

Cambridge University Press

978-0-521-88771-7 - Rethinking the Judicial Settlement of Reconstruction

Pamela Brandwein

Frontmatter

[More information](#)

Rethinking the Judicial Settlement of Reconstruction

American constitutional lawyers and legal historians routinely assert that the Supreme Court's state action doctrine halted Reconstruction in its tracks. But it didn't.

Rethinking the Judicial Settlement of Reconstruction demolishes the conventional wisdom – and puts a constructive alternative in its place. Pamela Brandwein unveils a lost jurisprudence of rights that provided expansive possibilities for protecting blacks' physical safety and electoral participation, even as it left public accommodation rights undefended. She shows that the Supreme Court supported a Republican coalition and left ample room for executive and legislative action. Blacks were abandoned, but by the president and Congress, not the Court. Brandwein unites close legal reading of judicial opinions (some hitherto unknown), sustained historical work, the study of political institutions, and the sociology of knowledge. This book explodes tired old debates and will provoke new ones.

Pamela Brandwein is professor of political science at the University of Michigan. She is the author of *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth*.

Cambridge University Press

978-0-521-88771-7 - Rethinking the Judicial Settlement of Reconstruction

Pamela Brandwein

Frontmatter

[More information](#)

CAMBRIDGE STUDIES ON THE AMERICAN CONSTITUTION

SERIES EDITORS

Maeva Marcus, *George Washington University*

Mark Tushnet, *Harvard University* and *Georgetown University Law Center*

Melvin I. Urofsky, *Virginia Commonwealth University*

Keith Whittington, *Princeton University*

Cambridge Studies on the American Constitution publishes books that examine the American Constitution and offers a range of interpretations and approaches, from traditional topics of constitutional history and theory, case studies, and judicial biographies, to more modern and often controversial issues dealing with gender and race. While many estimable series have incorporated constitutional studies, none has done so exclusively. This series seeks to illuminate the implications – governmental, political, social, and economic – of the relationship between the American Constitution and the country it governs through a wide array of perspectives.

TITLES IN THE SERIES

Mark A. Graber, *Dred Scott and the Problem of Constitutional Evil*

Christian G. Fritz, *American Sovereigns: The People and America's
Constitutional Tradition Before the Civil War*

Cambridge University Press

978-0-521-88771-7 - Rethinking the Judicial Settlement of Reconstruction

Pamela Brandwein

Frontmatter

[More information](#)

Rethinking the Judicial Settlement of Reconstruction

PAMELA BRANDWEIN

University of Michigan



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press
978-0-521-88771-7 - Rethinking the Judicial Settlement of Reconstruction
Pamela Brandwein
Frontmatter
[More information](#)

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Tokyo, Mexico City

Cambridge University Press
32 Avenue of the Americas, New York, NY 10013-2473, USA
www.cambridge.org
Information on this title: www.cambridge.org/9780521887717

© Pamela Brandwein 2011

This publication is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without the written
permission of Cambridge University Press.

First published 2011

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication data

Brandwein, Pamela.
Rethinking the judicial settlement of Reconstruction / Pamela Brandwein.
p. cm. – (Cambridge studies on the American Constitution)
Includes bibliographical references and index.

ISBN 978-0-521-88771-7
1. Civil rights – United States – States – History. 2. Blacks – Legal status, laws, etc. –
United States – States – History. 3. Discrimination – Law and legislation – United
States – States – History. 4. Civil rights – United States – History. 5. Discrimination –
Law and legislation – United States – History. 6. Civil rights – United States –
History. 7. Reconstruction (U.S. history, 1865–1877) I. Title.

KF4757.B655 2011
342.7308'73–dc22 2010030600

ISBN 978-0-521-88771-7 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for
external or third-party Internet Web sites referred to in this publication and does not guarantee
that any content on such Web sites is, or will remain, accurate or appropriate.

Cambridge University Press
978-0-521-88771-7 - Rethinking the Judicial Settlement of Reconstruction
Pamela Brandwein
Frontmatter
[More information](#)

Contents

| | |
|---|----------------|
| <i>Acknowledgments</i> | <i>page ix</i> |
| 1 Abandoned Blacks? | 1 |
| 2 The Emergence of the Concept of State Neglect, 1867–1873 | 28 |
| 3 The Civil/Social Distinction: An Intramural Republican Dispute | 60 |
| 4 The Birth of State Action Doctrine, 1874–1876 | 87 |
| 5 A Surviving Sectional Context, 1876–1891 | 129 |
| 6 The <i>Civil Rights Cases</i> and the Language of State Neglect | 161 |
| 7 Definitive Judicial Abandonment, 1896–1906 | 184 |
| 8 Twentieth-Century Receptions | 206 |
| 9 Conclusion | 240 |
| <i>Bibliography</i> | 245 |
| <i>Index</i> | 261 |

Cambridge University Press

978-0-521-88771-7 - Rethinking the Judicial Settlement of Reconstruction

Pamela Brandwein

Frontmatter

[More information](#)

Acknowledgments

I have accrued many debts in the course of writing this book, and it is a great pleasure to thank the colleagues and friends who have lent their support. My deep gratitude goes to Sandy Levinson, who offered reflections and advice at both a 2002 talk at the University of Texas at Austin and a 2008 conference at Harvard Law School. Many thanks to Mark Graber for providing early encouragement, as well as feedback on the entire project that advanced my thinking about the Waite Court and its relationship to the executive branch. Rogers Smith was a sounding board on numerous occasions and I am grateful for his skepticism, which gave me the opportunity to refine my analysis. I am also indebted to Robert C. Post for his enthusiasm and critical commentary at an early and vital time. Julie Novkov read multiple versions of chapters, provided detailed and insightful comments on the complete manuscript, and offered a steady stream of support. I am very pleased to acknowledge a long-running debt to Julie, whose work has helped me to think about white supremacy and legal change.

I owe special thanks to Richard M. Valelly, whom I had the great good fortune to meet as I worked on the project. I am deeply grateful to Rick for his intellectual generosity and support as for well as a set of comments on the full manuscript from which I profited greatly. My deepest appreciation also goes to Michael Les Benedict, whose reflections and insights were enormously helpful. An extended conversation with Les at the 2008 meeting of the American Society for Legal History buoyed me as I neared completion of the work. In their different ways, Les and Rick have made it seem obvious that the study of constitutional development during the post-Civil War decades is a joint endeavor between legal history and political science, and for that I am thankful.

Three of my steepest debts are to political theorists, all wonderful friends. Douglas C. Dow provided invaluable criticism during the early years of the project and later saw the work through a formative stage of development. I am deeply grateful for his insights and energy. It is a very special pleasure to thank Don Herzog, whose close attention to the full manuscript yielded comments,

Cambridge University Press

978-0-521-88771-7 - Rethinking the Judicial Settlement of Reconstruction

Pamela Brandwein

Frontmatter

[More information](#)

questions, and friendly provocations that substantially improved the book. I owe an enormous debt of gratitude to Don for his support, which sustained me during a turbulent time. At a late hour in the production process Elizabeth Wingrove gave an extraordinary amount of time to an intensive reading of the entire manuscript, making it better in ways large and small and too numerous to count. I am profoundly grateful for her critical interventions, editorial skill, and generosity of spirit.

The long process of writing and revising was aided by comments and suggestions from Richard Aynes, David Bogen, Mark Brandon, John Brigham, John Chamberlin, Lisa Disch, Lynda G. Dodd, Lauren Edelman, Sam Erman, Daniel Ernst, Bryant Garth, Deborah Hellman, Bob Kagan, Paul Kens, Charles Lane, George Lovell, Joe Lowndes, Jonathan Lurie, Wayne Moore, Amnon Reichman, Kim Scheppele, Daniel Sharfstein, Christopher Waldrep, Joe Wells, G. Edward White, Bryan Wildenthal, Dan Wirls, and Mariah Zeisberg. My thanks to them all. I want to particularly acknowledge Ronald Kahn and Ken Kersch, who gave me the opportunity to develop some core ideas in a chapter I contributed to their edited volume, *The Supreme Court and American Political Development*. I thank Ron and Ken for their engagement with the project at its early stages. Thanks also to Chris Waldrep for generously sharing with me copies of the indictment in *United States v. Harris* and several letters in the Joseph Bradley Papers.

I would like to gratefully acknowledge a number of institutions. The University of Michigan provided course relief to work on the project. I presented papers at Harvard Law School, the University of California at Berkeley, the University of North Carolina School of Law, American University's Washington College of Law, the University of Maryland School of Law, the University of Oregon, and the University of Iowa. Portions of Chapters 5, 6, and 8 appeared as "A Judicial Abandonment of Blacks? Reconsidering the 'State Action' Cases of the Waite Court," *Law & Society Review* 41 (2007): 343–86, and appear here in revised form by permission of Wiley-Blackwell. A very early version of Chapter 6 appeared as "The Civil Rights Cases and the Lost Language of State Neglect" in Ronald Kahn and Ken Kersch, eds., *The Supreme Court and American Political Development* (Lawrence: University Press of Kansas, 2006), 275–325. A small portion of a book review appears by permission of H-Law: "Review of Labbé, Ronald M.; Lurie, Jonathan, *The Slaughterhouse Cases: Regulation, Reconstruction, and the Fourteenth Amendment* and Ross, Michael A., *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era*," H-Law, H-Net Reviews (May 2004). I presented pieces of the argument at the American Society for Legal History, the American Political Science Association, the Western Political Science Association, the Law and Society Association, and the Southeastern Association of Law Schools, and I benefited greatly from comments, questions, and criticisms in those sessions.

It is a privilege to be included in the Cambridge Studies on the American Constitution series; my thanks to Maeva Marcus, Mark Tushnet, Melvin I.

Cambridge University Press

978-0-521-88771-7 - Rethinking the Judicial Settlement of Reconstruction

Pamela Brandwein

Frontmatter

[More information](#)*Acknowledgments*

xi

Urofsky, and Keith Whittington. Special thanks to Howard Gillman for his support of the project as he was stepping down from the series board. I am also grateful to an anonymous referee for Cambridge University Press for comments that allowed me to refine my argument and sharpen various disagreements. Lew Bateman supported the project and kept tabs on me over a long stretch during which I was absent, and I am appreciative on both scores. Russell Hahn was a patient copy editor, and I thank him as well.

I want to extend a very personal thank you to Anisha Mandol, who gave support and encouragement as I devoted time and energy to the project over the past many years. I hope she will accept an uncomplicated expression of gratitude for that support, which at times came with costs to her. I remain ever grateful for her love and care.

One final expression of thanks: In the months following the Supreme Court's ruling in *United States v. Morrison* (2000), I was startled by a brief passage in the dissenting opinion of Justice Stephen Breyer. Justice Breyer suggested that the canonical 1883 decision, the *Civil Rights Cases*, never considered the kind of claim advanced by the federal government in the *Morrison* case, namely, that Congress was authorized under the Fourteenth Amendment to remedy the failure of state actors to punish gender-motivated violence. My first thought was that Breyer must be wrong. I knew the *Civil Rights Cases*, and I was sure it blocked that kind of claim. After all, scholars widely condemn the decision for putting state failures to punish Klan violence outside the reach of the Fourteenth Amendment. But I reread the decision and was amazed to find that the text could support Breyer's reading. Such was the initiating event that led to this project and book. Justice Breyer, of course, bears no responsibility for the results.