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**MEDIEVAL STUDIES 119:
CONSTITUTIONAL AND LEGAL HISTORY OF MEDIEVAL CONTINENTAL EUROPE
Tentative Syllabus and Assignments
Spring, 2013**

Prof. Donahue

Ms. Schlozman

Requirements. There are four requirements for credit in the course: (1) a one-paragraph summary of the readings for each section turned in at the beginning of each section; (2) a *short* paper (no more than five double-spaced typed pages exclusive of notes); (3) an hour exam (Fri., Mar. 15); (4) a final exam (‘take-home’). (We will consider allowing students to write a term paper in lieu of taking the final exam. More about this below under “papers.”)

Meeting times. This course is also listed as Law 42100A. The FAS students will meet together with the law students for lectures on Mondays and Wednesdays from 11:10 to 12:00 (Room Sever 102). The law students and FAS graduate students will meet for “Section” on Tuesdays from 10:40 to 12:00 in the Law School (Room WCC 3018). There is a separate section for the undergraduates (time and place to be arranged; it’s listed below as if it were on Thursdays) and a separate “discussion class” for the undergraduates on Fridays from 11:10 to 12:00 (Room Sever 102). By and large, Ms. Schlozman will lead the section and Prof. Donahue the discussion class, but in some weeks the reverse will be the case.

Prerequisites. None. See below under “Background.”

Work load. For a history course, the reading load is fairly light, but much of it is documentary material, and is thus relatively slow going. Give priority to the documentary materials. Almost all classes have documentary assignments, and those which do will devote a considerable amount of time to the documents. You’ll be lost if haven’t read them in advance. This is why we have both a section (Thursdays) and a “discussion class” on Fridays, both without the law students. You should bring the multilithed *Documents* (see below under “Readings”) with you to every class.

The key to keeping up with this course is preparation for each class, particularly with the documents, and attendance at classes and sections. Much of our time in class will be spent discussing the documents. When we have previously given this course, we have noted that students who read the documents and attended classes did well, even if they hadn’t done all the secondary reading.

The Course. This course is an attempt to discover how the distinctive features of the “civil” law of the European Continent arose and why these distinctions persisted. It is also an attempt to discover how the legal systems of Continental Europe developed and were influenced by a group of ideas about politics and public order that are frequently invoked today when we speak of the “Western legal tradition.” In order to do this we have to conduct a “Cook’s tour” of European legal history, to survey the sources and literature of the law from the fall of Rome (roughly 500 A.D.) to the emergence of the “natural law school” in the 17th century. That gives the course something of the quality of “if-this-is-Tuesday-it-must-be-Belgium.” We have attempted to give focus to the course by emphasizing three topics, the capture of wild animals as the foundation of “property,” the formation of marriage, and the rules about the use of witnesses in criminal and civil procedure. We wish there were a more strictly public-law topic that we could use as well, but no public-law topic has deep enough roots to allow us to trace it over this long period of time. Hence our examination of public law will have to come about as we unfold the history of institutions within which the law operated. We focus on France. We will also deal with Germany, Italy, Spain and the Low Countries, but France give us the backbone, while the other areas give us examples (as does England by way both of comparison and contrast). The rest of the European Continent will get only an occasional mention.

We will proceed largely by way of lecture, interspersed with examination of documents that are contained in *Documents*. These documents will largely carry the story of wild animals, marriage and witnesses. In each period we will ask two questions: (1) how does the way people were thinking about law in this period proceed from what had gone before and lead to what was to come next (a largely diachronic question)? And (2) how was the way that people were thinking about law in this period relate to the broader political, social and intellectual developments in the period (a largely synchronic question)? The ultimate question is comparative: why did Continental law develop its distinctive features?

Background. No one (including the instructors) comes to a course like this with all the necessary background information. We will try to say everything that we think you need to know to make sense out of what is going on, and so, we will assume that you do not have any of the relevant background. On the other hand, in a survey course as broad as this one, we can say things only once. For this reason, we would suggest, particularly if you have not taken a course in medieval and/or early modern European history, that you read a good textbook on one or both of these topics. In the past we have asked the Coop to stock H. G. Koenigsberger's, *Medieval Europe, 400–1500* (1987) and the same author's, *Early Modern Europe, 1500–1789* (1987). The books are now out of print, but second hand copies are readily available. Both books are a relatively quick read, particularly if you're not trying to memorize kings and battles and dates. We have included the page numbers below at the relevant spots enclosed in square brackets at the end of the assignment.

If you have taken a medieval and/or early modern European *legal* history course someplace else or if you have had a European history course that devoted some time to legal development in the same periods, you probably should not take this course. There is a graduate reading course this semester (History 2080, formerly History 2126) for which you may be ready.

Readings. There is, unfortunately, no really good textbook in English of European legal history. In the past we asked the students to buy either Manlio Bellomo's, *The Common Legal Past of Europe: 1000–1800* or Raoul van Caenegem's *An Historical Introduction to Private Law*. Previous course evaluations suggested that the students found van Caenegem more helpful than Bellomo. Hence, that is the book that we are asking you buy this year. Neither Bellomo nor van Caenegem is really a textbook. Probably the best textbook in English is Robinson, Fergus and Gordon, *An Introduction to European Legal History* (2d ed., 1994) [RFG2]. (There's a third edition of RFG2 [RFG3], which is shorter and focuses more on the later period. It is available only in the Law School, where it's on permanent reserve.¹) As an alternative, we have also listed below readings in three other books. One of them is a classic: Paul Vinogradoff's, *Roman Law in Medieval Europe*. Two others are relatively new and controversial, Alan Watson's, *The Making of the Civil Law* and Harold Berman's *Law and Revolution*. Pdf copies of the extracts from Bellomo, van Caenegem, Vinogradoff, Watson, and Berman are found under 'lectures' on the website. They are also available in 'course-pack' form on reserve in the Law School.

By and large, we think that the books other than RFG do a better job of covering the topics to which they refer than does RFG. On the other hand, some people really like a text book, and none of the books extracted is a text book, though Bellomo and van Caenegem come close. You should read either RFG or the extracts from the other books for class, and you might want to read what you haven't read when you're reviewing the course for the exam.

The multilithed *Documents*² contains, as the name implies, a number of documents, legal sources in translation. These vary greatly in the length of their extracts. When they are long, we want you to get a sense

¹ Another textbook, Randall Lesaffer, *European Legal History: A Cultural and Political Perspective* (2009), is also on reserve for the course in the Law School. If you read it, let us know what you think of it. Our initial impression is that it is interesting, but that it doesn't say enough about the law.

² Previous editions of this have been called *Outlines and Documents*. We did not include the outlines this year, because they change constantly and are better served up on the web.

for the overall structure; when they are short, you should focus on the detail. The Syllabus contains some notes as to what is important.

Outlines for most of the classes are posted on the course's website: <http://www.law.harvard.edu/faculty/cdonahue/courses/CLH/>. We will probably be revising these as we go along, but you should bring them with you to class either in your computer or in paper form. Having this kind of material already written down saves you time in taking lecture notes.

Papers and Exams. There will be a short paper required for the course. It should be no more than five double-spaced typed pages exclusive of notes. It may analyze one or a couple of the documents in the *Documents*. The basic idea is to present an *idea* supported by *evidence* (primary sources please). You may do the paper any time during the semester. You should have chosen a topic no later than Thursday, March 28. You should turn in your first draft no later than Thursday, April 25. The final draft should be turned in before the beginning of exam period (Fri., May. 10).

There will be an hour exam for the undergraduates on Friday, March 15. (We will exempt from the hour exam seniors who are writing bachelor's essays.) Basically, the hour exam will cover material in the first 25 assignments. There will be one question, which will almost certainly involve analysis of a document in *Documents*.

The final exam ('take-home') will be an "open book" exam and will contain two or three questions. The first will give you a document drawn from the *Documents* and will ask you to comment on the document and its significance. The second will call for a more wide-ranging essay. A possible initial question will ask for some identifications.

If you wish to write a term paper in lieu of the final exam, you must take the hour exam and get our approval of your term paper topic. The term paper should cover material in at least two of major time periods of the course (e.g., early medieval and late medieval, or late medieval and early modern). It may trace the history of a particular idea or institution from one period to another or it may compare ideas and institutions in two different periods. In order to get our approval of a term-paper topic, you will need to have completed your short paper and to turn in a one-page statement or outline of what you plan to write about by Thursday, April 18. Students in the past who have taken the paper option in the past thought that it was fun but that it involved more work than taking an exam.

Offices. Prof. Donahue's office is in Hauser 512 in the Law School. His assistant is Ms. Reader in Hauser 518, and his office hours are from 2:00–4:00 on Tuesdays, or by appointment. An appointment is usually not necessary for the regularly scheduled office hours, but there is a sign-up sheet on the door of his office. That sheet will also tell you where his office hours will be held. They probably won't be in his office. Ms. Schlozman, who will be teaching most of the sections, will announce her office hours later.

Syllabus. In what follows Bellomo=MANLIO BELLOMO, *THE COMMON LEGAL PAST OF EUROPE: 1000–1800* (Washington, DC: Catholic U. Press, 1995); Berman = H. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (Cambridge [MA]: Harvard Press, 1983); K1500 = H.G. KOENIGSBERGER, *MEDIEVAL EUROPE, 400–1500* (Harlow: Longman, 1987); K1789 = H.G. KOENIGSBERGER, *EARLY MODERN EUROPE, 1500–1789* (Harlow: Longman, 1987); *Documents* = C. DONAHUE, *DOCUMENTS ON CONTINENTAL LEGAL HISTORY* (unpublished, first installment available in class or in Room 518 of Hauser Hall); RFG2 = O. F. ROBINSON, T. D. FERGUS and W. M. GORDON, *AN INTRODUCTION TO EUROPEAN LEGAL HISTORY*, 2d ed. (London: Butterworths, 1994); RFG3 = O. F. ROBINSON, T. D. FERGUS and W. M. GORDON, *AN INTRODUCTION TO EUROPEAN LEGAL HISTORY*, 3d ed. (London: Butterworths, 2000); van Caenegem = R. C. van Caenegem, *AN HISTORICAL INTRODUCTION TO PRIVATE LAW* (Cambridge [Eng]: U. Cambridge, 1988); Vinogradoff = P. VINOGRADOFF, *ROMAN LAW IN MEDIEVAL EUROPE*, 2d ed. (Oxford: Clarendon, 1929); Watson = A. WATSON, *THE MAKING OF THE CIVIL LAW* (Cambridge [MA]: Harvard Press, 1981).

A calendar follows the syllabus, which allows you to see at a glance the date, title of the class, and the assignment number.

Week Assignment

Week 1

- Lecture 1. 1. Introduction to the course. A basic chronology of three legal traditions: Roman, Continental European and English. Introduction to Roman law. Bellomo, 1–26; van Caenegem, 1–15; RFG2 vi-x; RFG3 v–vii, 285–319.
- Lecture 2. 2. Reflections on the distinction between “common law” and “civil law” and on what we mean by the “Western legal tradition.” The legacy of the ancient world: Roman law. RFG2 1–10; RFG3 1–11; Watson 1–38. Justinian’s *Institutes (Documents, Part I.A)*. [Focus on the overall structure of Justinian’s *Institutes* and on the specifics about wild animals and marriage (there’s nothing about witnesses).] How the story came out. (*Documents, Part XX*). [Ask yourself about the overall structure and the rules about wild animals, marriage and witnesses in the 19th century codifications. Are the different codes more notable for their similarities or their differences?]
- Discussion 1. 3. The legacy of the ancient world: Christianity. Paul’s letter to the Romans (*Documents, Part II.A*).

Week 2

- Lecture 3. 4. Two “barbarian” law codes—Aethelberht (*Documents, Part III.A*). [Ask yourself two questions: (1) What is the overall structure of this material? (2) What, if anything, does it have to say about wild animals, marriage and witnesses?]
- Lecture 4. 5. Two “barbarian” law codes—Gundobad (compared with the *Lex romana burgundionum*) (*Documents, Part III.B*). [Same questions as Lecture 3.]
- Section 1. 6. The “barbarian” invasions. van Caenegem, 16–29; RFG2 10–23; RFG3 11–25; Vinogradoff 11–42. Aethelberht and Gundobad compared. *Documents, Part III*.
- Discussion 2. 7. Reflections on “fundamental legal categories”: *ius* vs. *lex*, public vs. private, criminal vs. civil, persons vs. things vs. actions, property vs. contract vs. delict (tort). Justinian’s *Institutes (Documents, Part I.A)*. [K1500 1–66.]

Week 3

- Lecture 5. 8. Carolingian institutions and “feudalism”. Bellomo, 27–43; RFG2 23–70; RFG3 26–41; Documents on Continental feudalism (*Documents, Part IV*). [K1500 67–135.]
- Lecture 6. 9. Eleventh-century reforms and a glimpse at *regnum* and *sacerdotium*, to the end of the 13th century. Berman 85–119, 273–332. Documents on the investiture controversy (*Documents, Part V*). [K1500 136–212.] The Collection in 74 Titles. (*Documents, Part VI*).
- Section 2. 10. Eclectic sources of law: the Bible, Aethelberht and Gundobad, the Collection in 74 Titles (*Documents, Parts II.B, III, VI*). [Same questions as Lecture 3.]
- Discussion 3. 11. The legacy of the ancient world: New Testament extracts on marriage (*Documents, Part II.B*). Witnesses in the Bible (*Documents, Part II.C*).

Week 4

- No lecture. Holiday, President’s Day.
- Lecture 7. 12. The revival of academic law study: Roman law. Bellomo 44–61, 89–117; RFG2 71–99; RFG3 42–58; Vinogradoff 43–70. Roman law glossators on wild animals

- (J.I.2.1.12–13, D.41.1.55) (*Documents*, Part VII).
- Section 3. 13. Wild animals in the glossators. (*Documents*, Part VII).
- Discussion 4. 14. Marriage in the glossators. (*Documents*, Part VIII).
- Week 5
- Lecture 8. 15. The institutions of canon law. RFG2 122–152; RFG3 72–90. Substantive canon law. Marriage (J.I.1.10, D.23.2.5–6, Gratian C.27 q.2, Peter Lombard, selected decretals on marriage) (*Documents*, Part VIII).
- Lecture 9. 16. The revival of academic law study: Romano-canonical procedure. Witnesses (D.22.5, Gratian C.4 q.3, Tancred 3.6) (*Documents*, Part IX). Read van Caenegem, 30–114 (this is a good overview for the hour exam, though it takes us quite a bit further in time).
- Section 4. 17. How do we design a procedural system? *Documents*, Parts VI and IX.
- Discussion 5. 18. Reform and the “twelfth-century renaissance.” *Documents*, Parts V, VI, VII and VIII (revisited). [review K1500 67–212; read K1500 213–80]
- Week 6
- Lecture 10. 19. Marriage litigation in the High Middle Ages. *Smith c. Dolling* (1271–1272) (*Documents* Part XIV.A). *Adam Attebury c. Matilda de la Leye* (1271–72) (*Documents*, Part XIV.B).
- Lecture 11. 20. *Coutumiers* and *fueros*. Extracts from the *Usatges de Barcelona* on witnesses, marriage, and wild animals (*Documents* Part X.A).
- Section 5. 21. How to read a case. *Documents*, Part XIV.A–B.
- Discussion 6. 22. The institutional history of the 12th and 13th centuries. Bellomo 61–88; RFG2 179–207; RFG3 129–168; Vinogradoff 71–96. [review K1500 213–80]
- Week 7
- Lecture 12. 23. Courts and *coutumiers* in France. Extracts from the *coutume* of Tourraine-Anjou and from Beaumanoir on witnesses, marriage and marital property, and wild animals (*Documents* Part X.B, C).
- Lecture 13. 24. Political ideas of the 12th and 13th centuries. Extracts from the glossators and early commentators on sovereignty. (*Documents* Part XI)
- Section 6. 25. *Usatges* and Beaumanoir. *Documents*, Part X.
- Hour exam. (Will cover Assignments 1–25.)
- Spring break.
- Week 8
- Lecture 14. 26. The fourteenth and fifteenth centuries—Political and constitutional developments. Bellomo 118–61. [K1500 281–387.]
- Lecture 15. 27. The commentators. RFG2 100–121; RFG3 59–71, 107–24. *Documents*, Parts XII and XIII.
- Section 7. 28. Law and politics in the 13th century. *Documents*, Part XI.
- Discussion 7. 29. The formation of a persecuting society? Developments in the law of witnesses:

Tractatus de reprobatione testium; Gandinus, *Tractatus de maleficiis*; Robertus Maranta, *Speculum Aureum* (*Documents*, Part XII).

Week 9

- Lecture 16. 30. Commentators on wild animals: Bartolus on D.41.1.1, .5 (*Documents*, Part XIII.A, B); Portius and Faber on J.I.2.2.11–13 (*Documents*, Part XIII.C–E)
- Lecture 17. 31. Courts and case reports—14th through 18th Centuries. Watson 39–52. *Decisio S.R.R.* (1360 X 1365); *Decisio S.R.R.* (1574); the *Rota Fiorentina* (1780) (Gorla article) (*Documents*, Part XIV.B, C, D, E).
- Section 8. 32. Marriage in legal theory and legal practice. *Documents*, Part XIV. Pay particular attention to Panormitanus, *Consilium* (15th c.) (*Documents* Part XIV.C).
- Discussion 8. 33. Courts and case reports (cont'd). *Decisio S.R.R.* (1360 X 1365); *Decisio S.R.R.* (1574); Panormitanus, *Consilia*; the *Rota Fiorentina* (1780) (Gorla article) (*Documents*, Part XIV.B, D, E)

Week 10

- Lecture 18. 34. “Renaissance” Europe—Political, intellectual and constitutional developments. Bellomo 162–73. [K1789 1–94.]
- Lecture 19. 35. Homologation of custom and reception. RFG2 311–352; RFG3 188–212; Watson 53–82. *Coutumes de la prevoste et vicomte de Paris* (*Documents*, Part XVI.C).
- Section 9. 36. Legal humanism. *Documents*, Part XV. Pithou on the *Collatio* (*Documents*, Part XV).
- Discussion 9. 37. Humanists, humanism and the law. RFG2 280–310; RFG3 169–187. Bodin on political theory (*Documents*, Part XV).

Week 11

- Lecture 20. 38. The 17th and 18th centuries—Political, constitutional, and intellectual developments. RFG2 353–376, 406–37; RFG3 313–67. [K1789 161–281.]. The *Grandes ordonnances*. Decree, *Tametsi*; *Ordonnance* of Blois; *Ordonnance pour la procédure civile* (*Documents*, Part XVI.A, B, D (pp. 2–4, 5–6)).
- Lecture 21. 39. The *Grandes ordonnances*. Decree, *Tametsi*; *Ordonnance* of Blois; *Ordonnance pour la procédure civile* (*Documents*, Part XVI.A, B, D (pp. 2–4, 5–6)). The institutes of national law (*Documents*, Part XVII).
- Section 10. 40. Compilations, proto-codification, codification. *Documents*, Parts XVI and XVII.
- Discussion 10. 41. The institutes of national law (cont'd). (*Documents*, Part XVII). Intellectual developments and the law (Lecture outline for Lecture 20)

Week 12

- Lecture 22. 42. Spanish scholastics, “elegant jurists,” the natural law school, and the *usus modernus pandectarum*. Watson 83–98. The academics in action. Pufendorf on wild animals (*Documents*, Part XVIII).
- Lecture 23. 43. The academics in action (cont'd). Pufendorf on wild animals (*Documents*, Part XVIII).
- Section 11. 44. The relation between abstract ideas and legal results. *Documents*, Part XVIII.

- Discussion 11. 45. Domat and Pothier. Watson 99–125. Domat on marriage, wild animals, and witnesses; Pothier on marriage and wild animals (*Documents*, Part XIX). (*Documents*, Part XIX).

Week 13

- Lecture 24. 46. Final Lecture. The achievements and failures of the *ancien régime*. The road to codification. van Caenegem, 115–46, 170–97; RFG3 269–285. [K1789 282–331].

Section 12. Review. No specific assignment.

CALENDAR

Mon., Jan. 28	Assignment 1	Introduction to the course. Introduction to Roman law
Wed., Jan. 30	= Assignment 2	The legacy of the ancient world: Roman law. How the story came out
Fri., Feb. 1	= Assignment 3	The legacy of the ancient world: Christianity
Mon., Feb. 4	= Assignment 4	Two “barbarian” law codes—Aethelberht
Wed., Feb. 6	= Assignment 5	Two “barbarian” law codes—Gundobad
Thu., Feb. 7	= Assignment 6	The “barbarian” invasions; Aethelberht and Gundobad compared
Fri., Feb. 8	= Assignment 7	Reflections on “fundamental legal categories”
Mon., Feb. 11	= Assignment 8	Carolingian institutions and “feudalism”
Wed., Feb. 13	= Assignment 9	Eleventh-century reforms and a glimpse at <i>regnum</i> and <i>sacerdotium</i> , to the end of the 13th century. The Collection in 74 Titles
Thu., Feb. 14	= Assignment 10	Eclectic sources of law
Fri., Feb. 15	= Assignment 11	New Testament extracts on marriage
Mon., Feb. 18	= Holiday	
Wed., Feb. 20	= Assignment 12	The revival of academic law study: Roman law
Thu., Feb. 21	= Assignment 13	Wild animals in the glossators.
Fri., Feb. 22	= Assignment 14	Marriage in the glossators.
Mon., Feb. 25	= Assignment 15	The institutions of canon law.
Wed., Feb. 27	= Assignment 16	The revival of academic law study: Romano-canonical procedure
Thu., Feb. 28	= Assignment 17	How do we design a procedural system?
Fri., Mar. 1	= Assignment 18	Reform and the “twelfth-century renaissance.”
Mon., Mar. 4	= Assignment 19	Marriage litigation in the High Middle Ages
Wed., Mar. 6	= Assignment 20	<i>Coutumiers</i> and <i>fuegos</i>
Thu., Mar. 7	= Assignment 21	How to read a case
Fri., Mar. 8	= Assignment 22	The institutional history of the 12th and 13th centuries
Mon., Mar. 11	= Assignment 23	Courts and <i>coutumiers</i> in France
Wed., Mar. 13	= Assignment 24	Political ideas of the 12th and 13th centuries
Thu., Mar. 14	= Assignment 25	<i>Usatges</i> and Beaumanoir.
Fri., Mar. 15	= Hour exam	(Will cover Assignments 1–25)

Mon., Mar. 18	—	Fri., Mar. 22	Spring Vacation
Mon., Mar. 25	=	Assignment 26	The fourteenth and fifteenth centuries—Political and constitutional developments
Wed., Mar. 27		Assignment 27	The commentators.
Thu., Mar. 28	=	Assignment 28	Law and politics in the 13th century.
Fri., Mar. 29		Assignment 29	The formation of a persecuting society? (Short paper topics must be chosen by this date.)
Mon., Apr. 1	=	Assignment 30	Commentators on wild animals
Wed., Apr. 3	=	Assignment 31	Courts and case reports
Thu., Apr. 4	=	Assignment 32	Marriage in legal theory and legal practice
Fri., Apr. 5	=	Assignment 33	Courts and case reports (cont'd)
Mon., Apr. 8	=	Assignment 34	“Renaissance” Europe—Political, intellectual and constitutional developments
Wed., Apr. 10	=	Assignment 35	Homologation of custom and reception
Thu., Apr. 11	=	Assignment 36	Humanists, humanism and the law
Fri., Apr. 12	=	Assignment 37	Legal humanism (Section will meet in the Root Room of the HLS Library)
Mon., Apr. 15	=	Assignment 38	The 17th and 18th centuries—Political, constitutional, and intellectual developments. The <i>Grandes ordonnances</i> .
Wed., Apr. 17	=	Assignment 39	The institutes of national law. Intellectual developments and the law.
Thu., Apr. 18	=	Assignment 40	Compilations, proto-codification, codification. (Statement of term papers due.)
Fri., Apr. 19	=	Assignment 41	The institutes of national law (cont'd). Intellectual developments and the law (cont'd).
Mon., Apr. 22	=	Assignment 42	Spanish scholastics, “elegant jurisprudes,” the natural law school, and the <i>usus modernus pandectarum</i> . Pufendorf on wild animals.
Wed., Apr. 24	=	Assignment 43	Pufendorf on wild animals (cont'd).
Thu., Apr. 25	=	Assignment 44	The relation between abstract ideas and legal results. (Last date for turning in short paper drafts.)
Fri., Apr. 26	=	Assignment 45	Domat and Pothier.
Mon., Apr. 29	=	Assignment 46	Final Lecture
Wed., May. 1		No assignment	Review.
Fri., May. 10			Final draft of short paper due.