In This Issue

This issue presents innovative case studies that raise significant questions about the historian's method and the value of comparative legal histories. Collectively, our authors challenge us to reconsider such disparate topics as indigenous rights in the British Empire, cartels in the Progressive Era, the legal history of the family in the Americas, and the challenges of writing an international history of racism, nation building, and the administration of law.

Our first article, by Craig Bryan Yirush, analyzes the longest dispute over indigenous rights in the eighteenth-century British world. Known as the Mohegan case, it involved appeals to the Crown, three royal commissions, and the highest court in the empire. By examining the legal claims made by the colony of Connecticut, the Crown, and the Mohegans themselves, the article challenges the prevailing view that early modern British people, employing an argument from natural law, held the New World to be *res* or *terra nullius* (an empty land) because the indigenous peoples who inhabited it had not created property rights by labor. Instead, Yirush shows that the Mohegan case reveals an intra-imperial disagreement over indigenous rights. The Crown defended the Mohegans' property rights and political capacity, including their ability to sign treaties, in order to undermine Connecticut's autonomy. In response, Connecticut claimed the disputed territory by conquest and cession (thereby recognizing the tribe's prior rights), a claim that the colony then supplemented with arguments from prescription (they had held the land for a long time) and labor (they had improved the land by cultivation). In addition, Yirush examines the Mohegans' vision of their place in the empire, by revealing that they defended their inherent rights to land and autonomy as an equal part of a federal imperial polity.

Our second article, by Sachin S. Pandya, examines United States industrial organization in the Progressive Era. In 1896, a decade after liability insurance for personal injury accidents came to the United States, the leading liability insurance companies joined to fix prices and pool information about losses. The article documents the rise of this cartel, and evaluates four possible causes for why it abandoned price-fixing in 1906. Pandya concludes that price competition by non-cartel rivals probably played an important role; the

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influence of defections by fellow cartel members is unclear; and state competition law appears not to have made much of a difference. He also suggests a fourth plausible cause. The regulation of liability insurance loss reserves may have reduced the value of cartel membership. The rise and fall of this first liability insurance cartel therefore challenges the standard account of how law and legal institutions influenced industrial organization in the United States at the turn of the twentieth century.

Our third article, by Kif Augustine-Adams, contributes to the study of law, race, and marriage. In 1923, the state congress in Sonora, Mexico, enacted Law 31, a law that prohibited marriage between Mexican women and Chinese men. Although prejudice against Chinese in Sonora was long-standing, Law 31 marked a decided uptick in legal discrimination against them. Mexican–Chinese couples challenged Law 31 in federal court, seeking *amparo* – judicial relief – against its enforcement. The petitions, and reaction to them, tell a complex story about constitutionalism, judicial process, federalism, and national identity on the one hand; and race, citizenship, marriage, and family on the other. At the lower federal court level, the nearly complete success of Chinese *amparo* petitions in 1924 and 1925 represented a short time when a handful of federal judges applied Mexico's 1917 Constitution to protect a despised minority. The federal judges, especially Arsenio Espinosa, strictly applied the law and asserted the supremacy of the federal Constitution over state law. In contrast, the Mexican Supreme Court decided the Law 31 appeals it heard on other grounds. The Court considered what government entity could impose fines or punishments and whether states could regulate marriage. The Supreme Court legitimated Sonora's defiance of federal law and its discrimination against Chinese. As Augustine-Adams concludes, marriage equality failed and with it some of the promise of the 1917 Constitution.

The issue's forum, which begins with an introduction by John Wertheimer, focuses on racial determination and the law. The first article, also by Wertheimer and many of his former students, uses *Tucker v. Blease* to explore the legal origins of the "black–white paradigm": the misleading notion that the racial palette in the United States historically has contained only two colors. In 1913, an all-white school in South Carolina dismissed three light-skinned, well-behaved brothers because they were reputedly "not of pure Caucasian blood." The South Carolina Supreme Court upheld their expulsion. Superficially, *Tucker* illustrates the important role that Jim Crow-era legal systems played in sorting the United States population into two categories: "those with and those without negro blood," to quote the ruling itself. There was, however, a twist. Contrary to the consistent assumptions of subsequent journalists, lawyers, judges, and legal scholars, the Kirby boys were *not* alleged to have "Negro" ancestry, and their

neighbors did *not* seek to send them to segregated "Negro" schools. Instead, the Kirbys were part-Croatan Indian, and their neighbors sought to send them to segregated Indian schools. *Tucker* therefore shows how Jim Crow-era legal systems used the "one-drop rule" not only to divide those with from those without it, but also to filter out multicultural complexity. The case and this analysis of it demonstrate the central role that the legal system played in the development of the "black–white paradigm."

The second forum article, by Christopher J. Lee, examines the legal impact that multiracial people had on colonial rule in British Africa, specifically the manner in which their complex racial descent complicated definitions of "native" and "non-native" legal status. He uses the principles of *jus soli* (right of "soil" or territory) and *jus sanguinis* (right of "blood" or descent) to articulate the legal rationales at work and to open comparative discussion of the role these ideas had in defining social membership in colonies and sovereign states alike. Lee thus reveals how these specific legal ideas were shaped by racially-marginalized communities at the same time that colonial states sought to define them.

The third forum article, by Thomas Pegelow Kaplan, focuses on the intersections of law, race, and dictatorial power in the Third Reich. To do so, the article analyzes paternity suits from district courts in Nazi-era Munich between 1938 and 1945. It shows the significance of paternity suits in the Nazi regime's broader practices of determining "racial descent" and in the survival strategies of Germans of Jewish ancestry threatened by deportation and, ultimately, mass murder. Kaplan demonstrates that racialized definitions and legal codes remained inherently unstable. Court officials, Nazi bureaucrats, and scientists continually struggled over racialized categories and their imposition on the population. Even in the capital of the Nazi movement, these processes were anything but clear-cut. It was through these struggles that the categories' legal meanings, applications, and violent repercussions evolved. In addition, Kaplan reveals that German plaintiffs of Jewish ancestry participated in these partially court-based struggles, even though they found little support from the courts. With the limited help of lawyers, they cited legal discourses in the hope of bringing about ruptures and including themselves in the broader community of the *Volk*. The forum concludes with an essay by Ariela Gross and a comment by Peter C. Caldwell.

Building on the theme of comparative legal history, this issue includes two research notes that suggest the value of moving beyond the traditional national narrative framework. The first, by Theresa Alfaro-Velcamp and Robert H. McLaughlin, offers a critique of two conventional national narratives, one from Mexico and the other from the United States. The first narrative neglects the role of immigrants in the emergence of Mexico as an independent nation-state. The second uses immigration to define the

exceptionalism of the United States. Through an analysis of techniques of governance as applied in both countries, the histories of immigration in Mexico and the United States are understood to challenge these national narratives. The note focuses on three governance techniques: 1) the assignment of nationality as a singular attribute of personhood, 2) the use of demonstrable and documentable characteristics as criteria of admission, and 3) centralized registration procedures to monitor and control the immigrant population. Together, these techniques reveal how Mexico and the United States each accommodated those who gained admission, and accounted for those who were refused, excluded, or deported in the twentieth century. Thus, Alfaro-Velcamp and McLaughlin, through the comparison of Mexico and the United States, help chart a path for studying immigration to and within North America.

The second note, by Philip Girard, with Jim Phillips, also argues that scholars must reject the implicit assumption that nations are exceptional and cannot be profitably compared. Using the history of family law in Canada as a case study, they contend that national boundaries are more like nets than walls, and that national legal traditions are the product of ongoing transnational exchanges of legal and cultural ideas and practices. This receptivity, they argue, is itself a key aspect of Canadian legal culture. Unlike other comparativists, they also consider what the "nets" keep out as well as what they allow in. Canadian family law reveals over time the interplay of English, French, and aboriginal legal traditions, along with those of the United States and Scandinavia, in response to a variety of cultural, social, political, and economic changes. They also point out that comparative legal history can provide important insights about the nations used as comparators. Here, the resistance of Canadians to the importation of United States anti-miscegenation legislation and to liberal reforms to divorce, custody, and illegitimacy laws, coupled with their receptivity to married women's property law reform, is analyzed to provide insights about the history of United States law as well as of Canadian law.

As always, this issue concludes with a selection of book reviews. We also invite readers to explore and contribute to the ASLH's electronic discussion list, H-Law, and visit the society's website at http://www.legalhistorian.org/. Readers are also encouraged to investigate the *LHR* on the web, at http://journals.cambridge.org/LHR, where they may read and search issues, including this one.

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