SOURCES OF LAW OUTLINE (cont'd)
DOMINATE CONSTITUTIONAL OUTLINE

Note: There's some duplication here of the outline for the class on 9/21. That's because we're not sure how much we're going to be able to get through on 9/21.

I. THE PRAETOR AND THE JURISTS

D.1.2 is *De origine iuris et omnium magitratuum et successione prudentium* (On the origin of law and all the magistrates, and the succession of the jurists). D.1.2.2pr–53 (Materials p. 13–16) is one of only two passages in the title, the other being a short passage from Gaius on the XII Tables, which treats generally with the importance of showing the beginning of things.

1. The praetor and the jurists (this point needs to be emphasized) –> Pomponius in D.1.2.2pr-53 (p. 13-16) The text is probably anachronistic at this point but it shows us what is P.'s understanding of what happened. This is an important text; let us take its exposition as our theme.
    a. pr-.12 the historical development of the sources of law.
        i. the regal period, the *ius Papiranium* - mythical
        ii. the XII - certainly not mythical
        iii. the *legis actiones* - the role of the college of pontiffs—combination of all three –>a *ius civile* based on interpretation, statute and formulae
        iv. the *ius Flavianum* of c. 300 B.C. the wonderful story of the theft of the formulae
        v. *ps. sc. edicta consts*.
    b. .13–.34 outline of the history of the Republican magistracies, still in existence in Pomponius' time
    c. .35–.50 P.'s outline of the history of legal science—he begins again with Papirius, and Appius Claudius (jr); we are beginning to move into genuine history
        i. T. Coruncanius c. 250 B.C. first plebian *pontifex maximus* "who first began to profess the law"
        ii. the *tripertita* of S. Aelius Paetus, first book that we can be sure existed — organized according to the XII gives stat. interpretation and the *legis actio* based on it c. 200 B.C.
2. We'll return to our text in a minute but we're beginning to reach the point when our sources become fuller. We have the names of a couple of hundred jurists and extracts from the works of approximately 100. Obviously we can't learn them all. Let's try to capture a few while at the same time giving some sense of periods:
    a. Republican jurists — the influence of Greek dialectic and Greek rhetoric —
        i. Quintius Mucius the first to compile the *ius civile* which he arranged in titles, the first to arrange the law *generatim* by genus
        ii. Servius Sulpicius Rufus friend of Cicero, began as a rhetorician and then (43): "SERVIUS SULPICIUS, when he held the chief place in pleading cases, or at least second to Marcus Tullius [Cicero], is said to have gone to Quintus Mucius to gain advice on the case of a friend of his, and when the latter had responded to him on the law, Servius understood little; again he asked Quintus, and he was answered by Quintus Mucius, nor did he yet understand, and so he was reproached by Quintus Mucius; for he said that it was disgraceful that a patrician and a noble (*nobili*) and a pleader of cases was ignorant of the law in which he was employed. Servius, struck by this insult, we may say, paid

attention to the *ius civile* and received a great deal of instruction from those we have mentioned, taught by Balbus Lucilius, instructed most, however, by Gallus Aquilius, who lived at Cercina; accordingly, many books of his, extant, were written at Cercina."

b. Augustan jurists — Labeo of the old school, anti-imperial, the problem of the *ius respondendi* — seems to be marked by a decline of equestrian jurists and increase of senatorial — the debate between the schools — Labeo vs. Capito, Nerva vs. Sabinius, Proculus vs. Cassius — called Sabinians vs. Proculeans or Proculeans vs. Cassians — the beginnings of the bureaucratization of the jurists, Javolenus Priscus moves from the traditional republican magistracies to imperial service as a soldier and *iuridicus* in Britain ending up in the imperial council under the Flavian emperors

c. Middle period classical jurists — Celsus, the definer, Aristo the practitioner, Scaevola the giver of *responsa*, Julian treasurer under Hadrian (consolidated the edict) vs. Pomponius and Gaius, the commentators, the "academics" (Pomponius mentions Celsus and Julian, but none of the others, Scaevola and Gaius were probably alive when he wrote; Aristo may not have been associated with one of the schools.)

d. Late period classical jurists, Severan period—Papinian, Paul and Ulpian are all prefects of the praetorian guard, Modestinus was prefect of the watch, Papinian was also secretary *a libellis*—Papinian was executed by Caracalla, Ulpian was probably murdered by the guard—they are important because they are responsible for well over half the Digest—Ulpian alone is responsible for almost 1/3 of it, Paul for 1/6 (i.e., half the *Digest* between them—they are hard to characterize—they are all encyclopedic—Papinian may be the most balanced, Paul the most original, Ulpian the most comprehensive, Modestinus the least distinguished, writes in Greek, dies c. 244 and is regarded as the last of the classical jurist.

3. The jurists at work

a. The functions of the jurists: *cavere*, *agere*, *respondere* (*De oratore* 1.48.212; *respondendi*, *scribeni*, *cavendi* (*Pro Murena* 9.19); *respondere*, *instituere*, *cavere* (Id. 9.22) — whatever the meaning of the variable term, it is clear that in Cicero's time it did not include writing books, nor did it include teaching or arguing cases — the first two changed as the jurists became at once more academic (indeed, it had already changed by the end of Cicero's time, if we are to believe Pomponius) and more bureaucratic in the principate, but the last never changed, giving the jurist his unique quality — some sense of it remains among the academic lawyers on the Continent — Brandeis as counsel to the situation

b. The types of juristic literature:

i. *responsa, epistulae, quaestiones*

ii. *commentaria ad ius civile* (ad Q.M., ad Sabinum); *commentaria ad edictum*

iii. *epitome, notae*

iv. monographic literature

v. *digesta*, combines *ius civile* and *ius honorarium* with emphasis on case law

vi. *institutiones, enchiridia*

c. Juristic method—a mere glance at the problem

i. the old inductive, deductive dichotomy

ii. the role of science, Greek science particularly

iii. rules and definitions

iv. custom and policy

v. disputation and precedent

4. The problem of the *ius respondendi*

a. G.1.7: "The answers of the learned are the decisions of those who are authorized to lay down the law. If the decisions of all of them agree, what they so hold has the force of *lex*, but if they disagree, the judge is at liberty to follow whichever deicsion he pleases. This is declared in a rescript of the late emperor Hadrian." Schulz thinks that this is all interpolated (see the law of citations, above).

b. D.1.2.2.48–.50 Schulz's four hands

(1) And so MASSURIUS SABINUS succeeded Ateius Capito, NERVA Labeo, who then increased these dissensions. This Nerva was very intimate with the emperor. **(2)** Massurius Sabinus was in the equestrian order and was the first to respond publicly; afterwards, this privilege began to be given, which, however, had been granted to him by Tiberius Caesar. [Repeated in last para., contradicts next para.] **(3)** And as we may observe in passing, before the time of Augustus the right of responding publicly (ius respondendi publice) was not given by the emperors, but he who had confidence in his studies responded to his consultants; nor were responsa always given under seal, but often they themselves wrote to the iudices (judge jurors) or were testified to by those who consulted them. Divus Augustus was the first to decree, in order to ensure greater authority to the law, that they might respond upon his authority; and from that time on, this began to be sought as a favor. [Contradicts (2).] **(4)** And therefore [why, "therefore"?] the excellent emperor Hadrian, when praetorian men sought to be allowed to respond, rescripted that this was not to be sought, but was wont to be given, and consequently if anyone had faith in his own ability he (Hadrian) would be pleased to find <that> he was qualified to give responsa to the people. **(back to 1)**Accordingly, it was conceded to Sabinus by Tiberius Caesar that he might respond to the people; Sabinus was received into the equestrian order when advanced in age, in fact about fifty years old. He did not have ample means but for the most part was supported by his students.

c. The texts are a mess, the facts are hard to work out, a few things are reasonably clear:

i. *ius respondendi* did exist from Augustus to Hadrian, at least

ii. Labeo refused to become consul — Augustus may have trying to create a class of senatorial jurists

iii. Aristo right in the middle of the period (temp. Trajan) probably didn't have the *ius* and he gave a lot of *responsa* (the only jurists that we know for a fact had it are Sabinus and Innocentius an otherwise unknown jurist temp. Diocletian)

iv. The effective cooptation of the jurists comes in the 2d c. when they become bureaucrats

5. The problem of the schools — sec. 47 some good stories and a chain of teachers and pupils: Capito (S) vs. Labeo (P), Sabinus vs. Nerva, Cassius vs Proculus, Julian vs. Celsus (the definer) — what was it all about? The first thing to note is that some of these debates almost certainly have no principle behind them at all. If you went to the Yale Law School you style a case in conversation as *Smith against Jones*; if you go to the Harvard Law School you call it *Smith v. Jones*. I can create a principle out of that, but any principle that I create is likely to seem strained. Note, too, that the schools can cross. In G.3.140 (handout) (on whether a

third party can fix the price) (Labeo and Cassius, say no (they should be on opposite sides) vs. Ofilus (late Republican not associated with the schools) and Proculus (who should be with Labeo) say yes. Here, however, are three differences between the schools that some have thought could be used to derive a principle (quotations are on the outline):

i. Does barter = sale. The Sabinians (of which Gaius was one) say that it does, citing *vetustas*. The Proculeans say no. G.3.140–1: "**140**. The price [of a contract of sale] must be definite. Thus, if we agree that the thing be bought at a the value to be put on it by Titius, Labeo said that this transactions was of no effect, and Cassius approves his view. But Ofilius thought it was a sale, and Proculus followed his view. **141**. There is much question … whether the price [in a sales contract] can consist of other things [than money], for example a slave or a robe or land can be the price of something else. Our teachers [the Sabinians] hold that it can consist of another thing. Hence their opinion commonly is that the by exchange of things a sale is contracted and that this is the most ancient [*vetustissimam*] form of sale. [Quoting Iliad 7.472–5.] The other school [Proculeans] dissent, holding that exchange or barter is one thing and sale another; for if not, so they argue, one cannot, when things are exchanged, determine which is thing sold and which that given as price … ."

ii. If a defendant pays a plaintiff after the joinder of issue but before the judge renders his judgment, may the judge absolve the defendant? The Sabinians hold that he may in all actions. The Proculeans hold that he may in *bonae fidei* actions but not in *stricti iuris* actions. G.4.114: "It remains to consider what course befits the office of the *iudex* in a case where the defendant satisfies the plaintiff after joinder of issue, but before judgment—whether he should absolve the defendant, or rather condemn him on the ground that at the time of joinder of issue his position required his condemnation. Our teachers hold that he ought to absolve, irrespectively of the nature of the action; and this is expressed by the common saying that according to Sabinus and Cassius all actions contain the possibility of an absolution. The authorities of the other school dissent in regard to strict actions, but agree in regard to *bonae fidei* actions, because in these the discretion of the *iudex* is unfettered."

iii. Everyone is agreed that a legacy before the institution of an heir is void, so too a manumission; the Sabinians hold the appointment of a tutor there is void too, but Labeo and Proculus hold it ok b.c. nothing taken out of the inheritance. G.2.229–31: "**229.** A legacy preceding the institution an heir [in a will] is void, for the simple reason that wills derive their whole efficacy from the institution of an heir, and on this account the institution of an heir is reckoned to be, as it were, the source and foundation of the whole will. **230.** On the same ground also liberty cannot be conferred before the institution of an heir. **231.** Our teachers hold that tutors too cannot be appointed in that place. But Labeo and Proculus hold that this can be done, because by the appointment of a tutor nothing is taken out of the inheritance."

Clearly a simple dichotomy between strict and loose won't work (the Proculeans are strict in barter and absolution, loose in tutors in wills; the Sabinians are loose in the former two, strict in the latter), or policy-oriented vs. formalistic (in barter it's hard to see the policy; in absolution it looks as if the Sabinians have policy on their side [though they don't cite it]; in wills the Proculeans have policy on their side and cite it] will not account for these divergences. Does anything? Stein's suggestion (31 [1972B] Camb. L. J. 8–31): In grammar Labeo (P) was an analogist (NA 13.10.1) in the

interpretation of words he was strict; this leads to his search for *ratio* and for system; Capito (S) may have been an anomolist; thus the Proculeans hold that barter does not equal sale (because *emptio/venditio* is not *permutatio*, and the formula requires that one identify the *emptor* and the *venditor*), while the Sabinians hold that it does citing *vetustas* and *auctoritas*—typically anomalist arguments; similarly in a *stricti iuris* action the Proculeans hold that judge cannot absolve the defendant who pays in advance because the formula does not allow him to do so. On the other hand, where the words do not bind, we look to purpose. The rule is that you can't grant a legacy or make a manumission before the institution of the heir. There is no reason why this should apply to appointment of a tutor because that doesn't take anything out of the inheritance and the other two do. Here the Sabinians are strict because that's just not the way that we have traditionally made a will.

6. Jump to last paragraph of the outline [skip if less than ten minutes]. The jurists after Modestinus. We will see next time that considerable work was done in the dominate with imperial constitutions. I want to focus here on what happened in dominate with the materials that the classcal jurists had left behind.

   a. *Regulae Ulp.*, *Pauli Sententiae*, *Frag. Vat.*, *Collatio Legum Mos. et Rom.* The last is mid–4th century. The others are probably 4th century. Why they are important.

   b. The Eastern Law Schools—the best-known was in Beirut. There were also schools at Constantinople, Ceasarea (Palestine), and Alexandria.

   c. Law of Citations (C.Th.1.3.2 (426): Papinian, Paul, Ulpian, Modestinus, Gaius: majority rules; Papinian breaks ties, only where there was a tie and Papinian silent does the judge have discretion. Vulgar law, and the problem with the term.

   d. C.Th. Interp in Brev. Alaric of c. 500.

II. CHRONOLOGY AND CONSTITUTION

Principate 27 B.C. – 284 A.D; Dominate: 284–476 A.D. (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.

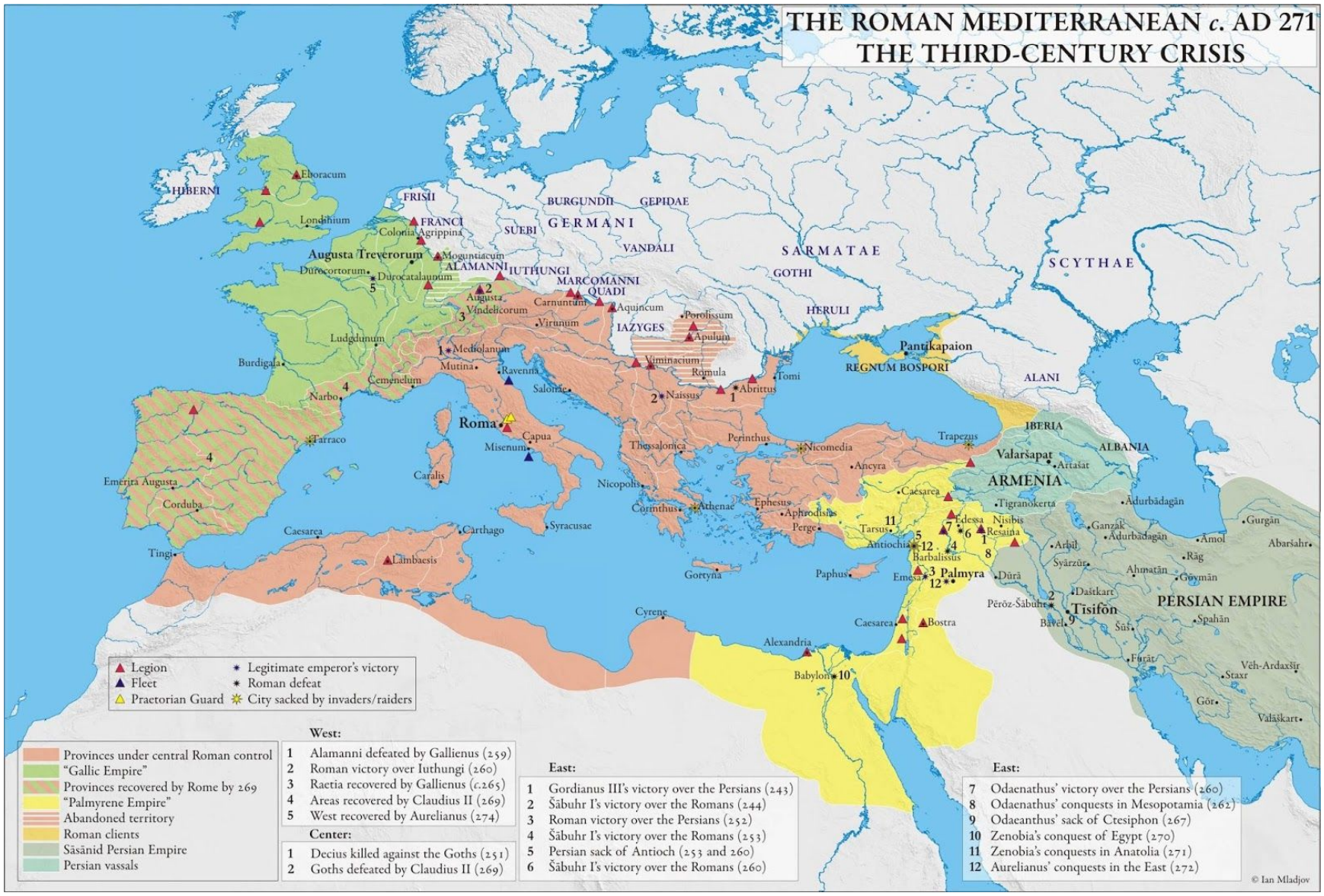
1. 27 B.C. to 284 A.D.: Principate

   a. 27 B.C.–69 A.D.: Julio-Claudian emperors. Augustus 27 B.C.–AD 14; ends in 69, the year of the four emperors.

   b. 69–235 A.D.: mostly good emperors (69–96: Flavians, all soldier-emperors; 96–180: Nerva, Trajan, Hadrian, Antoninus Pius, Marcus Aurelius; 180–235: Antonine and Severan dynasty)

   c. 235–284 A.D.: "30 tyrants" – There really weren't thirty unless you count pretenders and local emperors, but there were 20 official emperors. The period from 235 to 260 was probably not as disastrous as the older historians made it out to be. There was a considerable revival of imperial authority in the period from 260–284. The following map suggests, however, that the empire might have split into three parts in this period. Had that happened all of subsequent European history would have been quite different.

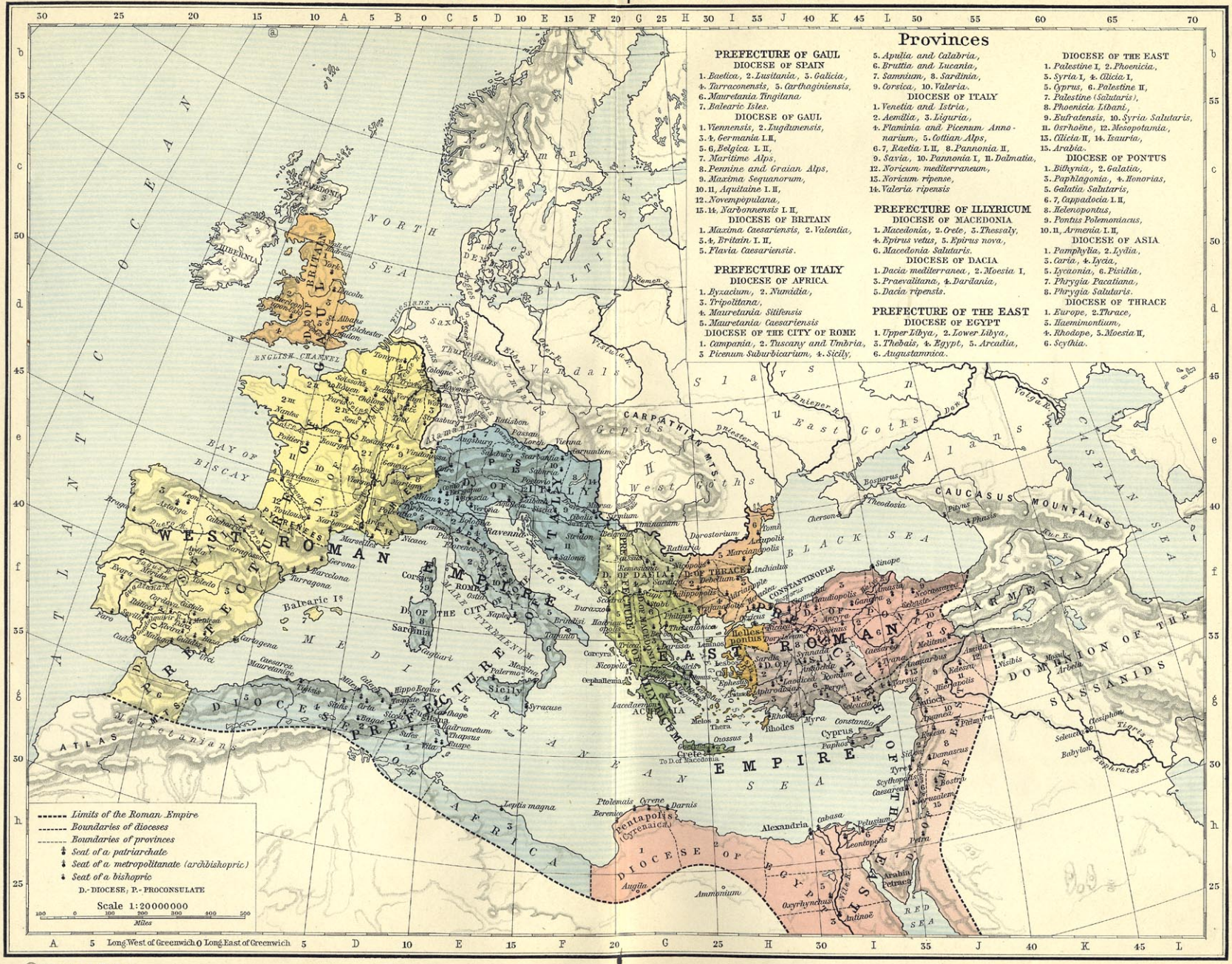
   (See map on next page.)

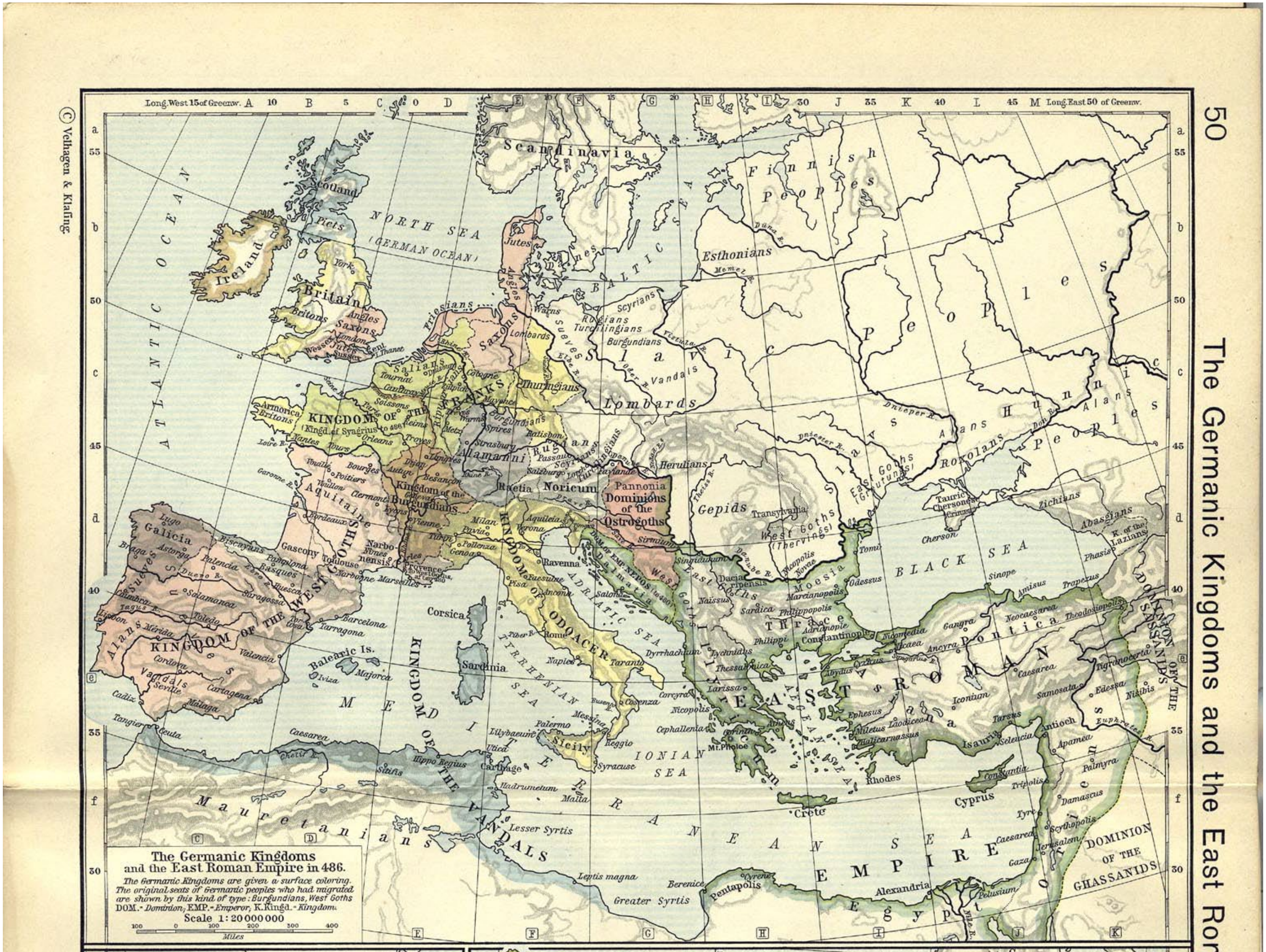


Downloaded from: https://i.pinimg.com/originals/9f/35/fa/9f35fab789fbc7125f222a4e35be5344.jpg where it is found without attribution. A Pinterest user named Jack Farmer, who seems to be interested in Armenia, has it on his board. It would be nice if we could identify the map-maker, who obviously put a lot of work into this.

2. 284–565: Dominate. The empire did not split into three parts. In the Dominate the constitution clearly became more autarchic.
   a. 284–305 Diocletian – first emperor to call himself *dominus*. *Dominus* is derived from *domus*, the basic word for 'house'. In addition to 'lord' or 'master', the word also means 'owner'. Diocletian tried to solve the succession problem by taking on both a co-emperor, Maximian, as another 'Augustus', and two sub-co-emperors 'Galerius and Constantinus Chlorus', called 'Caesars'.
   b. 306–337 Constantine – Diocletian's attempt to solve the succession problem did not work. It took a while for Constantine, son of Constantinus Chlorus, to cosolidate his power. In 313, he issued the edict of Milan, tolerating Christianity. In 324 he built a palace in the city of Byzantium and renamed the city Constantinople. It later was to become the capitol of the eastern empire. In 325, a church council met a Nicea and condemned Arius as a heretic. Constantine was baptised a Christian shortly before his death by an Arian bishop.
   c. 337–361 – The sons of Constantine struggle among themselves for power.
   d. 360–363 – Julian the Apostate, Constantine's nephew, takes over for a brief revival of paganism.
   e. 378 – a Germanic people called Goths, driven into the empire by a Asiatic people called Huns, knock the stuffing out of the Romans at the battle of Adrianople.
   f. 379–395 Theodosius the Great – persuades the Goths to move West as a federated people. In 380 Nicene Christianity becomes the offical religion of the Roman empire. A permanent division of the empire into east and west follows his reign. A map of the empire and its administrative divisions at Theodosius' death can be seen on the next page.
   g. 408–450 Theodosius II (East), 425–455 Valentinian III (until 437, regency of his mother Galla Placidia) (West).
   h. 410 – Sack of Rome by Alaric the Visigoth. Following the sack, a large number of Germanic tribes (though their numbers were small in comparison with native populations) entered the Roman empire. They established kingdoms that were at least nominally federated with the Roman emperors in the east. The most important of these, as of 486, can be seen on the map on the page after next.
   i. 438 – Promulgation of the Theodosian Code in both East and West
   j. 476 – Romulus Augustulus was defeated and desposed by Odoacer and mixed bag of Germanic troops. Traditional date of the end of the Western Empire.
   k. 527–565 Justinian – emperor of the east, reonquered much of the western empire, and promulgated what later was called 'Corpus Iuris Civilis', 'body of civil law'.

The Roman Empire about 395.

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The Germanic Kingdoms and the East Rom
The Germanic Kingdoms
and the East Roman Empire in 486.
The Germanic Kingdoms are given a surface coloring.
The original seats of Germanic peoples who had migrated
are shown by this kind of type: Burgundians, West Goths
DOM.- Dominion, EMP.- Emperor, K.Kingd.- Kingdom.
Scale 1: 20 000 000
Miles
© Velhagen & Klasing
Scandinavia
NORTH SEA
(GERMAN OCEAN)
ATLANTIC OCEAN
Ireland
Britain
Scotland
Picts
Esthonians
Finnish Peoples
Slavic Peoples
Huns
Alans
Roxolans
Lombards
Gepids
Transylvania
West Goths
East Goths
BLACK SEA
KINGDOM OF THE FRANKS
Alamanni
Thuringians
Saxons
Frisians
Jutes
Noricum
Pannonia
Dominions of the Ostrogoths
KINGDOM OF ODOACER
KINGDOM OF THE WEST GOTHS
KINGDOM OF THE VANDALS
Galicia
Sueves
Corsica
Sardinia
Sicily
Crete
Cyprus
Rhodes
Constantinople
Alexandria
EAST ROMAN EMPIRE
TYRRHENIAN SEA
IONIAN SEA
MEDITERRANEAN SEA
Mauretanians
DOMINION OF THE GHASSANIDS
DOMINION OF THE SASSANIDS
Egypt

3. The problem of the decline of the Roman empire. “The triumph of Christianity and barbarism” in the words of Gibbon. Relatively few modern historians would see Christianity as causative of the fall of the Roman Empire, just as relatively few have the attitude to the Germanic invaders of the empire that is illustrated in Sylvestre’s ‘Sack of Rome’. (Slide 22). Many would point to interconnected changes in governance, the society, and the economy: increasing bureaucracy, a breakdown of trade that dates back to the crisis of the third century, loss of confidence in the value of the currency, the collapse of the middle class, a decline of slavery but a rise of *coloni*, nominally free peasants who were bound to the land. In this view, the reforms of Diocletian were remarkable. They allowed the western empire to survive for another 100 years and the eastern for another thousand. Recently attention has also focused on the bubonic plague in time of Justinian, which is now shown to have been more widespread and to have lasted longer than was previously thought. The argument is that the reconquests of Justinian would have lasted had it not been for the fact that the population in both east and west was continually devastated by plague.

4. Whatever the cause of the ultimate collapse, the constitutional developments in the Dominate are quite easy to see:

   a. The total collapse of Republican institutions. The minutes of the Roman senate in 438 (*Materials*, p. 6–12) show that the greatest deliberative body that the Western world had known has become a cheering section:

      2. “Our Lord Theodosius, desired to add the following high honor also to His world, namely, that He should order to be established the regulations that must be observed throughout the world, in accordance with the precepts of the laws which had been gathered together in a compendium of sixteen books, and these books he had desired to be consecrated by His most sacred name. The immortal Emperor, Our Lord Valentinian, with the loyalty of a colleague and the affection of a son, approved this undertaking. . . .

      5. The assembly shouted:

      “Augustuses of Augustuses, the greatest of Augustuses!” Repeated eight times.

      “God gave You to us! God save You for us!” Repeated twenty-seven times.

      “As Roman Emperors, pious and felicitous, may You rule for many years!” Repeated twenty-two times.

      “For the good of the human race, for the good of the Senate, for the good of the State, for the good of all!” Repeated twenty-four times.

      “Our hope is in You, You are our salvation!” Repeated twenty-six times. etc. etc.

      The deification of the emperor, the use of an elaborate imperial liturgy, particularly in Constanople, the litanies, so reminiscent of the liturgy of the Eastern churches, should have made these supposed Christians uncomfortable. They do not seem to have had.

   b. The Theodosian Code illustrates an attempt to impose great state control over the individual: expansion of the offense of *laesa majestas* (treason); use of spies, *agentes in rebus*; confiscation of private property as early as Alexander Severus.

   c. The development of a caste system – *adscripti* (nominally free men bound to the soil) C.Th. 5.171; conscription of *collegia* (private social organizations made to perform

public functions) C.Th.12.19.1; hereditary labor C.Th.14.4.7; *curiales*, men required to serve in local government C.Th.12.1; the decline in the importance of citizenship.

d. 2 books (C.Th.11–12) devoted mostly to taxes; much of it having to do with personal liability of decurions for their payment

e. A particularly remarable attempt at economic regulation: Diocletian's Price Edict (partial copies of the original survive, one of the few that do; cf. C.Th.14.19–20 for much more modest attempts) – it is generally thought not to have worked

f. By and large we are poorly informed about the enforcement of the Code. It is possible that the regulation becomes more intrrusive, elaborate, detailed, and repeated because in fact less and less was happening in response to it.