

A Legal History of the Civil War and Reconstruction: A Nation of Rights

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Review

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Bringing the Law Into Dialogue with Civil War History

A long-running debate among American historians centers on the question of whether the era of the Civil War and Reconstruction produced substantial change, or instead was but an aberration to an otherwise uninterrupted nineteenth century of continuity in politics and society. The Progressive school of a century ago located in the Civil War the triumph of industrialization and modern capitalism over pre-modern plantation-style agrarianism. The Dunningite subsidiary of this school saw Reconstruction in particular as an era of violent, undesirable change, and one whose unfortunate wounds were only partly healed by the “redemption” of the South afterwards. Influenced by the modern civil rights movement, revisionist historians of Reconstruction also saw the war producing tremendous change; only for them, Reconstruction was a laudable attempt to create a biracial society based on equality. Post-revisionists of the 1970s and 1980s, however, dismayed by the nation’s slow advance in fulfilling the promises of the Civil Rights movement, bemoaned the conservative nature of Reconstruction, while others questioned the short-term impact of the war and aftermath, especially on the economy and economic policy. Since the 1990s, those who consider the Civil War to have been America’s second revolution seem to have held the upper hand in this debate. They have noted the shift in the center of wealth in the country from the South to the North, the economic changes brought by the war within the North, the improved economic lot of African Americans in the decades following the war, and (despite its short life), the advances in individual rights and equality that the Reconstruction experiment later made possible.

Laura Edwards, however, insists that historians have nonetheless “underestimated the extent of change because they have not brought legal history

into dialogue with the scholarship of other historical fields" (p. 7). The author maintains that historians have not fully grasped the fact that Reconstruction era policies were transformative of the entire country's legal institutions, not just those of the South, and that they resulted not only in the nationalization of individual rights on the federal level of government, but in a reconceptualization of the meaning of those rights by marginalized groups in society. This dialogue over the meaning of rights took place moreover, not just on the federal level, but at the state, local, and community levels as well.

The first half of the book focuses on change and the War itself, and each of its three chapters might be considered an attempt to reconcile conflicting historiographic traditions about the world the war made. Edwards agrees with those who have argued that the legislation enacted by the Republicans during the war (the Homestead Act, the Morrill Land-Grant Act, the creation of the Department of Agriculture, the National Banking Act, the Pacific Railroad Act, the Legal Tender Act, the Habeas Corpus Removal Act, the imposition of a military draft, as well higher tariffs and the first income tax) signaled a tremendous expansion of federal authority. And yet the Republicans' conception of a free labor economy put constraints on the federal government's ability to meet the expectations of un-empowered groups.

Like Emory Thomas and Mark Neely, Edwards writes of a Confederate federal government that, ironically – given all the states' rights rhetoric, was in some ways more centralized than its Union counterpart. But the failure of the Confederate war effort, the parochial interests of the state governments, and the Confederacy's loss of legitimacy in the eyes of southerners, especially on the local level, undermined federal power. The author's emphasis on the failure of centralization revitalizes David Donald's long-ago explanation that the Confederacy "died of democracy"—an alliterative title that may have been closer to mark than for which some earlier historians have given him credit.

Edwards's approach to the old question of "who freed the slaves – the government or the slaves themselves?" is to treat that process as dialectic. She certainly agrees that slaves were active agents in their emancipation, but she also maintains that without the Thirteenth Amendment, their legal status would have remained uncertain at best. For Edwards, the Thirteenth Amendment was not the anticlimax some have portrayed it to be. Moreover, it represented the first time the U.S. constitution gave the federal government the power to protect the rights of individuals, and against the actions of other individuals and in defiance of the

states.

Turning to Reconstruction, Edwards argues that Reconstruction not only sought to give African Americans new legal rights under the Fourteenth and Fifteenth Amendments, but encompassed a broadening of centralized authority at both the federal and state levels of government. Like Adam Dean, she pays special attention to Republican programs regarding Native Americans in the West, where, as in the South, the party's obsession with property rights ultimately limited the scope of Reconstruction.

In analyzing the shortcomings of Reconstruction, Edwards seeks to close the gap between legal historians infected with tunnel vision, and thus unable to see how the law actually operated in practice, especially for the under-empowered, and social historians who ignore the legal process under which aggrieved groups sought to assert their rights. African Americans, women, and white workers all aspired to a more egalitarian society, but congressional reconstruction laws, the state policies passed pursuant to them, and the courts of law where cases were adjudicated, all reflected a patriarchal society that placed prime emphasis on preserving existing property rights in land, male dominance of the household, employer prerogatives, and black dependency, in day to day economic dealings as well as in local regulations of access to public spaces. And "the framework of individual rights, which allowed for federal intervention, individualized problems that were in fact systemic" (p. 161). While not disputing the claims of Eric Foner that Reconstruction was praiseworthy as a rare post-emancipation experiment in biracial equality, she nonetheless emphasizes the point that ultimately "African American' rights meant nothing because legal authority belonged only to white men" (p. 144).

Still, Edwards does not regard Reconstruction as an unmitigated failure in the end, mainly because it implanted in the American people not just the possibility of expanded individual rights, as well as civil and political equality, but, also the concept of how government could be used to promote social justice. Despite disastrous court decisions in which the Fourteenth Amendment was used to retard the advance of worker rights, reformers pressed ahead with maximum hour, minimum wage, workplace safety, and collective bargaining rights legislation –and those efforts grew out of the postwar belief that government could be a proactive agent in promoting a just society.

The author's arguments, while powerful, are not entirely persuasive. It is not clear to me that reforms of the early to mid-twentieth century that sought to expand rights from the individual to the collective could not have come about without the Reconstruction experiment. Neither the expansion of federal economic regulatory authority under the commerce clause nor the re-assertion of the state governments' powers in regulating health and welfare depended on the Reconstruction Amendments or on the legislative precedents of the Civil War congresses. Surely industrialization and urbanization were, at the very least, equally important.

Edwards is to be lauded nonetheless for writing a solid synthesis of the extent of change in the Civil War era, and for incorporating more fully the role of law in bringing about both the changes that did come about, as well as the expectations for change that went unrealized.

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