

OUTLINE — LECTURE 13

POLITICAL THEORY IN THE GLOSSATORS

The Emperor, the Jurists and the Horse

[The numbering system added in brackets shows the order in which we will discuss these texts in the lecture. Highlighting indicates phrases that are particularly emphasized.]

1. [1a-1b] Continuator of Otto of Morena (c. 1220)—the story of the horse.

When the lord Frederick the emperor was once riding on a palfrey between Sirs Bulgarus and Martinus, he asked them whether he was lord [*dominus*, the word also means “owner”] of the world. And Sir Bulgarus replied that **he was not owner (*dominus*) so far as property was concerned**. Sir Martinus, however, replied that he was lord (*dominus*). And then the lord emperor, when he got down off the palfrey, had it presented to the said Sir Martinus. Sir Bulgarus, however, when he heard this, concocted this elegant turn of phrase: **“I lost an equine, because I upheld equity—which was not equitable.”** “*Amisi equum, quia dixi equum, quod non fuit equum.*”

2. [1c, 2b] Accursius on C.7.37.3 v. *everything to the prince*

Everything to the prince. Even as to property, as M. said to the prince at Roncaglia, through fear or favor. ... And explain it this way: **so far as protection and jurisdiction [are concerned everything is the prince’s]**. ... Whence my book does not belong to the prince, but **direct action for vindication is given to me not to the prince**.
Accursius.

3. [2a] D.14.2.9—where the phrase *dominus mundi* comes from

Volusius Maecianus, *From the Rhodian law*. Petition of Eudaemon of Nicomedia to the Emperor Antoninus: “Antoninus, King and Lord, we were shipwrecked in Icaria and robbed by the people of the Cyclades.” Antoninus replied to Eudaemon: **“I am master of the world [*tou kosmou kyrios, dominus mundi* in the translation that Accursius was using]**, but the law of the sea must be judged by the sea law of the Rhodians where our own law does not conflict with it.” Augustus, now deified, decided likewise.

Must be judged. That is, it is to be observed in judgments in such a way that no law can be cited in opposition to the custom of seafarers, as some say ... but badly. You however say that the aforesaid law is to be followed, that is **the sea-law and their custom, only in those things in which it does not contradict our law**, for the goods of those shipwrecked are to be restored to them, as [D.14.2.8; D.47.9.12].

4. [2b] C.7.37.3—the startling proposition about everything belonging to the emperor for why should such a difference be established when **everything is understood to belong to the prince**, whether what is alienated is derived from his private property, or from that belonging to the treasury?
5. [1c, 2b] Odofredus on C.7.37.3.

Everything to the prince. Here Sir Martinus wanted to gather that the emperor is owner of every single thing. Again for his opinion he cited the law which says that the emperor can give our lands to soldiers for their support, as [D.6.1.15; D.21.2.11] and because in the book of Kings it says ‘our daughters’ [1 Sam. 8:13]. Again for his

opinion he cited [D.1.14.3] and thus he responded to Frederick I when he was at Roncaglia, through fear or favor.

But Bulgarus said to the contrary in the same place. But we say to the contrary, because since someone has an action to vindicate his thing, as [C.3.29.9], therefore the emperor does not have the action to vindicate, because two people cannot be completely [*in solidum*] the owner of one thing [D.13.6.5.15 (a famous text denying the possibility of two ownership interests in one thing; co-owners, properly speaking, each own an “undivided share” (*pro indiviso*)). And Sir Bulgarus understood what is said here “all to the prince” to apply to protection or jurisdiction, or, more truly, things belonging to the treasury and things belonging to his patrimony.

6. [2b] D.6.3.1.1—Accursius on *dominium directum* and *dominium utile*

D.6.3.1.1: Those who are leased land to enjoy in perpetuity by cities, although they are not made owners, nonetheless it is held that they have an action *in rem* against any possessor, but also against the cities themselves.

Accursius on *Owners*. That is to say, directly.

Accursius on *In rem*: An *actio utilis*, as in [citations omitted], and this action is discussed in [citation omitted]. And note according to Joh[annes Bassianus] that it doesn't say here that he also has *dominium utile*, but that be said quite easily. Truly, the law does not call him heir or owner who has the *utiles actiones*. [Citation omitted.]

7. [2c–3] Ulpian (D.2.1.3)— the problem of *merum imperium*

Ulpian, *On the office of the quaestor, book 1*. *Imperium is pure (merum) or mixed (mixtum)*. To have pure *imperium* is to have the power of the sword to punish the wicked and this is also called *potestas*. *Imperium* is mixed where it also carries jurisdiction to grant *bonorum possessio*. Such jurisdiction also includes the power to appoint a judge.

8. [3–4] Azo on the topic of *merum imperium* (in his *Summa Codicis* 3.13 [“On the jurisdiction of all judges”]):

Does this pure power (*merum imperium*) pertain only to the prince? And some say that he alone has it. And it is said to be pure in him because he has it without any magistrate over him (*sine prelatura alicuius*). But certainly exalted magistrates also have pure power if the definition of the law that I have just given is good. For even the governors of provinces have the power of the sword, as [D.1.18.6.8]. Municipal magistrates, however, do not have it, as [(probably) D.2.1.12]. I say, however, that full or most full jurisdiction pertains to the prince alone, but pure power also to other exalted *podestá*, although on account of this I lost [one early MS. says “he lost”] a horse, which was not equitable.

9. [4] Odofredus on the problem of *imperium*:

Whence [a story about] the lord Henry the father of Frederick II who was ruling forty years ago: At that time Sir Azo and Sir Lotarius were teaching in this city and the emperor called them to him for a certain business, and while he was riding one day with them, he posed this question: “Gentlemen, tell me to whom pure *imperium* pertains.” Sir Azo said to Sir Lotarius, “You tell me.” Although Sir Lotarius was a better knight, nonetheless, Azo was better in our law. (And you ought to know that

Sir Lotarius greatly loved the ladies, and gazed on them freely, although afterwards he was made archbishop of Pisa, and on account of him two decretals were written [X 2.2.12; X 2.26.17 (neither of which has anything to do with scandalous behavior of the archbishop)].) And since Sir Lotarius said: “Since Sir Azo wants me to speak first, I tell you that pure *imperium* pertains to you alone and to none other.” Afterwards the emperor asked Azo, “What will you say?” Sir Azo said, “In our laws it is said that other judges have the power of the sword, but you have [it] by excellence. Nonetheless, other judges have it too, such as governors of provinces [D.1.18.6.8], [and] much more so other greater [magistrates]. Insofar as you have not revoked the jurisdiction of magistrates, others can exercise pure *imperium*.” When they had returned to the palace, the lord emperor sent Sir Lotario a horse, and nothing to Sir Azo. Whence Sir Azo said in the summary of this title, “I say that pure *imperium* belongs to the prince alone by excellence; nonetheless others can exercise pure *imperium*, such as the governors of provinces; and much more so the greater judges according to [D.1.18.6.8]. On account of these words we lost a horse, which was not equitable, because I spoke the law well and not Sir Lotarius.”

10. [5] Johannes Teutonicus on X 1.6.34 (Innocent III) on the power of emperor

X 1.6.34: Truly, we recognize that the right and power of electing a king to be promoted afterwards to emperor belongs to those princes to whom by law and ancient custom it is known to pertain, especially since this right and power came to them through the apostolic see which transferred the Roman empire from the Greeks to the Germans in the person of that distinguished man Charlemagne.

Johannes Teutonicus on *To the Germans*. The emperor is over all kings, as [C.7 q.1 c.41] and all nations are under him, as [C.11 q.1 c.37], for he is lord of the world [D.14.2.9]. Even the Jews are under him [C.1.9(12).8] and all provinces are under him [D.63 c.22], unless they can show themselves to be exempt [D.50.15.8]. None of the kings can have prescribed an exemption, since prescription has no place in this [X 2.26.17]. A kingdom cannot have been exempted from imperial authority, since it would be without at head [D.21 c.8] and it would be a monster without a head. Rather all must give the emperor tribute, unless they are exempt [D.50.15.8]. All things are in the power of the emperor. [C.23 q.8 c.21; C.7.37.3].

11. [6] *Princeps legibus solutus*

Ulpian, *Lex Julia et Papia*, book 5. The emperor is not bound by statutes (*princeps legibus solutus*). And though the empress is bound by them, nevertheless, emperors give the empress the same privileges as they have themselves.

12. [6] *Quod principi placuit legis habet vigorem*

Institutes 1.2.6: Again, what pleases the prince has the force of law (*quod principi placuit legis habet vigorem*), the people having conferred on him and in him all their *imperium* and power by the *lex regia*.

The *Materials*, p. XI–13 to XI–14, give some of the basic glosses on both of these passages.

13. [7b] The contribution of the canonists

The role of the canonists and canon law in developing the idea of sovereignty. A word on who Hostiensis was: Born probably c.1200 in a tiny town called Susa (*Segusium*) in northeast Italy but then the duchy of Savoy, he was a doctor of both laws, completing his

studies at Bologna probably around 1235. One of his fellow students was Sinibaldo dei Fieschi (Sinibaldus Fliscus), the future pope Innocent IV [1241–54]. After a brief and imperfectly recorded period of teaching Hostiensis embarked on a long career in pastoral and diplomatic work. From ?1236–1244, he served in the household of Eleanor of Provence, the queen of Henry III of England. In 1244 he served as ambassador of Henry III of England to the pope, Innocent IV. In the same year he was made bishop of Sisteron, in 1250 archbishop of Embrun. In 1261 he became cardinal-bishop of Ostia. He worked on his commentary on the decretals until the very end of his life in 1271.

Hostiensis' thoughts on papal power, and those of his predecessors, are found in glosses to decretal letters of the popes. The letters themselves are referred to below by their initial Latin words. Of the eight decretals given in the *Materials*, we will use five.

The color-coding in what follows is arranged by theme: (1) yellow – enthusiasm (We tend not to be enthusiastic when we learn that someone has a lot of power. Why is Hostiensis and others of his contemporary enthusiastic about their discovery of papal power?) (2) green – the heretical or sinful pope. (3) blue – can the pope bind private consciences? (4) pink – how is papal power to be exercised (the standard of utility)? (5) gray – ordained vs. absolute power. It is not completely clear that Hostiensis ever made up his mind about this.

Quanto personam, X 1.7.3 (1198), p. XI–7 (no. 1). Innocent III on the power of the pope to translate bishops. A number of the ancient canons of the church forbade bishops from leaving their dioceses to become bishops of another diocese. Perhaps in the ancient world and certainly in the early MA bishops were seen as married to their dioceses. In *Quanto personam*, Innocent III said that he had the power, if there were good reasons, to dissolve that marriage and translate a bishop from one diocese to another. Here's how he put it:

The Lord and master retained the power of transferring bishops to himself in such a way that he granted and conceded it by a special privilege only to blessed Peter his vicar and through him to his successors, as ancient practice, to which the decrees of the fathers order reverence to be paid, attests, and as the sanctions of the sacred canons plainly assert. For it is not man but God who separates whom the Roman Pontiff, who performs on earth the function not of a simple man but of the true God, separates, having weighed the necessity of the churches and their utility, by divine rather than human authority.

Simple man (Laurentius Hispanus, c. 1215) (Pennington, 47): Hence [the pope] is said to have divine will [*arbitrium*, the word can mean “discretion”]. [C.1.1.1.1] O, how great is the power of the prince; he changes the nature of things by applying the essences of one thing to another, argument [C. 6.43.2], and he can make iniquity from justice by correcting any canon or law, for in these things his will is held to be reason, argument [I.1.2.6]. And there is no one in this world who would say to him, “Why do you do this?” [De pen. D.3 d.p.21] He is held, nevertheless, to shape this power to the public good.

Function (Hostiensis, Pennington, 51): Therefore the consistory of God and of the pope are to be regarded as one and the same thing [VI 2.15.2], for he holds the very place of God [X 3.12.1] and in binding and in loosing whatever he does is ratified, for the key does not err. This is how you should understand [C.24 q.1 c.6] and you have the same thing in [X 1.7.1]. And briefly, except for sin, he can do almost

anything like God [De pen. D.2 c.5?] where you should say what is noted in [X 3.8.4] and [X 3.34.7].

The basic point of the next two sets of glosses is the same: that the pope exercises divine power.

Proposuit, X 3.8.4 (1198), p. XI–8 (no.4), Innocent III on papal power to dispense from canon law. The issue in this decretal is complicated. A basic provision of the canon law of benefices was that one could not institute someone to a benefice that was not vacant. Acting pursuant to a papal mandate the dean of Reims had instituted a man to the next benefice to become vacant in the cathedral church of Cambrai. The canons had gone ahead and instituted someone else when the benefice became vacant. Clement III had quashed this institution and had invested the first appointee. The question was whether the dean had done the right thing. Innocent III says that he need not reach that question, because the benefice was clearly vacant after Clement had quashed the canons' institution. In passing, however, he says: "It is not our intention to ratify investitures made against the canonical institutes of [benefices] to become vacant, although according to the plenitude of power we could dispense over the law." Hostiensis glosses "dispense":

Dispense (Hostiensis, Pennington, 60 nn. 85, 87): Even against the Apostle without, however, breach of faith [D.34 c.18 (concerning clerks who marry widows)] or against a canon of the apostles [D.78 cc. 4–5 (concerning the age for ordination)] or against the Old Testament so far as tithes are concerned He cannot, however, dispense against the general state of the church which I understand to mean in subversion of the faith. **Otherwise I do not deny him anything, even if wishes to change squares into circles.** But what if he wants to issue a statute that all the clergy could marry, since divine law does not forbid clerical marriages? (But [a contrary argument would be that] he cannot dispense the monastic rule forbidding a monk to have property, as is noted below [X 3.35.6].) This alone you should believe: he can dispense in all things provided that he does not violate the faith and provided that his dispensation does not lead to mortal sin, subversion of the faith, or danger for the salvation of souls. In these matters, he has no power against God. ... So, he may dispense from canon law generally and from divine law when he is not prohibited from dispensing and where there is no obvious mortal sin.

Over the law (Hostiensis, Pennington, 58): As if he says, we are bound by no law but rather we are placed above all laws and councils This [law], however, is fitting for us, even though it does not bind us. [D.1.3.31; C.1.14.4] Truly, because it conforms to our will, it is to be obeyed even though it is hard **Nonetheless I hand over a rule to you: that the pope of his own accord has so much power that even if he does and says whatever he pleases, he cannot be accused or condemned by any man, so long as he is not a heretic He can, however, and ought to be warned in secret or even openly, if he sins mortally, for willy-nilly he is subject to the truth of the Gospel so far as warnings are concerned But as to the matter that he speaks of here, he is not subject to the church except in heresy. I shall, however, say this, if he is impenitent, that it is for the church to pray to God that He inspire him and for the church triumphant to pray for him [translation uncertain]; otherwise, even if the emperor and all the clergy and people should gather together, they cannot judge him, but [can] warn him that his very soul is in his own hands, particularly to him [who is] above all others, [and] if he should so die, a terrible judgment awaits him and**

unbearable suffering Over subjects, however, he has such plenitude of power that as soon as he commands something, he is to be obeyed, even if there is doubt whether it is a mortal sin, so long as conscience can be overcome But if one is certain that the pope's command would result in mortal sin, then the heavenly pope should be obeyed. ... The church triumphant never fails, and has not failed. If your conscience dictates that you should not obey, you should stand by your conscience, but endure excommunication patiently ... even if your conscience is in error, unless you can detect it In every case in which you would commit a mortal sin by breaking divine law, you should not obey. If a mortal sin is committed by breaking human or canon law, then the pope should always be obeyed. ... And thus you should understand that when Innocent says "over the law," it means positive law.

Magnae devotionis, X 3.34.7 (1199), p. XI-9 (no. 5). Innocent III on papal power to dispense from vows. [Similar to *Proposuit* but need both; they suggest very different limits.] Here the issue is the power of pope to dispense a bishop from the vow that he had taken to go on crusade. In the process of dispensing the bishop, Innocent said: "Truly, we think that three things are to be attended to in this matter: what is permissible according to equity, what is fitting according to honesty, and what is expedient according to utility."

Three (Hostiensis, Pennington, 62 nn. 90–2): Which it is always important to consider in such matters, argument from [D.4 c.6; C.11 q.1 c.34], and especially the Roman church and pope who are above all ought [to consider] these things. I ask, therefore, what is permitted to the apostolic see? Reply: What have I asked? Rather, what is not permitted? It can do all things provided that it does not deviate from the faith. Saving that so long as the pope does not deviate from the faith, he cannot be condemned by anybody, as appears above in what I said about [X 3.8.4], and this is to be understood so far as transgression of the law of Ten Commandments is concerned and all other things the commission or omission of which is regarded as mortal sin by divine law, either in the new or the old testaments, as is apparent above and is noted in [X 5.19.4] and [X 1.4.11]. It is otherwise in those things that are mortal sins by canon law, for in all of those anything is permissible [to the pope], as is apparent in [X 3.8.4]. Although, however, according to the aforesaid all things are permissible to the pope, I ask whether all these things are fitting for him? I reply either there is sufficient cause for him to deviate from the written law or there is not. If there is such a cause, everything that is permitted is fitting, and whatever is fitting is permitted, argument [X 5.1.18]. If, on the other hand, there is no cause, or there is one but it is not sufficient, it is not fitting for him in any way to deviate from the law. [C.1.14.4; C.11 q.1 c.39; X 3.35.7] The utility of the state and especially the church of God and the salvation of souls is always to be preferred to private utility In this place I put down this rule: When it is asked whether something is expedient, always excepting a perversion of justice, a greater is always preferred to a lesser utility provided that it is licit.

Cum ad monasterium, X 3.35.6 (1202), p. XI–11 (no. 7). Innocent III on the power of the pope to dispense from monastic vows. In this long decretal Innocent III calls a group of monks back to their ancient rule, commanding them to give up fine clothing, abandon private property, keep silence, not eat meat, and obey their abbot and prior. The final sentence is what interested the commentators: "Nor should the abbot think that he can dispense any monk so that he may have private property, because the abdication of property, like the keeping of chastity, is so annexed to the

monastic rule, that the supreme pontiff cannot grant license against it.” [More on the question of dispensing, here with some remarkable examples of what might constitute a good reason for dispensing a monk from his vow.]

Supreme pontiff (Hostiensis, Pennington, 69): . . . But for cause the pope can dispense a monk to have private property. But for cause the pope can dispense a monk to have private property. For what if all Christianity or a large part of is were in danger unless a monk became king, perchance that there is no one else who knows how to and can govern the realm? Would you not say that the monk should be king in this case? Should he not offer himself entirely as a sacrifice to God to serve him who chose him to serve in a matter that pleases him more? But it pleases God above all else to preserve his rational and bodily creation for which he himself laid down his life. The greater good is to be preferred to the less and the common utility to the private Further, if for common utility a monk can be made a bishop ... and even a clerk or rector with care of souls, ... why in the same manner can he not be king? What if Christianity would not be safe unless he took the kingdom as his own and left it to his sons whom he had before he became a monk? What if those who had the power to give the kingdom, the heir to which was a girl, said to him “we are ready to give you the girl and the kingdom, but if you refuse we will give it to a tyrant or to some infidel”? In such a case do you place such value on the contemplation of one monk or the continence of one man, and do you think God so cruel that he would not provide by the dispensation of his vicar for such a multitude of Christians? Should it not be said that the pope can dispense in such a case, since greater power than this seems to be given to him Surely, it is to be believed that it would please God more if what was useful for the community was chosen.

Ex publico instrumento, X 3.32.7 (?1171), p. XI–9 (no. 6). Alexander III on the power of the pope to dispense from marriage vows. In this case, Alexander III allowed a woman to enter religion, even though she was married, but the marriage had not been consummated: “Clearly, what the Lord says in the Gospel, that it is not permitted to a man to dismiss his wife except for the cause of fornication, is to be understood according the interpretation of holy writ concerning those whose marriage is consummated by carnal coupling, without which it cannot be consummated.”

Consummated (Hostiensis, Pennington 65–7) [There are two recensions of this gloss. The second contains the material set off in diamond brackets. The printed edition combines the two.] Since the marriage has not been consummated, a couple may part with papal permission ... because an equal good has been substituted for the marriage ... but after consummation, this is no longer possible. ... I understand that when the pope permitted the wife to enter a monastery without her husband’s permission, he exercised his absolute, not his ordained power, unless there were another [here not expressed] reason for his action. Alexander did not issue this decretal without cause. <But most likely it can be said that since the church has the power of restricting or relaxing impediments to marriage ... it can legislate that a spouse can enter a religious order, even though the other spouse is opposed, and, at the same time, permit the other to remarry, the impediment of the first marriage notwithstanding. Cardinal deacon Matteo Rosso Orsini argued this position in my presence. If you would ask, from where does this great power of the church come, see [X 1.7.1–3].> Therefore, the pope might have promulgated this constitution even with his ordained power. <When therefore there has been no joining of bodies, we

do not offend God. And in this case, we can make laws, insofar as we please, with our absolute power, that is plenitude of power. This is true. But it is not expedient that we loosen the reins too much; it is not safe.>

A very difficult gloss. The problem seems to be that Hostiensis never fully made up his mind on the ordained and absolute power question, terms that, in fact, he rarely uses. The distinction may similar to that between constitutional and sovereign power.

14. Attempts to find limits

- a. **[8a]** Odofredus on C.7.37.3, with the suggestion of expropriation,

It is no objection that there are laws which say that the emperor may give our lands to soldiers for support, because **this is true [only] when the price is given to us**, as [C.7.13.4].

- b. **[8b]** *Institutes* 1.2.6: Again, what pleases the prince has the force of law (*quod principi placuit legis habet vigorem*), **the people having conferred on him and in him all their imperium and power by the lex regia.**

Conferred. That is, handed over, so that the people itself no longer has this right, as [C.1.17.2.21; C.1.14.12]. But others say that even now the people can make laws, and that it is said that the prince alone can do this, this is true, “alone” being understand as no one else can do it alone, according to Azo. [Some manuscripts add:] **And these things were true so long as imperium was with the Romans; today, however, it can be said to the contrary, according to everyone.**

- c. **[8c]** C.1.14(17) (*Digna vox*).

It is a cry worthy of the majesty of the one who reigns for the prince to profess himself bound by the laws, so much does our authority depend on the authority of the law. And in truth it is greater in *imperium* to submit the principate to the laws. And by the oracle of the present edict we indicate that we will not tolerate what we do not allow to ourselves.

- d. **[8d]** Bracton on Kingship (fol. 7a)

The king must not be under man but under God and under the law, because law makes the king And that he ought to be under the law appears by the analogy of Jesus Christ, whose vicegerent on earth he is, for though many ways were open to Him for his ineffable redemption the human race, the true mercy of God chose this most powerful way to destroy the devil’s work, he would use not the power of force but the reason of justice. Thus he willed himself to be under the law that he might redeem those who live under it. [Cf. Gal. 4:5.]

- e. **[5, 8d, 9]** Pierre de Mornay, *Quaestio*

There was a custom in Brittany that if anyone of the jurisdiction of the count [?duke] of Brittany was called before the count in either a civil or a criminal case, he could complain or appeal to the king of France, and thus the count could not further lay hands on the matter. Then the king of France wished to remit this right to the count, indeed we put it that he did so *de facto*, without calling the barons. Query whether this remission is valid or not? And the doctor [Pierre de Mornay] discussed this question briefly. First, he argued that is valid

according to the law, [C.1.19(22).2]. Since the king of France is reputed not to have a superior to himself in his lands, and hence by a certain error he reputed himself to be the prince. He can grant whatever rescript he wishes to in his subordinates, so long as the right of an adversary is not totally damaged or taken away. By this remission the right of the barons was not taken away entirely nor that of any other subordinates, therefore, etc. But the doctor in determining to the contrary said: Now something which would be tolerated in the persons of other lesser persons is reputed a great error and great iniquity [when done to] many persons or those of a given province.

f. **[8e]** Guido of Suzzara on D.1.3.31(30)

Again, when he submits himself to the laws as is proved in the laws now alleged, which at the beginning is a matter of will, to wit that he submit himself to the laws, becomes afterwards a matter of necessity. As we say in a compromise, what in the beginning is voluntary, afterwards is of necessity, as [D.4.8.3.1], so [also] is it apparent in *commodatum* [D.13.6.17?] and in like matters [C.4.10.5]. Who will be the judge in such a question? I reply: the proctor of Caesar, as in [C.3.26.5] and [C.2.36(37).2]

g. **[5, 8f]** Marinus de Caramanico on the *Liber Augustalis* (c. 1278)

This constitution of the prince is law and is observed as law in our kingdom of Sicily, as [D.1.2.2.12; I.1.2.6.] § 2. And no one should think that the aforesaid Roman laws only apply to the prince, that is the Roman emperor, as [Nov. 143; C.1.14.12; C.1.17.2]. ... § 3. But we say the same thing about a free king, who is subject to the power of no one, to wit, that the king himself can make law, as [D.49.15.7.1], such as the king of Sicily, as we shall expound below. Therefore we say boldly that a king can make a constitution for the subjects of his kingdom, and that he can even make law contrary to the common Roman law, as appears in [D.49.15.19].

15. **[9]** Johannes Monachus on *Rem non novam* (Extrav. com. 2.3.1, Boniface VIII)

Extrav. com. 2.3.1: A matter not new do we approach, nor are walking on an unaccustomed road, but one trod with the footprints of preceding law, we confirm with the undoubted strength of this present constitution, [and] we make it stable with unbroken strength. . . . [I]n like manner on the example of the aforesaid edicts put forward in the album of the praetor, even outside the solemn days in which the Roman pontiffs are accustomed to make general processes, citations publicly made by our special and knowing order in the audience of our letters or in the hall of our palace to be affixed to the doors of the church of the place in which the common Roman curia of all nations of Christian people resides, so that they can be apparent to all and thus brought to those cited shall be so valid and so bind those cited after the lapse of a term (a competent one of which we wish to be placed on the citations themselves, considering the distance of the places) as if they had come to them personally, notwithstanding any privileges, indulgences and letters apostolic both general and specific, granted to whatsoever persons endowed with pontifical, imperial, royal or other ecclesiastical or worldly dignity or to other inferior churches, monasteries, places, colleges and corporations in whatever form of words, even if it is necessary that special mention be made in our letters by which they are granted of them or of their entire contents word for word, or of the specific names of their persons, monasteries, churches, or of those places.

Johannes Monachus on *Notwithstanding any privileges*: On the evidence of the foregoing, **I ask whether the pope could proceed against someone without citation?** And it would seem that he could, because he is above the law. [X 3.4.8] Again because the prince is freed from the laws. [D. 1.3.31(30).] Again the pope has plenitude of power. [C.2 q.6 c.11; X 5.38.14; X 1.8.4.] But on the other hand: The citation is the beginning of the judicial process, as is noted above, and as you find in [X 2.19.11], and it is not possible to proceed to the end of the judicial process, which is the sentence, without the beginning. ... No one can be above the law which he has not laid down, but [the law that the pope makes] presupposes what has been laid down. But the pope or a simple man laid down none of the said laws [*iurium*, perhaps “rights”] [C.25 q.1 c.6], therefore he has power over none of them. The major [premise] is apparent; the minor is also apparent so far as eternal law [*lex*], or eternal *ius*, or divine or natural, and so far human *ius* derived from natural [is concerned] The conclusion therefore follows, to wit, that the pope has power over only of the law that is said to be of the fifth mode, to wit law purely positive. It remains, however, to see if citation is of natural law or of human law derived from natural, so that the conclusion follows from the premise, since if the pope has no power over such laws as appears in what preceded, the consequence is that he can proceed against no one without having issued a citation Since it is not possible to understand or to know fully a fact or justice or injustice without the presence of the person against whom the judgment is to be rendered, [C.30 q.5 p.c.9; X 2.27.18; C.11 q.3 c.76], then it is necessary that he be cited or called. And the pope cannot omit this, nor any lesser judge, because thereby he would omit the *cognitio* [a play on words, literally “understanding,” but also the technical term for a judicial hearing], which is of necessity required for a judgment And thus both the second and the third appear at the same time, to wit, that citation is of the natural law, and by consequence that the pope cannot proceed against anyone without having issued a citation. And this constitution proves this evidently. This is also plain in notorious matters in which, though the *iuris ordo* is not to be observed completely, it is to be observed in citation and sentencing. [X 2.24.21; C.2 q.1 c.7; X 4.19.13; C.2 q.1 c.15; note X 5.1.17] And **Genesis 18, where the fact was notorious, nevertheless God wanted to proof before he judged.** Nor does [X 5.1.9] stand in the way, for neither citation nor sentence is taken away there, because Genesis 3 proves them both necessary. Again, anyone is presumed innocent unless he is proved guilty. [X 2.23.16; X 1.12.1; D.40.4.20] And the law is quicker to absolve than to condemn. But perhaps you might say that the pope or another judge knows the cause and the truth of the matter in secret, in his capacity as a private person, but as a public person and therefore publicly the truth ought to be known to him, to wit by laws public, divine or human, together. ... To the third [objection; perhaps “second” is meant] it ought to be said that the will of the prince has the force of law if it is ruled by reason and comes about in the spirit of laying down law according to form of which it has been passed on, [C.1.14(17).8], for will is not a secure rule, as the Philosopher says in Politics 2. When moreover the prince judges or renders sentence without discussion and examination of the cause he does not have a will regulated according to the right judgment of reason. To the fourth [objection; perhaps “third” is meant] it ought to be said that according to the Philosopher in Politics 1 there are two kinds of principate, despotic and political. The first is of the owner over a slave who does not have the right to resist, because he is the slave of his owner entirely according to this manner. The second is the principate over children, who have [?no]

right of resisting in anything, and such is the principate of the church over her subjects. It is not plausible that the principate of the church is despotic. We are not the children of the slave woman but of the free woman for which liberty Christ freed us, Galatians 4[:31, reading *nos* for *non*]. Johannes Monachus, Cardinal.

16. [10] Bracton on kingship

[fol. 7a] [10a] The king has no equal within his realm, <Subjects cannot be equals of the ruler [cf. D.4.7.3.pr], because he thereby lose his rule, since equal can have no authority over equal.> nor *a fortiori* a superior, because he would then be subject to those subjected to him. The king must not be under man but under God and under the law, because law makes the king, <Let him therefore bestow upon the law what the law bestows upon him, namely, rule and power.> for there is no *rex* where will rules rather than *lex*. Since he is the vicar of God, <And that he ought to be under the law appears by the analogy of Jesus Christ, whose vicegerent on earth he is, for though many ways were open to Him for his ineffable redemption the human race, the true mercy of God chose this most powerful way to destroy the devil's work, he would use not the power of force but the reason of justice. Thus he willed himself to be under the law that he might redeem those who live under it. [Cf. Gal. 4:5.] For He did not wish to use force but judgment. [Cf. Leo the Great in P.L. 54:196.] And in that same way the Blessed Mother of God, the Virgin Mary, Mother of our Lord, who by an extraordinary privilege was above law, nevertheless, in order to show an example of humility, did not refuse to be subjected to established law. Let the king, therefore, do the same, lest his power remain unbridled.> there ought to be no one in his kingdom who surpasses him in the doing of justice, but he ought to be the last, or almost so, to receive it, when he is plaintiff. If it is asked of him, since no writ runs against him there will [only] be opportunity for a petition, that he correct and amend this act; if he does not, it is punishment enough for him that he await God's vengeance. No one may presume to question his acts, much less contravene them.

[fol. 107a–107b] Since nothing pertaining to the clerical estate is relevant to this treatise, we therefore must see who, in matters pertaining to the realm, [has ordinary jurisdiction, and then who] ought to act as judge. It is clear that it is the king himself and no other, could he do so unaided, for to that he is held bound by virtue of his oath. For at his coronation the king must swear, having taken an oath in the name of Jesus Christ, these three promises to the people subject to him: In the first place, that to the utmost of his power he will employ his might to secure and will enjoin that true peace shall be maintained for the church of God and all Christian people throughout his reign. Secondly, that he will forbid rapacity to his subjects of all degrees. Thirdly, that he will cause all judgments to be given with equity and mercy, so that he may himself be shown the mercy of a clement and merciful God, in order that by his justice all men may enjoy unbroken peace. To this end is a king made and chosen, that he do justice to all men <that the Lord may dwell in him, and he by His judgments may separate> and sustain and uphold what he has rightly adjudged, for if there were no one to do justice peace might easily be driven away and it would be to no purpose to establish laws (and do justice) were there no one to enforce them. The king, since he is the vicar of God on earth, must distinguish *jus* from *injuria*, equity from iniquity [D.1.1.1.], that all his subjects may live uprightly, none injure another, and by a just award each to be restored to what which is his own [I.1.1.3; D.1.1.10.1]. He must surpass in power all those subjected to him, <He ought to have no peer, much less a superior, especially in the doing of justice, that it may truly be

said of him, ‘Great is our lord and great is his virtue etc.,’ [Ps. 146:5] though in suing for justice he ought not to rank above the lowliest of the kingdom.> nevertheless, since the heart of a king ought to be in the hands of God, [Prov. 21:1; C.1.1.8.3] let him, that he be not unbridled, put on the bridle of temperance and the reins of moderation, lest being unbridled, he be drawn toward injustice. For the king, since he is the minister and vicar of God on earth, can do nothing save what he can do *de jure*, <despite the statement that the will of the prince has the force of law, [I.1.2.6; D.1.4.1pr] because there follows at the end of the *lex* the words ‘since by the *lex regia*, which was made with respect to his sovereignty’; nor is that anything rashly put forward of his own will, [I.1.2.6, gloss on *placuit* “not every word of a judge is a sentence just like not every word of the prince is law.”] what has been rightly decided with the counsel of his magnates, deliberation and consultation having been had thereon, the king giving it *auctoritas*.> His power is that of *jus*, not *injuria* <and since it is he from whom *jus* proceeds, from the source whence *jus* takes its origin no instance of *injuria* ought to arise, [C.8.4.6] and also, what one is bound by virtue of his office to forbid to others, he ought not to do himself. [D.8.5.15]> as vicar and minister of God on earth, for that power only is from God, <the power of *iniuria* however, is from the devil, not from God, and the king will be the minister of him whose work he performs,> whose work he performs. Therefore, as long as he does justice he is the vicar of the Eternal King, but the devil’s minister when he deviates into injustice. For he is called *rex* not from reigning but from ruling well, since he is a king as long as he rules well but a tyrant when he oppresses by violent domination the people entrusted to his care. [John of Salisbury, *Policraticus*, 8.17] Let him, therefore, temper his power by law, which is the bridle of power, that he may live according to the laws, for the law of mankind has decreed that his own laws bind the lawgiver, [D.2.2; D.2.2.1] and elsewhere in the same source, it is a saying worthy of the majesty of a ruler that the prince acknowledge himself bound by the laws. [C.1.14.4] Nothing is more fitting to the sovereign than to live by the laws, [C.6.23.3] nor is there any greater sovereignty than to govern according to law, [C.1.14.4] and he ought properly to yield to the law what the law has bestowed upon him, for the law makes him king.

17. [11] Boniface VIII on the power of the pope (*Unam sanctam*) (1302) (extrav. com. 1.8.1)

Boniface VIII, bishop, servant of the servants of God, To [serve as] a permanent memorial of the matter:

Urged by faith, we are obliged to believe and to maintain that the Church is one, holy, catholic, and also apostolic. We believe in her firmly and we confess with simplicity that outside of her there is neither salvation nor the remission of sins, as the Spouse in the Canticles [Sgs 6:8] proclaims: ‘One is my dove, my perfect one. She is the only one, the chosen of her who bore her,’ and she represents one sole mystical body whose Head is Christ and the head of Christ is God [1 Cor 11:3]. In her then is one Lord, one faith, one baptism [Eph 4:5]. There had been at the time of the deluge only one ark of Noah, prefiguring the one Church, which ark, having been finished to a single cubit, had only one pilot and guide, i.e., Noah, and we read that, outside of this ark, all that subsisted on the earth was destroyed.

We venerate this Church as one, the Lord having said by the mouth of the prophet: ‘Deliver, O God, my soul from the sword and my only one from the hand of the

dog.’ [Ps 21:20] He has prayed for his soul, that is for himself, heart and body; and this body, that is to say, the Church, He has called one because of the unity of the Spouse, of the faith, of the sacraments, and of the charity of the Church. This is the tunic of the Lord, the seamless tunic, which was not rent but which was cast by lot [Jn 19:23-24]. Therefore, of the one and only Church there is one body and one head, not two heads like a monster; that is, Christ and the Vicar of Christ, Peter and the successor of Peter, since the Lord speaking to Peter Himself said: ‘Feed my sheep’ [Jn 21:17], meaning, my sheep in general, not these, nor those in particular, whence we understand that He entrusted all to him [Peter]. Therefore, if the Greeks or others should say that they are not confided to Peter and to his successors, they must confess not being the sheep of Christ, since Our Lord says in John ‘there is one sheepfold and one shepherd’ [John 10:16]. We are informed by the texts of the gospels that in this Church and in its power are two swords; namely, the spiritual and the temporal. For when the Apostles say: ‘Behold, here are two swords’ [Lk 22:38] that is to say, in the Church, since the Apostles were speaking, the Lord did not reply that there were too many, but sufficient. Certainly the one who denies that the temporal sword is in the power of Peter has not listened well to the word of the Lord commanding: ‘Put up thy sword into thy scabbard’ [Mt 26:52]. Both, therefore, are in the power of the Church, that is to say, the spiritual and the material sword, but the latter is to be administered *for* the Church but the former by the Church; the former in the hands of the priest; the latter by the hands of kings and soldiers, but at the will and sufferance of the priest.

However, one sword ought to be subordinated to the other and temporal authority, subjected to spiritual power. For since the Apostle said: ‘There is no power except from God and the things that are, are ordained of God’ [Rom 13:1-2], but they would not be ordained if one sword were not subordinated to the other and if the inferior one, as it were, were not led upwards by the other.

For, according to the Blessed Dionysius, it is a law of the divinity that the lowest things reach the highest place by intermediaries. Then, according to the order of the universe, all things are not led back to order equally and immediately, but the lowest by the intermediary, and the inferior by the superior. Hence we must recognize the more clearly that spiritual power surpasses in dignity and in nobility any temporal power whatever, as spiritual things surpass the temporal. This we see very clearly also by the payment, benediction, and consecration of the tithes, but the acceptance of power itself and by the government even of things. For with truth as our witness, it belongs to spiritual power to establish the terrestrial power and to pass judgement if it has not been good. Thus is accomplished the prophecy of Jeremias concerning the Church and the ecclesiastical power: ‘Behold to-day I have placed you over nations, and over kingdoms’ [Jeremiah 1:10] and the rest. Therefore, if the terrestrial power err, it will be judged by the spiritual power; but if a minor spiritual power err, it will be judged by a superior spiritual power; but if the highest power of all err, it can be judged only by God, and not by man, according to the testimony of the Apostle: ‘The spiritual man judgeth of all things and he himself is judged by no man’ [1 Cor 2:15]. This authority, however, (though it has been given to man and is exercised by man), is not human but rather divine, granted to Peter by a divine word and reaffirmed to him (Peter) and his successors by the One Whom Peter confessed, the Lord saying to Peter himself, ‘Whatsoever you shall bind on earth, shall be bound also in Heaven’ etc., [Mt 16:19]. Therefore whoever resists this power thus

ordained by God, resists the ordinance of God [Rom 13:2], unless he invent like Manicheus two beginnings, which is false and judged by us heretical, since according to the testimony of Moses, it is not in the beginnings but in the beginning that God created heaven and earth [Gen 1:1]. Furthermore, we declare, we proclaim, we define that it is absolutely necessary for salvation that every human creature be subject to the Roman Pontiff.

Dated at the Lateran [18 November 1302].

- a. The top-line and the bottom-line of the decretal contain good summaries of the argument. The sources cited, of which there are an unusually large number for a papal bull of this period, differ substantially from those cited by Hostiensis. How do they differ? Why do they differ?
- b. The development of conciliarist theory in the late 14th and early 15th centuries, a development that we will outline in lecture after the break, obviously lead away from what Boniface seems to have been saying here.