Introduction

By itself, the Emancipation Proclamation did not free a single slave. That fact, well known by generations of historians, does not demean the proclamation. The proclamation was surely the most powerful instrument of slavery's destruction, for, more than any other measure, it defined the Civil War as a war for black freedom. Most Americans today would name the proclamation as the most important result of the war. Had the original document not been destroyed by fire in 1871, it would no doubt reside alongside the Declaration of Independence and the Constitution as one of our national treasures. Even those who contend that slaves did more than white commanders and politicians to abolish slavery tend to see the proclamation as the brightest achievement of slaves' efforts on behalf of their own freedom.

But the fact remains: the Emancipation Proclamation did not free a single slave. And that fact hung over the country during the last years of the Civil War. Many Americans during this period would have considered today's veneration of the proclamation misplaced. They knew that the proclamation freed slaves in only some areas – those regions not under Union control – leaving open the possibility that it might never apply to the whole country. They knew that even this limited proclamation might not survive the war: It might be ruled unconstitutional by the courts, outlawed by Congress, retracted by Lincoln or his successor, or simply ignored if the Confederacy won the war. Americans understood that the proclamation was but an early step in putting black freedom on secure legal footing. Abolition was assured only by Union military victory and by the Thirteenth Amendment, which outlawed slavery and involuntary servitude throughout the country. Congress passed the amendment more than two years after the proclamation, and the states ratified it in December 1865, eight months after Union victory in the Civil War.

Historians have written much about the fate of African Americans after the Emancipation Proclamation, but they have not been so attentive to the process by which emancipation was written into law. In part, the inattention is a natural consequence of the compartmentalization of history. Because emancipation proved to be but one stage in the process by which enslaved African Americans became legal citizens, historians have been prone to move directly from the Emancipation Proclamation to the issue of legalized racial equality. In other words, historians have skipped

quickly from the proclamation to the Fourteenth Amendment, ratified in 1868, which granted "due process of law" and "equal protection of the laws" to every American. Within this seamless narrative, the Thirteenth Amendment appears merely as a predictable epilogue to the Emancipation Proclamation or as an obligatory prologue to the Fourteenth Amendment.

The course of events leading from the Emancipation Proclamation to the Thirteenth Amendment was anything but predictable. After Lincoln issued the proclamation, lawmakers, politicians, and ordinary Americans considered a variety of plans for making emancipation permanent and constitutional. The abolition amendment was simply one of many methods considered and, in the early going, was by no means the leading choice. Only during the course of political struggles in late 1863 and early 1864 did the amendment emerge as the most popular of the abolition alternatives. By mid-1864, the amendment had become a leading policy of the Republican party, which wrote the measure into its national platform. As an avowed Republican policy, the amendment should have dominated the political campaign of 1864, but unforeseen circumstances and changing party strategies drove the measure from public debate. Nevertheless, supporters of the amendment claimed the Republican victories of 1864 as a mandate for the amendment, and they successfully carried the amendment through Congress in January 1865. A number of states quickly ratified the measure, and ratification was complete by the end of that year.

The sequence of events is crucial: the amendment became a party policy before its merit or meaning was precisely understood. For those historians seeking to recover one original meaning of the Thirteenth Amendment, the premature transformation of the measure into a party policy represents a real problem. As a party policy, the amendment attracted support from people with similar political objectives but different notions of freedom. Because of the diverse constituencies behind the amendment, some of its supporters allowed the meaning of the measure to remain vague. If they had instead assigned a precise meaning to the amendment, they would have alienated some of those constituencies and jeopardized the measure's adoption.[1]

This book is not a brief for or against one specific reading of the Thirteenth Amendment. Instead, it is an attempt to place the amendment in its proper historical context by recreating the climate in which the measure was drafted, debated, and adopted. To understand this climate, I have read through congressional and state legislative proceedings but have

1 William E. Nelson and others have noted a similar problem confounding efforts to determine the original meaning of the Fourteenth Amendment. See Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge, Mass.: Harvard University Press, 1988), 1–12.

also cast my eye far beyond these deliberative bodies. Because legislative activity was simply one part, albeit the most visible part, of a social and political process of law making, I also have read more than twenty Union newspapers published during the Civil War years, dozens of pamphlets and published diaries, and the manuscripts contained in almost three hundred collections in more than thirty archives across the country. Drawing together such disparate pieces as a local abolitionist society's petition, an African American newspaper editorial, or a private letter between two legal scholars, I have tried to give as much texture as possible to the story of the amendment's creation.

To understand the making of the amendment is to understand the fluid interaction between politics, law, and society in the Civil War era. The amendment was not originally part of a carefully orchestrated political strategy; nor was it a natural product of prevailing legal principles; nor was it a direct expression of popular thought. Political tactics, legal thought, and popular ideology were always intertwined, and, at every moment, unanticipated events interceded and led to unexpected consequences. The Thirteenth Amendment was, above all, a product of historical contingency. Americans glimmered the revolutionary potential of the amendment only after the measure emerged as an expedient solution to the problem of making emancipation constitutional. The "true" meaning of the amendment was thus destined to be controversial. Even today, historians and legal scholars struggle over the measure's original meaning, usually in order to understand its relevance to the present. Did it simply prohibit America's peculiar form of racialized chattel slavery, or did it promise in addition a full measure of freedom to all Americans? Was it the brainchild of conservative politicians, progressive abolitionists, or the slaves themselves?

Those who enter this book looking for simple answers to these questions will leave frustrated. I offer no single, original meaning of the amendment. Nor do I provide a single, clear answer to the increasingly stale question, Who freed the slaves? Histories that seek mainly to identify the primary agents of emancipation tend to emphasize divisions among those who strove for black freedom rather than acknowledging some of the common goals. The story of the Thirteenth Amendment is one of cooperation as well as discord, of achievements by one person as well as concerted efforts among many. The search for any measure's origins is always a perilous venture, and it is especially so in the case of the Thirteenth Amendment. The amendment was not the product of any one person or process, and its meaning was contested and transformed from the moment of its appearance. Thus there is a paradox in this book's title: despite the amendment's promise to make freedom final, Americans were

left to work out the origins and meanings of freedom long after the measure was adopted.[2]

Rather than thinking of the amendment as a well-planned measure with an agreed-upon purpose, it is best to see it as a by-product of, and a catalyst for, three distinct but related developments. The first was Americans' ongoing confrontation with the realities of emancipation. Struggles to attain and define freedom began with the period of European settlement of North America and continue today, but, as Eric Foner and other historians have demonstrated, they were most fierce during the Civil War and Reconstruction. Prior to the Civil War, Americans agreed upon only two facts about freedom: slaves were not free, and free people were not slaves. Once the Civil War began, Americans facing the prospect of constitutional abolition had to rethink emancipation. If the Constitution came to outlaw slavery, would it make everyone equally free? The struggle over the Thirteenth Amendment thus enlarged and enlivened the debate over freedom.[3]

The Thirteenth Amendment played a critical role in a second development: political transformation. One of the most remarkable phenomena in the Union during the last years of the Civil War was the fluidity of party politics. Prior to the Civil War, Republicans were primarily known as a northern party that abhorred slavery – or at least slavery's extension into the territories. During the last years of the Civil War, however, the prospect of reunion under the antislavery amendment forced Republicans to reconsider their objectives. Would the party now explicitly demand equal

2 For the search for original intent, especially the original intent of the Civil War amendments, see Herman Belz, *Abraham Lincoln, Constitutionalism, and Equal Rights in the Civil War Era* (New York: Fordham University Press, 1998), 170–86, which contains references to other important works on the subject. Also see Belz, "The Civil War Amendments to the Constitution: The Relevance of Original Intent," *Constitutional Commentary,* 5 (Winter 1988), 115–41. For debates over agency in emancipation, see 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: Kent State University Press, 1997), 105–21; and James M. McPherson, "Who Freed the Slaves?" *Reconstruction,* 2 (1994), 35–40. Despite the opposing thrusts of these essays, both authors are aware of the pitfalls of focusing on one person or group to the exclusion of all others. Lerone Bennett, *Forced into Glory: Abraham Lincoln's White Dream* (Chicago: Johnson, 1999), a powerful attack on the myth of Lincoln as "Great Emancipator," is the latest work to weigh in on the question of agency. Because Bennett's book was published when my own book was already in production, I was unable to attend to its argument and evidence in the pages that follow. The omission is not grave: like most works on Civil War emancipation, Bennett's book is focused almost entirely on the coming of the Emancipation Proclamation, whereas mine examines the fate of emancipation after the proclamation.

3 The best, most succinct discussion of emancipation, with citations to the literature on the subject, is Eric Foner, "The Meaning of Freedom in the Age of Emancipation," *Journal of American History,* 81 (September 1994), 435–60.

rights as well as freedom for African Americans? Would it try to make inroads into the South? Meanwhile, northern Democrats began to divide over their party's traditional stance against emancipation. While conservative Democrats deployed increasingly vicious attacks against Republican antislavery initiatives, more moderate Democrats tried to take the party in a new direction by embracing emancipation – at least emancipation in the form of a constitutional amendment. For some observers and political insiders, the appearance of a new coalition behind the amendment portended the creation of a new party system. Recent examinations of Civil War–era politics slight the fluidity in party politics during the period, either by looking at only one party in isolation or by treating the Republicans and Democrats as two well-defined entities constantly locked in battle. The real nature of politics during the period, the unpredictability and occasional incoherence, is better revealed by studying the complexity both within and between parties on one issue – in this case, slavery – over a brief period time. If one premise of the book is that politics can be understood only by examining all the parties at once, another is that political history must include as wide a population as possible. I follow the lead of recent scholars of political history who look to actors beyond candidates and voters and actions beyond campaigns and elections. But I also believe that political institutions such as Congress and the parties have an internal life of their own that can profoundly affect those at the peripheries of the political universe. To be as inclusive as possible, this book tries to attend to a broad population of political actors and ideas as well as to the inner workings of the institutions of power. It moves between the contemplations of the nonelite and the deliberations of the congressional committee and party caucus.[4]

The making of the Thirteenth Amendment was part of a third pivotal

4 The goals articulated here echo many of those described in Michael F. Holt, "An Elusive Synthesis: Northern Politics during the Civil War," in James M. McPherson and William J. Cooper, Jr., eds., *Writing the Civil War: The Quest to Understand* (Columbia: University of South Carolina Press, 1998), 112–34, esp. 133–34. My conception of politics has been enriched by recent scholars who have expanded the scope of political history along two different axes. The first expansion, which involves treating nonelites, including nonvoters, as crucial players in politics, is described in Jean Harvey Baker, "Politics, Paradigms, and Public Culture," *Journal of American History,* 84 (December 1997), 894–99. The second expansion, which involves treating institutional evolution as crucial to democratic development, is discussed with references to relevant works in Richard R. John, "Governmental Institutions as Agents of Change: Rethinking American Political Development in the Early Republic," *Studies in American Political Development,* 11 (Fall 1997), 347–80. On the specific issue of political fluidity during the last years of the Civil War and the first years afterward, see Michael Les Benedict, *A Compromise of Principle: Congressional Republicans and Reconstruction, 1863–1869* (New York: W. W. Norton, 1974); and LaWanda Cox and John H. Cox, *Politics, Principle, and Prejudice, 1865–1866: Dilemma of Reconstruction America* (New York: Free Press, 1963).

development: Americans' reconceptualization of their Constitution. More than any measure since the Bill of Rights, the Thirteenth Amendment allowed Americans to conceive of the Constitution as a document that could be altered without being sacrificed. In the fifty years leading up to the Civil War, Americans had come to regard the constitutional text as sacred. They rarely contemplated constitutional amendments, opting instead to alter constitutional doctrine through judicial and legislative interpretation. On the issue of slavery in particular, Americans had resisted tampering with constitutional provisions drafted by the founding generation. The Thirteenth Amendment took the nation in a different direction. It signaled that the venerated constitutional text needed revising, forcing Americans to confront the profound implications of rewriting the original Constitution. Historians have often looked to the Gettysburg Address as the document that "remade" the Constitution, but it was the Thirteenth Amendment, not Lincoln's address, that Americans of the Civil War era saw as the transforming act. Yet, although the Thirteenth Amendment represented a turn against the nation's fathers, it was no act of patricide. By altering the Constitution without eviscerating it, Americans could remain firm in the belief that they were building on the founders' structure rather than tearing it down. The movement toward an amendment did not signal a clear, fundamental shift in constitutional ideology. Rather, the shift was subtle, and its full effects would be realized only slowly. Amending the Constitution was nothing new in American history, but amending it to achieve a major social reform was. Unexpectedly, then, the discussion of the amendment opened up an even broader debate about the nature of amendment and the fundamentality of the Constitution. Through this dialogue, Americans rediscovered the amending device as a cure for constitutional paralysis. The amendment helped redirect Americans' attention to the concept of a living Constitution and set the stage for the drama of constitutional revision during the next seven decades.[5]

5 On constitutional development during the Civil War, see Phillip S. Paludan, *A Covenant with Death: The Constitution, Law, and Equality in the Civil War Era* (Urbana: University of Illinois Press, 1975); Harold M. Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (New York: Alfred A. Knopf, 1973). On the Gettysburg Address, especially the role that the address played in incorporating into the Constitution the doctrine of the Declaration of Independence that "all men are created equal," see Garry Wills, *Lincoln at Gettysburg: The Words That Remade America* (New York: Simon and Schuster, 1992), and Pauline Maier, *American Scripture: Making the Declaration of Independence* (New York: Alfred A. Knopf, 1997), 154–208. On the patricide theme, see George B. Forgie, *Patricide in the House Divided: A Psychological Interpretation of Lincoln and His Age* (New York: W. W. Norton, 1979). On the constitutional amending process in American history, see David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776–1995* (Lawrence: University Press of Kansas, 1996), esp. 154–87, which offers the most balanced treatment of the

The use of a constitutional amendment to abolish slavery was a distinguishing feature of emancipation in the United States. In other areas of the Western Hemisphere during the nineteenth century, abolition was accomplished by statute, edict, or judicial action. The peculiar form that abolition legislation took in the United States may not be as important as the extraordinary process by which slaves actually became free citizens, but the distinctiveness of this method nonetheless deserves attention. That Americans chose to graft abolition onto their most cherished legal document showed a desire not merely to eradicate slavery but to make a break with the past. Historians may continue to debate the extent to which slavery caused the Civil War, but one fact remains certain: it was slavery, more than anything else, that forced Americans to confront the imperfection of their Constitution. It was slavery, too, that gave rise to the modern notion of the amending power. Once they had amended the Constitution to abolish slavery, Americans felt more comfortable endorsing other amendments that could not have been adopted during the time of the framers. Reformers were more likely to accept the Constitution as an aid rather than an impediment to change, and they increasingly cast their proposals in the form of constitutional amendments. It is no small irony that slavery, the most antidemocratic institution sustained by the Constitution, unleashed one of the greatest democratizing forces to transform the Constitution.

significance of the Civil War amendments in reshaping Americans' attitudes toward amendments in general. Bruce Ackerman argues more forcefully than Kyvig for the significance of these amendments as moments of constitutional change; see Ackerman, *We the People*, vol. 2, *Transformations* (Cambridge, Mass.: Harvard University Press, 1998), 99–252. For an interpretation somewhat different from my own, one that views the Thirteenth Amendment merely as a "completion" of the Constitution, see Michael P. Zuckert, "Completing the Constitution: The Thirteenth Amendment," *Constitutional Commentary*, 4 (Summer 1987), 259–84. For the literature on the "living Constitution," see Howard Gillman, "The Collapse of Constitutional Originalism and the Rise of the Notion of the 'Living Constitution' in the Course of American State-Building," *Studies in American Political Development*, 11 (Fall 1997), 191–247.

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Slavery's Constitution

On July 4, 1854, the abolitionist William Lloyd Garrison observed Independence Day by burning a copy of the United States Constitution. He was disgusted that the Constitution not only permitted the continued enslavement of 4 million African Americans but also required federal officials to return fugitive slaves to their masters. The gesture earned Garrison both praise and scorn, as did his declaration that the founding document was a "covenant with death" and "an agreement with hell."[1] Today, in an era when burners of the American flag are routinely hauled before the courts, Garrison's destruction of another national icon seems radical in the extreme. The act seems even more poignant when contrasted with today's constitutional politics. When reformers today run into the roadblocks of constitutional provisions, congressional legislation, or judicial decisions, they are much more likely to demand a constitutional amendment than the abandonment of the entire Constitution. Garrison and other abolitionists, however, failed to embrace the amendment alternative.

Ultimately, of course, opponents of slavery did come to regard a constitutional amendment as the best method of ending slavery, but they did so only after the conflict over slavery had erupted into a shooting war. When Congress finally adopted the antislavery amendment in January 1865, Garrison announced that the Constitution, formerly "a covenant with death," was now "a covenant with life."[2] Garrison's praise suggested that the amendment had always been the abolitionists' goal, but, in fact, the measure appeared rather late on the antislavery agenda. Contrary to what abolitionists said after the amendment was adopted, and what historians have accepted ever since, the amendment was never the expected outcome of the conflict over slavery.

Nevertheless, in the years leading up to the Civil War, and in the first years of the war itself, Americans laid the groundwork for an abolition amendment, even if that particular measure had been little contemplated by either the early opponents or champions of slavery. Only the ante-

1 Phillip S. Paludan, *A Covenant with Death: The Constitution, Law, and Equality in the Civil War Era* (Urbana: University of Illinois Press, 1975), 1–3.
2 *Liberator,* February 10, 1865, p. 2.

bellum failure to resolve slavery disputes under the existing Constitution, followed by the wartime struggle to set the Union on new constitutional foundations, made it possible at last for Americans to contemplate an antislavery amendment.

The Constitution, Slavery, and the Coming of the Civil War

Americans of the nineteenth century, though often frustrated by the ambiguities of the Constitution, usually accepted the document's vagaries as the price of Union. "Nothing has made me admire the good sense and practical intelligence of the Americans," wrote the French social theorist Alexis de Tocqueville in 1835, "more than the way they avoid the innumerable difficulties deriving from their federal Constitution."[3] In a sense, the Civil War erupted because the American people refused any longer to overlook their competing conceptions of their founding charter.

The most difficult of the "innumerable difficulties" noted by de Tocqueville was the Constitution's ambiguity on slavery. The word "slavery" did not appear in the Constitution of 1787 – the framers opted for the less offensive expression "person held to service or labor" – but the institution nonetheless permeated the document. In five places slavery was directly indicated, and in as many as ten others it was implied.[4] Most important among the explicit concessions to slavery were the three-fifths clause, which counted each slave as three-fifths of a person for the purpose of representation in the House of Representatives; the fugitive slave provision, which decreed that escaped slaves had to be "delivered up" to their original state; and the perpetuation of the African slave trade to at least 1808. Of the implicit concessions to slavery, the most important was the absence of any mention of congressional authority over slavery in the enumeration of congressional powers. Because Congress was given only enumerated rather than plenary powers, and because it was not explicitly granted the power of emancipation, most Americans came to believe that Congress could not abolish slavery in the states. In the years after the Constitution was ratified, Americans generally regarded the document's protection of slavery as part of a necessary compromise. Yet there was no single compromise over slavery, no identifiable bargain in which northerners "sold out" the slaves to southern whites. Rather, there

3 Alexis de Tocqueville, *Democracy in America,* ed. J. P. Mayer (Garden City, N.Y.: Anchor Books, 1969), 165.

4 Paul Finkelman, "Slavery and the Constitutional Convention: Making a Covenant with Death," in Richard Beeman, Stephen Botein, and Edward C. Carter II, eds., *Beyond Confederation: Origins of the Constitution and American National Identity* (Chapel Hill: University of North Carolina Press, 1987), 188–225.

was a series of agreements, which, in the words of historian Don E. Fehrenbacher, formed a pattern "acknowledging the legitimate presence of slavery in American life while attaching a cluster of limitations to the acknowledgment."[5]

More than simply an exercise in coalition building, the framers' acceptance of slavery was, in part, a product of their vision of a Constitution open to improvement. The essence of that vision appeared in Article 5, which outlined the procedures for amending the Constitution. The amending provision was hardly revolutionary, for it had deep roots in Anglo-American legal tradition, and it prevented the Constitution from being whimsically rewritten.[6] The country could change its charter through two different methods. In the first, two-thirds of both houses of Congress approved the amendment, and then three-fourths of the states ratified it. In the second method, which has never been successful, two-thirds of the states petitioned Congress to call a national convention, and three-fourths of the states ratified any amendments proposed by the convention. No matter which method was used to amend the Constitution, Article 5 prohibited any amendment from depriving a state of its equal suffrage in the Senate.

At first, the new nation embraced the founders' notion of an adjustable Constitution. In the fifteen years after the Constitution's ratification in 1789, Congress proposed and the states ratified twelve amendments. The first ten, the Bill of Rights, James Madison pushed through Congress himself as concessions to the Antifederalists. These amendments, at least in Madison's view, made explicit those rights that the original Constitution had only implied. Both the eleventh and twelfth amendments rectified oversights by the framers of the original Constitution. The Eleventh Amendment made it clear that suits against individual states by private or foreign citizens would take place in state rather than federal courts, a matter that the Constitution and Judiciary Act of 1789 had failed to resolve. The Twelfth Amendment, adopted in the wake of a deadlocked presidential election between two candidates of the same party, adjusted

5 Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978), 27. See Earl M. Maltz, "The Idea of the Proslavery Constitution," *Journal of the Early Republic,* 17 (Spring 1997), 37–59; and Peter Knupfer, *The Union As It Is: Constitutional Unionism and Sectional Compromise, 1787–1861* (Chapel Hill: University of North Carolina Press, 1991), 45–47.

6 David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776–1995* (Lawrence: University Press of Kansas, 1996), 19–65; Richard B. Bernstein with Jerome Agel, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?* (New York: Times Books, 1993), 3–30; John R. Vile, *The Constitutional Amending Process in American Political Thought* (Westport, Conn.: Praeger, 1992), 1–46.