

1396, Milan: *Statuta Mediolani* (8 bks. promulgated just after Gian Galeazzo Visconti become duke of Milan, contains much of the now-lost compilations of 1330 and 1342)

1246–1324, Florence: fragments only survive of annual legislation

1293, Florence: *Ordinamenta Iustitiae* (triumph of the merchants over the magnates)

1325, Florence: *Statuto del Capitano del Popolo*; *Statuto del Podestà*

1414, Florence: *Statuta populi et communis Florentiae*

**The Iberian Peninsula**

<i>Castile</i>	<i>Aragon</i>
Sancho IV, 1284–1295	Alfonso III, 1285–1291

Ferdinand IV, 1295–1312	James II, 1291–1327*
Alfonso XI, 1312–1350	Alfonso IV, 1327–1336
Peter the Cruel, 1350–1369	Peter IV, 1336–1387
Henry II (of Trastamara), 1369–1379	John I, 1387–1395
John I, 1379–1390	Martin I, 1395–1410
Henry III, 1390–1406	Ferdinand I, 1412–1416*
John II, 1406–1454	Alfonso V, 1416–1458*
Henry IV, 1454–1474	John II, 1458–1479*
Isabella, 1474–1504	Ferdinand II, 1479–1516

In Castile, a series of disputed successions from Alfonso X to Isabella. During the reign of Alfonso XI (1348), we get the *Ordinamento de Alcalá*. Ferdinand I of Aragon was the younger brother of Henry III of Castile. (Their mother, Eleanor, was the oldest daughter of Peter IV of Aragon.) This connection made the union under Ferdinand II of Aragon and Isabella of Castile easier. Kings of Aragon with a couple of exceptions noted with an \* were also kings of Sicily. If they were not, the king of Sicily was frequently a close relative. The relationship with Naples was more complicated. The union of the crowns Castile and Aragon, under Ferdinand and Isabella, led to a series of events that you probably learned about in the fifth grade.

### A Way to Think About These Developments

1. A widening to the horizons of ordinary people.
2. The rise of the phenomenon of lay spirituality.
3. The emergence of the vernacular.
4. A crisis of legitimacy?
5. The ultimate decline of representative institutions.

### The commentators

#### The ‘civilians’

Odofredus de Denariis (†1265) (Bologna, all CJCiv)

Jacobus de Ravaniis (Jacques de Révigny) (†1296) (Orléans, all CJCiv)

Dinus de Mugello (†c.1303) (Bologna; 1st *consilia*, *De regulis iuris*)

Petrus de Bellapertica (Pierre de Belleperche) (†1308) (Orléans; Inst., Dig. Nov., Cod.)

Oldradus de Ponte (†1335) (Bologna, Pauda; *consilia*)

Cinus de Pistoia (1270–1336) (imperial judge, Siena; Cod.; teacher of Bartolus)

Johannes Faber (Jean Fauri, Faure) (†c.1340) (probably not a teacher; Inst.)

Bartolus de Saxoferrato (1313–1357) (Perugia; all CJCiv; teacher of Baldus)

Baldus de Ubaldis (1319/20 or 1327–1400) (Perugia, Pavia; most of CJCiv and some CJCan, *consilia*)

Johannes Christopherus Portius (Parcus, Porcus) (fl. 1434) (Inst.)



Paulus de Castro (†p.1441) (Florence; Dig., some Cod., *consilia*)

Alexander Tartagnus de Imola (†1477) (Bologna; *consilia*)

Jason de Mayno (1438–1519) (Padua, teacher of Alciatus; *consilia*)

Philippus Decius (1454– c.1535) (Pisa; *consilia*)

Robertus Maranta (c. 1476 – c. 1534 (Naples, proceduralist)

1. Like the glossators, almost all of the commentators were teachers.
2. Just as the school of Martinus had broken away in the mid-12th century and was brought back into the Bolognese mainstream by Azo and Accursius, so too, the commentators brought back into the mainstream the work of the French professors of the late 13th century.
3. By and large, the Italian commentators are associated with the imperial (Ghibelline, ‘white’ Guelf) faction of Italian politics.
4. Increasing use of custom and statute.
5. Incorporation of canon law.
6. *Consilia* are a new form of literature in this period. *Tractatus* are not new, but there are a lot of them. **The canonists**

Henricus de Segusio (Hostiensis) (†1271) (diplomat, prelate; X)

Johannes Andreae (†1348) (Bologna; X, VI, Clem.)

Aegidius Bellamera (Gilles Bellemère) (†1407) (auditor of Rota; X, *Decisiones Rotae*)

Antonius de Butrio (†1408) (Bologna; X)

Franciscus Zabarella (Cardinalis) (†1417) (Padua; X, Clem.)

Nicolaus de Tudeschis (Panormitanus, Abbas Siculus) (†1443) (Siena; X, VI)

Johannes de Turrecremata (Torquemada) (†1468) (cardinal; *Decreta*)

1. Encyclopedic commentaries
2. Continued development of procedure
3. The development of conciliarism
4. *Consilia*
5. Case reports
6. *Tractatus*

### **The development of the *ius commune***

Among proceduralists even in the 13th century the distinction between canonists and civilians will not hold water. We have indicated above that the distinction among the academics was becoming increasingly blurred in the later MA. Among the practicing lawyers it is hardly to be found at all. Both canonists and civilians get legal jobs in the church. Some churchmen with law degrees have degrees only in civil law. Some laymen have doctorates in both laws. Johannes Andreae was a layman and seems to have had a degree only in canon law. Professional

associations of lawyers from doctors' commons in England to the guilds of lawyers in Italy rarely distinguish between holders of the two kinds of degrees.

By the 14th century lawyers all over Europe are referring to the *ius commune*, the common law. It means the law that Europeans have in common, a combination of Roman and canon law, to be distinguished from the customary law of a particular city or region or the law embodied in the statutes or *fueros* of a particularly city or region. A notion of a hierarchy of sources prevailed over most of Italy and southern France as well. Local statute was primary. If it applied to the case, it was binding. After that came the *ius commune*. But the power of the *ius commune* was even greater than the hierarchy would seem to suggest, because the local statutes were interpreted in the light of the *ius commune*. The terminology and structure of the *ius commune* was the terminology and structure that every trained jurist used, and jurists were increasingly used as judges and consultors. Some of them participated in the drafting of the statutes for the city-states.

None of this would have been possible had it not been for the effort that had been going on for over two centuries to tame the sources, to make Roman law and the vast assemblage of canonic sources usable in a world far different from that in which most them had been written. None of it, too, would have been possible had the jurists not shared a common training and a common methodology.