

## ROMAN LAW

### PRINCIPATE CONSTITUTIONAL OUTLINE, PROCEDURE OUTLINE

I. Chronology: Principate 27 BC – 284 AD; Dominate: 284–476 AD (in the West). There is some controversy as to where to place the beginning of the Dominate. 284 AD, the beginning of the reign of Diocletian, seems best. He seems to have been the first emperor to use the word *dominus*, from which we get ‘dominate’ as part of his official title.

1. 27 BC – 284 AD: Principate

- a. 27 BC – 69 AD: Julio-Claudian emperors. Augustus, Tiberius, Gaius (called Caligula), Claudius (made emperor by the praetorian guard), Nero (of burning of Rome fame)
- b. 68/69 AD, the year of the four emperors: Galba, Otho, Vitellus, Vespasian. The succession problem becomes public
- c. 69–96 AD: Flavian emperors (soldiers all): Vespasian, Titus (sacks Jerusalem), Domitian (Titus’ brother)
- d. 96–180 AD: “5 good emperors”: Nerva, Trajan, Hadrian, Antoninus Pius, Marcus Aurelius. The first three were unrelated, the last two began a dynasty of Antonines.
- e. 180–235 AD: The Antonine dynasty merged into the Severan dynasty: Commodus (Marcus Aurelius’ son, a disaster as an emperor), Septimius Severus (a tough soldier and a good administrator), Caracalla (of baths and *constitutio Antoniniana* fame), Elagabalus (a sun-worshipper from the East), Severus Alexander (the last of the line). The last great classical jurist died shortly after the end of the Severan dynasty.

The chronology continues; the following will be considered in class on 9/22/2020:

- f. 235–284 AD: “30 tyrants”

2. 284–565 AD: Dominate

II. The Constitution of the Principate

1. *The Achievements of the Divine Augustus*. At the end of his life, according to the document, Augustus wrote an autobiography called after his death *Res gestae divi Augusti*, the ‘Achievements of the Divine Augustus’. The full text is given the *Materials* (p. 1–3), and is too long to quote here. It jumps around quite a bit chronologically, but in a key entry toward the end Augustus says (no. 34, emphasis supplied):

“In my sixth and seventh consulships [27 BC], after I had extinguished civil wars, and at a time when with universal consent I was in complete control of affairs, *I transferred the republic from my power to the dominion of the senate and people of Rome*. For this service of mine I was named Augustus by decree of the senate, and the door-posts of my house were publicly wreathed with bay leaves and a civic crown was fixed over my door and a golden shield was set in the Curia Julia, which, as attested by the inscription thereon, was given me by the senate and people of Rome on account of my courage, clemency, justice and piety. After this time I excelled all in influence (*auctoritas*), although I possessed no more official power than others who were my colleagues in the several magistracies.”

The passage tells that what Augustus got back in turn for his having made the transfer was the title Augustus (cf. nos. 10, 34.2), a bunch of bay leaves, and a monument on a golden shield. He gave up being consul in 23 BC, and his notion was that he, like the senate, relied not on specifically legal power but on *auctoritas*. There was, in fact, more to it than that:

- a. Augustus also received the title *princeps senatus* ‘chief citizen of the Senate’ (no. 7.1). This was something new and its scope was undefined. Effectively, it seemed to give him control over the Senate, and of the *auctoritas* that it possessed.

- b. He also had *tribunicia potestas*, the ‘power of a tribune’ (no. 4.4; no. 10.1). Notice that it does not say that he was a tribune. Augustus was a patrician, and only plebeians could be tribunes. The *tribunicia potestas* gave him *sacrosanctitas*, nobody could touch him, and the power to veto the act of any magistrate or assembly, including the senate. These were essentially negative powers. The way that Augustus got things done was through his control of the Senate, and because of his control of the Senate, he thereby had control of the Republican magistrates, who continued pretty much as they had before.
  - c. He also had *proconsulare imperium*, the *imperium* of a proconsul, in all of the Roman provinces. Interestingly, the *Res gestae* does not say anything about this. Exactly how this *proconsulare imperium* was achieved has only recently been sorted out, and the story is too complicated to recite here. Suffice it say that the way in which it was achieved resulted in there being two types of provinces, imperial provinces that were under the direct control of the princeps and senatorial provinces that were subject only his overarching control because his *proconsulare imperium* trumped all others’.
  - d. Hence, it is clear that Augustus’ constitutional arrangements substantially altered the elaborate system checks and balances that had been the feature of the republican constitution. It also seems that that Augustus wanted to give the impression that the republican constitution was still in effect. He says in a number of places that he refused to assume to accept changes that would, in his view, have been inconsistent with the republican constitution, most notably in the case of the creation of new office of ‘supervisor of laws and morals’ (*cura morum et legum*): “[In 19 BC, 18 BC, and 11 BC, he says] the senate and the people of Rome agreed that I should be appointed supervisor of laws and morals without a colleague and with supreme power, but I would not accept any office inconsistent with the custom of our ancestors.”
  - e. The *Res gestae* never uses the word *imperator*, ‘emperor’, to describe Augustus. In this period, the word *imperator* meant a general, and more specifically it was a title that soldiers gave to a victorious general. Non-legal writers and inscriptions sometimes apply to the Roman emperor in Julio-Claudian period, but it does not occur in technical legal writing with that meaning until Gaius in the mid-2d century, and even there it is not nearly so common as *princeps*.
2. *Lex de imperio Vespasiani*. We have a bronze tablet that contains about half of a ‘law about Vespasian’s imperium’ that can confidently be dated to the year 70 AD The entire text is in the *Materials* (p. 3–5) with some good notes about the ambiguities and the scholarly debates. We focus on three passages here.
- a. “. . . it shall be lawful for him to make a treaty with whom he wishes, just as it was lawful for the deified Augustus, for Tiberius Julius Caesar Augustus, and for Tiberius Claudius Caesar Augustus Germanicus.” (Clause 1) The ellipsis at the beginning of the clause shows that this is a carryover from the now-missing first table. The missing part probably gave Vespasian the power to make war. The war-and-peace power had been exercised by the Senate with the approval of the comitia centuriata during the Republic. The *Res Gestae* do not mention it as among Augustus’ powers, but the drafters of 69 AD apparently thought that he had exercised this power.
  - b. “And that whatsoever persons seeking a magistracy, power, imperium, or charge of anything he commends to the Roman Senate and people and to whomsoever he gives or promises his electoral support special consideration of them shall be taken in every election.” (Clause 4) Tiberius had transferred the right to choose magistrates from the comitia to the Senate. Unlike most of the clauses in the *Lex de imperio* this one does not mention precedents from previous emperors. There are those who have thought that the

support for this clause comes by virtue of the emperor's tribunician power, which is not specifically mentioned. Be that as it may be, "special consideration" (*extra ordinem ratio*) is a marvelous phrase.

- c. "And that by whatever laws or plebiscites it has been recorded that the deified Augustus or Tiberius Julius Caesar Augustus and Tiberius Claudius Caesar Augustus Germanicus were not bound, from these laws and plebiscites Emperor Caesar Vespasian shall be exempt." (Clause 7) Note that the word 'emperor' is used to describe Vespasian, as it is elsewhere in the document, but that may be because he was a victorious general, not because it was the name of the job he was about to take. Much controversy surrounds the exemption of the emperor from certain statutes, which is found here explicitly for the first time, but is said to date back to Augustus, Tiberius, and Claudius. Suffice it to say here that without knowing what statutes Augustus, Tiberius, and Claudius were exempt from, it is hard to know what the import of this provision is.
3. That is the last official document that describes the constitution of the principate. Juristic writing as late as the early third century suggests that the jurists thought that it was still in effect.
    - a. During the reign of Hadrian (117–138 AD), the senate acquired the power to pass binding statutes.
    - b. Probably during the same reign, though there are hints of it already in the *Lex de imperio Vespasiani*, 'constitutions' (a word that we will have to come back to) of the emperor came to be thought of as having the same force of law as statutes.
    - c. The emperor's staff, originally simply the staff of a rich private citizen, gradually morphed into a public bureaucracy.
      - i. It was already there in the time of Augustus in the staff that he had to administer the imperial provinces.
      - ii. The emperors were enormously wealthy, and the fisc of Caesar (*fiscus Caesaris*) gradually came to surpass in importance the Roman public treasury that was nominally under the control of the senate.
      - iii. The emperor generated a very large amount of correspondence, some of which became the source of the imperial constitutions that we just mentioned. In the early second century, we begin to hear of an imperial chancery with defined offices and functions.
      - iv. The military commanders in the civil wars always had a body-guard. Augustus turned his into the praetorian guard, an important public military and police body with its prefect as an important officer.
      - v. Augustus revived the ancient office of prefect of the city (*praefectus urbi*). This officer, who was answerable to the emperor, took over supervision of administering the city, particularly with regard to the holding of public games and festivals.
      - vi. By the time of the Flavian emperors we hear of a *concilium principis*, the 'council of princeps', an official group of advisors to the emperor.
      - vii. In some cases dates are hard to come by, but it is generally thought that a consolidation and regularization of the imperial bureaucracy occurred in the reign, once more, of Hadrian.
    - d. One imperial constitution deserves particular mention in a discussion of the constitution in the broad sense. The *constitutio Antoniniana* issued by the emperor

Caracalla in 212 AD granted Roman citizenship to almost all the free men in the empire. Before that time the distinction between citizen and non-citizen was quite important in the law. It ceased to be so close to the end of the Principate.

4. “Never was a system of government which had so completely lost the conception of legitimacy as the Augustan principate.” Theodor Mommsen, *Römisches Staatsrecht* (‘Roman Public Law’) (1877).
  - a. He does not mean that the Principate lacked the concept of the rule of law. Indeed, it not only had the concept but in a large number of cases seemed to follow it.
  - b. He is referring specifically to the problem of succession. The constitution of the principate had no fixed way to achieve it. Sometimes acceptance by the senate seems to have played the most significant role. Frequently the army played a significant, indeed, totally decisive role. Heredity plays a role in some cases. The choice of the outgoing emperor is often significant. There is evidence that the emperors themselves were aware of the problem. Particularly in the later Principate, emperors would take on a co-emperor in an attempt to secure a smooth succession. That did not work often enough for it to become a rule.

## I. Procedure

1. In our madcap survey of Roman constitutional history, we divided it into 4 parts

<i>Period</i>	<i>Description</i>	<i>Politics</i>	<i>Sources of Law</i>
500–250 BC	Archaic	City-State	XII Tables
250–1 BC	Pre-Classical	Urban Empire	Statutes/Cases
1–250 AD	Classical	Principate	Cases
250–500 AD	Post-Classical	Dominate	Imperial Constitutions
527–565 AD	Justinian	Byzantine	Code

archaic—with the peregrine praetor basic institutions in place

pre-classical—the heyday of the Republic

classical—the Principate

post-classical — the Dominate

2. We need to fit procedure and sources of law into this scheme. We start with procedure. Why?
  - a. because it is going to turn out that procedure particularly in the late pre-classical and classical periods form a bridge that gets us from the constitution to the sources of law
  - b. Writing after the common-law forms of action had been abolished in England, F. W. Maitland noted: “The forms of action we have buried, but they still rule us from their graves.” Whatever maybe the case with Anglo-American law, it is eminently true Roman law. The forms of one form procedure influenced, one might almost say dictated, the substance of the law after the form of procedure has been abolished.
  - c. The following is more controversial: “[F]or legal purposes a right is only the hypostasis of a prophecy — the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it . . . .” Oliver Wendell Holmes, Jr, *Harvard Law Review*, 32 (1918) 42.. Holmes was not a legal realist, but the legal realists took that statement almost as an article of faith. What it means for our exercise is that we cannot understand the substantive statements in our sources of law unless we understand the procedures by which they were enforced.

3. Over the course of 1000 years of constitutional development we can discern 3 procedural systems: *legis actiones*, formulary, *cognitio extraordinaria*. (See the schematic in Lecture 03, slide 04):

500 Archaic 250 Pre-Classical 1 Classical 250 Post-Classical

*Legis Actiones*                      Formulary      *Extraordinaria Cognitio*  
125 *lex Aebutia*

These systems parallel the constitutional development, i.e. archaic = *legis actio*; the heyday of the Republic (pre-classical) = rise of the formulary system; Principate (classical) = height of the formulary system and beginnings of the *extraordinaria cognitio* (the *legis actio* was not quite dead); Dominate (post-classical) = the triumph of the *extraordinaria cognitio*

4. What is the relationship between these three systems of procedure and the political and constitutional developments that are periodized in the main table? In order to answer that question, we need to get some idea of how these procedural systems worked.
- Our sources are deficient.
  - Our principal source for the *legis actio* and formulary systems is the *Institutes* of Gaius.
  - Gaius was Roman jurist of the mid-2d century AD about whom we do not know much. His *Institutes*, which survives in only one not totally complete manuscript, can be dated with some confidence to the years 160–161 AD.
5. Gaius was interested in history. Here's what he says about the *legis actio* system (GI.4.11):

**“11.** The actions of the practice of older times were called *legis actiones*, either because they were the creation of statutes (of course in those days the praetorian edicts, whereby a large number of actions have been introduced, were nor yet in use), or because they were framed in the very words of statutes and were consequently treated as no less immutable than statutes. Hence it was held that a man who, when suing for the cutting down of his vines, had used the word ‘vines’, had lost his claim, because he ought to have said ‘trees’, seeing that the law of the Twelve Tables, on which his action for the cutting down of his vines lay, spoke of cutting down trees in general.” *Materials*, p. 36.

*Legis actio* means literally ‘action of the statute’; *legis actiones* is the plural, ‘actions of the statute’. Gaius clearly thought that those actions were very rigid, at least in their pleading, and he contrasts them unfavorably with the actions of his day, those of the formulary procedure, which he tells us were based on the edicts of the urban and peregrine praetors.

**“12.** Procedure by *legis actio* was in five forms: *sacramentum*, *iudicis postulatio*, *condictio*, *manus iniectio* and *pignoris capio*.”

*Sacramentum* is derived from the verb *sacro*, which means to dedicate something to a divinity. *Iudicis postulatio* means literally ‘asking for a judge’. *Condictio* is derived from *condico*, which is one of many verbs meaning ‘to promise’. *Manus iniectio* means ‘laying on of hand’ and *pignoris capio* ‘seizure of pledge’. We will not pursue the actions other than the *sacramentum* here.

**“13.** Procedure by *sacramentum* was of general application: one proceeded by it in any cases for which another procedure had not been prescribed by statute. It involved, for parties found guilty of falsehood, the same sort of risk as is involved at the present day by the *actio certae creditae pecuniae* owing to the *sponsio* which the defendant risks, in case he is denying the debt rashly, and to the counter-*stipulatio* which the plaintiff risks, in case he is suing for what is not due. For the defeated party forfeited the amount of the *sacramentum* by way of penalty, and this went to the public treasury, sureties for it being given to the praetor, instead of going

into the pocket of the successful party, as the penalty of the *sponsio* or the counter-*stipulatio* now does.”

*Sponsio* and *stipulatio* were both technical terms for formal promises. The *actio certae creditae pecuniae* was in Gaius’ day, the action under the formulary procedure for the recovery of a debt of a fixed amount. As Gaius sees it, the *sacramentum* procedure was analogous to a procedure available in his own day whereby both the plaintiff and the defendant risked paying a penalty if it turned out either that the claim was false or the denial was false. The payment of the penalty was secured by the parties’ making formal promises that they would pay the penalty in the event that they lost the case. If the analogy is correct, then the word *sacramentum* refers to the fact that the public authorities who got the penalty were supposed to use it for public religious rites. The analogy, however, may not be correct. The word *sacramentum* is also found in many contexts meaning any kind of oath.

Gaius next divides *sacramentum* procedure into two kinds *in personam* and *in rem*. Little of what he has to say about the *legis actio sacramentum in personam* has survived. He does, however, give us the details of the pleading when the action was *in rem*.

“16. If the action was *in rem*, movables, inanimate and animate, provided they could be carried or led into court, were claimed in court in the following manner. The claimant, holding a rod and laying hold of the actual thing — let us say a slave — said: ‘I affirm that this man is mine by Quiritary right according to his proper title. As I have declared, so, look you, I have laid my staff on him’, and at that moment he laid his rod on the man. His opponent spoke and did the selfsame things. (Slide 1) Both parties having thus laid claim, the praetor said: ‘Unhand the man, both of you.’ They did so.”

As has often been suggested, this dramatic scene may be symbolic of public intervention in a dispute that had previously been settled by force.

‘Quirites’ is an ancient name for citizens of Rome, so it is clear that the right being claimed on both sides is dependent on the fact that they are citizens.

“The first claimant then put the following question to the other: ‘I ask, will you declare on what title you have laid claim?’ and he answered: ‘By laying on my staff I have exercised my right.’ Thereupon the first claimant said: ‘Seeing that you have laid claim unrightfully, I challenge you by a *sacramentum* of 500 *asses*.’ And his opponent likewise said: ‘And I you.’ . . .”

The fact that the plaintiff asks the defendant state by what title he claims the property strongly suggests that he had not done so previously. But the defendant does not do so now. He simply asserts his right again.

The rest of the paragraph tells us that the praetor then declared who was to have interim possession of the thing pending the outcome of the litigation. In the next paragraph, it tells how a symbol of the thing claimed could be brought into court if the whole thing could not physically be brought into court. Then the text breaks off. It may have something about the how the case was tried; it may not have.

6. 3 fundamental questions with Gaius’ description:
  - a. How did the plaintiff get the defendant into court?
  - b. What is the significance of the bet?
  - c. What happened after the bet?

We cannot answer those questions on the basis of Gaius’ text. The first turns out to be a problem until the rise of the *extraordinaria cognitio*, we will say something about it at the

end of the lecture. Consideration of the other two must wait until the third quarter of the course when we consider the archaic law in its own right.

7. “But all these *legis actiones* gradually became unpopular. For the excessive technicality of the early makers of the law was carried so far that a party who made the slightest mistake lost his case. Consequently by the *Lex Aebutia* and the two *Leges Iuliae* they were abolished, and litigation by means of adapted pleadings, that is by *formulae*, was established.” GI.4.30.

The *lex Aebutia* is normally dated to c. 125 BC. The *leges Iuliae* probably both date from Augustan period. Under formulary procedure:

- a. The plaintiff summoned the defendant personally by *in ius vocatio*, literally, ‘a calling to law’, a procedure that goes all the way back to the XII Tables.
- b. Proceedings were bifurcated. Those *in iure*, literally ‘in law’, took place before the praetor. The praetor, however, did not try the case in the modern sense of the word ‘try’. Rather what happened before the praetor was that the parties agreed to or had imposed on them a formula that instructed a *iudex*, a judge, to try the case. The *iudex* was a private Roman citizen, not a state official, who had agreed to serve in this capacity. Proceedings before the *iudex* were said to be *apud iudicem*, literally ‘with the judge’ or even ‘in the house of the judge’.
- c. The formula was critical. It determined the law that the *iudex* was supposed to apply to the case. We will have occasion at the end of the lecture to look at some sample formulae that show how the formula became a source of law. Here’s an example of a simple one, the formula the basic action for debt that we mentioned earlier:

“Let Octavius be judge (*Octavius iudex esto*).” This clause is called the ‘nomination’ (*nominatio*).

“If it appears that N.N. [the Roman equivalent of our ‘D(efendant)’] ought to give 10,000 sesterces [a Roman coin and unit of account, close to \$10,000 worth of silver in modern values] to A.A. [the Roman equivalent of our ‘P(laintiff)’] (*Si paret Numerium Negidium [NmNm] Aulo Agerio [A°A°] HS X milia dare oportere*).” This clause is called the ‘claim’ (*intentio*).

“Let the judge condemn N.N. [to pay] A.A. 10,000 sesterces; if it does not appear let him absolve (*Iudex NmNm A°A° HS X milia condemnato; si non paret absolvito*).” This clause is called the ‘condemnation’ (*condemnatio*).

The possible formulae were not without limit. They had to be contained in the edict of the praetor, which he announced when he took office. Each praetor’s edict tended to follow that of previous praetors, and the edict developed over time. Its contents were finally fixed in the reign of Hadrian, probably around 138 AD, when it became known as the ‘perpetual edict’.

Let us look at a social implication that Gaius does not consider. The population of Rome in the time of Augustus was probably about 1 million people. There was only one urban praetor and one peregrine praetor. They were very important officials in the late Republic, less important in the Principate, but still important people who had plenty to do other than signing off on lawsuits. That suggests that Roman litigation rates in the classical period were much lower than they are in the Boston area today, and leads to the further speculation that the legal system that we are looking at was of concern only to the top 5–10% of the population.

- d. We know less about proceedings *apud iudicem* than we do about proceedings *in iure*. They were not in the purview of jurists like Gaius but in the purview of rhetoricians like Cicero and Quintilian. The *iudex* seems to have followed whatever procedures he thought

- appropriate. There were no rules of evidence in this period. The *iudex* did not render a reasoned judgment, and there was no appeal from his decision.
- e. Judgments had to be in money (*condemnatio pecuniaria*, ‘condemnation in money’)
  - f. Execution of the judgment was the responsibility of the successful plaintiff. S/he might have to return to the praetor if the defendant proved unwilling or unable to pay. The ultimate sanction was to force the defendant into a kind of bankruptcy known as *bonorum emptio*, ‘purchase of goods’, or to obtain enforcement against the goods of the defendant by a process known as *cessio bonorum*, ‘cession of goods’.
  - g. The strict rule of *condemnatio pecuniaria* did not apply to actions of the praetor himself. There were separate types of procedure, known as interdicts, where the praetor issued an order, and there were no immediate proceedings *apud iudicem*. There was a wide variety of interdicts. An interdict might, for example, order the defendant to return to the plaintiff property that the defendant holds of the plaintiff at will (*precario*). If the defendant obeys, that is the end of the matter. If s/he does not (claiming, for example, that s/he does not hold at will), a *iudex* or an arbiter will be appointed to determine if the defendant has violated the order.
8. The jurists of the Middle Ages created out of the scraps and fragments that survive concerning the *extraordinaria cognitio* and out of medieval practice what is called Romano-canonical procedure, the basis of the civil, and to some extent the criminal, procedure of the European continent today. Granted the state of our knowledge and the purposes of this lecture, it is best to describe the *extraordinaria cognitio* by way of contrast with formulary procedure.
- a. The role of the praetor and the role of the judge were combined in a single public official called the *iudex*. Hence, the proceedings were no longer bifurcated, and the distinction between proceedings *in iure* and proceedings *apud iudicem* disappeared.
  - b. The plaintiff no longer summoned the defendant personally (*in ius vocatio*) but appeared in court in response to a summons by the judge (*evocatio*).
  - c. A formula was no longer necessary as there was no private *iudex* who had to be instructed how to proceed; rather, the defendant responded before the public *iudex* to a statement of plaintiff’s claim called a libel (*libellus*).
  - d. Rules of evidence developed about the handling by the *iudex* of what had formerly been proceedings *apud iudicem*. We are less clear about what these rules were than that they existed.
  - e. The rule of *condemnatio pecuniaria* was relaxed. It became possible that the result of the litigation would be an order by the *iudex* to the defendant that s/he do or not do something.
  - f. Since the *iudex* was a public official appeals from his decisions to the emperor (and perhaps to intermediate officials) was possible, and *iudices* (the plural of *iudex*) sometimes asked questions of the emperor when they were uncertain how to proceed.
9. Comparative lawyers have developed a series of descriptive generalities about procedural systems, listed here as dichotomies, but many of them are spectra.
- a. Ex parte vs. bilateral
  - b. Party presentation of evidence vs. judicial investigation of the matter
  - c. Party management of the process vs. official management
  - d. Sequence preclusion vs. contingent cumulation



- e. Formal or legal proof vs. rational or moral proof
  - f. Orality vs. documentation
  - g. Immediacy vs. mediacy (e.g. examination of witnesses)
  - h. Publicity vs. secrecy
10. The movement in the Roman procedural systems can be described in terms of the above criteria:
- a. Bilaterality is always there but it weakens in the *extraordinaria cognitio*.
  - b. Party presentation is always the rule in civil procedure.
  - c. Party management dominates in proceedings *apud iudicem* but official management in proceedings *in iure* – the abolition of the distinction tends to reduce the control of the parties.
  - d. Ideas of preclusion are always there, but they get stronger in the *extraordinaria cognitio*.
  - e. Rational or moral proof is always used at least after the archaic period.
  - f. Procedural documents come to be more important in the *extraordinaria cognitio* – the only document in the formulary procedure is the formula.
  - g. Immediacy is always the rule.
  - h. Proceedings *in iure* are public; those *apud iudicem* may be but probably do not have to be. When the distinction between the two is abolished, there does not seem to be any rule that the proceedings have to be public.
11. What are the grand themes here?
- a. Is the state's interest in dispute-resolution to avoid private vengeance, or simply not to have its members quarrelling vs. religion, i.e. that religion requires that people behave in a certain way?
  - b. Assuming that religion is out of the way, is the state simply interested in dispute-resolution because it is interested in resolving disputes or is it interested in using dispute-resolution as a mechanism to enforce public policy?
  - c. Efficiency vs. fairness, i.e., orderly exposition to keep the judge from getting confused and so that people know how to proceed vs. not penalizing people for their own or their lawyers' mistakes, allowing the parties or their counsel to present their cases in a way that seems persuasive.
  - d. Due process vs. efficiency is a slightly different dichotomy. Due process here means that the system should treat the parties equally and give each of them a meaningful opportunity to present their cases. This takes time, and efficiency might dictate cutting corners where it is clear what the result is going to be.
12. Applying these grand themes to the Roman procedural systems:
- a. Dispute-resolution vs. religion is hard to sort out at the beginning; dispute-resolution comes to dominate; religion may come back in in the late Empire.
  - b. Law-enforcement to enforce public policy is never a dominant feature of civil litigation. It is possible to see it hidden below the surface in some cases, and it does come to the fore in some statutes.
  - c. The efficiency vs. fairness dichotomy is continually compromised.
  - d. The due process vs. efficiency dichotomy is continually compromised.

There is evidence that the Romans were conscious of the last two problems.

13. What is the relationship between these three procedural systems and the constitutional developments that we sketched out in the previous lecture? The standard answer to that question is that the three different procedural systems reflect an increasing power of the state. Whether this way of looking at it is the way that we should look at it is a topic that we certainly ought to discuss.
14. To say something more about a topic suggested above: How did the plaintiff get the defendant to come to court? There are answers to that question for all three procedural systems, though ultimately the answers may not be satisfying.
  - a. *legis actio*: the *in ius vocatio*. The first table of the XII Tables tells us “If the plaintiff summons (*si in ius vocat*) the defendant to court, the defendant shall go. If the defendant does not go, the plaintiff shall call a witness thereto. Only then shall the plaintiff seize the defendant. If the defendant attempts evasion or takes flight the plaintiff shall lay hand on him.” That’s all very well, but what if the defendant were stronger than the plaintiff? It has been argued that the powerful man, or the man with powerful friends, would have often been able to snap his fingers at a weaker adversary.
  - b. Gaius tells us that the same system, *in ius vocatio*, was also used in the formulary system. Gaius also tells us that if the defendant could not come to court right away, he could post bail (*vadimonium*) that he would appear on a certain day. *Vadimonium* seems to have been quite common, but that still does not answer the fundamental question. What if the defendant simply told the plaintiff to go to hell?
  - c. A substantial change occurred with the *extraordinaria cognitio*. The judge now does the summoning (*evocatio*). If the defendant ignored the summons proceedings would go ahead without him. The plaintiff still had prove his case before the *iudex*, but it would be *ex parte*.
  - d. Hence it looks as if there was no effective mechanism in either the *legis actio* procedure or the formulary procedure for a weak man to get a strong man to come to court if the latter did not want to come. Was this a problem, and if so, did the Romans perceive it as a problem?
    - i. Despite some efforts to find evidence that they did, there is no real evidence that the Romans perceived that there was a problem of strong men simply refusing to come to court. The Romans were not shy about complaining about their legal system. That the private *iudices* were biased or corrupt is a quite frequent source of complaint. That the defendant simply would not come is not. It is quite possible that the weak did not often sue the strong. That the strong used the legal system to collect what they deemed was owed to them by the weak seems likely. Most of the litigation that we hear about, however, seems to be between people of relatively equal social standing.
    - ii. In considering the relation of those of relatively low social standing to the law we should bear in mind the Roman institution of patronage. Rich men, particularly in the late Republic, had large numbers of clients, and this institution goes back quite a long way and seems to have continued for quite a long time. Plutarch, for example, tells a story that Cato the elder (mid-2d c. B.C.) took poor men’s cases, and there are other examples of patrons supporting their clients in litigation.
    - iii. In terms of what this all might mean with regard to our basic question of the relationship between the constitutional development and the procedural one, it seems that the move to the *extraordinaria cognitio* does reflect the increasing power of the

state. A procedural system that was in some sense voluntary or heavily dependent on social sanctions became less so in the late empire.

The final section of the lecture is in the outline for class 03.