

# Final Freedom

The Civil War, the Abolition of Slavery, and  
the Thirteenth Amendment

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# *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.<sup>1</sup>

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 glimpsed 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.<sup>2</sup>

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.<sup>3</sup>

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.<sup>4</sup>

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.<sup>5</sup>

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.

## *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.”<sup>1</sup> 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.”<sup>2</sup> 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."<sup>3</sup> 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.<sup>4</sup> 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.”<sup>5</sup>

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.<sup>6</sup> 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.

the electoral system to conform to the unanticipated development of a two-party system. Although lawmakers argued over the form of these first twelve amendments, they generally saw the amendments as supplementing or clarifying the Constitution rather than revising it.<sup>7</sup> The difference between a supplement, which made explicit something implicit or remedied something unforeseen, and a revision, which seemed to challenge original doctrine, might seem trivial, but it was precisely this difference that would trigger a furious debate over the Thirteenth Amendment.

After the adoption of the first twelve amendments, constitutional doctrine evolved solely through judicial decisions, not constitutional amendments. In fact, the amending process generally fell into disuse. Between 1810 and 1860, congressmen proposed fewer constitutional amendments than had been proposed during the much shorter span between 1789 and 1810. And in the later period, no amendment was adopted by the nation or even approved by Congress.<sup>8</sup>

The atrophy of the amendment process during the antebellum era is remarkable considering how often during this period abolitionists spoke of the inadequacy of the proslavery Constitution. Prior to 1808, the year that Congress outlawed the African slave trade by statute, abolitionists in and out of Congress only occasionally proposed antislavery amendments, and after that date they almost never did. Those who aimed to outlaw slavery tended instead to target the legal system of individual states. That strategy had been successful in the northern states during the late 1700s and early 1800s, though in most of these states emancipation was gradual and slavery lingered on well into the nineteenth century. Meanwhile, in the southern states during the antebellum period, slavery became increasingly entrenched, and those rare moments when a statewide initiative for emancipation took hold passed quickly. By the 1830s most abolitionists had given up on state-level legislation in the South and opted instead to try to shame slaveholders into emancipating their own slaves. At the same time, they appealed to the federal government to abolish slavery in one of the few areas where it had exclusive jurisdiction: Washington, D.C. Rare was the abolitionist who proposed abolishing slavery everywhere by constitutional amendment.<sup>9</sup>

7 Kyvig, *Explicit and Authentic Acts*, 87–116. In a technical sense, the Twelfth Amendment was a genuine revision, rather than a mere supplement, because it changed explicit electoral procedures outlined in the original Constitution. But because these procedures had proved to be wholly impractical, people did not object to the Twelfth Amendment because it challenged “original” doctrine.

8 See Herman Ames, *The Proposed Amendments to the Constitution of the United States during the First Century of its History* (1896; repr., New York: Burt Franklin, 1970), 306–55.

9 Most of the proposed amendments attempted to abolish slave importation. One pro-

An important exception was John Quincy Adams. In 1839 the Massachusetts congressman and former president proposed amendments that prohibited slavery in the District of Columbia, banned the admission of more slave states, and abolished all hereditary slavery after 1842. The House of Representatives, which had imposed a gag rule on all antislavery petitions, refused to consider the amendments. Adams, who had been fighting the gag rule for years, knew that his proposals would never be debated, much less adopted. His hope had been to use the amendment method to keep the slavery issue before Congress and to push abolitionists to demand the emancipation of slaves everywhere, not merely in Washington, D.C. After Adams's failed effort, no one in Congress proposed an antislavery amendment until the outbreak of the Civil War; even outside of Congress, abolitionists rarely considered the amending strategy.<sup>10</sup>

The idea of writing emancipation into the Constitution did not fit well into most abolitionists' thinking about the Constitution. Antislavery activists tended to take one of three approaches to the Constitution, none of which led naturally to an abolition amendment. The first approach, which the historian William M. Wiecek labels "radical constitutionalism," assumed that the Constitution was a purely antislavery document that, from its inception, empowered the federal government to abolish slavery everywhere.<sup>11</sup> Radical constitutionalists believed that the framers' genuine attitude toward slavery was expressed in the Declaration of Independence, which declared that "all men are created equal," and in the Fifth Amendment, which prohibited the deprivation "of life, liberty, or property, without due process of law." Also demonstrating the founders' antislavery leanings was the Northwest Ordinance of 1787, an early version of which

posed amendment in 1818 prohibited slavery everywhere. See *ibid.*, 193, 208–9. On abolitionism in general, see Paul Goodman, *Of One Blood: Abolitionism and the Origins of Racial Equality* (Berkeley: University of California Press, 1998); Aileen Kraditor, *Means and Ends in American Abolitionism: Garrison and His Critics on Strategy and Tactics, 1834–1850* (New York: Pantheon Books, 1969). On emancipation in the North, see Joanne Pope Melish, *Disowning Slavery: Gradual Emancipation and "Race" in New England, 1780–1860* (Ithaca: Cornell University Press, 1998); Arthur Zilversmit, *The First Emancipation: The Abolition of Slavery in the North* (Chicago: University of Chicago Press, 1967).

10 Kyvig, *Explicit and Authentic Acts*, 144; William Lee Miller, *Arguing about Slavery: The Great Battle in the United States Congress* (New York: Alfred A. Knopf, 1996), 353–54; and William W. Freehling, *The Road to Disunion: Secessionists at Bay, 1776–1854* (New York: Oxford University Press, 1990), 343–44. David L. Child and Henry B. Stanton were two of the exceptional abolitionists who proposed antislavery amendments; each hoped to use this method to build popular support for the antislavery cause. David L. Child, *The Despotism of Freedom* (Boston: Young Men's Anti-Slavery Association, 1833), 25; and William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760–1848* (Ithaca: Cornell University Press, 1977), 256.

11 Wiecek, *Sources of Antislavery Constitutionalism*, 259–63.

had been drafted by Thomas Jefferson. Radical constitutionalists looked to the ordinance's ban on slavery in the Northwest as proof that the framers envisioned a nation free of slavery (though they chose to ignore the fact that the ordinance was only infrequently enforced).<sup>12</sup> Radical constitutionalists rarely argued for an antislavery amendment. For them, such a measure would be, at best, redundant and, at worst, an admission that the original, unnamed Constitution was proslavery – precisely the interpretation that they disputed.<sup>13</sup>

The second abolitionist reading of the Constitution, a reading made popular by William Lloyd Garrison and his allies, regarded the Constitution as thoroughly proslavery. Garrison himself had arrived at his position slowly. In the early 1830s, he contemplated constitutional solutions to slavery, even an antislavery amendment.<sup>14</sup> But during the latter part of the decade, antiabolitionist violence and legislative inaction on slavery turned Garrison against the Constitution and in favor of a sectional break with slave owners. After 1841 he never seriously contemplated revision of the Constitution, although Wendell Phillips, Garrison's main ally, seemed to lean in this direction when, in an 1847 pamphlet attacking the radical constitutionalist position, he wrote, "the Constitution will never be amended by persuading men that it does not need amendment."<sup>15</sup> But Phillips never suggested an antislavery amendment, not even as a long-term goal. He wanted an immediate break with slavery, and because no amendment could be adopted in the short term, the only path was "over the Constitution, trampling it under foot; not under it, trying to evade its fair meaning."<sup>16</sup> Many African American abolitionists joined Garrison in the proslavery reading of the Constitution, but just as many, perhaps even more, took the radical constitutionalist position that the Constitution *as it was* authorized abolition as well as equal rights for African Americans.<sup>17</sup>

12 Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson* (Armonk, N.Y.: M. E. Sharpe, 1996), 34–79; Peter S. Onuf, *Statehood and Union: A History of the Northwest Ordinance* (Bloomington: Indiana University Press, 1987).

13 See, for example, Amos A. Phelps, *Lectures on Slavery and its Remedy* (Boston: New-England Anti-Slavery Society, 1834), 192–96.

14 Garrison to Thomas Shipley, December 17, 1835, in Walter M. Merrill and Louis Ruchames, eds., *The Letters of William Lloyd Garrison*, vol. 1, *I Will Be Heard!*, 1822–1835 (Cambridge, Mass.: Harvard University Press, 1971), 584.

15 Wendell Phillips, *Review of Lysander Spooner's Essay on the Unconstitutionality of Slavery* (Boston: Andrews and Prentiss, 1847), 4.

16 Ibid. 35. See Louis S. Gerteis, *Morality and Utility in American Antislavery Reform* (Chapel Hill: University of North Carolina Press, 1987), 48–51.

17 See the 1857 debate between Frederick Douglass and Charles Lenox Remond in John W. Blassingame et al., eds., *The Frederick Douglass Papers* (New Haven: Yale University Press, 1985), ser. 1, 3:151–62 (Remond argued that the Constitution was proslavery, while Douglass argued that it was antislavery, a position that he had newly adopted in the early 1850s). Also see Vincent Gordon Harding, "Wrestling toward the Dawn:

Alongside the radical constitutionalist and Garrisonian readings of the Constitution was the more moderate free-soil reading, which was made popular by Salmon P. Chase, an Ohio lawyer who had gained fame by defending fugitive slaves. Originally a Whig sympathizer, Chase joined the antislavery Liberty party in the early 1840s and then helped create the Independent Democrats (or "Free Democracy," as he called it), a coalition of Liberty men and free-soil Democrats that elected him to the Senate in 1848. Chase eventually joined the fledgling Republican party in the 1850s and helped shape that party's stance on slavery. The problem with slavery, explained Chase and other Republican leaders, was that it violated the free-labor ideal of workers exchanging their labor for appropriate wages.<sup>18</sup> Here Republicans followed the ideology not only of established abolitionists but of most Americans in the market-oriented society of the North. Where Republicans differed from prior antislavery activists was in their free-soil approach to the Constitution. Instead of seeing the Constitution as wholly proslavery or antislavery, Chase and the Republicans argued that the framers of the Constitution meant for slavery to be prohibited from the territories but protected in the states. The way to abolish slavery, then, was by federal legislation where slavery did not yet exist and state legislation where it already existed.<sup>19</sup>

Republicans, along with other antislavery activists, seemed unable even to contemplate another constitutional route to emancipation: a federal abolition amendment. Perhaps some Republicans feared that proposing such a measure would give the party too radical a reputation. Critics could charge that the Republicans, despite their promise not to touch slavery where it existed, meant to abolish it everywhere. Yet this explanation for the absence of an amendment works only for moderate and conservative Republicans. We should still find calls for the measure from those radical Republicans who were openly committed to prohibiting slavery everywhere. But no faction of the party seems to have discussed, much less proposed, an abolition amendment. Perhaps antislavery groups saw the

The Afro-American Freedom Movement and the Changing Constitution," *Journal of American History*, 74 (December 1987), 721-23.

- 18 John Ashworth, "Free Labor, Wage Labor, and the Slave Power: Republicanism and the Republican Party in the 1850s," in Melvyn Stokes and Stephen Conway, eds., *The Market Revolution: Social, Political, and Religious Expressions* (Charlottesville: University Press of Virginia, 1996), 202-23; Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War* (New York: Oxford University Press, 1970), 11-39.
- 19 Michael A. Morrison, *Slavery and the American West: The Eclipse of Manifest Destiny and the Coming of the Civil War* (Chapel Hill: University of North Carolina Press, 1997), esp. 58-59; John Niven, *Salmon P. Chase: A Biography* (New York: Oxford University Press, 1995), esp. 99-113; Foner, *Free Soil, Free Labor, Free Men*, 73-102; Wiecek, *Sources of Antislavery Constitutionalism*, 191-93, 216-20.

impossibility of securing the requisite number of congressional votes and state ratifications to adopt the amendment. The unlikelihood of the amendment's adoption hardly explains why almost no one proposed it, however. Abolitionists could have proposed an antislavery amendment simply to keep the subject of universal emancipation before the public. That had been the strategy of John Quincy Adams in 1839 when he offered his antislavery amendments. Abolitionists had not been deterred from proposing other antislavery solutions by the unlikelihood of their adoption (Garrison's radical call for secession from slaveholders was the most obvious example), so it seems doubtful that the difficulty of securing an abolition amendment alone explains the absence of such a proposed measure.

The deeper reason for the absence of antislavery amendments was the widespread belief among all Americans that the constitutional text should remain static. This belief stemmed, in part, from the symbolic role that the Constitution had played as the defining emblem of the nation. Few Americans could cite specific provisions of the Constitution, yet almost all assumed that its alteration would stain the national character and render life rudderless.<sup>20</sup> No one better reflected this attitude than Abraham Lincoln, who in his now-famous "Lyceum address" of 1838 identified the Constitution as a central tenet in the nation's "political religion."<sup>21</sup> As a congressman in 1848, Lincoln opposed a constitutional amendment providing for internal improvements. "New provisions," he argued, "would introduce new difficulties, and thus create, and increase appetite for still further change. No sir, let it [the Constitution] stand as it is."<sup>22</sup> During the political convulsions over slavery's extension into the territories in the mid-1850s, Lincoln told an audience: "Don't interfere with anything in the Constitution. That must be maintained, for it is the only safeguard of our liberties."<sup>23</sup> Historians have rightly contended that Lincoln saw the Constitution as evolving, that he maintained the old Whig belief that federal power under the Constitution should expand in order to develop the country's natural resources and to ensure people's natural rights. But it is important to remember that he did not see this evolution occurring through constitutional amendments. In Lincoln's view, the Constitution needed only to be interpreted along proper Whig, then Republican, lines; it did not need revision.

Even when the Supreme Court issued a decision contrary to Republican

20 Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (1986; repr., New York: Vintage Books, 1987), pt. 1, esp. 101–4.

21 CW, 1:112.

22 CW, 1:488.

23 CW, 2:366.

doctrine in the *Dred Scott* case of 1857, Lincoln and other party members failed to propose a constitutional amendment as a corrective. In his majority decision, Chief Justice Roger B. Taney ruled that a slave residing temporarily in a free state or territory remained a slave and that any act prohibiting slavery in the territories was unconstitutional. He also declared that African Americans could not be citizens of the United States. Because of a persistent confusion in the country about the nature of freedom and citizenship, Taney could claim that freedom was in itself no guarantee of either state or national citizenship. Free blacks born in free states, therefore, were not necessarily citizens – a remarkable claim, not only because of the country's long-standing tradition of birthright citizenship, but because free blacks in a number of northern states had been living as citizens of those states for many years.<sup>24</sup> Taney justified his position by reading the clause of the Constitution declaring that “citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states” as saying that citizens of one state were not necessarily citizens of the nation, but citizens of the nation were citizens of every state. Republicans preferred the contrary interpretation of the dissenting Justice Benjamin R. Curtis. Curtis equated state and national citizenship even as he agreed with Taney that freedom alone was not a guarantee of citizenship and that states had the power to deny state and national citizenship as well as civil rights to its native-born residents. Lincoln called Taney's ruling something less than “a settled doctrine” and hoped for a time when the Court would overrule its own decision.<sup>25</sup> Republicans in general joined Lincoln in blaming the *Dred Scott* decision on a defective Court rather than a flawed Constitution. So committed were Republicans to the Constitution's original text that they did not urge the adoption of a constitutional amendment to override Taney's decision, even though Taney himself thought that Republicans might take precisely such a course.<sup>26</sup>

24 Paul Finkelman, “Rehearsal for Reconstruction: Antebellum Origins of the Fourteenth Amendment,” in Eric Anderson and Alfred A. Moss, Jr., eds., *The Facts of Reconstruction: Essays in Honor of John Hope Franklin* (Baton Rouge: Louisiana State University Press, 1991), 1–27; Robert J. Cottrol, “The Thirteenth Amendment and the North's Overlooked Egalitarian Heritage,” *National Black Law Journal*, 11 (1989), 198–211; James H. Kettner, *The Development of American Citizenship, 1608–1870* (Chapel Hill: University of North Carolina Press, 1978), 287–333.

25 CW, 2:401.

26 That Taney considered the possibility of Republicans proposing an antislavery amendment is suggested by that part of his decision pointing out that “if any of its [the Constitution's] provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended.” “*Dred Scott v. John F. A. Sandford*,” *United States Reports*, 19 (October 1857), 426. On the facts and resolution of the case, see Fehrenbacher, *The Dred Scott Case*.

Democrats were at least as devoted as Lincoln and the Republicans to preserving the text of the Constitution. Although Democrats during the antebellum era had been the leading proponents of constitutional change at the state level – a position that paralleled their preference for codification over judge-made law – their belief in the need for constitutional revision when governments abused their power rarely carried over to their view of the federal Constitution.<sup>27</sup> State constitutions never inspired the same awe, the same expectation of permanence, as the federal Constitution, and in no state was there a tradition of honoring the state constitution that compared with such traditions surrounding the federal Constitution. Democrats may have seen state constitutions as pliable, but the words that they used to describe the federal Constitution – “a rock,” “a sheet-anchor,” “the rubicon of our rights,” and “the ark of safety” – connoted permanence.<sup>28</sup> Despite their significant ideological differences with Republicans, Democrats in the antebellum era shared with Republicans a belief in the sanctity of the Constitution's text. Regardless of their political persuasion, Americans prior to 1860 were likely to see any amendment to the Constitution as an admission that the American national experiment had failed.

The proposal of an antislavery amendment in particular was unlikely, for most Americans assumed that a compromise on slavery was essential to the maintenance of the Union. Indeed, the amending device was invoked during the antebellum era more frequently to preserve rather than to abolish slavery. The proslavery statesman John C. Calhoun in particular did more than any northern abolitionist to popularize the amendment method.<sup>29</sup> Because a supermajority of the states was needed to ratify an amendment, Calhoun reasoned, a similar consensus should be required to adopt a federal law that went against a state's interests. In the anonymously authored *Exposition and Protest* of 1828, Calhoun argued that a state convention could nullify a law such as a tariff or, implicitly, a restriction against slavery. Congress then had to rescind the law or resubmit it to the states in the form of a constitutional amendment. Calhoun's theory enjoyed a powerful legacy, and Americans were likely during the antebellum years to associate the amendment method with the protection of

27 Harold M. Hyman and William M. Wiecek, *Equal Justice under Law: Constitutional Development, 1835–1875* (New York: Harper and Row, 1982), 3–5; Michael F. Holt, *The Political Crisis of the 1850s* (1978; repr., New York: W. W. Norton, 1983), 106–9.

28 Jean H. Baker, *Affairs of Party: The Political Culture of Northern Democrats in the Mid-Nineteenth Century* (Ithaca: Cornell University Press, 1983), 153; Joel H. Silbey, *A Respectable Minority: The Democratic Party in the Civil War Era, 1860–1868* (New York: W. W. Norton, 1977), 70–79.

29 Kyvig, *Explicit and Authentic Acts*, 139–43; Vile, *The Constitutional Amending Process*, 79–93.

slavery and states' rights. Some of the most frequently proposed amendments during this period were those ensuring that slaveholding and non-slaveholding sections had an equal say in the election of the president. Calhoun himself suggested an amendment establishing a dual executive – one president from the North, and one from the South.<sup>30</sup> During the antebellum era, as antislavery northerners devised every method *except* a constitutional amendment to end slavery, proslavery southerners established the precedent of proposing amendments that preserved slavery forever.

The election of 1860 should have awakened more of slavery's opponents to the possibility of using an amendment to abolish slavery. The victory of Lincoln and the Republicans, followed soon after by the secession of the seven states of the deep South and the departure of most of the southerners from Congress, provided an ideal opportunity to push through an abolition amendment. A number of southerners predicted that this would be the Republican strategy in the months to come.<sup>31</sup> From the perspective of today, when proposals for constitutional amendments have become commonplace, we might assume that southern fears of an abolition amendment were well founded, especially since we know that such an amendment was adopted in 1865. But, in fact, Lincoln and his party did not begin to consider an abolition amendment until they had fought more than two years of war. Instead, the amendment that most Republicans contemplated in the wake of the 1860 victories was yet another proposal for preserving slavery forever.

### The Secession Crisis: Amending the Constitution to Protect Slavery

The surge of proposed amendments during the secession crisis was staggering. Whereas only a handful of amendments concerning slavery was proposed in Congress between 1789 and December 1860, roughly 150 slavery amendments were proposed between December 1860 and March 1861, when Lincoln took office. Not only national leaders but ordinary citizens offered revisions. A Rochester man wrote to his local paper that the key doctrines of the *Dred Scott* decision should be added to the Constitution, while a Baltimore resident suggested an amendment prohibiting the succession of two northern presidents.<sup>32</sup> Not since the creation of

30 Bernstein, *Amending America*, 80–81; Ames, *Proposed Amendments*, 103–4.

31 See, for example, the speech of Henry L. Benning, November 19, 1860, in William W. Freehling and Craig M. Simpson, eds., *Secession Debated: Georgia's Showdown in 1860* (New York: Oxford University Press, 1992), 119.

32 *Rochester Democrat and American*, December 29, 1860, p. 2; Neilson Poe to Thurlow Weed, December 19, 1860, Thurlow Weed MSS, UR.

the Constitution had the nation witnessed such a torrent of proposed revisions.

Almost all of the proposed slavery amendments during the secession crisis sought to protect rather than abolish slavery. The proposals thus resurrected older proslavery efforts to use amendments to preserve slavery forever. This time, however, the amendments attracted much northern support, mainly because of fears of disunion. Senator Stephen Douglas of Illinois, Abraham Lincoln's longtime Democratic foe, promised a friend that a compromise amendment took "the slavery question out of Congress forever . . . and gives assurance of permanent peace."<sup>33</sup>

None of the amendments proposed early on in the secession crisis, however, did very well. In his last annual address to Congress in December 1860, President James Buchanan proposed one amendment that recognized the right of property in slaves, another that protected slavery in the territories, and a third that acknowledged the right of masters to recover escaped slaves.<sup>34</sup> No one in Congress pushed hard for the president's proposals. Senator John J. Crittenden of Kentucky offered a similar package of compromise measures, although his included an amendment creating a permanent boundary between slavery and freedom that ran along the old Missouri Compromise line, which extended west from Missouri's southern border. Southern moderates and northern Democrats welcomed Crittenden's solution, but the Republicans, who held a majority in both houses of Congress, refused to consent, for the measure directly violated their commitment to freedom in the territories. "Let there be no compromise on the question of extending slavery," Lincoln told Lyman Trumbull, a former Democrat but now a Republican senator from Illinois.<sup>35</sup> Only the most conservative Republicans supported Crittenden's solution, and the remaining members of the party easily blocked the measure's passage.<sup>36</sup>

The president-elect, who had counseled fellow Republicans to reject compromises such as Crittenden's, could see that such a strategy might make things worse. If Lincoln and his party refused to endorse a compromise, southern unionists might assume that the new administration meant to abolish slavery and trample on states' rights, just as the secessionists had predicted. As long as they seemed intractable, Republicans

33 Douglas to Charles H. Lanphier, December 25, 1860, Charles H. Lanphier MSS, ISHL.

34 R. Alton Lee, "The Corwin Amendment in the Secession Crisis," *Ohio Historical Quarterly*, 70 (January 1961), 7.

35 CW, 4:149.

36 Kenneth M. Stampp, *And the War Came: The North and the Secession Crisis* (Baton Rouge: Louisiana State University Press, 1950), 166–70; David M. Potter, *Lincoln and His Party in the Secession Crisis* (New Haven: Yale University Press, 1942), 108–10, 181–200.

risked the secession of the slave states of the upper South. Long before he took office, therefore, Lincoln began thinking of his own compromise measures to keep these so-called border states in tow. He shared his ideas with Thurlow Weed, the editor of the *Albany* (New York) *Evening Journal*, during a conversation in Springfield, Illinois, on December 20, 1860. Weed was the best-known and most influential wire-puller in the party. He was also the eyes and ears of New York senator William Henry Seward, Lincoln's choice for secretary of state. The president-elect gave the New York editor some written compromise measures that Seward might introduce to Congress. Although historians disagree about what Lincoln wrote on this occasion, his proposals most likely did not take the form of constitutional amendments and probably included only the modest concession of a guarantee to uphold the Fugitive Slave Law of 1850. Lincoln must have assumed that Weed would pass the proposals to Seward, and perhaps he hoped that Seward would introduce the measures to Congress. But the New York senator, who still stung from being denied the Republican presidential nomination, believed himself a much better judge than Lincoln of the political situation. So Seward took the liberty of rewriting Lincoln's proposals. The new plan called for a constitutional amendment that prohibited the adoption of any future amendment interfering with slavery in the southern states.<sup>37</sup> Such a proposal, Seward thought, would put an end to secessionist propaganda that Republicans planned to abolish slavery by constitutional amendment. Upper South unionism would then flourish, and secessionism would wither and die.

Seward's steering of his amendment through Congress was the first legislative success of the embryonic Lincoln administration. In the House, Seward's ally Charles Francis Adams of Massachusetts proposed a version of the amendment that was taken up by the "Committee of Thirty-Three," a body formed to consider and propose compromise measures. The head of the committee, Congressman Thomas Corwin of Ohio, reported out the amendment in January 1861, and from then on the measure was known as the Corwin amendment.

At first, it seemed that Republicans would oppose the Corwin amendment as they had blocked the previous compromise measures. A petition of Massachusetts Republicans proclaimed that the Constitution "needs to be obeyed rather than amended."<sup>38</sup> Other Republicans opposed the amendment because they, like most Americans, assumed that the constitutional text should remain static. Congressman Schuyler Colfax of Indiana

37 Lee, "The Corwin Amendment," 12-17; and Potter, *Lincoln and His Party in the Secession Crisis*, 166-70.

38 John M. Forbes to Charles Francis Adams, February 2, 1861, Adams family MSS, MHS.