VOLUME 102 NUMBER 2 SUMMER 2018

JUDICATURE

Published by the Bolch Judicial Institute of Duke Law. judicialstudies.duke.edu/judicature

Rights that made the world right

How freed slaves extended the reach of federal courts and expanded our understanding of the Fourteenth Amendment

by LAURA F. EDWARDS

In 1870, Maria Mitchell, an African American woman in Edgecombe County, North Carolina, did something that she could not have done when she was enslaved: She "talked for her rights." Mitchell had a problem with B.D. Armstrong, a white landowner who was likely her employer. According to the testimony in the trial that followed, she expressed her anger in a form common to the 19th-century South, a highly stylized, verbal barrage designed to draw attention to the situation and to shame the intended target. Or, as her son put it, "his Mama was talking loud." Armstrong demanded that she stop. Mitchell responded that "she was talking for her rights and would as much as she pleased and as loud as she pleased." So Armstrong issued a threat: "if she did not hush he would make her hush." When Mitchell continued to denounce him, he struck her in the face and broke out a piece of her tooth — or so she alleged when she turned her words into action and used her rights to file charges against him.[1]

The case provides a particularly compelling example of how the constitutional changes of the Reconstruction era extended rights to African Americans and, as a result, opened up the legal system to them. The Reconstruction Amendments profoundly altered the legal status of Maria Mitchell and other African Americans: the Thirteenth Amendment abolished slavery; the Fourteenth Amendment established birthright citizenship and provided federal protection of civil rights, which prohibited states from discriminating on the basis of race; and the Fifteenth Amendment provided federal oversight of voting rights. Mitchell's words, that "she was talking for her rights and would as much as she pleased and as loud as she pleased," underscored the importance of those changes in a way that was hard to miss.

More often than not, the application of rights tended to preserve existing inequalities, because lawmakers concerned themselves with the rights that governed property ownership and economic exchange, a body of law concerned with the interests of those who owned property, not those without.

Her case also shows how those constitutional changes dramatically affected legal matters that most people would consider unremarkable, not constitutional. While Maria Mitchell's case was adjudicated in the South, the legal framework that shaped her case was not exclusively Southern. It characterized the operation of law in local courts throughout the United States, and it was the one with which most Americans had familiarity in the early 19th century. This part of the legal system, focused at the local level, was charged with maintaining the public order or, in the terminology of the time, keeping the peace — a body of issues that included all but the most serious criminal cases as well as a broad range of issues involving the public health and welfare. The expectation was that officials would adjudicate conflicts in the community, doing what was right, although, obviously, not everyone agreed on what was right and not everyone's opinion carried equal weight, given the rigid inequalities of the early 19th century. Once local cases were concluded, the documents were folded in thirds, tied with a ribbon, filed away, and forgotten. So, too, was the legal context that produced these documents.[2]

These local courts seem far removed from the Fourteenth Amendment and the rights it protected. But they were not. This article explores how the Fourteenth Amendment brought together two legal frameworks — one focused on the rights of legally recognized individuals, which was the purview of state and federal jurisdictions, and the other focused on maintaining the public order and, essentially, doing what was right, which was associated with local jurisdictions — and encouraged Americans to see federal authority, in particular, as the protector of both rights and what was right. The result was a rights revolution, initiated by ordinary Americans, that transformed not just the meaning of rights, but also the reach of federal authority, stretching both to cover a much wider array of issues than had been the case before passage of the Fourteenth Amendment. The implications have been both profound and enduring, supporting expansive expectations of what rights can do and what federal authority can accomplish.[3]

Legal Frameworks

Maria Mitchell was "talking for her rights." Reading only her words, it seems like a straightforward claim: Mitchell was demanding rights that other American citizens had but that had been denied to her by state law until the federal government interceded with the Reconstruction Amendments, particularly the Fourteenth Amendment. When placed within the broader context of the legal system in the 19th century, however, that interpretation provides only a partial explanation of the import of Maria Mitchell's words.

Current scholarship tends to focus on law and legal institutions at the state and federal levels. But those jurisdictions did not have a monopoly on legal authority or the governing practices that

initiated new laws and enforced existing ones in the first half of the century. Instead, legal authority was widely dispersed and resided in institutions that were relatively private, such as households, churches, and communities, as well as those that were relatively public, such as local, state, and federal governments in their judicial, legislative, and administrative forms — although the lines between the categories of private and public forms of governance often blurred. Together, these various jurisdictions constituted a governing system that captured and contained the contradictory impulses of American life: They maintained existing inequalities while also adjudicating conflicts generated by those inequalities.[4]

Americans had more experience with some legal jurisdictions than with others. The federal government figured prominently in the territories, which lacked the institutional apparatus of state government. But it was a distant entity for most Americans, who encountered it in only a few ways: through the military, the campaigns of aspirants to federal office, the postal service, and in the context of federal cases, of which there were few, particularly in the first few decades of the 19th century.[5] People were more likely to encounter the legal authority of states, which had jurisdiction over most of the work of governance, through their responsibilities to protect the rights of individuals and to maintain the public order. But states then delegated significant power to counties and municipalities in matters involving the public order, making local areas, not the states, the jurisdictions most closely associated with those duties. That situation dates from the Revolution, when lawmakers turned their colonies into states and then decentralized the most important functions of state government, all in the name of bringing law closer to the people. Much of the daily business of governance was done in local legal venues such as the circuit courts and even more localized proceedings, such as magistrates' hearings and trials. These locations made the law part of the fabric of people's lives. They convened wherever there was sufficient space — in a house, a barn, a mill, or a yard. That was true even for circuit courts in the first decades of the 19th century, when many counties lacked the formal courthouses that would later house circuit courts. Local courts were the legal jurisdictions that would have been the most familiar to most Americans, given the wide range of issues handled in these venues and the wide variety of people who were involved in the process of adjudicating them.[6]

State and federal jurisdictions dealt with the protection of individual rights, although states handled a much wider variety of such cases. In the 19th century, the term "individual rights" — or "rights" for short — referred to those rights that were thought to be conferred by government, namely civil rights and, increasingly, political rights, which were available to those people recognized as legal individuals (namely free white men, particularly those with property). Secondarily, the term referred to natural rights, which belonged to everyone and could not be abridged by government, at least in theory. In practice, what constituted a natural right was contested and ultimately dependent on government recognition and enforcement. Natural rights — even life and liberty — were also connected to civil and political rights, in the sense that those who could claim civil and political rights (free white men) had stronger claims to natural rights than those who did not (such as married women, the enslaved, and even the working poor). Property ownership was inseparable from individual rights; property requirements for suffrage had only recently been eliminated for white men by the time of the Civil War. Even then, suffrage for white men was not quite universal: Elections for some offices in some states were still restricted on the basis of property. And most civil rights involved the ownership, accumulation, and exchange of property or access to those jurisdictions with authority over that body of law.[7]

Even though 19th-century political leaders invoked rights in expansive terms, often in connection to liberty, freedom, and equality, with the implication that they could accomplish those ends, rights had different implications within the legal system. To be sure, rights were necessary for individuals to function independently in American society. Without them, it was impossible to claim legal ownership of property, enter into contracts, or defend one's interests in state or federal courts. But, in the legal system, rights did not do the kind of work that the political rhetoric of the time implied. They resolved competing claims among individuals by identifying winners and losers, a situation that undercut the connection between rights and equality posited in political rhetoric. State courts, moreover, were committed to the preservation of rights as such, not to the concerns of the individuals who brought their problems for adjudication.

As a result, the legal framework of rights produced outcomes of questionable justice, according to the standards of many Americans: a conviction overturned because of an improperly framed indictment, for instance, or the seizure of property because of a faulty bill of sale. More often than not, the application of rights tended to preserve existing inequalities, because lawmakers concerned themselves with the ▸

rights that governed property ownership and economic exchange, a body of law concerned with the interests of those who owned property, not those without. That situation explains the popular stereotype of lawyers as parasites who exploited arcane rules to profit from the misfortune of others.[8]

Upholding the Social Order

The fact that states also had broad powers to regulate in the name of the public health and welfare also limited people's rights. State constitutions did have bills of rights, but the rights they enumerated were not absolute. In fact, state and local governments exercised wide latitude in limiting or suspending the rights of individuals in the name of the public good. That legal logic sanctioned not just slavery, but also the range of restrictions placed on free blacks, all women, and many white men without property. A right was a right only as long as the state decided not to take it away.[9] States delegated considerable authority over matters regarding the public welfare to local courts. In adjudicating most of these issues, local courts aimed to keep the peace — to do what was right, not to uphold the rights of individuals.

"The peace" was a well-established concept in Anglo-American law that expressed the ideal order of the metaphorical public body, subordinating everyone (in varying ways) within a hierarchical system. The peace was inclusive, but only in the sense that it forced everyone into its patriarchal embrace, raising its collective interests over those of any given individual. Keeping the peace meant keeping everyone — from the lowest to the highest — in their appropriate places, as defined by rigid inequalities of the early 19th century. Maintaining the peace was never a peaceful proposition; it was about coercion.[10]

While this localized system did not recognize the rights of free women, children, enslaved people, or free blacks, it still incorporated them into its basic workings, because they were part of the social order that the legal process was charged with overseeing. The system maintained their subordination and regulated their behavior. But it also relied on information they supplied about community disorder. Take, for example, two cases in North Carolina initiated by slaves: one slave complained to a magistrate that a free black man had been playing cards with other slaves on a Sunday; another complained that the same free black man assaulted one of those slaves after the card game. (One suspects that another complaint could have been filed about the consumption of "spirituous liquors," a common morals charge.) Technically, these slaves gave "information," because laws prohibited all slaves from filing a complaint; the magistrate then proceeded with the case based on that information.[11]

These two enslaved men had their own reasons for what they did, reasons distinct from the magistrate's likely concerns about disorder among slaves and free blacks. As such, the cases illustrate central elements of this part of the legal system. Different people pursued different ends within it, sometimes at the same time. Masters filed charges against slaves they could not control. Families regularly brought their feuds to court for resolution, with wives, husbands, parents, children, siblings, aunts, uncles, and cousins all lining up to air their dirty laundry. Even enslaved people tried to mobilize local courts to address their concerns. That was possible, because the system depended on the participation of everyone in the local community.[12]

The "law" in this part of the system was capacious and uncontrolled by legal professionals. In most legal matters, the interested parties collected evidence, gathered witnesses, and represented themselves. Local courts did follow state laws regarding rights in procedural respects, particularly in determining who could prosecute cases in their own names. But determinations about the merits of the claims — righting the wrongs in question — relied on common law in its traditional sense as a flexible collection of principles rooted in local custom, but that also included an array of texts and principles, in addition to statutes and state appellate law, as potential sources for authoritative legal principles. The information provided by those with an interest in the case also mattered, because the expectation was that outcomes should preserve the social order, as it existed in particular localities. Preservation of the social order was also why court officials took evidence and even prosecuted cases on behalf of individuals without the legal right to testify or prosecute — enslaved people, married women, and minors. This area of law existed in the lived context of people's lives and existing social relationships — what the scholarship tends to identify as elements of social history, distinct from the law.[13]

This legal framework allowed for the handling of situations that might not have had legal standing in either state or federal jurisdictions. Magistrates regularly prosecuted husbands, fathers, and even masters for violence against their wives, children, and slaves, because the authority granted heads of household was not absolute but was contingent on the maintenance of the social order. The court was concerned with keeping flagrant abuses of power in check so that households did not fall apart, not attending to the individual rights of either household heads or dependents. Magistrates also recognized that wives and slaves controlled property,

Local courts meted out justice on a case-by-case basis to right wrongs, not to maintain individual rights or even to produce precedents that others could claim. One person's experience did not transfer to another person of similar status or predict any other case's outcome.

even though they could not own it in other areas of law. The point was to keep the property where it belonged, not to uphold property rights.[14]

Particular, Not Universal

The effects of legal decisions then remained with the particular people involved, because the system was so personalized. Local courts meted out justice on a case-by-case basis to right wrongs, not to maintain individual rights or even to produce precedents that others could claim. One person's experience did not transfer to another person of similar status or predict any other case's outcome. Each jurisdiction thus produced inconsistent rulings, aimed at resolving particular matters, rather than producing a uniform, comprehensive body of law. Many saw that situation as natural and just: It made no sense to impose arbitrary rules developed elsewhere rather than to pay attention to the particular dynamics of local communities.[15]

Of course, people in local communities regularly disagreed on what was right. The legal process at the local level acknowledged that situation and provided a means for arriving at an outcome that would allow people to put conflicts behind them and move on. Consensus, however, was more apparent than real. In the slave South, it rested on a social order that subordinated the vast majority of the population — all African Americans, free white women, and property-less white men. All these groups experienced different levels of subordination, with enslaved African Americans enduring the most extreme forms. But none of these people could redefine the structural dynamics of the social order, even though they participated in the system and occasionally bent it to their interests. To the extent they had credibility, it was because of the social ties that also defined their subordination. They were insiders, not outsiders: enslaved people who had the support of their masters and other whites; married women who were known as good wives and neighbors; poor white men known for their work ethic and amiability. Positive outcomes of cases involving those insiders did not result in favorable treatment for anyone else. To the contrary, local communities in the slave South inflicted horrific punishments on those, particularly enslaved African Americans, who did not fulfill their subordinate roles. Those outcomes seemed just plain wrong to those who did not have the status to receive favorable treatment.[16]

Still, the legal culture of local courts was deeply engrained within American society and carried considerable power at the time of the Civil War. It framed expectations about what the law was supposed to be and do, even for those on the margins of the local legal system: The law should actively uphold what was right.[17]

African Americans' Rights During Reconstruction

African Americans, like Maria Mitchell, brought those expectations to the courts during Reconstruction. When Mitchell filed assault charges against B.D. Armstrong in 1870, she was using her new civil rights, which allowed her to access the legal system. But those rights were not the ones she had been talking about; those rights — the ones that were unspecified, but loudly asserted — were about what was right. The charges underscore the point: She charged B.D. Armstrong with assault, which was an offense against the peace of the community, a disruption of the public order, not a violation of Maria Mitchell's rights. People pursued such cases because they wanted public condemnation of behavior at odds with their view of the public order. In the first half of the 19th century, such claims about what was right stayed at the local level. But the Reconstruction Amendments, particularly the Fourteenth Amendment, changed all that. Those amendments did not just affirm the rights of African Americans. They also made it possible for claims about what was right to travel ▸

elsewhere in the system, altering the meaning of rights and changing people's relationship to the federal government. What was right acquired a closer relationship to rights.

Claims about what was right first traveled into federal jurisdictions through the claims of enslaved African Americans during the Civil War. Maria Mitchell's efforts to use the legal system are characteristic of the actions of many formerly enslaved people. Although contemporary observers and later historians have taken such actions for granted, it is remarkable that people who had been enslaved would look for redress in the very legal system that had maintained their enslavement. But they did. Historians usually attribute such faith in the law to the promise of rights. But formerly enslaved African Americans also were acting on other, deeply rooted expectations about the law — that it should do what was right and maintain a just public order. The promise of the moment gave them hope that they could access legal authority to elaborate their vision of what was right — of what constituted a just society.[18]

Those expectations explain why enslaved African Americans began bringing their complaints to legal venues during the Civil War, when their claims to freedom, let alone to rights, were still tenuous. Once behind federal lines, African Americans sought out military officials and military courts to adjudicate their conflicts. They continued to do so after Confederate surrender but before passage of the Fourteenth Amendment — a time when the states of the former Confederacy limited the rights of all African Americans through the notorious Black Codes. African Americans came to these venues with rights claims. But they also expected federal officials to address the kinds of issues that would have fallen to local courts and that had been handled within the framework of doing what was right: interpersonal conflicts, often involving violence and including domestic issues, as well as matters involving broader questions of social justice, such as the treatment of refugees, payment of wages, and reunification of families. In those cases, they expected federal venues to do what was right, not just to uphold rights. The various courts under federal jurisdiction, which lacked an established body of law to handle this diverse array of claims, struggled to keep up. Most of the issues were not of the kind that had previously fallen within federal purview. But African Americans persisted, pushing past jurisdictional boundaries in the pursuit of justice.[19]

The exercise of federal authority in cases of this kind might have been temporary if not for the passage of the Reconstruction Amendments, particularly the Fourteenth Amendment, which gave the federal government authority over the states' handling of rights — something that the federal government did not have before. To be sure, those powers were limited and largely negative. The Fourteenth Amendment placed restrictions on states, prohibiting them from making or enforcing "any law which shall abridge the privileges or immunities of citizens of the United States" or depriving any person "of life, liberty, or property, without due process of law." It also prohibited the denial "to any person within its jurisdiction the equal protection of the laws." The federal government could regulate the administration of rights, as defined by the states, but it could not create or distribute rights. Later Civil Rights Acts extended federal authority in ways that brought it into state law more actively. But, given political opposition and the limited resources of federal enforcement agencies, that authority was never fully utilized in the late 19th century.[20]

That negative power was nonetheless profound, particularly in the states of the former Confederacy. The Fourteenth Amendment forced states to extend rights to African Americans, which made it possible for Maria Mitchell to turn B. D. Armstrong's assault into a legal matter. If she had still been enslaved, Maria Mitchell could not have prosecuted a case of assault; like the two slaves mentioned earlier, she could only have given information. Mitchell and other African Americans could file charges because of their civil rights, which were enabled by the Fourteenth Amendment, enshrined in state constitutions, and protected by the threat of federal intervention.[21]

What happened in those local courts then altered federal authority. The Fourteenth Amendment opened up paths for ordinary Americans' conceptions about "what was right" to migrate out of local venues through the framework of "rights." (The Fifteenth Amendment did the same for voting rights.) Before those constitutional changes, Americans' claims about what was right remained in the local courts. Once a wrong was righted, order was restored. There were no further consequences for the law. Such cases would never have made it to a federal jurisdiction.[22]

Beyond Local Jurisdiction

The framework of rights allowed one person's claims about what was right to acquire the power of a universal claim, enforceable by federal authority. They could even acquire the status of constitutionally protected rights. One of the most dramatic examples is access to public venues and services, such as streetcars, railroads, restaurants, hotels, and even government jobs and education. In the early 19th century, claims to

During and after the Civil War, African Americans framed claims to new spaces in terms of rights that the state should extend to them and that the federal government should protect. Who, they asked, had a right to access public space and public accommodations if not the public? Was it not the government's duty to ensure access?

access involved the maintenance of the public order, not the rights of individuals. To the extent that questions of access involved rights, they were part of the nebulous category of social rights (privileges that were established in context and thus varied from one community to another and that were not protected by state or federal law). Vendors of such services were required to serve the public and were subject to state and local regulation as a result. But such expectations never guaranteed equal access. To the contrary, access to public areas and public services had always been restricted, particularly for African Americans but also for all women. The result was a patchwork of local ordinances and longstanding customary practices, which constrained where African Americans could go and how they could act. During and after the Civil War, African Americans framed claims to new spaces in terms of rights that the state should extend to them and that the federal government should protect. Who, they asked, had a right to access public space and public accommodations if not the public? Was it not the government's duty to ensure access?[23]

Such claims were not that far removed from those of Maria Mitchell, who was claiming the right to use space in ways that her employer clearly rejected: She could speak her mind where she wanted to and how she wanted to. To be sure, such views also had the support of key Congressional leaders. But it was ordinary people who pushed popular conceptions of access to public spaces as a "right" into legal arenas. The Civil Rights Act of 1875 explicitly acknowledged such claims as rights. Those provisions were subsequently declared unconstitutional, but cases involving access to public space continued to cast the issues in terms of civil rights, a characterization that was ultimately accepted and institutionalized.[24]

Violence

African Americans' claims to those rights already recognized in state and federal law were always difficult to separate from their conceptions of what was right, because of the structural racism in 19th-century society. Structural racism often took form in violence. White supremacists used violence widely and indiscriminately to keep African Americans from using their civil and political rights — to keep them from going to court or voting. But white supremacists also used violence widely and indiscriminately to keep African Americans from pursuing their vision of what was right — to keep them from using public space, advancing economically, gathering together, and even going to school.[25] Local courts routinely adjudicated cases involving violence that did not involve violations of civil or political rights — like that of Maria Mitchell. Many more acts of violence never reached the courts for adjudication at all. What distinguished the conflicts that remained at the local level from the ones that migrated to federal jurisdictions was the link to civil and political rights: If the violence in question resulted in a rights violation, then it could move up and out of the local courts. But the emphasis on those cases involving rights obscures underlying commonalities in all cases of violence: When African Americans challenged violence in court, they were challenging a social order marred by structural racism. They were substituting their own vision of what was right, by using their rights.

United States v. Cruikshank, one of the most famous cases of the period to reach the U.S. Supreme Court, provides a particularly dramatic example. The case resulted from the federal government's involvement in sorting out voting rights violations in Louisiana's 1872 election. A year later, there was no clear outcome and some local areas were still in a state of upheaval. In the town of Colfax, uncertainty exploded into violence, when a white mob, aligned with the ▸

Democratic Party, attacked local African Americans, aligned with the Republican Party. There is still no clear reckoning of the death toll, but it is estimated that the white mob killed between 60 and 150 African Americans. Federal prosecutors did what they could to identify, charge, and convict the members of the white mob. The defendants then promptly turned around and appealed, claiming that the federal government had overstepped its authority. As in so many other cases from this period, it was difficult to distill questions about rights from broader questions about what was right: There were the voting rights of African Americans and the rights claimed by the white mob's concerns over the public order. Ultimately, the justices who decided the case did so through the framework operative in that jurisdiction — which clearly frustrated some of the justices, who could find no good way uphold rights and to achieve justice. The decision affirmed the claims of the aggrieved members of the white mob, limiting federal authority and, with it, the federal government's ability to intervene on behalf of African Americans who claimed rights violations.[26]

Myra Bradwell and Women's Rights

The implications of the era's constitutional changes did not end with African Americans. The Reconstruction Amendments, particularly the Fourteenth Amendment, altered the relationship of all Americans to rights and the federal government: They positioned the federal government as an arbiter between all Americans and their states, while also elevating the importance of rights as the means by which Americans could access federal power. It did not take them long to do so, as evidenced in *Bradwell v. United States* and *The Slaughter-House Cases*, both of which were heard by the Supreme Court in 1873, the very year of Colfax massacre.

Myra Bradwell — the Bradwell in *Bradwell v. United States* — played an influential role in Illinois legal circles as editor of the *Chicago Legal News*, the publication on which many lawyers in the state depended to keep current on the law. It was, then, deeply ironic when the Illinois state legislature — filled with lawyers who read her publication — refused to consider her application to the bar. Bradwell challenged the decision, making creative use of the Fourteenth Amendment. She admitted that the opportunity to apply to the bar was not, in itself, a right. Even so, it was centrally connected to her right to pursue her livelihood and her property interests — issues of central importance to women, who lost such rights under coverture. When the legislature refused to consider her application, they had denied rights to her that were granted as a matter of course to other (male) citizens. The Supreme Court rejected the first part of the argument, which focused on what qualified as a protected right in the Fourteenth Amendment, thereby evading the second part, which dealt with the amendment's application to women. Still, her use of the Fourteenth Amendment illustrates the broader transformation underway.[27]

The New Orleans butchers in *The Slaughter-House Cases* were challenging an ordinance that regulated the slaughtering of meat and, among other things, required licensing and designated a central location for slaughterhouses downstream from the city. State and local governments had traditionally regulated the slaughterhouses where butchers worked because of the public health risks. But the butchers in New Orleans had a particular beef (so to speak) with their government: They were white men, mostly supporters of the Democratic Party, who saw the regulation as overreach on the part of the Republican Party, which was then in control of the city. With the backing of their party's leadership, they reached for the laws of their political opponents and used the Fourteenth Amendment to protect what they saw as their right to pursue a livelihood as others could. Like Bradwell, the butchers framed access to economic opportunities as a right protected by the Fourteenth Amendment. The court rejected the butchers' claims, upholding the states' rights to regulate for the public good, and tried to limit the meaning of rights in the Fourteenth Amendment, insisting that it was designed to protect the civil and political rights of African Americans — that is, their claims to those rights already recognized in state law. In both the *Slaughter-House* and *Bradwell* cases, the judges sought to contain the multiplication of rights.[28]

In which direction do these cases move? It is possible to read them as an affirmation of the Fourteenth Amendment's protection of African Americans' civil and political rights, because they limited other rights claims. It is also possible to read them as a harbinger of arguments that connected the Fourteenth Amendment to economic claims and, ultimately, a broader array of rights, often at the expense of protecting the civil and political equality of African Americans. Scholars have made both arguments, and the scholarship has stalled out there, unable to resolve the conflict. Yet the conflict was — and is — the point. These cases are examples of the efforts of Americans — all kinds of Americans — to make their view of what was right into a right.

Conclusion

The cases of formerly enslaved people like Maria Mitchell and the African

Americans who lived in Colfax, La., had a lot in common with those of Myra Bradwell and the New Orleans butchers. They all made rights claims, appealing to federal authority either indirectly or directly. And they were not alone. The key cases of the late 19th century feature a diverse array of characters — a grain elevator operator in Illinois, German brewers in Kansas, bakers in New York, to name a few — all with expansive views of federal power and what it could accomplish. Those views were firmly embedded in the constitutional changes of the Reconstruction era that dealt with rights but did so in a way that tied rights to expectations that legal venues would right wrongs — that rights made the world right. If anything, the connection between rights and what was right was even stronger in popular conceptions of the legal order, which increasingly identified rights as a means — even the primary means — to achieve justice.

That link carried its own problems — and still does. As the frustration of justices in *Cruikshank* suggests, individual rights, even in their most expansive form, had definite limits when it came to achieving social justice. Nor was the preservation of an individual's rights always synonymous with the public good. Still, the policy changes of the Reconstruction era allowed the aspirations of diverse groups of Americans to move into the realm of federal law and, once there, to acquire the status of universal legal principles. The results remade the relationship between Americans and the nation state, raising expectations about the federal government's role in maintaining a just social order. Those expectations could only result in conflict, as there was no consensus among the American people about what was right — about what constituted a just society. At the same time, though, the conflicts were and are necessary: They are about our aspirations for what the nation can be and our faith in the law to realize those aspirations.

LAURA F. EDWARDS is the Peabody Family Professor of History at Duke University. This article is derived from a lecture she gave in the Supreme Court as part of the Supreme Court Historical Society's 2015 Silverman Lecture Series on Reconstruction, and the article based on that lecture, *The Reconstruction of Rights: The Fourteenth Amendment and Popular Conceptions of Governance*, 42 J. Sup. Ct. Hist. 310 (2016). Edwards thanks Jennifer Lowe, Clare Cushman, and the Supreme Court Historical Society, as well as Melinda Vaughn, who helped revise the piece for *Judicature*. Edwards also thanks Greg Downs and Kate Masur, who read initial drafts, and Jacquelyn Hall, Nancy MacLean, and Lisa Levenstein, who read multiple versions of the lecture and provided invaluable insights.

[1] *State v. Armstrong* (1870), Criminal Action Papers, Edgecombe County, State Archives of North Carolina, Raleigh, North Carolina. This case is from the County Court, and is in its original, manuscript form with the other cases from this court in the State Archives.

[2] Laura F. Edwards, The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South (2009). The discussion of local courts draws extensively on the analysis in this book, which was based on local court records in North Carolina and South Carolina. The local courts in parts of the country worked similarly, as my own research and that of others suggests. *See, e.g., Laura F. Edwards, Textiles: Popular Culture and the Law,* Buff. L. Rev. 64, 193–214 (2016); *see also* Martha Jones, Birthright Citizens: A History of Race and Rights in Antebellum America *(2018);* Kelly Kennington, In the Shadow of Dred Scott: St. Louis Freedom Suits and the Legal Culture of Slavery in Antebellum America (2017); Felicity Turner, *Rights and the Ambiguities of Law: Infanticide in the Nineteenth-Century U.S. South, 4* J. Civ. War Era 350 (2014); Kimberly Welch, *Black Litigiousness and White Accountability: Free Blacks and the Rhetoric of Reputation in the Antebellum Natchez District, 5* J. Civ. War Era 372 (2015).

[3] In addition to *The People and Their Peace,* this Article draws on three other publications by Edwards: Laura F. Edwards, A Legal History of the Civil War and Reconstruction: A Nation of Rights (2015) [hereinafter A Legal History of the Civil War and Reconstruction]; Laura F. Edwards, *Reconstruction and the History of Governance, in* The World the Civil War Made 30 (Gregory P. Downs & Kate Masur eds. 2015) [hereinafter Reconstruction and the History of Governance]; Laura F. Edwards, *Status Without Rights: African Americans and the Tangled History of Law and Governance in the Nineteenth-Century U.S. South,* 112 Am. Hist. Rev. 365 (2007) [hereinafter *Status Without Rights*].

[4] Reconstruction and the History of Governance, *supra note 3*. Such a perspective is common in scholarship that focuses on the colonial period. *See* Lauren Benton, A Search for Sovereignty: Law and Geography in European Empires, 1400-1900 (2011); Philip J. Stern, The Company-State: Corporate Sovereignty and the Early Modern Foundation of the British Empire in India (2011); The Many Legalities of Early America (Christopher L. Tomlins & Bruce H. Mann eds. 2001). But the idea of "many legalities" and overlapping legal arenas tends to drop out of the scholarship focused on the 19th century, where the presumption is that the new nation secured a monopoly on legal authority with its founding. Recent work, however, suggests otherwise. *See, e.g.,* William J. Novak, *The Legal Transformation of Citizenship in Nineteenth-Century America, in* The Democratic Experiment: New Directions in American Political History 85 (Meg Jacobs, William J. Novak & Julian Zelizer eds. 2003); The Long Nineteenth Century (1789-1920) (Christopher Tomlins & Michael Grossberg eds. 2008); Barbara Young Welke, Law and

the Borders of Belonging in the Long Nineteenth Century United States (2010); William J. Novak, *The American Law of Association: The Legal-Political Construction of Civil Society,* 15 Stud. Am. Pol. Dev. 163 (2001).

[5] *See, e.g.,* Richard R. John, Spreading the News: The American Postal Service from Franklin to Morse (1995). Some Americans were more likely to be involved in federal courts than others. As the work of Martha S. Jones shows, free blacks actively defended their rights in local, state, and federal jurisdictions precisely because their legal status — and their ability to live within the United States — was so tenuous. *See, e.g.,* Jones, *supra* note 2.

[6] Edwards, *supra* note 2, *at 26–53, 256–85.*

[7] A Legal History of the Civil War and Reconstruction, *supra* note 3, at 90–119.

[8] Edwards, *supra* note 2, at 205–98. For a particularly compelling account of the limits of rights in the early 19th century, see Christopher L. Tomlins, Law, Labor, and Ideology in the Early American Republic (1993).

[9] The best statement on states' regulatory power is William J. Novak, The People's Welfare: Law and Regulation in Nineteenth-Century America (1996).

[10] Edwards, *supra* note 2, at 64–99.

[11] *State v. Chavis*, 1851, Criminal Actions Concerning Slaves and Free Persons of Color, Granville County, State Archives of North Carolina, Raleigh, North Carolina. Edwards, *supra* note 2, at 64–132.

[12] Edwards, *supra* note 2, at 64–132.

[13] *Id.* at 64–132.

[14] *Id.* at 100–201.

[15] *Id.* at 64–99.

[16] *Id.* at 169–201.

[17] *Status Without Rights, supra* note 3.

[18] *Id.*

[19] *Id.* Gregory P. Downs, After Appomattox: Military Occupation and the Ends of War (2015) emphasizes the pervasiveness and importance of federal legal venues, which often took over for local courts in the years following Confederate surrender. Recent scholarship on African Americans' experiences during the Civil War and Reconstruction often uses government documents, particularly legal records, and underscores the fact that African Americans made every effort to use various levels of the legal system. Generally, however, such works do not link those sources or the resulting cases to broader changes in law and legal institutions. The work associated with the Freedmen and Southern Society Project, which pioneered the use of federal records that had been largely overlooked, provided the framework for subsequent scholarship. *See, e.g.,* The Black Military Experience (Ira Berlin et al. eds. 1982); The Destruction of Slavery (Ira Berlin et al. eds. 1985); Ira Berlin et al., *Afro-American Families in the Transition from Slavery to Freedom,* 42 Radical Hist. Rev. 89 (1988). For other work on the period that makes extensive use of legal sources, see Laura F. Edwards, Gendered Strife and Confusion: The Political Culture of Reconstruction (1997); Mary Farmer-Kaiser, Freedwomen and the Freedmen's Bureau: Race, Gender, and Public Policy in the Age of Emancipation (2010); Crystal N. Feimster, *"What If I Am a Woman": Black Women's Campaigns for Sexual Justice and Citizenship, in* The World the Civil War Made, *supra note 3;* Barbara J. Fields, Slavery and Freedom on the Middle Ground: Maryland During the Nineteenth Century (1985); Kate Masur, An Example for All the Land: Emancipation and the Struggle Over Equality in Washington, D.C. (2010); Susan E. O'Donovan, Becoming Free in the Cotton South (2007); John C. Rodrigue, Reconstruction in the Cane Fields: From Slavery to Free Labor in Louisiana's Sugar Parishes, 1862–1880 (2001); Julie Saville, The Work of Reconstruction: From Slave to Wage Laborer in South Carolina, 1860–1870 (1994); Leslie Schwalm, A Hard Fight for We: Women's Transition from Slavery to Freedom in South Carolina (1997).

[20] A Legal History of the Civil War and Reconstruction, *supra* note 3, at 90–119.

[21] *Id.*

[22] Reconstruction and the History of Governance, *supra* note 3.

[23] For a particularly compelling account of African Americans' efforts to access public spaces, see Masur, *supra* note 19. For a fascinating discussion of the regulation of public carriers and people's access to them, *see* Barbara Young Welke, Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865–1920 (2001). Education is also an example of African Americans' efforts to access public services. The Reconstruction era constitutions of many states in the former Confederacy included access to public education as something akin to a right. *See* Emily Zackin, Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights 67–105 (2014). As Zackin argues, states recognized an array of positive rights in the late 19th century, often at the behest of citizens who actively sought out government protection. The claims of African Americans to schooling are well documented. *See* Masur, *supra* note 19; *see also* Hugh Davis, "We Will Be Satisfied with Nothing Less": The African American Struggle for Equal Rights in the North during Reconstruction (2011); Davison M. Douglas, Jim Crow Moves North: The Battle over Northern School Segregation, 1865–1954 (2005); Heather Williams, Self-Taught: African American Education in Slavery and Freedom (2005).

[24] Civil Rights Act of 1875, 18 Stat. 335; Civil Rights Cases, 109 U.S. 3 (1883); A Legal History of the Civil War and Reconstruction, *supra* note 3, at 163-64; *see also* Masur, *supra* note 19; Amy Dru Stanley, *Slave Emancipation and the Revolutionizing of Human Rights*, *in* The World the Civil War Made, *supra* note 3.

[25] The extent of violence is strikingly evident in most of the literature on Reconstruction, and has become the focus of recent work. See Downs, *supra* note 19; Hannah D. Rosen, Terror in the Heart of Freedom: Citizenship, Sexual Violence, and the Meaning of Citizenship in the Postemancipation South (2009); Kidada E. Williams, They Left Great Marks on Me: African American Testimonies of Racial Violence from Emancipation to World War I (2012). Examples of violence pervade the literature, and some of the most horrific examples were documented in federal hearings. *See, e.g.*, [reverse chronological order] 39th Cong. 1st sess., House Report 101, Select Committee on the Memphis Riots; 40th Cong., 3rd sess., House Miscellaneous Document 52, Condition of the Affairs in Georgia; 42nd Cong., 2nd sess., House Report 22, Testimony Taken by the Joint Committee to Enquire into the Condition of Affairs in the Late Insurrectionary States (Ku Klux Klan Hearings); 43rd Cong., 2nd sess., House Report 261, Condition of Affairs in the South

(Louisiana); 43rd Cong., 2nd sess., House Report 262, Affairs in Alabama; 43rd Cong., 2nd sess., House Report 265, Vicksburg Troubles; 44th Cong., 1st sess., Senate Report 527, Mississippi in 1875 44th Con., 2nd sess., House Miscellaneous Document 31, Recent Election in South Carolina; 44th Cong., 2nd sess., Senate Miscellaneous Document 45, Mississippi; 44th Cong., 2nd sess., Senate Miscellaneous Document 48, South Carolina in 1876. The literature on voting rights cases suggests how violence made its way into federal courts through these kinds of cases. See, in particular, the work cited in note 6 above.

[26] *United States v. Cruikshank*, 92 U.S. 542 (1876); see also *United States v. Reese*, 92 U.S. 214 (1876); A Legal History of the Civil War and Reconstruction, *supra* note 3, at 146–72. For information on the Colfax massacre, see Leanna Keith, The Colfax Massacre: The Untold Story of Black Power, White Terror, and the Death of Reconstruction (2008); Charles Lane, The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction (2008). Conventional historiographical wisdom has laid much of the blame for Reconstruction's failure at the feet of the U.S. Supreme Court, arguing that the Court's decisions represented nothing less than the conscious abandonment of African Americans to conservative whites intent on stripping them of their newly acquired civil and political rights. Recent scholarship, however, has moderated those conclusions, arguing that the Court was not as hostile to African Americans' rights as previous scholarship suggests, particularly in the area of voting rights, where it left significant protections in place. *See* Pamela Brandwein, Rethinking the Judicial Settlement of Reconstruction (2011); G. Edward White, *The Origins of Civil Rights in America,* 64 Case W. Res. L. Rev. 755 (2014). Throughout the late 19th century, however, the Court upheld a narrow, individualized view of civil rights, one at odds with the aspirations of many Americans. While it upheld federal enforcement, the Court's decisions did nothing to make an already difficult job any easier.

[27] *Bradwell v. Illinois,* 83 U.S. 130 (1873); A Legal History of the Civil War and Reconstruction, *supra* note 3, at 146–72; Joan Hoff, Law, Gender, and Injustice: A Legal History of U.S. Women 151–91 (1991). Myra Bradwell's case, however, also suggests countervailing political currents, giving women the same rights as men without acknowledging the particularities of structural inequalities that they faced as women; Illinois allowed women admission to the bar within a year of the U.S. Supreme Court's decision.

[28] *Slaughter-House Cases*, 83 U.S. 36 (1873); A Legal History of the Civil War and Reconstruction, *supra* note 3, at 146–72; see also Michael A. Ross, *Justice Miller's Reconstruction: The Slaughter House Cases, Health Codes, and Civil Rights in New Orleans, 1861–1873*, 64 J. Southern Hist. 649 (1998).