"The Thirteenth Amendment and the Meaning of Familial Bonds"

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In discussing the Thirteenth Amendment, we necessarily focus on the historical roots of the amendment, the effects of emancipation, and its immediate and long-term significance. I wish to approach the Thirteenth Amendment from a somewhat different perspective that I hope will pose a worthwhile line of consideration with implications for contemporary policy debates.

What was chattel slavery, and what did the Thirteenth Amendment abolish?

The most obvious meaning of chattel slavery, and therefore the most obvious implication of emancipation, was the forced and uncompensated expropriation of labor from some individuals by others. This aspect of slavery has been studied extensively. Its significance has been elegantly explored beyond the boundaries of the enslavement of Africans and their descendants by David Roediger, among others, who considered how the discourse of wage slavery shaped the development of conceptions of whiteness in the antebellum era. I do not deny the importance of this meaning or its connection to the post-bellum transformation of status and flowering of contract rights, both of which are intimately connected to the relationship between slavery and labor.

I wish, however, to turn my attention in a different direction and think about the meaning of slavery in the context of familial relations. This line of inquiry follows feminist historians' considerations of the intersections of race, gender, and sexuality in the antebellum and postbellum years. Victoria Bynum, Martha Hodes, Michael Grossberg, and Peggy Pascoe have traced the complex and sometimes surprising developmental trajectories of laws governing sexuality, family relations, and race in the antebellum era (Bynum 1992, Hodes 1997, Grossberg 1985, Pascoe 2009). Collectively they have traced the radically contingent nature of legal boundaries between black and white that shaped sexual relations and the connections between natality and status. They have also highlighted the need to understand slavery and freedom as strongly conditioned through gender relations.

This focus leads us first to a curious moment in an infamous case. Justice Taney's opinion in *Dred Scott v. Sandford* finds Scott's status as a slave as fixed by the unconstitutionality of Congress's attempt to regulate against the expansion of slavery in U.S. territories. Justice Curtis's evisceration of the majority position in *Dred Scott v. Sandford* rests upon his claim that Scott was not a slave, but a free man. He provides several reasons for this assertion, including his own interpretation of Missouri law. Yet in presenting their arguments, Taney, Curtis, and other Justices speak in passing about marriage regulations, familial relations, and natality in outlining the scope of slavery as a status.

Taney highlights this in his presentation of the fundamental question of the case. He writes:

Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen? . . . the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country, and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States. [*Dred Scott* at 403]

The status of slavery is, for Taney, a status established by natality, and it is a status that transcends emancipation. Race is intertwined with slavery but intertwined by the original decision of white colonists to import "negroes of the African race" into this country and sell and hold them as slaves. The descendant of slaves cannot achieve membership in the community of citizens.

In arguing that "the legislation of the different colonies furnishes positive and indisputable proof of this fact," Taney first cites several laws, not establishing slavery generally, but those banning and punishing intermarriage between negroes or mulattos and whites (Id. at 408). While Taney develops other frames to establish the inferiority of blacks and their unsuitability for citizenship, his reliance on ancestry, natality, and the regulation of marriage up front in his analysis is striking. The case turns on Taney's finding that the Missouri Compromise could not have legally created a zone of freedom, but Taney's reasoning concerning Scott's ancestry and the legal restrictions on familial relations between and among slaves undergirds this finding.

Much of the debate among the Justices concerns the validity of Missouri's laws and the status of the Compromise. However, Justice Benjamin Curtis, a Whig and by no means a radical, took issue with Taney's analysis. He argued that Taney's presumptions about Scott's status were incorrect in their reliance on Scott's ancestry. As Curtis explained, an individual alleged slave's status could not be determined by looking to that person's parents' statuses: "For they might have been sold after he was born; or the plaintiff himself, if once a slave, might have became a freeman before action brought. To aver that his ancestors were sold as slaves, is not equivalent, in point of law, to an averment that he was a slave" (569-570). Rather, Curtis argued, a person's status as slave or free had to rest in that individual's own life conditions. This

¹ Although Curtis resigned from the Court over the bitterness engendered by the *Dred Scott* ruling, he later acted as Andrew Johnson's chief counsel during Johnson's impeachment.

reconfiguration changed the fundamental question of the case for Curtis, rendering it as "whether any person of African descent, whose ancestors were sold as slaves in the United States, can be a citizen of the United States" If, claimed Curtis, such citizenship was possible – and he claimed that numerous state precedents demonstrated that it was – Scott was entitled to his freedom, "for no cause is shown by the plea why he is not so, except his descent and the slavery of his ancestors" (571).

As Gretchen Ritter notes in her analysis of gender and constitutional development (1996), Curtis emphasizes Scott's status as a married man (with two daughters born in wedlock) as clear evidence that Scott could not be considered a slave. No one had contested that Dred Scott had married Harriet in 1836 with the consent of Dr. Emerson, or that Harriet had borne two daughters in wedlock. The question for Curtis was then "whether, after the marriage of the plaintiff in the Territory, with the consent of Dr. Emerson, any other State or country can, consistently with the settled rules of international law, refuse to recognise and treat him as a free man, when suing for the liberty of himself, his wife, and the children of the marriage" (599). Because Scott was a free man according to the laws of the territory in which he was married, he had the capacity to contract a valid marriage.

This, however, violates the logic of the claim that Scott remained a slave. As Curtis outlined, insisting that Scott was still a slave would necessarily invalidate his marriage and his familial relations with his wife and children: "So that, though lawfully married in the Territory, when they came out of it, into the State of Missouri, they were no longer husband and wife; and a child of that lawful marriage, though born under the same dominion where its parents contracted a lawful marriage, is not the fruit of that marriage, nor the child of its father" (599-600). This would constitute a gross violation of the sanctity of contract, particularly the special contract that forms marriages. It would also destroy the legitimacy of the family, a core purpose of the state recognized not just in American law, but internationally.

For Curtis, this logic had important implications for the master who allowed a slave to marry. As he explained,

What, then, shall we say of the consent of the master, that the slave may contract a lawful marriage, attended with all the civil rights and duties which belong to that relation; that he may enter into a relation which none but a free man can assume-a relation which involves not only the rights and duties of the slave, but those of the other party to the contract, and of their descendants to the remotest generation? In my judgment, there can be no more effectual abandonment of the legal rights of a master over his slave, than by the consent of the master that the slave should enter into a contract of marriage, in a free State, attended by all the civil rights and obligations which belong to that condition. [600]

Note that in his analysis, the generational implications of slavery go in the opposite direction as for Taney: the (presumably male) slave who marries becomes free and transmits this freedom to his wife and the children and descendants produced through the marriage.

The status or condition of being a married man and the status of being a slave are fundamentally incompatible. The existence of the sanctioned relationship of marriage related directly to both citizenship and manhood for the married man, and by extension his family. Marriage, by this time a state-recognized and —ordered relation, marked the man as an agent rather than chattel, presumably both through the prior necessity of the capacity to form contracts behind marriage and by the obligations marriage generated directly to the wife and any children produced and secondarily to the state to prevent the wife and children from becoming dependent upon it.

The idea that marriage was incompatible with slavery and that legitimate marriage negated slavery was shown during the Civil War to work aggressively in the other direction. Historians have discussed at length the place of marriage promotion as an urgent policy priority throughout the space of slavery's collapse and the initiation of a new political and social order. First, the Union generals who established contraband camps for slaves who had emancipated themselves by crossing Union lines seemed to view the creation of orderly married relations among the freedmen and women as a matter of nearly as much significance as the logistics of managing the basic physical needs of a large population of ill-provisioned refugees (Onwuachi-Willig 2006, Gross 1998). Lawmakers in the south infuriated federal Republicans by passing black codes, but their early legislative efforts also included detailed mechanisms for solemnizing or presuming marriages and establishing the legitimacy through marriage of children born slaves. The Freedmen's Bureau was an important institutional mechanism for the implementation of the imperative to organize and legitimize family units, with agents providing practical assistance to what must have been to them a bewildering array of kin and sexual relationships among people who had not had the right to make the normatively acceptable monogamous, binding legal commitments to each other and to their children in common. Husbands and wives were found and paired off; children were placed with parents based on biological relationships – if possible. The local and external agents sorting out these situations fretted over how to manage women with children of different fathers or women who had partnered with men after bearing children fathered by another man.

Ultimately, the riotous multitude of familial relationships among ex-slaves and between ex-slaves and those who had never experienced slavery were largely tamed, or at least the norm was established that these relationships should follow the monogamous norms of white marital relationships. Intense discussion about the acquisition of individual civil and political rights and the resistance of white southerners provoked protective legislation from Congress and ultimately drove the adoption of the fourteenth and fifteenth amendments, but argumentation over these rights incorporated family structures. As I am developing in another project, arguments for

expanding freedmen's rights were gendered and based significantly in military sacrifice and service. The rights claimed by and for black men were fundamentally connected to masculinity, but also fundamentally connected to the idea of a head of household responsible for the care and welfare of the family: contract rights to protect economic security, voting rights to advance the interests of women virtually represented by their husbands, self-defense rights that extended to the protection of the home and family against both private and public violence, and legal rights to muster the state's protective power for access and exercise of these other rights.

Likewise, by the end of the war, both North and South agreed that slavery was fundamentally incompatible with military service. The story on the North's side is well known: the early debates over whether residents of contraband camps should be mobilized as military resources, the formation of the first units of freedmen, and the ultimate use of large numbers of freedmen to plug the Union's manpower losses through desertion and draft evasion. In the South too, however, by the end of the war policymakers were ready to embrace emancipation for those slaves willing to fight. Proposals discussed in the Confederate Congress and endorsed by Robert E. Lee entailed the emancipation not only of slaves agreeing to serve as soldiers, but of their families as well (Currie 2004). Military service thus appears both as a right/duty for free men and as an emancipatory device in itself.

Viewing these struggles from the vantage point of the early twenty-first century, I have largely seen it through the lens of citizenship and have thought, along with other scholars, about how this package of promised rights does or does not provide a framework for full citizenship on the part of members of politically and racially subordinated groups. Much of the historical consideration of the postbellum constitutional struggles has addressed these issues through the interpretive ambiguities of the fourteenth amendment. Its citizenship clause functions as a clear repudiation of the reasoning in *Dred Scott* and frames the discussion in the terms described above, while situating the rights as rights of citizens. The tripartite division of rights into the uneasily bounded categories of political, civil, and social rights, held citizenship as the touchstone form of membership around which the other debates swirled.

But what did it mean not to be a slave? The Thirteenth Amendment abolished slavery and the badges of slavery, a phrase that interested postbellum attorneys intensely. In the cases students commonly read to understand Reconstruction, post-Reconstruction, and the scope of the fourteenth amendment, the thirteenth amendment is generally read alongside it, and the application and outcome of both amendments tend to point in the same direction. To list just the most famous examples, in *Slaughter-House*, the major holding is that the fourteenth amendment's privileges or immunities clause does not apply, but the limitation on the independent slaughter-house operators does not constitute a form of slavery. The *Civil Rights Cases* do not allow the thirteenth amendment to provide independent authorization for the mechanisms of charging private defendants with acts of discrimination against freedmen. And *Plessy* infamously declares state-sponsored segregation not to be a badge of servitude but merely

the construction blacks choose to put upon the principle of separation as part of a larger argument that segregation does not constitute a violation of the fundamental principle of equality for citizens.

What was or is the point of the thirteenth amendment in light of its more litigated and celebrated successors, the fourteenth and fifteenth amendments? If citizenship alone is the point, and the scope and extent of birthright citizenship is the fundamental fulcrum of debate, then the thirteenth amendment seems mere makeweight. I argue here that there may be some value in considering the legal recognition of the family beyond conceptions of citizenship and civic membership, and in considering the significance of struggles over military service in light of the experiences and arguments over emancipation. I want to make a similar move to Justice Curtis's, thinking about leveraging non-slave status into an argument for a form of civic membership that exists alongside citizenship without depending upon it.

Most attempts to make more of the thirteenth amendment have considered other forms of arguably coerced labor or the civic status of other racially subordinated groups. The framers of the thirteenth amendment were considering the problem of the "cooly" trade and wanted to close the door to the functional ownership of Chinese railroad workers, even if they did not contemplate the extension of citizenship to these workers or their descendants (Torok 1996: 71-75). Still, early interpretations of the amendment only applied it actively and independently in the late nineteenth and early twentieth century struggles against peonage, which reinforced the contemporary impression that its primary core concerns labor and labor rights (Tsesis 2004). Recently, left legal theorists have begun to argue in favor of revitalizing the amendment as a source of anti-subordination principles (see particularly Zietlow 2010). These arguments make sense in light of 1) the failure of attempts to expand the scope of Congress's reach under the fourteenth amendment due to the persistence of the state action limitation and the strengthening of color blind frameworks, 2) the growing uncertainty surrounding the stability of commercebased legislation enforcing equality in an era in which federalism and states' rights seem to be making a strong comeback, and 3) the startling revitalization of the second amendment and concurrent hints that some jurists are willing to re-think settled doctrine from Reconstruction and post-Reconstruction.

A good bit of this discussion has used the thirteenth amendment as an alternative ground for the liberty- and equality-inflected purposes usually addressed through the fourteenth amendment. As noted above, labor is an obvious issue, and many scholars have looked thoughtfully at how some practices involving immigrant workers are functionally equivalent to slavery. Reproductive labor, too, has come under scrutiny when it is arguably coerced or

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² The nadir of the thirteenth amendment as a place for constitutional argumentation can probably be found in Linda Crane's 2003 suggestion that the commerce clause might be a better site for rooting constitutional arguments in favor of eliminating the last economic vestiges of slavery than the thirteenth amendment. Crane 2003.

commodified in ways that scholars have identified as inappropriate or dehumanizing. Another potential contemporary interpretation of badges of slavery (particularly relevant as we approach the 150th anniversary of the Civil War) is the use of Confederate signs and symbols as a means of expressing a hostile agenda toward African Americans. I would like in the remainder of this paper to ask about the implications of what I shall describe as a fundamental protection for the integrity of the family unit, the radical implications of birth as a form of belonging, and the connection between military service and anti-slavery that I believe also fall under the thirteenth amendment's command to the nation and to Congress.

First, the family unit. Of course, the thirteenth amendment does not define family, and its framers presumably did not have any particularly radical notion of family in mind when they drafted the amendment. Nonetheless, in *Dred Scott* and elsewhere, evidence suggests that one of the most disturbing elements of slavery to those seeking its abolition was its effect on families. Critiques of slavery on these grounds highlighted several elements: the lack of capacity for formation of long-term monogamous bonds, the production of children without any guarantee of long-term parental relationships with mothers or fathers, the prevalence of sexual coercion of black women and their incapacity to resist (which was seen as an assault both to the women and to the black men who sought to bond with them), the uses of black women as "breeding stock," the automatic classification of any child born to a slave woman as a slave regardless of the status of the child's father, and related insults.

Second is the issue of status at birth. As Frederick Douglass and numerous other critics emphasized, slavery undercut the radical promise of the Declaration of Independence that all men were created – born – equal and acquired at birth their God-given rights to life, liberty, and the pursuit of happiness. If slaves could be excluded from this guarantee simply on the basis of their natality, who else might be at risk? (By the 1850s, some anti-slavery advocates had begun to answer this question by looking to the condition of women.)

And third is the question of military service. While the amendment itself says nothing about military service, as noted above, military service was intimately connected to discussions of emancipation on both sides of the Mason-Dixon line. As acceptance for black soldiers spread among military leaders in the North, they increasingly came to conceptualize a war that would have as its inevitable endpoint the elimination of slavery and all its incidents. Advocates for emancipation also pressed the idea that freedmen's military contributions constituted a down payment on freedom for all descendants of Africans, both as a moral matter and because in practical terms, a soldier (and by extension his family) could not be subjected to slavery.

The colloquy in *Dred Scott* adds another element, however. The abolition of slavery means the abolition of these kinds of abuses of and limitations on familial bonds and the radical potential of natality, and it meant the reinforcement of the soldier persona as incompatible with the status of slavery. (In this light, one might consider the birthright citizenship protected in the

fourteenth amendment to be an extension or refinement of the promise of the thirteenth amendment.) Yet one might also argue that one who can contract a real, meaningful marriage, one who can build a family unit, one who can be born into freedom and a share of the promise of fundamental rights, or one who can serve in the military cannot be a slave.

How might these principles work with regard to contemporary struggles over rights, belonging, and membership? I sketch this out with respect to two issues: current debates over immigration, including proposals to end birthright citizenship for children of illegal immigrants, and the struggle over same-sex marriage. For both these cases, I draw from my previous unpublished work, but consider these issues through the lens of the thirteenth amendment rather than the lens of citizenship or civic membership.

On immigration, recently two popular and controversial political initiatives have run up against each other. One initiative presses for broader access to permanent residency and/or citizenship for immigrants who serve in the American armed forces, even if they entered the nation illegally as children. The other presses for the reinterpretation or amendment of the fourteenth amendment's guarantee of birthright citizenship to individuals born in the United States to parents who are in the country illegally. Arguments over both of these initiatives have tended to play out in terms of citizenship and civic membership and in terms of background fourteenth amendment conceptions of equality. What might they look like if reconsidered through the framework suggested by the thirteenth amendment?

Non-citizens do serve in the US armed forces and do, if legally enlisted, have access to a faster track to permanent residency or citizenship if they serve in times of war. President George W. Bush issued an executive order triggering the operation of this provision in 2002 with respect to the military conflicts that began shortly after September 11, and many immigrant members of the armed services have benefited from this (Executive Order 13269; White House Press Secretary 2006). But as Congress and the executive branch manage this process, it is discretionary and based only in moral suasion rather than in any coherent claim based in constitutional rights. Advocates for immigrants argue on the behalf of soldiers in terms of access to citizenship, but a thirteenth amendment argument that sacrificing in a time of war is fundamentally incompatible with something less than membership in the polity as a full human being might bolster these claims in interesting ways.

When the armed forces allow an individual to serve a nation, the precedent of slavery suggests that the relationship between the individual and the nation is fundamentally changed. As federal regulations demonstrate, citizenship is not an assured outcome of this relationship, and the United States has always allowed – in some cases even required – non-citizens to participate in the armed defense of the nation. But the experience of emancipation suggests that, while access to citizenship may remain ambiguous, slavery is both constitutionally and practically

incompatible with military service. Soldiers must be emancipated in order to serve as soldiers in a democratically controlled military force.

This has important implications for the families of soldiers. As two military analysts note, soldiers, like other citizens, can have family members who are not citizens, or in some cases, not legal residents. In the United States as in most nations, the construction of the soldier remains staunchly masculine and hews to a traditional conception of masculinity (see, e.g., Enloe 2000, Canaday 2009). Even in the contemporary era, a masculine ethic of protective and financially supportive investment in the family is presumed, giving the military incentives to ensure that the families of service members are safe. These arguments are highly reminiscent of Civil War era debates over emancipation, as this mandate is understood to go to the heart of military readiness. Thus, "for members of the military, the assurance that these spouses, children, and other family members are safe and well is critical to servicemembers' mission readiness, focus, and effectiveness in protecting the United States" (Timmons and Stock 2009: 273). Like members of the military, close family members of those serving are eligible for expedited or overseas naturalization, but like members of the military, they face challenges that bring debates over immigration and citizenship into conflict with cultural constructions of the soldier. Immigration advocates for these individuals seek to exploit these constructions in favor of their clients, but thirteenth amendment arguments could provide additional leverage.

To understand these dynamics, I will discuss in more detail the case of Yaderlin Jimenez, the undocumented wife of an American soldier. Jimenez was threatened with deportation when her status was discovered, but her case resulted in a public outpouring of support as deportation proceedings were initiated while her husband was missing in action and presumed dead in Iraq. In particular, the analytic processes at work in advocacy for these types of accommodations appear in Massachusetts Senator John Kerry's public communications about the case.

Kerry is an interesting player in this incident. Throughout his Senate career, he has been deeply engaged with military veterans' issues and his public persona is built in part upon his own identity as a Vietnam era combat veteran who departed the service with a Silver Star, a Bronze Star, and three Purple Hearts but then became a public opponent of the war. He currently chairs the Senate Committee on Foreign Relations and chaired the Senate Select Committee on POW/MIA Affairs as it sought to bind the wounds of Vietnam through negotiating normalization of relations and determining the fates of missing American soldiers.

In June of 2007, Kerry, who had, along with Senator Ted Kennedy, been working with Yaderlin Jimenez,³ released an open letter he had penned to Homeland Security chief Michael Chertoff regarding the Jimenezes. Kerry's narrative states that Yaderlin entered the country illegally in 2001 but that she married Army Specialist Jimenez in 2004, "and it was then that her

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³ Media reports alternatively refer to her as Yaderlin Jimenez and Yaderlin Hiraldo.

status was first brought to the attention of immigration officials" (Kerry 2007A). The letter then detailed Alex Jimenez's service and disappearance, noting that he had been awarded a Purple Heart and had returned to Iraq for a second tour of duty. Kerry noted the circumstances around Jimenez's disappearance: the discovery of the body of one of his comrades and Jimenez's identification card in an al Qaeda safe house shortly after the ambush in which he and two other soldiers disappeared. The clear implication was that Yaderlin was waiting for confirmation of her soldier husband's death (which, as noted in the introduction, was the case).

Kerry then rhetorically connected the claim for forbearance for Yaderlin to her identity as a military wife. He explained:

I do not believe that Yaderlin should have her stress and grief compounded by additional worries about her own immigration status. I request that no further action be taken Yaderlin's case while her husband is missing in action. As Yaderlin waits to hear what has happened to her husband I ask that she be allowed to stay in our country. I believe this is a very real test of our government's compassion for a military family which has already made enormous sacrifices for the United States (Kerry 2007A).

Obviously any undocumented immigrant may be experiencing stress and grief in her or his life circumstances when going through a deportation proceeding, and this stress and grief may be completely unrelated to the proceeding. No formal policy authorizes forbearance on this account. But Yaderin's circumstances, Kerry argued, warrant a different calculus, at least as long as Alex's whereabouts remained unknown. Kerry then tapped into an ideal of governmental compassion for "a military family," incorporating Yaderlin into the military frame and crediting her for the "enormous sacrifices" that Alex had already made through his honorable service.

Kerry's public comments that accompanied the release of the letter were even stronger. He claimed that the Department of Homeland Security's threats to deport Yaderlin were "unconscionable" and argued in favor of a blanket policy that "under no condition" should close family members of a deployed service member serving abroad ever be deported (Kerry 2007B). He vowed to do everything in his power to prevent Yaderlin's deportation, since "Our country owes a special debt of gratitude to anyone who puts their life on the line by wearing a uniform and fighting overseas on behalf of the United States" (Id.).

Kerry's impassioned defense made an impact. Shortly after his letter and press conference, Michael Chertoff responded that he had requested that immigration officials cease seeking the removal of Yaderlin Jimenez. In his statement announcing this outcome, he explained, "The sacrifices made by our soldiers and their families deserve our greatest respect" (Barbassa 2007). Yet while Yaderlin's personal dilemma was resolved favorably, other families

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⁴ Kerry does not indicate why proceedings were initiated against Yaderlin after the marriage, but this may have resulted from an attempt by the Jimenezes to register Yaderlin as a military spouse.

remained caught in the same trap. The *Boston Globe* story that reported the resolution of Yaderlin Jimenez's case reported additional sympathetic vignettes of deployed soldiers whose wives were facing legal proceedings while the male soldiers were serving in Iraq. To date, no blanket policy addresses these situations and favorable outcomes are only achieved through individual interventions by high-level policymakers.

A turn to the thirteenth amendment rather than ethics might ground a better policy solution. How should the family members of soldiers be treated? The process leading to abolition suggests that they should be treated as members of the polity, if not as citizens. Certainly they should not be treated as commodities (wanted or unwanted) and expelled at will. The thirteenth amendment's history enables the development of this argument as a matter of constitutional principle rather than simply as a generous or advisable form of forbearance by the state. Developing a broader argument from the thirteenth amendment also enables the family that does not fit the pathetic narrative as perfectly to benefit as a matter of right – the male partner of a female soldier or the father of a soldier (as opposed to the mother relying on a long-standing cultural construct of mothers' contributions of sons to war efforts).

When non-citizen soldiers die in the line of duty, section 329A provides immediate citizenship. This provision was initially adopted in 1989, allowing naturalization upon the petition of a next of kin. The law was symbolically important, embedding the idea that the sacrifice of one's life could earn citizenship, but as written, the primary impact was strictly symbolic. The granting of citizenship only affected the service member who had died. Any survivors were prohibited from receiving the standard set of benefits provided to the survivors of members of the military who were already citizens at the time of their deaths.

In 2003, the issue arose again as Congress considered the Armed Forces Naturalization Act. Individual members of Congress argued for expanding the act to allow for death benefits to the survivors of immigrants. The debate over this element of the bill shows how the discursive construction of soldiers produces a narrative of attachment that extends to the families. Democrat Zoe Lofgren argued for the bill as a positive symbol to support "of our troops who serve our Nation . . . and to support their families who must endure the loneliness and fear of losing a loved one to uphold the strength of our Nation." Lofgren then presented a gendered discussion of why she believed that the bill was just a first step, not an endpoint. She invoked the figure of the soldier's mother, who had given her child's life for a nation to which she herself did not belong. She lamented that "we could have and should have done more," but the Republicans thwarted these efforts because of their hard line on immigration generally: "the Republican majority, so intent on limiting immigration benefits, wouldn't even allow some mothers of soldiers killed in combat to legally remain in this country" (Congressional Record June 4, 2003: 13760).

Lofgren continued, describing the plight of the mother, bringing in the long-standing practice of devotion to the dead and grave decoration. She explained, "when an immigrant

proudly serves in the military and dies for the country, it is obvious that she or he has shown devotion to our country." Note here the transition from *the* country to *our* country in her analysis. She continued, "what about the families of soldiers whom [sic] so proudly serve our Nation? If the mother of the soldier has overstayed her visa, she is excluded from the benefits of this bill." Note here that Lofgren has chosen the mildest infraction that prevents a relative from benefiting. "Your son is killed in combat, but you are deported. How are you to put flowers on your son's grave?" (Id.). The soldier in this statement is dead, but also gendered male, and the mother is excluded from performing her maternal role within the framework of American practices for recognizing and honoring war dead. The dead soldier's civic performance should, in Lofgren's reading, render a maternal civic performance both possible and desirable even by a mother who is not herself a citizen.

Lofgren's analysis did not go unchallenged, however. Representative Doug Bereuter, a conservative Republican from Nebraska and vocal opponent of immigration, responded to Lofgren with another familiar trope that incorporated her dependent feminine survivor: that of the dangerous immigrant who is not self-supporting. He presented this as an equity concern, criticizing the fact that "unlike other people seeking legal immigrant status, these family members would not be required to meet financial thresholds which indicate that they would not immediately be public charges." Bereuter's vision of the non-citizen soldier was likewise starkly divergent from Lofgren's. Lofgren's hypothetical soldier was "proudly" serving and performing and providing evidence of attachment to the nation through the act of serving. For Bereuter, the provisions allowing for faster tracking for citizenship status for both non-citizen soldiers and their families constituted "excessive inducement" to non-citizens to join the military. He warned that this could result in "this country increasingly depending upon what could come to be thought of and called foreign mercenaries to serve in the Armed Forces." While the specter of foreign mercenaries might be understood to invoke the British hiring of Hessians to attempt to suppress the American Revolution, the parallel Bereuter intended to draw was to the decline and fall of Rome (Id.). While Lofgren's arguments for expanding the scope of benefits to more family members in more questionable circumstances did not succeed, the statute did pass, and now non-citizen survivors of those declared citizens posthumously have more opportunities both to receive benefits and to upgrade their own legal statuses. The thirteenth amendment, however, could strengthen these initiatives and provide Congress with the constitutional leverage to expand its conception of how to construct civic membership for the survivors of soldiers.

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⁵ Interestingly, Republican Darrell Issa, who followed Bereuter on the floor and is usually known for his highly conservative standpoints on immigration issues, supported the bill as it stood with benefits for spouses and children, since in his view this policy would "honor the sacrifice of fallen heroes by allowing their spouses and children to enjoy the benefits and freedoms of the country they were fighting to defend" (ld.). This demonstrates how conservative "support for the military" can override other conservative political standpoints in some circumstances.

The thirteenth amendment demands freedom at birth, but links this freedom to family security. This linkage has obvious implications for the current debate over stripping the children of illegal immigrants of birthright citizenship. Right now, the political and constitutional debate center around the fourteenth amendment. Supporters of birthright citizenship emphasize the simplicity of its specific text and the consistent judicial interpretation that the circumstances of birth and the status of the birth parents do not affect the child's access to citizenship. The thirteenth amendment could play an important role as well, though. Taney's interpretation of slavery, which we may take as a mirror image touchstone for its eradication, emphasizes birth and ancestry as the fundamental source of blacks' inability to achieve citizenship or any form of membership in the American polity. The abolition of slavery reverses this principle and places belonging and access to freedom in the moment of birth itself. The infant is radically free of any stain of ancestry; the principle in the original Constitution that corruption of blood and nobility by descent shall not be practiced in the United States is extended to former slaves.

Like struggles over the status of immigrants, struggles over marriage have largely played out in reference to the fourteenth amendment. Equal protection and the concept of marriage as a fundamental right have been core elements in the transformation of marriage as a state-sanctioned relationship through the twentieth century and into the beginning of the twenty-first. The right to marry as a fundamental right and as a privilege subject to equal protection has been developed particularly with respect to race in the struggle to eliminate anti-miscegenation laws, but currently advocates for same-sex marriage are attempting to expand this framework. The thirteenth amendment has played little, if any, role in these debates.⁶

This may well be a mistake. As I have discussed elsewhere (Novkov 2008), the analogy between bans on interracial marriage and bans on same-sex marriage is complex and introduces some interesting problems into the struggle for same-sex marriage. Fundamentally, the path taken to eliminate bans on interracial marriage at the national level endorsed a thin vision of racial equality that did not attend to deeply rooted historical structures of subordination. The thirteenth amendment has clear historical drawbacks (see below), but could present an opportunity to freshen the debate and focus it on a different set of historical concerns.

As *Dred Scott* and its demise suggest, the free capacity to marry and form a family unit is fundamentally incompatible with slavery. The act of marriage itself abrogates the status of slavery through its marking of the participants in the marriage as fully participatory and competent makers of the marriage contract. Slaves at times attempted to engage in this form of autonomy but the southern states refused to acknowledge these relationships as marriages. One

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⁶ Ironically, a quick internet search turned up some citations to the thirteenth amendment from advocates for maintaining or passing bans on same-sex marriage. The logic is that the thirteenth amendment should be read in conjunction with the fourteenth amendment to limit the scope of the fourteenth amendment's command of equality strictly to racial issues, thereby enabling advocates of same-sex marriage bans to distinguish these bans from bans on interracial marriage.

of the first and most urgent agendas of emancipation was to organize and recognize marital relationships.

The analogy to contemporary same-sex families is clear: some same-sex couples form bonded relationships and seek recognition of these relationships from their communities, families, and/or religious leaders. While neither the state nor any private individual has the capacity to separate these couples by force, the state can choose to render these couples as legal strangers to each other. Such renderings run the gamut from mild (the reservation of marriage as a specific relation only to opposite sex couples with the provision of all of its state-recognized benefits to same-sex couples through civil unions) to quite harsh (constitutional amendments in some states that bar the state from ever providing any of the incidences of marriage to same-sex couples). Beyond these individual state laws, federal law allows states to deny marital status to sojourners and in-migrants through the Defense of Marriage Act, which renders the geographic of any state supreme over legal relationships contracted in other states.

In some states, the analogy is stronger, as they prevent not only the sanctioned formation of bonded couples, but also bar the entrance of legally recognized offspring into the relationship by limiting adoption rights for same-sex couples. These limits may allow individual adoptions but bar same-sex couples from jointly adopting a child or even prevent a same-sex partner from adopting the biological child of her or his partner without terminating the biological parent's parental rights (Plowman 2010). Such limits effectively prevent the formation or continuation of a legally sanctioned family headed by two parents of the same sex by barring or disfavoring the placement of children with such couples or by forcing at least one of the parents to remain a legal stranger to the child she or he is parenting.

The relationship to the institution of slavery lies in the lack of recognition of these relationships and in the insistence that they cannot be legitimized. The analogy is further strengthened by its rootedness in state law and geographic sovereignty. *Dred Scott*'s geographic principle was that states had the capacity to define slaves as unfree chattel, and that even a marriage contracted outside of slave territory did not render the partners free. The elimination of slavery did not just permit, but demanded, the expansion of marriage. It involved federal authority actively for the first time in marriage politics, as first military officials and then Freedman's Bureau agents acted to support marriage and family formation in robust ways (Onwuachi-Willig 2005).

Likewise, the closure of the marital and familial relationship to state recognition is a contemporary badge of servitude or at least of deep inferiority. Even lesbians and gay men who

⁷ For evidence that this new federal concern with marriage politics and policies was no passing phase, one need look only to the massive shift of federal prosecutorial resources from the suppression of violent anti-black organized resistance in the south in the early 1870s to the suppression of polygamy in Utah Territory in the late 1870s through the 1890s (Gordon 2002).

live in jurisdictions where marriage is allowed cannot enjoy recognition throughout the borders of the nation. Their relationship, and thus their freedom, depends upon their presence in a state that acknowledges and protects it. And if marriage still serves the purpose of providing state-supported recognition for a family unit for the child members of this unit, the children of same-sex couples, like the children of slaves, are rendered bare of legal protection by laws that refuse to recognize their own freedom by virtue of birth.

I do not mean to imply that the thirteenth amendment route toward these arguments for greater freedom for immigrants, lesbians and gay men, and their families is easy or smooth. Novel constitutional arguments with right-leaning implications are clearly more in favor in the current political climate than those with left-leaning implications. The greater problem is that the thirteenth amendment itself, while it has the potential for the progressive implications I've outlined here, is rooted historically in a particular and problematic configuration of gender relations. As my discussion indicates, arguments about freedom rooted in marriage from the late 1850s through the 1880s would necessarily rest upon the extension of a classical liberal and masculine variety of freedom to freedmen as heads of household, with women gaining freedom secondarily through their connections to these men and the men's rights depending in part upon their newfound duties toward dependent and subordinated women. Likewise, the figure of the child itself and the child's role in the family has changed drastically since the passage of the thirteenth amendment. Children, for most American parents, are anything but economic assets or backstops to protect adults from poverty and lack of care in old age.

These concerns are vexing. But they are structurally similar to the concerns one might raise about fourteenth amendment equality and its ambiguous scope at the time when the amendment was drafted and adopted. The possibility I see in the thirteenth amendment also depends upon using slavery and its abolition as a two-way form of argumentation. The thirteenth amendment's ban on slavery and its incidences can ground substantive attacks against what we might interpret as progressed forms of servitude. But by the same token, any recognition of marriage and familial relations can also provide the leverage to argue for fuller forms of membership in the polity as they are incompatible with slavery and its badges. As we translate marriage and familial relations into their contemporary forms and places in American society, we can pull the thirteenth amendment forward in time as well to think through the meaning and significance of servitude or state-sponsored disrespect.

This thought experiment cannot ground a complete theory of liberation for immigrants and their families or for lesbians and gay men (or bisexuals or transgendered individuals, for that matter) because it rests in familial relations rather than individual rights. But bringing familial relations into the picture may also open up new possibilities by configuring the American as something other than a single individual who experiences and exercises rights outside of any deeply intimate context with another human being.

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