In This Issue

This issue of the *Law and History Review* canvasses relationships over the last two hundred and fifty years between representations of formal juridical practice and authority—legal processes and procedures, constitutional structures, judicial roles, jurisprudential ideologies—and struggles and outcomes in the political field of the state. Five articles address these matters in Euro-American contexts. The issue concentrates heavily, but by no means exclusively, on the United States after 1870.

Our first article, by Fabio López-Lázaro, examines how nineteenth-century Spanish reformers misrepresented *Ancien Régime* legal procedure in order to buttress their ideological struggle against what they perceived to be an undesirable past of arbitrary government. Quantitative analysis of cases from one of the Spanish Empire's principal law courts, dating between 1750 and 1802, suggests that reformers were mistaken in calling preliberal criminal procedure "inquisitorial." Critical examination of published and unpublished qualitative evidence corroborates quantitative results: this court's complex criminal practice substantially protected the individual from potential judicial arbitrariness. Juridical process, however, clearly placed ultimate control of this flexible system in the judges' hands, highlighting how procedure was less dependent on royal statute than on "common law" traditions they had evolved over centuries of practice. Both royalists and liberal reformers eventually agreed that this judicial control threatened the authority of the state and constituted an "arbitrary" exercise of power. Historical literature has uncritically adopted this portrayal of powerful judges and turned them into agents of social control, erroneously underplaying the significant ways in which judges acted as mediators of a commonly held moral code. The significance of this study lies in the unprecedented detail of its re-creation of Spanish court practice and in its correcting our view of pre-nineteenth-century legal institutions.

Our second article, by Gretchen Ritter, considers the relationship between jury service and women's citizenship before and after the passage of the Nineteenth Amendment in 1920. Why, Ritter asks, did the Nineteenth Amendment have so little effect on the constitutional structure of women's citizenship? In answer, Ritter points to the structure of national citizenship established on the basis of the Reconstruction Amendments, which separated civil and political rights, made political rights secondary, and denied women consideration under the Equal Protection Clause. All this limited

the potential impact of the suffrage amendment on citizenship. Ritter illuminates the changing nature of women's citizenship through consideration of the twin campaigns for suffrage and jury service in the late nineteenth and early twentieth centuries. Considering jury service as a political right, a civil right, and as a marker of civic status, Ritter shows that the jury service campaigns clarify both the impact of the Nineteenth Amendment and the nature of women's citizenship in general. In addition, these early campaigns for women's jury service reveal alternative conceptions of women's citizenship that are normatively promising.

Our third article is by Patrick Schmidt, recently a postdoctoral fellow at the Centre for Socio-Legal Studies, Oxford University. Schmidt's immediate subject is the 1949 United States Supreme Court case, *Terminiello v. City of Chicago*. On its surface the case presents a celebrated constitutional puzzle about the limits to freedom of speech when a speaker faces a hostile audience. But, Schmidt argues, the case can also be seen as a bridge between New Deal debates about the Supreme Court's role and the onset of Cold War politics. While the Court's majority issued a libertarian prescription, Justice Robert Jackson famously dissented, comparing the ideological conflict surrounding Father Terminiello to the battles in Europe over Nazism and articulating a conservative philosophy for the balancing of interests in postwar America. Schmidt's archival research shows that Jackson drew on the writings of Walter Bagehot, the important nineteenth-century editor and thinker, whose conception of legal and societal development can be seen in Jackson's opinion. Such influence on a judicial opinion rarely can be documented so explicitly, and the evidence allows us to examine how judges understand and engage wider social forces and pressures. Schmidt clarifies the bounds of the conservative jurisprudence advocated by Jackson and also sheds light on Jackson's intellectual development, which many commentators believe was profoundly affected by his encounter with totalitarian ideologies while serving as a Nuremberg prosecutor.

The fourth and fifth articles in this issue together constitute the issue's Forum, which revisits the rich history and historiography of late nineteenth-century constitutional and jurisprudential ideologies. First, Manuel Cachán returns us to the historiography of "laissez-faire constitutionalism." Progressive historians believed that the Supreme Court's decisions leading up to *Lochner* were produced by reactionary justices, chief among them Stephen J. Field, who aimed to constitutionalize laissez-faire economic principles. In reaction, revisionists—notably Charles McCurdy and Michael Les Benedict—maintained that Field's jurisprudence was misread by New Deal–era Progressives who were incapable of assuming a detached histor-

ical perspective. Where the Progressives saw the influence of laissez-faire in Field's jurisprudence, revisionists see the Free Labor and Free Soil movements and a Jacksonian desire for absolute procedural equality. Revising the revisionists, Cachán now seeks to show that the assumptions girding revisionism's understanding of Justice Field are based upon doubtful historical evidence. Field was never a Free Laborite. In early opinions for the California Supreme Court that favored the rights of large landowners, Field proved that he was not an advocate of Free Soil, either. In analyzing Field's work, then, revisionists have given undue emphasis to the impact of one ideological element over others. Stephen Field was never "fooled" by Free Soil, Free Labor thinking into misunderstanding the struggles between capital and labor or the changes that industrial capitalism brought about in the 1890s.

Second, Lewis Grossman offers an account of a rich but neglected strain of Gilded Age legal thought, "Mugwump jurisprudence," using James Coolidge Carter as his lens. Carter was a leading Gilded Age legal theorist, practicing attorney, and political reformer, famous for his resistance to codification. Like many elite legal figures in the late nineteenth century, Carter belonged to the genteel urban political culture known as the Mugwumps. Grossman shows how Carter's suspicion of legislators, his faith in courts, his equation of the common law with custom and his condemnation of legislation inconsistent with custom reflected his Mugwump world view. He also explores Carter's struggles—like those of other Mugwumps—to accommodate traditional modes of thought to the challenges of modernity, finding in those struggles the basis for the precarious combination of apparently inconsistent elements in his jurisprudence. Carter clung to a core of beliefs he inherited from the antebellum Whigs even as developments in the decades after the Civil War led him to embrace positions characteristic of the Jacksonians. He merged a traditional faith in timeless, objective moral principles with a more modern vision of evolving customary norms. And despite the antilegislative crux of his jurisprudence, he increasingly acknowledged the need for positive government in an urban and industrial society.

The Forum continues with a commentary on both articles by Stephen Siegel. It concludes with a response from Lewis Grossman. (Our other Forum author, Manuel Cachán, has not offered a response, feeling none is required in his case.)

As usual, the issue concludes with a comprehensive selection of book reviews. And as always, we encourage readers to explore and contribute to the American Society for Legal History's electronic discussion list, H-Law. Readers are also encouraged to investigate the *LHR* on the web, at

www.historycooperative.org/home.html, where they may read and search every issue, including this one, published since January 2001. In addition, the *LHR*'s own web site, at www.press.uillinois.edu/journals/lhr.html, enables readers to browse the contents of forthcoming issues, including abstracts and full-text "pre-prints" of articles.

Christopher Tomlins
American Bar Foundation

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