

Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era

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I. INTRODUCTION

In 1904, a lynch mob of more than 1000 white people burned Luther Holbert, a black Mississippi sharecropper, and his wife to death.¹ A Vicksburg, Mississippi newspaper gave the following eye-witness account of the lynching:

[T]he two Negroes . . . were tied to trees and while the funeral pyres were being prepared, they were forced to hold out their hands while one finger at a time was chopped off. The fingers were distributed as souvenirs. The ears . . . were cut off. Holbert was beaten severely, his skull fractured and one of his eyes, knocked out with a stick, hung by a shred from the socket.

Some of the mob used a large corkscrew to bore into the flesh of the man and woman. It was applied to their arms, legs and body, then pulled out, the spirals tearing out big pieces of . . . flesh every time it was withdrawn.²

The killings of Luther Holbert and his wife were all too typical of the acts of Southern lynch mobs during the period in American history known as the Progressive Era, which spanned the years from about the turn-of-the-century to roughly the early 1920s.³ Despite the notoriety of these incidents and the fact that the perpetrators were often well-known to the community, the lynching of a black person by a white mob was rarely investigated, even more

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1. For an account of the lynching of the Holberts, see *Lynched Negro and Wife Were First Mutilated*, VICKSBURG (MISS.) EVENING POST, Feb. 8, 1904, in RALPH GINZBURG, 100 YEARS OF LYNCHING 62-63 (1969) [hereinafter *Lynched Negro and Wife*]. See NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THIRTY YEARS OF LYNCHING IN THE UNITED STATES 15 (1919) [hereinafter *THIRTY YEARS OF LYNCHING*] for an additional account of the lynching. Unfortunately, neither of these accounts gives the name of Luther Holbert's wife.

2. See *Lynched Negro and Wife*, *supra* note 1, at 63.

3. As with much else about the Progressive Era, historians disagree about when it ended. The traditional view is that the era ended with the First World War. See, e.g., William E. Leuchtenburg, *Tired Radicals*, in THE PROGRESSIVE ERA 94, 95-96 (Arthur Mann ed., 1963). Other historians argue that progressive reform efforts continued into the 1920s, if not right up to the time of the New Deal. See, e.g., Arthur S. Link, *Not So Tired*, in THE PROGRESSIVE ERA, *supra* at 105.

rarely prosecuted, and almost never punished.⁴ Although federal legislative proposals seem to have stood the greatest chance for passage during the Progressive Era, Congress failed to pass any anti-lynching legislation at that time.⁵ Congress came closest to enacting anti-lynching legislation in 1922, when the House passed the Dyer Anti-Lynching Bill (named for its sponsor Leondias Dyer, Congressman from Missouri). The bill, however, failed in the Senate.⁶ This Article focuses on the failure to pass anti-lynching legislation during the Progressive Era.

Historians have suggested that the failure to enact anti-lynching legislation during the Progressive Era stemmed primarily from fears that such legislation was beyond Congress's constitutional authority, and would intrude upon the rights of the states.⁷ In my view, however, a full explanation of Congress's failure must take into account the widespread and deeply-felt cultural aversion toward intimate relations between black men and white women. This intersection of race and gender was at the heart of a number of social phenomena throughout the Progressive Era, particularly lynching. This antagonism toward interracial sex was one of the key reasons Congress failed to take action to curb lynching.

As evidence that anti-lynching opponents in Congress were not always consistent in their claimed concern for states' rights and the constitutional constraints upon federal power, I juxtapose the story of the failed anti-lynching legislative effort to the stories of three successful efforts to secure federal legislation in matters involving the protection of whites. These three

4. See *infra* part III.

5. Anti-lynching legislation stood the greatest chance for passage during the Progressive Era for three reasons. First, there existed an active, organized, and national anti-lynching movement, whose members constantly lobbied Congress to enact legislation targeting lynching. Second, the Republican party, which had traditionally been far more supportive of the rights of blacks than had the Democratic party, controlled both houses of Congress and the Presidency for most of the Progressive Era. After the 1920s, the Republican party's support for black rights was all but dead. The Democrats, who from the New Deal until the 1950s predominantly held the balance of power in Congress, allowed the Southern Democrats to block any legislation favorable to blacks. For a comparison of the relationships of the Republican and Democratic parties to blacks during the Reconstruction Era, see ERIC FONER, *RECONSTRUCTION* (1988). For the period from the end of the Reconstruction Era through the 1950s, see PAUL D. CASDORPH, *REPUBLICANS, NEGROES, AND PROGRESSIVES IN THE SOUTH, 1912-1916* (1981); RICHARD KLUGER, *SIMPLE JUSTICE* (1976); AUGUST MEIER & ELLIOT RUDWICK, *FROM PLANTATION TO GHETTO 194-357* (3d ed. 1976). Finally, the Progressive Era was a period of great social change and reform, and, notwithstanding the miserable conditions under which most black folks lived, the period held out some hope for improvement in their lives. See 9 ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., *THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-1921*, at 741-43 (1984) (arguing that in the Progressive Era blacks enjoyed impressive gains in mobility, economic self-sufficiency, and literacy, all of which brought about an increased militancy among blacks that in turn led them to demand even greater improvements in their social and economic conditions).

6. ROBERT L. ZANGRANNO, *THE NAACP CRUSADE AGAINST LYNCHING, 1900-1950*, at 68-69 (1980).

7. See, e.g., W. FITZHUGH BRUNDAGE, *LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930*, at 161 (1993) (suggesting that constitutional constraints prevented Congress from enacting anti-lynching legislation). For the only published study to address the question of why Congress failed to enact an anti-lynching measure, see Claudine Ferrell, *Nightmare and Dream: Antilynching in Congress, 1917-1922*, in *AMERICAN LEGAL AND CONSTITUTIONAL HISTORY: A GARLAND SERIES OF OUTSTANDING DISSERTATIONS* (Harold Hyman & Stuart Bruchey eds., 1986). In her study, Ferrell attributes the Dyer Bill's defeat primarily to constitutional impediments and to general concerns about federalism. *Id.* at 200-13.

enactments were the White Slave Traffic Act (popularly known as the Mann Act), the Harrison Narcotics Act, and the 1912 legislation that banned the interstate shipment of films of the boxing matches of Jack Johnson, the first black heavyweight world boxing champion. In all three of these successful legislative efforts, Congress showed itself willing to subordinate both constitutional objections and states' rights concerns to federal policy when the perceived social problem was of a particular kind: the need to protect white women from assaults by black men. In the context of lynching, by contrast, the "policy" of protecting white women prevented the federal government from enacting anti-lynching legislation.

This national policy had two intersecting levels. On one level, the three successful legislative efforts were partially motivated by the perceived need to protect white women. On another level, the concern for white women gained much greater strength and urgency when linked with the possibility of interracial sex between black men and white women. A principal motive for passage of the Mann Act, for example, was not simply that white women were being tricked, drugged, and kidnapped into prostitution, as anti-white slavery activists contended, but also that they were being forced into prostitution where they would be used for the benefit of at least some black men.⁸ Thus, in my view, it was not merely racism that was at work in the defeat of the Dyer Bill and Congress's failure to enact any other anti-lynching proposal. Instead, it was the intersection of race and gender: the widespread racist perception that black men were sexual "beasts" lusting after white women and the sexist and racist perception that white women—and only white women—needed or deserved legal protection.⁹

In placing racism and the intersection of racism and sexism at the center of my analysis of Congress's failure to pass anti-lynching legislation during the Progressive Era, I do not mean to suggest the absence of other forces contributing to this failure. In particular, some congressmen may genuinely have believed that Congress should not visit so broad an intrusion upon the traditional police powers of the states by interfering with a state's enforcement of its criminal laws. Arguably, even some of today's legal scholars might view the criminal law as lying at the core of state sovereignty. Those congressmen

8. See *infra* part V.

9. The sexism was in the patronizing desire to protect white women and the racism was in the brutal neglect of black women's sexual vulnerability. Despite the long history of the rape of black women by white men, which constituted a central feature of slavery in the United States, there was never any national outcry about this practice nor any general perception of a cultural problem requiring governmental action to protect black women from rape by white men (or by black men for that matter). For an analysis of the long history of American law's failure to protect black women from rape by white men or black men, see Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 157-60; Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 117-23 (1983). Crenshaw's article is part of a growing body of work by scholars who explore the connections between race and gender in American law. For other examples of this scholarship, see Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 n.3 (1991).

might have thought that the threats to state sovereignty posed by anti-lynching legislation were too great, even if doing nothing at the federal level meant that black lives would continue to be lost. In addition, although Southern Democrats were only a minority in Congress during the Progressive Era, they were able to use tactics such as the threat of filibuster to block passage of anti-lynching proposals.¹⁰ Finally, it is certainly relevant that blacks suffered de jure disenfranchisement in all of the South, and de facto disenfranchisement in much of the North as well, and that there were no blacks in Congress throughout the whole of the Progressive Era. One cannot, however, dismiss that white hatred of blacks, expressed in fears about interracial sex between black men and white women, was typically intertwined with and reinforced the federalism concerns, fueling the political dynamic of the times.

The study of the phenomenon of lynching is important, at least in part, because of the persistent power of its imagery. Lynching's legacy and the failure of the nation to stop it, haunts Americans today. For example, Clarence Thomas's attempt to fend off Anita Hill's accusation of sexual harassment by invoking the image of the lynching of black men had a powerful effect on many blacks.¹¹ Because the image of lynching, with its painful attendant myth of the black man as a rapist lusting after white women, is so close to us, "[n]o African American listening [to] or watching Judge Thomas could mistake his meaning or miss the depth of his feeling."¹² Thomas's use of the lynching image in part explains why many blacks wanted to see him confirmed even after the allegations made by Hill.¹³ The history of lynching and white America's cultivation of the myth of black men as "beast-rapists" may help to explain why blacks' reactions to recent media spectacles involving black men accused of crimes against white women is often so different from the reactions of whites to these same events.¹⁴ Lynching is a part of black

10. ZANGRANDO, *supra* note 6, at 63-71.

11. As Thomas put it:

[F]rom my standpoint, as a black American, it is a high-tech lynching for uppity blacks who in any way deign to think for themselves, to do for themselves, to have different ideas, and it is a message that unless you kowtow to an old order, this is what will happen to you. You will be lynched, destroyed, caricatured by the U.S. Senate rather than hung from a tree.

Second Statement of Judge Clarence Thomas to the Senate Judiciary Comm., Oct. 11 1991, *reprinted in* 22 THE BLACK SCHOLAR 1, 12 (1992).

12. Kendall Thomas, *Strange Fruit*, in RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 364, 367 (Toni Morrison ed., 1992).

13. As one commentator has argued, blacks are "justifiably sensitive about media events that stoke white fears about the brutal black buck [and thus] many [blacks] who find Clarence Thomas's politics abhorrent nonetheless have sympathized with his complaint that he was the victim of a 'high-tech lynching.'" Salim Muwakkil, *Subtle Shadings*, IN THESE TIMES, July 11, 1994, at 27.

14. Such recent media events include the O.J. Simpson trial in which Mr. Simpson, a black former football star, was accused of having murdered his white wife. *Newsweek* polls reported that 23% of whites, compared to 60% of blacks thought that Simpson was innocent and had been "set up." Jonathan Alter, *Black & White & Read All Over*, NEWSWEEK, Aug. 1, 1994, at 20. For another example, see JOAN DIDION, AFTER HENRY 253-319 (1993) (discussing the disparity between black and white reactions to the so-called "Central Park Jogger" case, in which a group of black and Hispanic teenage boys was accused of raping and severely beating a white female investment banker in April 1989).

Americans' "collective anguish from which white Americans have always averted their eyes."¹⁵

Notwithstanding lynching's importance, it has received insufficient attention from historians until recently. Although historians in general have begun to correct this oversight,¹⁶ legal historians still have largely ignored the topic. This Article attempts to explore some of the legal issues raised by the existence of lynching in America's past. Part II of the Article examines the phenomenon of lynching in the South, tracing its origins from the colonial period through its growth as a largely-Southern occurrence that, over time, became almost exclusively racial in character. Part III reviews the South's failure to enforce the law against the lynchers of blacks. Part IV examines the only serious effort Congress made during the Progressive Era to enact anti-lynching legislation. This examination suggests that racial prejudice—in particular the fear of interracial sex between white women and black men—was at least as responsible as federalism concerns for Congress's failure to pass this legislation. Finally, in Part V, the Article chronicles the stories of the Mann Act, the Harrison Narcotics Act, and the prize-fight film legislation as evidence of the Progressive-Era Congress's willingness to ignore constitutional and states' rights concerns in order to combat the perceived threat that black men posed to white women.

II. THE SOUTH'S STRANGE FRUIT

*Southern trees bear a strange fruit,
Blood on the leaves and blood at the root;
Black body swinging in the Southern breeze,
Strange fruit hanging from the poplar trees.*¹⁷

A. The Lynching Phenomenon

During and immediately after the Revolutionary War, lynching was practiced primarily in the East, where it was used as an extralegal means by

15. William Styron, *Slavery's Pain, Disney's Gain*, N.Y. TIMES, Aug. 4, 1994, at A23. In this essay, Styron sets forth the reasons why he and other historians opposed the plans of the Walt Disney Company's attempt to simulate America's history of slavery as one of the main "themes" in a theme park in northern Virginia.

16. Since 1990, several books about lynching have been published by historians. See, e.g., BRUNDAGE, *supra* note 7; WILLIAM C. CULBERSON, *VIGILANTISM: POLITICAL HISTORY OF PRIVATE POWER IN AMERICA* (1990); DENNIS B. DOWNEY & RAYMOND M. HYSER, *NO CROOKED DEATH: COATESVILLE, PENNSYLVANIA, AND THE LYNCHING OF ZACHARIAH WALKER* (1991); WALTER T. HOWARD, *LYNCHINGS: EXTRALEGAL VIOLENCE IN FLORIDA DURING THE 1930s* (1995); GEORGE C. WRIGHT, *RACIAL VIOLENCE IN KENTUCKY, 1865-1940* (1990). In addition, two social-scientists have recently published an extended analysis of why lynchings occurred. See STEWART E. TOLNAY & E.M. BECK, *A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882-1930* (1995).

17. These lyrics are from the song "Strange Fruit," popularized by the jazz singer Billie Holiday quoted in JACQUELYN DOWD HALL, *REVOLT AGAINST CHIVALRY: JESSIE DANIEL AMES AND THE WOMEN'S CAMPAIGN AGAINST LYNCHING* 150 (1993).

which private citizens' groups carried out their own enforcement of the criminal law. As the nation's frontier expanded, however, the practice of lynching spread west and south and became a popular means of enforcing local mores as well as of punishing suspected law-breakers. So pervasive was the practice that by 1918 lynchings had occurred in all but six states.¹⁸ The Department of Archives and Records of the Tuskegee Institute, which began gathering lynching accounts from newspapers during the 1880s, reports that from 1882 until 1968, 4743 persons were lynched in the United States.¹⁹ Tuskegee stopped gathering statistics in 1968. By then the number of reported annual lynchings had been zero since 1965, and had not been more than three since 1947.²⁰

In the early 1880s, white victims outnumbered black victims, with most of the lynchings of whites occurring in the West.²¹ The white targets were often members of groups seen as outsiders by local citizens, such as Mormons in Indiana and Italian immigrants in the West and South. Native Americans, Chinese immigrant laborers, and Mexicans were also lynching victims.²² By the twentieth century, however, lynching had taken on a decidedly racial character and had become concentrated in the South. Thus, during the Progressive Era and afterwards, lynching was inflicted almost exclusively by white Southerners upon black Southerners.²³ Of the 4742 reported lynchings that had taken place by 1968, 3445 of the victims were black.²⁴

As lynchings became concentrated in the South, their brutality increased. The mass mob began to dominate lynchings in some Southern states, accounting, for example, for 35% of black lynchings in Georgia and 49% in Virginia from 1880 to 1930.²⁵ These mass-mob lynchings were open affairs in which scores, and sometimes thousands, of whites participated.²⁶ Members of the mob would often riddle the victim's body with thousands of bullets, or burn him (or her) alive.²⁷ Although whites were murdered as a form of

18. THIRTY YEARS OF LYNCHING, *supra* note 1, at 34-35 tbl. 5.

19. ZANGRANDO, *supra* note 6, at 4 tbl. 1.

20. *See id.* Scholars offer various reasons for lynching's demise: economic and cultural changes, organized agitation and resistance, white Southerners' self-interest, and Southern fears about federal intervention. *See, e.g.*, BRUNDAGE, *supra* note 7, at 209; GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 565 (rev. ed. 1962); TOLNAY & BECK, *supra* note 16, at 218-19; ZANGRANDO *supra* note 6, at 11.

21. William H. Glasson, *The Statistics of Lynchings*, 5 S. ATLANTIC Q. 342, 344 (1909).

22. PATRICIA NELSON LIMERICK, THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST 241-42 (1987) (lynching of Mexicans); Glasson, *supra* note 21, at 344 (lynching of whites, Native Americans, Chinese immigrant laborers and Italian immigrants); Jesse W. Reeder, *Federal Efforts to Control Lynching 11-16* (1952) (unpublished Ph.D. dissertation, Cornell University, on file with *The Yale Journal of Law and Feminism*) (lynching of Mormons).

23. BRUNDAGE, *supra* note 7, at 4-5.

24. The Tuskegee Institute figures are the most widely used source of lynching statistics and are set forth in a number of sources, including ZANGRANDO, *supra* note 6, at 6-7.

25. BRUNDAGE, *supra* note 7, app. A at 262 tbl. 1.

26. *Id.* at 36. A 1916 Waco, Texas mob, for example, consisted of over 1500 people, with onlookers numbering 15,000. THIRTY YEARS OF LYNCHING, *supra* note 1, at 23-24 (reporting on the burning of Jesse Washington).

27. BRUNDAGE, *supra* note 7, at 35.

summary justice, mass-mobs confined their killings largely to blacks. Frequently, the leaders of the mob would sever the victim's body parts before his (or her) execution.²⁸ These parts, along with what remained of the victim after death, were fought over by enthusiastic mob members, who had come from miles around to attend the lynching. Newspapers, after announcing the lynching in advance, sent reporters and photographers to capture the actions of the mob. Mob members could then enjoy seeing pictures of themselves beside the victim's charred remains as they read the newspapers' accounts of the incident.²⁹

Mass mobs acted with community approval and regularly included some of the community's leading citizens. Men constituted the majority of the actual lynchers, but women and children often attended. They took an active role in the murders by cheering on the lynchers, "providing fuel for the execution pyre, and scavenging for souvenirs after the lynchings."³⁰

It is astonishing, given the barbarity of many Southern lynchings, just how commonplace and how acceptable they were, and how ordinary were the Americans who participated in such extreme violence. Southern apologists for lynching often claimed that only uneducated persons, persons of a lower class, or persons "outside the reach of modern agencies affecting group morals and public opinion" participated in lynchings.³¹ The actual portrait of lynchers belies these notions. In Georgia in 1922, for example, indictments for lynching were returned against a grocer, a loan agent, an insurance salesman, and a hotel clerk.³² In 1911, a South Carolina state legislator and his son were charged with having led a lynch mob.³³

B. *Reasons for Lynchings*

The list of "offenses" for which white Southerners lynched their black neighbors includes a bizarre mixture of what now seem to be innocuous breaches of the social code, and serious violations of the criminal law.³⁴ But the most persistent defense of lynching articulated by Southerners involved blacks' supposed inclination to commit one particular, serious violation of the criminal law: White men murdered black men by gun, rope, and burning, Southerners argued, because of the black man's propensity for raping white

28. In nearly a quarter of mass mob lynchings in Georgia, the lynchers tortured and mutilated their victim prior to ending his or her life. *Id.* at 42.

29. RICHARD M. BROWN, *STRAIN OF VIOLENCE: HISTORICAL STUDIES OF AMERICAN VIOLENCE AND VIGILANTISM* 217-18 (1975); ZANGRANDO, *supra* note 6, at 4.

30. BRUNDAGE, *supra* note 7, at 37-38.

31. JAMES H. CHADBOURN, *LYNCHING AND THE LAW* 124 (1933) (quoting SOUTHERN COMMISSION OF THE STUDY ON LYNCHING, *LYNCHINGS AND WHAT THEY MEAN* (1931)).

32. *Id.*

33. *Id.*

34. For a tabulation of alleged causes, see H.R. REP. NO. 1027, 66th Cong., 2d Sess. 15 (1920) (report of House Judiciary Committee on Anti-Lynching Bill) (For example, "insulting white woman . . . altercation with white man . . . murder . . . assault on white woman . . . talking of Chicago riot.")

women. This excuse for lynching is discussed more fully below.³⁵ For now, however, readers should note that the statistics on lynching clearly show that accusations of rape did not constitute the primary trigger for the lynchings of blacks by Southern whites. The statistics supplied to Congress by the NAACP, for example, indicate that only 28.4% of the blacks lynched between 1889 and 1918 had been accused of raping or attempting to assault a white woman.³⁶ Moreover, the percentage of lynching victims accused of sexual attacks on white women decreased over time, even as lynching became increasingly concentrated in the South and increasingly more depraved. Thus, for the five-year period from 1889 to 1893, the percentage of lynching victims accused of rape and "attacks upon women" was 31.8%. For the period between 1914 and 1918, the percentage had fallen to 19.8%.³⁷

Recent studies of Southern lynching confirm these earlier findings. For example, Stewart Tolnay and E. M. Beck report that accusations of sexual misconduct were present in less than 30% of Southern lynchings from 1882 to 1930.³⁸ A recent study of Kentucky lynchings shows that rape or attempted rape of a white woman was the reported motive for approximately 33% of the lynchings of blacks.³⁹ W. Fitzhugh Brundage's recent study reports that alleged sexual assaults on white women accounted for 28% of black lynchings in Georgia from 1880 to 1930. Moreover, Brundage's figures for Georgia show the same temporal pattern as did earlier studies of Southern lynchings in general: accusations of rape triggered 25% of the lynchings of blacks from 1880 to 1889, but only 14.5% between 1910 and 1919.⁴⁰

According to these studies, then, accusations of assaults on white women did not account for the largest percentage of the Progressive Era's lynching of blacks. Instead, all of the studies show that accusations of a black person murdering a white person represent the greatest single motivation for lynching. This excuse was given for nearly 36% of black lynchings between 1889 and 1918.⁴¹ Moreover, the percentage of lynchings motivated by the alleged murder of a white person increased over time, so that in Georgia, for example, accusations of murder accounted for less than 20% of lynchings during the 1880s, but for more than 60% during the period from 1910 to 1919.⁴²

In summary, the figures reported in the studies discussed above show that from 1889 to 1918, accusations of rape, attempted rape, or murder motivated

35. See discussion *infra* pp. 47-49.

36. H.R. REP. NO. 1027, *supra* note 34, at 13 tbl. 6.

37. THIRTY YEARS OF LYNCHING, *supra* note 1, at 10.

38. TOLNAY & BECK, *supra* note 16, at 48.

39. WRIGHT, *supra* note 16, at 77.

40. BRUNDAGE, *supra* note 7, app. A. at 263 tbl. 3. Note that even these figures probably exaggerate the number of lynchings actually triggered by accusations of sexual assault. The lynchers themselves reported the reasons that triggered their lynchings. Thus, "[u]ndoubtedly there were instances where [lynchers alleged rape] as a way of securing tacit approval for the lynching." WRIGHT, *supra* note 16, at 76.

41. H.R. REP. NO. 1027, *supra* note 34, at 12 tbl. 6.

42. BRUNDAGE, *supra* note 7, at 72.

nearly three-fourths of black lynchings. However, the South's primary justification for lynching, that lynching was a necessary response to the rape of white women by black men, is at odds with the actual facts. Statistics consistently reveal that the large majority of black lynching victims had not even been accused of rape.⁴³

III. THE SYSTEMATIC STATE INACTION

*The law may not be able to make a man love me, but it can keep him from lynching me.*⁴⁴

Whatever the cause of lynching's demise, the law had little or nothing to do with it. Throughout the Progressive Era, lynching remained a brutal crime that went largely uninvestigated, unprosecuted, unpunished, and undeterred by the agents of law at every level of government. State and local officials did not enforce existing law, and federal officials failed to enact any new legislation. Thus, lynchers never faced any serious deterrent from the government and could murder black people openly, notoriously, and boldly, without fear of reprisal. This Part examines the need for federal legislation as evidenced by the systematic failure of the Southern states—either from intention, indifference, or inability—to punish the crime of lynching. By the 1930s, most of the Southern states had specifically outlawed lynching.⁴⁵ The first surge of such legislation occurred in the 1890s, partially in response to the threat of interracial unity posed by the Democratic Party.⁴⁶ The second surge, in the 1920s, was probably prompted by the mass migration of African-Americans from the South, as well as the increased militancy of African-Americans after World War I.⁴⁷ In addition, the 1920s legislation may partially have been a response to the near-passage of a federal anti-lynching statute in 1922, which generated fears among Southern whites that next time

43. Tolnay and Beck report that accusations of sexual assault accounted for less than 30% of Southern lynchings from 1882 to 1930. TOLNAY & BECK, *supra* note 16, at 91-92 & tbl. 4.1. A recent study of Kentucky lynchings shows that rape or attempted rape of a white woman was the reported motive for approximately 33% of the lynchings of blacks. WRIGHT, *supra* note 16, at 77.

44. JIM BISHOP, *THE DAYS OF MARTIN LUTHER KING, JR.* 254 (1970) (quoting Martin Luther King, Jr.).

45. Those states were Alabama, Arkansas, Georgia, Kentucky, North Carolina, South Carolina, Tennessee, Virginia, and West Virginia. DONALD L. GRANT, *THE ANTI-LYNCHING MOVEMENT: 1883-1932*, at 68-72 (1975); CHARLES S. MANGUM, JR., *THE LEGAL STATUS OF THE NEGRO* 290-91 (1940). One example of the states' definition of lynching is as follows:

Any number of persons assembled for any unlawful purpose and intending to injure any person by violence and without authority of law shall be regarded as a mob, and any act of violence exercised by such mob upon the body of such person shall, when such act results in the death of the injured person, constitute the crime of lynching

ALA. CODE § 4939 (1928). Texas enacted a statute in 1897 criminalizing "murder by mob violence," but the legislature subsequently repealed it. CHADBOURN, *supra* note 31, at 27. The date of repeal is unknown. *Id.*

46. GRANT, *supra* note 45, at 70.

47. *Id.*

Congress might in fact succeed. Most of the statutes passed in the 1890s and the 1920s were weak. For example, none of them sought to prevent or punish the lynchings of persons who had not been accused of a crime. Instead, they sought only to deter or punish lynchings undertaken by mobs that seized prisoners from the custody of local sheriffs.⁴⁸

The near-total ineffectiveness of these laws during the Progressive Era requires no complex explanation: they were simply not enforced. Local officials rarely even arrested whites for lynching black people. Moreover, although the local community often knew the identities of lynchers, coroner's juries usually found that either no crime had been committed or that the identities of the perpetrators were unknown.⁴⁹ In the rare instance where an indictment was issued, juries would not convict. The Tuskegee Institute records for the period between 1900 and 1930 reveal twelve instances in which a total of sixty-seven individual convictions were secured. Thus, only about eight-tenths of one percent of the lynchings in the United States since 1900 have been followed by convictions of the lynchers. Meanwhile, convictions for regular homicides during the same period ran at forty-four percent.⁵⁰

Early scholars of the twentieth century argued that the inadequacy of rural law enforcement resources explained the Southern states' failure to enforce anti-lynching laws. Indeed, they contended, crime prevention in general was beyond the abilities of local law enforcement officials.⁵¹ In addition, the unwillingness of local officials and local white citizens to seek outside assistance from the state also contributed to the general lack of legal oversight. Local officials viewed such state aid as outside interference that would wound the pride of local whites.⁵²

But the paucity of law enforcement resources, while perhaps contributing to the states' failure to prevent lynchings, does not tell the whole story. Local sheriffs harbored indifference, or outright hostility, toward their duties to prevent mobs from killing blacks and to apprehend lynchers. In many cases a mob took possession of a prisoner from the sheriff without the sheriff attempting to protect the prisoner.⁵³ In fact, not only were local authorities unlikely to try to prevent lynchings, they were often themselves alleged to be active participants in mob violence.⁵⁴

Politics certainly contributed to the Southern states' failure to protect blacks from lynching and prosecute white mob members. Whites voted; blacks could

48. GRANT, *supra* note 45, at 68-72.

49. BRUNDAGE, *supra* note 7, at 44.

50. CHADBOURN, *supra* note 31, at 13-14. The Southern state anti-lynching laws were probably also ineffective because they were limited only to lynchings of prisoners taken from custody, yet many lynching victims had not been in custody prior to being lynched.

51. Thomas W. Page, *Lynching and Race Relations in the South*, 206 N. AM. REV. 242 (1917) (arguing that the physical terrain, consisting of mountains and deep rivers, as well as the sheer size of a sheriff's jurisdiction, made law enforcement difficult).

52. ARTHUR F. RAPER, *THE TRAGEDY OF LYNCHING* 16 (1933).

53. *Id.* at 13-14.

54. GINZBURG, *supra* note 1, at 177-78.

not. The local sheriffs, prosecutors, and judges were usually elected officials. They were aware that any vigorous protection of blacks from white violence would pave their way out of office. Lynching, after all, enjoyed widespread support among Southern whites.⁵⁵ This support and acceptance may well have been the most important factor contributing to the anemic legal response to lynching.

If local sheriffs had chosen to enforce the laws, they might have curtailed lynching significantly. According to James Chadbourn's research, lynchings in a particular county often sharply declined following the ouster of a sheriff for failing to protect his prisoner from a lynching.⁵⁶ It appears that higher officials in state governments could also deter lynchings. In Alabama, for example, state law enforcement effectively deterred lynchings from 1926 to 1930.⁵⁷ Alabama Governor Bibb Graves sent officials from the State Law Enforcement Department to investigate threats of mob violence in more than twenty instances during his term. A single lynching occurred during his administration, and in that case the state brought proceedings against the sheriff and the circuit solicitor for failure to do their sworn duties, prompting both to resign from office. But white pro-lynching sentiment and the white vote had the last word. The effectiveness of the State Law Enforcement Department became an issue in the 1930 gubernatorial election, and Graves lost. One of the first official acts of the next governor was the abolition of the Department.⁵⁸

In Virginia, Charles O'Ferrall, who became governor in 1894, also enjoyed some success at preventing lynchings by vigorously intervening when trouble threatened. Lynchers murdered only three black men and one white man during O'Ferrall's four-year term; twenty-seven people had died by lynching during the previous four years. Indeed, Brundage argues that O'Ferrall's strong opposition to lynching conditioned Virginians to the notion that it was the governor's responsibility to intervene to prevent lynchings. O'Ferrall's vocal opposition and that of the governors who followed him put pressure on local officials to prevent lynchings also. The governors' leadership perhaps helps to explain why only twenty-two of the 522 blacks reported to have been lynched between 1900 and 1930 were lynched by Virginia mobs.⁵⁹ Also, in North Carolina, Governor Cameron Morrison, who took office in 1921, vigorously opposed lynching and set the tone for the governors who came after him. Thanks in some measure to his leadership, North Carolina had fewer lynchings than any other Southern state.⁶⁰

55. RAPER, *supra* note 52, at 14.

56. CHADBOURN, *supra* note 31, at 60.

57. *Id.* at 17.

58. RAPER, *supra* note 52, at 69.

59. For the numbers of blacks lynched in Virginia between 1900 and 1930 see BRUNDAGE, *supra* note 7, app. A. at 263 tbl. 3; for total numbers of blacks lynched in all states between 1900 and 1930 see ZANGRANDO, *supra* note 6, at 4 tbl. 1.

60. William H. Richardson, *No More Lynchings: How North Carolina Solved the Problem*, 64 REV.

Examples of effective law enforcement suggest that the Southern states could have substantially reduced the incidence of lynching by enforcing anti-lynching laws at the state level. Moreover, the Southern states' consistent failure to respond to lynching at any level of law enforcement or government persuasively indicates that the South was unwilling to protect black life from mob violence, rather than incapable of doing so. Nonenforcement, therefore, not only justified federal intervention but demanded it.

IV. CONGRESS FAILS TO ENACT ANTI-LYNCHING LEGISLATION

This Part examines Congress's failure to pass anti-lynching legislation. Section A traces the federal statutory history and the Supreme Court's civil rights jurisprudence at the time Congress contemplated anti-lynching legislation. Section B then briefly sketches the antecedents of the 1922 Dyer Bill. Section C sets out the historical context in which the debate over the Dyer Bill took place. In particular, Section C focuses upon Progressive Era federal legislative reform efforts as well as upon the racism of that era. This context is important for understanding the comparisons this Article makes between the failed federal anti-lynching legislative effort and the successful campaigns to enact federal legislation to protect white women. Finally, Section D examines Congress's debate on the Dyer Bill.

A. Background: The Need for New Federal Legislation

As is well known, after the Civil War, Congress sought to secure the freedom of blacks by adopting three constitutional amendments and by enacting seven statutes implementing those amendments.⁶¹ Three of the civil rights statutes contained provisions that arguably authorized federal intervention to help curb lynchings.

First, the Civil Rights Act of 1866, enacted primarily to outlaw the so-called "Black Codes," which the Southern states had passed immediately after the Civil War, provided that all persons were to enjoy the same rights as white persons "to the full and equal benefit of all laws and proceedings for the

REVIEWS 401, 402 (1924).

61. See generally CIVIL RIGHTS AND THE AMERICAN NEGRO: A DOCUMENTARY HISTORY 209-43 (Albert P. Blaustein & Robert L. Zangrando eds., 1968). Five of these statutes were general civil rights statutes: one enacted in each of the years 1866, 1870, and 1875, and two in 1871. The other two statutes were the Slave Kidnapping Act of 1866, which made it a federal crime to kidnap or carry away a person with the intention of placing him in slavery or involuntary servitude, and the Peonage Abolition Act of 1867, enacted primarily in response to practices prevailing in the New Mexico Territory, but also was designed to define "involuntary servitude" and to provide specific criminal penalties for violations of the Thirteenth Amendment. ROBERT K. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD 39 (1947). Between 1866 and 1883, the federal government vigorously enforced these statutes, and the federal courts upheld their authority to do so. See generally John Hope Franklin, *The Enforcement of the Civil Rights Act of 1875*, in RACE AND HISTORY: SELECTED ESSAYS, 1938-1988, at 116 (1989).

security of persons and property.”⁶² Under Section Two of the Act, any person who “under color of any law, statute, ordinance, regulation, or custom” deprived another person of the rights secured by the Act or who subjected the person to “different punishments, pains, or penalties” on account of that person’s race, was subject to a fine of one thousand dollars and to imprisonment for one year.⁶³ Second, Section Six of the Civil Rights Act of 1870 provided for criminal sanctions against any person involved in a private conspiracy to violate another person’s federal rights.⁶⁴ And third, the Civil Rights Act of 1871 proscribed the activities of the Ku Klux Klan, which, through violence and intimidation, had been terrorizing blacks and their white supporters in the South during Reconstruction. Section Two of the 1871 Act made it a felony for private persons to “conspire together, or go in disguise upon the public highway or the premises of another for the purpose . . . [of] depriving any person or any class of persons of the equal protection of the laws, or equal privileges or immunities under the laws.”⁶⁵ Section Three authorized the President to use force whenever a state failed or refused to control private persons who denied any person or class of persons their federally protected rights.⁶⁶

Notwithstanding the existence of these statutes, a number of factors convinced anti-lynching forces of the need for new federal legislation. First, the Supreme Court, in a series of decisions beginning with the *Slaughter-House Cases*⁶⁷ and culminating with the *Civil Rights Cases*,⁶⁸ dismantled much of the civil rights program of the post-War Congress. Second, some of the civil rights provisions that had not been nullified by the Court were later repealed by Congress.⁶⁹ And third, in response to the first two factors, from the 1890s

62. 14 Stat. 27 (1866). This provision survives today as 42 U.S.C. § 1981.

63. *Id.* Section 2 of the 1866 Act survives today as 18 U.S.C. § 242 (1988).

64. Section 6 provides in part that:

[I]f two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent . . . to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States . . . such persons shall be held guilty of a felony, and . . . shall be fined or imprisoned, or both . . . the fine not to exceed five thousand dollars, and the imprisonment not to exceed ten years . . .

Civil Rights Act of 1870, ch. 114 § 6, 6 Stat. 140, 141 (1870) (codified as amended at 18 U.S.C. § 241 (1988 & Supp. 1994)).

In 1968 Congress amended this statute to increase the maximum allowable fine to \$10,000 and to allow for imprisonment for life if the death of the victim ensues from acts violating the statute. Civil Rights Act of 1968, Pub. L. No. 90-284, § 103(a), 82 Stat. 73, 75 (1968) (to be codified at 18 U.S.C. § 241 (1988 & Supp. 1994)).

65. Civil Rights Act of 1871, ch. 22, § 2, 17 Stat. 13, 13-14 (1871) (codified as amended at 18 U.S.C. § 241 (1988 & Supp. 1994)).

66. *Id.* § 3, 17 Stat. at 14.

67. 83 U.S. (16 Wall.) 36 (1872).

68. 109 U.S. 3 (1883).

69. In 1873, pursuant to a major recodification and publication of all federal laws, the provisions of the civil rights acts that had not been declared unconstitutional were separated under unrelated chapters of the Revised Statutes. In 1894, with the Democrats (for the first time in the post-Reconstruction Era) in control of both Houses of Congress and the White House, Congress repealed most provisions of the Reconstruction voting rights laws. In 1909, when Congress recodified all the federal criminal laws, it

to the late 1940s, the government argued that it was without statutory authority to investigate and prosecute lynchers.⁷⁰ For the anti-lynching forces, the Supreme Court interpretation of the post-Civil War Amendments presented the first great obstacle to securing federal anti-lynching legislation.

B. Federal Anti-lynching Proposals

Seeking to fulfill the perceived need for new anti-lynching federal legislation, anti-lynching proponents introduced well over one hundred bills in Congress between 1882 and 1951.⁷¹ Prior to the New Deal Era, Republicans introduced most of this proposed legislation; beginning in 1934, however, Northern Democratic legislators took the lead.⁷² These proposals met with success only three times in the House, which passed bills in 1922, 1937, and 1940. The sponsors of all three of these bills sought to curb the lynching of blacks by Southern lynch mobs.⁷³ Of the three, the 1922 Dyer Bill stood perhaps the greatest chance of enactment because in 1922 the Republicans controlled both Houses of Congress. In contrast, the 1937 and 1940 bills came at a time when the Democratic Party, controlled by Southerners, held the balance of power in Congress.⁷⁴

Not one of the three bills passed by the House of Representatives ever became law. On all three occasions, opponents of anti-lynching legislation used the filibuster, or the threat of it, to block the Senate from even voting on the measures. As a consequence, no post-Reconstruction Era Congress ever enacted an anti-lynching statute.⁷⁵

repealed other remnants of the Reconstruction civil rights legislation. Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1342-43 (1952).

70. MARY FRANCES BERRY, *BLACK RESISTANCE/WHITE LAW* 162-63 (1971).

71. For a list of these bills, and their sponsors, see Reeder, *supra* note 22, at 231 app. B.

72. *Id.*

73. Many of the anti-lynching bills introduced in Congress between 1882 and 1951 were responses to the lynching of aliens, a problem in the 1880s and during both World Wars, for which the United States had to pay considerable sums in damages to the countries from which the aliens had come. For a discussion of these alien anti-lynching proposals, see Reeder, *supra* note 22, at 64-72. Interestingly, Congress's failure to enact anti-lynching legislation protective of aliens may have been due in part to fears that such legislation would lead to enactment of legislation protective of blacks as well. *Id.* at 68-70.

74. On the hegemony of the Democratic Party in Congress after 1935, see KLUGER, *supra* note 5, at 166; on the failure of Congress to pass the 1937 and 1940 anti-lynching bills, see ZANGRANDO, *supra* note 6, at 122-65.

75. ZANGRANDO, *supra* note 6, at 19. The enactment of the Civil Rights Act of 1968 was the closest Congress ever came in the post-Reconstruction Era to enacting anti-lynching legislation. *Id.* The Act subjected to fines and/or imprisonment anyone convicted of injuring or killing a person seeking to exercise a variety of federally protected civil rights. Pub. L. No. 90-284, Title 1, § 101(a), 82 Stat. 73 (codified as amended at 18 U.S.C. § 245(b) (1988)).

C. The Progressive Era: Heyday of Racism

At first glance, the history of federal legislative efforts during the Progressive Era suggests that Congress would have been receptive to passing a federal anti-lynching statute. This was an activist Congress that, between 1906 and the early 1920s, enacted a wide range of social welfare measures, often in the teeth of states' rights arguments made by Southern congressmen.⁷⁶ In response to these constitutional challenges from the Southerners, supporters of social welfare legislation repeatedly argued that the particular evil addressed by the legislation was of such concern to the nation that Congress should act and leave any doubts as to the law's constitutionality to the Supreme Court for resolution.⁷⁷ This argument failed, however, to persuade Congress to override concerns about states' rights in the area of anti-lynching legislation. Ironically, just as the anti-lynching effort failed because the interest in protecting whites from blacks overrode concerns about protecting black life, some social welfare legislation succeeded because the perceived need to protect whites from blacks overrode concerns about states' rights.

76. Many of the legislative measures Congress enacted during the Progressive Era were economic regulatory measures, often passed at the behest of business interests which wanted predictability and stability in the laws regulating commercial activity. See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1216-29 (1986). However, Congress also enacted a variety of social welfare measures which expanded federal authority over matters traditionally within the police power of the states. As with the economic regulatory measures, most of the social welfare enactments were based upon Congress' authority over interstate and foreign commerce. In some cases, Congress relied upon its taxing power or on its treaty-making power. With all of these measures, the use of the commerce power (or the taxing power) was really a substitute for a national police power. Examples of such legislation include the two Federal Employers' Liability Acts, ch. 3073, 34 Stat. 232 (1906), and ch. 149, 35 Stat. 65 (1908) (codified at 45 U.S.C. §§ 51-59 (1988)); the Pure Food and Drug Act, 34 Stat. 768, 1906, ch. 3915, §§ 1-13, *repealed by* Food, Drug and Cosmetics Act of 1938, ch. 675, § 902(a), 52 Stat. 1040, 1059 (codified at 21 U.S.C. § 301 (1988)); the Owens-Keating Act of 1916, Pub. L. No. 64-249, 39 Stat. 675 (1916), and the Revenue Act of 1918, Pub. L. No. 254, § 202(b), 40 Stat. 1057, 1138-40 (1919).

Moreover, the activist nature of the Progressive Era Congress was demonstrated not just by its legislative efforts, but also by its ability to amend the United States Constitution: It successfully amended the Constitution four times—a rate of frequency unmatched since the adoption of the Bill of Rights. In 1913, the Sixteenth Amendment gave Congress the power to tax incomes, and the Seventeenth Amendment changed the manner in which members of the Senate were selected. In 1919, the Eighteenth Amendment gave Congress and the states the authority to prohibit the manufacture, sale and distribution of alcohol. In 1920, the Nineteenth Amendment conferred on women the right to vote. Although the first two of these amendments obviously involved matters integral to the operation and effectiveness of the federal government, the latter two—prohibition and suffrage—did not; indeed these issues traditionally had been left to the states. In addition to the four successful amendments, Congress also sent to the states for ratification the so-called Child Labor Amendment in 1924. Amendment supporters intended to overturn two Supreme Court cases, *Hammer v. Dagenhart*, 247 U.S. 251 (1918), and *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922), that had invalidated congressional statutes aimed at combatting the employment of children in factories and mines. The amendment failed to garner the requisite number of state ratifications. RICHARD B. BERNSTEIN, *AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT?* 179-81 (1993).

77. BICKEL & SCHMIDT, *supra* note 5, at 512. As noted in Part III of this Article, the supporters of anti-lynching legislation were unsuccessful in getting Congress to adopt this argument as a justification for enacting a law making lynching a federal crime.

Congress's indifference to the plight of black lynch-mob victims was a reflection of the virulent racism of the Progressive Era. In the South, the Era gave birth to "Jim Crow" and saw the near-total removal of blacks from political life. The conditions of black life became so intolerable that blacks left the South in droves, migrating principally to the industrial cities of the North.⁷⁸ The North, however, greeted these new migrants with residential segregation enforced by law and rioting that mirrored the violence of Southern lynching; in the Progressive Era America's cities experienced the bloodiest interracial conflicts in this nation's history.⁷⁹

On the national level, the Progressive Era Presidents at best ignored blacks and at worst tried actively to segregate them into a dim corner of the nation's life.⁸⁰ Perhaps most tellingly, Woodrow Wilson held the dubious distinction of being the first President to order that black federal employees no longer dine with or use the same toilet facilities as white employees.⁸¹ Meanwhile, Congress not only failed to pass anti-lynching legislation, but entertained at least twenty bills during Wilson's first administration calling for the segregation of the races on the street cars of Washington, D.C., the prohibition of Army and Navy commissions for blacks, the separation of white and black federal employees, and the restriction of all immigration by Africans to the United States.⁸²

Historians point to several factors to account for the heightened racism of the Progressive Era. First, by the end of the Spanish-American war, America had become an imperialist power, with most of the foreign lands under its

78. See MEIER & RUDWICK, *supra* note 5, at 232-36; C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH, 1877-1913, at 321-95 (1951); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 49-95 (1955).

79. See RICHARD M. BROWN, STRAIN OF VIOLENCE: HISTORICAL STUDIES OF AMERICAN VIOLENCE AND VIGILANTISM 211-15 (1975). Some 367 lynchings took place between 1917 and 1923, claiming the lives of 334 black people. Reeder, *supra* note 22, at 85-86. Many of these were unusually brutal, sadistic affairs, in which the victim was tortured alive and dragged through town or left hanging to serve as a message to other blacks. See, e.g., GINZBURG, *supra* note 1, at 113, 114; JAMES WELDON JOHNSON, ALONG THIS WAY 361-62 (1933). Some of the lynching victims were black soldiers, still in uniform, returning home from the war, whom the lynchers feared had been enjoying the company of white women while serving in Europe. *Id.*

80. The Progressive Republican, Theodore Roosevelt, spouted the rhetoric of reform while courting the black vote in the North, and early in his administration raised black hopes of fair treatment by inviting Booker T. Washington to the White House. MEIER & RUDWICK, *supra* note 5, at 210. But during the next election, running this time as the Progressive Party candidate, Roosevelt showed himself to be no friend of blacks by disavowing the traditional Republican commitment to black civil rights. RAYFORD W. LOGAN, THE BETRAYAL OF THE NEGRO: FROM RUTHERFORD B. HAYES TO WOODROW WILSON 347 (1965). William Howard Taft thought that winning the South for the Republican party was far more important than the concerns of black America, and became the first Republican candidate to campaign through the South. His campaign addresses assured whites that the South need have no fear that Republicans would force "social equality" on whites. BICKEL & SCHMIDT, *supra* note 5, at 740.

81. KLUGER, *supra* note 5, at 90. The Presidents in office after Wilson were no more enlightened on race matters than he was. Thus, while Warren G. Harding, in his short presidency, seemed completely unaware that there were blacks in America, his successor, Calvin Coolidge, was a thorough-going racist, who as Vice President in 1922 had written that the laws of biology demonstrated that race-mixing caused Nordic people to deteriorate. *Id.* at 307.

82. JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM 324 (5th ed. 1980); KLUGER, *supra* note 5, at 90.

dominion populated by darker-skinned peoples.⁸³ Second, as Benno Schmidt has explained, Northerners' own apprehensions about the strangers in their midst from Southern and Eastern Europe led Northern whites to adopt a more sympathetic view of Southerners' anxieties about blacks competing for "their" jobs and housing.⁸⁴ Third, white racism served to solidify alliances between white workers and the white owners of capital at a time of heightened class conflict in both the North and the South.⁸⁵ Finally, the ideology of innate black inferiority spread across America during the period.⁸⁶ Thus, since blacks were destined for extinction, no matter how much "do-gooders" tried to lift them up, white America should "segregate or quarantine" them, lest they become "a source of contamination and social danger to the white community, as [they sink] ever deeper into the slough of disease, vice, and criminality."⁸⁷

Perhaps the most damaging myth to grow out of this strain of American racist thought was the avalanche of extremist literature penned, not by racists of the South, but by Northern Biblical scholars. These writers created the myth that the black man was a "brute rapist beast," lusting after white women.⁸⁸ Not just a few members of the race but any black man was a potential rapist, for all blacks were susceptible to attacks of "sexual madness" which compelled them to rape white women. These attacks on white women, Dr. William Lee Howard wrote in a 1903 article published in the respected journal *Medicine*, "are evidence of racial instincts that are about as amenable to ethical culture as is the inherent odor of the race."⁸⁹ Indeed, many Progressive reformers, such as Jane Addams, who were otherwise sympathetic to the concerns of black America, accepted the myth that white Southerners were compelled to lynch black men to protect white women from rape.⁹⁰

83. Imperialists had to justify their expansionist forays into these foreign and "dark" lands to an America which viewed contacts between Americans and the peoples of darker-skinned nations as a threat to white civilization. GEORGE M. FREDERICKSON, *THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914*, at 305-08 (1971). They did so by concocting the notion of the "white man's burden." *Id.* at 308. In explaining this new ideology, one such imperialist, President Theodore Roosevelt, told the nation why annexing the Philippines was the right thing to do:

It is our duty toward the people living in barbarism to see they are freed from their chains, and we can free them only by destroying barbarism itself. The missionary, the merchant, and the soldier may each have a part to play in this destruction, and in the consequent uplifting of the people.

Id.

84. BICKEL & SCHMIDT, *supra* note 5, at 737.

85. *Id.*; ZANGRANDO, *supra* note 6, at 9.

86. MEIER & RUDWICK, *supra* note 5, at 211.

87. FREDERICKSON, *supra* note 83, at 255.

88. For a discussion of this literature, see *id.* at 276.

89. *Id.* at 279.

90. ANN DOUGLAS, *TERRIBLE HONESTY: MONGREL MANHATTAN IN THE 1920S* 256 (1995). Black feminists, who were at the forefront of the anti-lynching movement, attempted, usually unsuccessfully, to convince white feminists that the rape of white women was not the principal factor driving Southern lynching. On black feminists involved in the anti-lynching movement, see generally PAULA GIDDINGS, *WHERE AND WHEN I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* (1984). For a more recent treatment, see Amii Larkin Barnard, *The Application of Critical Race Feminism to the Anti-lynching Movement: Black Women's Fight Against Race and Gender Ideology, 1892-1920*, 3 *UCLA WOMEN'S L.J.* 1 (1993).

In the South, whites seemed obsessed with fears of interracial sex. Yet these fears were primarily masked by a rhetoric about the rape of white women by black men. As one writer to the editor of *The Nation* argued:

You have never had to leave your home with a feeling that upon coming back you might find your wife or daughter outraged and probably dead. Well that is the condition that faces the Southern people day-to-day, and there is no law to stop it . . . until the negro comes to realize that it is sure death for him to commit this outrage.⁹¹

Several scholars have argued that lynching, and its concomitant myth of rape, were intimately connected with white male anxieties about sex in general, and particularly about interracial sex. For example, historian Joel Williamson contends that white men believed black men enjoyed a sexual freedom that the former wanted but could not achieve without great feelings of guilt.⁹² In their sexual frustration, Williamson argues, white men projected onto black men the sexual thoughts they themselves dared not acknowledge and "symbolically killed those thoughts by lynching a hapless black man. . . . In effect, the black man lynched was the worst part of themselves. A function of lynching, if not indeed the primary function, was to offer up a sacrificial lamb for the sins of white men."⁹³

Hadley Cantril, on the other hand, contends that lynching reinforced a societal code in which white men alone possessed the "privilege" of interracial sex.⁹⁴ Southern culture strictly forbade interracial sex for white women, and indeed the very notion was supposed to be morally and otherwise repugnant to them. Black women's views on interracial sex were seen as irrelevant, while black men were lynched to enforce the extreme taboo against interracial sex between black men and white women.⁹⁵

Thus, lynching served, in part, as a sanction for voluntary sexual relations between white women and black men. Jacquelyn Dowd Hall, in her path-breaking work on rape and lynching, contends that in the South white women were viewed collectively as the keepers of white racial purity.⁹⁶ She cites as an example the views of Theodore Bilbo, who argued "that even though miscegenation practiced by white men may have 'poured a broad stream of white blood into black veins' white racial purity had in no way been impaired" because Southern white women had "preserved the integrity of their race."⁹⁷

91. THE NATION, July 6, 1916, at 11.

92. JOEL WILLIAMSON, *THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION* 308 (1984).

93. *Id.*

94. ZANGRANDO, *supra* note 6, at 10 (citing HADLEY CANTRIL, *PSYCHOLOGY OF SOCIAL MOVEMENTS* 93-122 (1941)).

95. *Id.*

96. See HALL, *supra* note 17, at 151-57.

97. *Id.* at 155 (quoting THEODORE BILBO, *TAKE YOUR CHOICE: SEPARATION OR MONGRELIZATION*

Beyond serving as a justification for lynching, the chimerical “beast-rapist” myth created an atmosphere of danger that kept the white Southern woman in a role of vulnerability and weakness. The use of black men as symbols of terror served in this way to keep Southern white women in their place: subservient, helpless, and dependent on men.⁹⁸ Perhaps it is no accident, as Hall illustrates, that these myths and stories flourished during the first organizational phase of the women’s rights movement in the South.⁹⁹

Whether or not the assessments of scholars such as Williamson, Cantril, and Hall are correct,¹⁰⁰ it cannot be gainsaid that lynching in Southern society seemed intimately tied to the complex sexual relations between men and women, particularly men and women of different races. It is otherwise difficult to understand the Southern persistence, in the face of evidence to the contrary, in justifying lynching by arguing that white men lynched because black men raped white women. As the section below illustrates, Congressional opponents of federal intervention reflected this obsession in their arguments during the debates on the Dyer Bill.

D. *Politics and Racism Defeat the Dyer Bill*

Entitled “An Act to assure to persons within the jurisdiction of every State the equal protection of the laws, and to punish the crime of lynching,” a title meant to convey the measure’s presumptive grounding in the Fourteenth Amendment’s Equal Protection Clause, House Bill 13 provided for imposition of a fine of as much as \$5,000 and imprisonment of up to five years on any state or municipal officer convicted of failing “to make all reasonable efforts” to prevent a prisoner in his charge from being put to death by a “mob or riotous assemblage.”¹⁰¹

The Bill defined “mob or riotous assemblage” as “an assemblage of three or more persons acting in concert for the purpose of depriving any person of his life without authority as a punishment for or to prevent the commission of some actual or supposed public offense.”¹⁰² The Bill further subjected to the same potential punishments those state or municipal officials convicted of having failed to “make all reasonable efforts to perform their duties of apprehending or prosecuting the members of a lynch mob.”¹⁰³ Moreover, if a public official having custody of a prisoner conspired with private

57-58 (1947)). At least one Congressman echoed the view of white women as the keepers of racial purity during the congressional debates on the Dyer Bill. *See infra* text accompanying note 150.

98. The threatening rape myths of the South apparently did their job: White women often described their feelings of fear and vulnerability, and their intense need for white male protection. HALL, *supra* note 17, at 153.

99. *Id.*

100. It should be noted that these scholars offer no analysis of why black women were lynched, often in just as barbaric fashion as black men.

101. H.R. 13, 67th Cong., 1st Sess. § 1 (1921).

102. *Id.*

103. *Id.* § 12.

individuals to lynch the prisoner, the officials as well as the private members of the conspiracy could be convicted of a felony and imprisoned for life.¹⁰⁴

Under Section Four of the Bill, the federal district court in the jurisdiction in which the lynching took place would have jurisdiction to punish those who violated the Bill, provided that the district court found that the relevant state officials had failed, refused, or neglected to prosecute violators.¹⁰⁵ Another section of the Bill provided for the forfeiture of \$10,000 by "any county in which a person is put to death by a mob or riotous assemblage," to be "recovered by an action therefore in the name of the United States against such county for the use of the family, if any, of the person so put to death."¹⁰⁶ If the victim of the lynching had no family, then the \$10,000 would be retained by the United States.¹⁰⁷ Any counties through which the mob transported the lynching victim between the time of his or her seizure and his or her being put to death would be jointly and severally liable for the \$10,000, along with the county in which the lynching occurred.¹⁰⁸

Finally, the legislation's drafters sought to make it clear that the Bill operated only in default of state action by providing that the Bill's protections applied where a state failed to afford equal protection of the law to a person. The legislation defined such failure as existing where the state or its governmental subdivisions failed, neglected, or refused "to provide and maintain protection to the life of any person within its jurisdiction against a mob or riotous assemblage."¹⁰⁹ The Bill, however, failed to mention race or any other basis upon which the failure to provide "equal protection" rested. Claudine Ferrell intimates that the Bill's supporters apparently feared that if the Bill specifically remedied wrongs against blacks, Southerners would seize upon this language as an attempt by the North to interfere with the South's right to deal with its black population as it saw fit.¹¹⁰

1. *Congress Debates the Dyer Bill*

The Dyer Bill reached the floor of the House for debate in December 1921 and was considered again in January 1922. The Southerners who led the debates for the Democrats made four primary arguments in opposition to the Bill, all of them grounded either on constitutional or states' rights concerns.¹¹¹ First, they argued that the Equal Protection Clause of the

104. *Id.*

105. *Id.* The bill further provided that "a failure for more than 30 days after the commission of such an offense to apprehend the persons guilty thereof shall be prima facie evidence in such failure, neglect, or refusal." *Id.*

106. *Id.* § 10.

107. *Id.* § 5.

108. *Id.* § 6.

109. *Id.* § 2.

110. Ferrell, *supra* note 7, at 201.

111. For a thorough discussion of the arguments made by Southern Democrats, see *id.* at 200-13. I partly have relied upon Ferrell's summary of these arguments, *id.* at 205-06, in setting forth the above

Fourteenth Amendment did not confer upon Congress the authority to protect individuals from private acts. Rather, they contended, Congress could act only where the state denied equal protection through some positive action, such as the enactment of discriminatory laws or a pattern of discriminatory treatment of a group. Moreover, the opponents argued that inaction, in the form of failing to punish an individual for acts against another individual, did not amount to state action required by the Constitution as interpreted by the Supreme Court.¹¹²

Second, the Southern Democrats argued that when a state official violated state law, for example by directly participating in a lynching or by turning over a prisoner to a lynch mob, that official acted as an individual and his actions were not those of the state. Furthermore, the Southerners contended that the Eleventh Amendment protected state officials from prosecution by the federal government, even if their actions violated state law.¹¹³

Third, at the time, the Bill's opponents could reasonably claim that the Eleventh Amendment also protected the counties, as creations of the state, from suit by anyone absent the state's consent. Thus, they asserted that the provisions of the Dyer Bill allowing the victim's family to sue the county in which the lynching occurred were unconstitutional.¹¹⁴

Fourth, the Southerners contended that lynching was ordinary murder, and thus exclusively within the police powers of the state. They argued that Congress had no general police power to enact criminal laws; rather, the Constitution limited Congress's authority to merely correcting a state's violation of the Fourteenth Amendment. Thus, if a state enacted a law discriminating against a group of persons, Congress had the authority to act. But unless there was something peculiar to the crime, the condition of the offender, or the place of commission, Congress had no power to proscribe the offender's conduct.¹¹⁵

As Ferrell notes, these contentions were grounded to a significant extent in contemporary constitutional theories.¹¹⁶ The opposition's strongest argument was the first one—that the Equal Protection Clause covered state action only, not mere private acts of violence. To support that argument, the Southerners could point to the series of cases in which the United States Supreme Court announced and developed the state action doctrine. First, in *United States v. Cruikshank*,¹¹⁷ the Court held that the first section of the Fourteenth Amendment was only a restriction upon the states, and did not “add

synopsis of the constitutional and states' rights arguments made by the opponents of the Dyer Bill.

112. *Id.* at 205.

113. *Id.* at 205-06.

114. *Id.* at 206. The Supreme Court since has declared that suits against counties under federal law are not barred by the Eleventh Amendment, even when the state has not consented to such suits. *Mount Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

115. Ferrell, *supra* note 7, at 206.

116. *Id.* at 207.

117. 92 U.S. 542 (1875).

any thing to the rights which one citizen has under the Constitution against another."¹¹⁸ Second, in *Virginia v. Rives*,¹¹⁹ the Court stated that the provisions of the Amendment referred to "[s]tate action exclusively, and not to any action of private individuals."¹²⁰ Third, in *United States v. Harris*,¹²¹ the Court declared as beyond the scope of Congress's authority the criminal conspiracy section of the Ku Klux Klan Act of 1871, on the ground that the Fourteenth Amendment applied to state action only and not to the private action alleged in the case.¹²² Fourth, in the *Civil Rights Cases*,¹²³ the Court again pointed out that the Fourteenth Amendment applied only to the states.¹²⁴ Finally, in *James v. Bowman*,¹²⁵ the Court struck down Section Five of the 1870 Civil Rights Act. In *James*, the white defendants had been indicted for preventing a group of blacks from voting in a congressional election, but the Court held that the indictment went beyond the protection provided by the Fifteenth Amendment in attempting to punish private individuals.

Despite this impressive vein of Supreme Court cases, the entire debate was infused more with racist diatribe than with constitutional arguments. It therefore is difficult to believe that constitutional and states' rights concerns were the primary reasons for the Southerners' objections to the bill. Indeed, the racist language in which the opponents of the bill clothed their constitutional and states' rights contentions prompted Anthony Griffin, a Democratic Congressman from New York, to exclaim that the position of his fellow Democrats from the South "actually degenerated into a quasiconstitutional defense of the inalienable right to resort to lynching."¹²⁶ Edward Little, a Republican from Kansas, agreed that the Southerners seemed to be arguing that "under the Constitution each State has a reserved power to permit its citizens to hang people and burn people whenever in their judgment it should be done."¹²⁷

Nevertheless, the supporters of the bill tried to address the Southerners' constitutional and states' rights arguments. First, they argued that the bill would not interfere with states' rights because its provisions became operative only where state officials failed, after a reasonable length of time, to arrest or to prosecute the members of a lynch mob.¹²⁸ Second, and more importantly, they argued that Congress was well within its authority under the Fourteenth Amendment to enact this legislation. The supporters contended that the

118. *Id.* at 554-55.

119. 100 U.S. 313 (1879).

120. *Id.* at 318.

121. 106 U.S. 629 (1882).

122. *Id.* at 639.

123. 109 U.S. 3 (1883).

124. *Id.* at 10-11.

125. 190 U.S. 127 (1903).

126. 62 CONG. REC. 1717 (1922).

127. *Id.* at 1732.

128. Ferrell, *supra* note 7, at 206.

statistics on lynching and the state prosecutions of mobs showed that certain states had failed in their duty under the Fourteenth Amendment to provide the equal protection of the laws to victims of mob violence. This evidence showed, they argued, that in the states where lynching existed, there had been a systematic failure to protect those targeted by mobs and to punish mob members. This failure, whether by design or inability, amounted to a state policy of denying equal protection. In support of this theory, the bill's advocates quoted language in a number of Supreme Court cases that suggested that a state's systematic withholding of protection from a group of persons while providing it to others was "state action" under the Fourteenth Amendment.¹²⁹ They also relied upon three lower court cases that, they argued, held that denying equal protection includes inaction as well as action.¹³⁰

Although the defenders of the bill were not particularly adept at making their arguments about its constitutionality, on January 26, 1922, the House passed the Dyer Bill by a vote of 231 to 119.¹³¹ After passage of the bill in the House, the fight for enactment moved to the Senate, where Henry Cabot Lodge, Republican majority leader and Senator from New York, introduced the measure to that chamber.¹³² The chairman of the subcommittee assigned the bill was Republican William Borah of Idaho who "took great pride in his reputation as a constitutional authority."¹³³

From the outset, Borah took the position that the bill was unconstitutional. According to James Weldon Johnson, the NAACP's chief lobbyist for the Bill, Borah said that he "could not support a measure that he did not believe was constitutional" even if doing so would save black lives.¹³⁴ Borah's home state, Idaho, had a small number of black voters; he had no political connection to blacks, nor any apparent interest in black rights.¹³⁵ Moreover, he had persistently championed states' rights, opposing much of the

129. The supporters relied upon language in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the *Civil Rights Cases*, 109 U.S. 3 (1883), and *Strauder v. West Virginia*, 100 U.S. 303 (1879).

130. Ferrell, *supra* note 7, at 212 (quoting Congressman Volstead, 62 CONG. REC. 1341 (1922)). The lower court cases were *Louisville & N.R. v. Bosworth*, 230 F. 191 (E.D. Ky. 1915), *United States v. Blackburn*, 24 F. Cas. 1158 (C.C.W.D. Mo. 1874) (No. 14,603), and *United States v. Hall*, 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282). As Ferrell notes, the supporters' equal protection arguments were vague, partly due to their unwillingness to change the language of the bill to refer specifically to race. Ferrell, *supra* note 7, at 213. The outside observers of the debate were much clearer about the equal protection basis of the bill. For example, *The Nation* stated: "[T]he simple facts are that officers make all reasonable efforts to protect their prisoners except against mobs bent on lynching a Negro, and that murder in the South is punished as vigorously as elsewhere, except when murder takes the form of lynching." *Id.* at 397 n.53 (quoting *The Anti-Lynching Bill*, THE NATION, June 7, 1922, at 664).

131. 62 CONG. REC. 1794-96 (1922).

132. For a discussion of the politics involved in the anti-lynching forces' strategy to secure Senate passage and particularly on the reasons for having Senator Lodge introduce the measure, see JOHNSON, *supra* note 79, at 366-73; ZANGRANDO, *supra* note 6, at 64-71.

133. ZANGRANDO, *supra* note 6, at 65.

134. JOHNSON, *supra* note 79, at 367.

135. Ferrell, *supra* note 7, at 238.

Progressive Era social welfare reform agenda.¹³⁶ In keeping with this indifference to black rights and concurrent devotion to states' rights, Borah refused to support the bill and eventually voted against it in committee. Without Borah's support or that of any other prominent Republican senator, the bill was doomed to failure in the Senate.

After various Southern Democratic parliamentary maneuvers and a filibuster that the Republicans made no effort to prevent or to end, Republican Majority Leader Lodge announced from the floor of the Senate that the Republicans would not seek a vote on the Dyer Bill either at that legislative session or the next.¹³⁷ As a result, any prospect of securing federal anti-lynching legislation came to an end.

Several factors contributed to the Dyer Bill's defeat, including a political climate in which the black vote was of insufficient strength to influence those in Congress who opposed federal anti-lynching legislation, and a group of senators doubtful about the constitutionality of the Dyer Bill. However, the atmosphere in which the congressional debate on the bill took place strongly suggests that racism, coupled with fears about interracial sex, also contributed significantly to the bill's defeat. Indeed, in view of the Progressive Era Congress's propensity for passing other social welfare legislation, it is difficult to believe that genuine doubts about constitutionality were the sole—or even a significant—impediment to passage of anti-lynching legislation.

A review of the debate on the Dyer Bill in Congress, covered in the next section, demonstrates that the vicious myth that lynching was justified by the need to protect white women from being raped by black men permeated the debate on the bill. While most of these arguments were made on the floor of the House, the chamber that eventually passed the Dyer Bill, it is probable that these racist arguments, which the press covered extensively, served to reinforce the resolve of those Senators who subsequently refused to support the measure. In doing so, the Senate reflected the racism and hysteria over miscegenation that permeated the rest of white America.

2. *Lynching as the White Southerner's Duty*

Early in the House debate, Representative James Buchanan of Texas set the tone for the Southern attack that was to come.¹³⁸ In a long diatribe, Buchanan equated the Constitution with the natural order of the universe, extolled the virtues of the federal system, and ignored the possibility that the Reconstruction Amendments had changed the balance of federal and state

136. For further examination of Borah's views on progressive federal social welfare proposals, see John Braeman, *Seven Profiles: Modernists and Traditionalists*, in *THE PROGRESSIVE ERA*, *supra* note 3, at 82, 89-93.

137. For a discussion of the events culminating in the Senate Republicans' abandonment of the Dyer Bill, see JOHNSON, *supra* note 79, at 369-71; ZANGRANDO, *supra* note 6, at 65-71.

138. 62 CONG. REC. 458-68 (1921).

power. Buchanan repeatedly asserted that lynching would cease once black men stopped the “diabolical crimes for which they are lynched.”¹³⁹ Voicing a theme to which the Democrats would return, Buchanan argued that the “Negro problem” was a peculiarly Southern predicament which would have been solved long ago “in the best interest of both races” if the Northern Republicans’ political “machine” and the “so-called white uplift organizations of the North and East” had not been sending their “disturbing emissaries” to stir up trouble in the South. The result of such missions was clear to Buchanan:

[In] the Southern States and in secret meetings of the Negro race [they] preach the damnable doctrine of social equality which excites the criminal sensualities of the criminal element of the Negro race and directly incites the diabolical crime of rape upon the white women. Lynching follows as swift as lightning, and all the statutes of State and Nation cannot stop it.¹⁴⁰

In addition, Buchanan contended that whites of the South deplored lynching as much as anyone, and that, while racial prejudice might to some degree provide the motive for lynching, the black race, the “race most addicted to the tragic infamy” of rape, “has long enjoyed its distinction as the most favored race protégé ever coddled and petted by the sentimental sacrifice of an indulgent people,” and had brought lynchings upon itself by committing the “hellish outrage that fires the spirit of retaliation.”¹⁴¹

Continuing with Buchanan’s themes of blacks as a uniquely Southern “problem” and rape as the cause of lynching, Representative Sisson of Mississippi argued that

[A]s long as rape continues lynching will continue. For this crime, and this crime alone, the South has not hesitated to administer swift and certain punishment. . . . We are going to protect our girls and womenfolk from these black brutes. When these black fiends keep their hands off the throats of the women of the South then lynching will stop
. . . .¹⁴²

Furthermore, he argued, the Republicans would do the same thing if there were “Negroes in New England.”¹⁴³ As another Southerner stated, removing controls on blacks would lead to a rampage of violence and rape, since the

139. *Id.* at 459.

140. *Id.* at 468.

141. *Id.* at 459.

142. *Id.* at 1721.

143. *Id.*

“Negro” exhibits “reckless indulgence of physical appetites and passions.”¹⁴⁴ Indeed, argued Finis Garrett of Tennessee, the Dyer Bill ought to be renamed “[a] bill to encourage rape.”¹⁴⁵

Congressman Dyer attempted to rebut these arguments with evidence demonstrating that relatively few lynching victims were involved in or even accused of raping white women. Reading from the reports of the Tuskegee Institute, Dyer informed his colleagues that of the 4096 reported lynching incidents from 1885 to 1921, in only 810 of them—less than 20%—was the victim even accused of rape or attempted rape.¹⁴⁶ Among these 810, furthermore, the supposed rape victim was frequently later shown not to have been assaulted at all. Moreover, between 1914 and 1918, only twenty-eight of the 264 blacks lynched in the South were accused of having raped a white woman.¹⁴⁷

Dyer’s quotation of these statistics made no difference to the Southern Democrats. Immediately after Dyer’s speech, Hatton Sumners of Texas dismissed the statistics and returned to the argument that the Dyer Bill “would increase mob violence by encouraging the crimes which are the most provocative of mob violence.”¹⁴⁸ No law could prevent white men from lynching black men for the crime of rape because in the South white men “have never yielded to the courts established by legislatures or to laws established by legislatures the protection of their women.”¹⁴⁹ Indeed, Sumners argued,

When a white woman is raped by a black man, the call to the man is from his two strongest, most primitive instincts. . . . When that call comes from the woman who has been raped by man of alien blood, woman, who in every age of the world has been the faithful guardian of the purity of the race—when that call comes it is the call of his woman and the call of his blood, and he goes. It is not an easy situation to deal with. . . . He goes not alone. His neighbors, whose women live under the same danger, go with him. The impulse is to kill, to kill as a wild beast would be killed.¹⁵⁰

Furthermore, argued Sumners, the anti-lynching bill directly threatened white women’s safety. He warned that the Republicans were “buying black votes with the safety of white women in the South.”¹⁵¹

144. *Id.* at 1713.

145. *Id.* at 548.

146. *Id.* at 787.

147. *Id.*

148. *Id.* at 797.

149. *Id.* at 799.

150. *Id.*

151. *Id.* at 1743

The “good black people” of the South understood why white men lynched the black rapist, Representative Percy Quin of Mississippi offered, and, he said, these “good black people” indeed “are going to continue to enforce the law against the beast that commits rape.”¹⁵² Further, he asked and asserted,

Whenever an infamous outrage is committed upon a white woman [in the South] the law is enforced, is it not, even if it happens to be enforced by the neighbors of the woman who has been outraged? The colored people of [the South] realize the manner of that enforcement, and that is the one method by which the horrible crime of rape has been held down where the Negro element is in a large majority. The man who believes that the Negro race is all bad is mistaken. But you must recollect that there is an element of barbarism in the black man, and the people around where he lives recognize that fact.¹⁵³

Unlike these “good Negroes” of the South, the Democrats explained, Northerners simply did not understand the threat under which white Southerners lived, a threat that the Dyer Bill would only increase. As Representative John Rankin of Mississippi argued to the Republicans: “You men from the North have never known what it means to live in a state of constant dread for the safety of your loved ones.”¹⁵⁴ In the South, matters were different, he claimed, for “the shadow of the Negro criminal constantly hangs . . . like the sword of Damocles over the head of every white woman in the South, and no one knows just when or where it is going to fall.”¹⁵⁵ The Dyer Bill itself, Rankin argued, was increasing the incidence of rape, as “four assaults were committed on white women by Negro brutes during the first week of [the bill’s] consideration by this House.”¹⁵⁶

Often the Southern Democrats merged racist apprehensions about white women’s vulnerability to rape with bigoted anxiety about “[a]malgamation” or the “intermarriage and intermixture of the two races,” a possibility “too repulsive even for consideration.”¹⁵⁷ Such race-mixing, Rankin argued, would cause America to “drop from her exalted position as a world power, her boasted civilization would disappear, and she would ultimately become the vassal province of some civilized State.”¹⁵⁸ Hatton Sumners echoed that “no white man of normal mind can entertain the thought of that day when his granddaughter will mingle her blood with that of the grandson of a black neighbor.”¹⁵⁹ And, Rankin railed, if white men were not willing to “take a

152. *Id.* at 1788-89.

153. *Id.* at 1788.

154. *Id.* at 1426.

155. *Id.*

156. *Id.*

157. *Id.* at 1427.

158. *Id.*

159. *Id.* at 1785.

permanent stand against such an evil, thank God, the white women of the Nation, the guardians of our racial purity, will take such a stand and maintain it against all odds."¹⁶⁰ In an emotional appeal characteristic of many Southern Democrats' speeches, Benjamin Tillman, Representative from South Carolina, claimed that the Dyer Bill would eliminate the states and "substitute for the starry banner of the Republic, a black flag of tyrannical centralized government . . . black as the face and heart of the rapist . . . who [recently] deflowered and killed Margaret Lear," a white girl in his state.¹⁶¹ Further, Tillman inquired how one could be concerned with the "burning of an occasional ravisher," when the House faced more pressing and important business.¹⁶²

More broadly, the Democrats opposed the Dyer Bill not only because they believed that lynching combatted black rapists, but because they feared that the Bill would serve as a license for blacks to demand social equality. As one Democrat put it, even though relations between "good" blacks and Southern whites were "harmonious," federal anti-lynching legislation would change "contented docile blacks into uncontrollable brutes filled with demands for the social equality long promised them by ignorant northern do-gooders."¹⁶³ As a result, said Representative Brand of Georgia, "the new arrogant, swaggering black" encouraged by federal legislation "would force the Southern white population to resort to violence to protect itself." The South would allow blacks to have social equality with whites only when "the stars . . . cease to shine and the heavens . . . roll[] up as a scroll."¹⁶⁴ The problem of lynching, asserted William Lankford of Georgia, was not as dire as Northerners believed, for only a "few of the worst Negroes will be lynched" if the South was left alone to deal with its race problems.¹⁶⁵ "The Negro of the South who commits rape," he continued, "knows what is coming. He simply commits suicide, that is all."¹⁶⁶ Indeed, "this whole race question will be solved, and the probability of lynchings and race riots will be greatly lessened," Lankford said, "when the white race everywhere asserts its supremacy to all races."¹⁶⁷

Although the Southern Democrats filibustered the debate on the bill in the Senate, a few Senators still managed to add their views about rape and lynching to those of their House counterparts. The most vocal of them, Senator T.H. Caraway of Arkansas, managed to exceed the inanity of the House Democrats by arguing that the NAACP was behind the Dyer Bill and that the organization's sole purpose was to shield the rapist:

160. *Id.* at 1427.

161. *Id.* at 1014.

162. *Id.* at 1013.

163. Ferrell, *supra* note 7, at 198.

164. 62 CONG. REC. 1703 (1921).

165. *Id.* at 1369.

166. *Id.*

167. *Id.* at 1371.

Here is the truth about the matter: I am sure, although I have no way to substantiate it, that a society known as the society for the protection of the rights of colored people wrote this bill and handed it to the proponents of it. These people had but one idea in view, and that was to make rape permissible, and to allow the guilty to go unpunished if that rape should be committed by a negro on a white woman of the South.¹⁶⁸

According to Caraway, the Dyer Bill would do nothing more than “encourage a negro to believe that the strong arm of the Federal Government was going to . . . protect him and save him from punishment, however infamous his crime might be.”¹⁶⁹

In sum, these excerpts from the congressional debate demonstrate that the myth of the black rapist threatening the chastity of white women permeated congressional consideration of the Dyer Bill. These arguments, more than simple rhetorical exercises practiced on the floor of Congress, reflected the views harbored by most of Progressive Era society. This pervasive societal racism and obsession with miscegenation undoubtedly doomed the Dyer Bill to defeat. While the constitutional arguments against federal intervention were substantial, they were not so formidable as to justify Congress’s rejection of anti-lynching legislation. The racism and interracial sexual concerns voiced by Southern Congressmen and tacitly accepted by many others were central to the failure of the bill.

V. RACIALLY MOTIVATED LEGISLATION

This Part of the Article presents an overview of the history of three successful federal legislative efforts, demonstrating that Congress was fully capable of overcoming constitutional concerns about its power to enact social welfare legislation that invaded state autonomy. Section A reviews the history of the White Slave Traffic Act, more popularly known as the Mann Act. Section B explores the successful Progressive Era campaign to enact a federal anti-drug act. And Section C examines the banning of Jack Johnson’s prize fight films from interstate commerce. In my view, each of these successful legislative efforts was fueled in part by white America’s obsessive fears about and aversion to both voluntary and involuntary interracial sex between black men and white women. In addition, particularly in the case of the Mann Act, apprehensions about the growing independence of white women as those women moved from the countryside to Northern cities also helped to ensure the success of these federal legislative campaigns. Thus, just as the Southern myth of the “black-beast” rapist justified lynching and the federal government’s

168. 63 CONG. REC. 400 (1922).

169. *Id.*

refusal to pass federal anti-lynching legislation, the myth that white women in the North also needed protection from black men trumped concerns about federalism and states' rights.

A. *The Mann Act*

This Section first discusses the parallels between passage of the Mann Act and the failure of the Dyer Bill. The Section then places the Mann Act in the context of the popular understanding of white slave traffic during the Progressive Era, specifically discussing the white slave traffic literature that fueled the hysteria over white slavery. Next, this Section traces the judicial and legislative origins of the Mann Act that provided the constitutional framework for the passage of the Act. Lastly, the Section sets forth the congressional debate on the Mann Act and demonstrates that fears of interracial sex helped to insure its victory.

1. *The Mann Act's Success and the Dyer Bill's Failure*

In 1910, Congress enacted the White Slave Traffic Act, commonly called the Mann Act after its sponsor, Representative James R. Mann of Illinois. The parallels between the successful effort to pass the Mann Act and the failed effort to enact anti-lynching legislation make for an instructive comparison. First, both legislative efforts sought federal intervention into matters traditionally thought to lie within the police powers of the states: murder, in the case of lynching, and prostitution, in the case of white slavery. Second, both involved two of America's most persistent obsessions—race and sex—and the intersection of the two in the taboos and myths surrounding interracial sex. Third, the campaign against lynching attempted to right wrongs against America's most despised group—blacks. The campaign against white slavery, on the other hand, revolved around the protection of America's most "revered" (if practically subordinated) group—white women.¹⁷⁰

Resistance to the growing independence of white women arguably influenced both the defeat of federal anti-lynching legislation and the success of federal anti-white slavery legislation. The Southern myth of the "black-beast rapist" and the parallel Northern fantasy of "white slavery"¹⁷¹ led to both the failure of the Dyer Bill and the success of the Mann Act. Both fictions

170. Of course, as Justice Brennan has noted, this revered status "in practical effect, put women, not on a pedestal, but in a cage." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973). As Jacquelyn Hall points out, the price white women paid for this adulation was subordination. See HALL, *supra* note 17, at 154-55.

171. By characterizing "white slavery" as a myth, I do not mean to suggest that prostitution was not (and is not still) a serious social problem. Nor do I wish to imply a dichotomy between "bad" prostitution, in which "innocent" women and girls are "forced" to participate, and "good" prostitution, in which women engage of their own free wills. As feminists have argued, in a society where women are economically and socially subordinated, any female prostitution is to some degree, if not largely, involuntary. See, e.g., Catharine A. MacKinnon, *Reflections on Sex Equality Under the Law*, 100 YALE L.J. 1281 (1991).

helped to control the sexuality and increasing autonomy of white women. In other words, the argument that lynching was necessary to keep black men from raping white women had resonance for white America—both in the South and in the North. Not only did anti-miscegenation theories influence the attitudes of Northern and Southern whites towards blacks, but, for white America, the Progressive Era was a period marked by intense fears and anxieties about sexual morality, as the repressive sexual mores of the preceding Victorian Age began to give way.¹⁷² Understandably, the advocates of the Mann Act, fighting an unsubstantiated bad dream, met with far greater national success than did the advocates of federal anti-lynching legislation, who were fighting a documented, bona fide nightmare. In both legislative battles the victors shared a common obsession with protecting and controlling white female sexuality, particularly from the imagined threat posed by black men and miscegenation.

2. *Popular Understandings of White Slavery*

The Mann Act made it a felony to transport knowingly any woman or girl across state lines for prostitution, debauchery, “or any other immoral purpose.”¹⁷³ Another provision made it a crime to procure or obtain a ticket to be used by a woman or girl to travel from one state to another for such an immoral purpose.¹⁷⁴ Under related sections, it became a felony to coerce a woman to travel for such immoral purposes. A stiffer penalty was imposed upon a defendant who had taken any of these actions with a girl under eighteen. Finally, the Act required anyone who kept, maintained, controlled, or harbored an alien woman or girl for prostitution or immoral purposes within three years after she entered the United States to file a statement to that effect with the Commissioner of Immigration and Naturalization.¹⁷⁵

What was white slavery? As defined by the sponsors of the Mann Act, the white slave trade was “the business of securing white women and girls and of selling them outright, or of exploiting them for immoral purposes.”¹⁷⁶ “[I]f given a fair chance,” the sponsors argued, those women and girls who were the victims of white slavery “would, in all human probability, have been good wives and mothers and useful citizens.”¹⁷⁷ They contended that these victims were not given such a chance, for they were induced by various forms of

172. See Barbara Epstein, *Family, Sexual Morality, and Popular Movements in Turn-of-the-Century America*, in *POWERS OF DESIRE, THE POLITICS OF SEXUALITY* 117 (Ann Snitow et al. eds., 1983).

173. White Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825, 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (1988)).

174. *Id.*

175. The law prohibited federal prosecution of the person filing the statement, perhaps fearing a legal challenge based on the Fifth Amendment right against self-incrimination. FREDERICK K. GRITNER, *WHITE SLAVERY: MYTH, IDEOLOGY, AND AMERICAN LAW* 87 (1990).

176. H.R. REP. NO. 47, 61st Cong., 2d Sess. 11 (1909).

177. *Id.*

deceit and fraud to enter into a life of prostitution, and kept in that life through the use of surveillance and violence.¹⁷⁸ The term “white slavery” did not include ordinary prostitutes, but rather only those women and girls

who are literally slaves—those women who are owned and held as property and chattels—whose lives are lives of involuntary servitude; those who practice prostitution as a result of the activities of the procurer, and who, for a considerable period at least, continue to lead their degraded lives because of the power exercised over them by their owners.¹⁷⁹

Moreover, the sponsors argued that white slavery was of “widespread dimensions,” and “so prevalent that prosecuting officers, both state and federal, even under inadequate and insufficient laws, have been able to secure many notable convictions.”¹⁸⁰

Prior to 1910, the hysteria surrounding white slavery was focused principally upon immigrants, both as the source of the “victims” and of their “enslavers.” Journalist George Kibbe Turner wrote the first major national articles on white slavery; the articles appeared in *McClure's Magazine* in 1907 and 1909.¹⁸¹ In sensationalist prose typical of the muckraking journalism of the day,¹⁸² Turner's 1909 article, entitled “Daughters of the Poor,” “describ[ed] how seduction, false marriage, and coercion were used to snare poor immigrant women.”¹⁸³ Turner “charged that a network of Austrian, Russian, and Hungarian Jews dealt in women”¹⁸⁴ and that such Jews “had contrived ‘a sort of loosely organized association, extending through large areas of the country, their chief centers being New York, Boston, Chicago, and New Orleans.’”¹⁸⁵ In addition to appealing to America's nativist prejudices and mining its deep vein of anti-semitism, in his 1907 article Turner also managed to tap into the society's other bottomless reservoir of bigotry by suggesting that the “vicious negro from the countryside,” along with “hundreds of thousands of rough and unrestrained male laborers” were the major sources of urban lawlessness, bringing prostitution and a threat to “the chastity of women.”¹⁸⁶ Turner ostensibly suggests that immigrants and blacks were the chief customers of the white women enslaved by the prostitution rings.

178. *Id.*

179. *Id.* at 10-11.

180. *Id.* at 10.

181. GRITNER, *supra* note 175, at 62.

182. For a general overview of the muckraking journalism of the Progressive Era, see ROBERT M. CRUNDEN, *MINISTERS OF REFORM: THE PROGRESSIVES' ACHIEVEMENT IN AMERICAN CIVILIZATION, 1889-1920*, at 163-174 (1972).

183. GRITNER, *supra* note 175, at 62-63.

184. *Id.* at 63.

185. MARK THOMAS CONNELLY, *THE RESPONSE TO PROSTITUTION IN THE PROGRESSIVE ERA* 61 (1980) (quoting Turner).

186. GRITNER, *supra* note 175, at 62 (quoting Turner).

While Turner was one of the earliest journalists to attack the "problem" of white slavery, concerns about the connection between immigration and prostitution were neither new¹⁸⁷ nor anomalous.¹⁸⁸ Moreover, these concerns also went to the "'racial' implications of prostitution."¹⁸⁹ A 1913 speech by Charles W. Eliot, the former president of Harvard University, was typical. America, Eliot warned, must rid itself of the evil of immigrant prostitution or the "country will not be ruled by the race that is now here. The family life of the white race is at stake in its purity, in its healthfulness, and in its fertility."¹⁹⁰

Although the anxiety about white slavery focused at first on immigrant women, it gradually transformed into a concern about the forced prostitution of native-born girls and women, particularly those who migrated from America's rural areas and small towns to the growing industrial cities. This change was in part due to the investigations of Congress during the consideration of the Mann Act and the appearance of white-slavery tracts beginning around 1909.¹⁹¹

In his analysis of the white slavery literature, Mark Thomas Connelly argues that the white slavery tracts "were updated versions of the genre inaugurated by the Indian captivity narratives."¹⁹² The captivity genre was frequently employed by anti-Catholic and anti-Mormon writings of the nineteenth century.¹⁹³ The white slave tracts "reflected . . . the anxieties of a rural society facing the new 'wilderness' of the twentieth century, the city."¹⁹⁴

Some of the white-slave tracts were written by reformers.¹⁹⁵ One notable reformer who published such literature was Clifford Roe, who had served as the President the American Alliance for the Suppression and Prevention of the White Slave Traffic.¹⁹⁶ In Roe's first publication, *Panders and Their White Slaves*, he expressed concern for immigrant women, but "concluded that native-born women were at the mercy of the foreign pimp."¹⁹⁷ Roe estimated that "at least three-fourths of the girl slave victims have been inveigled from

187. Connections between immigration and prostitution were posited in the second half of the nineteenth century but received little attention in the decades leading up to 1900. CONNELLY, *supra* note 185, at 48-67.

188. On the appearance of the white slavery tracts, see CONNELLY, *supra* note 185, at 48 ("Immigration and prostitution were perceived by many during the progressive years as contiguous pieces in a jigsaw puzzle of social pathology.")

189. *Id.* at 60.

190. *Id.* (quoting Eliot).

191. *Id.* at 114.

192. *Id.* at 117.

193. *Id.*

194. *Id.* at 117-18.

195. See generally GRITTNER, *supra* note 175, at 66-72.

196. *Id.* at 66.

197. *Id.* at 66-67.

our own farms, homes, towns and cities; but it was the foreigner who taught the American this dastardly business."¹⁹⁸

Other reform writers of the period went further than Roe in vilifying foreigners. Ernest Bell, for example, in his 1910 publication, *Fighting the Traffic in Young Girls*, linked the white slave problem to "the most despicable foreigners—French, Irish, Italians, Jews and Mongolians."¹⁹⁹ Robert Harland, another Chicago-based reform writer, surpassed both Roe and Bell by linking the white slave traffic with interracial sex, a sure means of arousing sentiment against the traffic. "White slavery symbolizes a general moral decline in America, and that decline has its roots in emerging modern values. The outcome produces disturbing images of whites and blacks mixing and sinning in 'holes of infamy.'"²⁰⁰ Samuel Paynter Wilson, in his 1910 publication, *Chicago and its Cess-Pools of Infamy*, also connected white slavery and interracial sex, painting a picture of the red-light districts of Chicago in which the "shrieks of the 'harlots' . . . are 'mingled with groans and curses of task masters in a foreign tongue, attracting the attention of hundreds of laborers, negroes and young boys.'"²⁰¹ Wilson attacked blacks and Chinese "who joined white men in the brothels."²⁰² "The image of 'young white girls, huddled in with the worst mob of negroes' gave Wilson his proof that Chicago was fouled by cesspools of immorality."²⁰³

Thus, the reform literature shifted in emphasis away from the original concern about immigrant women. The new themes were the ruin of native-born women who were attracted to the cities from rural and small-town America, and the mixing of blacks and whites in the brothels. These themes found prominence in the floor debates before the passage of the Mann Act, and surfaced yet again in the House Report accompanying the bill.

3. *Origins of the White Slave Traffic Act*

Congress's first involvement with regulating prostitution began in 1875 with the passage of the Alien Prostitution Importation Act.²⁰⁴ This statute made it a felony, punishable by five years in prison and a fine up to five thousand dollars, for anyone to import a woman into the United States for the purposes of prostitution.²⁰⁵ Later, in the 1880s and 1890s, purity groups in the United States and Europe increasingly focused on combatting the transport of women and girls from one country to another for the purposes of prostitution.²⁰⁶ As

198. *Id.* (quoting Roe).

199. *Id.* at 68-69 (quoting Bell).

200. *Id.* at 71 (quoting Harland).

201. *Id.* at 69.

202. *Id.* (quoting Wilson).

203. *Id.* (quoting Wilson).

204. Alien Prostitution Importation Act, ch. 141, 18 Stat. 477 (1875) (amended 1907).

205. *Id.*

206. CONNELLY, *supra* note 185, at 49.

a result of the activities of these groups, thirteen European countries convened international conferences on this traffic. In 1904 these nations signed a treaty agreeing to cooperate in ending the trade.²⁰⁷

Congress amended the Alien Prostitution Act to criminalize the importation of women for prostitution “or for any other immoral purpose.”²⁰⁸ The Supreme Court interpreted this amendment in *United States v. Bitty*²⁰⁹ and *Keller v. United States*,²¹⁰ setting the backdrop for the congressional debate on the constitutionality of the Mann Act. Because these cases are also important for what they reveal about prevailing views on white women and sexual morality during the Progressive Era, it is useful to look at them in some detail.

In *Bitty*, the government charged the defendant with importing a woman into the United States from England to “live with him as his concubine.”²¹¹ The trial court dismissed the indictment on the ground that “the statute, properly construed, did not make it an offense to bring and import an alien woman into the United States for the purpose of having her live with him as his concubine.”²¹² The court of appeals affirmed, holding that the bringing of a woman into the United States as a cohabiting concubine was not synonymous with prostitution and so was outside the “immoral purpose” provision of the statute.²¹³

The United States Supreme Court disagreed. The Court held that Congress intended the statute to prohibit Bitty’s conduct. There could be no doubt, the Court said, regarding Congress’s target when it outlawed the importation of women for the purpose of prostitution. Congress, the Court said, meant to exclude from this country alien women who “offer their bodies to indiscriminate intercourse with men,” whether for hire or not. Such women lead lives and set examples that are hostile to the “idea of family” as a union between a man and a woman for life “in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization.”²¹⁴ Congress obviously assumed that the public morality and well-being of the American people would be harmed by exposure to such women, asserted the Court, and therefore made it a crime to import alien women for prostitution. While the lives of concubines may “in the popular sense” be less degraded than that of prostitutes, the Court opined, concubines must nonetheless be seen as living immoral lives given society’s idea of the proper relationship between men and women.²¹⁵ The Court assumed that Congress must have had popular notions

207. *Id.*

208. Alien Immigration Amendments, ch. 11, § 3, 34 Stat. 898, 899-900 (1907).

209. 208 U.S. 393 (1908).

210. 213 U.S. 138 (1909).

211. 208 U.S. at 399.

212. *Id.*

213. *Id.* at 401.

214. *Id.* (quoting *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885)).

215. *Id.* at 402.

of morality in mind when it prohibited the importation of women into this country "for prostitution or for any other immoral purpose."²¹⁶ The Court reversed the judgment below and dismissed with instructions to set aside the order dismissing the indictment.²¹⁷

In the second case, *Keller*,²¹⁸ the government charged the defendants with violating an immigration act that made it a felony to "keep, maintain, control, support, or harbor" for three years after her arrival, any alien woman or girl for the purpose of prostitution.²¹⁹ A female immigrant, Irene Bodi, had entered the country in November 1905, moved to Chicago in October 1907, and shortly thereafter joined a house of prostitution that the defendants bought in November 1907.²²⁰ The defendants appealed their convictions, claiming that Congress unconstitutionally encroached on state police powers by criminalizing such activity.²²¹

In support of the constitutionality of the statute, the government contended that Congress had the authority to punish those who aided importation as an extension of its right to prohibit the importation of aliens for immoral purposes. Further, the government argued that the relevant section was valid because it represented a substantial limitation upon the conditions an alien female must meet in order to avoid deportation. The Supreme Court rejected both of these arguments.²²²

The Court defined the statutory provision as one primarily regulating prostitution, rather than immigration. Pursuant to this reading, it fell within the definition of the police power generally reserved to the states.²²³ While the federal government could exercise police powers that happened to fall within the domain of the authority conferred on the national government by the Constitution, there was no provision of the Constitution conferring power on Congress to enact this particular statute.²²⁴

Addressing the government's first argument, the Court suggested that the government's power to punish one who aids in the importation of a prostitute was immaterial to the facts of this case, since Bodi had become involved in prostitution before the defendants even knew her.²²⁵ With respect to the government's second argument, the Court expressed its concern that acceptance of such an argument could open the floodgates to unlimited federal legislation. Allowing Congress to control all dealings between American citizens and aliens would, given the large number of immigrants in the population, inevitably

216. *Id.*

217. *Id.* at 403.

218. *Keller v. United States*, 213 U.S. 138 (1909).

219. *Id.* at 139 (citing Alien Immigration Act Amendments, ch. 11 § 3g, 34 Stat. 898, 899 (1907)).

220. *Id.* at 147.

221. *Id.* at 143.

222. *Id.* at 147.

223. *Id.* at 144.

224. *Id.* at 148.

225. *Id.*

result in usurpation of "an immense body of legislation, which heretofore has been recognized as peculiarly within the jurisdiction of the States."²²⁶ It would result in "such a change in the internal conditions of this country as was never dreamed of by the framers of the Constitution" and might well lead to substituting "one consolidated government for the present Federal system."²²⁷

At first glance, *Keller* seemingly strikes a blow to the anti-prostitution reformers' efforts to enlist the federal government in their cause. But when one views *Keller* in combination with *Bitty*, the Court appears quite willing to allow federal intrusion into the police power of the states with regard to morality, so long as the legislation is based on a specific power granted to Congress by the Constitution. The specific constitutional "hook" in *Bitty* was Congress's authority over immigration. Although the Court searched, it could find no such hook with which to uphold the statute in *Keller*. Even so, the *Keller* Court noted that the prosecutions *would* have been constitutional had there been such a hook, even though the morality of individuals was clearly within the traditional police powers reserved to the states.²²⁸ Congress found its constitutional hook for the Mann Act in the Commerce Clause.

4. *Congress Debates the Mann Act*

By the time the Mann Act was to be passed, public opinion on white slavery had shifted from concern over the fate of innocent immigrant girls to obsession with the fate of native-born white women forced into a life of prostitution. Congress itself was partly responsible for the transformation of public opinion. The focus of the congressional floor debates on Mann's bill was the mythical white farm girl who came to the city looking for adventure and found herself trapped in a life of sexual slavery. The debate on the bill centered primarily on the question of whether it was unconstitutional. The minority report of the Committee plainly rested its objection on the view that the bill was beyond Congress's constitutional authority.²²⁹ Defenders of the bill argued that the measure was indeed constitutional and also vital to the protection of American womanhood. Framed this way, the debate presented a dilemma for Southern Congressmen, who found themselves torn between their loyalties to states' rights and to the myth of ideal womanhood.

Representative Richardson of Alabama devoted considerable time to advancing the proposition that the legislation invaded the states' police powers, which he deemed to be supreme and exclusive.²³⁰ The federal government, Richardson argued, ought to be required to show direct authority in the Constitution for all legislation passed by Congress. This showing was

226. *Id.*

227. *Id.* at 148-49.

228. *Id.* at 144.

229. H.R. REP. NO. 47, 61st Cong., 2d Sess. 30 (1990).

230. 45 CONG. REC. 809 (1910).

impossible in this instance because it was beyond dispute that “morals, like health, [are] in the supreme control of the State, . . . never . . . delegated to the Federal Government.”²³¹

Richardson’s impassioned defense of states’ rights was no match for the rhetoric in the defense of white womanhood of his fellow Southerner, Sims of Tennessee. If the bill were without doubt unconstitutional, Sims contended, he would vote against it. But where there was mere doubt as to its constitutionality, he would resolve such doubts in favor of the legislation. Sims was unable to comprehend how any man who had read the report of the Commission on Immigration yet considered “haggl[ing] or higg[ing]” over a constitutional provision:

Whenever I think of a beautiful girl taken from one State to another . . . by holding out to her the promise of improvement in her condition, then to Chicago, New York, or any other city, and drugged, debauched, and ruined, instead of being murdered, which would be a mercy after such treatment, retain[ed] . . . there and [sold] . . . to any brute who will pay the price, I can not bring myself to vote against this bill Such are the unquestioned and undisputed facts. Now, shall we stand here and split hairs over the *Keller* case or any other case? Pass this law, take care of the girls, the women—the defenseless—and let the courts say whether or not the law is constitutional.²³²

When asked by Richardson why the bill punished only the procurers of prostitutes and not the women themselves, Sims replied that a woman would be incapable of moving from one state to another without the assistance of the “demon, in human form, who is furnishing the money to carry her there, to sell her soul and body into hell, in order that he may have a few more dollars to put in his unholy pocket.”²³³

Congressman Russell, another Southerner, found himself on the side of protecting the virtue of white womanhood against federalism arguments. He engaged in a lengthy and scholarly defense of the bill’s constitutionality.²³⁴ At the end of his presentation he was attacked by two of his fellow Southern Congressmen, Bartlett of Georgia and Webb of North Carolina, who demanded to know how he could possibly find the measure constitutional.²³⁵ Russell’s reply was capable of silencing anyone in opposition. The legislation was designed, he said, “to destroy the revolting situation which has grown up in the last few years through the importation and interstate transportation of

231. *Id.* at 811.

232. *Id.*

233. *Id.* at 812.

234. *Id.* at 814-16.

235. *Id.* at 817, 820.

women and girls for immoral purposes.”²³⁶ To educate the House on the dimensions of the evil, Russell read the following quote from a book attacking the white slave trade by Tom Watson of Georgia:

Some weeks ago a negro who signed himself “John Frankling” wrote me from Tifton, Ga., a letter in which he states that he had a white wife whom he had bought out of a group of twenty-five that were offered for sale in Chicago, and that she was the third white “wife” that he had purchased. Upon making inquiry of prominent men in Chicago, I was told that there was reason to believe that the negro had told the truth.²³⁷

Russell then said the problem involved primarily native-born white women rather than foreign women. Russell noted that, according to some statistics, 65,000 “daughters of American homes” were inducted into white slavery each year, while only 15,000 alien girls per year were victims.²³⁸ He added that it was a mistake to think that the “importation of women from foreign countries for immoral purposes constitutes the larger part of the evils attending the white slave-traffic” when the “trade” in American-born girls was numerically “four times” as strong as that in foreign women.²³⁹

Concluding his defense of the bill, Russell quoted again from Watson’s book. Noting that inexperienced girls were lured to the cities by false promises of marriage and of better lives and then “decoyed into the house of prostitution,” Russell conjured up an ugly image of the clientele to whom these women are forced to cater: “In those dens of horror [the girls] are sold to all men who can pay the price—young or old, clean or unclean, healthy and diseased, black or white.”²⁴⁰ Russell concluded with words sure to resonate with his fellow Southerners:

More than forty years ago this country was drenched in fraternal blood and offered up the lives of nearly a million of the very pick and flower of its citizenship in the struggle to abolish slavery of the black man. In God’s name, can we do less now than pass this bill, which will be a step toward abolishing the slavery of white women? This bill is a tribute to every pure and good woman in this land.²⁴¹

On the last day of argument on the bill, the minority once again attempted to present the case for states’ rights. Again they were no match for the

236. *Id.* at 820-821.

237. *Id.* at 821.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

majority's rhetoric about protection of white womanhood. The Southerners in opposition once more found fellow Southerners aligned against them. Congressman Saunders of Virginia argued that the bill rested squarely on Congress's power to regulate interstate and foreign commerce. More important, he said, "no splitting of hairs in verbal dialectics, or subtle distinctions carried to the last refinement of analysis, should be sufficient to induce us to abandon a measure which we are impelled to enact by every consideration of morality, and every call of decency."²⁴² He was "as jealous of real interference" with the rights of the states as anyone, Saunders claimed, but the bill was constitutional and arguments about states' rights should not deter Congress from going forward and contributing to "the general movement to crush this traffic in human flesh, a traffic which oppresses the conscience of humanity with a sense of overpowering horror."²⁴³

But it was left to Representative Mann to put the finishing touches on the defense of the bill. The constitutionality of the bill had been thoroughly considered, he argued, and Congress had the power to pass the bill. Having the power, "Congress would be derelict in its duty if it did not exercise it, because all of the horrors which have ever been urged, either truthfully or fancifully, against the black-slave trade pale into insignificance as compared to the horrors of the so-called 'white-slave traffic.'"²⁴⁴

The Mann Act became law. Yet, the notion that there existed a widespread business of forcing women into prostitution was at best overdrawn, and was perhaps entirely devoid of factual support. For example, a 1910 special grand jury under the foremanship of John D. Rockefeller, Jr., investigated prostitution in the New York City area and found no evidence of an organized white slave traffic.²⁴⁵ Official investigations in the states of Illinois, Wisconsin, and Massachusetts, and in the cities of San Francisco, St. Paul, Minneapolis, and Syracuse reported no evidence to support the existence of white slavery or white slave traffic.²⁴⁶ In an exhaustive analysis of Progressive Era prostitution, Ruth Rosen interviewed 6,309 prostitutes and concluded that no more than 10%, and perhaps as few as 7.5%, were forced into prostitution.²⁴⁷ Congress, however, did not concern itself with these facts, for white America perceived white women in cities as presenting the dangerous possibilities of sexual license and of interracial sex.

242. 45 CONG. REC. 1037 (1910).

243. *Id.* at 1040.

244. *Id.*

245. CONNELLY, *supra* note 185, at 130.

246. *Id.*

247. GRITNER, *supra* note 175, at 4, 64.

B. Regulation of Narcotics

Like the Mann Act, the first federal narcotics law, enacted in 1914, commonly known as the Harrison Narcotics Act, provides a vivid example of how willingly Congress overcame states' rights inhibitions when faced with the specter of the black rapist preying on white women. Prior to the 1870s, the United States did not have an officially recognized narcotics problem. It was widely believed that many Chinese immigrants were habitual smokers of opium, but this caused no concern for the nation as a whole.²⁴⁸ Sometime between 1870 and 1900, however, an opium epidemic arose among the white population.²⁴⁹ This surge in use came to the attention of the federal government because of an increase in the amount of opium being imported annually.²⁵⁰ Many in the nascent drug reform movement viewed Chinese immigrants as primarily responsible for the spread of opium addiction to the larger white society.²⁵¹

Contemporaneously, concern about the alleged use of cocaine by Southern blacks was increasing.²⁵² Cocaine had long been popular among whites, who consumed it in everything from cough drops to Coca-Cola.²⁵³ Before the turn of the century, however, cocaine use had not been associated with blacks. Because of poverty and insufficient medical care, blacks apparently had not been using the drug as extensively as whites.²⁵⁴ The rise in the use of cocaine among the black population in the South, however, eventually became a matter of official concern to Southern whites.²⁵⁵ By 1900, cocaine was "identified with the underworld of the . . . blacks," and violent criminal conduct was frequently attributed to the influence of cocaine.²⁵⁶

In addition, the belief that cocaine had strange, deleterious effects on the behavior of black people gained wide currency during the Progressive Era. Stories circulated describing black cocaine users as having superhuman strength, cunning, and improved pistol marksmanship.²⁵⁷ For example, some Southern police departments used .38 caliber revolvers in the belief that cocaine made blacks impervious to .32 caliber bullets.²⁵⁸ Some thought that

248. DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 1-3 (1987).

249. *Id.* at 2.

250. HAMILTON WRIGHT, *REPORT OF THE INTERNATIONAL OPIUM COMMISSION ON THE OPIUM PROBLEM AS SEEN WITHIN THE UNITED STATES AND ITS POSSESSIONS, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, S. DOC. NO. 377, 61st Cong., 2d Sess. 48-49 (1910)* [hereinafter *INT'L OPIUM COMM. REP.*].

251. MUSTO, *supra* note 248, at 6.

252. *Id.*

253. DAVID T. COURTWRIGHT, *DARK PARADISE: OPIATE ADDICTION IN AMERICA BEFORE 1940*, at 82 (1982).

254. H. WAYNE MORGAN, *DRUGS IN AMERICA: A SOCIAL HISTORY 1800-1980*, at 34 (1981).

255. RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, *THE MARIHUANA CONVICTION: A HISTORY OF MARIHUANA PROHIBITION IN THE UNITED STATES* 14 (1974).

256. *Id.* at 14-15.

257. MUSTO, *supra* note 248, at 7.

258. David F. Musto, *America's First Cocaine Epidemic*, WILSON Q., Summer 1989, at 59, 64.

murder and insanity among lower class blacks was increasing because of cocaine use.²⁵⁹ The press linked particularly dangerous crimes committed by blacks to the effects of cocaine.²⁶⁰ Most alarmingly, some writers spread the notion that "most of the attacks upon white women of the South . . . are the direct result of a cocain[e]-crazed negro brain."²⁶¹ Moreover, the anticipation of a black rebellion, or at least a concern that blacks would undermine the social restrictions imposed upon them, also ignited white fears.²⁶²

Thus, at the beginning of America's drug problem, white America viewed narcotics as a threat posed by Chinese immigrants and Southern blacks. This perceived threat, coupled with the Progressive reformers' desire to wean white Americans from opium and cocaine use, fueled the drive for federal legislation to control Americans' access to narcotics.²⁶³ In 1906, Congress first responded to the growing public alarm over increased narcotics use by passing the 1906 Pure Food and Drug Act requiring labels on products containing certain amounts of opiates.²⁶⁴

Congress also responded by enacting a bill barring the importation of opium into the country. The bill, known as the Opium-Exclusion Act of 1909, passed Congress with relative ease. The lack of resistance was probably due to the association of narcotics with Chinese immigrants and blacks, and to the need to save the country from the embarrassment of having initiated a crusade against drugs without having any federal laws that barred the drug trade in some manner.²⁶⁵

Despite the enactment of the 1909 statute, agitation for further legislation continued for a number of reasons. First, the Opium-Exclusion Act failed to quench the reformers' zeal for federal regulation because of the Act's failure to regulate interstate manufacture, possession, or sale of narcotics.²⁶⁶ Second, after the Hague Convention of 1912, in which the international participants agreed to restrict the consumption of drugs to medicinal uses, the United States felt an obligation to enhance its efforts toward control of the domestic narcotics market.²⁶⁷ In addition, President Wilson submitted the International Opium Commission's report to Congress, in which Hamilton Wright, a United States delegate to the Commission and the report's author, affirmed societal beliefs

259. Edward H. Williams, *Negro Cocaine Fiends Are a New Menace*, N.Y. TIMES, Feb. 8, 1914, at 12.

260. *The Drug-Endangered Nation*, LITERARY DIG., Mar. 28, 1914, at 687.

261. *Id.*

262. MUSTO, *supra* note 248, at 7, 244.

263. Apparently, the fear that the "black drug problem" will cause harm to the white community still drives federal drug enforcement policy. See David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1292-97 (1995).

264. BONNIE & WHITEBREAD, *supra* note 255, at 15.

265. COURTWRIGHT, *supra* note 253, at 82.

266. INT'L OPIUM COMM. REP., *supra* note 250, at 60. Despite the Opium-Exclusion Act, it was still possible for physicians, pharmacists, and illicit dealers to ship large quantities of drugs between states. *Id.*

267. BONNIE & WHITEBREAD, *supra* note 255, at 15-16; COURTWRIGHT, *supra* note 253, at 104.

about blacks and their use of cocaine. In the report, Wright noted that the use of cocaine by blacks led to problems in the enforcement of laws in the Southern states.²⁶⁸ Moreover, he argued that cocaine use produced an incentive for the black population to rape white women and created black criminals with a penchant for violent behavior.²⁶⁹

On June 23, 1913, Congressman Francis Harrison of New York introduced a narcotics bill which, while ostensibly based on Congress's taxing powers, in effect regulated commerce in opiates and cocaine. In support of his bill, Harrison maintained that the traffic in drugs had created criminal classes and had contributed to degradation among the upper classes of society. Thus, he argued, legislation was necessary to carry out the United States' "humanitarian, moral, and international obligations."²⁷⁰ President Wilson subsequently supported the argument by stating that failure to provide further legislation was "unthinkable."²⁷¹

Despite this support for the legislation, many Southerners opposed it on states' rights grounds. In the end, however, the alleged link between cocaine-using blacks and crime, especially the specter of cocaine-induced rape, helped to convince Southern Senators and Representatives to vote in favor of further restrictions.²⁷² As a result, on December 17, 1914, the bill known as the Harrison Narcotics Act became law.²⁷³

C. Prize Fight Films

On Independence Day, 1910, Jack Johnson, the first black heavyweight boxing champion of the world, knocked out the "Great White Hope," Jim Jeffries, in their Reno, Nevada, title fight. Johnson prevailed after fifteen rounds of jeering, taunting, and laughing at his opponent.²⁷⁴ A New York State Senator, present at ringside, fainted. When revived, the Senator said that he "[I]ike many others . . . had come to Reno hoping that the white race would again triumph over the black," but added sorrowfully, "[i]t was not to be."²⁷⁵

As news of Johnson's victory spread, race riots exploded throughout the nation, as much of white America seemingly shared the Senator's dismay.²⁷⁶

268. INT'L OPIUM COMM. REP., *supra* note 250, at 49.

269. *Id.* at 50, 51.

270. FRANCIS B. HARRISON, REGISTRATION OF PRODUCERS AND IMPORTERS OF OPIUM, ETC., H.R. REP. NO. 23, 63d Cong., 1st Sess. 1 (1913).

271. WOODROW WILSON, ABOLITION OF THE OPIUM EVIL: MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. DOC. NO. 33, 63d Cong., 1st Sess. 1 (1913).

272. MORGAN, *supra* note 254, at 106; MUSTO, *supra* note 248, at 282.

273. Harrison Narcotics Act of 1914, ch. 1, 38 Stat. 785 (1914) (later codified at 26 U.S.C. § 691-708 (1928)), repealed by Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No 91-513, § 1101(b)(3)-(A), 38 Stat. 1236, 1292 (1970).

274. AL-TONY GILMORE, BAD NIGGER! THE NATIONAL IMPACT OF JACK JOHNSON 42 (1975).

275. *Id.* (quoting Senator Tim Sullivan of New York).

276. *Id.* at 59-74.

Jeffries had come out of retirement to prove white superiority,²⁷⁷ leading boxing promoters to bill Jeffries as the "Great White Hope."²⁷⁸ Johnson's victory thus threatened the white supremacist precept that blacks were physically inferior to whites.²⁷⁹ Accordingly, blacks took the victory as the personal triumph of all members of the race, while whites took the victory just as personally, seeing it as an affront to their supremacy.

The bout's promoters saw this "fight of the century" as an opportunity to make a profit beyond the gate receipts by showing films of the fight in theaters around the country. The day after the fight, however, various groups led by the United Society of Christian Endeavor called upon the nation's governors to censor the film for fear that race riots would follow such showings, just as riots had followed the fight itself.²⁸⁰ Most governors and the big-city mayors joined the white press in supporting the suppression of the film. Many white religious leaders, who fancied themselves progressive reformers, also called for a ban on the film. Although the proffered justification was fear of violent racial confrontations, the crusaders no doubt wanted to shield from public view the spectacle of a white man being physically beaten into submission by a black man.²⁸¹

Johnson's status as heavyweight champion of the world was sufficient reason by itself for white America to hate him. In addition, "[a]t a time when black men could be lynched simply for looking at white women," Johnson "caroused with and married [white women] at will."²⁸² His open relationships with white women were widely publicized by the press generally, and particularly because of his 1912 indictment under the Mann Act.²⁸³ The comments of one sportswriter exemplify the opprobrium with which white America viewed Johnson's interracial liaisons. Writing in the *Police Gazette*, Frank Force railed:

[Johnson] is the vilest, most despicable creature that lives. . . . In all sporting history, there never was a human being who so thoroughly deserved the sneers and jeers of his fellow creatures [H]e has disgusted the American public by flaunting in their faces an alliance

277. Just before the fight, Jeffries addressed his fans: "[T]hat portion of the white race that has been looking to me to defend its athletic superiority may feel assured that I am fit to do my very best." DAVID J. LANGUM, *CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT 180* (1994) (quoting RANDY ROBERTS, *PAPA JACK: JACK JOHNSON AND THE ERA OF WHITE HOPES 68* (1983)).

278. GILMORE, *supra* note 274, at 42.

279. It was still argued that whites surpassed blacks morally and mentally—or as one said, while the black man had achieved full physical stature as a man "whether he will ever breed brains to match his muscle is yet to be proven." *Id.* at 46.

280. *Id.* at 75-79. Critics charged that the censorship movement was actually driven by the fact that a black man had won the fight. *Id.* at 84.

281. *Id.* at 83.

282. *Id.* at 3.

283. LANGUM, *supra* note 277, at 181.

as bold as it was offensive . . . and has shown himself in every way to be what he is, an ingrate of the worst description.²⁸⁴

Thus, Johnson's open defiance of the taboo against interracial sex between black men and white women helped fuel the movement to ban his films.

The black press excoriated the progressive religious reformers, in particular, for organizing and participating in a campaign to ban the showing of a prize fight film while remaining silent about lynching.²⁸⁵ The comments of the *Baltimore Afro-American Ledger* are typical of the views expressed in the editorial pages of black publications:

There is entirely too much hypocrisy about the whole thing. Men in every station of life are holding up their hands in holy horror. Ministers are denouncing it from the pulpit, prominent men are speaking against it on the rostrum and in the newspapers, and it is being talked of everywhere. . . . If half of the protest against the showing of these pictures were made against the lynching fever now abroad in the land, lynching would stop. . . . [There have been several lynchings since the fight, and] not a single minister has denounced it [and] not a Mayor or Governor has had a word to say about it.²⁸⁶

Although the film eventually was shown in several cities without incident, the controversy would not die. Fearful that the next "Great White Hope" might be no more successful than Jeffries had been, the supporters of the ban moved to prevent the showing of films of future Johnson fights.²⁸⁷ This time, however, they appealed to the United States Congress.

Johnson's next fight was scheduled for July 4, 1912, in New Mexico, against the white boxer Jim Flynn. On the eve of the fight, Senator Simmons of North Carolina and Representative Roddenberry of Georgia introduced bills in Congress to prohibit the interstate or foreign transportation of prize fight films. Although the sponsors of these bills claimed that they opposed prize-fights in general as immoral and uncivilized, the haste with which they acted made it quite clear that the motivation for the legislation was specifically to ban films of Johnson's fights.²⁸⁸ On July 1, despite the absence of a quorum, Representative Sims of Tennessee expressed his desire to call up the bill designed "to prevent the shipping through the mails and in interstate commerce of moving-picture films of prize fights, especially the one between a negro and

284. GILMORE, *supra* note 274, at 98 (quoting Frank Force, POLICE GAZETTE, reprinted in MINN. TRIB., Nov. 10, 1912).

285. *Id.* at 84-85.

286. *Id.* at 85 (quoting Editorial, AFRO-AM. LEDGER, Aug. 6, 1913).

287. *Id.* at 88-89.

288. See 48 CONG. REC. 8551 (1912).

a white man, to be held in New Mexico on the 4th of July next."²⁸⁹ If the House waited for a quorum, he insisted, "it will be too late to get it passed before that date."²⁹⁰ Despite Sims' plea, the Speaker of the House insisted on a quorum, preventing the bill's passage until after the fight.

Following Johnson's defeat of Flynn, the House moved swiftly to pass the legislation. Roddenberry pointed out the importance of enacting the legislation swiftly:

I call the attention of the House to the fact that the recent prize fight which was had in New Mexico presented, perhaps, the grossest instance of base fraud and bogus effort at a fair fight between a Caucasian brute and an African biped beast that has ever taken place. It was repulsive. This bill is designed to prevent the display to morbid-minded adults and susceptible youth all over the country of representations of such a disgusting exhibition.²⁹¹

When asked whether he found prize fights between white men as reprehensible as those between white men and black men, Roddenberry answered that "[t]he act as a matter of moral conduct is the same. It differs in degree. No man descended from the old Saxon race can look upon that kind of a contest without abhorrence and disgust."²⁹²

Congressman Murray from Massachusetts questioned the necessity for federal legislation on the subject, arguing that the states were already regulating prize fights and the showing of prize-fight films. He noted the inconsistency of his Southern colleagues on matters of states' rights:

I wonder what it is that causes men from the Southland, who in this Hall have always insisted upon the doctrine of State rights, to arise and urge with such great seriousness that legislation of this kind be passed? I do not believe it is necessary for the National Government to invade the States of the Union and tell them what they shall and shall not do in this situation. . . .²⁹³

Despite his reservations, Murray did not oppose the legislation. The bill passed the House unanimously, and was signed into law on July 31, 1912.²⁹⁴

The constitutionality of the legislation came to the United States Supreme Court for review on only one occasion. In *Weber v. Freed*,²⁹⁵ the Court

289. *Id.*

290. *Id.*

291. 48 CONG. REC. 9305 (1912).

292. *Id.*

293. *Id.* at 9306.

294. Act of July 30, 1912, ch. 263, 37 Stat. 240 (1912).

295. 239 U.S. 325 (1915).

considered only that part of the statute that prohibited the importation of prize-fight films. The Court summarily rejected the appellants' argument that Congress was usurping the police powers of the states under the guise of regulating foreign commerce. Given Congress's "complete power" over foreign commerce, the Justices said, the appellants' "contentions are so devoid of merit as to cause them to be frivolous."²⁹⁶

The prize fight legislation is treated by legal historians at best as an historical footnote²⁹⁷—understandably, given the narrow issue presented in *Weber* and its minimal impact on the development of Commerce Clause doctrine. However, the Progressive Era reformers' desire and ability to make the showing of prize-fight films a federal crime while failing to criminalize lynching illustrates how "official" debates regarding federalism often masked the more heated issues involving race and gender relations.

D. Summary

In view of the many examples of federal social welfare legislation during the Progressive Era, it is difficult to believe that concerns about federal power limitations prevented Congress from passing a measure to criminalize lynching. Although some Congressmen may have harbored genuine doubts about their constitutional authority to override state autonomy on matters of social welfare, they did so when they perceived the need for such legislation, leaving the ultimate evaluation of constitutionality to the courts. The need for federal legislation with respect to lynching at least was as great as the need for federal legislation on white slavery, narcotics usage, or the viewing of prize-fight films. At least some of these measures were as much an intrusion upon a state's exercise of its police powers as a limited anti-lynching provision might have been. In the three instances of successful legislation discussed in this Article, racism and the perceived need to protect white women from black men played important roles in the movement to secure the legislation. Ironically, these same factors worked in inverse fashion to impede the effort to obtain a federal anti-lynching statute.

VI. CONCLUSION

Lynching was an open, notorious crime that the states allowed to continue unchecked by any agents of law enforcement. This wholesale failure of the states to protect the lives of their black citizens cried out for federal action. But throughout most of the history of lynching, the national government stood idly by. In addition to the pervasive racism of the times, the failure of

296. *Id.* at 329.

297. See, e.g., BICKEL & SCHMIDT, *supra* note 5, at 439; Robert E. Cushman, *The National Police Power under the Commerce Clause of the Constitution* (pt. 2), 3 MINN. L. REV. 381, 392 (1918-19).

Congress to enact an anti-lynching statute during the Progressive Era was due in substantial part to a prevailing and intense cultural aversion to sexual relations between black men and white women. This aversion was at the center of a number of social apprehensions during the Progressive Era, and certainly informed both the persistence of the phenomenon of lynching throughout the period and the federal government's failure to do anything to curb the practice.

This failure of the state and federal governments to protect blacks from lynching is part of a larger and more persistent failure of American law to find sufficient ways to defend black life and to ensure the promise of the Reconstruction Amendments to make African-Americans full citizens. As the nation rushes forward to embrace a "new federalism" that returns social welfare responsibility to the states,²⁹⁸ the history of the failed federal anti-lynching legislative effort should provide a cautionary tale about the inadequacy of extreme deference to states' rights where the protection of minority communities is at stake. Indeed, this history should provide the necessary skepticism toward those legislators today who wrap themselves in the cloak of federalism so as to obscure the more distasteful, politically unpopular reasons for failing to take federal action.

298. For a general overview of this "new federalism," see Richard C. Reuben, *The New Federalism*, A.B.A. J. 76 (Apr. 1995).