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The History of Slave Marriage in the United States

Darlene Goring
Louisiana State University Law Center, dgoring@lsu.edu

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DARLENE C. GORING*

> The slave has no rights. Of course, he or she cannot have the rights of a husband, a wife. The slave is a chattel, and chattels do not marry. 'The slave is not ranked among sentient beings, but among things;' and things are not married.[1]

I. INTRODUCTION

The American paradigm of legally permissible marital relationships was shaped by the African-American slave experience. Colonial and antebellum legislation and jurisprudence prohibited marriages between bonded slaves. The end of the Civil War and the passage of the Thirteenth Amendment[2] brought postbellum recognition of marriages between emancipated African slaves, and the Supreme Court's decision in *Loving v. Virginia* in 1967 recognized an even more expansive definition of the marital paradigm that included legal protection of marriages between mixed raced couples.[3] The boundary of this paradigm is currently being tested in federal and state courts and legislatures, as well the court of public opinion, as groups of gay and lesbian couples seek the legal recognition and protections associated with legislative and judicial sanction of their relationships.[4] The

* Associate Professor of Law, Paul M. Hebert Law Center, Louisiana State University, B.B.A., Howard University; J.D. and L.L.M., Northwestern University School of Law. I would like to thank my colleagues Michael Malinowski and Joseph Bockrath for their comments and assistance. I dedicate this article to my son, Richard M. Ross, III.

1. WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, JUDICIAL DECISIONS, & ILLUSTRATIVE FACTS 90 (1853).

2. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

3. Loving v. Virginia, 388 U.S. 1 (1967).

4. *See generally* Ronald J. Krotoszynski, Jr. & E. Gary Spitko, *Navigating Dangerous Constitutional Straits: A Prolegomenon on the Federal Marriage Amendment and the Disenfranchisement of Sexual Minorities*, 76 U. COLO. L. REV. 599, 625-38 (2005) (arguing that Congress should not pass the Federal

cultural and judicial scope of legally permissible marital relationships was raised to a dramatic level of scrutiny following the 2004 decision in *Goodridge v. Dep't of Pub. Health*. There, the Supreme Judicial Court of Massachusetts held that the Commonwealth's denial of marriage licenses to same sex couples violated the equal protection principles of the Massachusetts Constitution.[5]

In an effort to rally broad-based support for legal recognition of same-sex unions, a growing number of same-sex marriage advocates have made symbolic connections between their struggle for equal rights and the African-American civil rights movement.[6] Gays and lesbians have used the names of Rosa Parks and Dr. Martin Luther King, Jr. to rally supporters to their cause.

Marriage Amendment); Joe Rollins, *Same-Sex Unions and the Spectacles of Recognition*, 39 LAW & SOC'Y REV. 457, 467-74 (2005) (analyzing social perceptions of homosexuality); Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1764-87 (2005) (discussing the legal and social history of marriage licenses); Phyllis G. Bossin, *Same-Sex Unions: The New Civil Rights Struggle or an Assault on Traditional Marriage*, 40 TULSA L. REV. 381, 384-92 (2005) (discussing the history of civil unions and state and federal legislation affecting it); Edward Stein, *Introducing Lawrence v. Texas: Some Background and a Glimpse of the Future*, 10 CARDOZO WOMEN'S L.J. 263, 275-81 (2004) (discussing the effect of this decision on gay marriage); Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & POL'Y 107, 123-53 (1996) (describing the social effects of gay marriage); Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 581-610 (1994) (critiquing traditional attacks on gay marriage).

5. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003)("We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates [equal protection and due process requirements of] the Massachusetts Constitution.").

6. It seems only fitting, if perhaps late in the day, that *Lawrence v. Texas* should have been handed down just a year before the fiftieth anniversary of *Brown v. Board of Education*. For when the history of our times is written, *Lawrence* may well be remembered as the *Brown v. Board* of gay and lesbian America. *See e.g.*, Laurence H. Tribe, *Lawrence v. Texas: The 'Fundamental Right' that Dare Not Speak its Name*, 117 Harv. L. Rev. 1893, 1894-95 (2004). *See* WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 67 (2002). In his chapter discussing the passage of the Vermont Civil Union Act, Eskridge notes:

> Almost all of the speakers for the committee bill drew from their own experiences to support the civil rights framing of the issue. For example, Representative Gaye Symington drew parallels that she and her husband had uncovered between southern resistance to the mandate in *Brown v. Board of Education* and some Vermonters' resistance to *Baker v. State*;

Id. WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 65 (2002)("It is the most blatant evidence that gay and lesbian citizens must sit in the back of the law bus, paying for a first-class ticket and receiving second-class service.").

Moreover, civil rights advocates such as Coretta Scott King, Julian Bond, U.S. Representative John Lewis, and Al Sharpton support the campaign to legalize same-sex marriages.[7] Equally as vocal are African-American clergymen who resist comparisons between the civil rights and gay rights movements.[8]

This Article will address the legitimacy of this comparison by determining whether parallels exist between historic efforts to legalize slave marriages and the current same-sex marriage debate. This examination will trace the structural evolution of the right to marry among slaves and freed African Americans. Part II examines the legal status of slaves during the antebellum period. Legislation reinforced by federal and state jurisprudence, classified slaves as chattel devoid of both human and civil rights. This section will deconstruct the evolution of slaves from property to personhood and explore the confluence of human and civil rights associated with legal personhood, including the right to marry.

This examination will reveal that during the antebellum and postbellum periods, both black and white Americans believed that principles of natural rights governed whether slaves and freed blacks had any right to marry.[9] Slaves were prohibited from marrying because, as long as they were in a state of bondage, they lacked the capacity to enter into any legally enforceable civil contracts. Once emancipated and granted the capacity to contract, the right of freed slaves to marry was undisputed.

Part III of this Article will examine the historical, social, and cultural journey of African-Americans to both claim and exercise the right to marry. Although commonly used, the word "marriage" does not accurately describe the legal relationships between antebellum slaves. Slaves entered contubernal relationships which

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7. Erin Texeira, *Gays and African-Americans Parallels on Rights Case*, NEWSDAY, May 17, 2004, at A07; Edith C. Webster, *Gay Rights Spark Civil-rights Debate, Rockford Reg. Star*, Aug. 7, 2004, at 1AB; Sherri Williams, *Comparing Gay, Civil Rights A Divisive Issue for Blacks*, COLUMBUS DISPATCH (Ohio), July 2, 2004, at 8A; John Lewis, Editorial, *At a Crossroads on Gay Unions*, BOSTON GLOBE, October 25, 2003, at A15.

8. Aurelio Rojas, *Same-Sex Marriage Stand Opposed*, SACRAMENTO BEE, April 19, 2005, at A3 ("We are offended when the homosexual community compares what they do to the civil rights community . . . . It's not a civil right for anyone to be married - marriage is a privilege."); Michael Paulson, *Black Clergy Rejection Stirs Gay Marriage*, BOSTON GLOBE, February 10, 2004, at B1 ("[W]e're concerned with the epidemic rate of fatherlessness in America and in our community, and we don't think gay marriage helps that cause."); Brian DeBose, *Black Caucus Resists Comparison of Gay 'Marriage' to Civil Rights*, WASH. TIMES, March 15, 2004, at A01 ("The civil rights movement was more of a movement for the equal rights of all Americans: education, voting rights, jobs. Whereas gay rights in terms of gay marriage is a movement for a special group of Americans.").

9. *See* PETER KOLCHIN, AMERICAN SLAVERY 1619-1877 (1993) (describing distinctions between the antebellum and postbellum periods).

were evidenced by long term romantic commitments, solemnized by informal ceremonies conducted by the plantation masters or ministers, both slave and white. Although denied governmental sanction or recognition, slave relationships had the indicia of marriages between freed blacks and whites.

Part IV will identify the legislative and judicial models used by Confederate states, border states, and several Union States during the postbellum period to legalize and/or ratify slave relationships. A necessary component of this analysis focuses on the structural models used to legalize contubernal relationships during the antebellum period. Once identified, Part V of this Article will examine the legislative models used to legalize slave marriages and determine whether parallels exist between judicial efforts to legalize same-sex marriages. The Article concludes by finding that a valid comparison does exist between the experiences of freed slaves and same sex couples with respect to the role that state legislatures can and should play in creating and defining marital rights and obligations.

II. "MARRIAGE" BETWEEN HUMAN CHATTEL

African-Americans evolved socially and culturally from being legally defined as chattel and denied basic human and civil rights. The Declaration of Independence proclaimed that "all men are created equal" and that they are endowed with certain inalienable rights including the right to "Life, Liberty and the pursuit of Happiness."[10] There was, however, an asterisk on this proclamation that limited this grant of rights only to white males. Although gay white males may have been socially and culturally deprived of rights and excluded from some institutions such as marriage, they were not wholly excluded from the Declaration of Independence, and deemed the property of others by default.

African Americans fared only marginally better under the provisions of The United States Constitution. In Article I, § 2, slaves were reduced to the equivalent of only 3/5ths of a person for the purpose of apportioning representatives and tax obligations for each state.[11] Article I, § 9 sanctioned the continued importation of

10. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.").

11.

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

U.S. CONST. art. I, § 2, cl. 3.

slaves to the United States until 1808.[12] Article IV, § 2 prevented runaway slaves from seeking safe haven in free northern states by requiring the return of fugitive slaves to their masters.[13]

The jurisprudence of both the state and federal governments reinforced the notion that slaves were chattel devoid of any civil rights.[14] The diminished status of African slaves began in 1705 with the promulgation of the first slave codes that defined and governed the lives of African slaves during the antebellum period.[15] As chattel, slaves were considered items of personalty with little to distinguish them from horses, cows, or farm equipment.[16] During the antebellum period, each slave-holding state of the Union regulated the condition and legal status of slaves through slave codes.[17] These codes governed every facet of slave life.[18] Slaves could not own, rent, or transfer real property, own personal property, make or enter into any civil contracts,

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12.

> The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

U.S. CONST. art. I, § 9, cl. 1.

13.

> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

U.S. CONST. art. IV, § 2, cl. 2.

14. KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 197-98 (1956). Regarding the rights of slaves, the author states:

> Nor could a chattel be a party to a suit, except indirectly when a free person represented him in a suit for freedom. In court he was not a competent witness, except in a case involving another slave. He had no civil rights, no political rights, no claim to his time, no freedom of movement.

Id.

15. An Act Concerning Servants and Slaves, Ch. 48, 3 Va. Stat. 447 (1705), *available at* http://www.law.du.edu/russell/lh/alh/docs/virginiaslaverystatutes.html.

16. SLAVERY RACE AND THE AMERICAN LEGAL SYSTEM 1700-1872 93 (Paul Finkleman, ed. 1988) [hereinafter SLAVERY RACE] (Reprint of Sketch of the Laws relating to Slavery in the several states of the United States of America, George M. Stroud 23 (1827))("The cardinal principle of slavery, that the slave is not to be ranked among sentient beings, but among things - is an article of property - a chattel personal, obtains as undoubted law in all the Slave States.").

17. *Id.*

18. *Id.*

lawfully be taught to read or write,[19] or exert dominion over their physical body or surroundings.[20] In addition, slaves lacked the ability to receive real or personal property either by inheritance or intestacy.[21]

The slave's lack of capacity was affirmed by the Supreme Court in *Hall v. United States*, where the Court refused to enforce a claim made by a former slave against the estate of his master.[22] The Court agreed that a slave was not entitled to political or civil rights while subject to the condition of servitude.[23] The slave's acquisitions belonged to his master, he had no ability to contract or be contracted with, and could therefore make no binding contract with his master.[24] Prior to Lincoln's signing of the Emancipation Proclamation and the passage of the Thirteenth Amendment, slaves were human anomalies.[25] Until that point in

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19. SLAVERY RACE, *supra* note 16. *See generally* Miss. Act of June 18, 1822, § 25, (noting the "penalty for teaching a slave to read, imprisonment one year."); *Aiken's Digest of Alabama*, § 31, at 347. (explaining the penalty "for attempting to teach any free colored person, or slave, to spell, read or write, a fine of not less than two hundred and fifty dollars nor more than five hundred dollars"); Va. Rev. Code, Vol. I, at 424 (mandating that "[a]ny slave or free colored person found at any school for teaching reading or writing, by day or night, may be whipped, at the discretion of a justice, not exceeding twenty lashes.").

20. *See* WILBERT E. MOORE, AMERICAN NEGRO SLAVERY AND ABOLITION: A SOCIOLOGICAL STUDY 101 (1971). The author explains:

> Perhaps the most outstanding application of the legal rule that a slave could not be a party to a contract, and certainly the one most often pointed out by the abolitionists, was the denial of any legal marriage, either between slaves, or between a slave and a freeman . . . . The slave "husband" or "wife" might be forced to testify against the other partner in a criminal case (otherwise long exempted in Common Law judicial proceedings). The union between slaves might be as permanent or temporary as the interests of the slaves, or especially of the masters, might dictate. The union was subject at any time to being broken through sale of one of the slaves. Moreover, the charge of adultery could not be made against a slave, and the male slave had no legal action against another, whether slave, free Negro, or White, for intercourse with his "wife," nor could he present such evidence in his defense on a criminal charge of assault and battery or murder. The slave had no honor to defend. In this the slave codes of the South went much further than the Roman civil code, where a type of marriage (contubernium, not connubium) was recognized.

Id.

21. Trotter v. Blocker, 6 Port. 269, 290, (Ala. 1838).

22. Hall v. United States, 92 U.S. 27, 24-30 (1875).

23. *Id.*

24. *Id.*

25. See CONG. GLOBE, 38th Cong., 1st Sess. 2949-55 (1864) (characterizing conditions of slavery in the remarks and debates of members of the House of Representatives on the abolition of slavery and the adoption of the Thirteenth Amendment). Mr. Thomas Bowles Shannon noted on June 14, 1864:

> Now, sir, what is this institution of slavery that has sought to assume

history, a literal point of entry into some recognition of African-Americans as persons and citizens, the United States Supreme Court consistently supported the principle that slaves were chattel property. In 1856, the Supreme Court in *Scott v. Sanford*, declared not only that slaves were property but, as such, they were not citizens of the United States entitled to constitutional protection.[26] The Court held that slaves were "regarded as beings of an inferior order . . . altogether unfit to associate with the white race, either in social or political relations, and so far inferior, that they had no rights which the white man was bound to respect . . . ."[27] The Court struck down legislation that prohibited owning slaves in the state of Missouri as a violation of the due process clause.[28] The Court expressly addressed the status of American slaves, holding that:

> [T]he right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guarantied to the citizens of the United States, in every State that might desire it, for twenty years. And the Government in express terms is pledged to protect it in all future time . . . .[29]

The emancipation of slaves, coupled with ratification of the Thirteenth Amendment, shattered the paradox that slaves were both human and chattel. Thereafter, upon passage of the Civil Rights Act of 1866, basic human rights, such as the right to contract, the right to own, sell, and lease real and personal property, were conferred on freed slaves.[30] In this context, recognition of the slaves' right to marry was an integral part of their transformation into legally recognized personhood.[31]

> the reins of Government in this land of freedom? What is slavery, sir? It is 'the sum total of villainies.' It is the destroyer of every virtue, public as well as private, because it encourages promiscuous and unbridled licentiousness, and renders null the marriage relation.

Id. Mr. Francis William Kellogg stated:

> [Slaves] are men, but they must not read the work of God; they have no right to any reward for their labor; no right to their wives; no right to their children; no right to themselves! The law makes them property and affords them no protection, and what are the Christian people of this country doing about it? Nothing at all!

Id. at 2955.

26. *Scott*, 60 U.S. 393 (1856).

27. *Id.* at 407.

28. *Id.* at 450-52.

29. *Id.* at 451-52.

30. 1866 Civil Rights Act, Ch. 31, 14 Stat. 27, (1866) (codified as amended at 42 U.S.C. §§ 1481-1482 (2000)).

31. Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640, 666 (2001). Professor Gross states:

> The household approach to slavery also leads historians to focus on the institution of marriage during Reconstruction as a vehicle for political transformation. Several recent histories of Reconstruction have

One significant distinction between African-Americans and same-sex couples that becomes apparent from this historic reflection is that gay and lesbian individuals in the United States do not shoulder a legacy of being legally defined as chattel and not citizens. The status and individual rights enjoyed by each member of a same-sex union affords them with the potential ability, albeit limited, to provide their partners and their children with some legal protections.[32] None of these legal protections were available to slave couples.[33] As chattel owned by their masters, slaves could not exercise any control over their family life.[34] Their relationships were created and dissolved at their masters' whim.[35] Slaves could not confer legitimacy upon their children, even those born to

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emphasized African American assertions of the right to marry as a fundamental right of citizenship. As a black corporal in the U.S. Colored Troops declared to his regiment in 1866, "The Marriage Covenant is at the foundation of all our rights. In slavery we could not have legalised marriage: now we have it . . . and we shall be established as a people." This corporal recognized that marriage was "the entering wedge into a broad range of social privileges," including property rights and the right to enter into contracts. While many newly freed people rushed to exercise their right to marry, they also resisted efforts by Freedman's Bureau officials and the authors of the Black Codes to reduce marriage to a system of obligations, asserting the right not to marry and to end one marriage and begin another. . . . While marriage served the function of training freed people for citizenship, cultural-legal historians demonstrate resistance to this discipline.

Id. (footnotes omitted).

32. *See generally* Lornet Turnbull, *Is Same-Sex Marriage a Civil-rights Issue?*, SEATTLE TIMES, April 19, 2004, at A1 (quoting Pastor Reggie Witherspoon, Sr., who argues that comparisons between the Civil Rights movement and the gay rights movement are improper, stating that "there are so many things that gays can do that my grandmother couldn't do. . . . They can vote, they can live where they want to live. I don't see anyone siccing dogs on gays like they did to African Americans in the 60's").

33. *Id.*

34. STAMPP, *supra* note 14, at 198.

35. *See* STAMPP, *supra* note 14, at 198 (discussing the authority of a master to dissolve a "marriage" between slaves). The author notes:

Since slaves, as chattels, could not make contracts, marriages between them were not legally binding. "The relation between slaves is essentially different from that of man and wife joined in lawful wedlock," ruled the North Carolina Supreme Court, for "with slaves it may be dissolved at the pleasure of either party, or by the sale of one or both, depending upon the caprice or necessity of the owners." Their condition was compatible only with a form of concubinage, "voluntary on the part of the slaves, and permissive on that of the master." In law there was no such thing as fornication or adultery between slaves; nor was there bastardy, for, as a Kentucky judge noted, the father of a slave was "unknown" to the law. No state legislature ever seriously entertained the thought of encroaching upon the master's rights by legalizing slave marriage.

Id. (footnotes omitted).

putative slave marriages.[36] Lacking contractual capacity, slaves could not hold title to real or personal property, nor transfer any such property, either by inheritance or intestacy, to their putative spouse or children.[37] So, historically, African-Americans were in a very distinguishable legal-identity position from contemporary gay and lesbian Americans. Reading into the historic status of African-Americans for creation of analogies and metaphors to the contemporary status of gay couples is forced at best.

III. SLAVE TRADITION OF MARRIAGE

During the period of American Slavery, blacks were denied even the most basic of human rights, including the right to join together as a legally sanctioned family unit.[38] As personalty, slaves lacked the capacity to enter into any form of marital union recognized necessarily or legally by the plantation masters, the government, or the judiciary.[39] In 1853, William Goodell wrote that "[t]he slave is one who is in the power of a master to whom he belongs. How, then, can the slave marry?"[40]Slaves were, however, human beings although legally defined as chattel. Slave couples joined together in quasi-marital unions that were sanctioned by the plantation owners. Although viewed as marriages by members of the slave community, their compromised nature was without question.[41] The old folks called it "shacking up" which is an incredibly appropriate description of what is more appropriately referred to as contubernal[42] relationships. Contubernal

36. MOORE, *supra* note 20, at 101.

37. *Id.*

38. Andrews v. Page, 50 Tenn. 653, 660 (1871)

> While the institution of slavery existed, it was generally held, in the slaveholding States, that the marriage of slaves was utterly null and void; because of the paramount ownership in them as property, their incapacity to make a contract, and the incompatibility of the duties and obligations of husband and wife with the relation of slavery.

Id.

39. FINKLEMAN, *supra* note 16, at 157-77 (Reprint of George M. Stroud, Sketch of the Laws relating to Slavery in the several states of the United States of America, 21 (1827)("Slaves . . . were not entitled to the rights and considerations of matrimony, and therefore had no relief in case of adultery: nor were they proper objects of cognation or affinity, but of quasi-cognation only . . .").

40. *See* GOODELL, *supra* note 1, at 93.

41. *See generally*, SLAVERY RACE, *supra* note 16 (quoting from the Negro Law of South Carolina, Chapter II, Slaves, their Civil Rights, Liabilities, and Disabilities, Sec. 37.) ("A slave cannot even legally contract marriage. The marriage of such an one is morally good, but in point of law, the union of slave and slave, or slave and free negro, is concubinage merely.").

42. GOODELL, *supra* note 1, at 91 ("A slave cannot even contract matrimony; the association which takes place among slaves, and is called marriage, being properly designated by the word contuberium - a relation which has no sanctity, and to which no civil rights are attached.").

relationships are characterized by living together in an intimate setting,[43] sharing the "same tent,"[44] or "pertaining to temporary marriage."[45] No civil rights, obligations, or protections attached to contubernal relationships, and these relationships under slavery could be terminated at the will of the parties or, more significantly, at the will of a plantation master.[46] Many jurisdictions prohibited clergyman from solemnizing contubernal relationships, and prohibited clerks from issuing marriage licenses and recording these putative unions.[47]

In 1858, abolitionist George B. Cheever addressed this issue before the American Abolition Society.[48] Cheever noted that the institution of slavery was inconsistent with traditional notions of the familial christianity paradigm.[49] He argued that:

> The whole family relation, the whole domestic state, is prostituted, poisoned, turned into a misery-making machine for the agent of all evil. What God meant should be the source and inspiration of happiness, becomes the fountain of sin and woe. The sacred names of husband, wife, father, mother, son, daughter, babe, become the exponents of various forces and values in the slave-breeding institute.[50]

Although legally unenforceable during the antebellum period,

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43. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 497 (3d ed. 1986).

44. THE OXFORD ENGLISH DICTIONARY 856 (2d ed. 1989). *See* Jones v. Jones, 36 Md. 447, 456 (1872).

> No legal marriage could be contracted by slaves under civil law, yet it recognized a relation between them, which was termed contubernium, and, although this relation conferred no civil rights upon the parties, yet, when they became free, their children being free, although born in slavery, could inherit from each other and from their parents.

Id.

45. THE OXFORD ENGLISH DICTIONARY 856 (2d ed. 1989).

46. SLAVERY RACE, *supra* note 16, at 61-62. The author quotes George M. Stroud as saying:

> [A] slave cannot even contract matrimony - the association which takes place among slaves, and is called marriage, being properly designated by the word contubernuim - a relation which has no sanctity, and to which no civil rights are attached. "A slave has never maintained an action against the violator of his bed. A slave is not admonished for incontinence, or punished for fornication or adultery; never prosecuted for bigamy, or petty treason for killing a husband being a slave, any more than admitted to an appeal for murder."

Id.

47. *See, e.g.*, Laws of the State of Maryland, 1777 Md. Laws, Chapter 12, Section XI.

48. George B. Cheever, D.D., *The Fire and Hammer of God's Word Against the Sin of Slavery, Address at the Anniversary of the American Abolition Society* (May, 1858), *in* JACKSON MISCELLANIES No. 84, June 1, 1999, *available at* http://www.earlyrepublic.net/jm990601.htm (last visited Nov. 6, 2005).

49. *Id.*

50. *Id.*

slaves who formed longstanding contubernal relationships were rewarded upon emancipation with legislatures in a number of jurisdictions legalizing their relationships as valid marriages, thereby legitimizing the children born of those relationships.

Typically, slave couples did not solemnize their contubernal relationships with traditional wedding ceremonies performed by a clergyman or by a justice of the peace in a church or meeting hall. In many instances, slaves developed their own solemnization ceremonies.[51] The American public, both black and white, was introduced to the slave wedding tradition of "jumpin' the broom" by Alex Haley in the novel and subsequent ground-breaking television mini-series *Roots*.[52] In *Roots*, Haley vividly described the marriage ceremony of the slave couple, Bell and Kunta Kinte.[53] Prior to the wedding, the couple sought and obtained requisite approval of the marriage from the plantation's master.[54] As was the custom at slave weddings, the ceremony was performed in the garden by the plantation's laundress.[55] The formal joining of the slave couple was then solemnized by symbolically jumping over a household broomstick.[56] This ritual was described by Haley:

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51. ALEX HALEY, ROOTS 325-26 (Doubleday & Co., Inc. 1976). The groundbreaking television mini-series, *Roots*, was aired by ABC-TV in January 1977.

52. *Id.*

53. *Id.*

54. This practice was depicted in ROOTS:

> Massa ain't want to believe me when I tol' 'im," Bell said to Kunta. "But he finally say he feel us ought to think on it for a spell yet, 'cause peoples gittin' married is sacred in de eyes of Jesus. To Kunta, however, Massa Waller said not a word about it during the next few weeks. Then one night Bell came running out to Kunta's cabin and reported breathlessly, "I done tol' 'im we still wants to marry, an he say, well, den, he reckon it's awright!"

HALEY, *supra* note 51, at 324 (1976); *See* STAMPP, *supra* note 14, at 341 (noting that once slaves obtained the consent of their masters, they could immediately begin living together or wait and have a more formal solemn ceremony, sometimes accompanied by a feast and gifts for the bride); Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW AND INEQ. 187 (July 1987) (explaining that the marriage ceremony was usually performed by the master or a black preacher, and the Christian marriage ceremony for the slaves was the same as for whites except for the promise of permanence of the union). It was also a practice for couples to set up housekeeping with the master's consent, but without a ceremony. *Id.*

55. *See* COURTNI C. WRIGHT, JUMPING THE BROOM (1994) (providing a fictional account of a broom jumping ceremony). "Finally, it's time for Tillie and Will to jump over a broom lying on the ground. Mama says that the broom is for sweeping away their past lives as they begin a new life together. Grandma Sadie says it sweeps away evil spirits, too."
Id.

56. PAUL FINKELMAN, WOMAN AND THE FAMILY IN A SLAVE SOCIETY (Garland Pub. 1989), (citing Orville W. Taylor, *'Jumping the Broomstick': Slave Marriage and Morality in Arkansas*, ARK. HIST. Q. 17 (1958)) (noting that

> [S]olemnly, Aunt Sukey placed a broomstick on the close-cropped grass just in front of Kunta and Bell, whom she now motioned to link their arms. . . . and then, as if from afar, he heard Aunt Sukey asking, "Now, ya'll two is sho' you wants to git married?" . . . And then Aunt Sukey said, "Den, in de eyes of Jesus, y'all jump into de holy lan' of matrimony." Kunta and Bell jumped high over the broomstick together, as Bell had forced him to practice over and over the day before.[57]

Even after emancipation, many African-American couples incorporated this ritual into modern wedding ceremonies as an affirmation of their heritage.[58] The adoption of this ritual into modern marriage ceremonies is quite ironic in light of its true significance as a ritual born from desperation in the face of both societal and legal prohibitions.

The putative slave marriages were almost unclear from the type of marital unions described by the Supreme Court in *Griswold v. Connecticut*.[59] Justice Douglas noted in *Griswold* that the modern marital relationship reflected the joining of two people for the purpose of building a synergetic family unit:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[60]

The purpose of the slave marriage was not solely aimed at fostering a loving relationship between two individuals. Although slave wedding ceremonies incorporated elements of christianity, the marriages were neither recognized by the government nor sanctioned by the church. Instead, approval of the union by the plantation owner was merely a license to breed, a wealth-generating mechanism used by plantation owners to increase the number of slaves for their ownership and control.[61] Slave codes

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'jumping the broomstick' is one type of informal slave marriage ceremony, while others consisted of writing the names of the married slaves in the family bible and admonishing the couple to refrain from 'fussin' and 'fightin'). Other ceremonies were just as formal as those of white people. *Id.*

57. HALEY, *supra* note 51, at 325 (1976).

58. HARRIETTE COLE, JUMPING THE BROOM: THE AFRICAN-AMERICAN WEDDING PLANNER 10-11 (1st ed. 1993).

59. 381 U.S. 479 (1965).

60. *Id.* at 486.

61. *See* GOODELL, *supra* note 1, at 9 (noting this same doctrine has always been held, though differently enunciated, in the South). "Slave-mothers are there licensed by their masters to be 'breeders,' not wives; and thus they are retained as slaves." *Id. See generally* Pamela D. Bridgewater, *Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 WASH. & LEE RACE & ETHNIC ANC. L.J. 11 (2001) (discussing the systemic reproductive exploitation of slave women during the Antebellum period).

prevented slaves from obtaining marriage licenses, prevented clergy from performing marriage ceremonies for enslaved Africans, or protecting the sanctity of the marriage bed.[62] Plantation owners were free to sell off either spouse or the offspring of the slave couple with impunity.[63] It is no secret that slave owners routinely engaged in forced as well as consensual sexual relations with slave women, notwithstanding the marital status of the women.[64] The illegitimacy of slave marriages extended beyond the boundaries of the plantation.

Abolitionists drew upon the illegitimacy of slave relationships and their offspring to address not only the illegality but the immorality of slavery as an institution.[65] Cheever argued that plantation owners who not only fostered but benefited from the

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62. GOODELL, *supra* note 1, at 91 ("A slave has never maintained an action against the violator of his bed. A slave is not admonished for incontinence, or punished for fornication or adultery; never prosecuted for bigamy, or petty treason for killing a husband being a slave, any more than admitted to an appeal for murder.").

63. *See generally* GOODELL, *supra* note 1 (discussing the application of slave codes and their effects).

64. *See* Bridgewater, *supra* note 61, at 91. (noting the slave owner's right to have sexual relations with their slaves). The author states:

> Slave owners were granted carte blanche to rape and impregnate their slaves. Since slave owners had unfettered sexual access to their slaves, a slave owner was able to be the biological father and owner of many slave children. This state of the law made sexual assault a wise investment strategy for a cash-strapped slave owner who was interested in increasing the number of his slaves. In order to create a viable slave system supported by the reproductive capacities of female slaves, it was necessary to deny legal protection against sexual assault to female slaves.

Id. See also Stephanie L. Phillips, *Claiming our Foremothers: The legend of Sally Hemings and the tasks of Black Feminist Theory*, 8 HASTINGS WOMEN'S L. J. 401, 403 (1997) (noting the effects of relationships between slave women and their masters). The author states:

> Of the innumerable stories that have been told by African American women about sexual relationships between slave women and white men, only those that illustrate a paradigm of sexual oppression are usually treated as relevant to black feminist theory. This is problematic because other stories, wherein slave women have loving or ambivalent relationships with their masters, have present-day implications for black feminist theory and politics. Specifically, stories about love between master and slave present the question whether racial hierarchy can sometimes be transcended in the context of intimate relationships. Other stories, such as those about slave women who have ambivalent, perverse relationships with their masters, present the question whether black women form corrupt attachments to white men, to the detriment of 'the race,' in general, and black men, in particular.

Id.

65. Cheever, *supra* note 48.

illegitimacy of quasi-marriages between the slaves were directly contradicting the teachings of the Christian church:

> By our laws providing that the slave and its increase shall be deemed and doomed our personal chattels forever, we constitute for them a millennium of sin and misery. We convert them into a community, in which it is impossible that the fundamental laws of Christianity should be recognized and obeyed, or the most commonly acknowledged and most sacred institutions of the Christian state be regarded. The laws of God for husbands, wives, fathers, mothers, sons, daughters, children, can not be applied, can not be obeyed, in such a community. "Husbands, love your wives," is a divine injunction. But for those most miserable outcasts of humanity, the American slaves, there can be no such law, but an admonition against it. God's claims, so expressed, interfere with man's property in man. Husbands, beware of imagining that you have any rights, any authority, in regard to the chattels you are permitted to live with; beware of ever so loving them as to be unwilling to sacrifice them at a moment's warning to the avarice, the need, or the passions of your owners. Ye are not permitted to love, but only in subjection to the price of the market, the necessities of your master, and the grand rule of your domestic institution, the slave and its increase.[66]

An analogy can be drawn in contemporary society between slaves and same-sex couples regarding the creation of unique ceremonies to solemnize union relationships in the absence of a venue for legal recognition. The 'jumpin' the broom' ceremony is similar in nature to commitment ceremonies engaged in by same-sex couples. Prior to the Massachusetts decision in *Goodridge* and the marriage free-for-all sparked by San Francisco's Mayor Gavin Newsom, commitment ceremonies were a common way for same-sex couples to publicly recognize and celebrate their unions.[67]

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66. *Id.*

67. Tami Min, *Same-sex Couples Get Married in Droves and Hundreda Wed at San Francisco City Hall as Conservatives Push for Court Intervention*, MIL. J. & SENT., Feb. 15, 2004, at 14A. "About 500 people were lined up Saturday morning outside City Hall to secure marriage licenses – and then take each other as 'spouse for life' in brief vows that have given San Francisco's seat of government the feel of a Las Vegas wedding chapel." *Id.* Lisa Leff, *Gay Couples Marry in San Francisco; City's Mayor, Other Officials Protest Existing Marriage Law by Granting Licenses*, DAILY TEXAN, Feb. 13, 2004, at 1A. "In an open challenge to California law, city authorities performed scores of same-sex weddings Thursday and issued a stack of marriage licenses to gay and lesbian couples." *Id. See* Stephanie Chavez & Nicholas Riccardi, *California; All They Need is Love; Gays Flock to San Francisco and Straights Descend on Santa Ana for Valentine Wedding Licenses*, L.A. TIMES, Feb. 15, 2004, at B1. (noting the San Francisco clerk's office remained open throughout the weekend for same sex-marriages based on equal protection in the state's constitution). "Between Thursday and the end of the day Saturday, more than 1,000 gay couples had converged on Beaux Arts City Hall to get married. The court fight over whether their licenses will be legally binding documents is

Unlike the 'broom' ceremony, there is no symbolic icon used when conducting a commitment ceremony.[68] Typically, the couple designs the ceremony to fit their own unique characteristics and wishes.[69] The Episcopal Church in Vermont has recently created a unique ceremony specifically designed to solemnize same-sex unions.[70]

Same-sex couples lack the ability to enter into civil marriages, except in the state of Massachusetts, but they do not lack the ability to contract because of their recognized legal status as individuals.[71] As a result, unlike the slave population, same-sex couples can obtain many protections afforded to married couples, such as joint bank accounts, joint tenancy home ownership, living wills, powers of attorney, and adoption of each other's children.[72] Although both groups mimicked traditional marriage ceremonies, same-sex couples have greater protections even for their putative relationships than slaves did.

IV. ORIGIN OF THE RIGHT TO MARRY

This Part of the Article will examine the legislative and judicial models used by a number of states during both the antebellum and postbellum periods to determine the extent to which those jurisdictions would confer rights upon the contubernal relationships formed by slaves. This examination will focus on the eleven states of the Confederacy, the border states of Maryland,

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scheduled to begin Tuesday." *Id.*

68. *See* Holly Norton, *The Wedding*, NEWS J., May 12, 2004, at 14, 15A. (noting that gay and lesbian "commitment ceremonies" opening with a greeting by the couple or the officiant welcoming the guests and mentioning their relationship and commitment in general). "What's interesting here is that couples who perform the greeting can use this opportunity to say something personal and meaningful to guests at the start of the event. The result is a powerful and emotional opening that will set the tone for a ceremony." *Id.*

69. *Id.*

70. Kevin Eckstrom, *Episcopalians Unveil Rites for Gay Unions*, TIMES UNION, June 19, 2004, at B10. The author notes:

> The new ceremonies include the traditional vows 'to have and to hold from this day forward, for better, for worse; for richer, for poorer . . .' The prayers of the priest ask God to 'let their love for each other be a seal upon their hearts, a mantle about their shoulders, and a crown upon their foreheads.

Id.

71. *Goodridge*, 798 N.E.2d at 941.

72. *See generally* Jill Schachner Chanen, *The Changing Face of Gay Legal Issues: Lawyers Advising Clients Face Uncertainties on Issues Ranging from Parental Rights to Estate Planning*, 90 A.B.A.J. 46 (2004) (proclaiming that the same-sex marriage laws are so rapidly changing that the judiciary's response lacks uniformity); Matthew R. Dubois, *Legal Planning for Gay, Lesbian, and Non-Traditional Elders*, 63 ALB. L. REV. 263 (1999) (urging specialized to negate the inherent bias in the law facing homosexual couples).

Missouri and Kentucky, and several states that remained loyal to the Union including New York, Illinois, Ohio, and the District of Columbia.[73]

The first section of Part IV will identify and examine jurisdictions that conferred legal recognition upon slave marriages. The second section of Part IV will focus on states that relied upon the dormancy model, which viewed slaves as incapable of contracting marriage while in a state of bondage. Dormancy states will be further distinguished by the way in which they implemented this model. Some jurisdictions immediately recognized the legality of slave marriages upon the emancipation of the slave. Other jurisdictions required the passage of curative legislation before conferring legal status on slave marriages.

The third section of Part IV will analyze states that adopted repudiation models which, following the end of the Civil War, allowed slaves to either confirm or abandon antebellum relationships. The final slave marriage legalization model in this section of the Article examines states that conferred the right to marry only upon the passage of legislation granting freed slaves the right to marry.

A. Legal Recognition Model

Slaves who resided in Northern states could avail themselves of the highest legal recognition of slave marriages. For example, in 1809, the New York legislature legalized slave marriages.[74] No longer recognized as mere contubernal relationships or quasi-marriages, the legislature, in contravention of common law, passed the Act of February 17, 1809 which provided: "all marriages contracted or which may hereafter be contracted, wherein one or more of the parties was, were, or may be slaves, shall be considered equally valid, as though the parties thereto were free, and the child or children of any such marriage shall be deemed legitimate . . . ."[75]

The Supreme Court of New York in *Jackson v. Lervey*, cited "sound policy and a regard to the public morals" as the reasons underlying the legislature's departure from the traditional treatment of slave relationships.[76] The court broadly interpreted the language of the Act, and held that it legalized not only marriages in existence at the passage of the Act, but also applied

73. DAVID HERBERT DONALD, LINCOLN (Simon & Shuster 1995).

74. Act of Feb. 17, 1809 N.Y. Laws (legalizing slave marriages).

75. *Id.* The only limitation on the applicability of this statute was that the right to marry was not "deemed or construed to manumit any such slave or slaves." *Id. See* Marbletown v. Kingston, 20 Johns 1, 2-3 (1822) (noting that the Act does not "operate as an emancipation").

76. Jackson v. Lervey, 5 Cow. 397, (N.Y. Sup. Ct. 1826).

retroactively to legalize marriages that terminated upon the death of a spouse prior to the passage of the Act.[77]

Tennessee was the only Confederate state which recognized that slaves, notwithstanding their inability to contract, were entitled to a limited right to marry.[78] The idea that slaves were merely chattel was rejected as inconsistent with the state's "enlightened" position that the legislation and jurisprudence of Tennessee was "shaped with a view to ameliorate the condition of the slave, and to protect him against the tyranny or cruelty of the master and all other persons."[79] The rules governing slave life in Tennessee incorporated the slave's personhood into the bondage relationship and modified slaves' legal status to that of an "agent of their owners."[80] The Supreme Court in *Andrews v. Page*, noted that "under our modified system of slavery, slaves are not mere chattels, but are regarded in the two-fold character of persons and property . . . ."[81] In furtherance of this paternalistic approach to slavery, Tennessee adopted a form of "*de facto*" marriage which gave slave couples a limited opportunity to enjoy the benefits of traditional marital unions.[82]

The Tennessee Supreme Court in *Brown v. Cheatham* noted that standard objections to slave marriages such as the "want of freedom of will and of the paramount duties of the slave to his owner"[83] had no applicability when the "owners have consented to the marriage."[84] Once consent was granted, "the marriage of slaves is a valid and legal marriage, and the issue legitimate."[85] Not only was consent a necessary prerequisite to legalize the marriage, it was also required before the slave marriage could be dissolved.[86]

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77. *See id.* (declaring retroactive validity and legitimacy to both pre-Act marriages and children).

78. *Andrews*, 50 Tenn. at 662

79. *See id.* (concluding that "numerous authorities . . . show that slaves, although regarded as property and subject to many restrictions, never were considered by the courts of this State as standing on the same footing as horses, cattle, and other personal property").

80. *Id.* Slaves have certain rights even though they are the agents of their owners and not always in service. *Id.*

81. *See id.* (asserting that Tennessee's modified slavery system dictates that slaves are "persons" with certain rights that are granted to them by law and through owner consent).

82. *See* Brown v. Cheatham, 17 S.W. 1033, 1034 (1891) (asserting that slaves could indeed commence a "*de facto*" marriage whereby many of the statutory marriage effects obtain) (emphasis in original).

83. *Id.*

84. *Id.*

85. *Id.*

86. *See id.* at 1034-35 (emphasizing the absolute necessity of owner consent in slave marriage dissolution). In addition, the court stated, "[t]he permanent separation of a slave couple by act of the master, though not consented to by the parties, as where the husband or wife was sold to another state, operated necessarily to dissolve the relation." *Id.*

Following emancipation of the slaves and the passage of the Thirteenth Amendment, the owner's consent no longer governed the formation or dissolution of slave relationships. Tennessee affected the postbellum ratification of slave marriages with the passage of the Act of 1866.[87] The impact of the Act of 1866 on slave relationships was two-fold. First, Section Five of the Act ratified *de facto* slave marriages and legitimized the children borne of those relationships.[88] The Act provided, in pertinent part:

> That all free persons of color who were living together as husband and wife in this State, while in a state of slavery, are hereby declared to be man and wife, and their children legitimately entitled to an inheritance in any property heretofore acquired or that may hereafter be acquired by said parents, to as full an extent as the children of white citizens are now entitled, by the existing laws of this State.[89]

Second, the most significant impact of the Act was the grant of equal rights to freed persons of color residing in Tennessee.[90] These rights included "the right to make and enforce contracts, to sue and be sued, to be parties and give evidence, to inherit and to have full and equal benefits of all laws and proceedings for the security of person and estate . . . ."[91] Inherent in the granting of the right to contract was the right to marry in accordance with the laws of Tennessee.[92]

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87. Act of May 26, 1866, Sec. 5, 1866 Tenn. Laws (defining the term "free person of color" and to declare the rights of such persons). The act included legitimizing the children of slaves. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. Questions about the validity of slave marriages arose in both civil and criminal contexts. *See* McReynolds v. State, 45 Tenn. 18 (1867) (appealing slave's conviction for bigamy arising from multiple marriages entered into prior to his emancipation). While in a condition of slavery, the plaintiff married a slave in 1856 with the consent of their respective owners. *Id.* They lived together until approximately January 1, 1867. *Id.* Thereafter on January 17, 1867, plaintiff, having been emancipated, obtained a marriage license, and married a freed slave. *Id.* The Court in *McReynolds* held that "municipal law did not recognize the rites of marriage between slaves." *Id.* at 20. This portion of the opinion was clearly in error, and overturned by the Supreme Court of Tennessee three years later. *Andrews v. Page*, 50 Tenn. 653 (1870). Subsequent to emancipation, however, the Court noted that slave marriages could become legally binding upon ratification by examining the antebellum and postbellum state of mind of the slave couple. *McReynolds*, 45 Tenn. at 22. The common law articulation of the ratification test required "the declared assent of the mind to the act of marriage, which makes it legal. Such as declare their assent shall be bound." *Id.* This approach was codified in the Act of May 26, 1866, which ratified dormant slave marriages where the relationship remained viable after emancipation and legitimized the children born of such relationships. *Id.* at 24-5. Having determined that the lower court

B. Dormancy Model

The right of slaves to marry in a number of jurisdictions was not created by legislative or judicial action, but was restored to slaves upon either their emancipation or as a result of curative legislation enacted at the end of the Civil War. In these jurisdictions, courts focused on the diminished status of slaves arising from their lack of contractual capacity. The judiciaries and legislatures in these jurisdictions adopted natural rights principles when determining that slaves had the right to enter into intra-racial marital relationships, but lacked the ability to exercise that right by legalizing those relationships. This right remained dormant or inactive until the disability was removed through emancipation or curative legislation.[93]

1. Emancipation

Louisiana adopted a form of the dormancy model as early as 1819 with the decision of *Girod v. Lewis*.[94] With that decision, the Louisiana Supreme Court established the basis for moral marriage which included an agreement between the slave couple with the master's consent.[95] Such marriage did not "produce any civil effect," but it was a departure from the prohibition on slave marriage codified in 1807.[96] In 1819, *Girod* noted that:

> Emancipation gives to the slave his civil rights, and a contract of marriage, legal and valid by the consent of the master and moral assent of the slave, from the moment of freedom, although dormant during the slavery, produces all the effects which result from such contract among free persons.[97]

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erroneously applied the law governing slave marriages, the Tennessee Supreme Court reversed the conviction and ordered a new trial to determine whether the first slave marriage was ratified after emancipation and thus valid at the time the plaintiff entered into his second marriage. *Id.* at 26.

93. *See generally* Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 272 (1999)(indulging wholesale in the legal fiction underlying dormancy doctrine believing that they could conduct inquiries into the permanence and stability of relationships defined by law as transitional and unstable). Significantly, these statutes legitimized the children born from these relationships, terminating claims able to be made against the state for support. *Id.* The disciplinary effects of these statutes on black sexual relationships exposed the newly freed to prosecutions for bigamy, adultery, and fornication accompanied by cultural condemnations of promiscuity and uncivilized behavior. *Id.*

94. *Girod v. Lewis*, 6 Mart. 559, 559-60 (1819).

95. *Id.*

96. *Id.* The Act of 1807 prohibited both slave and freed blacks from not only marrying, but celebrating such unions. *See* An Act Concerning the Celebration of Marriages, Ch. 13 § 17 (1807) (noting that "free persons and slaves are incapable of contracting marriage together, the celebration of such is forbidden, and the marriage is void.").

97. *Girod*, 6 Mart. at 559-60.

After *Girod*, the Louisiana legislature modified its stance on slave marriage, and in 1825 adopted Civil Code Article 182 which provided that "slaves cannot marry without the consent of their masters, and their marriages do not produce any of the civil effects which result from such contracts."[98] It was these 'moral marriages' that were recognized by the Louisiana legislature and judiciary as worthy of legalization upon the emancipation of slave couples.[99]

Following the Civil War and emancipation, the Louisiana legislature legalized moral marriages that were entered into in either "private or religious" ceremonies.[100] Louisiana imposed the additional requirement that the moral marriage had to be in existence "at the time the emancipation takes place."[101] Once emancipated, the civil consequences of the moral marriage became effective, and related back "to the date of the original marriage."[102]Using the Louisiana decision of *Girod* as their guide, the following states (listed alphabetically) adopted similar dormancy models in which emancipation was viewed as the triggering event necessary for restoring the right to marry upon newly freed slaves: Alabama,[103] Maryland,[104] Missouri,[105] and

98. Louisiana Civil Code of 1825, Article 182 (1825).

99. *Id.*

100. Act of 1868, § 1, An Act Relative to Marriages (providing that all private or religious marriages contracted in this State prior to the passage of this act shall be valid and binding and have the same force and effect as if the marriages had been contracted as prescribed by the laws then existing). The Act of 1868 then provided that slave couples were required to acknowledge their moral marriage before a notary public or other authorized governmental entity before 1870. *Id.* However, Louisiana courts did not strictly construe this provision. In 1882, the Louisiana Supreme Court in *Ross v. Ross*, 34 La. Ann. 860, 862 (La. 1882), found that a slave couple who morally married in 1842, with the consent of their owner, and later continued to live together after emancipation, were legally married notwithstanding their failure to comply with the declaration requirements of the 1868 Act. The same result was reached in 1910 in the *Succession of George Devezin*, 7 Orleans App. 111, 1910 (La.App.Orleans 1910), where the Louisiana Court of Appeals held that:

> Constant cohabitation or living together after emancipation has been held to be sufficient proof of ratification by conduct, and it is doubtful whether ratification by formal declaration before a notary public in conformity with the Act of 1868 is at all necessary in a case where there has in fact been a slave marriage formally and publicly celebrated with the consent and approval of the master.

Id.

101. Pierre v. Fontenette, 25 La. Ann. 617, (La. 1873).

102. *Ross*, 34 La. Ann. at 862 (noting that the civil effects of such marriages were dormant during slavery, and that emancipation operated not a creation or birth of such rights, but merely an awakening of them).

103. Alabama engaged in a circuitous path before recognizing the legitimacy of slave marriages. In 1854, the Alabama Supreme Court held that relationship between slaves was merely contubernal unions that were "not marriage, or evidence of marriage." Malinda and Sarah v. Gardner, 24 Ala. 719 (Ala. 1854). Sixteen years later the Court's perspective on this issue

underwent a dramatic change. In *Stikes v. Swanson*, 44 Ala. 633, 636 (Ala. 1870), the Alabama Supreme Court overturned its previous decisions on this issue, and recognized "legal quasi marriages" between slaves. One reason underlying the decision in *Stikes* may be that Alabama's slave code also acknowledged that slaves were persons, as well as items of property, and as such the court sought to grant to slaves a modicum of the natural rights that slavery stripped away. *Id.* at 636-37. Although this decision was short lived, the Court in *Stikes* held that the condition of bondage did not deprive slaves of their "natural right" to marry. *Id.* at 636. In *Stikes*, the court adopted the dormancy model of Louisiana's decision in *Girod*, and held that "[e]mancipation has restored the former slave to his natural rights. The reason of the old cases is overturned, and the constructions upon which they rested fail to do justice to the citizen. This of itself is a sufficient reason to abandon them." *Id.* at 637. The *Stikes* decision was followed six years later by *Cantelou v. Doe*, 56 Ala. 519, 521-22 (Ala. 1876), which overturned *Stikes* and reaffirmed the longstanding principle that the slave was incapable of entering into any contract, not excepting the contract of marriage. *See generally* KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 192 (1956) (noting Alabama's legal code of 1852 had two clauses that recognized the dual nature of the slave). The first clause confirmed his status as property and required his obedient compliance with all lawful commands. *Id.* Masters relied upon the law of the state to use its power against white men who 'tampered' with their bondsmen, and against bondsmen they could not subdue. *Id.* "Courts, police, and militia were indispensable parts of the machinery of control." *Id.* The second clause acknowledged the slave's status as a person. *Id.* The law required that masters be humane, furnish adequate food and clothing, and provide care during sickness and old age. *Id.* The state endowed masters with duties as well as rights and assumed some responsibility for the welfare of the bondsmen. *Id.*

104. The state of Maryland addressed the issue of slave marriages one year after the Declaration of Independence was signed. The Act of 1777 permitted slaves to marry upon receipt of their master's consent. Act of 1777, Ch. 12, § XI. The act states:

> That if any Minister shall willfully publish the Banns of Marriage between any Servants, or between a free Person and a Servant, or if he shall willingly celebrate the Rites of Matrimony between any such, without Leave of the Master or Mistress of such Servant, he shall forfeit and pay for every Offense fifty Pounds current Money.

Id.

Although Maryland courts recognized the limited validity of these marriages, the slave's incapacity served as an impediment to civil recognition of the marriage. *Id. See Jones*, 36 Md. at 455 (Md. 1872) (noting that the Act of 1777 authorized slaves to marry with the assent of their owners even though the marriage would not confer civil rights upon them or affect the relation of master and slave); *See also* David Jones v. Henry Jones, 45 Md. 144, (Md. 1876) (noting that the Act of 1777 prohibited ministers from performing marital celebrations between servants or a servant and a free person without the master's consent, but did not declare, or by operation of law, make the marriage void). "The minister subjected himself to a fine, but the marriage was valid." *Id.* at 159. Following emancipation, Maryland analogized slave marriages to those of other persons lacking capacity such as "lunatics and infants," and treated the rights associated with these relationships as dormant until such time as slaves were freed and capable of exercising civil rights. *Jones*, 36 Md. at 456. Once vested with civil rights upon emancipation, slaves

Texas.[106] The states of Alabama,[107] Maryland, and Missouri

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were permitted to ratify these marriages by continuing to "live together as husband and wife" without "any other or new celebration." *Id.* Unable to marry, slaves lived together in a peculiar relation called contuberium, which conferred no civil rights, but once emancipated, the offspring of this connection were capable of inheriting from each other and from their parents. *Id.*

105. Many state legislatures passed postbellum legislation that ratified slave marriages after emancipation as long as the relationships continued after passage of the acts. Missouri, however, took a different approach. The Missouri legislature passed an Act that imposed an obligation upon slave couples who lived together in a marital relationship to solemnize their relationship and record notice of the same with the county recorder. *See* Act of February 20, 1865, Miscellaneous: Marital Rights, An Act in relation to the marital rights and children of colored persons (imposing an obligation upon slave couples who lived together to solemnize their relationship and record notice with the county recorder). The Act of 1865 provided in pertinent part:

> That in all cases where persons of color heretofore held as slaves in the State of Missouri have cohabited together as husband and wife, it shall be the duty of persons thus cohabiting to appear before a justice of the peace of the township where they reside, or before any other officer authorized to perform the ceremony of marriage, and it shall be the duty of such officer to join in marriage the persons thus applying, and to keep a record of the same.

Id. at § 1.

The Missouri Act required slave couples to comply with its terms on or before February 1866, or risk liability from a criminal prosecution. *Id.* at § 6. In 1920, the Missouri Supreme Court in *Erwin v. Nolan* interpreted the requirements imposed on slave couples after emancipation. 217 S.W. 837 (Mo. 1920) (holding that when confirmation by cohabitation or otherwise was present, substantial grounds existed for declaring a marriage binding). The court in *Erwin* recognized the validity of both common law ratification of dormant slave marriages as well as the statutory mandate of the Marriage Act of 1865. *Id.* The court in *Erwin* stated:

> If, therefore, persons in bondage lived together as husband and wife and during that status were married according to the usage established for the marriage of slaves, their subsequent mutual acknowledgment of the relation after their emancipation should be held to complete the act of matrimony so as to make them lawfully married from the time when their living together as husband and wife commenced.

Erwin, 217 S.W. at 841.

106. Until judicial and legislative recognition of slave marriages became the norm, Texas viewed these relationships as contubernal. *See* Timmins v. Lacy, 30 Tex. 115, 136 (Tex. 1867) (discussing the effect of emancipation on the rights of slaves to contract and marry). The court in *Timmins* stated

> Contubernism was the matrimony of slaves; a permitted cohabitation, not partaking of lawful marriage, which they could not contract. . . . The progress of society in civilization, more correct notions on the subject of moral obligation, and, above all, the benign influence of the christian religion, have softened many of the rigors attendant on slavery among the ancients. But the rights of the slave, in respect to marriage and the acquisition of property by way of inheritance, remain substantially on the same ground. These authorities show very conclusively that the permitted cohabitation existing formerly among our slave population did not partake of lawful marriage. If we could say the legal rights of husband and wife, parent and child, spring from these connections, it

> must also be held that corresponding disabilities flow from them, many of which are of a severely penal character, affecting almost this entire portion of our population.

Id.

The dormancy model adopted in the Louisiana decision in *Girod* served as guidance for the Supreme Court of Texas when it initially addressed this issue in *Timmons*. Under this model, the validity of the marriage was determined by examining several elements, including whether the parties continued to cohabit as husband and wife after emancipation. *See* Cumby v. Garland, 25 S.W. 673, 675 (Tx. 1894) (concluding that the marriage of appellant's father and mother was rendered complete and valid by the voluntary continuance of the relation of husband and wife after their emancipation); Coleman v. Vollmer, 31 S.W. 413,414 (1895) (holding that appellant and his wife were incapable of forming or entering into the marriage contract while slaves but they recognized and ratified the marriage relation when emancipated, and again when the constitution and law of their state proclaimed that they were man and wife). The court in *Timmons* held:

> [M]ost certainly emancipation can have this effect only in such connections as are existing between slaves at the time it takes place. Indeed, the only ground upon which the decision can be maintained is that the assent manifested by their continued cohabitation, after acquiring capacity to contract, gives validity to the existing relation, sanctioned by moral, though not by legal obligation.

Timmons. 30 Tex, at 115.

In 1869, the validity of slave marriages was finally resolved by the Texas legislature with the adoption of the Constitution of 1869. TEX. CONST. art. 12, §27 (Vernon 1869). This statute validated the marital relations of former slave couples where the couples continued to cohabit at the time of passage of the Constitution. *Id.* It also applied retroactively to validate slave marriages where one of the spouses died prior to the passage of the curative legislation. *Id.*

107. In 1867, the Alabama legislature finally addressed the legalization of slave marriage by passing the Act of November 30, 1867 which retroactively ratified marriages entered into by slaves prior to emancipation. In conjunction, ordinance No. 23 provided that as long as slave couples continued to live together "as man and wife," at the passage of the Act of November 30, 1867, such marriages were "hereby ratified and made valid." An Ordinance of September 29, 1865, No. 39, p. 64 (adopted as Revised Code of Alabama, No. 39) (ratifying marriages between freedmen and freedwomen). The ordinance states in part:

> All marriages between freedmen and freedwomen, whether in a state of slavery or since their emancipation, heretofore solemnized by any one acting or officiating as a minister, or any one claiming to exercise the right to solemnize the rites of matrimony, whether bond or free, are hereby ratified and made valid, provided the parties are now living together as man and wife; and in all cases of freedmen and freedwomen who are now living together recognizing each other as man and wife, be it ordained that the same are hereby declared to be man and wife, and bound by the legal obligations of such relationship.

Id.

In *Washington v. Washington*, 69 Ala. 281 (1881), the Supreme Court of Alabama was the first court in the state to thoroughly address this issue. The Alabama Legislature codified the dormancy paradigm in 1867 when it passed the Act of November 30, 1867 which provided that "freedmen and women who shall now be living together as man and wife, shall be regarded in law as man

adopted similar philosophical approaches to restoring the right to marry for emancipated slaves.[108] Typically, antebellum and postbellum laws and jurisprudence viewed slave marriages as merely contubernal unions that were "not marriage, or evidence of marriage."[109] Relying upon the dormancy paradigm, courts analogized the right of slaves to marry with the rights associated with infants and lunatics.[110] Characteristic of all three groups, the right to marry was viewed as "inchoate and imperfect," pending removal of the relevant infirmity.[111] In the case of slaves, emancipation restored their complete bundle of civil rights, and the slave couple was therefore deemed husband and wife.[112] The Missouri Supreme Court in *Johnson v. Johnson* concluded that:

> Emancipation gave to the slave his civil rights, and a contract of marriage, legal and valid by the consent of the master and moral assent of the slave, from the moment of freedom, although dormant during the slavery, produced all the effects which resulted from such a contract among free persons.[113]

2. *Legislation*

A number of jurisdictions recognized the marriages of freed slaves only after passage of legislation restoring the right to marry to these emancipated slaves. In these jurisdictions, the dormant

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and wife." Act of November 30, 1867 (regarding marriages between freedmen and freedwomen); Ordinance No. 23 of Convention of 1867, Session Laws of Alabama, 1868, page 175. This Act legalized marriages between freed slaves, legitimatized children of both "black and mixed color," and voided any "prosecutions for bigamy, adultery and fornication" instituted as a result of the purported relations. *Id.* The Ordinance of November 30, 1867 was extended until July 13, 1869 by the Act of December 31, 1868. Act Number 183 of Convention of 1867, Session Laws of Alabama, 1868, page 527.

108. *Id.*

109. *See* Malinda and Sarah v. Gardner, 24 Ala. 719, 724 (1854) (permitting cohabitation among slaves called contubernium, but not conferring civil rights). "It conferred no rights upon the offspring, and created no legal disabilities on the part of the father from forming a valid marriage, whenever he became in a condition which would authorize him to contract one." *Id.* at 704. In 1870, the Supreme Court of Missouri held that a marriage entered into by slaves "was absolutely void in legal contemplation." Johnson v. Johnson, 45 Mo. 595, 599 (1870). Although the court acknowledged the moral viability of slave marriage, the court, citing decisions from a number of jurisdictions, including Alabama and Kentucky, concluded that marriage between slaves was "necessarily incompatible with the nature of slavery . . . ." *Id.*

110. *Washington, 69 Ala. at 283*

111. *Id.*

112. *See id.* at 285-86. (citing the Louisiana decision in *Girod).* The court held that "emancipation gives to the slave his civil rights; and a contract of marriage, legal and valid by the consent of the master and moral assent of the slave, from the moment of freedom, although dormant in slavery, produces all effects which result from such contracts among free persons." *Id.*

113. *Johnson*, 45 Mo. at 600-01.

right to marry was triggered not by emancipation, but by legislative action. The states of Kentucky, Virginia, and South Carolina all followed this approach.

Slave couples living in Kentucky who joined together in putative antebellum marriages were not permitted to legally marry until February 14, 1866, when the state passed legislation specifically addressing this issue.[114] Section 2 of the Act of 1866 provided that such relationships would be deemed lawful marriages if the slave couple had "heretofore lived and cohabited, and do now live together as husband and wife . . . ."[115] The Act imposed an affirmative duty upon the slave couple to appear before the county clerk, pay a nominal fee, and declare "that they have been, and desire to continue, living together as husband and wife . . . ."[116] Upon the issuance of the certificate of declaration, the slave couple would have proof that their marriage was a legally recognized union, and that their children were legitimate.[117] The Court of Appeals of Kentucky noted:

The effect of their declaration was to legalize the customary marriage, and not to institute a new marriage between them. The statute declares that they shall be taken and held as legally married, and that their issue shall be held to be legitimate. The intention of the legislature was to protect and maintain, as far as possible, the domestic relations of that class of the population of the state, and in effect declared that their former cohabitation, when accompanied by an intention, expressed in the mode indicated in the statute, to continue the relation previously existing between them, should have the same effect as if they had been originally legally married.[118] Kentucky jurisprudence on the validity of slave relationships reflect the judiciary's recognition that the right of former slaves to marry was an important evolutionary step in the socialization and assimilation of former slaves into the postbellum legal framework of America. In *Ewing v. Bibb*,[119] the Court of Appeals of Kentucky noted:

> Hence when the *quasi* husband and wife by their emancipation became competent to contract marriage, the highest duty which they owed to themselves, their children, and to morality was to consummate and make perfect a union which had hitherto existed only by reason of the consent and approbation of their owners.[120]

Immediately following the general slave emancipation, the

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114. The Laws of Kentucky, Chapter 556, An Act in relation to the marriage of negroes and mulattoes, Act of February 14, 1866, page 37.
115. *Id.* The Act also legitimized children born of said relationships. *Id.*
116. *Id.*
117. *See* Stewart v. Munchandler, 65 Ky. 278, 281.
118. Dowd v. Hurley, 78 Ky. 260, 262 (1880).
119. Ewing v. Bibb, 70 Ky. 654 (1870).
120. *Id.* at 656.

legislatures of Virginia and South Carolina also passed curative statutes that conferred legal recognition upon putative slave marriages entered into during the Civil War.[121] The primary focus of legislation adopted by the aforementioned jurisdictions pertained to the standard of proof required to demonstrate the existence of a marital union worthy of legal recognition.[122]

The curative act passed by the Virginia legislature recognized marriages entered into by agreement of the parties, even absent a formal ceremony to solemnize the same.[123] The agreement to marry could be either express or implied by the "acts, conduct, and conversation of the parties."[124] When determining the existence of a slave marriage by implication, Virginia courts considered such factors as duration of cohabitation, reputation as married couple by members of community and extended family, public acknowledgment by couple of relationship to each other, and the conception and rearing of children during the union.[125] An express indication of a slave couple's intent to marry was generally demonstrated by their participation in a "jumping the broom" ceremony or some other informal public solemnization of their union by a preacher or the plantation's master.[126]

The legalization model adopted by the state of South Carolina was similar to Virginia's model in many respects. South Carolina's statute applied retroactively by recognizing that the right to marry laid dormant during the period in which slaves lacked the capacity

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121. *See* Scott v. Raub, 14 S.E. 178, 179 (Va. 1891) (stating that "as has been said, such a marriage is allowed a certain moral force, and may be confirmed after emancipation.").

122. *Id.*

123. Section 2, Chapter 18, Act of February 27, 1866, codified as Code of 1873, ch. 103, § 4, p. 941. The act states:

> [W]here colored persons . . . shall have undertaken and agreed to occupy the relation to each other of husband and wife, and shall be cohabiting together as such at the time of its passage, whether the rites of marriage shall have been celebrated between them or not, they shall be deemed husband and wife, and be entitled to the rights and privileges, and subject to the duties and obligations of that relation in like manner as if they had been duly married by law . . . .

Id.

124. Francis v. Francis, 72 Va. 283, 287 (1879). *See* Lemons v. Harris, 80 S.E. 740, 741 (Va. 1914) ("It is not necessary under the Act to prove an agreement . . . [but one] may be established by the acts, conduct, and conversation of the parties.").

125. *Francis*, 72 Va. at 287-88 (1879). *See* Fitchett and Als v. Smith's Adm'r and Als, 78 Va. 524 (1884) (holding that sufficient cohabitation as man and wife along with sufficient recognition of the father-child relationship were enough to legitimize the child); Smith v. Perry, 80 Va. 563 (1885) (concluding all that was needed to establish a marriage under the Act was an agreement by colored persons to carry on as husband and wife).

126. *Perry*, 80 Va. At 563.

to contract while in a state of bondage.[127] Additionally, South Carolina legalization statutes did not require slave couples to participate in any type of formal solemnization ceremony.[128] The marriages could be determined by either express agreement or by implication.[129] Finally, the statutory framework recognized that children born of such relationships were legitimatized, at least by the mother.[130]

The curative acts adopted by South Carolina's legislature differed from legislation passed by other jurisdictions because it only legalized "moral marriages" between freed slaves.[131] The

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127. An Act to Establish and Regulate the Domestic Relations of persons of Color, and to amend the law in relation to Paupers and vagrancy, Act of 1865, December 21, 1865, 13 Stat. 269.

128. *Id.*

129. *Id.*

130. *Id.* "Every colored child, heretofore born, is declared to be the legitimate child of his mother, and also of his colored father, if he is acknowledged by such a father." *Id.*

131. Subsequent to emancipation and the passage of the Act of 1865, South Carolina legalized putative slave marriages and legitimized children born from such unions. An Act to Establish and Regulate the Domestic Relations of persons of Color, and to amend the law in relation to Paupers and vagrancy, Act of 1865, December 21, 1865, 13 Stat. 269. "Every colored child, heretofore born, is declared to be the legitimate child of his mother, and also of his colored father, if he is acknowledged by such a father." *Id.* The Supreme Court of South Carolina addressed the constitutional validity of the Act of 1865 in *Davenport v. Caldwell*, 10 S.C. 317 (1878), and noted:

> The power of the State to remove disabilities which its own power had imposed, and of the Legislature to validate Acts which at the time, by reason of then existing laws, were null and void, is well recognized. Indeed, it is difficult to perceive real difference in principle, so far as the legislative power is concerned, between the Act of 1865 validating marriages entered into by slaves during slavery- slavery having, prior to the Act of 1865, been abolished by the Constitution of the State-between that Act and the Act of the Legislature in Connecticut validating marriages which by law were null and void *ab initio*.

Id.

In 1866, South Carolina repealed a portion of the 1865 Act, and later in 1872 completely repealed the 1865 Act. An act to declare the rights of persons of lately known as slaves and as free persons of color, Act of 1866, September 21, 1866, 13 Stat. 393. The Act of 1872, entitled "An Act legalizing certain marriages, and for other purposes therein mentioned," formed the framework for South Carolina's legislative and judicial efforts to confer legal status on slave marriages. *Davenport*, 10 S.C. at 330. The Act of 1872 provides, in pertinent part:

> All persons in this State who, previous to their actual emancipation, had undertaken and agreed to occupy the relation to each other of husband and wife and are cohabiting as such, or in any way recognizing the relation as still existing at the time of the passage of this Chapter, whether the rites of marriage have been celebrated or not, shall be deemed husband and wife, and be entitled to all the rights and privileges, and be subject to all the duties and obligations of that relation, in like manner as if they had been duly married according to

Supreme Court of South Carolina defined "moral marriages" as those relationships where by conduct or declarations, the "parties had agreed to occupy towards each other the relation of husband and wife."[132] In this context the only absent variable was the "power of contract to make it legal."[133]

The 1872 Act expressly distinguished "concubinage" relationships from "moral marriages," and indicated that persons living in concubinage unions were not entitled to legalization under these statutes.[134] The postbellum courts in South Carolina noted that concubinage relationships were based in part on an agreement to live together coupled with cohabitation based upon that agreement.[135] To identify a moral marriage, the courts focused on the aforementioned elements, but also evaluated the nature of the agreement reached between the couple to determine if they had the "moral intention to assume the duties incident to marriage."[136]

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law.

Davenport, 10 S.C. at 330.

132. *Clement v. Riley*, 11 S.E. 699, 701 (1890). *See also Roberson v. McCauley*, 39 S.E. 570, 573 (1901) (stating that it was well-known and universally acknowledged historical fact that slaves of different sexes were in the habit of entering into such relations, frequently through formal marriage ceremonies, and with the consent of their owners). "These relations, when thus assumed between slaves, are termed *moral* marriages, lacking only the power to contract to make them *legal* marriages." *Id.*

133. *Roberson, supra* note 132 at 573.

134. *See* Act of Mar. 12, 1872, S.C. CODE ANN. § 20-1-30 (2004) (indicating that the statute shall not be deemed to extend to persons who have agreed to live in concubinage after their emancipation). *See* Myers v. Ham, 20 S.C. 522 (1884)(explaining that only the intention of the parties to the slave marriage are controlling in determining its existence). The court stated:

> Now this question is not to be determined by what the neighbors and community considered them; but did Roanoke and Delia undertake and agree to occupy the relation to each other of husband and wife, and were they cohabiting as such? He says she did. She says she did not. I am disposed to think this is not the marriage contemplated by the act of 1872. Certainly Roanoke, by his own act, corroborates his wife. He did not consider Delia his wife, for he not only said he never married her, but has actually married another woman by the rites of the church. I must, therefore, conclude that these persons are properly in the words of the act as 'persons who have agreed to live in concubinage after their emancipation.'

Id.

135. Watson v. Ellerbe, 57 S.E. 855 (1907); Myers v. Ham, 20 S.C. 522 (1884).

136. *See Watson*, 57 S.E. at 856 (noting that the intent to create a marriage was controlling). The court stated:

> Suffice it to say here that it was a term applied to a relation between slaves who, although they had no power to make the marriage contract, yet came together and agreed to live as man and wife. The essence of such an agreement was that it be *bona fide* and that the parties act in accordance with it. Otherwise a moral marriage did not exist. The

Although curative, the statute's larger impact was that the legal recognition of these relationships related back to their antebellum formation. As long as the slave couple was able to satisfy the statutory requirements, the dormant rights inuring as a result of the marriage became effective upon the passage of the acts. In addition to the importance of this grant of one of the earliest civil rights, the legislative recognition of the marriage also legitimized the children born prior to the passage of the legislation, and permitted the legitimized children to gain paternal inheritance rights.

C. Repudiation Model

A number of Confederate states passed postbellum legislation recognizing the validity of slave marriages and legitimating the children born therefrom. These slave marriage statutes were simply drafted to reflect that following emancipation, marriages between slaves were automatically validated without further solemnization or license. The Supreme Courts of Illinois and Ohio, however, validated slave marriage only upon a showing that the marriage had not been repudiated by one or both of the parties following emancipation.[137]

In the seminal case of *Butler v. Butler*, the Illinois Supreme Court adopted the repudiation model to govern an intestacy dispute between the slave marriage widow and children borne of that relationship and the widow and children from the second marriage.[138] In this case, a slave, Allen Butler, married a freed woman in 1841.[139] The marriage lasted until 1851 when Butler was sold and relocated to Ohio.[140] In 1854, Butler, then a freed man, entered into a second marriage with a free woman and subsequently lived with her in Ohio, and then in Illinois until his

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formal agreement in itself could not constitute moral marriage, for if that were so, all line of demarcation between such marriage and concubinage would disappear. An agreement and cohabitation for a week, a month, or a year would become a moral marriage. There must be that moral intention to assume the duties incident to marriage. The legislature had in mind only those cases in which there would have been a legal marriage had the parties had the power to contract.

Id.

137. *See* Lewis v. King, 54 N.E. 330, 332 (1899) (noting the effect of emancipation on slave marriages). The court explained:

Emancipation alone, whether general or special, apparently had no effect upon the slave marriage. But emancipation, accompanied by the consent of the parties to a transmutation of the slave marriage into a legal one, or by continued cohabitation, had the effect of rendering the imperfect slave marriage a valid and legal union.

Id.

138. Butler v. Butler, 44 N.E. 203 (1896).

139. *Id.*

140. *Id.*

death in 1893.[141] Butler died intestate, leaving several parcels of real property.[142] The case came before the court to determine whether Butler's first wife and the children borne of that slave marriage, or his second wife and children, were his legitimate heirs at law.[143]

The Illinois Supreme Court initially recognized that, in the absence of contractual rights, marriages entered into during slavery were of no force or effect until such time after emancipation when the couple through affirmative acts, conduct or consent ratified the union.[144] The *Butler* court, noted:

> [I]f before emancipation, they were married in the form which either usage or law had established for the marriage of slaves, this subsequent mutual acknowledgment of each other as husband and wife should be held to complete the act of matrimony, so as to make them lawfully and fully married from the time at which this subsequent living together commenced.[145]

To determine whether the slave marriage was ratified or repudiated by the parties, the court examined the antebellum and postbellum conduct and state of mind of the couple.[146] In *Butler*, both spouses to the slave marriage entered into subsequent relationships following Butler's emancipation.[147] Butler first engaged in a number of relationships.[148]

Butler was married to his second wife for almost 40 years.[149] The court reviewed the conduct of the parties to the first marriage, and concluded that such conduct "instead of affirming, expressly disaffirmed" the first marriage.[150]

Unlike traditional marriages, which could only be dissolved upon death or judicial decree, the parties' conduct, actions, or state of mind were all sufficient methods of repudiating a slave marriage. Repudiation had far reaching consequences. Unlike divorce which terminates a marriage, repudiation not only

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141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 204-05.
146. *Id.*
147. *Id.* at 205.
148. *Butler*, 44 N.E. at 205.
149. *Id.*
150. *Id.* The court reasoned:

> By no act of Allen Butler, after his emancipation, did he affirm the slave marriage, but by his second marriage, celebrated in conformity to the laws of Ohio, he expressly disaffirmed it. For nearly forty years he and his wife, Mariah, lived together and were recognized as husband and wife. They had and reared children . . . Mary Ann, the other party to the slave marriage, by her conduct repudiated it also. She formed illicit relations with another man, by whom she had several children.

Id.

nullified the marriage from its inception, but it also rendered the children borne from the relationship illegitimate.[151] As a result, the court concluded that only Butler's second wife and children were his heirs at law.[152]

In a similarly decided case, the Illinois Supreme Court in *Middleton v. Middleton,* held that the mere act of entering into another intimate relationship was not evidence of repudiation of a former slave marriage.[153] In *Middleton*, the marriage of a slave couple that began in 1838 and ended with the death of the wife in 1863 was deemed valid, notwithstanding the fact that the father sired a child in 1855 or 1856 from another relationship.[154] The court held that because the first marriage was affirmed by the continued cohabitation of the parties, there was "no repudiation of the marriage by either of the parties thereto."[155]

Contemporaneous with the common law decisions legalizing slave marriage, in 1891 the Illinois legislature passed a statute that provided that slave marriages "shall be considered equally valid and binding as though the parties thereunto were free and the child or children of such marriages shall be deemed legitimate . . . ."[156] The Illinois Supreme Court in *Prescott v. Ayers* determined that the aim of the 1891 statute was to recognize as legally binding, voidable marriages that were affirmed by the slave couple.[157]

Ohio was one of only a few jurisdictions that, subsequent to the Civil War, did not address the issue of legalization of slave marriage through legislative act. The Supreme Court of Ohio adopted the repudiation model to determine the validity of slave marriages. In *McDowell v. Sapp*,[158] the court followed the prevailing school of thought as articulated by the United States Supreme Court in *Hall v. United States*, that it was "an inflexible rule of the law of African slavery, wherever it existed, that the slave was incapable of entering into any contract, not excepting the contract of marriage."[159]Although not legally binding, most

151. *Id.* "Upon well recognized legal principles it follows also, that the disaffirmance of the slave marriage rendered it null from the beginning, to the same extent as would a decree of nullity rendered by a court of competent jurisdiction . . . ." *Id.*

152. *Id.*

153. Middleton v. Middleton, 77 N.E. 1123, 1124 (1906).

154. *Id.* at 1123.

155. *Id.* at 1124.

156. *See* Act of May 15, 1891, p. 163, codified as Hurd's Rev. Stat. Ch. 89, §18, p. 961 (1893) (establishing the validity of marriages where one or both of the parties were slaves at the time, and establishing the legitimacy of their offspring and right to inherit property).

157. Prescott v. Ayers, 114 N.E. 557, 558-59 (1916).

158. McDowell v. Sapp, 39 Ohio St. 558, 561 (1883).

159. *McDowell*, 39 Ohio St. at 561 (citing Hall v. United States, 92 U.S. 27, 30 (1875)).

jurisdictions, including Ohio, acknowledged the moral legitimacy of slave marriages. In this regard, Ohio courts treated slave marriages as imperfect relationships that could be ratified or repudiated upon emancipation of the slave.[160] The court in *McDowell* noted that "a slave marriage becomes entirely valid by cohabitation subsequent to emancipation.[161] But in all these cases where there was no such ratification, the marriage might be avoided in some form."[162]

D. Legislative Model

The legislative process utilized by jurisdictions that conferred the right to marry upon slaves following the Civil War most closely parallels the campaign to legalize same-sex marriage. In both situations, state legislatures were called upon to exercise their authority to redefine the institution of marriage to reflect the evolving social and cultural dynamics of the time. Most of the jurisdictions examined for this Article that used the legislative model were members of the Confederacy. Generally, these states rejected the idea that slaves possessed a dormant right to marry triggered by emancipation. Instead, these jurisdictions equated the right to marry with the legislative conference of other civil and contractual rights upon the slaves.

Jurisdictions that adopted the legislative model to legalize slave marriages either expressly or implicitly rejected the dormancy model first affirmed by the Louisiana Supreme Court in *Girod v. Lewis*.[163] In 1858 the North Carolina Supreme Court in *Howard v. Howard*[164] distinguished *Girod v. Lewis*,[165] noting that:

No authority is cited, and no reason is given for the decision, except the suggestion that the marriage, being dormant during the slavery, is endowed with full energy from the moment of freedom. We are forced to the conclusion, that the idea of civil rights being merely dormant during slavery, is rather a fanciful conceit, (we say it with respect) than the ground of a sound argument. It may be, that in Louisiana, the marriage relation is greatly affected by

160. *Id.*
161. *Id.*
162. *Id.* "A separation at or before emancipation, therefore, would properly be deemed a divorce. For if the law takes cognizance of slave marriages, it must also of these slave divorces." *Id.* at 562. In *McDowell*, the husband from the slave marriage repudiated the same as a result of his escape from slavery and subsequent relocation to Canada. *Id.* While in Canada, the former slave entered into a 21 year second marriage with another free woman of color. *Id.* The court held that by solemnizing a second marriage after he affected his escape from slave ry the former slave spouse "effectually avoided the slave marriage." *Id.* at 563.
163. 6 Mart. 559 (1819).
164. 51 N.C. 235 (N.C. 1858).
165. 6 Mart. 559 (1819).

the influence of religion, and the mystery of its supposed dormant rights, is attributable to its divine origin. If so, the case has no application, for, in our courts, marriage is treated as a mere civil institution.[166]It was not until 1866 when North Carolina passed postbellum emancipation legislation which ratified and legalized slave relationships existing when the act was passed.[167] Once ratified, the relationships were legally recognized retroactively "to the commencement of such cohabitation."[168] Notwithstanding the legal benefit conferred upon former slave couples, the act also imposed an affirmative duty on the couple to publicly ratify the marriage by acknowledging the same before a pubic officer.[169] Although failure to file the public declaration did not negate the validity of the marriage, such failure could subject the couple to "indictable misdemeanors."[170] As long as freed couples continued to

166. *Howard*, 51 N.C. 235.

167. *See* An Act Concerning Negroes and Persons of Color or of Mixed Blood, Act of March 10, 1866, Ch. 40, §5 (defining lawful marriage between recently emancipated slaves so that if the slaves "now cohabit together in the relation of husband and wife, the parties shall be deemed to have lawfully married as man and wife at the time of the commencement of such cohabitation, although they may not have been married in due form of law.").

168. Act of March 10, 1866, Ch. 40, §5 (concerning negroes and persons of color or of mixed blood). *See also* State v. Harris, 63 N.C. 1, 14 (1868) (explaining that the legislature had the power to dispense with any particular formality, as it did to prescribe such regarding marriage once consent between the parties existed). The court went on to say:

> This neither made nor impaired the contract, but gave effect to the parties' consent, and recognized as a legal relation that which the parties had constituted a natural one. So that, by force of the original consent of the parties while they were slaves, renewed after they became free, and by the performance of what was required by the statute, they became to all intents and purposes man and wife. This would be so upon the *strictest* construction; much more than upon the liberal construction which should be given to . . . a domestic relation of one-third of our people, and the morals of society in general. (emphasis in original)

Id.

169. Act of March 10, 1866, Ch. 40, § 5 (concerning negroes and persons of color or mixed blood). The Act states in part:

> And all persons whose cohabitation is hereby ratified into a state of marriage, shall go before the clerk of the court of pleas and quarter sessions of the county in which they reside, at his office, or before some justice of the peace, and acknowledge the fact of such cohabitation, and the time of its commencement.

Id.

170. Act of March 10, 1866, Ch. 40, section 6 (concerning negroes and persons of color or of mixed blood). The act requires:

> That if any such persons shall fail to go before the clerk of the county court, or some justice of the peace of the county in which they reside, and have their marriage recorded before the first of September, one thousand eight hundred and sixty-six, they shall be deemed guilty of a misdemeanor, and punished at the discretion of the court, and their

reside together in a marital relationship, North Carolina courts held that such continued habitation evidenced consent to marry.[171]

The state of Florida also expressly rejected the dormancy model that viewed emancipation as the triggering event for the legalization of slave marriages, and instead relied on the legislature to legalize marriages between former slaves. "Emancipation was not retroactive . . . nor render valid slave marriages contracted before, but not confirmed after, emancipation."[172] In *Adams v. Sneed*, the Supreme Court of Florida noted that "[i]t is the province of the legislature to validate void or voidable marriages. . . ."[173]

Following emancipation, the state of Florida took an unusual approach to addressing the issue of legalization of slave relationships. The Act of January 11, 1866 required black couples living together as putative husband and wife to marry before "some person legally authorized to perform the marriage ceremony, and be regularly joined in the holy bands of matrimony."[174] This was the only compulsory marriage statute

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failure for each month thereafter, shall constitute a separate and distinct offense.

Id. *See also* State v. Melton, 26 S.E. 933, 934-35 (N.C. 1897) (explaining how slave marriages were legalized by operation of law). The court stated:

> [P]ersons married in North Carolina while slaves, who continued to cohabit after the abolition of slavery, were ipso facto legally married (Act 1866, Chap. 40), and no acknowledgment before an officer was essential. 'The marriage was complete before the prescribed acknowledgment' made before the clerk, even if such acknowledgment were not made at all.

Id. *See* State v. Whitford, 86 N.C. 636, 639 (1882) (illustrating that cohabitation as man and wife with knowledge of the existence of the act constituted evidence of consent to the marriage). The court noted:

> The act makes the cohabitation and living together as man and wife, after emancipation, and continued up to the time of the ratification of the act, evidence of the consent; if so, surely the continuing cohabitation and living together in that relation, after ratification for several years, with a full knowledge of the existence of the act and its purpose, must be held to be plenary evidence of a consent to the marriage.

Id.

171. *See Whitford*, 86 N.C. at 639 (1882) (illustrating that cohabitation as man and wife with knowledge of the existence of the act constituted evidence of consent to the marriage). The court noted:

> The act makes the cohabitation and living together as man and wife, after emancipation, and continued up to the time of the ratification of the act, evidence of the consent; if so, surely the continuing cohabitation and living together in that relation, after ratification for several years, with a full knowledge of the existence of the act and its purpose, must be held to be plenary evidence of a consent to the marriage.

Id.

172. Adams v. Sneed, 25 So. 893, 894 (Fla. 1899).

173. *Id.*

174. Act of January 11, 1866, 1865 Fla. Laws Ch. 1469, § 1 (establishing and enforcing the marriage relation between persons of color).

enacted by a Confederate state during the postbellum period. The statute required couples to solemnize their relationships within nine months after the passage of the Act, or be subject to prosecution for the misdemeanor offense of "fornication and adultery."[175] This statutory framework came under heavy criticism by Florida courts. The Supreme Court of Florida in *Daniel v. Sams* held that "[s]uch a statute enforced would have filled the jails of the country with persons subject to the charge of fornication and adultery from an innocent cohabitation as husband and wife."[176] Similarly, in *Christopher v. Mungen*, the Florida Supreme Court addressed the practical difficulties that arose from enforcement of the Act.[177] The Court noted:

> It is apparent that this statute had proven ineffectual to do justice to the emancipated slaves with reference to their status during slavery and the period just subsequent to emancipation. This was doubtless due to the general lack of acquaintance with the law by the freedmen and their inability to successfully meet the new conditions suddenly thrust upon them.[178]

The Florida legislature quickly responded to the inadequacies of the 1866 Act by adopting the Act of December 14, 1866. The passage of this new Act brought Florida in line with many other states that adopted the legislative model for the legalization of slave marriages. The Act of December 14, 1866, legalized all purported slave marriages where the couples cohabited together and "before the world recognized each other as husband and wife."[179] Notwithstanding the statute's broad language, the *Daniel*

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175. *Id. See also* AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE, LABOR, MARRIAGE AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 45 (1998) (discussing the ramifications of marriage between freed slaves). Professor Stanley anecdotally notes:

> Just a few months after the Emancipation Proclamation, one freedman attested that there were 'more married than ever I knew before.' Former slaves heralded the marriage contract as they did not the right to sell their labor. After the war multitudes rushed to marry, often in mass ceremonies. 'The marriage law gives general satisfaction among the Freedmen and their wives,' reported a Virginia agent of the Freedmen's Bureau in 1866. Neither the bureau nor the legal codes of most southern states legitimated slave marriages simply as an incident of emancipation; instead they required freed people to renew old vows or exchange new ones in proper wedding ceremonies or else to be punished for fornication and adultery. As another Virginia agent explained, 'I carefully read the law to them and take pains in explaining it to them so that they may fully understand it and its penalties.' In complying with the law, husbands and wives transmuted the nonbinding rites of slavery into the rights of freedom.

Id.

176. Daniel v. Sams, 17 Fla. 487, 496 (1880).

177. Christopher v. Mungen, 55 So. 273, 280 (Fla. 1911).

178. *Id.* at 280.

179. *Daniel*, 17 Fla. at 494-95. (quoting the act of December 14, 1866).

decision restricted the application of the Act to only legalize marriages between freed slaves where "cohabitation and recognition" occurred subsequent to the emancipation of the slave.[180] The Florida legislature revisited this issue again with the passage of the Act of 1899. This Act retroactively validated purported slave marriages existing prior to 1866 where such couples cohabitated together as husband and wife and were recognized as such "by the world."[181] The marriages of slave couples were legally recognized even in the absence of participation in solemnization ceremonies.[182] This gap-filling provision ensured comprehensive recognition of slave relationships under Florida law. As a result, both antebellum and postbellum slave marriages received the legal recognition that they were entitled to.[183]

The states of Arkansas, Mississippi, and Georgia all adopted similar legislative models to legalize the marriages of former slaves. Notwithstanding its tumultuous civil rights history,[184] Arkansas was one of a few Confederate states that legalized slave marriage in a quick and efficient manner following the end of the Civil War. "An Act to legalize marriages of persons of color" was approved by the legislature on December 20, 1866, and took effect immediately thereafter.[185] The Act legalized all putative marriages between "persons of color," whether previously freed or slave, who were "living together as husband and wife" at the passage of the Act.[186] Two months later, the Arkansas legislature passed broad legislation restoring a number of civil rights to former slaves. Additionally, in order to legitimize

180. *Id.* at 497. "A consistent and harmonious operation of the acts of December 14, 1866 . . . restricts the operation of the act of December 14, 1866, to a living together as husband and wife since emancipation." *Id.*

181. See Johnson v. Wilson 37 So. 179 (Fla. 1904) (construing the operation of the Act of 1899).

182. *Id.*

183. *Id.*

184. *See generally* JAMES C. DURAM, A MODERATE AMONG EXTREMISTS: DWIGHT D. EISENHOWER AND THE SCHOOL DESEGREGATION CRISIS, 143-172 (Nelson-Hall Publishers 1981) (noting that Little Rock, Arkansas gained notoriety in 1957 when nine African American students attempted to integrate the previously all white Central High School). Under orders of Governor Orval Faubus, the Arkansas National Guard was activated to prevent the students from entering the School. *Id.* at 169-170. After intervention from the federal government, including personal intervention by President Dwight Eisenhower, the students were eventually enrolled in the School. *Id.* at 170. However, in 1958 Governor Faubus closed the high schools for one year in an effort to prevent desegregation. *Id.* The schools reopened in 1959, and were forced to enroll African American students. *Id.* at 170.

185. Act of Dec. 20, 1866, Ch. 13 Act of Ark. (legalizing marriages between people of color). The Act further provided that all children of said relationships were hereby declared "legitimate." *Id.*

186. *Id.*

children born of slave relationships "not actually subsisting as marriages on December 20, 1866,"[187] the legislature passed "An Act to declare the rights of persons of African descent."[188] Section 3 of the 1867 Act was more broadly drafted, and as a result legalized relationships of all "negroes and mulattoes" who were "cohabiting as husband and wife" notwithstanding whether a putative marriage ceremony had been performed.[189] The clarity of this legislation produced few, if any, disputes regarding the validity of slave marriages.[190]The states of Mississippi and Georgia[191] utilized similar legislative frameworks to legalize the marriages of former slaves.[192] Following emancipation, slave couples were not recognized as legally married until Mississippi passed the Act of 1865, conferring marital status on "freedmen, free negroes and mulattoes, who do now and have heretofore lived and cohabited together as husband and wife . . . ."[193] This Act was prospective in

187. Daniels v. Johnson, 226 S.W.2d 571, 575 (Ark. 1950).

188. Act of Feb. 6, 1867, Ch. 35 (declaring the "rights of persons of African descent").

189. *Id.* The Act declares "[t]hat all negroes and mulattoes who are now cohabiting as husband and wife, and recognizing each other as such, shall be deemed lawfully married from the passage of the act, and shall be subject to all the obligations, and entitled to all the rights appertaining to the marriage relation . . . ." *Id.*

190. *See generally* Black v. Youmans, 179 S.W. 335 (1915) (holding that the act of Feb. 1867 controls having never been repealed); Gregley v. Jackson, 38 Ark. 487, 490-94 (Ark. 1882) (addressing problems of inheritance caused by slave marriages); Scoggins v. State, 32 Ark. 205 (1877) (using defendants previous marriage under the Act of Feb. 6, 1867, as evidence of bigamy; however, the guilty verdict was reversed on procedural grounds).

191. *See* William v. State, 33 Ga. 85, 93 (1864) (reversing a murder conviction against the defendant based on his slave wife testifying against him). During the antebellum period, the state of Georgia recognized slave marriage in a limited context. Citing the long-held proposition that the testimony of a spouse is inadmissible, the Court in *William* recognized the validity of the slave marriage for the limited purpose of extending the rule of evidence to the facts of that case. *Id.* William, a male slave, was accused of killing another slave. *Id.* His purported wife, also a slave, testified that she saw her husband with an axe, the alleged murder weapon, on the evening of the murder. *Id.* at 89. This decision recognized that purported slave marriages afforded limited protections to the slave couple. *Id.* at 93. The *William* decision held that the "contubernal relation among slaves shall be recognized in public sales whenever possible, and in criminal trials where it becomes important to the advancement of justice." *Id.*

192. *See* Andrews v. Simmons, 10 So. 65 (Miss. 1891) ("There being no marriages recognized in law among slaves, when this class of our population was enfranchised and elevated to citizenship, the legislature promptly enacted laws applicable to the changed condition, so far as possible validating slave-marriages, and legitimating the fruits of such marriages."); Rundle v. Pegram, 49 Miss. 751, (1874) (holding that there did exist among the colored people the marital relation and where these relations existed by the mutual recognition of the parties, the constitution established it as legal relations).

193. Act of Nov. 25, 1865, Ch. 4, §3, Act of Miss. (giving civil rights to

nature, and only legalized relationships existing at the passage of the Act.[194] Any relationship terminated by the death of one of the putative spouses prior to the passage of the Act was not retroactively legalized by this legislation.[195]

In 1866, Georgia's legislature passed the act of March 9, 1866, which legalized the relationships of blacks who were living together at the time the Act was passed "as husband and wife."[196] In commenting on the purpose of the Act, the Supreme Court of Georgia in *Williams v. State*, ruled that the end of slavery

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freedmen). This Act also legitimized the children born of such relationships. *Id.*

194. Reed v. Moseley, 23 So. 451, 452-53 (Miss. 1898) The court in *Reed* stated:

> For neither the act of 1865, nor said section 22 of article 12 of the constitution of 1869, had the purpose or the effect to marry parties against their will. But where a legal impediment did exist to marriage, and the parties therefore could not elect legally to marry, but did, as a fact, attempt marriage, according to the then custom of the country, and did live together and cohabit as husband and wife for years, up to, at the time of, and after the adoption of, the act of 1865 and the constitution of 1869, 'subsequent continued cohabitation' is 'of itself a strong circumstance to show an acceptance of the provisions of the act and the constitution, and a desire to assume towards each other a new and lawful relationship.'

Id.

195. Andrews v. Simmons, 10 So. 65, 65 (Miss. 1891). In 1869, the language of the Act of 1865 was adopted as article XII, section 22, of the Mississippi Constitution's Bill of Rights. *Id.* The relevant provision states:

> [A]ll persons who have not been married, but are now living together, cohabiting as husband and wife, shall be taken and held, for all purposes in law, as married, and their children, whether born before or after the ratification of this constitution, shall be legitimate; and the legislature may, by law, punish adultery and concubinage.

Id.

Whereas the language of the 1865 Act specifically referred to "freedman, free negroes and mulattoes," the Section 22 of the Bill of Rights had broader application. *Id.* In *Rundle v. Pegram*, 49 Miss. 751, 755 (1874), the Supreme Court of Mississippi noted that although the language of the provision applied to "'all persons,' without regard to race, color or previous condition . . . ," the primary purpose of this legislation was for the "benefit of the colored race." *Id.* Section 22 did not confer legal status on all putative slave relationships existing at the passage of the account. *Id.* The Mississippi Supreme Court held that only in a relationship where the co-habiting couple "accepting each other and recognizing each other as husband and wife, they shall be in law esteemed as married . . . ." *Id.* at 756. Notwithstanding the passage of the 1865 legislation, constitutional recognition of slave marriage was necessary due to questions concerning the validity of the 1865 Act. *Id.* at 755. "Because there may have been doubt whether the legislature of 1865 may, on account of the anomalous condition of public affairs, in the estimation of some, have been inoperative and of no effect." *Id.*

196. Act of Mar. 9, 1866, Title XXXI, No. 252, 240. (proscribing and regulating the relation of husband and wife between persons of color.

represented the demise of slaves living "in concubinage," and as such, they were entitled to have their relationships recognized as a "contract of marriage in the eye of the law."[197] However, unlike Arkansas and Mississippi, Georgia retroactively ratified slave marriages "as if they had been always free and had been legally married."[198]

During antebellum and postbellum periods, African-Americans migrated to the District of Columbia seeking refuge from the slave-holding jurisdictions located in the South.[199] The course of action taken by the federal government to legalize the relationships of former slaves closely parallels the legislative models adopted by many Confederate states. Prior to Emancipation, the District of Columbia recognized the dual nature of slaves as persons and property. In this regard, slave couples were permitted to cohabitate as 'husband and wife' in unions grounded in moral, but not legal foundations.[200] Compelled by "justice, humanity, as well as sound social policy," the United States Congress, following Emancipation, passed legislation to legalize slave marriages.[201] The Act of 1866 provided that couples who were formerly slaves and continued to cohabitate at the passage of the Act, regardless of whether the marriage was solemnized, "shall be deemed husband and wife."[202] Congressional

197. Williams v. State, 67 Ga. 260, 262 (Ga. 1881).

198. *See id.* (asserting that in Georgia, the Act of 1866 recognized slaves living together as man and wife and pronounced them married in the eyes of the law).

199. *See* Jennings v. Webb, 8 App. D.C. 43, 54 (1896) (noting the newly freed slaves demanded legal marriage rights and "[t]he spirit of this demand met with early and ready response in the legislation, of the former slave holding States, and in that of Congress, for the District of Columbia, in which great numbers of former slaves had congregated during and after the Civil War").

200. *Id.* at 43. The court in *Jennings* stated:

> That the legal relation of husband and wife could not exist among slaves, was not an arbitrary rule, prompted by a spirit of cruelty and oppression, but a necessary condition of the institution of slavery whilst it existed. Slaves could make no contracts, own no property; they were themselves property. The recognition of the duties, obligations and rights of the legal relation of husband and wife was necessarily incompatible with those conditions; hence they could not exist, and the illegitimacy of slave offspring followed as a logical result.

Id. at 53.

201. *Id.* (noting the rights slaves demanded after emancipation). The court further noted:

> When slavery had been abolished, and the right to acquire and transmit property had attached to the former slaves, justice and humanity, as well as sound public policy, demanded legislation giving legal sanction, as far as possible, to the moral obligations of these permissive relations, and rendering legitimate the offspring thereof.

Id.

202. Act of July 25, 1866, Ch. 2 (14 Stat. 536). Congress passed an almost identical Act in 1901. Act of Mar. 3, 1901, Ch. 854 (31 Stat. 1393).

legalization of slave marriages came on the heels of the passage of the Civil Rights Act of 1866, which at least facially conferred civil rights, including the right to marry, upon former slaves.[203] These rights included the right "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 person and property, as is enjoyed by white citizens."[204] As a result thereof, civil rights were fully restored to former slaves residing in Washington, D.C.

Reliance on state legislatures to confer civil rights on freed slaves was but one of many components in the emancipation process that led to the eventual removal of many legal and judicial barriers that had prevented blacks from having any hope of participating in postbellum America. This process was, however, a slow and painful one marked by legislative and judicial decisions that nullified constitutional guarantees of due process and equal protection, and relegated freed blacks to second-class status.[205] Notwithstanding the vigorous enforcement of Jim Crow laws enacted during the Reconstruction era to prevent freed slaves from fully exercising their newfound civil rights, the right of freed slaves to marry remained undisturbed by any legislative or judicial acts.[206]

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203. Civil Rights Act of Apr. 9, 1866, Ch. 31 (14 Stat.) 27-29.

204. Civil Rights Act of Apr. 9, 1866, Ch. 31 (14 Stat.) 27-29.

205. Plessy v. Ferguson, 163 U.S. 537, 544 (1896). This United States Supreme Court decision was indicative of America's refusal to afford blacks full participation in the social, judicial, and political fabric of society. *Id.* In *Plessy*, the inferior position of blacks was firmly established by the Court's announcement of the "separate but equal" doctrine. *Id.* at 552 (Harlan J., dissenting). The court stated:

> The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.

Id. at 544.

206. While it is important to note that the right to marry other blacks was secured after emancipation, the right of blacks to engage in interracial marriage was not conferred until the 1967 United States Supreme Court decision in *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

V. STRUCTURAL COMPARISON OF SLAVE MARRIAGE LEGALIZATION MODELS

The legislative and judicial constructs discussed in Part IV of this Article which led to the legalization of slave marriage were based upon the premise that slaves, even in a state of bondage, had a limited right to marry, or at the very least, were entitled to establish familial bonds. At the center of legal recognition, dormancy, and repudiation models that legalized slave marriages, was the idea that upon removal of their contractual incapacity, slaves were entitled to reclaim their right to marry. A factor that distinguishes the controversy surrounding same-sex marriages from the development of marital rights for African-Americans is the fact that the United States Supreme Court and Congress both acknowledged the fundamental right of freed slaves to marry. This right originated, not with the Emancipation Proclamation, the Thirteenth Amendment, or the Civil Rights Act of 1866, but with Lockean principles of natural or inalienable rights.[207] The framers of The Declaration of Independence relied on John Locke's philosophies when referring to the inalienable rights of man to life, liberty and the pursuit of happiness.[208] As early as 1865, supporters of the Thirteenth Amendment, motivated by the same Lockean ideals, pushed for the restoration of the natural rights stripped from African-Americans during slavery.[209]

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207. G. SIDNEY BUCHANAN, THE QUEST FOR FREEDOM: A LEGAL HISTORY OF THE THIRTEENTH AMENDMENT 8 (1976). The author argues:

> Conversely, to those supporting the amendment, the emancipation proclamations of President Lincoln and of the various states were not enough, as the incidents of slavery were not yet obliterated. The proponents of the amendment wanted to protect the civil liberties of all persons, whites as well as emancipated blacks. Here, the pro-amendment faction was basing its arguments on the Lockean presupposition of natural rights and the protective function of government. Senators Sumner, Trumbull, and other amendment supporters believed that slavery had destroyed the natural rights that the Constitution was designed to protect and that abolition of slavery would, in turn, secure protection of natural rights for all persons regardless of race.

Id.

208. *See generally* ALLEN JAYNE, JEFFERSON'S DECLARATION OF INDEPENDENCE: ORIGINS, PHILOSOPHY AND THEOLOGY (1998) (discussing the theories arising out of the Declaration of Independence).

209. *See* Edwin Vieira, Jr., *Of Syndicalism, Slavery and the Thirteenth Amendment: The Unconstitutionality of "Exclusive Representation" in Public-Sector Employment*, 12 WAKE FOREST L. REV. 515, 669 (1976) The author asserts that:

> What we should recall here is that the secular 'natural rights' theory best exemplified in John Locke's *Second Treatise of Government* was the intellectual source of the inalienable-rights philosophy which the Founders expressed in the Declaration and the Constitution. And this source also exercised an especially great influence on the course of

The first component of the restoration of civil rights to slaves was achieved through the elimination of their status as chattel by the execution of the Emancipation Proclamation and the passage of the Thirteenth Amendment.[210] The second component of this process was the restoration to freed slaves of their inalienable rights.[211] In *The Civil Rights Cases*, Justice Bradley noted that the Thirteenth Amendment "clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery . . . ."[212]

Congress fulfilled this grant of authority by restoring natural rights to freed slaves with the passage of the Civil Rights Act of 1866.[213] The Act provided that:

> such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right . . . 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 . . . .[214]

Justice Bradley viewed the denial of these natural rights as incidents of slavery that Congress, with the passage of the

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events during the 1860's. Indeed, '[t]hroughout the [post-Civil-War] debates, . . . two major ideas were combined and recombined into a single argument or purpose: First the Lockean presuppositions about natural rights and the protective functions of government; secondly, slavery's denial of these rights and this protection.'

Id.

210. G. SIDNEY BUCHANAN, THE QUEST FOR FREEDOM: A LEGAL HISTORY OF THE THIRTEENTH AMENDMENT 20 (1976). The author argues:

> Several conclusions concerning the intended reach of the thirteenth amendment can be drawn from the debaters surrounding the Emancipation Proclamation, the adoption of the amendment itself, and the passage of the Freedman's Bureau bill and the Civil Rights Act of 1866. First, it is clear that the supporters of the thirteenth amendment regarded its provisions as amply sufficient to secure universal freedom for all persons subject to the jurisdiction of the United States. For this purpose, the amendment was intended to be self-executing. The same provisions that destroyed the legal bondage of the black slave were seen as restoring to the freed slave the natural and inalienable rights previously secured only to white citizens. Under this conception, the thirteenth amendment nationalized the right of individual liberty and the natural rights that underlie this liberty.

Id.

211. The Civil Rights Cases, 109 U.S. 3, 20 (1883). Justice Bradley characterized this component of the Thirteenth Amendment as "reflex character" of the Amendment "establishing and decreeing universal civil and political freedom throughout the United States." *Id.*

212. *Id.*

213. Act of April 9, 1866, 14 Stat. 27 (1866).

214. Act of April 9, 1866, 14 Stat. 27 (1866). (protecting all persons in the United States in their civil rights, and furnishing the means of their vindication).

"[T]hirteenth Amendment . . . undertook to wipe out."[215] He further noted that these rights were "fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery."[216] Although the slave marriage legalization models examined in Part IV of this Article created the framework for implementation of the slaves' right to marry, slaves were endowed with this fundamental right to contract marriage by the constitutional framers. Slave marriage legalization models as well as Supreme Court jurisprudence do not, however, reveal an historic antecedent that can serve as a framework for the argument that parallels exist between the slave marriage legalization paradigm that implicitly recognized the right of freed slaves to marry as a fundamental right, and the argument that same-sex couples have a fundamental right to marry.[217] In the absence of judicial or legislative recognition that same-sex couples have a fundamental right to marry, no legitimate parallels can be drawn between the legal recognition, dormancy, or repudiation models used to legalize slave marriages and the efforts to legalize same sex marriages.

The legislative model discussed in Part IV is the only slave marriage legalization model that has any modern parallel with efforts to legalize same-sex marriage. The states of Arkansas, Florida, North Carolina, and Georgia used this model to confer civil rights upon freed slaves, including the right to marry, and thereby legalized existing slave relationships. Once conferred, these basic human rights remained undisturbed by any legislative or judicial acts. This was not the case with other Reconstruction era grants of civil rights, the actualization of which came about after hard fought battles such as the fight to desegregate public schools,[218] to achieve the right to vote,[219] and to integrate places of

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215. *The Civil Rights Cases*, 109 U.S. at 22 (1883).

216. *Id. See also* BUCHANAN *supra* note 210, at 74-75 (arguing that "Under the Bradley analysis, Congress clearly had the power to define and prohibit badges and incidents of slavery, but there was an important limitation on this power."). *Id.* Congress could legislate only for the protection of "fundamental" rights, such as the right to contract, to hold property, and to give evidence. *Id.*

217. In 2003, in *Lawrence v. Texas*, 539 U.S. 558 (2003), the United States Supreme Court held that gays and lesbians have the right to engage in private sexual conduct free of governmental intrusion. *Id.* at 578. Such rights, although founded in the "right to liberty under the Due Process Clause," of the Fourteenth Amendment, did not address "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.*

218. *See generally*, Brown v. Board of Education, 347 U.S. 483 (1954) (overturning the doctrine of "separate but equal"); Brown v. Board of Education, 349 U.S. 294 (1955) [hereinafter *Brown II*](remanding the case to lower courts to take the necessary and proper action to admit parties to public schools on a nondiscriminatory basis).

public accommodations.[220]

By utilizing state legislatures to effect change and to confer rights, a legitimate parallel can be drawn between the legalization of slave marriages and the campaign to recognize same-sex marriages. Legislative efforts to legalize same-sex unions are in their infancy.[221] The state of Vermont was the first American jurisdiction to pass legislation addressing this issue.[222] An Act Relating to Civil Unions[223] was passed by the Vermont legislature in 2000 in response to the 1999 decision in *Baker v. State*.[224] In *Baker*, the Supreme Court of Vermont directed the Vermont legislature to create a statutory framework that would provide same-sex couples with "the common benefit, protection, and security that Vermont law provides opposite-sex married couples."[225]

The court's decision was grounded in the notion that the Common Benefits Clause of the Vermont Constitution requires extension of "the benefits incident to a Civil Marriage license under Vermont law" to same-sex couples.[226] The Vermont Supreme Court retained jurisdiction over the case pending creation of a suitable legislative remedy.[227] A number of options were available

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219. *See generally* the Voting Rights Act of 1965, 42 U.S.C.A. § 1973 (1965) (prohibiting voting prerequisites or qualifications based on race).

220. *See generally* the Civil Rights Act of 1964, 42 U.S.C.A. § 2000a-2000a-3(b) (1965) (prohibiting discrimination or segregation in places of public accommodation).

221. Legislative efforts to prevent same sex marriage, are however, in full force. *See generally*, 1996 Defense of Marriage Act, 1 U.S.C.A. § 7 Pub.L. 104-109 § 2(a), 110 Stat. 2419 (1996) (allowing states to choose not to legally recognize marriages performed in other states). Thirty eight states have passed legislation or constitutional amendments banning same sex marriage, including Hawaii, Alaska, Texas, Florida, Michigan, Arkansas, Oregon, and Pennsylvania. There are also a number of legislative efforts, on both the state and federal levels, to regulate same- sex marriage. For example, on July 14, 2004, the United States Senate defeated the Federal Marriage Amendment, the language of which defined marriage as the union of a man and a woman. Philip Stephens, *Clinton Urges Kerry to Avoid 'Cultural Issues,'* FIN. TIMES, July 15, 2004, at 1. The legislatures of a number of states including Arkansas and Ohio are considering whether to ban same-sex marriages. Celeste Katz, *Pulling Lever on Hot Button Law Questions*, DAILY NEWS, Oct. 31, 2004, at 27.

222. An Act Relating to Civil Unions, VT. STAT. ANN. tit. 15, §§ 1201-1207 (2005).

223. An Act Relating to Civil Unions, VT. STAT. ANN. tit. 15, §§ 1201-1207 (2005).

224. Baker v. State, 744 A.2d 864 (Vt. 1999).

225. *Id.* at 886.

226. *Id.* The Common Benefits Clause of the Vermont Constitution, provides "[t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community . . . ." VT. CONST. ch. I, art. 7.

227. *Baker*, 744 A.2d at 864.

to the legislature, including granting same-sex couples the right to obtain a marriage license upon the same terms and conditions afforded to opposite sex couples.[228] The court clearly established that the state "could do so," but that "it is not required" to grant marriage licenses to same-sex couples to comply with the Vermont Constitution's common benefits clause.[229]

Although the holding in *Baker* and the passage of the Civil Unions Act affords same-sex couples with rights analogous to those held by opposite-sex couples, this framework fell far short of the explicit recognition of the right to marry granted to freed slaves in the postbellum South.[230] Further, the *Baker* decision only focused on the discriminatory nature of Vermont's marriage statutes without considering the broader issue of whether same-sex couples have a fundamental right to marry.[231]

In 2005, Connecticut became the second state to follow Vermont's lead by passing legislation legalizing civil unions.[232] Unlike Vermont, civil unions were legalized by the Connecticut legislature without prior judicial mandate. This legislation provides same-sex couples with "all the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage."[233] However, this Act specifically distinguishes a civil union from a traditional marriage by defining marriage as "the union of one man and one woman," thus preserving the right to marry only for heterosexual couples.[234]

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228. *See* WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 57-82 (2002) (discussing the process that led to the passage of civil union legislation in Vermont).

229. *Baker*, 744 A.2d at 887.

230. When faced with an almost identical issue, the Circuit Court of Oregon in *Li v. State*, decided against following the holding in *Goodridge*, and adopted the model utilized by *Baker* and the Vermont legislature. Li v. State, No. 0403-03057, 2004 WL 1258167 (Or. Cir. Apr. 20, 2004), *rev'd en banc*, 110 P.3d 91 (Or. Apr. 14, 2005). The Circuit Court of Orgeon in *Li* noted that the legislature was the best forum for crafting a solution to this issue because "it is the only realistic way to get the public at large squarely into the process." *Id.* at *8. In deferring this matter to the legislature, the Court cautioned that the State must adopt a legislative model that will insure that same sex couples are provided access to the "substantive rights afforded to married couples." *Id.* In 2004, Oregon voters approved Measure 36, imposing a state constitutional ban on same sex marriage. S. 1073, 73rd Or. Leg. Assem., 2005 Reg. Sess. (Or. 2005). Notwithstanding the constitutional ban, in 2005, the Oregon Senate passed a bill allowing civil unions for same sex couples. *Id.* However, the measure was met with opposition from members of the Oregon House of Representatives, and has not been voted upon.

231. Baker v. State, 744 A.2d 864 (Vt. 1999).

232. An Act Concerning Civil Unions, 2005 Conn. P.A. 05-10 (S.S.B. 963) (Effective October 1, 2005).

233. *Id.* at § 14.

234. *Id.*

> Reliance upon state legislatures to confer marital rights and define the scope of such rights has historic precedent dating back to the Supreme Court's first discussion of the importance of marriage within our society.[235] In *Maynard v. Hill*, the Court acknowledged the essential role of the legislature in this regard when it stated: Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.[236]

The Supreme Court has often pleaded for judicial restraint when considering whether to expand substantive due process protections into areas like same-sex marriage, that are traditionally recognized as "deeply rooted in this Nation's history and tradition."[237] In *Washington v. Glucksberg*, the Court cautioned against the creation of jurisprudence that reflects the "policy preferences of the Members of this Court."[238] It was for the purpose of restraining "an un-elected judiciary from usurping the power of the legislature," that the Supreme Court articulated a body of jurisprudence governing the area of substantive due process law.[239]

On an almost daily basis, state legislatures and judiciaries across the country are grappling with not only "expand[ing] the established right to marry," but also redefining "the legal meaning of 'marriage.'"[240] Not only is this decision of tremendous importance to the country, but almost equally as crucial is

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235. Maynard v. Hill, 125 U.S. 190 (1888).

236. *Id.* at 205.

237. Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977). The Supreme Court stated:

> Substantive due process has at times been a treacherous field for this Court. There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the Lochner era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court.

Id.

238. Washington v. Glucksberg, 521 U.S. 702, 720 (1997). Here the Supreme Court reasoned:

> By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore, 'exercise the utmost care whenever we are asked to break new ground in this field,' lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.

Id. (citations omitted).

239. Lewis v. Harris, No. Mer-L-15-03, 2003 WL 23191114, *8 (N.J. Super. Ct. Law Div. Nov. 15, 2003).

240. Standhardt v. County of Maricopa, 77 P.3d 451, 458 (Ariz. 2003).

whether the ultimate decision-maker will be the judiciary or the legislature. Even in decisions favorable to advocates of same-sex marriage, like *Baker* and *Li v. State*, the courts cautioned that they were not extending the right to marry to same-sex couples.[241] In *Goodridge*, the Massachusetts Supreme Court recognized this growing concern over judicial legislation, and tried to draw a distinction between its decision and judicial activism that the dissenting opinion accused the court of engaging in.[242] In *Goodridge*, the court argued that notwithstanding its "reformulation" of the definition of civil marriage, the decision "leaves intact the Legislature's broad discretion to regulate marriage."[243] This is a difficult position to defend when so many courts that considered whether same-sex couples have a right to marry, have turned to their respective state legislatures for guidance.[244]

VI. CONCLUSION

Recognition that parallels exist between efforts to legalize same-sex marriages and the legislative path taken by abolitionists to restore civil rights to freed slaves offers reciprocal benefits to African-Americans and same-sex marriage advocates. The most

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241. *Baker*, 744 A.2d at 887; *Li*, 2004 WL 1258167 at *7.

242. Goodridge v. Department of Public Health, 798 N.E.2d 941, 983 (Mass. 2003) (Cordy, J., dissenting). Justice Cordy stated:

> Because I find these conclusions to be unsupportable in light of the nature of the rights and regulations at issue, the presumption of constitutional validity and significant deference afforded to legislative enactments, and the 'undesirability of the judiciary substituting its notions of correct policy for that of a popularly elected Legislature' responsible for making such policy, I respectfully dissent. Although it may be desirable for many reasons to extend to same-sex couples the benefits and burdens of civil marriage (and the plaintiffs have made a powerfully reasoned case for that extension), that decision must be made by the Legislature, not the court.

Id. (citations omitted).

243. *Id.* at 969.

244. *See Standhardt*, 77 P.3d at 459 (upholding marriage law which defined a valid marriage as solely between a man and a woman). In reaching its decision, the court explained, "[w]e are mindful of the Supreme Court's admonition to 'exercise the utmost care' in conferring fundamental-right status on a newly asserted interest lest we transform the liberty protected by due process into judicial policy preferences rather than principles born of public debate and legislative action." *Id.* Singer v. Hara, 522 P.2d 1187, 1197 (Wash. 1974). In *Singer*, the court stated:

> We do not seek to define in detail the 'interests of basic importance' which are served by retaining the present definition of marriage as the legal union of one man and one woman. The societal values which are involved in this area must be left to the examination of the legislature.

Id.

obvious benefit is that it silences critics who argue that the same-sex marriage advocates are inappropriately capitalizing on the civil rights gains achieved by African-Americans.[245] Pulitzer Prize winning African-American newspaper columnist Leonard Pitts, Jr. has often responded to African-American leaders who criticize comparisons between the racial civil rights movement and the same-sex marriage movement.[246] Pitts notes that the same-sex marriage movement "isn't the civil rights movement, but make no mistake: it's definitely a civil rights movement."[247] By fostering an atmosphere of mutual recognition, each group can draw upon and learn from the political strategies and experiences utilized by their respective counterparts to achieve social, political, and economic equality.

Finding common ground between the same-sex movement and the African-American civil rights movement will ultimately save African-Americans from themselves. "We have become what we despised." This often quoted phrase has particular applicability when examining the growing African-American criticism of same-sex marriage. For years, white segregationists generated hysteria over interracial marriage through the use of biblical references and predictions about the destruction of traditional American family values.[248] African-American opponents of same-sex marriage are unashamedly using the same racist arguments to deny equality to gay and lesbian couples.[249] African-Americans have joined forces with conservative white political groups who, contemporaneous with their attacks on same-sex marriage, also support efforts to ban race-based affirmative action programs that benefit members of the constituencies that those same African-

245. Bishop Keith Butler, *Court Prompt Churches to Protect Marriage*, DETROIT. NEWS, July 3, 2004, at 8D; Sherri Williams, *Comparing Gay, Civil Rights A Divisive Issue for Blacks*, COLUMBUS DISPATCH, July 2, 2004, at 8A; Earl Ofari Hutchinson, *Shame on Black Leaders Who Condemn Same-sex Marriage*, KAN. CITY STAR, March 16, 2004, at 7.

246. Leonard Pitts, Jr., *How Do African-Americans View Same-sex Marriage?*, HOUSTON CHRON., Mar. 15, 2004, at 2; Leonard Pitts, Jr., *Gay Marriage a Fact of Life*, MILWAUKEE J. & SENTINEL, Feb. 21, 2004, at 15A.

247. Leonard Pitts, Jr., *How Do African-Americans View Same-sex Marriage?*, HOUSTON CHRON., Mar. 15, 2004, at 2.

248. Summer L. Nastich, *Questioning the Marriage Assumptions: The Justifications For 'Opposite-Sex Only' Marriage as Support for the Abolition of Marriage,* 21 LAW & INEQ. 114, 156 (Winter 2003); Brian Fahling, *The Natural Order of Life; Why the Federal Marriage Amendment is Necessary*, WASH. TIMES, Feb. 17, 2004, at A19.

249. Bruce Alpert, *Black Ministers Slam Gay Unions*, TIMES PICAYUNE, May 18, 2004, at 10; Stephen G. Vegh, *Clergy Group United in its Opposition to Gay Marriages*, VIRGINIAN PILOT, April 27, 2004, at B1; Frank Reeves, *Pastors say Bible Prohibits Homosexuality*, PITTSBURGH POST-GAZETTE, April 15, 2004, at A1; Jay Lindsay, *Black Conservatives Oppose Gay Marriage: Reject Parallels With Civil Rights Movement*, BOSTON GLOBE, Nov. 29, 2003, at A1.

American leaders represent. This misdirected energy against the same-sex marriage movement is not only inconsistent with the tenets of the equality espoused by so many African-American civil rights leaders, but more importantly, it detracts the American society from addressing some of the real issues affecting African-American families and communities like drug abuse, unemployment, absentee fathers, and increasing rates of HIV and AIDS.[250]

Utilization of state legislatures to achieve civil rights protections for same-sex couples in fact strengthens the development of parallels between the racial and sexual minority groups. During the height of the Civil Rights Movement, Dr. Martin Luther King, Jr. publicly lobbied President John F. Kennedy and members of Congress for passage of civil rights legislation, including the landmark Civil Rights Act of 1964, which brought about sweeping changes to the racial climate of the United States.[251] The legislative phase of the Civil Rights Movement achieved as much, if not more significant transformation toward a racially integrated society than any other political or judicial efforts, including boycotts, sit-ins and freedom rides. Although advocates of same-sex marriage achieved judicial success in Massachusetts as a result of *Goodridge*,[252] sweeping changes to the social, cultural, and political landscape should not come about without input from the public and accountability for decision-making that may be contrary to its will.

250. M. BELINDA TUCKER & CLAUDIA MITCHELL-KERNAN, THE DECLINE IN MARRIAGE AMONG AFRICAN AMERICANS: CAUSES, CONSEQUENCES, AND POLICY IMPLICATIONS 351-56 (1995).

251. ROBERT D. LOEVY, ED., THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION (1997); ROBERT D. LOEVY, TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964 63-64 (1990).

252. *Goodridge*, 798 N.E.2d 941.