

Spring 2017

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### Recommended Citation

Leslie F. Goldstein, *Legal Histories of America's Second Revolutionary War (1860-1876)*, 52 Tulsa L. Rev. 495 (2017).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol52/iss3/14>

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## LEGAL HISTORIES OF AMERICA'S SECOND REVOLUTIONARY WAR (1860-1876)

Leslie Friedman Goldstein\*

KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES OR IMMUNITIES OF AMERICAN CITIZENSHIP* (CAMBRIDGE UNIVERSITY PRESS 2014). PP. 326. HARDBACK \$113.00. PAPERBACK \$36.99.

WILLIAM A. BLAIR, *WITH MALICE TOWARD SOME: TREASON AND LOYALTY IN THE CIVIL WAR ERA* (UNIVERSITY OF NORTH CAROLINA PRESS 2014). PP. 432. HARDCOVER \$40.00.

LAURA F. EDWARDS, *A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS* (CAMBRIDGE UNIVERSITY PRESS, 2015). PP. 226. HARDCOVER \$82.00. PAPERBACK \$25.99.

The actual title of the Laura Edwards book, *A Legal History of the Civil War and Reconstruction*, could be applied to all three of these books, and yet they have hardly anything in common. Consequently, I will lay out the main themes and arguments of each book separately, mentioning occasional overlaps, or insights provoked, as I proceed.

The Laura Edwards book struck me as at least as much a social history as a legal one, with a dash of political history thrown in. It does mention the Thirteenth, Fourteenth and Fifteenth Amendments, but does not discuss them in any depth. The Edwards book also mentions the 1866 Civil Rights Act and the two Habeas Corpus Acts of 1863 and 1867, the Enforcement Acts of 1870 and 1871, and the Ku Klux Klan Act of 1871 but again, does not give them extensive discussion.<sup>1</sup> For instance, Edwards's book does not even mention that the Justice Department was officially created in 1870 to carry out all these new laws.<sup>2</sup> It describes a handful of well-known court cases, including: *The Slaughter-House Cases* (1873), *Cruikshank* (1876), the *Civil Rights Cases* (1883), *Plessy* (1896, which is mis-dated as 1898), but again one does not

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1. LAURA F. EDWARDS, *A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS* 150 (2015).

2. *About DOJ*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/about>.

receive more than a brief summary of the social contexts, legal issues, and resolutions of each case.<sup>3</sup>

There are mysteries of legal history in this Civil War-Reconstruction period that I would love to have seen explored in the Edwards book: Why was the Fifteenth Amendment adopted even though eight northern states voted down black suffrage from 1865 to 1868 period? The issue is not mentioned in this book.<sup>4</sup> Another mystery: Why was the Federal Code changed and by whom, in the process of supposedly merely codifying it in 1874, such that Sections Three and Four of the Enforcement Act of 1870 went from outlawing interferences with the vote on account of race or previous servitude to outlawing interferences with the vote simply?<sup>5</sup> This too, is not mentioned.

The central focus of the Edwards book, however, is neither Supreme Court cases nor constitutional or statutory changes brought about by the Civil War. Instead, Laura Edwards appears to be primarily interested in the intersection among laws, public policy, and social history. So Edwards's book contains a discussion of a variety of economic policies: the Homestead Act of 1862; the Morrill Land Grant Act of 1862; the establishment of a formal Department of Agriculture (also 1862); the financing of the Civil War through the issuance of bonds that ordinary people could and did buy (so-called "seven-thirties," the original U.S. Savings bonds); the increased nationalization of the regulation of state banks; the issuance of greenbacks not backed by gold (and the two corresponding Supreme Court cases); the massive governmental subsidization of a transcontinental railroad; the issuance of a highly popular income tax (that hit only the very wealthy); and the imposition of protective tariffs to help native industries.<sup>6</sup>

Edwards also devotes a full chapter of her book to describing legal developments within the Confederacy.<sup>7</sup> Wartime necessity brought about centralized government not only in the Union but also in the Confederacy. Just as in the Union, the Confederacy made extensive use of martial law and the suspension of the writ of habeas corpus. The Confederacy Constitution was closely modeled after the U.S. Constitution, but for (1) the addition of an explicit description of the Confederacy as a union of states, (2) the absence of a Supreme Court, (3) the explicit protection of slave property, and (4) bans on protective tariffs and internal improvement projects (the latter, unenforced).<sup>8</sup> Its framers voted down permission for secession or nullification.<sup>9</sup>

3. Edwards, *supra* note 1, at 162-65 (citing Slaughter-House Cases, 83 U.S. 36 (1873); United States v. Cruikshank, 92 U.S. 542 (1876); Civil Rights Cases, 109 U.S. 3 (1883); Plessy v. Ferguson, 163 U.S. 537 (1896)).

4. WILLIAM A. BLAIR, WITH MALICE TOWARD SOME: TREASON AND LOYALTY IN THE CIVIL WAR ERA 294 (2014) (summarily discussing this issue along with a list of relevant factors).

5. See PAM BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 122-24 (2011).

6. See EDWARDS, *supra* note 1; see also BLAIR, *supra* note 4 (discussing the imposition of numerous, highly unpopular federal excise taxes, a topic not addressed in Edwards's book).

7. See, e.g., EDWARDS, *supra* note 1, at 42-63.

8. *Id.* at 52.

9. *Id.* at 45.

Formal centralization, however, did not translate to efficacious authority.<sup>10</sup> The violent chaos of racially motivated mob violence that later confronted Northern troops trying to manage the South during Reconstruction, Edwards implicitly suggests, had its roots in the failure of the Confederate government to keep its citizenry supplied even with basic foodstuffs during the war.<sup>11</sup> Bread riots were not unusual. Government throughout the South lost its legitimacy during the war. By the end of the war, the Confederate Congress was so desperate for troops that it offered slaves freedom if they would enlist as armed troops.<sup>12</sup> This fact shocked me, and I wish Edwards offered more of a legal history on how the Confederate Congress's offer came about.

As in her chapters on the North, Edwards provides a good deal of description of economic policy development in the South.<sup>13</sup> She also provides a stark picture of how overmatched the Confederacy was. For instance, the Confederacy had a population of eight million (of whom 5.5 million were free), compared to the North's twenty-two million. Further, the Confederacy had a manufacturing base worth \$69 million, compared to the Union's worth \$813 million.<sup>14</sup>

Certain aspects of legal change normally associated with the Civil War that, in contrast to the general pattern of the book, do receive helpful, extensive discussion are the very beginnings of the war and the Emancipation.<sup>15</sup>

Edwards gives an excellent, blow-by-blow account of how the fighting began and how the states decided where to align. Seven deep-South states declared themselves out of the United States and in the Confederate States of America in February 1861.<sup>16</sup> On April 12, 1861, South Carolina's militia fired on Fort Sumter, where federal troops surrendered the very next day. Two days later, April 15, Lincoln called up militia from each state, totaling a force of 75,000, to put down the rebellion. At this point, state officials had to choose a side. Within the next two months, Virginia, North Carolina, Tennessee and Arkansas seceded. Missouri held a referendum in March; the Union won, but the governor wanted to align with the Confederacy and ordered Missouri's militia to seize federal arsenals. Federal troops chased down the governor and imposed martial law. In Maryland, pro-Confederacy gangs attacked a Pennsylvania regiment and destroyed telegraph lines and railroad bridges.<sup>17</sup> Lincoln sent in militia units, which then occupied Baltimore, and on April 27, he suspended habeas corpus along the railway corridor that ran Philadelphia-Wilmington-Baltimore-D.C. After these disorders, Lincoln called up an additional 42,000 volunteers to strengthen Union forces. In July of the same year, Union troops lost a major battle

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10. *Id.* at 56.

11. *Id.* at 57.

12. *See, e.g.*, EDWARDS, *supra* note 1, at 59.

13. *See id.* at 47-63.

14. EDWARDS, *supra* note 1; *see* EMORY M THOMAS, THE CONFEDERACY AS A REVOLUTIONARY EXPERIENCE 79-80 (1970).

15. *See, e.g.*, EDWARDS, *supra* note 1, at 16-41, 64-89.

16. *Id.* at 18-21.

17. *Id.*

at Bull Run. The war was on.<sup>18</sup>

Edwards gives considerable attention to the fact that numerous slaves freed themselves by running off to join Union lines (and that later numerous freed blacks petitioned government officials, both military and civilian, for rights enhancement).<sup>19</sup> Once the slaves arrived, however, commanders had no clear guidelines on how to cope with them. Technically the Fugitive Slave Act was still in effect. Commanders on the ground adlibbed. General Benjamin F. Butler (May 1861) treated the runaways in Virginia as contraband and held them to be used for labor within the military.<sup>20</sup> Better that they helped the Union than the Confederacy, thought General Butler. By contrast, in that same month in Missouri, Brigadier General William Harney sent the runaways he encountered “carefully” back to their owners.<sup>21</sup> In November 1861, General William T. Sherman held the runaway slaves in Kentucky until masters requested them, or else turned them over to a local sheriff.<sup>22</sup> Meanwhile, in August of 1861, Congress ended the uncertainty at least as to rebel territory, by adopting the First Confiscation Act.<sup>23</sup> All property used to support the rebellion could be seized by Union forces, and this included slave property.<sup>24</sup>

General John C. Fremont went further than mere seizure; he used his martial law power in Missouri in September 1861 to free all the slaves in that state.<sup>25</sup> Lincoln promptly countermanded the order and replaced Fremont.<sup>26</sup> In December of that year, Secretary of War, Simon Cameron, in his annual report penned a forceful defense of abolishing slavery in all of the territory captured by Union troops.<sup>27</sup> Lincoln ordered Cameron to delete this section of the report, and shortly thereafter replaced Cameron with Edward Stanton. In March of 1862, Congress adopted an article of war that forbade commanders from returning slaves to their owners.<sup>28</sup> In April, Congress abolished slavery in D.C. and paid compensation to the owners.<sup>29</sup> In May of the same year, General David Hunter used his authority as military commander governing conquered territory to declare martial law and free all the slaves in South Carolina, Georgia, and Florida. Lincoln immediately nullified Hunter’s emancipation order.<sup>30</sup> In June of 1862, Congress abolished slavery in all federal territories, but with no compensation. At Lincoln’s request, that same year Congress pledged compensation to owners in the loyal, border states if they would give up their slaves.<sup>31</sup> The Second

18. *Id.*

19. *See id.* at 67-82.

20. EDWARDS, *supra* note 1, at 72-73.

21. *Id.* at 75.

22. *Id.*

23. *Id.* at 76.

24. *Id.* at 71-82.

25. EDWARDS, *supra* note 1, at 20.

26. *Id.*

27. *Id.* at 77-78; see *Draft and Final Versions of a Passage in the Secretary of War’s Annual Report*, FREEDMEN AND SOUTHERN SOC’Y PROJECT, <http://www.history.umd.edu/Freedmen/cameron.htm>.

28. EDWARDS, *supra* note 1, at 78.

29. *Id.*

30. *Id.* at 79.

31. *Id.* at 80.

Confiscation Act was adopted in July 1862.<sup>32</sup> This law not only held the escaped slaves safely behind Union lines, but it also declared them free, if they were owned by members of the Confederacy who lived in territory that the Union controlled, so long as the master did not surrender to the U.S. government within the next sixty days.<sup>33</sup> Both Blair and Edwards omit this last detail. I infer from this detail that Lincoln then expanded upon the strategy (from the Second Confiscation Act) of threatening Emancipation as a way to induce surrender.<sup>34</sup> By September of 1862, President Lincoln issued the Preliminary Emancipation Proclamation, offering rebellious states 100 days to surrender. If they did, their residents could retain their slaves. If not, slaves in rebel states would be deemed free as of January 1, 1863.<sup>35</sup>

On the same day the Second Confiscation Act was enacted (July 17, 1862), Congress also adopted a Militia Act that allowed enlistment by black soldiers.<sup>36</sup> In June 1864, Congress repealed the Fugitive Slave Act of 1850, and legislated equal pay for white and black soldiers.<sup>37</sup> Although Edwards does not say so, this second move shows important progress in Union sentiment; equality under the law for the two races had not been politically thinkable as a feasible option in 1862. By 1864, however, the Union had taken a giant step toward the equal protection that just two years later Congress would place into its proposal for the Fourteenth Amendment that it was sending for ratification.

By the fall of 1864 Lincoln abandoned his Ten Percent Reconstruction Plan (announced in the December 1863 Proclamation of Amnesty and Reconstruction), which would have left abolition to the progressive ten percent within each state who might be willing to pledge loyalty to the Union and abolish slavery; rather, Lincoln announced his support for the Thirteenth Amendment, which passed the Senate as early as April 1864.<sup>38</sup> Once Lincoln won re-election, the House endorsed the Thirteenth Amendment also and sent it to the states in January of 1865. Even before the Thirteenth Amendment achieved ratification, at Lincoln's request, in March 1865, Congress established the Bureau of Freedmen and Abandoned Lands ("Freedman's Bureau").<sup>39</sup> The Freedman's Bureau, subordinate to the military, was established to handle disputes that resulted from the ending of slavery.<sup>40</sup> Lee surrendered to Grant on April 9, 1865 and Lincoln was shot on April 14, 1865. Andrew Johnson stepped into the presidency on April 15.<sup>41</sup>

Edwards makes an insightful point in describing the ratification of the Thirteenth Amendment. As Andrew Johnson met with Southern leaders to persuade

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32. *Id.*; see BLAIR, *supra* note 4, at 83-91 (discussing this law and noting the Congressional debate lasted from December 1861 into July 1862).

33. EDWARDS, *supra* note 1, at 81.

34. *See id.* at 71-82.

35. *Id.* at 71-82.

36. *Id.* at 85.

37. *Id.* at 85, 95.

38. EDWARDS, *supra* note 1, at 90-120.

39. *Id.* at 95.

40. *Id.* at 95.

41. *Id.* at 92-95.

them to accept the Ten Percent Reconstruction Plan, he minimized the legal power of the Thirteenth Amendment. Many (if not most) of its supporters in Congress viewed it as abolishing not only the legal relationship of slavery, but also the “badges and incidents of slavery”; in other words, bringing about full civil equality.<sup>42</sup> Edwards describes this as “civil and political equality,” but I view her assessment as a stretch.<sup>43</sup> Edwards further tells us that Johnson “made explicit assurances to representatives of the former Confederate states to obtain the required votes” for the Thirteenth Amendment, to the effect that it “eliminated slavery and no more.”<sup>44</sup> We learn that by December 6, 1865, when ratification of the Thirteenth Amendment was made official by the assent of Georgia, twenty-seven of the thirty-six Union states had also ratified. Ultimately, the Thirteenth Amendment attained a three-fourths vote both north and south, although the Southern votes were not only coerced by being kept out of Congress unless they would ratify, but also were misled as to the import of the Amendment.

Meanwhile, in the summer of 1865, the Southern states followed the Ten Percent Plan and adopted constitutions that abandoned secession and outlawed slavery, but proceeded to adopt detailed Black Codes, expanding upon antebellum statutes that had restricted free blacks. Edwards gives only a paragraph to these and does not detail the degree to which they virtually re-enslaved Southern blacks.<sup>45</sup> When Congress reconvened in 1866, after ratification of the Thirteenth Amendment, they rejected newly arrived Southern Congressional slates, which were led by the same men who had recently led the war against the Union. Next they set about proposing the Fourteenth Amendment, which would seal into the Constitution the advances of the 1866 Civil Rights Act for citizen rights (says Edwards), but also protect equal protection and due process of law for all persons.<sup>46</sup> Whole books (Kurt Lash’s, for instance)<sup>47</sup> have been written about the complexities of the Fourteenth Amendment, so I found Edwards’s treatment rather cursory, but perhaps she was constrained by her publisher into keeping her book short.

Since Section Two of the Fourteenth Amendment introduces into the Constitution a privileging of males, Edwards then devotes a section of her book to the hierarchical structure of nineteenth century laws in the states. These laws privileged the propertied male householder and denied rights to women and to subordinated workers generally.<sup>48</sup> Edwards returns to this theme at great length later in her book.<sup>49</sup>

Because gold and silver were discovered in the Mountain West in the 1850s, Euro-Americans flooded into Colorado, Nevada, the Dakotas, Idaho, Arizona, and Montana. These all became territories during the Civil War, and the massive increase

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42. *See id.* at 88, 103-04.

43. *Id.* at 88.

44. *Id.* at 88, 103-04.

45. EDWARDS, *supra* note 1, at 97.

46. *See id.* at 100-03.

47. *See* LASH, *infra* note 109.

48. EDWARDS, *supra* note 1, at 110-13.

49. *Id.* at 137-62, 166-73.

in population of Euro-Americans eventually led to bloody conflicts with the Indians. Edwards therefore offers a six-page excursion into Indian law,<sup>50</sup> that concludes with a passage asserting that the long-term seizure of Indian land that went on “was, essentially, the uncompensated seizure of property without due process of law.”<sup>51</sup> She makes no mention of the contrary argument by celebrated Indian law scholar Felix Cohen. Cohen maintained that for all its real horrors, Indian Removal involved purchase from Indian tribes of virtually every acre, in sharp contrast to the policies regarding treatment of indigenous property in South America, Canada, and Australia.<sup>52</sup> To select just one of myriad examples, the U.S., having paid Napoleon fifteen million dollars for the right to rule the Louisiana Territory, then turned around and paid the Native Americans three hundred million dollars for that property (exclusive of the cessions the U.S. reserved to the tribes). Through almost four hundred treaties, the United States purchased over two million square miles of land from Indian tribes at an estimated cost of at least eight hundred million dollars.<sup>53</sup>

Laura Edwards believes that Reconstruction failed not simply because of Southerners' intense, violent, and implacable racial hostility and accompanying resentment against the Civil War Amendments and enforcement acts that was far too massive and enduring for the weakly developed federal infrastructure to handle.<sup>54</sup> Edwards identifies a second cause of the failure as follows: The “new legal [postbellum] order that was national in scope [was] composed of citizens who were equal in theory, but unequal in practice.”<sup>55</sup> The promotion of industrialization, implicit in the tariff system, for instance, resulted in wage workers economically less equal (compared to pre-industrialization) than factory owners or railroad magnates, even as Emancipation and the Fourteenth Amendment promised equality before the law. After acknowledging that “[v]iolence overwhelmed [Reconstruction],”<sup>56</sup> Edwards argues that, nonetheless

[T]he intransigence of white southerners and the fecklessness of white northerners were not the only problems. . . . The law's underlying logic sustained profound inequalities, at odds with the kinds of legal equality that freed people and other Americans [e.g., women, wage laborers, American Indians] envisioned for themselves. . . . [T]he legal challenges of Reconstruction were not peculiarly southern; they were national in scope.<sup>57</sup>

Edwards makes this argument at great length in this short book.<sup>58</sup> I found it speculative rather than documented, and largely unpersuasive.

To Laura Edwards's credit, she recognizes and acknowledges the importance

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50. *Id.* at 113-19.

51. *Id.* at 118.

52. Felix Cohen, *Original Indian Title*, 32 MINN. L. REV. 34 (1948).

53. *Id.* at 35-40.

54. EDWARDS, *supra* note 1, at 151.

55. *Id.* at 18; *see id.* at 40-41, 110, 112, 119, 124-27.

56. *Id.* at 144.

57. *Id.* at 152.

58. *See id.* at 137-62, 166-73.



of Pam Brandwein's powerful re-examination and recasting of the Supreme Court's role during the waning of Reconstruction.<sup>59</sup> The Supreme Court under Chief Justice Waite was not the *bête noir* that many scholars have made it out to be. The country, in fact, lacked the political will to make Reconstruction stick.

Whereas the Edwards book often left me hungering for more details of legal history, William Blair's book, *With Malice Toward Some*, offers a sharp contrast.<sup>60</sup> It is elegantly argued, superbly documented, thick with descriptive detail, and chock-full of information. Blair provides thorough discussion not only about the complexities of official government policies towards the complicated matters of treason and disloyalty as legal and political problems, but also about law-on-the-ground, as enforced and unenforced at the local level, and via collective community behavior that operated as custom with the force of law (e.g., the storming and destroying locally unpopular printing presses) during the Civil War.<sup>61</sup> A review of the brevity required here cannot do justice to the degree of detail contained in *With Malice Toward Some*. Blair's book is an eye-opener.

The matter of treason and disloyalty was complicated because the U.S. was engaged in a civil war; the more the Union advanced, the more the Union government had to manage and cope with a fundamentally disloyal citizenry. The U.S. governmental infrastructure was not prepared for this, so the military ended up engaged in governance through martial law in much of the country.<sup>62</sup>

A glaring fact becomes clear by Chapter Two.<sup>63</sup> What twentieth and twenty-first century citizens have come to believe about the First Amendment freedoms of speech, press, and religion simply did not prevail during the Civil War. Speech and press, even speech during a religious service delivered as the sermon by professional clergy, that discouraged enlistment or defended slavery could and did lead to arrests, and lots of them. Popular sentiment strongly endorsed this reading of the First Amendment. My saying "even" professional clergy is misleading. In fact, during the Civil War, throughout the Union as well as in the conquered rebellious states, professional clergy and newspaper editors—the very folks that one would think had special First Amendment protection—were the ones targeted by officials for arrest.

My reading of Blair's book caused me to surmise that Justice Oliver Wendell Holmes, a veteran of the Civil War, may well have been influenced by having lived through this legal era while at an impressionable age. Justice Holmes' opinion in *Schenck v. U.S.* has always struck me as making mincemeat of the freedoms at stake, since Schenck went to prison for simply urging Americans to write Congress and claim the (World War I) draft law violated their rights protected by the Thirteenth Amendment.<sup>64</sup> This book has convinced me that there is no doubt that Schenck would have been imprisoned for comparable speech (likening the draft to slavery) during the Civil War, likely without arousing much controversy. Times have changed.

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59. BRANDWEIN, *supra* note 5, at 122-24.

60. See BLAIR, *supra* note 4.

61. See *id.*

62. See, e.g., *id.* at 112.

63. See, *id.* at 36-65.

64. 249 U.S. 47 (1919).

To return to the Blair book, the system of arrests for disloyal activity and activity understood to undermine the Union's efforts to suppress the traitorous military uprising in the South, was carried out in large part by a complex array of federal officials hired and supervised by the military. This complex array of federal officials (often called "provost marshals") was supplemented by federal bureaucrats, their hirelings, and local civilian officials, themselves often pressed into action by aroused loyal citizens, who otherwise might resort to mob behavior.<sup>65</sup> This system of combatting disloyalty extended to interdiction of the mails; capturing spies; suppressing newspapers; enforcing loyalty in the churches, editorial offices, and elsewhere by requiring loyalty oaths in order to hold a wide range of professional jobs; making political arrests; and stationing soldiers at polling places to help enforce loyalty oaths. The latter occasionally engaged in egregious excesses like closing the polls hours early.<sup>66</sup>

In the plentiful illustrative anecdotes that Blair provides, one can discern a pattern. While the enforcement system offered many reasons modern Americans might call it a police state, what saves the system from warranting that label is that (perhaps, because there simply were not enough jails and jailers to deal with the crowds), people who arrested for disloyalty were not held long—perhaps a month or two—and then would be released after taking a loyalty oath.<sup>67</sup> Often the order to release them, or an order to restrain the behavior of soldiers monitoring polling places, came from the top—either Lincoln himself or Secretary of War Stanton.<sup>68</sup>

Blair's book contains a lot of interesting legal history. The book takes readers back over the course of pre-Civil War United States history to explain why no one was ever executed for treason against the U.S., except abolitionist John Brown (and he was executed by the state of Virginia, not the federal government).<sup>69</sup> The U.S. Constitution, precisely to *prevent* anyone's punishment merely for traitorous speech, spells out that treason consists of an overt act of levying war against the U.S. or giving aid and comfort to its wartime enemies, and that there must be at least two witnesses to the overt act.<sup>70</sup> The Constitution (Sixth Amendment) also requires that prosecution for any federal crime (treason included) take place in "the state and district wherein such crime shall have been committed."<sup>71</sup> Federal officials were far from confident that the neighbors of Southern heroes like Jefferson Davis, Robert E. Lee, and Stonewall Jackson would convict them to be hung for treason after the war ended. So the cases were never prosecuted.<sup>72</sup>

As for activities short of "levying war" that helped the enemy—for instance: speaking in favor of the Confederacy or against enlistment in the Union army; smuggling food or other needed supplies to neighboring Southern states; and participating

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65. See, e.g., BLAIR, *supra* note 4, at 54, 100, 101, 119, 143-44, 180.

66. *Id.*

67. See BLAIR, *supra* note 4.

68. *Id.* at 54, 108.

69. *Id.* at 13.

70. U.S. CONST. art. III, § 3.

71. U.S. CONST. amend. IV.

72. BLAIR, *supra* note 4, at 240-41.

in Copperhead gang-style attacks on telegraph lines or on railroad lines, as mentioned in Edwards's book—the U.S. actually lacked useful statutes.<sup>73</sup> Below the crime of treason (which carried a statutory death penalty) there at first existed only the misdemeanor of “obstruction of [a federal] officer in the performance of his duty . . . .”<sup>74</sup> Under this law, a convicted murderer of a U.S. marshal, for instance, could receive “a maximum penalty of one year in jail and a fine of three hundred dollars.”<sup>75</sup>

Congress soon addressed this lacuna, by adopting two Conspiracies Acts, one in 1861 and the other in 1862; both laws made punishable various ways of plotting against the government.<sup>76</sup> While probably thousands of cases of disloyalty during the war were processed this way (one study of just southern Illinois located hundreds), the bulk of disloyalty cases were dealt with more summarily under martial law provisions, by just locking people up (usually for short periods) and confiscating contraband.<sup>77</sup>

Two important contributions from Blair's book include (1) a detailed description of the provost marshal system, the enforcement apparatus for the quasi-police-state conditions during the Civil War, and, (2) a detailed intellectual history of legal thinkers from the period, including professors, lower court judges who adjudicated the *Prize Cases*, members of Congress, and attorneys who, while working as counsel for the federal government on the *Prize Cases*, had to grapple with the conundrum posed by the waging of the Civil War.<sup>78</sup> The problem was that the official Union position began by judging the fighting in the South to be an illegal insurrection.<sup>79</sup> To call it a “war,” in order to justify what were in international law terms known to be acts of war, such as instituting blockades of ports and summarily confiscating contraband without trials, would seem to acknowledge the Confederacy's official position, that it was a sovereign state.<sup>80</sup> If the Confederacy were indeed a sovereign state, it would have had the right to expel U.S. troops from Fort Sumter, and so forth, and the North would have no justification for war.<sup>81</sup>

This dilemma instigated the relevant legal thinkers to turn to treatises on international law, whether foreigners like Emmerich de Vattel, or scholars like Francis Lieber, who digested people like Vattel and Hugo Grotius for the domestic market.<sup>82</sup> International law had established that long-term insurrection could be treated as war; the powers of war turned insurrectionists (i.e., domestic criminals) into belligerents (military enemies).<sup>83</sup> Once the war ended, the side that had put down the insurrection

73. See EDWARDS, *supra* note 1; BLAIR, *supra* note 4, at 16.

74. BLAIR, *supra* note 4, at 17.

75. *Id.* at 81.

76. *Id.* at 53.

77. *Id.*

78. *Id.* at 77; *The Amy Warwick*, 67 U.S. 635 (1863).

79. BLAIR, *supra* note 4, at 77.

80. *Id.* at 77-79.

81. *Id.* at 78.

82. *Id.* at 69-70; see, e.g., EMMERICH DE VATTEL, *THE LAW OF NATIONS* (1758); FRANCIS LIEBER, *NO PARTY NOW; BUT ALL FOR OUR COUNTRY* (1863).

83. BLAIR, *supra* note 4, at 68.

could then return to domestic law and punish the appropriate leaders for treasonous behavior, at least in principle.<sup>84</sup> This concept of insurrection-turned-war allowed for avoiding the massive bloodletting that could result from one side treating every single opposing combatant as literally committing treason by waging war against the government.<sup>85</sup> Both Lieber and William Whiting, “solicitor” in the War Department, had developed influential legal policies, derived from their study of international law, that guided the war (and are detailed in Blair’s book).<sup>86</sup> Even people like Congressman Samuel Shellabarger (GOP) in February of 1862 made the argument that the President, under the Constitution, has both a peace power and a war power.<sup>87</sup> The latter is his power as Commander-in-Chief of the armed forces.<sup>88</sup> But the nature of the President’s war power comes from the law of nations.<sup>89</sup> Since the Constitution gives the power, it is not one held against the Constitution. Still, it is (per the law of nations) a plenary power to do what is necessary to preserve the nation and its form of government.<sup>90</sup>

The war power had domestic applications that are uncomfortable for us twenty-first century Americans to confront. The security apparatus of the Civil War years included several layers, all of which made life difficult for anyone expressing the least opposition to the draft, the Union war effort, recruitment of black soldiers, or, after September of 1862, Emancipation. Blair describes how it all worked: starting with the Conscription Act of 1863, provost marshals were appointed for each Congressional district by military officials to supervise the draft and to find, arrest, and prevent desertion.<sup>91</sup> Further, the provost marshals could hire assistants.<sup>92</sup> They supervised the district with power to arrest people for interfering with the draft or recruitment through disloyal conduct or speech.<sup>93</sup> Meanwhile, state and local governments also had officials involved in supervision and arrest.<sup>94</sup> Moreover, other federal officials got in on the act: the State Department hired civilian detectives and U.S. Attorneys directed federal marshals to detain civilians.<sup>95</sup>

In the first two years of the war (1861-1862), marshals working for the military basically played a military police (“MP”) role, disciplining soldiers for drunkenness, gambling, and so on, and investigating civilian complaints about soldiers.<sup>96</sup> As early as August of 1861, however, General George B. McClellan ordered Colonel Andrew Porter (head of the provost marshal system) to use his men to surveil “all persons in

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84. *Id.* at 67.

85. *Id.*

86. *Id.* at 93, 96-97.

87. *Id.* at 87 (quoting Congressman Samuel Shellabarger, Delivered in the House of Representatives: The Habeas Corpus (May 12, 1862)).

88. U.S. CONST. art. II, § 2.

89. BLAIR, *supra* note 4, at 87.

90. *Id.*

91. *Id.* at 102.

92. *Id.* at 102-107.

93. *Id.*

94. BLAIR, *supra* note 4, at 103.

95. *Id.* at 102-103.

96. *Id.* at 103.

this city [Baltimore?] who are disposed inimically to the government.”<sup>97</sup> Porter then screened the mail and used State Department detectives to monitor suspicious persons. In September, General McClellan carried out orders to arrest Maryland legislators, newspaper editors, and other public officials. To support this effort, General McClellan deployed detective Allen Pinkerton, local officials, and troops throughout Maryland.<sup>98</sup> After this, the provost marshal system bifurcated, with one branch becoming MPs who also guarded roads, railroads, and telegraph lines against sabotage.<sup>99</sup> The other kind of provost marshal had civilian governance duties.<sup>100</sup> They were appointed by military officials to govern communities during the war.<sup>101</sup> In politically charged cities, like St. Louis or Baltimore, they made lots of arrests, but also regulated daily life by issuing travel passes, restricting mail, supervising prisoners, administering loyalty oaths, and authorizing commerce and trade.<sup>102</sup>

One critical time for the development of this security apparatus was late summer of 1862. Secretary Stanton appointed an internal security commissioner, Simon Draper to coordinate efforts to prevent desertion and encourage recruitment by engaging the Union’s state governors, local police, and state officials.<sup>103</sup> Stanton then empowered all U.S. marshals and police superintendents to imprison persons who may have, by speech or writing, discouraged enlistment or acted disloyally in any other way.<sup>104</sup> On top of all this, the military had control of large parts of the country via martial law.<sup>105</sup> With all these overlapping jurisdictions, persons even a little bit critical of the Lincoln administration had plenty to fear.<sup>106</sup>

The Blair volume details the deployment of this provost marshal system and Democratic complaints about abuses of this system and of an overbearing military that interfered with civilian liberties.<sup>107</sup> The complaints grew in volume during the election of 1864. Blair’s book also describes real reasons the government had to fear sabotage: Confederates sent agents to Canada who worked with Copperheads around the northwestern states to plot seizures of warships in the Great Lakes, rigging the gold market, burning boats on the Mississippi and hotels in New York City, raiding banks in St. Albans, Vermont, and seizing northern POW camps in an attempt to release Confederate prisoners who could join with the Sons of Liberty and affiliated Copperhead groups to start an insurrection in the North.<sup>108</sup> In the end, Blair does not take a stand on whether the Union’s running roughshod over civil liberties was justified in this situation or not. Still, the book makes for a fascinating read.

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97. *Id.*

98. *Id.* at 103.

99. BLAIR, *supra* note 4, at 104.

100. *Id.* at 105.

101. *Id.*

102. *Id.*

103. *Id.* at 108.

104. BLAIR, *supra* note 4, at 108.

105. *Id.* at 112.

106. *Id.* at 108-127.

107. *Id.* at 108-127.

108. *Id.* at 211-212.

Kurt Lash's book, *The Fourteenth Amendment and the Privileges and Immunities of American Citizenship* is essential reading for anyone who has ever wondered, "What was he thinking?" upon reading Justice Samuel F. Miller's opinion for the *Slaughter-House Cases*<sup>109</sup> or the mutually contradictory speeches of John Bingham (author of much of the Fourteenth Amendment) from the *Congressional Globe*,<sup>110</sup> or statements from various members of Congress in the *Congressional Globe* expressing mutually opposing views on the meaning of the Privileges or Immunities Clause.<sup>111</sup>

Many (including Edwards as to the first) believe that the clause, "No State shall make any law which shall abridge the privileges or immunities of citizens of the United States," (properly understood) referred to two bodies of rights: The first set is those protected by the 1866 Civil Rights Act (adopted into law over Andrew Johnson's veto on April 19, 1866), in turn derived from the circuit court opinion of Supreme Court Justice Bushrod Washington in *Corfield v. Coryell*.<sup>112</sup> This list of rights, specified as equal for white and black citizens in 1866, included the right to "make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property," and to equality under the law and due process of law.<sup>113</sup> The second body of rights is the group of the Bill of Rights protections listed in the First through Eighth Amendments, which had theretofore applied only to the federal government, as now restrictions on the state governments.

The U.S. Supreme Court, as constitutional law scholars will realize, agreed with neither of these positions. Rather, the Supreme Court turned the Privileges or Immunities Clause into a near nullity, first in the *Slaughter-House Cases* of 1873 (a mere five years after the Amendment became law) and more emphatically in *U.S. v. Cruikshank*.<sup>114</sup> In the Supreme Court's rendering, the clause secured against state abridgment only those protections that resulted from the citizen's relation to the federal government, such as the right to travel freely from one state to another (because of the federal power over commerce among the states), the Article 4, section 2 right to be free from discrimination on basic citizen rights based on out-of-state status when temporarily within one's non-home state, the right to take a federal case to federal court, and so forth. These rights were already secure from state abridgment under the Supremacy Clause; but, the last one listed reminds us why the Privileges or Immunities Clause was not (in the Court's reading) a total nullity. After all, the right to take a federal case to federal court is the right that had been denied to the purportedly free black, Dred Scott.<sup>115</sup> All blacks in 1866 were now free and the first sentence of the Fourteenth Amendment repeated the Civil Rights Act's grant to them of national

109. KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP* 252-265 (2014); *Slaughter-House*, 83 U.S. 36.

110. BLAIR, *supra* note 4, at 81-96.

111. *Id.* at 20-47; CONG. GLOBE, 39th Cong., 1st Sess. (1866).

112. U.S. CONST. amend. XIV, § 1; LAURA F. EDWARDS, *A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION* 105-106 (2015); *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

113. CIVIL RIGHTS ACT, CH. 31, 14 STAT. 27 (1866).

114. *Slaughter-House*, 83 U.S. 36; *U.S. v. Cruikshank*, 92 U.S. 542 (1875).

115. *See* *Scott v. Sandford*, 60 U.S. 393 (1857).

citizenship and added “citizenship in the state in which they reside.”<sup>116</sup> This Citizenship Clause, buttressed by the Supremacy Clause, would have already forbidden states to abridge these privileges of national citizenship. Stating this prohibition plainly, as a matter of emphasis, is how the Supreme Court of the 1870s seems to have read the Privileges or Immunities Clause. Although many have excoriated this minimizing interpretation of the clause, Lash’s book argues that the 1873 reading is more right than wrong.<sup>117</sup>

Kurt Lash persuasively makes the case in this book that “Justice Miller was absolutely right” in the *Slaughterhouse Cases* in (1) distinguishing state citizen rights from federal citizen rights and (2) insisting that the Privileges or Immunities Clause of the Fourteenth Amendment added only the latter to restrict state governments.<sup>118</sup> Where Justice Miller went wrong, according to Lash, was in voting with the Court in *U.S. v. Cruikshank*, an 1876 decision where the Court threw out convictions of murderers of many blacks in the Colfax Massacre in New Orleans of 1873.<sup>119</sup> The Court there faulted the indictments in a number of respects.<sup>120</sup> In the process, the Court plainly stated that private individuals could not violate Section One of the Fourteenth Amendment, which addressed state action, and perhaps state failure to act.<sup>121</sup> By contrast, the *Cruikshank* majority of eight would allow (more properly drawn) indictments of private individuals for interfering with Fifteenth Amendment voting rights (despite the fact that the Fifteenth Amendment speaks of denial or abridgment of the right to vote “by the United States or by any State”).<sup>122</sup>

The reasoning of *Cruikshank* that is of interest to Lash is the Court’s plain statement that the First and Second Amendment rights (which Cruikshank was accused of violating) are rights that *do not* directly restrict state government; instead, they restrict directly only the federal government. Justice Miller, in *Slaughter-House*, said the First Amendment right of peaceable assembly is a right of national citizenship that restricts the states, but in *Cruikshank* he sided with the opinion that explained (and limited) this earlier point: The national citizenship right is a right to assemble in order to petition Congress or other aspect of the federal government.<sup>123</sup> This federal government-related right may not be abridged by Congress or by the states (Supremacy Clause and Privileges or Immunities Clause). But, the national right is not a right to assemble for purpose of influencing state government or the state-level political process. Such rights are left to state constitutions for protection.

This legal arrangement had been plain since Justice John Marshall’s *Barron v. Baltimore* decision in 1833.<sup>124</sup> But, this is precisely the rule that Representative John

116. U.S. CONST. amend. XIV, § 1.

117. LASH, *supra* note 109, at 65.

118. *Id.* at 258.

119. *Id.* at 264; *Cruikshank*, 92 U.S. 542.

120. *Cruikshank*, 92 U.S. 542.

121. *Id.*

122. *Id.*; see U.S. CONST. amend. XV, § 1.

123. *Slaughter-House*, 83 U.S. 36; *Cruikshank*, 92 U.S. at 542.

124. *Barron v. Baltimore*, 32 U.S. 243 (1833).

Brigham and Senator Jacob Howard believed they were overturning with the adoption of the Privileges or Immunities Clause. It is the central argument of Lash's book—one convincingly made—that Representative Bingham's primary goal was to have the restrictions of the Bill of Rights contained in the First through Eighth Amendments apply as Congressionally enforceable restrictions on state governments, along with any other protections of individual rights specified explicitly or implicitly elsewhere in the Constitution.<sup>125</sup> Representative Bingham was emphatically *not* trying to nationalize the rights enshrined in the Civil Rights Act of 1866, which he twice voted against, nor to nationalize the rights listed in *Corfield v. Coryell*.<sup>126</sup> The latter list frightened him because of its open-ended quality and because it mentioned suffrage, albeit in guarded phrasing. Representative Bingham did not oppose equal protection of blacks' basic civil rights; rather, he favored equal protection for all persons, not just citizens, in these rights concerning property, contract, and their protection, and he said so in the Fourteenth Amendment's Equal Protection Clause.<sup>127</sup>

Lash's basic argument is that Senator Jacob Howard and Representative John Bingham meant for the Privileges or Immunities Clause to apply the Bill of Rights to state governments, and *not* to apply some unenumerated set of basic rights of the "citizens in the several states" to all the states equally.<sup>128</sup> Lash also believes this was the "Original Meaning" of the clause.<sup>129</sup> He defines this term of art as "the likely original understanding of the text at the time of its adoption by competent speakers of the English language who were aware of the context in which the text was communicated for ratification."<sup>130</sup> Lash further makes a strong case that attentive members of the House and Senate would have known what the Privileges or Immunities Clause meant. Outside of Congress, readers of Senator Howard's speech introducing the Amendment would have or should have grasped the point (although Senator Howard is a little murky on the role of the Comity Clause). *This speech was published in newspapers all over the land.* Beyond that, however, it is not clear to me that others amongst the adult public understood this Original Meaning. Lash is an honest enough scholar that he shows us many grounds for later misunderstanding; for instance, the early campaigners for Congressional office in 1866—if they were members of the Republican Party—mostly said, "We're for equal rights, and that's what this amendment does. It does not give the vote, but makes blacks equal before the law." Democratic Party campaigners accused the Fourteenth Amendment of moving toward the unpopular slippery slope that would give blacks the right to vote. By September 1866, race riots against peaceful meetings of blacks precipitated claims that the Fourteenth Amendment would protect First Amendment rights and Second Amendment (self-defense) rights, but the public message was hardly crystal clear during the entire ratification period. Then, in January 1871, the Judiciary Committee in Congress, in ex-

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125. LASH, *supra* note 109, at 158.

126. *Corfield*, 6 F. Cas. 546.

127. U.S. CONST. amend. XIV, § 1.

128. LASH, *supra* note 109, at 158.

129. *Id.* at 277.

130. *Id.* at xiv.



aming the Victoria Woodhull petition that asserted a right to vote under the Privileges or Immunities Clause, reported on the meaning of the Amendment in such a garbled way that no one could make sense of that explanation, not even Lash. Thus, within three years of the Amendment's ratification, even members of Congress appeared to have been confused about its meaning. Representative Bingham explained the meaning of the clause in 1870 and 1871, in terms more clear and cogent than many of his earlier statements, but these were apparently not clear enough to convince the Supreme Court *only five years later* in *Cruikshank*, when the Court flatly denied the meaning attributed to the Privileges or Immunities Clause by its primary author, Representative Bingham.<sup>131</sup>

In sum, Lash does an excellent job defending the claim that the drafters of the Fourteenth Amendment, and those members of Congress who voted to send it on to the states for ratification, during the debates and ratification period of the 1860s, would have known and, in fact intended, the Privileges or Immunities Clause to mean Bill of Rights protections and other rights of citizens named in the Constitution would now apply to state governments. Lash also does a terrific job tracing the twists and turns in Representative Bingham's views and the reasons for them and, also, making lucid what sometimes seems to be an opaque and bewildering set of arguments by others in the *Congressional Globe*.

Still, Lash shows in the rhetoric of the day a range of statements by public figures that could well have caused confusion among members of the general public about the sense of the clause.<sup>132</sup> I would have liked to read more from Lash about why the Supreme Court Justices, or at least eight of them (the lone dissent from Clifford not addressing the issue), lost sight of this Original Meaning or deliberately turned their backs on it.<sup>133</sup> For Lash to just stop short, right after the Court within eight years abandons the Original Meaning of an important constitutional clause, does make one wonder what may be missing from this account of Original Meaning. That said, Lash's book is nonetheless essential reading for anyone interested in the Fourteenth Amendment in particular, or in Original Meaning of the Constitution as a whole.<sup>134</sup>

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131. *Cruikshank*, 92 U.S. 542.

132. See LASH, *supra* note 109.

133. See *Cruikshank*, 92 U.S. at 559 (Clifford, J. dissenting).

134. LASH, *supra* note 109, at 158.