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Writing the Social History of Legal Doctrine

CYNTHIA NICOLETTI†

Doctrine, it seems, is a dirty word these days in legal history circles. A recent exchange between Risa Goluboff and Kenneth Mack in the *Harvard Law Review* on the topic of his new book focused, at least in part, on the centrality of doctrine to the enterprise of legal history.¹ Mack suggested that decentering “appellate legal doctrine” distinguishes the “new” civil rights history from the “old” traditional approach that seeks to explore how lawyers (and regular people) interacted with “formal law.” Writing about the nuts and bolts of legal doctrine—and seeking to explain its development—is no longer at the center of legal history scholarship, having been displaced by monographs that highlight how people experienced law. A more than passing concern with doctrine might well serve to mark someone as old-fashioned these days, and there is a poignant but delicious irony in reflecting on the idea that historians, above all else, do not want to be behind the curve.

In fairness, the disagreement between Mack and Goluboff is not primarily about the role of legal doctrine in legal history. Instead, the somewhat related issue of the degree to which law silently creates individual identity seems to be at the heart of the dispute, as Mack objects to the idea of lawyers as necessary mediators between the two realms of “law” and “social reality.”² Increasingly, legal historians have veered away from treating legal doctrine as a variable wholly distinct from society. Robert Gordon described the task of the legal historian in the 1970s as investigating the relationship

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1. Risa Goluboff, *Lawyers, Law, and the New Civil Rights History*, 126 HARV. L. REV. 2312 (2013) (reviewing KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER (2012)); Kenneth W. Mack, *Civil Rights History: The Old and the New*, 126 HARV. L. REV. FORUM 258 (2013); see also Susan Carle, *Conceptions of Agency in Social Movement Scholarship: Mack on African American Civil Rights Lawyers*, 39 LAW & SOC. INQUIRY 522, 525-26 (2014).

2. Mack, *supra* note 1, at 259-60.

between the “sphere of ‘legal’ phenomena” on the one hand and “‘society,’ the wide realm of the non-legal” on the other, with non-legal inputs and outputs passing through the realm of the legal.³ But new works of history are less interested in cordoning off the realm of the explicitly “legal.” Law and society are not necessarily distinct anymore in a meaningful way, or at least legal historians perceive the two realms as mutually constitutive of one another, such that it no longer makes sense to draw a sharp demarcation between the two.⁴ The boundary between the legal and the non-legal is porous and difficult to pinpoint with a great deal of precision.

But Mack’s easy dismissal of doctrine is jarring nonetheless. However difficult it might be to demarcate the boundaries of law, given that historians write about (and think about) law in increasingly expansive ways, legal doctrine has not disappeared from contemporary legal history. Historians are just using doctrine in different ways than we have in the past and we ask different questions about it. We do not assume that doctrine is important for its own sake, and we embed legal doctrine in its larger social context, but reconstructing the meaning of the legal doctrine of a past age has not fallen by the wayside. We seek to understand how Americans of an earlier generation conceived of the relationship between law and doctrine.⁵ We

3. Robert W. Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 *LAW & SOCIETY REV.* 9, 9-10 (1975).

4. See generally Jessica Lowe, *Radicalism’s Legacy: American Legal History Since 1998*, *ZEITSCHRIFT FÜR NEUERE RECHTSGESCHICHTE* (forthcoming) (Va. Pub. Law & Legal Theory Research Paper No. 24, Nov. 7, 2014), <http://ssrn.com/abstract=2520545>.

5. For instance, Laura Edwards’ recent study of the early nineteenth-century South, *The People and Their Peace*, discusses the system of informal local law that existed alongside the rights-based system of state law. Edwards argues that local law focused on keeping the peace and allowed judges to grant relief to a wider array of people than the formal apparatus of state law, which hardened rough justice into doctrinal categories and spoke in the language of formal rights, would permit. LAURA F. EDWARDS, *THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH* 4 (Univ. of N.C. Press 2009). Edwards’ book is not really about the *content* of any particular legal doctrine, but it is animated by the question of how nineteenth-century southerners conceived of doctrine and its relation to law and justice. See generally *id.*

might term this phenomenon the study of the social history of doctrine, by which I mean that we explore the ways in which historical actors (both lawyers and non-lawyers) understood the constraints and possibilities of doctrine.

Doctrine is always in the background of my own work. Groping toward a working knowledge of the doctrine that my historical actors understood is always an important (and difficult) part of the research. It's often a process of reverse engineering, which requires me to intuit a rule that would explain an initially dizzying array of legal distinctions. It also requires intensive study of old treatises, pamphlets, and articles to try to recover the baseline rules of a particular legal doctrine, which in turn allows me to understand departures from (or misunderstandings of) that baseline. In the past, Americans parsed categories and saw legal distinctions in different ways than we do, and understanding their distinctions is a way of understanding their world. Without taking this step, it is all too easy to write vaguely about law without truly understanding its content.

Paying attention to legal doctrine allows us to do more than recapture the delicate strands of arcane legal distinctions. Even more importantly, it enables us to reconstruct the ways in which the historical actors thought about law and its relationship to legal doctrine. The task of a legal historian, as I see it, is to try to understand how legal doctrine informed historical actors' conceptions of what "law" was and how they understood legal doctrine to interact with the world around them. If our historical subjects conceived of legal doctrine as an important part of the fabric of law (as multi-textured as that might be), taking doctrine seriously allows us to reconstruct their thoughts more faithfully.

Dismissing doctrine is the conceit of a generation of legal scholars steeped in legal realism.⁶ Today's historians were trained in an era in which legal doctrine didn't hold much sway in the academy because "everybody agrees, whether they say it or not, . . . that it's all rhetoric all the way down."⁷ But our thinking about the inherent malleability of legal

6. See Shyamkrishna Balganesh, *Foreword: The Constraint of Legal Doctrine*, 163 U. PA. L. REV. 1843 (2015).

7. Barbara Young Welke & Hendrik Hartog, "Glimmers of Life": A Conversation with Hendrik Hartog, 27 LAW & HIST. REV. 629, 641 (2009).

doctrine does not necessarily reflect that of our historical subjects. The popular understanding of law, even in today's post-realist world, is dependent on doctrine. Although many legal academics believe that doctrine is essentially meaningless and manipulable, most of us teach it to our students, and we certainly think that law commands social power because the majority of Americans think that legal rules have meaning. We have to be cognizant of what our historical subjects thought that "law" was. If we ignore lawyers' and laypeople's attachment to doctrine and *their* understanding of law's complicated relationship with doctrine, we do so at our peril, because we risk mistaking our conception of law for theirs.

I. LEGAL DOCTRINE IN THE CIVIL WAR ERA

My own specialized field, Civil War-era legal history, has unfortunately lacked "doctrine" for a long time.⁸ Legal historians who write about this era have tended to treat law as having almost no autonomy in this volatile period. In fact, it's something of a bold claim to maintain that doctrine is a very important factor in explaining the legal upheaval that occurred in the midst and the aftermath of the American Civil War. Given that the Civil War and Reconstruction were such volatile (and perhaps grossly anomalous)⁹ periods in American history, it would be hard to say that the internal logic of legal doctrine drove the massive legal changes of the 1860s. Indeed, my interest in the Civil War stems from the fact that events outpaced the regularized processes of the law, which led American lawyers and legal theorists to contemplate (in their contemplative moments) their attachment to the rule of law in the midst of a crisis. If there were ever an example one could point to about the relative

8. In truth, the field has largely been outside of the realm of mainstream legal history for some time. Much of the work in the field has been written by constitutional historians rather than legal historians. See Harold Hyman, *The Misery of Historians*, 69 LAW LIBR. J. 329 *passim* (1976).

9. See 1 MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at vii, 193, 198-206 (1992); G. EDWARD WHITE, *LAW IN AMERICAN HISTORY, VOLUME 1: FROM THE COLONIAL YEARS THROUGH THE CIVIL WAR 477-78* (2012).

unimportance of legal doctrine in explaining legal change, the Civil War would be that example.

Early historical studies of the Civil War and Reconstruction focused on the Constitution and criticized President Abraham Lincoln for his inattention to the letter of the law.¹⁰ James G. Randall, author of the magisterial *Constitutional Problems Under Lincoln*, wrote eloquently about Lincoln's statesmanship. Randall emphasized Lincoln's "respect for law," but allowed that "[i]n applying the Constitution to changing conditions, Lincoln favored a policy of reasonable adaptation. To this end he opposed a stultifying interpretation that would cause the nation to be hung up on excessive verbalisms or dialectic."¹¹ More recent studies have also focused on Lincoln, but have concluded that he acted (potentially unconstitutionally) in order to save the Union and end slavery, which surely justified his actions. In John Witt's recent account, Lincoln and his right-hand man, Secretary of State William Seward, viewed legal doctrine as essentially manipulable by savvy actors such as themselves.¹² Lincoln and Seward, by most accounts, were not very interested in legal doctrine. It certainly didn't constrain them; it was a mere annoyance to be brushed aside for the greater good. Their adherence to doctrine was tempered by an appreciation of the necessity of saving the Union.¹³

Some of the lack of serious attention to doctrine stems from (dare I say it) an overemphasis on Abraham Lincoln in the legal literature on the Civil War. A good deal of our thinking on this topic reflects our understanding of Lincoln's view of the law. Lincoln famously queried Congress after unilaterally suspending the writ of habeas corpus in order to ensure the safe passage of Union troops through Maryland: "[A]re all the laws, but one, to go unexecuted, and the

10. See W.A. DUNNING, *The Constitution of the United States in Civil War* ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION 1, 14-23 (1904).

11. JAMES G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* xx, xxi-ii (Univ. of Ill. Press rev. ed. 1964).

12. See JOHN FABIAN WITT, *LINCOLN'S CODE* 146-49 (2012).

13. See *id.*

government itself go to pieces, lest that one be violated?”¹⁴ In part, we believe Lincoln to be a great man because he ignored or transgressed the limits of legal doctrine as he understood them in order to save the Union and end slavery. Indeed, a certain amount of respectful deference to the Great Emancipator seems to be obligatory these days among those who worry about executive power during wartime in the modern context. It’s fine and probably expected to criticize George W. Bush for presidential excesses during the War on Terror, but ideally, one has to be able to do that in a way that doesn’t collaterally condemn Lincoln.¹⁵ But Lincoln’s soaring statements about the pettiness of rigidly adhering to legal doctrine in the midst of the Civil War cannot substitute for a more thoroughgoing analysis of Americans’ conceptions of law at the time.

Indeed, it is a mistake to dismiss the idea of the law’s autonomy during the Civil War out of hand. Legal doctrine mattered immensely to lawyers and legal thinkers of the nineteenth century. It was central to their understanding of what law was, even if it did not encompass all of what law was. Some people thought doctrine mattered less than others, but all lawyers worried about it. As Hendrik Hartog argued in his seminal article *Pigs and Positivism*, detailing the interactions between nineteenth-century New York City pig-keepers and the lawmakers who sought to curtail the practice of keeping swine in a growing metropolis, law is “an arena of conflict within which alternative social visions contended, bargained, and survived.”¹⁶ We can think about law in the nineteenth century as a dialectic between different

14. 4 ABRAHAM LINCOLN, *Message to Congress in Special Session, July 4, 1861*, in THE COLLECTED WORKS OF ABRAHAM LINCOLN 420, 430 (Roy P. Basler et al. eds., 1953).

15. Indeed, pointing to Lincoln’s example is often a very powerful argument on the part of those who defend a strong executive. A 2010 exchange between Jon Stewart and Professor John Yoo on the Daily Show provides a good example of just such a dynamic. See *The Daily Show with Jon Stewart* (Comedy Central television broadcast Jan. 11, 2010), <http://thedailyshow.cc.com/videos/csnw1c/john-yoo-pt--1> & <http://thedailyshow.cc.com/videos/7coohr/john-yoo-pt--2>; see also SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING* 1-2 (2015); WILLIAM H. RENQUIST, *ALL THE LAWS BUT ONE* (Vintage Books 2000); JOHN YOO, *CRISIS AND COMMAND* 199-201 (2009).

16. Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899, 934-35.

legal actors with competing (and sometimes ambivalent) views about the content of legal doctrine and its ability to constrain human behavior. These views did not magically dissipate during the war. In the 1860s, this conversation was sharpened by the edge of civil war, thus raising the stakes of demarcating the boundaries of what could be considered law.

While legal thinkers of the 1860s held widely varying opinions about the importance of adhering faithfully to legal doctrine in the midst of civil war, the power of doctrine was universally acknowledged. At one end of the spectrum was William Whiting, the Solicitor of the War Department (a position that only existed during the Civil War). In that capacity, Whiting wrote a treatise laying out a theory of essentially boundless federal power in time of war.¹⁷ Whiting was no shrinking violet when it came to turning established legal doctrine on its head, as his treatise demonstrates.

As War Department Solicitor, one of Whiting's duties was to deal with claims filed against the government for loss of property that the U.S. Army had taken, borrowed, or destroyed during the war. Eventually, Congress established a Court of Claims and the Southern Claims Commission to deal with such matters.¹⁸ But in the midst of the war, Whiting busily corresponded with numerous potential claimants who demanded compensation for their twenty-seven bushels of corn, lost cows, or private homes commandeered for the use of the Union army.¹⁹ This undertaking required Whiting to straddle two bodies of law: the domestic law of treason, which permitted the seizure of property belonging to rebels who had been convicted of levying war against the United States, and

17. See WILLIAM WHITING, *WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES* (10th ed. 1864).

18. See DYLAN C. PENNINGROTH, *THE CLAIMS OF KINFOLK* 112-14 (2003) (discussing the Southern Claims Commission); RANDALL, *supra* note 11, at 335-41. See generally William M. Wiecek, *The Origin of the United States Court of Claims*, 20 ADMIN. L. REV. 387 (1968). By statutory design, the court of claims could hear cases asking for compensation for government wrongs, but Congress would still have to appropriate money for any claims to be paid. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612.

19. Records of the Adjutant General's Office, Group 94, Records of the War Records Office of the War Department 1853-1903 (on file with the National Archives, Washington, D.C.).

the international law of belligerency, which gave a nation at war the right to seize certain enemy property.

The doctrine here was murky. Congress passed two Confiscation Acts in 1861 and 1862, premised on the law of treason,²⁰ and two Captured and Abandoned Property Acts in 1863 and 1864, which were grounded in the law of nations.²¹ In *The Prize Cases* (1863),²² the Supreme Court sanctioned the Union's use of international law against the Confederacy. This was permissible without conceding the Confederacy's separate existence as a foreign nation and the loss of sovereign rights over Confederate territory. But legal problems remained with the Union's confiscation policy. Whether international or domestic law governed, it seemed that neither body of law sanctioned this type of property seizure. The seizures of property in Confederate territory were undertaken without trials to determine guilt for treason as required under U.S. domestic law, and private property held by enemy civilians was generally immune from seizure under the law of nations unless it had been used directly for the war effort or trafficked for the use of the state.²³ Edward Jordan, Whiting's counterpart at the Treasury Department, told Secretary of the Treasury Salmon P. Chase, that he "apprehend[ed] that [under the law of nations], in order to justify . . . the seizure and condemnation of goods, it would seem to be necessary to show that the traffic was carried on behalf or account of the enemy [nation]."²⁴

While Jordan worried about the legal grounds and statutory authority for property confiscation, Whiting projected total confidence. Whiting rejected the cautious views put forth by "judges, by statesmen, and by well-informed citizens" who "almost universally questioned or

20. Confiscation Act of 1861, ch. 60, 12 stat. 319; Confiscation Act of 1862, ch. 195, 12 stat. 598.

21. Captured and Abandoned Property Act, ch. 120, 12 Stat. 820 (1863); Ch. 225, 13 Stat. 375 (1864).

22. 67 U.S. (2 Black) 635 (1863).

23. See FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES 12 (New York: D. Van Nostrand 1863); Letter from Edward Jordan to Salmon P. Chase (May 20, 1861).

24. Letter from Edward Jordan to Salmon P. Chase, *supra* note 23.

denied” the ability of the government to seize rebels’ property without individually determining their guilt for treason or proving that the property had been used to further the Confederate war effort.²⁵ In his treatise, he “vindicate[d] the right of our government . . . to capture and confiscate the property of all residents in rebel districts.”²⁶ In Whiting’s view, this seizure could be accomplished without any individual compensation for anyone living in Confederate territory, whether loyal to the Union or not. This was because Whiting scorned the distinctions between international and domestic law—and the limits inherent in each—that concerned Jordan.²⁷ Civil War, for Whiting, “destroys all claims of subjects engaged in [rebellion], as against the parent government, it does not release the subject from his duties to that government. By war, the subject loses his rights, but does not escape his obligations.”²⁸ During the war, according to Whiting, the government possessed an all-powerful hybrid of constitutional and international power that was subject to the constraints implicit in neither form of authority.

But Whiting was indeed more circumspect than his bold theory would indicate. In his wartime correspondence with potential claimants, his main goal was to discourage litigation rather than to meet a legal challenge head-on. Other than foreign claimants (such as Frenchmen living in Louisiana),²⁹ Whiting invariably told his correspondents that

25. WILLIAM WHITING, *WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES* 453 (Bos.: Lee & Shepard 1871).

26. *Id.*

27. In fact, Whiting maintained that acts that explicitly invoked Congress’s domestic powers, such as the Confiscation Acts (treason power) and the Law to Provide for the Collection of Duties (commerce power) were really premised on the law of nations. Confiscation Act of 1862, ch. 195, 12 Stat. 598; Confiscation Act of 1861, ch. 60, 12 Stat. 319; Law to Provide for the Collection of Duties, ch. 3, 12 Stat. 255 (1861).

28. WILLIAM WHITING, *WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES* 246-47 (Bos.: Little Brown, 1864). The book went through multiple editions with slightly different titles both during and after the war.

29. These were the only claims Whiting found to be compensable. *See generally* WILLIAM WHITING, *War Claims Against the United States*, in *WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES* 331-57 (Bos.: Lee & Shepherd 1871).

whatever the legal merits of their claims, Congress had failed to appropriate any money to reimburse them. Thus, it was useless to file suit. As he explained to Illinois Representative Elihu Washburne, he had “uniformly refused to acknowledge [the] legal validity [of any petitions], whether the claimant is loyal or otherwise.” Whiting fully believed that the government owed no compensation to any American living in Confederate territory, but he was well aware that a court might reject his views, adhere to the established doctrine, and decide otherwise. Because of this, “we ought not to allow any court or tribunal to pass upon this class of claims . . . while the war is going on.” To allow these claims to go to court was to risk losing the war, Whiting emphasized: he “look[ed] upon the army of claimants as really quite as formidable to the government as the army of rebels.”³⁰

Now, Whiting certainly did not adhere faithfully to doctrine—he was clearly someone who was willing to shape the rules to fit the situation. Yet he worried about it. He feared that clever attorneys employed by the claimants could press the courts to do things that would be detrimental—even fatal—to the Union cause. Whiting feared that courts³¹ might accept the claimants’ legal arguments and that judges might be constrained by doctrine to find in their favor. Whiting recognized the persuasive power of doctrine among his contemporaries. In fact, he was employed by the Lincoln administration to *construct* legal doctrine (in the form of a hefty treatise) that provided legal support for the government’s actions, although the legal principles contained in the treatise strayed quite far from preexisting doctrine. Indeed, Harvard law professor Joel Parker bitingly charged that Whiting had “gone to his reward’ in a solicitorship in the War Office” because he was willing to endorse “revolution . . . disguise[d] . . . under the pretense of

30. Letter from William Whiting, Solicitor of the Dep’t of War, to Elihu Washburne, U.S. Representative from Ill. (on file with the National Archives, Washington, D.C.).

31. Or potentially Congress, in the form of private bills. See generally James Pfander & Jonathan Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862 (2010).

constitutional authority.”³² The “disguise” of doctrine was important, as Whiting recognized the necessity of speaking to the American public in that register.

Whiting’s views on the manipulability of law and doctrine were not universal. Some American lawyers were confident that the neutral application of doctrine would triumph over the disturbances of war. In prosecuting Confederate president Jefferson Davis for treason in the aftermath of the Civil War, the Andrew Johnson administration quickly ran into an intractable problem. North and South alike presumed that Davis’s case would test the constitutionality of the Confederate states’ secession from the Union in 1860–61, on the theory that secession had removed Davis’s United States citizenship and duty of loyalty to the United States and thus rendered him incapable of committing treason. But Johnson and his cabinet could not be sure that a jury would convict Davis, and it even seemed possible that the Supreme Court could affirm a determination of secession’s constitutionality.³³

Several of Davis’s supporters claimed that a court—even the Supreme Court—would be forced to acquit him because the law was on his side, despite the fact that such an outcome would contradict the results of the war. The *Old Guard*, a New York magazine with a decidedly pro-Confederate sensibility, proclaimed that it was impossible for Davis’s trial to yield to the force of arms. Union victory could not constrain a court of law; indeed, the “law” would triumph over the results of the battlefield and redeem the Confederate cause. “Watch, and work, and the redemption [of just law] will come at last,” the paper declared: “[The] great, . . . sure remedy,” one article intoned, “is law. Law and justice are not always very swift, but with a brave and virtuous people, they are sure to break the power of the sword, and to whip the licentious force of arms at last.”³⁴ The *Charleston Tri-Weekly*

32. JOEL PARKER, *THE WAR POWERS OF CONGRESS, AND OF THE PRESIDENT* 8, 10 (Cambridge: H. O. Houghton, 1863).

33. For more, see CYNTHIA NICOLETTI, *THE FRAGILITY OF UNION: SECESSION IN THE AFTERMATH OF THE AMERICAN CIVIL WAR, 1865-1869* (forthcoming) (on file with author).

34. *State Sovereignty Not Dead*, 4 *OLD GUARD*, May 1866, at 263.

Courier expressed hope that the Supreme Court, bound to apply the law, would declare Davis not guilty and find against the verdict of the war. “[I]t might well be that an appeal to the fundamental law and to the true history of the Union would result in the reversal of the decision of arms by the Supreme Court,” the paper predicted. “The judgment of war might not be that of the tribunal of justice.”³⁵ Former Confederate diplomat James Mason (grandson of founder George Mason) judged the logic of the law to be so powerful that Chief Justice Salmon P. Chase, who was to preside over Davis’s trial, could not escape it. Whatever Chase’s own antislavery and pro-Union predilections might be, “yet he stands at the head of the Judiciary, [and] is undoubtedly an able lawyer . . .” Because of his position and the heft of the law, “he cannot rule that to be law, which he knows, is *not* law.”³⁶

From a modern perspective, these statements tend to strike us as hopelessly naïve. How could these Confederate apologists imagine the Supreme Court rendering a decision that was so clearly antithetical to social reality because of the justices’ adherence to doctrine? Were they expecting judges to fail to take judicial notice of a massive war that shook Americans to their foundations? Were they merely deluded by their intensely passionate pro-Confederate predilections? There could be no other choice, skeptical and jaded twenty-first century Americans might think, than for the judiciary to ensure that the decisions of the courts reflected the judgment of the battlefield. And indeed, other Americans (including former Confederates) predicted just such an outcome, often with a measurable tinge of regret that the law’s neutrality could not triumph over an event so catastrophic as the Civil War. Nonetheless, these statements reflect a baseline premise of the importance of adherence to legal doctrine, even if that powerful commitment was compromised by the upheaval of the Civil War. Overwhelmingly, nineteenth-century American lawyers did

35. C. O’Conor et al., *Jefferson Davis—His Case and the Decision*, CHARLESTON TRI-WKLY. COURIER, Dec. 8, 1868.

36. Letter from James M. Mason to Jefferson Davis (Apr. 22, 1868), in 7 JEFFERSON DAVIS, CONSTITUTIONALIST 239 (Dunbar Rowland ed., 1923).

not view their society's deviation from the letter of the law from a perspective of detached cynicism,³⁷ and in the wake of the Civil War, American legal thinkers engaged in a national debate about whether the law or the war would prove ascendant.

This issue consumed two successive attorneys general, Edward Bates and James Speed, who served under Lincoln and Johnson. Bates and Speed worried about their capacity to restore the rule of law in the United States following the upheaval of the Civil War. To them, the war represented the diminishment of the rule of law and thus the breakdown of an ordered society. War and law were antithetical to one another.³⁸ As the chief law officer of the United States, Speed considered it his duty to restore the rule of law, which would mark the real conclusion of the war.³⁹ As he told legal academic Francis Lieber: "Our war is over, but the questions growing out of it have to be settled."⁴⁰ Indeed, calming the disturbances of war might prove to be the Union's most difficult task yet. Speed's brother, Joshua, lamented that Secretary of State William Seward "dreaded the settlement of questions resulting from the war more than he did the war itself."⁴¹

37. See Philip S. Paludan, *The American Civil War Considered as a Crisis in Law and Order*, 77 AM. HIST. REV. 1013, 1024 (1972).

38. This is not to suggest that the two are necessarily distinct. For a discussion of war as a part of law see *infra* at pp. 136-37. See generally MARY L. DUDZIAK, *WAR TIME* (2012) (arguing against a clear demarcation between war and peacetime).

39. Indeed, there was some doctrinal basis for defining law and war as antipodes. In *The Prize Cases*, the Supreme Court's ultimate test for the existence of civil war (a question of fact) was when and where "the Courts of Justice cannot be kept open." *The Prize Cases*, 67 U.S. (2 Black) 635, 667 (1863). In *Ex parte Milligan*, the Supreme Court found the operation of military tribunals in Indiana to be unconstitutional. *Ex parte Milligan*, 71 U.S. 2 (1866). This was because the tribunals operated under the "laws and usages of war," which could not, by definition, apply in places "where the courts are open and their process unobstructed." *Id.* at 121 (internal quotation marks omitted).

40. Letter from James Speed to Francis Lieber (May 26, 1866 & June 27, 1865) (on file with the Huntington Library, San Marino, Cal.).

41. Letter from Joshua Speed to James Speed (Sept. 15, 1865), in JAMES SPEED: A PERSONALITY 67 (Morton & Co. Press 1914).

In the summer of 1865, Speed issued an official opinion endorsing the decision to try Lincoln's assassins before a military commission rather than a regularly-constituted civil court.⁴² Former Attorney General Bates was aghast. In his diary, Bates declared that the opinion must have been "wheedled out of [Speed]," because holding military trials for civilians was undeniably unconstitutional. But Bates was more concerned about the larger statement made by Speed's willingness to sanction this irregularity. The attorney general's opinion placed exigency over established constitutional principles and "denie[d] the great, fundamental principle, that ours is a government of *Law*, and that the law is strong enough, to rule the people wisely and well," Bates wrote.⁴³ Unless Speed actively sought to curb the government's tendency to defy the Constitution in times of crisis, Bates feared that the Civil War might well permanently sever Americans' attachment to the rule of law.

Bates worried that Speed would similarly support Jefferson Davis's military trial, but Speed did not, although he later exhibited ambivalence about this decision. Speed maintained that Lincoln's assassins were charged with violating the law of war and were thus susceptible to military prosecutions, whereas Davis was to be tried for the civil crime of treason, which should rightfully be tried in a civil court. Speed cautioned that the government should not resort to unconstitutional practices in seeking to ensure a conviction that would underscore the results of the war. It would be terrible, Speed insisted, if the leaders of the Confederacy were not convicted of treason, "but I would deem it a more direful calamity still, if [we] . . . should violate the plain meaning of the Constitution, or infringe, in the least particular, the living spirit of that instrument" in bringing them to trial.⁴⁴ Yet Speed later came to regret his refusal to deviate from the Constitution in order to convict Davis. There was a hefty consequence that followed from his decision: Davis was never tried. In 1867, Speed reluctantly told

42. Military Comm'ns, 11 Op. Att'y Gen. 297, 317 (1865).

43. 4 EDWARD BATES, THE DIARY OF EDWARD BATES 1859-1866, at 483 (Howard K. Beale ed., 1933).

44. Jefferson Davis, 11 Op. Att'y Gen. 411, 413 (1866).

Congress that the blame lay at his door. “I was,” he stated, “on those grounds [of caution], the principal cause of the non-trial of Jefferson Davis.”⁴⁵ Speed wrestled internally with the difficult questions about restoring the rule of law that divided American society in the 1860s.

II. WAR AS POPULAR CONSTITUTIONALISM

Because nineteenth-century legal thinkers conceived of law and doctrine as essentially synonymous (at least in theory), the war presented a challenge to their belief in the rule of law. In the nineteenth century, adherence to the rule of law became part (and perhaps the most important component) of Americans’ conception of their character as a people. Terming this ascendancy “law’s revolution,” Christopher Tomlins argued that “law became *the* paradigmatic discourse explaining life in America, the principal source of ‘life’s facts.’” In the latter half of the eighteenth century, Tomlins tells us,

law moved from an essentially peripheral position as little more than one among a number of authoritative discourses through which the social relations of a locality were reproduced . . . to a position of supreme imaginative authority from which, by the end of the century, its sphere of institutional and normative influence appeared unbounded.⁴⁶

Law’s influence was so powerful that it penetrated spaces where there was seemingly no law, simply because of its powerful hold on Americans’ consciousness. John Phillip Reid has demonstrated that on the overland trail—“the place where there was no legal machinery and individuals told themselves ‘there is no law,’ . . . there was not only law, it was a law hardly distinguishable from the law emigrants thought they were leaving behind.” According to Reid, among nineteenth-century Americans, law was “instilled into the

45. H.R. REP. NO. 40-7, pt. 2, at 799 (1868).

46. CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 21 (1993). This development did not necessarily augur positive changes in the United States, according to Tomlins’ account.

marrow of social behavior”; they “adher[ed] to a morality of law.”⁴⁷

This “morality of law” necessarily entailed a healthy dose of respect for legal doctrine. Reid’s emigrants adhered not only to the idea of law in a place where there was effectively no sovereign command, they parsed fine legal distinctions even more closely than did easterners who were not removed from legal institutions. Doctrinal niceties mattered to them, perhaps in ways that were more pronounced than their eastern counterparts. In the absence of legal institutions, rigid adherence to legal doctrine mattered all the more because this was the only law they had available to them. Clearly, the travelers on the overland trail considered doctrine to be an integral part of, if not precisely synonymous with, their conception of law.

This conception of law carried over into the Civil War era. The war presented a serious challenge to Americans who thought of law, with all of its orderly doctrinal categories, established norms, and rational rules, as a well-spring of stability. This is not to say that our nineteenth-century counterparts could not comprehend that the convulsion of the war also produced profound legal and constitutional changes, but that this was, for them, a gross deviation from the norm. Someone like international law scholar Francis Lieber might have celebrated war’s transformative effect on human society, as it possessed “the spark of moral electricity,”⁴⁸ but few of his fellow countrymen shared his enthusiasm. The gap between the formal deliberative processes of legal and constitutional development and the war’s chaotic tendency to produce social change that required the law to catch up was profoundly disquieting for many American legal theorists.

Today, we might refer to this latter method of legal change by the laudatory term “popular constitutionalism.” Although academics seem enamored with the concept of legal change outside the formal legal process,⁴⁹ I’m skeptical that

47. JOHN P. REID, *LAW FOR THE ELEPHANT: PROPERTY AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL* 361 (1996).

48. WITT, *supra* note 12, at 177.

49. See LARRY KRAMER, *THE PEOPLE THEMSELVES* 221-22 (2004); see also 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 3 (1998) (providing a

this idea is really so celebrated outside of these circles, or that nineteenth-century Americans would have found it appealing. According to Larry Kramer, it is “uncontroversial” that “popular constitutionalism remained ascendant in the antebellum era.”⁵⁰ Daniel Hamilton applied Kramer’s insights specifically to the Civil War, arguing that the “Civil War was widely recognized, at the time and since . . . as a [particularly robust] moment of popular constitutionalism,” primarily because Lincoln recognized the necessity of communicating his constitutional theories to the public in order to buoy support for his policies.⁵¹

But if we look at discussion among nineteenth-century Americans about the type of law made during—and by—the Civil War, a darker conception of this method of constitutional change emerges. In the 1860s, many Americans understood the war itself as a method of popular constitutionalism, and it was one in which the people had been actively involved, having literally devoted their lives to vindicate the Union or Confederate view of the Constitution. Thus, war was perhaps the most direct form of democracy that could exist. But although “popular constitutionalism” was self-consciously understood as a method of legal change, it was a frightening one, because it unmoored Americans from their foundations. The irregularity of the Civil War and the Reconstruction process shook them. They conceived of legal doctrine as something real, and legal change outside of regular institutions didn’t look very much like law as they understood it.

This discomfort with the legal changes wrought by the war lingered even when those changes were later formalized through constitutional amendments.⁵² Nineteenth-century American lawyers thought of law—even constitutional law—

more explicit celebration of the idea of popular constitutionalism: “The People must retake control of their government. We must act decisively to bring the law in line with the promise of American life.”).

50. KRAMER, *supra* note 49, at 209.

51. Daniel W. Hamilton, *Popular Constitutionalism in the Civil War: A Trial Run*, 81 CHI.-KENT L. REV. 953, 955-56 (2006).

52. See ACKERMAN, *supra* note 49, at 15-23 (discussing formal constitutional changes set within the context of popular constitutionalism).

as rigid, in that it was designed to withstand the tumult of human events. As Michael Vorenberg demonstrated, this conception of constitutional law led some Americans of that era to insist on the very strange-sounding (to our ears) concept of the “unamendable constitution,” which posited that some core principles of the U.S. Constitution (such as slavery and the distribution of federal and state powers) were so fundamental that they could not be altered. Although the Civil War Amendments were able to command a supermajority in Congress,⁵³ the notion that the document was to remain unchanged resonated widely, according to Vorenberg. Not just the American system of constitutional government but the “very text” of the Constitution “had become sacred in American culture.”⁵⁴

New York attorney Charles O’Conor objected to the Fourteenth Amendment on the grounds that it “is a total departure from fundamentals and plainly not within the legitimate scope of the amending power.”⁵⁵ According to him, this deviation from first principles had only occurred because of the corrosive nature of civil war. Quoting Edward Gibbon, O’Conor wrote a friend: “there is a vital difference in the consequences of a foreign and a civil war. ‘The former is the external warmth of summer, always tolerable and sometimes beneficial; the latter is the deadly heat of fever which consumes without [a] remedy the vitals of the constitution.’”⁵⁶ O’Conor worried that the war had tested—and overwhelmed—Americans’ deeply-held commitment to the rule of law.

53. See MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 112 (Christopher Tomlins ed., 2001) (noting that the Senate exceeded the necessary two-thirds majority in passing the Thirteenth Amendment). Of course, the thirty-ninth and fortieth congresses had refused to seat members from the unreconstructed states of the Confederacy, and those states ratified the amendments under coercion from the national government.

54. *Id.* at 107.

55. Letter from Charles O’Conor to Robert McKinley Ormsby (Oct. 7, 1867) (on file with the National Archives, Washington, D.C.).

56. Letter from Charles O’Conor to Samuel Chester Reid, Jr. (Nov. 29, 1876) (quoting 6 EDWARD GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE* ch.63 (1776-78)) (on file with the National Archives, Washington, D.C.).

CONCLUSION

In looking at the legal history of the American Civil War, what is reflected from the sources is that American lawyers still cared about legal doctrine. They still believed that doctrine constrained them. Claims of exigency and necessity did not overwhelm all of the rules that had ordered life in the United States before the war. At the very least, if American lawyers abandoned doctrinal niceties, they worried mightily about the consequences of doing so. Thinking about the ways in which lawyers argued with one another over the content and meaning of legal doctrine during and after the Civil War reveals the ways in which they thought about law. Before the war began, many of them considered law and legal doctrine to be largely synonymous. The war served to alter this perspective for many, as law was forged in great haste and with great irregularity, in many cases overwhelming established doctrine and precedent. American legal thinkers struggled to reconcile this new reality with their baseline premises about what law was and how it functioned in American society.

Taking legal doctrine out of the legal history of the Civil War thus flattens our picture of what the legal terrain looked like. Writing its social history opens us up to seeing patterns of belief about law's content and its autonomy that differ markedly from our own. The study of doctrine is a powerful tool in writing legal history because it can reveal a great deal about lawyers' (and non-lawyers') legal consciousness. It can provide a window onto "how law . . . and identity . . . help construct one another."⁵⁷ An exploration of doctrine for its own sake may be excessively narrow, but so is legal history that shuns doctrine for the sake of being trendy.

The task of the historian is two-fold. We have to be able to remove ourselves from our subjects sufficiently to evaluate the past with some degree of clarity, but an additional degree of attention to their concerns wouldn't be misplaced. Writing history charges us with the responsibility of becoming ethnographers of the past. Legal academics have come of age in a world in which we were taught to be wary of the power and slipperiness of legal doctrine, but that skepticism was

57. Mack, *supra* note 1, at 260.

not necessarily shared by Americans of a different generation. Our understanding of what law is and what it means and the different forms it can take may lead us to project those understandings onto the past. We should strive to be both inside and outside the world we're charged with describing.