
Instead of Waiting for the Thirteenth Amendment: The War Power, Slave Marriage, and Inviolable Human Rights

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IN THE FATEFUL YEAR before peace came at Appomattox—as slaves pursued their exodus from bondage and the Civil War dragged on—a counterpoint arose between two antislavery decrees under debate in the United States Congress. That counterpoint illuminates conceptions of universal human rights forged at an epic moment in the downfall of New World slavery.

One decree became the Thirteenth Amendment; all but forgotten is the other, a congressional act to “encourage Enlistments” in the Union Army. The amendment provided for abolishing slavery everywhere in the United States and its territories. The enlistment measure freed soldiers’ wives and children owned by masters in the loyal border states exempt from the 1863 Emancipation Proclamation. As destroying slavery became inseparable from vanquishing the South, bondsmen refused to go to war unless, in exchange, they won their families’ freedom as well as their own. “It is a burning shame to this country,” affirmed congressional abolitionists, “to hold the wives and the children in slavery of men who are periling their lives before the rebel legions.” A month before the war’s end, on the very day of Abraham Lincoln’s second inaugural, March 4, 1865, the measure took effect. As the Thirteenth Amendment awaited ratification and as the president spoke of malice toward none, upwards of 50,000 slave wives and children went free.¹ In a world in flux, where constitutional

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¹ *Congressional Globe*, 38th Cong., 2nd Sess., 1864, 64. For the text of the enlistment measure, see Figure 1. And see *U.S. Statutes at Large* 13 (1866): 571. Along with the loyal border states, the enlistment measure also applied initially to Confederate areas controlled by the Union and therefore exempt from the Emancipation Proclamation: Tennessee and portions of Louisiana and Virginia. But when it took effect, in March 1865, slavery remained only in Kentucky and Delaware. It is impossible to know how many slave wives and children it freed. Military estimates range from 75,000 to 100,000, based on Kentucky enlistment of about 25,000 bondsmen, though varying with counts of the children involved. See *Globe*, 38th Cong., 1st sess., 1864, 1180; 38th Cong., 2nd sess., 64; Ira Berlin, Joseph P. Reidy, and Leslie

change flowed from the tides of war, the abolition of slavery fused with freedom endowed by marriage, thereby tethering a new birth of human rights to enduring domestic bonds.

That counterpoint casts new light on the making of abolition—a problem of enduring historical and constitutional significance. It reveals not simply how Congress asserted its sovereignty to nullify chattel relations and secure human rights, but also what counted as slavery and freedom as the advance of the Union Army overthrew old ways of life. Simply put, it manifests what abolition was meant to overturn and to create. For both the Thirteenth Amendment and the enlistment measure were acts of abolition. Both split asunder the relation of master and slave, destroying constitutionally protected property in human beings without compensating owners. Both turned chattel into free persons. Arising together amid the crisis of the Civil War, they belonged to a tradition of declaring rights and invalidating unjust forms of sovereignty that had emerged throughout the Atlantic world in the Age of Revolution, a tradition that wedded emancipation to marriage bonds among ex-slaves—from Haiti to Jamaica to the American South to Brazil.² Their juxtaposition, however, has never been systematically studied; indeed, the enlistment measure barely appears in landmark scholarship on abolition or constitutional transformation.³ Overshadowed

S. Rowland, eds., *The Black Military Experience* (New York, 1982), 183–278, esp. 196–197; Herbert G. Gutman, *The Black Family in Slavery and Freedom, 1750–1925* (New York, 1976), 375–385. For contemporary accounts, see Henry Wilson, *History of the Antislavery Measures of the Thirty-seventh and Thirty-eighth United-States Congresses, 1861–64* (Boston, 1864), 293, 313–327; Ira Berlin, *The Destruction of Slavery* (New York, 1985), 54, 511–518; Berlin, Reidy, and Rowland, *The Black Military Experience*, 240–278; Richard D. Sears, *Camp Nelson, Kentucky: A Civil War History* (Lexington, Ky., 2002). On Union Army enlistment and slave emancipation, see Mary Frances Berry, *Military Necessity and Civil Rights Policy: Black Citizenship and the Constitution, 1861–1968* (Port Washington, N.Y., 1977), esp. 79–82; Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* (New York, 1988), 1–76; Ira Berlin, “Who Freed the Slaves? Emancipation and Its Meaning,” in David W. Blight and Brooks D. Simpson, eds., *Union and Emancipation: Essays on Politics and Race in the Civil War Era* (Kent, Ohio, 1997), 105–121, esp. 119; Joseph P. Reidy, “Armed Slaves and the Struggles for Republican Liberty in the U.S. Civil War,” in Christopher Leslie Brown and Philip D. Morgan, eds., *Arming Slaves: From Classical Times to the Modern Age* (New Haven, Conn., 2006), 274–303, esp. 285, 293.

² See Robin Blackburn, *The Overthrow of Colonial Slavery, 1776–1848* (London, 1988); Lynn Hunt, *Inventing Human Rights: A History* (New York, 2007); Stephanie McCurry, “War, Gender, and Emancipation in the Civil War South,” in William A. Blair and Karen Fisher Younger, eds., *Lincoln's Proclamation: Emancipation Reconsidered* (Chapel Hill, N.C., 2009); Christopher Leslie Brown, *Moral Capital: Foundations of British Abolitionism* (Chapel Hill, N.C., 2006), 235–236; Persis Charles, “The Name of the Father: Women, Paternity, and British Rule in Nineteenth-Century Jamaica,” *International Labor and Working-Class History* 41 (Spring 1992): 4–48; Myriam Cottias, “Gender and Republican Identity in the French West Indies, 1848–1945,” *Slavery & Abolition* 26, no. 2 (2005): 233–245; Elizabeth Colwill, “‘Fêtes de l’hymen, fêtes de la liberté’: Marriage, Manhood, and Emancipation in Revolutionary Saint-Domingue,” in David Patrick Geggus and Norman Fiering, eds., *The World of the Haitian Revolution* (Bloomington, Ind., 2009), 125–155; Pamela Scully and Diana Paton, eds., *Gender and Slave Emancipation in the Atlantic World* (Durham, N.C., 2005), esp. 13, 155–156; Frederick Cooper, Thomas C. Holt, and Rebecca J. Scott, *Beyond Slavery: Explorations of Race, Labor, and Citizenship in Postemancipation Societies* (Chapel Hill, N.C., 2000), 112–120.

³ With the exception of Berry, *Military Necessity and Civil Rights Policy*, 79–82, scholarly analysis of the enlistment measure focuses on local conflict over emancipation and family relations in Kentucky and other border states; see Gutman, *The Black Family in Slavery and Freedom*, 375–385; Victor B. Howard, *Black Liberation in Kentucky: Emancipation and Freedom, 1862–1884* (Lexington, Ky., 1983), 79–87, 111–129; Amy Murrell Taylor, *The Divided Family in Civil War America* (Chapel Hill, N.C., 2005), esp. 193–197. Although the measure involved congressional war power, it is not noted in key works on congressional law and constitutional transformation in the Civil War era; for example, Jacobus tenBroek, “Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key

by the antislavery amendment, the wartime bounty of freedom has seemed beside the point.

Yet for more than a year, from the early winter of 1864 to the early spring of 1865, Congress debated the emancipatory decrees simultaneously—hour after hour, month after month—making explicit as never before beliefs that resonated across the Atlantic about the inviolate rights born of slavery's death. The abolition amendment was a stark and momentous transformation of fundamental law. By contrast, the enlistment measure was an implicit act of abolition—a peculiar *quid pro quo*—premised on slave marriage bonds. Still, it represented an unprecedented assertion of congressional authority over the domestic institutions of the slave states. Divesting loyal masters of the wives and children of bondsmen turned Union soldiers, the nation-state for the first time imposed uncompensated emancipation on slave owners not in rebellion, a challenge to the Takings Clause of the Fifth Amendment. And the measure assumed precisely what slavery denied, the right of chattel to marry and have a family. In counterpoint, therefore, the heralded amendment and the obscure measure distilled the perplexity of abolishing slavery as a domestic institution defined by property in human beings; for in the eyes of the law, slavery and marriage amounted to symmetrical bonds, categorized together as relations of domestic dependency, entitling the master of a household to the persons and labor of both his wife and his slaves, although one bond originated in coercion and the other in consent.⁴ At the heart of the matter lay the badges of woman's slavery, all the aspects of chattel bondage particular to women.

In Thirteenth Amendment doctrine, slavery's badges have always signified not just what abolition ended but what freedom must forbid, wrongs so dehumanizing as to count as slavery. Here, too, the counterpoint between the abolition decrees is

to the Fourteenth," *California Law Review* 39, no. 2 (1951): 171–203; Harold M. Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (New York, 1973); Michael Les Benedict, *A Compromise of Principle: Congressional Republicans and Reconstruction, 1863–1869* (New York, 1974); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven, Conn., 1998); Bruce Ackerman, *We the People: Transformations* (Cambridge, Mass., 1998). Its enactment, but not its constitutional or legislative history, is discussed in Foner, *Reconstruction*, 8; Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, Mass., 2000), 84; Michael Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment* (Cambridge, 2001), 82.

⁴ See Charles K. Whipple, *The Family Relation, as Affected by Slavery* (Cincinnati, Ohio, 1858), esp. 3, 9, 11–14. At law, marriage and slavery were classified together as domestic relations in which a master held property in his wife, slaves, children, and servants; and the sovereignty of husbands was by no means disestablished by state marriage reform legislation that eroded coverture during the mid-nineteenth century. See John Locke, *Second Treatise of Government*, ed. C. B. Macpherson (1690; repr., Indianapolis, 1980), 46; Carole Pateman, *The Sexual Contract* (Stanford, Calif., 1988), 116–188; Michael P. Johnson, "Planters and Patriarchy: Charleston, 1800–1866," *Journal of Southern History* 46, no. 1 (1980): 45–72; Stephanie McCurry, *Masters of Small Worlds: Yeoman Households, Gender Relations, and the Political Culture of the Antebellum South Carolina Low Country* (New York, 1995); Thavolia Glymph, *Out of the House of Bondage: The Transformation of the Plantation Household* (New York, 2008); Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (New York, 1998), 1–59, 175–263; Norma Basch, "Marriage and Domestic Relations," in Michael Grossberg and Christopher Tomlins, eds., *The Cambridge History of Law in America*, 3 vols., vol. 2: *The Long Nineteenth Century (1789–1920)* (New York, 2008), 245–279. On the complexities of the institution of marriage, see Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill, N.C., 1988); Cott, *Public Vows*, esp. 1–104; Hendrik Hartog, *Man and Wife in America: A History* (Cambridge, Mass., 2000), esp. 1–39, 93–166; Laura F. Edwards, *Gendered Strife and Confusion: The Political Culture of Reconstruction* (Urbana, Ill., 1997); Reva B. Siegel, "'The Rule of Love': Wife Beating as Prerogative and Privacy," *Yale Law Journal* 105, no. 8 (1996): 2117–2207.

illuminating, highlighting the puzzle of an amendment revolutionary in design yet narrow in subsequent reach. It brings to light a paradox: the preeminence of woman's torments in calls for abolition but their absence thereafter from Thirteenth Amendment jurisprudence. Until abolition, the bondswoman's subjection carried much of the antislavery argument, by negation vindicating the ideal of inalienable human rights violated by chattel slavery. Yet under the abolition amendment, slavery has come to represent a matter only of labor, property, and race—not sex.⁵ Notably, the badges of woman's slavery so manifest in legitimating abolition have never figured in Thirteenth Amendment doctrine. It is as if abolitionists inside and outside the halls of Congress had never justified universal emancipation by speaking of woman's particular bondage.

In turn, the paradox of the Thirteenth Amendment illuminates a peculiar strain of the American human rights tradition—that national guarantees of newfound rights have often found grounding in the power of Congress to regulate interstate commerce rather than in expansive construction of the coercion and debasement barred as slavery by the amendment. Notably, beyond a handful of landmark rulings striking down debt peonage, flagrant involuntary servitude, and some instances of race-based violence and discrimination, the Thirteenth Amendment has never been a potent source of rights claims. Rather, the logic of attaching personal liberties to the traffic in things under the Commerce Clause, which Congress invoked in banning the African slave trade but never directed to the institution of slavery or even the domestic slave trade, has come to hold sway. Where no state action is at issue (and accordingly no Fourteenth Amendment guarantees of due process and equal protection), it is mainly through the commerce power that over the last century Congress has acted against unfreedom in spheres ranging from streets and workplaces to places of public accommodation and private households. Thus many fundamental rights, such as the right not to endure sexual trafficking or starvation wages, are not guaranteed as *human* rights but instead flow from capitalist exchange, secured by congressional enactments deriving constitutional legitimacy from “affecting” commodity transactions that cross state lines. Although the swelling of the commerce power emerged not with slave emancipation but from later reform aspirations, it vividly reflects the limits of antislavery constitutionalism. Freedom owes to commerce precisely where the Thirteenth Amendment founders as a declaration of universal human rights.⁶

⁵ See the cases running from *U.S. v. Rhodes*, 27 F. Cas. 785 (1866), and *Civil Rights Cases*, 109 U.S. 3 (1883), through *Bailey v. Alabama*, 219 U.S. 219 (1911), and *Butler v. Perry*, 240 U.S. 328 (1916), to *Jones v. Mayer*, 392 U.S. 409 (1968), and *United States v. Kozminski*, 487 U.S. 931 (1988); Aziz Z. Huq, “Peonage and Contractual Liberty,” *Columbia Law Review* 101, no. 2 (2001): 351–391; Akhil Reed Amar, “Women and the Constitution,” *Harvard Journal of Law and Public Policy* 18, no. 2 (1995): 465–473; Neal Kumar Katyal, “Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution,” *Yale Law Journal* 103, no. 3 (1993): 791–826, esp. 796–809; Guyora Binder, “The Slavery of Emancipation,” *Cardozo Law Review* 17, no. 6 (1996): 2063–2162; Joyce E. McConnell, “Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment,” *Yale Journal of Law and Feminism* 4 (1991–1992): 207–253.

⁶ *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 22, 24, 31, 43 (1937). On a rights tradition based on ideas of empathy and universal human dignity but entailing exclusions of its own, see Hunt, *Inventing Human Rights*. Contrast the language of the Commerce Clause in the U.S. Constitution empowering Congress “To regulate commerce with foreign nations, and among the several states” (Art. 1, sect. 8) with the preamble of the *Universal Declaration of Human Rights*, which

The roots of that peculiar rights tradition, therefore, reach back to abolition itself, and to the unexplored counterpoint between the Thirteenth Amendment and the enlistment measure. In that counterpoint lies a wealth of meaning about the opposition of slavery and freedom at the moment of abolition and the nature of personal and political sovereignty to be transformed—meaning that bears on both the disappearance of the badges of woman's slavery after abolition and a rights tradition stamped with the trademark of commerce. At bottom, the juxtaposition of the two abolition decrees reveals that the enigmas of the Thirteenth Amendment began in the slave household, where the master possessed dominion over both his wife and slaves.

Today, lawyers seek to breathe new life into the Thirteenth Amendment—to extend its reach and tap its core values, to undo its impotence. The aim is to re-interpret slavery's badges so as to advance antislavery constitutionalism and guarantees of human rights unstated at either the first or the second founding.⁷

states: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . ." Landmark congressional acts grounded in the Commerce Clause include the 1910 White Slave Traffic Act, the 1935 Wagner Act, the 1938 Fair Labor Standards Act guaranteeing rights at work, the 1964 Civil Rights Act guaranteeing an equal right to public accommodations and employment, and the 1994 Violence Against Women Act guaranteeing the right to be free from bodily harm arising from gender animus.

It is beyond the scope of this essay, which focuses on the moment of abolition and its meaning for human rights doctrine, to trace the subsequent development of antislavery constitutionalism or the commerce power. The essay is not intended to join the jurisprudential debate over current application of the amendment. Nor is it a normative plea for either the amendment or the enlistment measure. Finally, it is not a theoretical meditation on the genuine meaning of slavery, past or present. Rather, it is a historical inquiry into abolition's moment of origin—an inquiry that helps illuminate why the amendment's subsequent sweep has been narrow by bringing to light the unexplored counterpoint between the amendment and the enlistment measure. See, in addition to the sources in fn. 5, Harold M. Hyman and William M. Wiecek, *Equal Justice under Law: Constitutional Development, 1835–1875* (New York, 1982), esp. 386–472; James Gray Pope, "The Thirteenth Amendment versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957," *Columbia Law Review* 102, no. 1 (2002): 1–122; Risa L. Goluboff, *The Lost Promise of Civil Rights* (Cambridge, Mass., 2007); Kermit Hall, ed., *The Oxford Companion to the Supreme Court of the United States* (New York, 1992), 168–169; William M. Carter, Jr., "Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery," *University of California Davis Law Review* 40, no. 4 (2007): 1311–1378; Alexander Tsesis, ed., *The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment* (New York, forthcoming 2010). On the Commerce Clause and slavery, see Steven Deyle, *Carry Me Back: The Domestic Slave Trade in American Life* (New York, 2005), 3–39, 174–205; David L. Lightner, *Slavery and the Commerce Power: How the Struggle against the Interstate Slave Trade Led to the Civil War* (New Haven, Conn., 2006). The Trafficking Victims Protection Act of 2000 condemns trafficking in persons as "a contemporary manifestation of slavery" and broadened the anti-peonage statute. Pub. L. 106-386, Div. A, secs. 102(a), 112 (amending 18 U.S.C. sec. 1589), 114 Stat. 1466, 1486. The act is largely aimed at reducing the international trafficking in persons both for involuntary labor and for prostitution. Although Congress cites both the effect of human trafficking on interstate and foreign commerce and the abolition of slavery by the Thirteenth Amendment in the Findings section of the act (*ibid.*, sec. 102(b)(12), (22), 114 Stat. 1467, 1468), the act's operative provisions apply only to trafficking that is "in or affecting interstate commerce." *Ibid.*, sec. 112, 114 Stat. 1487 (amending 18 U.S.C. sec. 1591). In *United States v. Morrison*, 529 U.S. 598 (2000), the Court held that the civil remedy afforded under the Violence Against Women Act exceeded congressional power under the Commerce Clause.

⁷ See Akhil Reed Amar, "Remember the Thirteenth," *Constitutional Commentary* 10, no. 2 (1993): 403–408; Andrew Koppelman, "Forced Labor: A Thirteenth Amendment Defense of Abortion," *Northwestern University Law Review* 84, no. 2 (1989–1990): 480–535; Angie Perone, "Unchain My Heart: Slavery as a Defense to the Dismantling of the Violence Against Women Act," *Hastings Women's Law Journal* 17, no. 1 (2006): 115–140; Carter, "Race, Rights, and the Thirteenth Amendment"; Katyal, "Men Who Own Women"; Tobias Barrington Wolff, "The Thirteenth Amendment and Slavery in the Global Economy," *Columbia Law Review* 102, no. 4 (2002): 973–1050.

At stake here is a different query—not what the law should be, but rather what abolitionists meant by dwelling on the bondswoman as they amended the constitution to forbid slavery and affirmed freedom as intrinsic to being human. The question is what the badges of her slavery had to do with the Thirteenth Amendment, and what the Thirteenth Amendment had to do with antislavery doctrines of human rights. At the core of those doctrines lay the ideal of the inviolate self—the antithesis of the chattel relations whose inhumanity abolitionists so powerfully symbolized by the bondswoman’s violation.⁸

Such a vantage point renders all the more poignant the question about freedom that a bondswoman owned by a loyal Maryland master posed to Lincoln in a letter of August 25, 1864. As the abolition amendment and enlistment measure lay pending in Congress, she wrote:

Mr president It is my Desire to be free. to go to see my people on the eastern shore . . . you will please let me know if we are free. and what i can do. I write to you for advice. please send me word this week. or as soon as possible and oblige.⁹

It is not clear whether she was a soldier’s wife; nor does President Lincoln appear to have written back. Yet both perhaps would have found bitter irony in foreseeing that a century later, fundamental rights denied by slavery—to bargain over wages, not to endure unremitting labor, sexual trafficking, or employment discrimination, and to be free from sexual violence—all would be safeguarded by congressional law resting not on the Thirteenth Amendment but rather on the commerce power, as if she and her doings were still no different than a commodity crossing state lines. How that came to occur owed to the counterpoint between the abolition amendment and the enlistment measure. In basing the bondswoman’s freedom on her being a wife, abolition’s authors began narrowing what counted as slavery at the very moment of its downfall. Within the bonds of marriage, the badges of her slavery disappeared.

THE QUESTION LINCOLN LEFT UNANSWERED haunted Congress as the debate over abolition unfolded—over whether ownership of human beings still could coexist with freedom and whether the death blow to slavery should be delivered solely as a constitutional amendment or by a legislative act as well. Fiercely divided over the legitimacy of chattel slavery and the authority of Congress to eradicate it, statesmen nonetheless agreed that the enlistment measure constituted abolition by another name. For both decrees violated Lincoln’s pledge that slave property belonging to masters loyal to the Union would be left untouched by the Civil War. Before floor debate even opened on the amendment, as Confederate troops advanced through Kentucky in the spring of 1864, Congress began thrashing out the meaning of freeing slave wives and children. “I say it is sound policy to strike this system of slavery whenever and wherever you can get a blow at it,” declared the measure’s author, Senator Henry Wilson of Massachusetts. A year later, as Union soldiers swept through North Carolina, a slaveholding Maryland congressman, Benjamin Harris,

⁸ On inviolability as a core value, a right of personhood, fundamental to human dignity, see Martha C. Nussbaum, *Sex and Social Justice* (New York, 1999), 55–84; Hunt, *Inventing Human Rights*, 28–31.

⁹ “Maryland Slave to the President,” in Berlin, *The Destruction of Slavery*, 384–385.

38TH CONGRESS,
2D SESSION.

S. R. 82.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 13, 1864.

Mr. WILSON asked, and by unanimous consent obtained, leave to bring in the following joint resolution; which was read twice, referred to the Committee on Military Affairs and the Militia, and ordered to be printed.

JOINT RESOLUTION

To encourage enlistments and to promote the efficiency of the military forces of the United States.

1 *Resolved by the Senate and House of Representatives*
 2 *of the United States of America in Congress assembled,*
 3 That, for the purpose of encouraging enlistments and pro-
 4 moting the efficiency of the military and naval forces of the
 5 United States, it is hereby enacted that the wife and children,
 6 if any he have, of any person that has been, or may be,
 7 mustered into the military or naval service of the United
 8 States shall, from and after the passage of this act, be for-
 9 ever free, any law, usage, or custom whatsoever to the con-
 10 trary notwithstanding; and in determining who is or was the
 11 wife and who are the children of the enlisted person herein
 12 mentioned, evidence that he and the woman claimed to be
 13 his wife have cohabited together, or associated as husband
 14 and wife, and so continued to cohabit or associate at the

FIGURE 1: *From Bills and Resolutions*, U.S. Senate, 38th Congress, 2nd Session.

2

15 time of the enlistment, or evidence that a form or ceremony
 16 of marriage, whether such marriage was or was not author-
 17 ized or recognized by law, has been entered into or cele-
 18 brated by them, and that the parties thereto thereafter lived
 19 together, or associated or cohabited as husband and wife, and
 20 so continued to live, cohabit, or associate at the time of
 21 the enlistment, shall be deemed sufficient proof of marriage
 22 for the purposes of this act, and the children born during the
 23 continuance of any such marriage shall be deemed and taken
 24 to be the children embraced within the provisions of this act,
 25 whether such marriage shall or shall not have been dissolved
 26 at the time of such enlistment.

railed, "It is for the purpose, and that only, of interfering with and abolishing the institution called slavery . . . by the most underhand and unconstitutional means."¹⁰

Simultaneously, the two abolition decrees traveled slowly through Congress, and first appeared in the Senate days apart in January 1864—the amendment referred to the Judiciary Committee, the enlistment measure emerging from Wilson's Committee on Military Affairs and the Militia. Finally, more than a year later, they were carried through both houses of Congress, weeks apart. In early March, just after Congress established the Freedmen's Bureau, Lincoln signed the enlistment measure into law, while the war dragged on and the states proceeded with ratifying the amendment.¹¹

¹⁰ *Globe*, 38th Cong., 1st sess., 1180; 38th Cong., 2nd sess., 1003. On Lincoln's position regarding non-interference with slavery in loyal states, see 1860 Republican Party National Platform, plank 4, available at <http://history.furman.edu/~benson/docs/repplat6.htm>; James Oakes, *The Radical and the Republican: Frederick Douglass, Abraham Lincoln, and the Triumph of Antislavery Politics* (New York, 2007), 139–140, 151–155.

¹¹ In January 1865, the Senate approved the enlistment measure; meanwhile, in the House, debate was just resuming on the amendment, which the Senate had passed in the spring of 1864. At the end of the month, the House adopted the amendment, and then finally, in February, the enlistment measure, as the states proceeded with ratification.

The counterpoint between them was plain to all in Congress. "I think it is a measure to fill up our armies," Wilson somewhat disingenuously said. "It is a very simple and plain proposition. It simply provides for freeing the wife and children." But none misunderstood the momentous consequences of the simple measure, with its peculiar household basis. It fell short of constitutional transformation, yet decisively broke with all other emancipatory precedents that respected the slave property of loyal masters, reaching beyond the contraband of war; beyond the Confiscation Acts; beyond the 1862 Militia Act, which freed only soldiers' families owned by rebel masters; beyond the Emancipation Proclamation, which touched only rebel states; and beyond the principle of freeing the bondsman himself as a reward for fighting for the Union. The point was to pursue the amendment and the measure in tandem, two paths leading to one end, argued abolitionists. As Massachusetts senator Charles Sumner bluntly set forth the intersection, "The main proposition, sir, is to strike slavery wherever you can hit it . . . I am for a constitutional amendment . . . but how long will it take to carry that proposition through both Houses of Congress, then to carry it to its final consummation by the votes of the Legislatures of the country?" Meanwhile, proslavery men condemned the measure as tantamount to abolition, but worse. "I do not believe that it is for the purpose of supplying soldiers to the United States," Congressman Harris rebuked the House. "You are fearful that the amendment may not be adopted by the States, and you are determined to break through all legal and moral obligations in order to carry out your determination to destroy this institution."¹² Whether in advance of the Thirteenth Amendment or as a fallback, the soldier's quid pro quo aimed at slave wives and children owned by masters loyal to the Union, property safeguarded by the existing Constitution.

Through the bonds of marriage between chattel, then, the enlistment measure would abolish slavery. By contrast, the amendment was universal in nature, its reach unlimited by household relations. And all in Congress knew that the amendment represented no simple and plain proposition meant only to free slave wives and children. Therefore, it was all the more peculiar that the final Senate colloquy on the amendment, on April 8, 1864, came to turn on its meaning for women—not only bondswomen, but all women.

The colloquy concerned the language of the Thirteenth Amendment, but ultimately brought to light the ambiguities of constitutional abolition itself and the inviolable rights at stake. After weeks of debate, two differing proposals for the amendment still lay before the Senate. There were the now-familiar words, drafted by the Senate Judiciary Committee and drawn from the Northwest Ordinance of 1787: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation." And there were the now-forgotten words, drafted by Sumner, who drew on France's revolutionary *Declaration of the Rights of Man*: "All

¹² *Globe*, 38th Cong., 1st sess., 1178, 1181, 1178; 38th Cong., 2nd sess., 1003. See Berlin, "Who Freed the Slaves?"; Kate Masur, "'A Rare Phenomenon of Philological Vegetation': The Word 'Contraband' and the Meanings of Emancipation in the United States," *Journal of American History* 93, no. 4 (2007): 1–65.



FIGURE 2: "Scene in the House on the Passage of the proposition to amend the Constitution, January 31, 1865." From *Harper's Weekly*, February 18, 1865, 97. Prints and Photographs Division, Library of Congress, LC-USZ62-127599.

persons are equal before the law, so that no person can hold another as a slave; and the Congress shall have power to make all laws necessary and proper to carry this declaration into effect everywhere in the United States.” This was the amendment Sumner had in mind when he was pleading for the swift enactment of the enlistment measure.¹³

A crucial difference in the proposed constitutional prohibitions of slavery was that the Judiciary Committee’s amendment spoke about place, whereas Sumner’s amendment spoke about persons. The committee’s amendment constituted the consummate free-soil ordinance, everywhere and forever forbidding slavery in the land. Sumner’s amendment constituted a declaration of universal human rights, expressly recognizing all persons as rights-bearing individuals. Although the French *Declaration* did not prohibit colonial slavery, it provided a model for establishing individual rights. “We must repair for a moment to France,” Sumner proposed. Then he proceeded to invoke the “natural rights of man, inalienable and sacred” brought forth in the “throes of revolution.” Both versions of the abolition amendment enjoined universal emancipation. Yet the committee’s purely negative injunction infinitely extended the boundary of the Northwest Ordinance revered by abolitionists. Meanwhile, Sumner pointed out that his affirmation of freedom hewed to another sacred text as well—“that idea of human rights which is enunciated in our Declaration of Independence.”¹⁴

At such a turning point as abolition, language was of “transcendent importance,” and Congress must “make that language as perfect as possible,” said Sumner. “In placing a new and important text into our Constitution, it seems to me we cannot be too careful in the language we adopt.” Sounding like Rousseau, he declared, “Universal emancipation, which is at hand, can only be won by complete emancipation of the Constitution itself, which has been degraded to wear chains so long.”¹⁵

Yet confusion about the language still existed. As handwritten by Sumner, his amendment used the words “free before the law.” But that was a “mistake”—for the word was supposed to be “equal,” he said. Either way, affirming all persons as rights-bearing—whether by being free or by being equal before the law—was opposed by a Senate Judiciary Committee wary of transnational revolutionary doctrine. According to the committee chairman, Lyman Trumbull of Illinois, it was unclear why Sumner was “so pertinacious about particular words.” Still, after considering his proposal, the committee chose the free-soil language as the “best words,” homegrown American rhetoric, not words “copied from the French Revolution,” not foreign words with “nothing historical about them.” Even more pointedly, Jacob Howard of Michigan, who had joined in drafting the free-soil amendment, explained that he wished to “use significant language,” but not Sumner’s. “I prefer to dismiss all reference to French constitutions or French codes, and go back to the good old Anglo-Saxon language employed by our fathers.” For the French *Declaration of Rights* abolished “privileged classes”—not chattel slavery. Because the Thirteenth Amendment

¹³ *Globe*, 38th Cong., 1st sess., 1482; Vorenberg, *Final Freedom*, 52–60, 106–107. On the Northwest Ordinance, see *Butler v. Perry*, 240 U.S. 328 (1916); David Brion Davis, *In the Image of God: Religion, Moral Values, and Our Heritage of Slavery* (New Haven, Conn., 2001), 188–204.

¹⁴ *Globe*, 38th Cong., 1st sess., 1482, 1483.

¹⁵ *Ibid.*, 1447, 1488, 1480.

involved slavery, not class relations, universal words about the freedom (or equality) of all persons did not belong there.¹⁶

For a moment, then, in the spring of 1864, there arose the faint possibility that the abolition amendment might have been worded like the *Universal Declaration of Human Rights* a century later, presaging that charter's affirmation of all humanity as free and equal before the law, while also perhaps preempting any further guarantees of equal protection (as in the 1866 Civil Rights Act and the Fourteenth Amendment).¹⁷ Yet in the midst of the dispute over the French rights rhetoric, there arose another question—a question much closer to home. Indifferent to whether the word was “free” or “equal,” Senator Howard asked whether Sumner's imported words would touch the relation between men and women.

What significance is given to the phrase “equal” or “free” before the law in a common law court? . . . Besides, the proposition speaks of all men being equal. I suppose before the law a woman would be equal to a man, a woman would be as free as a man. A wife would be equal to her husband and as free as her husband before the law.¹⁸

In fact, Howard's paraphrasing was imprecise, for Sumner's language embraced all persons, not all men, thereby auguring the downfall of bondage sought by advocates of woman's emancipation. Implicitly, its universalism impinged on the master's dominion over his wife as well as his slaves—a form of sexed subjection older than American slavery but made newly conspicuous by the rise of transatlantic feminism, which was infused by the same rights doctrine as Sumner's amendment.¹⁹ The question could not have been more plain: Would such a Thirteenth Amendment recognize woman's rights and undo the bonds of marriage?

Yet the question was purely rhetorical, meant to vindicate only the free-soil amendment, not woman's freedom. Whereas Sumner echoed Rousseau in envisioning abolition, Howard oddly echoed the proslavery thinker George Fitzhugh, who forewarned, “Marriage is too much like slavery not to be involved in its fate.” So, too, Howard echoed a slaveholding member of the Judiciary Committee who that very day had assailed any amendment related to a “domestic matter in the States” by recalling that the marriage bond derived from the same system of dependent social relations as “property in slaves” and parent and child.²⁰ Thus Howard's rhe-

¹⁶ Ibid., 1447, 1488.

¹⁷ Ironically, as a sponsor of the Fourteenth Amendment, with its guarantees of equal protection, Jacob Howard later claimed that the abolition amendment implied equal standing before the law, irrespective of color or race; see Vorenberg, *Final Freedom*, 236.

¹⁸ *Globe*, 38th Cong., 1st sess., 1488. See McConnell, “Beyond Metaphor,” 207–208; Cott, *Public Vows*, 80; Vorenberg, *Final Freedom*, 57; Basch, “Marriage and Domestic Relations,” 269.

¹⁹ See Bonnie S. Anderson, *Joyous Greetings: The First International Women's Movement, 1830–1860* (New York, 2000); Nancy A. Hewitt, “Re-rooting American Women's Activism: Global Perspectives on 1848,” in Patricia Grimshaw, Katie Holmes, and Marilyn Lake, eds., *Women's Rights and Human Rights: International Historical Perspectives* (New York, 2001), 123–137; Kathryn Kish Sklar and James Brewer Stewart, eds., *Women's Rights and Transatlantic Antislavery in the Era of Emancipation* (New Haven, Conn., 2007).

²⁰ George Fitzhugh, *Sociology for the South; or, The Failure of Free Society* (1854; repr., New York, 1965), 205; *Globe*, 38th Cong., 1st sess., 1483. See James Henley Thornwell, *The Rights and Duties of Masters: A Sermon Preached at the Dedication of a Church, Erected in Charleston, S. C., for the Benefit and Instruction of the Coloured Population* (Charleston, S.C., 1850), 48–49; McCurry, *Masters of Small Worlds*.

torical question about woman's condition might have been taken for a protest against abolition.

Again, a question about woman's freedom went unanswered, as the Senate adopted the free-soil amendment, not least because the "clear, brief, and comprehensive clause" avoided the perplexities of a more universal declaration of human rights. Indeed, just a breath before it was posed, Sumner withdrew his phrasing, bowing to the will of the Judiciary Committee.²¹ Yet in that closing colloquy, abolitionists had come to link marriage with bondage in dissenting from principles of constitutional abolition inspired by revolutionary human rights doctrine, inadvertently revealing that the amendment's bearing on the badges of woman's slavery was anything but clear.

IT WAS THE ENLISTMENT MEASURE that began to settle the question of the bondswoman's freedom left hanging by the debate on the Thirteenth Amendment. Aiming both to fill the Union Army and to strike at the slave system, Congress dwelled on recruiting the bondsman and granting his wife liberty. Meanwhile, masters in the loyal states still trafficked in slave women and children and their crops—reaping the last value from slave property so long as it existed. Yet abolitionists never broached the commerce power as authority for Congress to enact the soldier's quid pro quo. For that would have contradicted an essential antislavery tenet—the immorality of recognizing property in human beings and treating them as commodities.²² Rather, the justification for the vast new sweep of legislative power entailed in congressional abolition turned on matters of war, marriage, property, and humanity.

On the battlefields, the demand for Union troops seemed insatiable. Meanwhile, Congress argued over the anomalies of the enlistment measure, rewording it repeatedly, raising momentous constitutional issues—from abolition as a war power to the legitimacy of human bondage to the property rights sanctified by the Fifth Amendment. At one point, the measure would have restated both the Emancipation Proclamation and the free-soil amendment. At others, it either would have reached only rebel masters, or alternatively would have compensated loyal masters for the taking of their property. At still another, it would have overturned property rights in Yankee capital as well as in human chattel. And again and again, abolitionists voted down slaveholders' calls to refer the measure to the Senate Judiciary Committee to decide its constitutionality. It was a debate at least as vituperative as that over the Thirteenth Amendment, and it went on longer; indeed, the measure's language remained unsettled for months after the amendment's had been fixed. At first, in early 1864, it concerned a hodgepodge of army affairs, from engineer battalions to equal pay regardless of race, but those were dispersed to other bills. And at first it echoed the Militia Act in speaking of "any man or boy of African descent" enlisted in Union military service and granting freedom to his mother as well as his wife and

²¹ *Globe*, 38th Cong., 1st sess., 1488, 1489, 1490.

²² On the persistence of commerce in slaves and their declining value in the border states, see *Globe*, 38th Cong., 1st sess., 1176, 396. On abolitionist rejection of the principle of property in man and the commerce in human beings, see William Lloyd Garrison, "Declaration of the National Anti-Slavery Convention," *The Liberator*, December 14, 1833, 198.



FIGURE 3: Thomas Nast, "A Negro Regiment in Action." From *Harper's Weekly*, March 14, 1863, 168–169.

children. At last, in December 1864, Wilson's Military Affairs Committee delivered a final text that spoke in universal terms of "any person" mustered into making war for the United States and declared simply that his wife and children were "forever free," so long as "sufficient proof of marriage" existed, namely cohabiting or associating, "whether such marriage was or was not authorized or recognized by law." Along the way, Congress disputed the debt owed "colored soldiers" for risking their lives, the existence of slave marriage, the situation of bondswomen, and the nature of inviolate rights—always mindful of the counterpoint between the measure and the amendment.²³

The oratory of the great congressional antagonists Charles Sumner and Garrett Davis distilled the constitutional questions at stake, as the debate endured into 1865. Here, the conflict was not free-soil versus human rights doctrine. Rather, the Mas-

²³ Wilson, *History of the Antislavery Measures*, 293, 313–327; *Globe*, 38th Cong., 1st sess., 134, 289, 438, 1176, 1181, 1207; 38th Cong., 2nd sess., 64, 78; 38th Cong., 1st sess., 1181. On other provisions of the initial resolution, see "An Act making Appropriations for the Support of the Army for the Year ending the thirtieth June, eighteen hundred and sixty-five, and for other Purposes," *Statutes at Large* 13: 126–130. Notably, the 1862 Militia Act, which applied only to slaves owned by rebels, did not use the word "marriage." By contrast, the enlistment measure lodged the congressional grant of freedom expressly in marriage. The relevant part of the Militia Act reads:

And be it further enacted, That when any man or boy of African descent, who by the laws of any State shall owe service or labor to any person who, during the present rebellion, has levied war or has borne arms against the United States, or adhered to their enemies by giving them aid and comfort, shall render any such service as is provided for in this act, he, his mother and his wife and children, shall forever thereafter be free, any law, usage, or custom whatsoever to the contrary notwithstanding: *Provided*, That the mother, wife and children of such man or boy of African descent shall not be made free by the operation of this act except where such mother, wife or children owe service or labor to some person

sachusetts abolitionist and the Kentucky slaveholder clashed over the authority of Congress to wage war through a soldier's quid pro quo liberating slaves in loyal states—a quid pro quo premised on slave marriage bonds void at law. Of the bondsman turned Union soldier and his family's freedom, Sumner proclaimed, "I know not how we can use his right arm and ask him to shed his blood in our defense and then hand over his wife and child to bondage . . . Concede that the soldier may be enfranchised, and it follows that by the same constitutional power his family may be admitted to equal liberty." But of the slave master and his title to human beings, Davis proclaimed, "I am a slaveholder myself; and I have my rights guarantied . . . by the Constitution and laws of Congress . . . It has been argued again and again that because the husband is liberated therefore the Congress has the power to liberate the wife and the children. There is no logic in that conclusion." Whereas Sumner spoke of war, freedom, and expansive congressional power, Davis spoke of slavery, private property, and sacred constitutional guarantees, though both dwelled on household bonds.²⁴

On one thing Sumner and Davis did agree—the core question was whether Congress possessed the power to divest loyal masters of slave property. "I want to know what provision of the Constitution confers on Congress the power to pass such a measure," Davis asked. "My answer," Sumner replied, "is that Congress has precisely the same power to enfranchise the families that it has to enfranchise the colored soldier." That was the power to make war. Yet there also existed a humane tradition dating back to antiquity of freeing a bondsman at war for his master's sake. In exchange for the "hazard of life" arose the "boon of freedom," as Sumner said. But the Civil War was for the Union's sake, not for the master's. And the ancient tradition had never reached beyond the bondsman himself to his slave wife and children.²⁵

In making his constitutional argument, Sumner began with the relentless mustering of thousands of Union troops and ended with an appeal to humanity on behalf of congressional abolition. He set forth principles of both expediency and benevolence; yet no liberatory theory of interstate commerce fell from his lips—no linking of the rights of persons with commercial intercourse. Rather, he spoke about war and humanity. The measure's validity, he explained, "must be found, first, in its practical necessity, that we may secure the best services of the slaves, and secondly, in its intrinsic justice and humanity." He spoke of "a power so simple and benevolent" belonging to Congress—reflecting its authority to create an army but also "founded in reason and the nature of things"—a power to extend the soldier's emancipation to his enslaved household. "Any other conclusion would be as illogical as inhuman; discreditable alike to the head and the heart," Sumner declared, "all this from the necessity of the case, and to prevent an intolerable meanness." Thus in justifying

who, during the present rebellion, has borne arms against the United States or adhered to their enemies by giving them aid and comfort.

"An Act to amend the Act calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions, approved February twenty-eight, seventeen hundred and ninety-five, and the Acts amendatory thereof, and for other Purposes," *U.S. Statutes at Large* 12 (1863): 597–600.

²⁴ *Globe*, 38th Cong., 2nd sess., 114, 162. See Charles Sumner, *The Works of Charles Sumner*, 15 vols. (Boston, 1883), 15: 261–265.

²⁵ *Globe*, 38th Cong., 2nd sess., 77, 114. See Brown and Morgan, *Arming Slaves*.

freedom based on slave marriage, Sumner grounded the power of Congress on both intrinsic humanity and immediate exigency.²⁶

It was an argument that presupposed the abolitionist intent of the measure. Impatient with waiting for the Thirteenth Amendment, which was stalled in the House, Sumner boldly called for a legislative blow. "Congress at this moment is complete master of the whole question of slavery everywhere in the United States, even without any constitutional amendment. It can sweep it all out of existence," he declared.²⁷ According to this stunning assertion of congressional sovereignty, which contravened *Dred Scott*, the bond between slave husband and wife could subvert the lawful bond between master and slave, whatever the fate of the abolition amendment.

Such an argument was irreconcilable with slaveholders' interpretation of the Constitution, for there Fifth Amendment property rights were the most sacred guaranty. Against antislavery notions of humanity, nature, and necessity stood fundamental law protecting property and forbidding its taking for public use without just compensation. Seemingly blind to the wartime transformation of the constitutional order, protesting that "the fifth amendment . . . has been quoted countless times," Garrett Davis attacked the enlistment measure as "a crusade against slavery . . . as unjust, as fanatical, and as irrational as all the other crusades that have heretofore taken place in the world." Congress possessed "no plenary legislative power" to abolish slavery, he argued, given the Constitution's "express clauses . . . which guaranty to every citizen his rights of property." Moreover, there were hardly any bondsmen left to enlist, for the border states had released "more than our proportion of negroes to the field." Nor were slave wives and children of any "public use," as they would not be recruited into the war for the Union. And the measure struck retroactively as well as prospectively, freeing the kin of soldiers already in the army, indicating a goal beyond enlistment. "What, then, is the object of the measure?" objected Davis. "The object is to deprive slave owners of their property; it is still further to demoralize the institution; it is to break it up," he raged, "it is utterly to disregard the Constitution . . . and utterly to destroy slave property."²⁸ It was unconstitutional abolition, pure and simple.

In condemning the injustice to loyal masters such as himself, Davis began with a defense of inviolable property rights and ended with a tribute to the paternalism of chattel slavery. According to the slaveholder's way of thinking, "a full and fair price" must be paid in exchange for slave wives and children, a system of compensated emancipation required by the Takings Clause of the Fifth Amendment, which had been imposed by abolition in the District of Columbia and previous slave recruitment orders. Bitterly, Davis proposed rewriting the "flagitiously unjust" measure to strike at bourgeois wealth as well as slave property by granting all Massachusetts soldiers an interest in any capitalist venture, whether in "banking, brokering, merchandising, shipping, trading, fishing, manufacturing . . . or making or fabricating anything whatever, by hand or by machinery." Vengefully, he warned of "retributive justice" for violating the Fifth Amendment. "Are the members of the Senate ready

²⁶ *Globe*, 38th Cong., 2nd sess., 114.

²⁷ *Ibid.*

²⁸ *Ibid.*, 162, 77, 78. And see 38th Cong., 1st sess., 1210–1212.

to have this poisoned chalice which they are now concocting and mixing for other lips tendered to their own?"²⁹

Yet if Davis spoke of retribution against abolitionists, he also spoke of humanity toward slaves protected by beneficent masters against the deprivations of freedom. As slavery lay dying, he affirmed its virtue. Countering a household logic of abolition with a household defense of slavery, he argued that freedom was no boon to a race of eternal dependents, and therefore the Union must care for slave wives and children set free by Congress. "If you intend severing the relation between the negro wife and children and their owner," he pleaded, "do not leave them altogether without such support." As he spoke of "humanity to a degraded and helpless race of beings," he rejected both the assumption that a freedman would maintain his own family and the premise that "because the husband is liberated," Congress gained "the power to liberate the wife and children." Deploring the emancipatory quid pro quo, the slaveholding statesman confessed, "this is the first time I have ever ventured to utter a voice in the name of humanity in the Senate."³⁰

To the antislavery way of thinking, the enlistment measure would usher in abolition before the day of the Thirteenth Amendment, but the proslavery prophecy was that the measure would be struck down as unconstitutional. As Sumner adjured, "Congress must act to the extent of its power." Yet as Davis protested, in a "competent and independent court," the slaveholder's rights would remain "an invulnerable constitutional and legal truth."³¹ As expressed in this consummate colloquy, the claims of loyal masters to slave wives and children stood diametrically opposed to the tenets of humanity, the needs of war, and the bonds of slave marriage as grounds for empowering Congress to enact abolition.

IN SORTING OUT THE CONTRADICTIONS of the enlistment measure, amid the work of defeating the South and amending the Constitution, Congress turned to the bondswoman herself and the nature of her slavery and freedom. It was not that her fate mattered simply as a rhetorical question, raised to expose the perils of framing the Thirteenth Amendment in terms of human rights rather than free soil. Rather, it was the very heart of the soldier's quid pro quo—and therefore of the debate over enacting abolition. Pressed by her own claims as well as by the impatience of Union Army men, Congress argued over whether to wait for the Thirteenth Amendment or rush ahead with the enlistment measure or uphold the Fifth Amendment. At length, the authors of abolition appraised the slave wife's market worth, but also her torment of body and soul—sometimes sounding like a band of slave traders, sometimes like antislavery immediatists. Thus Congress came to enumerate the badges of her slavery. Yet under the enlistment measure, her freedom lay in bonds of mar-

²⁹ *Globe*, 38th Cong., 2nd sess., 78. See "An Act for the Release of Certain Persons held to Service or Labor in the District of Columbia," *Statutes at Large* 12: 406–408; "An Act to Amend an Act Entitled 'An Act for enrolling and calling out the National Forces, and for other Purposes,'" *Statutes at Large* 13: 6–11. On Lincoln's position on compensated emancipation, see Michael P. Johnson, ed., *Abraham Lincoln, Slavery, and the Civil War: Selected Writings and Speeches* (Boston, 2001), 186–217.

³⁰ *Globe*, 38th Cong., 2nd sess., 160. On the antislavery view of soldiers' pay and family support, see *ibid.*, 165.

³¹ *Ibid.*, 114, 162.

riage that paralleled the bonds of slavery—abolition as paradoxical as freeing her under the commerce power as if she were like a hogshead of Kentucky tobacco. Neither as a slave wife nor as a freed wife was she conceived to possess inviolate rights simply by dint of being human.

All the antislavery luminaries dilated on the enlistment measure, as did the proslavery men still left in Congress. Some believed it would “stand the test of the judgment of the world”; others decried it as “palpably unconstitutional” and abolitionist legal doctrine as “all twaddle and bosh.” But none doubted that the intent was “abolishing slavery inch by inch”—as one antislavery man put it. The prospect provoked ugly words, as when one slaveholder lamented that abolitionists had “contracted the disease called ‘nigger on the brain.’”³²

What agitated both antislavery and proslavery statesmen was the condition of the slave wife bound to both a loyal master and a soldier away fighting the Confederacy. In particular, three questions troubled them: Who exactly was she, the wife of a bondsman turned soldier, as slaves had no marriage rights by law? What was she worth, if the Union paid for her taking? And, in light of the counterpoint between the abolition decrees, why free her through a measure fraught with constitutional difficulty instead of waiting for the amendment? Those questions set apart not only abolitionists and slaveholders, but also abolitionists themselves, dividing men mindful of higher law and men heeding the existing Constitution—as the debate became a forum on the badges of woman’s slavery. While disputing the breadth of the war power and the Takings Clause, the boundaries of states’ rights, and the validity of property in man, statesmen paused to read aloud letters from slave wives and describe the bruises on their bodies.

Who was a slave wife? That was the most basic enigma, vexing to slaveholding statesmen and even to some abolitionists. For the measure hinged on the fiction that the bonds of slave marriage were binding, so much so as to dissolve the bonds of chattel slavery. “Who is the wife of a slave?” asked the antislavery senator John Sherman of Ohio as the argument opened in early 1864—perhaps as his brother, General William Tecumseh Sherman, was contemplating his famed March to the Sea later that year. Meanwhile, proslavery men protested, “There will be a dozen women claiming freedom: ‘I am the wife,’ and ‘I am the wife,’ and ‘I am the wife.’” As Senator Reverdy Johnson of Maryland jeered, “Now, pass this bill, and you will find it very difficult to prove who has a wife, or how many wives he has.”³³

Though simple to ask, the question of the slave wife’s identity was deeply confusing, for it reflected not only the conflict between southern law and custom but also the lived contradictions of slavery—the secrets of southern households as well as the flagrant terrors of the slave trade. Antebellum southern classics, such as *An Inquiry into the Law of Negro Slavery*, explained that there was “no recognized marriage relation in law between slaves” because chattel had no rights of contract. Yet custom, nowhere more openly on display than in notices posted for fugitives, recognized slave marriage. “Ranaway, my negro Philip . . . He may have gone to St. Louis, as *he has a wife there*,” read the infamous advertisements. “The subscriber will give \$20 for the apprehension of the negro woman, Maria . . . She is known to be lurking in or about

³² *Globe*, 38th Cong., 1st sess., 1182, 361, 395; 38th Cong., 2nd sess., 160, 158, 166, 538, 1003.

³³ *Globe*, 38th Cong., 1st sess., 439, 396, and see 1229.

Chuckatuch . . . where *she has a husband, and formerly belonged*.”³⁴ Hewing to custom, rather than the letter of the law, the enlistment measure simply took slave marriage for granted.

To border statesmen, however, who claimed to be wisest in slavery’s ways, a bondswife was a nullity. “Except in the eye of Heaven,” slaves were “never man and wife,” dissented Reverdy Johnson, but chattel subject to sale. “How are you going to ascertain whether a man taken here in Virginia has a wife in Maryland? He will say so, and he will prove that the woman whom he claims to be his wife once associated with him. But that, according to our laws, is not marriage.” Moreover, because marriage was a creature of state law, if Congress presumed “to recognize as marriage that which is not marriage, you clearly violate the Constitution.” Visions of a host of slave women all claiming freedom by clamoring “‘I am the wife,’ and each will be able to prove it by precisely the same evidence,” interrupted the sober debate. “Senators are laughing at very grave matters,” admonished Johnson. “We can put in a proviso that but one shall be allowed,” countered an abolitionist. “But which is to be the one?” retorted Johnson.³⁵

Even to some abolitionists, the household logic seemed dubious. Especially those most circumspect about the letter of the law could not easily fathom how slave marriage bonds could free a woman from the bonds of slavery. As John Sherman reasoned, the essence of the measure was “universal emancipation” through “domestic ties.” Yet its original spare grant of freedom did not define the terms of a slave marriage. Repeatedly, Sherman queried, “Who is the wife of a slave?” Under the war power, she might perhaps be freed “in the name of God and humanity,” but not as a vague entity. “We know that the relation of husband and wife is not recognized with slaves, and yet this relation is spoken of as a measure of emancipation,” Sherman worried. “You must define who shall be considered the wife of the slave.” Other abolitionists warned that the measure allowed for “boundless disputes.” Those concerns prompted the Military Affairs Committee to return with new definitions of slave marriage, though none required any particular civil procedures or religious ceremonies. Finally, after almost a year of debate, the measure stipulated that slaves having “lived together, or associated or cohabited” until enlistment day counted as “evidence” of marriage, with children entitled to freedom even if the marriage had dissolved. Still, the household logic vexed framers of the Thirteenth Amendment. “What is this measure?” Lyman Trumbull asked, pointing to the traffic in slaves. “Here is a negro man who was sold . . . not having seen his family nearly a quarter of a century.”³⁶ The question was whether freedom could be sustained by slave marriage bonds that defied the rules of both law and commerce.

The answer was that slaves’ everyday practice and mutual understandings must prevail; it was through her own will and her husband’s—not her master’s or the rule

³⁴ Thomas R. R. Cobb, *An Inquiry into the Law of Negro Slavery in the United States of America* (Savannah, Ga., 1858), 242–243; Theodore Dwight Weld, *American Slavery As It Is: Testimony of a Thousand Witnesses* (New York, 1839), 165. On the contradictions of southern legal culture, see Laura F. Edwards, “Status without Rights: African Americans and the Tangled History of Law and Governance in the Nineteenth-Century U.S. South,” *American Historical Review* 112, no. 2 (April 2007): 365–393.

³⁵ *Globe*, 38th Cong., 1st sess., 396. See *Barber v. Barber*, 62 U.S. 21 How. 582 (1858).

³⁶ *Globe*, 38th Cong., 1st sess., 289, 439, 441, 1179, 1183; 38th Cong., 2nd sess., 64, 168. And see *Statutes at Large* 13: 571.

of law—that a slave wife could be known. On this point, even some who differed over the Thirteenth Amendment’s language found accord. Sumner affirmed that slave marriage could be determined merely “by cohabitation and mutual recognition as man and wife.” Likewise, rather than rhetorically asking about a wife’s freedom, Jacob Howard earnestly postulated: “that person shall be held to be the wife of the slave who recognizes the slave to be her husband and whose husband recognizes the woman to be his wife.”³⁷ Looking to human relations, not property rights; to experience, not law—to slaves’ willing, reciprocal assent to their own marriage bonds—abolitionists resolved the enigma of the slave wife.

Just as perplexing was the question of how much the slave wife was worth, and whether abolitionists should credit slaveholders’ outcries about just compensation under the Fifth Amendment. And slavery’s advocates were not alone in raising it. From the outset, freeing a slave wife without paying “no matter how loyal a master” troubled Senator John Henderson, the Missourian who had introduced the abolition amendment but considered uncompensated congressional abolition unconstitutional. She had to be bought by the Union, other abolitionists objected. “When you take the slave of a loyal master,” John Sherman argued, “a fair and reasonable compensation for the labor of the slave should be paid.” Accordingly, Wilson and his Military Affairs Committee revised the measure, returning with a new draft in March 1864 that afforded loyal masters “a just compensation” to be set by military commissions.³⁸

Thus abolitionists and slaveholders came to debate the bondswife’s cash value, with Congress taking on the aura of a slave market as statesmen reckoned the price of her freedom. No specimen of this enigmatic chattel appeared in the Capitol’s chambers, nor did statesmen figure whether she might be young or old, fair or dark, a good field hand, or a good breeder—all the traits, representing labor value and exchange value, typically itemized. Yet they calculated her worth, fixing it to the war’s fortunes, speculating about the traffic in slave wives. “I do not think it will take very much money to pay for such slaves,” Sherman observed. “Only pay the master that depreciated value,” he advised, “caused by the rebellion.” In Maryland, granted Reverdy Johnson, “not a slave . . . would bring at this day, in the present state of things, ten dollars.” Henry Wilson also figured a slave wife would be “worth very little,” about “\$100 on the average.” But slave owners such as Garrett Davis insisted on a higher price, about “five hundred apiece.” Doing antislavery arithmetic, Wisconsin senator James Doolittle figured there were about 27,000 black soldiers in the loyal slave states, and allowing for a family of three, freedom would cost the Union \$8,100,000—“at the lowest figure, \$100 apiece.” Some claimed the slave wife should be paid for years of unrequited labor. Others simply deemed it “bad economy” for the Union to be “rushing into the market to buy slaves while the price is high.” Abolition would be a “burden upon our Treasury,” antislavery men painfully admitted. “One of these women, if you please, regarding her as property, may to-day be considered so much,” noted William Fessenden of Maine, “and to-morrow, es-

³⁷ *Globe* 38th Cong., 2nd sess., 114; 38th Cong., 1st sess., 1182; and see 38th Cong., 1st sess., 1179, 1181.

³⁸ *Globe*, 38th Cong., 1st sess., 362, 439, 444, 1176, 1180. On Henderson and the abolition amendment, see Vorenberg, *Final Freedom*, 52–53.

pecially in times like these, she may be worth vastly less or nothing at all.” Exasperated, Wilson marveled, “the country is going to ruin while you are higgling about a fall in the price of the slave.” By his reckoning, “true economy” was any expense that “helps to break down the slave system.”³⁹

Ultimately, however, Congress resolved that the question of a slave wife’s worth was unconscionable. For asking it assumed the legitimacy of property in human beings—an unthinkable principle for abolitionists, who deplored attaching it to the Takings Clause. Condemning both property in man and the traffic in women, they counterposed antislavery moral economy to southern political economy. “I do not want this government to become the purchaser of slaves,” argued Morton Wilkinson of Minnesota, affirming his free-soil roots. “I am opposed to inserting here the same words which are employed in the Constitution of the United States in the provision that requires compensation to be made for property taken for public use. I think it is time that the idea that slaves are property like horses and oxen should be utterly repudiated by the Congress of the United States.” And Henry Wilson wholeheartedly agreed, avowing that ideally the soldier’s quid pro quo should take a “simple form,” unsullied by a price.⁴⁰ Thus compensation was stricken from the enlistment measure, an act denying that a slave wife still counted as property under the Fifth Amendment. Only for a moment, then, did Congress consider purchasing her from a loyal master and bequeathing her to a black soldier—asking what she was worth—until the cost in dollars and ethics appeared abhorrent. The answer was that she had no just price.

That left the fundamental question—why not wait for the Thirteenth Amendment? Given all the dilemmas of the enlistment measure, the ambiguity of slave marriage compounded by the immorality of compensation, why proceed with legislating abolition while amending the Constitution? Thus Congress argued over the counterpoint between the measure and the amendment. It was a debate, finally, between antislavery immediatism and constitutionalism, one that had emerged with abolitionism itself in the 1830s and now culminated in wartime with the question of whether Congress should free the slave wife or wait for an abolition amendment.

Late in 1864, as Sherman’s army was laying waste to Georgia, ending its triumphant March to the Sea, abolitionists in Congress grew impatient to finish their work. With the amendment’s fate uncertain, the enlistment measure seemed a more direct route to freedom. “Let the Senate then act now. Let us hasten the enactment of this beneficent measure, inspired by patriotism and hallowed by justice and humanity,” Wilson exhorted, “so that ere merry Christmas shall come the intelligence shall be flashed over the land, to cheer to the hearts of the nation’s defenders, and arouse the manhood of the bondsman, that on the forehead of the soldier’s wife and the soldier’s child no man can write slave.” But in the new year, once the amendment had been approved in both houses of Congress—while Sherman’s troops were marching north and the Confederacy was desperately debating whether to arm

³⁹ *Globe*, 38th Cong., 1st sess., 444, 396, 1180, 1178, 1208, 1180, 183, 1178. See, for example, Solomon Northup, *Twelve Years a Slave* (Auburn, N.Y., 1853), 78–82. Although precedent (abolition in the District of Columbia and the 1864 Enrollment Act) granted loyal masters no more than \$300, the enlistment measure prescribed only a just compensation; see “An Act for the Release of Certain Persons held to Service or Labor in the District of Columbia”; “An Act to Amend an Act Entitled ‘An Act for enrolling and calling out the National Forces, and for other Purposes.’”

⁴⁰ *Globe*, 38th Cong., 1st sess., 1180, 1178, and see 1208–1216.



FIGURE 4: James Fuller Queen, "Journey of a slave from the plantation to the battlefield," 1863. Prints and Photographs Division, Library of Congress, LC-USZC4-6677.

slaves—some statesmen asked why act at all on the enlistment measure. "If that amendment shall be ratified, slavery is abolished throughout the United States, swept overboard everywhere," objected a Kentucky congressman. "Why press this measure upon the House? I cannot perceive the necessity or reason for it."⁴¹

That question—why free the slave wife if the amendment would abolish slavery

⁴¹ *Globe*, 38th Cong., 2nd sess., 64, 1004, and see 113. See also Bruce C. Levine, *Confederate Emancipation: Southern Plans to Free and Arm Slaves during the Civil War* (New York, 2006), esp. 3–5, 115–120;

everywhere—had agitated Congress for a year. And it, too, was asked not simply by slaveholders, but also by the amendment's authors, who believed that the enlistment measure was morally right but unconstitutional. Early in 1864, while the amendment still lay in committee, they pointed to the measure's "uncertainties and difficulties as to who may be made free." A year later, with the amendment still pending in the House, Lyman Trumbull wistfully confessed, "I had hoped that this constitutional amendment would pass, and end this thing forever." Yet he could not support the measure. "If you have power to do this, why have you not power to free every slave in the land?" he wonderingly asked. "If I were to follow the inclinations of my mind I should vote to free every human being where my vote would have any tendency to accomplish the object . . . But, sir, we hold our seats here by virtue of a written Constitution."⁴² Even devotion to freedom must yield to reverence for fundamental law.

Thus the counterpoint between the measure and the amendment raised anew old contradictions between immediate abolition and fidelity to the Constitution. It harked back to earlier turning points—William Lloyd Garrison setting fire to a copy of the Constitution, antislavery justices returning fugitives to bondage, Frederick Douglass envisioning the Civil War as an "Abolition war," Lincoln proposing gradual, compensated emancipation—and expressed a still deeper antagonism between higher law and human law. As Congress wrangled over legislating abolition or waiting for the amendment (some saying that would take years, others just a few months), Sumner and Trumbull again elucidated the opposing antislavery perspectives. Justifying immediatism in the name of both humanity and expedience, Sumner affirmed, "There can be no delay. The country cannot wait the slow action of a constitutional amendment . . . All must confess the humanity of the proposition to enfranchise the families of the colored persons who have borne arms for their country." Conversely, dismissing "appeals which may be made for humanity's sake," Trumbull defended constitutionalism in the name of the founders: "I do not understand that the men who made the Constitution . . . so understood the power of the Federal Government . . . We can have no government worth preserving unless we stand by the Constitution as it is till we change it in a constitutional mode."⁴³ By no means had the accord on the Thirteenth Amendment's language defused the question of whether the time was right for congressional abolition.

It was the subjection of the slave wife that answered this fundamental question

Reidy, "Armed Slaves and the Struggles for Republican Liberty," 274–280. See *Watchman and State Journal*, August 11, 1865.

⁴² *Globe*, 38th Cong., 1st sess., 362; 38th Cong., 2nd sess., 64, 168, 167. And see 38th Cong., 1st sess., appendix, 44.

⁴³ *Globe*, 38th Cong., 1st sess., 1178; 38th Cong., 2nd sess., 114, 167–168. See Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven, Conn., 1984); Johnson, *Abraham Lincoln, Slavery, and the Civil War*, 186–217; Frederick Douglass, "The American Constitution and the Slave," in John W. Blassingame, ed., *The Frederick Douglass Papers*, ser. 1, vol. 3: *Speeches, Debates, and Interviews, 1855–63* (New Haven, Conn., 1985), 340–366; Douglass, "The Mission of the War," *ibid.*, vol. 4: *Speeches, Debates, and Interviews, 1864–80* (New Haven, Conn., 1991), 3–24; David Brion Davis, "The Emergence of Immediatism in British and American Antislavery Thought," in Davis, ed., *Ante-Bellum Reform* (New York, 1967), 139–152; Davis, *Inhuman Bondage: The Rise and Fall of Slavery in the New World* (New York, 2006), 250–322; Richard S. Newman, *The Transformation of American Abolitionism: Fighting Slavery in the Early Republic* (Chapel Hill, N.C., 2002), 60–184; Oakes, *The Radical and the Republican*.

raised by the soldier's quid pro quo. The vindication of her freedom—of immediate abolition by Congress—ultimately rested on her torment at the loyal master's hand. In the evidence of a slave wife being beaten and sold and refused subsistence, wrongs that negated her humanity, abolitionists found reason not to wait for the Thirteenth Amendment.

And so inventories of her misery filled the halls of Congress. "A sight greeted me such as I never beheld in the world, . . . a colored woman, whom I should suppose to be thirty years of age, appeared before us, all bruised to pieces," cried out Ohio senator Benjamin Wade, describing a scene he had witnessed in Kentucky in the summer of 1864. "Her face was all whipped to a jelly . . . Her head was all cut to pieces . . . her skull was laid bare almost, and her back perfectly mangled." None knew the situation better than Missouri senator Benjamin Gratz Brown, who had been a Union colonel. Earlier that spring, he had told of "gross and glaring outrage" as the argument over buying the slave wife's freedom gave way to accounts of her distress. Retaliating against their slaves' enlistment, loyal masters were "selling the wives and children of those soldiers, making merchandise of their flesh and blood, and doing it as punishment for their entry into our Army. And shall we tolerate this scene?" Brown asked. "Sit quietly by with no legislation?" Almost a year later, Henry Wilson despaired that while Congress was still debating, the slave wife was suffering all kinds of "tender mercies."⁴⁴

From military intelligence relayed to abolitionist statesmen—letters from army camps and plantations read aloud on the Senate floor—word came that time was of the essence, for slave owners were "hounding on a persecution in the border States." Reportedly, conditions were unbearable in Missouri in early 1864, with lieutenants, provost marshals, and generals all writing of "the fact that the soldiers' (colored) wives and families are being awfully abused" and citing grievances brought by recruits whose wives were "unmercifully whipped" or "run off to Kentucky." And there were letters from slave wives describing home life to husbands away at war. As quoted by Henry Wilson, one was "beaten '*scandalously*'" by a master unwilling to "take care of her children"; another was left "almost naked" and treated "worse and worse"; and another wrote: "I cannot ask any of our neighbors to enlist and have them suffer as I am suffering." Belying the loyal master's vaunted paternalism, the situation drew soldiers back to plantations, some to exact their quid pro quo by carrying off slave wives and tobacco, but others to wait for abolition.⁴⁵

For a moment, then, the sentiments of slaves and ex-slaves—of bondswives and black soldiers—figured directly in the congressional debate over abolition. There was

⁴⁴ *Globe*, 38th Cong., 2nd sess., 161; 38th Cong., 1st sess., 1179; 38th Cong., 2nd sess., 113, 165. On conditions in Kentucky, see Berlin, Reidy, and Rowland, *The Black Military Experience*, 251–278; Howard, *Black Liberation in Kentucky*, 111–121; Sears, *Camp Nelson, Kentucky*. And see Karen Halttunen, "Humanitarianism and the Pornography of Pain in Anglo-American Culture," *American Historical Review* 100, no. 2 (April 1995): 303–334.

⁴⁵ *Globe*, 38th Cong., 1st sess., 1179, 1176–1179, 1178. Army letters read aloud and/or cited in Congress are reprinted in Berlin, *The Destruction of Slavery*, 479–489; Berlin, Reidy, and Rowland, *The Black Military Experience*, 240–250; Reidy, "Armed Slaves and the Struggles for Republican Liberty," 293. And see Taylor, *The Divided Family in Civil War America*, 193–197; Glymph, *Out of the House of Bondage*, 97–166. While historians have addressed these letters for evidence of events on the ground, they have not explored their significance in Congress—that is, the link between lawmaking and conflict at the level of the everyday.

“nothing more inhuman than the intelligence we have from portions of the country,” lamented Wilson, singling out a letter “from a wife to her husband, in which she tells him how she is treated . . . she thinks he ought not to have left her and her children to suffer.” Even a Kentucky senator admitted that sometimes slaveholders were “bad persons,” while other statesmen opposed to the enlistment measure confessed that their “commiseration was excited . . . by the reading of the letters.” The crisis was epitomized by the case of “Richard Glover, a colored soldier,” and his slave wife, who was flogged “with a strap taken from a harness, and this when she was *pregnant and near her confinement*.” It evoked a blunt message from Brigadier General William Pile to the Military Affairs Committee: “Nothing will reach the case but the *immediate emancipation* of these people . . . We cannot wait for the routine of ‘amendment to the Constitution’; we want an immediate remedy. Can one be provided at Washington?” Up from the ground—from the particulars of the slave wife’s condition—arose appeals for congressional abolition, delivered from the border states to the Capitol.⁴⁶

Thus Congress dwelled on the badges of woman’s slavery. Hastening to free the slave wife, statesmen catalogued her torment rather than buying her liberty, while finding that slaves saw no difference between loyal masters and rebels and were already embracing freedom based on marriage bonds, with the blessing of antislavery military commanders. And in justifying their haste—refuting claims that the soldier’s quid pro quo made the Constitution a dead letter—abolitionists drew on the bondswife’s own words as well as army men’s. Meanwhile, statesmen willing to wait for the Thirteenth Amendment asked, “Suppose that shall take a year, what of it?” Yet impatient men implored, “why shall you refuse to act . . . why shall you raise technical objections,” and conjured up slaveholders’ “infernal acts” and slave wives “mangled and tortured.” Justifying the amendment, abolitionists imagined an “angel from the skies” descending to behold a slave wife doomed to “avarice” and “lust.” Impatiently, however, they answered the question of immediatism by asking: “Do you propose to stand here and let these wives and children be abused three months, six months, or a year, until you can amend the Constitution?”⁴⁷

For almost a century, antislavery appeals circulating throughout the Atlantic world had been filled with images of affliction resembling those summoned in Congress. Whippings, forcible labor, and slave auctions all represented the sins of slavery, against which the virtues of freedom—namely wage labor and marriage bonds—appeared all the more starkly. Above all, the bondswoman denied the right of being a wife, her sexual violation creating wealth, embodied the wrong of reducing persons to property. Over and over, abolitionists depicted her desecration as proof of slavery’s breach of natural law—from Olaudah Equiano’s early protests against the Atlantic slave trade to the tirades of antislavery statesmen as sectional crisis deepened into civil war. In “The Slave Auction” (1857), the poet Frances Ellen Watkins Harper depicted the owning and selling that she escaped as a free black:

⁴⁶ *Globe*, 38th Cong., 1st sess., 1178; 38th Cong., 2nd sess., 166; 38th Cong., 1st sess., 1228, 1177.

⁴⁷ *Globe*, 38th Cong., 1st sess., 1179; 38th Cong., 2nd sess., 1003; 38th Cong., 1st sess., 1179; 38th Cong., 2nd sess., 162; 38th Cong., 1st sess., 1479, 1481; 38th Cong., 1st sess., 1181–1182.

The sale began—young girls were there,
 Defenseless in their wretchedness,
 Whose stifled sobs of deep despair,
 Revealed their anguish and distress . . .
 While tyrants bartered them for gold . . .

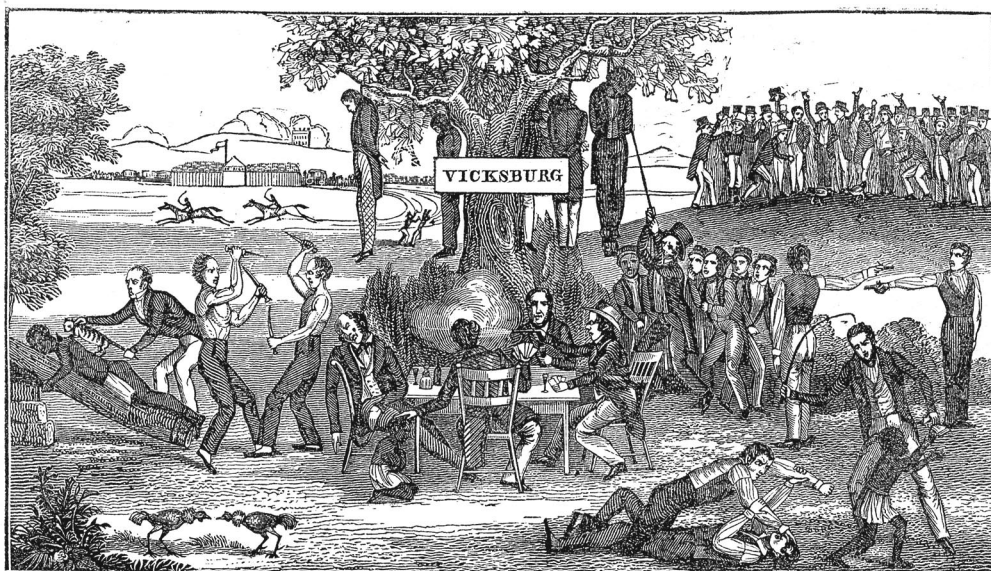
Years earlier in Congress, breaking the gag rule that once forbade debate on abolition, John Quincy Adams had protested, “The most damning sin of slavery is that it does abolish the marriage institution.” By the time of the debate on the Thirteenth Amendment, it was commonplace for statesmen to condemn “property in black men” by evoking “the humblest daughter of sorrow that ever crouched beneath the lash of the task-master . . . whose pleasure is the price of her shame, and who eats bread in the sweat of her brow.”⁴⁸

The figure of the ravaged bondswoman validated not simply slave emancipation but also affirmations of freedom as an inalienable right. The moral power of the negative symbolism shored up universal ideals of human liberty as the antithesis of chattel relations of dominion and subjection. “The right to enjoy liberty is inalienable. To invade it is to usurp the prerogative of Jehovah,” the American Anti-Slavery Society declared at its founding in 1833, juxtaposing the dignity of the sovereign rights-bearing individual to the dehumanizing conditions of slavery: “marketable commodities . . . brute beasts . . . ruthlessly torn asunder—the tender babe from the arms of its frantic mother—the heart-broken wife from her weeping husband—at the caprice or pleasure of irresponsible tyrants.”⁴⁹ By negation, the wretched slave wife legitimated the right of inviolable freedom as abolitionism emerged.

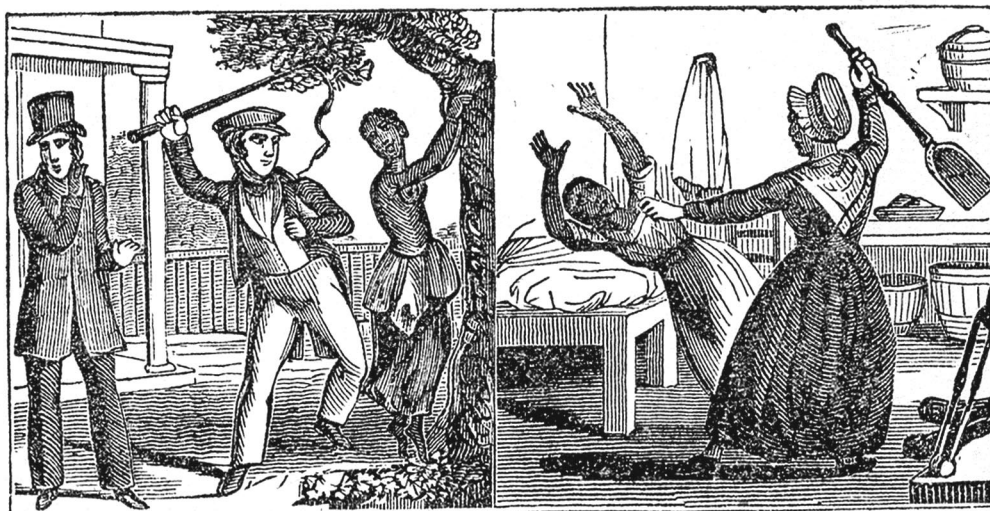
So, too, did her wrongs carry arguments for immediatism. At its founding, the American Anti-Slavery Society set forth the call for “immediate and total abolition” and broadcast this doctrine through appeals illustrating that slavery’s inhumanity spared none but fell most cruelly on woman. Even a children’s magazine titled *The Slave’s Friend* portrayed chained bondswomen and instilled the lesson: “*doing a thing right off* . . . That is immediatism.” More insurrectionary was an 1848 address by the former slave Henry Highland Garnet arousing bondsmen to liberate their own people: “You had far better all die—die immediately, than live slaves . . . And worse than all, you tamely submit, while your lords tear your wives from your embraces, and defile them before your eyes. In the name of God we ask, are you men?” Most famously, in *My Bondage and My Freedom*, Frederick Douglass decried the “brutal castigation” of a bondswoman who simply wished to be a slave wife, calling it “incidental to the relation of master and slave,” meaning, in the parlance of the day, that it represented a badge of slavery. She stood tethered,

⁴⁸ Frances Ellen Watkins (Harper), *Poems on Miscellaneous Subjects* (Philadelphia, 1857), 14–15; Adams in Henry Wilson, *History of the Rise and Fall of the Slave Power in America*, 3 vols. (Boston, 1872), 1: 425; *Globe*, 38th Cong., 2nd sess., 484; and see 38th Cong., 1st sess., 2948. See Katyal, “Men Who Own Women,” 796–809; Cott, *Public Vows*, 86; Elizabeth B. Clark, “‘The Sacred Rights of the Weak’: Pain, Sympathy, and the Culture of Individual Rights in Antebellum America,” *Journal of American History* 82, no. 2 (1995): 463–493.

⁴⁹ Garrison, “Declaration of the National Anti-Slavery Convention.”



"Our Peculiar Domestic Institutions."



Showing how slavery improves the condition of the female sex.

FIGURE 5: Detail from an 1840 broadside, "Illustrations of the American Anti-Slavery Almanac for 1840." Rare Book and Special Collections Division, Library of Congress, LC-USZ62-43972.

bare to the waist. Behind her stood old master, with cowskin in hand, preparing his barbarous work with all manner of harsh, coarse, and tantalizing epithets . . . Again and again he drew the hateful whip.

Such were the images recalled in congressional accounts of the slave wife's torment.⁵⁰

The enlistment measure hewed to the principles of immediatism, then, while also transforming its original terms. For the American Anti-Slavery Society did not assert the power of Congress to overthrow slavery everywhere. Rather, its founding charter expressly denied immediate abolition's reach within existing slave states in deference to the covenant that created the Union: "We fully and unanimously recognise the sovereignty of each State, to legislate exclusively on the subject of the slavery . . . we concede that Congress, under the present national compact, has no right to interfere with any of the slave States." Penetrating into the loyal border states, the enlistment measure transgressed that antislavery boundary. Not unlike the Thirteenth Amendment, therefore, the measure amended a fundamental charter of freedom.⁵¹

But in other ways, the measure obeyed the limits of abolitionist aspirations. For in basing freedom on marriage bonds, it gave congressional sanction to antislavery doctrine that idealized the very bonds granting husbands property in women and divesting even a free wife of an inviolate self. The most basic right promised by abolition was self-sovereignty. "Every man has a right to his own body," the anti-slavery *Declaration* postulated. "Freeing the slave is . . . not wronging the master, but righting the slave—restoring him to himself." Yet along with the slave's conversion from property into a rights-bearing person, abolition also promised redemption of slave marriage bonds and the master's dispossession of the slave wife. As the ex-slave William Wells Brown, an antislavery writer, dramatized that vision, "I am yours," a slave wife vows to her slave husband, who vows, "I can die, but shall never live to see you the mistress of another man." Meanwhile, just as the bondswoman's wrongs vindicated the slave's inalienable rights, chattel slavery became the negative touchstone for woman's emancipation. A free wife was "a chattel personal, a tool that is used," protested Sarah Grimké, the slave owner turned abolitionist. Thus the slave wife's liberation—her conveyance from her loyal master to a Union soldier—distilled antislavery contradictions as well as the ambiguity of marriage as a bond intrinsic to freedom but evocative of slavery. The heart of the matter was the sovereignty that would supplant the slave master's. Either the bondsman would be "master of his own person, of his wife," as *The Liberator* imparted the rule among free men; or the bondswoman would gain "supreme sovereignty over her own person," as

⁵⁰ "Immediatism," *The Slave's Friend*, no. 7 (New York, 1836): 13; David Walker and Henry Highland Garnet, *Walker's Appeal: With a Brief Sketch of His Life* (New York, 1848), 94, 96; Frederick Douglass, *My Bondage and My Freedom* (New York, 1857), 87–88. See Weld, *American Slavery As It Is*; Saidiya V. Hartman, *Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth-Century America* (New York, 1997); Carol Lasser, "Voyeuristic Abolitionism: Sex, Gender, and the Transformation of Anti-slavery Rhetoric," *Journal of the Early Republic* 28, no. 1 (2008): 83–114.

⁵¹ Garrison, "Declaration of the National Anti-Slavery Convention." On Douglass's renunciation of non-interference with slavery in the existing states, see "The Mission of the War." However, there were some non-Garrisonian abolitionists, besides Douglass, who came to assert the power of the national government over slavery in the existing states; see Deyle, *Carry Me Back*, 201.

Grimké explained the rule of woman's rights.⁵² In Congress, it was the less expansive immediatism that abolitionists aimed to impose in the loyal slave states.

Therefore, in dissolving the bonds of slavery through marriage bonds, the soldier's quid pro quo offered the slave wife freedom but withheld the right to an inviolate self. Her freedom represented something owed to him, a token of the exchange relation between the Union soldier and the national state. No less had the overthrow of colonial slavery in the French and British West Indies affirmed marriage bonds; yet the enlistment measure newly designated slave marriage the very source of American abolition. Always, Henry Wilson spoke of "humanity" to the slave wife but "justice to these colored men," and always of more troops to win the war. Never did he argue for restoring the bondswoman to herself as a natural right, but instead to the soldier, as a just return for risking his life for the Union. "As a matter of justice," he inquired, "how can you go to a man and ask him to enlist to fight the battles of his country when he knows that the moment his back is turned his wife and his children will be sold to strangers?" Simply taking the "wife of his bosom" from the slaveholder would inspire "deeds of heroic daring" against the Confederacy.⁵³

At no point did the question emerge that haunted the debate over the Thirteenth Amendment: whether striking at slavery would erode marriage, by virtue of their symmetry as property relations of the household, thereby transforming slaves and wives alike into sovereign persons.⁵⁴ For the soldier's quid pro quo presupposed marriage bonds as the very instrument of abolition. At one point, justifying the enlistment measure, Benjamin Gratz Brown spoke grandly of the "inalienable rights of freedom," but without attaching those rights to slave wives. At another point, countering paternalistic defenses of slavery, antislavery men claimed that "these individuals can take care of themselves" when facing freedom's vicissitudes. Otherwise, slave wives embodied abject dependency, beings "innocent and helpless." What mattered was the power of Congress to seize them and the right of Union soldiers to claim them. "Colored men," Benjamin Wade pointed out,

⁵² Garrison, "Declaration of the National Anti-Slavery Convention"; William Wells Brown, *The Escape; or, A Leap for Freedom* (1858; repr., Knoxville, 2001), 10, 11; Sarah Grimké, "Marriage," in Elizabeth Ann Bartlett, ed., *Sarah Grimké: Letters on the Equality of the Sexes and Other Essays* (New Haven, Conn., 1988), 141; "Free Laborers and Slaves," *The Liberator*, December 7, 1855, 193. See Kristin Hoganson, "Garrisonian Abolitionists and the Rhetoric of Gender, 1850–1860," *American Quarterly* 45, no. 4 (1993): 558–595; Amy Dru Stanley, "'The Right to Possess All the Faculties That God Has Given': Possessive Individualism, Slave Women, and Abolitionist Thought," in Karen Halttunen and Lewis Perry, eds., *Moral Problems in American Life: New Perspectives on Cultural History* (Ithaca, N.Y., 1998), 123–143; Ellen Carol Dubois, "'The Pivot of the Marriage Relation': Stanton's Analysis of Women's Subordination in Marriage," in Ellen Carol DuBois and Richard Cándida Smith, eds., *Elizabeth Cady Stanton, Feminist as Thinker: A Reader in Documents and Essays* (New Haven, Conn., 2007), 82–92; David A. J. Richards, "Abolitionist Feminism, Moral Slavery, and the Constitution: 'On the Same Platform of Human Rights,'" *Cardozo Law Review* 18, no. 2 (1996): 767–844; Scully and Paton, *Gender and Slave Emancipation in the Atlantic World*.

⁵³ *Globe*, 38th Cong., 1st sess., 1177, 1178; 38th Cong., 2nd sess., 64. See McCurry, "War, Gender, and Emancipation in the Civil War South." Whereas emancipation in the West Indies imposed the rule of marriage, the enlistment measure derived freedom from existing slave marriage. The enlistment measure also differed from the 1862 Militia Act in specifying "marriage" (whose terms it defined in detail) as the basis of abolition.

⁵⁴ See *Globe*, 38th Cong., 1st sess., 1483; 38th Cong., 2nd sess., 194–195; Cott, *Public Vows*, 79–81, 94–96; Lea VanderVelde and Sandhya Subramanian, "Mrs. Dred Scott," *Yale Law Journal* 106, no. 4 (1997): 454–459.

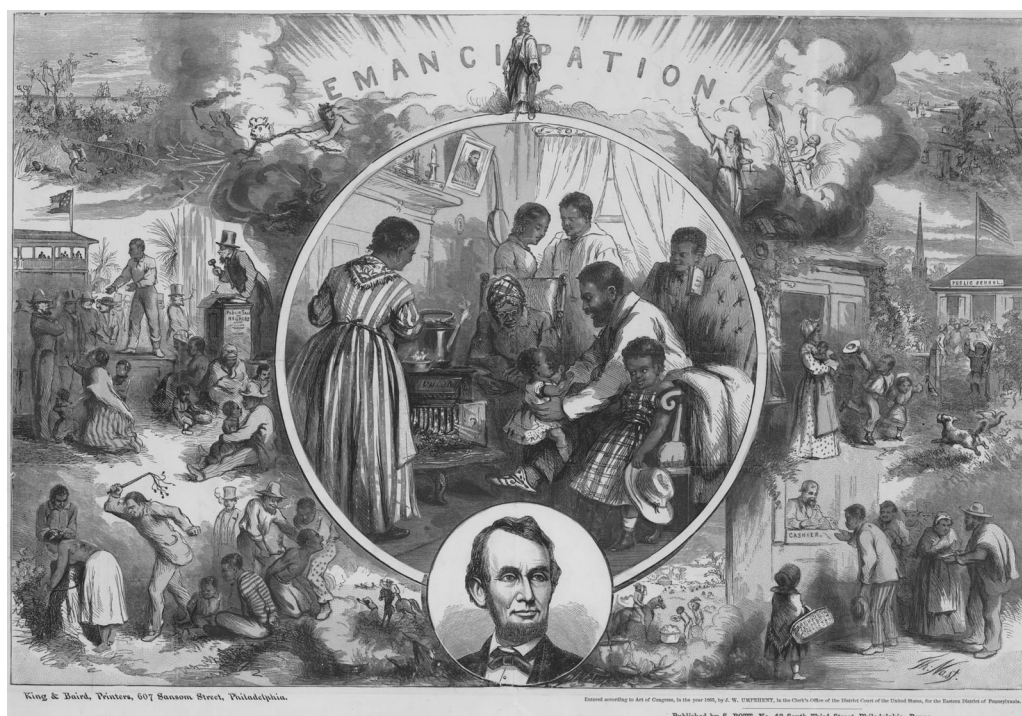


FIGURE 6: Thomas Nast, "Emancipation." Philadelphia: S. Bott, 1865. Prints and Photographs Division, Library of Congress, LC-USZ62-2573.

have the same feelings toward their wives and children that white men have, as near as I can ascertain; and where is the white man who would enlist in the Army of the United States and leave his wife and children subject to the taunts, the insults, and ignominy of a master.

"Gentleman stand up here and talk about constitutional law," Wade remonstrated, "while we deny his right to have his wife and children emancipated."⁵⁵ The vindication was of the rights of man, irrespective of race.

In the Senate, the last antislavery word belonged to Lyman Trumbull, who pronounced the enlistment measure unconstitutional; in the House, it belonged to the Iowan James Wilson, who celebrated the abolition of "property tenure" in slave wives. "We, acting for the nation, must treat them as persons." But by persons, he did not mean persons possessing inviolable rights. Rather, the slave wife's freedom was simply part of "a duty we owe, under the powers we possess, to the great and eternal principles of God's justice, to see that a full meed of equity and right is meted out to these men who are risking all for our sakes and for the sake of this nation"—a soldier's *quid pro quo*.⁵⁶

For a year, then, Congress debated freeing the slave wife—who she was, what she was worth, and whether to buy her; how she suffered; and whether to wait for the Thirteenth Amendment. Yet the question of her right to herself never arose. For all the enumeration of her torments—her mangled body and torn face, her sale down

⁵⁵ *Globe*, 38th Cong., 1st sess., 985; 38th Cong., 2nd sess., 160; 38th Cong., 1st sess., 1182; 38th Cong., 2nd sess., 162, 161.

⁵⁶ *Globe*, 38th Cong., 2nd sess., 1004.

the river—this inventory of slavery's badges did not add up to a declaration of her rights of sovereign personhood. Under the soldier's quid pro quo, no longer would she be akin to a bale of tobacco she cultivated; but as a wife, she still would not be master of herself.

AT LAST, IN LATE February 1865, immediatism prevailed, as impatient abolitionists carried the enlistment measure through Congress. By then, the Thirteenth Amendment had been ratified by half the states still left in the Union, and slavery had been abolished by state constitutional transformation in Maryland and Missouri. In both houses of Congress, the measure passed by far slimmer margins than the amendment. Whereas Sherman set aside his doubts to vote yea, Trumbull voted nay. Other framers of the amendment failed to appear for the vote. A message of March 3, 1865, to President Abraham Lincoln from the secretary of war, Edwin Stanton, stated that the measure was of "the highest importance," and that day Lincoln signed it into law. In April, peace came at Appomattox; at the end of the year, the abolition amendment became part of the Constitution.⁵⁷

Slave wives went free, therefore, under the soldier's quid pro quo before the Thirteenth Amendment abolished slavery throughout the country. Emancipating as many as 100,000 women and children, principally in Kentucky, the measure joined the enactments, stretching from the Confiscation Acts to the Reconstruction Amendments, that governed the transition from slavery to freedom. By dint of being a slave wife, the bondswoman won deliverance from her loyal master, only to become subject to the Union soldier's newfound sovereignty at home. Accordingly, a Union war order, dated March 23, 1865, announced to the "colored men of Kentucky" that enlistment would liberate "helpless women and children." Meanwhile, the Kentucky Court of Appeals struck down the measure as an unconstitutional taking of slave property without compensation, ordering "a negro woman, the wife of a soldier," reported a Cleveland paper, "to be sold as a slave." Garrett Davis had kept his promise, taking his defense of slaveholders' rights directly from Congress to state court.⁵⁸

Nonetheless, bondswomen claimed freedom as soldiers' wives, swearing out affidavits against ex-masters who still treated them like chattel. With Union army of-

⁵⁷ In the Senate, the vote on the measure was 27 to 10, with 12 not voting; in the House, 74 to 63, with 45 not voting. In the Senate, the vote on the Thirteenth Amendment was 38 to 6; in the House, 119 to 56, with 8 not voting. *Globe*, 38th Cong., 2nd sess., 168, 1004; 38th Cong., 1st sess., 1490; 38th Cong., 2nd sess., 531. War Department Communication, in Sears, *Camp Nelson, Kentucky*, 180. By February 1865, Louisiana and Tennessee, originally covered by the enlistment measure, had also abolished slavery under the state constitutions.

⁵⁸ General John M. Palmer, "Order No. 10, March 23, 1865," in Berlin, Reidy, and Rowland, *The Black Military Experience*, 275; *Corbin v. Marsh*, 63 Ky. 193, 194 (1865); "Prospective Trouble," *Daily Cleveland Herald*, October 20, 1865, col. c. And see "Important Judicial Decisions in Kentucky," *Cincinnati Enquirer*, March 30, 1865, 1; "Slavery in Kentucky," *Chicago Tribune*, October 18, 1865, 2. Unbound to a Union soldier, the bondswoman remained a slave. During this interlude between slavery's downfall and abolition's conclusion, recalled Union general John Palmer, polygamy sometimes even may have offered freedom. The Appeals Court ruling was consistent with Kentucky's refusal to ratify the Thirteenth Amendment. See John M. Palmer, *Personal Recollections of John M. Palmer: The Story of an Earnest Life* (Cincinnati, 1901), 233; Palmer, "Order No. 10"; Gutman, *The Black Family in Slavery and Freedom*, 375–385; Sears, *Camp Nelson*.

ficers as their witnesses, they described standing naked under the lash. "When my husband enlisted my master beat me over the head with an axe handle," testified a Kentucky freedwife.

On Wednesday last March 22" he said that he had not time to beat me on Tuesday but now he had time . . . He then tied my hands threw the rope over a joist stripped me entirely naked and gave me about three hundred lashes. I cried out. He then caught me by the throat and almost choked me then continued to lash me with switches until my back was all cut up.⁵⁹

It was an account reminiscent of the scenes that justified abolition, in which women's torments legitimated inviolable human rights, representing essential wrongs to be banished by freedom. In Thirteenth Amendment jurisprudence, however, the subjection of woman has disappeared. It is involuntary servitude and Jim Crow that count as vestiges of slavery, not wrongs particular to women, wrongs evoked by the image of a bondswoman left to her master's tender mercies, involving unfree sex as well as forcible labor and racial subjugation. Aspects of bondage highlighted in arguments for abolition—the torment of woman, body and soul—do not figure as badges of slavery recognized by the courts as forbidden by the abolition amendment. "Those laws that prevented the colored man going from home, that did not allow him to buy or to sell, or to make contracts; that did not allow him to own property; that did not allow him to enforce rights," maintained Lyman Trumbull just a month after the amendment's adoption, "were all badges of servitude made in the interest of slavery and as a part of slavery."⁶⁰

Therein lies a paradox of the Thirteenth Amendment. It was clear to the authors of abolition that slavery constituted not just property in man but the violation of woman—not just forced production of staples but also unfree reproduction of wealth in slaves. And because freedom and slavery were always paired as opposites, acquiring meaning as contrasting systems of social relations, abolition promised to end the predicaments of woman so powerfully symbolizing the evils of slavery. Yet those sexed predicaments have disappeared from constitutional doctrine. And with that disappearance, the meaning of slavery has narrowed, and conversely of freedom as well, circumscribing the reach of the Thirteenth Amendment. "What divinity in whipping women for protesting when their virtue is assailed?" abolitionists cried out on behalf of the amendment.⁶¹ But in Thirteenth Amendment jurisprudence, slavery's badges arise from contract, property, and race—not sex.

Why this is so lies in the logic of the enlistment measure. Speaking more directly to the bondswoman's condition than any other emancipatory enactment, it tied her freedom to marriage bonds and did the work of abolition just before the Thirteenth Amendment became part of the Constitution. Indeed, it answered the question about the nature of her freedom intended by abolition that was never explored in the debate over the amendment's language. Taking her from a loyal master, the soldier's quid pro quo defined her as a person rather than property, but not as a sovereign individual, for as a wife she fell within her husband's dominion. The badges of her slavery disappeared in bonds of marriage that abolition upheld as the essence

⁵⁹ "Affidavits," in Berlin, *The Destruction of Slavery*, 615, 623.

⁶⁰ *Globe*, 39th Cong., 1st sess., 1866, 322.

⁶¹ *Globe*, 38th Cong., 1st sess., 2948.



FIGURE 7: Alfred R. Waud, "Mustered Out": Colored Volunteers at Little Rock, Arkansas." *Harper's Weekly*, May 19, 1866, 308. Prints and Photographs Division, Library of Congress, LC-USZ62-175.

of freedom. And in its free-soil rather than human rights phrasing, the amendment by no means contravened that logic. Thus after abolition, as before, no less an apologist for all forms of household unfreedom than George Fitzhugh could still blithely affirm: "The law makes the husband master of his wife." Meanwhile, the Reconstruction Amendments designated race a suspect category but enshrined woman's disfranchisement as a citizen. Only a century later would the logic of the soldier's quid pro quo begin to be systematically overturned, with the advent of another constitutional revolution disestablishing the wife's subjection under the Equal Protection Clause of the Fourteenth Amendment rather than the antislavery Thirteenth.⁶²

⁶² George Fitzhugh, "What's to Be Done with the Negroes," *Debow's Review*, June 1866, 577–581, 579. On slave emancipation and marriage bonds, consider abolitionist assurances during the debate over the Thirteenth Amendment that freedom meant a man's right "to himself, to his wife and children"; *Globe*, 38th Cong., 2nd sess., 200; and see *Bradwell v. The State*, 83 U.S. 130 (1872); Edwards, *Gendered Strife and Confusion*; Cott, *Public Vows*, 77–104. On gender, citizenship, and the postbellum limits of equal protection, see Amar, "Women and the Constitution"; Ellen Carol Dubois, *Woman Suffrage and Women's Rights* (New York, 1993); Barbara Welke, "Law, Personhood, and Citizenship in the Long Nineteenth Century: The Borders of Belonging," in Grossberg and Tomlins, *The Long Nineteenth Century*, 345–386; Laura Edwards, "The Civil War and Reconstruction," *ibid.*, 313–344, esp. 339–341. On gender and modern equal protection doctrine, consider the ruling of Justice Burger: "Nowhere in the common-law world—indeed in any modern society—is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being. Chip by chip, over the years those archaic notions have been cast aside." *Trammel v. United States*, 445 U.S. 40 (1980). And see Hartog, *Man and Wife in America*; Reva B. Siegel, "Gender and the United States Constitution," in Beverly Baines and Ruth Rubio-Marin, eds., *The Gender of Constitutional Jurisprudence* (New York, 2005), 306–332; George Chauncey, *Why Marriage? The History Shaping Today's Debate over Gay Equality* (New York, 2004), 59–86. On the limits of equal protection, see Robin West, "Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment," *Florida Law Review* 42, no. 1

Thus the counterpoint between the enlistment measure and the Thirteenth Amendment casts new light on the meaning of slavery and freedom at the moment of abolition. It illuminates the paradox of the amendment—the potent symbolism of the bondswoman’s wrongs in justifying abolition but the amendment’s impotence in guaranteeing woman’s freedom. And in turn that paradox illuminates the seemingly perverse American significance of the commerce power in rooting out wrongs forbidden by human rights guarantees in other jurisdictions. Perhaps if the amendment had spoken in terms of revolutionary doctrine, of human rights rather than of free soil, its ambit might have been wider and that of the commerce power narrower.⁶³ For then the amendment might have entitled woman to herself, thereby nullifying laws treating her as unfree and unequal while also striking at the private sovereignty of all masters in the household, a sovereignty rooted in relations of dominion and dependence even older than New World slavery.

It is not a historian’s task to speculate about newly construing the Thirteenth Amendment to count the violation of woman’s human dignity as a badge of slavery—as abolitionists once did. Yet history surely brings to light contradictions in ideas of inviolate right as they were made palpable at the moment of slavery’s abolition, contradictions that still inhibit the progress of human rights. Accordingly, the past illuminates freedom to be won.

(1990): 45–79; Martha C. Nussbaum, “Sex, Laws, and Inequality: What India Can Teach the United States,” *Daedalus* 131, no. 1 (2002): 95–106; Richards, “Abolitionist Feminism, Moral Slavery, and the Constitution.”

⁶³ See *United States v. Morrison*, 529 U.S. 598 (2000); Katyal, “Men Who Own Women”; Akhil Reed Amar and Daniel Widawsky, “Child Abuse as Slavery: Amendment Response to *Deshaney*,” *Harvard Law Review* 105, no. 6 (1992): 1359–1385; Marcellene E. Hearn, “A Thirteenth Amendment Defense of the Violence Against Women Act,” *University of Pennsylvania Law Review* 146, no. 4 (1998): 1097–1167; Judith Resnick, “Sisterhood, Slavery, and Sovereignty: Transnational Antislavery Work and Women’s Rights Movements in the United States during the Twentieth Century,” in Sklar and Stewart, *Women’s Rights and Transatlantic Antislavery*, 19–54; Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (New York, 2000), 1–110; Marjorie Agosin, ed., *Women, Gender, and Human Rights: A Global Perspective* (New Brunswick, N.J., 2001).

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