Western New England Law Review

Volume 36 *36 (2014)*
Issue 2

Article 4

2014

WHAT'S LOVE GOT TO DO WITH IT? INTEREST-CONVERGENCE AS A LENS TO VIEW STATE RATIFICATION OF POST EMANCIPATION SLAVE MARRIAGES

Danne L. Johnson
Oklahoma City University School of Law

WHAT'S LOVE GOT TO DO WITH IT? INTEREST-CONVERGENCE AS A LENS TO VIEW STATE RATIFICATION OF POST EMANCIPATION SLAVE MARRIAGES

DANNÉ L. JOHNSON*

INTRODUCTION

As an honored participant in the Western New England University School of Law's *Building the Arc of Justice: The Life and Legal Thought of Derrick Bell* Symposium, I examined and reflected on the late Professor Bell's contribution to my understanding of life and law. I looked for his legacy, mark, and influence on notions of fairness, justice, and motives. I hope to go beyond the veneer, the glossy wax coating, on the life that we know and the stories that we tell, or that we avoid telling, in the hope of revealing a more well-rounded truth. If eight people stand in a circle and describe an inanimate object resting at the center of the circle, each will have a different view, a different story, a different description. Consider a crowd on a busy street witnessing a purse snatching. Each saw the event, but it takes several eyewitnesses to arrive at a composite sketch of the perpetrator because each witness has a different vantage point or view.[1] Finally, consider a nation watching the emancipation and the journey toward freedom of hundreds of thousands of former slaves—men, women, and children. The different angles, views, perspectives, reflections, and vantage points are countless. Each account is valid and truthful but perhaps none will be exactly

* Professor of Law, Oklahoma City University School of Law. The author wishes to thank Western New England University School of Law, the Center for Gender Studies & Sexuality Studies, and the Clason Speaker Series for sponsoring Building the Arc of Justice: The Life and Legal Thought of Derrick Bell Symposium. The author also thanks the Oklahoma City University School of Law for support during the writing process, Professor Lee Peoples, the OCU library staff, and OCU students and research assistants Kevin Garrett and Emily Eleftherakis.

1. "[T]he issue [is] whether such conflicts or inconsistencies reflect intentional falsehoods, or whether they are inadvertent or merely the product of different people seeing the same event from different perspectives and with different recall." Arthur L. Burnett, Sr., *Race and National Origin as Influential Factors in Juvenile Detention*, 3 D.C. L. REV. 355, 367 (1995).

representative.[2] Too often we judge and select a single likeable version of the truth to credit and promote, resulting in a single account, which serves as the whole or complete truth.[3] We devalue, discredit, and ignore the stories that fail to comfort us or otherwise paint us in a less than flattering light.[4] We tell the Christopher Columbus story from his eyes, not from the eyes of the Native Americans that he encountered.[5] Interest-convergence requires that we give voice to competing stories and theories as a method to understand events more fully.

This Article examines whether interest-convergence and/or critical legal theory more thoroughly explains post-emancipation state ratification of former Slave marriages. Section I of this Article discusses interest-convergence theory and critical legal theory. Section II discusses the disruption of the Civil War, Emancipation, and Reconstruction to the American South and its attempts to reestablish normalcy. Section III examines the contours of Pre-Civil War Marriage. Section IV discusses the competing interests of the Freedmen and whites, and the convergence of those interests resulting in post-emancipation state ratification of former Slave marriages.

2. "As [one] African American lawyer [observed], it was unsettling for me to read some of the history in *Emancipation*. It was troubling because many of the difficulties African American law students and lawyers withstood over fifty-one years ago still exist today." Cynthia R. Mabry, *Emancipation: The Making of the Black Lawyer, 1844 -1944*, 14 NAT'L BLACK L.J. 173, 178 (1995) (book review).

3. "When I say that a thing is true, I mean that I cannot help believing it." Oliver W. Holmes, *Ideals and Doubts*, *in* COLLECTED LEGAL PAPERS 303-04 (1920).

4. "[O]rdinarily we are hesitant to accept claims of truth that we recognize fly in the face of our beliefs about the world and how we should live." Kent Greenawalt, *Grounds for Political Judgment: The Status of Personal Experience and the Autonomy and Generality of Principles of Restraint*, 30 SAN DIEGO L. REV. 647, 663 (1993).

5. "Such a distorted view of Christopher Columbus as a heroic friend of the Native Americans is quite different from what his personal journal reveals." Evan Mascagni, *The Legal Process of Cultural Genocide: Chinese Destruction of Tibetan Culture V. U.S. Destruction of Native American Culture*, 14 UDC/DCSL L. REV. 241, 242 (2011).

> "[The Indians] are so naïve and so free with their possessions that no one who has not witnessed them would believe it. When you ask for something they have, they never say no. To the contrary, they offer to share with anyone . . . . They would make fine servants . . . . With fifty men we could subjugate them all and make them do whatever we want."

Id. (quoting HANS KONING, COLUMBUS: HIS ENTERPRISE (1992)) (excerpting Christopher Columbus' journal shortly after arriving in the Americas).

I. ALL GOD'S CHILDREN NEED SEEING GLASSES[6]

> In order to get beyond racism, we must first take account of race. There is no other way.[7]

The late Professor Derrick A. Bell was widely known for his contributions to civil rights and community justice as well as his leadership as a scholar, teacher, and activist.[8] Bell passed away at age seventy-one on October 5, 2011, leaving a legacy to legal scholars that has fostered a new perspective in the way we now view the relationship between race and the law.[9] This promising new lens provides clarity to accurately assess our nation's history.

Bell was born on November 6, 1930, in Pittsburg, Pennsylvania to Derrick Albert and Ada Elizabeth Childress Bell.[10] Many of Bell's early influences in life are directly attributable to his parents. Bell credited his mother for being the source of his willingness to challenge authority.[11] Bell's father never trusted whites, and advised him of the realities of being a Black man in a white man's world.[12] After graduating high school, he became the first member of his family to go to college.[13] He later became an Air Force officer for two years. After leaving the Air

6. Maya Angelou authored *All of God's Children Need Traveling Shoes*. This autobiographical work received high accolades and brought attention to the lives and histories of African Americans. "Angelou's journey into Africa is a journey into herself, into that part of every Afro-American's soul that is still wedded to Africa, that still yearns for a home." Barbara T. Christian, *Black Author Explores Africa and Finds Herself*, CHI. TRIB., Mar. 23, 1986, http://articles.chicagotribune.com/1986-03-23/entertainment/8601220083_1_angelou-afro-african.

7. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

8. "Most people know Derrick Bell as the renegade civil rights scholar who took a leave of absence from Harvard Law School in spring 1990 to protest the school's failure to put an African-American woman on its permanent faculty." Stephanie B. Goldberg, *Who's Afraid of Derrick Bel?l: A Conversation on Harvard, Storytelling and the Meaning of Color*, 78 A.B.A. J. 56, 56 (1992).

9. *See generally* DERRICK BELL, CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTER 10 (1994).

10. *Biography of Professor Derrick Bell*, DERRICK BELL OFFICIAL SITE, http://professorderrickbell.com/about/ (last visited May 13, 2014).

11. Bell relates one story:

> My mother, standing in front of the barred teller's window, taking cash from her purse, waved it in front of the clerk . . . [S]he told him, "This is the rent money. I have it—and you will get it when you fix the back steps so that my children won't fall and hurt themselves."

BELL, *supra* note 9, at 11.

12. Bell's father told him, "Son, you must work hard because white folks are planning and scheming while we Negroes are eating and sleeping." *Id*. at 14.

13. *Biography of Professor Derrick Bell*, *supra* note 10.

Force, Bell decided to attend the University of Pittsburgh Law School where he was the only Black student.[14] Furthermore, there were no women in his class.[15] Earning his LL.B. degree in 1957, he studied, applied himself, and kept silent in spite of racially insensitive remarks made by professors.[16]

Bell's first job after law school was with the Civil Rights Division of the U.S. Justice Department.[17] He was the only African American among thousands of lawyers. Claiming a conflict of interest, the government asked him to resign his membership in the National Association for the Advancement of Colored People (NAACP) to continue his employment.[18] After refusing, the Justice Department moved him to a desk in a hallway and barred him from doing any race-related work.[19] Bell resigned after two years, a decision comparable to vocational suicide. After leaving, however, he went on to become First Assistant Counsel at the NAACP Legal Defense and Educational Fund under Thurgood Marshall, where he supervised more than 300 school desegregation cases in Mississippi.[20]

In 1968, Bell turned to teaching at the University of Southern

14. Eric Ilhyung Lee, *Nomination of Derrick A. Bell, Jr. To Be An Associate Justice of The Supreme Court of the United States: The Chronicles of A Civil Rights Activist*, 22 OHIO N.U. L. REV. 363, 382 (1996).

15. *Id.*

16. BELL, *supra* note 9, at 16.

17. Roberta S. Mitchell, *The Founding of Capital's Law Review: A Retrospective*, 25 CAP. U. L. REV. 237, 248 n. 39 (1996).

> Professor Derrick Albert Bell . . . was an attorney with the Civil Rights Division of the Justice Department from 1957-1959, first assistant counsel of the NAACP Legal Defense Fund from 1960-1966, and deputy director of the Office of Civil Rights, Department of Health, Education and Welfare from 1966-1968. He was a professor of law at Harvard University from 1971-1980 and again from 1986-1992. In the interim he served as dean of the Oregan [sic] Law School. He has written extensively in the area of constitutional law and minority issues.

Id.

18. "[Bell's] first professional act of defiance was in 1959, when he resigned from the Justice Department's Civil Rights Division, rather than give up his membership in the NAACP." Goldberg, *supra* note 8.

19. *In Memoriam: Derrick Bell, 1930-2011*, NYU LAW http://www.law.nyu.edu/news/DERRICK_BELL_MEMORIAM (last visited May 13, 2014).

20. *Id.* "Well, that was a marvelous experience, working with the Legal Defense Fund in the early '60s, and it's an experience I wouldn't have gotten had I not done what I thought was right with regard to my NAACP membership with the Justice Department." *Fresh Air: 'STAND UP, SPEAK OUT,' Derrick Bell Told Law Students*, NAT'L PUB.RADIO (Oct. 7, 2011), *available at* http://www.npr.org/2011/10/07/141152319/stand-up-speak-out-derrick-bell-told-law-students (Law professor and civil rights activist, Derrick Bell, speaking to Terry Gross in 1992).

California Law Center.[21] A year later, he accepted an offer from Harvard Law School, becoming the first full-time Black law professor in Harvard's history.[22] Conceding that he did not have the usual prerequisites for a Harvard professorship, Bell attained tenure two years later.[23]

While serving on the faculty of various other law schools, Bell consistently maintained a campaign for equality among the faculty.[24] In 1981, he left Harvard to become Dean of the University of Oregon Law School, later resigning "when the school refused to back his decision to offer tenure to an Asian-American woman."[25]

After seemingly vain attempts to persuade the Harvard faculty to appoint women of color on a permanent basis, Bell protested by taking two years unpaid leave.[26] By 1990, he still lacked support for the hiring of women of color. Despite being the law school's first Black tenured professor, one of the most popular professors, and a regular recipient of prestigious grants, Harvard terminated him. However, Bell's strict adherence to his principles did not go unnoticed.[27] During his first year of unpaid leave from Harvard, he began teaching at New York University (NYU) School of Law, as a visiting professor and remained at NYU where he continued his writings and activism until his death.

---

21. Bell was an adjunct professor and executive director of the Western Center on Law & Poverty at the University of Southern California Law Center. Lee, *supra* note 14, at 448.

22. *Id.*

23. Bell, *supra* note 9, at 14.

24. Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1746 (1989).

> [T]he racial distinctiveness thesis [proposes that]: the belief (1) that minority scholars, like all people of color in the United States, have experienced racial oppression; (2) that this experience causes minority scholars to view the world with a different perspective than their white colleagues; and (3) that this different perspective displays itself in valuable ways in the work of minority scholars. Bell expresses one version of the distinctiveness thesis when he writes that '[r]ace can [be an important positive qualification] in filling a teaching position intended to interpret . . . the impact of racial discrimination on the law and lawyering.

Id.

25. Goldberg, *supra* note 8, at 56.

26. "In 1992, Harvard Law School severed its sixteen-year association with Professor Derrick Bell. The school revoked his tenure in response to his refusal to end a self-imposed two-year absence." Mario L. Barnes, Book Note, *"Each One, Pull One": The Inspirational Methodology Behind an Impassioned Though Somewhat Flawed Protest*, 1 AFR.-AM. L. & POL'Y REP. 89, 93 (1994) (reviewing DERRICK BELL, CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTOR (1994)).

27. "Professor Bell's leave from Harvard was the protest which garnered him the greatest amount of attention, it was but one in a long sequence of confrontations with authority." *Id.*

A. *Critical Race Theory*

Critical race theory (CRT) originated in the 1970s when lawyers, activists and legal scholars realized that advances made during the previous decade had stalled.[28] It emerged in legal scholarship in the mid to late 1980s initially as a reaction to critical legal studies.[29] Frequent use of the first person, storytelling, narrative, allegory, interdisciplinary treatment of law, and the unapologetic use of creativity characterize CRT writings and lecturing.[30]

Bell, sometimes called the father of CRT,[31] was generally in agreement with the focus of civil rights scholarship on race during the late 1960s and early 1970s.[32] However, he and other scholars were deeply critical of civil rights scholars' commitment to colorblindness and their focus on intentional discrimination, rather than a broader focus on the conditions of racial inequality.[33] Bell believed that racism is pervasive in American life.[34] Today, racism plays a role in almost every decision made by courts and legislatures alike.[35] It is an existing legal

28. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 4 (2d ed. 2012).

29. William C. Kidder, *Legal Storytelling: Derailing A Civil Rights Legacy: The Chronicle of the Second Underground Railroad*, 5 AFR.-AM. L. & POL'Y REP. 51, 59 (2002). "Many progressive law professors, including Derrick Bell, find that assigning short reflection pieces improves the quality of learning in their classrooms." *Id*. at 51 n.2.

30. Derrick A. Bell, *Who's Afraid of Critical Race Theory*, 1995 U. ILL. L. REV. 893, 899 (1995).

31. "Derrick Bell, considered a forefather of CRT, in . . . suggest[ing] that civil rights attorneys' approach to litigating school cases for purposes of desegregating entire school districts (and balancing them racially) might be at odds with their clients[]—African American families." Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 341 (2007).

32. Critical race theory's founding members are usually identified as Derrick Bell, Richard Delgado, Charles Lawrence, Mari Matsuda, and Patricia Williams. *See* Bell, *supra* note 30, at 898 n.16.

33. "One Stanford law professor agrees that scholarship on race and the law must reflect novel ideas to balance Critical Race Theory against 'colorblindness viewed as the central impediment to policies that would further substantiate racial equality.'" Starla J. Williams, *A Values-Based Pedagogy for the Legal Academy in a Post-Racial Era*, 16 J. GENDER RACE & JUST. 235, 259 (2013); *see also*, Douglas E. Litowitz, *Some Critical Thoughts on Critical Race Theory*, 72 NOTRE DAME L. REV. 503, 506 (1997).

34. *See generally*, DERRICK A. BELL, JR., FACES AT THE BOTTOM OF THE WELL (1992). Bell discusses how racist attitudes are built into American culture and society through an allegorical story.

35. "[T]he quest by blacks for racial justice has resulted in dozens of major court decisions that led to social reforms of general significance. These decisions are seldom society's gifts. The litigation is usually carefully planned and intelligently executed." Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 176 n.143 (2011) (quoting Derrick A. Bell, *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME L. REV. 5, 14 (1976)).

system that is not as colorblind as it purports to be.[36] Bell and others posited that the existing system repeatedly advantaged the majority, to the detriment of minorities.[37]

CRT scholarship borrows from diverse intellectual traditions such as Marxism, pragmatism, nationalism, and postmodernism.[38] As an intellectual movement, CRT aspires to eliminate all forms of oppression, as it is grounded in the experiences of real people.[39] One of the defining elements of CRT is that the law must be understood historically and contextually. Another central element to CRT is that the subjective experiences of women and African Americans make them well-suited for analyzing race relations and discrimination law.[40] Having experienced racism and discrimination first-hand, women and minorities make better race relations scholars and professors.[41] It is precisely because of their experiences that they see sexism and racism where the majority cannot or will not.[42]

Roy L. Brooks has defined CRT as "a collection of critical stances against the existing legal order from a race-based point of view," and

36. Litowitz, *supra* note 33, at 506.

> The existing legal system (and mainstream legal scholarship as well) are not color-blind although they pretend to be. Despite the pretense of neutrality, the system has always worked to the disadvantage of people of color and it continues to do so. People of color are more likely to be convicted, to serve more time, to suffer arbitrary arrest and deprivation of liberty and property. A pervasive but unconscious racism infects the legal system.

Id.

37. John A. Scanlan, *Call and Response: The Particular and the General*, 2000 U. ILL. L. REV. 639, 659 (2000).

> According to Bell, "[t]he narrative voice, the teller, is important to critical race theory in a way not understandable by those whose voices are tacitly deemed legitimate and authoritarian . . . . " Implicit in what . . . Bell [] writ[es] [is the] proposition[]: that those who have been, or presently are, subordinated can offer a counterdiscourse, a retelling of familiar tales from another perspective capable of piercing the comfortable armor of complacency worn so lightly by "majority" listeners . . . .

Id.

38. "Critical Race Theory is interdisciplinary and eclectic. It borrows from several traditions, including liberalism, law and society, feminism, Marxism, poststructuralism, critical legal theory, pragmatism and nationalism." Eric Heinze, *Truth and Myth in Critical Race Theory and Latcrit: Human Rights and the Ethnocentrism of Anti-Ethnocentrism*, 20 NAT'L BLACK L.J. 107, 114 (2007).

39. Erika George, Book Note, *Words As Sticks and Stones: Naming the Harm of Racist Speech*, 11 HARV. BLACKLETTER L.J. 221 (1994) (reviewing MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993)).

40. Litowitz, *supra* note 33, at 506.

41. *Id.*

42. *Id.*

says it focuses on the various ways in which the legal tradition adversely affects people of color not as individuals but as a group.[43] CRT sometimes incorporates stories, narratives, and personal and revisionist histories to counter and challenge abstract legal arguments.[44] By incorporating narrative, CRT hopes to inform legal analysis with experiences instead of abstractions.[45] Thus, CRT attempts to analyze law and legal traditions through the history, contemporary experiences, and racial sensibilities of racial minorities in this country.

B. *Interest-Convergence Theory*

Arguably Bell's most notable contribution, the interest-convergence theory, has gone on to explain historical developments related to social justice. He established the interest-convergence theory in his article Brown v. Board of Education *and the Interest-Convergence Dilemma*.[46] Interest-convergence stands for the proposition that African American advancement to equality only develops to the extent it merges with whites' interest. The system changes when the interests of the powerful need it to change. Social justice, if it occurs, is merely a collateral benefit.[47]

Scholars can use interest-convergence as a tool or, as suggested here, a new pair of glasses, to help view historical developments related to equality and justice. This new lens provides clarity regardless of the minority or marginalized group. Therefore, interest-convergence is not a universal maxim, but rather a recurring historical pattern throughout American history.[48]

---

43. Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 85 (1994).

44. George, *supra* note 39, at 223.

45. Alan D. Freeman, *Derrick Bell-Race and Class: The Dilemma of Liberal Reform*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE 458, 458-59 (Richard Delgado & Jean Stefancic eds., 1995).

> Bell's approach to legal doctrine is unabashedly instrumental. The only important question is whether doctrinal developments have improved, worsened, or left unchanged the actual lives of American blacks . . . . Bell eschews the realm of abstract, ahistorical, normative debate; he focuses instead on the relationships between doctrine and concrete change, and the extent to which doctrine can be manipulated to produce more change.

Id.

46. Derrick A. Bell Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

47. Jennifer S. Hendricks, *Converging Trajectories: Interest Convergence, Justice Kennedy, and Jeannie Suk's "The Trajectory of Trauma,"* 110 COLUM. L. REV. SIDEBAR 63, 66 (2010).

48. Stephen M. Feldman, *Do the Right Thing: Understanding the Interest-Convergence Thesis*, 106 NW. U.L. REV. COLLOQUY 248, 259 (2012).

> Whereas *Racial Remediation* primarily used a historical lens to examine the subordination of black rights, Professor Bell's Brown v. Board of Education *and the Interest-Convergence Dilemma* provided a distinctly more future-oriented account of the possibility for attaining Black advancement. As the title suggests, *Interest-Convergence* used *Brown* and its accompanying history as a point of departure.[49]

Interest-convergence theory is now most often deployed to explain a particular case or a line of judicial decisions or legislative enactments. Like Bell, other legal scholars have used interest-convergence to explain a host of Supreme Court decisions, legislative enactments, and state court cases.[50]

A close reading of Bell's *Interest-Convergence Dilemma* illustrates that the *Brown v. Board of Education*[51] ruling appealed to the interests of four specific groups. First, the *Brown* decision facially appealed to those concerned about the immorality of racial inequality. Next, and perhaps the driving force behind *Brown*, the decision appealed to whites in policymaking positions. Bell posits that economic and political advances of policymakers motivated the abandonment of segregation. Legislators were aware that at least the appearance of equality in the United States would provide immediate credibility to its struggle with Communist countries to win over third world countries.[52] In fact, the news media played an important role as it predicted *Brown* would have an impact on the world stage.[53] By doing so, the media in effect pushed legislators to act.

Third, the *Brown* decision appealed to American Black soldiers who fought in World War II.[54] Black actor Paul Robeson described in 1949, "[i]t is unthinkable . . . that American Negroes would go to war on behalf of those who have oppressed us for generations . . . against a country (the Soviet Union) which in one generation has raised our

49. *See* Driver, *supra* note 35, at 160-61.

50. Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911, 925 (2007).

51. 347 U.S. 483 (1954).

52. "In many countries, where U.S. prestige and leadership have been damaged by the fact of U.S. segregation, it will come as a timely reassertion of the basic American principle that 'all men are created equal.'" Bell, *supra* note 46, at 524 (quoting Derrick Bell, *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME LAW. 5, 12 n.31 (1976)).

53. "*Time* magazine, for example, predicted that the international impact of *Brown* would be scarcely less important than its effect on the education of black children." *Id.*

54. *Id.*

people to the full human dignity of mankind."[55] Therefore, fear of the spread of such sentiments among Blacks and their allies made the *Brown* decision appealing to policymakers, and perhaps even the courts.

Finally, the fourth group to whom the *Brown* decision appealed was Southern whites. Southerners seized the *Brown* decision as an economic opportunity to transition out of a plantation society.[56] Bell's theory suggested that segregation was viewed as a barrier to the South's further industrialization. In simple mathematical terms, Bell's view of interest-convergence can be expressed as follows: White Racism + Justice = White Racism. In other words, when white racists are confronted with issues of justice, the end result is an expression of racism not justice. However, if the equation is White Racism + White Self-Interest = Justice, such as when white racists are confronted with protecting their economic interest, the outcome will be named justice, even though justice is a secondary result.[57] Regardless of the need for justice, only white self-interest will motivate white racists to yield a result that appears to be justice. When viewed through this lens, history is less *his story* and more accurately *the story*. This leads to the conclusion that White Racism prevails against Justice unless White Self-Interest is in play as a factor. In this Article, the interest-convergence theory is employed as a "new pair of glasses" through which to view Southern states' legalization of the freedmen's marriages after the Emancipation.

II. THE CIVIL WAR, EMANCIPATION, AND DISRUPTION

At the start of the Civil War, the Southern states had some of the most powerful and vibrant cities.[58] According to the 1860 Census, what would become the eleven Confederate states had a population of 9.1 million, including 3.5 million slaves, thirty-nine percent of the total population.[59] The Census indicates that only six percent of the free population owned slaves, however the culture of slavery was widespread and enforced by all classes of people.[60] The Civil War raged on for four

55. DOROTHY BUTLER GILLIAM, PAUL ROBESON: ALL AMERICAN 137 (1976) (unwritten speech before the Partisans of Peace, World Peace Congress in Paris).

56. Bell, *supra* note 46, at 524, 525.

57. DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 46 (1972).

58. "[Prior to the Civil War] slavery was a powerful economic institution . . . [it] was the central economic institution. Almost all the leaders in southern states were slaveowners." Paul Finkelman, *How the Proslavery Constitution Led to the Civil War*, 43 RUTGERS L.J. 405, 408 (2013).

59. *See generally* JOSEPH C. G. KENNEDY, POPULATION OF THE UNITED STATES IN 1860; COMPILED FROM THE ORIGINAL RETURNS OF THE EIGHTH CENSUS (1864).

60. *Id.*

years leaving the rebelling American South demoralized and broken.[61] The social, economic, political, and legal systems were severely damaged.[62]

During the time of war, the Confederate state issued its own currency and attempted to establish itself as a free and independent entity.[63] The majority of the battles were fought in the upper Southern states, specifically Virginia and Tennessee.[64] Of the approximately 297 Confederate towns and cities, 162 of them were at some point occupied by Union troops and several of these cities were damaged or destroyed, including Atlanta, Charleston, Columbia, and Richmond.[65] Historians have noted fourteen percent of the urban South lived in eleven major cities, which were damaged or destroyed during the Civil War.[66] The rural South did not fare any better than the urban areas during the war.[67] While most rural land and farms were intact, the loss of the labor force,

61. *Civil War Facts*, CIVIL WAR TRUST [hereinafter CIVIL WAR TRUST], http://www.civilwar.org/education/history/faq/ (last visited May 13, 2014).

62. In his first inaugural address:

> [President] Lincoln starts by contesting any claim that the federal government has violated or intends to violate the Constitution: 'Apprehension seems to exist among the people of the Southern States,' Lincoln says, that his election poses a threat to their 'property' (an important choice of words), their peace, and their personal security.

Michael Stokes Paulsen, *The Civil War As Constitutional Interpretation*, 71 U. CHI. L. REV. 691, 704 (2004). *See also*, Saul Touster, *Patriotic Gore: Studies in the Literature of the American Civil War*, 76 HARV. L. REV. 434, 440 n.6 (1962) (book review) ("comments on Robert Penn Warren's *The Legacy of the Civil War*, in which the theme of 'the two fraudulent traditions' is developed, as follows: 'In the South, it is . . . the 'Great Alibi,' which enables the Southerners to put the blame for everything that is lazy, provincial, barbarous and degraded in the South on the damage that they suffered in the war.'").

63. G. Edward White, *Recovering the Legal History of the Confederacy*, 68 WASH. & LEE L. REV. 467, 498 (2011).

> [T]he preamble to the Confederate Constitution substituted, for the opening words of the U.S. Constitution ("We the People of the United States, in Order to form a more perfect Union") the phrase "We, the people of the Confederate States, each state in its sovereign and independent character, in order to form a permanent Federal Government." The version employed by the Confederate delegates emphasized the 'sovereign and independent character' of states and the association of individuals with them . . . .

Id. (footnotes omitted).

64. CIVIL WAR TRUST, *supra* note 61.

65. Paul F. Paskoff, *Measures of War: A Quantitative Examination of the Civil War's Destructiveness in the Confederacy*, *in* CIVIL WAR HISTORY 35-62 (2008).

66. "As economic theory would predict, white planters were unable to form a successful voluntary cartel to stifle the free labor market, so they turned to government coercion." David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 TEX. L. REV. 781, 784 (1998).

67. JAMES M. MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION 38 (1992).

slaves, horses, mules, cattle, and tools crippled the agricultural infrastructure and productivity.[68] Further, Union blockades and other measures destroyed the economic well-being of the South.[69] By the end of the war, the Confederate currency was worthless, its resources depleted, and financial institutions were on the verge of bankruptcy.[70]

The Civil War transformed Southern society and normative values. Of the approximately 750,000 white men between the ages of fifteen and fifty-nine in the Confederate states, twenty percent of these men did not return from war.[71] Many widows were unable to live independent lives without assets and the opportunity to remarry.[72] Women often had to move in with other family members and seek alternatives to traditional courtships. Young women often delayed marriages, became less selective in choosing a spouse, or rushed into marriage for fear of being an Old Maid. Young women often had no prospects of marriage and the benefits that it offered.[73] White Southern women were forced to seek work and a new type of Southern woman began to awaken.[74] Women without kind or able relations were forced to live in refugee camps facing rationed food, violence, disease, and death.[75] The lack of men in the Southern states altered the mythic Southern Belles and the Gallant Gentlemen.

The end of the Civil War began a period of rehabilitating the people and the economy of the Southern states. The Army had a principal role in reconstruction. As the Union armies advanced in the South, the civil

68. Many slaves in the rebelling states were freed at the end of the war, although slavery was not officially made illegal until the passage of the 13th Amendment. Many other slaves enlisted with Union troops as a method of emancipation.

69. "The Civil War devastated the economy of the South and left the country with significant deficits resulting from military operations as well as pension obligations to Union soldiers and their survivors." Eric M. Zolt, *Inequality, Collective Action, and Taxing and Spending Patterns of State and Local Governments*, 62 TAX L. REV. 445, 468 (2009).

70. For arguments that American bankruptcy law may have been sparked by the Civil War, how law has affected the development of the southern states and, in turn, how the South has affected the development of American law, see Carl H. Moneyhon, Book Note, 47 AM. J. LEGAL HIST. 452 (2005) (reviewing ELIZABETH LEE THOMPSON, THE RECONSTRUCTION OF SOUTHERN DEBTORS: BANKRUPTCY AFTER THE CIVIL WAR. ATHENS: UNIVERSITY OF GEORGIA PRESS (2004)). Thompson's work explores these issues by examining the federal Bankruptcy Act of 1867, testing two major theses regarding the Act and its relationship with the South.

71. *American Experience: Death and the Civil War* (PBS television broadcast, Sept. 18, 2012).

72. J. David Hacker et al., *The Effect of the Civil War on Southern Marriage Patterns*, 76 J. SOUTH HIST. 39, 40 (2010).

73. *Id*. at 55, 57.

74. *Id*. at 69.

75. JUDITH E. HARPER, WOMEN DURING THE CIVIL WAR: AN ENCYCLOPEDIA 315-17 (2004).

government collapsed. The Army acted in place of the civil government by extending the official function of marshals from policing troop activities to policing and, in effect, governing the occupied areas.[76] During the period between the Civil War and a state's readmission, upon application to the Union, states were subjected to military occupation.[77] The Military Reconstruction Act of 1867, passed by Congress, disbanded former Confederate state governments and implemented military authority, and organized these states into military districts.[78] Readmission to the Union was predicated on several steps. Generally, the states were to denounce secession and to ratify the 13th, 14th, and 15th Amendments of the Constitution. These Amendments would abolish slavery, provide equal rights to all people within the state, and grant the franchise to former slaves. The new or reconstructed state governments refused to adopt these Amendments initially and those states that adopted the Amendments adopted "Black Codes" to regulate the lives and bodies of former slaves, and to provide for their punishment. In 1868, seven of the former Confederate states voted to ratify the 14th Amendment and in 1870 the 15th Amendment was ratified.[79]

Near the end of the war, in March 1865, Congress created the Bureau of Refugees, Freedmen, and Abandoned Lands ("Freedmen's Bureau") to protect and help the freedmen live alongside their former owners.[80] The Freedmen's Bureau, through its agents, expended most of its efforts adjudicating differences between landless Black farmers and white landowners, encouraging labor contracts benefiting freedmen, providing rations to refugees and freedmen, and building schools for

76. "[T]he military had tried to establish a legal order in which everyone was entitled to security in a society resting upon legal equality. This had not been the measure of the first phase of Reconstruction during which the military was involved in the restoration of order." Thomas D. Morris, *Military Justice in the South, 1865-1868: South Carolina As A Test Case*, 54 CLEV. ST. L. REV. 511, 553 (2006).

77. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 Ch. 6 (1988).

78. Gabriel J. Chin, *The "Voting Rights Act of 1867": The Constitutionality of Federal Regulation Suffrage During Reconstruction*, 82 N.C. L. REV. 1581, 1589-91 (2004). Tennessee, which ratified the Fourteenth Amendment, escaped invalidation and military subjugation. *Id.* at 1582 n.2.

79. *Id.* at 1581 n.1. Texas, Mississippi, and Virginia were required to ratify the new amendment as a precondition for readmission to the Union.

80. "As the war ended and the newly created Freedmen's Bureau took charge of freedmen's affairs, Bureau agents played a crucial role in spreading concepts of rights and equality throughout the southern countryside." Donald G. Nieman, *From Slaves to Citizens: African-Americans, Rights Consciousness, and Reconstruction*, 17 CARDOZO L. REV. 2115, 2125 (1996).

freedmen.[81]

Author Paul Scheip describes this period:

> As the southern states were restored to the Union under the reconstruction governments, military rule came to an end and civil authorities assumed full control of state offices. This process was largely completed in 1870.
>
> With the ending of Congressional reconstruction, the Army's direct supervision of civil affairs in the South came to an end and the number of troops on occupation duty, which already had fallen off markedly, was reduced still further. Now [the Freedman's Bureau's] mission was to preserve the new state governments [and support federal marshals] by continuing its protection of the [freedmen and their White supporters] upon whom the governments rested. . . .
>
> . . . .
>
> In April 1877, as a result of the compromise by which Rutherford B. Hayes became President after the disputed election of 1876, the last of the troops on reconstruction duty in the South were transferred to other duty and the federal military occupation of the South came to an end.[82]

Unfortunately, readmission of seceded states seemed more important to the nation than securing the rights of former slaves, and the Freedmen's Bureau never realized its full potential.

The Civil War, emancipation, and reconstruction were a disruption to Southern life in every way. The cities and the economy were decimated, social hierarchies and long held norms were in flux, and the Northern military was an unwelcomed presence. Southern white interests needed to address these very important issues beginning with shedding the military presence, gaining admission to the Union, and reestablishing social, economic, and political order.

A. *Disruption to the Social Order and State Interest in Reestablishing Control*

As the status quo began to change, the need for government control over the seeming disruption emerged. Since the United States' inception, the quintessential role of government has been to protect citizens from threats and catastrophe, seen in situations such as war and disease. Thus, an established framework for how government should respond to such threats and risks was critical. In government, two

81. *Id.*

82. Paul T. Scheip, *Darkness & Light: The Interwar Years 1865-1898*, in AMERICAN MILITARY HISTORY 281, 284-85 (Maurice Matloff, ed., 1969).

important paradigms have emerged as possible responses to social disruption: cost-benefit analysis and the precautionary principle.[83] Cost-benefit analysis has a variety of meanings and uses:

> At the highest level of generality . . . [cost-benefit analysis] is virtually synonymous with welfare economics, that is, economics used normatively . . . to provide guidance for the formation of policy, either public . . . or private. At the other end of the scale of generality, the term denotes the use of . . . [a] wealth maximization rather than utility maximization[] concept of efficiency to evaluate government projects, such as the building of a dam or the procurement of a weapons system; government grants, such as grants for medical research; and government regulations, including not only administrative regulations dealing with health, the environment, and other heavily regulated activities but also statutes and common-law doctrines and decisions.[84]

Under the precautionary principle, any risk is automatically deemed problematic, unless the person introducing it can prove otherwise.[85] This method of response to disruption seeks to preempt threats or risks, whereas cost-benefit analysis can be used as "a method of pure evaluation, conducted wholly without regard to the possible use for its result in a decision."[86] Post-Civil War control of the social order was paramount to Reconstruction, and Congress set out to devise a plan for Southern states' readmission to the Union.[87] Both cost-benefit and precautionary techniques were necessary to smooth the stifled relation between the North and South and protect state interests while pushing a federal agenda.[88]

As Southern states attempted to restore social order and end the various disruptions presented by the Civil War, the state post emancipation affirmation or legal ratification of slave marriages was just one solution.

83. Gregory N. Mandel & James Thuo Gathii, *Cost-Benefit Analysis Versus the Precautionary Principle: Beyond Cass Sunstein's Law of Fear*, 2006 U. ILL. L. REV. 1037, 1038 (2006) (book review).

84. Richard A. Posner, *Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers*, 29 J. LEGAL STUD. 1153, 1153-54 (2000) (internal citations ommited).

85. *Twenty Years of CEI*, 21 NO. 1 CAL. ENVTL. INSIDER 6 (2007).

86. Posner, *supra* note 84, at 1154.

87. RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 29 (2004).

88. *Id.*

III. THE ROLE OF MARRIAGE IN THE SOCIAL HIERARCHY IN THE PRE-CIVIL WAR SOUTH

John Bouvier, the American author of an influential pre-Civil War legal encyclopedia, published in Philadelphia, explained that: "Marriage owes its institution to the law of nature, and its perfection to the municipal or civil law . . . . As an institution established by nature, it consists in the free and voluntary consent of both parties, in the reciprocal faith which they pledge to each other."[89] Throughout history, marriage has been used to control both men and women. Marriage creates a private sphere of duty and obligation between two parties. In the early 19th century, women could be protected, cared for, and directed toward the appropriate activities through marriage. The acceptable gender related activities for women included child rearing and household chores, and in exchange for these services, a woman's materials needs would be met.[90] Once women married, all of their property came under the exclusive control of their husbands.[91] Women were unable to work outside of the home, unable to contract, and unable to lay claim to property. The laws rendered married women completely dependent on their husbands. Husbands had an obligation to financially support a wife and any children. Marriage in the southern United States was no different. Marriage in the antebellum period was a form of guardianship of the husband over the wife.[92]

A. *Interracial Relationships*

Before the Civil War, interracial marriages occurred with some regularity in the southern United States. Few of these marriages actually took place between whites and full-blooded African Americans. But a number of mixed-race women married white men, and a similar number of white women married mixed-race men.[93] Additionally, there had always been some sexual relationships between white male slave owners and Black female slaves.[94]

89. *See* 1 JOHN BOUVIER, INSTITUTES OF AMERICAN LAW 101 (1851).

90. NANCY F. COTT, THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835, at 1-2 (2d ed. 1997).

91. MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA 15 (1986).

92. NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN THE NINETEENTH-CENTURY NEW YORK 67 (1982).

93. Gary B. Mills, *Miscegenation and the Free Negro in Antebellum "Anglo" Alabama: A Reexamination of Southern Race Relations*, 68 J. AM. HIST. 16, 21(1981).

94. Michael J. Rosenfeld, *Intermarriage, in* THE ENCYCLOPEDIA OF RACE, ETHNICITY, AND SOCIETY 736, 736 (2008), *available at* http://www.stanford.edu/~mrosenfe/Rosenfeld_Intermarriage_Sage_Encyclopedia.pdf.

As tensions between races grew and the Civil War neared, white society worked diligently to make interracial relationships invisible. One technique used was "the 'one-drop rule,' which meant that anyone with as much as 'one drop' of non-White blood could not be considered white."[95] By legal definition, if a white slave master impregnated a Black slave, her child was Black and a slave as well. "Formal marriage was generally not possible between slaves (because slaves had no legal standing), and therefore formal marriage between whites and slaves was impossible."[96]

Prior to the Civil War, several states had statutes prohibiting marriage between races.

> Notably, during the years of Reconstruction in the South . . . none of the statutes against miscegenation appear to have been repealed. Even outside the South, only a handful of states repealed their anti-miscegenation statutes in the wake of the Civil War. By 1910, twenty-eight states still had such statutes in effect. Six of these states, all Southern, prohibited racial intermarriage through constitutional provisions.
>
> Although the text of these statutes varied by state, all 28 statutes expressly prohibited intermarriage between whites and blacks . . . . The universal application to African Americans suggests that these prohibitions primarily sought to prevent white-black intermarriage.[97]

In 1883, the Supreme Court ruled in *Pace v. Alabama* that state-level bans on interracial marriage did not violate the 14th Amendment of the U.S. Constitution, a ruling that held for more than 80 years.[98]

> The laws regarding racial purity and interracial sex in [the] pre-Civil War [South] sprang from two concerns. The first concern was with the maintenance of clear racial boundary lines in a society . . . based on racial slavery. Starting in the late seventeenth century, white Virginians devised statutes to discourage racial intermingling and then statutes to classify racially the mixed-race children born when the earlier statutes were ineffective. The statutes punishing voluntary interracial sex and marriage were directed only at whites;

95. *Id.*

96. *Id.*

97. Hrishi Karthikeyan & Gabriel J. Chin, *Preserving Racial Identity: Population Patterns and the Application of Anti-miscegenation Statutes to Asian Americans, 1910-1950*, 9 ASIAN L. J. 1, 14-19 (2002) (internal quotations and citations omitted); *see* Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 151-56 (1998) (examining the bans on interracial marriages in the post-war South).

98. 106 U.S. 583, 585 (1883), *overruled in part by* McLaughlin v. State of Fla., 379 U.S. 184 (1964).

> they alone were charged with the responsibility for maintaining racial purity.
>
> The second concern was with involuntary interracial sex . . . . This was seen primarily as an aspect of power relations between the races.[99]

These early laws were applied more harshly to Black men than to white men, "punish[ing] only [B]lack men for interracial rape."[100]

B. *Slaves*

Slave "marriages" happened with some frequency in spite of the fact that slaves had no legal standing and lacked the ability to enter into formal agreements.[101] Enslaved couples did not enjoy the rights and privileges that we commonly associate with marriage. Slave marriages were done or entered into with slave owner consent, and through the slave community acknowledgment and custom. The reasons behind these marriages range from love to companionship to owner coercion.

Enslaved couples were not entitled to live together and often partners lived miles apart on different plantations.[102] Abroad couples accounted for one-third of South Carolina marriages and one-half of Missouri marriages.[103] For slave owners, these marriages would lead to an eventual increase in their labor force and economic well-being through child birth. The owners of slave men held hope that family bonds would make slave men less likely to run away. This mutual understanding among slave owners made abroad marriages possible. Slave men were able to visit with their wives as frequently as their mutual owners would allow.[104] On these visits the husbands could provide very limited support economically, physically, or otherwise because of the length of the visit. Slave husbands could not protect their wives from violence and sexual abuse. Marriages on a single or neighboring plantation were often symbolized by simply living together

99. A. Leon Higginbotham, Jr. & Barbara K. Kopytoff , *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1968 (1989).

100. *Id.*

101. *See* Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1647, 1655 (2005).

102. Tera W. Hunter, *Putting an Antebellum Myth to Rest*, N.Y. TIMES, Aug. 1, 2011, http://www.nytimes.com/2011/08/02/opinion/putting-an-antebellum-myth-about-slave-families-to-rest.html?_r=0.

103. This practice was known as an Abroad Marriage, "where wives and husbands were owned by two different slaveholders and lived on separate farms or plantations." DIANA RAMEY BERRY & DELESO A. ALFORD, ENSLAVED WOMEN IN AMERICA: AN ENCYCLOPEDIA 193 (2012).

104. *Id.* at 84-85.

or in a more formal way by slave owner permission. A slave husband on the same plantation as the wife could in most instances cohabitate and provide assistance with chores and the sharing of food. Slave marriages and other family relationships were often disrupted by the business of slavery. Enslaved couples were separated from one another and their children through sales and lease arrangements. This transient nature of family membership required a communal sense of family and often resulted in "non-white" or non-traditional households. It was not uncommon to have siblings with different fathers and multiple spouses.

For newly freed slaves, life after the Civil War underwent a dramatic change. In growing numbers, Blacks were moving from the country to the city, from the South to the North.[105] Emancipation was a disruption to the social order of the South, and as more African Americans migrated out of the rural South, Black migration and competition for jobs threatened the status quo of the North.[106] Racial hostilities began to brew and images of the urban slave emerged, reflecting the perceived threat of an expanding Black labor force.[107]

IV. THE MARRIAGE PATCH; STATE POST EMANCIPATION AFFIRMATION OR LEGAL RATIFICATION OF SLAVE MARRIAGE

Most Southern states took action to affirm slave marriages as the Civil War came to a close.

A. *State and Federal Action to Ratify Freedmen Marriages*

The legalization of slave marriages was an important result of emancipation. During and immediately following the war, federal authorities, states, and missionaries encouraged former slaves to make their marriages legally binding for the first time. This seeming acceptance of marriages also carried criminal penalties for bigotry, adultery, fornication, cohabitation, and other moral crimes. In some states, failure to complete the paperwork to evidence a marriage was an "indictable misdemeanor."[108] The Alabama State Convention adopted a measure on September 29, 1865, legalizing former slave unions.[109] The

105. JACQUELINE JONES, LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY, FROM SLAVERY TO THE PRESENT 72 (2010).

106. *Id.* at 72-73.

107. *Id.*

108. Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. MARSHALL L. REV. 299, 331 (2006) (quoting North Carolina Act of March 10, 1866, Ch. 40, section 6).

109. *Id*. at 322 (Ordinance No. 39, p. 64 (adopted as Revised Code of Alabama, No. 39) (ratifying marriages between freedmen and freedwomen)).

District of Columbia field office established an office of the superintendent of marriages. The superintendent's office advised freedmen of the Act of Congress of July 25, 1866, (14 Stat. 236), which stipulated that "all color persons" in the District who recognized each other as man and wife prior to the law were now legally married and their children legitimate.[110] Tennessee required that all freemen living together in contraband camps must be married.[111]

> 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.' This was the only compulsory marriage statute 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.'[112]

In addition to state actions to ratify the marriages of freedmen, the Freedmen's Bureau served as licenser and record keeper of freedmen marriages.[113] This task of assuring these marriages was most unusual, for it was the first time in history that the federal government would enter into the personal lives of citizens.[114] Couples who were not separated during slavery approached the Freedman's Bureau for assistance.[115] Post-Emancipation, the Bureau performed marriages and recorded and issued certificates related to freedman marriages. This work was a small percentage of the Bureau's, and the records fail to reflect the rates of marriage.

Both states and the Freedman's Bureau showed a keen interest in the marriage of former slaves. Revisiting post-bellum freedmen marriages through an interest-convergence lens begs the question, were the sanctioned marriages merely a collateral benefit of self-interested

110. *Id*. at 320-30.

111. *Id*.

112. *Id*. at 332-33 (quoting Act of January 11, 1866, 1865 Fla. Laws Ch. 1469, § 1 and Daniel v. Sams, 17 Fla. 487, 496 (1880)).

113. John M. Bickers, *The Power to Do What Manifestly Must Be Done: Congress, the Freedmen's Bureau, and Constitutional Imagination*, 12 ROGER WILLIAMS U. L. REV. 70, 74 (2006).

114. *Id.* at 75.

115. "[The Freedmen's Bureau, through] federal intervention had helped destroy the restrictions on family formation that were constitutive of American slavery and helped provide the freedmen with the family rights inherent in freedom." Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1357 (1998).

whites? Perhaps marriage served whites as much if not more than the freedmen. As with Bell's interest convergence theory as applied to the *Brown* decision, a different historical perspective suggests that marriage of former slaves appealed to three separate groups. These groups' interests are similar to the four groups to whom the *Brown* decision appealed.[116]

B. *Whose Interest Did Post-Emancipation State Ratification of Slave Marriages Serve?*

The wholesale ratification or affirmation of slave marriages by states appealed to several interest groups. Historians have discussed at length the role of marriage promotion as an urgent policy priority during slavery's collapse and the initiation of a new political and social order.[117]

1. The Interest of Freedmen, Anti-Slavery Advocates, and Moral Groups

The right to marry has been a symbol of humanity and freedom.[118] "While whites often dismissed the value black couples placed on their wedding rites and tried to manipulate Black marriages for political control, [freedmen] often saw marriage as an institutional sanction for their families and a platform from which to assert citizenship and political participation."[119] The legitimacy of marriage for Blacks and the expectations of ensuing liberty rights coincided, for the most part, with those concerned about the immorality of racial inequality.

To the newly emancipated, marriage meant training for citizenship, escape from state control through the Freedmen's Bureau, and a new beginning. Some moral and perhaps religious whites viewed marriage as a natural right in accordance with Locke and other philosophers. Antislavery advocates had a genuine concern for the lack of freedmen's right to legal marriages.[120] Ample historical support indicates religious

116. Bell, *supra* note 46, at 524-25.

117. Julie Novkov, *The Thirteenth Amendment and the Meaning of Familial Bonds*, 71 MD. L. REV. 203, 209-10 (2011) (citing Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. MARSHALL L. REV. 299, 313-38 (2006)).

118. "Formerly enslaved people and abolitionists generally deemed the right to marry one of the most important ramifications of emancipation." Katherine M. Franke, *Becoming A Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251, 277 (1999).

119. Krystal D. Frazier, From the Reunions of Reconstruction to the Reconstruction of Reunions: Extended and Adoptive Kin Traditions Among Late-Nineteenth and Twentieth Century African Americans 39 (Jan. 2010) (unpublished Ph.D. dissertation, Rutgers University) (on file with author).

120. "With emancipation . . . . many southern whites began to view the absence of legal marriage among enslaved people with the same critical eye as white northerners. At times

abolitionist societies, such as the American Missionary Association and the National Freedmen's Relief Organization funded and sent volunteers to assist freedmen marriages.[121]

States and the Freedmen's Bureau proceeded to establish, and in some cases reaffirm, freedmen family ties and biological ties in a manner most consistent with the monogamous norms of white marital relationships.[122] In some cases, Bureau agents were confronted with multiple spouses due to family disruption through slave sells or one household with children with multiple fathers.[123] Traditional history credits the Freedmen's Bureau for championing freedman marriages and helping reunite families separated by the slave system.[124] However, interest-convergence tells a different story. The Freedmen's Bureau's policies for accomplishing these tasks were two-sided: assuring the newly emancipated their right to liberty, while simultaneously warning that freedom came with a steep price tag – being barred from state dependency.[125] The ratification of freedman marriages accomplished the privatization of poverty.[126]

As optimistic as freedmen were, scholars have shown that freedmen were also resistant to marriage in the manner proscribed.[127] Their resistance can be explained by examining the terms and conditions under which the marriages took place. Interest-convergence theory suggests that Blacks did not transition from slavery to civil society on their own terms. Instead, marriage and its (false) promises of citizenship came on the non-negotiable terms of whites.[128] There is historical evidence that some freedmen sought a right to *not marry* and a right to *remarry*; rights

southern whites seemed to promote it as enthusiastically as freedpeople themselves, but they did so for very different reasons." Laura F. Edwards, *"The Marriage Covenant Is at the Foundation of All Our Rights": The Politics of Slave Marriages in North Carolina After Emancipation*, 14 LAW & HIST. REV. 81, 90 (1996).

121. Nathan A. Adams IV, *Florida's Blaine Amendment: Goldilocks and the Separate but Equal Doctrine*, 24 ST. THOMAS L. REV. 1, 7 (2011).

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

123. Novkov, *supra* note 117, at 210 (citing Onwuachi-Willig, *supra* note 101, at 1657-61 (identifying a variety of freedman family relationships and how Bureau Agents responded to those relationships)).

124. "[T]he most endearing legacy of the Freedmen's Bureau is its work in reuniting formerly enslaved African American families." Frazier, *supra* note 119, at 30.

125. Cristina Gallo, *Marrying Poor: Women's Citizenship, Race, and TANF Policies*, 19 UCLA WOMEN'S L.J. 61, 73 (2012).

126. Katherine M. Franke, *Taking Care*, 76 CHI-KENT L. REV. 1541, 1549 (2001) ("[T]he state's recognition of the integrity of the African American family was motivated, in significant part, by a desire to privatize dependency.").

127. Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640, 683 (2001).

128. Franke, *supra* note 118, at 253.

that were ignored.[129] The benefits of legal marriage hardly resembled the quasi-marital norms Blacks experienced prior to emancipation.[130] For instance, once married, newly freedmen had to conform to the familial model thrust upon them rather than their own choosing.[131] They could not retain their family models adopted during slavery, models that had a longstanding history of maintaining extended kinship networks, which often also incorporated non-relatives as adoptive kin. These were traditions of familial flexibility, first developed under slavery, that shaped their conceptions of family.[132] Post-bellum marriage for freedwomen not only starkly contrasted with white wives, it was a major reality check on their expectations — the sobering recognition that the system had conscripted them (back) into servitude through marriage.[133]

2. Interests of Those Who Opposed Race Mixing

The ratification of Slave marriages and the legitimization of children appealed to groups that opposed race mixing and those who feared for the physical safety of white women. Southern states had a low number of white men available to care for and protect white men. Many white women were single and in many ways vulnerable after the Civil War. Laws against miscegenation were on the books in most Southern states, but the disruption of the Civil War made the possibility of race mixing more likely. A powerful myth of African sexuality became both the reason and the excuse for the rape of slave women and the distrust of slave men.[134] This increased sexual nature or primal instinct made slave women insatiable and irresistible as seductresses, and unable to be raped based on their status as property.[135] The heightened sexual nature of slave men placed all white women at risk.[136] Legal and extra-legal

129. Anthony E. Kaye, The Personality of Power: The Ideology of Slaves in the Natchez District and the Delta of Mississippi, 1830-1865, at 1-14 passim (1999) (unpublished Ph.D. dissertation, Columbia University) (on file with the Columbia Law Review).

130. *Id.*

131. Gross, *supra* note 127, at 683.

132. Frazier, *supra* note 119, at 30-31.

133. Gallo, *supra* note 125, at 75.

134. N. Jeremi Duru, *The Central Park Five, the Scotsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1320 (2004) (analyzing the development of the Black man as a "sexual beast").

135. DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE REPRODUCTION, AND THE MEANING OF LIBERTY 11 (1997) (in most of American history the rape of a Black woman did not exist as a crime).

136. Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 860-61 (2006) (analyzing the assumption that Black men are a threat to the sexual safety of white women); *see* ROBERT L. ZANGRANDO, THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950, at 3 (1980) (asserting that lynching was used to "intimidate, degrade, and control black

means were used to tame the sexual instincts of both slave men and women. Laws were enacted early in American history to preserve racial purity while other laws were enacted to preserve slavery in light of interracial sexuality.[137] These concerns about interracial sexuality were enhanced with the Emancipation. The broad ratification of freedmen marriage offered the possibility of decreased interracial contact. The freedmen would have assigned sexual partners. In addition, there might have been hope the Whites and Blacks would respect monogamy implied by vows of marriage.

3. States' Interests in Freedmen Marriages

States, through political power brokers, had the greatest interest in the ratification of slave marriages. Endorsing marriages under the guise of promoting freedmen's interests reasserted the institutional stronghold on Blacks that slavery once maintained. For example, in 1867, Kentucky's newly elected Governor John L. Helm stated in his inaugural address that state lawmaker's role would be to help Blacks position themselves "within the social and economic order."[138]

> "Helm believed that black Kentuckians' freedom would be enacted primarily through social relations, rather than through the exercise of individual rights . . . [and that they] 'must understand . . . that white men will rule Kentucky. We are not yet sunk so low as to consent to be governed by negroes.'"[139]

In light of the Southern states' economic downturn, "positioning themselves within the order" meant a return for Black Kentuckians to their former state of subordination to whites. This was Kentucky policymakers' only viable alternative—exchange its institution of slavery, grounded in the structure of law, for the coercive power of marriage, labor contracts, and child apprentices, as freedmen's supposed path to liberty rights and citizenship.[140] Endorsing marriages, and their promises, would impose a "moral influence" barrier in their path to true

people throughout the southern and border states, from Reconstruction to the mid-twentieth century").

137. A. LEON HIGGINBOTHAM JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 252 (1978). In 1662 laws were adopted in the colonies to classify the child of a white man and a slave as a "slave." *Id.*

138. Helen H. LaCroix, In the Absence of Reconstruction: Race, Politics, and State Power in Kentucky, 1850-1872, at 129 (January 11, 2011) (unpublished Ph.D. dissertation, University of Wisconsin - Madison) (on file with author).

139. *Id.*

140. *Id.* at 124.

liberty rights for freedmen.[141] In other words, with marriage as the barometer for fitness for their citizenship, the Freedman's Bureau would no longer be necessary to protect freedmen once they became citizens.[142] It might also be said that marriage was a badge of civilization and sign of domestication similar to education and land ownership.[143] States through the ratification of freedman marriages would be able to represent to the Union that the state was prepared to treat freedmen kindly and that the military control and occupation were no longer necessary.

Ratification of these marriages served judicial economy. Because the slave system did not recognize formal parental rights of children born into slavery, these children would become wards of the state.[144] Without marriage, inheritance and legitimacy issues would loom before courts. Take, for example, the history of President Thomas Jefferson and his secret affair with Sally Hemings. Scholars and historians uncovered that several of the children that Jefferson sired by Sally Hemings sought to pass themselves for white.[145] Eston Hemings, emancipated in 1827 by Jefferson's will, along with his older brother Madison Hemings, probably sought marriages that would ensure that their children would inherit.[146] This illustrates the complexities of the inheritance and legitimacy issues of children born of a slave woman by a white man. Freedmen marriage therefore, not only relieved states of the burden of supporting freedmen women and children, it also relieved white men who fathered children with slaves of the duty to financially support their children. Ratifying freedmen marriages removed many foreseeable strains on the legal system.[147]

The ratification of freedmen marriages enhanced a State's financial well-being. Marriage prescribed white familial norms onto the freedmen, thus requiring a working father and a dependent wife and children.[148] Labor and the support of family became an obligation of

141. "[W]ithout the moral influence of marriage, many white legislators and editorialists maintained, freedpeople would never take responsibility for themselves and their families." Franke, *supra* note 118, at 308.

142. James M. Rhyne, Rehearsal for Redemption: The Politics of Post-Emancipation Violence in Kentucky's Bluegrass Region at 155 (December 13, 2006). (unpublished Ph.D. dissertation, University of Cincinnati) (on file with author).

143. *See, e.g.*, Edwards, *supra* note 120, at 91-107.

144. *Id.* at 86.

145. Randall Kennedy, *Racial Passing*, 62 OHIO ST. L.J. 1145, 1151 (2001).

146. *Id.*

147. Edwards, *supra* note 120, at 101 ("Indigent women and children became wards of the state in the absence of marriage, but they became the legal responsibility of individual household heads in its presence.").

148. *See, e.g.*, Julie Ewing, *Public Vows: A History of Marriage and the Nation*, 4 J.L. & FAM. STUD. 199, 204 (2002) (book review).

newly freedmen through marriage. This would release the state government from its duty to care for indigent women and children.[149] The establishment of these economic norms and gender roles shifted the financial responsibility of freedwomen and children from the state to husbands, moving poverty from the public sphere to private spaces. The tender and practical interests of freedmen, abolitionists, and moral groups do little to compare to the restorative and economic interests of states in freedmen marriages.

CONCLUSION

Interest-convergence theory sheds new light on post-bellum slave marriages, displaying other groups' interests at work rather than freedmen's rights. Traditional history informed us that slavery's end marked a release from coercive state control and a beginning of liberty rights for former slaves.[150] However, interest-convergence reveals that freedmen's marriage was a mere instrumentality of a new relationship between the newly emancipated and the state.[151] Although freedmen's development to citizenship was the facial purpose of ratifying marriages, the actual interests served were those of policymakers and poor whites. With interest-convergence as a forward-looking device, the landmark decision of *Brown* conceivably was an extension of whites' interests served, borne of granting former slaves the right to marry.

149. Onwuachi-Willig, *supra* note 101, at 1654 n.44 (2005) (citing Katherine M. Franke, Subjects of Freedom 3 (2003) (unpublished manuscript) (on file with the author) ("stating that marriage laws during the post-bellum period were strictly enforced as a means of controlling freed Blacks' 'more base urges . . .[and] prepar[ing them] for the responsibilities of citizenship.'")).

150. Franke, *supra* note 118, at 253

151. *Id.*