

## Chapter 1

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### The “Duties as Well as Privileges of Freedom”

After the Civil War, agents of the federal Bureau of Refugees, Freedmen and Abandoned Lands (the Freedmen's Bureau), charged with inculcating former slaves with the precepts of freedom and American citizenship, imposed policies designed to teach African Americans the benefits and obligations of marriage. Also during this period, anti-interracial marriage laws were actively upheld in southern and northern courts as necessary to the protection and maintenance of “civilization.” Thus, while ex-slaves were being pressed into one kind of marriage, they were legally prohibited from another, in both cases as the price of freedom and citizenship.

The period of Reconstruction (1863–77) was a time of intense political upheaval as the shape and scope of the American state were being reconfigured. The emancipation of almost four million slaves, the military and political defeat of the Confederacy, and a new phase of nation-building dramatically opened up and challenged prior definitions of freedom, citizenship, and political order. The ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments and six major federal statutes restructured American citizenship laws in the United States.<sup>1</sup> Along with emancipation, citizenship, male suffrage, and civil rights, formerly enslaved African Americans were also granted the right to legal marriage. Thus, like voting and civil rights, marriage rights played a role in reshaping the political and social relationships between blacks and whites, in negotiating power relations between the North and South, and in defining the grounds of black citizenship.

Marriage rights helped distinguish between freed and slave status. Slave unions and families were neither legal nor protected. Families were broken up by the demands of their masters and the slave economy. Once ex-slaves gained the right to marry, however, they could establish legal households. At the same time, they also inherited the obligations of marriage, not only to family but to the state as well. As Freedmen's Bureau chief Oliver Otis

Howard explained, former slaves in their transition to citizenship must be "taught there are duties as well as privileges of freedom."<sup>2</sup> Delineating the obligations and rights of marriage for the newly established citizens was important in both promoting the civil status of former slaves and preventing change to the foundations of racial hierarchy.

During the nineteenth century, the scope of the marriage contract in the United States was dictated by the English common-law principle of coverture. Coverture placed married women's property and their own persons in the hands and under the legal "cover" of their husbands. English jurist and common-law scholar William Blackstone summarized the features of the doctrine in his 1765 book on English law in a chapter entitled, "Of Husband and Wife": "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband, under whose wing, protection and cover, she performs every thing."<sup>3</sup> Under coverture, a man's political and civic status stemmed from being the legal head—and legal representative—of a household, which included dependent women and children requiring economic and social protection. Marriage thus endowed men with the fullness of civic status, as independent individuals and as political decision makers. Women's political and civic status was also defined by their marital status, but it rendered them economically, civilly, and politically dependent.

In his commentaries on American beliefs and institutions during the 1830s, Alexis de Tocqueville found Americans' firm insistence on women's role to be "the chief cause" of the country's growing prosperity and power. His *Democracy in America* provided one of the most influential formulations of the nation's "separate sphere" ideology, relying on appeals to nature as well as political economy to suggest the appropriateness of purely domestic roles for women. Americans, Tocqueville wrote, "carefully divid[ed] the duties of man from those of woman [so that] the great work of society may be the better carried on." Women, he explained, received sufficient education to play their politically crucial role in shaping the mores of the nation's future citizens.<sup>4</sup> These embodied statuses were viewed as undergirding the progress and stability of the nation, and more specifically the white race.

As a common-law contract marriage was private and defined the private sphere. Yet, with the granting of marriage rights to ex-slaves, the interest of the state in the role of marriage as a relation and status expanded and evolved.

In the last third of the nineteenth century in particular, legislators, jurists, and social scientists assumed there was a close link between monogamous, patriarchal marriage and the state. Through marriage, the states were actively involved in creating social and civic statuses for both men and women, relying on these roles to order society. State power was seen as patterned on the male-headed family, its legitimacy dependent on the same source.<sup>5</sup> By protecting the family, then, the law also protected the state from disruption, instability, and discord. In this way, marriage was considered the foundation of the nation and society. It defined important statuses in the nation, which were unequal and based in privilege. Gender was crucial to the institutional framework of marriage.

After the Civil War, marriage became an important institutional site for the reestablishment of norms and the incorporation of ex-slaves into citizenship. Through marriage, political and social actors formulated and contested the rights and obligations of the newly defined citizens. As new citizens, many former slaves actively exercised the right to marry and create legal families. During this period of political instability and change, marriage was one way in which political inclusion and citizenship were reformulated; marriage was used to promote but also limit changes to status hierarchies based on race, class, gender, and sexuality. The obligations of citizenship were defined by the Freedmen's Bureau marriage policy that encouraged ex-slaves to marry each other; at the same time, southern courts curtailed and limited their right to marry through antimiscegenation laws. Thus, marriage was a political institution through which the economic, political, and social rights of the newly freed slaves were shaped.

### Promarriage Policies and Defining Marital Obligations

Republican state legislators, in particular the federal Freedmen's Bureau, held that the practice of marriage, and its attendant gender roles, was a way to introduce ex-slaves into the moral and economic dimensions of American citizenship and belonging. After the war, states across the South passed laws that enforced marriage, attempting to substitute the patriarchal family unit for economic dependency on the state. Legal scholar Katherine Franke shows how the paternalistic marriage policies of both the Freedmen's Bureau and southern states were attempts to shape and direct black social, economic, and

sexual behavior to ready the new citizens for the cultural and political norms of freedom and economic independence.<sup>6</sup> In essence, marriage helped define independent citizenship. The demands of the postbellum period resulted in the linking of marriage, citizenship, and economic independence, where each came to rely on the other. In addition to creating a new right that could be denied or granted, marriage for blacks also produced new obligations to the state and within families.

The right of former slaves to marry not only represented a new privilege but, more importantly, it delineated a new regulatory relationship to the state. Union officials and northern missionaries who came to the South during and after the war to “reconstruct” southern political society, and thus the lives of ex-slaves, taught ex-slaves in particular that freedom meant enacting the precepts of civilization through marriage. By insisting that marriage was a necessary foundation to citizenship and critical for grasping the value of independence—what was called “self-protection,” “self-support,” and “standing alone”—the relationship of former slaves to the polity was circumscribed by a notion of family obligation rather than citizenship rights.

This tension in marriage rights was not lost on ex-slaves, yet they also understood the right to marry as a crucial consequence of emancipation and as undergirding their new found rights. Franke describes how “after emancipation, formerly enslaved people travelled great distances and endured hardships in order to reunite families that had been separated under slavery.”<sup>7</sup> Even though marriage rights also meant state power to compel former slaves to meet their new domestic obligations, African Americans saw that marriage was a way to protect not only their families but also a range of public rights. Historian Laura Edwards notes that at the same time ex-slaves appropriated certain tenets of legal marriage, they also maintained rules and practices that coalesced with those of many poor whites rather than bourgeois whites.<sup>8</sup>

Union officials and northern missionaries in the South came to understand the freedom to work and the freedom to marry as complementary and mutually supportive. As historian Amy Dru Stanley aptly explains, in order to create American citizens out of former slaves, they focused on teaching the freedmen and freedwomen both to work for wages and to honor the practice of marriage.<sup>9</sup> With the 1865 assassination of President Lincoln and the failure of Radical Reconstruction with its proposed program to grant ex-slaves plots of land, Republicans increasingly pushed ex-slaves toward marriage

and working for wages as symbols of freedom, independence, and equality, as opposed to owning land.<sup>10</sup> Thus, after emancipation, marriage helped define one notion of equality as opposed to another. Political equality was not undergirded by economic access but marital obligations. This period also saw the beginning of a marriage policy that was government enforced. The link between membership in the polity and the practice of marriage limited the right of ex-slaves to demand and gain government aid.

### Marriage Policies in the Contraband Camps

Not having the right to marry, and under the control of slave owners, slaves built families and relationships based on nonbinding traditions that defined a complex constellation of relationships, including “sweethearting,” “taking up,” and “living together.” Sweethearting and taking up were considered open-ended and nonmonogamous relationships. Living together, however, was understood to be a more binding relationship that assumed a long-term commitment. Laura Edwards, among others, describes slave relationships as more fluid and open than the family structures of the then-dominant white society.<sup>11</sup> Once slaves became citizens, these familial practices were viewed by whites as incongruous with the principles and moral norms of American society that slaves were now entering. In fact they were considered an obstacle to the slaves’ successful transition to living outside the bonds of slavery. Because monogamous unions and patriarchal gender roles served to define traditional marriage as the foundation of the nation, policies that encouraged ex-slaves to marry were widely encouraged by northern Republicans.

During the fall and winter of 1862–63, in a number of small towns across the Deep South and Southwest, General Ulysses S. Grant instructed his army to organize “contraband camps” where ex-slaves could be sheltered and supervised by Union officials, chaplains, and some civilians. Existing on the boundary of the North and South, between war and peace, slavery and emancipation, these camps also became liminal spaces where Union superintendents attempted to help former slaves adjust to, and understand, the meaning of living in freedom. Teaching the fundamentals of formal, legal marriage was one of the first priorities. Camp officials were ordered to “lay the foundations of society” by not only setting up public schools, encouraging religious worship, regulating trade, but also by “enforcing laws of marriage.”<sup>12</sup> These

foundations of society and civilization defined what it meant to be living as free men and women. In other words, freedom and citizenship were characterized by certain acceptable behaviors.

The familial and sexual practices of the fugitive slaves who crossed over Union lines during the Civil War received intense scrutiny, and this was especially true for those who entered the camps. In trying to obtain information about former slaves and their habits, Chaplain John Eaton Jr., the general superintendent of the contrabands in Grant's charge, circulated a questionnaire in April 1863 to the director of each camp concerning the freedpeople's "marital notions & practices."<sup>13</sup> One of Eaton's questions concerned how ex-slaves understood marriage. A camp director from Corinth, Mississippi replied concisely that ex-slaves' understanding of marriage was "all wrong." Still another from Grand Junction, Tennessee responded that "most of them have no idea of the sacredness of the marriage tie, declaring that marriage, as it exists among the whites, has been impossible for them. In other cases, the marriage relation exists in all its sacredness without legal sanction." While officials reported that some slave unions could be characterized as committed unions, more often they noted that slaves "know what marriage is among the whites but have yielded to the sad necessity of their case." Chaplain Eaton charged that, "among the things to be done, to fit the freed people for a life of happiness and usefulness, it was obvious that the inculcation of right principles and practices in regard to the social relations ought to find a place."<sup>14</sup>

Linking the practice of marriage to freedom and a "life of happiness and usefulness," individual camp directors developed marriage rules. In 1863, the contraband camp in Corinth, Mississippi reported that "all entering our camps who have been living or desire to live together as husband and wife are required to be married in the proper manner, and a certificate of the same is given. This regulation has done much to promote the good order of the camp."<sup>15</sup> These rules were designed not only to maintain decorum as ex-slaves entered the camps, but also to emphasize that marriage, representing the "right principles and practices," was important because it promoted order grounded in moral, sexual, and gender norms that former slaves were to emulate.

By early 1864, the secretary of war had made marriage regulation official military policy and directed camp supervisors to "solemnize the rite of marriage among Freedmen."<sup>16</sup> By that spring the policy had expanded. A Union

military edict had authorized army clergy to perform marriages among freedmen and women, instructing them to issue marriage certificates and record all marriages.<sup>17</sup> The policy was widely supported by superintendents of the contraband camps. Chaplain Warren from Vicksburg, Mississippi observed: "the introduction of the rite of christian marriage and requiring its strict observance, exerted a most wholesome influence upon the order of the camps and the conduct of the people."<sup>18</sup>

Early Union marriage policies were aimed at maintaining moral standards within the camps as well as fitting ex-slaves to be citizens. Camp directors argued for the necessity of learning social relations in transitioning to freedom. Their approach was based on the presumed organic relationship between morality and citizenship, and the importance of the principles of marriage and family to defining belonging. The obligations embedded in marriage, which included moral and gender norms, were crucial to this transition. Some of the testimonies from camp officials to the American Freedmen's Inquiry Commission illustrate this focus on social relations and morality as the basis for inclusion and freedom. The American Freedmen's Inquiry Commission was created by the War Department in 1863 to investigate the status of the emancipated slaves. The establishment of the Freedmen's Bureau was one of its recommendations. The commission was made up of three members, all of whom were abolitionists and reformers. They visited the South to hear testimony from former slaves and Union officers, and wrote two reports and many pages of individual observations.<sup>19</sup>

The testimony by Colonel William Pile, administrator of the Vicksburg contraband camp, illustrates the developing link between marriage, citizenship, and civic belonging. He explained to the commission that "one great defect in the management of the negroes down there was, as I judged, the ignoring of the family relationship. . . . My judgment is that one of the first things to be done with these people, to qualify them for citizenship, for self-protection and self-support, is to impress upon them the family obligations."<sup>20</sup> Pile explained that marriage was one of the "first things" necessary to qualify ex-slaves for citizenship.

An important part of this view of marriage was how it shaped understandings of economic independence. The commission urged that freedpeople should "stand alone" as soon as possible and that, while temporary government oversight was recommended to aid the transition to freedom, the dependencies of slavery should not be prolonged.<sup>21</sup> "Working for wages,

they [ex-slaves] soon get an idea of accumulating," one commission report commented, continuing that former slaves should regard marriage "as a privilege appertaining to emancipation." Marriage was more than a right. It was also a privilege that slaves were obligated to enact. The institution would fit ex-slaves for citizenship by defining gender roles and economic independence. Marriage enabled "standing alone" because it encouraged self-protection and self-support, both economically and culturally—the commission urged that the wife must learn the "instinct of chastity" and the husband his "obligation to support his family."<sup>22</sup> In the commission's recommendations for emancipation, wage work and marriage emerged as important in defining freedom and civic belonging. These were mutually reinforcing notions that would lay the foundation of an economic and moral understanding of independence and self-support. Thus, a notion of family obligation, rather than one of rights, defined the foundation of citizenship, the value of self-protection and self-support, and ultimately the relationship of former slaves to the polity.

By focusing on the roles of marriage and family, camp directors understood marriage as a process of civilizing former slaves, inculcating them into the traditions and practices of the dominant society. The commission's final report to the secretary of war reflected the general view among whites that the rule of law and the kind guidance from whites together would civilize the uncivilized and unchristian ways of former slaves.<sup>23</sup> The commission concluded that "they [ex-slaves] will learn much and gain much from us. They will gain in force of character, in mental cultivation, in self-reliance, in enterprise, in breadth of views and habits of generalization. Our influence over them, if we treat them well, will be powerful for good."<sup>24</sup> As Katherine Franke explains, the commission urged and recommended an active, paternalistic role for the federal government in the moral cultivation of the black character.<sup>25</sup> In defining the rights and obligations of freed slaves through marriage, a racial hierarchy was reinforced under the banner of citizenship. Freedom and citizenship took form but were tempered by the social and economic obligations attached to the status of marriage. Here we see how marriage acted as a public and political institution that regulated and shaped obligations and rights of the newly defined citizens. Union officers in the Contraband camps used marriage to respond to political and social problems. Marriage became a legitimate venue for exercising state control and individual rights, structuring the economic and cultural notions of self-support and standing alone. This view of marriage

as applied to ex-slaves affected how marriage would come to be seen more generally.

### Postwar and the Freedmen's Bureau

After the end of the war, the Thirteenth Amendment did not clearly spell out the dimensions of freedom or the powers of Congress to enforce it. The devastation in the South called for immediate action, and federal aid was deemed necessary for providing relief, rebuilding, and reestablishing order. The South was unstable and destitute, with a desperate refugee population, widespread starvation, and no organized civil authority. In March 1865, Congress established the Freedmen's Bureau under the authority of the War Department, in an effort to begin the process of transition from war and slavery to order and freedom. The bureau was set up to coordinate a national program of relief, supervision, and management of "all abandoned lands and the control of all subjects relating to refugees and freedmen from rebel states . . . under such rules and regulations as may be prescribed by the head of the bureau and approved by the President."<sup>26</sup> The establishment of the Freedmen's Bureau represented an unprecedented federal effort as the government took responsibility for the relief and sustenance of the emancipated slaves.

The bureau, however, was unable to actually take full responsibility for the emancipated slaves because it lacked a clear mandate as to the scope of its authority and responsibilities. When Andrew Johnson was made president by Lincoln's assassination, he pardoned former Confederates and did not redistribute land.<sup>27</sup> Consequently, during the summer of 1865, it became clear that ex-slaves would not get the small farms many had expected; instead, they were reduced to working as hired laborers or sharecroppers on land owned by whites.<sup>28</sup> Following the Republican notion of free labor, the Freedmen's Bureau structured its approach to Reconstruction on the belief that economic mobility ensured social and republican order. The agency maintained that "personal habits of industry, frugality, integrity, and self-discipline would lead to independence and prosperity for both individuals and society."<sup>29</sup> These habits were essential not only for economic independence but for manliness. Freedmen, the bureau avowed, could become free men by working land rather than relying on government subsidy and protection.<sup>30</sup> Thus, with the failure of Radical Reconstruction, the Freedmen's Bureau evolved into assisting the transformation of ex-slaves into wage workers rather than landowners. In

trying to help former slaves "stand alone," agents concentrated on familiarizing their charges with the idea of contracts, urging them to make contracts for work under white landowners as well as for marriage.<sup>31</sup>

As "wage laborer" took the place of "landowner" in defining freedom for ex-slaves, bureau agents impressed upon the former slaves that freedom was counter not just to bondage but also the habits of laziness and immorality.<sup>32</sup> In teaching freedpeople to be a "self-supporting class of free laborers" who understood the necessity of steady employment, the bureau also taught freedmen to be responsible husbands and fathers who provided for their families, and freedwomen to be devoted wives and mothers.<sup>33</sup> Marriage, which already defined patriarchal notions of independence prior to the Civil War, had become a useful framework through which to define freedom, economic independence, and self-support. Thus, reform of the sexual practices and family patterns of former slaves became crucial to the work of the Freedmen's Bureau.

### The "Marriage Rules"

Freedmen's Bureau commissioner general Oliver Otis Howard considered the sanctity of contracts, self-support, and equal justice under the law as mainstays of Reconstruction and the new social order. In pledging to bar compulsory, unpaid labor and to protect domestic rights, Howard declared it bureau protocol to write out wage agreements and officially register marriages to ensure that both were enforceable by law. Former slaves were required to marry, and bureau agents were granted the authority to perform weddings, to create rules for certifying and dissolving slave unions, and to manage the complexities that arose from the forced separation of slave couples.<sup>34</sup>

In 1866 the bureau issued a general order titled "Marriage Rules," intended to "correct, as far as possible, one of the most cruel wrongs inflicted by slavery, and also to aid the freedmen in properly appreciating and religiously observing the sacred obligations of the marriage state."<sup>35</sup> The rules stated clearly that "No Parties having agreed to enter the marriage relation will be allowed to live together as husband and wife until their marriage had been legally solemnized."<sup>36</sup> And teaching the precepts of marriage included more than just understanding the importance of living as man and wife. The rules also made clear that it was necessary to care for children: "if a man living without a wife find[s] two wives restored to him by freedom, the one

having children by him and the other not, he shall take the mother of his children as his lawful wife."<sup>37</sup>

All across the South, Freedmen's Bureau agents proselytized marriage, attempting to counter what they considered informal, illegal, and illegitimate slave unions. An assistant commissioner in Kentucky asserted that "taking up with each other" is an abominable practice, and must perish with the institution which gave it birth."<sup>38</sup> Wager Swayne, a Union general in charge of Alabama, insisted that those informally wed should engage in a "general re-marriage" or risk prosecution and punishment. Swayne focused on urging ex-slaves to form contracts, to "work energetically and patiently," and to establish lawful relationships, even while acknowledging that emancipated slaves faced "fiendish atrocity" from local whites.<sup>39</sup>

An assistant commissioner in Vicksburg was insistent on the value of marriage. He counseled freedpeople to be patient in their claims for jobs and schools, emphasizing that in order to revert the habits of slavery,

regular lawful marriage is a most important thing. No people can ever be good and great, nor even respectable, if the men and women 'take up together' without being married, and change from one to another and quarrel and part whenever the fancy takes them. Sin and shame of this class always destroys a people if not repented of. . . . Let no woman consent to live with a man at all who will not at once marry her. Unfaithfulness to the marriage relation is such a sin and shame that it ought not to be heard of among free people.<sup>40</sup>

Thus marriage represented freedom whereas nonmonogamy was a savage practice that existed within the bonds of slavery.<sup>41</sup> Officials argued that regulation of the sexual practices of former slaves was crucial to freedpeople's understanding of American civic belonging. The practice of "taking up" disrupted the gender roles of patriarchal society and therefore the society they were premised upon. These marriage rules also suggest a belief that, without legal marriage, "taking up" threatened to create a new group of dependent African American women and children who, once under the care of plantation owners, would now look to the state for aid if no husbands were available. There were two views of marriage. On the one hand coverture and gender roles defined the foundation of the nation and the private sphere, and on the other marriage defined public freedom and manliness. Both sought to forestall public dependency.

The Freedman's Bureau instruction on marriage combined economic independence and patriarchal gender traits.<sup>42</sup> One bureau agent in Virginia reported that, at each meeting, the freedpeople in his charge learned "the duties and relations of the matrimonial state." The assistant commissioner in Tennessee impressed upon former slaves that a wife must be her husband's "help meet" and "the charm of the household." The wife must not be "a slovenly woman who goes about with her heels out of her stockings, her dress unpinned, her hair uncombed, with dirt under her finger-nails." In turn the husband must "Be a MAN. Earn money and save it." The assistant commissioner explained to the freedmen that, "Your wives will not love you if you do not provide bread and clothes for them."<sup>43</sup> The Freedmen's Bureau focused not only on enforcing marriage but also on reproducing the traits associated with gender roles in marriage.

Bureau agents were accustomed to understanding the social order based on male-headed households, and so they focused on policing and reforming the freedmen, and not freedwomen. In addition, they sought to halt the growing burden of orphans and an increase in relief funding. They assumed that freedmen should be the providers and protectors for their families. The effort to create monogamous husbands who were industrious and responsible providers for their dependents correlated with the aspiration to see them as citizens. Marriage and work reinforced the foundations of citizenship.<sup>44</sup>

Teaching the merits and practices of formal marriage was not the only way marriage defined freedom for ex-slaves and their relationship to the polity. As historian Eric Foner explains "with freedom came developments that strengthened patriarchy within the black family and institutionalized the notion that men and women should inhabit separate spheres." For instance, when the Freedmen's Bureau designated the husband as head of household, it insisted that men sign contracts for the labor of the entire family and established wage scales that paid women less for identical work.<sup>45</sup> In other words, labor contracts were structured to promote and enforce the patriarchal principles of marriage so that the wife's wages were not her own but belonged to her husband.

According to bureau agents, citizenship status was premised on a freedmen's control over family labor, acquired through marriage. Historian Nancy Cott explains "when a man had no property but only his own labor to indicate his independence and stake in society, he had greater interest in seeing his wife's labor as his own." This view was prevalent in the political context. Republican congressmen, in describing the rights of ex-slaves as citizens,

contrasted the slave who had no rights and was economically dependent, with the free man with his rights and responsibilities as a husband and father.<sup>46</sup> Thus, freedom and citizenship came to be defined through the obligations of family life, particularly in the absence of other possibilities, such as owning land.

### State Marriage Policies

Shortly after the end of the war, many southern state legislatures as well as the national Congress passed validation statutes or constitutional provisions rendering marriages begun under slavery legal. Some required registration of slave marriages; others just declared slave marriages legal if the couple was cohabiting as husband and wife when the law went into effect.<sup>47</sup> Mississippi's 1865 civil rights law was typical: "All freedmen, negros and mulattos, who do now and have heretofore lived and cohabited together as husband and wife shall be taken and held in law as legally married."<sup>48</sup> As another example, in North Carolina the legal status of slave unions was among the first issues on the agenda of the 1865 constitutional convention. The final act declared the unions of all ex-slaves who "now cohabit together in relation of husband and wife" to be lawful marriages from "the time of commencement of such cohabitation." As historian Laura Edwards argues, the date of commencement was important. "If the date had been set at either emancipation or the ratification of the act, then all children born in slavery would have been illegitimate and their maintenance could have fallen to the state."<sup>49</sup>

These state marriage laws tended to be coercive. In some states cohabitation without legal marriage was a misdemeanor punishable by a fine. Other states, in reestablishing their sovereignty, collected a fee for a marriage certificate. Once states reinstated their authority, the Freedmen's Bureau stopped granting marriages but assisted freedmen and women to comply with marriage regulations, in some cases arresting adulterers and bringing them before local state authorities.<sup>50</sup> Other states passed laws that gave former slaves time limits in which to remarry formally before a minister or civil officer. For instance, in Florida, "all colored inhabitants of this State claiming to be living together in the relation of husband and wife . . . and who shall mutually desire to continue in that relation" had nine months to file a marriage license with the county circuit court.<sup>51</sup> Former slaves who failed to comply and continued to cohabit would be criminally prosecuted for the crimes of

adultery and fornication.<sup>52</sup> In North Carolina, ex-slaves had just less than six months to legalize their unions with the county clerk. "Each month after they failed to do so constituted a distinct and separately prosecutable criminal offense."<sup>53</sup>

These laws illustrate not only the strong regulation of ex-slaves' relationships but also how important it was to ensure that ex-slaves formed state-sanctioned marriages and families. State laws that enforced family and marriage stressed the obligations rather than the rights and privileges of citizenship. Through the rules surrounding marriage, then, a new relationship with the state was defined, one predicated on restrictions and obligations.<sup>54</sup> Freedmen's Bureau chief Oliver Otis Howard explained the logic behind enforcing both marriage and wage contracts, stating that if former slaves "can be induced to enter into contracts, they are taught that there are duties as well as privileges of freedom."<sup>55</sup>

### Antimiscegenation Laws and Limiting Marriage Rights

In contrast to the federal marriage policy, white southern elites limited the reach of Reconstruction by using existing anti-interracial marriage laws to curtail the rights of black citizens, in order to maintain the racial hierarchy. By prohibiting interracial marriages, southern legislative and judicial bodies limited black entrance into the civic realm. After formal racial subjugation was abolished, southern courts held the line with antimiscegenation laws, fighting challenges to this form of legal segregation. The arguments the courts made on behalf of antimiscegenation policies focused on the relationship of marriage, gender, and family to the health of the state, and to civilization more generally. Through anti-interracial marriage laws, a concept of racial homogeneity was institutionalized as individual state policies and the ex-slave's relationship to the state were defined and curtailed. In particular, the courts argued that gender roles in marriage could not be maintained in the context of an interracial union, that a stable family was defined through its racial homogeneity. Thus, antimiscegenation laws were meant to reconstitute the political and social hierarchies that the Reconstruction Amendments were meant to abolish, and partially succeeded in doing so.

Southern judges in many antimiscegenation cases used the institution of

marriage to re-impose a political and social race hierarchy. In the process they shifted the meaning of marriage itself, from a private nuptial obligation of men and women, as outlined by Blackstone, to a right that could be denied. Asserting that marriage provided a special status, in opposition to the view that Blackstone had articulated in contract philosophy in the eighteenth century, southern judges rendered state court intervention into the common-law marital union and the private sphere appropriate, even necessary. A distinction between social and political equality was further articulated, allowing the courts to push back the equalizing spirit of the Reconstruction Amendments.

While the Freedmen's Bureau was promoting certain marital arrangements among African Americans, southern courts were prohibiting others. Laws against interracial marriage had been on the books since the 1660s, but after the Civil War, efforts to prevent interracial marriages in the South increased dramatically, not only through enforcing laws that already existed, but by passing new ones. By the end of the nineteenth century, interracial marriage was legally forbidden in at least twenty-six states, mainly in the South and West. Between 1865 and 1899, indictments of individuals who intermarried made up 72 percent of southern appellate cases.<sup>56</sup> During the latter half of the nineteenth century, antimiscegenation laws were consistently upheld as constitutional.<sup>57</sup> The examples below reveal that southern courts were combating the political changes wrought by Reconstruction, or were at least attempting to define and circumscribe black citizenship, through the very language of the legal rulings that knocked back challenges to these laws. Political scientist Julie Novkov explains that questions about "interracial intimacy" at this moment were more than concerns about sexual mores, but "many whites saw interracial marriage as a symbol of the most radical implications of freedom."<sup>58</sup> Thus the struggles over the constitutionality of interracial unions were matters of the state.

After the Civil War, the most challenging task facing the Union was reintegrating the nation, and doing so in a way that incorporated former slaves as citizens. For defeated Confederates, the postwar challenge was recovering some political power and, in particular, working out a new set of arrangements between the "races" to replace the political, social, and economic lines between whites and blacks once enforced by slavery. Between 1865 and 1866, the South looked to redraw the racial line, as legislatures across the region, in an attempt to reestablish white economic supremacy, enacted detailed codes of harsh labor laws that limited the economic rights of ex-slaves. The Black Codes, as they were called, varied by state, but generally authorized local

officials to apprehend unemployed blacks and fine them for vagrancy. Some codes forbade blacks to own or lease farms. As a response to this attack on both ex-slaves and the power of the Union, Congress effectively struck down the Black Codes by passing the Civil Rights Act of 1866, which declared blacks to be citizens and empowered the federal government to intervene in state affairs when necessary.

After the installation of Reconstruction state legislatures in the former Confederacy, restricting interracial marriage was one attempt to revive the preexisting social and political order by sustaining white, masculine political sovereignty. But given the control exerted over the South by the Union during Reconstruction, how did southern courts exercise this power? After the adoption of the Fourteenth Amendment in 1868, the question arose as to whether state laws prohibiting interracial marriage denied people of color the equality guaranteed by the amendment. Challengers to antimiscegenation laws used federal initiatives, the Fourteenth Amendment (the privileges and immunities clause, the due process clause, and the equal protection clause),<sup>59</sup> the U.S. Constitution's right of contract clause in Article I, and the Civil Rights Act of 1866 to frame these kinds of marriage laws as an infringement of rights.<sup>60</sup> However, in constitutionality challenges, the laws were invariably determined to be valid.<sup>61</sup> The state courts' findings of constitutionality rested primarily upon three arguments: the statutes were not discriminatory because both races, black and white, were affected equally; the state had a rational, scientific basis for treating interracial marriages as threats to society; and, finally, marriage was under subnational jurisdiction. Southern courts mapped out legal and political territory for the institution of marriage, and in doing so attempted to reestablish white supremacy.

In response to the Reconstruction Amendments, southern courts differentiated social equality from political equality through marriage laws, and argued for limitations on the right to marry. In an 1869 Georgia case, *Scott v. State of Georgia*, a white man and black woman were convicted of intermarrying. The state supreme court proclaimed:

Before the laws, the Code of Georgia makes all citizens equal, without regard to race or color. But it does not create, nor does any law of the State attempt to enforce, moral or social equality between the different races or citizens of the State. Such equality does not in fact exist and never can. The God of nature made it otherwise, and no hu-

man law can produce it, and no human tribunal can enforce it. There are gradations and classes throughout the universe. From the tallest archangel in Heaven, down to the meanest reptile on earth, moral and social inequalities exist and must continue to exist through all eternity.<sup>62</sup>

The law drew on then-current scientific definitions of race to establish Anglo-Saxons as the socially and biologically privileged race. The court argued that these natural inequalities maintained order in society and the polity, and it did so by asserting the distinction between political and social equality. While former slaves enjoyed political equality and protection from the federal government, social equality was not mandated or natural.

Thus, legal entitlement and notions of status and hierarchy derived from marriage were concerned not just with the statuses of men and women. Racial identity was also merged with stratified social and legal status. After the Civil War, whiteness was not just a privileged identity but also a vested political interest—an interest and right that could now be protected through marriage law.<sup>63</sup> In contrast to the Freedmen's Bureau Marriage Rules that asserted the obligation of ex-slaves to marry, here the right to marry was to be protected. Antimiscegenation laws served to protect racial identity and to keep property and financial inheritance entirely within white families, further limiting the access of black citizens. So, even though courts argued for the distinction between social and political equality, the construction of social inequalities undergirded political and economic interests and relationships.

Scientific racial and gender discourse of the time was also used as the legal argument against mixed unions. The court extolled the virtue of antimiscegenation legislation, professing that "the amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us, that the offspring of these unnatural connections are generally *sickly and effeminate*, and that they are inferior in physical development and strength, to the full-blood of either race. . . . They are productive of evil, and evil only, without any corresponding good."<sup>64</sup> Calling the progeny of interracial unions "effeminate" suggests a cultural concern with masculinity and patriarchy, and thus shows a conflation of race and gender. Mixed unions would threaten not only whiteness but also patriarchy, and therefore also the core principles underlying political order and civic membership. The idea of interracial marriage threatened to contaminate the family, the foundation of

the state authority. Such marriages also threatened to blur the line between whites and blacks and to "effeminize" politics. Thus, curtailing the right to marriage was considered both legitimate and necessary.

The threat of interracial marriage also had a more practical edge. In ways similar to poor blacks, poor whites lacked the means necessary to live up to elite white standards of marriage, manhood, and womanhood.<sup>65</sup> Thus included in the danger of interracial marriage was also the potential that poor whites would marry poor blacks, finding common cause against the bourbon elites. Because marriage formed a political relationship that defined the ideological basis of the state, this kind of union would not only upset the race and class dimensions of marriage, but threatened to unite poor whites and blacks in a class allegiance. In this sense, antimiscegenation laws reveal a distinctly politico-legal logic, a precursor to the language that led to the *Plessy v. Ferguson* "separate but equal" decision in 1896 and later the Jim Crow segregation laws. Southern judges substantiated a distinction between political and social equality, and between those inside and outside politics. They also institutionalized the notion of an "outside" within the confines of the polity. In doing so, they created the legal framework from which to codify "separate but equal." The forces animating this logic can be found in the links between the race and gender discourses of the time on a variety of issues that dealt with ideas of protecting the home, the family, civilization, society, and politics.

The role of marriage as a political institution regulated and defined those inside and outside the institution. After the Civil War, marriage as private contract was supplanted by marriage as conferring racialized hierarchical and privileged status. In 1871, the state court's decision in *Doc Lonas v. State of Tennessee* found a black man and white woman guilty of violating an 1870 act that made it a felony to intermarry. Judge Sneed, of the Supreme Court of Tennessee, argued that marriage was more than a contract. Rather, he ruled, "It is the civil status of a man and a woman, united in law for life . . . it is not a contract but one of the domestic relations . . . it is no more a contract than a fatherhood, or a sonship, or serfdom, or slavery, or apprenticeship, are contracts."<sup>66</sup> Because marriage, according to the court, was considered more than a contract, it constituted a relation of dependency and domination that could not be ended at will. It was not merely a right.

Against the political ambiguity of race relations during Reconstruction, the marital union was clarified as a domestic relation, bound as if by blood.

In arguing that the marriage relation was not something entered into freely like a contract, the court asserted its right to regulate the marriage relation. This view stands in tension with the attempts to link marriage with freedom and contracts, which was the work of the Freedmen's Bureau. In the context of establishing citizenship through marriage rights for ex-slaves, the more public the marriage status became, the more regulated it was.

After claiming that marriage was a status like "one of the domestic relations," the court went on to argue for the separation of the races, grounding the progress of civilization in a notion of racial homogeneity in the name of the public good: "The laws of civilization demand that the races be kept apart in this country. The progress of either does not depend upon the admixture of blood. A sound philanthropy, looking to the public peace and the happiness of both races, would regard any effort to intermarry the individuality of the races as a calamity full of the saddest and gloomiest portent to the generations that are to come after us." The decision here makes marriage a public concern, and what is good for the public is racial purity. In arguing for the separation of the races, the court legally defined order and peace through a notion of difference, that being racial difference, without which the progress and civilization of generations to come would be threatened.

The Tennessee court legitimated this claim to racial homogeneity by using the racist scientific doctrines of the time as evidence that racial inequalities were real and unassailable. Incorporating the precept of race as a physically defined reality allowed the law to assign social standing through the institution of marriage. Bowing to the rights acquired by former slaves, Judge Sneed explained, "They are among us. They were faithful slaves, and are becoming useful and valuable as laborers. . . . Their rights, social, civil, political and religious, will be jealously guarded; but [they] must not marry or be given in marriage with the sons and daughters of our people."

The court acknowledged the rights of ex-slaves, claiming to protect equal rights, but it also asserted that ex-slaves should not marry the children of "our people." Marriage, as the foundation of the state, would be ordered by racial homogeneity; the perceived purity of the black and white races had been and continued to be maintained as an institutional relationship, not merely a social one. Thus, institutionalized, marriage status determined a hierarchical relationship between men and women as well as between whites and blacks. Judge Sneed argued that it was necessary "to prevent the production of [a] hybrid race. To prevent violence and bloodshed which would arise from such

cohabitation, distasteful to our people, and unfit to produce the human race in any of the types in which it was created. . . . The equality intended, is not equality in all things."

A decree on interracial marriage like this one was quite common in post-Civil War southern courts. Such rulings asserted the importance of keeping whites and blacks separate, and held that marriage was a realm where equality was neither required nor desirable.<sup>67</sup> The legal rhetorical logic went as follows: Interracial marriage was not just wrong, it was dangerous. The offspring of such unions were unfit for political life and violence would be inevitable, thus bringing the end of civilization. The courts conceded that ex-slaves had been granted political equality by the Reconstruction Amendments, but they did not allow that this guaranteed free blacks the right to marry white persons or that the laws were meant to legislate social equality.

Southern judges, allowing for some legal flourish and drama, expressed both real and imagined concerns over the scope and representation of the institution of marriage.<sup>68</sup> The courts considered marriage—the realm of the home and family—to be the legal and cultural foundation of the political and social order. By protecting the family, the law also protected the state from what southern courts characterized as the "disruption," "disorder," and "discord" of the mixing of the races. In other words, the courts argued that racial homogeneity, in stabilizing the family, was necessary to stabilize the state. Judge Sneed, and the southern courts generally, defined the home, marriage, and family as not just social categories but political ones as well.

In the South, the slave system had been the foundation of the patriarchal and white household. In turn, the white patriarchal family was the nursery of southern political order. In the 1877 case *Green v. the State of Alabama*, the state court reasserted this bedrock notion, claiming that state intervention and limits on marriage rights were necessary to maintain the integrity of the family against interracial unions. The family as the microcosm of the state had to be protected because as the family goes, so goes the state.

In this Alabama case, a black man and white woman were charged with "intermarrying."<sup>69</sup> The court argued for state intervention into the marriage contract because of the disruption that racial mixing brought to homes, the "nurseries of the state":

This institution [marriage] is indeed, the most interesting and important in its nature of any in society. It is through the marriage relation that the *homes* of a people are created—those homes in which,

ordinarily, all the members of all the families of the land are, during a part of everyday, assembled together; where the elders of the household seek repose and cheer, and reparation of strength from the toils and cares of life; and where, in an affectionate intercourse and conversation with them, the young become imbued with the principles, and animated by the spirit and ideas, which in a great degree give shape to their characters and determine the manner of their future lives. These homes, in which the virtues are most cultivated and happiness most abounds, are the true *officines gentium*—the nurseries of the state.

If interracial marriage were tolerated, utter chaos would result. The decision continued, "Who can estimate the *evil* of introducing into their most intimate relations, elements so heterogeneous that they must naturally cause discord, shame, disruption of family circles and estrangement of kindred? While with their *interior* administration, the State should interfere but little, it is obviously of the highest public concern that it should, by general laws adapted to the state of things around them, guard them against disturbances from *without*."

In this logic, interracial marriages would disrupt the social and political order because such unions threatened to defile the "interior" of the household—the racial and gendered integrity of the nineteenth-century home. And it was the state's responsibility to protect the marital relation and the family. The state had to protect the family and home from the ensuing "discord" and "shame" of racial mixing. The heterogeneity of racial mixing would confound the order of things, causing "estrangement of kindred" and "disruption of family circles." The order to which the court referred was particular not only to a racial order but also to notions of domesticity, the role of women, and the sexual division of political labor. In the home, women, seen as the bearers of morality, created the conditions of "repose" in which children developed and cultivated "principles," "character," and "virtue." These were, in turn, the essential elements of public life that, the court asserted, were violated by blackness.

In its language of inside and outside, the *Green* decision attempted to redraw the political line between blacks and whites that the end of slavery challenged. According to the court, the state should guard against "disturbances from without." However, blacks were not "outside"; the Thirteenth, Fourteenth, and Fifteenth Amendments were already ratified. While legally

ex-slaves were equal citizens, the southern courts were redrawing that political line not only against blacks but also against federal intrusion. Here, then, federalism is analogous to the protection of the home. In protecting the family from racial mixing, the courts were protecting the virtue and homogeneity of the southern states from the Union. Here again using the institution of marriage to distinguish those inside from those outside is premised upon the authority of the court to use antimiscegenation laws to define marriage as a right that needs to be limited. Not only was interracial marriage beyond the pale, but federal power over the south was as well. The institution of marriage, a subnational state jurisdiction, was one area in which states could exercise power outside the federal nation.

### Marriage and the Racialization of Freedom

Reconstruction-era antimiscegenation court cases and the Freedmen's Bureau marriage policies were different attempts at addressing what had become the nation's greatest dilemma following the Civil War: on what grounds would African Americans enter society and the polity? Freed slaves had been granted citizenship, but the Fourteenth Amendment merely begged the question of how this group would become incorporated as participants in the nation's future. In other words, formal citizenship rights did not guarantee immediate black entrance into equal membership. The marriage laws of the period reveal how notions of inclusion were marked by specific gender roles, sexual practices, social norms, and economic behavior. The racialization of freedom and paternalist policies toward assimilated former slaves defined a racially homogeneous marital household as the foundation of respectable citizenship. Furthermore, the interaction of race hierarchy and marriage during this time renders the political link between marriage and civic belonging visible, revealing that marital status powerfully shaped ideas of inclusion and responsible citizenship in the American nation.

In this era, the role of marriage as a fulcrum between the obligations and the rights of citizens emerges. The Freedmen's Bureau vision of marriage as an obligation conflicted with antimiscegenation laws that defined marriage as a right subject to limitation. Freedmen's Bureau policies and state legislation introduced marriage as a way for the state to train and regulate ex-slaves: marriage policies prohibited certain sexual and familial behaviors, structured gender roles, prepared former slaves for wage work, prevented dependency,

and sought to make ex-slaves responsible for their own economic welfare. Instead of being a contractual right, marriage became a schoolhouse for citizenship—or, to use a more accurate if less appealing description, marriage became a disciplinary regime that penetrated the most private of relations to serve a public need for reordering society in the wake of war and emancipation. Family obligations were meant to motivate work, not only citizenship. Promarriage policies that enforced the obligation of marriage in order to enable economic independence, and promoted a notion of racial equality, reemerged a century later in the federal policies of welfare reform, discussed in detail in Chapters 4 and 5.

Though comprehended as an obligation for ex-slaves, at the same time, marriage was conceived of as a right that had to be limited through antimiscegenation laws in order to preserve the nation. In their rulings upholding these laws, southern judges sought to dictate how African Americans would enter the polity. The courts conceded that they had citizenship, granted by the Fourteenth Amendment. But for these southern justices the state (and civilization itself) was founded on—and would continue to be secured by—an understanding of marriage as a status under the protection and authority of the state. Marriage was not simply a right of ex-slaves, but the private realm of intimate relations and the rearing of children, and a homology of the nation itself.

Antimiscegenation laws and the rulings upholding them limited the rights of former slaves and maintained racial and gender hierarchies. Laws against interracial marriage, during the postbellum era, solidified the racial and gendered underpinnings and practices of civic inclusion and inequality. Marriage was a right that came with freedom but that also designated and represented a new obligatory relationship to the state. In other words, antimiscegenation laws served to sustain the white, masculine political order as well as to maintain a notion of citizenship and family based on racial homogeneity.

At the same time, within the context of the occupation of the former Confederacy by the Union, the granting of marriage rights to emancipated slaves made the institution available for the fashioning of new citizens in a reconfigured political order. In other words, the high priority that state policymakers placed upon marriage during Reconstruction suggests that they saw the racialized, economic and gendered roles in families and within civil society to be vital to political stability. An underlying political question was, if marriage defined the foundation of society and was the root of its progress,

then what did it mean that legal black families were now part of the basis of the nation? In its role in negotiating and settling the terms of former slave inclusion, marriage itself and what marriage meant began to change as well, particularly as the racial restrictions on marriage became more pronounced in the law and through scientific racial discourse. While primarily shaped by common-law practices, the private marriage contract was now set against a view of marriage as a tool of public state interest. Thus, a direct consideration of marriage's transformation has much to offer the narratives of political development.

The prohibition of certain marriages for the good of the nation appears again at later moments—specifically in relation to immigrants in the Progressive Era and with respect to gays and lesbians at the turn of the twenty-first century. These linkages over time underscore that marriage is deeply, inexorably, and dynamically intertwined with notions of state order, citizenship, and belonging. The mandatory marriage policies of the Freedmen's Bureau were a form of inclusion, while anti-interracial cases tempered this notion of inclusion by limiting the right to marry. This tension between the obligations and rights of marriage with regard to racial hierarchy illuminates a central tension in American politics, one that emerges again at the end of the nineteenth century.