An online version of this syllabus may be found at http://www.law.harvard.edu/faculty/cdonahue/courses/ELH/elhfas/syllabus/. In that version the hyperlinks work.

MEDITIVAL STUDIES 117:
CONSTITUTIONAL AND LEGAL HISTORY OF MEDIEVAL ENGLAND

Spring 2015

Tentative Syllabus

Professor Donahue

Mr. Straus

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Requirements

There are four requirements for credit in the course: (1) a short 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., 13 Mar.); (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 2370. 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 3007). 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 10:10 to 11:00 (Room Sever 102). By and large, Mr. Straus 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. Not all classes have documentary assignments, but those which do will devote a considerable amount of time to the documents, and 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 (without the law students). You should bring the multilithed documentary Materials (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 I have previously given this course, I 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 is a survey course on the constitutional and legal history of England from the time of the Anglo-Saxon invasions to the end of the Tudor period. We begin with a barely literate, largely pagan, people, whose laws and institutions are best studied with the techniques of anthropology and historical linguistics, and we end with a major European power, about to become a world power, whose laws and institutions, though different from our own, are recognizably the ancestors of those of Great Britain and the United States today. Our chronological span covers roughly 1000 years, from Aethelberht (r. ?584–616) to Elizabeth I (r. 1558–1603). We have 24 lectures (Mon. & Wed. 11:10 to 12:00), 11 “discussion classes” (Fri. 11:10 to 12:00), and 11 sections (to be arranged) in which to do it. (There will be a separate section for the law students (Tue., 9:40 to 11:00); graduate students in the FAS should attend this section. The Friday classes are not required for the law students and FAS graduate students.)

Obviously we cannot cover in depth all aspects of English constitutional and legal history in this long period. One way to handle the problem would be to deal with a few topics in depth and ignore the rest. Such an approach is particularly tempting for historians like ourselves who believe that legal and constitutional history can only be properly understood in its social, economic and political context and who also believe that no one should study history after high school without looking at primary source material. On the other hand, there is something about that great sweep of development from the early Middle Ages to the early modern period that we find irresistible. Some place in the university someone ought to try to “put it all together.”

We have divided our 1000 years into four major periods: Anglo-Saxon, High Middle Ages, Later Middle Ages, Early Modern. In each period we will consider first the major historical developments, particularly the “constitutional” developments, in the period, then the legal institutions and finally, documents illustrating one or more of the central themes of the substantive law in the period. Thus, the first part of the course is devoted to the emergence of the kingdom of England and of the concept of legal wrong in the Anglo-Saxon period. The second part is devoted to how institutions of royal governance interacted with the lords, tenants, and the church to produce notions of private property in feudal England. The third part is devoted to how the notion of wrong split into what today we call contract and tort against a backdrop in which Parliament emerged as a major force in English governance. And the fourth part is devoted to how ideas of equity shaped property, contract and tort during the political, social and religious conflicts of the late medieval and early modern periods.

The focus on particular substantive topics in each period involves a judgment that these topics best illustrate our overall theme of how the relationship between “law,” on the one hand, and politics, society, and economics, on the other, changed over 1000 years. It also involves distortions. The first of these has to do with the topics themselves. Our story of how the ideas of tort and contract came to separate does not end until Slade’s Case in
1602, considerably after our “age of trespass” has formally come to an end. In order to see how equity shaped the law of property in the early modern period, we are going to have to go back and pick up a story that we will have left at the Statute Quia Emptores in 1290. These discontinuities, however, are not as troubling as what we will have to omit: Criminal law is a topic that we will barely cover. The older views on this topic have been largely upset, but the modern research is too disparate and inchoate to summarize in a survey course. Nor will we deal with any other “public law” topic in depth. A diachronic study of any of the modern public law topics, with the possible exception of tax law, is fraught with difficulties, while a synchronic study of public law in any given period leaves us, at least in the present state of research, without much that we can carry over to the next period. We will, however, consider a number of public law topics in our surveys of constitutional developments.

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Background

Probably everyone in this course has some pieces of the necessary background knowledge—a course in Chaucer, for example, is a marvelous introduction to much of what we will be doing, as is, in a somewhat different way, a course in Shakespeare—and no one, including ourselves, has all the necessary background knowledge. We will assume that you have never taken a course in English history and that you know no Latin and no French. We will explain what you need to know of these topics in class.

If you have taken a medieval and/or early modern English legal history course someplace else or if you have had an English constitutional 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.

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Readings

We will distribute in class, installments of:

C. Donahue, *Materials on English Constitutional and Legal History* (*Materials*)

The *Materials* contain all the documents that we will be discussing in class, and they also contain some secondary readings that we will be discussing in class. They do not, however, contain any attempt to give an overview of the themes of the course. For this, you should probably read a couple of good books, because there is no really good book that covers all that this course covers.

We are asking you to buy:


For the rest, the assignments contain some additional suggestions for secondary reading, and some advice about each of them follows. As we said before, however, the gist of course is in the documents not in the secondary readings. Ideally one would read the extracts from *Baker* indicated in the assignments, and one relatively short additional book for each of the four sections of the course. There are substitutes if you get into time trouble. You should do some secondary reading, but what you read is up
Baker is an English legal historian whose specialty is the 16th century. His book is designed for English law students (who, like you, are undergraduates). He treats the history of law almost entirely independently of constitutional developments. It’s a good book for its purpose, but it contains a great deal about developments after our period. When you read Baker, therefore, you should be particularly careful about dates. We have required Baker this year because previous students in the course found its discussions of legal doctrine helpful. Baker is arranged in an entirely different way from the way in which the course is organized, but we have included references in the syllabus at the relevant places.

Bryce Lyon, *A Constitutional and Legal History of Medieval England*, 2d ed. (New York: Norton, 1980) (*Lyon*) is a text book that covers most of what we will be doing in this course. *Lyon* is “temporarily out of stock” at the publishers. The current edition is on reserve in the Law School. An older edition is available in both Lamont and the Quad libraries. We have included page references to the latter in the syllabus. There are also a few extracts from *Lyon* in the *Materials* to help us through the narrative history of our periods.


Each of these books has its strengths and weaknesses. Brown, Elton and Warren were all first-rate historians. They are writing, however, for English audiences, and they assume a familiarity with the basic narrative history of the periods with which we are dealing. (H.R. Loyn’s *Governance of Anglo-Saxon England* [Stanford: Stanford U. Press, 1984], the first volume in the Brown-Warren series [also on reserve], is particularly recommended for those who are interested in the early period.) You will discover that Brown and Warren’s idea of governance is not quite the same as the idea of constitution that we will try to develop in the course, and they treat legal developments only in passing. Elton is a bit too detailed for our purposes, and he cannot resist engaging in polemics with virtually every historian who treated his topics before him. The readings and documents in the *Materials* are designed to make up for these deficiencies both by giving much more of the legal background and by providing different points of view.

*Lyon* is a solid, if uninspiring, introduction to the constitutional and legal history of medieval England, a text book with all the deficiencies of the genre. It probably covers the area that we are going to cover in this course better than any other single book, and it is particularly recommended for those of you who find the “straight history” parts of the course going too fast for comfort.

*Jolliffe* was not written as a text book, and he assumes a basic knowledge of the material given in *Brown* and *Warren*. *Jolliffe* is not free from error, and the book is woefully unbalanced. His treatment of legal development, social and economic
development, and the role of the church is quite inadequate. Yet, in some ways, the book is a flawed masterpiece. The organizing theme, the relationship between the exercise of governmental power and community, is certainly one of the most, if not the most, critical in the development of the medieval English constitution. The book is, as Helen Cam said in her highly critical review of the first edition (EHR 54 [1939] 489), “brilliant, suggestive, provocative and provoking.”

In previous renditions of this course we have used Carl Stephenson & F.G. Marcham, eds., *Sources of English Constitutional History*, vol. 1, rev. ed. (New York: Harper & Row, 1971). That book is also now out of print. Many of the documentary assignments in the *Materials* are drawn from it; the book is on reserve for those who want to write papers on the basis of other documents in it, and a list of documents from the book that are in the *Materials* can be found in the beginning pages of the *Materials*.

**Papers and exams**

The paper(s) should present an idea supported by evidence (primary materials please). The paper(s) should illustrate some broad theme about the relationship of governance, law and society. We will suggest paper topics to you on the basis of your one-paragraph summaries of the reading that you turn in at each section. If you have not already chosen a paper topic by Thursday, 26 March, you must do so by that date. The first draft of the short paper is due no later than Wednesday, 29 April (most of you, we hope, will do it much earlier than that). We will return the draft with comments. You should turn in the final draft before the end of reading period (Fri., 8 May). A fuller description of the paper requirement and some suggested topics will be available from Mr. Straus at the first section meeting.

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 our four periods. 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, 16 April. Students in the past who have taken the paper option 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 503, and his office hours are from 12:45–2:45 on Mondays, or by appointment. There is a sign-up sheet for office hours on the door. Signing up for the office hours is usually not necessary at the beginning of the term, but it will be by the end. Mr. Straus, who will be leading most of the sections, will have office hours at a time and place to be announced later.
**Syllabus Proper**

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### SYLLABUS

**Topic I. The Age of Tort**

*General Readings: Baker, 1–10, 27–34, 212–19. Loyn (the whole book); or Jolliffe 1–138; or Lyon 3–103; or Warren 1–22 (this last only recommended for those who are already familiar with Anglo-Saxon England).*

**Assignment**

**Mon., 26 Jan.**

Introduction; the legacy of the ancient world (herewith some brief remarks on Roman law); the "reception" question — *Materials § 1* (CD bk. rev., outlines, Justinian extracts).

**Wed., 28 Jan.**


**Fri., 30 Jan.**

Introduction; the legacy of the ancient world (herewith some brief remarks on Christianity); — *Materials § 1* (Letter to the Romans, outlines).

**Mon., 2 Feb.**


**Wed., 4 Feb.**

The conquest of England and the feudalism debate — *Materials §§ 3A–3B, 3D–3E*, pp. 88–99, 115–32 (narrative, White bk. rev., Domesday Book extracts). [Try to get a sense for what the debate is all about and how one might use a document like Domesday Book to come to some conclusions about the debate.]

**Thu., 5 Feb.**

Kings, lords and families in Anglo-Saxon England; Aethelberht’s Code — *Materials § 2*, pp. 49–78 (Aethelberht’s code, Simpson article, notes)

**Fri., 6 Feb.**


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**Topic II. The Age of Property**


**Assignment**

**Mon., 9 Feb.**


**Wed., 11 Feb.**

Thu., 12 Feb. Norman and Angevin institutions: the Exchequer and the courts — 


Wed., 18 Feb. The assizes of Henry II as seen by the barons: *Magna Carta* —
*Materials § 5A (Magna Carta and the Treaty of Winchester).


Thu., 26 Feb. Property and the family — *Materials § 5B (Statutes *De Donis* and *Quia Emptores*) (Section).


Thu., 5 Mar. 13th century governance (overview) — Review *Materials §§ 5C–5D (outline, documents [S&M, Nos. 47–9, 51–2], narrative); *Materials § 5H (S&M No. 54G) (Section).


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**Topic III.**

*The Age of Trespass*


**Assignment**

**Wed., 11 Mar.** Introduction to the 14th century; household, council, parliament — *Materials §§ 6A–6B (Articles against Gavaston; S&M Nos. 57–8, 60–2, 63A–63E, 64; narrative). [This assignment belongs with Topic III, but is put here because of the way the calendar works. It will not be covered on the hour exam.]]


**Thu., 26 Mar.** Personal actions — Review *Materials §§ 7C, 7E.*
Fri., 27 Mar.
Personal actions revisited — Review Materials §§ 7C, 7E (Section).

Mon., 30 Mar.
King making and unmaking — Materials § 6G (documents concerning the depositions of Edward II, Richard II, and Edward V); review Materials § 6A (Articles against Gavaston).

Wed., 1 Apr.
Order, social structure and the law, 1348 – 1500 — Materials § 6F (Statute of Labourers; wage rates; S&M Nos. 62D, 64C, Statute 1 Henry IV; Statute, 8 Edward IV; Sumptuary Statute; S&M Nos. 73F, 74I, 81C).

Thu., 2 Apr.
Order, social structure and the law, 1348 – 1500 — Review Materials § 6F (Section).

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Topic IV.
The Age of Equity


Assignment

Fri., 3 Apr.
Pleading and the legal profession — Materials § 7A (a Y.B. case).
(Class will meet in the Root Room of the Harvard Law School Library).

Mon., 6 Apr.
Littleton, Fortescue, St. German: Idea of law, c. 1500 — Materials §§ 8A, 9A (S&M no. 73, 74A, S&M 74B–N; Littleton, Fortescue, St. German extracts).

Wed., 8 Apr.
The origins and development of equity; the search for a forum — Materials § 9C (S&M no. 71; petitions; cases; St. German).

Thu., 9 Apr.

Fri., 10 Apr.
Late medieval/early modern legal theory (overview) — Review Materials §§ 8A, 9A.

Mon., 13 Apr.
Ecclesiastical Jurisdiction, 1250–1600 — Materials § 9B (Donahue article; Circumspecte Agatis; Articuli Cleri; S&M Nos. 62E, G, 64F, 69B, 74B–C; Dolling c. Smith).

Wed., 15 Apr.

Thu., 16 Apr.
Ecclesiastical Jurisdiction, 1250–1600 — Review Materials § 9B (Section).

Fri., 17 Apr.
From late medieval to early modern: governance, law, and society (overview) — Materials § 8A–8B (chronology, documents, narrative).

Mon., 20 Apr.
Uses and the Statute — Materials § 9C, 9E (S&M no. 71C; S&M nos. 64E, 74H).

Wed., 22 Apr.
Slade's Case — Review Materials § 7E (Orwell, Pickering, Holygrave, Slade's Case).

Thu., 23 Apr.
St. German on uses — Review Materials § 9A, 9C (St. German; S&M no. 71C) (Section).
Fri, 24 Apr. Late medieval/early modern property (review) — Review Materials § 5B (Statutes De Donis and Quia Emptores); Materials § 9A, 9C (St. German; S&M no. 71C).

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**CALENDAR**

The section has yet to be arranged, but the section meetings are listed here as if they were on Thursdays.

<p>| Mon., 26 Jan. | = Assignment 1 | Introduction; the legacy of the ancient world – Roman law |
| Wed., 28 Jan. | = Assignment 2 | Anglo-Saxon constitution |
| Fri., 30 Jan. | = Assignment 3 | The legacy of the ancient world – Christianity |
| Mon., 2 Feb.  | = Assignment 4 | Anglo-Saxon constitution (cont’d) |
| Wed., 4 Feb.  | = Assignment 5 | The conquest and feudalism |
| Thu., 5 Feb.  | = Assignment 6 | Aethelberht (Section) |
| Fri., 6 Feb.  | = Assignment 7 | Anglo-Saxons (overview) |
| Mon., 9 Feb.  | = Assignment 8 | Regnum and sacerdotium, 1066–1215 |
| Wed., 11 Feb. | = Assignment 9 | Glanvill |
| Thu., 12 Feb. | = Assignment 10 | Norman and Angevin institutions (Section) |
| Fri., 13 Feb. | = Assignment 11 | Glanvill |
| Mon., 16 Feb. | = Holiday      | |
| Wed., 18 Feb. | = Assignment 12 | Magna carta |
| Thu., 19 Feb. | = Assignment 13 | Angevin governance (overview) (Section) |
| Fri., 20 Feb. | = Assignment 14 | The Polestead saga |
| Mon., 23 Feb. | = Assignment 15 | The assizes of Henry II revisited |
| Wed., 25 Feb. | = Assignment 16 | The king and the barons |
| Thu., 26 Feb. | = Assignment 17 | Property and the family: The statutes De Donis and Quia Emptores (Section) |
| Fri., 27 Feb. | = Assignment 18 | The Polestead saga (cont’d) |
| Mon., 2 Mar.  | = Assignment 19 | Parliament |
| Wed., 4 Mar.  | = Assignment 20 | Court structure and social structure c1300 |
| Thu., 5 Mar.  | = Assignment 21 | Thirteenth century governance |
| Fri., 6 Mar.  | = Assignment 22 | The Problem of Proof |
| Mon., 9 Mar.  | = Assignment 23 | Theory of kingship and the English and French constitutions c1300 |
| Wed., 11 Mar. | = Assignment 24 | The 14th century—household, council, parliament |
| Thu., 12 Mar. | = Review        | (Section) |
| Fri., 13 Mar. | = Hour exam     | (will cover Assignments 1–22) |
| Mon., 23 Mar. | = Assignment 25 | Trespass |
| Thu., 26 Mar. | = Assignment 27 | Personal actions (Section, final date for selecting topic for short paper) |
| Fri., 27 Mar. | = Assignment 28 | Personal actions revisited |
| Mon., 30 Mar. | = Assignment 29 | King making and unmaking |
| Wed., 1 Apr.  | = Assignment 30 | Order, social structure and the law, 1350 – 1600 |</p>
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