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A little over a year after the American Civil War began its end at Appomattox Courthouse, Mary Jones, a South Georgia planter, found
herself embroiled in a contract dispute with her former slaves, now hands farming for a share of the crop on one of her Sea Island plantations. The customary share in her area was half the crop; apparently her contract provided her laborers with less than that amount, which caused them to suspect duplicity on her part. After consulting with the local Freedmen's Bureau agent, who affirmed the legality of her contract, she demanded and received a "return to order and duty on the place."1 She wrote to her son in New York:

Since this outbreak things have moved on very well. I have told the people that in doubting my word they offered me the greatest insult I ever received in my life; that I had considered them friends and treated them as such, giving them gallons of clabber every day and syrup once a week, with rice and extra dinners; but that now they were only laborers under contract, and only the law would rule between us.2

In Mary Jones's eyes, what had prevailed between Jones and her workers under the regime of slavery and its immediate aftermath was a relationship of reciprocity based on a sort of stewardship. Numerous owners, overseers, and apologists for the system attempted to justify this stewardship both before and after slavery through a series of arguments that fit together as what I will call a "moral economy of dependency."3 Jones professed to throw off the regime of dependency, bitterly demoting her "friends" to laborers under contract, related to her not as dependents, but only through the impersonal bonds of law. But in fact, Jones, and many like her, continued to fight against the replacement of dependency with the rule of law and legal rights.4


2. Id.


4. It is worth distinguishing between the dependency on public charity that resulted from the failures of the marketplace or personal volition, and the dependency created by status relationships and enforced by legal restrictions on property ownership or access to economically remunerative jobs. It is with the latter that I am concerned here. On the former manifestation of dependency, and its connections with restructuring the postbellum Southern labor system, see
Before the war, the law had supported dependency as a form of economic organization through the law of coverture and the complex of regulations and relationships that made up the law of slavery. Coverture (the system of laws that excluded women from any and all civil rights upon marriage), and the law of slavery were in turn justified and supported by ideologies of gender and race explicitly linked to dependency. Although the law of slavery was swept away on the rip-tide of war, its underlying purpose was not: White Southerners sought other legal means to maintain an economic organization based on dependency. The law of coverture did not suffer a similar fate, but by the latter half of the nineteenth century it was under sustained attack. When slavery had provided a (deceptively) coherent legal category, racial ideology functioned to support and explain the category. Once slavery as a legal category was dissolved, and coverture's vulnerabilities were exposed, however, race and gender took on heightened importance as the bases for a revamped system of dependency.

Emancipation not only freed slaves, it confronted Americans, North and South, with the pervasiveness of dependency in the late nineteenth century. The proslavery argument had justified slavery as a part of a household system, on a continuum with marriage and childhood. Consequently, slavery's demise in some senses reinforced various reformers' critiques of other forms of dependency. For White


5. Historians are split over whether slavery represented a system of race relations or class relations. See Barbara J. Fields, *Ideology and Race in American History, in Region, Race, and Reconstruction* 143, 150-51 (J. Morgan Kousser & James M. McPherson eds., 1982); Stephanie McCurry, *The Two Faces of Republicanism: Gender and Proslavery Politics in Antebellum South Carolina*, 78 J. Am. Hist. 1245, 1247 n.6 (1992); Charles L. Flynn, *White Land, Black Labor: Caste and Class in Late Nineteenth-Century Georgia* 1-5 (1983). As my argument suggests, I see the issue as an ideological one, in which ideologies of race and gender are used to construct, support, and explain a system of dependency, which has as its major theme neither class nor race. Because I view race as a cultural construct, and the categories "white" and "black" to represent sociological groupings rather than biological adjectives, I have capitalized White and Black throughout this Article.


8. The model for a system based solely on dependency can be found in Stephanie McCurry's elaboration of the yeoman household in antebellum South Carolina. *The Politics of Yeoman Households in South Carolina, in Divided Houses: Gender and the Civil War* 22, 22-38 (Catherine Clinton & Nina Silber eds., 1992).

Southerners, at least, belief in their own antebellum rhetoric led them to rethink the compass of household dependency after a key component — slavery — had been destroyed.

For reasons complicated and opaque, Southern Whites set up interracial marriage as one of their most potent symbols of what they perceived as the manifest danger and wrongheadedness of suggesting that freedom should include equality. Although both political and civil equality were deplored and resisted, Southern Whites made what they referred to as “social equality,” the point beyond which they would not give ground. In so doing, they used the category of “social rights” to effectively limit access to the full range of citizenship rights and privileges.10

Freedom for slaves was bad enough — a situation to be endured only because superior force of arms imposed it. In fact, freedom would be blamed for the fabricated epidemic of Black men raping White women, the myth that became the stalking horse for the White reign of terror that gripped the South for decades, well into the mid-twentieth century. Interracial marriage, on the other hand, was less a decoy in the White South’s war against equality, than a mixed warning and fear of what true equality might mean — a thought that was apparently beyond rational contemplation.11 Interracial marriage between Black men and White women was taken as an affront to the very definition of manhood, which had as core elements whiteness and access to esteem. Manhood’s negative referents were, among others, White women and Black men.12 Interracial marriage between White

1973); Amy D. Stanley, Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation, 75 J. Am. Hist. 471 (1988); Lea S. VanderVelde, The Labor Vision of the Thirteenth Amendment, 138 U. Pa. L. Rev. 437 (1989). Michael Grossberg argues that dependent rights became increasingly enforceable over the course of the nineteenth century as republicanism undermined the patriarchal family and judges created a “judicial patriarchy” to allocate rights and responsibilities that had traditionally been the prerogative of the father. It may well be this “judicial patriarchy” and the illusion it created of legally enforceable “dependents’ rights” that has helped make the journey to equal rights such a long one. Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America 244-47, 300-02 (1985).

10. It is beyond the scope of this paper to explore the antebellum history of this phrase; it was certainly in use in connection with racial intermarriage, although how widely is unclear. See, e.g., Mr. Abraham Lincoln, Fourth Lincoln-Douglas Debate, Charleston, Illinois (Sept. 18, 1858) in Abraham Lincoln: Speeches and Writings 1832-1858, at 636, 636-37 (Don E. Fehrenbacher ed., 1989). What is clear is that by the time of Reconstruction, “social equality” would become virtually synonymous with miscegenation.

11. In the North, interracial marriage did serve primarily as a decoy, used to magnify partisan differences between political parties. See infra text accompanying note 104.

12. On women as manhood’s negative referents, see E. Anthony Rotundo, American Manhood: Transformations in Masculinity from the Revolution to the Modern Era 217-22, 270-74 (1993); Bertram Wyatt-Brown, Southern Honor: Ethics and Be-
men and Black women, on the other hand, did not so much challenge manhood’s definition, as it represented a transgression against manhood’s tenets. But, in either case, gender and race became intertwined in the ideology of the White South; they were mutually defining.

This Article offers some preliminary thoughts about a much larger undertaking: an exploration of why sex and gender have been historically bound up with race, and how these concepts figured in the process by which the meaning of civil, social and political rights were parsed out during Reconstruction and beyond. One of the legal places where gender, race, and dependency were most closely entangled was in the prohibitions on interracial marriage and its branching thickets, such as lynching. At the core of the early debate were several closely linked questions about what kind of contract marriage was, its social and legal meaning in the shambles of the slave system, and, finally, what the limits of the right to marry, or to choose one’s associates, might be in a world where the meaning and content of “rights” were up for grabs.

Another question, from the perspective of Whites, was how manhood would be defined and its attributes protected from dilution or negation by access to those attributes by Black men. From the perspective of Blacks, the question of access to manhood was equally pressing from the other direction.13 Rights — civil, political and social — were the locus of this battle, with contract, suffrage and public accommodations at the center of each of these categories. Interracial marriage, and the social equality it was made to represent, was used to forestall access by Blacks to a whole range of public rights and privileges, because such access, according to its opponents’ beliefs, must ultimately lead to interracial marriage.14

I will first lay out the antebellum understandings of and justifications for the moral economy of dependency and their relationship to later delineations of different categories of rights — civil, political and social.15 Then, focussing particularly on Georgia and the federal con-
gress, I will explore the Reconstruction debates over rights and contract in the context of interracial marriage, and the manifestation of the conclusions reached in the symbol and tragedy of lynching. Finally, I will offer some thoughts about the connections between law, race, and gender on the legal battlegrounds of intimacy and free will: the law of marriage and the law of contract.

II. THE MORAL ECONOMY OF DEPENDENCY AND THE ANTEBELLUM MEANING OF “RIGHTS”

Antebellum defenses of slavery, in conjunction with slave management literature, laid out much of what Southern Whites came to believe was a hierarchical structure of rights that had, as its base, a concept of dependent rights and reciprocal duties. This belief was especially true in the context of the regulation of marriage and the marriage contract. In the realm of law, Southern defenders of slavery were comfortable with a continuum between public and private life that relegated significant responsibilities for social order to the “law of the father.”

Southern judges were faced with the apparent difficulty of explaining and justifying a paternalist social and labor system through the use of legal language that Northern jurists had devised for supporting an individualistic, free labor society. In fitting their legal doctrines with Northern precedents in market settings, “slave owners found it difficult to explain paternalism in the [Northern] language of individualism.”

But slave owners had another language at their disposal, one that was familiar to Northerners, and one that they used: the language of domesticity and dependence. The Southern version of the ideology of domesticity provided Southern slaveholders with a nationally understood lexicon for articulating a patriarchal vision of rights-in-servitude that they characterized and defended as “dependent rights.”

Slaveholders’ assertions that slaves possessed certain moral claims against their masters, which slaveholders expressed as the rights of slaves and the duties of masters, functioned ideologically...

16. TUSHNET, supra note 7, at 36.

17. The concept of dependent rights was not unique to Southern slaveholders, but the need to defend their way of life led them to create one of the most explicit and sustained defenses of the concept.
as a "moral economy" of dependency and slavery.\footnote{Jaynes, supra note 3, at 3-15. See also Strickland, supra note 3, at 141-78. Larry Tise has identified "conservative republicanism" as another national language with which not only Southern proslavery writers, but Northern writers as well defended the peculiar institution.\cite{Tise, supra}} Dependency was the defining factor in a social system that was rooted in a patriarchal ideal and which encompassed, in differing degrees, all household relationships.

According to this model of social life, the filial household was not only the basis of society, but the only place where weakness and dependence could be granted what were commonly referred to as "rights" and what was claimed to be actual, although not formal, equality in the allocation of these "rights." Through the "slavery-as-a-positive-good" argument, planters sought to justify and explain — in a very real sense, to create and re-create — their social system.\footnote{The other, and generally earlier, defense of slavery was premised on the notion that it was a necessary evil. The "positive good" argument sought to place slavery, and thus slaveowners, on a higher moral ground by claiming that slavery was a more humane and rational form of social and economic organization than free labor. See, e.g., Bertram Wyatt-Brown, Modernizing Southern Slavery: The Proslavery Argument Reinterpreted, in Region, Race, and Reconstruction 27 (J. Morgan Kousser & James M. McPherson eds., 1982).} Part of this endeavor was an appeal to what were initially at least two distinct categories of rights, categories that would later be broken down even further. On the one hand they claimed constitutional, political "rights as trumps" for themselves; on the other, they averred the existence of dependent, economic rights, or rights as the fulfillment of needs rather than as entitlements, for their households.\footnote{See Hendrik Hartog, Constitution of Aspiration, The Rights That Belong to Us All, 74 J. Am. Hist. 1013, 1020-21 (1987). As Stephanie McCurry suggests, antebellum Southern ministers and politicians "offered an elaborate theory of providential relations and particularistic rights" under which rights were specific to status. McCurry, supra note 5, at 1250. Drew Gilpin Faust's recovery of the "sacred circle" of the Southern intellectuals, and their defense of slavery establishes the same theme. "A natural right, according to Simms and his network, took into account the reality of the natural laws of inequality and was 'not intended to disturb the natural degrees of humanity, ... not to make the butcher a judge, or the baker a president, but to protect them, according to their claims as butcher and baker.' The natural society, therefore, was inevitably hierarchical and provided for appropriate and orderly differentiations among men." Drew G. Faust, A Sacred Circle: The Dilemma of the Intellectual in the Old South, 1840-1860, at 120 (1977). See also Thomas R. R. Cobb, An Historical Sketch of Slavery, From the Earliest Periods, at cxxi (Philadelphia, T. & J. Johnson & Co., 1858) ("natural rights depend entirely upon the nature of the possessor, not of the right; for, it is the former and not the latter that determines the question of right").} It is with the latter that this Article is most concerned. Rights language in the hands of White slaveholders, given the context of other language about servitude and hierarchy, clearly had a meaning quite different from the dominant liberal meaning, which focused on individualism, autonomy, and the institutional vindication of those values for White
males. But, underneath that dominant meaning another strata of rights-talk existed that was applied to people, such as women, children, idiots, and lunatics, who were denied access to liberal political rights: those who in the language of the law were defined as dependent. Although needs were explicitly equated with rights in reference to dependents, when placed next to the lexicon of legal rights for which there existed legal remedies, the language of dependent rights more accurately reflected a concept of reciprocal duties. It was this language that slaveholders appropriated in their defense. And, it was this set of ideas that would underpin and influence Southern Whites' attempts to shape the post-war meaning and limits of fundamental Constitutional rights, privileges, and immunities for former slaves, and to cabin them off from other categories of rights.

A. Dependent Rights and Rights in Dependency

Most nineteenth-century Americans, North and South, probably believed that all household relationships either were or should be governed by notions of the rights and duties of dependency. But these notions reached their fullest articulation in the antebellum South under pressure to defend slavery as a moral organization of society. In the slave management literature that proliferated in the middle years of the nineteenth century, the phrase "rights of slaves" was synonymous with "duties of masters." By the 1850s, the well-developed proslavery understanding of rights paid no lip service to a classical liberal notion of natural individual rights antecedent to human society. Instead, slavery's defenders explicitly harkened back to an older understanding that found the bases of social order in reciprocal relationships of duty and obligation reposing in the family or household.

21. All rights might be characterized in this fashion; the critical distinction here is enforceability. On the existence of a notion of reciprocal duties inherent in modern "rights-talk," see Thomas L. Haskell, The Curious Persistence of Rights Talk in the Age of Interpretation, 74 J. Am. Hist. 984 (1987).


23. See infra text accompanying notes 26-40.

The argument had a distinctly moral and explicitly Christian tone, as it was based on scriptural interpretations of biblical patriarchy and slavery. Without institutional state guaranteed remedies, these "slaves' rights" were "dependent rights" in more than one sense of the term. Their recognition or enforcement relied entirely on the predictions of the slaveholder, or the intervention of some civil-rights-bearing individual (i.e., a White male) willing to set institutional wheels in motion on behalf of the slave. Thus, to the extent that these "entitlements" can be understood as rights at all in a modern sense, they must be understood, not so much as "rights of dependents," but precisely as "dependent rights"—a meaningful phrase in the nineteenth century that subsequent legal and social development has transformed into an oxymoron.25

Dependent rights were familiar to all nineteenth-century Americans through the nineteenth-century popular ideal of domesticity. This ideal mandated a duty of support that free men owed their dependent wives and children. Thus, when Virginia's George Fitzhugh claimed for slaves an equality, though not an identity, of rights with their masters, he was appealing to a discourse of reciprocal duties in families that existed underneath America's Revolutionary discourse of Constitutional rights. According to Fitzhugh, "The dependent exercise, because of their dependence, as much control over their superiors, in most things, as those superiors exercise over them. Thus, and thus only, can conditions be equalized. This constitutes practical equality of rights, enforced not by human, but by divine law."26 The model for such a system of dependent rights owed more to the patriarchy of Filmer than to Lockean contract or Jeffersonian republicanism.27 Rights were personal and, like rights for married women, depended on the proper feelings of the "lord and master." Rights in this sense were to be vindicated by the operation of natural law or the

25. Although I do not propose to do so here, it might prove fruitful to explore the question of whether the distinction between "rights-of-dependents" and "dependent rights" had significance to those pressing these arguments.


27. Locke finessed the issue by segregating the domestic sphere from the political sphere and excluding the domestic relations from consideration in political philosophy. In reality, of course, patriarchy as a social system did not disappear with patriarchy as a political system; as a consequence, domesticity as a "domestic philosophy," premised on dependency, grew up alongside liberalism as a "political philosophy" premised on individualism.
“law of the father” within the interdependent “family,” with the father’s power supported implicitly by the state through the legal system. In Georgia, as elsewhere, this meant denying access to state power to other members of the household.28

In the 1850s, E.N. Elliott most thoroughly and explicitly expressed the content of dependent rights:

The master, as the head of the system, has a right to the obedience and labor of the slave, but the slave has also his mutual rights in the master; the right of protection, the right of counsel and guidance, the right of subsistence, the right of care and attention in sickness and old age. He has also a right in his master as the sole arbiter in all his wrongs and difficulties, and as a merciful judge and dispenser of law to award the penalty of his misdeeds.29

In the 1830s, Harriet Martineau provided a more succinct explanation of slaveholders’ understanding of rights for slaves: “Sufficient subsistence in return for labor.”30 This prescription has a familiar ring: “support for labor” echoes through family law, which of course was paired with master and servant in the law of domestic relations throughout the nineteenth century.31

Among the most significant of the rights that slaveholders claimed for their slaves were rights to subsistence, housing and clothing, or what would approximate economic, as opposed to political, rights.32 White Southerners found it morally comfortable to defend slavery as a system of labor in part because they lived in a world that, rhetoric of egalitarianism to the contrary, saw dependency as a necessary part of a rational society. Dependency was most often contained within a household, and was defined as a relationship to the head of

28. Examples of such denials include making the action of seduction a father’s action, rather than the daughter’s, and enforcing the wife’s right to support from her husband through the doctrine of necessaries - a merchant’s action unavailable to wives directly.

29. E.N. ELLIOTT, AN INTRODUCTION TO COTTON IS KING AND PRO-SLAVERY ARGUMENTS, reprinted in GENOVESE, ROLL, JORDAN, ROLL, supra note 26, at 76. These “rights” almost perfectly parallel the appurtenances of patriarchy listed by Cobb. See infra note 40 and accompanying text.

30. GENOVESE, ROLL, JORDAN, ROLL, supra note 26, at 78.

31. Id. See also SOUTHERN CULTIVATOR, Jan., 1866, at 3 (middle Georgia’s agricultural journal). The more familiar and comfortable formulation of this was “support for obedience.” Obedience was the overarching obligation within which labor was subsumed.

32. Other groups made claims for themselves based on a divergent understanding of the need for economic rights to complement political rights, most notably temperance, evangelical and suffrage women, and the labor movement. The contemporary failure to recognize economic rights as legitimate, much less privileged equally with political rights, may be due in no small part to the close connection of such arguments with slavery and dependency, not to mention socialism. See, e.g., Nancy Fraser & Linda Gordon, A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State, 19 SIGNS 309 (1994). In a society born in a rhetoric of independence and individualism, the connection of economic rights with a defense of slavery could only have served to highlight the folly of promoting economic rights.
the household. Dependent statuses were arranged in a hierarchy under the rule of the husband/father/master. Wives occupied the step under husband, with the other statuses ranging in descending order to children, wage laborers, indentured servants and apprentices, down finally to slaves (who Whites did not differentiate, legally or otherwise, by family status).33

In response to abolitionist attacks on slavery, Southern elites defended their "peculiar institution" by assailing the free labor system of the North and Europe, under which, slaveholders argued, work was wrongly separated from worker, job from home, and organic society was rent root from branch in a manner that would lead to the ultimate destruction of the whole.34 The lack of control over the total lives of workers that freedom of contract and domestic privacy required was anathema to southern sociology both before and after the war. The Black Codes of the immediate post-war South are eloquent testament to the *sine qua non* that total labor control represented in the mind of the White South.35

Unlike the free labor system, according to slavery's supporters, slavery linked the economic and domestic spheres in one location—the household. In return for the unquestioning obedience thought necessary for social order, domestic slavery offered "cradle to grave" security for workers in a household economy.36 To defenders of slavery, a paramount aspect of the danger of free labor was its supposed destruction of the organic bonds of dependency. As Senator James Henry Hammond thundered to the North in his famous "mudsill speech" of 1858:

[1]n short, your whole hireling class of manual laborers and "operatives," as you call them, are essentially slaves. The difference between us is, that our slaves are hired for life and well compensated. There is no starvation, no begging, no want of employment among our people, and not too much employment either. Yours are hired by the day, not cared for, and scantily compensated . . . .37

33. On lack of differentiation of black slaves and later emancipated blacks by white society, see Anna J. Cooper, *A Voice From the South* (1988)(1892).
34. McCurry, supra note 5, at 1248-50.
37. Hammond Speech, supra note 36.
Without dependency there could be no social control and destruction of society would result. Thus, the more aggressive apologists saw a close link between the class strife of Europe, the “isms” of the North, and the dissolution of domestic dependency as the organizing principle of economic life.  

As conflict between the North and South heightened in the middle third of the nineteenth century, many White slaveowners came to believe what proslavery apologists such as Georgia’s Thomas R.R. Cobb or propagandists such as Virginia’s George Fitzhugh, lauded as the virtues of Southern slavery over the evils of free labor. Of particular significance for the purposes of this study is the explicit invocation of the language of family, household, domesticity and dependency to explain the virtues of slavery. To Cobb, writing in 1858, the relationship between master and slave was more than simply analogous to a familial relationship; it was a quintessentially patriarchal relationship with all that implied in the way of a commonwealth ruled by the law of the father:

In short, the Southern slavery is a patriarchal, social system. The master is the head of his family. Next to wife and children, he cares for his slaves. He avenges their injuries, protects their persons, provides for their wants, and guides their labors. In return, he is revered and held as protector and master. Nine-tenths of the Southern masters would be defended by their slaves, at the peril of their own lives.

In even more explicit terms, Virginia’s Robert Dabney defended slavery in language that would have taken little imagination to transpose with many Northern marriage tracts of the day, stating that “[n]ow it is the genius of slavery to make the family the slave’s commonwealth. The master is his magistrate and legislator . . . . He is a member of a municipal society only through his master, who represents him.”

39. As Eugene Genovese has persuasively argued, Slaveholders generally believed that their slaves lived better than the great mass of peasants and industrial workers of the world. Virtually every southerner who raised his [sic] voice at all on this subject insisted on the point, not only those who wrote articles and made speeches for propaganda but those who commented privately in family letters and wills.
Genovese, Roll, Jordan, Roll, supra note 26, at 58. See also Ideology of Slavery, supra note 36, at 10-13.
40. Cobb, supra note 20, at ccxviii; Genovese, Roll, Jordan, Roll, supra note 26, at 73-75 (discussing the prevalence of the familial ideology of slavery).
41. Robert L. Dabney, Defence of Virginia [and through Her, of the South] in Recent and Pending Contests Against the Sectional Party (1867), reprinted in Elizabeth Fox-Genovese,
Many conservative Southern slaveholders shared Fitzhugh's views on the virtues for social governance of families organized around patriarchal authority and a household economy.\textsuperscript{42} Judges, among others, were not immune to the appeal of defending slavery by invoking the precariousness and misery of free labor; appellate opinions reflect the slaveholders' widespread claims that a society of patriarchal households was more humane than a society of possessive individuals.\textsuperscript{43} The slaveholding South was also situated within an ethos of evangelical Protestantism. Where Fitzhugh and other pro-slavery intellectuals failed to penetrate, evangelical religion filled in: “The ordinary slaveholder, seldom a reading man, appreciated the domestic imagery and paternal authoritarianism that he heard from the pulpit.”\textsuperscript{44} As a descendant of the Lumpkins, a huge clan of slaveholding Georgians, noted:

[R]eligion was in no way incidental to these middle Georgia ante-bellum planters. As they were solid, ambitious men, conscious of responsibilities of rulership, so were they pious and God-fearing, at least the better of them, with an acutely developed sense of duty. . . . It was a simple faith with little adornment: these men believed in church, in going to church, in training their charges, be they children or slaves, in religious duties.\textsuperscript{45}

And increasingly, as more and more slaveholders sought to enhance the efficiency of their workforce and justify their social system on moral, ethical and religious grounds—that is, create a model of the Christian master imbued in a moral economy of slavery—they began advising each other on slave management in terms that grounded the “positive good” of slavery in the patriarchal family.\textsuperscript{46} A planter


\textsuperscript{42} Charles Colcock Jones, Jr., for instance, on receiving word from his mother of the deaths of two of her slaves, commented in a letter meant only for family consumption, that at least the orphans left behind would be cared for in the family, unlike what he expected would happen in the free North, which was that they would be “left to public charity.” Letter from Charles Colcock Jones, Jr. to Mary Jones (Nov. 22, 1856), in \textit{Children of Pride}, supra note 1, at 266. \textit{See also} Dudley v. Mallery, 4 Ga. 52 (1848); C. Vann Woodward, \textit{Foreward to Fitzhugh}, supra note 26, at vii. For the importance of the familial metaphor to Southern slaveholding women, see \textit{Fox-Genovese, Plantation Household}, supra note 41, at 100-02, 131-34.

\textsuperscript{43} \textit{See}, e.g., Bryan v. Walton, 14 Ga. 185 (1853).

\textsuperscript{44} Wyatt-Brown, supra note 19, at 32. Fitzhugh's claims for slavery in the abstract, as opposed to others' defense of the concrete instance of racial slavery in the South, went too far for most Southern slaveholders who drew the line at advocating slavery for all workers regardless of race. Racism provided adequate logic for their system, and the contrast of slavery with free labor served more as an invitation to abolitionists to tend their own gardens than as a suggestion that slavery transcend racial barriers.

\textsuperscript{45} KATHARINE DU PRE LUMPKIN, \textit{The Making of a Southerner} 11-12 (1946).

\textsuperscript{46} James Breeden's collection of slave management documents is immensely useful in tracking the tasks taken by slaveholders in their public communications with each other on the
named Foby, writing in middle Georgia’s agricultural journal, *The Southern Cultivator*, offered his views on “the Management of Servants” to his fellow slave owners in 1853.47 His brief for a familial, patriarchal model for slave society explicitly rejects despotism or tyranny as appropriate alternative approaches to master/slave relations. According to Foby:

The fundamental principles upon which the system is based are simply these: that all living on the plantation, whether colored or not, are members of the same family and to be treated as such—that they all have their respective duties to perform, and that the happiness and prosperity of all will be in proportion to the fidelity with which each member discharges his part.48

Foby, like Fitzhugh, identified the family as the repository of rights, and he impressed upon his slaves that membership in the family, under the patriarch, was the means through which their rights (“needs”) would be satisfied: “I take occasion to inculcate repeatedly that, as the patriarch (not tyrant) of the family, my laws, when clearly promulgated, must be obeyed—that, as patriarch, it is my duty to protect their rights, to feed, clothe and house them properly . . . to provide for all their proper wants . . . .”49

J.B.D. De Bow also spoke of rights in connection with slavery, in a context indicating that he, too, invested the word with a different meaning for dependents than he would claim for himself. He welcomed discussion in the pages of his influential agricultural journal of “the question of improving the moral or physical condition of the slave, or his better regulation by law and policy, adapted to his condition, his wants, necessities and rights, or his improved status as an agent in the production of wealth.”50 This comment followed DeBow’s rejection of any further discussion of the relative merits of slavery itself as a social system. By recognizing the slaves’ rights and improved status, DeBow was not challenging the existing patriarchal topic of slavery. *Advice Among Masters, supra* note 26, at 36-42. Several slaveholders discussed patriarchal justice, referring to the plantation rules as “laws” and the master as legislator and judge. For example, “the laws necessary for the regular and proper management of a plantation should be few and simple, operating alike upon overseer and negro, and as immutable and inviolable as those of the Medes and Persians.” *Id.* at 37. The rules also entail the “laws of God and man,” the “lawgiver and judge,” and the “lawgiver and friend.” *Id.* at 36-41. Proper management includes “never issu[ing] an order that you do not intend to enforce, and which it is right that you should have enforced.” *Id.* at 42.

48. *Advice Among Masters, supra* note 26, at 306.
49. *Id.*
50. 3 J.B.D. DeBow, *The Commercial Review* 421 (1847).
model or implying that slaves possessed civil rights akin to those of free White men. Instead, he grouped rights with wants and necessities as duties to be fulfilled by masters rather than demands to be advanced by slaves.

B. The Household Model

By law, if not practice, even free Blacks in Georgia were not to escape the household model of dependence and control with its patriarchal allocation of rights. In 1810, notes Ira Berlin, "Georgia took the unprecedented step of inviting free Negroes to take white guardians to supervise their affairs."51 By 1833 the state legislature cemented racially based dependence by curtailing property rights with its decree that contracts of free Blacks, even for necessaries, would henceforth be void unless made pursuant to an order from a court-appointed guardian.52 This change followed an 1818 act, founded, according to Chief Justice Joseph Lumpkin, "on our own peculiar policy, in order to fix the condition of a free negro in this State."53 By this act, free Blacks were prohibited from trading in or acquiring title to slaves in any way except through descent.54

In the 1853 case of Bryan v. Walton, Lumpkin analyzed the legal abilities of free Blacks, particularly their ability to own and convey slaves.55 He was unable to resist the urge to step outside the case and instruct his state on the dependent nature of free Blacks, invoking a patriarchy more biblical than benevolent.56 In Bryan, the lower court had noted in its jury charge that "the relation of free negro and guardian, was of a more dependent nature, than that of ordinary Trustees and cestui que trust."57 Lumpkin, with more than a little vitriolic approval, described this level of dependence as a state of perpetual childhood for the free Black.58 According to Lumpkin, one might wrongly attempt to draw an analogy from the contract of the free Black in Bryan v. Walton to the contracts of (White) infants,

52. Bryan, 14 Ga. at 190.
53. Id. at 204. Inheritance through intestate succession rather than through a will.
54. Id.
55. Id. at 196-97.
56. Id. at 198 ("I feel a strong inclination, I confess, to give my sentiments pretty fully upon this subject - to go beyond the usual limits of an opinion; and to speak in the style of argument rather than of authority.").
57. "Beneficiary of a trust;" Id. at 190.
58. Id. at 198.
which [it] is insisted that the infant may confirm and give binding force to, after he comes of age. The parallel fails in this. At twenty-one, the legal disability attached to infancy, terminates. The minor is then a man.—But the pupilage in the other case is perpetual. The acts of an infant are *voidable*, only, because at maturity, he may affirm or disaffirm them. The acts of a free person of color are *void* because he never ceases to be a ward, though he attain to the age of Methuselah. His legal existence is forever merged in that of his guardian.59

At another point, Lumpkin, quoting Aristotle, equated the relation of master and slave to that of husband and wife, calling them indispensable relations for a well-ordered state.60 This discussion by Lumpkin indicates that familial language frequently did not connote affectual relations, but relations of duty and obedience.61

Of course, the ideal of dependency in a household economy played itself out in other domestic relations as well, most explicitly in the statuses of wife and child. These statuses, legally defined by sex and marriage on the one hand, and age on the other, were equally dependent in all parts of the country. Interestingly enough, however, in the Northeast, antebellum debates over married women’s property rights and abolitionism encouraged women to challenge the tenets of dependency; no response of similar strength occurred in the South until the 1890s. Ironically, in the South both the passage of married women’s property acts and abolitionism served the function of reinforcing the ideology of dependence.62

By the 1850s, many large slaveholders shared a sense that the best model for a slave society was the family or household. The tone of their argument was distinctly defensive, reflecting in the need to assert the benevolence of the family model as a contrast to the Revolutionary ideals of liberty and equality.63 Through slave management

59. Id. at 205.
60. Id. at 200.
61. James Oakes suggests that the paternal image was as much a matter of demographics as ideology; most of the antebellum slaveholders that he studied were over 43 years old, while short life expectancy meant that most slaves died by age forty. The most common master/slave relationship therefore was between a middle-aged (elderly?) master and a slave under age 18. James Oakes, *The Ruling Race: A History of American Slaveholders* 195-96, 249-50 (1983).
63. On the break from Revolutionary ideology, see Faust, *Southern Stories*, supra note 38, at 78-79. Nellie Kinzie Gordon (a Northerner who “married South”) could not resist including a dig in her diary description of a slaveholding friend: “He loves them [his slaves] all, I believe, as well as he does his own relations—what do you think of that, old Beecher?” This, she suggested, was more than Northerners—even the most ardent abolitionists—could be expected to do. Elite white southerners by the 1850s equated “Northerner” and “abolitionist” and re-
literature, tracts instructing masters in their religious responsibilities toward their slaves, defenses of slavery as a basis for social organization, and the aspirations of the law, Southern White men promulgated dependency, above liberty and equality, as the organizing principle of Southern society, embedded in households and controlling not only slaves, but White women and free Blacks. Much of the content of the positive-good argument was directed toward linking family and moral, patriarchal "law" in defense of hierarchy and dependence.64

The patriarchal ideal of the old South existed as a subculture within a contractarian democracy. Consequently, slaveholders were constrained by such widely-held national beliefs as individualism and political equality as they sought to justify their possession of power and dominion. They resolved the conflict by classifying their male slaves, along with all women and children, as household dependents, organizing the labor force on the principles of family and domesticity. By advocating an organic social structure organized around households headed by White males and characterized by dependence and obedience, slaveholders simply took the tenets of domesticity to govern the entire social system. They contrasted this system with free wage labor, and found free labor wanting.65

By the last decade before the Civil War, articulate slaveholders had begun to fashion both a defense of slavery and a sense of the need for a cohesive and consistent approach to slave management that circulated widely among themselves. A social ideal of dependence within a household structure served as both a counter to abolitionists in a language familiar to Northerners and as the basis for a developing consensus on proper slave management. "Household" and "family" responded to abolitionist writings as if they represented a majority if not a monolithic Northern ideology. Northern Rebel: The Journal of Nellie Kinzie Gordon, Savannah, 1862, 70 GA. HIST. Q 477 (1986). Eliza Robarts commiserated with Mary Jones in similar fashion: "I am sorry to hear of the death of your servant Eve. We feel those losses more than the Northerners think; the tie is next to our relatives." Letter from Eliza Robarts to Mary Jones (Nov. 10, 1856), in CHILDREN OF PRIDE, supra note 1, at 263. See also Masters Without Slaves, in WILLIE L. ROSE, SLAVERY AND FREEDOM 76-77 (William W. Freehling ed., 1982).

64. Much of what the slaveholders spoke of as law, Mark Tushnet has referred to as sentiment; that is, the system of patriarchal rule operated alongside of, but autonomously from, the state legal system, and was ideally self-contained within each household. TUSHNET, supra note 7, at 31. The point here, though, is that the slaveholders themselves spoke of their rule as law, and seemed to believe in its legitimacy as such. Id. at 44-45.

on the lips (or, more accurately, pens) of Southern slaveowners have an unfamiliar ring in contemporary ears. But White Southerners as generally, and as genuinely, believed in the essential dependent nature of all Blacks as White males believed in the essential dependent nature of White women and children. Given this belief, the family seemed the best model for master/slave relations in a nation not disposed towards recognizing slavery as the best paradigm for labor relations. After the war, this belief did not disappear. But when emancipation removed the labor force from the White household and destroyed the legal relationship between labor and dependency, White male Southerners confronted challenges to pre-war understandings of dependence and family when the patriarchal household was no longer a viable institution for the close control of Blacks and the maintenance of White supremacy.

III. The Moral Economy of Dependency Revised: Rights and Reconstruction

Eric Foner has identified one of the central themes of the Reconstruction Era as "the persistent conflict between planters’ desire to reexert control over their labor force and blacks’ quest for economic independence."66 Gerald Jaynes, in a penetrating study of the genesis of the Southern Black working class, offered this distillation of the central issue of Reconstruction: "[A]fter the abolition of slavery, how was an industrial order dedicated to commercial production of agricultural products for a market system to be maintained?"67 Many Southern state legislatures addressed these issues through passage of "Black Codes" that would, through vagrancy laws, hunting and fishing bans, prohibitions against gun and dog ownership, and other restrictions, effectively reassert the moral economy of dependency without the ownership component of slavery and resolve the planter/labor conflict in favor of the planter.68

In a lengthy disquisition on the subject, Fitzhugh represented what many other planter class Southerners would endorse, that in order to ensure an adequate supply of labor to the planting class, former slaves would have to be compelled by some legal substitute for slavery. According to Professor Jaynes:

66. FONER, RECONSTRUCTION, supra note 35, at xxv-xxvi.
67. JAYNES, supra note 3, at 5.
68. FONER, RECONSTRUCTION, supra note 35, at 128-36; JAYNES, supra note 3, at 301-06.
To Fitzhugh, the threat of a truly free labor system posed a dilemma which appeared to have no solution. If the blacks were as inherently inferior and degenerate as he claimed, so that without the close guardianship of whites they were destined to “perish and disappear from the face of the earth,” then the South would be left with no labor at all. Alternatively, if the inferiority of blacks did prove to be a consequence of slavery, the implications, pointing to a mongrelized society, were too awful to contemplate. The one acceptable solution to this dilemma was its dissolution. The free labor experiment could not be attempted. The only conclusion Fitzhugh and any similar thinker could make was simple: “A great deal of severe legislation will be required to compel Negroes to labor as much as they should . . . we must have a Black Code.”

Black Codes for labor control were a portion of the solution to the Southern planters’ dilemma; bans on interracial marriage addressed the alternative. A “mongrelized society” was “too awful to contemplate” because Whites feared the blurring of racial lines that mulattoes represented. But at least as important for the first wave of miscegenation bans was the fear that interracial marriage would undermine the assumed superiority of White over Black. What White Southerners seemed to fear more than mixed-race children was the implication of “social equality” that mixed race marriage implied.

The intellectual and moral defense of slavery in the decades before the Civil War led Georgia Whites vehemently to deny that civil rights (narrowly defined) accorded to African Americans after the war meant any change in social rights as they had been loosely defined before the war, and more specifically defined in the debates that raged during Reconstruction. In defense of this stance, White men not only appealed to racism, but sought to reinforce the legal foundation for dependency that extended to White women and children as well as to all Blacks. While the destruction of slavery and the passage of the Fourteenth Amendment would eventually undermine many of the ideological bases for a social theory of dependency in opposition to a political theory of equality, such change was fought vigorously and successfully in nineteenth-century Georgia courts, constitutional conventions, and legislatures. Furthermore, it was fiercely debated in the Federal Congress from the end of the war through the passage of the Civil Rights Act of 1875. One point where the issue was joined most fervently was at the volatile intersection of sexuality, dependence and contract: interracial marriage.

69. JAYNES, supra note 3, at 58-59 (quoting George Fitzhugh, What’s To Be Done with the Negroes?, DEBow’s REV., June 1866, at 577-81).
70. Id.
A. A Hierarchy of Rights

Because the Civil War and the Emancipation Proclamation freed the slaves, but did not abolish slavery or deal with Justice Taney’s dictum that “the negro has no rights that the white man is bound to repect,” Congressional Republicans set out to craft a new legal order to address these issues.\textsuperscript{71} One of the first orders of business was the passage, over Andrew Johnson’s veto, of the Civil Rights Act of 1866,\textsuperscript{72} which declared that all persons born in the United States were citizens of the United States,\textsuperscript{73} and, as such, had

the same right in every State and Territory of the United States to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.\textsuperscript{74}

President Johnson, in his veto message, had raised the possibility that it was but a short step from Congressional provision of the citizenship rights accorded by this bill to Congressional repeal of state statutes forbidding marriage between races.\textsuperscript{75} The evil of the Civil Rights Act was multi-faceted from Johnson’s perspective, and included at the most basic level the interposition of law into the relations between former masters and former slaves.\textsuperscript{76}

The Kentucky Supreme Court also challenged the constitutionality of the Civil Rights Act under the Thirteenth Amendment, declaring that the Amendment “certainly gave the colored race nothing more than freedom. It neither gave nor aimed to give them, in defiance of state laws, all the rights of the white race.”\textsuperscript{77} To allow Congress the authority, under the Thirteenth Amendment, to pass the Civil Rights Act, would be “a monstrous construction” that would theoretically allow Congress to “legalize intermarriages between the two races deteriorating to the Caucasian blood, and destructive of the so-

\begin{itemize}
\item \textsuperscript{71} Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
\item \textsuperscript{72} Civil Rights Act of 1866, ch. 14 Stat. 27 (1866) (codified at 42 U.S.C. §§ 1981, 1982 (1976)).
\item \textsuperscript{73} With the exception of “Indians not taxed” and those subject to a foreign power.
\item \textsuperscript{74} Civil Rights Act of 1866, 14 Stat. 27 (1866).
\item \textsuperscript{75} Andrew Johnson’s Veto of “[a]n act to protect all persons in the United States in their civil rights and furnish the means of their vindication.” 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3603, 3605, 3610-11 (March 27, 1866).
\item \textsuperscript{76} Id.
\item \textsuperscript{77} Bowlin v. Commonwealth, 65 Ky. (2 Bush) 5, 8 (1867).
\end{itemize}
sial and legislative decorum of the states." The evils most to be feared from Federal usurpation of states' rights were laid out in the concerns of Andrew Johnson and the Kentucky Supreme Court. First, there was the fear that the labor control provided by the moral economy of dependency would be upset by the replacement of dependent relations with legal relations; the second concern was that dependent relations would be similarly destroyed by the imposition of "social equality" represented in its starkest form by the legalization of marriages between the races.

In the White South, the set of beliefs that had coalesced in the moral economy of dependency clearly did not disappear with slavery; Mary Jones and many like her bitterly "demoted" erstwhile slaves to "only laborers under contract" while striving mightily to maintain a hierarchy of rights that would ensure continued and reinforced dependency. The "ingratitude" of former slaves was remarked incessantly in the post-war South, and has been understood by historians as a sort of emotional hiccup by deluded former masters. But complaints about ingratitude reflected more than simple emotional disappointment; the system of dependent rights required those subjected to it to understand rights as linked to the planter's virtue and inherent power rather than to law.

The "inevitable dependency" of those physically incapable of supporting themselves—the very old, the very young, and the incapacitated—revealed the White South's hostility toward replacement of patriarchal relations with legal relations. The Assistant Commissioner of the Freedmen's Bureau for Georgia, General Davis Tillson, issued an order requiring former masters to support "helpless and decrepid freed people or young children." Invoking the requirements of honor and humanity, Tillson justified this order in contractual terms, reminding former masters of the "implied contract between the master and his slave, that in return for his service, the slave should be fed, clothed and lodged, during his old age." Tillson added that the elderly had fulfilled the conditions of their contract, and "the former master is not absolved from his obligations, by the freedom of the

78. Id. at 9.
79. See generally Rose, supra note 63, at 73-89 (discussing the problem and meaning of freed people's "ingratitude").
82. Id.
slave, for which the latter is in no way responsible." Tillson articulated the nature of the relationship in much the same way that slave-owners had done. Indeed, the only difference was that he linked the obligations to the legal relations of contract, which were vehemently rejected. "After all our sacrifices and losses," fumed The Southern Cultivator, "we don't feel bound to respond when ordered to do anything further for the negro." According to the Cultivator, to the extent there had been a contract, the consideration had "totally failed" because the master's duty of support was conditioned not only on the provision of labor from the able bodied, but also on the power to enforce obedience from all. The best hope of the freed people lay not with the law and legally enforceable rights, but with the White South's "natural sympathy and good feeling for those of the colored race we are interested in." Within a very short period, the debate over the nature of post-war relationships became a sustained justification for reasserting the social relations of slavery.

The myth of the Lost Cause, and of pure White womanhood were turned into talismans against equality, which was accomplished in part by dividing rights into three categories—social, political, and civil—and according them different levels of respect and entitlement. Intertwined in the debates over rights, although not explicitly identified as such, was the holdover notion of "dependent rights": the moral economy of dependency. Senator Stevenson of Kentucky was most explicit, stating that the White people of Kentucky would extend to the colored people who were once their slaves... kindness and protection and they would see them kindly cared for and justly protected in the enjoyment of their civil rights; but they regard them justly as their inferiors, and could never degrade themselves by a social or political equality for which they never were and never can be fitted.

Like the pre-war slave-owning paternalists, Stevenson claimed that "everything in the main is done for the freedman that an enlightened benevolence would dictate or an enlarged humanity demand." But, it was too much to ask, and counterproductive as well, that White men ever agree to "confound political with civil rights" or give up

83. Id.
84. Id.
85. Id.
86. Foner, Reconstruction, supra note 35, at 243-45; Hyman & Wieck, supra note 15, at 395-400; Wheeler, supra note 62, at 5-8; Tushnet, supra note 15, at 886-90. On the relationship between the Lost Cause of the Confederacy and White supremacy, see, e.g., Lumpkin, supra note 45, at 111-14, 127-47.
their "utter abhorrence of social equality between the white and black races."\textsuperscript{88} In the same vein, Representative Alexander Stephens of Georgia, former vice president of the Confederacy, declared of Black men in Georgia:

They have no desire for anything partaking of the character of social rights; . . . Reciprocal duties will soon, of themselves, bring about as much harmony and concord as are usually found in any state or country. . . . [T]here is not a colored man in Georgia who knows me who would not come to me for a personal favor . . . or in case of real grievance for a redress of personal wrongs, with more confidence in my having justice secured him, than to any "carpet-bagger" . . . vociferous in advocating the doctrines of the "civil-rights bill," so called.\textsuperscript{89}

Such appeals to the pre-war tenets of the moral economy of dependency were echoed throughout the White South, with concomitant manifestations of disbelief that "dependent rights" might not seem adequate and even generous to those subjected to their vagaries. Thus Mary Jones's expression of surprise that gallons of clabber and extra dinners should not be sufficient for "the people" when balanced against an appeal to law;\textsuperscript{90} and thus Southern members of Congress's assertions that Southern Whites' protective feelings towards Blacks would assure their happiness better than the accord of legal rights could.

\textbf{B. Unlinking Dependency From Households: Antimiscegenation, Rights and Contract}

For nearly the whole of the 250 year history of slavery in America, one constant in the regulation of the institution was the prohibition on sexual relations between Whites and Blacks. Begun as a religious ban on relations between Christians and pagans, it soon became racialized, grounded in ideas about color. Ira Berlin has pointed out the haphazard regulation of free Blacks during the colonial period, noting the inconsistencies, ambiguities, and incomplete nature of White thought as represented in the Black Codes.\textsuperscript{91} But, he further notes that "[o]nly on the sensitive question of interracial sexual relations did whites throughout the South reach a firm consensus: no

\textsuperscript{88} Id.

\textsuperscript{89} 43 Cong. Rec. 381 (1874). In 1872, Congress passed a general amnesty bill restoring to former Confederates the ability to hold national office, which had been prohibited under the Fourteenth Amendment. U.S. Const. art. XIV, § 3. Georgia elected Stephens to the House of Representatives shortly thereafter.

\textsuperscript{90} See Children of Pride, supra note 1 and accompanying text.

\textsuperscript{91} See Berlin, supra note 51.
black, free or slave, could legally sleep with a white." Why should this have been?

Antimiscegenation rules, long a small part of the larger machinery of Southern slave and caste law (applying as they did to free people as well as slaves), were revived after the war, given new, independent emphasis, and put in service as a symbol of White resistance to "social equality" with former slaves. Miscegenation restrictions, while on one level directed, as they always had been, towards control of sexuality and maintenance of racial boundaries, were on another level used to redefine White households as racially impregnable institutions, most particularly in terms of regulations of marriage.

White Georgians who had been imbued with the racial/patriarchal rationale for slavery in the years of sectional animosity leading up to the Civil War found adjusting to the new world of wage labor and free contract as severe a shock as the pre-war polemics against free society might have foretold. One woman, writing of her family's generations-old heritage of slaveholding and of her father's boyhood training for the cloak of mastery, suggested that perhaps those who never had actually become masters clung tighter to ideals of patriarchy than even their fathers: "it would seem it [mastery] left a special stamp on men who lived this life. But more particularly in a special way it stamped their sons, who were reared to expect it and then saw it snatched away."

In emancipating the slaves, the North had raised the specter of social equality through Black claims of place within the very families to which Whites had long asserted to Northerners, and to each other, that they rightfully belonged. Once the relationship between Whites

92. Id. at 8.
93. The term "miscegenation" (from Latin "miscere," to blend, and "genus" race) was coined by David Croly, editor of the New York World in his 1864 pamphlet entitled Miscegenation: The Theory of the Blending of the Races, Applied to the American White Man and the Negro. For the etymology of miscegenation, see the entry in Oxford English Dictionary (1989), and infra text at notes 104-07. See also Sidney Kaplan, The Miscegenation Issue in the Election of 1864, 34 J. NEGRO Hist. 274 (1949); Forest G. Wood, Black Scare The Racist Response to Emancipation and Reconstruction 53 (1968); Eva Saks, Representing Miscegenation Law, Raritan, 39, 42 (Fall 1988).
95. LUMPKIN, supra note 45, at 41-44; for discussion on ingratitude, see id. at 73-74.
96. White Southerners did not corner the market on "social equality" fears. See DAVID H. FOWLER, NORTHERN ATTITUDES TOWARDS INTERRACIAL MARRIAGE: LEGISLATION AND PUBLIC OPINION IN THE MIDDLE ATLANTIC AND THE STATES OF THE OLD NORTHWEST, 1780-1930, at 147-221 (1987) (Northern debates over bans on racial intermarriage during the height of the
and Blacks was no longer based on a legal structure of inferiority and servitude, however, and White power could no longer be taken for granted, the cozy familial justification for slavery in an ostensibly free nation became dangerous for those suddenly facing the possibility that both Whites and Blacks might believe that familialism could be exercised on an egalitarian rather than a dependent basis. No longer could White planters rely on the law and system of slavery to maintain social relations of dominance and distance within the spatial and emotional confines of a household.

The "deep conviction of superiority" that planters held regarding slaves had maintained a hierarchial social structure in the face of levels of intimacy that went far beyond mere proximity. But in the absence of its legal support, this sense of superiority alone was clearly not sufficient for planters facing a free labor force of independently-minded people; particularly since these people, to the surprise of many planters, did not seem disposed to acquiesce to planter superiority. Proximity, and even intimacy had not been problematic (other than in a moral sense) when the law of slavery made "social equality" a concept not easily contemplated. Several Southern states had no antimiscegenation statutes on the books prior to the Civil War. But without racial slavery to define boundaries, White Southerners seemed truly panicked by the possibility that "white supremacy" was a figment of the slaveholding imagination, insupportable without new caste barriers enthroned in law. Congressional debates from 1866 through 1875 are replete with references to fears of legalized racial intermarriage as the ultimate symbol of "social equality." Representative Joseph Rainey of South Carolina recognized the link between "dependent rights" and White Southerners' fear of social rights, noting:

So long as he makes himself content with ordinary gifts, why it is all well; but when he aspires to be a man, ... then he is asking too much ... [when the] Southern states ... mete out to us what they think we ought to have, and we receive it without objection, we are good, clever fellows; but just as soon as we begin to assert our man-

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97. Fields, supra note 5, at 143, 156.
98. On planters' surprise, see CHILDREN OF PRIDE, supra note 1, at 1286-87 (Letter from Mary Jones to Eva Jones dated August 5, 1865); LUMPKIN, supra note 45, at 73-74.
99. Mississippi, Alabama, Georgia and South Carolina. FOWLER, supra note 96, at 217, appendix.
100. See infra Section IV.
hood and demand our rights, we become objectionable, we become obnoxious, and we hear this howl about social equality.\textsuperscript{101}

The problem lay in the aspirations of Black males to be "men." Political rights would lead to social rights; both in differing degrees connoted manhood, a position of power, honor, and esteem that had hitherto been confined to White males.\textsuperscript{102} "Here is the difficulty," explained Senator Daniel Clark of New Hampshire during a debate on the Civil Rights Act in 1866, "that the negro is a man!"\textsuperscript{103} This point was the crux of the issue, "and the senator from Kentucky may prove that there are . . . a hundred and six points of difference between him and the white man, but until he shows that he is not a man, the negro will be entitled to be treated as a man, and to demand and enjoy the same privileges as other men."\textsuperscript{104} This was the challenge to White Southerners: to show that Black men were not men; to exclude them from access to the attributes and privileges of manhood. Bans on interracial marriage were part of this project.

Racial intermarriage had a sporadic life as a political issue between the 1840s and 1860s, generating contentious debate and resulting in the passage of intermarriage bans in several Northern and Midwestern states. The most thorough and insightful student of this legislation concludes that these episodes were more closely linked to partisan jockeying than to the importance of the issue of intermarriage itself.\textsuperscript{105} But during the 1864 presidential campaign, an elaborate political hoax catapulted racial intermarriage into international prominence, and etched this issue indelibly on the White Southern psyche.\textsuperscript{106}

Two journalists at the Democratic New York World concocted an anonymous pamphlet coining the term miscegenation and advocating what had previously been termed "racial amalgamation" as the preferred route toward a higher civilization. The pamphlet was then circulated to leading abolitionists and Republicans in hopes of eliciting endorsements of its philosophy. When some rose to the bait, their replies were fed to the rabidly racist Democrat, Ohio Representative Samuel Sullivan Cox, who used them to berate the Republicans in a

\textsuperscript{101} 43 Cong. Rec. 344 (1873).
\textsuperscript{102} On the power, honor, and esteem associated with white manhood, see generally Wytatt-Brown, supra note 12.
\textsuperscript{103} Pole, supra note 15, at 207.
\textsuperscript{104} Id.
\textsuperscript{105} Fowler, supra note 96, at 147-220.
\textsuperscript{106} See Kaplan, supra note 93.
debate over the establishment of the Bureau of Freedmen’s Affairs.\textsuperscript{107} Claiming that the war was not “between slavery and freedom, but between black and white,” Cox went on to link public accommodations, social equality and miscegenation in a triad that would become inseparable in political debate and would serve as a rallying slogan for the forces of “white supremacy.”\textsuperscript{108}

Miscegenation, or “racial amalgamation,” had been inflicted on slaves by owners before the war; but the absorption of the children of such relationships into the household was automatic and (at least incidentally) profitable. The children of slave mothers were slaves by law, no matter who their father was, and White male planters seemed frequently to have little compunction against holding their children as slaves.\textsuperscript{109} Under slavery, antimiscegenation laws had been merely one piece of a complex of laws that made “non-whiteness” a legally defined status virtually equivalent to slavery. After the war, prohibitions on intermarriage took on a highly charged importance as the legal system of slavery and the labor control it exerted fell by the wayside.\textsuperscript{110}

Before the War, all but four slave states had laws forbidding marriages between Whites and people of African descent.\textsuperscript{111} Florida, Georgia, Kentucky, Maryland and Texas penalized interracial fornication and adultery; only Georgia did not also forbid interracial mar-

\textsuperscript{107} Id. at 295-97.

\textsuperscript{108} Id. This triad had its apotheosis in Plessy v. Ferguson, 163 U.S. 537, 544-45 (1896), and retained its power for members of the Supreme Court well beyond Brown v. Board of Education. Note, for example, Felix Frankfurter’s reluctance to address challenges to antimiscegenation statutes in the wake of Brown. GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 666-71 (1994). In correspondence with Learned Hand about the implications of Brown for state bans on interracial marriage, Frankfurter argued that the Brown case “did not rest on the absolute that the XIVth in effect said ‘[ever] state law differentiating between colored and non-colored is forbidden’... I’m confident that as comprehensive a position as yours in dealing with miscegenation ... would not have commanded unanimity. I know I would not have agreed to it—nor, I’m sure would several others.” Letter from Felix Frankfurter to Learned Hand (September 27, 1957), in GUNTHER, supra, at 669 (emphasis added).


\textsuperscript{110} See TUSHNET, supra note 7, at 153-54.

riage.112 In the last third of the nineteenth century, as virtually all Northern states (and some Midwestern states) that had banned racial intermarriage stripped those laws from the books,113 virtually every Southern state enacted or re-enacted laws against intermarriage, often increasing the severity of the punishment.114 While marriage between races was forbidden and frequently criminalized, illicit sex and bastardy — which were at least as dangerous to the goal of "racial purity" as interracial marriage — were only infrequently singled out from general prohibitions on non-marital sex for special legal sanction.115

Mississippi, one of the few Southern states that had not banned marriage between the races before the Civil War,116 made up for that failure by mandating life imprisonment for any "white person" and "freedman, free negro or mulatto" who intermarried.117 Interracial sex, on the other hand, subjected the offending White man to a two hundred dollar fine and imprisonment of no longer than six months; the "freedwoman" could be fined fifty dollars and imprisoned for no more than ten days.118 The difference in punishment is stark—the message could not be more clear that marriage, or "social equality" was the target, with maintenance of racial purity coming in a distant second.119

Like Mississippi's legislators, Georgia's first postwar (White) lawmakers perceived interracial marriage as an immediate and significant threat to White supremacy; they singled out the code section forbidding such marriages for inclusion in the fundamental law of the state, declaring that "the marriage relation between white persons and

114. See, e.g., ALA. CODE §§ 3602, 3603 (1867) (penalty of two to seven years in the penitentiary or hard labor); 1881 Fla. Laws ch. 3283 (making interracial marriage a felony, subject to 6 months to 10 years in prison); 1865 Miss. Laws ch. 4, § 3 (penalty for interracial marriage life imprisonment); 1870 Tenn. Laws ch. 39 (changing offense from misdemeanor to felony subject to one to five years in prison or county jail); TEX. REV. CIV. STAT. ANN. (1879) (penalty of one to five years in prison).
115. Alabama and Texas were two of the states that had these legal sanctions.
116. Two states were Alabama and South Carolina; Georgia adopted a ban in 1861.
117. 1865 Miss. Laws ch. 4, § 3; 1865 Miss. Laws ch. 6, § 2.
118. Id.
119. In 1880, Mississippi reduced the penalty from life imprisonment to a $500 fine or up to 10 years in prison, or both. Miss. CODE ANN. §§ 1147, 2895 (1880). Not only did Mississippi criminalize interracial marriage, but by 1920 created a new misdemeanor to penalize advocacy of "social equality or of intermarriage between whites and negroes." 1920 Miss. Laws ch. 214.
persons of African descent, is forever prohibited.”120 Before the war, Georgia had directed its legislative attention solely to interracial sex, addressing interracial marriage only in the Code implemented as the state left the Union.121 And, although an interracial anti-fornication statute was passed after the war, it was so little noted that the state supreme court seemed unaware of its existence.122

During Reconstruction, Black legislators in Mississippi, Louisiana, and Arkansas attempted to criminalize interracial concubinage—as a protection for Black women—and to legitimize interracial marriage.123 In Arkansas, Black delegate William Grey sought to persuade the 1868 constitutional convention to mandate the death penalty for any White man cohabiting with a Black woman.124 The Draconian nature of Grey’s proposal only partially explains its rejection; Southern legislatures in the immediate postwar period were more interested in maintaining racial hierarchy than the racial purity that would become paramount in the twentieth century.125 Legislators gave short shrift to the objection that a prohibition on marriage between Whites and “persons of African descent” would require “a board of scientific physicians, or professors of anatomy to discover who is a negro.”126 Where legislators were silent on the definition of

120. According to the 1865 Georgia Constitution,

The marriage relation between white persons and persons of African descent, is forever prohibited, and such marriage shall be null and void; and it shall be the duty of the General Assembly to enact laws for the punishment of any officer who shall knowingly issue a license for the celebration of such marriage, and any officer or minister of the gospel who shall marry such persons together.


124. Id.

125. To the extent that antimiscegenation measures were intended to assure racial purity, they probably functioned primarily on a symbolic or ideological level. One study surmised that “neither the severity of the law nor the intolerance of public sentiment (in American pioneer society) seemed to have much effect on the miscegenation of the races: they prevented intermarriage rather than race mixture. The clandestine intermingling tended to increase.” Although this study estimated an increase in the mixed race population of 500% between 1850 and 1910, it is likely that most of this increase came from mixing between mulattoes and blacks, rather than through significantly increased mixing between whites and blacks. Edward B. Reuter, The American Race Problem: A Study of the Negro 314 (1927). On the racist problems of Reuter’s study, see John D. Smith, An Old Creed For the New South: Pro-Slavery Ideology and Historiography, 1865-1918, at 188, 218-19 (1985). See also Williamson, supra note 94, at 97-98.

126. Gutman, supra note 123, at 400.
“negro” courts and juries were able to use their own judgement. Additionally, where detailed quantification of “blood” was prescribed, the sense of the community was the effective determinant of what marriages would be challenged.\textsuperscript{127}

The truth of the matter was that race-definition was so imprecise that even under the slave regime, those with the most at stake in maintaining the fiction of race, were embarrassed by their inability to unerringly follow their race precepts. White slaveowner Gertrude Thomas tells of a “singular little circumstance” under which she was presented with a visitor whose appearance was “so much that of a mulatto” that she was uncertain how to behave toward him.\textsuperscript{128} Since she did not wish to insult him if he were White, she invited him in.\textsuperscript{129} When her husband returned, he invited the visitor to dinner.\textsuperscript{130} According to Thomas:

\begin{quote}
When he took his hat off, he looked more suspicious than ever. Mr. Thomas . . . then asked him several questions, among them where they voted around here? His reply was “I am not a voter!” . . . [T]he temptation to reply to him “that the same law that did not allow him to vote did not allow him to sit at a white lady’s table” was almost irresistible . . . .\textsuperscript{131}
\end{quote}

Georgia's Chief Justice, with unintended poignancy and irony, noted the multiple levels of embarrassment that the ideology of race presented: “which of us has not narrowly escaped petting one of the pretty little mulattoes belonging to our neighbors as one of the family?”\textsuperscript{132}

It was argued by some, particularly in the years preceding the decision in \textit{Loving v. Virginia}\textsuperscript{133} in which the Supreme Court declared antimiscegenation statutes unconstitutional, that the arguments in Congress by Southern members against the Fourteenth Amendment on the grounds that it might allow miscegenation, represented “political smokescreens, which everyone discounted at the time” since no

\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{Id.}
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} Bryan v. Walton, 33 Ga. Supp. 11, 24 (1864). Mark Tushnet discusses the problems that Southern judges confronted when they unsuccessfully attempted to transform the law of slavery into a law of race: the difficulties “seem to have included problems in determining race when it mattered, miscegenation on a scale large enough to complicate line-drawings, and manumission with its concomitant creation of an undesired but apparently ineradicable class of free blacks.” \textit{Tushnet, supra} note 7, at 140.
\textsuperscript{133} 388 U.S. 1 (1967).
one seriously believed that interracial marriage would ever be allowed. The miscegenation hoax of 1864 suggests the limits of this assertion. If this were not a serious fear on the part of White Southerners, there would have been no need to go further than simply to re-enact pre-war antimiscegenation statutes. The experience of Georgia, however, suggests otherwise. In Georgia, the first post-war constitutional convention, convened in 1865 and made up of unreconstructed White secessionists, essentially preserved the confederate constitution of 1861, with nods to the North on emancipation and the supremacy of the Federal Constitution. As noted above, one of the few significant additions was the prohibition against interracial marriages and the mandate to the legislature to pass laws for the punishment of officers performing such marriages. That Georgia should forbid interracial marriage is no surprise; Southern states (and Northern) had begun such prohibitions as early as the eighteenth century; some colonies had such prohibitions in the seventeenth century. But it is hard to escape the importance this prohibition held after the war when, in spite of the re-enactment of the entire 1861 Code, including the antimiscegenation provision, the convention singled out antimiscegenation for explicit reaffirmation in the organic law of the state. States such as South Carolina, Alabama, and Mississippi that had not prohibited interracial marriage in the antebellum period scrambled to place such bans in their postwar codes. South Carolina extended contract rights to freed people in 1866, and repealed all discriminatory laws contrary to


136. See Kaplan, supra note 93. Shortly thereafter, the legislature passed an act mandating fines of $500 to $1000 and/or six months in jail for officiating at an interracial marriage, and $200 to $500 and/or three months in jail for issuing a license. Georgia Act of Mar. 7, 1866, No. 254, at 241.


139. 1864-65 S.C. Acts § 8, at 291; Ala. Code §§ 3602, 3603 (1867), at 690; 1865 Miss. Laws ch. 4, § 3.
the act, but specifically excepted the 1865 intermarriage prohibition.  

C. Social Rights v. Social Equality

White Southerners, both male and female, were preoccupied with racial intermarriage. Gertrude Thomas, in a long and contradictory passage in her diary during the summer of 1869, revealed internal conflict that she resolved against interracial marriage.  

Although she begins by predicting that “these persons never having known the weight of bondage & having received the equalizing influence of education will be received socially into some families,” (noting that “already I see social equality between our uneducated women & our late servants”), she concludes that

[the boys of our country poor as well as rich must be educated, must have instilled and ever kept before them the idea of social & mental superiority & this must be no imaginary idea of caste but a real substantial fact. . . . We have superiority of race by nature & education. Let us see that we maintain it and then all laws concerning marrying or giving in marriage will be useless. As it is the law is almost an insult to Southern women.]

“Social equality” became virtually synonymous with interracial marriage in the late nineteenth century, and was used as a slogan against all manner of rights-access for Blacks in much the same way as the term “white supremacy.” For many Whites, the logic seemed inexorable: if Blacks were given the vote; if they were educated in the same schools as Whites; if they rode on the same streetcars, stayed in the same hotels, traveled in the same railroad cars or attended the same theatres, “social equality” — racial intermarriage — could be expected to result. Like its counterpart, “white supremacy,” “social equality” was trotted out in all manner of debate over public policy. A delegate to the Georgia constitutional convention of 1877 argued that failure to provide a sufficient level of debt protection for Whites would “sooner or later lead” to that “social incubus:” “the amalgamation of races.”

140. See 1866 S.C. Acts at 394. South Carolina subsequently abrogated the proscription in the 1868 constitution; within two years after the Compromise of 1877 and the end of Reconstruction, the ban was back in place. S.C. Const. of 1868 art 1, § 39 (1868); 1879 S.C. Acts at 3.

141. THE SECRET EYE, supra note 109, at 320-22 (entry for June 26, 1869).

142. Id.

In his 1912 treatise on Georgia’s constitutional law, Walter McElreath summarized the thinking behind, and the importance of, legal prohibitions on interracial marriage following emancipation:

The most important of all the provisions of the [1865] constitution framed at that dark and critical period was that great police regulation laid in the State’s organic law at the very foundation of her social life simultaneously with the recognition of the negro as a free man that: ‘The marriage relation between white persons and persons of African descent is forever prohibited, and such marriage shall be null and void.’ Thus, while superior power forced the negro into the ranks of the freeman, and, presently, admitted him into the full domain of political rights, the white people of Georgia, as the inheritors of the common law, asserted that their homes, though ruined by war, were their castles and that into them even the king could not enter, and upon their thresholds, they erected a barrier behind which legitimate home life should be sheltered from African admixture.144

What, legally, could such a prohibition accomplish? The language of “barrier” is set in the context of men barricading their castles against an encroaching sovereign, but the issue in question touches on the social relations between individuals.145 Georgia’s Chief Justice Joseph Brown evoked the same blurred public private prohibition when he determined that no law could compel social equality in public accommodations such as trains, boats, or hotels, and that “[t]he same remarks apply to the regulation of social status among families, and to the social intercourse of society generally.”146

Miscegenation laws were by their very nature state regulation of families, as was all marriage law. But this language of sovereignty and familial autonomy against state (read Federal) interference is heard over and over in the context of sexual relationships between Whites and Blacks. The language is curious and demands careful examination to determine how various Southerners — White and Black, male and female — understood the meaning of the regulation.

144. McELREATH, supra note 138, at 145.
145. The imagery of family protection is one of the most perplexing to understand and explain. Time and again restrictions on rights generally and on racial intermarriage specifically were justified as protecting white families from “racial admixture,” as if whites would be forced against their will to marry blacks. One way to understand the meaning of this argument is to read “family” very broadly as a symbol of or analogy to white society in the South; thus individual whites who chose to marry blacks would be forcing “racial amalgamation” on the unwilling “white family” of the entire South.
146. Scott v. State, 30 Ga. 321, 325 (1869). Scott was decided before Congress passed the Civil Rights Act of 1875 prohibiting discrimination in public accommodations and before the Act was struck down by the Supreme Court.
IV. “THE 'BUGBEAR' AT WHICH AMERICAN JUSTICE IS FRIGHTENED”

Senator Charles Sumner confronted the amalgam of social relations and civil rights time and again as he brought what was to become the Civil Rights Act of 1875 to the Senate floor from 1870 until his death in 1873. Thus, in an exchange between Sumner and Senator Hill of Georgia, Senator Hill affirmed that Sumner's definition of rights differs materially from my own. What he may term a right may be the right of any man that pleases to come into my parlor and be my guest. . . . The Senator may contend that it is the right of any man, under the institutions of this nation, to intermarry with any caste that he pleases.¹⁴⁷

To Sumner, this was a familiar approach, “confounding what belongs to society with what belongs to rights.”¹⁴⁸ To African Americans as well, the claim was transparent and frustrating. Douglas Griffing of Oberlin, Ohio, expressed that frustration in a letter to Charles Sumner:

We do not wish to force ourselves into American Society unwelcomed. Social equality seems to be the bugbear at which American justice is frightened, and the colored man denied many public privileges accorded to other American citizens. What we ask now, is simply equal public privileges, and that the social question be allowed to regulate itself without the interference of the law of any States. . . . We desire social rights.¹⁴⁹

The specter of federally mandated “amalgamation” was brought to bear time and again in the Congress as an argument against equal treatment in public accommodations. In 1873, during debate in the House over the Civil Rights Act, another Southerner, Kentucky Democrat James B. Beck argued:

I suppose there are gentlemen on this floor who would arrest, imprison, and fine a young woman in any State of the South if she were to refuse to marry a negro man on account of color, race or previous condition of servitude, in the event of his making her a proposal of marriage, and her refusing on that ground. That would be depriving him of a right he had under the amendment, and Congress would be asked to take it up, and say, “This insolent white woman must be taught to know that it is a misdemeanor to deny a man marriage because of race, color, or previous condition of servitude;” and Congress will be urged to say after a while that that sort

¹⁴⁸. Id.
of thing must be put a stop to, and your conventions of colored men
will come here asking you to enforce that right.\textsuperscript{150}

From a modern perspective, formed in the aftermath of the \textit{Civil
Rights Cases} and the creation of the state action doctrine, the
verse of antimiscegenation laws would have been no regulation, or the
extension of freedom of contract to all without regard to race, rather
than the suggestion by McElreath and Chief Justice Brown that the
alternative was state mandated intermarriage, or at least, enforcement
of marriage contracts against Whites coerced into marrying Blacks
under the aegis of the Civil Rights Act and the Fourteenth Amend-
ment. Still, the state action doctrine laid down in 1883 was not a fore-
gone conclusion prior to its announcement by Justice Bradley.\textsuperscript{151}
Contemporaries in and out of Congress viewed the Reconstruction
amendments and the Civil Rights Acts as potentially potent checks on
private as well as public behavior. The \textit{New York Times}, commenting
on an “affair or honor” arising between a White candidate for the
Virginia Legislature and “a chivalrous colored person,” reported as
follows:

Mr. Flanagan, having knocked the colored man down for differing
with him in political opinion, was challenged to fight a duel by the
aggrieved man. . . . Mr. Flanagan not only refused to fight but ap-
pealed to the law for protection. Of course, Mr. Flanagan bases his
refusal to give the colored man the satisfaction of a gentleman on
the ground that the code is silent in regard to colored challenges,
and that hence a challenge sent by a colored man can be ig-
nored. . . . If the colored challenger of Mr. Flanagan is arrested, he
should at once bring proceedings against Mr. Flanagan under the
Civil Rights bill. Mr. Flanagan, in discriminating against his chal-
lenger on the ground of color, has clearly violated the principles of
the Civil Rights bill, and should be prosecuted to the extent of the
law.\textsuperscript{152}

Although the \textit{Times} and Congressman Beck may well have had
tongue-in-cheek in suggesting legal penalties for private foibles, they

\textsuperscript{150} CONG. GLOBE, 43rd Cong., 1st Sess. 343 (Dec. 19, 1873) (Beck’s remarks are an inter-
esting commentary on the meaning of marriage generally and on what the legitimate bases might
be for refusing a marriage offer).

\textsuperscript{151} The \textit{Civil Rights Cases}, 109 U.S 3 (1883). Hyman and Wiecek indicate that by 1876 the
Supreme Court was well on its way down “a state-action-only path of interpretation,” but their
discussion of Justice Bradley’s circuit court position in \textit{United States v. Cruikshank}, and Justice
Hunt’s dissent in \textit{United States v. Reese} indicates that the door was not yet closed to an expansive
interpretation of federal powers under the Thirteenth or Fourteenth Amendments or the 1870
Supreme Court understood to be the limits of federal power in the aftermath of the Compromise
of 1877 was less than self-evidently true to Republicans, particularly the Radicals.

\textsuperscript{152} MAJOR BEN C. TRUMAN, DUELLING IN AMERICA 30 (Steven Randolph Wood ed.,
nevertheless reveal an important point about popular nineteenth-century impressions of the Fourteenth Amendment, both North and South. State action, as a necessary precursor to federal action, did not have so firm a grip upon public perceptions as it came to have for the Supreme Court; certainly it did not immediately preclude an understanding of Fourteenth Amendment scope that encompassed prohibitions on private acts.  

A. "Lern to spell and pronownce Missenegenegenashun.
It's a good word . . . ."

The ban on interracial marriages may initially have been in part the act of defiance against the conquering North that McElreath suggested, but certainly more was at stake than flouting Northern precepts, which were frequently as virulently opposed to racial intermarriage as those of the South. Southern antimiscegenation laws trumpeted the message that White families should close ranks to exclude and thus socially subordinate inferior Blacks. The Little Rock Gazette, outraged at the 1868 Arkansas convention’s failure constitutionally to prohibit interracial marriage (it chose instead the compromise measure of condemning “all amalgamation”), invoked a slogan that was to reverberate through the first two-thirds of the twentieth century. The danger to White men of the new constitution, declared the Gazette, was that it sent a signal to Black men “to marry their [White men’s] daughters and, if necessary, hug their wives.”

When the discussion shifted from the threat of Black men marrying White women to the problem of White men marrying Black women, the tone of the debate changed markedly. To opponents of such bans, the tack was to suggest that proponents felt that only an affirma-

153. This may have been because the public continued to link federal action to the Thirteenth Amendment, rather than the Fourteenth Amendment for longer than the courts did.

154. Of course, Justice Harlan, in his dissent in the Civil Rights Cases argued the position of the Act’s supporters; but he referred primarily to acts of individuals that were by their nature public. The Civil Rights Cases, 109 U.S. at 26, 36 (Harlan, J., dissenting).

155. For Northern attitudes, see Fowler, supra note 96; Applebaum, supra note 137 (listing the states that repealed and the states that passed the bans). Congressional debates over the implications of the Fourteenth Amendment and the Civil Rights Act of 1866 for the marriage contract and the status of married women suggest that Northern congressmen would for the most part agree that marriage was more status than contract. As for Northern racial relations, segregation of other sorts was more prevalent in both the North and South in the years immediately surrounding the Civil War. See generally C. Vann Woodward, The Strange Career of Jim Crow (2nd rev. ed. 1966).

156. Gutman, supra note 123, at 401.
tive law against such intermarriage could adequately protect White men against the menace of their own proclivities.\footnote{Debates over the Fourteenth Amendment and the 1866 Civil Rights Act reveal sarcastic charges such as this by Northern congressmen against Southern congressmen.} Republican members of Congress recognized and exploited the humorous aspects of this argument, but without apparent effect. Petroleum Vesuvius Nasby, the satirical creation of David Ross Locke, and at the time "Paster at the Church uv the Noo Dispensashun" advised "Alluz preech agin the nigger" in his counsel to a Democratic student of the ministry:

\begin{quote}
It’s soothin to a ginooine, constooshnel Southern-rites Dimekrat to be constantly told that ther is a race uv men meaner than he is. . . . Preech agin amalgamashen at least 4 Sundays per muntoth. A man uv straw that yoo set up yerself is the eesiest nockt down, pertikelerly if you set him up with a view uv nockin uv him down. . . . Lern to speli and pronownce Missenegenegenashun. It’s a good word . . . . \footnote{D.R. Locke, The Moral History of America’s Life Struggle 15 (1874), quoted in Kaplan, supra note 93, at 307.}
\end{quote}

Years later, in a wry comment on the Southern White male psyche, suffragist and anti-lynching reformer Jessie Daniel Ames mused "I have always been curious about the . . . white mentality which as far back as I remember assumes that only segregation and the law against intermarriage keep . . . white women from preferring the arms of Negro men."\footnote{Jacqueline D. Hall, Revolt Against Chivalry: Jessie Daniel Ames and the Women’s Campaign Against Lynching 154 (1979).} Gertrude Thomas had made much the same observation in the 1860s. The law had done its job — for Ames, as for Thomas — intermarriage was unthinkable and thus neither legal nor extra-legal means of discouraging racial mixing seemed necessary.

\section*{B. Scott v. State and "The Social Status of Citizens"}

In Georgia, the legal meaning of the state’s ban on racial intermarriage was not worked out until 1869, one year after the 1865 constitution was abrogated in the first phase of Reconstruction. The Republican document that replaced the 1865 constitution and brought Georgia temporarily back into the Union the first time in 1868 decreed that “[t]he social status of the citizen shall never be the subject of legislation.”\footnote{Ga. Const. art. I, § 11 (1868). What the convention had in mind in approving this clause is unclear, in part because although the convention was clearly dominated by Republicans, the Georgia party was thoroughly factionalized. Although the Radicals succeeded in their main economic program—passage of relief and homestead exemption proposals—"the presence of fifty-nine Moderate Republicans and forty-six Democratic delegates ensured that on most
tion, the 1868 convention also reinstated the Georgia code containing the provision prohibiting and nullifying interracial marriage.161

Two Supreme Court Justices, Joseph Brown and Henry McCay, gave their views on the matter in Scott v. State in 1869.162 Charlotte Scott, a Black woman, was brought before Judge Clark of the Dougherty Superior Court in December of 1868 under indictment for “cohabiting and having sexual intercourse” with a White man named Leopold Daniels.163 Judge Clark refused to hear Charlotte Scott, her daughter Missouri, or Leopold Daniels testify that Scott and Daniels had been married in Macon three months before the indictment.164 He also refused to act on counsel’s suggestion that he marry the two (in fornication cases, subsequent marriage was a defense), saying that they might get someone else to perform the ceremony, if they could find anyone who would.165 The court charged the jury that even if Scott had married Daniels, the marriage was null and void.166 The jury found Scott guilty.167 On appeal to the state supreme court, Scott’s attorney argued, among other things, that the code section prohibiting interracial marriage was in conflict with the 1868 constitutional clause, declaring that “[t]he social status of the citizen shall never be the subject of legislation.”168

Chief Justice Joseph Brown, who had been Georgia’s secession and Confederate governor, and subsequent pragmatic supporter of the 1868 Republican constitution, delivered the court’s opinion in Scott v. State. To Brown, the marriage relation was certainly one of social status, but the code’s ban on interracial marriage had defined that aspect of the status before the ratification of the 1868 constitution.169 Therefore, he interpreted the constitutional ban to mean that measures the Georgia convention would adopt a conservative stand.” ELIZABETH S. NATHANS, LOSING THE PEACE: GEORGIA REPUBLICANS AND RECONSTRUCTION, 1865-1871, at 58-62 (1968); see also EDMUND L. DRAGO, BLACK POLITICIANS & RECONSTRUCTION IN GEORGIA: A SPLENDID FAILURE 41 (1992).

161. GA. CONST. art. XI, § 3 (1868).
163. Id. at 322. The indictment itself specified the charge as adultery and fornication; the Supreme Court silently changed the wording to make the charge consistent. See Indictment, Scott v. State, 39 Ga. 321 (1869) (Ga. Supreme Ct. Case File No. A-4372) (located at the Georgia Department of Archives and History) [hereinafter Indictment]. There is no evidence that Scott’s husband, a white man, was similarly prosecuted.
164. Scott, 39 Ga. at 322.
165. Id.
166. Id. at 324.
167. Id.
168. Id. at 324 (citing to GA. CONST. art. I, § 11 (1868)).
169. Id.
the legislature could never repeal the antimiscegenation statute. 170 In the manuscript version of Brown’s opinion, which became the headnote to the published version, Brown concluded with the highly contradictory statement that “as the social relations of citizens are not the proper subjects of legislation the Constitution has wisely put the matter at rest by denying to the legislature the power to repeal or enact laws on that subject.” 171 Invoking the religious imagery of social hierarchy that had been the mainstay of the antebellum pro-slavery argument, Brown decried the notion of social equality that interracial marriage represented:

Such equality does not in fact exist, and never can. The God of nature made it otherwise, and no human law can produce it, and no human tribunal can enforce it. There are gradations and classes throughout the universe. From the tallest arch angel in Heaven, down to the meanest reptile on earth, moral and social inequalities exits, and must continue to exist through all eternity. 172

Brown relied on regulations of social status in existence at the time the 1868 Constitution was ratified to support his reading of the Constitutional ban on status legislation. In Brown’s reading, the Constitution left “social rights” and status where it found them, and prohibited any future legislation that might change the “social” relations that pertained in 1868. 173 Given the political complexion of the 1868 convention, it may well be that Brown’s interpretation of the status ban was what the convention had in mind. 174 But, it would have been more in line with Brown’s own statement of the impropriety of legislation on the subject to suppose that the Constitutional provision repealed the legislative provision.

Once he had determined that the Constitution, Republican or not, solidified social status as it existed in 1861, Chief Justice Brown set about classifying marriage as a relationship beyond the ken of civil rights. Foreshadowing the Civil Rights Act of 1875, and the Southern position on the subject of equal access to public accommodations, Brown referred to the common law right in Georgia of churches to segregate their congregations as well as the practice of railroad and steamboat companies, and of hotel keepers, to classify their guests and passengers according to race or sex, and to assign them accommo-

170. Id. at 321.
172. Scott, 39 Ga. at 326.
173. Id. at 324.
174. See supra note 157.
dations on that basis.175 "There was no law," Brown accurately stated, "to compel them to group together in social connection, persons who did not recognize each other as social equals."176 And in this absence, the 1868 Constitution acquiesced and mandated that there should be no such law in the future.177 The conquering North could not require anything more than equality of civil rights. "The fortunes of war have compelled us to yield to the freedmen the legal rights above mentioned," Brown acknowledged, "but we have neither authorized nor legalized the marriage relation between the races, nor have we enacted laws or placed it in the power of the Legislature hereafter to make laws, regulating the social status, so as to compel our people to meet the colored race on terms of social equality."178

Judge McCay,179 in a concurring opinion, disagreed with Brown's assertion that marriage was a relationship of status; he based his concurrence on the belief that marriage was purely contractual and thus not only within the purview of legislative regulation, but also in no sense in conflict with Georgia's constitutional prohibition against tampering with the citizen's social status. McCay professed agreement with Brown on the intent of the status-legislation ban, but read around the status prohibition simply by denying that marriage was anything but a civil contract. This, of course, carried its own difficulties, as Brown's opinion suggests: if marriage was only a civil contract and no more, federal law might be brought to bear, implicating the provision on new equal protection grounds under the Fourteenth Amendment or the Civil Rights Act. If marriage was a civil contract, then, as the Civil Rights Act debates suggest, it could not be circumscribed without calling into question the legitimacy of the discrimination as a denial of equal protection. But, as with the Congress, categorizing rights helped justify limits that could not otherwise be supported if rights were associated with citizenship as an undifferentiated whole. As had been the case before the war, dividing rights into

175. See Scott v. State, 39 Ga. at 326. Efforts to insure equal access to public accommodations failed throughout the South during the Presidential Reconstruction; by 1873, however, equal access laws had been passed throughout much of the South. Foner, supra note 35, at 369-72. Never adequately enforced, these laws would be gone by the 1890s. Id. at 593.

176. Scott, 39 Ga. at 325.

177. In 1870, Georgia passed a law requiring common carriers to provide "like and equal accommodations" for all passengers; apparently this did not qualify as legislation relating to the "social status" of the citizen. 1870 Ga. Acts 398, 427-28.

178. Scott, 39 Ga. at 326.

179. For biographical background of Henry Kent McCay, see 3 William J. Northen, Men of Mark in Georgia 432-34 (1911); I.W. Avery, The History of the State of Georgia From 1850 to 1881, at 375-76, 440 (1881).
groups and placing them within a hierarchical structure allowed for an allocation of limited and perhaps dependent rights without extending to freed people the whole panoply of civil, political and social rights associated with White male citizenship.

This legerdemain with the content of rights was no arid legal debate: how the Reconstruction Acts and Amendments would be interpreted was of intense moment, and the subject of heated disagreement for all who perceived a stake in the outcome. What the extent of federal power might be under the Fourteenth Amendment was totally uncharted territory, of significant concern to many Southerners, White and Black. “Government has full power to regulate civil and political rights,” announced Brown, “and to give each citizen of the state . . . equal protection of the laws.”\textsuperscript{180} This, according to Brown, the conquering North could require, but “social” and “moral” equality it could not.\textsuperscript{181} By removing marriage from the realm of civil or political rights, and placing it within the category of purely social status—and thus in the forbidden territory of social equality—Brown sought to forestall the possibility of federal interference, declaring “government has no power to regulate social status.”\textsuperscript{182} Shortly thereafter, the first federal judge to hear the issue, Judge John Erskine of the Northern and Southern District of Georgia, while acknowledging the mixed contract/status aspects of marriage, found that marriage “has hitherto been regulated and controlled by each state within its own territorial limits” and thus in the absence of a violation of equal protection, outside the jurisdiction of federal courts.\textsuperscript{183} In an opinion that completely obliterated the humanity of the parties, Erskine determined that a ban on interracial marriage could have no implications of any import to the provision of equal civil rights.\textsuperscript{184} In a statement that would later be echoed and achieve prominence in the United States Supreme Court in the case of \textit{Pace v. Alabama},\textsuperscript{185} Erskine denied that the marriage ban constituted a denial of equal protection, since the burden fell equally on both races.\textsuperscript{186}

Georgia’s assertion that the marriage relation was a mixed status/contract relationship echoed a national trend away from a pure con-
tract model of marriage. At the same time Elizabeth Cady Stanton was arguing for divorce reform on the grounds that marriage should be purely contractual on a commercial mode, other women were likewise suggesting that family needed to look more like contract.187 Judges throughout the South reverted to status language to keep marriage out of the realm of contract, where the Fourteenth Amendment and the Civil Rights Act of 1866 would bring it under federal supervision. Judge McCay's analysis of marriage as a purely contractual relationship was unusual, prompted by the opacity of the "social status" clause of the Georgia Constitution. Judge McCay notwithstanding, the effect of the antimiscegenation reasoning of Georgia's judges was to reinforce a status notion of the marriage relation, in order to assert a cultural control over one of the most intimate areas of people's lives, the decision to marry. In Georgia, this was being done in the name of race and White supremacy.

C. Antimiscegenation, Lynching, and Gender: Defining Manhood as White

The link between Whiteness, citizenship and manhood was not one initially forged in the tensions of Reconstruction. Even before Justice Taney's denial of manhood and citizenship to free Black men in 1857,188 Judge Henry Lumpkin had made the same point in a case concerning the effects of manumission in 1853:

the status of the African in Georgia, whether bond or free, is such that he has no civil, social or political rights or capacity, whatever, except such as are bestowed on him by Statute . . . the act of manumission confers no other right but that of freedom from dominion of the master, and the limited liberty of locomotion; that it does not and cannot confer citizenship, nor any of the powers, civil or political, incident to citizenship . . . .189

Citizenship and its civil, political, and social rights were not, and could never be, acquired by a man of African descent, precisely because he was not White, but also because, not being White, he could not be a man:

The argument is, that a negro is a man; and that when not held to involuntary service, that he is free; consequently that he is a free man; and if a freeman in the common acceptance of the term, then

187. For the "growing retreat from a full contractual definition of matrimony," see Grossberg, supra note 9, at 137. For Elizabeth Cady Stanton's contrasting contract model of marriage, see Elizabeth B. Clark, Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America, 8 L. & Hist. Rev. 25, 26 (1990).
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a freeman in every acceptation of it. . . . The fallacy of it is, its assumption that the manumission of the negro, which signifies nothing but exemption from involuntary service, implies necessarily, and imparts ipso facto, all the rights, privileges and immunities which are incident to freedom, among the free white inhabitants of this country.190

Therefore, to be a man, one had to be White; part of the clear definition of manhood was Whiteness. By Lumpkin’s lights, “to enjoy the offices, trusts and privileges our institutions confer on the White man, is not now, never has been, and never will be, the condition of this degraded race.”191 Lumpkin further stated that

To my mind, the idea is absurd, that the mere act of manumission can invest with all the attributes of manhood in a free state, a being who had no head or name or title, in the State before; who was held, pro nullis, pro mortuis, and for some, yea many purposes, pro quadrupedibus.192

In 1874, during debate over Sumner’s civil rights bill recently introduced in the House, Tennessee Democrat John D. Atkins made reference to an antimiscegenation provision that he supposed was in Pennsylvania’s new constitution, noting that “Pennsylvania wisely declines to allow her manhood to be emasculated by the degeneracy which always marks a mongrel race.”193 In a similar understanding of the linkage between manhood, Whiteness, and marriage, a Tennessee state convention of African Americans passed a resolution that same year in favor of pressing the case of David Galloway to the United States Supreme Court, a resolution that was read into the Congressional Record in both the House and Senate by opponents of the Civil Rights Act.194 Galloway, a Black man, had been prosecuted and imprisoned for having married a White woman.195 The Tennessee convention declared that Galloway, although exercising his right of American citizenship, “had been deprived of his liberty and divested of his manhood and the enjoyment of his personal rights.”196 Ten years later, “Africanus” in the Cleveland Gazette railed against this perception in reaction to Fredrick Douglass’s marriage to a White woman, writing that “[a]ny attempt on his part to set forth that we can

190. Id. at 203.
191. Id. at 202.
192. Id. at 204.
193. 2 Cong. Rec., 453 (1874).
194. 2 Cong. Rec., 4143 (1874) (Resolution of the colored State convention, Nashville, Tenn., April 29, 1874); see also Martyn dissertation, supra note 134, at 599.
195. Martyn, Racism, supra note 134, at 599.
196. Id.; see also Avins, supra note 134.
only remove the obstacles in our way to manhood is to bleach out the race, is unfair to the negro." 197

By the end of the century, racial purity arguments supported spreading antimiscegenation laws in the wake of Social Darwinism and the eugenics movement. 198 While Northern states were repealing their antimiscegenation laws, some western states passed antimiscegenation laws in the last third of the century, particularly focussing on peculiarly Western immigrant concerns: the Japanese and the Chinese. 199 But as David Donald has noted, Social Darwinism does little to explain Southern racial attitudes in the 1890s, much less in the 1870s and 1880s. Southern Whites did not need to turn to science to support their belief in racial superiority; biblical citations did quite well enough. 200 In the South, ownership of one's body did not prove to be the solution to domination that Stanton argued for in the North. 201 The cultural context for antimiscegenation in Georgia suggests that the law was used to define proper family relations for White men who attempted to marry Black women, while lynching drew the line at any intimate relationship between Black men and White women long before marriage could even be contemplated. 202 Black women would continue to be subjected to unprotected sexual violation by White men — frequently their employers — while being denied the possibility of legitimate union with White men. 203 White women could not have any relationship at all with Black men on pain of opprobrium for themselves in the White world, and potentially death for their men. 204

197. Fowler, supra note 96, at 245 (quoting a letter from “Africanus” which appeared in the Cleveland Gazette in February, 1884).
198. On the relationship between the eugenics movement and regulation of interracial marriage, see Paul A. Lombardo, Miscegenation, Eugenics and Racism: Historical Footnotes to Loving v. Virginia, 21 U.C. Davis L. Rev. 421 (1988); on racial purity, see Walter Wadlington, The Loving Case: Virginia’s Anti-Miscegenation Statute in Historical Perspective, 52 Va. L. Rev. 1189 (1966). By 1927, 29 states had antimiscegenation laws of one sort or another; all of these were either western or southern states with the exception of two midwestern states: Indiana and Nebraska. Of the nineteen states without antimiscegenation laws in 1927, all were northern or midwestern states except Arizona, New Mexico, and Washington (Washington had repealed its antimiscegenation statute in 1867, and New Mexico had done the same in 1886). See Miscellany, 13 Va. L. Reg. 311 (1927).
199. See Fowler, supra note 96, at 267-68.
201. Clark, supra note 187, at 30. This was also true in many other contexts, especially labor.
203. Gutman, supra note 123, at 385-400.
As Ida B. Wells Barnett exposed in her indictment of "the old thread-bare lie that Negro men assault White women," miscegenation laws were aimed at forestalling "the legitimate union of the races," noting that there were "many white women in the South who would marry colored men if such an act would not place them at once beyond the pale of society and within the clutches of the law."\(^{205}\) With antimiscegenation law in Georgia directed primarily toward marriage, White men could continue their quasi-legal prerogative of sexual domination of Black women while still maintaining control over Black male/White female non-marital relationships through the threat of lynch law. Thus, it was under lynch law that rape came to mean "any mesalliance existing between a White woman and a colored man."\(^{206}\)

What is critical here is not that the majority of lynchings were probably economically rather than sexually motivated, but that lynching as a symbol of the ultimate control — that of life or death — that the White world could exercise over the Black, was justified as a primal and protective response to Black rape of White women. Neither Black men nor White women could escape the implicit message: relationships between White women and Black men could be fatal to Black men.\(^{207}\)

The threat of rape embodied in the imagery of lynching, and the reinforcement of social and economic boundaries that lynching represented "were intimately connected, for the fear of rape, like the threat of lynching, served to keep a subordinated group in a state of anxiety and fear."\(^{208}\) Jacqueline Dowd Hall concludes that "[i]t may be no accident that the vision of the Negro as threatening beast flourished during the first organizational phase of the women’s rights movement in the South."\(^{209}\) Genital mutilation and castration accompanied many lynchings. Henry Lowther, for instance, became too active in the Republican party for Klu Klux comfort; he was visited with the choice between castration and death.\(^{210}\) In another case, a body was strung up and burned after its death placed the owner beyond the reach of any message, either punitive or deterrent.\(^{211}\) Clearly the act

\(^{206}\) Id. at 113.
\(^{207}\) Id.
\(^{208}\) Hall, supra note 159, at 153.
\(^{209}\) Id.
\(^{211}\) See also Jones, supra note 204, at 149-50.
was meant to achieve other ends. Mutilation and the defiling of bodies testify to the level of hatred and animosity that Blacks as "the other" aroused in the Reconstruction and post-Reconstruction White South. Killing was not sufficient to satisfy the virulence and pathology of the antipathy Southern Whites felt towards those no longer legally within their complete control.212

D. David Dickson's Will

To a certain extent what set Southern antimiscegenation law apart from that of the Midwest, and to a lesser extent, the law of the West, was how White Southerners chose to characterize the prohibition within the boundaries of their culture in the decades following emancipation. What was spoken of elsewhere primarily in scientific terms of maintaining racial purity was spoken of in Georgia in the more intimate terms of family integrity and patriarchal control. Certainly the two could be mixed: Justice Brown spoke of the degenerative effects of racial intermarriage in his opinion in the Scott case.213 But the overwhelming rhetorical concern seemed to be in maintaining "legitimate" social distance and in reestablishing "white supremacy" through cordonning off White families rather than simply White individuals. Jacqueline Jones has shown that "black domestics and their employers daily lived out the paradoxical southern system of public segregation and private integration."214 For all their professed fears of "social" contact in public accommodations, Whites were clearly focused on a particular type of contact, that is, contact on the plane of equality. For Whites, but particularly White men, Black men marrying White women represented an assumption of equality in access to manhood, and that was simply too much to bear.

As eugenics concerns penetrated popular thought in the twentieth century, purity arguments began to take on greater importance in the South.215 The difference between the later and earlier periods lay in the nature of the threat to the structure of Southern society as perceived by shifting coalitions of White lawmakers. The immediate postwar concern was in defining family through marriage laws; later

212. Id.
214. Jones, supra note 204, at 150.
215. See generally Lombardo, supra note 198; Wadlington, supra note 198.
the precise details of status definition and barricading the color line became paramount.216

The importance of family to Georgia’s antimiscegenation scheme comes into focus from a look through the lens of the notorious case Smith v. DuBose,217 the case of David Dickson’s will.218 Unlike Scott, which concerned interracial marriage and a criminal indictment, Smith focussed on concubinage, illegitimacy, and property rights, and explicitly implicated Georgia’s public policy with regard to those issues. The judges, obliged to decide the case on appeal, thought it important enough to engage in highly irregular behavior, even for nineteenth-century Georgia.

David Dickson was one of the wealthiest men in Georgia at the time of his death in 1885, and perhaps one of the more eccentric as well.219 Certainly his White family and neighbors thought as much. As a forty-year old bachelor, Dickson, a planter and agriculturist who made his fortune (twice) in cotton, seed, and fertilizers, had impregnated one of his slaves, thirteen year old Julia. Julia and Dickson had one child, Amanda America Dickson. Not only did Dickson give Amanda a good education, but, according to David’s brother Green, he treated Julia better than he did his mother.220

Dickson lost his first fortune in the war, but began building up a new one almost immediately after the war through his seed and fertilizer business. By his death in 1885, he had an estate valued at upwards of $500,000.221 In his will, David Dickson left the bulk of his estate to his daughter for life, with the remainder to go to her children when she died. At the time Dickson drew up the will, Amanda had two sons, born in 1866 and 1870, whose father was Dickson’s best friend, Charles Eubanks. Dickson’s White relatives, who began

216. For a characteristic statement of twentieth-century obsessions with racial purity and maintaining the color line, see generally The New Virginia Law to Preserve Racial Integrity in XVI VIRGINIA HEALTH BULLETIN (1924).

217. 78 Ga. 413 (1887).

218. For the notoriousness of the Dickson will case, see REBECCA L. FELTON, COUNTRY LIFE IN GEORGIA IN THE DAYS OF MY YOUTH 93 (1919); NATHANIEL HARRIS, AUTOBIOGRAPHY 487-93 (1925).


220. Smith v. Dubose, 78 Ga. at 419.

221. Bryant, supra note 219, at 226-27.
emerging from the woodwork when he died, were left a total of $30,000. They immediately took steps to challenge the will.222

The various relatives, represented in the case name by Dickson’s White nephew J. Dickson Smith, challenged the will on three basic fronts, the third of which is of most concern here.223 This third challenge was based on the theory that the will was void because it was contrary to the public policy of Georgia, garnered from the prohibition on racial intermarriage.224

Smith and the other White relatives claimed that the will “in its scheme nature and tendencies, is illegal and immoral and in its spirit aims and purposes is contrary to public policy subversive of the interest and well-being of society and in violation of the constitution and laws of this state.”225 On its face, the import of this claim simply suggests that leaving property to an illegitimate child and her illegitimate children supports immorality, but a rejected jury charge clarifies exactly what the would-be heirs were claiming. They requested the trial judge to charge the jury that: “Under the constitution and laws of the State of Georgia, marriages between White persons and negroes are forbidden, and the public policy of the State is against the mingling of the blood of these races, and if you believe this will is against said policy, it is absolutely void.”226 The lower court judge, Samuel Lumpkin, refused to make this charge, and for this, along with twenty-seven other enumerated errors, the White relatives appealed to the state supreme court.227

One of the attorneys for the disinherited relatives, Nathaniel Harris, left an unusually frank and detailed account of the behind-the-scenes machinations of the Smith court.228 The case was a notorious one, and the three justices of the supreme court were clearly reluctant to decide it. According to Harris, the two associate justices, Samuel Hall and Mark Blandford, took him aside during the noon recess on the first day of arguments to discuss the progress of the case and its

222. Id. at 234.
223. Two concerned fraud and undue influence—that Amanda and/or her mother Julia had exercised undue influence over Dickson to procure the will; and that they had fraudulently conspired to make Dickson believe that Amanda was his daughter when in fact she was not and that her children were Charles Eubanks’ when in fact they were not. Smith v. Dubose, 78 Ga. at 427-28.
224. Id. at 427-28, 433.
225. Smith, Supreme Court Case File, supra note 219.
227. Id. at 417-26.
228. HARRIS, supra note 218, at 487-93.
political impact. 229 “This, of course, was entirely out of the ordinary,” admitted Harris in a respectful understatement, “but as the case involved questions of State and National policy, the judges were willing to talk to me to ascertain what view was entertained outside the courthouse.” 230

Harris did his best to explain public sentiment about the will, but was apparently unable to sway the judges, who told him he had better settle the case. A disgruntled Harris replied that he could not possibly settle the case now, after the judges’ morning questions had left the opposing lawyers absolutely confident of the outcome. “I’ll help you out,” volunteered Judge Blandford, “[l]et me ask a few questions of the counsel who speaks for the defendants in error this afternoon and he won’t be so confident at the end of my questions.” 231 True to his word, Blandford sought to shake the confidence of Harris’s opponents, but to no avail. Colonels DuBose and Reese, perceiving their possession of both the law and the court, refused to give an inch. 232

Supremely discouraged, Harris conveyed to his co-counsel, Colonel Rutherford, the inclination of the court to uphold the lower court’s ruling: “[S]tartled, hurt, and almost overwhelmed,” Col. Rutherford gathered himself the next day to deliver “a speech such as has never been heard in any courthouse in Georgia, or in the South.” 233 His impassioned oration in defense of “the future of the Anglo-Saxon, the traditions of the past, the hopes of the future . . . finally overwhelmed the court.” 234 Judge Hall acknowledged that he had not understood the case before, and Chief Justice Jackson “put his head down upon the docket before him and wept like a child.” 235 Lest the reader be unconvinced of the depths of emotion stirred by Colonel Rutherford in relating the evils of David Dickson’s will, Harris adds that the Chief Justice pounded the bench with a “resounding crash,” exclaiming “I would rather die in my place than uphold this will.” 236 Only Judge Blandford remained unmoved. 237

Unfortunately for the Chief Justice, he proved true to his word. Within a few days after arguments in the Dickson case he was stricken

229. Id. at 488.
230. Id.
231. Id. at 489.
232. Id.
233. Id. at 490-91.
234. Id. at 491.
235. Id.
236. Id.
237. Id. at 492.
with pneumonia and died.\textsuperscript{238} And, despite Judge Hall’s impulsive request for Colonel Rutherford’s argument, that he might put it in the opinion as “a warning and an appeal to the people of this generation,” Judge Blandford prevailed, the Supreme Court affirmed, and the will was upheld.\textsuperscript{239}

Like Judge Lumpkin in the case below, Judge Hall turned away Colonel Rutherford’s appeal to public policy. “What is public policy” he asked, “[a]nd where must we look to find it? And in ascertaining and applying it to the transactions of life, by what rules and precautions are the courts to be guided?”\textsuperscript{240} His objection rested on two judicial tenets: first, that judges should be most concerned with the concrete interests of the individuals immediately before them, rather than the interests of an abstract public embodied in the state; and second, that in refusing to instruct the jury that they might decide on what the public policy of Georgia might be in relation to David Dickinson’s will, the trial judge quite properly recognized that such a question was not one of fact for the jury, but one of law for the judge.\textsuperscript{241} These points, however, have the air of \textit{ex post facto} rationalization about them, as the court certainly implied that appeals to public policy would have had more force to change the outcome had David and Julia been “married.”\textsuperscript{242}

Before it rejected resorts to public policy as bases for decision making in all but the most limited instances, the court declared that “It is unquestionably true that a testator, by his will, may make any disposition of his property, not inconsistent with the laws or contrary to the policy of the State.”\textsuperscript{243} As the court noted, the objection to the validity of the will was based on the constitutional and statutory prohibition against intermarriage between the races, as tending to implicate a policy against interracial intercourse. But, said Hall, “Illicit intercourse between persons of the same as well as different races is made penal by our code” and “whatever rights and privileges belong to a White concubine, or to a bastard White woman and her children,

\textsuperscript{238} \textit{Id.} Jackson died in January of 1887. \textsc{Braswell D. Deen, Jr. \\ \\

\textsuperscript{239} See Harris, \textit{supra} note 218, at 492-93. The reluctance of this court to decide this case may have been well-founded in concerns beyond law and policy. If we are to take Harris’s word, it proved to be an unusually fatal case, killing not only the Chief Justice only days after the argument, but Judge Hall as well, shortly after the decision was read. \textsc{Deen \\ \\
& Henwood}, \textit{supra} note 238, at 49; Judge Blandford managed to survive the case, living until 1902. \textit{Id.} at 51.

\textsuperscript{240} \textit{Smith v. Dubose}, 78 Ga. at 435.

\textsuperscript{241} \textit{Id.} at 435-40.

\textsuperscript{242} \textit{Id.} at 431.

\textsuperscript{243} \textit{Id.} at 434.
under the laws of Georgia, belong also to a colored woman and her children.\textsuperscript{244} The constitutional prohibition, in other words, was directed toward racial intermarriage, not interracial intercourse, which could be adequately controlled under the general proscription against fornication and adultery. Dickson's will made no suggestion that he wished to dispose of his property in response to an assumption of marriage with Julia or legitimacy of his biracial daughter Amanda, as "there was no pretense of marriage between Eubanks and Amanda" and no assumption by Dickson of the legitimacy of his biracial grandsons. Consequently, no policy questions were implicated beyond a policy against meretricious intercourse, which the court took some pains to indicate could not be brought to bear because the will could not be encouraging such intercourse in either Julia or Amanda's case, since both Dickson and Eubanks were dead.\textsuperscript{245}

The \textit{Smith} court's equal protection grounds for upholding the will, coming as it did after the Fourteenth Amendment had been eviscerated by the United States Supreme Court, has a strange ring to it, and requires explanation. One reading has it that this case was part of a general post-Reconstruction strengthening of absolute property rights in order to bolster planters' authority over their workers.\textsuperscript{246} Under this reading, \textit{Smith} falls within a whole grouping of economic legislation and cases which sought, through for example, crop lien laws, stock laws, and hunting and fishing regulations, to control labor and bring Blacks, (and of Constitutional necessity poor Whites as well), under a new class-based plantation system.\textsuperscript{247} Certainly, property rules were being used to do just that, and \textit{Smith} can be read as part of a reworking of labor control into a legally class-based rather than race-based system in response to the strictures of the Fourteenth Amendment. But such a reading seems too narrowly economic in light of the strong antimiscegenation sentiments in the South at the time. Dickson was not flouting racial policy in his will; he had cohabited with a Black woman and fathered a bastard child, both activities which Georgia had a long tradition of viewing with an indulgent eye and a wink. All he had done was provide for his child and grandchildren after his death, with no pretense that his relationship or that of his daughter ought be legitimated by such an act. Indeed,

\textsuperscript{244} Id. at 433-34.
\textsuperscript{245} Id. at 431, 435, 441.
\textsuperscript{246} Bryant, \textit{supra} note 219, at 237-40.
Dickson’s well-known life and writings precluded any assumption that his relationship with Julia constituted an attack on Southern social hierarchy. The short work done with the Fourteenth Amendment in *Scott* and *Hobbs* suggests what would have happened had there been an issue of marriage: the court could simply have said that allowing Amanda Dickson to inherit from her White father undermined a positive statement of law abrogating interracial marriage, and the same result would have been obtained had it been a Black man claiming marriage to a White woman. The law fell equally on both races.

Finally, it is important to note that Amanda Dickson was born of a union between a master and a slave, and that in her case, there could have been no question of a threat to post-war racial purity. Her sons were another question: assuming that David Dickson was “all white” and Julia was “all black,” Amanda was “half-white” and her sons were “three quarters white.” Both were born after the war, and thus posed a threat to a new notion of White purity. But as I have suggested, the real issue was not racial purity in the abstract, but family purity in the service of White supremacy. Just as the positive-good argument had relied on a racial justification for slavery, and thus a rigid and defensible definition of race, so in slavery’s aftermath a similar argument of economic and social stratification relied on a rigid race definition. Georgia law did not define fornicators and their illegitimate children as families. Thus, as Nathaniel Harris tells us, Judge Hall narrowly interpreted the scope of Georgia’s family policy and allowed a White man to leave his property to his “illegitimate negro offspring, even to the exclusion of his childless widow and his White nephews and nieces.”

It is difficult to escape the familial content of White Georgia’s strictures against miscegenation. Although the Fourteenth Amendment forced the arguments in support of Georgia’s prohibition on interracial marriage into certain channels, one should not discount the courts’ dismissive attitude toward interracial fornication as compared to interracial marriage. Judge Hall’s answer to the suggestion that the

248. LUMPKIN, supra note 45, at 63-64. Friends, acquaintances and employees of David Dickson indicated that while he built Julia a house that was in some respects nicer than his own, he did not flaunt his relationship with her by having her stay in his house; likewise, he was discreet enough so that business associates and friends could bring their wives and daughters to his house and testify that they were unaware of the relationship between the two or that Dickson had a biracial child and grandchildren. *Id.*

249. HARRIS, supra note 218, at 493. Harris’s biases overcame him here: David Dickson had no widow. He did marry in the early 1870s, but his wife died after two years, predeceasing him by thirteen years. Georgia law did not allow complete disinheritance of a wife. *Id.*
antimiscegenation provision was in the nature of a state policy against interracial intercourse is telling: Georgia had no need for such a policy, because the law prohibited all illicit intercourse.\textsuperscript{250} Intercourse was not the issue addressed by the miscegenation law, according to Hall, that problem was dealt with elsewhere, and was not (in Georgia) in itself racist.\textsuperscript{251}

V. Final Thoughts

Marriage fixed legal statuses. It regulated property ownership, transmission, and control; legitimized children; contained sexuality; and determined legal power relationships by gender and age. Under slavery, legal marriage had been impossible for the unfree both under the property theory of slavery and within the logic of the moral economy of dependency. With the Civil Rights Act of 1866, and later with the Fourteenth Amendment, the right to marry and acquire the status relationships that marriage conferred was extended to those who had been slaves. One of those statuses was head of household, and its legal implication of manhood. The question was, how far would Black men be allowed to take that status without challenge?

W. E. B. Du Bois suggested that "[t]o the ordinary American or Englishman the race question at bottom is simply a matter of ownership of women; White men want the right to use all women, colored and White, and they resent the intrusion of colored men in this domain."\textsuperscript{252} Jessie Daniel Ames likewise would claim that "lynching is a result of causes which are deeply buried in our political and economic system which find nourishment in our doctrine of white supremacy, which in its nature is tied in to a sex warfare between white and Negro men."\textsuperscript{253} Whatever its label or manifestation, friction over every aspect of "social relations" between the races was endemic in the post-war South. The White South adopted myriad strategies for maintaining dependency on a new footing after the destruction of legal slavery. These strategies ranged from the virtual re-creation of slavery under the Black Codes that preceded Congressional Reconstruction, to the Jim Crow laws that followed the abandonment of Reconstruction.

\textsuperscript{250} See id.
\textsuperscript{251} Smith v. Dubose, 78 Ga. at 433. ("The principal complaint here is that anything which has a tendency to induce intercourse between persons of the white and negro races, is contrary to public policy, and consequently void; and this conclusion is drawn from the prohibition of marriage between the races . . . ").
\textsuperscript{252} PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 61 (1984).
\textsuperscript{253} HALL, supra note 159, at 248.
They included terrorism and social degradation. Moreover, it is clear that the prohibitions on racial intermarriage were indeed intended to be, among other things, "badges and incidents of slavery."

Bans on the right to marry "across the color line" became more stringent in the twentieth century as the quest for "racial purity" overcame and displaced debates over social rights and social equality which had receded with the accomplishment of Constitutionally sanctioned Jim Crow laws. The intensity of White antipathy to the idea of interracial marriage, when seen in the context of the reality of interracial sex and procreation, requires more explanation than has yet been given. The desire for "racial purity" is clear, but as explanation, it does no more than rephrase the question. And, again, maintenance of "white supremacy" leads us no further than its statement. Antimiscegenation rules may have affected only a tiny minority in terms of directly checking individual action, and the same could be said about lynching. But the rules not only determined the limits of action, they served to reinforce the White definition of manhood, and helped to legitimize limitations on "social rights."

In determining the meaning and nature of freedom, the judges and lawmakers of the Reconstruction era and beyond used the tactic of categorizing and ordering rights as a means to reinforce the racialization of dependency. This worked in part because the familialization of slavery in the proslavery rhetoric of the antebellum period fed into the power of the miscegenation "bugbear" that was promoted and exploited in the political struggles during the war and after. Gender figured significantly in the identification of social rights (generally public accomodations) with "social equality" as a code for racial intermarriage; this association justified severely limiting the ambit of rights guaranteed by the Fourteenth Amendment. At the same time, the complex linkages of manhood, citizenship, and Whiteness played back into the moral economy of dependency that White Southerners sought to maintain in the face of legal rights claims. The mark of their success was the distance yet to cover before "only the law would rule between us."