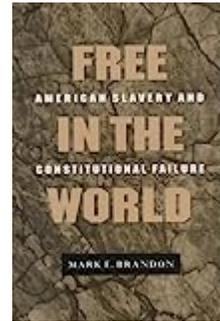




Mark E. Brandon. *Free in the World: American Slavery and Constitutional Failure.* Princeton: Princeton University Press, 1998. 248 pp. \$39.50 (cloth), ISBN 978-0-691-01581-1.



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According to Paul Johnson, between 1920 and 1975 over 500 written constitutions were adopted and abandoned by former British colonies (*Modern Times* (1983), 508). This record stands in sharp contrast to that of the American constitution, which has apparently withstood the test of time since 1789. Moreover, according to standard American government and history texts, the American constitution has steadily improved with age, most notably by providing greater protection for the rights and liberties of all Americans. Sophisticated academics are unlikely to treat the Constitution in the fileopietistic manner common among nineteenth century historians, but there is still a strong tendency to focus on its success.

Mark Brandon, who teaches political science the University of Michigan, agrees that many aspects of America's constitutional experiment justify satisfaction and celebration. However, he argues that the experiment has not been an unqualified success and suggests that "dwelling on success may teach less than evaluating the significance of failure" (p.3). Its greatest failure was its inability to resolve the issue of slavery. This fact has hardly been overlooked by academics, but Brandon contends that they have generally learned the wrong lessons from it (6).

Free in the World is primarily a work of constitutional theory and historical interpretation. Brandon begins by

carefully laying out the basic tenets of his theory of constitutionalism—tenets heavily influenced by linguistic approaches to law. After distancing himself from views of constitutions as embodying transcendent principles, he argues for a "new" constitutionalism best conceived of as an "enterprise" where "(1) people, or a people, (2) self-consciously attempt (3) to conceive the design for a new political world, (4) to embody that design in some sort of text, and (5) to implement it in the world" (p. 10). Contrary to many constitutional historians, he emphasizes that constitutions must be written, a provision that he recognizes excludes Israel, New Zealand, and Great Britain as constitutionalist societies (pp. 10-12).

Less controversial, and in what will likely be one of the book's most lasting contributions to constitutional theory, Brandon presents a multidimensional typology of constitutional failure. Briefly, there are failures of (1) constitutionalism, whereby basic principles of a constitutional regime are not properly employed (p. 18), (2) a constitution, "which involves discarding, abandoning, or ignoring a particular constitution" (p. 20) (3) constitutional order, "which is signified by the breakdown of a political regime established or authorized by a constitution" (p. 20), (4) constitutional discourse, "which occurs when a constitutional order is unable to speak coherently, or, more seriously, to sustain itself through con-

stitutional interpretation or through discourse pertaining to its constitution” (p. 21).

The bulk of Brandon’s book shows how slavery led to the breakdown of American constitutional order. He begins by discussing the necessity of founding myths, and by highlighting the differences between America’s two major founding myths: that of the Federalists and the Antifederalists. He repeatedly shows how many of the constitutional debates concerning slavery ultimately appealed to one of these two myths. He clearly presents constitutional arguments for and against slavery and Congress’s power to regulate it. Of particular interest is his discussion of Frederick Douglass’s constitutional opinions, which changed significantly over time.

>From an institutional perspective, Brandon does well to remind his readers that many of the most important debates regarding the constitutional status of slavery occurred in Congress, not the courts. Nonetheless, his discussion of the relevant case law (at both the state and national level), is clear and informative. He also provides a fine analysis of the debates between two potential presidential candidates: Abraham Lincoln and Stephen Douglas. He uses the Lincoln-Douglas debates to illustrate the possible political uses of different founding myths. However, he concludes, counter-intuitively, that they “arrived at conclusions that were substantially similar on almost all significant issues” (p. 121). Notably, they both had racist inclinations, rejected a constitutional right to own slaves, and supported versions of popular sovereignty whereby laws concerning slavery or abolition should be made at the state level.

Brandon’s most interesting and controversial arguments are that secession is a necessary part of any constitutional theory and that the South’s arguments for secession were, at a minimum, plausible. He provides telling criticisms of each of Lincoln’s arguments against secession, and recounts historical and theoretical arguments in its favor. Finally, he argues that the Reconstruction amendments were both illegitimate and ineffective. While one might question his portrayal (caricature?) of the Radical Republicans, his views of these amendments are not unreasonable.

Given the above arguments, it should be noted that Brandon clearly disavows any support for slavery or desire to resurrect the old Confederacy (e.g. xiv-xv). There is no reason to doubt his sincerity, although many academics will undoubtedly find it difficult to admit that

southern arguments for secession had merit. In his epilogue, Brandon suggests other possible uses of the doctrine of secession in America, notably Louis Farrakhan’s call for a separate black state (which Brandon does not necessarily endorse). His theoretical arguments for secession perhaps become more attractive if one thinks of the Kosovars in Yugoslavia or the Kurds in Iraq. Brandon does not make the latter argument, but it seems to be a reasonable application of his constitutional theory.

Brandon’s historical arguments will be controversial because of their association with slavery, racism, and the Confederacy, but in the final analysis they are generally convincing. His arguments regarding constitutionalism will likely be less controversial, but I find troubling his desire to distance himself from the concept of constitutions as embodying transcendent truths. He acknowledges, for instance, that under his view of constitutionalism it may be necessary to recognize Nazi Germany, Stalinist Russia, and Maoist China as constitutional regimes (although he suggests that there might be enough normative content in his theory to deny these claims) (pp. 11-12).

In rejecting the notion of constitutions as embodying transcendent principles, Brandon makes reference to the difficulty of knowing and enforcing such principles. Moreover he makes the reasonable point that people often differ regarding the morality of issues like slavery (e.g. pp. 8-11, 148-159). Yet the idea that law is more than a human construction, that constitutions and statutes should reflect, and certainly not contradict, transcendent norms, is arguably one of the strengths of traditional western jurisprudence. I recognize that this idea has been unpopular in the American academy since at least the time of the Legal Realists, but the recent work of scholars like Hadley Arkes, Robert George, and Michael Moore suggest that it might be useful to reconsider it.

Even if I am right about my qualm, I still willingly concede that Brandon’s insights regarding constitutional theory have merit and deserve to be taken seriously. Indeed, all of his arguments are worthy of careful consideration by any student of constitutional theory and American political/constitutional history.

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