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

BOOK REVIEW: *Pamela Brandwein,* Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth* (Durham, N.C.: Duke Univ. Press 1999).

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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 *Reconstructing Reconstruction*[1] is one of the finest meditations on history and law in recent years.

The Civil War, though it ended on the battlefield in 1865, has been refought ever since by (among others) members of Congress, Supreme Court Justices, legal scholars, and historians. Bullets and cannon fire 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 great constitutional legacy: the Reconstruction Amendments (most especially the Fourteenth Amendment).

Professor 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 1870s, among Justices and legal scholars in the 1940s and 1950s, 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 de-

 See *Bryan H. Wildenthal,* Civil War Without End: The Sociology and Synergy of Law and History, *H-NET REVIEWS (Sept. 2000),* at *http://www.h-net.msu.edu/reviews/showrev.cgi?path=16407969652699.*

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1. PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH (1999).

bate between Republicans and Northern Democrats (united during the war in opposition to 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, which was 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 on the Republican-dominated Court of the 1870s. That Court 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 Professors Charles Fairman and William Winslow Crosskey over whether the Fourteenth Amendment was intended and understood in 1866–68 to "incorporate" the Bill of Rights and thus apply it to the states. Justice Hugo Black's famous 1947 dissent in *Adamson v. California*[2] 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,[3] and Crosskey responded in defense of Black, primarily in a 1954 article.[4] 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, requiring federal and state legislative reapportionment on the principle of "one person, one vote."[5]

Recent legal scholarship, building on the vast modern "revisionist" historiography of Reconstruction,[6] has (in this reviewer's opinion) decisively discredited Professor Fairman's thesis and provided long-overdue vindication to Professor Crosskey.[7] Professor Brandwein's purpose,

2. 332 U.S. 46, 68 (1947) (Black, J., dissenting).

3. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

4. William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954).

5. *See* Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); Baker v. Carr, 369 U.S. 186 (1962).

6. 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* BRANDWEIN, *supra* note 1, at 13–14, 115, 218 n.21; *see also, e.g.*, W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 711–28 (Atheneum 1992) (1935). 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* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 (1988); JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR (2d ed. 1994); KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION: 1865–1877 (1965).

7. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 137–230 (1998); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND

however, is not to offer her opinion of the rightful "winner" of any of these post–Civil War "aftershock" battles. Rather, she is concerned 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 how law, in turn, 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, molded 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 if the 1870s Court had 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)."[8] 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.[9] Although, as noted, she 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."[10] Rather, as Brandwein suggests, Fairman's account fit far better than Crosskey's with the prevailing beliefs and assumptions of their

THE BILL OF RIGHTS (1986); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993); 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*, 61 OHIO ST. L.J. 1051 (2000) [hereinafter Wildenthal, *Lost Compromise*]; Bryan H. Wildenthal, *The Road to* Twining*: Reassessing the Disincorporation of the Bill of Rights*, 61 OHIO ST. L.J. 1457 (2000). *But see, e.g.*, RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1989).

8. BRANDWEIN, *supra* note 1, at 209.

9. *See id*. at 96–102.

10. *Id.* at 15.

time. As a legal scholar who does not shy away from rendering a verdict on the merits of this debate, 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.

Professor Brandwein, nonlawyer that she is, displays some 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.[11] Brandwein's book 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 polarized and often sterile 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"[12]—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 and nuanced modification of the federal system, substantially expanding federal power to protect basic rights of citizenship from state violation, while also adhering to the traditional federal-state balance in most other ways.[13]

Professor Brandwein missteps occasionally on some legal issues. 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.[14] 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

11. For example, two political scientists whose work on law I have had recent occasion to benefit from are Howard Gillman and Mark Graber. *See* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE (1993); Mark A. Graber, *The Constitution as a Whole: A Partial Political Science Perspective*, 33 U. RICH. L. REV. 343 (1999).

12. BRANDWEIN, *supra* note 1, at 5.

13. *See id.* at 5–6, 57–58. I develop a similar point in a recent article on the Bill of Rights "incorporation" debate, analyzing 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 7, at 1116–25.

14. *See* BRANDWEIN, *supra* note 1, at 16–17, 212.

proposed constitutional amendments), but that proponents of "original intent" *do* pursue such inquiries. She is right, of course, about "original intent" theorists, and that there is a distinction between "intent" and "understanding," and that some "textualists" (though usually allied with originalists) are highly skeptical of legislative history.[15]

Originalism, however—which should, strictly speaking, be distinguished from textualism[16]—is an umbrella term encompassing both the "intent" and "understanding" approaches. Proponents of original 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 if not most textualists) typically place heavy reliance on 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, despite Brandwein's puzzling contrary suggestion, such "historical appeals" *are* "explicitly made today"[17]—and very prominently so—by the Rehnquist Court.[18]

Less surprising is that Professor Brandwein, in discussing the 1870s Court's narrow view of the Fourteenth Amendment, accepts without question the long-prevailing conventional view among legal scholars and historians that Justice Samuel Miller's majority opinion in the *Slaughter-House Cases*[19] rejected incorporation of the Bill of Rights, thereby making a "dead letter" of the Fourteenth Amendment Privileges and Immunities Clause.[20] But, as a few modern dissidents have contended, *Slaughter-House* need not be read so narrowly. Furthermore, as I argue in a recent article, it may not have been so read at the time it was decided.[21]

15. Justice Scalia, whom Brandwein correctly cites as both an originalist and a textualist, *see id*. at 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 that "we are a Government of laws, not of committee reports." Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 621 (1991) (Scalia, J., concurring in the judgment). Scalia, however (a hypertextualist in my view), has described himself as only "a faint-hearted originalist." Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 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*, 48 WASH. & LEE L. REV. 1323, 1380–92 (1991).

16. Professor Philip Bobbitt has provided a very helpful explanation of the distinctions between the originalist (or "historical," as he terms it) and textualist modes of constitutional argument. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 9–38 (1982).

17. BRANDWEIN, *supra* note 1, at 212.

18. For just three notable recent examples, see *Alden v. Maine*, 527 U.S. 706 (1999), *Printz v. United States*, 521 U.S. 898 (1997), and *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

19. 83 U.S. (16 Wall.) 36 (1873).

20. BRANDWEIN, *supra* note 1, at 61, 67–68.

21. *See* Wildenthal, *Lost Compromise*, *supra* note 7, at 1079–1125; *see also* 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1128–30 (1953); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 196–97 n.59 (1980); Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the* Slaughter-House Cases, 109 YALE L.J. 643 (2000); Robert C. Palmer, *The Parameters of Constitutional*

When it comes to writing style, it might finally be noted, Brandwein gets bogged down occasionally in that ever-present pitfall of even the best studies in law and other social sciences: dense and convoluted jargon.[22]

But these somewhat quibbly criticisms pretty much exhaust the shortcomings of the book. By comparison, I could write far more extolling its many strengths and important contributions. Brandwein has made a giant and pioneering stride toward developing, as she aptly calls it, "a sociology of constitutional law."[23] And she has added substantially to our understanding of one of the most critical periods in American legal history. For these accomplishments, scholars in any field who are concerned with law should be grateful.

Reconstruction: Slaughter-House*,* Cruikshank*, and the Fourteenth Amendment*, 1984 U. ILL. L. REV. 739; *cf.* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1307 (3d ed. 2000).

22. There are a few too many sentences like the following:

> 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.

BRANDWEIN, *supra* note 1, at 186. Fortunately, Brandwein conveys the thought far more effectively (and with comparatively Hemingway-esque prose) a few pages later:

> 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?

Id. at 189.

23. *Id.* at 185–207.