Conclusion

The obvious way to conclude this book would be to provide a summary of what has been said in its various chapters: the interpretation of the *lex Barbarius* provided by the Accursian Gloss, the difference between *Citramontani* and *Ultramontani*, the approach of the canon lawyers and in particular of Innocent IV to the similar problem of the occult heretic, the influence that Innocent had on Baldus, the originality of Baldus' own approach, his distinction between internal and external validity of agency, and the progressive misunderstanding and simplification of Baldus and Innocent, leading eventually to the crystallisation of the double requirement of coloured title and common mistake.

Another and perhaps more interesting conclusion could be wondering whether it was really necessary to follow all those twists and turns in the road leading from Accursius to the formation of the *de facto* officer doctrine. Because of the non-linear development of our subject, both answers are possible. Better stated, given the complex historical development of the subject, the question itself may have two different meanings. If the question is whether this complex analysis was needed to make sense of the later developments of the subject, the answer seems to be negative. For instance, there is little connection between the *Ultramontani* and Baldus. It might therefore be possible to skip the first without compromising too much our understanding of the second. Similarly, because the position of Innocent came to be progressively simplified, the elaborate approach of Baldus was also generously and increasingly pruned until both authors (Innocent and Baldus) came to be interpreted as saying more or less the same thing. An in-depth analysis of their specific arguments is therefore not necessary to understand the approach of later jurists.

If however our question is whether this lengthy analysis was necessary to make sense of the route – and not just of the point of arrival – then the answer seems to be different. It is only with hindsight that the solutions of the Bolognese jurists first and then also of the French ones could be considered outdated and so less important. The influence of canon law on the civil lawyers' interpretation of the *lex Barbarius* was not something that was bound to happen sooner or later. It is also only with hindsight that certain interpretations may be relegated to a secondary rank: in their heyday they ranked among the most advanced positions on the subject. To understand why Baldus ventured into his complex reasoning on Barbarius' case, therefore, it is not possible to avoid (nor to shorten too much) either the Accursian position or the Orléanese dissent. The jurists of Orléans fully exposed the limits of the reading of Accursius, and those limits also became increasingly clear among the *Citramontani*. Any solution to the Barbarius problem leading to the ratification of the slave's praetorship would necessarily have meant approving of Accursius' much-criticised position. So Baldus had to adapt Innocent's concept of toleration to a different scenario – one in which the agent was never validly appointed. It is because of this added difficulty that Baldus came to distinguish so clearly between the internal and external validity of agency.

Perhaps the most important element in this study has been the progressive influence of canon law on civil lawyers. Overlooking the role of canon law, the whole development of our subject from the second half of the fourteenth century onwards would simply not make sense. Thus, the canon law concept of toleration of the jurisdiction of the unworthy provides a remarkably good example of the profound influence that canon law had on civil law, especially on its growing (proto-)public law component. In turn, the same idea of toleration allows a look at the rapid passage from ecclesiological to legal concepts within canon law itself (or rather, at the progressive crystallisation of ecclesiastical principles into legal rules). With specific reference to the concept of toleration, it seems hardly fortuitous that this passage culminated with a canonist as legally minded as Innocent IV.

One of the few authors who noticed the crucial importance of Innocent IV's position for the development of the *lex Barbarius* and the modern *de facto* officer theory lamented that the pope did not bring that theory to its 'logical' (i. e. modern) conclusions. In insisting on both the election and especially the confirmation by the superior authority, this author said, Innocent subordinated public utility considerations to the presence of a valid title. As such, the ignorance as to the true condition of an office holder could not shield third parties in good faith from the consequences of their mistake.[1] If we were to look at the same issue from Innocent's perspective, however, it would be our modern interpretation that appeared curious, for such an approach would entail forsaking the basic principles upon which the entire structure of legal representation was built. As a lawyer, Innocent never had much doubt that the system was more important than the man. If one of them had to be sacrificed, it was not going to be the system.

The most 'advanced' solution, advocated especially by the American courts from the second half of the nineteenth century, was in fact almost as old as Innocent's one. Ultimately, it was the same approach as Bellapertica's: public utility suffices. It is however telling that this solution was first (and for a very long time, only) proposed by civil lawyers – and not by canon lawyers.

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[1] Fedele (1936), p. 344. Fedele extended the same critique to Panormitanus, for having adhered too closely to Innocent's position without realising its shortcomings (*ibid.*, p. 357).

Jettisoning the requirement of valid title (thus the link with the superior authority) to the exclusive benefit of public utility would have exposed nearly any ecclesiastical office to serious threat. The threat was as much legal as it was political, for it would have undermined the hierarchical structure of the Church itself. Confirmation in office by the superior ecclesiastical authority had a clear centripetal effect: shifting the decision-making process higher up in the Church hierarchy. Innocent's insistence on the need of confirmation in any case, and without any exception, had a deliberate centralising aim. Subordinating the toleration principle to confirmation in office avoided clashes with that aim. Far from challenging the central role of confirmation, tolerating the unworthy in office highlighted its importance: the unworthy retained his office because of the superior authority's confirmation – not because of those who elected him in the first place. The legal consequence of this approach was that the toleration principle could work only to extend the initial validity of the appointment, not to replace it. Hence the office could be exercised only by the agent who was fully entitled to represent it. External validity of agency was a consequence of internal validity – a deliberate consequence. Innocent rejected our 'modern' solution not because he could not see it, but because it would have not made much sense to him.

Innocent's concept of toleration meant thinking of individual offices in terms of legal representation. This might appear obvious to the modern reader, but it was remarkably innovative. Corporation theory was developed mostly, if not only, with regard to *universitates*. For individual offices, it was much easier to think of individual persons vested with specific powers than of different subjects from the physical persons acting for them. Here lies the genius of Innocent: applying the basic principles of legal personality also to individual offices. A bishop is both the physical person anointed as successor of the Apostles and the legal representative of an office. What he does *qua* legal representative cannot be done *qua* individual. The same can be said of any prelate and, more broadly, any holder of a public office (an *officium*, not a simple *munus*). With Innocent, jurisdictional toleration becomes a manifestation of legal representation. And it applies only to individual offices precisely because of the identification between representative and office: the formation of the will of the office, and its external manifestation towards the thirds, is entrusted to the single individual *qua* representative. But if the agent were to consist of a plurality of individuals (as in the cathedral chapter) then no single individual could be considered the legal representative, and so it would be possible to exclude any of them from the relationship with the office. With individual offices it is precisely the impossibility of doing so that leads to the toleration of the person as representative of the office. This toleration is however based on the possibility of distinguishing the person as individual from the person as representative, and predicating the validity of the representation not on the basis of the condition of the individual, but exclusively on the link with the office. Representing the office, the person *qua* individual gives way to the person *qua* agent.

If the identification between agent and office allowed Innocent to develop his concept of toleration as a manifestation of legal representation, it also set firm boundaries on its further development. The difference between Baldus and Innocent lay in the symmetry between internal and external sides of agency. For Innocent, toleration ultimately prolonged the validity of the agency relationship – hence the person unworthy *qua* individual could still validly discharge the office *qua* agent. The external validity of agency (the relationship between office and third parties), therefore, depended on its internal validity (the relationship between agent and office). The office could act validly because – and insofar as – the person could validly represent the office. Baldus severs that symmetry, and argues for the external validity of agency despite the invalidity as to its internal side. The slave Barbarius is praetor 'with regard to the others' but 'not to himself', he is 'nothing as to himself' but 'something as to the parties litigant'.[2] The difference depends on the relationship between agent and office. Baldus could oppose internal invalidity to external validity because he kept agent and office more distant from each other than Innocent. What Innocent did was to some extent the very opposite of what previous civil lawyers did: instead of smothering the office with the person (*qua* individual), smothering the person (*qua* agent) with the office.

Baldus' reading of the *lex Barbarius* sought to avoid this identification between agent and office. The agent would still lack the right to act in the name of the office, but the office could nonetheless act validly towards third parties. The way Baldus came to sever the symmetry between internal and external validity of agency, however, cannot be explained just as the outcome of an abstract reasoning. It must be read against the background of contemporary dicussions on the subject.

We have seen that Baldus also hinted at this distinction between the two sides of agency in other parts of his opus. But he never devoted a full-scale legal analysis to the matter. It is only with regard to Barbarius' case that he elaborated the concept fully. He did so because he had to. Baldus built on Innocent's concept of representation. But, for Innocent, there could not be representation without full entitlement to the office. And this entitlement necessarily required confirmation by the superior authority. Toleration was therefore subordinated to confirmation. Applied to the *lex Barbarius*, Innocent's reasoning would lead to the same conclusion as the Accursian Gloss – Barbarius' election was ratified by

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[2] *Supra*, pt. III, §12.4.3, notes 148 and 162.

the people or the prince. The need to avoid this conclusion forced Baldus into a complex and elaborate discourse, seeking a different way to explain the lawful exercise of the office – not *de iure* entitlement to the office, but lawful possession of it. This different approach allowed Baldus (admittedly not without some ambiguities) to highlight the difference between agent and office. It is precisely because the slave Barbarius would never acquire *de iure* entitlement to discharge the office of praetor that Baldus sought to keep agent and office as distant as possible from each other. This way Baldus never reached the same degree of identification between agent and office as Innocent. Even when the person is acting *qua* agent of the office towards the thirds, the office would always remain clearly visible in the picture, as a different and distinct subject from its representative. This is also why Baldus did not speak of toleration with reference to Barbarius: in Innocent's elaboration, toleration required full integration between agent and office.

Without Innocent's insistence on the need of confirmation, Baldus could perhaps have applied the concept of toleration to Barbarius without great difficulty. But Innocent's unrelenting position on confirmation forced Baldus to find a different path and, in so doing, continue the development of agency theory. The only way to understand why Innocent's position was so problematic for Baldus is to appreciate the position of previous civil lawyers on the *lex Barbarius*, and the increasingly critical stance that many of them took on the Accursian solution. Coming back to what was said at the beginning of this conclusion, we might appreciate how the complex route leading to Baldus' solution on Barbarius – the separation between the internal and the external validity of agency – is ultimately (once again) a product of the non-linear development of the history of legal thought. A 'functional' reading of our subject, skipping or abridging what does not lead to its modern developments, would risk to overlook it.

When appreciating the remarkable modernity of Baldus' approach, we should also be mindful that it is the product of a complex, multifaceted but still unitary discourse. For the student of medieval law – and, more broadly, of medieval thought – the challenge is often to appreciate this underlying unity. Some links are surprising only because we no longer partake in this unity, which is perhaps the most fascinating and elusive feature of the medieval world.