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<td>Monastic scholars</td>
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<td>Early scholasticism</td>
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<td>Gratian–&gt;decretists</td>
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<td>1700–1900</td>
<td>Modern: codification</td>
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### Roman Legal History

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<th>Period</th>
<th>Description</th>
<th>Politics</th>
<th>Sources of Law</th>
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</thead>
<tbody>
<tr>
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<td>Archaic</td>
<td>City-State</td>
<td>XII Tables</td>
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<tr>
<td>250-1 BC</td>
<td>Pre-Classical</td>
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<td>1-250 AD</td>
<td>Classical</td>
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<td>250-500 AD</td>
<td>Post-Classical</td>
<td>Dominate</td>
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<td>550 AD</td>
<td>Justinian</td>
<td>Byzantine</td>
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### English Legal History

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<th>Period</th>
<th>Description</th>
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<th>Sources of Law</th>
<th>Roman Influence</th>
<th>Continental Contrast</th>
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<tbody>
<tr>
<td>600-1150</td>
<td>Age of Tort</td>
<td>Tribal –&gt; Feudal Monarchy</td>
<td>Barbarian Codes, Custom</td>
<td>Non-existent</td>
<td>Weak</td>
</tr>
<tr>
<td>1150-1300</td>
<td>Age of Property</td>
<td>Feudal monarchy</td>
<td>Custom, Case Law, Statute</td>
<td>Strong on Method</td>
<td>Same</td>
</tr>
<tr>
<td>1300-1500</td>
<td>Age of Trespass</td>
<td>National monarchy</td>
<td>Case Law</td>
<td>Weak</td>
<td>Quite Strong</td>
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<tr>
<td>1500-1700</td>
<td>Age of Equity</td>
<td>Absolute Monarchy –&gt; Const. Monarchy</td>
<td>Case Law, Statute</td>
<td>Strong in spots</td>
<td>Strong</td>
</tr>
<tr>
<td>1700-1900</td>
<td>Age of Reform</td>
<td>Const. monarchy</td>
<td>Case law, Some Codification</td>
<td>Submerged but there</td>
<td>Very strong</td>
</tr>
</tbody>
</table>

Medieval Studies 119
Constitutional and Legal History of Medieval Continental Europe
Prof. Donahue, Mr. Straus

Get a copy of the information sheet, syllabus, and outline of today’s class from Mr. Straus.

If you are registered for the course, get a copy of the first installment of the coursepack. The documents and a selection of secondary readings are available on the course website, keyed to the day on which they are assigned.
I. INTRODUCTORY REMARKS

1. Chronological range: 450 AD to 1648, with looks backward 400 years and forward 250 more. Geographical range: all of Continental Europe with occasional glances at England. How to avoid superficiality?

2. By testing our generalities against three particular topics:
   a. The capture of wild animals as the foundation of “property.”
   b. The formation of marriage
   c. Witnesses in both criminal and civil procedure

3. By relating our generalities to one particular region: France (with England, Germany, Italy, Spain, the Low Countries, giving examples for comparison and contrast)

4. By checking our generalities against the documents in the coursepack.

II. WHAT IS THIS COURSE ABOUT?

1. law ← liegan, not lecgan, i.e., ‘lie’ not ‘lay’

2. lex vs. ius: loi vs. droit; Gesetz vs. Recht; wet vs. recht; diritto vs. legge; derecho vs. ley

3. Gratian, *Concordance of Discordant Canons*, c. 1140: “Mankind is ruled by two things, natural law and custom. The law of nature is what is contained in the Mosaic law and the Gospels, in which everyone is ordered to do to another what he wants done to himself and is prohibited from doing to another what he does not want done to himself.”

4. ‘Constitution’

5. ‘Civil law’ vs. ‘common law’

III. PERIODIZATION

1. The problem of periodization.

2. Look at the tables at the top of the outline. We can organize the material:
   a. By events.
   b. By intellectual centers.
   c. By formal sources of law.
   d. We can try to create a matrix of all three.
   e. Some tag phrases with which to begin:
      450–1100    age of the primitive collections
      1250–1500    age of academic application
1450–1550 age of academic bifurcation
1550–1750 age of bureaucracy and philosophers
1750–1917 age of codification

f. In all these ages except perhaps for the 1550–1750 period there was a close parallel between the canon law developments and the Roman and some with the national

3. The codification phenomenon.
   a. At the beginning:
      i. literacy
      ii. the beginnings of a realization that law belongs in separate category
      iii. realization of the connection between what we would call the state, and what they called different things, and the law
   b. At the end:
      i. a long period of professional development
      ii. sources of law proliferating and becoming unmanageable
      iii. person of power and/or genius
   c. Taking Justinian, the Napoleonic Code and the Uniform Commercial Code as examples of ‘end-codifications’, the differences may be more important than the similarities:
      i. Justinian is a collection of texts, the Napoleonic Code and Uniform Commercial Code are systematic rewritings of the law.
      ii. The politics seem to be similar between Justinian and Napoleon but not Karl Llewelyn, the drafter of the UCC.
      iii. Justinian is legally conservative; Napoleon and Llewelyn are much less so.
   d. ‘True codes’, i.e., codes that follow the model of the 19th European codes, are:
      i. authoritative
      ii. exclusive
      iii. systematic
Applying these tests there is no Western code as opposed to collection before the Prussian Civil Code of 1794; this is followed by the Napoleonic code of 1804, and by the Austrian Civil Code of 1811.
   e. At the end of the table above for Roman law, we have the great Roman collections: 529–533 A.D. They are going to become
hugely important in our story.

The ‘Codification’ of Roman Law

220 A.D. — End of classical period; no official collection except the praetor’s *edictum perpetuum* (perpetual edict), a collection of formulae and rules of procedure published by the chief judge of Rome, known as the praetor. Even before the end of the classical period unpublished decisions of the emperor, known as constitutions, were becoming an increasingly important source of law.

439 A.D. — Theodosian Code (begun 429). About 1/3 to 1/2 of the Theodosian Code survives. The *pays de droit écrit*, the land of the written law, in southern third of France, owes its name to the fact that for a long period Roman law as represented by the Theodosian Code was regarded as being in force there.

527 A.D. — Justinian becomes emperor

529 A.D. — Publication of the first Code

530–533 A.D. — Compilation of the Digest

533 A.D. — Publication of the Digest and the Institutes

534 A.D. — Publication of the second Code

534–565 A.D. — Justinian’s Novels

Justinian’s first Code does not survive, but the rest of his work does survive:

1. The *Digest* or Pandects, a mammoth collection of extracts from the writings of the classical jurists from roughly 100 BC to roughly 220 AD.

2. The *Institutes*, an elementary and quite short textbook following that of the second-century jurist Gaius.

3. The *Code*, a compilation of imperial constitutions (i.e., rulings by the emperor on matters of law) from roughly 100 AD to Justinian’s time.

4. The *Novels*, a private collection, probably made shortly after Justinian’s death, of 168 constitutions that he promulgated after 534.

Together, these became known as the *Corpus Iuris Civilis*. Extracts from the *Institutes*, the *Digest* and *Code*, designed to show how these books are arranged, may be found in Part I of the coursepack. Applying our tests of authoritative, systematic, and exclusive to the parts of the CJCiv: The *Digest*, *Code*, and *Institutes* are all authoritative. The *Digest* is exclusive in its sphere but not systematic, the *Code* is not exclusive nor is it systematic, and the *Institutes* are systematic but not exclusive. The *Novels* are neither authoritative nor exclusive nor systematic, though the constitutions that they contain may be regarded as authoritative.

Sources:

*Codex Theodosianus*, P. Meyer & T. Mommsen eds., 2 vols. (1905) (includes the Sirmondian Constitutions and the Theodosian Novels)

*The Theodosian Code and Novels and the Sirmondian Constitutions*, C. Pharr trans. (1952)

*Corpus Iuris Civilis*, T. Mommsen, P. Krüger, R. Schöll, W. Kroll eds. (var. ed. 1911,
1915, 1904) (Many times reprinted, known as 'the Berlin stereotype edition')

*The Civil Law*, S.P. Scott trans., 17 vols. in 7 (1922) (only complete English trans. of the *Corpus Iuris Civilis*, must be used with caution)


*The Institutes of Justinian*, J.B. Moyle trans., 5th ed. (1913, repr. 1967)