

REVIEWS

HISTORY OF ROMAN LEGAL SCIENCE. By Fritz Schulz. Oxford: Clarendon Press, 1946. Pp. xvi, 358. 21s.

THE attention of Anglo-American lawyers is periodically called to the appearance of a new book on Roman law, and invariably the statement is made that the volume is a significant contribution in an important field. That such a statement is true in this case will perhaps be demonstrated by a rather detailed analysis of the book. For those who read the volume this will serve merely as an introduction to the wealth of material contained therein, and for the larger number who unfortunately will not read it, this review will attempt briefly to portray a vital aspect of the Roman legal system, now for the first time comprehensively presented in any language.

The volume opens with an introductory chapter defining legal science as "every form of vocational activity in the sphere of law," and "jurist" as one who dedicates himself to such activity.¹ The bulk of the book is broken up into four parts, corresponding to the periods into which Schulz divides Roman jurisprudence. Within each part there is a recurring sequence of topics: an introduction which defines the period, then chapters upon the jurists, the legal profession, the character and tendencies of the jurisprudence, and the forms and transmission of the literature.

The first or "archaic period" of Roman juristic science, which closed about 200 B.C., is preeminently the period of the pontiffs, at least in so far as private law is concerned. Tradition has it that about 300 B.C. a secular science began to contest the pontifical monopoly of private law, but Schulz, who sees no possibility of conflict between the two, would discard the greater part of this as legend and admit only of the existence of a secular jurisprudence. Many scholars would differ here, and in truth, Schulz has little to sustain his position. A striking contribution by the author, however, is his distinction between a "cautelary" opinion—"when the question put to the priests was whether a contemplated sacral act was admissible and, if so, in what form, the opinion would be in the nature of advice on action to be taken,"²—and a "judicial" opinion, when the priests were called upon "to pronounce on the legality of an act already performed; in this case the answer would be in the nature of a judicial pronouncement, though not of a judicial sentence in the legal sense."³ Such a distinction is of great value in considering the *responsa* (opinions) of the jurists of the succeeding periods.⁴ The most characteristic feature of archaic Roman jurisprudence is what the author terms "actional formalism, by which we mean its tendency to endow every act in

1. Pp. 1-2.

2. Pp. 16-7.

3. P. 17.

4. Pp. 49-52, 111 *et seq.*

the law with a definite form."⁵ The author has superbly portrayed this formalism, replete with relevant illustrations, and his description of this tendency, carried on in subsequent epochs, has been done with like effectiveness.⁶ Schulz further sees an historical evolution in the concept of interpretation, "at first freedom, then servitude to the letter, and finally, from the Hellenistic period, return to comparative freedom."⁷ This envisages a refinement too subtle for this reviewer to accept, but the general views set forth are in line with the current—and I believe, correct—emphasis on a strictly Roman, as contrasted with a Hellenistic, conception.⁸

The second period of Roman juristic science is designated the "Hellenistic period". This period extends to the establishment of the Principate by Augustus, although the author admits that "the science of Roman law [as] constituted in the Hellenistic period went on."⁹ Indeed there would seem to be little reason for the separation of the Hellenistic from the succeeding "classical period". Schulz bases his distinction largely on the scope of the activities of the jurists of the two periods, but in this respect the author appears to have grossly underestimated the talents of the jurists of the later period.¹⁰ The sharp differentiation between jurists and advocates is a prime factor for a full understanding of the real nature of Roman legal science, and the approach of the two groups to the imported Greek dialectical method is one of the interesting facets of the whole story. "It was only through dialectic that Roman jurisprudence became fully logical, achieved unity and cognoscibility, reached its full stature, and developed its refinement."¹¹ The masterly portrayal of the efforts of the jurists of the Hellenistic period in the sacral, public and private law, and the description of the literature of the period must be passed over without further comment. Occasionally one feels that a fairly rounded picture is based on rather flimsy evidence. For example, legislation is said to have been "formulated not by the proposing magistrates, but by professional draftsmen drawn from the ranks of the senatorial jurists and the secretariate of the archives."¹² Though this may be true, the only evidence which Schulz offers is a cross reference to a similar statement earlier in the chapter that there existed a subordinate staff of secretaries and copyists in the archaic period.¹³

It is the third or "classical period" of Roman jurisprudence (from Au-

5. Pp. 24-5.

6. Pp. 75 *et seq.*, 132 *et seq.*

7. P. 30.

8. This aspect is further emphasized in the following period, pp. 76 *et seq.*

9. P. 39 n.2.

10. Riccobono, *La giurisprudenza classica come fattore di evoluzione nel diritto romano* in SCRITTI DI DIRITTO ROMANO IN ONORE DI CONTARDO FERRINI 17 *et seq.* (1946).

11. P. 68.

12. P. 96.

13. The statement on p. 96 notes as reference, "Above, p. 87," which itself is annotated, "See above, p. 12," where the authorities noted only discuss magisterial staffs in general.

gustus to Diocletian) which is best known to us, and the names and biographies of a considerable number of jurists of these centuries are available. A primary activity of jurists continued to be the uttering of opinions (*respondere*). Schulz has therefore had to discuss a perplexing problem, the right to respond on the authority of the emperor. The author conceives this to be merely the adding of persuasive weight to the opinions of those jurists 'authorized' by the emperor, not that such rulings were binding on magistrates or judges. Consequently he eliminates two texts which he considers apochryphal, Gaius' *Inst.* I.7 and Pomponius' *Dig.* 1.2.2.48-51, and which would lead to a different conclusion. Although Schulz's interpretation is suggestive, it should be noted that while at times he is willing to accept the evidence presented by Pomponius in this well-known extract he occasionally treats it as postclassical.¹⁴ The most informative and most significant of all the chapters in the book is perhaps that which deals with the forms and transmission of the legal literature of the classical period.¹⁵ Schulz has demonstrated beyond the shadow of a doubt that many, if not most, of the works of the classical jurists were considerably revised in the early post-classical epoch—the last part of the third and the early portion of the fourth century. This explains the seeming paradox noted in the first decades of the present century, that the Digest of Justinian (533 A.D.) was crammed with what are known as interpolations (passages which could not have been written by the classical jurists to whom they were ascribed), yet the consensus of scholarship in the early decades of this century was that the compilers of the Digest had neither the time nor the ability to make the changes or deletions noted. It remained for the twenties and thirties to take the new approach, that early revised classical texts were those used by the compilers of the Digest.¹⁶ Although there are many scholars who may well refuse to accept Schulz's conclusions respecting this or that work, the discussion is sufficiently provocative to insure that his observations will long remain the point of departure in future critical studies of the juristic works of the classical authors. In closing the discussion of this period attention should be called to the lucid description of juristic commentaries, with its careful differentiation of the lemmatic commentary and the commenting epitome,¹⁷ and

14. Schulz accepts the statements as those of Pomponius, for example, in *Dig.* 1.2.2.5 (p. 20), 1.2.2.7 (p. 35 n.4), 1.2.2.36 (p. 9 n.1); he maintains, on the contrary, that *Dig.* 1.2.2.12 (p. 74 n.2) and 1.2.2.49 (p. 112 n.5) are postclassical. A striking instance is afforded on p. 91: it is unlikely that Ofilius wrote a commentary on specific laws, citing *Pomp. Dig.* 1.2.2.44; and just below: the first extensive commentary on the edict comes from Ofilius, citing the same passage. It is true that most scholars have cast doubt on the authenticity of Pomponius' text (discussion by Schulz, p. 168 *et seq.*) but what to accept and what to reject is still a matter of uncertainty.

15. Pp. 141-261.

16. Schulz, himself, did not recognize the extent of pre-Justinian interpolation in 1913, p. 326 n.3.

17. P.183 *et seq.*

finally, to the brief but outstanding delineation of the juristic language of the epoch.¹⁸

The last period of Roman jurisprudence, which Schulz terms the "Bureaucratic period", ends with the compilation of Justinian's codification in 529 A.D. "Roman legal science did not die with the Principate, but took on forms suitable to contemporary conditions; its adaptability shows its vitality."¹⁹ Earlier scholars have incorrectly evaluated the achievements of this period, largely because too much emphasis had been placed on the contributions of the professors and bureaucrats of the eastern half of the Roman empire. The recognition of extensive early postclassical revision, a product of western juristic activity, requires a complete reconsideration of the efforts of the anonymous legal lights of this area. The chapter on the character of the legal science in the bureaucratic period is a brilliant treatment of exceedingly complex subject matter. The classicizing tendency, the trend to stabilization, combined with efforts toward simplicity and informality, together with the Hellenizing, humanizing and Christianizing influences are all expertly interwoven into a clear and convincing picture.²⁰ The final chapter of the book—save for a brief epilogue—treats of the literature of the age.²¹ Here too, full bibliographical annotations, coupled with stimulating observations, offer a basic point of departure for future workers in the field.

There remains a basic problem, best considered without regard to chronological period, which reveals the one serious deficiency of this illuminating volume. This may be characterized briefly as a failure to penetrate deeply into the nature of what has been termed "juristic law". Early this year there was published one of the first post-war publications on Roman law in Germany. *Europa und das Römische Recht* by Paul Koschaker, a recognized leader in the field, is destined to become a classic.²² In the chapter devoted to juristic law Koschaker, by a careful consideration of such matters as the relation of jurists to the political structure, legislation, and legal history, has definitively established the nature and position of juristic law, whether that of Rome, England or France. Schulz, on the other hand, failed to perceive the effect of the underlying concept on the history of legal science in Rome. This may be partly due to over-attention to externals. The weight attributed to the technical term *auctoritas* seems to be a case in point.²³

18. P. 259 *et seq.*

19. P. 264.

20. An interesting comparison is afforded with the chapter on The General Character of the Post-Classical Law in JOLOWICZ, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* (reprint 1939).

21. The promised study by Schulz on the MSS of the *Collatio legum* (p. 311 n.1) has appeared in *SYMBOLAE AD IUS ET HISTORIAM ANTIQUITATIS PERTINENTES J. C. VAN OVEN DEDICATAE* 313 *et seq.* (1946) and is a model for the study of MS tradition.

22. Biederstein Verlag, München/Berlin (1947). The volume treats of the place of Roman law, as it evolved in the medieval and modern periods, in the European cultural tradition, as a basis for contemporary study of the subject.

23. Pp. 23-24, 61, 92, 124.

"Also, being aristocratic, Roman jurisprudence was authoritarian; though a matter of reasoning, as its products show, it based its decisions not on reasons given, but on the authority (*auctoritas*) of the jurists." However, it was authoritarian because it was professional. The pontifical jurists of the archaic period, the senatorial jurists of the Hellenistic era, the equestrian bureaucratic jurists of the late Principate, all took over the guidance and control of legal institutions. Whether they recognized a system of law is not important since a given group of individuals, a profession, developed the law instinctively along particular lines.²⁴ Such development was provided by precedent, not—in the case of Rome—judicial decisions but rather juristic opinions. And the rational element, coupled with a recognition of social and economic needs, plays a far more important role than Schulz seems to concede. Nor does Schulz seem to have comprehended the true nature of the juristic law of preclassical and classical Rome in other respects.

The method of legal education in the Hellenistic epoch, according to the author, was based largely on the attendance of young men upon the activities of some jurist. The young man "attended when clients came for legal advice, accompanied his master to the *forum* and observed his behaviour there both as counsel giving *responsa* and as member of the *consilium* of a praetor or a *iudex*, or when he assisted a party in proceedings before a magistrate (*in iure*) at which the terms of a processual formula were settled. . . . The traditional method of legal education thus consisted in impregnating oneself, by contact with practice and professional tradition, with the spirit of the law."²⁵ This accords with the accepted view, and depicts a system well organized to perpetuate a professional class. But for the classical period Schulz suggests the existence of a system of academic legal education, evidenced by the two law "schools" of Rome of the first and second centuries.²⁶ The fact that no "fundamental difference of scientific principle between the two schools"²⁷ can be discovered is, according to Schulz, proof of formal educational establishments. Is it not just as likely that the relation of master and student with the latter becoming master to other students—the method of the Hellenistic epoch—persisted in the classical period, save that now two lines of jurists (master and student) were simultaneously present? To imagine academic institutions quite similar to the law schools of the bureaucratic period, with the jurists only partially concerned therewith, is to fail to recognize the nature of the juristic profession of the classical period. The products of such schools would no more be jurists than would the students of the school of Berytus. Classical Roman law would be "professors' law", not "jurists' law".²⁸

Another topic misconceived by Schulz is the attitude of the jurists to-

24. KOSCHAKER, *EUROPA UND DAS RÖMISCHE RECHT* 166 (1947).

25. P. 57.

26. Pp. 119 *et seq.*

27. P. 122.

28. KOSCHAKER, *op. cit. supra* note 24, at 211 *et seq.*

wards legal history. The Roman jurists "held aloof from legal history"; "legal history remained a closed book"; "interest in legal history is shown only by two academic jurists, Pomponius and Gaius."²⁹ The author is correct in stating that the extant writings on legal history per se are negligible, and that the jurists were not interested in historical jurisprudence for itself. But when he offers the story told by Gellius of the jurist who has no idea of the meaning of a word in the Twelve Tables, that "as a practising lawyer he was not called upon to cumber himself with the antiquated lumber of the Twelve Tables, which had long been abandoned in practice,"³⁰ he is a little unfair. For Koschaker, who uses the story to point up exactly the contrary idea,³¹ gives us the rest of the passage: "and [since] all this antiquity of the Twelve Tables was put to sleep by the enactment of the *lex Aebutia*, except for cases tried by *legis actio* procedure before the court of the *centumviri*, I ought only be interested in the study and science of the law and the statutes and their words, which we use."³² In other words, where historical institutions were of practical value, the jurist perforce made them part and parcel of his intellectual equipment. It was not "senile obstinacy" that led to the retention of "superannuated forms" such as *mancipatio* and *in iure cessio*,³³ but rather that these forms suited the needs of the times and exhibited the conservative tendency of jurists generally to retain old forms while the newer underwent a century or two of experimentation. Tradition is a keystone of juristic law. The classical jurists commented upon the *Ius civile* of Mucius and Sabinus because they were the traditional works in the field. Ulpian cites his predecessors because he thereby establishes a line of precedent. It is incorrect to allege that the Roman jurists had no interest in legal history merely because they failed to record the external events of juristic science. Legal tradition, professional conservatism, the weight of precedent, are all factors indicating a primary interest in the history of legal institutions, without which, indeed, juristic law cannot be supreme.

Many scholars might take issue with Schulz's judgment on the significance of legal philosophy to Roman juristic science.³⁴ To say of Celsus' *ius est ars boni et aequi* that it is "an empty rhetorical phrase"³⁵ is bound to stimulate discussion. However, the reviewer is inclined to agree with Schulz. The Roman jurists of the Hellenistic and classical epochs were not profoundly affected by this aspect of Greek philosophy. The author approaches the real issue when he states that "Roman legal science was a professional science,"³⁶ but he fails to make it quite evident that if the jurists had delved deeper into legal philosophy and thus strayed from the paths of practical jurisprudence,

29. Pp. 70, 134.

30. P. 134.

31. KOSCHAKER, *op. cit. supra* note 24, at p. 189 n. 4.

32. GELLIUS, *ATTIC NIGHTS* XVI.10.8.

33. P. 132.

34. Especially pp. 69 *et seq.*, 135 *et seq.*, 240.

35. P. 136.

36. P. 135.

they would have been the exponents of "professors' law" rather than "jurists' law."³⁷

The author is the first—for some time at least—³⁸ to dwell upon the relation of the developing bureaucracy of the Principate to juristic science.³⁹ However, he seems to have underestimated the importance of the relationship. The bureaucratic structure—at least that which was in any way affected with juridical activity—was gradually taken over by the jurists. The jurists of the later Principate were civil servants and their literary effort was in part given over to works on administrative law. Even their works on the civil and praetorian law reflected the new conditions.⁴⁰ Only in passing does Schulz mention *ius novum*.⁴¹ The idea of a legal system developing out of the administrative reorganization of the state, a *ius novum*, was not completely quashed by the criticism of Wlassak,⁴² as many of the more recent monographs demonstrate.⁴³ The jurists from Julian on played the major role in developing this new law, and Schulz neglects to point out that Roman juristic law after Hadrian advanced along other and new lines.

The wealth of information and of ideas contained within the covers of this book, despite the author's wish that it be "a book to read", will serve to make it a constant source of reference. Minutiae, misprints⁴⁴ or obscure language are of little consequence. *History of Roman Legal Science* is a "must" for the specialist in Roman law, as well as the serious student of classical philology and ancient history. It will also prove intensely interesting to the student of Anglo-American law, for the problems of juristic law—the basis of these two legal systems—are largely the same, whatever epoch of human history is treated. A careful reading of the book leaves one with the feeling that a significant aspect of Roman law, one indeed that is of particular moment to the modern scholar, has at last been most adequately presented.

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37. As were many of the writers of the school of natural law, KOSCHAKER, *op. cit. supra* note 24, at 248 *et seq.*

38. Among others, HIRSCHFELD, *VERWALTUNGSBEAMTEN* 318 *et seq.*, 476 *et seq.* (1905); SAMTER, *NICHTFÖRMLICHES GERICHTSVERFAHREN* (1911).

39. Pp. 101, 111, 117, 138, 198.

40. A paper on "Bureaucracy and the Roman Law" read by the reviewer before the American Historical Association in December, 1944, is being revised for publication in the forthcoming studies in honor of Professor Max Radin.

41. In connection with the SYRO-ROMAN LAWBOOK 324.

42. WLASSAK, *KRITISCHE STUDIEN ZUR THEORIE DER RECHTSQUELLEN* 51 *et seq.* (1884).

43. *E.g.*, BIONDI, *PROSPETTIVE ROMANISTICHE* 51 *et seq.* (1933); ORESTANO, *IL POTERE NORMATIVO DEGLI IMPERATORI E LE COSTITUZIONI IMPERIALI* (1937).

44. The author, in correspondence with the reviewer, has noted the following misprints. P. 15 n. 2 and 8: write Nilsson; p. 38 n. 1: insert p. 333; p. 67 line 2: write quae rem quae est; p. 70 n. 2: write Eth.Nic.; p. 97 n. 1: write Svennung; p. 166: write Norsa instead of Korsa; p. 321 n. 2: write oströmisch; p. 337 line 4: write Martha; p. 338 line 4: write Berger, PW.XVII instead of XII; p. 347: write p. 282 n. 1 on the Law of Citations; p. 348: write p. 304 Rudolphus Ambrosino; p. 349: write Acceptilatio 159 n. 4.

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A DECLARATION OF LEGAL FAITH. By Wiley Rutledge. Lawrence: The University of Kansas Press, 1947. Pp. 82. \$2.00.

In this small but inspiring book, an Associate Justice of the United States Supreme Court sandwiches a semi-technical discussion of the Commerce Clause between two layers of political philosophy. Indeed, what is essentially political philosophy is as ill-concealed in that part of the volume dealing with interstate commerce as it is in the author's judicial opinions. The middle of the book is pretty good; the first and last parts eloquent. The reader can hardly escape the emotional sincerity and intellectual integrity which characterizes every page and line.

The Commerce Clause, the author believes, is the central core of our national unity. The fathers wrought even better than they knew. "By a stroke as bold as it proved successful, they founded a nation, although they had set out only to find a way to reduce trade restrictions."¹ From it has evolved a mighty continent of free trade, mighty because trade was free; a continent and a democracy able to triumph over depression and war and, for good or ill, to assume leadership in a shattered world.

The Commerce Clause is a uniquely federal instrument. In all the brilliant bickering and strategic statesmanship of the making of the Constitution, perhaps the greatest stroke of genius was that which incorporated the twelve magic words: "The Congress shall have Power . . . to regulate Commerce . . . among the several States. . . ." The Clause was to become the greatest monument to the vision of those who realistically appraised the toughest problem at hand and ahead. "More than any other provision, it has had to do with clashes of federal and state power, the lines of their division and their reconciliation in the federal plan."²

In language sufficiently technical to be accurate and popular enough to be intelligible to laymen, the Justice writes briefly on the major problems under the Commerce Clause. He develops the views of Marshall and Taney, and the conflicting interpretations which have evolved therefrom, with appropriate credit to both jurists for their contributions to the continuous solution required in a dynamic nation. To Marshall must be attributed the establishment of the judicial role in the accommodation of the powers over commerce to the federal system. "*Gibbons v. Ogden* will stand for the life of the federal system as a landmark in Commerce Clause law, as it will also in the law of federal supremacy and of the place of judicial power in the scheme."³ *Cooley v. Board of Wardens* detracts but little from the luster of Marshall's achievement. Taney, differing from Marshall as to the exclusiveness of federal power, is entitled to major credit for the realistic manipulation of the Clause to permit desirable if not necessary State action. "For him, it may be surprising to those who know him only as the author of an

1. P. 26.

2. P. 33.

3. P. 36.

opinion in the *Dred Scott* case, the nation and the States were not essential antagonists, each seeking to exclude the other from power. He was rather a statesman of great common sense, except in the single instance, devoted to making workable accommodation between the two great powers in the federal scheme and giving appropriate play for each to act."⁴

The author not only traces the swing of the pendulum of federal power across its narrowing and lengthening arc, but develops the conflicting interpretations of the implied prohibition upon State power. One, rooted in Marshall's conviction of exclusive Congressional power, which declares the prohibition self operating in the Clause itself; the other, evolved from Taney's views, that the intention of Congressional silence is the touchstone by which to determine the limits of State action.⁵ Although recognizing that the silence of Congress may on occasion mean merely that it has no attitude at all and disavowing the major premise of the self-executing character of the Commerce Clause, the Justice appears to find value in both views as affording the Court necessary latitude for handling Commerce Clause problems.

The author is at his best in his declaration of faith in federal democracy. He believes in law. He also believes in freedom. And he knows that each of these things may destroy the other. But he also knows "that without both, neither can long endure." Man, he believes, instinctively denies the validity of anarchism as he intuitively shrinks from despotism. He therefore seeks to reconcile the opposing extremes, and in doing so, is motivated by the desire for justice. Justice in the abstract, for the author, is but the source from which concrete justice springs. In its finite form, justice is neither complete nor perfect. It is, on the other hand, incomplete, imperfect and everchanging. The federal system, the author believes, is the only political framework within which man's conflicting objectives can successfully be reconciled. His exaggerated evaluation of the Commerce Clause is based on this conviction.

Like all idealists, Justice Rutledge reaches for something which probably isn't there. He would apply the federal plan to the entire world. He thus marks himself as an incurable internationalist. If there are any copies of this little book left after World War III and if there is anybody left alive who can read, he will reflect sadly upon the tragedy of a civilization which could not bring itself to follow the path which Justice Rutledge, along with all too few others, pointed.

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4. P. 52.

5. See P. 55.

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COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774-1861. By Oscar Handlin and Mary Flug Handlin. New York: New York University Press, 1947. Pp. 364. \$3.50.

According to the Handlins, the central problem of this work is "the delineation of the developing conception of the role of government in the economy of the United States before the Civil War."¹ Most people are aware of the influence now exerted by the federal government in economic affairs. The authors have shown the extent to which the state government played its part in economic life from 1774 to 1861, and how changing conditions caused by the Industrial Revolution altered its role. This volume is the first of four studies, set up by the Committee on Research in Economic History, covering four different states.

In the development of their study, the Handlins have made three worthwhile contributions. First, they have shown that the economy of Massachusetts before the Civil War was always a generous mixture of private enterprise and government influence—it was never completely *laissez-faire*. Next, they have traced the concept of government from that of commonwealth state to reform state. During the early decades of the period, the people of Massachusetts looked on their government as a commonwealth which would use its own creature, the corporation, both to promote and to direct the state's economy for the common welfare. Eventually the state, having lost control over the corporation, ceased its efforts to guide economic development through direct participation. Instead, it became something of an umpire, using its police powers to bring about reform for the common good. And finally, the Handlins have shown the development of the corporation itself from an instrument of the commonwealth state to a form of business organization designed solely for private profit.

Unfortunately this review cannot end with a simple summary of the authors' contributions. The first two chapters of the book are particularly open to criticism on grounds of scholarship, for the Handlins' conclusions, which I think are quite correct, do not follow logically from the evidence. The first chapter gives the background for the State Constitution of 1780—the foundation of political power in Massachusetts. The authors make brief reference to unifying factors in this background, but their stress is on the class struggle—debtor against creditor, poor against rich, "debt-dominated west" against eastern commercial cities. Specifically, they maintain that the law of 1776, increasing representation for the larger towns, was put over by a rump session of the General Court after the country members had left and extended the powers of the large towns almost indefinitely.² They present the Constitution of 1780 itself as a sort of conspiracy of the upper classes and commercial interest. A strong executive with veto powers, an independ-

1. P. xii.

2. P. 15.

ent judiciary appointed for good behavior, and a senate representing propertied classes effectively restrained the house of representatives, "the only popular branch of the government."³ In addition, this popular branch "was weighted in favor of eastern mercantile towns", and "heavy property qualifications" for voting as well as office-holding "were actually higher than under the old Province Charter."⁴ Yet we are asked to believe that out of this class conflict came a constitution containing "a broad vision of the nature of the state, explicitly propounded in terms that appealed to preconceptions in the minds of all Massachusetts men";⁵ that in the constitution, "John Adams formalized ideas current throughout the state,"⁶ and that these theories when "placed against their proper background, . . . appear as the intellectualized expression of deep-rooted and widespread sentiments."⁷

The paradox is not difficult to resolve. As the authors themselves point out, the law of 1776 increasing representation for the larger towns was the result of a similar law in 1775 doing the same for the smaller ones.⁸ However, the Handlins neglect to explain that both laws remedied injustices which had developed under British rule, both were the work of a "western" representative, Joseph Hawley, and, in spite of a few protests, both were generally accepted by the agrarian interests. Otherwise, the agrarian towns could have changed the law at any time, for the "commercial cities" had less than an eighth of the state's representation. As for the Constitution of 1780, the House was not "the only popular branch of the government." Governor and senators were elected yearly by the same voters who elected representatives, and, as the Shays' Rebellion election of 1787 demonstrated, neither could hold office without popular consent. Larger towns naturally had more representatives than smaller ones, but the "eastern mercantile towns" never overbalanced the agrarian towns. As for the voting franchise, the "lawful money" qualifications under the Constitution of 1780 were about the same as the "sterling money" qualifications under the Province Charter, since sterling money was worth approximately a third more than lawful money. And finally, this reviewer has ample evidence (contrary to accepted views) that the "heavy property qualifications" for voting were not in reality heavy at all, and that even if they had been enforced, which they seldom were, they would not have excluded many men from the vote.

Similar criticism can be levelled at the treatment of Shays' Rebellion in the second chapter. The authors claim that victory over the Shaysites was complete, and that the General Court "disenfranchised hundreds to preclude the remotest chance of realizing by ballot what could not be attained by

3. Pp. 25-6.

4. Pp. 26-7.

5. P. 28.

6. *Ibid.*

7. *Ibid.*

8. P. 15.

arms."⁹ They should have pointed out that the government, even before declaring that a rebellion existed, undermined the uprising by granting practically everything the Shaysites demanded, including a pardon for all but a few leaders, provided the men laid down their arms and took an oath of allegiance. Later a committee of the General Court pardoned all but approximately two hundred before the election of 1787. And in that election the Shaysites and their sympathizers won a complete victory "by ballot".

It is unfortunate that the Handlins were not as objective in their first two chapters as they were thereafter. As they say, the commonwealth idea was strengthened by the experiences of the American Revolution and Shays' Rebellion. But it was strengthened because the Constitution of 1780, growing out of the Revolution, represented generally accepted political ideas and Shays' Rebellion ended in compromise, not because both resulted in a victory for the upper classes. Beginning with the third chapter, the authors put less emphasis on class conflict and more on the compromise of many interests and groups. As a result, their conclusions are more compatible with their evidence.

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9. P. 48.

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