AMERICAN CONSTITUTIONALISM
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Supplementary Material

Chapter 7: The Republican Era—Foundations/Scope/State Action

## The Debate over Federal Power to Punish Lynching[1]

*Although lynch law had always existed in the United States, lynching became increasingly racial, sectional, and brutal after the Civil War. More than four thousand persons were lynched between Reconstruction and the Second World War, the vast majority of lynching victims were persons of color, and the vast majority of lynchings took place in former slave states. In sharp contrast to pre–Civil War lynchings, which were largely summary affairs, southern lynch mobs typically devised grotesque tortures for the African-American victims. One account observed,*

> *The two Negroes . . . were tied to trees and while the funeral pyres were being prepared [they were to be burned alive], 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. [One of the victims] was beaten severely, his skull fractured and one of his eyes, knocked out with a stick, hung by a shred from the socket.*[2]

*Although lynch mobs functioned openly, participants rarely faced arrest, much less conviction. One study found that southern states were fifty times more likely to achieve convictions in ordinary homicides, where perpetrators typically made some attempt to cover their tracks, than in lynchings, which were done in public—sometimes on courthouse lawns.*[3]

*Most American elites during the Progressive Era condemned resort to extra-legal punishments and barbarisms. "Lynching," a prominent politician stated, "is the darkest blot upon an otherwise splendid civilization."*[4] *What could be done to remove this stain was more controversial. Several Reconstruction measures aimed at safeguarding persons of color from lynching either had been declared unconstitutional or had been repealed. Justice department officials thought inadequate those measures that were still on the books. Whether revised measures could pass constitutional muster was an open question. Even Moorfield Storey, the main constitutional litigator for the National Association for the Advancement of Colored People (NAACP) during the Progressive Era initially had doubts about the constitutionality of federal anti-lynching legislation.*

*The movement for federal anti-lynching legislation picked up steam after World War I. Some prominent political elites were horrified by racial violence against persons of color that broke out in the war's aftermath. The return to national power of the Republican Party, the political coalition more sympathetic to persons of color, improved the chances of favorable legislation. The Republican Party platform in 1920 "urge[d] Congress to consider the most effective means to end lynching in this country which continues to be a terrible blot on our American civilization." Similar language was used in the Republican Party platform in 1924 and 1928. Nevertheless, although anti-lynching bills were routinely introduced in Congress, none became law. In fact, no civil rights legislation was passed by Congress from 1876 until 1957. This meant that a Republican-dominated Supreme Court*

[1] Excerpt taken from House Committee on the Judiciary, *Constitutionality of a Federal Anti-Lynching Law*, 67th Cong., 1st Sess. (1921), 16; 62 *Congressional Record* 67th Cong., 2nd Sess. (1922), 1290.
[2] Barbara Holden-Smith, "Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era," *Yale Journal of Law & Feminism* 8 (1996):31. See also Sherrilyn A. Ifill, *On the Courthouse Lawn: Confronting the Legacy of Lynching in the Twenty-First Century* (Boston, MA: Beacon Press, 2007).
[3] James Harmon Chadbourn, *Lynching and the Law* (Chapel Hill: University of North Carolina Press, 1933), 13–14.
[4] 62 *Congressional Record*, 67th Cong., 2nd Sess. (1922):1276 (statement of Representative Burton).

*was never asked to consider the fairly broad understanding of federal power underlying various proposed anti-lynching measures.*

*The Dyer Bill was the best hope proponents of federal anti-lynching legislation had for securing favorable law. Proposed by Representative Leonidas Dyer of Missouri, the measure passed the House in 1922 but was defeated by a filibuster in the Senate. Unlike previous Reconstruction measures, the Dyer bill focused on state officers who either made no effort to prevent or participated in lynchings. States were deemed to have denied persons equal protection of the law if they "fail[ed], neglect[ed], or refuse[d] to provide and maintain protection to the life of any person within its jurisdiction against a mob or riotous assemblage." State officers who did not make "reasonable efforts" to prevent lynching or punish lynchers were subject to severe criminal sanctions. The Dyer bill also authorized federal attorneys to try as criminals any private person who conspired with a state official during a lynching. Significantly, these offenses could be tried in federal courts when state courts refused to convict.*

*Proponents of the Dyer Bill insisted that Section 5 of the Fourteenth Amendment permitted Congress to legislate against both state action and state inaction that violated constitutional rights. This constitutional understanding was supported by the Harding Administration. Opponents of the measure insisted that Congress could constitutionally punish only state actions that enforced or implemented discriminatory state laws. Did Justice Bradley's opinion in* The Civil Rights Cases *(1883) make clear whether the federal government could punish state actors who failed to protect fundamental rights? Can a state violate the equal protection clause, not just by engaging in discriminatory conduct, but by a sufficient level of disregard for protecting certain classes of people? How far might that principle be extended?*

Letter of ATTORNEY GENERAL H. M. DAUGHERTY to REPRESENTATIVE A. J. VOLSTEAD (Republican, Minnesota) (1921)

. . .

Considerable discussion has taken place as to the constitutionality of the proposed legislation, it being contended that the fourteenth amendment gave Congress power to legislate so as to prevent a denial of the equal protection of the laws by the States and not as to acts of individuals not clothed with State authority.

. . . It will be observed that . . . the State may act through its legislative, its judicial, or its executive authorities, and the act of any one these is the act of the State. . . .

> The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty without due process of law or denies or takes away the equal protection of the laws, violates the constitutional inhibition, and as he acts in the name and for the State and is clothed with the State's power his act is that of the State. This must be so or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.
> *Ex parte Virginia* (1879)

. . . To my mind there can be no doubt that negativity on the part of the State may be, as well as any act of a positive nature by such State, a denial of the equal protection of the laws and thus be within the prohibition of the fourteenth amendment so as to give Congress power to act with reference to it. . . .

. . .

Section 12 and section 13 provide for the punishment of State and municipal officers who fail in their duty to prevent lynchings or who suffer persons accused of crime to be taken from their custody for the purpose of lynching. These sections seem to me to strike at the heart of the evil, namely, the failure of State officers to perform their duty in such cases. The fourteenth amendment recognizes as preexisting the right to due process of law and to the equal protection of the law and guarantees against State infringement of those rights. A State officer charged with the protection of those rights who fails or

refuses to do all in his power to protect an accused person against mob action denies to such person due process of law and the equal protection of the laws in every sense of the term. . . .

. . .

REPRESENTATIVE HARRY BARTOW HAWES (Democrat, Missouri)

. . .

[The Fourteenth Amendment] relates to the laws of a State, does not relate, nor was it intended to relate, to the individual action of a citizen, nor was it directed toward the malfeasance or nonfeasance of a State officer.

. . .

Mob violence is a criminal offense in all States. Persons who form part of a mob which takes human life are guilty of murder. Penalties are provided for unlawful assemblage. Penalties are provided for interfering with an officer in the discharge of his duty or taking a prisoner from an officer. There is no State, whose laws in this respect have been questioned by a single proponent of this bill.

The fourteenth amendment does not relate to the acts of individuals or the acts of official agents of a State where the acts of such agents were outside the pale of the law and not in conformity with the law of the Commonwealth. The fourteenth amendment deals directly with the State and the agencies of the State performing certain specific acts for the State.

. . .

If the Federal Government assumes the right to punish an officer of a State for failure to prevent a crime, or a prosecuting attorney for failure to prosecute a crime, then the Federal Government can go into the business of prosecuting the chicken thief, the crap shooter, the card player, the drunkard, the wife beater, or the thief.

It was never intended that the fourteenth amendment should apply other than to the acts of States or the agents of States, in so far as they complied with the laws of the State. It is not the act of the official, or his omission to act, that is controlled by the fourteenth amendment, but it is the State law that controls the act and provides the things guaranteed in the fourteenth amendment.

. . .