In This Issue

This issue presents five articles that address the limits of law's authority. The first two articles examine English efforts to control defiant local populations in eighteenth-century Massachusetts and nineteenth-century Ireland. The issue then turns to the role of law in the United States during the antebellum era. Two articles re-examine judicial attempts to define the place of slavery, including the controversial United States Supreme Court decision in *Prigg v. Pennsylania* (1842) and the later role of antislavery judges in upholding the Fugitive Slave Act of 1850. The final article reveals the defining role of slavery in the emerging political culture of the trans-Mississippi Southwest. Collectively, these articles show the inherent friction between formal law and local culture in empire building and expansion.

Our first article, by Neil York, examines why the English did not prosecute American colonists for treason in the years leading up to the Revolution. As his article points out, from 1768 to 1775 there were those in Britain who believed that either treason ought to be broadly construed, to make prosecutions possible, or that an old parliamentary statute should be revived so that the trials could take place in English rather than in colonial courts to assure convictions. Yet no trials followed, even as rebels in Massachusetts took over the colony without firing a shot. It is ironic, as York observes, that these revolutionaries were able to turn the tables on imperial authorities by alleging that the defenders of empire were the real traitors, whereas they, the revolutionaries, stood as defenders of the law. They could do so, he explains, partly because treason was poorly defined and partly because the constitutional relationship between mother country and colonies had never been defined. Most importantly, he concludes, imperial administrators could find no effective way to apply the law of treason without causing the very confrontation that they hoped to avoid.

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Our second article, by Níamh Howlin, builds on the theme of law's limits. Her article notes that the Irish jury system (and the wider justice system) in the nineteenth century operated under significant pressures, and that English commentators often portrayed Irish juries as unreliable, ignorant, perverse, and easily manipulated. Moreover, in times of political turmoil, even impaneling a jury could prove difficult, and during certain fraught periods the authorities attempted to do away with jury trials in certain types of sensitive criminal cases. To study the Irish jury, Howlin examines those men who were called upon to sit on juries in civil and criminal cases. She shows that jury service was an inconvenient, uncomfortable, overly frequent, and, at times, dangerous activity. Her findings contribute to our understanding of how the system of trial by jury – and, by extension, the system of justice – operated in Ireland during the difficult years of the entire nineteenth century. Because Ireland was one of the first places that the common law was transplanted, the problems experienced with jury trials in Ireland were often forerunners of problems later experienced in other common law jurisdictions. Howlin's article may therefore help to clarify the reasons behind certain jury developments in countries other than Ireland, and stimulate further research and debate on the wider issues of transplanting legal systems and institutions.

As many scholars have recently shown, there were parallels between the English efforts to govern North America in the seventeenth and eighteenth centuries and the later efforts by the United States to govern itself in the nineteenth century. Our third article, by Leslie Friedman Goldstein, re-examines *Prigg v. Pennsylvania* in order to focus on the relationship between slavery and freedom in constitutional politics. As she explains, some see Justice Story's extreme devotion to nationalism as guiding the Court opinion to a degree that undercut his former opposition to slavery and rendered the decision extremely proslavery, whereas others see the expression of Story's nationalism in *Prigg* as compatible with his opposition to slavery. By placing the case into a political culture, Goldstein argues that Story could have viewed his opinion as a "triumph for freedom." She posits that by 1842 the dynamics of political power at the national level were observably shifting from the South toward the North. This change helps to explain the optimism of Story, Charles Sumner, and others about procedural reform of the Fugitive Slave Act. The Cherokee case, *Worcester v. Georgia*, also pressed upon Supreme Court attention the value of making federal habeas relief available to protect against state-level abuses of Native Americans. Story's efforts to obtain a federal judicial bureaucracy to uphold all federal law, Goldstein concludes, could have provided such habeas protection and similarly would

have helped black seamen incarcerated in Southern ports, a documented concern of Justice Story's in the final years of his life.

Whereas Goldstein revisits a contested case, our next author, Jeffrey Schmitt, re-examines the Fugitive Slave Act of 1850. He challenges the conventional view that antislavery judges who upheld proslavery legislation were forced to sacrifice their moral convictions against slavery in order to remain faithful to their judicial role. He argues that this assumption should be reconsidered because the constitutionality of the Fugitive Slave Act of 1850 itself was so ambiguous. Therefore, judges had ample discretion to render an antislavery verdict using accepted legal principles. However, because the fugitive act was an essential element of a tenuous sectional compromise, major Southern political parties were pledged to support disunion if its terms were not enforced. Using John McLean and Lemuel Shaw as primary examples, Schmitt shows that prominent antislavery judges were probably influenced to support the Fugitive Slave Act by a fear that an alternative ruling would threaten the Union. By studying the judges' fugitive slave decisions as part of their overall jurisprudence, he contends that a new view of the antislavery judge emerges. During the antebellum era, prominent antislavery judges, similarly to moderate antislavery politicians, were inclined to accept only those antislavery legal arguments that they believed would not endanger the Union.

Our fifth article, by Mark Carroll, takes us to the trans-Mississippi Southwest. In August 1849, proslavery Missouri Supreme Court Judge James H. Birch sued Unionist Senator Thomas Hart Benton of Missouri for slander because Benton had publicly accused Birch of having kept "his own Negro wench" and of whipping his wife because she had dared to complain about it. *Birch v. Benton* marked the beginning of one of the most widely publicized episodes in the bitter struggle between Free-Soil and proslavery Democrats in the trans-Mississippi Southwest. By contextualizing *Birch v. Benton*, Carroll reveals how ordinary people, newspaper editors, and elected officials understood political invective and the appropriate limitations on defamation actions in a boisterous white man's democracy deeply conflicted over African-American bondage. Carroll thus provides a fresh perspective on the relationship between the public vilification of elected officials and the rise of competitive two-party politics, and the implications of this relationship for constitutionally-protected freedom of political expression in the antebellum United States.

As always, this issue includes 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 *LHR* on the

web, at http://journals.cambridge.org/LHR, where they may read and search issues, including this one.

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