MARRIAGE AND REDEMPTION: MORMON POLYGAMY IN THE CONGRESSIONAL IMAGINATION, 1862–1887

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> "Every historical rupture, every advent of a new master signifier, changes retroactively the meaning of all tradition, . . . [and] makes it readable in another, new way."
>
> Slavoj Žižek[1]

INTRODUCTION

IN early 2008, Texas authorities raided Yearning for Zion Ranch, a polygamous community in Texas operated by the Fundamentalist Church of Jesus Christ of Latter-Day Saints ("FLDS"). That raid raises tough questions about the line between rescuing victims and oppressing their communities. Following the raid, the State assumed custody of more than four hundred children, alleging that the practice of marrying girls younger than sixteen into plural marriages constituted a "pattern of [child] endangerment."[2] An investigator with the State's Child Protection Services explained that the community's marriage practices create "a culture of young girls being pregnant by old men" suggesting that, according to the State, a whole community, not just an individual perpetrator, can commit abuse.[3]

"Celestial" marriage—a form of plural marriage first practiced by mainstream Mormons and later by breakaway groups like the FLDS—has existed in the United States for over one hundred and fifty years. The images that its critics have invoked to describe and condemn the practice, however, have changed. Contemporary allegations that polygamy is "child abuse" have not always predominated. Nineteenth-century anti-polygamist legislators in Congress condemned polygamy as "oriental paganism."[4] Polygamy's place in the constellation of national social issues has also changed over time. Contemporary critics of same-sex marriage invoke legalized

[1] Slavoj Žižek, The Truth Arises from Misrecognition, *in* Lacan and the Subject of Language 188, 189 (Ellie Ragland-Sullivan & Mark Bracher eds., 1991).

[2] Kirk Johnson & John Dougherty, Busy Day at Court Handling Sect's Children, N.Y. Times, Apr. 18, 2008, at A14.

[3] Kirk Johnson & John Dougherty, Sect's Children to Stay in State Custody for Now, N.Y. Times, Apr. 19, 2008, at A11.

[4] 13 Cong. Rec. 1875 (1882).

polygamy as the inexorable result of expanding marriage rights.[5] Civil War-era Northern politicians portrayed the polygamous Utah Territory as another Southern slave power waiting to rebel and, later, as another region of traitors needing a dose of Reconstruction. The polemical images used to condemn polygamy can reveal far more about a particular cultural and historical moment than about how polygamous unions are experienced by those who enter them.

In 1856, the newly-formed Republican Party boldly proclaimed that it would eradicate Mormon polygamy along with slavery in the territories, labeling the pair the "twin relics of barbarism."[6] Fourteen years and a civil war later, the Republicans had abolished slavery nationwide, inscribed equal protection and suffrage impartial to race into the Constitution, and reconfigured, for the time being, Southern state governments in the image of political equality.[7] In 1870, however, the overwhelmingly Republican Congress failed to pass the Cullom Bill,[8] which aimed to transform the Utah Territory into a monogamous society. The Morrill Anti-Bigamy Act of 1862,[9] a federal criminal law directed at polygamy in Utah, had been a nullity since the day it was enacted; the bill was flawed and Congress lacked the political will to remedy it.[10] The original Republican platform thus remained essentially unrealized.

Congress failed to enact further anti-polygamy legislation until the 1880s. Then, the floodgates opened. The Edmunds Act of 1882 and the Edmunds-Tucker Act of 1887 imposed a battery of politi-

[5] See generally Joseph Bozzuti, The Constitutionality of Polygamy After *Lawrence v. Texas*: Is Scalia a Punchline or a Prophet?, 43 Cath. Law. 409 (2004); Elizabeth Larcano, A "Pink" Herring: The Prospect of Polygamy Following the Legalization of Same-Sex Marriage, 38 Conn. L. Rev. 1065 (2006); Michael G. Myers, Polygamist Eye for the Monogamist Guy: Homosexual Sodomy . . . Gay Marriage . . . Is Polygamy Next?, 42 Hous. L. Rev. 1451 (2006).

[6] Republican Platform (June 17, 1856), *reprinted in* Thomas Hudson McKee, The National Conventions and Platforms of All Political Parties, 1789 to 1905, at 96, 98 (6th ed. 1906) [hereinafter National Conventions].

[7] U.S. Const. amends. XIII–XV; Eric Foner, Reconstruction: America's Unfinished Revolution, 1863–1877, at 452–55 (1988) [hereinafter Foner, Reconstruction].

[8] H.R. 1089, 41st Cong. (2d Sess. 1870); Sarah Barringer Gordon, The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America 273–74 n.6 (2002) [hereinafter Gordon, Mormon Question].

[9] Anti-Bigamy (Morrill) Act, ch. 126, 12 Stat. 501 (1862).

[10] Stephen Cresswell, Mormons, Cowboys, Moonshiners & Klansmen: Federal Law Enforcement in the South & West, 1870–1893, at 81–82 (1991).

cal disabilities on practicing polygamists and their sympathizers.[11] These disabilities paralleled those imposed on Confederates during and after the Civil War: exclusion from voting, office-holding, and jury service by use of test oaths.[12] Other provisions dissolved the corporate charter of the Church of Jesus Christ of Latter-Day Saints ("LDS Church") and seized its assets.[13] Faced with zealous enforcement by hostile federal officials, the LDS Church officially disavowed polygamy in 1890, paving the way for Utah's statehood in 1896.[14] In response to the 1890 Manifesto, Mormon fundamentalists eventually broke with the Church and organized numerous sects, including the contemporary FLDS.[15]

The drive behind anti-polygamy legislation was linked to shifts in the racial politics of the Republican Party. During Reconstruction, radical Republicans explicitly connected anti-polygamy with the movement to abolish Southern slavery, analogizing Mormon

[11] Edmunds Act, ch. 47, 22 Stat. 30 (1882) (repealed 1983); Edmunds-Tucker Act, ch. 397, 24 Stat. 635 (1887) (repealed 1978).

[12] Harold Melvin Hyman, Era of the Oath: Northern Loyalty Tests During the Civil War and Reconstruction 21–32 (Octagon Books 1978) (1954) [hereinafter Hyman, Era]; Orma Linford, The Mormons and the Law: The Polygamy Cases (pt. 2), 9 Utah L. Rev. 543, 543–56 (1965).

[13] Edmunds-Tucker Act, §§ 13–17, 24 Stat. 635, 637–38.

[14] See Cresswell, supra note 10, at 131–32; Gustive O. Larson, The "Americanization" of Utah for Statehood 261–67, 301 (1971).

[15] Jason D. Berkowitz, Beneath the Veil of Mormonism: Uncovering the Truth About Polygamy in the United States and Canada, 38 U. Miami Inter-Am. L. Rev. 615, 616–19, 623–24 (2007); Shayna M. Sigman, Everything Lawyers Know About Polygamy is Wrong, 16 Cornell J.L. & Pub. Pol'y 101, 134–37 (2006). Members of the FLDS community have mounted numerous legal challenges to state marriage laws on free exercise, right of privacy, right of association, equal protection, and vagueness grounds. None has been successful. See, e.g., Bronson v. Swensen, 500 F.3d 1099, 1103 (10th Cir. 2007) (rejecting plaintiffs' claims of infringement of their rights to free exercise of religion, freedom of intimate expression and association, and privacy); White v. Utah, 41 F. App'x 325, 325–26 (10th Cir. 2002) (rejecting plaintiff's claim of infringement of free exercise of religion because the precedent for prohibiting polygamy was so established); State v. Holm, 137 P.3d 726, 741 (Utah 2006) (rejecting defendant's claim of infringement of his rights to free exercise, liberty under the Due Process Clause, equal protection, and free association, and his claims of overbreadth and vagueness). See generally Catherine Blake, I Pronounce You Husband and Wife and Wife and Wife: The Utah Supreme Court's Re-Affirmation of Anti-Polygamy Laws in *Utah v. Green*, 7 J.L. & Fam. Stud. 405 (2005). For an analysis of contemporary FLDS pro-polygamy rhetoric and legal strategy, see Jeffrey Michael Hayes, Polygamy Comes Out of the Closet: The New Strategy of Polygamy Activists, 3 Stan. J. Civ. Rts. & Civ. Liberties 99 (2007).

husbands to white Southern slaveholders. Legislators of all political stripes saw the proposed anti-polygamy measures as obvious companions to controversial Reconstruction measures. These Republicans portrayed Mormon plural wives as innocent "victims" of subjugation, just as enslaved blacks in the South had been. Accordingly, the laws they proposed sought to protect plural wives from destitution upon the dissolution of their (unlawful) marriages by conferring upon them rights in their husbands' property.

In the early 1870s, however, Republican consensus on Reconstruction and civil rights enforcement began to disintegrate.[16] By 1880, Reconstruction had collapsed altogether and the South had been redeemed.[17] The continued association of anti-polygamy with memories of Southern slavery and civil war initially stifled debate. A growing desire in Congress to exclude Chinese immigrants, however, introduced a new justification for legislators to condemn Mormon polygamy. In the 1880s, Republicans compared Mormon polygamy to Chinese, Muslim, and South Asian "despotic" cultural practices, like concubinage, coolieism, and prostitution. The moral status of the plural wife deteriorated from victim of oppression, to accomplice, to perpetrator of a "crime against the race."[18] Republicans portrayed anti-polygamy as the struggle of a unified, explicitly white nation against the entire Mormon community, claiming its deviant marriage practices set it apart from the rest of the white race.

Congressional polygamy debates took place during historical moments when the meaning and scope of national membership were profoundly unstable. In discussing polygamy, Republicans put forth their idealized visions for the United States as a nation. As Benedict Anderson has argued, a nation is first and foremost an

[16] Foner, Reconstruction, supra note 7, at 497–500.

[17] The idea of "redemption" appears in this Note in two distinct senses. In the first sense, I use "redemption" as it is commonly used in Reconstruction historiography, referring to the violent and extralegal recapture of Southern state governments by white Democrats, replacing the Republican Reconstruction governments. I use "redemption" in the second sense here, to describe the contemporaneous process by which Northern Republicans came to view former Confederates as a legitimate part of the nation.

[18] H.R. Rep. No. 48-1351, pt. 2, at 38 (1884) (views of the minority).

"imagined political community."[19] In polygamy debates, Republicans defined their national vision by invoking symbolic "Others"—figures that embodied all that their imagined community was not.[20] Postbellum radical Republicans, like the abolitionists before them, imagined a nation purged of licentious power and the tyrants who sought it: traitorous white slave-masters and polygamous husbands. Republicans of the 1880s envisioned a white nation from which racial "Others" were excluded and within which all conducted themselves according to a rigidly-defined ideal of "whiteness." These apparently disparate national visions were actually related. Claims that the Chinese and the Mormons were the true perpetrators of "slavery" helped absolve Southern whites of their brutal past just as a new regime of white supremacy, Jim Crow, was emerging in the South.[21]

On one level, this Note will describe Republican anti-polygamy rhetoric in Congress, and the political context that shaped it. This rhetoric changed over time, but it consistently involved metaphorical comparisons to political issues seemingly unrelated to marriage: Reconstruction, slavery, and Chinese immigration. Anti-polygamists in Congress did not frame their proposed legislation as primarily a defense of "traditional" Christian mores concerning the

[19] Benedict Anderson, Imagined Communities: Reflections on the Origin and Spread of Nationalism 6–7 (rev. ed. 1991).

[20] The idea of the "Other" derives from the psychoanalytic concept of the "mirror stage," the moment in a child's mental development when the child encounters his own mirror image and the images of others, and through these images develops self-identity. For uses of the mirror stage concept in critical legal analysis, see David S. Cauldill, Lacan and the Subject of Law: Toward a Psychoanalytic Critical Legal Theory 30–41 (1997) (discussing law as an "Other" and analyzing the complex relationships between subjects, others, and Other); Drucilla Cornell, The Imaginary Domain: Abortion, Pornography, & Sexual Harassment 38–43 (1995) (using a mirror stage analysis to emphasize the importance of abortion rights to women's rights, presenting the legal system as an "Other" that validates and gives identity, thereby confirming and constituting who is a person); Anthony Paul Farley, Lacan and Voting Rights, *in* Cultural Analysis, Cultural Studies, and the Law: Moving Beyond Legal Realism 304, 304 (Austin Sarat & Jonathan Simon eds., 2003).

[21] See Edward J. Blum, Reforging the White Republic: Race, Religion, and American Nationalism, 1865–1898, at 1–19 (2005) (describing, from a primarily Northern perspective, how national reconciliation was the reunification of whites); Grace Elizabeth Hale, Making Whiteness: The Culture of Segregation in the South, 1890–1940, at 7–9 (1998) (arguing that Southern whites formed a postbellum collective identity by making racial difference visible through mass culture, and that this new concept of whiteness grounded national reconciliation).

family.[22] Nor did other nineteenth-century criticisms of Mormonism—such as comparisons between Mormonism and Catholicism, or allegations of child-marriage—feature prominently in Congressional debates about polygamy. Comparisons to Reconstruction and Chinese Exclusion provided a justification for federal action that other types of argument could not. Despite Utah's territorial status, norms of federal deference to local domestic relations law mitigated against federal intervention. Connecting anti-polygamy to the concededly national issues of Reconstruction or immigration, however, legitimated federal action. The rhetorical choices of these nineteenth-century anti-polygamists are of continuing significance. Nineteenth-century federal anti-polygamy laws were the fountainhead of what current scholars call the "federalization of family law," and immigration and "slavery" continue to justify the federal regulation of family relations.[23]

[22] Sarah Barringer Gordon has written the leading work on the nineteenth-century federal struggle against polygamy. See Gordon, Mormon Question, supra note 8, at 1–15, 228–33. In her book, Gordon advances the "Christian nation" thesis. She argues that federal officials attacked polygamy because they viewed the United States as a Christian nation and they viewed Mormon plural marriage as an affront to the Christian family. Aside from Gordon's study, most works assert—often tacitly—that federal anti-polygamy regulations were motivated by a desire to suppress "deviant" sexual practices and defend traditional, monogamous marriage. These studies tend to characterize anti-polygamy as essentially unchanged over time. See, e.g., Orma Linford, The Mormons and the Law: The Polygamy Cases (pt. 1), 9 Utah L. Rev. 308, 311 (1964) [hereinafter Linford (pt.1)] (noting the perception that polygamy was contrary to progress, rooted in base sexual desires, inequitable, and likely to result in the neglect of women and children); C. Peter Magrath, Chief Justice Waite and the "Twin Relic": *Reynolds v. United States*, 18 Vand. L. Rev 507, 514–20 (1965) (noting the perception of Mormon polygamy as cult-like, a violation of Victorian sexual mores, and a form of slavery).

[23] See, e.g., Kerry Abrams, Immigration Law and the Regulation of Marriage, 91 Minn. L. Rev. 1625 (2007) (describing the numerous ways in which our current immigration law regulates marriage); Laura Elizabeth Brown, Regulating the Marrying Kind: The Constitutionality of Federal Regulation of Polygamy Under the Mann Act, 39 McGeorge L. Rev. 267, 277–79, 283, 288–97 (2008) (exploring the current boundaries of federal power to regulate polygamy); Anne M. Coughlin, Of White Slaves and Domestic Hostages, 1 Buff. Crim. L. Rev. 109, 109–111 (1997) (discussing slavery discourse in the White Slave Traffic (Mann) Act of 1910 and the Violence Against Women Act of 1994); Ann Laquer Estin, Family Law Federalism: Divorce and the Constitution, 16 Wm. & Mary Bill Rts. J. 381, 395–418 (2007) (describing increasing federal interventions into local divorce law via the Full Faith and Credit Clause); John Tanagho, New Illinois Legislation Combats Modern-Day Slavery: A Comparative Analysis of Illinois Anti-Trafficking Law with Its Federal and State Counterparts, 28 Loy. U. Chi. L.J. 895, 895–902, 913–18 (2007) (discussing, among other laws, the Vic-

This Note will further argue that metaphorical comparisons to Reconstruction and Chinese Exclusion actually made federal anti-polygamy legislation possible. First, the availability of these metaphors induced legislators to generate bills. Legislators introduced bills containing innovative anti-polygamy enforcement strategies *only* in 1867 and 1881—coinciding precisely with debates over Congressional Reconstruction and the Chinese Exclusion Act. Before Reconstruction began and after it collapsed, legislatures lacked a compelling metaphor to shape their understanding of polygamy. The result was a failure of the imagination. During these periods, not a single bill was introduced matching the Cullom Bill's aggressiveness. Second, the metaphors through which Republicans understood polygamy shaped the content of the bills they proposed. The content of these bills, in turn, shaped the responses these bills received once they reached floor debate. The nearly-successful and understudied Cullom Bill best illustrates this process.[24]

By focusing on Congressional sources, this Note will offer a new chronology of federal anti-polygamy legislation. Most accounts suggest that Congress exhibited relatively consistent commitment to anti-polygamy from 1862 to 1887, and that the harsh legislation of the 1880s was merely the conclusion of what Republicans started in 1856.[25] Because many current analyses of the constitutionality of

tims of Trafficking and Violence Protection Act of 2000 as a way to fight "modern-day slavery"); David B. Thronson, Custody & Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody, 59 Hastings L.J. 453 (2008) (discussing the profound influence of immigration law on child custody determinations). For a list of other articles on the subject, see Nancy Levit, Federalization of Family Law: A Supplemental Annotated Bibliography, 2001–2006, 20 J. Am. Acad. Matrim. Law. 351 (2007).

[24] See Ray Jay Davis, The Polygamous Prelude, 6 Am. J. Legal Hist. 1, 6 (1962) (noting only that legislative efforts in the 1860s to strengthen the Morrill Act failed); Gordon, Mormon Question, supra note 8, at 273–74 n.6 (mentioning the Cullom Bill only in a footnote); Linford (pt. 1), supra note 22, at 316 n.34 (mentioning the Cullom Bill only in a footnote). Other studies tend to emphasize the similarities between the Cullom Bill and legislation of the 1880s. See, e.g., Larson, supra note 14, at 82–87 (discussing frustrations with law enforcement that led to Congressional legislation), 95–97 (Edmunds Act), 208–12 (Edmunds-Tucker Act).

[25] See, e.g., Cresswell, supra note 10, at 81–82; Gordon, Mormon Question, supra note 8, at 153; Mary K. Campbell, Mr. Peay's Horses: The Federal Response to Mormon Polygamy, 1854–1887, 13 Yale J.L. & Feminism 29, 37–42, 50, 65 (2001); Davis, supra note 24, at 5.

anti-polygamy laws take this history as a starting point,[26] rethinking it is of present significance. Congress' attempts to legislate were more sporadic than has been suggested, and Chinese Exclusionism, the popular movement to end immigration to the United States from China, was the proximate trigger of the first enforceable anti-polygamy legislation. Part I will discuss the link between Southern slavery and polygamy in the antebellum period. Part II will demonstrate that the Cullom Bill was an outgrowth of Reconstruction. Part III will describe the effects of the collapse of Reconstruction and the rise of Chinese Exclusionism on Congressional polygamy debates. Part IV will argue that white cultural nationalism motivated successful legislation in the 1880s.

I. THE ANTEBELLUM ORIGINS OF REPUBLICAN ANTI-POLYGAMY

Before the Civil War, abolitionists claimed that slavery made truly monogamous marriage an impossibility in the South. To abolitionists, "the Southern states [were] one great Sodom" where slave marriages were forbidden, and slaveholders' lurid interest in adulterous interracial sex made white marriages into shams.[27] The later Republican claim that polygamy and slavery were twin "barbarisms" was not an argument from tradition; it was an argument for the sweeping eradication of "tyrannical" cultural practices. Mainstream Republicans, however, did not share this radical vision, and they embraced anti-polygamy instrumentally. All Republicans were committed to ending slavery in the territories, and the party exploited discomfort with polygamy in Utah to argue that the federal government should have the power to govern the territories. The practically useless Morrill Anti-Bigamy Act of 1862 may have been initially inspired by radical opponents of both slavery

[26] See James Askew, The Slippery Slope: The Vitality of *Reynolds v. United States* After *Romer* & *Lawrence*, 12 Cardozo J.L. & Gender 627, 633 (2006); Gregory C. Pingree, Rhetorical Holy War: Polygamy, Homosexuality, and the Paradox of Community and Autonomy, 14 Am. U. J. Gender Soc. Pol'y & L. 313, 335–37, 354 (2006); Alyssa Rower, The Legality of Polygamy: Using the Due Process Clause of the Fourteenth Amendment, 38 Fam. L.Q. 711, 717–20 (2004); Sigman, supra note 15, at 131–34; Mark Strasser, Marriage, Free Exercise, and the Constitution, 26 Law & Ineq. 59, 65–66 (2008).

[27] Ronald G. Walters, The Erotic South: Civilization and Sexuality in American Abolitionism, 25 Am. Q. 177, 182–83 (1973).

and polygamy. This Act, however, was primarily a symbolic assertion of federal power, not a realistic anti-polygamy policy.

A. Polygamy as American "Barbarism"

For radical Republicans, the difference between Southern slave society and the Mormon polygamous society in Utah was only one of degree. Abolitionists in the mid-1830s advanced a sweeping critique of Southern society, emphasizing the barbarity of the master's absolute power over the slave. The slaveholder's unrestrained domination was violent, political, and sexual in character; as one scholar has put it, "For abolitionists the distance was not great from lust for power to mere lust."[28] In their view, "'[i]llicit intercourse' was embedded in the very conditions of Southern life," as manifest most poignantly in the sexual aggression of white masters upon enslaved black women.[29] The idea of polygamy as "barbarism" was motivated by a similar concern that unrestrained sexuality produced anti-Republican tendencies.

The few Republicans advocating immediate, nationwide abolition of slavery in the 1850s and 1860s similarly analogized slavery to polygamy. They portrayed the tyrannical power of the slave master and the Mormon husband's "licentious" desire for many wives as manifestations of the same barbarism. As Senator Charles Sumner (R-Mass.) stated in his 1860 "Barbarism of Slavery" speech, both slavery and polygamy entailed the "complete *abrogation of marriage*."[30] Noting the hypocrisy of one Southern senator who "wince[d]" at "the comparison between Slavery and Polygamy," Sumner argued that under slavery "a whole race is delivered over to prostitution and concubinage."[31] The phrase "twin relics of barbarism," coined by abolitionist Ebenezer Rockwood Hoar of Massachusetts,[32] was an outgrowth of this conception of the relationship between slavery and polygamy.

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[28] Id. at 180.

[29] Id. at 182.

[30] Cong. Globe, 36th Cong., 1st Sess. 2591–92 (1860); Nancy F. Cott, Public Vows: A History of Marriage and the Nation 73–74 (2000).

[31] Cong. Globe, 36th Cong., 1st Sess. 2591–92 (1860).

[32] Eric Foner, Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War 130 (1995) [hereinafter Foner, Free Soil].

This radical comparison between slavery and polygamy gave anti-polygamy a long-lasting, distinctively anti-Southern hue that was not lost on white Southern politicians.[33] This scathing rhetoric of "barbarism" construed the South as "Other." The Southern slave owner was antithetical to radical Republicans' idea of the free North, and the label "twin relics of barbarism" placed Mormon polygamous husbands in the same category. "Barbarism" did not imply something outside the geographic boundaries of the United States. For Northern abolitionists, "barbarism" was rampant among Southern whites, and it increasingly made the South seem foreign.

B. Polygamy and "Popular Sovereignty" in the Territories

The Republican Party as a whole did not embrace or act upon this sweeping abolitionist critique of the South. But all Republicans did recognize that the specter of polygamy had political value in debates over slavery in federal territories. The Republican Party had formed around the issue of abolishing slavery in federal territories, and Republicans believed that Congress had the power to do so. Northern Democrats like Stephen A. Douglas of Illinois advocated "popular sovereignty," arguing that the voting residents of each territory should set their own policies in traditionally local matters, including slavery.[34] Like slavery, the law of domestic relations was traditionally set locally, and so the popular sovereignty argument ostensibly extended to polygamy as well.[35] Contemporaries believed that without federal intervention Mormon majorities in Utah would ensure polygamy's perennial existence.[36] General public discomfort with polygamy made it an excellent illustration of the necessity of federal power over the territories.

[33] On the alliance between conservative Southerners and Mormons, see David Buice, A Stench in the Nostrils of Honest Men: Southern Democrats and the Edmunds Act of 1882, 21 Dialogue: J. Mormon Thought 100 (1988).

[34] This argument was prominent in debates over the Kansas-Nebraska Act of 1854, which ultimately expanded slavery in the territories. Id. at 171–73.

[35] Don Fehrenbacher, The *Dred Scott* Case: Its Significance in American Law and Politics 202 (1978); Gordon, Mormon Question, supra note 8, at 60.

[36] Gordon, Mormon Question, supra note 8, at 60–66; Linford (pt. 1), supra note 22, at 312–13.

Just because Republicans were willing to invoke polygamy to assert federal power to govern territories did not mean that Republicans were committed to any particular plan for using this power to eradicate polygamy. Even the phrase "twin relics of barbarism" in the 1856 Republican national platform did not reflect a defined anti-polygamy agenda. Located in a plank of the platform about congressional power, the phrase at most expressed a vague duty with regard to polygamy:

> *Resolved,* That the Constitution confers upon Congress sovereign power over the territories of the United States for their government, and that in the exercise of this power it is both the right and the duty of Congress to prohibit in the territories those twin relics of barbarism, polygamy, and slavery.[37]

In contrast to this single reference to polygamy, the numerous planks on slavery in the territories were specific and outraged in tone. For instance, the platform demanded that Congress immediately admit Kansas as a free state and listed numerous specific abuses perpetrated by pro-slavery forces in the territory.[38]

Read as a whole, the platform suggests that the polygamy reference simply bolstered the case for federal power to abolish slavery in the territories. It did not reflect a Republican consensus on *how* to unmake Utah's polygamous society. Moreover, when the Republican Party took a moderate turn in 1860, Republicans dropped all references to polygamy from their platform. By this time, the threat of secession made the moderate Republicans disinclined to refer to Southern slavery as a "barbarism," and anti-polygamy went by the wayside at the convention.[39] Moderates viewed anti-polygamy as derivative of anti-slavery; it was not an issue to which most Republicans were independently committed.

C. The Morrill Anti-Bigamy Act of 1862

Republicans demonstrated that they lacked a commitment to eradicate polygamy when they passed the Morrill Anti-Bigamy Act

[37] Republican Platform (June 17, 1856), *reprinted in* National Conventions, supra note 6, at 98.

[38] Id. at 98–99.

[39] Foner, Free Soil, supra note 32, at 133; Republican Platform (May 16–18, 1860), *reprinted in* National Conventions, supra note 6, at 113–16.

of 1862, a criminal ban on bigamy in the territories. Congress, suddenly majority-Republican because of secession, passed the Morrill Anti-Bigamy Act hurriedly in the spring of 1862 as part of a flurry of legislation repudiating popular sovereignty. On April 11, 1862, Congress abolished slavery in the District Columbia.[40] On June 17, 1862, Congress similarly banned slavery in the territories.[41] The Morrill Act followed closely on the heels of these bills, passing in Congress on July 1, 1862.[42]

The brief floor debate suggests that legislators did not seriously believe that the bill would end polygamy. Supporters of the Morrill Act did not deliver the long-winded condemnations of polygamy that would characterize debates after the Civil War. Nor did anyone offer any explanation of how the proposed law could reduce, let alone eliminate, polygamy in Utah. Territorial Delegate John Cradlebaugh (I-Nev.), a supporter of the bill, urged the House to "correct" it, stating that "in its present shape, [it does] not amount to anything."[43] Cradlebaugh was a former United States associate justice for the district of Utah, and so one would expect his assessment of the bill to carry some weight.[44] Morrill, however, quickly dismissed Cradlebaugh's suggestion, stating without explanation that he preferred for the bill to pass as it was.[45] In the Senate, an opponent suggested that even supporters were perfectly aware that the bill had fatal flaws. The opponent observed: "It is understood its provisions will be a dead letter upon our statute-book. Its provisions will be either ignored or avoided."[46] This allegation received no response.

In floor debates, these speakers did not specify why they thought that the bill was useless. The bill, however, had some fairly obvious fatal flaws that likely motivated these speakers' concerns. First, the law gave prosecutors an insurmountable burden of proof. The

[40] Leonard P. Curry, Blueprint for Modern America: Nonmilitary Legislation of the First Civil War Congress 42 (1968).

[41] Id. at 55–56.

[42] Anti-Bigamy (Morrill) Act, ch. 126, 12 Stat. 501 (1862).

[43] Cong. Globe, 37th Cong., 2d Sess. 1847 (1862).

[44] United States Congress, Biographical Directory of the United States Congress, 1774–present (2007), available at http://bioguide.congress.gov/biosearch/biosearch.asp [hereinafter Congress, Biographical Directory].

[45] Cong. Globe, 37th Cong., 2d Sess. 1847 (1862).

[46] Id. at 2507 (statement of Sen. McDougall, D-Cal.).

Morrill Anti-Bigamy Act replicated the crime of bigamy as typically defined by the states, but this legal regime did not travel well to Mormon Utah.[47] Traditional bigamy laws required that prosecutors prove the solemnization of first and subsequent marriages. Outside Utah, prosecutors could generally rely on churches, community members, or local officials to provide evidence of solemnization. But Mormon plural marriages were performed in secret and the Church officials who performed them were not likely to turn over evidence to prosecutors.[48] The House version of the bill would have criminalized garden-variety, non-marital cohabitation in addition to bigamy, a much easier offense to prove. Prosecutors unable to prove solemnization could have used this as an alternative means to prosecute a man demonstrably cohabitating with two (or more) women, since both women could not possibly be lawful wives. The Senate, however, struck out this provision as "beyond the evil intended to be remedied."[49]

Second, legislators had reason to believe that jury nullification would block polygamy prosecutions. Ten years earlier, the Utah territorial legislature had implemented procedures that effectively placed leaders of the LDS Church in control of jury selection in all courts in the territory. In the Utah court system, the President of the United States appointed federal district court judges, and the all-Mormon territorial legislature appointed judges to the probate courts. The legislature typically selected Mormon bishops to serve as probate judges.[50] In the 1850s, the legislature expanded the traditional jurisdiction of the probate courts, giving these courts concurrent criminal and civil jurisdiction with the federal district courts. Further, the territorial legislature required that the federal district courts select jurors from lists prepared by the probate judges.[51] Foreseeably, all juries in both probate and district courts were comprised exclusively of Mormons, and federal officials believed that such juries would nullify polygamy prosecutions.[52]

[47] See H.R. Rep. No. 41-21, at 7–11 (1870) (listing the text of several state anti-bigamy statutes).

[48] Cresswell, supra note 10, at 83–84.

[49] H.R. 391, 37th Cong. (2d Sess. 1862) (as amended by the Senate, May 9, 1862); Cong. Globe, 37th Cong., 2d Sess. 2506 (1862).

[50] Cresswell, supra note 10, at 81–82; Linford (pt. 1), supra note 22, at 316–17 & n.35.

[51] Cresswell, supra note 10, at 81.

[52] Id. at 82; Linford (pt. 1), supra note 22, at 316–17.

Republicans did not use floor debates over the Morrill Act to propose remedies to these problems. Instead, floor speeches were dedicated to deriding popular sovereignty and arguing for federal power to abolish slavery in the territories. Indeed, the Morrill Act came to the Senate floor while the Senate was considering a bill to end slavery in the territories.[53] The territorial abolition bill had stalled for several weeks, likely because of concerns about openly flouting the Supreme Court's decision in *Dred Scott v. Sandford* in 1857.[54] When Senator James Bayard (D-Del.)—a proponent of popular sovereignty—expressed support for the Morrill Act, Senator John Parker Hale (R-N.H.)[55] sarcastically interrogated him about his hypocritical stance. Hale noted that proponents of popular sovereignty like Bayard had explained "as often as once a month . . . that the same law prevailed as to the regulation of the relations of husband and wife, parent and child, and master and servant." Hale then suggested that Bayard "read the *Dred Scott* decision over again" out of respect for "all the reverence there is in the country for the tribunals of the country."[56] Hale got the concession he was seeking: Bayard curtly responded that he had "read the decision . . . with some care," and that the federal government indeed had the power to outlaw polygamy in the territories.[57]

[53] The Morrill Act was reported to the Senate with amendments on May 9, 1862, and passed on June 3, 1862. Cong. Globe, 37th Cong., 2d Sess. 2031, 2506–07 (1862). A bill from the House of Representatives to end slavery in the territories was referred to committee on May 12, 1862, reported to the Senate with amendments on May 15, 1862, and passed on June 9, 1862. Cong. Globe, 37th Cong., 2d Sess. 2064, 2139, 2618 (1862).

[54] 60 U.S. (19 How.) 393 (1857). In contrast to slow progress of the territorial abolition bill, a bill abolishing slavery in the District of Columbia had sailed through both houses of Congress two months earlier. Curry, supra note 40, at 55–56. The power of Congress to regulate slavery in the District of Columbia was not necessarily implicated by the *Dred Scott* opinion.

[55] Hale was a longtime advocate of abolition in the territories and the Free Soil Democratic Party's presidential nominee in 1852. Free-Soil Democratic Platform (Aug. 11, 1852), *reprinted in* National Conventions, supra note 6, at 80–84.

[56] Cong. Globe, 37th Cong., 2d Sess. 2507 (1862). Given the unpopularity of this decision among Republicans, Hale's statements about the Court were obviously sarcastic.

[57] Id. All aspects of the *Dred Scott* opinion did not automatically apply to polygamy in the territories. Part of Justice Taney's opinion rejected "popular sovereignty" with regard to slavery in territories, stating that the Due Process Clause of the Fifth Amendment protected a master's property interests in the people he enslaved. He reasoned that the federal government had an affirmative obligation to protect slave

Finally, it is difficult to see the Morrill Anti-Bigamy Act as the true beginning of federal anti-polygamy enforcement in Utah. The Morrill Act's complete lack of an enforcement mechanism is particularly remarkable in light of the omnibus anti-polygamy enforcement bills Republicans would propose less than six years later. The connection between slavery and polygamy originated in an abolitionist critique of subjugation in all forms. But, the Morrill Act did not embody this ideal, and even its sponsors did not seem to believe it would work when they passed it. Rather, the Act only symbolically repudiated polygamy and popular sovereignty. Thus, the Republican Party entered the post-war era with a catchy phrase about polygamy and a useless law on the books. During Reconstruction, certain radical Republicans attempted to resuscitate anti-polygamy, recasting the Morrill Act as the embodiment of abolitionist ideals and urging their partisans to fulfill its promise.

II. RECONSTRUCTION POLITICS AND THE FAILED CULLOM BILL OF 1870

The failure of the Morrill Act quickly became "so well known to all the world that there [could] be no question as to the state of things existing" in Utah.[58] Despite large majorities in both houses of Congress, Republicans remained silent about their stated commitment to anti-polygamy immediately after the war. Then, as Congress began to assume control of Reconstruction in 1867, a contingent of radical Republicans revisited the issue. Their proposals for dismantling polygamous society in Utah were inspired in structure and spirit by the radical Republicans' aggressive propos-

owners' property interests in the people they enslaved, regardless of what the majority of territorial residents thought about slavery. Taney also concluded, however, that the federal government lacked plenary authority to govern the territories, except pursuant to Congress' power to admit new states. See *Dred Scott*, 60 U.S. (19 How.) at 425–26, 436–37, 439, 446, 450 (1857); Fehrenbacher, supra note 35, at 365–88. This latter aspect of the opinion would theoretically suggest that Congress could not restrict polygamy in a territory prior to that territory's application to become a state. Republicans frequently pointed this out in their critiques of *Dred Scott*. Polygamy in Utah was the very first thing Abraham Lincoln mentioned in his reaction to the *Dred Scott* opinion. 3 Life and Works of Abraham Lincoln 12–13 (Marion Mills Miller ed., 1907) (discussing Lincoln's speech given in reply to Stephen A. Douglas, in Springfield, Ill., on June 26, 1857).

[58] H.R. Rep. No. 41-21, at 3 (1870).

als for dealing with the South. They introduced a series of bills that culminated in the nearly successful Cullom Bill of 1870. Their fellow Republicans, however, did not share their expansive vision of a nation free of "licentious" power. Despite an overwhelming Republican majority in Congress, the radical Republicans' efforts failed.

A. Slavery and Polygamy After the Civil War

In the post-war period, the federal government faced profound dilemmas about the scope and meaning of membership in the national community. The Union victory raised questions about the terms on which rebel states would be restored to their full status within the Union, the rights of emancipated slaves, and the rights of individuals who had supported the Confederacy. Initially, much responsibility for resolving these questions fell to the archconservative Johnson administration, which stalled the ratification of the Fourteenth Amendment and failed to halt ongoing violence against blacks and Union loyalists in the South.[59] In January 1867, Republicans in Congress began debating a more stringent program of Congressional Reconstruction to replace the lenient policies of the Johnson administration.[60] In 1867–1868, Congress impeached and tried President Andrew Johnson for his conduct in the years following the war.[61] Although Republicans were united by "shared convictions about racial justice, slavery, and the restoration of the Union,"[62] there existed significant divisions among Republicans on the amount of federal protection due to former slaves and Southern loyalists and the degree of leniency due to the defeated rebels. True radical Republicans were a minority within their party. Centrist and conservative Republicans, with their tendency to broker compromises in the interest of expediency, carried the day in most Reconstruction debates.[63]

[59] Michael Les Benedict, A Compromise of Principle: Congressional Republicans and Reconstruction 1863–1869, at 211–13 (1974).

[60] Id.

[61] Id. at 299–300, 307–14.

[62] Id. at 41.

[63] Id. at 46–48. Throughout this paper, I rely on Benedict's characterizations of particular Republican politicians as "radical" or "non-radical." Benedict's study provides a full account of the voting behavior of all members of Congress on all matters related

Just as Congress began to take control of Reconstruction, a small contingent of radical Republicans rekindled the comparison between polygamy and slavery—and with it the abolitionists' vision of a nation free of "licentious" power. The Senate Committee on Territories reported out the first anti-polygamy bill of the postwar period in February 1867, just one month after Congress began crafting a new Reconstruction.[64] The leaders of this anti-polygamy campaign included Representatives Shelby Cullom (R-Ill.), Hamilton Ward (R-N.Y.), Charles Pomeroy (R-Iowa), and Senator Aaron Cragin (R-N.H.).[65] All but Pomeroy of Iowa, who first took his seat in 1869, tended to vote with radical political factions on civil rights and Reconstruction. Representative Pomeroy urged Republicans to prove that in 1856 they had not merely been "playing upon words or performing political legerdemain for the deception of the nation," by acting to "purge [the] Territories" of the other relic, polygamy.[66] Representative Ward asked whether "after . . . redeeming [the nation] from the stain of human slavery" Republicans "had not the . . . manhood [or] the nobility" to help the wives and children of Utah's polygamous marriages. [67] Their campaign began in 1867 and culminated with the Cullom Bill of 1870, which ultimately passed in the House but failed in the Senate.[68]

Anti-polygamists believed that plural marriage subjugated women utterly to their husbands' desires. In Ward's view, polygamy

Reconstruction from 1863–1869. The primary interests of the Republicans have been the subject of considerable historiographical debate. For a discussion of Reconstruction historiography, see Foner, Reconstruction, supra note 7, at xix–xxv. Benedict's work is an example of revisionist scholarship, now the conventional wisdom, that Republicans were motivated by a commitment to a democratic, racially egalitarian society, but that their vision was not realized by Reconstruction.

[64] S. 404, 39th Cong. (1867) (as reported by the Committee on Territories, Feb. 1867).

[65] Cong. Globe, 41st Cong., 2d Sess. 2142–46, 2149–52, 2180–81 (1870).

[66] Cong. Globe, 41st Cong., 2d Sess. 2150 (1870).

[67] Id. at 2144.

[68] Between 1867 and 1870, legislators introduced a succession of bills containing substantially similar anti-polygamy enforcement mechanisms. The specifics of these bills are discussed in Section II.B. and Section II.C., infra. The first, S. 404, 39th Cong. (1867), was reported by the Senate Committee on Territories in February 1867. The Cullom Bill, H.R. 1089, 41st Cong. § 12 (1870), generated the most floor debate, and was the only bill to make it to a vote in either chamber. Other bills in this series include: H.R. 696, 41st Cong. (1869); S. 286, 41st Cong. (1869); S. 24, 40th Cong. (1867).

crushed the "great ambition" of the "true woman" to "make her home a paradise." When "[y]ou break down that home," he explained, "you crush her . . . you leave her at the mercy of every wind . . . that may assault her."[69] Thus, plural wives became "slaves to a system worse than death."[70] Cragin argued that the effects of polygamy on a woman's character produced a form of enslavement: "[d]egraded into slaves by this barbarism, they are . . . submissive and . . . miserable."[71] He believed Mormon men regarded women as "inferior being[s] and . . . slave[s],"[72] and stated that Mormon husbands referred to their wives as "'my women;' about the same as . . . our [S]outhern slave lords used to speak of their 'likely young niggers.'"[73]

These radicals were unconcerned that plural wives were not legally or physically coerced into marriage the way black men and women had been forced into slavery. Anti-polygamists' expansive definition of "enslavement" encompassed situations where women had merely been pressured into marriage by their communities. Legislators and witnesses before Congress testified that Mormon women had succumbed to religious indoctrination, but they never claimed that women were kidnapped and forced to marry.[74] As one witness stated, Mormon leaders "urge[d] them to enter into polygamy as a religious duty, and in most cases they finally yield[ed] to these influences."[75] Likewise, Senator Aaron Cragin described how "religious duty" and the "devilish art of cunning men" caused "ignorant and deluded women" to embrace polygamy.[76] Radical opponents of polygamy were far more concerned about the absolute

[69] Cong. Globe, 41st Cong., 2d Sess. 2143 (1870).
[70] Id. at 2144.
[71] Id. at 3575.
[72] Id. at 3574.
[73] Id. at 3580 (quoting James Rusling).
[74] Outside Congress, popular portrayals frequently did depict polygamy as involving kidnapping, violent coercion, and child-marriage. See generally Sarah Barringer Gordon, "Our National Hearthstone": Antipolygamy Fiction and the Sentimental Campaign Against Moral Diversity in Antebellum America, 8 Yale J.L. & Human. 295, 295–300 (1996); Sarah Barringer Gordon, "The Liberty of Self-Degradation," Polygamy, Woman Suffrage, and Consent in Nineteenth Century America, 83 J. Am. Hist. 815, 815–17, 819, 821, 832–34 (1996) [hereinafter Gordon, Self-Degradation].
[75] H.R Rep. No. 41-21, at 15 (quoting testimony of Mr. Duval, Feb. 3, 1870).
[76] Cong. Globe, 41st Cong., 2d Sess. 3574 (1870).

dominance they believed plural marriages entailed than whether these relationships were technically consensual at their inception.

Non-radical Republicans were highly skeptical of this expansive conception of subjugation. Now that the controversy over popular sovereignty and slavery in the territories had been resolved by the Civil War, centrists and conservatives no longer had any instrumental reason to link slavery and polygamy. More importantly, mainstream Republican thought in the post-slavery era sharply distinguished compulsion and consent, making the claim that social pressure alone could amount to slavery increasingly untenable.[77] Republican opponents of anti-polygamy legislation argued that if women were not physically or legally coerced to marry, polygamy was consensual and could not be categorized with slavery.

For instance, Representative Austin Blair (R-Mich.) opposed the Cullom Bill, arguing that "we cannot forget the fact that [plural wives] went there voluntarily . . . if they are concubines, they are concubines voluntarily."[78] Echoing this sentiment, Representative Aaron Sargent (R-Cal.) commented that "[t]he continuance of polygamy depends largely on the consent of the women there."[79] Representative Thomas Fitch (R-Nev.) expressed his "amazement and pity at the voluntary degradation of the Mormon women," but noted the critical differences between Southern slavery and Mormon polygamy: "Slavery rested on compulsion and drew its vitalizing force from oppression; polygamy depends on persuasion and leans upon its own distorted interpretation of divine philosophy." Dismissing the 1856 phrase "twin relics of barbarism" as merely a "good rallying cry," he asserted that the two were simply "not equal in present importance or in possible consequences."[80] For these Republicans, Mormon women's consent to plural marriage ended the debate. Centrists and conservatives were not prepared to intervene simply because they believed polygamy to be sexually deviant or morally dubious.

[77] Gordon, Self-Degradation, supra note 74, at 832–34. See generally Amy Dru Stanley, From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation ix–xii (1998) (describing the rise of a contract worldview after the Civil War in which wage labor, contracts, and the market represented the ideal of freedom and the polar opposite of chattel slavery).

[78] Cong. Globe, 41st Cong., 2d Sess. 2149 (1870).

[79] Id. at 1520.

[80] Id. at 1517–18.

B. The Cullom Bill and Polygamy as Subjugation

Radical Republicans were concerned with polygamy as subjugation, not as a form of sexual vice or as mere bigamy. Accordingly, the anti-polygamy bills of 1867–1870 defined polygamy functionally, departing from the Morrill Act's formalistic approach. Thus, the Cullom Bill and its predecessors would have avoided the problem of proving solemnization that plagued the Morrill Act.

The Cullom Bill of 1870 defined marriage as "solely . . . the contract of the parties, followed by cohabitation" regardless of whether the marriage followed a particular "form, manner or ceremony" or whether there existed any "recordation, certificate or publication" documenting it.[81] The husband's "acts recognizing, acknowledging, introducing, treating, or deporting himself toward" his wives could create a rebuttable presumption of a marriage relation.[82] The bill also created a separate crime of concubinage, defined as cohabitation "with one woman or more, other than his lawful wife" in a purported marriage.[83] Both polygamy and concubinage, however, required the pretense of a marriage. Legislators sought to avoid application to sexual vices sanctioned by no institution, such as open and notorious adultery in an otherwise monogamous marriage. As the defender of a subsequent bill containing similar language put it, the drafters did "not undertake to deal with the sins and wickedness of the rest of mankind" by their anti-polygamy legislation.[84]

C. Reconstruction in the Cullom Bill

Because they believed polygamy was analogous to Southern slavery, radical Republicans replicated specific provisions of the Reconstruction Acts of 1867 in the anti-polygamy legislation they proposed in 1867–1870. The Cullom Bill and its predecessors were omnibus measures containing up to forty sections that addressed a

[81] H.R. 1089, 41st Cong. § 12 (1870).
[82] Id.
[83] Id. § 13.
[84] 47 Cong. Rec. 1216 (1882). One legislator observed that the concubinage provision might permit a man to have a "concubine" if he did not reside with his wife. The sponsor of the bill objected to an amendment that would remove this ambiguity by simply prohibiting a man from living with "any woman other than his wife." Id.

variety of law enforcement issues in Utah.[85] Two provisions, both the subject of vigorous debate on the floor, were essential to the proposed anti-polygamy regime: the use of test oaths to exclude polygamists from voting, office-holding, and jury service, and the transfer of "marital" property from a polygamous husband to his several wives.

1. Test Oaths and Civil Disabilities

The Cullom Bill used test oaths to impose civil and political disabilities upon polygamists, provisions strongly evocative of Congressional Reconstruction measures. The bill barred "any person living in or practicing bigamy, polygamy, or concubinage" from holding "any office of trust or profit" in Utah, "vot[ing] at any election," or claiming entitlement "to the benefits of the homestead or pre-emption laws of the United States . . . ."[86] "[N]o person . . . who believes in, advocates, or practices . . . polygamy" would be allowed to serve on a jury in a polygamy-related criminal trial.[87] Finally, those elected to office would be required to swear, "I am not living in or practicing bigamy, polygamy, or concubinage, and I will not hereafter live in or practice the same."[88]

This oath provision was analogous to the "ironclad oath," an oath of past and future loyalty to the United States that all federal officeholders were required to swear after 1862.[89] Republicans in Congress incorporated the ironclad oath into each of the three Reconstruction Acts of 1867, and in each instance increased its application. The first Reconstruction Act, passed March 2, 1867, disenfranchised those who had held office prior to the war and then participated in the rebellion.[90] The first Supplemental Reconstruction Act, passed March 23, 1867, disenfranchised any individual who had aided or participated in the Confederacy.[91] The second

[85] See H.R. 696, 41st Cong. (1869); S. 286, 41st Cong. (1869); S. 404, 39th Cong. (as reported by Comm. on the Territories, 1867); S. 24, 40th Cong. (1867).

[86] H.R. 1089, 41st Cong. § 19 (1870); Cong. Globe, 41st Cong., 2d Sess. 1371 (1870).

[87] H.R. 1089, 41st Cong. § 10 (1870); Cong. Globe, 41st Cong., 2d Sess. 1369–70 (1870).

[88] H.R. 1089, 41st Cong. § 19 (1870).

[89] Act of July 2, 1862, 12 Stat. 502, 502–03; Hyman, Era, supra note 12, at 125.

[90] Hyman, Era supra note 12, at 125.

[91] Id.

Supplemental Reconstruction Act, passed July 19, 1867, disenfranchised and disqualified from office even those who had been pardoned for their support of the Confederacy.[92] Those who had aided the Confederacy also could be excluded from federal juries.[93]

Proponents unabashedly linked the oaths and disabilities that applied to the former Confederates to those that would apply to the polygamists. Cullom noted that Congress had "already adopted" test oaths against "certain classes of men lately in rebellion against the Government," arguing that "wicked and vile" polygamists deserved similar treatment.[94] Representative Ward scoffed at opponents of stringent anti-polygamy measures, accusing them of harboring the same "sickly sentimentality which proposes to punish nobody, which proposes to hang nobody, which proposes to let all the unchained passions of the human heart become free to prey upon mankind."[95] He added that he had "seen too much of that in this . . . generation," and continued:

> Had you hung one hundred traitors you would not have had rebellion in North Carolina and Tennessee to-day. Had you enforced the laws of the country against Utah years ago you would not have had this terrible power confronting you at this moment. . . . [A]s [the nation] has arisen disenthralled from the great struggle against the oppression of the black man, so shall it arise pure from this taint in the Territories . . . .[96]

The ironclad oath was a powerful signifier of the political and social exclusion of Confederate sympathizers from the national community. For Republicans, the ironclad oath was the "patent of nobility for every loyal man,"[97] signifying the honor of inclusion in

[92] Id. at 126.

[93] Act of June 17, 1862, 12 Stat. 430 § 1; Drew Kershen, The Jury Selection Act of 1879: Theory and Practice of Citizen Participation in the Judicial System, 1980 U. Ill. L.F. 707, 710 (1980). States also created parallel oath requirements for various vocations, such as attorney or minster. Hyman, Era supra note 12, at 95–99. The Supreme Court invalidated retroactive state loyalty oaths in the late 1860s. Cummings v. Missouri, 71 U.S. (4. Wall.) 277, 279–282 (1866); Ex parte Garland, 71 U.S. 333, 380 (1866).

[94] Cong. Globe, 41st Cong., 2d Sess. 1371 (1870).

[95] Id. at 2144–45.

[96] Id.

[97] Hyman, Era, supra note 12, at 142.

the post-war order. The oath provision of the Cullom Bill directed similar symbolic exclusion at polygamous husbands.

2. "Confiscation" in the Cullom Bill

Further, the Cullom Bill proposed to hold polygamous husbands financially responsible for the welfare of illegally married wives. Republicans sought to provide for plural wives upon the dissolution of their unlawful unions until they were financially independent. These legislators were concerned that "too suddenly break[ing] down the system of polygamy" would "leave the women and children of the Territory helpless and dependent, and, perhaps, in a starving condition."[98] The Cullom Bill would have compelled a man convicted of "bigamy, polygamy, or of any adulterous or incestuous marriage," to provide for his "wife . . . concubine or concubines" if they were "dependent in whole or in part" upon him. In such cases, the bill empowered courts

> to order the sale of so much of the personal property . . . as shall be needed for the support and maintenance of the wife [or] concubines . . . until such time when such persons can procure labor or means to support themselves, and when the personal property is exhausted . . . [to] order the sale of the real estate.[99]

A court could also liquidate a husband's property if he fled the territory and left behind dependent wives or concubines.[100] Further, the bill authorized the Secretary of the United States Treasury "to afford . . . temporary relief" to those "reduced to destitution by the enforcement of the laws against polygamy" if the husband's assets were insufficient.[101]

This legal mechanism mirrored both the structure and application of the Confiscation Act of 1862. The Confiscation Act authorized the federal government to seize the property of Confederates

[98] Cong. Globe, 41st Cong., 2d Sess. 1372 (1870).

[99] H.R. 1089, 41st Cong. § 30 (1870); Cong. Globe, 41st Cong., 2d Sess. 1372 (1870); see also H.R. 696, 41st Cong. (1870) (Ward Amendment). The Senate bills would have granted plural wives an action of *assumpsit*, or common law breach of contract, for her "labor . . . without any deduction under pretence of support . . . of her by him during the period of such . . . marriage." S. 286, 41st Cong. §14 (1869); S. 404, 39th Cong. §15 (1866) (as reported in 1867).

[100] H.R. 1089, 41st Cong. § 30 (1870).

[101] Id. § 31.

during the war.[102] After the war, radical Republicans saw confiscation as a way to distribute the property of disloyal former slave owners to newly freed blacks. As it was initially imagined in March 1865, the Freedman's Bureau would have relied upon the continued use of confiscation to generate revenue to aid freed blacks in their transition to freedom.[103] In the summer of 1865, the Johnson administration halted confiscation and issued presidential pardons to ex-Confederates, who then demanded the return of previously confiscated land.[104] It is not clear whether many Republicans ever supported confiscation. However, during President Johnson's impeachment, radicals condemned Johnson's nullification of the Confiscation Act as an illegal usurpation of power.[105]

Contemporaries saw the Cullom Bill's property liquidation provisions as a form of "confiscation," and this parallel to Reconstruction turned out to be a serious liability. As Eric Foner argues, the use of confiscation to transform the "whole fabric of [S]outhern society" by replacing the aristocracy and the landless classes with a society built on "free labor" was appealing only at the "outer limits of Radical Republicanism."[106] Confiscation in the South was never resumed after Johnson's nullification, and by 1870 the Freedman's Bureau was well on its way to sunset.[107] One Congressman mocked the Cullom Bill by inquiring whether the "advantages of the Freedmen's Bureau" should simply be extended to plural wives, reminding the House that "polygamy and slavery have been classed together as the 'twin relics of barbarism.'"[108] Another op-

[102] Second Confiscation Act, 12 Stat. 589, 590–91 § 5–7 (1862); Benedict, supra note 59, at 247; see also Curry, supra note 40, at 75–100 (providing legislative history of the First and Second Confiscation Acts).

[103] Benedict, supra note 59, at 357; W.E.B. Du Bois, Black Reconstruction in America, 1860–1880, at 220–21, 223 (Meridian 1964) (1935); Foner, Reconstruction, supra note 7, at 158–60; Randall Miller, The Freedman's Bureau and Reconstruction: An Overview, *in* Paul A. Cimbala & Randall M. Miller, The Freedman's Bureau and Reconstruction: Reconsiderations xiii, xx–xxii (1999).

[104] Benedict, supra note 59, at 248–51; Foner, Reconstruction, supra note 7, at 159–161.

[105] Benedict, supra note 59, at 249–51, 282.

[106] Foner, Reconstruction, supra note 7, at 235–36.

[107] Harold Hyman, The Radical Republicans and Reconstruction 1861–1870, at 462–63 (1967); Miller, supra note 103, at xxiv.

[108] Cong. Globe, 41st Cong., 2d Sess. 2149 (1870).

ponent dismissed it as an "absurdity."[109] Proponents of the bill seemed to recognize that this parallel was a political liability, even though they remained committed to the property liquidation provision. Although the word "confiscation" did not appear in the bill itself or in Cullom's introduction, a representative moving to strike the provision began to summarize it as "propos[ing] to confiscate . . . property."[110] Hamilton Ward objected to this characterization and insisted that the section did "not confiscate anything."[111]

These provisions were remarkable in the context of mid-nineteenth century family law. The Cullom Bill essentially recognized polygamous marriages for the limited purpose of dividing "marital" property among the wives. No jurisdiction recognized such property rights for women who knowingly married a lawfully married man,[112] and even monogamously married women generally had limited rights in their husbands' property.[113] Upon divorce, wives received alimony only in cases of egregious behavior by the husband. Further, a wife who knew her husband had committed adultery and nevertheless continued to cohabitate with him, like Mormon plural wives did, could be denied a divorce altogether.[114] The Cullom Bill departed from these norms because its drafters believed plural wives deserved the same treatment as freed slaves in the South.

D. The Reconstruction and the Failure of the Cullom Bill

The radical Republicans who introduced and advocated anti-polygamy legislation were motivated by an expansive opposition to relationships of subordination, leading them to categorize polyg-

[109] Id. at 1519, 2144.
[110] Id. at 2180.
[111] Id.
[112] Michael Grossberg, Governing the Hearth: Law and Family in Nineteenth-Century America 344–45 n. 40 (1985); Leslie Joan Harris, Lee E. Teiltebaum & June Carbone, Family Law 35–39, 430–31 (3d ed. 2005). Common law jurisdictions did not recognize the property rights of bigamous wives under any circumstances. A few civil law jurisdictions recognized the putative spouse doctrine, which permitted both wives of a bigamous husband to assert rights in a husband's property, provided that the second wife married without reason to know of her husband's prior valid marriage.
[113] 2 Joel Prentiss Bishop, Commentaries on the Law of Marriage & Divorce §§ 436–45 (4th ed. 1864); Harris et al., supra note 112, at 430–31.
[114] Harris et al., supra note 112, at 109–10, 303–04.

amy with Southern slavery. This vision, however, was the bill's downfall. Democrats, who opposed Reconstruction, were some of the Cullom Bill's most vocal critics. Moderate and conservative Republicans, leery of the bill's expansive conception of "enslavement," tepidly allowed the Democratic minority to strip out the most important provisions.

1. Democratic Opposition

Democratic opposition to the Cullom Bill had much to do with the bill's parallels to Reconstruction. Democrats consistently opposed civil rights for freed blacks and urged lenient treatment of the former Confederacy, and they also opposed the Cullom Bill. Democrats voted overwhelmingly in favor of motions to table the Cullom Bill, and supported the removal of key provisions.[115] Among the most vocal opponents of the Cullom Bill were Representative Samuel Cox (D-N.Y.) and Representative Samuel Niblack (D-Ind.).[116] Cox had stumped against the ironclad oath in 1868, and a decade later would lead a fight to repeal remnants of loyalty oaths still on the statute books.[117]

Southern Democrats had obvious incentives to combat confiscation and the disfranchisement of former Confederates, since these measures helped create Republican-dominated Southern governments. Democrats, however, built their case against Reconstruction on abstract principles, appealing to shared values of the North and South. Their arguments, applied squarely to the tactics of the Cullom Bill. For instance, Democrats urged that a republican government could not disenfranchise those who had previously had the right to vote and deemed "test oaths alike revolting to justice

[115] A motion to table the Cullom Bill in the House failed 40-121; the yea votes were all Democrats except for three Republicans and three Conservatives from Virginia. Cong. Globe, 41st Cong, 2d Sess. 2146 (1870). Several amendments stripping various provisions of the bill passed by wide margins, and were supported by virtually all of the voting Democrats. Id. at 2180–81. For party affiliations of voting legislators, see Congress, Biographical Directory, supra note 44.

[116] Cong. Globe, 41st Cong., 2d Sess. 2149 (1870); Benedict, supra note 59, at 340, 344, 348, 353, 358, 363, 371; Michael Zuckert, Completing the Constitution: The Thirteenth Amendment, 4 Const. Comment. 259, 264–65 (1987). Cox, then representing Ohio, was a Peace Democrat during the Civil War and opposed the Thirteenth Amendment.

[117] Hyman, Era, supra note 12, at 135, 149–50.

and civilization."[118] Democrats also claimed that harsh treatment created Southern intransigence instead of suppressing it. Cox condemned the Cullom Bill as likely to have the same effect, urging that it would only spurn resistance, "as all such bills have uniformly had that effect when urged by the spirit of persecution."[119] Cox urged the bill's drafters to "strangle polygamy by another process than the hostile persecution" of the Cullom Bill.[120]

2. Republican Reluctance

Because they were vastly outnumbered, members of the Democratic opposition could not have impeded the Cullom Bill's passage if Republicans had been unified behind it. Nonradical Republicans, however, largely opposed the bill as well. The Cullom Bill passed the House in much weakened form. The Senate, which Republicans controlled almost six-to-one, failed to bring the bill to a vote, much less replace the critical provisions that had been removed.[121] Nonradicals rejected the idea that Mormon husbands belonged in the same category as Southern traitors, and ultimately impeded the bill's passage.

For nonradical Republicans, and even a few radicals,[122] polygamy did not make Mormons deserving of exclusion from the national polity. Conservative and centrist Republicans denied that polygamy posed a threat to the nation comparable to that of the former slave power. As Representative Thomas Fitch (R-Nev.) explained, "Slavery was incorporated into the civil, political, and social framework of fifteen [s]tates; polygamy is a pariah which has fled to the desert for a home. Slavery was the basis of a vast industrial system; polygamy is an excrescence upon a promising industrial

[118] Id. at 135.

[119] Cong. Globe, 41st Cong., 2d Sess. 2149 (1870).

[120] Id.

[121] Cong. Globe, 41st Cong., 2d Sess. 2180–81, 3582 (1870); McKee, supra note 6, at 142.

[122] Robert Schenk was the only radical to oppose the Cullom Bill openly on the House floor. He supported anti-polygamy but concluded that the Cullom Bill was too harsh and moved to recommit the bill for further discussion in the Committee on Territories. His motion failed 75–87. Cong. Globe, 41st Cong., 2d Sess. 2179–80 (1870); see Benedict, supra note 59, at 27 (providing a list of consistently radical Congressmen).

experiment."[123] To Fitch, the Mormon community had made important contributions to the nation, having transformed desert territory into "towns containing thousands of people, with newspapers and telegraph lines, factories and founderies [sic]."[124]

The radical Republicans' primary interest in anti-polygamy derived from their belief that polygamy fell into a class of oppressive relations deserving of federal intervention, and their response was to replicate Reconstruction in Utah. The Cullom Bill ultimately failed because most Republicans did not share their expansive idea of subjugation and did not believe the Mormons posed a threat equal to the former slave power. The Cullom Bill was the last serious effort to realize the abolitionists' vision of a nation purged of "licentious" power. It was also the closest that Congress came to implementing anti-polygamy enforcement legislation before the 1880s.

III. REPUBLICAN ANTI-POLYGAMY IN TRANSITION, 1870–1880

During the 1870s, the radical Republican energy that had almost propelled the Cullom Bill to passage dissipated, along with the Republican Party's commitment to Reconstruction. Some Republican legislators continued to introduce anti-polygamy bills, but their aims were moderate and their rhetoric confused. Even when a crisis of law enforcement in Utah presented an ideal opportunity to move anti-polygamy legislation, these legislators found little support even for a dramatically scaled-back version of the 1870 bill. By the late 1870s, however, the anti-Chinese sentiment in the West moved eastward, providing a new idea of "Otherness" to fuel anti-polygamy in the 1880s. During this decade, the last vestiges of the abolitionist ideal of a nation free of "licentious" power disappeared, and the ideal of a nation unified by whiteness began to emerge.

A. "Redemption" and the Decline of Reconstruction

The 1870s witnessed ongoing turbulence in the South. Reconstruction continued officially until the federal government with-

[123] Cong. Globe, 41st Cong., 2d Sess. 1517–18 (1870).
[124] Id. at 1517.

drew troops from the South in 1877. In the meantime, white Southerners sought to "redeem" their state governments by returning them to white, Democratic rule through violent, extralegal means.[125] Many Republicans believed federal involvement was needed to quell violence and preserve hard-won civil rights in the South, but this position was increasingly contested. In the early 1870s, a Liberal Republican movement broke off from the mainstream of the Republican Party, taking several prominent and formerly radical leaders with them. Liberal Republicans urged that blacks could protect their own rights with the ballot and claimed that harsh federal policies were fomenting, not discouraging, Southern terrorism. They sought amnesty and re-enfranchisement for former Confederates and accepted the South as a full member of the Union.[126]

The mainstream of the Republican Party also lost the resolve to intervene, and federal responses to election terrorism gradually ceased. By 1873, Tennessee, Georgia, and Virginia had ousted Reconstruction governments and were under conservative control.[127] In 1875, whites in Mississippi strategically reduced the visibility of their violent tactics, engaging in just enough violence to accomplish their aims without drawing federal ire. Republicans in Congress were all too eager to ignore what was going on; President Grant declined to intervene, and the Republican press lauded this decision.[128] Whites in remaining Southern states adopted the "Mississippi plan" and redeemed their state governments by 1875.[129]

During this period, national views about the South and the racially egalitarian vision of Reconstruction were in transition.

[125] The Colfax massacre at Grant Parish in Louisiana was the most notorious incident. The results of the 1872 elections were disputed. Violence erupted, and a faction consisting primarily of blacks defended the county courthouse against an attack by 200 white conservatives. The hostilities resulted in the deaths of seventy-one blacks and two whites. William Gillette, Retreat from Reconstruction 1869–1877, at 115 (1979). See generally Nicholas Lemann, Redemption: The Last Battle of the Civil War (2006) (examining the Colfax massacre and other incidents of political violence in Mississippi and Louisiana in the mid-1870s).

[126] Foner, Reconstruction, supra note 7, at 499–511; Gillette, supra note 125, at 60–72; Liberal Republican Platform (May 1, 1872), *reprinted in* National Conventions, supra note 6, at 144–47.

[127] Gillette, supra note 125, at 166.

[128] Id. at 154–165.

[129] Id. at 154, 165–66.

Southern whites portrayed themselves as the victims of Reconstruction governments and tyrannical black legislators biologically incapable of democratic government.[130] Northerners increasingly abandoned the notion that blacks were victims deserving of federal protection, even as widespread violence threatened their rights and safety.[131] These developments undermined the vision of embracing victims and excluding oppressors that had informed Republican anti-polygamy proposals before 1870. If former slaveholders and traitors had a rightful place in the nation, it became unclear why Mormon husbands should be excluded.

B. The Englebrecht *Decision and the Crisis in the Utah Court System*

Meanwhile, in the early 1870s, a crisis in the Utah court system arose, and several Republican legislators attempted to include anti-polygamy provisions in Congress's response. In 1870, Justice McKean, a recently appointed federal district judge, decided to judicially reclaim the power that the Utah legislature had taken away from the federal courts in the territory two decades prior.[132] In the 1850s, the territorial legislature effectively denied federal district courts the ability to select their own juries, and made much federal district court jurisdiction redundant by expanding the jurisdiction of the territorial probate courts.[133] Justice McKean's reclamation of federal judicial power provoked a conflict between non-Mormon federal officials and Mormon territorial officials in Utah. Overturning acts of the territorial legislature to the contrary, McKean recognized a United States attorney and marshal and empowered the United States marshal to summon jurors using an open venire without the supervision of the probate court. The district court began assembling largely non-Mormon grand and petit juries and

[130] Id. at 153.

[131] Foner, Reconstruction, supra note 7, at 550–51. Foner illustrates increasing white Northern agreement with the white Southern view that blacks were unfit to rule using three Thomas Nast cartoons, dated 1865, 1868, and 1874. The 1865 cartoon showed a black man, hobbling on crutches being introduced to political society by an allegorical figure. The 1874 cartoon showed black legislators, depicted vulgarly, yelling at one another with fists flailing in a legislative chamber. See id. at 386 (eighth page of illustrations following page 386).

[132] Cresswell, supra note 10, at 82.

[133] See supra text accompanying notes 50–52.

handed down indictments against people they believed had been sheltered by church control of the courts.[134] Several indictments were of questionable merit and reflected strong anti-Mormon bias. For instance, a grand jury indicted several church officials for ordering murders of apostates.[135] Most indictments, however, were ordinary federal suits, such as mail robbery and tax crimes that may have been previously neglected by territorial prosecutors hostile to federal interests.[136]

Two years later, the Supreme Court of the United States brought these practices to a halt by overturning the new procedures established by Justice McKean. In *Clinton v. Englebrecht*,[137] the Supreme Court held that the federal district courts in the territories lacked the constitutional authority to strike down acts of territorial legislatures. Only Congress, the Court held, had the authority to overrule acts of the territorial legislature and implement the type of reform Justice McKean had attempted.[138] The *Englebrecht* decision immediately quashed more than one hundred grand jury indictments and compelled the release of a number of prisoners from custody. In the longer term, it immobilized the federal district courts in Utah, leaving only the territorial probate and ecclesiastical courts operational.[139]

The question of what to do about the federal courts in Utah, therefore, fell to Congress. Legislators in Congress began to introduce bills in anticipation of the *Englebrecht* decision in early 1872, and continued to do so for the rest of the year.[140] After considering several proposals, the Senate Judiciary Committee reported a bill sponsored by Senator Fredrick Frelinghuysen (R-N.J.).[141] From the beginning of the debates, legislators generally saw their task as cre-

[134] Cresswell, supra note 10, at 82; Larson, supra note 14, at 73–74.

[135] Cresswell, supra note 10, at 84–85.

[136] H.R. Exec. Doc. No. 42-256 (1872); Cresswell, supra note 10 at 84–85. Not a single Morrill Act prosecution was listed as pending.

[137] 80 U.S. (13 Wall.) 434 (1871).

[138] Id. at 434, 447–49; see Cresswell, supra note 10, at 87.

[139] Cresswell, supra note 10, at 87; Larson, supra note 14, at 74–75.

[140] H.R. 1486, 42d Cong. (1872) (introduced Feb. 12); H.R. 2158, 42d Cong. (1872) (introduced Apr. 1); H.R. 2694, 42d Cong. (1872) (introduced May 8); H.R. 3791, 42d Cong. (1873) (introduced Feb. 3); S. 325, 42d Cong. (1871) (introduced Dec. 4; reintroduced Apr. 29, 1872); S. 1540, 42d Cong. (1873) (introduced Feb. 6).

[141] S. 1540, 42d Cong. (1873) (reported with amendment Feb. 15); Cong. Globe, 42d Cong., 3d Sess. 1133 (1873).

ating a court system that would avoid the persecution of Mormons and Gentiles by ensuring jurors were selected "without regard to religious, political, or social opinions."[142] There was considerable debate over the best strategy to achieve this end.[143] The Senate ultimately opted for a model that authorized federal and territorial officials to jointly create the list from which federal court jurors would be drawn.[144] The Frelinghuysen Bill passed the Senate, but was laid aside in the House. Two years later, Congress adopted a similar approach in the Poland Act of 1874, named for its sponsor, Representative Luke Poland (R-Vt.).[145]

Polygamy featured prominently in the debates over the Frelinghuysen and Poland bills, but anti-polygamy was never the primary focus of this wave of proposed legislation. Rather, legislators were primarily concerned with reanimating the federal courts in the territory. In 1874, Representative Poland, the chair of the House Judiciary Committee, received an inflammatory report from the War Department that United States soldiers were suffering "brutal treatment" at the hands of the Salt Lake City municipal police, and that the federal courts were "powerless to punish offenders."[146] Included was a medical report describing in gruesome detail the injuries of a soldier who had been beaten and imprisoned by the Salt Lake City police, as well as several shorter accounts of violence, false imprisonment, and theft against military personnel. Also included was a statement by Chief Justice McKean of the Utah Su-

[142] Cong. Globe, 42d Cong., 3d Sess. 1781 (1873); see S. 1540, 42d Cong. § 7 (1873). "Gentiles" are non-Mormons.

[143] Legislators initially struggled to find a method that would achieve religiously mixed juries. Frelinghuysen insisted that the bill's requirement that jury selection be conducted without regard to religion was sufficient, and stated that if any federal official did otherwise "Congress would at once impeach and depose him." S. 1540, 42d Cong. § 7 (1873); Cong. Globe, 42d Cong., 3d Sess. 1781 (1873). Others were skeptical that would achieve the desired end. Cong. Globe, 42d Cong., 3d Sess. 1782 (1873).

[144] Id. at 1787.

[145] H.R. 3097, 43d Cong. (1874) (reported Apr. 25). This Act ultimately provided for the joint selection of names for the jury list by the clerk of the district court and the probate court judge. This list would then be used to select jurors for federal grand and petit jurors.

[146] E.D. Townsend, Adjutant Gen., Dep't of War, to Hon. L.P. Poland, House of Representatives, Apr. 6, 1874, Papers of the House Comm. on the Judiciary, National Archives, Box HR 43A-F14.9 (Poland Act) (enclosed letter from H.A. Morrow, Lt. Colonel, Camp Douglas, Utah Territory to Adjutant Gen., Departmental Office, Omaha, Neb., Feb. 7, 1874).

preme Court explaining that the immobilization of the district courts allowed the perpetrators to go unpunished.[147] This report, received by Poland on April 6, 1874, provided Congress with the impetus to pass a law. On April 20, Poland moved to suspend the rules to permit the House Judiciary Committee to report a bill on Utah law enforcement at any time.[148] Within the next week, the Committee had reported out a bill, H.R. 3097, which would become the Poland Act of 1874.[149]

C. Anti-Polygamy in Decline: The Frelinghuysen Bill and Poland Act

At various junctures, the Poland Act and the Frelinghuysen Bill both contained anti-polygamy provisions of two varieties: those excluding practicing polygamists from federal juries in polygamy trials and those granting plural wives rights in their polygamous husbands' property to protect them from destitution. As with the Cullom Bill, these provisions were motivated by the notion that polygamy was analogous to Southern slavery. But legislators who still held on to this notion were rare, and they struggled in this new context to justify these measures to their colleagues.

1. Jury Exclusion and Reconstruction

Early versions of the Poland Act would have excluded those who "practice[d] polygamy, or that . . . believe[d] in the rightfulness of the same" from the jury in polygamy trials.[150] On the floor, Poland framed the jury selection provision as a mild version of the Cullom Bill and defended this provision using heavy "bloody shirt" rhetoric. He urged that the jury provision was "remarkable for its moderation," and contrasted it specifically with the radical Cullom Bill. It seems, however, that he could not resist suggesting that polygamists deserved much worse. He added that it was "undeniable that these people are as directly hostile to the Government of the

[147] Id. (enclosed letter from Judge McKean, Salt Lake City, Utah to Gen. Poland Morrow, Feb. 6, 1874).
[148] 2 Cong. Rec. 3206 (1874).
[149] H.R. 3097, 43d Cong. (1874) (reported Apr. 25).
[150] Id. § 4.

United States as was ever any portion of the country when it was in the very darkest hour of the rebellion."[151]

The jury exclusion provision was highly divisive, and the House Judiciary Committee was apparently uncertain whether to endorse it. The Committee opened the Poland Act debates by reporting out two bills that were largely similar, except that one contained the jury exclusion provision and one did not.[152] The House passed the Poland Act with this provision intact. The Senate, however, labeled the provision "objectionable" and "aggressive," and the bill's sponsor removed the provision out of fear that "the bill should fail and that there should be no law in Utah."[153] That this provision had the power to jeopardize the entire bill is rather peculiar, since it merely excluded those with an admitted bias toward defendants in polygamy trials. This provision was controversial primarily because it echoed Reconstruction measures in an era when Reconstruction was increasingly repudiated.

2. Pseudo-Divorce and "Confiscation"

The Frelinghuysen Bill and early versions of the Poland Act also contained provisions that would have given plural wives a share in their husbands' property, much as the "confiscation" provisions of the Cullom Bill would have done. These provisions were motivated by the same purpose, namely, to protect women from becoming destitute after the government dissolved their marriages.[154] With postwar confiscation and the Freedman's Bureau now a fading memory, however, Republican anti-polygamists tried, somewhat desperately, to use principles from domestic relations law to make a persuasive case to their colleagues. Predictably, this was to no avail.

Both the Frelinghuysen Bill and early versions of the Poland Act would have permitted plural wives to receive a property settlement after a pseudo-divorce. The Frelinghuysen Bill disclaimed "recognizing the validity or legal effect of any dual or plural marriage," but nevertheless provided that a

[151] 2 Cong. Rec. 4474 (1874).
[152] H.R. 3089, 43d Cong. (1874); 2 Cong. Rec. 3247 (1874).
[153] 2 Cong. Rec. 4475, 5415, 5417 (1874).
[154] Cong. Globe, 42d Cong., 3d Sess. 1789 (1873).

> woman holding relation of spouse or consort to any man who cohabits with another woman as his wife, spouse, or consort, may file her petition in the district court . . . asking to be discharged from such relation, and . . . the said court may, upon due hearing, adjudge and decree her discharged and free from such relation as aforesaid, and may adjudge and decree to her . . . such portion of the estate and property of the said man to whom she held the said relation as shall, under the circumstances, be equitable and just for [her] support.[155]

Similarly, an early version of the Poland Act would have allowed plural wives to file a bill to declare their pretended marriages void. The court could then "grant such a reasonable sum of money for alimony . . . as the circumstances of the case will justify, and . . . make such allowance for the maintenance of the complainant . . . as may be just and reasonable."[156]

The debate over these provisions turned on the moral status of the plural wife. Proponents urged that plural wives "deserved" property and maintenance on account of their "victimization." To do this, they desperately attempted to bolster the old justifications for "confiscation" on account of "slavery" with a tortured reading of family law principles. Senator George F. Edmunds (R-Vt.) still referred to polygamy as a "relic of barbarism," and expressed sorrow that his colleagues did not have "sympathy" for plural wives and seek to "provide for" them.[157] Edmunds further argued that polygamy was enough like monogamous marriage to justify the pseudo-divorce proceeding. While conceding that the "law does not recognize [a] plurality" of wives, he claimed that the law should acknowledge a relation "which is not sporadic, which is not criminal in the Mormon sense, but which is a steady relation of a plurality of wives."[158] Much debate concerned how to extend property rights to Mormon plural wives but not to prostitutes and adulteresses. Supporters of the measure saw a world of difference between plural wives and these morally dubious women.[159]

[155] S. 1540, 42d Cong. § 11 (1873) (as amended and reported Feb. 15, 1873).
[156] H.R. 3089, 43d Cong. § 4 (1874) (as reported Apr. 21, 1874).
[157] Cong. Globe, 42d Cong., 3d Sess. 1789 (1873).
[158] Id.
[159] Id. at 1784–85, 1788–89, 1791–92.

Predictably, opponents condemned these provisions as a monstrosity. Senator Oliver Morton (R-Ind.) expressed his horror, stating that "there is no country in the civilized world so far as I know that ever tolerated a law of that kind." He believed plural wives bore fault for their relation, and rejected that "women who live in that relation with a man [should] thereby acquire rights to his property as against his children and as against his relatives, where they are both in fault and both in crime."[160] Senator Eugene Casserly (D-Cal.) echoed these sentiments, denying that plural marriage, no matter how consistent a relation, was anything like monogamy:

> [W]hat a contradiction this section is. What is a divorce? It is the dissolution of a marriage. What kind of a marriage? A lawful marriage. Otherwise there is no bond to be loosened, no marriage to be dissolved; and yet as to past considerations, which everybody agrees are, in the case of all these plural wives, grossly unlawful, simply null and void, we propose to put the women involved in them on precisely the same footing as if they were, one and all, lawful wives.[161]

For opponents of the measure, there was a clear distinction between the moral status of the first wife and that of the subsequent wives. Part of their critique of the pseudo-divorce proceeding was that it implicitly reduced the share of marital property available to the first wife. Casserly vowed, "I never will vote to put the unlawful wife above the lawful wife," and he rejected attempts to "smooth it over" by calling the subsequent wives "'consort' or 'spouse.'"[162]

Casserly's statements highlight how little Republican anti-polygamists worried about preserving traditional principles of the law of domestic relations. Casserly, not Edmunds or Frelinghuysen, used the traditional understanding of culpability in cases of bigamy to allocate blame and entitlement within a polygamous family. In Casserly's view, the bigamous husband was a criminal, unlawful "wives" had no entitlement to his property, and the first and legal wife was blameless and retained all rights. The Republican "slav-

[160] Id. at 1789.
[161] Id. at 1795.
[162] Id. at 1800.

ery" paradigm, prominent until 1870, viewed all plural wives as innocent victims, and would have given them each a share in the family's property. Republican views about polygamy in the 1880s involved a marked departure from *both* these positions. Later Republicans would insist that all parties to a plural marriage—the husband, the legal wife, and the subsequent wives—were morally culpable. These later anti-polygamists would abandon the time-honored principle of spousal privilege and allow prosecutors to imprison even first and lawful wives who refused to give up their husbands.[163]

D. A Racial Framework of Inclusion and Exclusion Consolidates in the West

After Congress' relatively feeble effort between 1872 and 1874 to pass anti-polygamy enforcement legislation failed, the connection between Southern-ness and polygamy in Republican discourse fizzled. Debates over Chinese immigration in the West consolidated a new, explicitly racial model of inclusion and exclusion. Advocates of restricting Chinese immigration invoked slavery in their rhetoric; arguing that Chinese "coolie" laborers and prostitutes were "slaves," they urged Congress to prohibit their immigration. Chinese Exclusionism, however, was a new, ominous variation on the Reconstruction-era anti-slavery theme. In this context, calling immigrants "slaves" did not entitle them to material aid or civil and political rights; it justified denying them the right to enter or remain in the United States.

Since the mid-nineteenth century, the Chinese immigrant community in the West had steadily grown, largely through the efforts of railroad companies who relied on their labor. Anti-Chinese animus was rampant among whites in the West, and the Chinese communities there suffered harsh legal discrimination and frequent mob violence.[164] In the 1870s, California began lobbying the federal

[163] See infra Part IV.

[164] See, e.g., Lucy E. Salyer, Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law 19–26 (1995); Ronald Takaki, Strangers from a Different Shore: A History of Asian Americans 79–131 (1989). On the history of race, ethnicity and immigration law, see John Higham, Strangers in the Land: Patterns of American Nativism 1860–1925 (1955); Mae M. Ngai, Impossible Subjects: Illegal Aliens and the Making of Modern America (2004).

government to curtail the flow of Chinese immigrants into the country. Westerners found support among Southern Democrats, and in 1875 Congress passed the Page Law, the first restrictive federal immigration statute.[165] The Page Law barred the entry of indentured servants, or "coolies," and prostitutes.[166]

Anti-Chinese discourse had two aspects that would later influence the Republican portrayal of Mormon polygamy. First, exclusionists cast Chinese men *and* women as morally and sexually deviant. Chinese men were depicted as having a voracious appetite for prostitutes, particularly white women. White mothers were instructed "never [to] leave their children with them, especially little girls."[167] Chinese women were "a depraved class" inherently predisposed to engage in prostitution.[168] The Chinese practice of polygamy was "antithetical to American notions of marriage," and it became a signifier of the essential foreignness of Chinese immigrants.[169] Despite the fact that the Page Law was expressly directed at prostitutes, Chinese polygamy was a recurrent topic of discussion in congressional hearings. To "expert" witnesses from California, "Chinese women in polygamous marriages seemed more akin to prostitutes than to proper wives."[170] Unlike Mormon plural wives as described by Cullom and Frelinghuysen, Chinese women were categorically on the wrong side of the "dividing line between vice and virtue."[171] Second, the "servility" of the Chinese made them threats, not victims deserving of national pity and protection. The specter of slavery loomed large in the movement to exclude Chinese immigrants. Debates over the Page Law depicted Chinese prostitutes, as well as "coolie" laborers, as slaves.[172]

[165] Page Law, ch. 141, 18 Stat. 477 (1875) (repealed 1974); Andrew Gyory, Closing the Gate: Race, Politics, and the Chinese Exclusion Act 70–71, 138–42 (1998) (describing the regional dynamics of early federal immigration debates); Kerry Abrams, Polygamy, Prostitution, and the Federalization of Immigration Law, 105 Colum. L. Rev. 641, 664–701 (2005) (examining the legislative history of the Page Law).

[166] Page Law, ch. 141, 18 Stat. 477 (1875) (repealed 1974); Abrams, supra note 165, at 691–92.

[167] Ronald T. Takaki, Iron Cages: Race and Culture in Nineteenth-Century America 217 (1979).

[168] Id.

[169] Abrams, supra note 165, at 659.

[170] Id. at 683.

[171] Id. at 693 (quoting Rep. Horace Page (R-Cal.) in defense of the Page Law).

[172] Id. at 691–94.

Although worries about Chinese prostitutes and "coolie" laborers had origins in Republican objections to Southern slavery, Chinese exclusionism also incorporated Southern pro-slavery, anti-Northern ideas. Anxiety about prostitution also had roots in white Southern objections to Northern industrial capitalism. As Amy Dru Stanley has noted, "prostitution stood for a social system . . . in which the market operated as the arbiter of human relations," a system that whites, nostalgic for the rigidly hierarchical Old South, detested. Thus, not only was prostitution "how antislavery represented life in the Old South," it was also "how proslavery represented the Yankee culture of free contract."[173] Also, the gulf between the radical Republican or abolitionist response to slavery and the exclusionist response to Chinese immigration was wide. Exclusionists wanted to remove "coolies" and prostitutes from the nation to protect American democracy from the "insidious danger" posed by "this servile population."[174] The abolitionist vision, in contrast, would have elevated the oppressed into full national membership and punished those who were responsible for their enslavement. In fact, exclusionist discourses had far more in common with white Southern responses to black participation in Reconstruction governments. Claiming that "servility" was a racial characteristic, white Southerners insisted that blacks were innately unfit to participate in republican government, and that political power would turn blacks into raging tyrants.[175] The distinction between "victim" and "oppressor" thus became hopelessly blurred and stripped of any power to define national belonging.

E. Initial Effects of Anti-Chinese Discourse on Debates About Mormon Polygamy

These developments initially had little impact on polygamy debates and did not inspire anti-polygamy legislation in Utah in the late 1870s. The Northeastern Republicans primarily responsible for earlier anti-polygamy efforts did not demonstrate any serious sup-

[173] Stanley, supra note 77, at 240.

[174] Abrams, supra note 165, at 692–93.

[175] Takaki, supra note 167, at 216–19 (describing the "Negroization" of the Chinese); Foner, Reconstruction, supra note 7, at 550–51 (describing white Southern and white Northern responses to black participation in Reconstruction state legislatures).

port for Chinese exclusion until the presidential campaign of 1878.[176] The 1870s, however, witnessed a few signs of the coming synthesis of Chinese exclusionism and anti-polygamy. The Republican platform of 1876 expressed a cautious opposition to Chinese immigration and urged that Congress "fully investigate" its effects on "the moral and material interests of the country."[177] This plank, a controversial endorsement of "discrimination of race," was nevertheless supported by over two-thirds of delegates to the Republican convention.[178] This same platform reincarnated the phrase "relic of barbarism," but this time it was no longer a "twin."[179] Abandoning the linkage with Southern slavery altogether, the Republican platform framed anti-polygamy in terms of an American cultural nationalism and advocated legislation to "secure . . . the supremacy of American institutions in all the territories."[180]

The Morrill Anti-Bigamy Act—still the only law relating to polygamy ever passed by Congress—remained a nullity, and fewer legislators introduced bills to strengthen it. By 1880 there had been only one successful Morrill Act prosecution, that of George Reynolds, Mormon leader Brigham Young's personal secretary. Reynolds's case, however, involved some collusion between federal prosecutors and Mormon leaders, who hoped that the Supreme Court would vindicate their constitutional rights.[181] The Supreme Court ultimately sustained Reynolds's conviction in 1878 in *Reynolds v. United States*, finding the Morrill Act to be constitutional.[182] The Court's opinion, which anticipated the white cultural nationalism of later Republican anti-polygamists, described polygamy as "almost exclusively a feature of the life of Asiatic and of African

[176] Gyory, supra note 165, at 136–84 (describing the increasing support for the exclusion of Chinese immigrants among New Englanders and other Northern Republicans beginning with the presidential campaign of 1878).

[177] National Conventions, supra note 6, at 172.

[178] Id. at 169; Foner, Reconstruction, supra note 7, at 567; Abrams, supra note 165, at 690.

[179] National Conventions, supra note 6, at 172.

[180] Id.

[181] Cresswell, supra note 10, at 90–91. At the time, Mormon leaders claimed that polygamy was constitutionally protected under the free exercise clause of the First Amendment or, oddly, under *Dred Scott*'s limitation on Congress' power over the territories. Gordon, Mormon Question, supra note 8, at 122–23.

[182] 98 U.S. 145, 165–66 (1878).

people" and insisted that it would lead inevitably to "despotism."[183] This ruling was somewhat anti-climactic, however. It did nothing to inspire Republicans, who no longer controlled both houses of Congress, to introduce anti-polygamy legislation.[184] Not until late 1881 and early 1882 would Republicans again raise anti-polygamy legislation in earnest.

IV. ANTI-POLYGAMY, RACE, AND THE REDEMPTION OF THE SOUTH IN THE 1880S

Debates about the Chinese Exclusion Act of 1882, combined with increasing Republican commitment to sectional reconciliation after 1880, had two interrelated effects on Republican anti-polygamy discourse. First, Republicans began attacking Mormon polygamy as contrary to "white" marriage norms rather than as a form of enslavement. Second, the growing national anxiety over Chinese immigration allowed Republicans to compare Mormon polygamy to Chinese marital practices, displacing the image of the Southern white slaveholder as the paradigm of "barbarism." Republican anti-polygamists succeeded in passing the Edmunds and Edmunds-Tucker Acts in 1882 and 1887, respectively. These laws relied on test oaths and civil disabilities, but the new Republican portrayal of polygamy made these provisions palatable even to some Democrats. Gone, however, was any concern for the condition of plural wives upon the breakup of their families. Republicans of the 1880s believed that Mormon women and men *both* were to blame for polygamy, and subjected all to punitive sanctions.

[183] Id. at 164–66; Cott, supra note 30, at 114–15; Abrams, supra note 165, at 691–92. The *Reynolds* court also condemned polygamy as a threat to society generally, rather than as the victimization of individual plural wives. Edwin B. Firmage, Free Exercise of Religion in Nineteenth Century America, 7 J.L. & Religion 281, 290 (1989); Linford (pt. 1), supra note 22, at 341.

[184] The *Reynolds* decision was announced in early 1879, halfway through the first session of the Forty-Fifth Congress. No bills were introduced until December of that year, and none moved out of committee. See H.R. 2444, 46th Cong. (1879) (introduced Dec. 2); H.R. 2960, 46th Cong. (1879) (introduced Dec. 15); H.R. 2961, 46th Cong. (1879) (introduced Dec. 15); H.R. 2962, 46th Cong. (1879) (introduced Dec. 15). Republicans lost the House in 1874 and only narrowly retained control of the Presidency in 1876. Foner, Reconstruction, supra note 7, at 523, 575.

A. Anti-Polygamy Legislation in the 1880s

In the 1880s, Congress enacted two pieces of comprehensive anti-polygamy legislation, the Edmunds Act of 1882 and the Edmunds-Tucker Act of 1887.[185] The 1882 act lessened the burdens of proof for polygamy prosecutions, criminalized non-marital cohabitation, required potential jurors in polygamy cases to swear a test oath, disqualified any man convicted of a polygamy offense or any woman cohabitating with a polygamist from voting or holding office, and required federal supervision of elections in Utah.[186]

The 1887 act abolished spousal privilege in polygamy cases, allowed prosecutors to detain witnesses (including a defendant's wives) in polygamy cases, criminalized adultery and fornication, regulated the solemnization of marriage, annulled an 1870 territorial law granting women the right to vote, prescribed a test oath for voting and office-holding, stripped the territorial probate courts of jurisdiction beyond the administration of wills and estates, and dissolved the LDS Church corporation and related entities.[187] Although enacted in two waves, Republicans introduced virtually all of the provisions in both Acts by the end of 1881.[188]

B. The Causes of Renewed Congressional Interest in Polygamy

The proximate cause of Congress' renewed interest in polygamy was the Supreme Court's decision in *Miles v. United States*.[189] In *Miles*, the Court vacated a second successful Morrill Act conviction, and, in the process, laid bare one of the Morrill Act's chief flaws.[190] The trial court permitted the defendant's disaffected second wife to testify that she had married the defendant and that she had also witnessed his previous marriage to another woman. The

[185] Edmunds Act, ch. 47, 22 Stat. 30, 30–32 (1882); Edmunds-Tucker Act, ch. 397, 24 Stat. 635, 635–41 (1887).

[186] Edmunds Act, §§ 1, 3, 5, 8, 9.

[187] Edmunds-Tucker Act, §§ 1–3, 5, 9, 12, 13, 17, 20, 24.

[188] The flurry of bills that would become Edmunds Act began in earnest in December 1881. That month, the following ten bills were introduced: H.R. 756, 47th Cong. (1881); H.R. 757, 47th Cong. (1881); H.R. 758, 47th Cong. (1881); H.R. 1465, 47th Cong. (1881); H.R. 1466, 47th Cong. (1881); H.R. 2959, 47th Cong. (1881); H.R. 2960, 47th Cong. (1881); S. 309, 47th Cong. (1881); S. 310, 47th Cong. (1881); S. 353, 47th Cong. (1881).

[189] 103 U.S. 304 (1880).

[190] See Cresswell, supra note 10, at 94–95.

second wife's testimony was the only evidence of either marriage. Rather cunningly, Miles conceded his marriage to the testifying wife but denied his first marriage.[191] The Supreme Court found that the second wife was the presumptively legal wife and found her testimony violated spousal privilege.[192] This ruling revealed the challenge of spousal privilege in polygamy prosecutions. Without third-party testimony, prosecutors had to secure the testimony of at least two wives, and even then they faced a risk of jury nullification. Because Congress could modify territorial statutes concerning spousal privilege, the *Miles* decision was practically an invitation for Congress to act. Congress responded with sweeping legislation extending far beyond jury selection and spousal privilege.

1. The Republican Party Turns Toward Sectional Reconciliation

By the time the *Miles* decision put polygamy in the spotlight, Republicans were reinventing their party and its ideology in earnest. In the late 1870s, Republicans attempted to cultivate support among the white Southerners most tolerant of black constitutional rights. The 1880 election, however, revealed a dramatic loss of Republican support in the South.[193] Realizing that retaining their political dominance depended on winning white voters away from Democrats in the "Solid South," various Republican candidates and factions experimented throughout the decade with strategies for building cross-sectional alliances.[194] This required abandoning the "bloody shirt" rhetoric that invoked memories of war and remaining silent about the abuses that Democratic Southern governments perpetrated against blacks. In 1881, Republican President Chester A. Arthur delivered the first presidential inaugural address in over two decades that mentioned neither race nor the South.[195] In 1883, President Arthur reacted tepidly when the Supreme Court declared unconstitutional the Civil Rights Act of 1875, which had granted blacks equal access to public accommoda-

[191] Id. at 94. A secondary issue in the case was the legality of excluding Mormons from the petit jury. Id. at 94–95; *Miles*, 103 U.S. at 304.

[192] Cresswell, supra note 10, at 94–95.

[193] Vincent De Santis, Republicans Face the Southern Question 101–03 (1959).

[194] Paul H. Buck, The Road to Reunion: 1865–1900, at 265–69 (1937).

[195] Id. at 265; Stanley Hirshon, Farewell to the Bloody Shirt: Northern Republicans & The Southern Negro, 1877–1893, at 99 (1968).

tions.[196] While some Republicans still condemned Southern atrocities, others rejected such criticism as "vicious and unpatriotic."[197]

2. Chinese Exclusion

At the same time, previously resistant New England Republicans began to endorse the exclusion of Chinese immigrants. In 1882, Congress suspended the immigration of all Chinese laborers, regardless of whether they labored involuntarily or not.[198] In a surprising and influential speech about this bill, Republican Senator George F. Edmunds of Vermont announced his support for excluding Chinese immigrants, prompting other Eastern Republicans to follow suit.[199] Asserting that "no republic can succeed that has not a homogenous population," Edmunds found the irreconcilable differences between the Chinese and whites to be sufficient justification for their exclusion.[200] As historian Andrew Gyory argues, Edmunds rejected the abolitionists' moralistic defense of racial egalitarianism by implying that "[e]xclusion was *moral* not because it was *right* but because it was *popular*."[201] This new homogenizing, majoritarian Republican tendency helped fuel the desire to quash Mormon polygamy.

C. The Construction of Polygamy in Congress in the 1880s

Republicans in the 1880s displaced the sectionalism entrenched in earlier forms of anti-polygamy activism by claiming that a shared tradition of monogamy united the North and South. As Edmunds urged final passage of the 1882 anti-polygamy act, he called on the Senate to remember that "[n]o man, North or South, who believes in the Christian religion, who believes in a republican government,

[196] Civil Rights Cases, 109 U.S. 3 (1883); Hirshon, supra note 195, at 103–05.

[197] Hirshon, supra note 195, at 135.

[198] Chinese Exclusion Act, ch. 126, 22 Stat 58 (1882) (repealed 1943); Gyory, supra note 165, at 254.

[199] Gyory, supra note 165, at 231–33. Gyory notes that Edmunds ultimately voted against the Chinese Exclusion Act on the grounds that the period of exclusion exceeded that permissible under a standing treaty between the United States and China. Nevertheless, Edmunds's speech was highly influential, and many Republicans subsequently adopted his position. Id.

[200] Id.

[201] Id. at 232.

can maintain [that polygamy] can exist consistently with . . . a republican government."[202] That North and South were similar in their practice of monogamy might at first seem a matter of common sense, but the history of Republican anti-polygamy reveals that this was truly an innovative idea. For decades Republicans had sought to analogize polygamists and white Southerners. Since 1856, the crux of the party's critique of polygamy was its similarity to Southern slavery. After the Civil War, Republicans insisted that ex-Confederates and polygamists deserved similar penalties. This newly articulated cultural unity between North and South was no more natural or inherent than the comparison of polygamy and slavery. In both instances, lines of commonality and difference were the products of the party's present ideological orientation.

1. Racism and Anti-Polygamy Discourse

The new conception of a unified American culture was expressly white, and Republicans relied on overtly racist language to explain why polygamy could not coexist with it. Comments analogized Mormon polygamy to Chinese, "Mohammedian," "Hindoo," or "oriental" cultural practices.[203] Republicans on the House Judiciary Committee condemned polygamy as "directly antagonistic to all ideas of European and American civilization" and found the "two types of domestic life [to be] absolutely irreconcilable and inconsistent. They cannot unite; they must part. They cannot coalesce; they must exist in separate nationalities."[204] In his "benediction" before the Edmunds Act passed the Senate in 1882, Republican Representative Charles Williams of Wisconsin referred to Mormonism as "oriental paganism" and commanded it to "pause in the presence of the nation's power."[205]

Legislators justified the austere measures of the Edmunds and Edmunds-Tucker Acts as necessary to repress a "deviant" racial performance. Republicans of the House Judiciary Committee de-

[202] 13 Cong. Rec. 1212–13 (1882).

[203] Id. at 1204 (statement of Sen. Brown); Id. at 1875 (statement of Rep. Williams); 49 Cong. Rec. 561 (1884) (statement of Sen. Maxley); H.R. Rep. No. 48-1351, pt. 2, at 17 (1884) (statement of Judge Goodwin).

[204] H.R. Rep. No. 49-2735 at 3 (1886).

[205] 47 Cong. Rec. 1875 (1882).

cried polygamy as "a crime against the race."[206] Legislators conceptualized polygamy and the LDS Church as conferring upon their adherents negative traits, such as deceitfulness, untrustworthiness, insularity, and servility—all of which featured prominently in white supremacist stereotypes of Asians and blacks. In 1884, a committee endorsed the following account, by an "expert" on Mormonism:

> Mormons are like the Chinese; they will work for Gentiles for money; sell Gentiles anything they have to sell; buy land from them; but there transactions cease . . . . They belong to a kingdom foreign in its ways and foreign in fealty to this country. . . .
>
> . . . .
>
> . . . [Mormons] are as careless of their oaths as a Chinaman, and bear as little allegiance to the United States Government . . . .[207]

Even though Mormons themselves were predominantly white, Republicans described the practice of polygamy as compromising their racial integrity. However, the Mormons' "true" racial identity and cultural ties to the United States led legislators to conclude that their racial "deviance" was correctible through force of law. The report continued, "Utah is not Turkey or any of the Barbary States; the air is pure; the American flag is overhead . . . . The thing to do is strike at the animalism which underlies the Mormon system . . . ."[208]

In this new, racialized conception of polygamy, the plural wives lost the innocent-victim status afforded them by earlier anti-polygamists. Instead, anti-polygamists of the 1880s held that wives were morally complicit in the degradation of their community's racial integrity. Despite their right to vote, Mormon women had failed to effect "the overthrow of polygamy and . . . the vindication of their race."[209] The attributes that had previously made them sympathetic, if deluded, victims transformed them into something

[206] H.R. Rep. No. 48-1351, at 38.
[207] Id. at 16–17.
[208] Id. at 18.
[209] H.R. Rep. No. 48-1351, pt. 2, at 2 (1884).

essentially foreign, "like the women of Central Asia."[210] By embracing polygamy, Mormon women became "the real citadel of the Mormon power."[211]

2. The Racialization of Polygamy Was a New Development

The racialization of polygamy was new to Republican anti-polygamy discourse. Previously, legislators had not used the observation that polygamy was practiced predominantly in Asian cultures as a justification for anti-polygamy legislation. On the contrary, this observation had been used to support leniency or even legalization. Representative J. G. Blair (Liberal Republican-Mo.) in 1872 introduced a bill to repeal the Morrill Act and legalize polygamy in Utah. He urged the United States to develop a policy towards Utah that mirrored the British Empire's official policy of nonintervention in the cultural practices of India, including polygamy.[212] Blair argued that, when a practice had the sanction of a community, it was distinguishable from ordinary vice. "The bigamy of England is not the bigamy of India," and therefore, he argued, it would be an "outrage upon criminal jurisprudence" for England to enforce bigamy laws "applicable to single marriages in England, against polygamous marriages in India."[213] Likewise, he believed it would be a "folly of American statesmanship" to transform Mormon "[m]en and women heretofore regarded as honorable, chaste, and virtuous" within their community "into felons and criminals."[214]

Blair's advocacy of complete legalization was certainly an anomaly, but his line of argument was not. In 1872, Senator John Sherman (R-Ohio) noted that polygamy was "inconsistent with the ideas of the Anglo-Saxon race" but went on to urge Congress to treat the "ignorant" Mormons "kindly . . . doing nothing that would even look like an act of harshness."[215] Even the Committee on Territories' report accompanying the Cullom Bill expressly avoided linking polygamy to Asian cultures as a basis for opposing polygamy. The report noted that polygamy existed only where "the

[210] 14 Cong. Rec. 3057–58 (1883).
[211] 17 Cong. Rec. 407 (1886).
[212] H.R. 721, 42d Cong. (1872); Cong. Globe, 42d Cong., 2d Sess. 1096–99 (1872).
[213] Cong. Globe, 42d Cong., 2d Sess. 1099 (1872)
[214] Id.
[215] Id. at 1790.

most shameful lust had the sanction of religion" and that "ancient nations" and "the Orientals in particular" had often prohibited polygamy.[216]

3. The Memory of Slavery and the Redemption of the South

The debates of the 1880s reveal that the South had been brought back into the national fold. The most troublesome difference to Republicans was no longer sectional and political, but racial. In the 1880s, the racialization of polygamy helped disconnect even the use of the test oath from its Reconstruction legacy. In his final speech urging passage of the 1882 act, Edmunds sought to disentangle memories of the ironclad oath from the anti-polygamy oath in vague and diplomatic terms. Stating that he hoped most of the Senators had "forgotten . . . as I have until I am spurred up to remember" the political divisions of the past, he denied any "coordination" between the instant legislation and "something that has gone by . . . ."[217]

Many Democrats perceived the connection to Reconstruction and objected to the methods of the bill,[218] but remarkably some prominent Southern Democrats embraced the anti-polygamy test-oath. Not a single Democrat had spoken in favor of the Cullom Bill. The Edmunds-Tucker Act was co-sponsored by Virginia Democrat John Randolph Tucker and signed into law by President Grover Cleveland, also a Democrat.[219] During debate over the Edmunds Act, Senator Augustus Hill Garland (D-Ark.) came out unequivocally in support of using test oaths and imposing disabilities against polygamists.[220] Garland, a former Confederate Congressman, had famously contested the use of loyalty oaths before the United States Supreme Court in *Ex Parte Garland.*[221] In 1882, Garland admitted that he had once believed "you could not disfranchise a person who had once been enfranchised without his conviction of crime." Urging that "this is a desperate case which requires

[216] H.R. Rep. No. 41-21, at 6 (1870).
[217] 13 Cong. Rec. 1212–13 (1882).
[218] Id. at 1198 (statement of Sen. Morgan), 1202–03 (statement of Sen. Brown), 1211 (statement of Sen. Pendleton), 1874 (statement of Rep. Converse).
[219] Gordon, Mormon Question, supra note 8, at 180.
[220] 13 Cong. Rec. 1158–59 (1882).
[221] 71 U.S. (4 Wall.) 333 (1866); Hyman, Era, supra note 12, at 107–10.

desperate remedies," he stated that the threat of polygamy had changed his mind. He then read aloud a passage on Asia from "Professor Heeren's Historical Researches," noting that "no nation practicing polygamy has ever attained to a true republican constitution, nor even that of a free monarchy."[222]

Even slavery itself was remembered as a collective "national sin," not as a badge of shame to be worn by the former Confederacy alone. The sectionalist invocation of slavery rarely occurred in this round of polygamy debates, and when it did occur, it stood out as anachronistic. Senator George Frisbee Hoar (R-Mass.) was the son of abolitionist Samuel Hoar and the brother of Ebenezer Rockwood Hoar, who coined the "twin relics" slogan at the 1856 Republican convention.[223] During the 1880s, Senator Hoar criticized other Republicans for ignoring Southern atrocities. A decade later, he would try unsuccessfully to build Republican support for legislation to safeguard Fifteenth Amendment voting rights.[224] Hoar also continued to embrace the conception of polygamy as analogous to Southern slavery. In an acrimonious exchange about a related bill with Senator Joseph Brown (D-Ga.), Hoar conjured the specter of slavery and its "prohibit[ion] of the institution of marriage altogether."[225]

Brown's response, hardly imaginable in 1870, was to reprimand Hoar for this divisive invocation. Two weeks later, Brown retaliated against Hoar's "disinter[ring] for exhibition the corpse of slavery" by describing at length Massachusetts's own complicity in the enslavement of black people during the Revolutionary period.[226] "So much for slavery in Massachusetts," Brown concluded. Describing slavery as "our great national sin," perpetrated by whites in the North and South alike, he laid it to rest as "one of the

[222] 47 Cong. Rec. 1159 (1882). Representative Richard Townshend (D-Ill.) repeated Garland's arguments in the House debate. Id. at 1868. Garland's source was likely Arnold Hermann L. Heeren, Historical Researches into the Politics, Intercourse, and Trade of the Principal Nations of Antiquity (1833).

[223] Foner, Reconstruction, supra note 7, at 130; Congress, Biographical Directory, supra note 44.

[224] Buck, supra note 194, at 279–80; Charles W. Calhoun, Conceiving a New Republic 238–39, 246–48 (2006); Hirshon, supra note 195, at 130–33.

[225] 48 Cong. Rec. 4563 (1884).

[226] Id. at 5184.

dead issues of the past."[227] Like Republican anti-polygamists motivated by anxiety about racial difference, Brown saw Southern slavery as "disconnected with the subject under discussion."[228] Former Confederates and many Republicans now agreed: "white" folks had rejected slavery; the trouble was everyone else.

CONCLUSION

When Republicans announced their intention to eradicate the "twin relics of barbarism" in the territories, they forged a link between polygamy and the politics of slavery that would drive, shape, and hamper anti-polygamy efforts throughout the 1880s. In contrast to the modern view that polygamy is antithetical to a deeply rooted tradition of monogamous marriage, legislators in this period seemed unable to explain why polygamy was so objectionable. Instead, they described the "evil" of Mormon polygamy by analogy to the evils of the moment: the Southern slave power, defeated Confederates, Chinese immigrants. Not only were arguments from tradition remarkably absent from Republican anti-polygamy rhetoric—anti-polygamists were prepared to do considerable violence to traditional domestic relations law principles in service to their goal. At all times, Republican anti-polygamists saw their campaign for monogamous marriage in Utah as the pursuit of a new, unrealized vision for the nation, not the preservation or reconstruction of the ways of the past.

When abolitionists and radical Republicans placed Mormon husbands in the same category as former slaveholders, they imagined a nation free of licentious power and subjugation, broadly defined. They believed, however inaccurately, that polygamous marriages involved the enslavement of the plural wives. In response, radical Republicans proposed, literally, a second Reconstruction in Utah. The Cullom Bill would have imposed the same penalties and disabilities on polygamous husbands as Reconstruction had imposed on former Confederates—test oaths, disfranchisement, and confiscation. Radical Republicans also portrayed plural wives as innocent victims, despite the fact that they had acquiesced to plural marriages without obvious compulsion. Ultimately, the Cullom Bill

[227] Id. at 5183–84.
[228] Id. at 5183.

failed because, particularly by 1870, a majority of Republicans simply did not share the radicals' expansive vision or believe that polygamy warranted the same response as Southern rebellion.

As their commitment to Reconstruction collapsed, Republicans lost their will to perceive the difference between "victims" and "oppressors" in the South. Without these moral categories to rely upon, Congressional anti-polygamy efforts stalled, and Republicans still concerned about polygamy in Utah seemed unable to justify their proposals coherently. When anti-polygamy efforts resumed in the 1880s, the campaign carried a fundamentally different meaning and reflected a very different vision for the nation. While polygamy remained a "barbarism," this term no longer connoted the state of affairs in half of the United States. Instead, "barbarism" described the antithesis of "whiteness." The model of culpability changed, and Mormon men and women were both guilty for their marital crimes. Polygamy was a deviant racial practice, and white American society was its victim. As the nation moved toward sectional reconciliation, the Republican impulse to protect the "white" practice of monogamy succeeded where the impulse to halt the perceived subordination of women had failed.