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 978-1-107-00879-3 - A Legal History of the Civil War and  
 Reconstruction: A Nation of Rights  
 Laura F. Edwards  
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## Introduction

To read an American newspaper in 1860 was to trip constantly over invocations of the U.S. Constitution, usually stated with vigor and passion and infused with a sense of utter righteousness. “A Crime to Sustain the Law and the Constitution,” screamed the *Weekly Wisconsin Patriot*, in an article defending the state’s refusal to enforce the Fugitive Slave Act (1850) or to recognize the U.S. Supreme Court’s ruling in *Dred Scott* (1857). The Fugitive Slave Act, which required local and state authorities to aid in the capture of escaped slaves, had never been popular in the free states (states that had abolished slavery). *Dred Scott* dramatically raised the stakes by allowing slaveholders not only to take slaves into free states and territories but also to keep them enslaved there indefinitely, in violation of those states’ and territories’ laws.<sup>1</sup> For the editors of the *Weekly Wisconsin Patriot* the Constitution justified their opposition to federal policies that – as they saw it – elevated the protection of slavery over state laws that had abolished property in slaves. But those on the other side of the argument also invoked the Constitution. So far as the *Augusta Chronicle* was concerned, the Fugitive Slave Act was completely constitutional. So was property in slaves. The problem was the “reckless band of disorganizers” in the

<sup>1</sup> “A Crime to Sustain the Law and the Constitution,” 14 January 1860, *Weekly Wisconsin Patriot*, vol. 6, issue 43, p. 4, at America’s Historical Newspapers, [http://infoweb.newsbank.com.proxy.lib.duke.edu/iw-search/we/HistArchive?p\\_product=EANX&p\\_action=timeframes&p\\_theme=ahnp&p\\_nbid=R56P57JLMTQxNTY0OTY4OC4yNTIzNDQ6MT0xMz0xNTIuMy4xMDIuMjQy&p\\_clear\\_search=&s\\_search\\_type=timeframes&d\\_lastaction=&d\\_ETC=&s\\_category=none&d\\_refprod=EANX&s\\_browseRef.Fugitive Slave Act, 9 U.S. Statutes at Large 462 \(1850\). \*Dred Scott v. Sandford\* 60 U.S. 393 \(1857\).](http://infoweb.newsbank.com.proxy.lib.duke.edu/iw-search/we/HistArchive?p_product=EANX&p_action=timeframes&p_theme=ahnp&p_nbid=R56P57JLMTQxNTY0OTY4OC4yNTIzNDQ6MT0xMz0xNTIuMy4xMDIuMjQy&p_clear_search=&s_search_type=timeframes&d_lastaction=&d_ETC=&s_category=none&d_refprod=EANX&s_browseRef.Fugitive%20Slave%20Act,9%20U.S.Statutes%20at%20Large%20462%20(1850).Dred%20Scott%20v.%20Sandford%2060%20U.S.%20393%20(1857).)

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North “working to force the common government in a position ... to override the Constitution.”<sup>2</sup>

Therein lay the conflict that led to secession. Critics of slavery feared that federal policies would perpetuate the institution and even allow for its extension into free states. Proponents of slavery feared that federal policies would undermine the power of slave states to maintain slavery. Yet the similarities were as striking as the differences. Both sides held up the Constitution, and the legal order it established, as the ultimate authority, the one that trumped all others. References to the Constitution were so ubiquitous on both sides of the debate that a traveler with no knowledge of context might be excused for confusion as to the nature of the sectional crisis. All the arguments came back to the U.S Constitution. Everyone revered it and claimed it as their own.

The Civil War was as much about Americans’ belief in their legal order as in their disagreements over it. At the outbreak of the conflict, secessionists advocated an extreme view of states’ rights, while their opponents predicted the end of the Union should such a position prevail. Yet the polarized rhetoric overstated the differences between the two sections. Federalism – the relative balance of legal authority between states and the federal government that defined the rhetoric of states’ rights – had not always divided the nation into opposing geographic sections. At the time of the nation’s founding, political leaders from slaveholding states were among those who favored a stronger federal government. In 1832, during South Carolina’s Nullification Crisis, most southern political leaders still rejected the extreme states’ rights position of the radicals in that state. Even in subsequent decades, as states’ rights became a lightning rod for sectional differences, the rhetoric did not accurately describe federalism’s practical dynamics. Political leaders shifted back and forth, depending on the issue and their strategy for obtaining a desired outcome. Stances on the Fugitive Slave Act and

<sup>2</sup> “Our Country – The Constitution, The Union, and the Enforcement of the Laws,” 13 May 1860, *Augusta Chronicle*, p. 2, at America’s Historical Newspapers, [http://infoweb.newsbank.com.proxy.lib.duke.edu/iw-search/we/HistArchive?p\\_product=EANX&p\\_action=timeframes&p\\_theme=ahnp&p\\_nbid=R56P57JLMTQxNTYoOTY4OC4yNTI2NDQ6MT0xMz0xNTIuMy4xMDIuMjQy&p\\_clear\\_search=&s\\_search\\_type=timeframes&d\\_lastaction=&d\\_ETC=&s\\_category=none&d\\_refprod=EANX&s\\_browseRef](http://infoweb.newsbank.com.proxy.lib.duke.edu/iw-search/we/HistArchive?p_product=EANX&p_action=timeframes&p_theme=ahnp&p_nbid=R56P57JLMTQxNTYoOTY4OC4yNTI2NDQ6MT0xMz0xNTIuMy4xMDIuMjQy&p_clear_search=&s_search_type=timeframes&d_lastaction=&d_ETC=&s_category=none&d_refprod=EANX&s_browseRef).

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the U.S. Supreme Court's decision in *Dred Scott* are representative. Many leaders in free states saw both as illegitimate encroachments on states' established purview over the legal status of those who lived within their borders. Yet leaders in slaveholding states viewed both as necessary support for property rights that they believed to be threatened by other states' laws. Tensions escalated during the 1850s and culminated in Abraham Lincoln's election in 1860. To many of slavery's proponents, particularly those in the Deep South where the economy depended on the institution, Lincoln's election was the beginning of the end. It signaled a fundamental shift in the balance of power that would leave slave states in the minority and result in federal policies that undermined those states' ability to maintain the institution of slavery. The only solution was to secede: to abandon the federal government that would undermine the authority of slave states.<sup>3</sup> At that point, faith in the Constitution and the rule of law it represented led the country past the breaking point. Secessionists sought to found a new nation based on the Constitution as they saw it. Political leaders remaining in the Union vowed to defend their vision of the Constitution. And the American people lined up to fight for the legal order they identified with that document.

But the legal order that generated the conflict numbered among the Civil War's casualties: both the Union and Confederate governments' Herculean efforts to sustain the military conflict forever altered what they sought to preserve. At war's end, many of the legal system's foundational assumptions had been intentionally dismantled or unintentionally eviscerated. Most notably, both the Union and the Confederacy extended the scope and authority of their federal governments, significantly weakening the traditional powers of states. If anything, the Confederacy outdid the Union in this regard, despite its stated attachment to states' rights.

The turmoil of war also created space for people to express popular conceptions of justice and to move them into the ambit of government policy. Most well known are the efforts of slaves, free blacks, and white abolitionists to realize emancipation and racial equality. But other Americans – in both the Union and the

<sup>3</sup> Donald E. Fehrenbacher, *The Slaveholding Republic: An Account of the United States Government's Relationship to Slavery* (New York, 2001).

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Confederacy – also seized the opportunity to pursue their own legal agendas. As a result, the Civil War stirred up existing, but previously suppressed conflicts about the legal status of individuals, their relationship to government, and the location of legal authority: Who was a citizen? What did that mean? How, and by whom, were these matters decided? Reconstruction was forced to address these questions while dealing with two urgent tasks: bringing the slave states of the Confederacy back into the Union and contending with the status of former slaves. While both of those tasks centered on emancipation, they necessarily involved broader, structural changes that institutionalized wartime policies and ultimately transformed the legal status of all Americans.

Before the Civil War, the nation formed an ambiguous part of people's identities as Americans. They spoke of "these United States" or the Union, referring to an entity that was less a coherent nation than it was a coalition of separate states. People expressed their legal relationships to government in similar terms, identifying themselves as citizens of their states or even their hometowns as often as they did as citizens of their country. By the end of the war, those rhetorical constructions had become more singular and definitive among those who identified with the Union: Americans were now citizens of *the* United States. That new construction was most clearly articulated by Lincoln in the Gettysburg Address, with its powerful image of a newly consecrated nation, one built on the past but remade in the crucible of war: "It is rather for us to be here dedicated to the great task remaining before us – that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion – that we here highly resolve that these dead shall not have died in vain, that this nation under God shall have a new birth of freedom, and that government of the people, by the people, for the people shall not perish from the earth."<sup>4</sup> Legal change in the United States during the Civil

<sup>4</sup> Gettysburg Address, 9 November 1863, available at The Avalon Project: Documents in Law, History, and Diplomacy, [http://avalon.law.yale.edu/19th\\_century/gettyb.asp](http://avalon.law.yale.edu/19th_century/gettyb.asp). Priscilla Wald, *Constituting Americans: Cultural Anxiety and Narrative Form* (Durham, NC, 1995). Of course, people referred to "the United States" before the Civil War, just as they continued to refer to "these United States" after the Civil War. But, as Wald's work suggests, the shift was at the level of conceptualization:

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War gave institutional form to these national aspirations, providing the federal government the legal authority necessary to connect the people to it in ways that had not been possible before.

The heavy-handed policies of the Confederate federal government also brought people into a more direct relationship with that new nation. At first glance, the centralization of authority within the Confederate government might seem odd, given secessionists' emphasis on states' rights. But conducting a war to establish states' rights required a centralized, federal government. By the end of the war, the Confederate federal government had assumed far more authority than the U.S. federal government ever had, at least on paper. In practice, however, the continued commitment of some white southerners to states' rights undercut the central government's legitimacy and tied it up in controversy. The upheaval of war, which was fought primarily in the Confederacy, further undermined the credibility of government at all levels. It was not just the war, moreover, that produced conflicts over the legal order. Different people had long defined law in their own terms, and the dislocation of war provided opportunities for those differences to flourish. Even as the Confederate government continued to centralize, its legitimacy collapsed. In many places, people simply gave up on federal and even state government, a situation that resulted in a radical decentralization of legal authority that went far beyond what states' rights advocates ever imagined or desired. The end of the war may have led to the demise of both the Confederate government and the legal order that it tried to create. But the conflicts generated by that government and its policies defined the postwar years, as the region became part of a newly reimagined United States. Indeed, white southerners' skepticism of federal authority was as much a product of their experience with the Confederacy as it was of their experience with the U.S. government.

Confederate defeat put all Americans within the jurisdiction of one nation, the United States. The Republican Party's Reconstruction Amendments then solidified the connections between the nation and the American people that the Union had been building during

in many Americans' perception of their connection to United States as a unified, national entity.

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the Civil War. These amendments abolished slavery and secured the people's civil and political rights through federal authority. They also allowed people to imagine the federal government as a more immediate presence in their lives: a legal ally in their efforts to give rights meaning and to use those rights to effect change in their own lives and in society at large. Legal change not only flowed from above, but also welled up from below, as ordinary Americans confronted questions about law in the course of the war and its aftermath. The result was conflict, because many Americans imagined rights in far more expansive ways than their political leaders or their courts did. Where they saw rights as a means to accomplish social and economic change, federal policy and the courts tended to define rights in highly individualized terms, as the bundle of privileges necessary for individuals to access the legal system in civil and criminal matters and to attend to their economic interests. Once individuals had these privileges, they could take care of themselves, without further alterations to social relations, the economy, or the legal order and without further assistance from the federal government. That view, which ultimately prevailed, disaggregated the American people into a nation of individuals, each one connected to the federal government through his or her own rights. It was a legal order at odds with both the rhetorical promises of the Republican Party and the aspirations of so many Americans. This legal order was also unstable and subject to change, precisely because of the American people's faith in it and their insistence on accessing it. In the wake of the Civil War and Reconstruction, their faith took new forms. Not only did many Americans embrace their new relationship to the federal government, but they also expected it to act on their vision of rights. Even those who rejected federal policies accepted the fact of federal power and tried to channel it toward their own interests.

## HISTORIOGRAPHY

*A Legal History of the Civil War and Reconstruction: A Nation of Rights* tells the legal history of this era by developing two inter-related arguments that emphasize the depth and breadth of legal change. Debates about whether the period is best characterized

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by change or by continuity have defined the historiography of the Civil War and Reconstruction since its inception. This book argues that historians have tended to underestimate the extent of change because they have not brought legal history into dialogue with the scholarship of other historical fields.

The first group of professional historians to write about the era ensured that questions about change would dominate the historiography. This group – influenced by the Dunning School, after its intellectual mentor, William A. Dunning, a professor at Columbia University – was composed of white men who were raised in the bitter aftermath of the war and, not surprisingly, deemed Reconstruction an unmitigated failure. Although the work of Dunning School historians found little in the period to praise, the legal changes at the federal level – the Thirteenth, Fourteenth, and Fifteenth Amendments – received their harshest criticism. Open apologists for white supremacy, these historians argued that the amendments constituted an illegal usurpation of state authority by imposing the will of a radical minority and granting rights to African American men who were incapable of exercising them, thereby destroying the South and jeopardizing the nation's future. Inflammatory today because of its open racism, Dunning School scholarship reflected the politics of sectional reunion in the late nineteenth and early twentieth centuries, in which white northerners joined white southerners in distancing themselves from the more radical policy changes of the Civil War and Reconstruction, particularly emancipation and the granting of full civil and political equality to African Americans. In that context, the scholarship associated with the Dunning School characterized the war and, particularly, its aftermath, as an avoidable aberration, the result of radicals in the North who captured the national stage and imposed their wild schemes on an unsuspecting populace.

The Dunning School has had a remarkable and enduring influence on the historiography, including legal history. The aftershocks of World War II, when the scope of the Holocaust was revealed, brought down its overtly racist props. But its themes continued to define basic questions about legal change: Was the Civil War inevitable, within the existing constitutional framework? To what extent did postwar policies alter the legal order of the nation?

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By mid-century, the New Deal, World War II, and the civil rights movement had cast a more favorable light on federal authority and, ultimately, the Civil War era. Reflecting that viewpoint, a new body of revisionist literature emphasized the accomplishments of federal policies, particularly during Reconstruction. If anything, revisionist scholarship faulted federal officials for not reaching far enough and, thus, falling short of their goals. The combination of judicial foot-dragging and political maneuvering in the 1870s turned back the clock nearly to where it had been before the war. Not only were white southerners allowed to regain control, but they were also allowed – even encouraged – to ignore new federal laws and to resurrect a racial system that closely resembled slavery. To make matters worse, federal courts then turned to the Fourteenth Amendment to buttress the position of corporations at the expense of labor, creating new inequalities from the very laws that were intended to promote greater equality. Other historians saw the glass half full, rather than half empty. To them, federal policy, particularly the Fourteenth Amendment, constituted a “second American revolution” that provided the constitutional basis to at last fulfill the promises of the first. Progress came slowly, culminating only eventually in the mid-twentieth century with the civil rights movement. But those changes never would have been realized at all had it not been for the policies of the Reconstruction era.

The tendency to see Reconstruction as an era that promised great legal change has spilled over into the scholarship on the Civil War. Recent scholarship has treated the war as if it were inevitable, a fight that had to be waged in order to clear the way for what came next. In this body of work, the conflict becomes the collision of two distinct social orders, each with different conceptions of individual rights, the role of law, and the reach of the state. Only one could survive. One branch of this scholarship has focused on the dynamics leading up to the war, with an eye toward explaining why those conflicts reached the point where the existing order could no longer contain them. The work has tended to point to inherent weaknesses, attributable to the Constitution, particularly the lack of authority at the federal level, which short-circuited the development of a strong, effective nation state. Those weaknesses not only contributed to the outbreak of the war but also presaged problems that

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the reconstructed nation would need to address afterward. Another branch of scholarship has looked to the war years more directly as a precursor to Reconstruction, examining wartime policies within the Union and the Confederacy to contextualize subsequent legal innovations and reactions to them. This work also has tended to emphasize change rather than continuity by showing how the war took the nation in new legal directions. The positive reinterpretation of federal power that has marked recent scholarship on Reconstruction extended to the war years as well, although measures such as the draft, martial law, and the suspension of *habeas corpus* have been harder to defend than efforts to secure African Americans' civil and political rights. But even those policies have emerged as a means of preserving, not undermining individual liberty.

Historians have not paid as much attention to the Confederacy's legal order, because they assume that defeat ended its historical significance. While treating Confederate laws and policies as fleeting products of a short-lived political experiment, the scholarship has focused on the extent to which the Confederacy lived up to its principles of states' rights as well as the effectiveness of its policies in waging war. All this literature emphasizes change – in fact, dramatic change. The exigencies of war ultimately swept away the Confederacy's legal order. What remained after the collapse of conditions on the home front and military defeat succumbed to the political changes of Reconstruction.

Yet even those legal historians who have emphasized change have missed its broad reach because of their emphasis on particular arenas of law. Much of the existing work within the field of legal history has focused on the federal level in the United States, exploring policy debates there, tracing the effects through the states and, from there, to people's lives. The lines of causation tend to flow from the top down, with the most significant changes emanating from the three branches of the national government. That focus, however, has limits. It misses much of the historical action, because many of the most profound changes in legal culture did not happen at the federal level. This perspective also tends to frame analytical questions primarily in terms of the intended objectives of U.S. policy: the expansion of federal authority and the extension of civil and political rights to African American men. That focus has a regional

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and temporal frame, foregrounding the South (where most African Americans lived) and defining the end of Reconstruction in 1877 (when the disputed presidential election resulted in the Compromise of 1877, which the historiography identifies, mistakenly, as the end of federal involvement in the former Confederate states and, by implication, of any effective support for the Reconstruction Amendments in those states).

The historiographical assessments of federal authority actually recapitulate the terms and limits of political debate at the time of the Civil War, with one side opposing federal authority as a perversion of the country's basic principles and the other advocating it as a means of achieving them. This overly simplistic conceptual frame fails historiographically for the same reasons it failed politically in the 1860s: the expansion of federal power led in multiple, contradictory directions in matters of political participation, civil rights, and even opportunities for economic advancement. The one clear outcome was the transformation of the people's relationship to the federal government and, consequently, to the nation's legal order.

Other strands of scholarship, both within and outside legal history, create a very different temporal and geographic range. There is a large body of scholarship in legal history tracing the implications of the Fourteenth Amendment beyond what the historiography has conventionally identified as the formal end of Reconstruction. Yet such work is not usually considered to be about Reconstruction, because its focus is later in the nineteenth century and because it deals with questions of gender, labor, and economic development outside of the South. Yet, as that scholarship suggests, the Reconstruction Amendments and other state and federal policies from this period actually had legal consequences across time and region. They altered the status of people whom federal lawmakers never intended to touch, not only all women, but also all men in all areas of the nation. Beyond that, Reconstruction-era policies profoundly transformed legal institutions and legal culture throughout the nation, not just for a brief decade in the states of the former Confederacy and not just at the federal level. As the work in legal history shows, Reconstruction fundamentally altered the dynamics of law and governance in ways that transformed the lives of all Americans.