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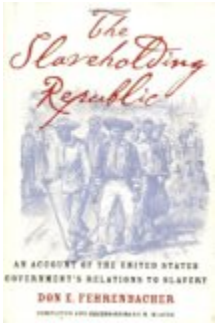
Don E. Fehrenbacher. *The Slaveholding Republic: An Account of the United States Government's Relations to Slavery.* Completed and edited by Ward M McAfee. New York: Oxford University Press, 2001. xiv + 466 pp. $35.00 (paper), ISBN 978-0-19-514177-1.



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The Land of the Free?

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There was a time when most American historians believed that the Civil War had been a needless conflict, brought by an exaggeration of the issues on the part of a "blundering generation" that exaggerated the sectional differences in a "paranoid style" of rhetoric and reasoning in an age of democratic excess.[1] As late as 1969, David Brion Davis, taking account of recent research that explained why intelligent people on both sides could find overblown charges credible, still argued that the war was the consequence of a "paranoid style" of political rhetoric and perceptions.[2]

This interpretation was rendered progressively more untenable in the 1950s and following decades, not only by changes in racial attitudes but also by research that showed how deeply slavery compromised American liberty, black and white, North and South.[3] Among the most important of these have been studies of the various ways that the federal government sustained slavery and restricted freedom on its behalf.[4] Forty years ago Leon Litwack showed how the federal government's pervasive support for slavery led to shameful treatment of free African Americans.[5] In his history of African Americans and American constitutionalism, Donald G. Nieman called his discussion of African-American rights and antebellum law "Towards a Proslavery Constitution."[6] In a brief chapter of his monumental study of the *Dred Scott* case, the late Don E. Fehrenbacher too suggested that before the Civil War the federal government had become "to some degree a sponsor and protector of the institution."[7]

In this volume Fehrenbacher, the William Robertson Coe Professor of History and American Studies at Stanford University, and Ward McAfee, Fehrenbacher's friend and former student (and now professor of history at California State University, San Bernardino), expand on those few pages of Fehrenbacher's earlier work, describing how deeply entwined slavery and federal policy became in the decades between the ratification of the Constitution and the election of Abraham Lincoln to the presidency. By the completion of his research Fehrenbacher had concluded that the federal government sponsored and sustained slavery more than merely "to some degree." By the 1850s, he and McAfee conclude, decades of practice, statute, and law had made the United States *The Slaveholding Republic*. So entrenched was this fundamental truth that the Republican victory in the presidential election of 1860 indicated a revolutionary transformation of the basic premises of American governance – the North's and West's rejection of the identification of United States government with slavery. "[T]he antebellum United States ... was a slaveholding republic. That was the impression given by the national capital. That was the image presented in diplomacy to the rest of the world. And that had become the law of the land by edict of the Supreme Court." The Republicans' perception of slaveholders' dominance was hardly paranoid, nor was the South's reaction to their challenge. The South seceded because it understood the implications of Lin-

coln's election: "The old republic–which had protected the slaveholding interest on the high seas, in relations with foreign government, in the District of Columbia, in the federal territories, and to some extent even in the free states–was at an end" (pp. 296-97).

At the same time, Fehrenbacher intended this volume to be a defense of the Constitution itself from the charge, commonly made by historians and others, that it was from its inception a proslavery document. It was the later interpretation and practice that put a proslavery gloss on the Constitution, Fehrenbacher insists, not the Framers' intent.

Fehrenbacher and McAfee tell the story in eleven chapters, the first eight by Fehrenbacher, two of the final three begun by him. Most begin with a telling vignette illustrating how slavery raised issues for the national government, followed by the sort of insightful and detailed analysis that characterized

Fehrenbacher's work. McAfee's hand is less sure. In the final chapters he explicitly states his reliance on the insights of other leading historians, appearing to try to bolster his own authority with theirs in a way that his mentor never found necessary. His penultimate chapter and conclusion, which carry the story of the "Republican Revolution" through Reconstruction, often read more like an essay in historiography than an original analysis of the degree to which the postwar republic really repudiated the old, slaveholding one.

Fehrenbacher begins with an account of the role slavery played in the nation's founding, challenging the widely articulated view that the Constitution was from its inception a proslavery document.[8] Slavery was "a brooding presence" that "significantly influenced the deliberations of the Constitutional Convention," Fehrenbacher concludes. "But the Convention made no calculated effort to affect the institution of slavery, and its members never conceived of themselves as having any power or responsibility to do so" (p. 36). Assessing the key points of William Lloyd Garrison's criticism, echoed by many historians, that the Constitution was proslavery throughout, Fehrenbacher points out that, no matter how representation would have been apportioned, it inevitably would have obliquely recognized the existence of slavery. Further, the slave-trade clause was a temporary restriction on a broad power to ban the foreign slave trade; the restriction itself confirmed that Congress had the power to ban the domestic slave trade as well. The Fugitive Slave Clause was "the one unambiguously proslavery provision of the Constitution" (p. 44), but even it did not speak of slavery explicitly, and it was placed in Article IV rather than Article I, imposing requirements on the states but conferring no authority to Congress to enforce the prohibition. The authority to suppress insurrections and the obligation to protect states against domestic violence were aimed at resistance to civil authority generally, and not specifically at slave insurrections. Fehrenbacher regards further examples of proslavery provisions produced by recent historians as even more far-fetched. This will probably be the most controversial of Fehrenbacher's conclusions. It coincides with the views of other analysts,[9] and he presented it even more trenchantly in a bicentennial essay more than a decade ago.[10] Readers will want to assess his argument against the opposing views cited above.

The Constitution itself did not establish the slaveholding republic, Fehrenbacher insists. It was rather interpretations of the Constitution over the following decades and the practical actions of the federal government that did so. In Chapter 3 he discusses slavery in the District of Columbia. Rather than providing a legal code for the District, Congress retained the accumulated law of both Maryland and Virginia and then failed to update it, so that District law continued to include obsolete and often inhumane provisions that Virginia and Maryland later repealed. It was left to the courts to ameliorate their worst features. But "it was in the courtrooms and jails of the District that the United States government became most intimately involved with slavery" (p. 63), enforcing all the property rights associated with it. When Congress did deal with slavery in District, it sought primarily to accommodate slaveholders.

Fehrenbacher recounts abolitionist efforts to abolish slavery in the District, discussing in this chapter the free-speech issues raised by the Gag Rule, which attempted to de-legitimize antislavery petitions, and the proslavery argument that Congress's authority over the District justified only legislation to protect slavery but not to inhibit it. These arguments attracted little support, he says, but played an important role in developing similar theories about congressional power to regulate slavery in the territories. Suggestions that Congress abolish slavery in the District got nowhere, even in the 1850s when Congress did ban the slave trade as part of the Compromise of 1850. That was the only deviation "from a general pattern of southern success that prevailed from 1789 until the outbreak of civil war," Fehrenbacher reports. The provision for a federal district "was itself no proslavery feature of the Constitution…, but by 1861 the clause had been made proslavery by construction" and the nation's capital be-

came "a symbolic stronghold of the slave power in America" (p. 88).

If the federal government presented a proslavery aspect it domestic affairs, it did so even more completely in foreign relations. For forty-five years the United States "energetically" (p. 93) pressed the claims of American slaveholders against Great Britain, which had confiscated slave property and encouraged runaways during both the Revolution and the War of 1812, finally winning substantial compensation for them. The use of federal troops to recover runaway slaves in Spanish Florida provoked the Seminole Wars and was one of the factors behind the persistent American efforts to gain control of the territory. The attraction of free Mexico to Louisiana and later to Texan runaways was among the causes of tension that led to the Mexican-American War. American officials worked assiduously to establish a fugitive-slave treaty with Britain obligating the return of fugitive slaves there, not giving up until 1830. Likewise they fought to secure the return of slaves that accidentally or by design reached free ports in the British Caribbean, succeeding in securing indemnities for their owners.

No matter how disputed domestically, the actions of U.S. State Department officials, both northern and southern, gave "American slavery the character of a national institution fully protected by the Constitution" (p. 111). That perception was reinforced by the government's adamant refusal to recognize Haiti, the advocacy of which was "treason," in the words of a "moderate" southerner–"not to their country only, but to the whole human race" (p. 117).

Finding slavery's influence on American expansionism "more difficult to assess" (p. 118), Fehrenbacher nonetheless paints a clear picture of its leading role. The desires to protect and to promote slavery were central to the annexation of Texas and efforts to acquire Cuba. In sum, although "neither the Garrisonians nor any of their latter day disciples" have cited the foreign-relations provisions of the Constitution as proslavery, "in the actual conduct of diplomacy..., the federal government habitually assumed the role of a protector and ... even as a vindicator of slavery" (p. 132). Fehrenbacher's point is not only that the federal government's foreign policy was supportive of slavery, but that the later use of constitutional powers to support slavery did not mean that they were intended for that purpose.

Fehrenbacher devotes two chapters to the African slave trade. Widespread opposition to the foreign slave trade, North and South, led to a stringent law banning it the moment Congress acquired the constitutional power to do so. Slave smuggling was risky although lucrative, and relatively few slaves were smuggled into the country in the decades following the slave-trade ban, in part because the inter-regional domestic slave trade supplied slaves to newly developing states that needed them. On the other hand, American efforts to help suppress the international slave trade were sporadic and generally lacked conviction, even though Americans were ubiquitous participants in that criminal activity. American squadrons assigned to patrol the African coast often did little. The United States government adamantly resisted British searches of suspect American vessels, with the Senate refusing to ratify a bilateral treaty permitting such searches. This pattern of conduct led slavers from all nations to fly the American flag, with the British insisting on a "right to visit" vessels to ascertain their true nationality. When visited vessels were actually American, American resentment would run at fever pitch. Finally, Britain agreed to indemnify owners of vessels that proved to be American upon visitation. Nonetheless a virtual British blockade of Cuba, designed to suppress a resurgent illegal slave trade there, briefly led to war fever among Americans in all regions in 1858 when American ships complained of British harassment. But, Fehrenbacher concludes, the suppression of the international slave trade was one area where sectional conflict was minimal. Both northerners and southerners opposed the trade, but both insisted on freedom of the seas in the face of British efforts to suppress it.

Fehrenbacher also takes two chapters to discuss the fugitive slave problem.

Again he argues that the Constitution itself made the return of runaways a matter of comity between the states, made necessary because northern states were moving towards abolishing laws sustaining slavery within their states.

When in 1793 Congress passed the Fugitive Slave Act, paradoxically trying to settle a dispute between Pennsylvania and Maryland over extradition of fugitives from justice rather than slavery, it converted "a matter of interstate comity ... into a matter of federal relationship." In the end the national government became "virtually an agent of the slaveholding interest within free-state jurisdictions." Conflicts between state and national authority were inevitable, Fehrenbacher says, simply because "effective recovery of fugitive slaves was incompatible with effective protection of free blacks against wrongful seizure" (pp. 212-13). Detailing both well-known and

lesser known episodes, Fehrenbacher describes the futility with which black and white northerners attempted to secure federal recognition of the states' obligations to their own citizens, with the ultimate exercise of federal authority, the Fugitive Slave Act of 1850, "utterly one-sided, lending categorical federal protection to slavery while making no concession to the humanity of African Americans" (p. 232).

In the end, however, the stress the antislavery movement placed on keeping the territories free "marginalize[d] the fugitive slave issue, which was closely associated in the public mind with abolitionist sympathies" (p. 245). Although Republican state legislatures passed personal liberty laws, Fehrenbacher concludes that these were driven more by a desire to retaliate against southern intransigence on the territorial issue than to secure African-Americans' rights. More than five years passed before any Republican introduced a bill or resolution on the subject in Congress, he reports. Lincoln opposed agitation of the subject and not until 1864 did Congress finally repeal the offensive legislation.

McAfee completed the chapters on slavery in the territories and "the Republican revolution." The first concisely summarizes some of the points Fehrenbacher made in his monumental *Dred Scott Case*,[11] but concentrates on the territorial issue. (Surprisingly, Fehrenbacher and McAfee nowhere attend to the struggle over the definition of American citizenship – a conflict central to the *Scott* case specifically and the development of the slaveholding republic generally.) There was no basis for the argument, developed only in the 1830s and adopted by the Supreme Court in 1857 (and articulated in a different form by northern Democrats), that Congress lacked plenary authority over slavery in the territories. Despite the ban on slavery in the Northwest Ordinance, early congressional policy was generally proslavery, leading to a northern effort in the Missouri crisis to bar the northward creep of slavery in the Louisiana Purchase. That controversy so panicked southerners that they insisted, with great success, that northerners suppress their antislavery sentiments, revising the universal principles of the Declaration of Independence to apply to white people alone. The *Dred Scott* decision and subsequent southern demands that Congress pass a slave code for the territories were the logical consequences of the establishment of the slaveholding republic. "[T]he federal government had effectively become a proslavery instrument…." So deeply and for so long had slavery permeated the federal government, that southerners had come to see its identification with slavery as part of the constitutional order itself. When northern majorities challenged slavery's perquisites, southerners "demanded that the federal government enforce what it had come to regard as binding constitutional guarantees" (p. 291). As Fehrenbacher and McAfee make clear in their chapter "The Republican Revolution," to southerners, repudiation of the slaveholding republic was repudiation of the Constitution itself. However, McAfee suggests in his brief sketch of Reconstruction, the revolution was incomplete; by maintaining a state-centered federal system with only limited federal power to protect citizens' rights, the Supreme Court enabled a key aspect of the slaveholding republic to live on.

As the foregoing description suggests, Fehrenbacher's work is a major synthesis of the understanding of the causes of the Civil War that has developed over the past half-century among historians who concentrate on law and public policy.

It is old-fashioned in that it sees public policy as the crucial element in the struggle over slavery. Fehrenbacher says little or nothing about the cultural and economic aspects of the conflict, and relatively little about the racial aspects–and nothing about the social construction of race that many historians would now attend to. He takes no pains to establish the "agency" of ordinary white and black people in precipitating the issues that culminated in public policy, and thus conveys no sense of the "popular constitutionalism" that in part explains why ordinary northerners and southerners were willing to fight rather than compromise the slavery issue. No doubt Fehrenbacher and McAfee would agree that such factors were important, but clearly for them the key matter is how they manifested themselves in at the highest levels of government. Yet something is definitely missing in such an account, for public policy developed in a democratic environment in which public opinion played a crucial role; the reader never gets the sense of the larger politics of the slaveholding republic.

One of the consequences of this concentration at the top levels of government is that Fehrenbacher was surprisingly oblivious to one of the most important ways the federal government sustained slavery, and one of the ways it did so that most directly touched ordinary Americans. Despite his experience as a legal historian, Fehrenbacher says not a word about the degree to which federal courts enforced contracts for the sale and hiring of slaves, sustained the use of slaves as collateral for loans, enforced negotiable instruments secured by slave property, and in general applied throughout the nation, in free states as well as slave, what was essentially the commer-

cial law of the slave states.

Historians generally have not appreciated what the implications of the antislavery principle of "Freedom National, Slavery Local" might have been for the federal courts. But its main exponent, Salmon P. Chase, gave a tantalizing hint as chief justice of the Supreme Court in 1872. He alone sustained the constitutionality of provisions of Reconstruction-era southern state constitutions barring the enforcement of debts based on the sale or lease of slaves, denying that they impaired the obligation of a contract. Contracts sustaining or depending upon slavery "were and are against sound morals and natural justice, and without support except in positive law," he insisted.[12]

Imagine antebellum federal courts saying the same! Surely the federal courts' uniform treatment of slaves as property for legal purposes was one element of the slaveholding republic with which southerners were most concerned, and its potential reversal by antislavery judges one of the nightmares they envisioned in a republic rededicated to freedom. (This point suggests an aspect of the rule in *Swift v. Tyson*[13]–which established a federal commercial law independent of state law, especially free-state law–that has not been much attended to; the federal courts could disregard any future state court decision that might have pronounced contracts or other commercial transactions based on slavery against public policy.)

Fehrenbacher's book is a major statement of historians' present view of the deep entanglement between slavery and the federal government before the Civil War. Although specialists in the various areas–political, legal, diplomatic–that he assesses will be familiar with much of the material, they will find new nuggets of information and new insights into the relationship between the federal government and slavery in those areas with which they are less familiar. Clearly written but not lively, it is aimed more at the scholar than the student, but it will certainly enlighten anyone who wants to learn more about national policy towards slavery and the public-policy origins of the Civil War.

Notes

[1]. Seminal articulations of the "needless war" view were Charles W. Ramsdell, "The Natural Limits of Slavery Expansion," *Mississippi Valley Historical Review* 16 (October 1929): 151-71; Avery Craven, "The Coming of the War Between the States," *Journal of Southern History* 2 (August 1936): 30-63; James G. Randall, "A Blundering Generation," *Mississippi Valley Historical Review* 27 (June 1940): 3-28; David Donald, *An Excess of Democracy: The Civil War and the Social Process* (Oxford: Clarendon Press, 1960), republished in David Donald, *Lincoln Reconsidered: Essays on the Civil War Era*, 2d ed. (New York: Alfred A. Knopf, 1966), 209-35. *See* Thomas J. Pressly, "The Repressible Conflict," chapter 7 of *Americans Interpret Their Civil War* (Princeton: Princeton University Press, 1954).

[2]. David Brion Davis, *The Slave Power Conspiracy and the Paranoid Style* (Baton Rouge: Louisiana State University, 1969).

[3]. For example, Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975); Michael Kent Curtis, *Free Speech, "the People's Darling Privilege": Struggles for Freedom of Expression in American History* (Durham: Duke University Press, 2000), 117-299; Merton L. Dillon, *The Abolitionists: The Growth of a Dissenting Minority* (DeKalb: Northern Illinois University Press, 1974), 83-111; Russel B. Nye, *Fettered Freedom: Civil Liberties and the Slavery Controversy, 1830-1860* (Urbana: University of Illinois Press, 1963), 153-73; Leonard L. Richards, *"Gentlemen of Property and Standing": Anti-Abolition Mobs in Jacksonian America* (New York: Oxford University Press, 1970).

[4]. Mary Frances Berry, *Black Resistance, White Law: A History of Constitutional Racism in America* (New York: Appleton-Century-Crofts, 1971); Stanley W. Campbell, *The Slave Catchers: Enforcement of the Fugitive Slave Law, 1850-1860* (Chapel Hill: University of North Carolina Press, 1968); Curtis, *Free Speech*; Nye, *Fettered Freedom*, 153-73; Clement Eaton, *The Freedom-of-Thought Struggle in the Old South* (New York: Harper & Row, 1964); Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978); Carole Wilson, *Freedom at Risk: The Kidnapping of Free Blacks in America, 1780-1865* (Lexington: University Press of Kentucky, 1994); James Oliver Horton and Lois E. Horton, "A Federal Assault: African-Americans and the Impact of the Fugitive Slave Law of 1850," in Paul Finkelman, ed., *Slavery & the Law* (Madison: Madison House, 1997),143-60; Michael Kent, Curtis, "The Crisis Over The Impending Crisis: Free Speech, Slavery, and the Fourteenth Amendment," in *id.*, 161-206.

[5]. Leon F. Litwack, "The Federal Government and the Free Negro," chapter 2 of *North of Slavery: The Negro in the Free States, 1790-1860* (Chicago: University of Chicago Press, 1961), 30-63.

[6]. Donald G. Nieman, *Promises to Keep: African*

Americans and the Constitutional Order, 1776 to the Present (New York: Oxford University Press, 1991), 14-24.

[7]. Fehrenbacher, *The Dred Scott Case*, 37.

[8]. *See, e.g.*, Thurgood Marshall, "The Constitution: A Living Document," *Howard Law Journal* 1987: 623-28; Paul Finkelman, "Affirmative Action for the Master Class: The Creation of the Proslavery Constitution," *University of Akron Law Review* 32 (No. 3, 1999): 423-70; Finkelman, *Slavery and the Founders: Race and Slavery in the Age of Jefferson* (Armonk, NY: M.E. Sharpe, 1996); Finkelman, "Slavery and the Constitution: Making a Covenant with Death," in Richard R. Beeman, Stephen Botein, and Edward C., Carter, II, eds., *Beyond Confederation: Origins of the Constitution and American National Identity* (Chapel Hill: University of North Carolina Press, 1987); William M. Wiecek, "The Witch at the Christening: Slavery and the Constitution's Origins," Leonard W. Levy and Dennis J. Mahoney, eds., *The Framing and Ratification of the Constitution* (New York: Macmillan, 1987), 178-84; Wiecek, " 'The Blessings of Liberty': Slavery in the American Constitutional Order," in Robert A. Goldman and Art Kaufman, eds., *Slavery and Its Consequences: The Constitution, Equality, and Race* (Washington, DC: American Enterprise Institute, 1988), 23-34.

[9]. *E.g.*, Phillip Shaw Paludan, "Hercules Unbound: Lincoln, Slavery, and the Intention of the Framers," in Donald G. Nieman (ed.), *The Constitution, Law, and American Life: Critical Aspects of the Nineteenth-Century Experience* (Athens: University of Georgia Press, 1992), 1-22; Herbert J. Storing, "Slavery and the Moral Foundations of the American Republic," in Goldman and Kaufman, eds., *Slavery and Its Consequences*, 45-63, esp. 45-55; Nieman, *Promises to Keep*, 10-14. That Jack N. Rakove views slavery as merely a tangential matter to the framers is implicit but clear in his *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Alfred A. Knopf, 1996).

[10]. Don E. Fehrenbacher, "Slavery, the Framers, and the Living Constitution," in Goldman and Kaufman, eds., *Slavery and Its Consequences*, 1-22.

[11]. Fehrenbacher, *The Dred Scott Case*.

[12]. Osborn v. Nicholson, 80 U.S. (13 Wall.) 654, 663 (1872) (Chase, C.J., dissenting).

[13]. 41 U.S. 1 (1842).

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