

Untangling the Relationship between Rights, Federal Power, and Inequality: The Legal Legacy of Reconstruction

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Laura Edwards, [A Legal History of the Civil War and Reconstruction: A Nation of Rights](#) (2015).

“Black lives matter.” When spoken in law schools, these words have had a particular subtext. They expressed outrage at the lives taken in the name of the law, and despair at the distance between our legal ideals and the everyday legal encounters of people like Michael Brown, Eric Garner, and Freddie Gray. In the words of a [statement](#) signed by many of my UC Berkeley colleagues, law school communities “struggle to reconcile the constitutional values [taught] in the classroom with the reality that race determines how communities of color experience our legal system.”

Helping our students make sense of this dissonance requires that we bring history into our teaching, and further, that we go beyond stock narratives about the evils of Jim Crow and the victories of the modern civil rights movement. High on my list of teaching aides, going forward, will be [Laura F. Edwards’ A Legal History of the Civil War and Reconstruction](#). It offers both a concise overview of an important legal-historical moment and a bold argument. Reconstruction did more than “abolish slavery and bring Confederate states back into the Union,” Edwards explains; it “unsettled the nation’s entire legal order.” (P. 13.) The resulting legal changes encouraged all Americans—not just freed slaves—to see the world around them in terms of individual rights and to champion the value of equality. This is the very same vision that many entering law students carry with them today.

Embedded within this new legal order, however, were seeds of disappointment, resentment, and conflict. The Reconstruction Amendments and related civil rights legislation implied a nation of equal citizens at a time when inequality pervaded American life. Similarly, the new legal order encouraged people to look to the federal government for aid and protection, even though states and localities still provided the bundle of goods, services, and opportunities that gave content to the notion of citizenship. Helping readers see this emergent legal order, complete with its built-in contradictions, is Edwards’ main task. In what follows I’ll emphasize how she so deftly accomplishes her goal and why her success is our gain.

A crucial first move is to disrupt some common assumptions about rights. Americans today rely heavily on the language of rights, using it to discuss everything from mass murder to healthcare to same-sex marriage. Frequently, the specter of the federal government hovers over these conversations, as the assumed guarantor and enforcer of rights claims. Edwards reminds readers that before the Civil War, rights did not operate in the same way. Americans generally looked to state and local governments to define their rights, as part of the larger project of advancing and protecting the public welfare. Perceived rights violations were a matter for local courts, not federal ones, and were adjudicated with an eye towards preserving a locally defined sense of order. With this background, Edwards sets readers up to appreciate the broad significance of the Reconstruction Amendments. The Thirteenth Amendment, in Edwards’ telling, did not simply abolish slavery; it “gave the federal government the power to trump the authority of the states in matters of individual rights.” (P. 88.) The Fourteenth Amendment broke ground in a similar way: by asserting federal authority over the legal status of citizenship and by characterizing citizens’ rights as a matter federal concern. Of course, neither of these amendments, nor the Fifteenth Amendment, actually required the states to extend particular civil and political rights to their residents, but by establishing the federal government as the enforcer of a new non-discrimination guarantee, they fundamentally reconfigured individuals’ relationships to the authorities around them.

Edwards’ second key move is to show, as only a social historian could, how these formal changes affected real people. Lots of scholars have written about the consequences of the Reconstruction Amendments, but often their gaze

has been set on the civil rights gains of the mid-to-late twentieth century. They have tended to portray the intervening decades as a time when, thanks to a hostile Supreme Court, the transformative potential of the Reconstruction Amendments was inaccessible to the people who most needed it. While acknowledging the narrowing effect of Supreme Court decisions, Edwards directs readers' attention to the new dynamics that the Reconstruction Amendments nonetheless created at the ground level. Ordinary African Americans, she finds, "stretched" the new "framework of rights," to cover education, government jobs, and access to public venues. (Pp. 131-32.) Women and wage workers showed similar imagination. White men, meanwhile, sometimes responded with extralegal violence. Before the Civil War, Edwards explains, white men's privileged legal status was based on their "rights over those without rights," such as their slaves and wives. (P. 125.) A world in which women and racial minorities possessed legal rights—rights tied to federal authority—was a changed world indeed, even when those rights remained more theoretical than real.

Probing the gap between theory and reality is Edwards' third important move. Her key point here is that from the start (before the Supreme Court got involved), the Reconstruction Amendments created the conditions for deep and enduring conflict. They did so by announcing new reigning principles without "alter[ing] the logic that structured so much of American law," a logic that "subordinated all people of color, all women, and all working people." (P. 149.) Inspired by the Reconstruction Amendments, some Americans attempted to reform this wider legal universe—for example, the doctrines governing marriage, employment relationships, and real property—but such reforms generally proceeded slowly, in a piecemeal fashion. Phrased differently, Edwards reminds readers that Reconstruction was not only a political project but also a *legal* project, and that the latter rippled through the legal landscape long after the political winds had shifted.

In the end, this is a book about great changes and changes that were never great enough. One thing that had not changed by the end of the nineteenth century, Edwards emphasizes, was structural inequality. The new legal order had enabled Americans to perceive race, class, and gender inequality as injustice and to call upon the federal government for help, but that same legal order channeled dissent into fights to define and protect individual rights, and thereby away from structural solutions.

Edwards' historical critique could lead readers to take a dark view of the present. It need not. While surely inspired by the promise of the Reconstruction Amendments, the recent insistence that "Black lives matter" is notable for finally escaping the limiting frame that Edwards has described. While protesters have welcomed the help of the federal government, they have directed their energies largely at local authorities—the ones who continue to control many Americans' sense of belonging (or lack thereof) in the broader political community. And while protesters have decried particular civil rights violations, they have resisted efforts to individualize their grievances. Theirs, like Edwards', is a narrative of systemic racism, demanding the sort of systemic legal changes that the abolition of slavery once ushered in.

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