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## THE THIRTEENTH AMENDMENT AND THE MEANING OF FAMILIAL BONDS

JULIE NOVKOV\*

The majority of Thirteenth Amendment literature focuses 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 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 post-bellum years. By addressing the significance of military service, I will seek to create a form of civic membership that exists alongside citizenship but does not depend on it. I will then suggest a next step forward, using contemporary debates over immigration and marriage rights to show how the Thirteenth Amendment can support not only robust rights claims by individuals, but also by the family unit as a whole.

Part I of this Essay will analyze the meaning of chattel slavery and trace the concepts of family, marriage, and military service throughout the emancipation era. Part II will explain the different perspectives through which scholars have seen the Thirteenth Amendment, involving both the individual and the family. Part III will examine how refocusing the Thirteenth Amendment on the family unit supports arguments for providing significant rights and protections to immigrants and gays and lesbians. Part IV will briefly summarize and conclude this Essay.

### I. WHAT WAS CHATTEL SLAVERY, AND WHAT DID THE THIRTEENTH AMENDMENT ABOLISH?

The most obvious meaning of chattel slavery is the forced and uncompensated expropriation of labor from some individuals by oth-

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ers.<sup>1</sup> Scholars have studied this aspect of slavery extensively, and have explored its significance beyond the boundaries of the enslavement of Africans and their descendants.<sup>2</sup> 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.<sup>3</sup> However, considering slavery in a familial context reveals equally significant meanings and connections between the present day and the years following emancipation.

A. *Family and Defining Slave Status in Dred Scott*

Analyzing the meaning of slavery in the context of familial relations requires tracing the complex and sometimes surprising developmental trajectories of laws governing sexuality, family relations, and race in the antebellum era.<sup>4</sup> Collectively, feminist historians studying this perspective have traced the contingent nature of legal boundaries between black and white that shaped sexual relations, the connections between natality and status, and the need to understand both slavery and freedom as strongly conditioned through gender relations.<sup>5</sup>

This focus on family and natality leads first to a curious moment in the infamous case of *Dred Scott v. Sandford*.<sup>6</sup> Chief Justice Taney's opinion held that Scott was not a citizen of Missouri because his status

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1. For other definitions of slavery, see James Gray Pope, *What's Different About the Thirteenth Amendment, and Why Does It Matter?*, 71 MD. L. REV. 189, 196 (2011) (analyzing nineteenth century definitions of slavery from judicial opinions and contemporary dictionaries).

2. See, e.g., DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* 8 (rev. ed. 2007) (considering how the discourse of wage slavery shaped the development of conceptions of whiteness in the antebellum era).

3. By post-bellum, I mean the period immediately following the Civil War and encompassing Reconstruction.

4. See generally VICTORIA E. BYNUM, *UNRULY WOMEN: THE POLITICS OF SOCIAL AND SEXUAL CONTROL IN THE OLD SOUTH* (1992) (exploring the impact of female behavior, race, and class on the social structure of antebellum North Carolina); MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND FAMILY IN 19TH-CENTURY AMERICA* (1985) (examining the development of family law and its effects on society); MARTHA HODES, *WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE NINETEENTH-CENTURY SOUTH* (1997) (analyzing the violent transformation of governmental and societal reactions to interracial relationships in the post-emancipation South); PEGGY PASCOE, *WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA* (2009) (describing the history of miscegenation laws and the idea of white supremacy).

5. See BYNUM, *supra* note 4, at 3, 5–6 (reviewing several works by feminist historians exploring the connections between gender, the family, and slavery).

6. 60 U.S. (19 How.) 393 (1857), *superseded by* U.S. CONST. amend. XIII & XIV.

as a slave was fixed by the Constitution and any attempt by Congress to restrict the expansion of slavery into new U.S. territories was unconstitutional.<sup>7</sup> Justice Curtis's dissent claimed that Scott was not a slave, but a free man.<sup>8</sup> The two opinions thus reached drastically different outcomes; yet, both opinions speak in passing about marriage regulations, familial relations, and natality in defining slavery as a status.<sup>9</sup>

Chief Justice Taney's presentation of the fundamental question presented in *Dred Scott* highlights a very particular definition of slavery. He writes:

The question is simply this: 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? . . . [T]he 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.<sup>10</sup>

The status of slavery is, for Chief Justice Taney, a status established by natality, and it is a status that transcends emancipation.<sup>11</sup> Race is intertwined with slavery by the original decision of white co-

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7. *Id.* at 451–54.

8. *Id.* at 569–70 (Curtis, J., dissenting) (explaining that the slave status of Scott's parents and the possibility that Scott had been born a slave did not disqualify his claim to have become a free man before he brought this action).

9. *See, e.g., id.* at 408–16 (majority opinion) (explaining the laws of several states which prohibited interracial marriage); *id.* at 410 (explaining that the opening words of the Declaration of Independence “would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration . . .”); *id.* at 599 (Curtis, J., dissenting) (“It is in reference to his *status*, as viewed in other States and countries, that the contract of marriage and the birth of children becomes strictly material.” (emphasis in original)).

10. *Id.* at 403 (majority opinion).

11. *See id.* (explaining that the Court's opinion speaks only “of those persons who are the descendants of Africans who were imported into this country, and sold as slaves” regardless of whether such person has been emancipated or whether their parents had been freed before their birth).

lonists to import “negroes of the African race” into this country and sell and hold them as slaves.<sup>12</sup> The descendants of slaves cannot achieve membership in the community of citizens.<sup>13</sup>

In arguing that “[t]he legislation of the different colonies furnishes positive and indisputable proof of this fact,” Taney first cites several laws banning and punishing intermarriage between negroes or mulattos and whites.<sup>14</sup> While Chief Justice 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 Chief Justice Taney’s finding that the Missouri Compromise could not have legally created a zone of freedom, but the Chief Justice’s reasoning concerning Scott’s ancestry and the legal restrictions on familial relations between and among slaves undergirds this finding.<sup>15</sup>

Much of the debate among the Justices concerned 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 Chief Justice Taney’s analysis.<sup>16</sup> He argued that the Chief Justice’s presumptions about Scott’s status were incorrect in their reliance on Scott’s ancestry.<sup>17</sup> As Justice Curtis explained, an individual’s alleged status as a slave could not be determined by looking to the statuses of that person’s parents.<sup>18</sup> Rather, Justice Curtis argued that a person’s status as a slave or free man had to rest on that individual’s own life conditions.<sup>19</sup> This reconfiguration of how to define a person’s status

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12. *Id.*

13. *Id.* at 404.

14. *Id.* at 408–09, 413, 416 (citing a 1717 Maryland law which punished any white man or woman who married a black individual with seven years of servitude, 1705 and 1786 Massachusetts laws prohibiting interracial marriage, and an 1822 Rhode Island law banning any and all interracial marriages).

15. *Id.* at 403, 417, 452–54.

16. *Id.* at 564 (Curtis, J., dissenting). The disagreement between Justice Curtis and Chief Justice Taney was so strong that it caused Justice Curtis to resign from the Court over the bitterness engendered by the *Dred Scott* ruling, upon which he was quickly selected as President Andrew Johnson’s chief counsel during Johnson’s impeachment. STUART STREICHLER, *JUSTICE CURTIS IN THE CIVIL WAR ERA: AT THE CROSSROADS OF AMERICAN CONSTITUTIONALISM* 145–50, 172–74 (2005).

17. *Dred Scott*, 60 U.S. at 569–70 (Curtis, J., dissenting).

18. *Id.* (“For they might have been sold after he was born; or the plaintiff himself, if once a slave, might have become 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.”)

19. *See id.* at 571 (“If any such person can be a citizen, this plaintiff has the right to the judgment of the court that he is so; for no cause is shown by the plea why he is not so, except his descent and the slavery of his ancestors.”).

changed the fundamental question of the case for Justice 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.”<sup>20</sup> If such citizenship was possible—and Justice Curtis claimed that numerous state precedents demonstrated that it was—then he believed that 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.”<sup>21</sup>

Justice Curtis emphasized Scott’s status as a married man (with two daughters born in wedlock) as clear evidence that Scott could not be considered a slave.<sup>22</sup> No one contested that Dred Scott married Harriet in 1836 with the consent of Dr. Emerson, or that Harriet had borne two daughters in wedlock.<sup>23</sup> The question for Justice 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 that marriage.”<sup>24</sup> Justice Curtis continued that because Scott was a free man according to the laws of the territory in which he was married, and because Scott’s master consented to his marriage, he had the capacity to contract a valid marriage.<sup>25</sup>

Scott’s possessing the freedom to marry, however, contradicts the logic of Chief Justice Taney’s claim that Scott remained a slave. As Justice 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,

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20. *Id.*

21. *Id.*

22. *Id.* at 599 (“[T]here can be no doubt these parties were capable of contracting a lawful marriage, attended with all the usual civil rights and obligations of that condition. In that Territory they were *absolutely free persons*, having full capacity to enter into the civil contract of marriage.” (emphasis added)); see also GRETCHEN RITTER, *THE CONSTITUTION AS SOCIAL DESIGN* 71–73 (2006) (“Scott’s capacity for consent [to marriage] was indicative of his ability to act as a legal person.”). Some scholars speculate that Dred Scott’s wife, Harriet Robinson Scott, had an even stronger legal claim to freedom than her husband based upon her residential history in states and territories that either did not have slavery or were in the process of eliminating it. Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 *YALE L.J.* 1033, 1034 (1997).

23. *Dred Scott*, 60 U.S. at 398 (majority opinion); *id.* at 599 (Curtis, J., dissenting).

24. *Id.* at 599 (Curtis, J., dissenting).

25. *Id.*

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 . . . .<sup>26</sup>

This would constitute a gross violation of the sanctity of contract, particularly the special contract that forms marriages.<sup>27</sup> It would also destroy the legitimacy of the family, a core purpose of the state recognized not just in American law, but in American engagements with other nations.

For Justice Curtis, this logic had important implications for the master who allowed a slave to marry. As he explained, the marital relation did not affect only the status of the individual marrying, but also “those of the other party to the contract, and of their descendants to the remotest generation.”<sup>28</sup> On this basis, he concluded:

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.<sup>29</sup>

In Justice Curtis’s analysis, the generational implications of slavery are inapposite to the implications of Chief Justice Taney’s argument: Justice Curtis would find that the (presumably male) slave who marries becomes free and transmits this freedom to his wife and the children and descendants produced through the marriage.<sup>30</sup>

### *B. Marriage and Emancipation*

As Lea VanderVelde and Sandhya Subramanian have shown, Dred and Harriet Scott were trapped in a larger struggle over the

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26. *Id.* at 599–600.

27. *Id.* at 600–01 (explaining that no law of Missouri can annul a marriage lawfully entered into in Wisconsin and to hold otherwise would “destroy the obligation of the contract of marriage, and bastardize their issue, and reduce them to slavery”).

28. *Id.* at 600.

29. *Id.*

30. *Id.* For a summary of Chief Justice Taney’s argument, see *supra* text accompanying notes 10–15.

meaning of marriage that encompassed slavery but also addressed contemporary changes in the meaning of being married as a status.<sup>31</sup> They argue that legal observers of the 1840s and '50s agreed that "the institution of marriage was thought to be legally antithetical to slavery."<sup>32</sup> Both slavery and marriage were patriarchal institutions, but marriage presumed particular elements of male autonomy and authority that subverted slavery. A husband had to have sufficient autonomy to form the marriage contract, sufficient control and authority over his wife and children, sufficient legal personhood to assert his own and their interests in court, and sufficient authoritative contractual power to provide for his family.<sup>33</sup> Furthermore, he was presumed to exercise mastery within the household.<sup>34</sup> All of these presumptions about marriage rendered the status or condition of being a married man and the status of being a slave as fundamentally incompatible.<sup>35</sup>

This tension had increasingly different implications for northern states and southern states. Northern states increasingly took the position that a slave who married a free woman with the consent of his master was thereby emancipated.<sup>36</sup> Southern states, however, adopted the analysis of legal analyst Thomas Cobb, who drew from the law of feudal relations to argue that a man's slave status did not change as a result of his marriage, but rather that a slave's marriage could never be a true marital relation due to its potential to undermine the authority of the master.<sup>37</sup> The matter was thus ambiguous, and in *Dred Scott*, the Court (except for Justice Curtis), ignored the implications of Dred and Harriet Robinson Scott's marriage, implying acceptance of the framework that prevailed in the South.<sup>38</sup>

The northern 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 role of marriage promotion as an urgent policy priority during slavery's collapse and the initiation of a new politi-

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31. VanderVelde & Subramanian, *supra* note 22, at 1103.

32. *Id.*

33. *Id.* at 1103–04.

34. *Id.* at 1103.

35. *Id.* at 1103–04.

36. *Id.* at 1105.

37. *Id.* at 1106–07 (explaining that this pertained to both the purported wife, whose status followed that of her husband, and over the husband-slave himself, who could not maintain a position of mastery due to his slave status).

38. *Id.* at 1109–11.



cal and social order.<sup>39</sup> First, the Union generals who established contraband camps for self-emancipated slaves viewed the creation of orderly married relations among the freedmen and women as a matter of nearly equal significance to the logistics of managing the basic needs of a large population of ill-provisioned refugees.<sup>40</sup> Even the racially provocative early legislative efforts of southern lawmakers included detailed mechanisms for solemnizing or presuming marriages and establishing the legitimacy through marriage of children born slaves.<sup>41</sup> Second, the Freedmen's Bureau was an important institutional mechanism for organizing and legitimizing family units.<sup>42</sup> Agents provided practical assistance to what must have been a bewildering array of kin and sexual relationships among people previously denied the right to make the normatively acceptable monogamous, binding legal commitments to each other and to their children.<sup>43</sup> Husbands and wives were found and paired off and children were placed with parents based on biological relationships when possible. Local and external agents 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.<sup>44</sup>

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.<sup>45</sup> Intense discussion about the acquisition of individual civil and political rights and the resistance of white sou-

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39. See, e.g., Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. MARSHALL L. REV. 299, 313–38 (2006) (explaining the antebellum and post-bellum laws of southern states which dealt with the right of blacks to marry); Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 151–56 (1998) (examining the bans on interracial marriages in the post-war South); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647, 1653–63 (2005) (arguing that efforts to allow newly freed blacks to engage in legal marriage was an attempt by whites to maintain control and regulate their behavior so that blacks did not disrupt white society).

40. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877*, at 5, 48, 56–57 (1988).

41. See Goring, *supra* note 39, at 313–38 (examining the laws of southern states that conferred the right to marry on newly freed blacks).

42. Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251, 279–84 (1999).

43. *Id.*

44. See Onwuachi-Willig, *supra* note 39, at 1657–61 (describing the various structures of freedmen families and how the Freedmen's Bureau responded to those relationships).

45. JULIE NOVKOV, *RACIAL UNION: LAW, INTIMACY, AND THE WHITE STATE IN ALABAMA, 1865–1954*, at 5 (2008).

therners provoked protective legislation from Congress, and ultimately led to the adoption of the Fourteenth and Fifteenth Amendments.<sup>46</sup> While these Amendments framed rights broadly and neutrally, the nature and scope of these rights had gendered implications arising primarily from the context in which they had been gained—through arguments about the meaning of military service.

*C. Slavery and Military Service*

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.<sup>47</sup> This conception of masculinity included contract rights to protect economic security, voting rights to advance the interests of women represented by their husbands, self-defense rights that protected 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.<sup>48</sup>

Likewise, by the end of the war, both the North and South agreed that slavery was fundamentally incompatible with military service. In the North, early debates focused on 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 supplement the Union's manpower losses through desertion and draft evasion.<sup>49</sup> By the end of the war, southern policymakers were also 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.<sup>50</sup> Military service thus appears both as a right/duty for free men and as an emancipatory device in itself, but it also bears interesting links to the family.

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46. See Pope, *supra* note 1, at 191.

47. VanderVelde & Subramanian, *supra* note 22, at 1103–04.

48. *Id.*

49. PHILIP A. KLINKNER WITH ROGERS M. SMITH, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* 53–55 (1998).

50. David P. Currie, *Through the Looking Glass: The Confederate Constitution in Congress, 1861–1865*, 90 VA. L. REV. 1257, 1295–1305 (2004).

## II. CITIZENSHIP, FAMILY, AND THE THIRTEENTH AMENDMENT

This Essay views struggles over the scope of freedom gained by emancipation through the lens of citizenship and inquires 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. Many of the historical considerations of the post-bellum constitutional struggles have addressed these issues through the Fourteenth Amendment. Its Citizenship Clause clearly repudiates the reasoning in *Dred Scott* and frames the discussion in the terms described above, while situating the rights as rights of citizens.<sup>51</sup> 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.<sup>52</sup>

A. *Citizenship and the Thirteenth Amendment*

But what did it mean not to be a slave? 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 the *Slaughter-House Cases*,<sup>53</sup> the Court held that the Fourteenth Amendment's Privileges and Immunities Clause does not apply against the state, and the limitation on the independent slaughter-house operators does not constitute a form of slavery.<sup>54</sup> The *Civil Rights Cases*<sup>55</sup> found that the Fourteenth Amendment does not independently authorize mechanisms of charging private defendants with acts of discrimination against freedmen.<sup>56</sup> And *Plessy v. Ferguson*<sup>57</sup> 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 ar-

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51. U.S. CONST. amend. XIV.

52. Within these debates, civil rights "pertained to the economic sphere and were regarded as basic and fundamental." PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* 70–71 (2011). Political rights came from the "political collective and were not seen (initially) as necessary for freedom." *Id.* And social rights "designated a sphere in which 'association' took place." *Id.*

53. 83 U.S. (16 Wall.) 36 (1873).

54. *Id.* at 78–83.

55. 109 U.S. 3 (1883).

56. *Id.* at 11–13.

57. 163 U.S. 537 (1896).

gument that segregation does not constitute a violation of the fundamental principle of equality for citizens.<sup>58</sup>

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 make-weight.<sup>59</sup> I argue 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 seek to make a move similar to that of Justice Curtis and leverage non-slave status into an argument for a form of civic membership that exists alongside citizenship without depending upon it. But I also want to go further and use the Thirteenth Amendment to analyze the possibility of rights that extend not just to the individual, but to the family.

### *B. Theories of the Family and the Thirteenth Amendment*

Part of this argument depends not on the Thirteenth Amendment, but on the significance of family in constitutional and state structures. Liberal political theory ranging from Tocqueville to contemporary debates has focused largely on the significance of liberal individualism. Recent debates have focused extensively on whether liberalism is inherently egalitarian but hampered by the evolution of non-egalitarian ideologies,<sup>60</sup> or whether liberalism incorporated within itself elements of ascription and hierarchy that predated liberalism.<sup>61</sup> These debates, as well as debates over American exceptionalism and the presence or lack of feudal legacies, configure the

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58. *Id.* at 550–52.

59. 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. Linda R. Crane, *From Gibbons to Lopez: Does the Commerce Clause Remain a Viable Tool for Eliminating the Vestiges of Slavery?* 4 BARRY L. REV. 71, 81–82 (2003).

60. For the most comprehensive argument on this point, see ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 4–5 (1997).

61. See, e.g., Jacqueline Stevens, *Beyond Tocqueville, Please!*, 89 AM. POL. SCI. REV. 987 (1995) (critiquing Rogers Smith and explaining W.E.B. Du Bois's description of ascriptive norms).

individual as the fundamental unit of state membership or belonging.<sup>62</sup>

Critical feminist analysts of American political theory and political development question this individualist formulation by surveying the role of non-individual units in the development of the American state. Priscilla Yamin, drawing from the work of historian Nancy Cott, considers the role of marriage as a site for development and a premier location for the resolution of significant political anxieties about America and Americanism because of the symbolic importance of the marital unit in the minds of state actors.<sup>63</sup> Patricia Strach considers the rhetorical significance and political import of families both as “family” is used to drive policy outcomes in political struggle and as the family unit is mobilized as an agent of the state for collective and distributive purposes.<sup>64</sup> These insights follow earlier feminist observations that politics looks different when we take into account the dependency and interconnectedness seen more readily if women are centered in the analysis.<sup>65</sup>

Most historical attempts to make more of the Thirteenth Amendment considered other forms of coerced labor or the civic status of other racially subordinated groups. The framers of the Thirteenth Amendment considered the problem of the “coolly” 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.<sup>66</sup> In the late nineteenth and early twentieth centuries, courts applied the Thirteenth Amendment independently (without the Fourteenth and Fifteenth Amendments) in struggles against peonage. This independent appli-

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62. See, e.g., KAREN ORREN, *BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES* 7 (1991) (“[T]he liberal centerpiece, is the sovereignty of the individual citizen.”).

63. Priscilla Yamin, *Nuptial Nation: Marriage and the Politics of Civic Membership in the United States* (2005) (unpublished dissertation, New School for Social Research).

64. PATRICIA STRACH, *ALL IN THE FAMILY: THE PRIVATE ROOTS OF AMERICAN PUBLIC POLICY* (2007).

65. See, e.g., MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004) (arguing the conception that society is organized by familial relationships is outdated and that caretaking relationships are a more accurate reflection of society’s organization).

66. See John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 *ASIAN L.J.* 55, 71–75 (1996) (noting that President Lincoln outlawed the cooly trade prior to signing the Emancipation Proclamation).

cation reinforced the contemporary impression that its primary core concerns labor and labor rights.<sup>67</sup>

Recently, left legal theorists have begun to argue in favor of revitalizing the Amendment as a source of anti-subordination principles.<sup>68</sup> A substantial portion of this argument uses 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.<sup>69</sup> Reproductive labor, too, has come under scrutiny when it is arguably coerced or commodified in ways that scholars have identified as inappropriate or dehumanizing.<sup>70</sup> 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.<sup>71</sup> These creative reconfigurations continue to frame slavery as an individual problem, however, and emancipation as an individualized process.

### III. REFOCUSING THE THIRTEENTH AMENDMENT ON THE FAMILY UNIT TO STRENGTHEN ITS CONTEMPORARY SIGNIFICANCE

The remainder of this Essay addresses the deficiencies of the reconfigurations described above by focusing on the implications of the 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 emancipation which I believe also fall under the Thirteenth Amendment's command to the nation and to Congress.

First, the family unit. The Thirteenth Amendment does not define family, and its framers presumably did not have any particularly radical notion of family in mind when drafting the Amendment. Nonetheless, in *Dred Scott* and elsewhere, evidence suggests that one

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67. Cf. Pope, *supra* note 1, at 193; see also Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 308–09, 333 (2004) (arguing that the Thirteenth Amendment applies to “interferences against autonomy”).

68. See, e.g., Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255 (2010).

69. Maria L. Ontiveros, *Immigrant Workers' Rights in a Post-Hoffman World: Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L.J. 651, 651–72 (2004).

70. Pamela D. Bridgewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment's Role in the Struggle for Reproductive Rights*, 3 J. GENDER, RACE & JUST. 401 (2000).

71. Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539, 542–43, 607–09 (2002).

of the most disturbing elements of slavery to those seeking its abolition was its effect on families.<sup>72</sup> Second is the issue of status at birth. As Frederick Douglass and numerous other critics emphasized, slavery undercut the fundamental 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.<sup>73</sup> 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 antislavery 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.<sup>74</sup> As acceptance of black soldiers spread among northern military leaders, they increasingly began to conceptualize a war that would have as its inevitable endpoint the elimination of slavery and all of 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.<sup>75</sup>

This Part examines how these principles work with regard to contemporary struggles over immigration, including proposals to end birthright citizenship for children of illegal immigrants, and same-sex marriage. I consider both of these issues through the lens of the Thirteenth Amendment as it protects family integrity rather than the lens of citizenship or civic membership as established and protected for individuals under the Fourteenth Amendment.

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72. Antebellum 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.

73. Christopher N. Breiseth, *Lincoln and Frederick Douglass: Another Debate*, 68 J. ILL. STATE HISTORICAL SOCIETY 9, 26 (1975).

74. See *supra* text accompanying notes 49–50.

75. See, e.g., *Resolutions of the Convention, 1864*, in PROCEEDINGS OF THE NATIONAL CONVENTION OF COLORED MEN 33–36 (William Loren Katz ed., reprinted Arno Press 1969).

*A. Immigration*

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 serving in the U.S. armed forces do have access to a faster track to permanent residency or citizenship if they serve in times of war and are legally enlisted. President George W. Bush issued an executive order triggering the operation of this provision in 2002, and many immigrant members of the armed services have benefited from this.<sup>76</sup> The process, however, is discretionary and based only in moral suasion rather than in any coherent claim based in constitutional rights.<sup>77</sup> 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 full membership in the polity might bolster these claims.

When the armed forces allow an individual to serve a nation, the precedent set by freedmen who fought in the Civil War suggests that the relationship between the individual and the nation is fundamentally changed. As federal regulations demonstrate, however, citizenship is not an assured outcome of this relationship. But the experience of emancipation suggests that, while access to citizenship may remain ambiguous, slavery is both constitutionally and practically incompatible with military service.

This has important implications for the families of soldiers. 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

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76. Exec. Order No. 13,269, 67 Fed. Reg. 45,287 (Jan. 3, 2002). See Fact Sheet: Honoring Immigrant Members of America's Armed Services in JOHN T. WOOLLEY & GERHARD PETERS, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=82610>.

77. See *id.* (listing good moral character as one of the requirements for expedited naturalization).



most nations, the construction of the soldier remains staunchly masculine and hews to a traditional conception of masculinity.<sup>78</sup> 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.<sup>79</sup> 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.”<sup>80</sup> Family members of those serving are also 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.<sup>81</sup> Immigration advocates for these individuals seek to exploit these constructions in favor of their clients, but Thirteenth Amendment arguments could provide additional leverage by changing the framework for these claims.

*1. Yaderlin Jimenez and How the Thirteenth Amendment Can Help the Immigrant Spouses of Soldiers*

The case of Yaderlin Jimenez, the undocumented wife of an American soldier, is helpful in illustrating these dynamics. 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 U.S. Senator John Kerry’s public statements about the case.<sup>82</sup>

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78. CYNTHIA ENLOE, *MANEUVERS: THE INTERNATIONAL POLITICS OF MILITARIZING WOMEN’S LIVES* 235–36 (2000).

79. While the phrase “military spending” is usually understood to address payment for troops and their materiel, it also encompasses what is probably the largest and most comprehensive social service bureaucracy in the United States: providing housing, support, medical care, job placement services, and a myriad of other resources to the families of active military personnel. See KAREN HOUPPERT, *HOME FIRES BURNING: MARRIED TO THE MILITARY—FOR BETTER OR WORSE* 85–90 (2005).

80. Susan E. Timmons & Margaret D. Stock, *Immigration Issues Faced by U.S. Servicemembers: Challenges and Solutions*, 43 *CLEARINGHOUSE REV.* 270, 273 (2009).

81. *Id.*

82. Throughout his Senate career, John Kerry 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. DOUGLAS

In June of 2007, Kerry and Senator Ted Kennedy released an open letter to Homeland Security Secretary Michael Chertoff regarding the Jimenezes. Kerry's narrative states that Yaderlin entered the country illegally in 2001 but that she married Army Specialist Alex Jimenez in 2004, "and it was then that her status was first brought to the attention of immigration officials."<sup>83</sup> The letter then detailed Alex Jimenez's service and disappearance, noting that he had been awarded a Purple Heart and had chosen to return to Iraq for a second tour of duty.<sup>84</sup> 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.<sup>85</sup> The clear implication was that Yaderlin was waiting for confirmation of her soldier husband's death (which occurred more than a year after his disappearance).

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 [in] 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.<sup>86</sup>

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, warranted a different calculus, at least as long as her husband's whe-

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BRINKLEY, *TOUR OF DUTY: JOHN KERRY AND THE VIETNAM WAR* (2004); Biography, JOHN KERRY, <http://kerry.senate.gov/about/> (last visited July 24, 2011).

83. 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. Letter from John Kerry, U.S. Senator, to Michael Chertoff, Secretary of Homeland Security (June 20, 2007), *available at* <http://kerry.senate.gov/press/release/?id=cebda090-62f5-41ed-8680-741856d0a659> (last visited July 24, 2011).

84. *Id.*

85. *Id.*

86. *Id.*

reabouts remained unknown. Kerry 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.<sup>87</sup>

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.<sup>88</sup> He vowed to do everything in his power to prevent Yaderlin’s deportation, since “[o]ur 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.”<sup>89</sup>

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, Chertoff explained, “The sacrifices made by our soldiers and their families deserve our greatest respect.”<sup>90</sup> Yet while Yaderlin’s personal dilemma was resolved favorably, other families remained caught in the same trap. The Associated Press article 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.<sup>91</sup> To date, no blanket policy addresses these situations and favorable outcomes are only achieved through individual interventions by high-level policymakers. Because citizenship is personal and only partially contingent upon familial relations, Jimenez and those in her circumstances stand powerless before the law, able to turn only to moral suasion for resolution.

I advocate that a turn to the Thirteenth Amendment rather than ethics can present 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

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87. *Id.*

88. John Kerry, *Kerry Tells Homeland Security Not to Deport Wife of Missing Soldier*, JOHN KERRY (June 20, 2007), <http://kerry.senate.gov/press/release/?id=cebda090-62f5-41ed-8680-741856d0a659>.

89. *Id.*

90. Letter from Michael Chertoff, Secretary of Homeland Security, to John Kerry, U.S. Senator (June 21, 2007), *available at* <http://kerry.senate.gov/press/release/?id=ea809eea-4266-43ed-b016-f0286019f7a1> (last visited September 5, 2011).

91. Juliana Barbassa, *Troops Worry Relatives Could Be Deported*, USA TODAY, Aug. 10, 2007, [http://www.usatoday.com/news/topstories/2007-08-10-1458753044\\_x.htm](http://www.usatoday.com/news/topstories/2007-08-10-1458753044_x.htm).

citizens.<sup>92</sup> 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. The soldier—who cannot be a slave—cannot be expected to devote civic service to the state if her or his family is not afforded the protection of the state. To expect such service renders the soldier an unmoored individual rather than a member of a family unit that collectively allows the soldier to give over productive energy and possibly blood that belongs to the family to serve the interests of the state. The family itself thus serves the state through sacrifice.

2. *Expanding the Thirteenth Amendment to Protect All Immigrant Family Members*

Of course, this framework, if adopted directly from the 1860s, would be patriarchal in its nature. The family, however, is a legal and social construct of the state, informed by social practices. Developing a broader argument from the Thirteenth Amendment also enables the family that does not fit the patriarchal narrative as perfectly to benefit as a matter of right—for instance, 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, initially adopted in 1989, permitted naturalization upon the petition of a next of kin.<sup>93</sup> 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.<sup>94</sup>

In 2003, the issue arose again as Congress considered the Armed Forces Naturalization Act. Individual members of Congress argued for expanding the act so that survivors of immigrants could receive

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92. *See supra* text accompanying notes 32–50.

93. Immigration and Nationality Act, 8 U.S.C. §§ 1439–1440A (2006).

94. *Id.*

death benefits.<sup>95</sup> The debate over this element of the bill shows how the construction of soldiers produces a narrative of attachment that extends to the families. Congresswoman Zoe Lofgren argued for the bill as a positive symbol to support “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.”<sup>96</sup> 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 and should have done more,” but “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.”<sup>97</sup> Lofgren continued, explaining that “[w]hen 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.”<sup>98</sup> She asked, “What about the families of soldiers whom so proudly serve our Nation? If the mother of the soldier has overstayed her visa, she is excluded from the benefits of this bill.”<sup>99</sup> “Your son is killed in combat: but you are deported. How are you to put flowers on your son’s grave?”<sup>100</sup> The soldier Lofgren references 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

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95. See, e.g., 149 CONG. REC. 13,728, 13,758–59 (2003) (explaining Democratic Congressman John Conyers’s belief that the new law should provide benefits to the families of immigrants killed while serving in the military).

96. *Id.* at 13,759–60 (statement of Rep. Zoe Lofgren).

97. *Id.* at 13,760.

98. *Id.* Note here the transition from *the* country to *our* country in Lofgren’s analysis.

99. *Id.* Note here that Lofgren has chosen the mildest infraction that prevents a relative from benefiting.

100. *Id.*

would not immediately be public charges.”<sup>101</sup> Bereuter’s vision of the non-citizen soldier was 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.<sup>102</sup> 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.”<sup>103</sup> 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.<sup>104</sup> While Lofgren’s arguments for expanding the scope of benefits to more family members in more questionable circumstances did not succeed, the bill 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 civic membership both for non-citizen soldiers and for the non-citizen survivors of soldiers. 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 is centered on 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. Chief Justice 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

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101. *Id.* (statement of Rep. Doug Bereuter).

102. *Id.*

103. *Id.*

104. *Id.* 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 . . . .” *Id.* (statement of Rep. Darrell Issa).

form of membership in the American polity.<sup>105</sup> 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.

### B. Marriage Rights

Like struggles over the status of immigrants, struggles over marriage have largely played out in reference to the Fourteenth Amendment and have centered on the rights of individuals. 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.<sup>106</sup> 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 to incorporate their cause.<sup>107</sup> The Thirteenth Amendment has played little, if any, role in these debates, although Robert Burt's and Darlene Goring's work are important exceptions.<sup>108</sup>

This may well be a mistake. As I have discussed elsewhere, 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.<sup>109</sup> Fundamentally, the path taken in *Loving v. Virginia* 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, as I outline

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105. For a description of Chief Justice Taney's analysis in *Dred Scott*, see *supra* text accompanying notes 10–15.

106. See Julie Novkov, *The Miscegenation/Same-Sex Marriage Analogy: What Can We Learn from Legal History?* 33 LAW & SOC. INQUIRY 345, 356–58 (2008) (explaining how the Supreme Court used the Equal Protection Clause to declare bans on interracial marriage to be unconstitutional).

107. See *id.* at 358–79 (explaining how the framework of the Equal Protection Clause used in interracial marriage cases can be analogized to same-sex marriage).

108. See Robert A. Burt, *Overruling Dred Scott: The Case for Same-Sex Marriage*, 17 WIDENER L.J. 73, 78 (2007) (explaining that both “the Thirteenth and Fourteenth Amendments were the fulfillment of the generalized promise of the American Revolution”); Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. MARSHALL L. REV. 299 (2006) (analogizing between prohibitions on slave marriages and prohibitions on same-sex marriage).

109. Novkov, *supra* note 106.

below, but could present an opportunity to freshen and refocus the debate 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 competent makers of the marriage contract.<sup>110</sup> Slaves at times attempted to engage in this form of autonomy but the southern states refused to acknowledge these relationships as marriages even while northern states saw valid marriages as changing slaves' status to that of freedmen. One of the first and most urgent agendas of emancipation was to organize and recognize marital relationships.<sup>111</sup>

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).<sup>112</sup> Beyond these individual state laws, federal law allows states to deny marital status to sojourners and immigrants through the Defense of Marriage Act, which renders the geographic authority of any state policy supreme over legal relationships contracted in other states.<sup>113</sup>

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 pa-

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110. See *supra* text accompanying notes 32–47.

111. See *supra* text accompanying notes 32–47.

112. See Quick Facts, LAMBDA LEGAL DEFENSE, <http://www.lambdalegal.org/news/quick-facts.html> (explaining the status of same-sex relationships by state) (last visited Oct. 4, 2011).

113. See ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGE CROSSES STATE LINES (2006).



rental rights.<sup>114</sup> 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.<sup>115</sup>

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.<sup>116</sup> 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 Freedmen's Bureau agents acted to support marriage and family formation in robust ways.<sup>117</sup>

Likewise, the denial of recognition for the marital and familial relationship is a contemporary badge of servitude or at least of deep inferiority. Even lesbians and gay men who live in jurisdictions where same-sex 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 the child members of a family 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.

A Thirteenth Amendment analysis that places familial relations in a constitutional frame recognizes that some same-sex relationships do actively constitute families in which the members intend to fulfill the functions of families in their relation to the state. The public ac-

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114. Jason N.W. Plowman, *When Second-Parent Adoption Is the Second-Best Option: The Case for Legislative Reform as the Next Best Option for Same-Sex Couples in the Face of Continued Marriage Inequality*, 11 SCHOLAR 57, 63–64 (2010).

115. *Id.*

116. See *supra* text accompanying notes 10–15.

117. See Onwuachi-Willig, *supra* note 39. 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 the Utah Territory in the late 1870s through the 1890s. See SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* (2002).

knowledge of long-term pair bonds and the situation of these bonds generate a membership unit for the state that differs from and in some regards supersedes that of the individuals who form the bond. Especially when a same-sex couple chooses to raise children, states that refuse to acknowledge these relations as familial bonds place not just the individuals but the families themselves in a subordinated relationship to the state in terms that contradict the Thirteenth Amendment's command that legitimate families be acknowledged as units of the state.

*C. Difficulties That the Thirteenth Amendment Presents*

I do not mean to imply that establishing Thirteenth Amendment arguments for greater freedom for immigrants, lesbians and gay men, and their families will be easy or smooth, especially since constitutional arguments with right-leaning implications are more in favor in the current political climate than those with left-leaning implications. However, 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 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.<sup>118</sup> Likewise, the figure of the child itself and the child's role in the family have 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.

IV. CONCLUSION

These concerns are vexing. But they are structurally similar to the concerns one might raise about the Fourteenth Amendment's particular conception of 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 substan-

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118. See *supra* text accompanying notes 32–47.

tive 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.