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Mathias Reimann
University of Michigan Law School

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*Mathias Reimann**

THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA. By *James Q. Whitman.* Princeton: Princeton University Press. 1990. Pp. xix, 281. $39.50.

According to traditional legal historiography, the Roman law's modern significance lies in its huge role in shaping the civil law. Since its revival in the medieval universities, first in Italy and then all over Europe, the Roman law was the primary intellectual training ground for civil lawyers and provided much of the substance of modern codifications. More recently, this became particularly evident in the spectacular renaissance of Roman law in nineteenth-century Germany, where the law professors of Friedrich Carl von Savigny's historical school and Georg Friedrich Puchta's conceptual jurisprudence analyzed and systematized the Roman law more intensely than ever before.[1] Enshrined in their treatises, Roman law became the common law of the German-speaking countries of Europe and influenced modern civil law on a truly worldwide scale.[2]

In *The Legacy of Roman Law in the German Romantic Era,* Professor Whitman transcends this established view by considering the Roman law from a different perspective. He does not directly take issue with the traditional perception; rather, he takes it by and large for granted.[3] But he laments that legal (and other) historians "have too often shown themselves to be uninterested in exploring the place of Roman legal scholarship in German cultural and political life in general" (p. xi). Thus he looks at the Roman law in a broader context and finds that its importance went beyond the realm of law proper. It was also a powerful political and cultural ideology.

As Professor Whitman of course recognizes, this approach is not completely new. Almost half a century ago, Paul Koschaker reflected

* Professor of Law, University of Michigan. Dr. iur. 1982, University of Freiburg; LL.M. 1983, University of Michigan. — Ed.

1. *See* F. WIEACKER, PRIVATRECHTSGESCHICHTE DER NEUZEIT 377-416, 430-58 (2d ed. 1967); Reimann, *Nineteenth Century German Legal Science,* 31 B.C. L. REV. 837, 858-71 (1990).

2. A. SCHWARTZ, *Einflüsse deutscher Zivilistik im Auslande,* in RECHTSGESCHICHTE UND GEGENWART (H. Thieme & F. Wieacker eds.) in 13 FREIBURGER RECHTS-UND STAATSWISSENSCHAFTLICHE ABHANDLUNGEN 26 (1960).

3. He disputes traditional views on a few occasions, for example, with regard to the Romanists' conception of property (p. 166), but a critique of established views is not his primary goal.

broadly upon the Roman law as a cultural phenomenon.[4] But the precise meaning and impact of the Roman law as a political and cultural ideology, particularly in its heyday in nineteenth-century Germany, has never been explored. By undertaking such an exploration, Professor Whitman has written an important book that deserves the attention not only of legal historians but of all who have an interest in the culture and politics of eighteenth- and nineteenth-century Germany in particular, and of Europe in general.

To explore the Roman law from this perspective is a challenging task because it requires both technical understanding of the Roman law itself and a contextual approach to its role in history — in other words, it requires a lawyer as well as a historian. Professor Whitman is both, and he often weaves analyses of Roman legal doctrine into the broader fabric of history. His success in this endeavor varies,[5] but the overall result is a subtle and complex study of an intriguing and difficult subject.[6] The book offers, in a lively style,[7] a new and colorful picture of the Roman law and its proponents in the nineteenth century.

Professor Whitman paints his picture by doing two things at the same time — telling a story and presenting a thesis. Professor Whitman blends story and thesis together, but in this review I separate them because the former is rather straightforward while the latter invites debate. I first summarize the story, the tale of the learned professors (Part I), and then consider Professor Whitman's main thesis that the Roman law was a political agenda (Part II) pursued by these at times very powerful scholars. This thesis raises questions of proof and plausibility (Part III), and answering them helps to identify more clearly the book's strengths and weaknesses (Part IV).

I. THE TALE OF THE LEARNED PROFESSORS

As a story, Professor Whitman's book is the tale of the learned

4. P. KOSCHAKER, EUROPA UND DAS RÖMISCHE RECHT (1947) (cited on p. x).

5. *See infra* Part III, notes 19-20, 22-26 and accompanying text.

6. The book is based on thorough research using primary sources from German archives and libraries as well as a wealth of English, German, and Italian secondary literature.

7. The style suffers, however, from the extensive use of "-isms." Professor Whitman drives this bad habit characteristic of current scholarship in the humanities to extremes. Characterizing trends and movements as "-isms" is by and large acceptable, as in the case of "codificationism" (pp. 54, 217), but expressions like "third-way-ism" (p. 95), or "Febronianism" (p. 78 n.52) are awkward. Referring to attitudes or ideas of persons in this manner is worse, and few of the characters in Professor Whitman's tale escape this fate. Whatever one thinks of "Melanchthonianism" (p. 42), "Lipsianism" (p. 57), "Montesqieuianism" (p. 76 n.40), or "Schellingianism" (p. 215 n.70), certainly "Savignyan Niebuhrianism" (p. 160) is a stylistic monster. These "isms" are not only aesthetic nuisances, but they also cause vagueness and confusion. Given the complexity of Niebuhr's as well as Savigny's thought, I have, frankly, not much of an idea, what exactly "Savignyan Niebuhrianism" (in contrast to "Zachariä's Niebuhrianism," p. 160) means. It implies much learning but conveys little useful information.

Roman law professors' repeated rise and fall, taking us from the age of reformation to the late nineteenth century. Whitman's account emphasizes the function of Roman law in society and the professors' perception of their own position and responsibility as its keepers. The story's main theme is the revival of a sixteenth-century tradition in the Romantic era.

Professor Whitman sees the origins of this tradition in the concept of "Law in the Fourth Monarchy of Melanchthon."[8] In the age of reformation, Melanchthon and Luther looked for a law of peace for all society. For two reasons, they believed the Roman law was the answer. First, Roman law was universal throughout the Empire and thus not tied to particular interests. As the *ius commune,* Roman law was the law common to all and thus promised impartiality. Second, Roman law was connected, since the Middle Ages, with the public peace movement.[9] As the law of peace, it promised to overcome public disorder. The professors, as the Roman law's representatives, could thus, like their ancient and medieval predecessors, establish a "corporate tradition" as the impartial arbiters of social conflict and as the bringers of public peace.

A variety of political and intellectual changes in the early modern age led to a "Decline of the Roman-Law Corporate Tradition in the Eighteenth Century" (pp. 41-65). The consolidation of modern nation states broke up the Empire and destroyed the prevalence of the *ius commune,* which was preempted by princely legislation and eventually replaced by enlightened codification. In the age of reason of the eighteenth century, the social function of Roman law was disregarded; Roman law was conceived merely as a collection of timeless maxims of legal truth. Thus the professors found themselves degraded from independent arbiters and peace bringers to *Fürstendiener,* mere lawyers under the absolutist princes.

But the old tradition of equating Roman law with the law of peace for all society returned with the "Imperial Revival in the First Romantic Decade and the Discovery of the Antonines" (pp. 66-91). As the *ancien regime* withered and the power of the princes declined towards the end of the eighteenth century, the imperial tradition was revived. The Roman law regained prestige as the law of neutrality and peace, and the professors regained their status as its independent and socially prestigious keepers. Likening themselves to the great jurists

8. Pp. 3-40. The title of this chapter refers to Melanchthon's view of Rome as the last of the Four Monarchies in the Book of Daniel, as Professor Whitman duly explains. P. 4.

9. Professor Whitman sees this connection primarily in the constitutional reform of 1495, *i.e.,* the *Ewiger Landfrieden,* the Perpetual Land-Peace, and the establishment of the *Reichskammergericht,* the Imperial Court. Pp. 10-14. Whether the Imperial Court Ordinance *(Reichs-Kammergerichtsordnung)* of 1495 referred to the common (Roman) law because it was considered the law of peace is surely open to debate.

under the Antonine emperors,[10] they rose from *Fürstendiener* to *Staatsdiener,* from servants of the prince to servants of the state, and thus of the public interest.

This revival reached its high-water mark in the second and third decade of the new century. Hence, in its central chapter, "The Imperial Tradition and the New Professoriate after 1814" (pp. 92-150), the book describes the Romantic period as the "professorial age" (p. 101). Leading academics like Savigny and Puchta, Thibaut, and Welcker sought to revive the corporate tradition of the Holy Roman Empire in a variety of ways[11] in order to overcome the remnants of absolutism and feudalism. Their plans for political and social reforms by and large failed, but their efforts to regain prominence and influence for themselves were, at least temporarily, successful. As a result of their revivalist efforts, the "Roman law professoriate became a political force in post-Napoleonic Germany" (p. 93).

This professoriate, Professor Whitman tells us, did not confine its attention to grand jurisprudential questions. Instead, these scholars deeply involved themselves in pressing social issues of their time. Using their "High Cultural Tradition as an Instrument for Reform" (pp. 151-99), they tackled the *Agrarfrage* — the issue of how to abolish the remnants of feudal landholding in the early nineteenth-century German countryside. Although their success was very limited, Whitman believes these efforts demonstrated the scholars' belief that Roman law could ensure a peaceful transition from a feudalist to a liberal social order.[12]

Despite their efforts, the revived corporate tradition of the Roman law professors as the keepers of the *ius commune* and as the bringers of social peace was not to last. The Romantic era was followed by a time of "Cultural Crisis and Legal Change After 1840" (pp. 200-28). In the sharpened conflicts of the *Vormärz* period, the monarchial reaction took over as the Germanists launched their assault on the Roman law, criticizing it as alien to the German culture and indeed as an instrument of despotism. After 1850, materialism replaced romanticism and classicism as intellectual life focused on commerce and industry and became dominated by the paradigms of the natural sciences. In this new world and to its inhabitants like Mommsen and Jhering, Roman law was no longer a grand corporate and imperial tradition but the law of a marketplace dominated by laissez-faire. Jhering's mostly ill-fated attempts to use the ancient sources as a basis for modern commercial law illustrated his continuing admiration for Roman law, but it was admiration of "systematic consistency and pre-

10. The Rome of the Antonines stands more generally for the period of peace and prosperity in the second century A.D.

11. *See infra* Part II.

12. *See infra* Part III.

cision,"[13] not of a cultural tradition.

When the General German Commercial Code[14] was promulgated in 1861, the trend towards pervasive codification had become irreversible. It was also the year of Savigny's death. In the book's conclusion (pp. 229-43), Professor Whitman briefly considers the period after this date and finds that the political Roman law professors — and with them the visions of a revivified past — vanished towards the end of the nineteenth century. And when the Civil Code superceded the Digest as the fundamental text of German private law in 1900, it ended a period of half a millennium in which the professors had had primary control over the basic source of law.[15]

Many elements of this story are familiar to a student of German legal history, but this does not mean that the story is banal. Professor Whitman draws new and intriguing connections between major periods of German legal history by linking nineteenth-century scholars to their sixteenth-century predecessors as well as to the ancient jurists. He skillfully illuminates this connection by several pervasive themes. The book shows, for example, how some Roman law professors of the modern age linked their own claims to status as authoritative interpreters to the *ius respondendi* of the ancient jurists — the right to give officially binding answers to legal questions. And it shows that while many of these modern scholars regarded Rome and its law as their model, they saw very different things in it. To Melanchthon and Luther, it was a universal empire in which peace could prevail; to eighteenth-century thinkers, Rome meant the reign of Augustus as the enlightened prince who saved Rome from chaos; to Hugo, Rome was the glorious period of the Antonines; and to Jhering, Rome was a laissez-faire society and economy. The view depended on the expectations and needs of the viewer. And yet Rome remained the lodestar of jurisprudence.

Themes like these hold Professor Whitman's story together; they make it coherent, rich in perspectives, and highly interesting in its own right. But ultimately, he writes the story in order to make a distinct point about the professoriate of the Romantic era itself.

II. Roman Law as a Political Program

At its most general level, Professor Whitman's thesis is that, to the legal academics of the Romantic period, the Roman law was not

13. P. 232 (quoting John, *The Politics of Legal Unity in Germany, 1870-1896,* 28 Hist. J. 341, 350 (1985)).

14. Das Allgemeine Deutsche Handelsgesetzbuch (1861).

15. Professor Whitman's statement that with codification "interpretive authority passed to the class of the judges" (p. 229) is likely, however, to mislead the reader. The scholars did not lose all of this authority, as a look at the commentaries on the Civil Code and at the treatises on German private law amply illustrates even today. It is more accurate to say that after codification the judges had a greater share of the interpretive authority over the basic text than before.

merely a matter of jurisprudence but also a political program and a social vision. If we truly want to understand these academics, we must thus look beyond their well-known disputes about codification and legal science. We must understand that they believed in their, and the Roman law's, capability to bring about the much-needed reforms of German society in a peaceful way.

The meaning of Whitman's thesis becomes clear only in the context of the political and social situation in early nineteenth-century Germany. Although Professor Whitman does not elaborate on this context,[16] recalling it will help to reveal the essence of the book. In the Romantic period, Germany found itself in an uneasy situation for which France was responsible in a dual sense. First, the revolution and the fall of the *ancien regime* in France had made it clear that the days of the old politically absolutist and socially feudal order were numbered in Germany as well. Second, Napoleon's armies had first overrun and then occupied Germany and shattered much of this old order before the Germans could change it themselves. As a result, the need for social and political reform was clear. What form it would take, however, was not. On the one hand, the bourgeoisie was becoming too self-assertive and the people had gained too much national pride and self-confidence in the wars against Napoleon to let the princes retain absolute power. On the other hand, populism and democracy were widely discredited by the bloody excesses of the French Revolution itself.

In this situation, Professor Whitman tells us, the Roman law professors "claim[ed] for themselves a new role as national leaders" (p. 101). In other words, they consciously sought to navigate a German society caught between the Scylla of despotic absolutism and the Charybdis of violent populism to the quiet waters of gradual and peaceful reform. Because they considered themselves heirs of a past the revival of which could solve the problems of the present, they believed to have "all the resources necessary to carry Germany safely into the post-French Revolutionary world" (p. 112).

Professor Whitman's thesis is more specifically that the revivalism of these professors was focused on really two internally connected eras in the past. The Roman law scholars saw themselves as representatives of the sixteenth-century German tradition. And they sought to bring the social and political order of ancient Rome back to life.

First, the Roman law professors were "lawyers who thought of themselves as revivers of the sixteenth century" (p. ix), of the Roman law that had stood for political neutrality and social peace.

> It was this political revival of the traditions of the Holy Roman Empire, a revival deeply bound up with romantic yearnings for the pre-absolutist

16. This does not present a problem since Professor Whitman writes for an audience familiar with German history.

> past, that allowed the Roman law professors to reassert their own sixteenth-century corporate tradition, and to present themselves to their countrymen as an "impartial" alternative to the terrors of post-Napoleonic politics. [p. xv]

Like the professors of Luther's and Melanchthon's age, they wanted to revive an order in which the "rule of law . . . utterly excluded rule of men, [a] legal order without the sovereignty of either Volk or Fürst" (p. 126) — in short, a *Rechtsstaat* under Roman law and its keepers.

The manner in which the professors pursued this goal varied regionally. In the strongly monarchial Prussian North, conservatives like Savigny and Puchta demanded that academic jurists take the lead in making and administering the law, leaving the legislator as well as the judges in subordinate positions — a program first announced by Savigny and then fully developed in Puchta's notion of a *Juristenrecht.*[17] They envisaged a politically conservative state in which academic jurists developed the law through a historically and conceptually oriented legal science, thus gradually and peacefully reforming society. Beneath their program lay the "hope that the charismatic Roman law professors, sheltered within the free universities, could form the basis for a true spontaneous order that, in an odd way, represented a kind of intellectual laissez-faire" (p. 111).

In the increasingly constitutionalist South, comparatively liberal professors like Thibaut and Welcker sought a more limited but nevertheless highly important role for legal academics by supporting the revival of the *Aktenversendung.*[18] They intended to employ the power of the law faculties, to which the courts sent cases for decision of intricate legal questions, to protect liberal political activists persecuted by the government (pp. 138-39). For professors like Thibaut, Welcker, or Zachariä, the *Spruchkollegien* — the law faculties sitting as (appellate) courts — were thus institutions of a *Rechtsstaat* in which impartial Roman law professors would mete out impartial justice (pp. 139-46). Their program, Professor Whitman tells us, was just as much an attempt to restore the old constitution of the sixteenth-century Holy Roman Empire as were Savigny's and Puchta's efforts. The respective agendas were simply different versions of the same revivalism (pp. 98-99).

Professor Whitman also is convinced that these academics shared the wish to revive another more distant past. Through their sixteenth-

17. *See* G. PUCHTA, DAS GEWOHNHEITSRECHT (1828).

18. Allowed by article 12 of the *Bundesacte* of 1815. Pp. 135-36. "Aktenversendung" literally means "sending of the (case) file." The practice was widespread in the early modern age. The court gathered the facts of the case, collected the relevant documents, and thus built a dossier of the litigation. It then sent the whole record to a law faculty, the designated members of which (the "Spruchkollegium," decisionmaking panel) gave an opinion on which party was entitled to judgment. Thereafter the file was sent back to the court, which formally rendered the judgment and pronounced it. Thus, law professors (of Roman law) performed the function of judges. For more detail, see J. DAWSON, THE ORACLES OF THE LAW 200-07 (1968).

century predecessors, they looked to the ancient jurists and to Imperial Rome. The law professors of the Romantic period saw themselves also as representatives of "the political and social notions of Antiquity" (p. 98). In their view, the peaceful and prosperous reign of the Antonine emperors could serve as a model for post-Napoleonic Germany. The early nineteenth-century law professors were thus "motivated . . . by the conviction that they could somehow restore Roman social relations through a restoration of Roman law" (p. xv). To be sure, scholars like Savigny and Puchta on the one hand, and Welcker and Zachariä on the other hand, may have disagreed as to what that meant. They were nevertheless part of the same revivalist tradition because "they shared a conviction that German society could be remade on the model of Rome" (p. 150).

In sum, Professor Whitman portrays Savigny and his academic colleagues as united under the cause of a dual revivalism. Regardless of their political differences, they all

> harbored the same hope, that the Roman-law professorial tradition could, on the one hand, infuse political life with the strength and free sensibility of old corporate society, and, on the other hand, lend a sense of moral mission to the Germans, a sense drawn from the grandeur of the classical tradition. [p. 99]

This view of the German law professoriate of the Romantic period as a guild united in pursuit of a common political agenda is novel and intriguing. But is it correct?

III. Proof and Plausibility

Perhaps. The answer, however, is by no means clear or easy because the support Professor Whitman presents for his view is sometimes not wholly convincing. To be sure, Whitman need not offer unequivocal proof for his case, such as overt acknowledgments or acts by which the people under consideration clearly demonstrate that they intended what the author claims they did. Support can also consist of inferences that the author draws from other phenomena. But even granting these options, Professor Whitman's account is open to challenge. The overt acts and assertions he relies on are rarely clear proof for the correctness of his interpretation, and the inferences he draws from more general phenomena are sometimes not entirely plausible.

In evaluating the evidence he presents, we must distinguish between the various elements of his thesis; some are well supported, others are not. As Part II of this review has shown, Professor Whitman's characterization of the professors as revivalists with a conscious political agenda contains at least two major claims, each of which in turn encompasses several minor points. First, he portrays the legal academics of the Romantic era as "deeply conscious" (p. 98) of the past, by which he means that they considered themselves the modern

representatives of the sixteenth-century tradition on the one hand and of ancient Rome on the other hand. And second, he goes further and attributes to them a conscious and common political agenda, that is, a desire actually to revivify both the German preabsolutist corporate tradition and the social order of antiquity.

The first claim, that the Roman lawyers, in the north as well as in the south, all saw themselves as heirs both of sixteenth-century Germany and of second-century Rome, is questionable because of its generality. There is support for some of its aspects, but virtually none for others.

The Romanists in the Prussian north, notably Savigny and Puchta, clearly considered Rome "the model society of scholarly lawmaking" (p. 128). This is well documented throughout their writings to which Professor Whitman refers (pp. 125-31), but it is not new or surprising. It is also legitimate to regard the southern professors' enthusiasm for the institution of *Aktenversendung* as a conscious endorsement of preabsolutist constitutional traditions (pp. 131-48). Although the record here is more mixed,[19] at least some of the leading thinkers about a new *Rechtsstaat* like Zachariae, and maybe even Thibaut, Welcker, and von Mohl, probably saw a connection between the old constitution and their own time (pp. 81, 140-43).

But Professor Whitman fails to support sufficiently the less obvious dimensions of this (first) claim. He demonstrates neither that the southerners had great enthusiasm for ancient Rome, nor that the northerners considered themselves heirs of the sixteenth century. There is virtually no evidence in the book that scholars like Welcker, Zachariä, or Thibaut saw themselves, like Savigny and Puchta, as the proud and legitimate successors of Ulpian, Paulus, or Julian.[20] What evidence is presented actually indicates the contrary. As Professor Whitman admits, many southern academics were blatantly hostile towards Roman law (pp. 131-34). And they saw the *Spruchkollegien* primarily as the equivalent of the *Schöppenstühle,*[21] not of the *ius respondendi* — that is, they saw the *Spruchkollegien* as a medieval German, not an ancient Roman tradition.

The assertion that scholars in the Prussian north were highly conscious of the old sixteenth-century tradition is better supported. But

19. Thibaut and Welcker were, at least initially, opposed to *Aktenversendung.* Pp. 136-37.

20. At least not to a greater degree than all continental law professors had seen themselves as the modern equivalents of the Roman jurists ever since the middle ages.

21. See the long quotation (p. 144) from A. REHBERG, DIE ERWARTUNGEN DER DEUTSCHEN VON DEM BUND IHRER FÜRSTEN (1835). The "Schöppenstühle" were, so to speak, the (indigenous) German law equivalents of the (Romanist) "Spruchkollegien." In contrast to law faculties at the universities, they consisted of laymen without academic legal training, though not without experience in legal affairs. They sat as a group of decisionmakers in major cities to which judgments of lay courts in smaller towns and rural areas were frequently referred for quasi-appellate review. *See* J. DAWSON, *supra* note 18, at 158-76.

even here a good deal of skepticism is in order. Professor Whitman's attempt to prove his point is ingenious but not compelling. The ideas of Savigny and Puchta, he asserts, were formed by observing the legal practice in Hesse and Hannover (pp. 112-14) where the traditional preabsolutist ways of judging had never been disturbed by enlightened codes, and where courts thus still followed both local custom and Roman law. Here, Professor Whitman argues, lay the origins of Savigny's and Puchta's ideas of the *Volksgeist* as the essence of law, an essence which manifested itself in the people's customs but was then cast into the form of legal rules by the Roman lawyers. "Savigny and his followers acquired a sense of their own place in German society from the use of scholarship in these countryside courts" (p. 119). To be sure, this is possible in light of the parallels between the *Volksgeist* theory and the practice in the Hannoverian courts, as the author sees it. But the book does not show that it was in fact so. There is no hard proof that either Savigny or Puchta considered these courts their model.[22] Perhaps it is plausible to infer a link between local court practice and *Volksgeist* theory with regard to Savigny, who grew up and began his academic career in Hesse, and who was a friend of Burchard Wilhelm Pfeiffer, who in turn wrote about the Hannoverian courts. But the support for this inference is extremely weak.[23] And certainly Puchta, who allegedly "always had one eye on the world of Hannover" (pp. 121-22) and who allegedly derived his theory of the *Gewohnheitsrecht,* (the development of) customary law, from it (pp. 120-24), had no significant connections with, nor any discernible interest in, that region.[24] As a result, the claim that "the legal order of this Hannoverian Rechtsstaat provided Savigny and his followers with the village tradition . . . on which they could base their traditionalist program" (p. 120) rests primarily on speculation.

22. Professor Whitman does not cite any reference in their works to the legal order in Hannover or Hesse. There is also no reason to believe that either Savigny or Puchta had a particular interest in the practice of such rural courts. Quite to the contrary, their works are marked by a paucity of references to any sort of contemporary court practice.

23. Pfeiffer's importance for Savigny's ideas remains unclear. Professor Whitman asserts that Pfeiffer "exercised direct influence on Savigny's thinking" (p. 131) but fails to explain how. His documentation (p. 185 n.148) is limited to three references to Pfeiffer in the footnotes in Savigny's *System des heutigen römischen Rechts, see* 4 F. SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS 498 n.u, 504 n.bb & 505 n.dd (1841), and to Savigny's approval of Pfeiffer's (much earlier) dissertation. But only one of the footnotes in the *System* refers to Pfeiffer's writing about Hannoverian court practice, and it is not of great importance for Savigny's argument. Nor is there any indication that Pfeiffer's dissertation had anything to do with the courts in the countryside of Hannover, *see* J. RÜCKERT, IDEALISMUS, JURISPRUDENZ UND POLITIK BEI FRIEDRICH CARL VON SAVIGNY 13 (1984). Professor Whitman's evidence thus does not prove any significant link among rural court practice, Pfeiffer, and Savigny's fundamental ideas.

24. Puchta had studied and begun his academic career in Erlangen, and then became a professor in Munich. He did teach in Marburg (in Hesse) for two years, but this was merely a stepping stone on his way to Leipzig and, finally, Berlin. Aside from occasional visits to Göttingen, Puchta had nothing to do with Hannover. G. KLEINHEYER & J. SCHRÖDER, DEUTSCHE JURISTEN AUS FÜNF JAHRHUNDERTEN 206-09 (1976).

In light of this record, Professor Whitman's (first) claim that all Roman law scholars shared the same consciousness of the past seems bold. It is more appropriate to conclude that, while they all felt connected to some distant past, they often had different eras in mind. Savigny and Puchta saw themselves in the tradition of ancient Rome while Thibaut, Welcker, and Zachariae were probably more or less conscious of the preabsolutist German constitution. But the converse, the northerners' interest in the sixteenth century and the southerners' affection for ancient Rome, are matters of doubt.

Professor Whitman's second major claim builds on the first, but then goes beyond it. When he sees the Roman lawyers of the Romantic period on "campaigns for social change" (p. xv), he ascribes to them the conscious attempt to revivify the sixteenth century as well as the ancient legal and social order. But again, direct evidence is scarce, and some of the inferences are dubious.

The extent to which these Roman lawyers really wanted to bring back the sixteenth-century Imperial Constitution remains unclear. Of course, one may see their striving for independence from the princes and for public influence as an attempt to reestablish their old position in society. But that hardly amounts to embracing the sixteenth-century constitution in any more general sense. And of course, one can interpret the revival of the old institution of *Aktenversendung* as an effort to return to preabsolutist times. But even among the southerners, the enthusiasm for *Aktenversendung* varied greatly among the various scholars and over time; there is very little hard proof that any of them supported it out of love for the past rather than out of a felt necessity in the present. Although it may very well be that Savigny, who believed that *Aktenversendung* could render "most excellent services" (p. 109), felt a vague Romantic love for the old institution, that does not mean that he, or for that matter Puchta or others, therefore wanted to reestablish the political world of Melanchthon's time.[25]

It is equally questionable to assert broadly that these Roman lawyers wanted to "restore Roman social relations" (p. xv). This would certainly be extremely surprising with regard to the southern liberal professors. But, it is also a novel interpretation of Savigny and Puchta — though, in light of their classicist attitude, a more reasonable one. Professor Whitman, in fact, focuses on Savigny and Puchta (as well as some other northerners). Indeed, his claim that scholars like Savigny and Puchta consciously employed Roman law to bring antiquity back

25. Such revivalist ambitions are more likely in the case of the radical students in the Romantic Era, who wore the medieval student garb, as one can see in many paintings of Caspar David Friedrich, the foremost German painter of the time. This traditional garb symbolized the old, preabsolutist academic freedom. Donning it was a protest against the restrictions of that freedom after 1819. But conservative scholars like Savigny and Puchta were neither students nor radicals and did not necessarily endorse their agendas.

to life is so central to his whole argument that he devotes a long chapter (Chapter Five, pp. 151-99) solely to its demonstration. Thus, in evaluating Professor Whitman's argument, it is imperative to ask whether this demonstration succeeds.

Professor Whitman chooses the professoriate's involvement in the *Agrarfrage,* the issue of agrarian reform, to demonstrate how the Roman lawyers purposefully attempted to revivify ancient traditions. He shows how historians like Niebuhr and lawyers like Savigny reformulated the historical account of the relationship between the ancient Roman and the medieval German peasantry (pp. 154-65). And he explains how scholars like Savigny and Puchta reconceptualized the law of real property by casting the old feudal concepts of *Obereigentum* and *Untereigentum* (superior and inferior property rights) into the Roman molds of property and servitudes (pp. 165-89). This reformulation had important consequences because servitudes were subject to prescription while (full) property rights were not. If the lord had only a servitude in the peasant's land he could lose it by failing to claim it. In other words, time could slowly erase feudal rights.

Professor Whitman's analysis is a tour de force through a highly complex area of law and history, as well as an excellent illustration of the interplay between scholarly debates and social issues. The problem is, of course, that in and of themselves these scholarly reconceptualizations do not demonstrate that the Roman lawyers pursued any particular social or political agenda. On the face of their writings, scholars like Savigny and Puchta employed Roman legal doctrine only to conceptualize the legal aspects of the *Agrarfrage,* the rights and obligations of the peasantry vis-à-vis the landholding nobility. At least openly, they argued only issues of law, not of politics. The hard question then is whether Professor Whitman's claim that they got involved in the *Agrarfrage* for reasons beyond waging a "doctrinal battle against feudalism" (p. 151) is warranted. To some extent, it probably is. But we must, again, distinguish at least two different elements of his claim.

Perhaps the more important element is Professor Whitman's assertion that the professors tried to show that land law could be reformed through Roman doctrine without violent social disruptions. Roman law professors could peacefully transform feudal rights and obligations into modern property rights (pp. 198-99). Scholars like Savigny and Puchta wanted to complete a "process by which learned law had slowly eaten away the conceptual foundations of feudalism" (p. 186). In short, they proffered legal reinterpretation to avoid political revolution. In this sense, they indeed wanted to revivify the Roman tradition — the gradual and peaceful reform by the jurists through law (p. 158). This element of Professor Whitman's interpretation of the professors'

ambitions is an original and valuable contribution to our understanding of their ideas and goals.

But he ventures beyond that. He assumes that the professors employed the Roman law not only to demonstrate a method of social change but also because they embraced the substantive goals of reform — the concern beneath their scholarly debates was not only the maintenance of social peace but also the liberty of the peasantry itself. Professor Whitman portrays Savigny and Puchta as agrarian reformers who made use of a (concealed) "tactic" (p. 161) — reconceptualizing property law in Roman terms — in a "battle" (p. 185) for personal freedom, a battle motivated by a "romantic Romanist love for the peasantry" (p. 165). This claim is not only intrinsically implausible in light of Savigny's political conservatism and social elitism, it is also unsupported by convincing evidence. If Savigny, Puchta, or Thibaut felt any such love for the peasantry, Professor Whitman fails to show how they expressed it.[26] Even though Professor Whitman is right that Savigny was not, as has often been assumed, hostile to the peasantry (p. 166), there is still no evidence that he particularly cared for it either. His self-styled aloofness actually speaks very much against that. Perhaps there were indeed some "Romanists in the countryside who believed they could free the peasantry" (p. 193), and Professor Whitman refers to the efforts of some Hannoverian lawyers to do so (pp. 190-93). But their occasional use of Savigny's ideas proves nothing about the latter's intentions, just as the reference by others to Puchta (pp. 187-89) does not mean that he endorsed their efforts.

Professor Whitman's interpretation is dubious on yet another ground. Even if Savigny and Puchta had wanted to free the peasantry, the Romanist reconceptualization of feudal property rights would have been a very questionable tool for that purpose. Roman property law was by no means in and of itself beneficial to the peasants. It was a two-edged sword that could be, and often was, used against them instead of in their favor, as Professor Whitman openly admits (pp. 193-94). We can be sure that Savigny and Puchta were keenly aware of that. Thus they had no reason to believe that casting property rights in the forms of Roman law would necessarily promote the cause of freedom, even had they pursued it. For these reasons, Professor Whitman's conclusion that these scholars aimed to model modern social relations after ancient Rome so that "German peasants [would] become plebeians" (p. 198), is neither proven nor inherently plausible.

Thus, the evidence does not always sufficiently support Professor Whitman's broad thesis concerning the Roman law professors' common consciousness of, and shared longing for, both the sixteenth cen-

26. Perhaps others, like Niebuhr, Möser, or Zachariä did, but even that is far from clear. *See* pp. 156-57, 159-60. And it says nothing about Savigny and Puchta themselves.

tury and ancient Rome. The thesis is clearly proven in some respects, still plausible in others, but in some respects it is neither.

IV. Strengths and Weaknesses

In judging the merits of a thesis about historical figures and events, two criteria are particularly important. Does it add something important to our knowledge and understanding? And is it proven or made at least plausible? As Parts I and II of this review show, the answer to the former question is clearly yes. But as Part III indicates, the second criterion is not met consistently. Thus the book has both strength and weaknesses. They can be more clearly formulated by considering the book from two different perspectives.

As a synthesis of ideas and as a proposal to view a piece of the past in a certain light — in short, as a suggestive essay — the book deserves high praise. It has all the qualities that matter in this regard. I hope that my summary of its story and of its thesis has shown its originality and perceptiveness. I fear that my summary did not show that it is also incredibly wide-ranging in its content, rich in its insights, and subtle in many of its analyses.[27] For the purposes of a suggestive essay, the evidence it contains is acceptable because it suffices to illustrate its interpretation, to provoke thought, and to stimulate argument.

As a declaration of fact and as a demonstration of historical truth — in short, as a definitive account — however, the book suffers from a mismatch between the breadth and boldness of its thesis and the patchiness and inconclusiveness of much of its proof. To be sure, the weaknesses are by no means glaring, and only a fairly thorough inquiry illuminates the gaps and flaws in its evidence. But Professor Whitman sometimes[28] paints with a broad brush where finer lines would render a more accurate picture.

Professor Whitman ultimately tries both to write an interpretive essay with a provocative thesis, and to present a definitive account proven by the facts. But to succeed at both endeavors at the same time is very difficult because they call for different approaches, and the strength of one can easily become the weakness of the other. The author of a definitive account must be meticulous, circumspect, and preoccupied with adducing evidence for every assertion, but he risks boring the reader with factual detail and narrowly circumscribed conclusions. The suggestive essayist must provide grand synthesis and imaginative interpretation in order to stimulate thought, but this

27. Several passages in the book are excellent little essays in their own right; see, for example, the highly perceptive discussion of post-Napoleonic German politics, and especially of German liberalism. Pp. 94-98.

28. I do not wish to create the misimpression that this is a pervasive flaw of the book. Much of Professor Whitman's discussion is marked by admirable subtlety and careful differentiation. But many of his major assertions are not.

makes him vulnerable to the charge of speculation without definitive proof.

The Legacy of the Roman Law must be evaluated in light of this dilemma. On the whole, it seems quite clear though, that the strengths of the suggestive essay outweigh the occasional weaknesses of the definitive account because the book opens new and highly interesting perspectives with enough support to warrant serious consideration. Thus it succeeds in its ultimate goal — to show that there was a lot more to the Roman law in nineteenth-century Germany than just law. To be sure, exactly how much more, and what it was, is open to further debate — but it will be a debate for which Professor Whitman has laid the foundation and given the impetus.