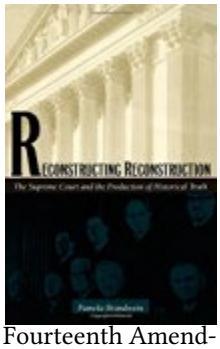
H-Net Reviews
in the Humanities & Social Sciences

Pamela Brandwein. *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth.* Durham, N.C. and London: Duke University Press, 1999. xi + 272 pp. $17.95 (cloth), ISBN 978-0-8223-2316-7.



Reviewed by Bryan H. Wildenthal (Thomas Jefferson School of Law, San Diego, California)
Published on H-Law (September, 2000)

CIVIL WAR WITHOUT END: THE SOCIOLOGY AND SYNERGY OF LAW AND HISTORY

There is an old saying that histories are written by the winners of wars, to which one might add a Yogi Berra-style corollary that no war is ever really over, nor ever finally "won," until the last historian has had her say. And it is doubtful that will ever happen, while academia endures. Pamela Brandwein is a sociologist, not a historian or lawyer, but her book *Reconstructing Reconstruction* is one of the finest meditations on history and law in recent years.

The Civil War, though ended on the battlefield in 1865, has continued to be refought by (among others) Supreme Court Justices, legal scholars, and historians. Bullets and cannonfire have given way to competing historical accounts of what the war was about and the meaning of slavery's abolition, and to competing interpretations of the war's constitutional legacy, the Reconstruction Amendments (most especially the Fourteenth).

Brandwein focuses on three aftershocks of this greatest national trauma the United States has ever experienced: debates among politicians and Supreme Court Justices during the 1860s and '70s, among Justices and legal scholars in the 1940s and '50s, and on the Court of the 1960s. The bone of contention in each was the meaning of the Fourteenth Amendment. She begins by discussing the postwar debate between Republicans and Northern Democrats (united during the war against the Southern rebellion) over what it meant to truly abolish slavery, which was formally (at least) accomplished by the Thirteenth Amendment in 1865.

This debate over "slavery history" was seemingly resolved by the 1868 ratification of the Fourteenth Amendment, premised on the Republican notion that true and complete abolition required federal guarantees of citizenship and fundamental rights for all (including the freed slaves) against any renewed tyranny by the states. But, as Brandwein chronicles, the Democrats won a partial, rearguard victory when the Republican-dominated Court of the 1870s construed the Reconstruction Amendments narrowly by accepting and promoting, to a large degree, the Northern Democratic version of what the war and abolition meant.

The centerpiece of Brandwein's work is a study of the epic scholarly debate between Charles Fairman and W.W. Crosskey over whether the Fourteenth Amendment was intended and understood in 1866-68 to extend ("incorporate") the Bill of Rights against the states. Justice Hugo Black's famous dissent in *Adamson v. California* (1947)[1] came within a single vote on the Court of achieving "total incorporation" of the Bill of Rights. Fairman wrote an influential article in 1949 attacking Black's historical argument,[2] and Crosskey responded in defense of Black, primarily in a 1954 article.[3] Brandwein rounds out her book with a look at the Court's hotly disputed decisions in the 1960s, relying in part on the Fourteenth Amendment, to require federal and state legislative reapportionment on the principle of "one person, one vote."[4]

Recent legal scholarship, building on the vast modern "revisionist" historiography of Reconstruction,[5] has (in this reviewer's opinion) decisively discredited Fairman's thesis and provided long-overdue vindication to Crosskey.[6] Brandwein's purpose, however, is not to offer her opinion of the rightful "winner" of any of these post-Civil War "aftershock" battles. Rather, she is con-

cerned with exploring, from a sociological perspective, how the conduct and outcomes (as perceived at the time) of these battles were influenced by the social construction of competing versions of historical "truth."

Brandwein brilliantly illuminates the synergistic interaction of history with law: how history molds law, and in turn, law molds history. More specifically, she shows how certain legal regimes (such as interpretations of the Fourteenth Amendment on the 1870s Court) flowed not just from underlying historical events, but from the Court's adoption of certain accounts of that history, and its rejection of others. She explores the links between the version of slavery history adopted by the 1870s Court and the white-supremacist belief systems of the post-Civil War Northern Democrats. She then shows how this dominant historical account, once entrenched, affected the debates on the Court, and between Fairman and Crosskey, almost a century later.

Brandwein's analysis also points to how the outcomes of key legal debates affect, in turn, the subsequent flow of historical events. Certainly American history would have moved along a very different path had the 1870s Court constructed a broader and more powerful regime of Fourteenth Amendment law. Nor would we have had to wait until the 1960s to witness the vindication of many of the noblest aspirations of the post-Civil War Republicans, had Justice Black had one more vote in 1947.

Brandwein is at her best in "emphasizing the complexity of the dynamics that regulate exchanges between past and present (*i.e.*, inquiries into the past and the effects of past practices on present arrangements)" (p. 209). She makes extensive use of "frame" analysis to show how the outcomes of important legal debates have been contingent on the frameworks of assumptions and beliefs brought to the debates by their participants, and embraced by the legal establishments that have adjudicated the "winners" of such debates. (See, *e.g.*, pp. 96-102.) While, as noted, Brandwein does not purport to offer her own verdict on the merits of such debates, she does not shy away from concluding that the dominance of Fairman's account for so many decades cannot primarily be attributed to "the intrinsic merits of his argument" (p. 15). Rather (as I would phrase it, relying on Brandwein's insights), Fairman's account fit far better than Crosskey's with the prevailing beliefs and assumptions of their time. For us legal scholars who do not shy away from rendering verdicts on the merits of such debates, I cannot resist adding that Crosskey's account fits far better with the beliefs and assumptions prevailing among the Civil War-era Republicans who actually proposed and secured the ratification of the Fourteenth Amendment.

Brandwein, nonlawyer that she is, displays impressive insights into legal arguments. Her work has much to offer "legal scholars" as traditionally defined (*i.e.*, law school professors), as well as scholars in other disciplines concerned with law. Legal scholars ignore at their peril the growing wave of legal studies by scholars outside law school academia, in fields such as history and political science.[7] Brandwein has emphatically secured the place of sociology among those fields.

Just one example of Brandwein's perceptiveness about law is that she cuts through the sometimes sterile and binary debate about just how far-reaching the post-Civil War Republicans intended and understood the Fourteenth Amendment to be. Brandwein correctly questions the presumption that any "vigorous Fourteenth Amendment jurisprudence" requires "evidence that Republicans intended to eviscerate the traditional federal system" (p. 5) – and, conversely, the presumption that evidence of Republican attachment to the traditional federal system is inconsistent with, for example, Republican support for incorporation of the Bill of Rights. The Republicans, as she notes, seem to have intended a partial modification of the federal system, substantially expanding federal power to protect basic rights of citizenship, while also adhering to the traditional federal-state balance in most other ways (see pp. 5-6, 57-58).[8]

Brandwein missteps occasionally. For example, in discussing approaches to constitutional interpretation, she conflates "originalism" with "textualism," and distinguishes "original understanding" from "original intent" approaches, in a somewhat mistaken and confusing way (see pp. 16-17, 212). She asserts that "originalists" – those who place primary importance on uncovering the original, historical understanding of constitutional text at the time it was adopted – generally disdain inquiries into legislative history (such as congressional debates over proposed constitutional amendments), while proponents of "original intent" would (of course) pursue such inquiries. She is right about "original intent" theorists, and that there is a distinction between "intent" and "understanding," and that some "textualists" (though often allied with originalists) might be skeptical of legislative history.[9]

But "originalism" is an umbrella term encompassing the "intent" and "understanding" approaches. Proponents of "understanding" focus less on the subjective intentions of those who drafted new proposals, and more

on how such proposals were understood at the time by those (politicians, lawyers, and voters generally) who debated and adopted them. But originalists of all stripes (and many textualists) typically grant heavy importance to legislative history, because debates in Congress may be an excellent guide (and often the best extant source) as to how proposed constitutional text was contemporaneously understood. And contrary to Brandwein's suggestion (p. 212), such "historical appeals" *are* "explicitly made today" (in very important ways) by the Rehnquist Court.[10]

In discussing the 1870s Court's narrow view of the Fourteenth Amendment, Brandwein accepts without question the long-prevailing conventional view that Justice Samuel Miller's majority opinion in the *Slaughter-House Cases* (1873)[11] rejected incorporation of the Bill of Rights, thereby making a "dead letter" of the Fourteenth Amendment Privileges and Immunities Clause (see pp. 61, 67-68). But as a few modern legal scholars have contended, *Slaughter-House* need not be read so narrowly, and may not have been so read at the time it was decided.[12] Finally, when it comes to writing style, Brandwein gets bogged down occasionally in dense and convoluted jargon.[13]

But these criticisms are relatively minor and quibbly in comparison to the many strengths and important contributions of Brandwein's work. She has made a giant and pioneering stride toward developing, as she calls it, "a sociology of constitutional law" (see pp. 185-207). And for that, scholars in any field who are concerned with law should be grateful.

Notes

[1]. 332 U.S. 46, 68 (1947).

[2]. Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? : The Original Understanding," *Stanford Law Review* 2 (1949): 5.

[3]. William Winslow Crosskey, "Charles Fairman, 'Legislative History,' and the Constitutional Limitations on State Authority", *University of Chicago Law Review* 22 (1954): 1.

[4]. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962); Wesberry v. Sanders, 371 U.S. 1 (1963); Reynolds v. Sims, 377 U.S. 533 (1964).

[5]. For many years, a dominant school of American historiography (identified with William Dunning) portrayed Reconstruction essentially as a vengeful victimization of the South, and discounted Republican efforts to secure the rights of the freed slaves. *See* pp. 13-14, 115, 218 n.21; *see also, e.g.*, W.E.B. DuBois (David Levering Lewis, ed.), *Black Reconstruction in America: 1860-1880* (1935: New York: Macmillan, 1992), at 711-28. Modern accounts of Reconstruction (of which DuBois's heroic work was the pioneer) provide a more balanced treatment of Republican goals and accomplishments, and break free of the white-supremacist premises of the Dunning School. *See, e.g.*, Kenneth M. Stampp, *The Era of Reconstruction: 1865-1877* (New York: Alfred A. Knopf, 1965); Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York: Harper & Row, 1988); John Hope Franklin, *Reconstruction After the Civil War*, 2d ed. (Chicago: University of Chicago Press, 1994).

[6]. See, *e.g.*, Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Durham, NC: Duke University Press, 1986); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 137-230 (New Haven: Yale University Press, 1998), 137-230; Richard L. Aynes, "On Misreading John Bingham and the Fourteenth Amendment," *Yale Law Journal* 103 (1993): 57; Bryan H. Wildenthal, "The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment," *Ohio State Law Journal 61 (forthcoming 2000); Bryan H. Wildenthal, "The Road to* Twining*: Reassessing the Disincorporation of the Bill of Rights,"* Ohio State Law Journal *61 (forthcoming 2000).* But see, e.g., *Raoul Berger,* The Fourteenth Amendment and the Bill of Rights_ (Norman: University of Oklahoma Press, 1989).

[7]. For example, two political scientists from whose work on law I have benefitted are Howard Gillman (*see, e.g.,* The Constitution Besieged: The Rise and Demise of *Lochner* Era Police Powers Jurisprudence *[Durham, NC: Duke University Press, 1993]) and Mark Graber (*see, e.g., *"The Constitution as a Whole: A Partial Political Science Perspective",* University of Richmond Law Review_ 33 [1999]: 343).

[8]. I develop a similar point in the first of my forthcoming articles on the Bill of Rights "incorporation" debate, which analyzes evidence that even diehard Southern Democrats united with Republicans, in the early 1870s, in support of total incorporation of the Bill of Rights, as a minimum, consensus interpretation of the Fourteenth Amendment. See Wildenthal, "Lost Compromise," *supra* note [6].

[9]. Justice Scalia, whom Brandwein correctly cites as both an originalist and a textualist (p. 16), does have a

well-known aversion to reliance on legislative history (of statutes, anyway). One of Scalia's better *bon mots* is his quip, in Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 621 (1991) (Scalia, J., concurring in the judgment), that "we are a Government of laws, not of committee reports." Incidentally, Scalia (a hypertextualist in my view) has described himself as only "a faint-hearted originalist." Antonin Scalia, "Originalism: The Lesser Evil," *University of Cincinnati Law Review* 57 (1989): 849, 864 (1989). I happen to identify myself as a textualist while also harboring a healthy skepticism of originalism (and of Scalia's particular brand of either approach). See Bryan H. Wildenthal, "The Right of Confrontation, Justice Scalia, and the Power and Limits of Textualism," *Washington and Lee Law Review* 48 (1991): 1323, 1380-92 (1991). But Scalia and I are probably both atypical as textualists (in different ways, and I more so than he), in that most textualists regard evidence of original understanding (and perhaps also intent) as the strongest available guide to the meaning of text.

[10]. For just three notable recent examples, in the area of state autonomy and sovereign immunity, see Seminole Tribe v. Florida, 517 U.S. 44 (1996), Printz v. United States, 521 U.S. 898 (1997), and Alden v. Maine, 119 S. Ct. 2240 (1999).

[11]. 83 U.S. (16 Wall.) 36 (1873).

[12]. See William Winslow Crosskey, *Politics and the Constitution in the History of the United States* (3 vols., Chicago: University of Chicago Press, 1953, 1980), 2: 1128-30 (1953); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980), 196-97 n.59; Robert C. Palmer, "The Parameters of Constitutional Reconstruction: *Slaughter-House*, *Cruikshank*, and the Fourteenth Amendment, *University of Illinois Law Review 1984 (1984): 739; Kevin Christopher Newsom, "Setting Incorporationism Straight: A Reinterpretation of the* Slaughter-House Cases," Yale Law Journal *109 (2000): 643; Wildenthal, "Lost Compromise,"* supra *note [6]; see also 1 Laurence H. Tribe,* American Constitutional Law_, 3d ed. (Mineola, NY: Foundation Press, 2000–), 1: sec. 7-3, at 1307.

[13]. There are a few too many sentences like the following (p. 186): "By giving prominence to a series of questions about how institutional legitimacy is achieved and sustained, won and lost, I make a case for the central relevance of the sociology of knowledge (the production and mobilization of various knowledge claims) in the theorization of social structure and institutional Court legitimation." Fortunately, Brandwein conveys the thought far more effectively (and with comparatively Hemingwayesque prose) a few pages later (p. 189): "Whenever institutional actors (like judges) act, and whenever they build justifications for their actions, they invoke knowledge systems.... This chapter builds a theoretical link between social structure and the production of knowledge. I make a case for bringing sociological attention to the processes by which institutional actors come to know what they know. Under what conditions and circumstances do they come to know it? "

Citation: Bryan H. Wildenthal. Review of Brandwein, Pamela, *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth.* H-Law, H-Net Reviews. September, 2000.

URL: http://www.h-net.org/reviews/showrev.php?id=4506