

Emancipation and Equal Rights

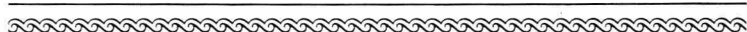
*Politics and Constitutionalism
in the Civil War Era*

By Herman Belz



Emancipation and Equal Rights

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Herman Belz



W • W • NORTON & COMPANY • New York • London

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Published simultaneously in Canada by George J. McLeod Limited,
Toronto. Printed in the United States of America.

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First Edition

Library of Congress Cataloging in Publication Data

Belz, Herman.

Emancipation and equal rights.

(The Norton essays in American history)

Bibliography: p.

Includes index.

1. Reconstruction. 2. Afro-Americans—

History—1863–1877. I. Title.

E668.B45 1978 973.8 78–16811

ISBN 0-393-05692-9

ISBN 0-393-09016-7 pbk.

1 2 3 4 5 6 7 8 9 0

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Herman Belz

*For Arthur Bestor,
scholar and constitutionalist*

Preface

THE INTENSE racial and social conflict that racked American society a decade ago caused a curious re-evaluation of slave emancipation and the constitutional decision for equal rights, which a century earlier had laid the foundation for modern advances in the sphere of civil rights. If it was necessary for black Americans to go so far as to engage in virtually revolutionary activity in order to achieve equality, many historians reasoned, then the release from bondage that occurred during the Civil War and the steps toward equality before the law taken during Reconstruction must have been regrettably, nay, tragically insubstantial. I am inclined to disagree with this judgment, not because I think that revolutionary or reformist action—a separate question in any case—was inappropriate in the circumstances that prevailed ten years ago, but because it presents an unhistorical view of past actions and events. By that I mean that it considers them principally in relation to present day concerns rather than in the context of their own time. Without denying the often very direct connection between past events and present tendencies in politics and society, I have tried in this book to present an accurate rendering of the events and ideas that in a political and constitutional sense marked the beginning of modern efforts to achieve racial integration on the basis of civil equality.

I acknowledge with pleasure and gratitude the valuable criticism and advice I have received in preparing this volume from George M. Dennison, trusted constitutional critic and friend, of Colorado State University, and from my colleagues Fred Nicklason, Ira Berlin, and George Callcott of the University of Maryland. The Graduate School of the University of Maryland,

and especially Dean David S. Sparks, assisted by providing a stipend to cover the cost of typing the manuscript. I owe a large debt of gratitude also to Professor Harold M. Hyman of Rice University for his cordial and steady encouragement, not only in the writing of this book but also in respect of other matters historical and professional.

HERMAN BELZ

Silver Spring, Maryland
March 1978

Introduction

THE SECTIONAL controversy that issued in the Civil War involved not only the morality of slavery but also and more fundamentally the nature of American political and social institutions. In comparative perspective American society was liberal and democratic from its very inception. Nevertheless it tolerated if it did not positively encourage an institution that, irrespective of the intentions of particular individuals, stood as a continual reproach to and contradiction of the democratic values that a growing portion of the American people regarded as the very basis of American nationality. The ability of slaves to carve out spheres of personal autonomy notwithstanding, slavery denied the right of four million black persons to the most elementary kind of self-determination. It literally denied the right of self-government that was the touchstone of the American polity. By 1861 moreover efforts to protect and promote slavery threatened the very integrity of the federal republic, eventually provoking northerners to fight in its defense. Once war began, the desire to preserve the Union merged with hostility toward slavery as the antithesis of republican institutions to produce the decision for emancipation. Amidst the profound social upheaval that the abolition of slavery caused, a combination of principled and expedient considerations led the Union Congress to pass a series of civil rights laws and constitutional amendments—the first in United States history—that insisted on national application of the principle of equality before the law in each state irrespective of race.

The principle of equal rights was a cardinal feature of the republican ideology that had sustained the American people in their revolutionary origins and guided them as they expanded

territorially and politically in the nineteenth century. In the crisis of national life that marked the 1860s the equal rights idea provided a standard of value and a guideline for political action as Americans entered upon the uncharted social and civil landscape created by emancipation. Again considering matters in comparative perspective, one notes that civil and legal equality had come relatively easily for white male Americans in the eighteenth and nineteenth centuries. In part this was because Americans used the ideals of republican self-government and equal citizenship to define their national identity, rather than language, religion, history, or tradition which formed the bases of European nationalism. Given the broadly democratic character of American society, the logic of this highly rational and ideological political culture was toward the inclusion of all persons as citizens. Although in some states Negroes might become state, and therefore national citizens, in general they were the exception that proved the tendency or rule of democratic inclusiveness, especially in the antebellum period of heightened racial restrictiveness.

After abolishing slavery, however, in a radical reversal of outlook and policy, Americans took steps to include blacks in this ideological and institutional system. From the Dred Scott decision, which on the eve of the war declared them neither citizen nor alien but rather a kind of subject national without any rights, Negroes became American citizens with constitutionally protected privileges and immunities. Viewed in broad historical perspective, this abrupt change from exclusion to integration may appear to have been the inexorable result of the inner logic of the political culture. In a society that knows no gradations of citizenship the status of freedom necessarily carries with it equality of citizenship. Yet though freedom and equality may have described the tendency of American institutions—or more precisely, in view of the challenge presented by slavery, a tendency of American institutions—there was nothing inevitable about the civil rights laws and constitutional amendments adopted by Republican lawmakers in the 1860s. This fact becomes obvious when one considers the very different and

decidedly anti-equalitarian proposals for racial policy offered by the Democratic party at the same time.

In short, Americans had choices as they wrestled with the problem of slavery and the results which followed its abolition, and the choices they made went far toward establishing integration and equal rights as the norm in American public life. It is of course necessary to point out that while Americans had reason to assert equality as a norm, other factors, including racial prejudice, kept them from making it a social reality in any comprehensive way. Yet the failure fully to realize the ideal of equality, lamentable though it was, should not obscure the greatly broadened scope of civil, political, and social activities that Negroes could and did in fact pursue as American citizens after emancipation. As a legal-constitutional structure the new civil rights dispensation did not by itself assure equalitarian results, but the success blacks enjoyed in vindicating their civil liberty would not have been possible without it. When one considers finally the gains blacks have made in the civil rights revolution of the past two decades, the importance of the original equal rights settlement of the slavery question stands out all the more clearly.

The idea of civil equality pointed the direction of post-emancipation public law within a system of assumptions, institutions, and rules about government that formed a second major component of American ideology. This system of beliefs and practices was constitutionalism, and it shaped and gave a distinct character to the political events surrounding emancipation.

Constitutionalism is an approach to the conduct of politics which rests on the assumption that the purpose of a constitution—in the United States a written constitution that is the proximate source of governing authority—is to restrict the power of government in the interest of individual liberty and self-determination. Still an important influence in American politics, the significance of constitutionalism was even more considerable in the Civil War era. Concern for preserving constitutional principle had been a central motive in the American Revolution, and after 1787 it led to swift acceptance and even veneration of

the new federal Constitution. In an extensive, heterogeneous, and rapidly changing society constitutional principles were a source of national identity and stability. Problems of national unification, moreover, essentially constitutional in nature, were among the most important of the nineteenth century in the United States no less than in Europe. In the United States national growth occurred through the formation of new states in the western territories, a process that reinforced the habit of constitution-making that began during the Revolution. It is probably true also that because of the prevalent philosophical idealism of the age, which attributed causal significance to ideas in general, the nineteenth century mind took constitutional principles and issues more seriously than the more realist mind of the twentieth century, which tends to see material or economic forces as the chief motivating influence in political life.

Two substantive issues were of preeminent importance in the constitutionalism of the Civil War era. Federalism, the first of these issues, was rooted in the development of the American colonies in the seventeenth and eighteenth centuries as virtually autonomous parts of the British empire. A form of political organization, federalism divided power between local governments and a general or central government, yet provided that both kinds of governing authority share the same territory and population base. Several distinct approaches to federalism appeared in the nineteenth century. Chief Justice John Marshall, though recognizing state powers, expounded a theory of national-supremacy federalism which held that federal power properly exercised could in case of conflict supersede state power and control any person in American territory. Marshall's successor, Jacksonian Democrat Roger B. Taney, endorsed dual federalism, according to which the states and the federal government, neither of them supreme in any comprehensive or plenary sense, operated in mutually exclusive and reciprocally limiting spheres of power. Although dual federalism in theory placed the federal government and the states on an equal plane, in practice it emphasized strict construction of national powers and encouraged an expansion of state powers. Pro-slavery con-

stitutional theorists such as John C. Calhoun offered yet another version of federalism that regarded the Union as a compact of states that retained unitary and indivisible sovereignty, while delegating a nondiscretionary, ministerial power to the federal government as their agent.

The Republican party that came to power in 1861 confounded these traditions of constitutional theory by blending national-supremacy federalism with recognition of the vitality and importance of the states to form what has aptly been called state-rights nationalism.¹ Repudiating state sovereignty, Lincoln's party in the 1850s sought a national solution to the slavery question by upholding congressional power to keep the territories free. In the secession crisis Republicans used John Marshall's idea of federal supremacy to defend the life of the national government. Yet in other respects the party that defended the Union relied on states' rights. In controversies over fugitive slaves, for example, Republicans interposed state power to prevent the carrying out of national law and uphold the right of free states to protect their citizens against deprivation of liberty. Furthermore, though regarding slavery as a national problem, they argued less for the application than for the withdrawal of federal power in all matters pertaining to slavery.

Republican defense of the Union in 1861 expressed a strong feeling of nationalism but not a desire to centralize American government. Politically an amalgam of Whigs and Democrats, Republicans in a constitutional sense resembled the former in their emphasis on Unionism and the latter in their identification of the Union with local self-government. Republican state-rights nationalism was proof that states' rights was a preoccupation not only of the South but of the North as well because it gave people at the local level power to control their individual and collective affairs. Relative to antebellum times, wartime exigencies were to require a considerable degree of centralization, but Republican state-rights nationalism checked this tendency.

1. I use the term employed by Phillip S. Paludan in his illuminating essay, "John Norton Pomeroy, State Rights Nationalist," *American Journal of Legal History*, XII (July 1968), 275-93.

"Centralism is the convergence of all the rays of power into one central point," the ardent Unionist Francis Lieber observed, while "nationalization is the diffusion of the same life-blood through a system of arteries, throughout a body politic. . . ." ² In state-rights nationalism the states were the arteries through which flowed the life-blood of American nationality—the ideas and practices of local self-government. ³

The nature of republican government was the second issue of fundamental importance in the constitutionalism of the Civil War era. Whereas federalism involved the relationship between and among the various levels of government in the United States, republicanism concerned the proper relationship between government and individual citizen. In the eighteenth century republican government meant nonmonarchical government resting on popular consent and participation. In the nineteenth century the republican tradition flourished, and with the quickening of democratic spirit produced variations on the theme of representative government. Jeffersonian Republicans and Federalists, Jacksonian Democrats and Whigs, gave different emphases to the theory and practice of republicanism.

Sharp controversies arose among diverse proponents of the republican tradition, but no differences that proved irreconcilable. When events in the 1840s forced Americans to consider the significance of slavery for republican government, however, American politics began to assume a more hostile, divisive character. Southerners defined republican government as local autonomy and, pointing to the example of slave-holding states during the American Revolution, said it was compatible with slavery. Northerners insisted that free government resting on consent could not tolerate an institution that utterly denied con-

2. Quoted in David Donald, *et al.*, *The Great Republic: A History of the American People* (2 vols.; Lexington, Mass., 1977), II, 772.

3. See generally Yehoshua Arieli, *Individualism and Nationalism in American Ideology* (Baltimore, 1966), and Phillip S. Paludan, "The American Civil War Considered as a Crisis in Law and Order," *American Historical Review*, LXXVII (October 1972), 1013–34.

sent, and hence condemned slavery as a desecration of republican values.⁴

Theoretically separable, the constitutional problems of federalism and republican government were inextricably connected in the slavery controversy. Northerners in the 1850s believed that the defense of slavery, in measures such as the fugitive slave act, the Dred Scott decision, and the proposal for a federal slave code in the territories, threatened both republican liberty and the federal principle of local self-government. When Lincoln's election seemed to place in jeopardy the security of their society, southerners invoked the principle of state sovereignty and the time-honored republican tradition of local self-determination, as they saw it, to form a new confederation of states. When finally the Confederate states attacked Fort Sumter, northerners took up arms to defend not merely a nation state but a federal Union of republican states. Both federalism and republicanism were at issue in the Civil War.

The decision to abolish slavery carried in its train important consequences for both federalism and the meaning of republican government. In order to confirm emancipation, Republican lawmakers restricted the plenary power over personal liberty and civil rights that states had enjoyed in the antebellum period, and enlarged federal authority in this sphere. They further insisted that in order to reenter the Union the states must agree not only to support the Constitution but also to accept a new conception of republican government. Equality before states' laws irrespective of race provided the foundation for this new conception.

This book examines the interrelated elements of equal rights ideology and constitutionalism that influenced the political struggles surrounding emancipation and the definition of Negro status during the Civil War and Reconstruction. It focuses on these elements but not to the exclusion of the more familiar facts of racial

4. On the constitutional history of the idea of republican government, see William M. Wiecek, *The Guarantee Clause of the U.S. Constitution* (Ithaca, 1972).

prejudice and party ambition that also played an essential role and that frequently dominate accounts of this period. Indeed, it takes these facts for granted. It is concerned rather to show that an accurate understanding of emancipation and its consequences requires attention to the role of formal ideological and institutional structures in mediating and refracting social and political forces. The abolition of slavery, which never in history had occurred on so large a scale, stirred political passions and racial fears, and these passions and fears intersected with ideological and constitutional considerations to produce the unique events that marked the introduction of equal citizenship into American public law.

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