In This Issue

This issue presents seven articles, which are a testament to the breadth and vitality of the field of legal history. Collectively, they raise significant questions about context and periodization and invite close rereadings of significant texts, such as a twelfth-century Latin treatise and several seminal Marshall Court opinions. The articles also examine how legal processes shaped families and their histories in the Americas, contributed to the democratic process in Nova Scotia and nation building in the New American Republic, and provided private remedies for international disputes during revolutionary times in the Atlantic World.

Our first article, by Sueann Caulfield, crosses the shifting boundary between past and present to consider how the guarantee of human dignity in Brazil's 1988 Constitution has influenced family law and policy, particularly children's right to paternal recognition. It traces the history of legal debates over illegitimacy and "family rights" since the nineteenth century, describing how Brazilian courts have used the concept of "social fact" to argue that they can and should rule in cases involving non-legitimate family relationships (first "concubinage," in the 1940s; then, half a century later, "homoafective unions," or same-sex unions). The article then describes changes brought by the 1988 Constitution, which eliminated the category of illegitimacy in family law, and analyzes a contemporary state program to promote "responsible paternity." Caulfield concludes that neither this program nor the Constitution represent the resolution of debates over the rights of out-of-wedlock children. Both reflect instead ongoing struggles over what kinds of families merit constitutional protection.

Our second article, by Richard Keyser, takes us back a millennium to examine ideas about legal decision making in the *Leges Henrici Primi (LHP)*, an anonymous Latin treatise written c.1108 in England, as they were encapsulated in the aphorism "agreement supersedes law and love judgment." Whereas many scholars have seen this statement as epitomizing a preference for settling disputes through informal compromise rather

Law and History Review February 2012, Vol. 30, No. 1

doi:10.1017/S0738248011000873

than court judgment, Keyser offers a different interpretation. When seen in light of the *LHP* as a whole, he argues, this statement reflects complex attitudes. First, in a fluid, unspecialized judicial system, the flexibility of rules and the consensual character of judgment complicate the simple opposition between law and love. Second, the aphorism's first half does not refer primarily to conflict resolution, but rather to the ability to suspend rules governing procedural accords and other non-contentious agreements. Third, Keyser explains that the author nuanced his contrast between judgment and concord by recognizing that informal social bonds shaped many judgments and that judicial assemblies often authorized amicable settlements. The author, according to Keyser, appears to be a spokesperson for a robust but still customary legal system, one that drew strength from its willingness to endorse arrangements based on mutual consent. Thus, Keyser contends the author's ability to articulate the traditional emphasis on compromise stems, ironically, from his role as a promoter of royal power.

Our third article, by Jim Phillips and Bradley Miller, examines Nova Scotia's "Age of Reform," to explain why the court system and judiciary were at the forefront of colonial politics. Four issues – judicial salaries and fees, the chief justice's membership on the lieutenant governor's council, and the fate of the inferior civil courts – were prominent. Phillips and Miller demonstrate how the judiciary became a target for democratic reformers, and why legal reform played a significant role in galvanizing political and cultural change. The related issues of fees and the chief justice's political role in particular, for example, embodied for many the corruption of the ancien régime, in which exploitative elites ran the colony for their own benefit. Phillips and Miller conclude that the debates over judges and the courts revealed a reforming zeal in an otherwise conservative society, fed into and drew from the wider clash of ideologies, and pushed the colony toward responsible government.

Continuing the theme of periodization and context, the issue offers a forum on law in early America. Bruce H. Mann's introduction explains how the field has changed since the mid-1990s. The first forum article, by Terri Synder, focuses on the legal experiences of free women of color who married enslaved men in "across-status" unions and analyzes their changing relationship to the law in colonial and early national Southern jurisdictions. Across-status marriages were one example in a range of possible unions among people of color in early North America, and they had particular effects on free wives. Synder explores the anomalous position held by these women under the law, the legal strategies they pursued to protect their freedom and families, and the growing intolerance for these marriages on the part of legal and political authorities. Each of these perspectives, she argues, reveals the power of the law, especially

customary law in local contexts, to shape and propel the lives of the ordinary early Americans; each also reflected the extent and limits of individual access to the law and legal remedies in the early American South. She concludes that wives in across-status marriages merit consideration not simply because they demonstrate a previously overlooked aspect of women's experiences under the law but especially because, more so than was the case for other women in early America, their lives and their futures were played out as a result of their sustained dialogue with early American Southern courts.

The second forum article, by Honor Sachs, reconstructs the legal history of the enslaved Coleman family of Virginia and Kentucky as they pursued freedom suits through Indian ancestry during the eighteenth and early nineteenth centuries. She examines how, over five decades, members of this enslaved Afro-Indian family initiated legal suits claiming freedom through a common female Indian ancestor named "Indian Judith," an Apalachee Indian purchased in South Carolina in the early eighteenth century by Francis Coleman of Virginia. Beginning in the 1770s, Judith's descendants began to sue for freedom as descendants of a free Indianwoman, and would continue to do so even as they were bought, sold, and separated. Tracing the history of the Coleman plaintiffs through 50 years of litigation, Sachs reveals how the legal system intentionally obscured and denied slaves' family and personal relationships as part of the larger project of defining racial categories. As the Coleman family litigation reveals, Virginia's judicial decisions in cases of mixed-race ancestry were as centrally concerned with the legal eradication of slave family knowledge as they were with the institutional construction of race. Thus, her article reunites the collective experiences of the enslaved Coleman family as it seeks to understand the legal reasons for their disappearance.

The third forum article, by Alison LaCroix, provides a new interpretation of the origins of three central obsessions of federal-courts and constitutional-law scholarship: the question of whether inferior federal courts are constitutionally required; the relative powers of Congress, the Supreme Court, and the inferior federal courts to define federal jurisdiction; and judicial supremacy. LaCroix argues that the extension of federal judicial power to the inferior federal courts was a crucial element of the Federalists' project of building national supremacy into the Republic's structure. Chief Justice John Marshall, similarly to many other federalist theorists, viewed the inferior federal courts as essential to the establishment of a union in which national supremacy was instantiated through judicial structure. Marshall and his federalist colleagues shared a commitment to judiciary-centered federalism. In the early nineteenth century, most notably in two cases involving the Second Bank of the United States, Lacroix

shows how the Marshall Court attempted to execute through case law what the political branches had been unable to do following the election of 1800: grant the lower federal courts general federal question jurisdiction. Lacroix's findings challenge the traditional story of the Marshall Court's nationalism, which had overlooked both this link between law and politics and the importance of the lower federal courts to beliefs about federal structure in the early Republic.

The final forum article, by Kevin Arlyck, examines the private claims making of Spanish and Portuguese consuls in United States federal courts from 1816 to 1822 serving the revolutionary governments of South America against American privateers. Arlyck demonstrates that this was the primary mechanism through which the fledging nation's juridical relationship with the Atlantic world was articulated. Frustrated with the intransigence, or impotence, of executive branch officials, who consistently asserted that deep principles of United States constitutionalism prevented them from acting decisively to interdict the privateers, consular officials turned to the courts in order to bring federal government power to bear against their enemies. Because consuls were commercial agents for the Iberian mercantile diaspora, they often adopted a pragmatic approach to litigation that allowed room for negotiation and compromise when the circumstances dictated; at the same time, in their political capacities they pursued a number of these cases to the Supreme Court. By translating the endemic violence of the Age of Revolution into private claims over the legal status of captured vessels and goods, he reveals that this "consular litigation" obliged the federal judiciary not only to weigh the sovereign legitimacy of the emergent polities of the Americas, but also to define its own jurisdiction over the persistent turmoil of the revolutionary Atlantic.

As always, this issue concludes with a comprehensive 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.

David S. Tanenhaus
University of Nevada, Las Vegas